Improving Regulatory Governance

TRENDS, PRACTICES AND THE WAY FORWARD



OECD KDI

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Foreword

Regulations are meant to support economic growth, social welfare and environmental protection. The challenge is to i) design clear, coherent, and efficient regulations; ii) to effectively implement them; and iii) continually evaluate them for their appropriateness, relevance and impact. This report presents cutting-edge thinking and latest practices on how to facilitate good regulatory design and implementation. Jointly developed by the OECD and the Korea Development Institute (KDI), the report analyses the experience of Korea and other OECD countries in designing and implementing regulatory oversight, stakeholder engagement, regulatory impact assessment and *ex post* evaluation. It also identifies forthcoming challenges, possible solutions and areas for further analysis that can help governments improve their regulatory systems.

A common theme of the chapters is the importance of "connecting the dots" across different regulatory institutions, tools, and processes to create an ecosystem where these different instruments are effectively used to design and implement policies and regulation. They are best seen as a means to an end and should be used as part of a holistic system to support policy makers in designing and implementing good policies based on evidence, rather than as separate exercises. They can help encourage innovation and new approaches to addressing challenging situations in a multi-disciplinary way.

The cases and examples presented in the chapters point to the importance of pushing the boundaries beyond the perimeter of the executive, where these instruments are currently mostly applied. Legislatures play a key role in designing policies and regulations as well as overseeing their implementation, including by holding the executive accountable for results. These instruments can support and enhance the role of legislatures in carrying out these fundamental functions.

Equally important is to embed this ecosystem into each country's administrative and institutional context and culture. There is no single blueprint or approach to good regulatory practices. The design and use of the instruments need to be adapted and tailored to a specific context. Ultimately, the objective is the same, i.e. making public policy work for all constituents.

This work is carried out jointly by the OECD and the Korea Development Institute (KDI) as part of the work programmes of the OECD Regulatory Policy Committee (RPC) and KDI's Center for regulatory studies. The RPC is supported by the Regulatory Policy Division of the OECD Public Governance Directorate. The Directorate's mission is to help government at all levels design and implement strategic, evidence-based and innovative policies. The goal is to support countries in building better government systems and implementing policies at both national and regional level that lead to sustainable economic and social development. The KDI Center for Regulatory Studies advocates for innovative reform policies to promote a nurturing environment for competition and emerging industries through in-depth analyses of the economic effects of regulatory reforms and policy measures aimed at improving regulatory institutions, in

addition to validating cost-benefit analysis statements prepared by the line ministries and training government officials on cost-benefit analysis to enhance the overall effectiveness of regulatory reform systems.

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Acronyms and abbreviations

ACTAL	*Adviescollege toetsing regeldruk* (Advisory Board on Administrative Burden)
ARI	Accountability for Regulator Impact
BCC	British Chambers of Commerce
BERR	Business, Enterprise and Regulatory Reform
BEIS	Department for Business, Energy and Industry Strategy
BIS	Department for Business, Innovation and Skills
BIT	Business Impact Target
BRDO	Better Regulation Delivery Office
BRE	Better Regulation Executive
BRFM	Better Regulation Framework Manual
BRTF	Better Regulation Task Force
BRU	Better Regulation Unit
BSE	Bovine Spongiform Encephalopathy
CAPM	Capital Asset Pricing Model
CATV	Cable Television
CBA	Cost-Benefit Analysis
CBI	Confederation of British Industry
CBP	Capacity Building and Participation
CCA	Cumulative Cost Assessments
CDRM	Cabinet Directive on Regulatory Management
CDSR	Cabinet Directive on Streamlining Regulation
CICO	Cost-in, Cost-out
COFEMER	*Comisión Federal de Mejora Regulatoria* (Federal Regulatory Improvement Commission)
CPPP	California Public Participation Plan
CSMIS	Consultation and Stakeholder Information Management System
CVM	Contingent Valuation Method
DEFRA	Department of Environment, Food, and Rural Affairs
DRIU	Departmental Regulatory Impact Units
DT	Design Thinking
DTI	Department of Trade and Industry
EANCB	Equivalent Annual Net Cost to Business
EBS	Korea Educational Broadcasting System

EEA	European Economic Area
EEF	Engineering Employers Federation
EMA	European Medicines Agency
EPRS	European Parliament Research Service
e-RIA	e-Regulatory Impact Analysis
EU	European Union
FAA	Federal Aviation Administration
FAAR	Framework act on Administrative Regulations
FDA	Food and Drug Administration
HC	Health Canada
HCA	Human Capital Approach
IA	Impact Assessment
ICT	Information and Communications Technology
IFA	Independent Financial Adviser
IGEES	Irish Government Economic and Evaluation Service
IoD	Institute of Directors
IPTV	Internet Protocol Television
iREG	Indicators of Regulatory Policy and Governance
IRN	Initial Review Notices
ISDS	Investor-State Dispute Settlement
JCSI	Joint Committee on Statutory Instruments
KBS	Korea Broadcasting System
KCA	Korea Communications Agency
KCCI	Korea Chamber of Commerce and Industry
KCTA	Korea Cable TV Association
KDI	Korea Development Institute
KIPA	Korea Institute of Public Administration
KRW	Korean Won
LIA	Legislative Impact Assessment
MC	Memoranda to Cabinet
MCA	Multi-criteria Analysis
MCDA	Multi-criteria Decision Analysis
MMMR	Ministerial Meeting on Regulatory Reform
MPMO	Major Projects Management Office
MSOC	Marginal Social Opportunity Cost
NABO	National Assembly Budget Office
NAIC	National Association of Insurance Commissioners
NAO	National Audit Office

NBII	National Board of Industrial Injuries
NDPB	Non-departmental public body
NKR	*Nationaler Normenkontollrat* (National Regulatory Control Council)
NLW	National Living Wage
NPV	Net Present Value
NRCC	National Regulatory Control Council
OIOO	one-in, one-out
OIRA	Office for Information and Regulatory Affairs
OI3O	One-in, three-out
OITO	One-in, two-out
OMB	Office of Management and Budget
OPIC	Office of Public Insurance Counsel
PAC	Public Accounts Committee
PCA	Parliamentary Control of the Administration
PCO	Privy Council Office
PFS	Preliminary Feasibility Study
PHAC	Public Health Agency of Canada
PIR	Post Implementation Review
PMO	Prime Minister's Office
PPJRAI	Public-Private Joint Regulation Advancement Initiative
PVNCB	Present Value of Net Direct Cost to Business
QCA	Qualitative Comparative Analysis
RAS	Regulatory Affairs Sector
REFIT	Regulatory Fitness and Performance Programme
RIA	Regulatory Impact Analysis/Assessment
RIAB	Regulatory Impact Assessment Board
RIAS	Regulatory Impact Analysis Statement
RIU	Regulatory Impact Unit
ROB	Regulatory Oversight Bodies
RPC	Regulatory Policy Committee
RRC	Regulatory Reform Committee
RRS	Regulatory Reform Sinmungo
R&D	Research and Development
SAGE	Science Advice for Government Effectiveness
SaMBA	Small and micro-business assessment
SARS	Severe Acute Respiratory Syndrome
SBEE	Small Business, Enterprise and Employment
SCSI	Select Committee on Statutory Instruments

SDR	Social Discount Rate
SI	Statutory Instrument
SLSC	Secondary Legislation Scrutiny Committee
SME	Small and medium-sized enterprise
SRTP	Social Discount Time Preference
TBS	Treasury Board Secretariat
TTIP	Transatlantic Trade and Investment Partnership
TUC	Trades Union Congress
UAS	Unmanned Aircraft Systems
VESC	Visually Enhanced Sustainability Conversation
VSL	Value of Statistical Life
WA	Weighted Average
WTP	Willingness to pay

Executive summary

There is no single model or blueprint for good regulatory design and implementation. Each country has its own institutional setting and faces a unique, diverse set of issues. Simply transferring what works in one context to another might not work unless it is embedded in and adapted to each context. At the same time, this diversity provides an opportunity for countries to learn from each other's experiences.

This research presents the experiences of Korea and other OECD members in designing and implementing regulatory institutions, processes and tools. Highlights include:

- **Regulatory oversight**: a cross-institutional comparison of oversight in presidential and parliamentary systems stresses the importance of accounting for the specific context and constellation of actors. While the ultimate goal is to ensure that good regulatory practices are applied when designing and implementing regulation, the range of tools and methods used by oversight bodies to meet these objectives can vary depending, for example, on the type of institutional set-up (for instance, presidential vs. parliamentary) and the administrative culture (for instance, strong centre of government vs. collegial/consensus-based). Case studies of oversight in Canada and Korea also point to the growing complexity and scope of oversight, as well as the increasing range of managerial tasks performed by some bodies. The oversight role often includes providing regulatory guidance, direction, and training to ministries, departments and other regulatory bodies, which are ultimately responsible for the use of the good regulatory practice tools like impact assessment, stakeholder engagement and *ex post* evaluation for designing and implementing regulation. The case studies included in the chapters also highlight the importance of having regulatory quality processes and institutions, including quality checks, in legislatures as well as in the executive.
- **Stakeholder engagement:** international practices suggest four main considerations for engaging stakeholders: 1) relying excessively on reactive, "complaint-driven" approaches (for instance, businesses or citizens signalling problems in regulation that are already being implemented) might reduce the incentives for and capacity of governments to self-diagnose administrative and regulatory bottlenecks and commit to learning; 2) ensuring both inclusiveness and effectiveness in each engagement exercise is challenging, and could be addressed through methods such as consultation plans and stakeholders mapping, which is an exercise that encourages greater involvement from stakeholders by mapping stakeholder experience in dealing with a service or when complying with a regulation; 3) it is important to differentiate between stakeholder engagement and the procurement of scientific and other forms of expertise, which provide an important technical input but does not substitute for wider and open consultation; and 4) governments are increasingly called upon to control for manipulation and capture when engaging with stakeholders and the public. Governments are often scrutinised more on the basis of how they manage the consultation process than on the actual merit of the decisions taken. Stakeholder engagement has thus an

important intrinsic value, despite the challenges related to its effective implementation. For example, Korea's experience through the Regulatory Reform *Sinmungo,* a petition system to alert the government of unnecessary burdens for businesses and citizens shows how crowdsourcing and open policy making can provide useful information that may have otherwise be overlooked by government officials and may even lead to practical solutions to problems. Although information collected through crowdsourcing may be idiosyncratic and uneven in quality – an issue that needs to be recognised as highlighted above – *Sinmungo* provides a useful example of using a "complaint-driven" method to improve the implementation of regulation.

- **Regulatory impact assessment:** case studies from Korea and the United Kingdom point to the importance of buy-in from policy makers and the business sector for making impact assessment a tool for decision making. A legislative basis may help secure this, although past experience and the cultural and policy-making context should also be taken into account. Greater openness can also help build credibility and secure buy-in. There is significant scope to improve benefit modelling and to consider alternatives to cost-benefit analysis. Equally important is the ecosystem where RIA is implemented. A network of agencies with relevant competences is needed to successfully run a system of regulatory impact assessment and oversight, as is independent scrutiny, preferably backed by sanctions. A regulatory budget or target is one way of adding leverage to the role of an independent scrutiny body. RIAs should mainly inform decision making and scrutiny by parliament and not just be a process for the executive.
- ***Ex post* assessment:** there are two potential tensions that may emerge when organising and carrying out *ex post* evaluations. The first tension is about who evaluates. It is important to properly organise the various channels, actors and "entry points" that form the evaluation regime (either centralised or decentralised). A second tension is about how much to evaluate. There is a trade-off between quantity and quality – i.e. between the number of the evaluations and their relevance to decision making in terms of comprehensiveness (depth), timing, and hence the usefulness of the analysis. To address these tensions, there is a clear need to identify what to evaluate, when and how. A practical problem faced by any government is to identify the regulations that need to be reviewed. One approach is through regulatory planning. Sunset clauses can also be used as an automatic trigger for evaluation. Equally important is the institutional ecosystem where *ex post* evaluation is carried out (in part reflected in the centralisation-decentralisation tension highlighted above). Regulatory oversight can help improve the quality and efficiency of *ex post* evaluations, by, for example, co-ordinating different evaluation mechanisms and actors. Finally, little attention has been given so far to the role of stakeholders in *ex post* evaluation. Stakeholders may help the regulators search for better alternatives and analyse the impacts of regulatory changes.

Two main messages emerge from this body of work that can guide future work aimed at improving regulatory governance:

- ***The "ecology of instruments":*** regulatory institutions, processes and tools need to be designed and implemented holistically, and inform regulatory design, implementation and evaluation across government, in both the executive and legislative branches.

- ***Networks and incentives as key success factors***: good regulatory design and implementation rely on an effective network of agencies and officials that implement these tools with appropriate incentives and oversight, or ensure their effective implementation.

Chapter 1

Insights on improving regulatory governance

This research brings together leading-edge thinking on trends and experience in facilitating regulatory reform through institutional improvements. The chapters reflect the outcomes of research and workshops conducted jointly by the Korea Development Institute (KDI) and the OECD over the course of 2015-16. This introduction provides a short primer on regulatory policy and governance drawing on the work conducted by the OECD and presents some of the key insights from the study. The chapters are organised in four sections, presenting the experience of Korea and other OECD countries in: regulatory oversight; stakeholder engagement; regulatory impact assessment; and ex post assessment.

Why regulate?

Laws and regulations are essential instruments, alongside taxing and spending, that help governments, businesses, and citizens achieve policy objectives including economic growth, social welfare and environmental protection. Regulations can range from legal restrictions, contracts, co-regulation to certifications or accreditation and social regulations such as norm-setting. Lodge (2015: 12) classifies the contribution of regulations to inclusive growth and economic performance into four broad areas, namely:

- The wider better regulation (or regulatory policy) agenda that seeks to enhance the quality of standard-setting, information-gathering, and behaviour-modification.
- Economic regulations in the context of infrastructure industries.
- Inspection-heavy regulatory activities in the areas of health and safety, environmental and other areas of conduct regulation.
- Wider legislative/regulatory approaches relating to market opening and market correcting provisions.

All these aim to contribute to the development of a sector and, ultimately, to the sustainable and inclusive growth of a country. In a globalised world, where markets have become more complex and intertwined, the challenge is to design clear, coherent, and efficient regulations (regulatory policy) as well as to ensure their effective implementation.

Regulations are efficient when the benefits gained exceed the costs of implementation; are coherent when they are aligned with the overall regulatory regime; and are clear when their purpose is well understood by all those who have to implement and comply with them. There have been undoubtedly significant advances in the regulatory policy agenda and many governments have come up with tools and mechanisms to guide policymakers when drafting and implementing regulations.

However, there is no single model or blueprint that guarantees good regulatory policy and governance. Each country has its own institutional setting and faces a diverse set of issues. Notwithstanding these important contextual factors, countries do have the opportunity to learn from each other and gain knowledge on the challenges faced by various institutions in the regulatory process. Regulatory tools can also be further improved, particularly those that help enhance transparency and ensure quality control.

What is regulatory quality?

Regulatory quality focuses on enhancing the cost-effectiveness, legal quality, and performance of the regulatory process and outcomes, i.e. the way regulations are developed, enforced, and evaluated. The OECD (1995), OECD & European Commission (2004), and Radaelli (2004) provide some key characteristics in defining regulatory quality. Quality regulations:

- Serve clearly identified policy goals and are effective in achieving these goals
- Are clear, simple, and practical for users
- Have a sound legal and empirical basis

- Are consistent with other regulations and policies
- Produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental, and social effects into account
- Are implemented in a fair, transparent, and proportionate way
- Minimise costs and market distortions
- Promote innovation through market incentives and goal-based approaches
- Are compatible as far as possible with competition, trade, and investment-facilitating principles at domestic and international levels.

Among OECD countries, a strong commitment to regulatory quality has led to the development of principles, tools, and regulatory instruments to guide governments in the development and implementation of regulatory reform. These instruments include the *1995 Recommendation of the Council on Improving the Quality of Government Regulations*, the *2005 APEC-OECD Integrated Checklist on Regulatory Reform*, and the *2012 Recommendation of the Council on Regulatory Policy and Governance* (Box 1.1). Furthermore, there has been a growing emphasis across countries in considering regulatory policy as a crucial part of public sector reform. The research collected through this work present the experience of some OECD countries in implementing some of these principles, tools and instruments.

Box 1.1. 2012 Recommendation of the Council on Regulatory Policy and Governance

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised.
2. Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.
3. Establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.
4. Integrate Regulatory Impact Assessment (RIA) into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals, and evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the tradeoffs of the different approaches analysed to identify the best approach.
5. Conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and delivery the intended policy objectives.

Box 1.1. **2012 Recommendation of the Council on Regulatory Policy and Governance** (*cont.*)

6. Regularly publish reports on the performance of regulatory policy and reform programmes and the public authorities applying the regulations. Such reports should also include information on how regulatory tools such as Regulatory Impact Assessments (RIA), public consultation practices and reviews of existing regulations are functioning in practice.
7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.
8. Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.
9. As appropriate apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.
10. Where appropriate promote regulatory coherence through co-ordination mechanisms between the supranational, the national and sub-national levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of regulations.
11. Foster the development of regulatory management capacity and performance at sub-national levels of government.
12. In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.

Source: OECD (2012), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris, www.oecd.org/gov/regulatory-policy/2012-recommendation.htm.

What are the main challenges in the regulatory process?

A key challenge faced by policymakers and regulators is to ensure that good regulations are embedded in the policymaking process, with a need for the right balance of control, consistency, discretion, and decentralisation. Lodge (2015) highlights four main deficits of regulation as a result of the political economy of regulations or of how it is shaped and managed, namely: oversight, participation, incentive, and adaptation.

- **Oversight deficit refers to the lack of consistency, predictability, and oversight over regulatory activities**; hence, leading to redundant, inconsistent, or contradictory demands over time and across different regulatory actors – ultimately affecting the enforceability of regulations. This is often associated with the lack of capacity and resources of regulators to develop and stay updated on the challenges that regulated bodies face and to establish reliable mechanisms to ensure compliance, which is further amplified by the emergence of private and transnational regimes.

- **Participation deficit refers to the "top-down" nature of regulations and the lack of inclusiveness in the regulatory process**. This entails that some regulations fail to reflect the concerns of the affected or regulated parties. Furthermore, there has been limited emphasis in achieving wider consultation efforts, such that they are restrained to incumbent participants. The challenge of engaging additional expertise is also constrained by the challenge of mediating a wide range of interests and views.
- **Incentive deficit is associated with the nature of regulations, which have the propensity to be over-prescriptive and often lacks attention to individual incentives**; therefore, discouraging opportunities for innovation and opportunities, particularly for new market entrants and emerging industries. Regulators may also be affected by incentive deficits through the lack of benchmarking and reflection on the value-for-money aspect of their respective activities.
- **Adaptability deficit describes the tendency of regulations to be too uniform, predictable, and lacking diversity**. This therefore challenges the long-term viability and adaptability of a single regulatory approach, especially in relation to cross-linkages and cross-sanctions. This also entails that some regulations tend to be too risk-averse and often overlook the possible unintended consequences of a regulations.

The papers included in this work show how some OECD countries have addressed these often overlapping deficits by developing incentive mechanisms and institutions that balance top-down and bottom-up approaches and soft vs. hard incentives.

How to improve regulatory quality?

Improving regulatory quality can be a daunting task, given the multiplicity of factors and dynamics that come into play. Despite the current progress in pursuing regulatory reform, a number of OECD countries face the challenge of strategically positioning regulatory policies in their overall reform and growth agenda. Issues also differ across countries. However, this diversity does not inhibit countries from achieving regulatory quality; rather, it shows that there are several ways of improving the quality of regulation as shown in the papers presented in this work.

Notwithstanding this diversity, there are a number of issues and themes that are shared among countries. As such, regulatory policy can be achieved by ensuring the right balance in applying various tools throughout the regulatory process, which includes: 1) planning; 2) stakeholder consultation; 3) impact assessments; 4) quality control; 5) monitoring and fitness checks; 6) evaluation and *ex post* evaluation.

Quality regulations are complemented by effective enforcement and inspection. Regulatory enforcement and inspection is considered as a budding element in regulatory policy, with the objective of ensuring the highest level of compliance at the lowest cost for the regulators and with the least burden imposed on the regulated parties. In 2014, the OECD came up with a set of international best practice principles to guide governments in ensuring high-quality enforcement and inspection activities (Box 1.2).

Box 1.2. Draft international best practice principles: Improving regulatory enforcement and inspections

1. Evidence-based enforcement. Regulatory enforcement and inspections should be evidence-based and measurement-based: deciding what to inspect and how should be grounded on data and evidence, and results should be evaluated regularly.
2. Selectivity. Promoting compliance and enforcing rules should be left to market forces, private sector and civil society actions wherever possible: inspections and enforcement cannot be everywhere and address everything, and there are many other ways to achieve regulatory objectives.
3. Risk focus and proportionality. Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should be aiming at reducing the actual risk posed by infractions.
4. Responsive regulation. Enforcement should be based on "responsive regulation" principles: inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses.
5. Long term vision. Governments should adopt policies and institutional mechanisms on regulatory enforcement and inspections with clear objectives and a long-term road-map.
6. Co-ordination and consolidation. Inspection functions should be co-ordinated and, where needed, consolidated: less duplication and overlaps will ensure better use of public resources, minimise burden on regulated subjects, and maximise effectiveness.
7. Transparent governance. Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results-oriented management. Execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded/
8. Information integration. Information and communication technologies should be used to maximise risk-focus, co-ordination and information-sharing – as well as optimal use of resources.
9. Clear and fair process. Governments should ensure clarity of rules and process for enforcement and inspections: coherent legislation to organise inspections and enforcement needs to be adopted and published, and clearly articulate rights and obligations of officials and businesses.
10. Compliance promotion. Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists.
11. Professionalism. Inspectors should be trained and managed to ensure professionalism, integrity, consistency and transparency: this requires substantial training focusing not only on technical but also on generic inspection skills, and official guidelines for inspectors to help ensure consistency and fairness.

Source: OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, http://dx.doi.org/10.1787/9789264208117-en.

Regulators undoubtedly play an increasingly vital role in delivering regulatory reforms. Oftentimes, regulators are faced with the following questions throughout the policy cycle: "How can we ensure a stable, sustainable and long-term commitment to the regulatory reform agenda?; "What is the extent of the roles of independent and autonomous regulatory oversight bodies?"; "How can governments improve public-

private interface in the regulatory process?"; or "What are the most effective tools that can be used to encourage participation?".

Recognising the importance that regulators play in effectively carrying out reforms, the OECD released a list of principles to help guide governments and institutions in improving regulatory governance (Box 1.3). These principles serve as detailed considerations for governments to weigh upon when establishing and operating regulatory agencies.

Box 1.3. **OECD Best Practice Principles for the Governance of Regulators**

1. **Role clarity**: for a regulator to understand and fulfil its role effectively it is essential that its objectives and functions are clearly specified in the establishing legislation. The regulator should not be assigned objectives that are conflicting or should be provided with management and resolution mechanisms in case of conflicts. The legislation should also provide for clear and appropriate regulatory powers in order to achieve the objectives and regulators should be explicitly empowered to cooperate and coordinate with other relevant bodies in a transparent manner.
2. **Preventing undue influence and maintaining trust**: independence from the government and from the industry that is regulated is crucial to improving regulatory outcomes by allowing the regulator to make decisions that are fair and impartial. It is important that regulatory decisions and functions are conducted with upmost integrity to ensure that there is confidence in the regulatory regime. This is even more important for ensuring rule of law, encouraging investment and having an enabling environment for inclusive growth built on trust. This requires a pro-active approach to regulating that is accessible by regulated entities and yet within the national strategic priorities. To maintain trust in the regulator, directions and communication with the political process should be clear and transparent. In addition there should be criteria for the employment of the governing body and staff of the regulator that protects from any conflicts of current or future interest.
3. **Decision making and governing body structure for independent regulators**: regulators require governance arrangements that ensure their effective functioning preserve its regulatory integrity and deliver the regulatory objectives of its mandate. The governing body structure of the regulator (e.g. a single head or a board of directors) should be determined by the nature of the regulated activities and their motivation. The membership of the governing body should also protect from potential conflicts of interest from the political process and should be ultimately for the public interest.
4. **Accountability and transparency**: businesses and citizens expect the delivery of regulatory outcomes from government and regulatory agencies and the proper use of public authority and resources to achieve them. Regulators are generally accountable to three groups of stakeholders: i) ministers and the legislature; ii) regulated entities; iii) the public. The expectations for the regulator should be published and regulators should regularly report on the fulfilment of their objectives, including through meaningful performance indicators. Key operational policies and other guidance material, covering matters such as compliance, enforcement and decision review should be publicly available. Regulated entities and the public should have the right of appeal of preferably through a judicial process and the opportunity for independent review of significant regulatory decisions should be available.
5. **Engagement**: the knowledge of regulated sectors, businesses and citizens affected by regulatory schemes assists to regulate effectively. Regulators should also regularly and purposefully engage with regulated entities and other stakeholders to enhance public and stakeholder confidence in the regulator and to improve regulatory outcomes.

Box 1.3. **OECD Best Practice Principles for the Governance of Regulators** (*cont.*)

6. **Funding**: the amount and source of funding for a regulator will determine its organisation and operations. It should not influence the regulatory decisions and the regulator should be enabled to be impartial and efficient to achieve its objectives. Funding levels should be adequate and funding processes should be transparent, efficient and simple.

7. **Performance evaluation**: it is important that regulators are aware of the impacts of their regulatory actions and decisions. This helps drive improvements and enhance systems and processes internally. It also demonstrates the effectiveness of the regulator to those it is accountable toward and helps to build confidence in the regulatory system. The regulatory decisions, actions and interventions of the regulator should be evaluated through performance indicators. This creates awareness and understanding of the impact of the regulator's own actions and helps to communicate and demonstrate to stakeholders the added value of the regulator.

Source: OECD (2014), *OECD Best Practice Principles for Regulatory Policy*, The Governance of Regulators, OECD Publishing, http://dx.doi.org/10.1787/9789264208117-en.

OECD Regulatory Policy Outlook 2015: Key trends and areas for further action

The *OECD Regulatory Policy Outlook 2015* also highlights four important issues and recommendations that are crucial to improve regulatory policy and governance. This includes:

- Closing the regulatory policy cycle by improving strategies related to regulatory design, compliance and inspections such as the use of behaviourally-informed approaches and by applying *ex post* evaluation to complete the regulatory governance cycle.
- Empowering the actors of regulatory governance by increasing the engagement of regulatory players in promoting regulatory reform.
- Promoting evidence-based policy through developing tools and approaches that support the assessment of trade-offs, costs, and benefits when examining alternative regulatory approaches.
- Addressing regulatory impacts beyond the border by ensuring that regulatory activities consider both the internal and external impacts in the various regional and global integration processes.

The *OECD Regulatory Policy Outlook 2015* provides a unique, evidence-based, cross-country analysis of the progress made by OECD countries and the European Commission to improve regulatory policy. The outlook provides in-depth analysis on the various areas of the regulatory cycle, notably in terms of the way countries design, enforce, and modify regulations. Furthermore, the publication offers an overview of the institutional and organisational arrangements across countries, as well as the extent to which they apply the various tools of regulatory policy *i.e.* regulatory impact assessments (RIA), stakeholder engagement, and *ex post* evaluation.

Key findings of the *OECD Regulatory Policy Outlook 2015* were based on the *OECD 2014 Regulatory Indicators Survey*. The key findings of the Outlook are presented Box 1.4:

Box 1.4. Key findings from the *OECD Regulatory Policy Outlook*

Laws and regulations are essential instruments, together with taxes and spending, in attaining policy objectives such as economic growth, social welfare and environmental protection. OECD countries have generally committed at the highest political level to an explicit whole-of-government policy for regulatory quality and have established a standing body charged with regulatory oversight.

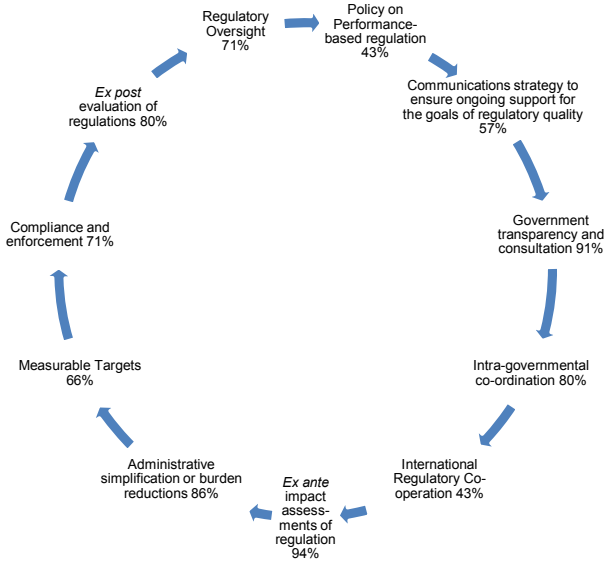
Implementation of regulatory policy varies greatly in scope and form across countries. While RIA has been widely adopted, few countries systematically assess whether their laws and regulations achieve their objectives. Stakeholder engagement on rule making is widespread in OECD countries, taking place mostly in the final phase of developing regulation.

The national executive government has made important progress over the last decade to improve the quality of regulations. Parliaments, regulatory agencies and sub-national and international levels of government need to be more engaged to ensure that there are evidence-based and efficient laws and regulations for stimulating economic activity and promoting well-being.

The impact of regulatory policy could be further improved by addressing shortcomings in the implementation and enforcement of regulations and by considering new approaches to regulatory design and delivery, such as those based on behavioural economics.

Source: OECD (2015), *OECD Regulatory Policy Outlook 2015*, Country Notes, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en.

Figure 1.1. **Areas covered in regulatory policy across OECD countries**

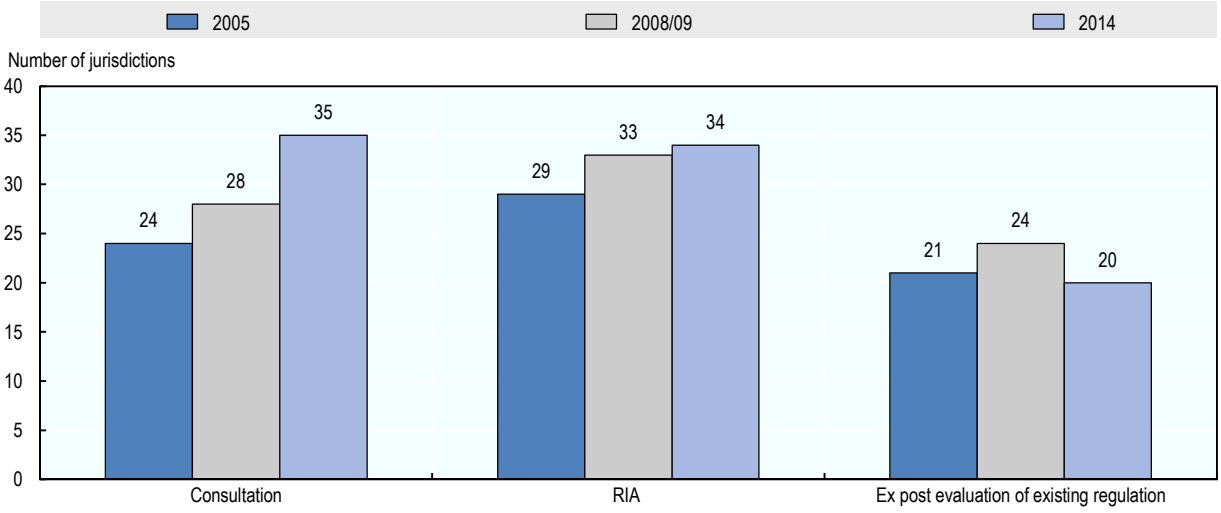


Source: 2014 Regulatory Indicator Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

Figure 1.1 shows the various areas covered by regulatory policy across OECD countries. The most common areas covered by regulatory policy include: *ex ante* impact assessments of regulation, government transparency and consultation, administrative simplification or burden reduction, and intra-governmental coordination. In contrast, regulatory policy in OECD countries has made lesser progress in the implementation stage, as suggested by the limited focus on international regulatory co-operation and policy on performance-based regulation.

Furthermore, the *Regulatory Policy Outlook 2015* focused on the use of regulatory management tools across the 34 countries, notably stakeholder consultation, RIA, and *ex post* evaluation. Figure 1.2 shows that there has been considerable progress in the area of stakeholder consultation, but less in terms of *ex post* evaluation – reflecting limited focus on regulatory quality management and oversight. More detailed information on the three areas, using composite indicators, is also captured in the Outlook.

Figure 1.2. **Formal requirements in the areas of consultation, RIA and *ex post* evaluation**



Note: Based on data from 34 countries and the European Commission. Chile, Estonia, Israel and Slovenia were not members of the OECD in2005 and so were not included in that year's survey.

Source: *2014 Regulatory Indicator Survey results*, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

OECD countries have been proactive in introducing RIA in the regulatory process over the past years and this practice is gradually spreading across emerging and developing countries in Latin America and Southeast Asia. Governments have introduced RIA for several reasons, including: 1) improving efficiency and cutting red tape; 2) promoting transparency and accountability of administrations; 3) controlling bureaucracies; and 4) promoting effectiveness and policy coherence. Consequently, limited attention has been devoted to ensuring that RIA is properly streamlined to the national and international context and that it is sustained by effective regulatory governance arrangements, which has led to significant disparities in implementation across OECD countries.

Apart from ensuring that there is strong regulatory governance, solid political support, and a systematic RIA process, there is also opportunity for RIA to go beyond the standard full-fledged cost-benefit analysis that normally focus on the direct impacts of the legislation. This includes the possibility of considering direct and indirect costs, such as social costs, in considering the various alternatives to the legislation. Renda (2015) also highlights the importance of looking the behavioural aspect of RIA through innovative approaches in relation to the implementation of legislation i.e. compliance, inspection and enforcement.

In relation to stakeholder engagement, a number of countries continue to make efforts in developing effective frameworks and mechanisms to safeguard public engagement in the regulatory process, many of which have been very innovative approaches. Alemanno

(2015) highlights the growing consensus among OECD countries to move beyond traditional practices notably with the increasing use of ICT. The traditional approach of consolidating, developing and discussing policy options within a single institution may, in certain cases, pose major shortcomings to the participation process. There is opportunity for governments and regulators to establish innovative mechanisms to forge strong relationships with people, but this would entail significant cultural shifts.

While there is no single model to effectively engage stakeholders in the regulatory process, Alemanno (2015) recommends different approaches to encourage governments to consider other options for public engagement. Among this include the importance of pursuing a bottom up understanding of stakeholder engagement, going beyond the tick-box exercise, and ensuring that the mechanisms pursued reflect the long-term needs of the stakeholders and general public. Emphasis has also been placed in improving the design of engagement mechanisms to incentivise engagement and trust from both the policymakers and the stakeholders. This can go beyond the conventional consultation process, such as exploring opportunities for co-production through testing and trials to guide and inform the government. Furthermore, there is potential to engage citizens and stakeholders through digital engagement, but its effectiveness is linked to the optimal design and investment of resources.

Ex post evaluation provides an avenue for governments to further improve regulatory quality, but evidence shows that only a limited set of countries use the tool as part of the regulatory process and there is no dedicated governance structure that deals with function. There is therefore less initiative from governments to pursue comprehensive studies on the impacts of the policies across the different sectors, either in terms of implementation or in identifying regulatory burdens – hence, whether the regulations are delivering its intended objectives. This creates a gap in the regulatory policy cycle, especially with the importance of embedding retrospective analysis. Nonetheless, a number of good practices and principles on *ex post* evaluation can be drawn from OECD countries. Allio (2015: 235) summarises these as: 1) prioritising and sequencing the efforts; 2) planning and embedding evaluation into the policy cycle; 3) constructing a comprehensive understanding of reality; 4) promoting a creation of an "evaluation function"; 5) building adequate organisational and administrative capacity to support such evaluation function; 6) leveraging on stakeholder engagement; and 7) ensuring high levels of transparency and accountability.

Indicators of regulatory policy and governance

The Indicators of Regulatory Policy and Governance (iREG) provide up-to-date information on the regulatory policy and governance practices of OECD member countries based on the *2012 Recommendation of the Council on Regulatory Policy and Governance*. The indicators are updated every 3-4 years and are continuously expanding to cover non-member countries. At present, the survey gathers information from all 34 OECD countries and the European Commission. The indicators were constructed based on three key principles: 1) Regulatory Impact Assessment; 2) stakeholder engagement; and 3) *ex post* evaluation. Arndt, et al. (2015: 11) elaborates on the four equally-weighted categories for producing the three composite indicators:

- **Systematic adoption** which records formal requirements and how often these requirements are conducted in practice.

- **Methodology** which records information on the methods used in each area, e.g. the type of impacts assessed or how frequently different forms of consultations are used.
- **Oversight and quality control** records the role of oversight bodies and publically available evaluations; and
- **Transparency** which records information from the questions that relate to the principles of open government e.g. whether government decisions are made publically available.

The survey highlights the various regulatory practices of a country. This means that the indicator score is relative to the policy practices adopted by a country.

The next frontier: Key insights from the papers

The papers presented in this work provide a set of insights and thought-provoking considerations. While not necessarily representing the views of the OECD Secretariat, they offer valuable food for thought on the next frontier in making regulatory policy deliver for citizens and businesses.

- **Regulatory oversight**: a cross-institutional comparison of oversight in presidential and parliamentary systems stresses the importance of accounting for the specific context and constellation of actors. The analysis also brings home the importance of understanding the match between the demand side (what the actors expect as a change in the regulatory policy, or through regulatory policy) and the supply side (what a regulatory oversight body can deliver, and how, in order to constitute an actual added value). Case studies of oversight in Canada and Korea also point to the growing complexity of oversight. Regulatory and guidance oversight would be a better descriptor of the range of managerial tasks performed by some oversight bodies and in fact a lot of oversight tasks are guidance about guidance. They also stress the importance of having regulatory quality processes and institutions not only within the executive but also in legislatures, a theme that emerges prominently also in the papers on regulatory impact assessment.
- **Stakeholder engagement**: international practices suggest four key considerations: 1) Relying excessively on reactive, "complaint-driven" approaches to reform might reduce the incentive and capacity by governments to self-diagnose administrative and regulatory bottlenecks and commit to learning (this is not to say that petition and complaint-driven engagement mechanisms aren't useful); 2) ensuring both inclusiveness and effectiveness in each engagement exercise is challenging and needs to be acknowledged and could be addressed for example through consultation plans and stakeholders mapping; 3) it is important to differentiate between stakeholder engagement and the procurement of scientific expertise and other forms of expert; and 4) governments are increasingly called upon to control for manipulation and capture when engaging with stakeholders and the public. Indeed, governments are often scrutinised more on the basis of how they are perceived to manage the consultation process than on the actual merit of the decisions taken. In this respect, the papers also highlight the extreme context-specific character of co-production modes, which raises questions about standardisation and institutionalisation. Stakeholder engagement has thus important intrinsic values, despite the challenges related to its effective

implementation. Also, as Korea's Regulatory Reform *Sinmungo* shows, crowd sourcing and open policymaking can provide useful information that may have been overlooked by government officials and even lead to practical solutions to problems. Although information collected through crowd sourcing may be idiosyncratic and uneven in quality, such a "complaint-driven" exercise can play a useful role in regulatory reform. Moreover, as there is learning from accumulated experience, the quality of information is likely to improve over time.

- **Regulatory impact assessment**: buy-in from policymakers and business is essential and a legislative basis may help secure this, although account also needs to be taken of past experience and the cultural and policy-making context. Greater openness can also help build credibility and secure buy-in. There is also plenty of scope to improve benefit modelling and to consider alternatives to cost-benefit analysis. Moving to the ecosystem where RIA is implemented, a network of agencies with relevant competences is needed to run a system of regulatory impact assessment and oversight successfully. Equally important is the role of independent scrutiny, preferably backed by sanctions. A regulatory budget or target is one way of adding leverage to the role of the independent scrutiny body. Finally, RIAs should also inform decision-making and scrutiny by Parliament and not just be a process for the Executive.
- ***Ex post* assessment**: there are two potential tensions that may emerge when organising and carrying out *ex post* evaluations. The first tension spans along the centralisation – de-centralisation – outsourcing spectrum. This requires properly organising the plurality of the channels, of the actors and of their "entry points" that form the evaluation regime. A second tension may by reflected by the trade-off between quantity and quality – i.e. between the number of the evaluations and their relevance to decision-making in terms of comprehensiveness (depth), timing, and hence usefulness and of the analysis. How to go about addressing these tensions? One issue brought home by the Korean experience is the need to identify what to evaluate, when and how. A practical problem faced by any government is to identify the regulations that need to be reviewed. One approach is through regulatory planning. Sunset clauses can also be used as an automatic, in-built trigger for evaluation. Equally important is the institutional ecosystem where *ex post* evaluation is carried out (in part reflected in the centralisation-decentralisation tension highlighted above). Regulatory oversight can help improve quality and efficiency of *ex post* evaluations, by, for example, coordination different evaluation mechanisms and actors. Finally, little attention has been given so fat to the role of stakeholders in *ex post* evaluation. An overlook? Stakeholders may assist the regulators to search for better alternatives and analyse the impacts of regulatory changes. In this respect, it may prove opportune to consider "ecologies of instruments" when conceiving and implementing regulatory policy holistically rather than through the parallel management of individual tools. Food for thought for "(…) the final frontier…to boldly go where no one has gone before!" (Jean-Luc Picard, Captain, Starship Enterprise; NCC-1701D, from the opening credits of Star Trek: The Next Generation; TV series, 1987-1994).

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PART I

Regulatory oversight

Chapter 2

Improving regulatory oversight

by Lorenzo Allio[1]

This chapter presents some general considerations on the role and functions of oversight in different institutional and constitutional settings across OECD countries. The cross-country and cross-institutional analysis finds some evidence of a trend towards establishing control-driven oversight bodies at the centre of government in presidential regimes, while equivalent oversight bodies on parliamentary regimes would rather tend to put emphasis on catalysing efforts to enhance regulatory policy. Nevertheless, the analysis also stresses the importance of accounting for the specific context and constellation of actors. Regulatory oversight bodies can deliver if they are embedded in the wider regulatory policy environment. They are institutionalised if they are able to shape the way in which all relevant actors involved in regulatory policy 1) understand their role; 2) perceive the problems; and 3) engage and operate towards solving them. The analysis also brings home the importance of understanding the match between the demand side (what the actors expect as a change in the regulatory policy, or through regulatory policy) and the supply side (what a regulatory oversight body can deliver, and how, in order to constitute an actual added value). This is likely to be the deciding factor in the choice of the oversight body's features – location, mandate, and powers.

1. Director, Allio-Rodrigo Consulting. The author would like to thank Claudio Radaelli and Katarina Staroňová for the insightful discussions when preparing the draft.

Introduction

Context and research question

This chapter contributes to the current KDI-OECD joint research project on Improving Regulatory Governance. It builds on the *OECD 2012 Recommendation of the Council on Regulatory Policy and Governance* and the findings from the work carried out in the framework of the *OECD Regulatory Policy Outlook 2015*. From the latter exercise, in particular, there appears to be a correlation between high scoring in the "regulatory oversight" indicator and the overall performance of a country in the OECD composite indicators.[1]

The chapter explores the interface between the institutional design of OECD countries (typically categorised as presidential, parliamentary, and hybrid systems); the performance of regulatory policy; and the main features of Regulatory Oversight Bodies (ROBs) – notably with respect to their mandate, powers, and location.

The paper's research question can, in other words, be phrased as to gauge whether institutional design is a possible critical success factor for effective regulatory policy and whether there are specific features that ROBs should take to fully exploit that potential for performance. In doing so, the paper does not seek to be exhaustive and to minutely report on practices and experiences and it is rather a thought piece to support discussion and reflection on regulatory oversight.

Structure of the paper

The chapter first defines the main constitutive elements of the research question so as to clarify the framework of analysis. It then discusses the core roles of ROBs with respect to regulatory policy – to ensure control of delegated powers and to stimulate ever better regulation, respectively.

The concluding remarks propose considerations on how to further exploit the potential of regulatory oversight and offer ideas for the future research agenda.

Setting the framework: Definitions and assumptions

This chapter proposes to approach the research question set above by first clarifying the notional framework of reference. All three elements of the question in fact lend themselves to wide-ranging definitions and multiple interpretations – what constitutes a "Regulatory Oversight Body"; how we can define (national) approaches to "regulatory policy"; and how we can categorise types of "institutional design".

This section discusses definitions and presents assumptions and simplifications that will be instrumental to further disentangle the research question.

Regulatory Oversight Bodies: A heterogeneous landscape

Regulatory oversight is acknowledged to be a pivotal element in the quest for improved governance and better regulatory outcomes. The *OECD 2012 Recommendation on Regulatory Policy and Governance* urges member countries to establish, close to the centre of government, mechanisms and institutions to actively and independently provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality (OECD, 2012; Rec.3).

Over the past two decades, forms of regulatory oversight have emerged in most OECD countries. Thirty three out of 35 of them record either single or multiple bodies performing oversight (OECD, 2015a:34). Such key actors in regulatory policy may be either "traditional" services at the centre of government (see e.g. OECD, 2014a); or, increasingly, dedicated ROBs (OECD, 2016).

Such an evolution prompts a number of considerations that touch upon three core dimensions at least:

- **Intensity**. A trade-off appears to inform decisions about setting up ROBs and establishing their mandate. As it has been pointed out, "too little oversight is likely to lead to neglect, too much oversight is likely to undermine essential informal relationships and likely to incur resistance." (Lodge, 2015:13) There is a risk of regulatory policy tools being deployed merely further to an administrative requirement imposed by oversight bodies rather than as real instruments of regulatory policy.
- **Remit**. The scope of oversight is, moreover, a critical differentiating factor. ROBs may focus on relatively narrower tasks and be involved in daily decision-making (for instance by scrutinizing impact calculations or RIA analyses); or they may cover wider policy issues (e.g. fostering productivity) or perform governance reviews or spending audits (NZ Productivity Commission, 2014).
- **Dynamic interface**. A further dimension refers to the way in which the oversight bodies relate to other parts of the public administration, and in particular to the line regulators, on the one hand, and with respect to the decision-makers on the other hand.

ROBs respond to different purposes and take various shapes. Work by the OECD has highlighted several possible combinations of function, powers and location (see Annex A.) – Castro and Renda (2015: 28) speak of "an ever-changing picture" when it comes to ROBs. OECD countries feature high variety in coverage and depth of the ROBs' responsibilities. Only four bodies have been charged with five of the typical oversight responsibilities,[2] while not less than 35 other bodies have a single-responsibility mandate (OECD, 2015a: 36). Review by Castro and Renda (2015) of selected ROBs confirms not only the current absence of blueprints for institutional setting and allocation of powers to ROBs, but also the difficulty to identify clear-cut trends towards progressive convergence in oversight forms and practices – apart from possibly an overall tendency to locate ROBs close to or at the Centre of Government; and to first deploy ROBs scrutiny primarily to the flow of regulation rather than checking existing regulations.

Differences in jurisdictions account for variations among ROBs configuration as much as difference in regulatory policy goals and tools. We turn to this latter element of the research question in the next paragraph.

Regulatory policy in OECD countries

"Regulatory policy" is defined as "the process by which government, when identifying a policy objective, decides whether to use regulation as a policy instrument, and proceeds to draft and adopt a regulation through evidence-based decision-making." (OECD, 2012: Rec.1.1)

The *OECD Regulatory Policy Outlook 2015* shows that OECD countries have established the conditions for implementing the *2012 Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012:Rec.1). OECD countries have generally committed at the highest political level to an explicit whole-of-government policy for regulatory quality, including by appointing ministerial portfolios, publishing explicit policy statements and upgrading standard procedures (OECD, 2015a:26).

However, so-called Better Regulation programmes may differ significantly from one country to the other. This is possibly mirrored by the variety of regulatory instruments that can be found across the OECD zone. The classical example is the diffusion of RIA, which still has not generated convergence since first observations of international trends more than ten years ago (Radaelli, 2005). This is also confirmed by work by the OECD on regulatory policy evaluation, which highlights the range (in scope and depth) of policy performance reporting (OECD, 2014b, esp. Ch.3).

One primary challenge refers to the **purpose of regulatory policy** – the "why Better Regulation?" – and, in turn, to the notion of regulatory quality. As argued by Radaelli and De Francesco (2007), the belief that there is substantial agreement on what "good regulation" is might be misleading. Regulatory quality is "prismatic", depending on the perspective and logic taken by various actors. Accordingly, regulatory policies across OECD countries seek to achieve different goals.

Further challenges that pertain more to the "what Better Regulation, and how?" add to these difficulties in classifying and organising governmental regulatory policies:

- **On the one hand, there is an acknowledged gap between stated commitments, formal requirements, and actual practice.** The way regulatory policy is embedded into law differs substantially across countries. In addition, in many jurisdictions there is discrepancy between the statutory provisions for due process standards and their actual implementation (OECD, 2015b).
- **On the other hand, regulatory policies do not cover necessarily the same scope.** This refers to the stages of the policy cycle that are covered by the formal policy commitment – not all countries focus equally on the same stages (OECD, 2015a: 27-28). Moreover, a gap also exists between the overarching strategic design and coordination of reform initiatives that should fall under the wider regulatory policy umbrella, but might not be perceived as such. Examples include autonomous strategies to enhance evidence-based decision-making; to implement the Open Government Agenda; to foster Public Sector Innovation; or again to better organise multi-level governance arrangements.
- **Finally, better regulation is determined by the efforts of multiple actors, on top of the regulators themselves**. Regulatory policies often span beyond the formal commitments and programmes launched by Governments, and include activities from parliamentary assemblies and / or (more or less) organised stakeholders.

Institutional designs: Modelled typologies

Democratic regimes are complex polities with multi-factorial features. Comparative political research has long studied constitutional and institutional settings across the globe. Lijphart (1999), for instance, discusses several constitutional, institutional and political elements, the constellation of which has shaped established democracies. Several

dynamics are at play and influence both democratic governance and public sector reforms.

Lijphart isolates and investigates two types of democracies – what he calls "majoritarian" or "Westminster" democracy on the one hand, and "consensus" democracy on the other. In the first case, a legislature is elected by a simple majority of the voters. The executive branch of power reflects that vote and governs, and voters dismiss it if unsatisfied. The classic example epitomising this model is the United Kingdom. Consensus democratic systems, by contrast, involve executive power sharing, far greater compromise and significant minority rights. Typical examples of such a system are Switzerland, Germany and Belgium.

According to Lijphart, Westminster and consensus democracies differ along two analytical dimensions of allocation of powers: the (horizontal) executive–parties divide, and the (vertical) federal–unitary divide, respectively – each of which has five differentiating elements (see Annex B. for an overview).

Lijphart's work has been subject to intense review and scholar criticism, both with regard to his conclusion on the superiority of the consensus democracy model; and because of the allegedly weak explanatory power of his typology to capture patterns of democratic developments outside the established paradigms included in his original sample of countries (Bormann, 2010; and literature therein).

This chapter does not take any normative position on this debate. It merely rests on those considerations to highlight the extent to which both Westminster democracy and consensus democracy models need to be interpreted and reviewed against the complexity of institutional arrangements in real democratic political systems. This renders comparative studies all the more speculative, if the dividing line is set between the classical "presidentialism vs. parliamentarism" taxonomy – a possibly even narrower dichotomy. Such latter taxonomy appears to be empirically questionable, given the many hybrid features presented in many constitutions (Cheibub et al., 2013).

Simplify to operationalise

The above considerations prompt us to simplify in order to discuss possible causal inference. Not only are there several types of ROBs; several functions that ROBs may be entrusted with; and several "ROB-like" possible institutional arrangements within the same jurisdiction. There is also various understanding as to the purposes and scope of regulatory policies; and there are no clear-cut defining characteristics of institutional designs across OECD countries.

In order to operationalise the research question, the paper hence draws from two assumptions and conceptual limitations. Specifically:

- It considers abstract, "archetypal" forms of the parliamentary regime and the presidential regime, despite the conceptual and empirical reservations mentioned above.
- It focuses the analysis on two general rationales for introducing ROBs and mainstreaming their role in the framework of regulatory policy – One the one hand, it is about "using the stick", i.e. policing and ensuring control by setting standards for and monitoring regulatory quality (with more or less gate-keeping powers). One the other hand, it is about "offering the carrot", i.e. positively unsettling common regulatory practice by providing advice as well as technical

guidance for enhanced evidence-based decision-making; leveraging coalition advocacies around Better Regulation; promoting capacity-building and, eventually, learning.[3]

The "stick" and the "carrot" functions of ROBs are both addressed in the sections below.

Regulatory oversight to compensate agency loss?

While the chapter addresses archetypal forms of the parliamentary and the presidential government, arguably the difference between the two institutional designs is not just about the relationships between the legislator(s) and the executive branch, but more fundamentally about the ways in which the citizens influence the ultimate policy outcomes that such political actors help shape. The parliamentary and presidential designs can, in other words, be considered from the perspective of a *chain of delegation* from voters to the ultimate policy makers (Bergman et al., 2000; Strøm, 2000).

This reasoning of successive steps can be easily followed for instance in relation to welfare or environmental policies, but it holds also when it comes to regulatory policy. This section shortly summarises the chain of delegation argument and considers some implications for ROBs design and functioning.

The chain of delegation lens

Strøm (2000) presents institutional designs as a "chain of delegation" from voters to the ultimate policy makers, grounding the logic on the so-called "principal–agent model" (McCubbins et al., 1987: Kiviet/McCubbins, 1991; Laffont/Martimort, 2002). Those authorised to make political decisions (the "principals") conditionally designate others (the "agents") to either directly make such decisions in their name and place, or to elaborate the case for such decisions.

Delegation is inevitable in modern democratic regimes, which deviate to the ideal model of perfectly direct democracy and feature elements of representation. It takes place because the agent has certain kinds of information, expertise or skills, or simply time, that the ordinary citizens (the voters) lack. Delegation occurs through a chain consisting of four distinct links (Strøm, 2000:267):

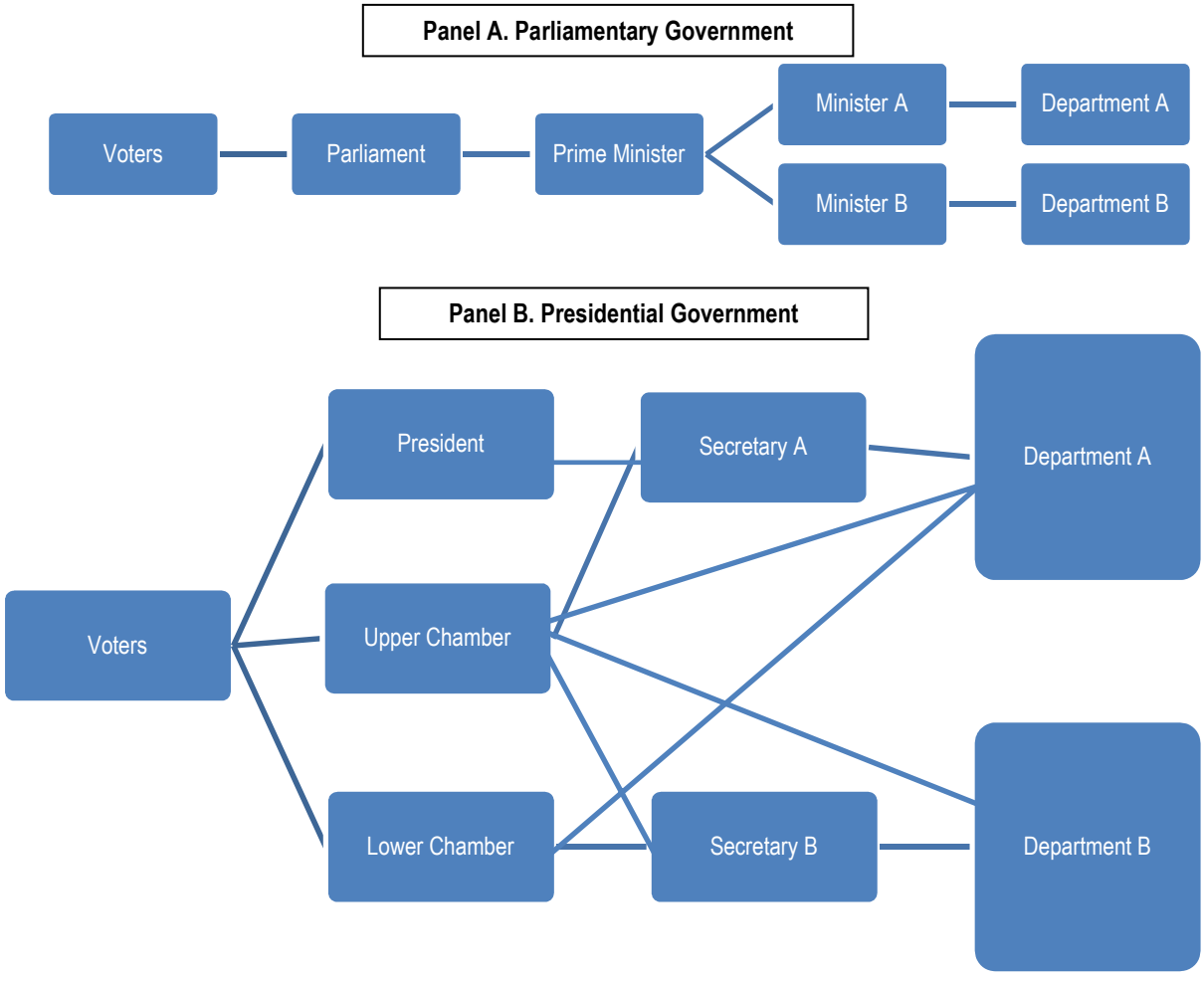
- from voters to elected representatives;
- from legislators to the executive branch, specifically, to the head of government (the prime minister);
- from the prime minister to the heads of the different executive departments;
- from the heads of the executive departments to the civil servants.

Such chain of delegation is paralleled by a set of accountability mechanisms and arrangements that run in the reverse direction. For each agent, there are rules concerning the sets of actions that he or she is authorized to take.[4] This possibility to delegate and to control (make accountable) *ex post* is the defining feature of democratic regimes.

The delegation / accountability chain lens can be instrumental to read institutional designs (Figure 2.1):

- In its purest, archetypal model, a **parliamentary regime** is characterized by the so-called singularity principle. The links form a single, linear chain where, from left to right, the principal delegates to single (or multiple) agents, which are not competing among themselves. Similarly but in the reverse direction, the agents are each accountable to only one single principal.
- Under **presidentialism**, by contrast, the delegation relationships are ramified, they tend to take the form of a grid. The singularity principle does not apply. In a presidential system, voters can for instance directly elect multiple competing representatives; legislators may establish a range of different executive agencies with similar or overlapping jurisdictions; and civil servants may have multiple principals in the form of reporting duties to the president or to one or several legislative chambers.

Figure 2.1. **Delegation and accountability chains in archetypal parliamentary and presidential government**



Strøm, K. (2000), "Delegation and accountability in parliamentary democracies", in *European Journal of Political Research*, Vol.37, pp. 269.

Accounting for the "agency loss"

Delegation comes at some costs. Scholars on transaction costs, game and contracts theories have studied various problems arising from the dynamic interplay between principals and agents, notably in the field of neo-institutional economics (Furubotn/Richter, 2005). Because both principals and agents are motivated by self-interest, problems arise when an agent does not act in her principal's interest; or because the amount of knowledge of the two is uneven. The term "agency loss" is often used to capture the difference between the best possible outcome for the principal and the consequences of the acts of the agent.

Two particular shortcomings of delegation linked to asymmetric information are worth mentioning here:

- **Adverse selection,** when principals do not fully know the competencies or preferences of their agents or the exact demands of the task at hand – this may lead to the appointment of inadequate agents.
- **Moral hazard,** when principals cannot fully observe the actions of their agents – this may give rise to incentives for the agents to deviate from their delegated tasks or powers and exert discretion.

Agency loss can arguably not be fully eliminated, but it can be contained. A number of strategies help principals minimise such risk. Two typical measures are "contract design" and "screening and selection mechanisms". They intervene *ex ante*, i.e. before the principal and the agent(s) enter any agreement. Additional two measures operate *ex post* – these are "monitoring and reporting requirements" and "institutional checks". The choice of which oversight mechanisms to deploy depends to a great extent on the nature of agency problems. *Ex ante* measures tend to be more effective if the dominant agency problem is adverse selection, whereas *ex post* control measures appear best placed to address issues of moral hazard (Kiewiet/McCubbins, 1991).

All forms of representative democracies potentially suffer either from cases of adverse selection or from cases of moral hazard, or both. Acknowledging this, and in the light of the delegation / accountability chain logic, Strøm (2000) argues that the archetypal parliamentary system enjoys an intrinsically stronger accountability mechanism, notably because the simple, single linear chain that binds each agent to her principal. In principle, therefore, we should expect less a need to intervene with *ex post* control measures – particularly in the form of "institutional checks" – in parliamentary regimes than in presidential government.[5]

As he points out, "the main problem is not that parliamentary systems lack the opportunity to sanction, but rather that they do not have monitoring capacity necessary to determine when such sanctions might be appropriate. Presidential constitutions tend to feature institutions that facilitate active legislative oversight, of either the police-patrol or the fire alarm variety." (Strøm, 2000: 274).[6]

Control through regulatory oversight: Evidence from practice

In the light of the heterogeneity of the ROBs landscape across the OECD, this chapter has assumed that one core function of ROBs can be catalysed as "using the stick" (see Point II.4. above). This broadly includes exerting more or less binding control over the production of new acts by regulatory services (executive departments) by setting quality standards and scrutinising compliance to such standards. From this perspective, ROBs

can be considered as an "institutional check" established by principals (the head of government) to control their regulatory agents in order to mitigate agency loss – limit the agents' discretion and strengthen accountability).

As just recalled above, the chain of delegation logic leads to the conclusion that parliamentary government is less at risk of accountability problems than other regimes. We should hence expect that ROBs, understood as executive-internal institutional control devices, should be more present in presidential systems than in parliamentary systems.

Is this reflected in practice? Anecdotal review highlights examples confirming the argument:

- **The establishment of ROBs within the executive to control administrative and regulatory agents finds application in presidential systems. In those cases, oversight typically pertains the type and quality of *ex ante* impact assessments**.[7] In the United States, the Office for Information and Regulatory Affairs at the Office of Management and Budget (OMB/OIRA) in the White House is explicitly mandated to review the implementing regulations issued by the executive agencies. OIRA is acknowledged to effectively exercise presidential oversight because it has been introduced and moulded on the pre-existing delegation / accountability paradigm of United States federal decision-making. The "control architecture" was not established ex novo through the Executive Orders on RIA. It finds its foundation in the Administrative Procedure Act of 1946.8 In Mexico, one of COMFEMER's (the Federal Commission for Regulatory Improvement) core tasks is to review ministerial impact assessments and issue mandatory and binding opinions. COFEMER can require that the RIA be modified, corrected or completed with more information. The regulator cannot issue the regulation until COFEMER's final opinion, both on the RIA and on the regulation, is completed. COFEMER also has a system for managing the quality of RIA, in which regulators are "named and shamed" based on their performance on the evaluation of RIAs.
- **In parliamentary governments, by contrast, the creation of ROBs within the executive appears to have not been triggered primarily by the intention to hold regulatory agents accountable for the use of the powers delegated to them**. Changes in their location, moreover, have not been uncommon. In Canada, for example, the location of the RIA control unit has swung over the years between the Privy Office and the Treasury Board Secretariat, arguably on the basis mainly of pragmatic considerations reflecting adjustments in line with administrative capacity or resources for the implementation of the legislative manifesto of the governments.
- In Australia, the Office of Best Practice Regulation originally created as a separate unit within the Australian Productivity Commission was moved to the Department of Finance and Deregulation, to then be re-located to the Prime Minister and Cabinet's Office. As its name suggests, OBPR does perform quality checks and compliance scrutiny over ministerial *ex ante* and *ex post* impact assessments (with also significant powers), but it also actively promotes best practices and stimulates the implementation of the Government's de-regulation agenda. Similarly, the Office of Deregulation, also located in the Prime Minister and Cabinet's Office, is tasked with coordinating the ministerial deregulation units, rather than controlling them.

- In the United Kingdom, the Thatcher Government set up an Enterprise and Deregulation Unit within the Department of Trade and Industry, reflecting the adoption of compliance cost assessment. However, the central body tasked with the coordination and supervision of the exercise was given no powers to review the substance of regulatory proposals. Several years later, the Better Regulation Unit of the Cabinet Office was relocated to the then Department of Business, Enterprise and Regulatory Reform, arguably reflecting more a shift in the emphasis put on sectoral (economic) impact assessments rather than administrative power concerns.

The thesis could find further confirmation from the observation that, when parliamentary systems have sought stronger institutional regulatory control (notably by checking compliance to quality standards or costing rigour), they have opted to locating ROBs outside the executive.

- In Germany, the Better Regulation Unit (BRU) within the Federal Chancellery, the core of the Executive. The BRU does not however perform scrutiny tasks. Rather, it co-ordinates and monitors implementation of the programme on reduction of bureaucracy and compiles the annual report of the Federal government to the federal parliament on the subject. The report is subject to an inter-service consultation and is finally subject to a decision of the cabinet. A more control-driven mandate, by contrast, has been conferred to the National Regulatory Control Council (NCRR), which operates at arm's length from the executive (in terms of both political and operational independence) to review – it is important to recall – (originally) clearly defined impact assessments, namely administrative costs calculations.
- The NRCC model was pioneered by the Advisory Board on Regulatory Burden (ACTAL) in the Netherlands, which was set up to serve as the government's watchdog, with two deputy ministers (of finance and economic affairs) overseeing its activities and a special inter-departmental project unit providing support.
- A further parliamentary system featuring an equivalent institutional arrangement in terms of external, independent regulatory oversight is for instance Sweden, with its Better Regulation Council.
- In the United Kingdom, oversight over the One-In, Two-Out mechanism has been entrusted to the Regulatory Policy Committee (RPC), which operates independently and outside the Government. Before the RPC, also the Better Regulation Commission and the Risk Regulation Advisory Council have operated as external quality assurance bodies for, more generally, better regulation oversight.
- In Switzerland, forms of oversight are performed by the Parliamentary Control of the Administration (PCA), which is part of the Parliamentary Services Department of the Federal Assembly. Parliamentary scrutiny is particularly developed in the United Kingdom, as established by the 1946 Statutory Instrument Act.

Regulatory oversight to propel better regulation?

A second approach to addressing the research question is to centre the analysis around the notion of regulatory policy – instead of the type of institutional design, as presented earlier. As the term coined and used by the OECD aptly recalls, it is appropriate to

consider Better Regulation programmes as fully-fledged "public policies". This is not about semantics. It translates the acknowledgement that "regulatory policy", to succeed, needs to be considered holistically, as the result of a sustained and synergetic strategy instead of a sequence of individual initiatives and tools.

This section hence explores whether – and in case, how – ROBs contribute to enhancing regulatory policy, within the institutional context of a given country. That context, however, may or may not be a necessary (let alone, sufficient) condition determining success. In doing so, the section tackles the second core function attributed to ROBs (see the section on "Simplify to operationalise" above), namely ***"offering the carrot"*** and constructively advancing the regulatory reform agenda.

The public policy framework lens

In its most abstract terms, a "public policy" is a set of actions that affects the solution to a given policy problem. A more specific definition refers to it as "the connection of intentionally consistent decisions and activities taken from different public actors, and sometimes private ones, (…) in order to solve in a targeted way a problem which, politically, is defined as collective" (Knoepfel, et al., 2001: 29).

The above definition is helpful in as much as it hints to the existence of multiple elements that constitute a "policy". In turn, this allows to disentangle and reconstruct the logic for "policy-making". The conceptual framework proposed by Dente (2014:36 – emphasis in original) is in this respect insightful: "The outcomes of a public policy decisional process depend on the interaction of different types of **actors** with different goals and roles who, within a **network** that can have different characteristics, exchange **resources** using different **patterns of interaction**, to obtain a **stake**, within a given **decisional context**."

In other words, in order to investigate intentional policy change – in our specific case: "better regulation", it is opportune to start by analysing the way(s) in which public policy decisions are made.[9] **Public policy transformation, be it in its process, organisation or outcomes, is likely to be the result of a change in the constellation of the constitutive elements highlighted in the quote above.**

For the purpose of this chapter, the following three elements are worth being considered more closely (although succinctly):

- Relevant **actors** are those that make actions able to influence the decisional outcomes and that do this because they pursue goals either regarding the problem and its possible solution, or regarding their relations with the other actors. Typically, in public policy decision-making relevant actors are represented by the "politician"; the "bureaucrat"; the "special interest stakeholder"; the "citizen" (public); and the "expert".
- **Resources** in public policy processes can be differentiated into i) "political resources", which refer to the amount of consensus an actor is able to gather. This type of resources is critically important especially to policy innovators, i.e. the promoters of change. ii) "Economic resources" pertain to the creation and / or the transfer of financial means and capacities across the process or from an actor to the other(s). iii) "Legal resources" take the forms of the decision by the regulatory or administrative authority, which enshrine mandate, powers to an actor or a set of actors. Finally, iv) "cognitive resources" are understood as the availability of important information, knowledge or conceptual models for the decisional

process.[10] It is important to note that, just like consensus, money or legally recognised authority, also knowledge becomes an asset only if it operates in the interaction among actors.

- Although often underestimated or misunderstood, patterns of interaction are therefore a pivotal factor determining policy change. They are the ways in which actors relate to each other. In contexts where actors are many, with different interests, goals and logics of action, even the simple order in which they enter the process can have effects on the progressive definition of the problem and the determination of the outcomes.[11]

"For whom" and "by whom" regulatory policy is shaped is thus as important as considering "how" it is shaped. Actually, the policy finalisation determines its design. Different actors bring into the better regulation policy game different preferences; logics for action; and criteria for success (Radaelli/De Francesco, 2007: 44–49, Table 2.1.).

Table 2.1. **How different actors look at regulatory policy**

	Politician	Civil servant	Special interest stakeholder	Citizen	Expert
Evaluation criterion	Consensus	Conformity to rules	Cost minimisation	Cost-effective protection from risk	Efficiency
Meaning of quality	Outcome of negotiation	Following legitimate procedures	Profit	Enabling regulation	Achieving goals in term of real-world impact
Logic of action	Responsiveness, negotiation	Standard operating procedures	Influence	Participation	Science

Source: Adapted from Radaelli, C.M. / F. De Francesco (2007), *Regulatory Quality in Europe*, Manchester University Press, p. 47.

In the light of the framework sketched above, the introduction of a ROB appears as a deliberate attempt to positively unsettle the constellation of the constitutive elements of the regulatory policy decision process. From this perspective, ROBs are not meant primarily to control and sanction, but to significantly alter the regulatory policy framework to generate positive change. In principle, a ROB is successful if its introduction accounts for the mainstream rationale for regulatory policy; for the players and for the rules of the game in a given political, administrative and institutional context.

Transformation through regulatory oversight: Evidence from practice

As reported in recent work (OECD, 2015b; 2016; Castro/Renda, 2015), experience from OECD countries shows the commitment to "gear up" regulatory policy through the creation of ROBs. Typical ROBs' tasks associated to such a goal are the development of technical guidance for enhanced evidence-based decision-making; the organisation and promotion of capacity-building programmes; advocacy initiatives publicising and raising awareness of the ongoing reform; and stimulating learning through monitoring and evaluation activities.

The following are anecdotal cases where ROBs appears to have leveraged the dynamics between the regulatory policy constitutive elements to recalibrate or more radically alter the overall Better Regulation framework in the country.

- The experience of the Czech Republic, where regulatory oversight is allegedly the most developed across Central and Eastern European countries, is an interesting case study for parliamentary systems. The Czech RIA Unit enjoys a strong mandate with return powers. It was moved from a line ministry (the Ministry of Interior) back to the Government Office, where it was originally created, under the direct supervision of the Deputy Prime Minister in charge of the legislative process. Such profiling has been possible also thanks to the initiative of committed civil servants that have successfully promoted a bottom-up approach, while a window of opportunity for change was offered when a new Government took office in 2012. That development has been complemented by a new RIA Committee of the Legislative Council of the Government, consisting of well-respected independent academics, economists and lawyers from outside the civil service who provide opinions on both draft regulation and accompanying RIA (Staroňová, 2016; 2017). The Czech ROB is also a member of the RegWatch Europe, a network of seven like-minded bodies, which ensures internationalisation, diffusion of practices and authoritativeness. A change in the set of actors; a tailored pattern of interaction (a pro-active, bottom-up push); and the concomitant appearance of an authoritative "ally" have thus contributed to leveraging success.
- Special mention deserves the Productivity Commissions in Australia and New Zealand. While it may be debated whether they can be considered "oversight" bodies, their advocacy and advisory functions are fundamental in both promoting regulatory policy goals (enhanced productivity, competitiveness) and identifying policy areas where there is margin to improve regulatory effectiveness. They are an authoritative source of research and advice on reform opportunities and strategies for policy implementation, not only as a result of their resources – notably in the case of the Australian body – but thanks also to the close synergy between their mandate and the overarching rationale for regulatory policy by the Government. In the Australian and New Zealand cases, therefore, the advocacy dimension of regulatory oversight is highly profiled also because it is well nested in the overarching public discourse and policy narrative about regulatory policy.
- In Mexico, COFEMER does not screen impact assessments, only. It reviews the national regulatory framework recommending sectoral or more specific revisions; it issues guidelines; and provides technical advice and training on Better Regulation. It also supervises and coordinates the regulatory process with a "technical liaison" belonging to a lower hierarchical level, established within each ministry and centralised body, stipulating also inter-agency agreements. Furthermore, COFEMER addresses an annual report to Congress on its performance and on the progress with regulatory reform in line ministries and decentralised entities. COFEMER also carries out international relations functions. Here again, the ROB is nested in (and itself fosters) a web of relations, which make it the pivotal element of regulatory policy. It is such comprehensive a mandate that profiled COFEMER as an effective body to promote ever better regulation across levels of government in Mexico. The fact of enjoying significantly better expertise than ministerial average and be placed under the Ministry of Economy (while COFEMER's Head is directly appointed by the

President), moreover, have contributed to leverage the authority and the credibility of the work (OECD, 2013:46ff).

The fact that in the above examples the presence of the ROBs has brought about significant regulatory policy change in both presidential and parliamentary regimes suggests that institutional design might not be the distinctive critical success factor in this respect. Rather, it has been the specific art and manner through which the ROBs have been introduced and the role they play throughout the decision-making process (notably in terms of leadership, coordination and advocacy) that has yielded enhanced regulatory policy outcomes.

In some instances, regulatory oversight has actually delivered little in relative terms, while other factors have arguably been more decisive in increasing regulatory quality. Staroňová (2016), for instance, points to the limits of regulatory oversight using the case of Slovakia, where the standardisation of RIA documents had a bigger effect on broadening the overall scope of RIAs than the establishment of a ROB that was fragmented and which enjoyed limited power, hence resulting in rather a symbolic institution.

Fully exploiting the potential of regulatory oversight: Some concluding remarks

Summing up

This chapter explores the relationship between types of institutional design; framework of regulatory policy; and the mandate, powers and location of Regulatory Oversight Bodies (ROBs). It does not present a comprehensive overview of ROBs in OECD countries, but proposes two interpretative lenses to understand the underlying dynamics that may determine the role and effectiveness of ROBs.

In light of the large number of nuanced cases along the spectrum from parliamentary to presidential system, the diversity in purpose and scope of Better Regulation programmes across OECD countries; and the heterogeneity of ROBs even within the same jurisdiction, the chapter rests on two relatively drastic but necessary simplifying assumptions:

- Working definition of institutional design leads to considering archetypal forms of presidential and parliamentary regimes.
- The various several tasks and powers that are in practice attributed to ROBs can be distilled into two basic functions – control (the "stick"), and catalyst for better regulation (the "carrot").

The first interpretative lens presented in this chapter referred to the delegation / accountability chain as a conceptual model defining parliamentary and presidential regimes. It claims that we should expect greater chances to observe the establishment of control-driven ROBs at the centre of government in presidential regimes, while equivalent ROBs on parliamentary regimes would rather tend to put emphasis on catalysing efforts to enhance regulatory policy. The example of United States OIRA/OMB neatly fits this interpretation, highlighting how the ROB has been conceived as a function of the already existing delegation / accountability dynamics in the United States federal executive (as enshrined in the United States APA).

The second lens pivoted around the notion of "regulatory policy", highlighting the dynamics that exist between some of the constitutive elements of a typical public policy:

the actors; the resources; and the patterns of interaction. The explanatory power of such conceptual framework rests on the acknowledgment that transformation in the policy outcomes (i.e., in our case, better regulation) depends on changes in the constellation of the actors involved; the re-allocation of resources; and the alteration of the networks between them. While the introduction of a ROB affects all those three dimensions, the conceptual framework is not in a position to predict in which way the policy outcome will change (i.e., whether the ROB will be successful, and better regulation will be delivered).

Concluding

The ideas presented in this chapter are but a preliminary attempt at disentangling the political economy of ROBs. At this stage, they prompt a number of considerations.

Caution with lesson-drawing to ensure institutionalisation.

This might not sound terribly innovative and insightful, but it may be simplistic and even counter-productive to blindly transplant organisational models from one context to the other. The same mandate and capacity endowment entrusted to a ROB (input) delivers different outputs. The following issues are worth highlighting:

- It is important to account for the specific context and constellation of actors. ROBs can deliver if they are embedded in the wider regulatory policy environment. They are institutionalised if they are able to alter the way in which all relevant actors involved in regulatory policy (i) understand their role; (ii) perceive the problems; and (iii) engage and operate towards solving them.
- When conferring powers and tasks to a ROB, it is important to understand the match between the demand side (what the actors expect as a change in the regulatory policy, or through regulatory policy) and the supply side (what a ROB can deliver, and how, in order to constitute an actual added value). This is likely to be the deciding factor in the choice of the ROB's features – location; mandate; and powers. Eventually, a ROB needs to be exposed to the regulator-regulated interface, even if it is located and is exclusively bound to the public administration.

Leveraging the "multiplier effect" of ROBs

From the latter remark also follows that ROBs can benefit from being part of a wider coalition of actors, public and private, and of various constituencies. This is relevant not only at the moment of creating the ROB, to ensure legitimacy and horizontal support. It also concerns the role that the ROB can play in wider, overarching policy goals. In this respect, it is worth exploring whether the influence of regulatory oversight in achieving ever better regulation is sustained by the fact that ROBs are geared towards and hooked up to a regulatory policy which is at the service of shared policy goals.

The example of the Australian Productivity Commission well illustrates this logic. Also the evolving mandates granted to the Dutch ACTAL and the German NRCC underscore the symbiosis between the rationale for the ROB and the overarching purpose of regulatory policy in those countries. In those cases, the ROBs have contributed to multiply the synergies between regulatory policy and other policy objectives. In countries where regulatory oversight remains confined to relatively narrower mandates, such as scrutinising RIAs, such multiplier effect by ROBs might by contrast remain unexploited

and overarching policy goals might not benefit as much from the governance of regulatory policy.

It is thus fair to conclude that "getting it right" with introducing and mainstreaming regulatory oversight fully reflects the modernity of Better Regulation. It is one of its latest frontier. The reform agenda is no longer (only) about to measuring possible impacts of regulatory decisions to seek economic performance but has adventured onto a more holistic and ambitious territory – the shaping and functioning of institutional design and governance to facilitate the achievement of policy and societal goals.

Looking ahead

As mentioned from the outset, this is a thought piece. As such, it seeks to trigger further investigation and analysis. The chapter thus ends with suggestions for further research in the field of regulatory oversight; regulatory policy; and governance (institutional design).

A first consideration invites to refer to studies on the diffusion of administrative reforms. They suggest that significant change depends largely on the way in which regulatory policy is connected to parallel, co-evolving dynamics (such as wider public sector reforms) as well as to the underlying reform implementation context. To this end, Pollitt and Bouckaert (2004) have developed an analytical framework that has robustly investigated reforms patterns in various countries. Pollitt and Bouckaert investigate the scope, pace and sustainability of reforms on the basis of six dimensions:

- **Decentralisation**. Stretching from unitary to federalist or fragmented systems, this refers to the vertical dispersion of authority across the levels of government.
- **Executive government**. This dimension considers the form and working mode upon which the executive rests: the spectrum may range from single-party government to coalition or minority government.
- **Horizontal coordination within central government**. This considers the extent to which various organisational actors at the centre of the executive are capable of collaborate and act synergistically.
- **Politician**. Civil servant relations – this covers the interface and interaction between the political class and top career civil servants, considering for instance the degree of revolving doors between politics and administration, the volatility of senior positions in civil service.
- **Administrative models**. This accounts for the expectations that civil servants have as to what is considered "acceptable", "normal" within their organisation. It broadly refers to the administrative culture, shaped by rules as well as softer norms, which might range from being legalistic and procedural (Rechtsstaat-driven) to more geared towards the public interest rationale.
- **Market for ideas and advice**. This last dimension refers to the extent to which (regulatory policy) reform discourse is shared and porous, with inputs from various governmental, non-governmental, and private actors are promoted and valued.

It may thus be opportune to broaden the type of explanatory variables that possibly contribute to regulatory performance through changes in regulatory oversight, beyond the initial duality between presidential and parliamentary systems. A system of variables

reflecting the framework proposed by Pollitt and Bouckaert (2004) might facilitate the task of identifying *why* a given experience of a ROB has been more successful than another, in the light of the different contexts in which the ROBs operate.

Future research could, in other words, seek to disentangle the relational, political, legal and administrative mechanisms that enable a specific practice of regulatory oversight to achieve the objective it achieves – since there are many institutional contexts; there is not one single type of regulatory policy; and there are various goals and functions entrusted to regulatory oversight.[12]

The second consideration about the future research agenda concerns a specific technique that helps investigate whether and which constellations of factors correlate with changes in the interface between context characteristics; types of regulatory oversight and ROB's main features; and regulatory policy performance. Constellations may merely enable, actively trigger or hinder hypothetical such changes. ROB's specific features refer to a body's location; its powers; the stage it intervenes in the regulatory process; etc.

Qualitative Comparative Analysis (QCA) is a technique that allows researchers to assess correlation and causation, enquiring under which assumption a given casual factor might be necessary or sufficient for an outcome. It is particularly helpful when dealing with many variables and a small to medium number of N-cases (Ragin, 1987; Schneider/Wagemann (2012). QCA combines the advantages of case-oriented qualitative studies (in-depth knowledge of cases and attention to multiple, singular, or deviant patterns of causation) with the precision, transparency, and systematic accuracy of a variable-oriented quantitative approach (Rihoux, 2003). Applied to ROBs, QCA could explore the different combinations of conditions that lead to different impacts of such bodies on regulatory performance.

Notes

1. The composite indicators for stakeholder engagement measure four main areas; i) oversight and quality control; ii) transparency; iii) systematic adoption; and iv) methodology.

2. ROBs responsibilities are oversight over Regulatory Impact Assessment (RIA), administrative simplification, stakeholder engagement, *ex post* analysis, legal quality. The OECD iReg indicators compute a sixth set of responsibilities under the category "other", which includes tasks such as co-ordination across the government, or verifying compliance with legal requirements of the country, or driving strategy and planning in regulatory policy (OECD, 2015:36).

3. The reduction of the functions of ROBs down to these two broad sets of tasks reflects insights from March and Olson (1983), who argue that rational management and political control are the predominant rationales for adopting administrative re-organisation (adding however that discourse, symbols and interpretation of values do shape such re-organisation).

4. An agent is accountable to his principal if 1) she is obliged to act on the latter's behalf, and 2) the latter is empowered to reward or punish her for her performance in this capacity (Fearon, 1999: 55).

5. Conversely, the argument suggests that parliamentary democracy tend to relies more on *ex ante* controls, whereby internal delegation, for instance, implies reliance on *ex ante* forms of screening and selection.

6. Strøm (2000) continues his analysis on the implications for parliamentary and presidential governments that their different chains of delegation generate in terms of efficiency, transparency and predictability of the decision-making; and of flexibility and entrepreneurship of civil service.

7. Regulatory Impact Assessment is a privileged territory for regulatory oversight, in particular because it intervenes as a "fire alarm". It does not require full control on the part of the principal to "police and patrol" the agent. It is sufficient to establish procedures that alert when something dangerous is being done. For this reason, ROBs tend to exert their control function with respect to and on the basis of RIAs (Radaelli, 2010).

8. It shall be added, however, that OIRA is not the only oversight mechanisms at play in the United States federal government. Third-party supervision in the form of judicially enforceable administrative procedures, for instance, delegates the quality-control task of the agents to the court system.

9. Dente (2014:36) nonetheless warns that his model is merely interpretative. "It does not seek to define the features that an institutional system has to assume to secure the decisional feasibility of changes." And that it is neutral as to "the substantial quality

of the innovation proposal, meaning that it is not able to predict if it will be able to effectively solve the problem or be the correct solution to face that specific problem."

10. It shall be recalled that the level of committed resources may vary on a case-by-case scenario. For instance, it may appear preferable to policy innovators to invest more on political consensus rather than seeking high commitment of legal resources.

11. Dente (2014: 71) illustrates the relevance of patterns of interaction through the example of a policy innovator positioned centrally in a network but with insufficient resources, while the network members enjoy significant action resources and propose highly contradictory requests. Any innovator's stance will likely displease some of his powerful interlocutors and may cause the loss of the innovator's centrality, which is actually his only asset. "This explains, for example, why initially ambitious reforms end up setting for compromise leaving things basically as they were: when facing often contradictory oppositions, a promoter/director who fears losing the consensus of other important actors, will end up diluting decisions and operating incremental changes."

12. Such a mechanism-driven approach was for instance applied to drawing lessons from international RIA systems by Radaelli et al. (2010). See also Radaelli (2010).

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Annex 2.A

Functions, areas of responsibility and locations of oversight bodies

Areas of responsibility	Functions	Location
Consultation/stakeholder engagement Legal quality Administrative simplification RIA *Ex post* evaluation Other (e.g. de-regulation agenda or e-government)	**Quality control** • Scrutinise evaluations • Challenge unsatisfactory tools or processes • Review legal quality **Identifying areas of policy where regulation can be made more effective** • Gather opinions from stakeholders on areas in which regulatory costs are excessive and submit them to individual departments/ministries. • Reviews of existing regulation • Analysis on the stock and/or flow of regulation. • Advocate for particular areas of reform **Systematic improvement of regulatory policy** • Institutional relations e.g. co-operation with international fora • Co-ordination with other oversight bodies • Monitoring and reporting, including report progress to parliament / government to help track success of implementation of regulatory policy **Co-ordination of regulatory tools** • Encourage the smooth adoption of the different aspects of regulatory policy at every stage of the policy cycle. **Guidance and training** • Issue guidelines • Provide assistance and advice to regulators for performing assessments	**Within government** • Centre of government (e.g. PM's office, cabinet office) • Ministry of Finance / Ministry of Economy / Treasury • Ministry of Justice • Other ministries **External to government** • Independent bodies • Parliament • Advisory group • Office of Attorney General

Source: Based on OECD (2015), 2012 OECD Recommendation of the Council on Regulatory Policy and Governance, OECD Publishing, Paris; Renda, A. (2015), "Regulatory Impact Assessment and Regulatory Policy: A Progress Report", in Regulatory Policy in Perspective: A Reader's Companion to the OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris; and 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

Annex 2.B

Lijphart (1999) categorisation of consensus and majoritarian democratic systems

Characteristic	Indicator	Consensus / Majoritarian
Executive – Parties		
Executive power	Percentage of time minimal winning coalitions or single parties have stayed in power throughout the entire sample period – the higher that percentage is, the more concentrated power is in the executive	Dispersed / Concentrated
Executive-Legislative relationship	Variable 1: amount of time a coalition sticks together Variable 2: every change of leadership or occurrence of election even though a coalition may stick Dominance of executive taken as the mean of both variables – the longer a coalition lasts the more dominant the executive	Balanced / Executive dominant
Party system	Laakson-Taagepera Index that counts the number of the most important parties in the lower chamber – the closer the index approximates "2" the more the party system resembles a bipartisan setup	Multiparty / Two-Party
Electoral system	Gallagher Index that computes the difference between received vote share and received seat share – the higher the difference the more disproportional the electoral system is considered to be	Proportional / Winner-Takes-All
Interest groups	Siaroff Index which consists of eight different characteristics of corporatism and pluralism on a scale from one to five. The lower the score the higher the degree of corporatism in the given society.	Corporatism / Pluralism
Federal – Unitary		
Executive division of power	Ordinal scale created by Lijphart that assesses each countries performance on two dimensions – centralization and degree of federalism. All scores are summed up and the higher the score the more federal and central a given state is.	Federal / Unitary
Legislative division of power	Ordinal scale created by Lijphart on the strength and presence of bicameralism in a given country. The lower the index the more a country tends toward a unicameral system.	Bicameral / Unicameral
Constitution	Ordinal scale created by Lijphart on the size of the majority necessary for changing the constitution.	Rigid / Flexible
Judicial review	Ordinal scale created by Lijphart that differentiates between no, weak, medium and strong judicial review.	Yes / No
Independent Central Bank	A composite index that assesses the independence of central banks on a scale from 0-1 where "1" means high independence	Yes / No

Source: Bermann (2010), Appendix A.

Chapter 3

Understanding and improving regulatory oversight: Canadian systems and experiences with a focus on the Treasury Board Secretariat as central oversight agency

by Dr. G. Bruce Doern[1]

This chapter provides a closer look at regulatory oversight in the federal government of Canada, with a special emphasis on the role and functions of the Treasury Board Secretariat. It finds that Canada's system of regulatory oversight is one composed of central agency and ministerial dimensions of Cabinet government and which shows examples of the benefits of oversight but also its growing complexity. It also stresses the much greater and needed presence of, and attention to, life-cycle regulation in policies about regulation, regarding regulatory plans but critically also in environmental and sustainable development realms/departments and therefore oversight. It also highlights efforts to both increase the role of scientific advice in oversight, as well as establish more independence for regulators and advisory bodies who produce scientific advice. Finally, the case study finds that oversight functions at the centre depend on competent, knowledgeable and dedicated staff but also on adequate budgets that are fit for purpose (indeed purposes).

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Introduction

The ***purpose and main objective*** of this chapter is to examine critical success factors for *regulatory oversight* by *key oversight bodies* regarding their functions in promoting high-quality evidence-based decision making, including: quality control; identifying areas of policy where regulation can be made more effective; systematic improvement of regulatory policy; coordination of policy tools; and guidance and training. This includes taking into consideration the resource limitations and the expending of political capital within regulatory systems to achieve genuine, constructive and impactful oversight for better regulatory outcomes.

This is done through a critical examination of the current institutional setup for regulatory oversight in Canada, with a specific focus on the Treasury Board Secretariat's regulatory oversight roles and challenges, including examples of its own links with, and dependency on, other Canadian federal government oversight bodies. The chapter is thus Canadian-focused but it also provides some brief contextual reference to other Westminster system countries, in this case the United Kingdom and Australia, regarding oversight reform involving the required publishing of forward regulatory plans.

Key descriptive information about the Canadian system is provided. This involves some needed accounts of different policies and programmes over the recent years. The analysis draws on extensively published research on the Canadian system covering its evolution over roughly the last 25 to 30 years. It also builds on and extends the author's published research with colleagues on the Canadian regulatory system directly (Doern, Prince and Schultz 2014; Doern 2011; Doern 2007; Doern and Johnson 2006) but also on recent other major Canadian policy and governance fields such as fiscal policy, environmental policy, and science and technology policy. These fields have been and are being influenced by central regulatory oversight governance (Doern, Maslove and Prince, 2013; Doern, Auld and Stoney 2015, Doern, Castle and Phillips 2016). Indeed, these processes are what we later refer to as *mezzo-regulatory oversight* processes and agencies with responsibilities regarding several federal departments and agencies. It must be stressed that the chapter does *not* examine regulatory oversight at the provincial government level. Canada is a federation and thus regulation is bound up in federal-provincial dynamics and jurisdictional boundaries, cooperation and conflict with the provinces (Atkinson, Beland et.al. 2013).

Current federal government oversight is also being driven by other agenda dynamics that arise from global and international bilateral pressures as well as reacting to crises or disasters. Canada's regulatory regime is inherently impacted by its environment, such as through Canada's proximity to the United States, long historical ties to the United Kingdom, or through signing free trade agreements that impact domestic regulations, such as with the European Union. As a result, changes in the regulatory environment over time will have exogenous impacts on domestic regulations and change what regulatory oversight means regardless of how it may have been described in law and practice historically in both these jurisdictions. Given Canada's close ties to both nations, impacts are likely to spill over into Canada's regulatory environment. Space does not allow coverage of these in this chapter but it is important to see it as a part of recent and also past kinds of *turbulence* in governance systems (Ansell, Ogard and Trondal 2017; Pal 2014; 2012) and what Howlett and Ramesh (2016) characterize as "critical capacity deficits" in governance failures.

The structure of the chapter flows from the basic needs and tasks at hand. The *first section* maps briefly for crucial contextual purposes the Canadian macro-regulatory governance system showing which players and oversight entities are at the centre and why. The need to stress oversight entities "at the centre" is important because "oversight" is a common descriptor of how any number of Canadian federal regulatory departments and agencies describe their main tasks. The Treasury Board Secretariat (TBS) is one of these central oversight entities and its regulatory oversight mandate, as we see further below, is only one of its central agency mandate tasks in its overall support for the work of the Treasury Board, a statutory Cabinet committee.

The *second and main section of the chapter* describes and analyses the Treasury Board Secretariat's regulatory oversight mandate, evolution and growing complexity. This mandate relates to: the Cabinet Directive on Regulatory Management (CDRM) established by the government in 2012; the *Statutory Instruments Act* and the *Canada Gazette*-centred consultation and regulatory assessment processes which have been in place for decades under both Conservative and Liberal governments; new more recent life cycle approaches and post-market product and project monitoring and the imperatives of longer term temporal regulatory governance oversight; the move towards regulatory forward plans and agendas (with some United Kingdom and Australia contextual discussion on such reforms); recent further "regulatory management initiatives" such as (the "one-for-one rule"; the small business lens; the administrative burden baseline); the instrument mix dynamics of soft tools (e.g. advice/cajoling/guidance) versus hard tools (statutes, rules, enforcement and sanctions) and more intricate instruments-ends dynamics in actual "regulation"; and the role of science and evidence in regulatory oversight.

Conclusions and the author's related arguments then follow on: Canadian experiences and the TBS oversight role: some lessons on success factors regarding central oversight but also institutional over-reach and implementation challenges, including resource limitations and the expending, exercise of political capital. Indeed regulatory oversight can be political in many ways.

An initial contextual mapping of the Canadian macro-regulatory governance system: Who is at the centre and why?

The TBS aspect of regulatory oversight is our ultimate focus but first it is important to understand that though it is a central agency in Canadian Cabinet government, and in the Canadian federal macro regulatory governance system, it is not necessarily always at the "centre of the centre". Thus, we need to see who else is at the centre and who determines and impacts on regulatory matters both directly and indirectly. To do this we look very briefly at:

- Four Core Cabinet and Central Agency Oversight and Challenge Functions
  - Prime Minister, Ministers and Cabinet Committees;
  - Central Agencies (Privy Council Office; Department of Finance and Treasury Board Secretariat);
  - Prime Minister's Office; and
  - Minister of Justice and legislative review (laws that are themselves rules; and that yield delegated law (the regulations that must conform to parent laws); and

- Constitutional and quasi-constitutional provisions such as The Charter of Rights and Freedoms and the Canadian Free Trade Agreement (formerly the Agreement on Internal Trade).

The *Oversight and Challenge Function system* has evolved over recent decades (Johnson 2006; Canada 2007). It is anchored foremost in core concepts of Cabinet-Parliamentary government, responsible government and democracy and hence in the roles and duties of the Prime Minister and his/her office, as well as the key central agencies: the Privy Council Office (PCO); the Department of Finance; and the Treasury Board of Canada Secretariat. Parliament is also involved in regulatory review in several parliamentary and Senate committees but these features of the Canadian system are *not* examined in this chapter.

Prime Ministers, the Prime Minister's Office, Ministers and Cabinet Committees

Prime Ministers, with ever greater degrees of political power overall in the Cabinet, have exercised power on regulatory matters directly and via the PMO and PCO and via discourse and communication strategies on how change should be politically crafted and marketed, such as for example by presenting and advocating regulation as "smart" regulation, "streamlining" regulation, "regulatory management" and "red-tape reduction" and other values and discourse but also for particular regulatory and policy stances. For example Liberal Prime Minister Jean Chrétien personally led Canada's climate change stance and set goals for the planned level of greenhouse gas emission *reductions* but his direction on other files prevented those reductions from occurring. In fact there was an increase in those emissions. (Doern, Auld and Stoney 2015, 99-105). Conservative Prime Minister Stephen Harper also personally fostered a planned much greater use of the criminal code as an enforcement feature for some law and order socio-economic rule-making (Jones 2014; Prince 2012).

Prime Ministers are the dominant player in the development of periodic "Speeches from the Throne". These occur as agenda-setting events about every 18 months and include new announced laws and policy positions and priorities some of which are regulatory in nature. The **Prime Minister's Office (PMO)** and Cabinet committee dynamics also involve detailed day- to- day "inter-executive" activity of ministerial policy advisors seeking both to influence, anticipate, and side-track initiatives from the key oversight bodies and from federal departments and agencies (Wilson 2016). As we see further below, there is major inter-executive activity among all the central agencies, including the TBS on regulatory matters, and spending decision impacts on regulation and also overall management strategies in the public service.

Also involved in the oversight process are **ministers** (individually and collectively) in a Cabinet and **Cabinet committees**. Cabinet government is built on concepts of ministerial responsibility and accountability. These include the political imperative and convention of a minister's individual and collective support for all policies of the government, even when, in internal Cabinet debate, some may be critical of, or opposed to, some policies.

Central Agencies

The **Privy Council Office (PCO)** as a central agency is mandated to "assess memoranda to Cabinet and legislative proposals with respect to instrument selection, regulatory implications and consistency with (the CDRM) and with the Cabinet Directive

on Law-making" (Treasury Board Secretariat 2017a, 13). As we see further below the Cabinet Directive on Law-making was given more explicit emphasis in its TBS website on regulatory matters by the current Liberal government because of its concerns about the increased excessive detailed control of some law making by the previous Conservative government regarding the use of criminal law penalties. The PCO is also responsible for formally registering new regulations and can refuse registration "if it deems that certain sections of the *Statutory Instruments Act* were not followed" (Ibid) (see more below).

The **Department of Finance** reports to the Finance Minister and provides advice to the Minister in the making of economic and fiscal policy. It also provides advice on setting rules for spending and taxation and has central power regarding what kinds of funding and staffing levels regulatory bodies can have, including that of the TBS. The Department of Finance plays a significant role in providing policy advice and assistance to the Minister of Finance in the development of the annual budget. In annual "Budget Speeches" as a central agenda- setting occasion, the Minister of Finance can both make regulatory policy and restrain or eliminate the efficacy of federal regulation and rule enforcement through taxing and spending decisions (Doern, Maslove and Prince 2013). The Minister of Finance and the Department of Finance are also rule-makers on matters such as *tax expenditures*, with new ones in virtually every budget. If these had been cast as new regulations, they would have been assessed in very different ways; but, as tax expenditures, they are simply announced in Budget Speeches. Calls for reform and better oversight have been numerous, not to mention calls to eliminate many of them in order to reduce complex tax procedure and reduce their harmful effects on equality (Macdonald 2016; Spiro 2017; Lester 2012).

Minister of Justice and Legislative Review

The **Department of Justice's** role in regulatory oversight and a challenge function includes the Statutory Instruments Act and legislative review. Laws themselves contain rules; and they yield delegated law (regulations) that must conform to parent laws. The department and its minister (the government's lead lawyer) also has oversight on constitutional matters regarding rule-making under federal versus provincial powers, and under the need for careful legal drafting of regulations to ensure that they conform to parent statutes, and of course to ensure constitutional adherence to the Charter of Rights and Freedoms. The Courts are also a highly authoritative oversight institution, even more so since Canada's Charter of Rights and Freedoms was introduced in the early 1980s. The Charter enabled the Supreme Court and judicial branch to be much more active in policy making, in part because many groups used the courts increasingly by taking up and mobilizing the language of equality seekers and rights holders (Songer 2008; Paehlke 2003). Recently, charter and constitutional issues impacted decisions on laws regarding assisted suicide.

Rules, regulations and compliance approaches are crafted with these jurisdictional and potential court and appeal roles in mind, also to ensure that compliance approaches do not involve the federal government in continuous and costly litigation and liabilities. Also relevant here is the federal-provincial Canadian Free Trade Agreement (2017) which is quasi- constitutional in that it contains rules about federalist interprovincial trade, including dispute-settlement provisions.

Any of the above oversight mechanisms can result in good oversight practices, in change, complexity, and inertia and thus in improved regulation, in red-tape defined procedurally and substantively in assorted ways, and red-tape reduction aimed at

benefiting small business or business overall. Oversight bodies and their political leaders function in Cabinet government but they also often seek and gain power and primacy over each other as electoral, policy, rule-making and regulatory agendas change in different, often unexpected, ways.

The permanent regulatory oversight machinery also involves both the oversight of policy and of compliance implementation. The overall regulatory policy applies to Governor in Council (Cabinet) review and approvals (the majority of regulations). In addition, however, some departments or aspects of departmental regulation are under the jurisdiction of departments and their ministers only, but crucially federal regulatory policy such as the CDRM still apply to these bodies. At the departmental level, the system frequently involves multiple regulatory bodies and agencies within its portfolio or across federal departments. The author refers to these as *mezzo-level centres of regulatory oversight* such as those regarding environmental regulation, major natural resource projects, health, food and risk-benefit and safety regulation; procurement; charities, aspects of infrastructure; and international trade law and regulation. Charitable organizations, for example, are regulated by the Canada Revenue Agency but the activities of charities impact on a large number of federal departments and their policy and regulatory fields (Levasseur 2016).

Thus, before we move to the TBS as our focal point, and as the central agency with primary responsibility for conducting regulatory oversight, it is already clear that at least four other oversight centres of power and governance are involved. There is thus a high probability of political and jurisdictional interplay among the main regulatory oversight entities over who would have the lead-role in setting new political or administrative agendas in a rapidly changing national, regional or international context. Coordination and some good results among the oversight bodies certainly occur such as in relation to the *Canada Gazette* process discussed below. Stalemates and turbulence, however, also occur where new processes are added without limited consideration, or time, or with understaffed budgets and staff expertise. We comment further on these dynamics in the next section on the TBS, in part because TBS regulatory oversight provisions are built with the support from the other central agencies in Canadian Cabinet government but also because its mandate is wedged between policy, politics ("big P" and "little P"), and extended temporal regulatory coverage and imperatives in a world of multiple values and desired purposes – some of which conflict at least partly with each other.

The Treasury Board Secretariat (TBS) regulatory oversight: Mandate, evolution, and growing complexity

The Treasury Board of Canada is a statutory Cabinet committee headed by its President. The Board is "responsible for accountability and ethics, financial, personnel and administrative management of the government, comptrollership, approving regulations and most Orders-in-Council" (Canada 2017a, 1). Together with this mandate, its secretariat, the TBS as its administrative arm, "provides advice and makes recommendations to the Treasury Board committee of ministers on how the government spends money on programs and services, how it regulates and how it is managed. The Secretariat helps ensure tax dollars are spent wisely and effectively for Canadians" (Treasury Board Secretariat, 2017b, 1).

It is important to stress contextually that the TBS' tasks and staffing levels have varied and swung with the pendulum of macro fiscal policy and how the centre had to respond to degrees of central control and budgetary scrutiny, such as in the 1980s deficit

and program review eras, 1990s cuts, budgetary surpluses from 2000 to 2007, and then 2008 to 2013 global financial crisis cuts/deficits. In short, under the different administrations, various centralization and decentralization cycles had impacts on the role and function of the TBS (Veilleux and Savoie 1988; Swimmer 1996; Potter 2000).

Before discussing its regulatory oversight roles below, it is important to stress that the TBS is first an agency responsible for public spending and personnel and administrative management rather than one that is focused only or primarily on regulatory approval matters. By far, the largest part of the TBS' staff work on matters other than regulatory matters, though the latter role remains important.

Over the years, there has been a notable increase in personnel at the TBS. In 2006, there was a total of 856 TBS staff members working for TBS, which then increased to 895 in 2009 and 1,728 in 2016. (Canada 2017c). Its regulatory oversight staff, *per se*, is small by comparison, but it is also difficult to estimate at given that actions or staff research on other public spending and administrative management duties within the Secretariat could easily cross-over to some extent into regulatory matters and tasks. For example, since 2010, the TBS has a role and mandate in fostering a "framework for the management of risk" (Treasury Board Secretariat 2017b). The framework states that risk management is ever more a necessary reality for departments and for the government as a whole. The framework is thus presented as a "principles-based approach to risk management" and it "enables strategic, risks-informed oversight and less transactional involvement of the Treasury Board and Treasury Board Secretariat in supporting department and agency management initiatives" (Ibid 1). Indeed, there is scarcely any regulatory policy or new regulation that does not involve rules about risk. The framework for the management and oversight of risk therefore remains to be an important function; but, is also one that might be hard to track in terms of TBS staff involvement precisely because it is something that is "less transactional" in nature.

The Cabinet Directive on Regulatory Management (CDRM)

The Cabinet Directive on Regulatory Management (CDRM) is a crucial starting point for understanding the TBS in action. The CDRM was developed and approved in 2012 by the Conservative Government. The CDRM contains seven commitments that regulatory departments are expected to meet when regulating, and TBS provides a challenge function to ensure that they are compliant with these objectives:

1. Protect and advance the public interest in health, safety, and security, the quality of the environment, and the social and economic well-being of Canadians, as expressed by Parliament in legislation.

2. Advance the efficiency and effectiveness of regulation by ascertaining that the benefits of regulation justify the costs, by focusing human and financial resources where they can do the most good, and by demonstrating tangible results for Canadians.

3. Make decisions based on evidence and on the best available knowledge and science in Canada and worldwide, while recognizing that the application of precaution may be necessary when there is an absence of full scientific certainty and a risk of serious or irreversible harm.

4. Promote a fair and competitive market economy that encourages entrepreneurship, investment, and innovation.

5. Monitor and control the administrative burden (i.e. red tape) of regulations on business and be sensitive to the burden that regulations place on small business.

6. Create accessible, understandable, and responsive regulation through engagement, transparency, accountability, and public scrutiny; and

7. Require timeliness, policy coherence, and minimal duplication throughout the regulatory process by consulting, coordinating and cooperating across the federal government, with other governments and jurisdictions in Canada and abroad, and with businesses and Canadians (Treasury Board Secretariat, 2017: 2).

Overall, the seven expressed commitments in the current CDRM add up to at least 20 expressed values and normative goals. The seven commitments are much more elaborate than the two commitments in the previous 2007 Cabinet Directive on Streamlining Regulation (CDSR) (also developed by the then new Conservative government) which were:

- Protect and advance the public interest in health, safety and security, the quality of the environment, and social and economic well-being of Canadians as expressed by Parliament in legislation; and
- Promote a fair and competitive market economy that encourages entrepreneurship, investment, and innovation (Canada 2007, 1).

But even this two commitment list adds up to about nine expressed values and purposes. The seven current CDRM commitments are cast as "managerial" content but at their core they still set out multiple inherently political socio-economic values about regulation and hence rules about rule-making, some of which conflict with others at least to some extent.

The current government did not change the CDRM or its seven core CDRM commitments but they did highlight the roles of departmental and agency responsibilities regarding "assessing legal implications and other Cabinet directions" (Treasury Board Secretariat 2017: 6) in the Treasury Board Secretariat website. These included an explicit provision that states that regulations need to be "consistent with the Constitution Act 1982 (including the Canadian Charter of Rights and Freedoms and with particular note of any obligations in Section 35 relating to Aboriginal and treaty rights" (Ibid). Departments and agencies are also "responsible for ensuring that relevant directions from the Cabinet and the Treasury Board are followed, including the following:

- Cabinet Directive on Law-Making;
- Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals;
- A Framework for the Application of Precaution in Science-based Decision
- Making about Risk;
- A Framework for Science and Technology Advice: Principles for the Effective Use of Science and Technology Advice in Government Decision Making. (Ibid)

However, as is normal in democratic states, changes in governing political parties often bring with them a focus on different aspects of the regulatory agendas, and describe them with changed or preferred public discourse. This will be further discussed below, in relation to the focus on policies and values and "rules about rules" that occurred when the government changed in 2015, bringing a focus to (re-) establishing or give renewed attention to these priorities (Stoney and Doern 2015; Doern and Stoney 2016). More generally, this often happens as well with new government priorities based on changing agendas or public discourse.

The Statutory Instruments Act and the Canada Gazette Consultation System

The Statutory Instruments Act governs the regulatory process in that it defines a regulation as a:

> *statutory instrument made in the exercise of a legislative power conferred by or under an Act of Parliament, or for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament. This definition of regulation includes a rule, an order, or regulation governing proceedings before a judicial or quasi-judicial body established by an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament (Canada 2017d, section 2).*

Related instruments such as guidelines, codes, and standards may not be captured by this statutory definition, yet they are certainly a growing part of the regulatory world we are examining in this chapter, as well as in key features of "regulatory capitalism" and "regulatory unruliness" (see more below).

The information and consultation processes of the *Canada Gazette* system are another feature of the regime as a whole and is in itself seen as a beneficial example of regulatory oversight and processes that has been in place for a long period of time under both Conservative and Liberal governments. The federal regulatory policy requires that federal departments and agencies demonstrate that Canadians have been consulted and that they have had an opportunity to participate in developing or modifying regulations and regulatory programs. (Canada, 2017e). This obviously embraces a participatory democratic ethos but it does not spell out democracy fully in relation to w7hether it is federalist, interest group pluralism or civil society democracy or direct democracy. These processes also create different kinds of analytical discourse about participatory strategies and styles including consultative, deliberative and public engagement approaches (Lenihan, 2012) but also those which are, in some cases, intended to exclude some players by design and intent.

Part I of the *Canada Gazette* process involves a pre-publication stage where interested parties, including stakeholders previously consulted at the beginning of the regulatory process, are given the opportunity to see how the final draft proposal – including draft legal text – is in keeping with previous consultation drafts (Canada 2017e). Part II of the *Canada Gazette* process involves the enactment and publication stage. While there is little doubt that consultation processes are underpinned by these requirements, there is still much more involved in actual consultation strategies by both regulators and regulated interests and also in accompanying political communication approaches to various audiences and media and social media outlets.

Regulatory proposals can form part of the basic system of Memoranda to Cabinet (MCs) and thus be examined and debated within different cabinet committees. As a pillar of the Cabinet's regulatory oversight system, the Treasury Board's review focuses mainly through its Regulatory Affairs Sector (RAS) on the new specific individual regulatory proposals. The aim is to ensure that regulatory proposals are in conformance with the CDRM, the *Statutory Instruments Act* and the *Canada Gazette* process. Treasury Board also ensures that required regulatory impact analysis statements (RIAS) are carried out by departments and agencies, as well as the even earlier stage Triage Statements intended to differentiate medium and high impact regulations from low and medium impact regulations being proposed.

Regulatory impact analysis is also a core task. In consultation with the RAS, departments and agencies are required to "assess the impact of regulatory proposals at an early stage to determine where approval processes can be streamlined and where resources should be focused" (Treasury Board Secretariat 2017, 4). A Regulatory Impact Analysis Statement (RIAS) is published in the *Canada Gazette*. Several factors are considered in the overall assessment process including: the potential impact of the regulation on health and safety, security, environment, and the social and economic well-being of Canadians; cost or savings to government, business or Canadians, and potential impact on the Canadian economy and its international competitiveness; potential impact on other federal departments or agencies, on other governments in Canada, and on Canada's foreign affairs; degree of interest, contention and support among affected parties; and the overall expected impact (Ibid).

These oversight approval and challenge roles of the Treasury Board Secretariat are well regarded. They are also complemented by advisory, educational, and facilitating roles. This has included work through its Centre for Regulatory Expertise, a small minimally staffed unit designed to help in implementing the CDRM. Its annual planning process, based on discussions with departments, seeks to identify and improve analytical capacity, with attention also being paid to the different challenges faced by small versus larger departments. The RAS unit itself is also fairly small in terms of staff, with just over 30 professional analysts.

As mentioned earlier, the relative size and capacity of the Treasury Board regulatory review staff in a central agency with an overall expenditure and management policy and review mandate is of considerable importance. At present, the RAS works on a kind of "first come, first served" basis; nonetheless, it is by no means a passive entity waiting for departmental regulations to arrive. The RAS is proactive through the earlier stage of the process, as it is responsible for departmental queries, and remains so through its knowledge of other departmental plans and what may be emerging in the overall Cabinet and ministerial arenas.

It must be stressed, however, that the role of this central agency challenge function is not to second guess every regulatory proposal, given that numerous regulations (new or amendments, the latter being as high as 80% of the total) proceed through the system each year. On regulatory proposals with expected high impacts, it is still nonetheless a more limited scrutiny, early advice, watchdog, commentary and guidance role, including on the quality of regulatory analysis.

One of the related problematical issues relates to exactly how many new regulations are approved each year. The federal government does not publish such data on a yearly basis. The only occasions when it has revealed such information is when the OECD is doing a country regulatory study on Canada. The last one of these overall country reports

was in 2002 when Canada's new annual regulatory approvals were near the 2000 per year level (OECD, 2002; Doern, 2007). These data do not include rules *within new legislation* nor do they necessarily do a good job of differentiating major rules from minor amendments.

This limited or constrained notion of a challenge function is the product of two realities of modern Cabinet government and bureaucratic delegated administration. The first is that regulatory departments and agencies overwhelmingly have the main substantive regulatory expertise and familiarity with their regulatory socio-economic clientele. Therefore, Cabinet government also functions on large amounts of delegation in regulatory development and the crafting of proposals. These are partly monitored through normal forms of internal discussion or as external complaints when concerns arise; but, these are considered limited given the practical need for delegation. The second, and equally important, reinforcing reality is that most regulatory proposals depend on science-based and evidence-based capacity within and across departments and also related capacities for risk assessment and risk management (Doern, Castle and Phillips 2016, 132-162). Central challenge function entities have some needed expertise and perspectives of their own; however, in the total scheme of things and in the context of a large 30 member Cabinet and extended amounts of legal and policy delegation, there is little doubt of where the preponderance of expertise lies but also where the responsibility lies for ensuring that the quality and nature of that expertise is kept up to date and indeed stays ahead of the game.

Oversight is multi-level in nature and can take many forms. In addition to the above processes and institutions, particular regulatory units within federal departments and arms-length regulators that are a part of broader ministries (many with more than one regulatory body) are also subject to oversight and challenge functions within these organizations. This can be seen as a form of the *mezzo-level oversight* which we referred to above and it includes oversight processes related to: environmental assessment, natural resource major projects; health, food and drug product assessment; science and technology advice; procurement, charities, international and internal trade; and aspects of infrastructure. This has variously occurred through different changes in government over the last few decades.

An example of this is the formation and work of the Major Projects Management Office (MPMO) in Natural Resources Canada (Canada 2017a). Its mandate emerged centrally from a Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects (Canada 2017). The MPMO then had considerable independent power but it reported periodically as per other TBS requirements. Regulatory efficiency was a key goal linked to the emphasis on a pro-resource development policy agenda under the former Conservative government (Doern, Auld and Stoney 2015).

The federal government 'of the day' mounted periodic or ad hoc oversight exercises and mechanisms usually cast as regulatory reform. Some examples include the red tape reduction commission as well as special inquiries and studies on epidemics or hazards such as SARS, BSE, and listeriosis.

Life cycle approaches and post-market product and project monitoring: The imperatives of longer term continuous temporal regulatory governance

Current federal regulatory governance under the CDRM and other related Health Canada, but federal government approved, statements seek to move towards a life cycle approach. Under the CDRM, life cycle means greater scrutiny and coverage beyond

initial regulation making and related challenge functions into *later stages of regular evaluation*. Under Health Canada statements approved by the federal government, life cycle means extending the process assessment of regulated drug and health products from its historic focus – from *pre-market* safety assessment (the imperative following the thalidomide crisis of the early 1960s) to a broader and more complex complementary *post-market monitoring* of product use, efficacy, and risk-benefit outcomes and the development of a progressive licensing framework for biotechnology and related products and processes (Doern, Castle and Phillips 2016, 143-150; Health Canada 2014, 2007; 2006).

Thus, the temporal range is considerably longer and multi-faceted. Until recently, policy on federal *regulatory evaluation* was anchored in both the federal Evaluation Policy and in the CDRM. Sections 43, 44 and 45 of the CDRM refers to both evaluating and reviewing linked to measuring and reporting activities (Treasury Board Secretariat 2017, 9-10). But in the summer of 2016, the *Treasury Board Policy on Results* replaced the Policy on Evaluation and the Policy on Management, Resources, and Results Structures. Departments now must evaluate their performance, including that of their regulatory programs, according to the time frames and cycle established in the new Policy on Results. The objectives of the Policy on Results are to improve the achievement of results across government.

While the focus of the CDRM is on requiring and encouraging departments and agencies to evaluate regulatory programs, it is also true that this aspect of the CDRM, despite the larger requirement in the Evaluation Policy, is still in the early stages of development and implementation on regulation. The historic focus of regulatory departments and agencies has been mainly on the *ex ante* stage of assessing, creating and implementing regulatory programs in the dominant "one regulation at a time" approach.

One way to express the place of evaluation in the regulatory governance of the federal government is to say that if a federal regulator had $1 000 more to spend on regulation; it is far more likely than not that the department will spend it on the development of new regulations rather than the evaluation of existing ones. Ministers and regulatory heads and officials are far more likely to get into difficulty politically, legally, and publicly for failing to regulate and ensure compliance than for overt failures to evaluate regulations. Yet, evaluation is without doubt important and necessary as a part of accountability, democracy and effective managerial performance.

The *time period coverage* of any evaluation in regulatory matters garners criticism because of the overall reality that when new regulations are developed, regulatory costs emerge early on but regulatory benefits typically take longer to emerge. As an example, environmental, health and risk-safety regulations are often caught up in these legitimate and difficult temporal issues.

As noted above, the CDRM also refers to regulatory reviews of regulatory frameworks. Departments and agencies periodically do some of this kind of reviewing. For example, the food listeriosis crisis of 2009, led to both a specific review and a broader review of the food regulatory system including its international aspects and its underlying approaches and relationships between regulators and food companies involved in ever more intricate international and cross border supply and distribution chains. *Information, independence and causal attribution* issues are also ultimately closely linked in this process.

The acquisition of information for evaluation involves data that need to come from business, stakeholders, multiple government departments and agencies, and provincial, local, and foreign governments as well as international agencies. Increasingly, knowledge means information produced and searched through social production in the Internet age via social media firms such as Google, Facebook and Twitter. In this case, data also means so-called "big data" based on algorithms, search strategies, and possible misuse (Floridi 2014; Doern, Castle and Phillips 2016, 80-84). The emergence of new information and forms and volumes of data thus impacts on what kinds of staff expertise are needed both at the central oversight levels and in particular regulatory bodies.

With regard to the second notion of life cycle approaches, *movement from pre-market assessment to greater post-market monitoring* of products is undoubtedly even more complex in nature than the regulatory program evaluation notion of life cycle management. Because it deals with regulatory implementation in the form of drug and health product assessment it is much more in the hands of departmental and arms-length regulators rather than under the control of regulatory policy and governance ministers and officials at the centre. Moreover, it is a set of monitoring activities that requires networks of co-participants in the business and NGO communities and among health professions, patients, care givers and users (Health Canada 2014; 2007;2006).

The life cycle concept is by no means entirely new. It has a longer lineage in environmental regulatory policy history with regard to environmental assessment of projects and of policies, and in the regulation of nuclear reactors and the long term storage of nuclear wastes. Federal environmental assessment policy focuses on assessing proposed projects that involve federal laws or funding but they also deal with requirements for life-cycle regimes to follow the project through time, including final stages such as the closing of a mining operation or a pulp and paper plant. A report by the National Roundtable on Environment and the Economy (2011) also stressed the great value of life-cycle approaches to foster sustainable economic development in Canada but it also pointed to many practical obstacles along the way. This includes conceptual understanding, complexity, and serious gaps in science and front-line science-based regulatory and policy capacity. Concepts of sustainable development and the precautionary principle are implied in life cycle notions and aspirations, although these norms are not always realised.

Life cycle monitoring and regulation involves inherently a high "degree of difficulty" and "degree of complexity" quotient, given the spatial scale at the national and international level and the inbuilt number of regulators and their clientele interests that may be attempting to implement such full life cycle regulatory activity. Nuclear reactor cycles can last quite literally hundreds of years and diverse energy-environment regulatory systems can involve dozens of regulators in Canada and North America with each piece of the regulatory action needing considerable capacity, coordination, and knowledge backed up by political will and focus.

Analysis by Ireland, Milligan, Webb, and Xie (2012) explore the rise and fall of regulatory regimes in relation to the life-cycles of regulatory agencies and regimes, particularly with regard to how regulatory enforcement capacities, compliance, and achievement of objectives can vary depending on whether the regulatory agency or regime is in its infancy, high growth, mature, or declining stage. More will be said later about these kinds of life cycle policy inherent in federal regulatory governance regime change overall. At present, it is best described as important and desirable but also aspirational in nature and so very much a work-in-progress.

Regulatory forward plans

The CDRM now requires that departments and agencies are to: a) develop regulatory plans and priorities for the coming year(s); and, b) report publicly on plans, priorities, and performance, and regulatory reviews in accordance with Treasury Board guidelines (Treasury Board Secretariat 2017, 11). The forward regulatory plan concept is traced to the work of the Red Tape Reduction Commission. Presently, it is stated that "plans describe upcoming regulatory proposals that departments or agencies plan to introduce over a 24 month period" (Ibid).

While we focus on the Canadian provisions for regulatory forward plans, we also make some contextual comparison below with the United Kingdom and Australia. The former is of interest because its trajectory is tied to reforms linked to regulatory budgets and agenda-setting which ended unsuccessfully as the 2008 global banking crisis and recession began. Canadian developers of the regulatory forward plans idea were aware of this history. The Australian case is also looked at briefly, largely because its adoption of annual regulatory plans applied only to those affecting business.

With respect to regulatory plans and priorities, there are four logical definitional and practical kinds of issues/concepts to be considered: i) plans considered simply as *published lists* of proposed regulations: this could include planned regulations by program; ii) plans considered as an *explicit announced agenda* where priorities are set and announced that mean that some proposed regulatory proposals/projects will proceed and others will not (as happens, for example, in the public spending process). Departments could also announce planned intentions to regulate because they know this well before a final form of regulatory instrument is decided upon; iii) plans and agendas explicitly informed and disciplined by a *formal regulatory budget* (as defined below); and iv) plans for all the above types that could be *government-wide* in nature and scope and/or *department by department* (or ministry by ministry) and could be for *annual time periods or multi-year time periods*. In addition, one would need to consider the issue in any such processes for handling emergencies that require new regulations.

The value of publishing plans for new regulations is that they thereby create "a more predictable regulatory environment so businesses and Canadians can plan ahead" (Treasury Board Secretariat 2017, 1). Departments and agencies and the Treasury Board Secretariat are fully aware of the CDRM requirements and are engaged in ensuring that they are implemented. In practice, however, the extent of implementation is thus far varied, often limited and inconsistent across departments. The *published lists* option for extended regulatory forward plans appears, at a minimum, to be what is being called for in the departmental and agency duty regarding plans under the CDRM.

For example, Transport Canada has processed about 30 to 35 new regulations annually in recent years but its newer planning and priority system indicated that as of June 2010, 147 projects were in the queue (Doern 2010). The list of 147 projects in place was prepared initially to give senior Transport Canada managers a better idea of how many regulatory projects were queuing up in the department. It is not clear how many of these were new regulations or amendments to existing regulations. Transport Canada's forward plan for the 2016-18 period shows that there are 23 proposed regulations in the queue for this period (Transport Canada 2017).

The Transport Canada example illustrates there is some progress on this front with departments saying that actual priorities among regulatory proposals are now being set but the degree of progress varies. A sampling of federal departmental websites (a good

guide as well as to how transparent are the plans) reveals that some departments are listing regulatory proposals but not priorities while other departments are not; or, if they are, the plans are difficult to find or to interpret.

Plans and agendas continue to raise other issues regarding whether they should be expressed as, and deal with, broader programs or groupings of proposed regulations. In the latter case, this could mean new broader regulatory packages devised as delegated law (new revised regulations) or occasionally as new statutes. Examples here could easily be regimes such as consumer regulation, organic food regulation, biotechnology in related areas of food, health and life, and different modes of transportation regulation.

Plans considered as an *explicit announced agenda* would be a more significant change than publishing lists in the queue whether developed and announced at the departmental level or the government-wide level (Doern 2007). The more one moves into such agendas, the greater are the issues of interest group politics and other forms of democracy. Public consultation and engagement processes are already complex, even more so in the Internet and social media age. Under an agenda system of forward plans, stakeholder concerns and lobbying are likely to grow and become more publicly explicit and even contentious for a government's basic political management skills regarding interest group pluralist democracy as well as representative Cabinet-Parliamentary democracy. Such interest group and stakeholder politics are accepted as a part of everyday policy and governance targeted on the development of the Speech from the Throne and regarding spending and taxation centred on the Budget Speech.

Plans and agendas explicitly informed and disciplined by a *formal regulatory budget* would constitute an even more significant change. A *regulatory budget* is a budget which sets government-wide limits on the costs of new regulation on the private sector (firms and consumers) with a view to maximizing the net benefits of regulation. We draw attention to it here because such a regulatory budget was on the verge of being adopted in the United Kingdom in 2009. But it was first advanced as a reform idea in the United States in the late 1970s in work by the U.S. Office of Management and Budget. A cross-government regulatory budget was never adopted in the U.S., partly because of the lack of information on regulatory costs and a consistent and comprehensive set of cost estimates and partly because of stakeholder concerns that it might favour more or less regulation overall.

In 2008, the British Government committed itself "to consult on the introduction of a new system of regulatory budgets for Departments that would set out the cost of new regulation that can be introduced within a given period" (HM Treasury and Department for Business Enterprise and Regulatory Reform 2008, 73). The regulatory budget initiative in Britain emerged with Prime Ministerial backing and a decision to proceed with a consultation document published in 2008. The regulatory budget system was designed for a 2009 start-up trial run, and then made fully operational in 2010. In 2009, however, the initiative was ended largely because of the banking crisis and the related fiscal crisis where government and business priorities shifted sharply and quickly. The British system was planned to centre on a three-year regulatory budget period in part to complement the three year cycle of its regular expenditure budget system. It was also based on the argument, that three-year systems may make more sense for regulatory agendas and budgets due to the complexity of setting up and operating new regulatory initiatives. This is, in part, because new regulations take time to become fully operational and that there are normal processes to manage such as the fact that regulatory costs to the

private sector and to citizens occur early on whereas regulatory benefits become more evident later after new behaviours take hold.

Australia's regulatory oversight system refers to an annual regulatory plan anchored in the Department of Finance and Deregulation, one of the two main central regulatory oversight departments, while the other being the Department of the Prime Minister and the Cabinet. In the latter, there is no reference to forward regulatory plans per se (Australian Government, Department of the Prime Minister and Cabinet 2017a). But, the Department of Finance and Deregulation is the home base for such annual regulatory plans and requires that all departments and agencies must publish this information on its website early in each financial year (Australian Government, Department of Finance and Deregulation 2017b).

The annual regulatory plan "covers business regulation" which includes "primary legislation, subordinate legislation, quasi-regulation or treaties which directly affect business, have a significant effect on business, or restrict competition" (Ibid 1). Quasi-regulation "refers to rules or arrangements where governments influences businesses to comply, but which do not form part of explicit government regulation" (Ibid). The Australian regulatory plan guidance draws attention to information that is not included such as "regulations of a minor or machinery nature" and "regulations that involve consideration of specific Government purchases" (Ibid). The guidance ends with the cautionary note that in "view of these exclusions, users should not take this regulatory plan to be a comprehensive source of information on past or potential changes to business regulation" (Ibid).

In the Australian context, it is important to see that its overall regulatory oversight system is arguably more focused on deregulation. The Castro and Renda (2015) comparison for the OECD regulatory oversight systems of several OECD member countries captures some of this. As observed, the deregulatory themes in these websites are much more central and frequent than they are in Canada's. Canada has certainly had major periods of deregulation but also eras of expanded regulation as a matter of de facto policy. For example, general economic deregulation was advocated in the mid-1980s Freedom to Move policy, which had led to some successful results but had also been met with resistance. This has then expanded regulation as different challenges, global and national emerged in the 1990s and beyond (Doern, Schultz and Prince 2014, 25-53).

Regulatory management initiatives

While the previous two sections have dealt with two key overriding regulatory management initiatives, three others are also sighted and have been given emphasis in TBS reports, namely the "one-for-one rule"; the small business lens; and the administrative burden baseline.

The Red-tape reduction committee was struck in 2011 and issued an "What was Heard" Report in the same year. It issued its recommendations in January 2012. The *One-for One Rule* was implemented immediately as policy in 2012 and was enshrined in regulation in 2015. Through this rule, the government sought to reduce the administrative burden on business in two ways. First, "when a new or amended regulation increases the administrative burden on business, the regulators are required to offset – from their existing regulations – an equal amount of administrative burden cost on business" (Treasury Board Secretariat, 2017: 10). Second, it "requires regulators to remove a regulation each time they introduce a new regulation that imposes new administrative burdens on business" (Ibid). The latter "offsets are required to be provided within two

years of receiving final approval of regulatory changes that impose new administrative burden on business" (Ibid). In fact, Canada is the first country to give such a rule "the weight of legislation" (Ibid).

The *Small Business Lens* initiative is "to reduce regulatory costs on small businesses" but "without compromising the health, safety, security and environment of Canadians" (Ibid). Regulators must complete a "checklist that drives consultation with small business to understand their realities at the earliest stages of design" (Ibid). Thus, they must consider "flexible regulatory options that reduce costs" (Ibid). Similarly motivated but broader in scope, the *Administrative Burden Baseline* requires "departments to establish a baseline count of federal requirements in regulations and related forms that impose administrative burden on businesses" (Ibid). This baseline applies to all businesses operating in the country.

Instrument mix, options and tools: Complexity and instrument-ends dynamics

We now come to regulatory policy and governance oversight centred on instrument mix, options and tools which is immediately and unavoidably a nexus of complexity and instrument-ends dynamicsin a fast changing networked world. Instrument mix evokes choices and combinations of soft versus hard ways of governing and meeting desirable multiple goals. Soft as a designation includes various kinds of advice, guidance, cajoling, and nudging. The regulation as "nudge" concept emerged through the work of Thaler and Sunstein (2008) and Sunstein (2013) and led to the emergence of small "nudge units" at the centre of both the American and United Kingdom governments. It does not really refer to regulation. Nudge favours softer approaches geared psychologically to how people think and then to design "choice instruments" that make it easier for people to choose for themselves and their societies, by nudging them through the provision of appropriate information to appropriate viable and accepted forms of behaviour (Thaler and Sunstein 2008). Hard instruments evoke statutory requirements, sanctions, penalties, fines and enforcement not only via regular law but also via criminal law with the last of these in Canada residing with the federal government.

Consider in the above overall "soft versus hard" instrument choice context the CDRM section on "regulatory impact analysis" where there is a sub-section on "selecting the appropriate mix of government instruments" (Treasury Board Secretariat 2017, Section d, 1). Of immediate interest is the fact that they are called "government" instruments; whereas, in much of the regulatory literature, one also speaks of the instruments of "governance", knowing that it is increasingly much more than government. The CDRM section goes on to distinguish choices for assessing the effectiveness and appropriateness of regulatory and non-regulatory instruments for achieving policy objectives. Non-regulatory instruments are said to include "voluntary standards", information disclosure, and guidelines, and whether outcome or performance based approaches would be suitable" (Ibid 6) rather than detailed input and procedural rules and requirements.

Later discussion in the CDRM is on what is needed in recommending an option that "maximizes net benefits". It contains references to limiting the "cumulative administrative burden" but also ensuring that "regulatory restrictions on competition are fair, limited, and proportionate" to what is necessary (Ibid 8). Later, on implementation planning, departments and agencies are responsible for "the necessary human and financial resources that the recommended option would require, including compliance and enforcement activities" (Ibid 9). This, of course, is essential but it is not true that all

of this is within their power, given that central agencies also have a key role in providing staff and budget, especially if new staff and new money is needed and sought.

The TBS documentation also includes a section on "guidelines and tools" neither of which are defined there. The guidelines section lists 14 examples, beginning with a guide for the above mentioned "One-for-One" Rule, and ending with a guide "for developing and implementing interpretation policies" (Treasury Board Secretariat 2017). Four "tools" are then listed including two that are templates for Regulatory Impact Analysis Statement (RIAS), one for low impact items and another for medium and high-impact. Another is a check list regarding the small business lens initiative discussed above.

The notion of instrument-ends dynamics is essential and immediately requires going back through all the earlier sections of the CDRM. Most real world examples of regulation involve purposes and instruments where one is doing two things, namely treating people or interests in equal situations equally and also treating people in unequal situations unequally. Both are forms of equality and fairness. Recall that the 7 main purposes of the CDRM (which is a "Directive") contain at least

20 values or desired end states. Virtually no law or regulation queuing up for approval or already approved or rejected has one goal or one instrument for achieving it and even many of the so-called instruments are themselves "valued" and desired by some citizens, interests, businesses, but not others. Moreover, instrument-ends dynamics are contested differently if there are longer temporal features to them. As we have seen, the life-cycle approach and the movement from pre-market product and project regulation to post-market progressive licensing regulation brings in an ever wider sets of players over multiple years with different and changing views about both ends and means and their causal and partial causal links.

One also has to have some sense of how regulation is itself defined in overall regulatory policy. Consider for example, the Australian case where regulation is defined as "any rule endorsed by government where there is an expectation of compliance" (Australian Government 2014, 3).

Both the word "endorsed" and the notion of an "expectation" of compliance, leave lots of wiggle room and realms of ambiguity, partly because regulation is indeed complex in intricate instrument-ends and temporal ways. Some related concerns were found in the paper by Jacobi (2012) on the OECD itself. It raised questions about how one went about "regulating regulation".

In multi-faceted ways, analyses and discourse about "regulation" inside and outside of government reveal both stability and profound change. For example, historically and at present the senior "self-regulating" professions such as those for lawyers and the medical profession have been treated specially and largely because they have independent political power. However, in the past 10 to 15 years, different notions of regulation and governance have emerged. One sees key parts of the regulatory world cast quite accurately as "regulatory capitalism" (Braithwaite 2008) This concept captures the fact that regulation is growing rapidly but is less a feature of state rule and enforcement. It is likewise not only a system of co-regulation and compliance between the state and business interests and firms but also with other non-state interests and networks and is also crucial to understanding modern capitalism. The concept of "private governance" and how it is being constructed is similar but is applied in the rise and evolution of certification systems at the national and international level and in fields such as forestry

and fisheries (Auld 2014). As a reference, Buthe and Mattli (2013) focus on the full *privatization of regulation in the global economy*.

Coglianese (2010; 2012) has cast the U.S. regulatory system linked to global regulationas increasingly focused on "regulatory management" in relation to risk and risk-benefit dynamics, which has, in certain circumstances, led to serious regulatory "breakdowns". In contrast, Canadian regulation and rules as also often characterized by its "unruliness", which is a central concept in the Doern, Prince and Schultz (2014) analysis. Unruliness refers to different "inabilities to effectively develop and enforce rules because of any number of policy and mandate conflicts, democratic gaps, and governance challenges" (Ibid 46). They are examined and found in three main types of regulation as they relate to: regulatory agencies, the complexity of regulatory regimes, and agenda-setting (Ibid). A recent published analysis by Carter, Fraser and Zalik (2017) examines Canadian environmental policy and federal-provincial fossil fuel regulation showing adverse interactions related to "regulatory streamlining, impediments and drift" (Ibid 1-6).

"Networks" is also a frequent macro, middle-level and micro descriptor and reality of policy and regulatory governance and how it is evolving (Doern, Prince and Schultz 2014, 39-41). Analytically, they imply a rejection of government as hierarchy but also of simplistic notions of markets. The networks concept is aided and abetted by the Internet and by the rapid emergence of social media. These changes, among others, are combined with and contribute to distinctions between "risk-benefit versus safety" values and performance standards and outcomes in health and consumer product regulation. The precautionary principle is also a key conception found in environmental laws and practice and, as we have seen, in Canada's CDRM oversight directive.

The role of science and evidence in regulatory oversight

The overall macro issue of evidence and science advice and the role of scientists in regulatory matters and oversight have been present for decades in Canada under both Liberal and Conservative governments. The issue took on a higher profile in Canada in two periods: the late 1990s and early 2000s, and from 2006 to 2015 (Doern, Castle and Phillips 2016). Concerns about policy for science advice in regulation and oversight emerged quite sharply and visibly in the late 1990s in the wake of public controversies, such as the safety of blood supplies, declining fish stocks, aspects of nuclear reactor safety, and biotechnology (Enros 2013; Council of Science and Technology Advisors 1999). They also flowed from the cuts in federal spending on science in the 1990s, which emerged from focused debates on the general state of science in government and from the concerns about newer partnership-centred ways of linking government science with university and industrial science. These concerns were not unique to Canada—they are global and international, with most countries and jurisdictions having to deal with similar problems and challenges. International controversies such as BSE, foot and mouth, stem-cell research, biotechnology, nuclear power, disaster management and general debates about the use of the precautionary principle have made science advice and links to regulation a global issue.

The Liberal government responded to these challenges and concerns in several ways, including the formation of the Council of Science and Technology Advisors and the publication in May 1999 of the report on Science Advice for Government Effectiveness or SAGE report (Council of Science and Technology Advisors 1999). The report advocated the adoption of the six SAGE principles (Box 3.1):

Box 3.1. Science Advice for Government Effectiveness (SAGE) Report, 1999

In 1996, the Government released their strategy for science and technology, entitled *Science and Technology for the New Century – A Federal Strategy*. To help achieve the goals of this strategy, the Council of Science and Technology Advisors (CSTA) was created to provide external expert advice on internal federal government science and technology issues that require strategic attention to the Cabinet Committee on Economic Union (CCEU). Recognising public concerns about the ability of government to effectively address science-based issues in decision-making, the CCEU asked CSTA to develop a set of principles and guidelines for the effective use of science advice in making policy and regulatory decisions. Their first output was the Science Advice for Government Effectiveness (SAGE) Report.

The SAGE report intended to establish an effective science advisory process to ensure that ministers, parliamentarians, and the public are confident that rigourous, objective and credible information was used in providing advice and making decisions, as well as enhance the ability of Canada to influence international solutions to global problems. Six principles were developed to reflect these desired outcomes:

Early Identification: Recognising the importance of science advice, decision makers and departments need to anticipate, as early as possible, when science advice is needed.

Inclusiveness: Advice should be drawn from a variety of scientific sources and from experts in many disciplines to capture the full diversity of scientific schools of thought and opinion.

Sound science and sound advice: The public expects government to employ measures to ensure the quality, integrity, and objectivity of the science and the science advice it utilizes, and to ensure that science advice is considered seriously in decision making.

Uncertainty and risk: Recognising that science in public policy contains some uncertainty that needs to be assessed, communicated and managed, departments should adopt a risk management approach that is scientifically sound, cost-effective, integrated actions that reduce risks while taking into account social, cultural, ethical, political, and legal considerations.

Openness: Democratic governments are expected to employ decision-making processes that are transparent and open to stakeholders, which implies a clear articulation of how decisions are reached, policies are presented in open fora, and the public has access to the findings and advice of scientists as early as possible.

Review: The principle of review includes two elements: 1) subsequent review of science-based decisions to determine whether recent advances in knowledge impact the science and science advice used to inform the decision, and 2) evaluation of the decision-making process. Appropriate accountability mechanisms need to be in place to ensure that these principles and guidelines for sound science advice are followed.

Source: Council of Science and Technology (1999), *Science Advice for Government Effectiveness (SAGE)*, A report of the Council of Science and Technology Advisors (CSTA), Industry Canada, Ottawa, http://publications.gc.ca/collections/Collection/C2-445-1999E.pdf; University of Ottawa (n.d.), "Council of Science and Technology Advisors," *University of Ottawa,* http://artsites.uottawa.ca/sca/en/council-of-science-and-technology-advisors/ (accessed 4 April 2017).

However, an important limitation to the advisory system is that advice tends to be synthesised as it is translated up the hierarchy of the federal government. Naturally, as fewer scientists are employed in the upper echelons of government, basic scientific and technological literacy might not reside near the top in a consistent fashion. This may limit the effectiveness of scientific advice in the institutional context, which can have important impacts in the context of a knowledge-based and innovation economy. However, in other respects, this situation is simply a reflection of the fact that the upper

levels of government typically embrace a broader level of values and points of view as more diverse trade-offs are confronted in public policy formation.

This limitation is further highlighted by the manner in which scientific advice is translated up the institutional hierarchy, which is motivated by realities of decision-making in the political context. A key distinction to note here is the difference between transmitting scientific advice and knowledge *in writing versus in-person or verbally*. At some stages, a paper (or electronic) trail of written knowledge and advice is the norm and includes memos, reports, emails, and Cabinet documents. However, decisions often move to the top of the federal government through in-person and verbal summaries of scientific advice. Indeed verbal "summaries of summaries of summaries" become the norm. While Cabinet and detailed background documents are carefully prepared and read, there is also the world of "slide-decks", "power points", and person-to-person meetings and briefings as officials rush from one meeting to another. Science advice in policy and decision making, which is often complex, must fit into these overarching realities.

Even these kinds of specific dynamics, however, need to be put into some kind of practical wider set of constraints in diverse situations. This is because scientific input is but one consideration that has to be weighed against a wide spectrum of risks and against other types of analytical information and views both within the government and vis- a-vis external participants.

While the SAGE guidelines were accepted, they did not stay for long in an explicit noticeable way (Enros 2013). Other issues and agendas climbed to centre stage, including the mid-1990s era of Program Review and budget cuts under the Liberal government and then an early 2000s era of budgetary surpluses that were policy platforms of the Liberal government at the time.

With a change of government in 2006 came also a change in the approach to the role of scientific advice in the decision-making process. The new Conservative government's views and practices about science advice and the role of scientists was a basic one in its first science and technology policy strategy, published in 2007 (Canada, 2007). The strategy offered general support for the overall work of Canada's scientific and technological experts and research centres that "provide solutions to many of the most important issues to Canadians, giving us the knowledge and the means to preserve the quality of our environment, protect endangered species, improve our health, enhance public safety and security and manage our natural and energy resources" (Canada, 2007, 7). However, a movement away from giving prominence to scientific advice occurred as the Office of the National Science Advisor was moved out of the PCO, where it reported directly to the Prime Minister, and was eventually closed in 2008. Following this, the independence of scientific advice was reduced following the introduction of new stricter internal communication measures (Douglas, 2013: 1) that required "that all public servants, including scientists" got "approval before speaking in public or to a journalist on any topic". These rules were rolled back for routine queries about the weather, but other than that, scientists were to check with media relations or communications officers before any public contact (Douglas 2013: 1). These controls were especially detailed on sensitive science and technology and related policy issues, such as climate change and, later, oil sands pipeline developments. However, further limits were also placed on government scientists' ability to publish their research in peer reviewed journals (Doern, Castle and Phillips 2016; Findlay and Dufour 2013: Professional Institute of the Public Service of Canada 2014).

As expressed in the above mentioned SAGE report, the role of scientific advice in regulatory policy making and oversight was conceived of as an objective and credible evidence-based system of providing advice to establish confidence in the government's ability to effectively address science-based issues. Recent work from the OECD has also provided guidance on creating a culture of independence for regulators (OECD 2017a) and establishing the role of advisory bodies in providing strategic advice (OECD, 2017b). The guidance contained within these reports serves to, among other things, separate the short-term incentives of public actors (particularly elected officials) from the long-term stability regulatory and advisory bodies can provide. Specifically, guidance on independence advises that how formal arrangements are translated into practice can have a significant impact on protecting a regulator's independence. This included the need for role clarity by providing a clear framework for when it is appropriate for regulators to engage with public and private stakeholders, balanced with the independence to engage with stakeholders, and coupled with the ability to be proactive in informing and promoting a better understanding of issues with the executive, legislature and stakeholders. Moreover, guidance on the role of advisory bodies maintains that there is a need for a credible and trusted evidence-based knowledge infrastructure that underpins policy making with advice to resolve dynamic and complex challenges to bridge the traditional 'silo' approach to policy making. The role of objective and independent advice is especially important in contentious debates, such as climate change policy and natural resource development, and in regards to technical fields, such as infrastructure, fisheries, and the environment.

A change in government again signalled a shift in the role of scientific advice on regulatory oversight. In 2015-16, the new Liberal government contained within their election platform a promise to reform and support the role of scientists in the decision-making process. After taking office, they made a part of the overall provisions that departments and agencies are also responsible for ensuring that relevant directions from Cabinet and the Treasury Board are followed, including the following: the Cabinet Directive on Law-Making; Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals; A Framework for the Application of Precaution in Science-based Decision Making about Risk; and A Framework for Science and Technology Advice: Principles for the Effective Use of Science and Technology Advice in Government Decision Making.

Conclusions and related arguments

This analysis for the OECD has examined critical success factors and challenges for *regulatory oversight* by *key oversight bodies*. This has been done through a critical examination of the evolving institutional setup for regulatory oversight in Canada, with a specific focus on the Treasury Board Secretariat's regulatory oversight roles and challenges, including examples of its own links with, and dependency on, other Canadian federal government oversight bodies. The analysis has described the regulatory and related policy preferences and agendas of the various governments as key features of Canadian democracy. The chapter is thus Canadian focused but it also provides some brief contextual reference to other Westminster system countries, in this case the United Kingdom and Australia, regarding oversight reform involving the required publishing of forward regulatory plans.

Key descriptive information about the Canadian system has been provided for OECD readers and participants but this has been interwoven with analytical research

commentary both by the author and through references to other relevant and recent Canadian academic literature. Broadly speaking, our analysis covers regulatory oversight changes and inertia over the past thirty years.

Five overall conclusions and related arguments on the Canadian system of regulatory oversight emerge regarding lessons on success factors and implementation challenges, including resource limitations and the expending and abuse of political capital in Canadian democratic politics.

The **first conclusion** is that Canada's system of regulatory oversight is one composed of central agency and ministerial dimensions of Cabinet government and which shows examples of the benefits of oversight but also its growing complexity and hence greater problems of tracing what works and what is more questionable. For example, we have seen the benefits and overall validity of the long established *Canada Gazette*-centred process. We have necessarily focused on the TBS but have drawn attention to the roles of the Prime Minister (and the PMO and PCO); the Minister and Department of Finance; and the Minister of Justice. There is, thus, at the centre, oversight entities with different claims of primacy as the elected government and governing political party in office faces and creates new changes in regulation and must negotiate or impose the primacy of one or more players at the centre. It is a centre whose boundaries and domains are never fully stable. They are being maintained and also contested.

Interestingly, the notion of "oversight", while understandable in certain ways, is increasingly vague. The CDRM ends with the word "management" but it is also de facto a "directive" on multiple policy values and inevitably on politics within government and outside it with interests, citizens, corporations and businesses, including that of small businesses. While our conclusions relate to such multiple oversight entities, we have also made necessary mentions in the Canadian case at the federal government level to the presence of other oversight entities and processes with significant regulatory content, referred to partly as *mezzo oversight entities and processes*. These impact several departments and agencies in parts of the government, for example on: environmental assessment; major resource projects regulation, science and evidence advice and openness; procurement; charities; infrastructure, and trade (international and internal). The TBS is aware of these kinds of bodies and processes but there remains to be limited coordination among other central agencies or players, as explained in the science advice story and the Natural Resources Canada major resource projects management process.

A **second conclusion** relates to the much greater and needed presence of, and attention to, *life-cycle regulation* in policies about regulation, regarding regulatory plans but critically also in environmental and sustainable development departments – therefore, oversight. They also relate to regulation and policy aspirations and strategies that shift and expand the focus of health and food and other product regulation from a pre-market focus to one that also focuses on even more complex post-market changes, impacts, and knowledge and learning. These both *expand the temporal scope and coverage of regulation,* and oversight, but also vastly increases the number of interests, citizens, scientists and knowledge holders involved, including front-line citizens as knowledge-holders and active lobbies.

A **third conclusion** emerges from our discussion of *oversight centred on instrument mix, hard and soft options and tools* which is immediately and unavoidably a nexus of complexity and instrument-ends political, policy and governance dynamics in a fast changing networked world. A conclusion that emerges in this author's mind is that *"regulatory oversight" is no longer even close to being an accurate title that captures*

what is involved. A new title cannot possibly include all the political and managerial values now involved but perhaps something like "regulatory and guidance" oversight is a better macro descriptor. Indeed a lot of oversight tasks are guidance about guidance. In this sense, it may be true that the Australian system has come closer to truth in advertising when it defines regulation, as quoted earlier, as "any rule endorsed by government where there is an expectation of compliance".

The Canadian TBS and broader oversight institutional story certainly includes statutory law (constitutional and normal law making) and also delegated law that produces regulation. But it has seen a quite massive shift to guidance and its instrument-ends complexity and ambiguity, especially in life-cycle contexts and realities that have not been given the kind of titular recognition that is actually involved and is now the norm. We are often told that we live in a "world of law" but rarely, officially, in a world of government and socio-economic guidance.

The **fourth conclusion** from the Canadian experience and example relates to our discussion about *science and evidence in regulatory oversight (and policy) governance and decision making*. We focused on two periods of science and technology and their function in oversight under Liberal and Conservative democratic federal governments. While the role of evidence-based advice has changed under different social, political and public pressures, the most recent evidence shows that there are efforts to both increase the role of scientific advice in oversight as well as establish more independence for regulators and advisory bodies that produce scientific advice. As new measures are being implemented in this regard, a full evaluation of the success and results will need further study in the coming years.

The **fifth and final conclusion** about regulatory oversight is that these functions at the centre and also at mezzo levels *depend on competent, knowledgeable and dedicated staff but also on adequate budgets that are fit-for-purpose*. There is very good staff involved in the various Canadian oversight realms but the core staff of lead agencies on regulatory and guidance matters are often exceedingly small compared to the government departments and agencies in a very large government. We referred illustratively to large cycles of expansion and contraction of staff at the TBS that were due to larger cycles of macro-economic and fiscal policy, under budgetary cuts and also in surplus eras. Also shown in a very different way was the example of the TBS separate framework for the management of risk, which was not centred in its regulatory staff but rather in its management mandate. Consequently, it is difficult to assess the competences needed in the management of risk task compared to regulatory oversight per se.

Staff budget and science cuts of major kinds have also been a part of the story in Canada under both Liberal and Conservative governments. These are determined by the Department of Finance as the ultimate expenditure budget decision maker in response to periodic macro fiscal policy stances and crises throughout the past 30 years. Oversight agency staff will and should never reach the size of the regulatory analytical staff in the dozens of federal departments and agencies but there is little doubt that oversight agencies need greater continuous attention regarding the modern mix of science and knowledge capacities they need just to stay in the game. The instruments-ends dynamics and the extended temporal coverage and scope implies the need to staff and re-staff on a continuous basis. A policy and regulatory world in an Internet social production and fast changing big data world of algorithms already is, and will no longer be, "management" as usual in almost any sense of the term.

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Chapter 4

Regulatory oversight and incentive mechanism in Korea

by Wonhyuk Lim[1]

This chapter provides an overview of the oversight roles and functions within the central government in Korea. It highlights the importance of establishing regulatory governance structures that cover both legislative and executive branches and the need to build capacity and cultural change within ministries and agencies (and not only at the centre of government),in addition to systemising crowdsourcing and private-public consultation for the enhanced quality of collected information and facilitating the development of regulatory measures.

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Introduction

In March 2014, the Park Geun-hye government launched an ambitious regulatory reform agenda as a part of its Three-Year Economic Innovation Plan (March 2014 – February 2017). The agenda includes both "what" (regulations to be improved or eliminated to promote employment and investment, with a view toward accelerating economic growth) and "how" (institutional improvement to facilitate regulatory reform). The former focuses on regulations affecting investment in services such as health, education, tourism, finance, software, culture, and logistics. The latter consists of three pillars:

- Introduction of cost-in, cost-out (CICO), under which any measure that is expected to result in an incremental net increase in direct regulatory cost to business (or, more broadly, those affected by regulation) must be offset by compensatory measures providing savings at least equal to that amount (similar to Britain's one-in, one-out "OIOO" and one-in, two-out "OITO").
- Establishment of regulatory reform principles: review of all economic regulations from zero base, shift from a positive-list system to a negative-list system, expansion of sunset provisions, and shift from *ex ante* to *ex post* regulatory approach (that is, from *ex ante* regulation to control harms to *ex post* liability for harms done).
- Disclosure of regulatory information: expansion of the regulatory information portal, (better.go.kr), and establishment of on- and off-line communication channels such as the regulatory reform petition drum (sinmungo) to facilitate crowd sourcing and open policymaking.

Conspicuously missing from the regulatory reform agenda is regulatory governance and oversight, where Korea has featured essentially the same three key players since 1998, in addition to line ministries and local governments:

- Regulatory Reform Committee (RRC), a non-standing committee co-chaired by the Prime Minister and a non-government official that has the authority to review and clear every new administrative regulation proposal, prepare comprehensive plans to streamline existing regulations, and evaluate the performance of ministries and agencies in improving regulation.
- Regulatory Reform Office (RRO) within the Prime Minister's Office (PMO).
- Private-Public Joint Regulation Advancement Initiative, led by the Korea Chamber of Commerce and Industry (KCCI), Korea Federation of SMEs (KBIZ) and the Prime Minister's Office (PMO), which holds regular consultations with businesses by sector and region to identify regulatory problems and recommend solutions.

Also missing from the government's agenda is the analytical basis for the regulatory reform proposals. The lack of analytical basis for the reform proposals raises some critical questions that need to be addressed if there is to be a better buy-in from stakeholders. For instance, with regard to the CICO system, some countries (including Australia, Britain, Canada, France, Italy, and Portugal) have introduced a variant of one-in, one-out or one-for-one mechanism to manage regulatory burden on the basis of direct regulatory cost and force government ministries to pause-and-think and prioritize their regulatory policy.

However, the mandatory offset mechanism is controversial because it may prevent the introduction of regulations that impose some direct regulatory cost but have a much larger net benefit for the whole society. How is Korea going to address this problem? Among regulatory reform principles, the expansion of sunset provisions (leading to an automatic expiration of regulations after a certain number of years) is controversial because it may undermine the predictability of regulations and unduly increase legislative costs. Instead of taking a high renewal rate itself as a problem and imposing an automatic sunset, it may make more sense to conduct a post-implementation review to examine prior assumptions and modify regulations if needed. By contrast, if hundreds or even thousands of regulations automatically expire each year due to the expansion of sunset provisions, how is the National Assembly, not known for its efficiency, going to deal with the legislative challenge?

The expansion of regulatory communication channels may be useful in facilitating crowd sourcing and open policymaking, but information collected through such channels may be low in quality and quite idiosyncratic in nature. By contrast, structured consultation involving sector or functional champions (e.g., business associations) may create biases in information collected and raise the risk of regulatory capture. What should the government do to improve the quality of information collected through these communication channels? Last but not least, in regulatory governance and oversight, the role of line ministries is important but problematic because they draft and enforce administrative regulations and may be reluctant to give up their powers.

A regulatory oversight body can try to push line ministries to undertake regulatory reform, but without their buy-in and reform capacity, the supervisory body's impact may be limited. How should Korea design its regulatory oversight body to improve its effectiveness and incentivize line ministries to embrace regulatory reform?

This chapter takes up these critical issues in Korea's regulatory governance and incentive mechanism. It is organized as follows. It first analyses the political and legal background of regulatory governance in Korea, a country with a mixed presidential-parliamentary system and civil law tradition. It then examines institutional arrangements for regulatory governance and oversight, focusing on major issues and options for the Regulatory Reform Committee. It finally looks at the regulatory incentive mechanism in Korea, focusing on regulatory impact analysis (RIA) and regulatory budget mechanism such as CICO. Finally, the chapter concludes with some policy recommendations.

Political and legal background

Before looking at institutional arrangements for regulatory governance and oversight, it is important to understand their political and legal background, because regulatory governance and oversight in any country is deeply influenced by the underlying political and legal structure. Political systems around the world can be divided into two main types: presidential system vs. parliamentary system. Likewise, legal systems around the world can be divided into two traditions common law vs. civil law.

In comparing presidential and parliamentary systems, there are primarily two dimensions to consider: (1) the executive vs. legislative branch and (2) centre of government vs. sectoral ministries within the executive branch. Compared with a parliamentary system, a pure presidential system has a greater separation of the executive and legislative branches; however, because the President is "the decider" and not "first among equals" like the Prime Minister, the centre of government vis-a-vis sectoral

ministries is stronger under a presidential system. The strength of the centre of government vis-à-vis sectoral ministries is inversely related to the prevalence of coalition governments, which tend to result in greater ministerial autonomy and need for consensus building among ministries. A presidential system does not necessarily have a stronger government than a parliamentary system because it can suffer from divided government, with the executive branch at odds with the legislative branch; however, within the executive branch, a presidential system may have more internal coherence and discipline[1].

Historically, common law systems (e.g., Britain) developed to protect citizens from abuse by the king; whereas, civil law systems (e.g., France) existed to implement the will of the king. Furthermore, under common law, judges make their decisions based on general principles and precedents, as well as legislation; whereas, under civil law, which provides more detailed instructions than common law, judges rely more on legal codes than general principles and precedents. Although the difference between the two has narrowed over time, common law systems tend to protect the weak from the strong to a greater extent than civil law systems.[2]

Korea's political system

Korea has a mixed presidential-parliamentary system with the President having enhanced powers but only for a five-year single term under the constitutional amendment of 1987, which restored direct presidential elections and did away with the authoritarian abuses of the past.[3] In the Korean political system, the President does not have a running-mate Vice President, who, in other countries with a presidential system such as the United States, may serve as a champion of the President's legacy and run for President himself or herself. In Korea, by contrast, the President typically becomes a lame duck after 3 or 4 years in office, and most ruling party candidates try to differentiate himself or herself from the President. Instead of having a running-mate Vice President, the President appoints the Prime Minister subject to approval by a unicameral National Assembly. Despite the same name as in a parliamentary system, the Prime Minister in the Korean political system is a weak and frequently replaced figure. In fact, since the constitutional amendment of 1987, an average Prime Minister has served a term of 1.13 years.

The National Assembly does not have power to exercise a vote of no confidence in the Cabinet and instead has *non-binding* power to recommend the dismissal of the Prime Minister or Ministers. The President no longer has power to dismiss the National Assembly since the 1987 constitutional amendment. In this regard, Korea is similar to other presidential systems. However, unlike in pure presidential systems where there is a clear separation of the executive and legislative branches, National Assembly members can concurrently serve as the Prime Minister or Ministers. The Executive as well as National Assembly members may introduce bills, but ultimate legislative power is vested in the National Assembly. The State Council is a deliberative body rather than a decision-making body. Impeachment of the President requires a two-third majority each of the National Assembly and the Constitutional Court, which specializes in constitutional issues, separate from the Supreme Court.

Any regulatory reform effort should take into account Korea's political system. In particular, the President should launch regulatory reform early in his or her term because of the early lame-duck status that the current system tends to create. The Prime Minister, who is supposed to manage regulatory reform through the Regulatory Reform Office, should be given a longer tenure and greater room to maneuver if he or she is to be

effective. Also, the executive branch should make every effort to have the legislative branch on board in pursuing regulatory reform, given the potential for friction between the two sides in the Korea's political system. The National Assembly currently has no functional equivalent to regulatory impact analysis, and is frequently at odds with the executive branch, which, for its part, sometimes displays authoritarian tendencies in dealing with the National Assembly. The lack of quality control mechanism at the legislative level and weak communication between the two branches are serious problems.

Korea's legal system

Korea has a civil law system with detailed legal codes on procedural as well as substantive matters. Korean law tends to use a positive-list system and *ex ante* regulatory approach, with detailed provisions on what is permissible. These features of the Korean legal system may impede the introduction of innovative products and processes that are outside the scope of what is permissible under the current law.

The Constitution clearly defines a hierarchy of laws and sets out the authority of relevant institutions:

> *The legislative power shall be vested in the National Assembly (Article 40). Bills may be introduced by members of the National Assembly or by the Executive (Article 52). The President may issue presidential decrees concerning matters delegated to him or her by Acts with the scope specifically defined and also matters necessary to enforce Acts (Article 75).*[4] *The Prime Minister or the head of each Executive Ministry may, under the powers delegated by Acts or Presidential Decrees, or ex officio, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction. (Article 95)*

Thus, the Constitution makes clear that executive decrees (and, by extension, ordinances) should be within the scope defined by legislative acts. Combined with the separation of executive and legislative branches, this hierarchy of laws implies ordered bifurcation, under which the National Assembly makes legislative acts that set the boundaries of executive decrees and the President, Prime Minister, and Executive Ministers accordingly issue administrative regulations.

The ordered bifurcation of laws and regulations raises some interesting questions. How is the legislative process set up if the legislative power is vested in the National Assembly but bills may be introduced by members of the National Assembly or by the Executive? Are there procedural differences between the two branches that may create distortions in legislation? What happens if executive decrees or ordinances are deemed to go outside the scope defined by legislative acts? What happens if executive decrees or ordinances do not back up legislative acts to ensure implementation? Who judges whether executive decrees or ordinances are not consistent with legislative acts?

As for the legislative process, there are important procedural differences between bills introduced by the Executive and by members of the National Assembly, and these differences may create legislative distortions. Table 4.1 shows legislative steps for bills introduced by the Executive and members of the National Assembly. Executive-initiated legislation requires all 13 steps, including corruption impact assessment, regulatory review, and deliberation by the State Council. By contrast, National Assembly-initiated legislation does not require steps 2 through 9 (shaded cells in Table 4.1). A review by the Ministry of Government Legislation is replaced by an internal review within the National

Assembly, and regulatory review can be avoided entirely. The lack of legislative impact assessment (LIA), equivalent to regulatory impact analysis (RIA) for Executive-initiated legislation, implies that a crucial quality control mechanism is missing for National Assembly-initiated legislation. It also creates incentives for government officials to ask a member of the National Assembly to sponsor a bill and introduce it as National Assembly-initiated legislation to bypass regulatory review and other legislative steps required of Executive-initiated legislation.[5]

As for Presidential Decrees and Prime Minister's or Ministerial Ordinances, Steps 10 through 12 and Steps 8 through 12 are not required, respectively. In other words, although they have to go through regulatory review, they can avoid National Assembly deliberation. Supposedly, these administrative regulations are to be within the scope defined by legislative acts, but if they in fact are not bound by legislative acts, they open up channels for executive legislation without National Assembly scrutiny.

Table 4.1. **Legislative steps for executive- and national assembly- initiated legislation**

1. Drafting of the Bill	8. State Council Deliberation
2. Corruption Impact Assessment	9. Executive Approval
3. Consultation with Relevant Ministries and Agencies	10. Submission of the Bill to the National Assembly
4. Consultation with the Ruling Party	11. National Assembly Deliberation and Vote
5. Pre-Announcement of Legislation	12. Transfer of the Passed Bill to the Executive
6. Regulatory Review	13. Promulgation by the Executive;
7. Review by the Ministry of Government Legislation	Or Executive Veto and National Assembly Override / Defeat

What happens if executive decrees or ordinances are deemed inconsistent with legislative acts? Who judges whether executive decrees or ordinances are not in accordance with legislative acts? Article 107 Section (2) of the Constitution stipulates: "The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial." However, the Constitution has no provision when the constitutionality or legality of administrative decrees, regulations or actions is not at issue in a trial. In other words, the Supreme Court has no jurisdiction unless someone challenges the constitutionality or legality of administrative decrees, regulations or actions in a trial.

The National Assembly, which has the legislative power, can interpret whether executive decrees or ordinances are consistent with its legislative intent, and unless there is a court challenge, the National Assembly's interpretation may be regarded as being authoritative, if not final. It may take action if it finds that executive decrees or ordinances are not in accordance with legislative acts. In fact, Article 98-2 (Introduction of Presidential Decrees, etc.) Section (3) of the National Assembly Act states: "(…) where deemed that the relevant Presidential Decrees, etc. are not in accord with the purport and content of the Acts (…), the head of the central administrative agency shall notify without delay the competent Standing Committee of the plans for disposal of notified details and the results thereof."

It is noteworthy that this provision falls short of ensuring that executive decrees or ordinances are consistent with legislative acts. The relevant administrative agency only has to submit plans to deal with issues raised by the National Assembly and report their

results; it does not have to change executive decrees or ordinances in accordance with issues raised by the National Assembly.

This loophole in the law may allow executive decrees or ordinances to deviate from the intent of legislative acts. In fact, this issue came to a boil in the spring of 2015 over the content of the draft executive decree, following the legislation of the Special Act on the Investigation of the Sewol Ferry Tragedy and Building of a Safe Society. The Sewol Ferry tragedy involved the sinking and botched rescue of an overloaded and structurally unsound ferry, resulting in 295 deaths and 9 missing persons on April 16, 2014, and it highlighted the problem of corruption and incompetence in Korea, underscoring the need for better regulation, not one-sided deregulation, especially in regard to health and safety. The Special Act called for a comprehensive investigation into the causes of the tragedy with a view toward building a safe society, but the draft executive decree prepared by the Ministry of Maritime Affairs and Fisheries limited the scope of investigation to the analysis of a previously released government probe and weakened the independence of the investigative committee. Outraged by this draft executive decree that effectively undermined the Special Act, the National Assembly introduced an amendment to Article 98-2 Section (3) of the National Assembly Act that sought to improve executive compliance with a National Assembly request for revision in accordance with legislative acts. However, in June 2015, President Park Geun-hye vetoed this amendment for interfering with executive powers and transformed it into an issue of party loyalty rather than legal hierarchy. The ruling party subsequently decided to support the President. As a result, the National Assembly failed to override this executive veto, and the National Assembly Act remains unchanged, with the same loophole.

In sum, although Korea's civil law system seems to offer clarity and predictability with detailed legal codes on procedural as well as substantive matters, it has some tendencies and loopholes that need to be addressed. In particular, the tendency to use a positive-list system and *ex ante* regulatory approach may impede the introduction of innovative products and processes that are outside the scope of what is permitted under the current law. A full conversion to a negative-list system and *ex post* regulatory approach may not be realistic within the framework of civil law, but some flexibility must be introduced if innovation is to be encouraged.[6] In addition, some gaps must be filled if the ordered bifurcation of laws and regulation stipulated in the Constitution is to be realized without creating distortions or problems. A legislative equivalent to regulatory impact analysis must be introduced, and the National Assembly Act must be amended to improve executive compliance with legislative acts.

Regulatory governance and oversight: Institutional arrangements

Regulatory governance may be defined as the entire set of institutions through which the objectives of the regulatory agenda are set and executed and the performance is monitored and evaluated. A central player in regulatory governance is the regulatory oversight body (with an unfortunate acronym of ROB), who oversees the regulators.[7] The two core functions of regulatory oversight bodies with regard to their mandate and scope of oversight are: 1) strategic planning and coordination, including reform advocacy and prompt; and 2) review and advice, especially as part of regulatory impact analysis. The two critical factors for the structure and organisation of regulatory oversight bodies are: 1) its status and power within the executive branch, regarding its access to the centre of government and independence from sectoral Ministries; and 2) its mandate in terms of issue coverage and time.[8] For instance, if the mandate includes not only political

responsibility (e.g., reform advocacy) but also technical scrutiny in the process of reviewing regulatory impact analysis or standard cost model (SCM) calculations submitted by line ministries, it is desirable to have a secretariat that can provide technical expertise.[9]

In Korea, under the 1998 Framework Act on Administrative Regulations (FAAR), regulatory oversight regarding administrative regulations is performed by the Regulatory Reform Committee (RRC) and the Regulatory Reform Office within the Prime Minister's Office. There is no equivalent regulatory oversight for the legislative branch. The RRC is a non-standing committee co-chaired by the Prime Minister and a non-government official that has the authority to review and clear every new administrative regulation proposal, prepare comprehensive plans to streamline existing regulations,[10] and evaluate the performance of ministries and agencies in improving regulation. According to Article 24 of the FAAR, the RRC is also supposed to deliberate upon and co-ordinate matters concerning "basic direction-setting for regulation policy as well as research and development of regulatory system," even though its role has been limited in this area. Regulatory Reform Office within the Prime Minister's Office plays a central role in policy making and co-ordination and also serves as a de facto secretariat for the RRC.

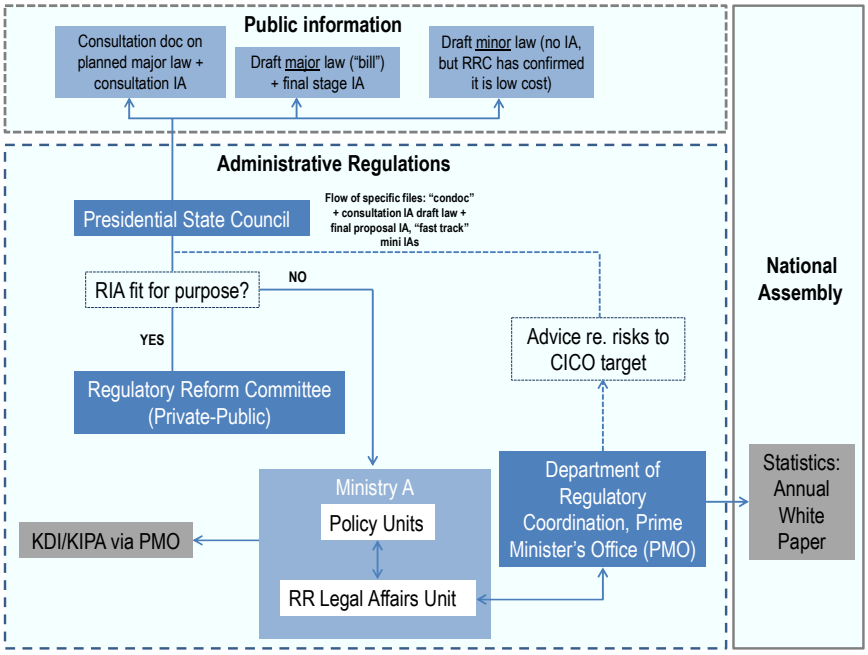
After the Regulatory Reform Legal Unit conducts an internal review within each Ministry, Korea Development Institute (KDI) and Korea Institute of Public Administration (KIPA) provide an external technical review of RIAs for economic and non-economic Ministries, respectively, and make requests for revision if necessary. Both KDI and KIPA are public research institutes. Taking into account the results of the technical review, the RRC examines RIAs and may recommend to the relevant Ministries the withdrawal or improvement of new or reinforced regulations. For Presidential Decrees, the President makes final confirmation of Presidential Decrees after deliberation by the State Council; for Prime Minister's and Minister's Ordinances, the Prime Minister and the relevant Ministers respectively make final confirmation. Table 4.2 summarises institutional arrangements for regulatory governance and oversight in Korea, in comparison with Britain. Figure 4.1 shows corresponding diagrams.

Table 4.2. **Institutional arrangements for regulatory governance and oversight**

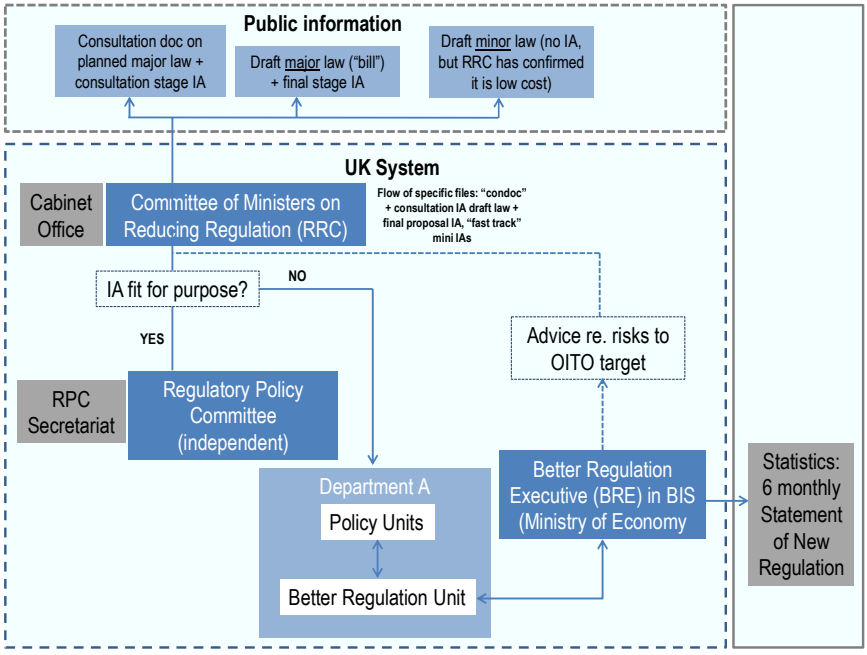
	Korea	Britain
Final Confirmation of Regulatory Proposals	President for Decrees; Prime Minister or Relevant Ministers for Ordinances	Reducing Regulation Sub-Committee [Cabinet Committee]
External Confirmation of RIAs	Regulatory Reform Committee [Private-Public Committee]	Regulatory Policy Committee [Independent Committee]
External Review of RIAs	KDI [Public Research Institute]: For Economic Ministries; KIPA [Public Research Institute]: For Non-Economic Ministries	Regulatory Policy Committee Secretariat [Officials], Directly Supporting RPC
Internal Review of RIAs	Regulatory Reform and Legal Affairs Division	Better Regulation Unit
Policy making and Co-ordination	Regulatory Reform Office in the Prime Minister's Office (PMO)	Better Regulation Executive (BRE) in the Department of Business, Innovation & Skills (BIS)

Figure 4.1. **Institutional arrangements for regulatory governance**

Panel A. Korea



Panel B. Britain



Source: (OECD, 2015a:76)

Although the RRC plays a key role in Korea's regulatory governance, there has been some debate on its status, composition, and scope of mandate, given its quasi-legislative authority without corresponding accountability.[11]

With regard to its status, the RRC is unusual among regulatory oversight bodies in OECD countries in that it is a private-public deliberative body whose members (20 to 25 in number) are all appointed by the President. In most OECD countries, a typical regulatory oversight body consists entirely of government officials and is located at the centre of government or in one of non-sectoral Ministries such as Economy, Finance, Interior, or Justice, as it requires access to the centre of government and independence from sectoral Ministries, with due accountability.[12] By contrast, Korea's RRC is a non-standing deliberative committee (or council) whose members from the government and the private sector are all appointed by the President and where non-officials are to comprise a majority. It is not merely an advisory committee. Although one may argue that it is appropriate for the President to appoint all members of the RRC since its mandate covers only administrative regulations, its gate-keeping role in some cases can actually have the effect of unduly blocking or altering some administrative regulations that have been drafted by Ministries in accordance with legislative acts.[13] For example, if some members of the RRC object to the intent of a legislative act and use their review authority to demand a revision in draft administrative regulations that are in fact in accordance with the legislative act, the scope of the RRC's deliberative authority would in effect extend beyond administrative regulations to legislative acts. It is one thing for the RRC to raise issues with the poor quality of a draft RIA, but quite another for the RRC to block a draft regulation on the basis of its disagreement with the underlying legislative intent as expressed by the National Assembly. In this case, it may not be appropriate to give the President power to appoint all members of the RRC, but rather have some mechanism to reflect the concerns of the National Assembly.

Moreover, a great majority of past and current members of the RRC have tended to be pro-business rather than pro-market. There have been very few advocates of competition and consumer welfare. In addition, there have been some instances of conflict of interest, where, for instance, RRC members who concurrently served as outside directors at financial institutions participated in a review of draft regulations that were designed to strengthen financial supervision. In addition to ineffective conflict-of-interest rules, weak public disclosure rules further raise concerns about the operation of the RRC. Although having non-government persons as RRC members may bring in useful private-sector perspectives on regulation, there have to be measures to deal with the risks of regulatory capture and corruption. To address these problems, it is important to improve the representativeness and accountability of committee members through diversified nominations and stronger conflict-of-interest and public disclosure provisions. Otherwise, its status as a powerful deliberative body is likely to be challenged. In fact, even if the RRC's status is reduced to an advisory body, as some advocate, it would be important to have pro-competition and pro-consumer voices represented and effective conflict-of-interest and public disclosure provisions in place.

Another point of contention is the scope of RRC's mandate. Currently, the RRC examines all administrative regulations except for affairs executed by constitutional bodies (National Assembly, Courts, Election Commission, and Board of Audit and Inspection) or matters relevant to criminal, intelligence, military, and tax measures. Some argue that regulatory matters under the jurisdiction of independent regulatory commissions should be carved out as well; whereas, others contend that independent regulatory commissions need oversight, too, and the RRC can provide such regulatory oversight.

Regulatory incentive mechanism

Most OECD countries have regulatory impact analysis (RIA) to take a snapshot of the appropriateness of draft regulations on an individual basis, and some variant of "regulatory budget"[14] to manage dynamically the stock and flow of regulations on a collective basis. These mechanisms have a significant effect on the regulatory practices of government officials, especially if they are linked to performance evaluation and compensation. To be fully effective, however, these mechanisms should be a part of a comprehensive reform package, including a political commitment to bring about a change of culture in policymaking and to strengthen public officials' capacity to make evidence-based policy (OECD, 2015a).[15]

Regulatory impact analysis in Korea

In 1998, the Framework Act on Administrative Regulations introduced regulatory impact analysis and registration system in Korea. It stipulated that for any new or reinforced draft administrative regulation, the relevant Ministry/Agency prepare a RIA, publicly disclose it, and submit it to the Regulatory Reform Committee for confirmation. A RIA is supposed to include: rationale for regulation, review of options, cost-benefit analysis, and assessment of proportionality and effectiveness. This is in line with OECD practice, at least on paper.[16]

However, despite the adoption of the OECD standard, RIAs have suffered from serious quality deficiencies in Korea. According to a 2008 study by the National Assembly Budget Office (NABO), out of 328 RIAs for important regulations in 2007, 32.7% had a weak rationale for regulation, 90.2% failed to consider multiple options, and 84.2% and 82.0% had poor cost and benefit calculations, respectively. According to another study by NABO in 2011, 82.0% and 79.8% of reviewed RIAs had poor cost and benefit calculations based on, for instance, unjustified assumptions.[17]

Ministries/Agencies have complained that they simply do not have time and resources to do proper RIAs, and have not placed priority on impact assessment as an integral part of policymaking. They do not suffer any real consequences for the poor quality of their RIAs, because RIAs are basically regarded as the final formalistic hurdle to be cleared in the policymaking process and the lack of time and resources to do proper RIAs is a common knowledge.

For example, just like other Ministries/Agencies, Korea's Ministry of Agriculture, Food, and Rural Affairs (MAFRA) has a unit called Regulatory Reform Legal Affairs Office. The unit has 8 government officials, including a public-service legal officer (in lieu of military service), but most of them are busy with general legal affairs and protocol. Only two officials, a director-level Legal Affairs Officer and a deputy director with engineering background (Ph.D. in civil engineering in irrigation), primarily focus on regulatory impact analysis. This is typical of a government ministry. Although some government officials have good knowledge of economics and statistics (and some even have a Ph.D.), they are typically not engaged in "specialist work," as they are busy with paperwork. Government Ministries/Agencies in Korea do not have specialist units devoted to economic and statistical analysis. They typically rely on taxpayer-funded public research institutes such as KDI and KIPA outside the government for in-depth analysis and research. This system can work if there is effective communication between government ministries and public research institutes; however, if government ministries make a policy proposal and then outsource analytical work to

public research institutes to provide a justification for the policy proposal, evidence-based policymaking will be a pipe dream.

For a comparative benchmark, in Britain, in a government department of 2 000 people, such as Department of Environment, Food, and Rural Affairs (DEFRA), there might be five people in the Better Regulation Team/Unit who scrutinize regulatory proposals including reviewing Impact Assessments (IAs) and 50 economists/analysts who advise on the quantitative aspects of IAs (among other tasks such as advising on evaluations, business cases and design of economic policies). These economists/analysts are embedded in policy teams and available to policy makers when they draft IAs. There is strong oversight for IAs within the department before they go to the Regulatory Policy Committee (RPC) for external confirmation, including 1) review by the Better Regulation Team 2) peer review by an economist from a different part of the department 3) sign-off by the chief economist of the department.[18] There is very direct feedback and dialogue in the development of IAs, often with constant development and review. In addition, a consultation-stage IA is usually published as part of public consultation about a proposal, and this provides a level of review from stakeholders, whose feedback is then incorporated into the final-stage IA before it is submitted to the RPC. Government departments typically undertake their IAs in-house, although research to inform them is often commissioned outside.[19] Regarding methodological issues, the main resource is the Better Regulation Framework Manual.[20] In addition, the Regulatory Framework Group and a cross-departmental group on the Economics of Regulation discuss issues not covered in the standard manual. Also, the RPC puts together a live document called "Case Histories," which provides examples of exceptional cases and how these were dealt with. Empirical data for IAs are drawn from a wide variety of sources that have been subject to validation either by professional peer review, or where such data is lacking, by consensus review. Most importantly, there is a credible political commitment to evidence-based policy making through IAs: policies cannot progress without IAs being scored as fit for purpose, and information on department performance is widely available, including "league tables" showing the ranking of government departments based on their IA performance. Government departments suffer a decline in reputation if they perform poorly.[21]

Regulatory budget in Korea

In 2004, the Roh Moo-hyun government introduced a cap on the number of regulations to manage regulatory burden, but flaws in the mechanism design and the lack of buy-in from government officials derailed the experiment in less than two years. Because the cap was based on the *number* of regulations, not *cost-benefit*, it was easy for Ministries/Agencies to meet the cap by offsetting a new significant regulation with an existing minor regulation. More fundamentally, because the cap on the number of regulations lacked a legal basis and political consensus/will, Ministries/Agencies did not co-operate.

In 2014, the Park Geun-hye government announced a plan to introduce a cap on regulatory cost ("cost-in, cost-out"), in two stages. Benchmarking the United Kingdom case (to a lesser extent, Australia's offset), the cap on regulatory cost is based on direct incremental net cost to business (more broadly, all individuals and firms affected by a regulation in question). A pilot phase (8 Ministries/Agencies) in the second half of 2014 is to be expanded in 2015, until a full implementation phase (41) is likely reached in 2016, pending legislative amendment.

To sum up, cost-in, cost-out (CICO) is being introduced even though Ministerial capacity and buy-in to produce quality RIAs have yet to be secured. Can CICO serve as a catalyst for evidence-based regulatory reform in Korea? In addition to this fundamental problem of introducing CICO before having a solid base of high-quality RIAs, CICO in the Korean context raises other important issues as well.

It would be one thing for an economy with well-established environmental, health, safety, and social regulations to deregulate, but quite another for a developing or emerging economy with poor existing regulations to do so. For such an economy, applying a strict offset rule could be problematic, because Ministries in, say, health and safety must find offsetting regulations in an area where regulations should be strengthened overall. In fact, this is exactly the argument that the European Union (EU) made in refusing to adopt OIOO/OITO, on behalf of new EU members such as Romania. A starting point would possibly be an assessment of the necessary basic measures that need to be in place in the first place, taking into account local conditions as well as international benchmarks, and then a review against that, mapping any pre-existing national legal requirements and examining any scope for simplification without reducing existing protections.

In response to public concerns about environmental, health, safety, and social risks, regulations pertaining to the following are exempted from CICO in Korea:

- emergency situations requiring urgent response;
- international treaties and obligations (as long as they are not "gold-plated");
- directly related to maintaining law & order and protecting people's lives & safety;
- preventing financial crisis and environmental crisis, with a very large social benefit;
- automatic sunset provision within a year;
- adjustments in line with wage or price increases to maintain the existing level of regulation;
- fees and charges;
- fines and penalties;
- others approved by the Regulatory Reform Committee.

By comparison, in Britain, there has been little demand from the public or business for new health and safety controls over recent years, because the system of goal-setting legislation under the Health and Safety at Work Act 1974 allows the country to effectively deal with all workplace risks, including those that are new or emerging. Unlike a developing or emerging economy, Britain has a well-established system of health and safety regulations. However, even in an advance economy like Britain, there may not be a good regulatory framework for some other risks. For instance, when Britain had to introduce a large of number of new regulations around financial systemic risk in the wake of the global financial crisis of 2008, this area was declared exempt or out of scope from OIOO. Of course, care has to be taken in introducing exemptions so as not to undermine the credibility of the offset system. Although Britain does not exempt regulations with a large social benefit in general, it seems to have the following "safety valves," which reduce the need to have exemptions from One-In, One-Out (OIOO) / One-In, Two-Out (OITO):

- A large stock of existing regulations with room for improvement (e.g., sheep identification – electronic slaughter tag vs. prior non-electronic tag in the United Kingdom and pork traceability programme vs. nothing prior in Korea);
- EU Regulations, Decisions, and Directives (as long as they are not "gold-plated");
- Political decisions (e.g., Home Office's new immigration regulation despite its chronic problem on the OIOO/OITO account).

Under CICO and other offset mechanisms such as OIOO and OITO, any measure that is expected to result in an incremental net increase in direct regulatory cost to business (more broadly, all individuals and firms affected by a regulation in question) must be offset by compensatory measures providing savings at least equal to that amount. As is well known, this narrow focus on direct regulatory cost and those affected by a regulation in question does not fully capture the impact of a regulation and may lead to a misleading conclusion about the desirability of the regulation. For instance, a ban on tobacco vending machines to reduce underage smoking raise direct regulatory cost for those firms involved in tobacco vending business; however, it may bring in a much larger benefit to the society as a whole by reducing smoking and improving the health of the population. This issue is also more amplified in Korea than in Britain.

Conclusion: Tasks ahead

- Establish regulatory governance structure that covers both legislative and executive branches:
  - Change laws (e.g., National Assembly Act) and institutions (e.g., Regulatory Reform Committee) so that they will become consistent with the spirit of the Constitution; Introduce LIA and co-ordinate with RIA.
- Firmly establish Better Regulation principles and build the capacity of the Ministries/Agencies accordingly:
  - Promote a cultural change / paradigm shift that incorporates RIA as an integral part of policymaking (cf. resale price maintenance for books);
  - At each Ministry, appoint a Chief Economist and expand the Regulatory Reform and Legal Affairs Division/Office to include at least a few Economists. Also, embed officials with some knowledge of economics and statistics in policy teams. Co-operate with public research institutes, but avoid a false dichotomy between policy making and cost-benefit analysis.
- Take stock of existing regulations and co-ordinate regulatory offsets within the Ministry and across ministries by using an appropriate incentive scheme regarding their cost and benefit:
  - Prioritise existing regulations based on their regulatory cost as well as overall impact, to identify regulatory offsets in advance;
  - Give credit to those who come up with ideas for regulatory offsets as well as those responsible for implementation.

- Change the regulatory registration system to ensure consistency with cost-in, cost-out:
  - Use the regulatory registration system as a statutory bookkeeping tool, rather than as a basic metric for regulatory burden. (Note: A registered regulation roughly corresponds to an article of a law);
  - Use a coherent set of related regulations as the object of analysis for RIA and CICO. (For example, the pork traceability program includes 11 separate registered regulations.)
- Systemise crowd sourcing and private-public consultation to enhance the quality of collected information and facilitate the discovery of regulatory measures for removal or improvement:
  - Select a regulatory topic, summarise key existing regulations, and solicit comments and ideas for regulatory reform through on- and off-line channels (cf. Red Tape Challenge vs. Your Freedom);
- Publicise successful regulatory reform cases to secure public support and interest.

Notes

1. For a comparative discussion on parliamentary and presidential systems, see Linz, J.J. (1996), "The Perils of Presidentialism," in L. Diamond and M.F. Plattner, eds., *The Global Resurgence of Democracy*, The Johns Hopkins University Press, Baltimore and London, pp. 124-142.

2. For a more detailed discussion on the difference between the common and civil law systems and its impact on corporate governance, see Randall, K. Morck and L. Steier (2007), "The Global History of Corporate Governance: An Introduction", *A History of Corporate Governance Around the World*, University of Chicago Press, Chicago, pp. 1-64, especially, pp. 40-42.

3. The *Yushin* Constitution (1972-1980) scrapped direct presidential elections, eliminated term limits, and gave the President the authority to appoint all judges and essentially one-third of the National Assembly. It also gave the President emergency powers to suspend the Constitution and dismiss the National Assembly. Presidential Emergency Decrees over the same period made it illegal to criticize the *Yushin* Constitution. The constitutional amendment of 1980 introduced a seven-year single term limit for the President but retained many of the authoritarian features of the *Yushin* constitution.

4. An exception to this rule is Presidential Emergency Orders, which can be issued by the President in a time of national emergency without prior delegation by the National Assembly, according to Article 76 of the Constitution. However, after issuing a Presidential Emergency Order, the President must promptly report to the National Assembly and obtain its approval. Otherwise, the Presidential Emergency Order loses its effect.

5. The lack of quality control at the legislative level and the preference for National Assembly-initiated legislation, in combination with voters' increasing demand for social welfare, have contributed to a proliferation of legislative bills. The number of draft bills introduced by members of the National Assembly increased from 1 912 during the 16th National Assembly (2000-04) to 6 387 during the 17th (2004-08), and then to 12 220 during the 18th (2008-2012). During the 19th National Assembly (2012-16), a total of 16 729 draft bills were introduced by the members of the Assembly. Some key regulations have been introduced through National Assembly-initiated legislation, including the strengthening of the resale price maintenance provision for books.

6. Japan's "grey zone" programme is a notable effort in this regard. Under this program, when it is not clear whether a new innovation is permissible under the law, the government clarifies whether it is indeed permissible upon request from the firm, before a full investment is made.

7. For a comprehensive discussion of key issues in the mandate and structure of regulatory oversight bodies, see Jonathan B. Wiener, "Issues in the Comparison of Regulatory Oversight Bodies," paper prepared for the OECD Working Party 21-22 October 2008. He cites the Roman poet Juvenal and asks, "Quis custodiet ipsos custodies?" or "Who will watch the watchers, who will guard the guardians?" (Wiener 2008: 4)

8. An alternative classification by the OECD involves four factors: (1) mandate: scrutiny of correct application vs. assessment of the content of regulation; (2) powers: hard vs. soft oversight mechanism; (3) location: balance between independence and connections to political decision-making; (4) timing: oversight at what stage in policy development. In the classification above, (2) and (3) fall under "status," and (1) and (4), under "mandate," regarding issue coverage and time.

9. For a comparative analysis of regulatory oversight bodies in OECD countries, see Cordova-Novion, C. and S. Jacobzone (2011), "Strengthening the Institutional Setting for Regulatory Reform: The Experience From OECD Countries," *OECD Public Governance Working Papers*, No. 19, OECD Publishing, Paris http://dx.doi.org/10.1787/5kgglrpvcpth-en.

10. Each year the RRC prepares comprehensive plans to streamline existing regulations by designating core regulatory items and combining them with self-chosen existing regulations by the Ministries. At the end of each year, the RRC calculates the achievement rate and evaluates the performance of the Ministries based on their progress. For instance, in 2015, the RRC designated 110 core regulatory items, including regulations on certification, and added 859 self-chosen existing regulations submitted for streamlining by the Ministries. Its achievement rate was 87% in 2015.

11. See, for instance, Sangjo Kim, "Problems with the Regulatory Reform Committee and a Reform Agenda: Right Regulatory Reform? Start with the Regulatory Reform Committee" and Sunghwan Lee, "An Assessment of Regulatory Reform Realities from a Constitutional Perspective," papers presented at Seminar on the Reform Agenda for the Regulatory Reform Committee for True Regulatory Reform (in Korean), hosted by the Economic Democratization Forum, Citizens' Coalition for Economic Justice (CCEJ), Solidarity for Economic Reform, and People's Solidarity for Participatory Democracy (PSPD), on October 15, 2014, at the National Assembly Members' Hall.

12. See Cordovan-Novion C. and S. Jacobzone (2011: 18-20) for a typology of regulatory oversight bodies in OECD countries.

13. Under Articles 14 of FAAR, the RRC may recommend to the relevant Ministry the withdrawal or improvement of new or improved regulations, and the Ministry shall comply with the RRC's recommendation, unless any special grounds exist to the contrary. This FAAR provision imposes a stronger compliance obligation on the Ministry than does Article 98-2 of the National Assembly Act, which merely requires the Ministry to report a plan to dispose of the request and its result without having to comply with the request. Although Article 15 of FAAR allows the Ministry to request the RRC to conduct re-examination if the Ministry has objections to the RRC's recommendation, the RRC does not have to change its recommendation. When the Ministry and the RRC continue to disagree, it is not clear whether the Ministry can move to the next legislative step as long as it submits the RRC's examination opinion. It may be useful to amend the current provision so that when the Ministry and the RRC continue to disagree, the Ministry can move to the next step as long as the Ministry of Government Legislation and the State Council can see for themselves

what the disagreement is about, with the RRC's examination opinion attached to the Ministry's draft regulation. According to Article 16 of FAAR, the Ministry cannot proceed to the next legislative step without going through the RRC's examination and must submit the RRC's examination opinion to the Ministry of Government Legislation.

14. A regulatory budget requires that a government account for regulatory costs in a similar way to fiscal expenditures and manage regulatory resources accordingly. For a useful discussion, see Nick Malyshev (2010), "A Primer on Regulatory Budgets", *OECD Journal on Budgeting*, Volume 2010/3, pp. 1-10.

15. For a systematic discussion of recent trends in regulatory policy in OECD countries, see OECD (2015), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris. It emphasises stakeholder engagement, evidence-based policy making through RIA, and closing the regulatory governance cycle through systematic *ex post* evaluation.

16. For a comprehensive discussion of regulatory impact analysis in OECD countries, see OECD (2009), *Regulatory Impact Analysis: A Tool for Policy Coherence*, OECD Publishing, Paris.

17. For more detailed information, see NABO (2011), *Assessment of Government's Regulatory Reform* (in Korean), Seoul.

18. This information is based on the author's e-mail correspondence with Edward Lockhart-Mummery, Review Leader, Smarter Environmental Regulation Review, Department for Environment, Food, and Rural Affairs, September 2014.

19. For instance, Health and Safety Executive (HSE) has undertaken all its IAs in-house in recent years.

20. See https://www.gov.uk/government/publications/better-regulation-framework-manual.

21. Better Regulation Executive, Regulatory Policy Committee, and National Audit Office all publish information of department performance on IAs.

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PART II

Stakeholder engagement

Chapter 5

Improving regulatory governance through stakeholder engagement

by Lorenzo Allio[1]

The principles underpinning stakeholder engagement and the efforts made by countries to enhance participatory decision-making are undisputed. This chapter therefore provides some considerations on the trends and lessons in engaging with stakeholders. It focuses on how modern government requires decisions to be based on the best available evidence. This allows governments to effectively identify potential risks, protect citizens, use resources wisely, and foster prosperity. To that end, it is necessary to differentiate between public consultation and the process of procuring (scientific) expertise in order to ensure transparency, predictability and proportionality in decision-making and eventually reduce the risk of regulatory failures. This chapter also addresses the need to carefully understand potential self-selection biases in upstream engagements and co-production arrangements, acknowledging that these modes of public interaction are typically very context-driven and must be tailored to the specific cultural, policy and administrative conditions at hand. Ensuring meaningfully broad and transparent consultations under procedural scrutiny appears a means to reduce capture. In this respect, broad stakeholder engagement has important intrinsic values, despite the challenges related to its effective implementation.

1. Director, Allio-Rodrigo Consulting. The author would like to thank Claudio Radaelli and Katarina Staroňová for the insightful discussions when preparing the draft.

The conceptual framework for stakeholder engagement: A primer

The following paragraphs summarise the case for public consultation and the practices typically deployed to foster stakeholder engagement; and reports on the main findings from the international comparison carried out in the framework of the OECD 2015 Regulatory Policy Outlook (OECD, 2015a).

The what, why and how of stakeholder engagement

Stakeholder engagement lies at the core of regulatory policy and is active and continued along the policy cycle. If the design and implementation of regulations is to serve the public interest, then those affected by regulations and the end-users can help achieve that objective. Engagement reflects the wider shift from "government" to multi-actor, open and inclusive "governance". It may include more or less porous forms on the interface between the public administration (the regulators) and the public in the form of "information", "consultation" and "participation".

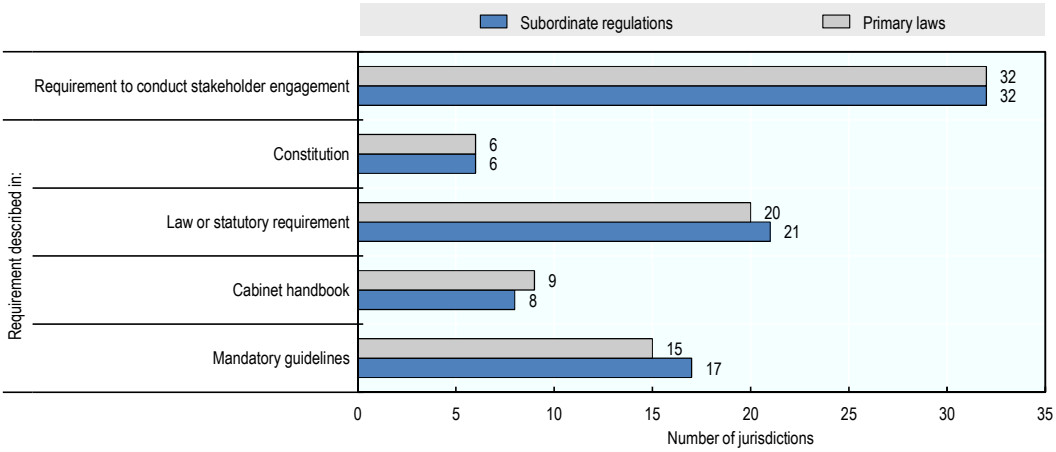
Irrespective of its form and intensity, "engagement" is typically understood as the commitment by government to actively involve citizens as well as representatives of the private sector and civil society in policy making through deliberation. Such involvement should take place not only during the policy elaboration phase and regulatory preparatory process, but also in the governance of the regulatory stock management, including enforcement strategies (Alemanno, 2015). As such, the deployment of engagement practices pertains both to administrative due process standards and to cultural paradigms.

Stakeholder engagement rests on the rationale and principles of the Open Government agenda, but is also understood instrumentally to deliver better policies. It is a critical element of representative democracy. Public engagement thus presents "intrinsic value by ensuring accountability, broadening the sphere in which societal actors can make and shape decisions, and building civic capacity and trust." On the other hand and at the same time, it is also possible to consider stakeholder engagement instrumentally, in the light of its contribution to enhancing evidence-based policy-making by leveraging a broader reservoir of ideas and resources. The focus of this perspective is then rather on the outputs from decision-making processes, not on their input legitimisation (Klingemann/Fuchs, 1995). Arguably, OECD countries have tended to put emphasis on the instrumental rather than the intrinsic value of stakeholder engagement (OECD, 2009), and under that lens participatory practices are seen also as a way to promote public service innovation.

Key findings from the OECD 2015 Regulatory Policy Outlook

Stakeholder engagement practices are nowadays systematic in most OECD countries, especially in relation to the elaboration of new regulations. Only on a handful of cases public consultation is informal or is mandated only in limited, specific areas of regulation. The Open Government Partnership Initiative has helped to bring this issue forward and to put it on the agenda of a broader range of countries across the globe. The Open Government Declaration endorsed by 65 countries at the end of 2014, commits members of the Open Government Partnership, among other things, to "support civic participation".[1] The requirements to engage stakeholders are most often enshrined in legal and statutory acts, in mandatory guidelines. In a few jurisdictions, it is a constitutional obligation (Figure 5.1).

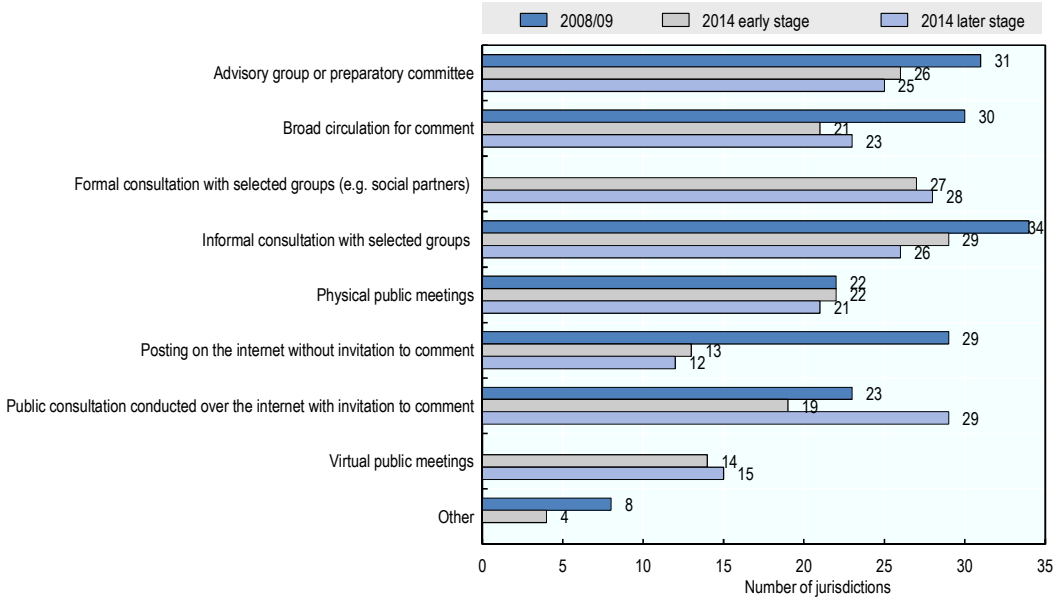
Figure 5.1. **Requirement to conduct stakeholder engagement**



Source: OECD (2015a), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en, p. 76.

Countries tend to exploit the wide range of consultation tools to accommodate best their needs. Deploying one type and channel of public engagement rather than others may reflect choices related to the overall purpose of the consultation exercise; the stage of the policy cycle at which it takes place; the type of stakeholders that are primarily targeted and other considerations. Figure 5.2 shows that some tools are used more in the early stages of stakeholder engagement, such as the advisory groups or preparatory committees, while other tools are used more frequently later in the engagement process, such as posting draft regulations on the Internet or formal consultations with social partners and all interested stakeholders.

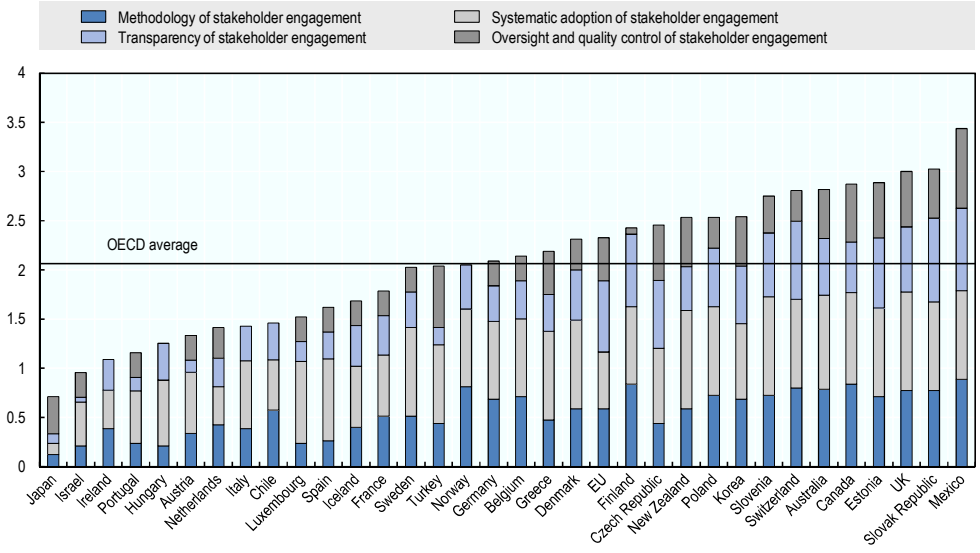
Figure 5.2. **Types of consultation**



Source: OECD (2015a), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en, p. 78.

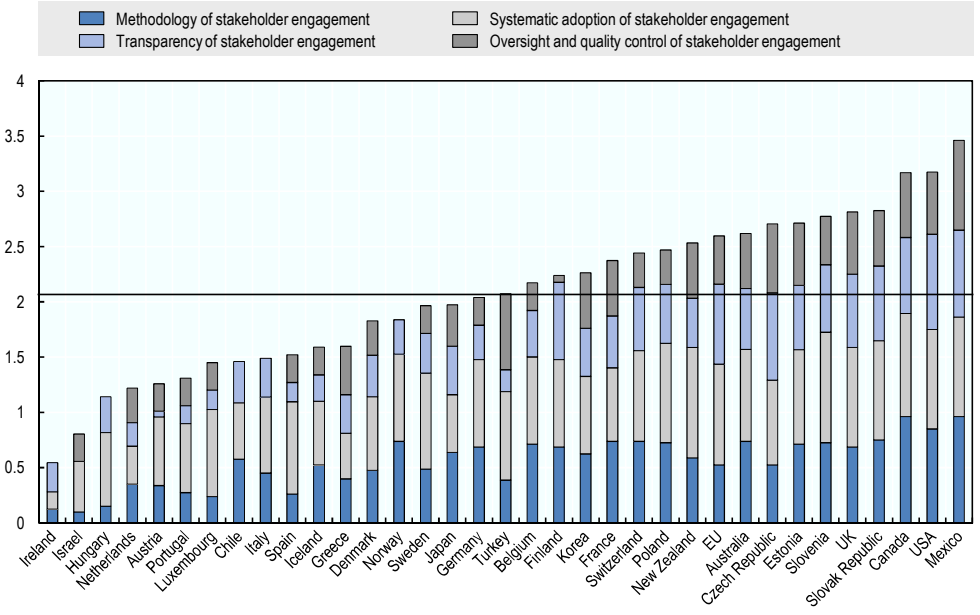
While consultation practices and channels may vary significantly, quality control and systematic adoption are critical. International comparison suggests that critical factors for determining whether a country performs relatively better or not according to the OECD composite indicators[2] are the presence of dedicated oversight bodies checking the quality and comprehensiveness of the consultation practices; and the systematic recourse to consultations open to the general public. The factors influencing the scoring are very similar for primary and secondary regulations (see Figures 5.3. and 5.4.).

Figure 5.3. **Composite indicators: Stakeholder engagement in primary laws**



Source: OECD (2015a), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en, p. 74.

Figure 5.4. **Composite indicators: Stakeholder engagement in developing subordinate regulations**

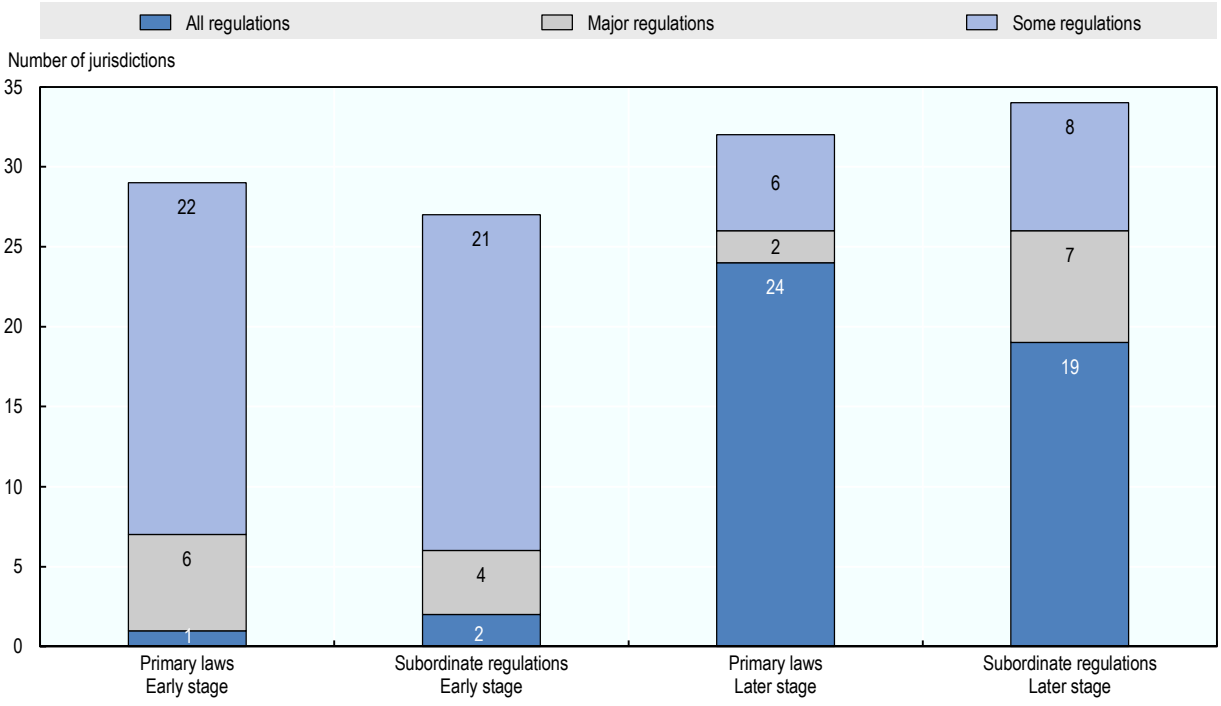


Source: OECD (2015a), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en, p. 74.

Increasing attention is being put on making (draft) regulations and public consultation easily accessible. Countries increasingly tap on the potential offered by ICT and digital platform to reaching out to a greater public; reduce costs; and facilitate searching through databases. In several cases, accessibility is also actively sought by means of plain language guidance. A relatively small but increasing number of countries are experimenting with more innovative tools such as social media, crowdsourcing, wiki-based tools, etc.

By contrast, there is still margin for improving the way countries assess the performance of consultation practices and the actual degree of influence that stakeholder inputs have in decision-making. Enhancing this aspect of the stakeholder engagement governance is particularly relevant especially considering that public consultation typically take place over the internet at the final stage of the drafting process (Figure 5.5). Countries increasingly seek stakeholders' feedback when reviewing existing regulations, in particular in relation to administrative burden and regulatory simplification programme, much less however in the phase of monitoring and implementation.

Figure 5.5. **Early stage and later stage consultations**



Source: (OECD, 2015a: 82)

The 2015 Regulatory Policy Outlook (OECD, 2015a:71-72) comes to the following areas for further action by governments to further enhance stakeholder engagement:

- moving away from traditional processes and establishing fundamental new relationships and lines of communication across society;
- considering stakeholders as beneficiaries of government policies and an integral part of regulatory policy;

- fostering a cultural change among civil servants on why and how to engage with stakeholders, while acting as guardians of the overall process through high levels of transparency;
- clearly defining the purpose of engagement and its scope, and foreseeing feedback mechanisms on the findings of engagement activity; and
- considering digital engagement as a complement not a substitute to conventional practices, such as working groups, advisory committees or public hearings, and, wherever appropriate, co-production schemes.

Insights from international practices

The following section presents a selective overview of ways in which OECD countries have deployed stakeholder engagement practices in the recent past, with a view to highlighting emerging trends or consolidated approaches that may contribute to further refining stakeholder engagement practices

(Digital) Stakeholder engagement and the risk of "complaint-driven" decision-making

Several OECD countries have developed programmes, established platforms and started web-portals to seek, review and store comments from the public on given issues. Many of these initiatives have focused on collecting feedback on irritating or burdensome regulations, some also with the intention of seeking active ideas for (more or less) structural reforms and punctual revisions. In many countries such a "complaint-driven" decision-making has arguably intensified over the past decade or so in the wake of the persistent economic crisis. Examples of digital portals to collect public inputs for simplification include the "Red Tape Challenge" in the United Kingdom, the "Faire simple" initiative in France and the "Lighten the load – Have your say!" portal run by the European Commission.[3]

These forms of engagement are not new. They reflect to a large extent a structured commitment by governments to reach out more systematically to the citizens and business, as a part of the Open Government agenda. Government seek to understand better how policy and regulatory decisions impact (or do not impact) on the daily quality of life and on the operating framework "on the ground". They want to gather first-hand evidence of what the concrete pressing challenges are for the various constituencies. This is a milestone in the attempt at ensuring an ever-smoother interface between the regulators and end-users.

On the other hand, while recourse to the "voice of the public" is a potentially very powerful approach and should be pursued, it should not become an excuse for exclusively reactive decision-making and passive approaches instead of comprehensive, whole-of-government regulatory reforms. Besides abiding by the openness and participation paradigms, the recourse of public inputs might also signal a certain incapacity or de-motivation by governments to proceed to self-diagnostics; to adequately define the policy contexts; and to correctly calibrate the intervention logics and the most appropriate policy instruments. In addition, arrangements should be deployed to avoid focusing on "irritation" or perceived bottlenecks, only, possibly neglecting more substantial costs; and to manage attempts at capturing the agenda.

This note of caution is all the more relevant in the light of the intrinsically digital format that such forms of stakeholder engagement tend to take. As will be highlighted later in this chapter, challenges persist with the conception and management of online consultations and upstream engagement, whereby consultation objects might be spun relatively easily (albeit even inadvertently) on the basis of "problematic" question design or may be hijacked by specific vested interests' capture. If not well handled, in other words, stakeholder engagement practices might paradoxically back-fire the administrative services that launch them, resulting in potential regulatory failures and a factor for further distrust in the government's capacity to deliver societal goals.

Striving for efficiency through customer engagement and negotiated settlements in economic regulation?

Public consultations with all stakeholders are the most common formal means of interacting with industry during the development of regulatory decisions. In Latvia, for example, stakeholders can request to participate in the board meetings of the country's multi-sector regulator, the Public Utilities Commission. The meetings are open to the public and the minutes of which can be obtained by the public upon request (OECD, 2016a). A number of regulators in OECD countries have permanent bodies to facilitate regular exchanges with industry and in some cases also with representatives of local government. It is the case of regulators in France, Italy, Mexico and the United Kingdom (OECD, 2016b).

One form of stakeholder engagement takes the shape of the direct, almost preferential interaction between the regulator and the regulated entities in a given sector. Those practices are often referred to as "customer engagement" approaches (and equivalent) in economic regulation, notably utility regulation.

Customer engagement differs from traditional approaches to consultation essentially for the revisited relationship to the end-users (notably, the consumers). While in traditional regulatory processes most interactions occur between the regulator and the regulated firms – with little interface between customers and the regulator and (almost) none between the customers and the regulated firm, under a customer engagement regime the core interaction is between the customers and the regulated firms.

Customer engagement is in other words grounded on the idea that the role of the regulator may be to facilitate the market process of building preferences and sharing information, rather than to take all the decisions – a sort of catalyst and dispute settlement platform. Administering and adapting the "regulatory contract" over time becomes a task entrusted to the customers, who negotiate directly with the service provider (with the right to seek a ruling from the regulator).

Customer engagement and other forms of negotiated settlements have been implemented in particular in regulatory framework governing networked utilities such as telecoms, airports, gas, water, electricity and rail (Heims/Lodge, 2016; Littlechild, 2012 and literature therein).

The approach challenges the "regulator knows best" philosophy and bears potential for enhancing participation and regulatory efficiency at the same time. The parties know their own needs, desires, and constraints better than the regulator; they have local knowledge of their environment and can negotiate or tailor arrangements which suit them. As such, customer engagement bears the potential for better regulatory outcomes, swifter regulatory decisions, clarity of regulatory roles, and more constructive and less litigious

industry relationships. The approach also bears tremendous potential to prompt behavioural changes. For instance, for energy utilities to educate and engage their customers – who become "empowered customers" (Gustavsson, 2012) – about how to better control how much energy they use, the resulting costs they incur and the benefits of shifting their consumption.[4]

Customer engagement is, however, not free from objections or reservations. These approaches, for instance, raise the question of the representatives of the entities participating in such arrangements. This issue tends to concern especially the consumers' interests. Not all organisations are acknowledged to legitimately represent consumers. They tend to suffer from fewer financial resources and, allegedly, less in-depth expertise compared to the regulated firms. Such risks may be mitigated by adequate arrangements. As it will be outlined later in this chapter, many United States states, though by no means all, have for instance established an independent consumer advocate, with an express role to represent customers' interests before the regulatory body (see the section on consumer empowerment programmes below). The situation is similar in the United Kingdom (Littlechild, 2012:62). Customer groups should also be given more responsibility and accountability vis-à-vis their members (Littlechild, 2008).

Co-producing to make more adaptable, effective and embedded societal decisions?

Citizen co-production to reduce silos and maximise policy synergies

Truly joined-up, tailored government action, notably when it comes to deliver public service, is a rare commodity even in very advanced government systems. Public services have traditionally been formulated, formalised, and delivered within determined policy programme silos, such as employment, housing, health care, education, and so on. In reality, those policy and organisational constructs hardly reflect "the people" – who they are, how they live, and what they need. For instance, some individuals may be unemployed, homeless and chronically ill at the same time. An individual might therefore easily end up facing several entry points to public service delivery, with manifest inefficiencies, opacity and uneven responses.

To address this challenge, public sector reformers have traditionally tended to engineer steadily refined solutions without however denaturing the intrinsic organisational and cultural rationale of public service. This pattern is increasingly challenged as being inefficient. Against this background, co-production is often proposed as the alternative innovative way to re-organise public administration.

Governments are required to work at the intersection of multi-disciplinary, multi-actor knowledge. To answer the right questions correctly, solutions are less likely to be found in any one single silo, however sophisticated it may be, but in a mix. Box 5.1 reports on the experience of the Australian Department of Human Services and its quest to mainstreaming practices of citizen co-design.

Box 5.1. Co-design to enhance efficiency in public service delivery: The Australian DHS

In Australia, reaching out to the community is not a new approach. In the 1990s, government agencies started to move from mere information to customers about the services available to consulting with them on their satisfaction. "Do you like what we are doing to you?" was the classical question, which was progressively complemented by consultations on how those services could be delivered. That constituted an embryonic citizen input to service design.

The Department of Human Services (DHS)[1] has today embarked on a newer approach. It is seeking a much greater involvement from customers to help determine what type of services should be delivered by what means. The focusing question has thus become "what do you want us to do?" and perhaps, "who should do it?"

Co-design has been deployed to structure and accompany this shift in organisational paradigm, reflecting the greater desire of customers for more integration and tailoring of services to make them more appropriate to their circumstances. The rationale for exploiting co-design approaches is to strike a balance between what customers want and what is viable.

Being the department responsible for delivering the majority of the Australian Government's social, health and welfare programs, for DHS this also meant better understanding how to re-organise the "back-office" so as to tap administrative resources most effectively and efficiently. To that end, DHS has carried out a number of engagement activities that differed from traditional consultation. In particular:

- In 2010, the Department undertook a series of **"community fora"** with people across Australia to further inform the development of new service offers: The fora allowed the participants in the dedicated focus groups to discuss their expectations, frustrations and desires in a broad and open manner.[2]
- The so-called "customer journey mapping" is a further technique used by DHS. It involves developing a map of the customer experience in dealing with a service. Aspects of service delivery are thus highlighted that can be re-designed based on customer needs. Such a visual mapping is well suited to capture the emotional experience of the customers, identifying irritation factors, bottlenecks but also good practices in the service that increase satisfaction and positive perception. The mapping has been performed on particular "life events" in interaction with several groups of customers, such as the elderly, new parents, homeless people, single mothers, etc.
- As part of the journey mapping, DHS has also run series of **"deep dives".** These involve more extensive research including ethnographic research using social media (blogs and videography) to capture customer insights. The aim has been to gain deeper insight into the lives, attitudes and behaviours of customers, with a view to identifying where DHS might need to work with customers to co-design better outcomes.

While ICT and e-Government solutions clearly facilitate and accelerate the potential from co-design, the reverse also holds: co-design approaches are instrumental to achieve ever better functioning e-Services. DHS is progressively simplifying and automating online services and customer. Interactions to make it easier and more efficient for customers to self-manage. The objective is to ensure that the quality of **e-Services** results in DHS customers continuing to regularly use e-Services rather than returning to traditional channels.

Box 5.1. Co-design to enhance efficiency in public service delivery: The Australian DHS (*cont.*)

Besides upgrading the functions available on its web portal, DHS is looking at **social media** both as a communication tool and as a form of community engagement. As a communication tool DHS monitors mention of human services in the social media and responds where needed. The department has Facebook and Twitter accounts to promote payments and services it delivers. The aim is to take government information to places where people are online. Webcasting, an online community, and an online discussion forum contribute to diversify and intensify the interaction between service providers and users.

1. The DHS reports to the Minister for Human Services and is responsible for delivering the majority of the Australian Government's social, health and welfare programs; as well as for providing the Australian Government with advice on government service delivery.

2. The outcomes of this work are in the *What you told us* report on the DHS website.

Source: Bridge, C. (2012), "Citizen Centric Service in the Australian Department of Human Services: The Department's Experience in Engaging the Community in Co-design of Government Service Delivery and Developments in E-Government Services", *The Australian Journal of Public Administration*, Vol. 71/2, pp.167–177.

Design Thinking as the epitome of co-production?

Design Thinking (DT) is a particular, arguably more advanced and ambitious form of co-production. It leads to solutions that are progressively refined through an iterative process that starts off by providing voice to end-users and engaging them in shaping decisions (through professional empathy and co-creation). The process continues to considering multiple causes of and diversified perspectives to the problems at hand and experimenting initial ideas accordingly (through prototyping and testing); and yields to ever larger implementation (through scaling up initiatives). As such, it is arguably most promising when disruptive innovation (rather than progressive adaptation) is needed (Box 5.2.).

Box 5.2. Design Thinking

Originating from the private sector, the underlying logic of Design Thinking (DT) is to stimulate creative thinking within the decision-making process and accelerate the synthesis of increasingly effective and efficient policy solutions. In DT, policy and administrative designers work to enhance interactions both across administrative compartments and on the interface between the public administration and the "real world".[1]

DT approaches start with "empathising" with the end-users, i.e. understanding and imaginatively entering into another person's feelings. Developing empathy is about literally bringing public administrators outside their office; confronting them with real-life situations; and making them directly grasp users' challenges and expectations. This process not only enhances mutual trust. It is likely to lead to a full reconsideration of granted beliefs, conventions and values. In turn, this feeds inquisitiveness and the desire to know why things work the way they do – the most promising foundation of creative and innovative work.

"Co-creation" is the pivotal component of DT. It is the process of "generative learning" that results from shared experimentation and comparison of experiences across the public and non-public sectors. As such, co-creation should not be confused with co-production, which rather defines attempts at leveraging people's own resources and engagement to enhance public service delivery.

Box 5.2. **Design Thinking** (*cont.*)

DT then allows "experimenting with prototype solutions". These are deliberately conceived as means to refine initial assumptions and test options that can then progressively be scaled up in the light of cumulative improvement.

If implemented well, DT approaches are expected to help improve decision-making thanks to a more comprehensive problem definition; reduced risks of duplications, inconsistencies or overlaps; minimised unintended consequences and more legitimised and effective decisions.

1. Details on the notion of DT when applied to decision-making are provided by, among others, Bason (2010); Boyer et al. (2011); and European Commission (2012).

Source: Allio, L. (2014), "Design Thinking for Public Service Excellence", UNDP GPCSE paper, Singapore.

Supporters of DT praise it because it helps couple the participatory paradigm with a strong emphasis on innovation in problem-solving. By promising smoother implementation thanks its holistic vision and participation of the end-user in basically all phases of the government intervention, DT bears the potential to provide overall efficient solutions. This is not a trivial advantage in an era of austerity which puts significant pressure on public sector budgets and where governments strive for ways to deliver more value at less cost.

On the other hand, evidence is still lacking at present of systematic increased effectiveness from recurring to co-production. DT, for instance, does generate costs – or at least it has to rely on previous investment, if only we think of the skills that DT officials will need to acquire: communication sciences, ethnography, anthropology, sociology as well as architecture and design.

Above all, institutionalising DT remains very challenging**.** It is difficult to mainstream it and make it a routine approach embedded in the government's way of understanding itself and its role vis-à-vis societal problems. For these reasons, so-called "laboratories" for public sector innovation, located within government or at arm's length to it, are necessary catalysers for the promotion of DT practices and the diffusion of a well-disposed administrative culture. Laboratories fulfil the function of "stewardship", channelling the ability to make designed ideas operational in complex environments (Box 5.3.).

Box 5.3. **Design Thinking through dedicated laboratories: MindLab in Denmark**

The Danish "MindLab" (http://mind-lab.dk/en/) well illustrates this typology of laboratories. It has enjoyed visibility thanks to its being part of three ministries and one municipality – the Ministry of Business and Growth, the Ministry of Education, the Ministry of Employment and Odense Municipality. Moreover, MindLab developed formal collaborations with the Ministry for Economic Affairs and the one of Interior. MindLab may be considered a pioneering institute, being first established by the (then) Ministry of Business in 2002 as a part of its efforts to reduce administrative burdens imposed on Danish businesses.

As innovation catalyst, MindLab helped the Danish National Board of Industrial Injuries (NBII) to understand young people's case histories and to come up with new ideas for cutting "red tape". It diagnosed that many young industrial injury victims could not fully understand the content of the (several) letters the NBII sent them. They also had difficulty grasping how their cases were handled and how decisions were reached.

Box 5.3. Design Thinking through dedicated laboratories: MindLab in Denmark (*cont.*)

Together with NBII colleagues, MindLab visited twice seven young people who had suffered work injuries. The sample included young people with short as well as medium-term health educations. What emerged from the discussions was a real difference between a nurse and a social health care worker when it came to dealing with public sector bureaucracy. A medium-term education enabled a person to better understand forms, questionnaires, the consultation of interested parties and rules and this increased their degree of satisfaction with the handling of the case. The discussions on the field addressed the misunderstandings, frustrations and red tape the NBII letters generated. The people interviewed gave an insight into their reasoning and their behavioural patterns. MindLab transformed those insights into specific ideas and the proposed solutions were subsequently adjusted and refined after another meeting with the injured. MindLab developed four specific ideas, based on streamlining administrative procedures and enhance the communication. It also helped make the injured more aware of what a NBII case involved.*

Experience from various labs such as MindLab suggests that these bodies advance their agendas on *ad hoc* basis, often building on individual projects rather than operating from preconceived top-down strategies. Labs typically advance through small-scale and local (controllable) initiatives that deliver meaningful impacts, prove effectiveness and, possibly, create momentum. How labs approach decision-making is more important than the end-result, although successful projects bear significant potential for lesson-drawing and the progressive institutionalisation of DT. For this reason, also the logistical arrangements of the labs are as relevant as the type of expertise they manage to mobilise.

Note: The example of contribution that MindLab made to administrative burden reduction strategy in Denmark draws from www.mind-lab.dk/en/cases/away-with-the-red-tape-for-young-people-who-have-suffered-industrial-injuries.

Source: Allio, L. (2014), "Design Thinking for Public Service Excellence", UNDP GPCSE paper, Singapore.

A further challenge in this respect refers to the capacity of DT to be effective and legitimate beyond the delivery of public services. Applying DT to the policy formulation phase may present some limitations. We turn to these open issues in the next section.

The role of public officials in co-producing public services

Comparative studies on international practices and academic literature have recognised the consolidated added value that stakeholder engagement may bring to modern decision-making (OECD, 2011). Co-production has become an embedded paradigm, most notably with regard to the production and delivery of public services.

Nonetheless, literature has arguably neglected (or not sufficiently underscored) the important role that the civil servants involved in co-production initiatives play for the overarching effectiveness of the latter, their sustainability and their capacity to disseminate lessons and spill-over effects. Box 5.4 seeks to fill this gap by presenting findings from a number of case studies in emerging countries. It shows how crucial public officials are in the engagement process itself. For government, it is increasingly necessary to investigate this dimension of any co-production approach.

While the box primarily draws from experiences in low and middle income economies, where civil service is often inadequate[5] and constitutes in itself a critical factor for slow development, the insights resulting from them may be informative to the most OECD countries because of the heterogeneity of political leadership and human

resource capacities in administrations across various levels of government, and because co-production is still embryonic, applied unsystematically and with irregular outcomes.

Box 5.4. The role of public officials in shaping co-production for public service delivery: Lessons from case studies

Co-production supporters rightly stress the rich potential of this approach in fulfilling many of the promises of the Open Government agenda. With the term "co-production" is often understood the generally close(r) interplay between users on the one hand and decision-makers and bureaucrats on the other, not exclusively in the phase of ideating and formulating interventions, but also those of joint delivery, monitoring and even enforcement. Literature tends to stress the perspective of the citizens and the users – what they need, what they want, and how best they can go about obtaining it from the State. The end-user is placed at the centre of governance.

This approach is noble and very promising indeed to stimulate transformational change, not least in the self-definition of public sector actors and in their attitude towards decision-making and delivery. However, for engagement to be meaningful and productive, the State has to recognise the value of engagement and it has to be willing to take advantage of it. The role of public officials in shaping co-production is crucial. The full participation and buy-in of public officials are a pre-condition to achieve significant public sector transformations.

Case studies from the Philippines, China, Viet Nam, Indonesia and Kyrgyzstan offer a number of insights about the value and use of citizen co-production forms for achieving governance and service delivery goals. The experiences were examined from a "public officials' perspective", which highlighted the following key lessons:

- **Legitimisation.** In the Philippines, reform-minded officials committed to enhancing the accountability arrangements for public procurement gained the upper hand owing to the enhanced legitimacy derived from the alliance with citizens, despite the fact that not every public official in the public sector was interested in public procurement reform. Two other success factors were the mobilisation of other forms of accountability within state structures (e.g. sharing reports with various government agencies and the Ombudsman), and the transfer of knowledge and expertise from anti-corruption and public procurement experts across both sides of the movement.

- **Socialisation.** The "embeddedness" of public officials in grassroots citizens' initiatives in China (in the form of their participation in the groups' activities, for instance) was the key factor of success because it generated trust, cooperation and accountability by enabling and enforcing moral motivations and by lowering costs for service recipients of monitoring service providers' compliance with the public interest.

Through a process of socialisation and internalisation of norms, the engagement process resulted in a coalition of like-minded people across the state-society divide working together for improved service delivery.

- **Shared ownership.** The less effective experience in the specific Vietnamese, Indonesian and Kyrgyz initiatives considered in the study, by contrast, reveals the challenges of prompting co-production exogenously (for instance, through donor projects only, or in presence of elite capture) and confirms that availability of information alone is not enough to get the government to respond to citizen feedback and to ensure accountability. Coalition-building is a pre-requisite.

Box 5.4. The role of public officials in shaping co-production for public service delivery: Lessons from case studies (*cont.*)

Taken together, these lessons underscore the importance of consolidating collective action across state-society boundaries; achieving effective ownership of the initiatives; and institutionalising the initiatives in formal governance processes.

Successful co-production schemes occur through long-term sustained processes of confrontation, accommodation, trial and error in which participants discover what works, find self-confidence and gain a sense of empowerment. They imply a shift in terms of the citizen moving closer to the centre of governance into an evolving public sector where users, politicians, bureaucrats and service providers become co-creators of public goods. That process challenges established notions of public sector values, practices, accountability, knowledge and skills. It also highlights the need for a professional, agile, open, ethical and passionate public service and rebuilding the morale and motivation of public officials where they have been damaged by politicisation or lack of resources.[1]

Those interested in promoting citizen engagement should identify pro-reform public officials, elected representatives and citizens, understand their motivations and incentives and consider forming broad, pro-reform coalitions.

Strategies for supporting citizen engagement and, in particular, for designing and implementing possible co-production initiatives, can be developed from this approach (see Table 5.1. below).

1. On the role of public managers' motivation in stakeholder engagement, see for instance Huang/Feeney (2016).

Source: Bajraktari, E. (2016), "Citizen Engagement in Public Service Delivery – The Critical Role of Public Officials", UNDP GPCSE Paper, Singapore.

Table 5.1. **Strategic approach to citizen engagement**

Questions to ask at each step	Issues to consider
Step 1: What is the problem to be addressed? What are the desired outcomes? What is the context? • What is the problem and why is it a problem? What level of government does it relate to? • What are the desired outcomes and how could success be defined? • How is the problem perceived by the various sections of society and state? How does it affect the balance of power between state and society actors? Is there a risk of a backlash or retribution against the initiative? Where is it likely to originate from? • Are there broader ongoing governance reforms and how does the problem sit in that context? Can there be mutual synergies?	• Framing the problem clearly is important. Likewise, stating clearly what demands are being put forward by the initiative is crucial. Are they related to improved services, more transparency, justifications or sanctions for wrongful behaviour from state officials? • Clearly defining the possible and desired outcomes and success will inform the strategic approach to engagement. • It is important to understand how the initiative affects the balance of power in the society and state and how in turn it is shaped by those powers. • Assessing the contextual factors is essential. It is important to understand power structure and the incentives that state and society actors face and whether there is any likelihood that the state would resort to repressive measures. • Social accountability may complement other governance reforms. For success, synergies should be achieved with other reform initiatives. Also, the institutional openness matters, hence it should be examined carefully.

Table 5.1. **Strategic approach to citizen engagement** (*cont.*)

Questions to ask at each step	Issues to consider
Step 2: What kind of state action is possible? • What are the possible entry points? Who can initiate the engagement? • Are certain politicians willing to pursue the same objectives? What roles can they play? How can they be mobilised? • Are there sections of the bureaucracy or individual public officials willing to support the initiative? What roles can they play? If so, do they have the capacity to respond? How can they be mobilised? What is the power structure within the state? • Are the checks and balances institutions willing to partner with citizens and civil society organisations? • Can state actors be included in a reform coalition? How can they be mobilised? What role will they play? • What coalitions might emerge in response to the initiative? How can their impact be neutralised? • Are there risks of repressive response by the state? How can the risks of state reprisal be mitigated?	• State action is just as important as citizen action. Sometimes, state structures may initiate and formalise citizen engagement and social accountability initiatives. • When the initiative comes from outside the government, identifying a good entry point is key to success. An entry point could be located in a relevant section of the state which is interested in the reform and willing and capable to engage. • Assessing the willingness and capacity of state actors is crucial for a good engagement strategy. • Politicians can play a key role because they are more susceptible to popular demands and they are in a better position to pressure the bureaucracy and service providers. • Similarly, the involvement of public officials strengthens the initiative. • Linking social accountability with political and bureaucratic accountability by creating coalitions with politicians and public officials who have an interest in accountability and reform may improve results. • Also, risks of reprisal should be carefully assessed.
Step 3: What kind of citizen action can stimulate change and promote the desired outcome? • Is individual action sufficient for the particular initiative? Or is collective action necessary? • Can citizen action and/or mobilisation build on existing organisations or social movements? • What constrains mobilisation? Is limited information and awareness a constraint? • Is direct engagement possible or an interlocutor between the citizens and the state is necessary? Who can be a credible and legitimate interlocutor?	• Sometimes, individual action is pursued, but most often collective action is necessary. Collective action has a lower risk of limited impact or state repercussion. • Civic mobilisation can be more effective when building on existing organisations or social movements. • Information alone is not sufficient to spur citizen action. Mobilisation is often needed to build collective action. • Often intermediaries are needed to facilitate mobilisation, especially among vulnerable and marginalised groups with limited capacities for self-organisation.
Step 4: How to strengthen and sustain citizen engagement? • Is the initiative sustainable? How do we measure sustainability? What key factors affect it? • What kind of trajectory do we expect it to follow? When do we expect the first results? How can we measure them confidently? • Can powerful pro-accountability coalitions be created? With whom? Who will lead them? • How can mobilisation be facilitated? Are intermediaries, such as NGOs, necessary? • Can the initiative be scaled up? Under what conditions? What modifications are required to make it more amenable to scaling up? • Can the initiative be firmly embedded in existing formal governance processes? • How can the initiative be connected more effectively to other channels of accountability – i.e. political and horizontal accountability?	• Assessing the sustainability of an initiative is essential before deciding to further support or expand it. • Having a good idea about the trajectory it is expected allows for effective monitoring and evaluation. • Building pro-accountability coalitions and alliances is essential for the effectiveness of the initiative. • Localised, short-term and information-led interventions don't work well in the long-run. Embedding citizen engagement initiatives in exiting institutions and governance processes enhances their sustainability. This requires a good understanding of the institutional context and the social contract between the society and the state. Identifying social pressures for change and accountability will be essential. • Citizen engagement is most effective when bottom-up accountability is combined with top-down and horizontal accountability. • The role of NGOs is crucial for mobilising collective action across societal and state boundaries.

Table 5.1. **Strategic approach to citizen engagement** (*cont.*)

Step 5: What are the risks and opportunity costs of engagement? • Which members of the society stand to lose or gain from engagement? How does it affect them? • Are the wealthy and better educated more likely to participate? Is there a risk that vulnerable and marginalised groups might be side-lines or excluded? How can that risk be mitigated? • Are there any risks of elite capture and special interests? Are there any risks of fragmentation of communities? • Are there existing forms of accountability that might be displaced by the new initiative? Has their worth been assessed properly? • What are the benefits and costs of engagement for both citizens and state officials? Are participants getting value from the process? • Is there a risk of apathy and inertia from state institutions which might undermine citizen trust and interest in the long-run?	• Quite often, citizen initiatives are captured by elites and special interests which manipulate the process for their benefit. This further exacerbates the balance of power at the disadvantage of the poor and marginalised. • When marginalised and vulnerable groups are excluded, the space for engagement narrows even further. • In certain cases, citizen initiatives captured by special interests may result in social fragmentation of communities and even outright conflict. • Sometimes, new initiatives may displace existing forms of accountability which may be more valuable, legitimate and sustainable. Assessing their worth before starting the new initiative is crucial. • Citizen engagement entails direct costs or opportunity costs for both citizens and state actors. All participants spend time and resources in the process. For engagement to be meaningful, benefits must exceed costs. • Also, another risk is state apathy or inertia. When state institutions are not actively and consistently engaged in the long run, citizens will lose interest and trust in the process and will disengage.

Source: Bajraktari, E. (2016), "Citizen Engagement in Public Service Delivery – The Critical Role of Public Officials", UNDP GPCSE Paper, Singapore, p. 16).

Challenges to design and implementation

Stakeholder engagement and participatory initiatives bear tremendous potential to make decision-making address today's societal problems effectively and credibly. One of their key positive features is the fact that such initiatives are not bound by any preconceived context. In principle, they may be deployed at any of the various levels of government – from local communities to the national level; and to most policy fields – from education to health care, from local disaster management to economic development, etc. There is, as a result, ample margin for benchmarking and mutual learning to achieve the best formats possible.

Experience with forms of stakeholder engagement has however also highlighted challenges related either to the design of the initiatives or their implementation, or both (Box 5.5).

This section builds on these insights, while providing a general overview of the reported participatory practices, it and highlights two specific sets of challenges. One first set concerns initiatives of digital public consultations and upstream engagement. A second set refers to co-production arrangements as a possible complementary option to participatory decision making.

Box 5.5. Obstacles to effective public participation and engagement

Active and sustained public engagement is still not systematic in most OECD countries. Besides the fact that these practices tend to be costly both in time and resources, a number of factors contribute to making stakeholder engagement practices difficult to implement. They include:

- **Lack of awareness** – Despite the advances in mass communication thanks to the Internet, governments and media still fail to inform the public holistically, typically conveying the message that policy actions are taken but without providing context nor explaining the engagement opportunities.
- **Low participation literacy** – Aside from lobbyists and professional players, few actors know how government works and how its various decision-making processes are organised. Even when stakeholders learn about policy making through the media, a blog or an email advocating for action, they might not realise that this is an ongoing process in which policy makers look for their participation.
- **Information overload and capture** – Consultation documents are often too long, technical and difficult for non-expert audiences to understand, creating potential for so-called "information capture".
- **Cynicism due to past record** – Because of previous negative experiences, in many countries there still is significant diffuse scepticism and disillusion about governments' efforts at promoting public engagement.

Consultations have all too often been used to legitimise decisions that have already been taken, or as mere "tick-box" exercises.

Source: Alemanno, A. (2015), "Stakeholder Engagement in Regulatory Policy", in *Regulatory Policy in Perspective: A Reader's Companion to the OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris, 133ff.

Overcoming the duality between universalism and effectiveness

One of the core rationales for implementing Open Government principles is the ambition by modern governments to reach out to the widest spectrum of interests possible to best inform decision-making. Not least thanks to the diffusion of ICTs, it is nowadays much cheaper to potentially engage the public. This has, in turn, also created expectations by civil society and the citizens to be heard, to be explained, and to have voice.

On the other hand, exactly the increased flow of potential inputs and feedback from stakeholders and the public pushes governments to prioritise and allocate rationally their resources, so as to ensure efficiency in decision-making. Stakeholder engagement are costly both politically as well as in terms time and of human and financial resources. Targeted and proportionate consultation practices are in this respect as necessary as wider, more comprehensive approaches.

Planning for consultations helps manage a demanding process

Good international practices recommend policy officials in charge of public consultation to exploit a mix of channels and tools to ensure that engagement campaigns both reflect democratic imperatives and are effective and manageable. One way to achieve this is through organising "consultation plans" that should, on the basis of a

structured process, assist policy officials on how to best manage their interaction with the public.

Many governments have issued administrative guidelines to facilitate the implementation of their commitment to a universal but also effective and manageable stakeholder engagement. Generally, guidance documents tend to recommend consultation plans to cover:

- **When to launch the consultation round**. Consultations should be scheduled as early as possible when policy officials are ready to put sufficient information into the public domain to enable an effective and informed dialogue.
- **Why to launch the consultation round**. The consultation objectives may include gathering new ideas (brainstorming), collecting evidence and factual data, validating assumptions or clarifying the possible impacts of the proposal on the wider community. Identifying the objectives of consultation will help determine who should be consulted, how and when.
- **Who should be consulted.** Identifying relevant and interested stakeholders is key. Not all the sectors of the economy, the sub-population groups or the geographical areas are equally affected by the policy proposals. Some actors may moreover be directly concerned, other indirectly or only potentially. Another category of relevant stakeholders are those that may contribute to deliver the policy proposals.
- **Why they should be consulted**. This is generally done on the basis of a "stakeholder matrix" that helps map the relevant stakeholders in terms of the intensity of their interest in the issues covered by the policy proposal and in terms of their capacity to mobilise resources to promote that interest (influence). Particular attentions should be given to those stakeholder groups who have high stakes in the proposal but low capacities to voice them.
- **How consultation should take place**. Consultation may occur in many forms and through various channels, which range from open online notice-and-comment to the organisation of surveys, public hearings, focus groups, etc. The choice of which channel to use depends on the type of stakeholders need to be contacted; the stage of the policy formulation; and the resources available. Often, a mix of approaches is desirable.
- **How to communicate.** Communicating timely and fully about the consultation round is an essential part of stakeholder engagement. It is important that regulators know and let know what they want, so as to avoid creating false expectations but also to account for the ultimate decisions taken. Reporting transparently on the reasons why some stakeholders' contributions to the consultation round have been retained and other discarded is fundamental.

Examples of consultation guidelines that include consultation plans include documents by Australia, Canada, the European Commission.[6]

Seeking proportionate consultation approaches

Investment on reaching out the public must be efficient. Box 5.6 puts emphasis on the structured approach to proportionately decide on the choice for the consultation method outlined in the guidelines issued by the French Government.

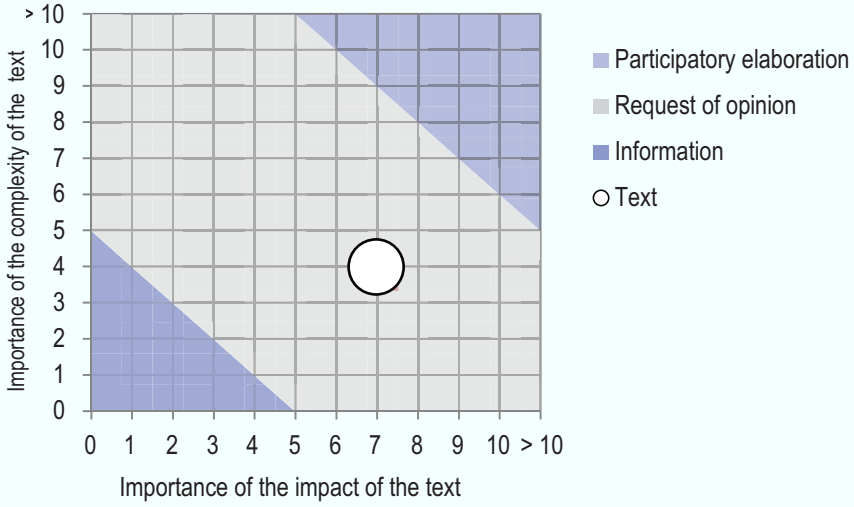
Box 5.6. A structured approach to consultation: The French consultation guidelines

Specifically addressing the interface with the private sector, the guidelines issued by the French Government assist policy officials in organising facultative consultation rounds. The guidelines provide a structured, practical approach to appraise the most proportionate and effective method to interact with businesses.

The document contains tables and scoring grids to calculate the importance of the policy proposal (the "text") in terms of complexity and impact. On the basis of the scores obtained on each of those criteria, the text falls into a typology of consultation, as illustrated by Figure 5.6.

Three consultation methods are envisaged: i) merely providing information among businesses; ii) actively seeking opinions from individual economic actors or sectoral associations; and iii) elaborating the text (or parts thereof) on a participatory basis. The three methods are cumulative: if, for instance, a text requires participative elaboration, policy officials will also have to organise its wide publication (information) and issue requests for opinions.

Figure 5.6. **Recommended type of consultation**



The guidelines also provide a structured method to establish whether a SME-Test is to be envisaged. The latter is considered as a participatory consultation tool since it implies direct interviews over four weeks with at least twenty among micro-, small- and medium-enterprises. A "SME-Test barometer" helps policy officials grasp the relevance of the text for that specific type of enterprises. The barometer scores from 0 to 50 on the basis of a formula that considers the complexity and the impact of the text, putting particular emphasis on the SME dimension. The Test should be conducted if the barometer scores 30 points or more.

Source: French Government (2013), "Consulter pour mieux réglementer. Guide pratique pour la consultation des entreprises et des organisations professionnelles", www.entreprises.gouv.fr/files/files/directions_services/dgcis/consultation-publique/guide-pratique-consultation-entreprises.pdf; p. 42 for Figure 5.6.

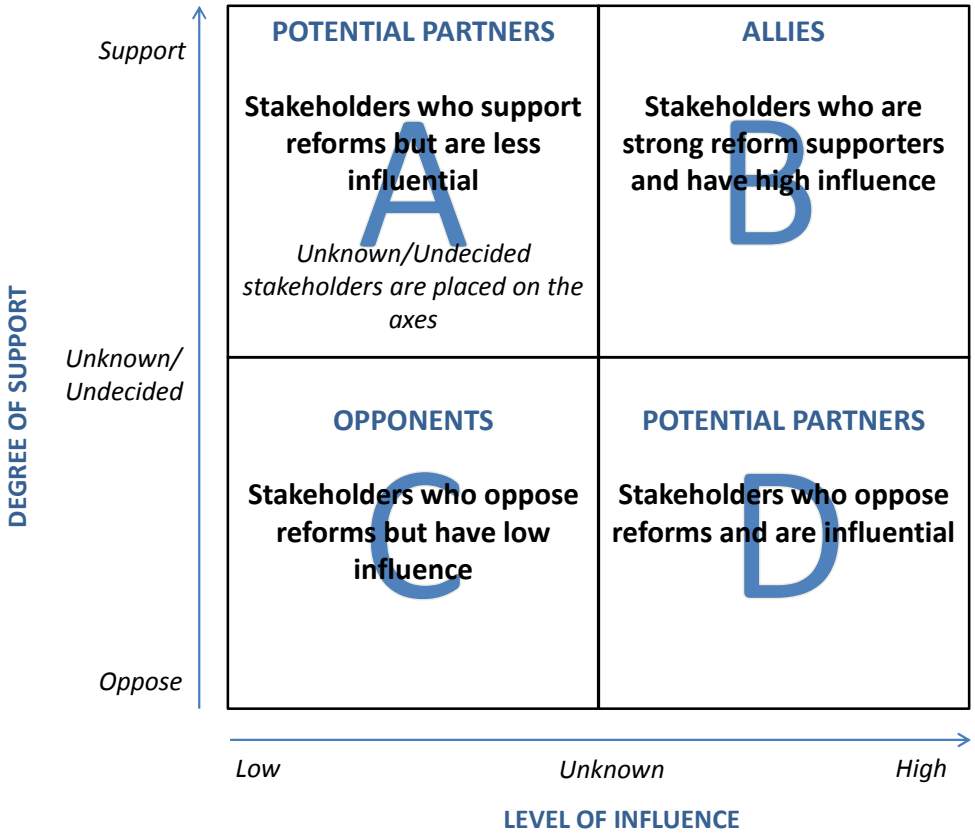
Differentiating approaches through strategic communication

Governments may increase the effectiveness and efficiency of how they interact with stakeholders if they strategically map stakeholders and engage and communicate with them. A possible way to implement this is to organise the framework in which public engagement takes place along the axis of the (supposed or proven) support that stakeholders express to a given policy initiative on the one hand, and the capacity for influence that such stakeholders have (World Bank, 2007).

"Influence" may be defined as the power a stakeholder has to facilitate or impede achievement of the policy or reform objectives. "Support" is the extent to which the stakeholder endorses or opposes the reform initiative. Those stakeholders who are highly active or vocal in their position are viewed as weighing more than those who have a strong opinion but are inactive.

Figure 5.7 shows the resulting stakeholder map differentiating four possible interaction scenarios (World Bank, 2007: 40ff).

Figure 5.7. **Diagnosing the stakeholder engagement**



Source: World Bank (2007: 25).

- **Scenario A.** Mobilising and empowering potential partners. Options to do so include increasing the understanding to enable implementation (e.g., give them information about their legal rights); motivating to become more active supporters (e.g., showcase impact of similar reforms elsewhere); "moving to Quadrant B"

(e.g., build capacity or organize as a group so they can collectively lobby for change).

- **Scenario B.** Leveraging allies. Options to do so include cultivating champions by increasing the level of activity (e.g., make it easy for them to advocate by providing them with facts and figures and with opportunities for visibility and acknowledgement); partnering with ally for mutual gain (e.g., work closely with a business association or an NGO focusing on similar issues); ensuring buy-in by building consensus (e.g., hold consultative meetings with all key stakeholders); leveraging allies to expand supporter and audience networks (e.g., participate in their events, use their distribution lists to reach larger audiences); building support of groups near median (e.g., convince undecided groups of reform benefits through facts and statistics – show them how/why the reform will benefit them, or how/why it will not adversely affect their interests); building ownership and encouraging increased level of activity (e.g., give credit to allies and provide opportunities for visibility).
- **Scenario C**. Bypassing opponents. Options to do so include diminishing resistance by raising awareness (e.g., educate stakeholders about benefits of reform, but also recognize costs to specific stakeholder groups); reducing resilience by showing strength of pro-reformers (e.g., ensure awareness of pro-reform movement's successes and activities to discourage efforts to organize); monitoring changes in influence or resistance levels (e.g., keep an eye on opponents that seem disparate and weak as they may unify and gain strength).
- **Scenario D**. Diffusing and neutralising adversaries. Options to do so include increasing support/decrease opposition (e.g., create divisions within the group to reduce strength, educate to confront misperceptions); decreasing influence by diminishing credibility (e.g., expose by releasing damaging information); confronting by exposing vested interests (e.g., focus media attention on interests and/or corrupt practices); co-opting, weakening, or neutralising (e.g., educate to confront misperceptions, compensate for potential losses, take legal action).

Matching demand with increased supply of engagement opportunities

While the opportunities now open to stakeholders to interact with government have widened in the recent past, notably propelled by the diffusion of ICT solutions, the public and stakeholders seem not to fully exploit them. Has the supply of information and consultation portals managed to create a matching demand? "Consultation fatigue", "information overload" or still excessively high "barriers to entry" for certain actors appear to remain an obstacle in this respect.

An overview of international experiences highlights possible initiatives addressing this type of challenges:

- **Data platform and management systems.** The Canadian Government, for instance, put in place an electronic database to proactively stimulate the encounter between the consulting administration and affected or interested parties in health policy (Box 5.7).

Box 5.7. Enhancing the participation potential: Canada's CSMIS

Health Canada (HC) and Public Health Agency of Canada (PHAC) launched a web-based, centralized Consultation and Stakeholder Information Management System (CSMIS) to improve the openness and transparency of stakeholder engagement and allow Canadians to have a stronger say in our departmental/agency priorities and policies.

In addition to basic contact information of the external stakeholders, CSIMS contains information on their organisation type, areas of interest, and desired level of interaction with the Department and Agency. For example, stakeholders may decide if they want to only receive information, receive invitations to public engagement activities, and/or participate in other research activities.

As such, CSIMS allows stakeholders to identify the areas in which they want to engage as well as the level of that interaction. It facilitates the management of their engagement activities with HC/PHAC by staying informed of the latest consultations, searching for specific consultations, and accepting or declining invitations to participate.

The system helps also health regulators. CSMIS combines a public-facing stakeholder registry with a central repository of information about current and past HC and PHAC public engagement activities. When designing their consultation and public engagement activities, staff at HC/PHAC can use the information that stakeholders provide to target only those stakeholders who are relevant to a specific public engagement activity.

HC supports policy officials in this task by listing a series of guiding questions, such as

- Who has communicated to government on this issue in the past?
- Who is directly interested in or affected by the issue, whether economically, socially or otherwise?
- How informed on the issue are various potential participants and groups?
- What level of engagement is appropriate given the potential participants? What kind of feedback will we need them to provide?
- Are there factors such as age, gender, geography, sector, ethnicity, or language, which are especially important in this issue?

Source: Health Canada's Public engagement website at www.hc-sc.gc.ca/ahc-asc/public-consult/index-eng.php and www.hc-sc.gc.ca/ahc-asc/public-consult/stakeholder-intervenants/faq-eng.php; HC/PHAC Guidelines on Public Engagement (2016), www.healthycanadians.gc.ca/publications/health-system-systeme-sante/guidelines-public-engagement-publique-lignes-directrice/index-eng.php#sp-1.

- **Deploying horizon** scanning units. United Kingdom Department for Environment, Food and Rural Affairs (Defra), like other departments in the United Kingdom Government, runs a Horizon Scanning and Futures Programme that provides the department with a "knowledge radar" that scans emerging areas of attention by policy makers and gives advanced warning of the related opportunities and risks. Stakeholder engagement plays a fundamental role in this context and Defra established dedicated units to empower critical, informed interaction with regulators, experts and stakeholders. Such exchanges provide for a bottom-up debate and an opportunity for engaging with the stakeholders before the individual formal consultation is opened. Their success depends also on the context and culture of dialogue among stakeholders, which may range from being adversarial to more constructive and proactive.

- **"Nudging participation".** Another possible way to stimulate the participation of stakeholders is leveraging their reputational capital and/or the perception for action. The requirement under Executive Order 12866, for instance, mandates the Office of Information and Regulatory Affairs under the United States Office of Management and Budget to publicly list all the meetings held by the United States departments and agencies with stakeholders[7]. Besides complying with transparency imperatives, this provision may prompt organisations that failed to engage on a given issue or proposal to interact with regulators, if they see that other stakeholders have already done so.
- **Actively developing the stakeholders' literacy and supporting capacity building for participation**. Some authorities have launched programmes to actively fund and support the participation of vulnerable or weak stakeholders. The Capacity Building and Participation (CBP) Program, for instance, is designed to build the knowledge and skills of multicultural communities across the Australian State of Victoria.[8] It emphasises a collaborative approach where communities and organisations work together on priority issues, and additional contributions are leveraged through partnerships with government, philanthropy and/or community agencies. Various types of grants are made available depending of the types of partnership and involvement of the beneficiaries. Initiatives have also been launched to align public participation with stakeholders' literacy of policy issues (Box 5.8.).

Box 5.8. Promote literacy for meaningful participation: Urban planning in Phoenix (United States)

In many policy domains, policy officials face the challenge of managing public participation processes under conditions of uneven and sub-optimal literacy by several stakeholders. This type of challenge might arguably be more acute at the local level. The City of Phoenix (Arizona, United States) provides a case study in the field of sustainable urban planning.

Generating robust sustainability outcomes through public participation processes requires stakeholders to engage in sustainability-oriented conversations. Many members of the public, however, lack a strong grounding in sustainability principles, and their values and behaviours may be in conflict with sustainability.

When a public participation process is not aligned with stakeholders' sustainability literacy, there is a knowledge and/or values gap on sustainability between experts and stakeholders. When this problem persists, participants may feel confused, they may harbour frustrations or distrust, and their input may be incompatible with sustainability goals and objectives. This is not to imply that sustainability-literate participants would guarantee a consensus around sustainability outcomes. Rather, a public participation process aligned to participants' sustainability literacy might yield constructive dialogue, seek compromise, find common understanding, and enable robust sustainability-oriented outcomes to influence subsequent policy decisions.

To this end, the "Reinvent Phoenix Participatory Visioning Process" was launched by a partnership involving the City of Phoenix, Arizona State University, St. Luke's Health Initiative and other community organisations, with funding from the United States Department of Housing and Urban Development. The Programme sought to promote transit-oriented and sustainable urban development along Phoenix's light rail corridor in five districts. The public participation process was so managed as to create sustainability visions for each district.

Box 5.8. **Promote literacy for meaningful participation: Urban planning in Phoenix (United States)** (*cont.*)

Programme researchers engaged with stakeholders, who live, work, do business in, or visit the district, through one-on-one interviews, community organisation meetings, public mapping forums, and public visioning workshops. Through the engagements leading to the visioning workshops, participants identified areas they would like to see preserved or changed, and they discussed the types of changes they would like to see occur. Researchers identified consensus areas for change (transition areas) and prepared a visioning workshop to enable participants to discuss in detail how each of the transition areas might look in the future.

So-called Visually Enhanced Sustainability Conversations (VESCs) were held to facilitate a public discussion to prioritise sustainability objectives and identify means (vision elements) for achieving these objectives that would be acceptable to stakeholders. VESCs helped sustainability experts translate abstract, hard to understand sustainability principles into something that is tangible, down to earth, and reasonably easy to understand.

Source: Cohen, C. et al. (2015), "Aligning Public Participation to Stakeholders' Sustainability Literacy – A Case Study on Sustainable Urban Development in Phoenix, Arizona", *Sustainability*, Vol. 7, pp. 8709-8728.

Ensuring unbiased (digital) public consultations and upstream engagement

Digital public consultations and upstream engagement are nowadays a widely used tool to reach out an as wide public as possible. Following Alemanno's typology of challenges recalled above (Box 5.8.), this section expands on the "information overload and capture" obstacle.

Avoiding manipulation and capture

A pressing issue is the extent to which (especially online) public consultations and digital platforms are catalysts of structured universal participation or, in turn, are even more vulnerable to manipulation and hence capture[9] by vested interest. Empirical research suggests that a small number of participants to online platforms tend to contribute a disproportionate share of ideas and opinions. There is also evidence that such activist practices come from various camps, from the private sector and from civil society organisations alike (see Box 5.9).

Box 5.9. **Between constructive and manipulative digital participation**

The EU ISDS consultation

An example of vulnerability to manipulation – or at least to mis-representation – is provided by the European Commission's consultation on an investment protection and Investor-State Dispute Settlement (ISDS) clause in the Transatlantic Trade and Investment Partnership (TTIP) in 2014, which is currently under negotiation. The public consultation was launched as a response to the growing public debate and increased concerns about the issue.

The Commission received almost 150 000 replies over the period of three months, allegedly 95% of which were submissions stemming from a handful of groups in the form of identical or very similar responses, automated or generated by forms filled in on websites campaigning against the trade agreement. In their turn, also anti-TTIP organisations denounced bad practices with that specific consultation, which allegedly favoured corporation capture trough privileged access to meetings.[1]

Box 5.9. **Between constructive and manipulative digital participation** (*cont.*)

Future Melbourne and the Open Government Dialogue

Liu's (2016) analysis of two cases of online citizen engagement – *Future Melbourne* (2008)[2] and the United States White House's *Open Government Dialogue* (2009) – comes to the conclusion that both were perceived as successful by their initiators because they demonstrated that large crowds could be engaged in online consultations over a short period of time. As such, the platforms generated a great deal of ideas and interest from citizens and substantially influenced policy outcomes. When further exploring the concentration of those contributions, however, there is evidence that those reflected a relatively small percentage of citizens who were actively involved, despite the platforms' crowd-based designs.

A number of recommendations can be drawn from these two initiatives:

- Transparency of goals and commitment: make online deliberation more transparent and informative for citizens by disclosing, prior to the start of the consultation, how inputs will be incorporated into the policy. For instance, Future Melbourne declared on its front page that the online strategic city plan edited through the wiki would be the final version submitted to the Council in Melbourne for approval;
- Conflict of interest management: make contributors' backgrounds, positions, and political/ideological belief systems transparent would ensure that participants are well informed. In the Future Melbourne case, to avoid conflicts of interest, the participants disclosed their relationships with the City of Melbourne when applicable; these included contractors, consultants, and employees; and
- Input management: refine the techno-management systems for classification and labelling of ideas to allow sorting for the most useful and relevant posts (rather than the most popular); and to limit repeated posts and avoid abuse.

Controlling for the origin of the various inputs gathered throughout the Future Melbourne project highlights for instance that some 90% of the wiki content was submitted by only 20% of the contributors. Furthermore, 29 of the repeat contributors were government officials or contractors with the City of Melbourne, and contributed approximately 80% of the content throughout the consultation period. This however proved to be "positive" capture. The initiative received praise because those government contributors also spent time discussing and communicating with other contributors on the platform. Requiring disclosure of a relationship with the City of Melbourne also helped to establish the accountability of the contributors and the platform; and enhance timely communication.

1. On this specific case, see www.euractiv.com/section/trade-society/news/commission-swamped-by-150-000-replies-to-ttip-consultation/; http://corporateeurope.org/pressreleases/2015/01/commission-consultation-investor-rights-ttip-makes-mockery-democracy; and www.futuremelbourne.com.au/.

2. Liu, H.K. (2016), "Exploring Online Engagement in Public Policy Consultation: The Crowd or the Few?", *Australian Journal of Public Administration*, first published 4 August.

Leveraging consumer empowerment programmes

Empowering consumer voice through more or less formalised and statutory arrangements may contribute to ensuring that consumers are effectively heard in decision-making and can participate and benefit from market processes. This may particularly be instrumental in context of negotiated settlements recalled above. Box 5.10 reports on examples of such programmes in the United States insurance sector.

Box 5.10. Consumer empowerment to prevent capture: Examples from the United States

The insurance sector is an interesting case study to analyse capture because of the degree of asymmetric information existing between the economic operators and the consumers. "Information capture" occurs when industry exerts substantial control over regulatory outcomes by producing "uncontrolled and excessive" amounts of information.

One approach to preventing capture that has gained some traction in recent decades is the creation of consumer empowerment programs that directly enhance the capacity of consumer representatives to participate in regulatory processes. These programs come in two basic varieties:

- **"Proxy advocacy"** relies on independent government entities that are tasked with representing the public interest in designated regulatory proceedings. A classic example is the Texas Office of Public Insurance Counsel (OPIC), modelled on experiences in public utilities regulation.

OPIC is an independent statutory authority established by law. It represents the interests of consumers as a class (not on an individual basis) in insurance matters. It promotes public understanding of insurance issues, advocates fairness and stability in insurance rates and coverage, works to make the overall insurance market more responsive to consumers, and strives to ensure consumers receive the services they have purchased.[1]

- **"Tripartite programs"** seek to amplify the voice of non-government public interest groups that would ordinarily be underrepresented in the regulatory fray. Examples include statutorily required consumer advisory panels for regulators and programs that reimburse consumer groups for the cost of participating in regulatory proceedings. The California Public Participation Plan (CPPP), for instance, reimburses the expenses of designated public interest groups who make a "substantial contribution" to certain regulatory proceedings. Another example of tripartism is the National Association of Insurance Commissioners' (NAIC) Consumer Participation Program, which provides selected "consumer representatives" with limited reimbursement of expenses, research assistance, free access to public documents, training, designated public fora to present on issues of their choosing, and privileged access to regulators. The task of these consumer representatives are entitled to participate in and influence NAIC activities that assist State regulators in their primary objective of protecting insurance consumers.[2]

Research on the United States States experience suggests that proxy advocacy can effectively counteract industry influence where there exists a discernible consumer position, new information is likely to impact regulatory results, and the involvement of non-industry stakeholders is limited. Proxy advocates appear to influence regulatory results primarily by providing regulators with expertise and information from a consumer perspective, rather than by applying political pressure. The existence of specific procedural rights granted to proxy advocates in the regulatory process increase their leverage to negotiate settlements with industry participants.

Tripartism may by contrast be more desirable than proxy advocacy when a clear consumer position is difficult to identify or the threat of political pressure is an important tool to influence results. On the other hand, a key shortcoming of tripartism is that it requires a robust network of public interest groups with broad-ranging expertise and interests. Alternatively, empowered consumer representatives would remain rather isolated in their engagement.

Employing both forms of consumer empowerment might consequently allow each mechanism to focus on its comparative advantage and safeguard against the limitations and blind-spots of the other. This dual approach need not be costly. As the NAIC consumer participation program suggests, effective tripartism does not require substantial funding where a robust network of potential public interest groups already exists.

Box 5.10. **Consumer empowerment to prevent capture: Examples from the United States** (*cont.*)

Simply by providing those groups with improved access to information and regulators, some oversight over early regulatory proceedings, and better access to media, tripartism can enhance the capacity of concerned groups and individuals to counteract industry influence.

1. See www.opic.texas.gov/.

2. On the NAIC programme, see www.naic.org/consumer_participation.htm.

Source: Schwarcz, D. (2013), "Preventing capture through consumer empowerment programs: Some evidence from insurance regulation", Chapter 13, in D. Carpenter and D. Moss (eds.), *Preventing Capture: Special Interest Influence in Regulation, and How to Limit It*, Cambridge University Press.

Ensuring impartiality and high quality standards for evidence

One way commonly used by regulators to resist capture by stakeholders has been the adoption of code of conducts and rules governing conflict of interest of experts intervening in risk assessment and risk management decisions. In their typical forms, these guidelines focus their attention to more or less direct and even perceived financial links to third parties, notably industry. Experts engaging with regulators are required to disclose any private interest had by themselves and their closest relatives. However, the independence of expertise cannot be guaranteed by solely excluding experts with links to a specific group.

A tiered control for conflicts of interest tends to promote the procurement of needed expertise while ensuring undue influence and capture. An example of such a gradual management of conflict of interest is provided by the European Medicines Agency (EMA), which screens each declaration of interests by the external scientific experts to decide whether or not to include him or her as a member of a committee, working party or another group. EMA assigns each declaration of interest an interest level based on whether the expert has any interests, and whether these are direct or indirect, and determines determine if an expert's involvement should be restricted or excluded in the Agency's specific activities, such as the evaluation of a particular medicine.[10] The notion of impartiality nonetheless does not pertain only to financial interests but also to lack of objectivity and biases due to ideologies and values (United States National Academies, 2003; United States OMB/OSTP, 2007).

A further issue related to public involvement refers to the evidential standards accepted and retained as a basis to inform decision-making. Without rejecting the value of citizens' (lay) participation in modern democracies, the question needs to be addressed about the role of science in decision-making and, consequently, the type of scientific evidence that ought to be used. This issue is constantly highlighted in many various risk management decisions taken to protect human health and the environment from harm posed by new technologies – from crop protection products and biocides to endocrine disruptors, from veterinary antibiotics to biotech applications. This is particularly relevant also in relation to the opportunities offered by the "Open Science" agenda, as well as its limitations (OECD, 2015b; 2016c).

From a participatory governance perspective, the case of upstream engagement in life sciences may provide a number of insights for future government approaches (Box 5.11.).

Box 5.11. Upstream engagement in managing risk: The GM crops debate in the United Kingdom

Upstream engagement comes from the recognition by some social scientists that "lay knowledge" of groups such as farmers or consumers is equivalent to traditional scientific expertise when making decisions on how to manage risks (Jasanoff, 1987; Wilsdon et al., 2005).

Caution about mainstreaming upstream engagement in life sciences related to policy formulation has been by contrast raised for instance by Tait (2009) (see Table I.2.). She points out that in such initiatives decisions about scientific research tend to vary, depending on public opinion shifts in response to the latest events, amplified or modulated by media campaigns. As a result, upstream engagement merely substitutes one set of value judgments with others that are not necessarily more universal or sounder, and possibly less based on scientific evidence than the previous ones.

Horlick-Jones et al. (2006) evaluated the process underpinning the public debate about GM crops (the so-called *GM Nation?* debate) that took place in Britain in 2002–03. Taking into consideration the novelty and the scale of the engagement process as well as the resources and time constraints, the authors come to the following conclusions:

- the importance of relying on a predefined, clear template, with explicit measurable goals and objectives;
- the importance of providing the public with adequate background information timely on both the topic to be discussed and the purpose and functioning of the engagement exercise;
- the need to reach out the public beyond those already active, informed and committed to participate;
- the importance of stimulate the discussions through material that addresses the perceived public concerns and structures the debate;
- the imperative to explain how the findings from the engagement exercise are going to be used in final decision-making and what is the relative weight given to the debate in comparison with other factors.

Source: Jasanoff, S. (1987), "Contested Boundaries in Policy-Relevant Science", *Social Studies of Science*, Vol.17/2, pp.195–230; Wilsdon, J. et al. (2005), *The Public Value of Science*, Demos, London; Tait, J. (2009), "Upstream engagement and the governance of science – The shadow of the genetically modified crops experience in Europe", *EMBO reports*, Vol.10 (special issue), pp. 18-22; Horlick-Jones, T. et al. (2006), "On evaluating the *GM Nation?* Public debate about the commercialisation of transgenic crops in Britain", *New Genetics and Society*, Vol. 25/3, pp. 265–288.

Table 5.2. **Problems in applying upstream engagement to life sciences**

Problems with prediction	
At the stage of funding basic scientific research (timescale, >15 years)	It is impossible to know, when the funding of scientific research is being discussed, what the outcome will be. It is impossible to know what future developments will arise from the research and what their risks might be.
Developing innovative products or processes based on proven research outcomes (timescale, >10 years)	Most of the ideas that seem feasible at this stage will fail. Innovation usually requires inputs from research in a range of disciplines (that might have been blocked or delayed by outcomes from other engagement initiatives).

Table 5.2. **Problems in applying upstream engagement to life sciences** (*cont.*)

Problems with prediction	
Foresight	We are extremely poor at the long-range prediction of technology futures.
Problems with stakeholder engagement	
Group think	The views of small groups will be easily swayed by participants with strong opinions or by those leading the engagement.
Issue framing	Given our ignorance about the future, engagement can be a process of fictitiously framing new science and technology in the minds of the public.
Recruitment bias	It is difficult to persuade uncommitted citizens to participate in hypothetical discussions about science and innovation a long time in the future—those who engage are likely to have a specific agenda.
Conflict	Where there is polarization of views, engagement can lead to increased levels of conflict.
Engagement focus	Some topics — for example, nanotechnology — are too broad and multifaceted to allow meaningful engagement.
Engagement fatigue	There will be insufficient time and resources to engage on every relevant issue and people will become cynical about the process.
Labile public opinion	People who do not already have strong opinions will change their minds over relatively short timescales, and much more so over 10–15 years.

Source: Tait, J. (2009), "Upstream engagement and the governance of science – The shadow of the genetically modified crops experience in Europe", *EMBO reports*, Vol. 10 (special issue), pp. 18-22.

Anecdotal review from various international practices with these types of public consultations and engagements suggests governments to pay special attention to the following sensitive issues:

- **The design of questionnaires**. The scope of the consultation process should be clearly understood by both the consulting authorities and the public. It is tempting for regulators to structure the consultation along closed questions as they facilitate comparison and might lead to more direct inputs. Particularly in the case of online consultations through standardised digital forms, however, this may result in leading and biased design; and it reduces the option for the public to submit the rationale and evidential documentation in support of their arguments, or present alternative options.
- **The role and type of scientific evidence.** There should not be confusion and elision between the process of engaging the public and the process of collecting scientific evidence, notably in the case of risk management decisions. It remains the responsibility of regulators to adopt whole-of-government policies that set out minimum standards for the quality, collection, validation and use of scientific evidence, and to rely on the best available science. Expert studies used by regulators should be informed by credible knowledge of real world exposures; and performed and quality assured in accordance with internationally accepted and objective protocols, based most notably on the "scientific method". The studies should be subject to mandatory Systematic Review[11] with specific emphasis on reproducibility (Allen et al., 2016; Aschner et al., 2016; EuroScientist, 2017).

- **The trade-off between publicity and confidentiality**. Principles of good administrations include the "public record" principle, according to which regulatory decisions should be exclusively based on evidence that is publicly available (and reviewable). However, often imperatives of commercial confidentiality need to be taken into considerations to preserve intellectual property rights or other fundamental private interests.
- **The importance of summarising objectively**. Many OECD governments often underestimate the importance for the public of their commitment to publish a summary of the contributions received further to a public consultation is often underestimated. ICT tools offer in this respect the possibility to trace back inputs more easily and identify and filter the contributions provided in the regulatory process. Not only are those reports integral part of the accountability system (and hence they contribute to the overall predictability, credibility and trust). They are also instrumental in distinguishing evidence from values and illustrating what lessons are drawn from the consultation exercise. It is fundamental, in this respect, that regulators explain why relevant recommendations provided by the public have been retained while others rejected.

Institutionalising co-production

The second set of challenges addressed in this section refers to co-production arrangements, in particular in relation to they can realistically be institutionalised as a structured approach to decision-making. Referring in particular to Design Thinking, Allio (2014) draws attention to the relatively high barriers to entry that prevent such an approach from getting mainstreamed and become standard bureaucratic practice (Box 5.12).

Box 5.12. **Addressing Design Thinking's institutionalisation**

In order for DT to be made systematic within decision-making, governments need to tackle the following issues:

- How can the right skills be found and brought in to decision-making, and how can they be further nurtured within public administration?
- Can government afford to institutionalise prototyping and creative experimentation? How can creative thinking by managers cope with (possibly diverging) simultaneous political agendas and various (possibly resisting) bureaucratic cultures?
- How can DT be institutionalised in such a way that it meets other compelling imperatives for government action like the principles of legitimate expectations and legal certainty – especially if one moves from DT for public service delivery to DT at the service of policy formulation?
- How does it fit with existing procedural requirements such as public consultation, or regulatory impact analysis? How can the latter serve DT purposes?
- How can innovative solutions win sometimes irrational or unconscious public perceptions and beliefs?

Source: Allio, L. (2014), "Design Thinking for Public Service Excellence", UNDP GPCSE paper, Singapore.

All forms of jointly designing, implementing and monitoring public interventions imply the participation of a variety of actors, whose spheres of competence, expertise and involvement have traditionally been kept distinct and largely autonomous.

By institutionalising co-production, questions inevitably arise about who qualifies as a "relevant stakeholder"; who (among those) gets to participate; how to ensure balanced representation; and the risks of self-selection or volunteerism. Participation by outsiders in public policy and regulatory matters, especially by NGOs or industry groups, may prompt fears of capture by special interests. Moreover, a proliferation of participants may increase the chances of conflict and lead to protracted negotiations, possibly paralysing the overall process, as mentioned above in relation to managing upstream engagement. The legitimacy of outcomes elaborated within these frameworks might be challenged in the context of the regime of representative democracy, if co-produced deliberations are taken as the proxy of the will of the people.

Activating co-production

The bias of self-selection and the risks of capture in co-production may be accentuated when engagement in these arrangements is not universally spontaneous and needs to be prompted. In this respect, it is important for government to understand why only a limited number of citizens volunteer to engage or respond to co-production initiatives, and what motivates citizens to engage in co-production of public solutions. This can help improve participant recruitment and the design of engagement processes (Box 5.13).

Box 5.13. Stimulating active engagement in co-production

Individual co-production is generally easier than collective co-production.[1] The question why citizens engage in processes of co-production of public services is still open – especially in its corollary consequence: what should governments do to enable and even activate those conditions, if these exist, that prompt individual engagement.

Literature on co-production, political participation and volunteerism reveals **three factors that contribute to willingness to co-produce**: i) perceptions of the co-production task and competency to contribute to the process, ii) individual characteristics, and iii) self-interest and community-led motivations.

Much of the potential pay-off from co-production is likely to arise from group-based activities, so activating citizens to move from individual to collective co-production may be an important issue for policy. People's decision to act originates somewhere in-between self-interest and community-centred motivations. People judge the value of engagements based on their perception of a topic's importance, weighed against their investment of effort. They consider their own competencies and the potential results of their engagement. Individual characteristics related to socioeconomic variables, social connectedness and trust within (and between) networks affect attitudes and behaviours towards participation. Both individual and collective coproduction tend to be higher when respondents have a strong sense that people can make a difference ("political self-efficacy").

To engage a broader range of potential co-producers, therefore, activity designers in the public service must bear in mind, and take advantage of, the various factors that attract and motivate citizens to participate. In particular, individual expectations or levels of involvement may vary depending on the type or design of the co-production activities. For instance, citizen-initiated co-delivery (e.g. neighbourhood watch schemes, which are partly triggered by service dissatisfaction) have stronger feedback loops than institutionalised co-planning and co-management (e.g. through

Box 5.13. **Stimulating active engagement in co-production** (*cont.*)

user councils in health care organisations or civic bodies like advisory councils at primary schools). Nudge strategies can prove effective in moving citizens from no engagement to engagement, but they need to be rather strong to be effective.

1. Bovaird et al. (2016: 50) distinguish between "individual co-production", which is based on "voluntary behaviours that citizens undertake for their own consumption" so that "both the contributions made and the benefits received by citizens are at an individual level"; and "collective co-production", where "co-productive activities result in collective goods whose benefits may be enjoyed by the entire community."

Source: Van Eijk, C. and T. Steen (2016), "Why engage in co-production of public services? Mixing theory and empirical evidence", *International Review of Administrative Sciences*, Vol. 82/1, pp. 28-46; Bovaird, T. et al. (2016), "Activating collective co-production of public services: influencing citizens to participate in complex governance mechanisms in the UK", *International Review of Administrative Sciences*, Vol. 82/1, pp.47-68.

Redefining established accountability arrangements

Mixing roles between professionals, volunteers and service users creates a new, complex environment in which to produce and deliver public services. In this kind of environment, the issue of accountability becomes ever more important because of the engagement of actors with different political, operational, legal, and financial liabilities. The emergence of cases of "street-level bureaucracy", in which the dual principal-agent relationship between the public administration and the user is superseded, prompts to modify the concept of accountability (Box 5.14).

Box 5.14. **Nurturing different accountability arrangements: Conciliation in Finland**

The case of conciliation arrangements in Finland provides insights on how accountability arrangements may be adapted further to new forms of governance.

In the Finnish conciliation setting, volunteers and professionals are considered equal partners in the production of a legally regulated public service. Conciliation is a free and voluntary service, regulated by law.[1] The Ministry of Social Affairs and Health has overarching competence on the general supervision, management and monitoring of mediation services. Mediation is supervised and guided by regional state authorities. A regional mediation office organises conciliation activities; they train and coordinate the voluntary mediators for their tasks. The office cooperates with, among others, the local police authorities, prosecuting authorities and social welfare authorities. The initiative for conciliation may come from the police, the prosecution, social workers or even from the parties to conciliation, the offender or the victim. After the conciliation process has finished in the mediation office, the case returns to the district court for final resolution.

In this context, conciliation accountability relationships diverge from the typically vertical nature of political, legal and managerial accountability of public administrations to embrace a "professional form" of accountability. This means that the actors involved are held accountable by their peers and they practise collective self-management. This form of accountability is hence horizontal and based on expertise. It manifests itself through social control and peer evaluation.

In the Finnish case study, to be successful the conciliation arrangement implied the shared understanding and the agreement among all involved actors on the fact that professional accountability was exerted on the one side by professionals on the basis of the skills and expertise learned through work, whereas the volunteers offer their *persona* with their different backgrounds,

Box 5.14. **Nurturing different accountability arrangements: Conciliation in Finland** (*cont.*)

life experiences and worldviews for the service. Such inter-dependency is probably the glue that make this co-produced service work – the fact that both parties have something the others need.

Conciliation in Finland is mainly directed to preventing recidivism of young people. It hence bridges legal and social service provisions. Because the service users do not consider volunteers to be part of the authority, such co-produced conciliations tend to be successful. In Finland, the need to modify the accountability paradigm has been accepted by professionals and the public authority. It remains to be seen how this type of governance may be extended to societies with a highly professionalized legal service system, or whether conciliation endures as an exception in the system.

1. Act on Conciliation in Criminal and Certain Civil Cases (1015/2005), which came into force on 1 June 2006.

Source: Tuurnas, S. et al. (2016), "The impact of co-production on frontline accountability: the case of the conciliation service", *International Review of Administrative Sciences*, Vol. 82/1, pp.131-149.

Balancing ad hoc and routinised practices

The case just presented – like most of the instances of co-production – highlights the intrinsic challenge of such approaches: a certain willingness to break with orthodoxy. Institutionalising co-production yields to blurred boundaries between public and private authority, organisations and resources. The traditional linear process input-output-outcome and control is redefined with no clear, standardised protocols. Almost by their very nature, co-production arrangements are ad hoc because both the contexts and the involved actors vary each time.

While partners for collaboration (government services, NGOs, private sector, citizens' groups) are often chosen based on the problem at hand, it remains important to control flexibility and limit fragmentation. Failure to do this runs the risk of adding to further complexity; hampering institutional cumulative learning and hence increasing the entry costs to efficient collaboration ("starting from scratch" each time).

Stewart (2009) speaks of "dilemmas of engagement": government need to be well-equipped to recognise and deal with issues of power and control, risk and challenge. To avoid capture, backlash and confused accountabilities, it is essential for governments to develop a good strategic perspective, i.e. an overview of the costs and benefits of different courses of action and an understanding of the *realpolitik* (mapping the stakes for politicians, agencies and communities). Formal and informal ways of communicating with stakeholders need to be balanced.

Summarising from the governance of stakeholder engagement

Stakeholder engagement has been the object of repeated attention by most OECD governments, not least in the wake of the principles of the Open Government agenda. Still now, stakeholder engagement remains at the core of OECD countries' regulatory policies and international comparisons highlight several models and variants (OECD, 2015a; Alemanno, 2015). This chapter has reported on selected international experiences to illustrate the ongoing reflection by governments on how to improve the governance of

stakeholder engagement. With no ambition to capture the entire possible range of issues, the aim of the chapter is to provide inputs for reflective thinking and possible learning.

The issues presented here draw attention to the following main considerations:

- **Stakeholder engagement strategies are a vital resource but governments should not use them as a substitute of their role of designing and implementing regulations and to discharge responsibility.** Recourse to "the voice of the public" may backfire, in the sense of leading the public to question the capacity of governments to be in control of the regulatory framework; and to self-diagnose bottleneck and inefficiencies. This may lead, paradoxically, to less trust and legitimacy in the government action. It may also result in accepting (if not even incentivise) a more passive attitude by government services in learning from existing practice and seek constant, sustained improvement.
- **Possibly today more than ever, efforts to "reach out to the public" are challenged by issues related to the representativeness of the parties involved and the imperative to ensure them equitable power of "voice".** This applies to exclusive forms of engagement such as the "customer engagement" in utility regulation as well as to upstream debates and online consultations. The risk of manipulation and capture must be mitigated by, inter alia, i) crafting questions carefully; ii) adequately explaining the consultation scope and objectives; iii) requiring to transparently expose interests and affiliations; and iv) enforcing due process standards (for instance, in terms of transparency, by applying the so-called "public record" principle according to which decisions must be based exclusively on publicly available and reviewable evidence).
- **A further critical element is the importance of differentiating public consultation from the procurement of (scientific) evidence. The two processes rest on different rationales and pursue different purposes.** The latter should be grounded on clearly defined due process and quality standards – "the scientific method" – to ensure excellence and impartiality of the evidence underpinning decision-making, while controlling for impartiality from financial conflict of interests and bias.
- Co-production is a powerful approach to reduce silos and maximise policy synergies and spill-over but **it might not be cost-effective in the light of its intrinsic context-specific nature that challenges institutionalisation**. It is actually its flexibility and capacity to match the policy and regulatory environment in which it is applied that makes co-production successful. Each co-production solution is custom-made to the given context and unfolds along own logics. Each co-production solution is custom-made to the given context and unfolds along own logics. At the same time, lack of standardisation raises the question of replicability and cumulative institutional learning from what might remain fragmented experiences. Design Thinking is perhaps the most ambitious of the co-production approaches because of its iterative, experimental process. As this chapter has highlighted, co-production raises a series of governance questions which deserve further attention by reformers – about the incentives to embark in more or less systematic modes of co-production; about the capacities and the resources of both citizens and policy-makers to effectively engage and work on equal footing; and about the role of civil servants as objective and impartial facilitators of co-production processes.

- The capacity of co-production to mitigate risks of capture and over-representation needs further investigation. It is crucial to understand how and why citizens and end-users get motivated, mobilise and join-in. This includes accounting for self-selection biases. At the same time, civil servants play a critical role in making co-production initiatives work. Governments envisaging diffusing co-production practices should take these dimensions into account in order to maximise the efficiency of the whole process while avoiding ideological biases or capture. Concretely, it means identifying pro-reform public officials, elected representatives and citizens, understanding their motivations and incentives and considering forming broad, pro-reform coalitions.
- A further open issue related to co-production refers to its capacity to deliver beyond the design and provision of public services and be applied to the formulation of public policies. Linked also to this, the question of accountability deserves careful consideration, given the participation on a more or less equal footing of public and private actors with different political, legal and financial liabilities.

Notes

1. See www.opengovpartnership.org/about/open-government-declaration.
2. The composite indicators for stakeholder engagement measure four main areas; i) oversight and quality control; ii) transparency; iii) systematic adoption; and iv) methodology.
3. See https://cutting-red-tape.cabinetoffice.gov.uk/; www.faire-simple.gouv.fr/; and http://ec.europa.eu/smart-regulation/refit/simplification/consultation/consultation_en.htm#up, respectively.
4. See in this respect the experiences with promotion of Smart Grids collected at http://smartgridcc.org/sgcc-smart-grid-customer-engagement-case-studies/.
5. Either in terms of absolute quantity, of depth and diversification of skills, of inefficient allocation, or of a mix of the above.
6. On Australia, see https://www.dpmc.gov.au/sites/default/files/publications/best-practice-consultation.pdf; Canada, www.tbs-sct.gc.ca/rtrap-parfa/erc-cer/erc-cer-eng.pdf and www.dfo-mpo.gc.ca/Library/282189.pdf; the European Commission, see http://ec.europa.eu/smart-regulation/guidelines/tool_50_en.htm.
7. See https://www.whitehouse.gov/omb/oira_default.
8. See www.multicultural.vic.gov.au/grants/apply-for-a-grant/capacity-building-and-participation-program.
9. It is important to note that capture is here understood as an opportunistic drift of a close relationship between the regulator and specific regulated vested interests. Close collaboration between public authorities and industry may actually provide advantages in terms of information supply as well as timely and more effective compliance (Rubinstein Reiss, 2012)
10. See www.ema.europa.eu/ema/index.jsp?curl=pages/about_us/document_listing/document_listing_000178.jsp&mid=WC0b01ac0580029338.
11. See for instance: http://handbook.cochrane.org/.

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Chapter 6

Broad stakeholder engagement in policy making

by Wonhyuk Lim[1]

This chapter zooms in on the possibilities offered by broad stakeholder engagement in the problem-solving stage of policy making, particularly drawing on the insights from the experience of Korea. It looks at the implications that the various forms of engagement have on the policy makers and the civil service. As Korea's regulatory reform Sinmungo shows, crowdsourcing and open policy making can provide useful information that may have been overlooked by government officials, and even lead to practical solutions to various challenges in policy making. Although information collected through crowdsourcing may be idiosyncratic and uneven in quality, especially in the early phases of implementation, the quality of information is likely to improve over time with the learnings from accumulated experience.

1. KDI School of Public Policy and Management.

Introduction

Stakeholder engagement is usually defined as the practice of involving members of the public in the process of policymaking– in contrast to the traditional delegated model of government in which elected representatives, assisted by appointed experts, are left alone to make policy[1]. Although this definition of stakeholder engagement highlights the difference between the new *participatory* model of government and the traditional *delegated* model of government, it underestimates the stakeholder engagement component of the traditional delegated model, at least when there is some accountability and election mechanism. Even in the traditional delegated model, politicians, seeking their electoral success, have an incentive to listen to voters and stay in touch with their concerns and wishes. Voters influence politicians' policy agenda, and a smaller group of stakeholders, based on their interest and knowledge, affect policy development. Town hall meetings with voters provide an example of the former; business representatives' participation in public-private deliberation council meetings, an example of the latter. Viewed in this light, broad stakeholder engagement in the agenda-setting or problem-defining stage of policymaking has been around for a long time. So has narrow stakeholder engagement in the problem-solving stage of policymaking. What is relatively new in the new participatory model of government is *broad stakeholder engagement in the problem-solving stage of policymaking*. Although the desirability of such broad stakeholder engagement seems impeccable based on democratic principles, making it work in practice remains a challenge.

This chapter is organized as follows. To frame key questions regarding broad stakeholder engagement in policymaking, it first provides three perspectives on stakeholder engagement: participatory democracy and open government, capability and incentive, and political economy perspectives. After highlighting the intrinsic value of stakeholder engagement in terms of participatory democracy, this section examines its instrumental value in policymaking based on cost-benefit and individual payoff considerations. It then provides a typology of stakeholder engagement based on the range of participants, flows of information, and stages of the policymaking cycle. After highlighting the tension between representativeness legitimacy and effectiveness legitimacy, this section emphasizes that both "fair representation" and "robust evidence-based discussion" are needed. It then looks at the design and operation of stakeholder engagement in practice, such as the use of referendums in Switzerland (compared with the Brexit vote) and jury duty and stakeholder-recommended rulemaking in the United States. It then moves on to look at stakeholder engagement mechanisms in Korea. A particular attention is given to recent innovations to promote broad stakeholder engagement in policymaking such as Regulatory Reform *Sinmungo* (petition drum). Although information collected through crowd sourcing may be idiosyncratic and uneven in quality, such a "complaint-driven" exercise can play a useful role in regulatory reform by providing information that may have been overlooked by government officials and leading to practical solutions to problems. It finally offers some conclusions.

Perspectives on stakeholder engagement

The effectiveness of stakeholder engagement is influenced by the quality and structure of information flows, individual capability and incentive, and interaction among groups with different interests. Unfortunately, much of the existing literature on stakeholder engagement tends to overlook these practical issues and focus instead on its desirability from a good governance angle. It highlights the *intrinsic* value of stakeholder

engagement in terms of participatory democracy, but has little to say about its *instrumental* value in policymaking. This section presents three different perspectives on stakeholder engagement: participatory democracy and open government, capability and incentive, and political economy perspectives.

Participatory democracy and open government

A participatory democracy perspective starts from the premise that government should be of the people and by the people, not just for the people. According to this perspective, although a democratic election and accountability mechanism may help to ensure that elected representatives work for the people in principle, its effectiveness is limited in practice by the indirect and infrequent nature of its operation; special interest groups have much better access to politicians than ordinary citizens and influence policymaking in such a way to advance their interest. To address this problem, it is argued, citizens should take a more active role in government decision-making between elections through broad stakeholder engagement.

In its early years, the open government movement emphasized the "transparency of government actions, *accessibility* of government services and information and the responsiveness of government to new ideas, demands and needs," but in more recent years, it has increasingly devoted its attention to "co-creation and co-production of policy".[2] In other words, the government should go beyond being open to the public and promote broad stakeholder engagement in the problem-solving stage of policymaking.

The desirability of such stakeholder engagement seems impeccable based on democratic principles, but the question is how it can actually work in practice. Do citizens and policymakers have the necessary capability and incentive to make participatory democracy and open government a reality? As in regulatory impact assessment (RIA), do they have the capability to understand relevant issues connected with the problem, examine various policy options and weigh their benefits and costs, and formulate workable solutions that can be implemented effectively? Even if they have the necessary intellectual capability, do they have an incentive to spend time and energy on "co-production"? Is there a risk that those who are able and willing to do so have a private interest in co-producing a particular outcome? How can government officials retain "embedded autonomy" under democratic accountability and act as impartial facilitators in stakeholder engagement toward "co-production"?[3]

Capability and incentive

A capability and incentive perspective on stakeholder engagement essentially poses three questions: 1) Do citizens have requisite capability and incentive to make informed decisions? 2) Do policy makers have the requisite capability and incentive to facilitate stakeholder engagement? 3) What is the cost and benefit of stakeholder engagement?

While it may be possible in principle to involve ordinary citizens in all forms of deliberative activities, their individual capability and incentive should be taken into account. Not everyone has the capability to analyze complex legal, scientific, or technical information. This is the domain of experts with requisite knowledge and experience. That said, it may be argued that ordinary citizens, much like policymakers, can make a reasonably good judgement based on comments and opinions presented by experts. In other words, in terms of technical knowledge, the difference between ordinary citizens and policymakers may be much smaller than that between ordinary citizens and experts or between policymakers and experts. Take a jury trial for an example: A judge facilitates

the proceedings, forensic experts provide technical comments and opinions, the prosecutor and the defendant are cross-examined, and jurors reach a verdict. In an analogous manner, a government official can facilitate the proceedings, experts provide technical comments and opinions, interest groups are cross-examined, and ordinary citizens participating in "co-production" can help to make a decision, which is usually more complicated than a binary (guilty or not guilty) decision in a trial—but not formidably so. Thus, at least on the capability side, ordinary citizens should be able to engage in "co-production" if they are assisted by institutional infrastructure similar to the one available for a jury trial. On the incentive side, too, if ordinary citizens are required to participate in policymaking and some form of compensation is provided for their opportunity cost, it should be possible to motivate them for stakeholder engagement. Analogous to jury selection, however, a mechanism must be in place to reduce the self-selection bias; otherwise, those who have more to gain from participating in stakeholder engagement are more likely to "volunteer" their service and affect decision-making in a way that is consistent with their interest.

Policymakers are supposed to have the requisite capability and incentive to formulate policy, but they may need to develop new skills if they are to serve as facilitators and co-producers in broad stakeholder engagement in the problem-solving stage of policymaking. Still, they should be held accountable for the final "co-produced" product, lest they outsource policymaking and avoid accountability.

Even if it may be possible in principle to ensure that the public and the government have the capability and incentive to make stakeholder engagement a reality, basic cost-benefit considerations seem to place some practical limits. For instance, for matters related to the interpretation of constitutional law, it would seem more cost-effective to rely directly on judges and constitutional scholars rather than on ordinary citizens who must digest comments and opinions provided by experts.

More systematically, one could imagine conducting regulatory impact assessment on stakeholder engagement. Relevant questions would include:

- Does the benefit of stakeholder engagement justify the cost?
- What is the difference in policy outcome with vs. without stakeholder engagement? What is the instrumental value of broad public participation?
- What is the difference in citizens' satisfaction (e.g., sense of ownership) with vs. without stakeholder engagement? What is the intrinsic value of policy ownership and buy-in?
- What is the cost of educating the general public about relevant issues and options so that they can make informed comments and choices during stakeholder engagement (ensuring public awareness and participation literacy while avoiding information overload)? How much compensation is needed to ensure their participation?
- What is the cost of educating policymakers so that they can avoid (information and non-information) capture by interest groups during stakeholder engagement? How much does broad stakeholder engagement incrementally raise the prospect of capture, though, compared with narrow stakeholder engagement in the traditional setting?

Political economy

Different types of politics are likely to prevail depending on the distribution of benefits and costs associated with regulations. In some cases, both the benefits and costs of a regulation may be highly concentrated. For example, suppose the government is setting an industry standard by choosing between A and B, advocated by Group A and Group B, respectively. If the government chooses A as the industry standard, Group A will make a handsome profit while Group B will suffer a huge loss. In this case, the two groups are likely to engage in intense lobbying effort to have their system adopted as the industry standard through the new regulation. They will volunteer their comment and advice even if the government does not organize a formal consultation process. With Group A and Group B competing to make their respective argument, there is little risk of the government being misled by one-sided information, although, even in this case, it would be better for the government to solicit comment and advice from consumers, manufacturers, and researchers as well.

In other cases, by contrast, the benefits of a regulation may be widely dispersed while its costs are highly concentrated. For example, a regulation to restrict tobacco sales may bring about a significant improvement in overall public welfare, but this benefit is widely dispersed among many citizens; whereas, the cost of such a regulation is highly concentrated among tobacco companies. In this case, tobacco companies would have a much greater incentive to fight against the regulation than would citizens to support the regulation because each of them has only a small individual payoff. For such a regulation to be adopted, it requires what is called entrepreneurial politics: It needs a political entrepreneur who can mobilize a large number of citizens to overcome vigorous opposition from tobacco companies. Such a political entrepreneur has a different payoff structure from ordinary citizens. In the absence of such a political entrepreneur, tobacco companies are likely to dominate the policy discussion, if the government does not actively seek comment and advice from ordinary citizens through a well-designed stakeholder engagement process.

In the reverse case, where the benefits of a regulation are concentrated and its costs are dispersed, the regulation is championed by interest groups who may offer their organized support to politicians. Such client politics is quite common. For example, companies may attempt to restrict competition through such regulations as legally mandated resale price maintenance for books or prohibition on consumer subsidies offered by producers. These companies are likely to argue that curbing "excessive competition" will improve consumer welfare in the long run. Unless stakeholder engagement is designed in such a way to provide opportunities for consumers to express their concerns, politicians are likely to be swayed by one-sided information provided by producers.

Finally, when both the benefits and costs of a regulation are widely dispersed, there may not be any interest group willing to expend resources to collect relevant information—one-sided or not—and offer comment and advice. In this case, the government should proactively collect relevant information and solicit comment and advance from stakeholders likely to be affected by the prospective regulation.

In the diagram below, (1) pits interest groups against each other; (2) and (3) essentially pit a well-organized and highly motivated interest group against the general public; and (4) pits broad segments of the general public against each other. In designing stakeholder engagement, the government should take these critical differences into account.

Table 6.1. **Types of politics based on the payoff structure of the regulation**

		Costs of Regulation	
		Concentrated	Dispersed
Benefits of Regulation	Concentrated	(1) Interest group politics (e.g., Group A vs. Group B in standard-setting)	(2) Client politics (e.g., restricting competition)
	Dispersed	(3) Entrepreneurial politics (e.g., restricting tobacco sales)	(4) Majoritarian politics (e.g., choosing between new flag designs in New Zealand)

Source: James Q. Wilson (1980), *The Politics of Regulation*, Basic Books, New York.

Typology of stakeholder engagement

Stakeholder engagement in regulatory context is defined as the practice of involving members of the public in the process of policymaking. Imagine a baseline model of government without any stakeholder engagement, where officials, assisted by appointed experts, are left alone to make policy. Stakeholder engagement changes this baseline model by having government officials interact with the public in the process of policymaking. Types of stakeholder engagement can be classified based on who are involved and how and when they are involved.

Range of participants

Stakeholder engagement can be narrow or broad, depending on who are involved, based on their interest and knowledge with regard to the issue at hand. In narrow stakeholder engagement, only those who have a fairly significant amount of interest and knowledge with regard to the issue at hand are involved in the process of policymaking. An example is provided by public-private deliberation council meetings for innovation policy, involving government officials, business representatives, scientists, engineers, and other experts. In broad stakeholder engagement, the scope of involvement is extended to the general public. An example is participation by consumers and workers in the formulation of innovation policy. Such broad stakeholder engagement may be justified on the grounds that innovation policy affects citizens' well-being and that they may have general concerns, even though the extent of their interest and knowledge in the issue area may be limited (for example, with regard to genetically modified organisms, artificial intelligence, or climate change).

There may be a tension between representativeness legitimacy and effectiveness legitimacy (or expertise legitimacy) in stakeholder engagement. In the example cited above regarding innovation policy, public concern about the social impact of science should be represented in policymaking, but the procurement of scientific evidence should rest on clearly defined quality standards based on the scientific method. The general public, concerned about the social impact of science, may not know, or even care, about the science of science; however, policymaking cannot be on a solid ground without scientific knowledge and empirical evidence. Although it has become popular to talk about "the death of experts" in the wake of the global financial crisis and other events that experts had failed to predict, the failure of experts does not mean that the scientific method is worthless. Rather, it means that there should be redoubled effort to go beyond prejudice-based policymaking, ideological or otherwise, and procure scientific evidence

and communicate this evidence to the general public. Though important in stakeholder engagement, representativeness legitimacy is not the overriding value; policymaking should be evidence-based. To achieve "fair representation" and "robust evidence-based discussion," the risk of manipulation and capture should be mitigated by requiring transparency on interests and affiliations and enforcing due process standards. Cross-examination and international benchmarking could be useful as well.

Flows of information

Stakeholder engagement can also be classified based how members of the public are involved, especially with regard to the direction of information flows between the government and the public. There are mainly three types: notification, consultation, and participation.

Public notification involves only one-way information flows from the government to the public, with little opportunity for the public to influence these information flows. The extent of public participation is minimal in this case.

Public consultation involves two-way informational flows whose structure is largely determined by the government. In public consultation, the government typically solicits comments and opinions from the public regarding questions framed and posed by the government. The extent of public participation and its impact on policy depend heavily on the structure of consultation and the degree to which the government is willing to change its initial position based on the result of consultation. If the government frames questions in such a way as to elicit responses in support of the government's position and disregards dissenting comments and opinions from the public, consultation would be little more than an "alibi" exercise, designed to provide the government with evidence for stakeholder engagement in the course of policymaking. As an old Simon & Garfunkel song would say, a public hearing in this case would be an occasion for the government to hear what it wants to hear and disregard the rest. In fact, some scholars have cited cynicism due to past record as an obstacle to effective stakeholder engagement: "Consultations have all too often been used to legitimize decisions that have already been taken, or as mere 'tick-box' exercises." (Alemanno, A. (2015), pp. 133-134). By contrast, if the government poses questions without assuming "appropriate" responses and modifies draft policy based on feedback provided by the public, consultation could serve as a useful component of policymaking.[4]

Public participation goes beyond consultation and involves two-way exchanges of information between the government and the public. The degree to which the government structures information flows is lower in public participation than consultation. Rather than soliciting comments and opinions from the public on a fairly well-defined draft proposal, the government engages in dialogue and deliberation with the public to identify problems and search for their solutions. For public participation to be effective, both the government *and* the public should have (or quickly develop) relevant knowledge about the issues and be open-minded about dialogue and deliberation, willing to work together to examine alternatives and arrive at practical solutions. The government should not use this mechanism to outsource decision-making to the public and avoid accountability. Recourse to stakeholder engagement, designed to promote participatory democracy, may lead the public to question the capability of governments to be in control of the regulatory framework and hence paradoxically weaken the public's trust in the government. Stakeholder engagement may also lead governments to adopt a passive attitude and reduce their incentive to self-diagnose problems and seek improvements.[5] If stakeholder

engagement increasingly transfers such responsibilities from governments to the general public, it would raise a fundamental question about what "policymakers" are being paid for.

Stages of the policymaking cycle

Finally, stakeholder engagement can be classified based on the policymaking stage in which it takes place: policy initiation and agenda-setting, development and design, implementation and enforcement, and monitoring and feedback.

In the policy initiation and agenda-setting stage of the policymaking cycle, examples of stakeholder engagement include referendums, petitions, and initiatives, as well as open-ended town hall meetings. Typically, these participatory measures focus on a single issue for which a yes-or-no vote by the public is feasible. Based on the result of the vote, specific policy is developed in the subsequent stage, if needed. In this case, policymaking is intimately connected with a plebiscitary process.

Perhaps the best-known example in this regard is Switzerland, which practices direct democracy in parallel with representative democracy to a much greater extent than any other modern democratic nation. Direct democracy in Switzerland allows citizens to propose a modification of the constitution through a popular initiative or challenge any new law approved by the parliament through a legislative referendum. A minimum of 100,000 citizens (approximately 2.5% of the electorate) and 50,000 citizens, respectively, is needed for a popular initiative and a legislative referendum. In Switzerland's political system, the constitution defines in some detail all areas subject to federal legislation; anything not explicitly mentioned is left to the legislation of the cantons (federal states). A double majority is required to change the constitution: a majority of the electorate and a majority of the canton votes. All federal laws are subject to a four-step process.

1. The first draft of a new law is prepared by experts in the federal administration.
2. This draft is presented in a formal consultation process during which cantonal governments, political parties as well as many non-governmental organizations and associations of the civil society may comment on the draft and propose changes.
3. The result is presented to dedicated parliamentary commissions of both chambers of the federal parliament, and revised drafts of a new law are discussed in detail behind closed doors and debated in public sessions of both chambers of parliament before legislation.
4. If a minimum of 50,000 citizens within 3 months sign a form demanding a referendum on a new law, a legislative referendum must be held. Unlike constitutional changes, a new law only needs to secure a majority of the national electorate to pass a referendum, not a majority of the canton votes.

This system tries to achieve representativeness legitimacy *and* effectiveness legitimacy with carefully defined roles for voters and their representatives and experts. Both voters and their representatives can initiate a legislative agenda. In the case of a voter-led constitutional modification, a minimum of 100,000 citizens (approximately 2.5% of the electorate) is needed to qualify for a popular initiative. On the basis of a legislative agenda, experts prepare the first draft of a new law. Citizens are then asked to comment on the draft and propose changes in a formal consultation process. Their representatives in the parliament in turn take up the result of the consultation and craft the

new law after extensive discussions. Voters have a final say on the new law through a referendum, if a minimum of 50,000 citizens within 3 months demand it. The threat of a referendum helps to ensure that the formal consultations and parliamentary debates are carried out in good faith and that new laws secure majority support.

At least four times a year, voting takes place in Switzerland so that voters can show their preferences regarding issues raised by popular initiatives and referendums, as well as elect their representatives. The most frequent themes covered by initiatives and referendums have to do with taxes, welfare, public transport, immigration, and education. This structure ensures that direct democracy is practiced in parallel with representative democracy on a regular basis while minimizing costs. It is argued that the Swiss system not only facilitates direct participation by its citizens but also promotes consensus politics.[6]

Although more than 100 years of Switzerland's experience with legislative referendums and popular initiatives show that these participatory measures can indeed work, there may be pitfalls in practice. For example, as the *Brexit* vote in 2016 shows, one or both of the choices in a referendum may be ill-defined. In the case of Brexit, choosing to remain in the European Union (EU) meant basically upholding the status quo and possibly making minor adjustments in Britain's relationship with the EU. By contrast, choosing to leave the EU meant different things to different people, especially with regard to immigration and access to the single market. Although a number of pro-Brexit politicians campaigned on the premise that Britain could prevent the free movement of people while retaining its access to the single market, the viability of such an option was and still is doubtful. If the public had been asked to choose between the status quo and a well-defined and realistic Brexit option (e.g., Norwegian option, Swiss option), rather than an ill-defined residual option influenced by wishful thinking, the referendum result might have been quite different. There was also a sense that the Brexit vote became a general referendum on the performance of the government in addressing people's economic and social concerns, rather than merely the leave-or-remain question.[7] In short, for this mode of stakeholder engagement, it is a challenge to formulate well-defined and realistic options *and* inform the public of these options for their yes-or-no vote. If a highly motivated group of individuals make a "fantastic" proposal and frame issues in such a way to appeal to the public's pressing concerns, and if policymakers are unwilling or unable to make effective counter-arguments, there is a risk that this mode of stakeholder engagement would deliver a politically irreproachable but intellectually indefensible outcome. One could say that "the people have spoken" but they may have been misinformed.

In the policy development and design stage, examples of stakeholder engagement include notice-and-comment, negotiated rule-making, other consultation and participation. Because policy development and design requires a much greater understanding of issues than policy initiation and agenda-setting, it tends to involve a smaller group of stakeholders with interest and knowledge.

A recent U.S. effort to establish regulations for drones provides a good example of such stakeholder engagement in the policy development and design stage. In February 2016, the U.S. Federal Aviation Administration (FAA) established an aviation rulemaking committee consisting of aviation stakeholders to recommend within a month "performance standards and requirements for certain unmanned aircraft systems (UAS) that are operated over people who are no directly participating in the operation of the UAS or under a covered structure." The committee consisted of 26 members,

representing UAS manufacturers, UAS operators, consensus-standards organizations, researchers, and consumer groups. The FAA had initially contemplated creating a "micro" classification for UAS defined primarily by weight and materials in the Notice of Proposed Rulemaking for small UAS in 2015, but after reviewing comments on the proposed rule, the FAA decided instead to pursue "a flexible, performance-based regulatory framework that addresses potential hazards." To develop such a framework, the FAA established the aviation rulemaking committee. Specifically, the committee was asked to: 1) develop recommendations for a performance-based standard for the classification of micro UAS; 2) identify means-of-compliance for manufactures to show that unmanned aircraft meet the performance-based safety requirement; 3) recommend operational requirements for micro UAS appropriate to the recommended performance-based safety requirement.[8]

If ordinary citizens are to participate directly in policy development and design, they need to have the motivation and the requisite knowledge. As seen in the case of jury duty, it is possible for members of the general public to participate in deliberative activities for weeks or even months if supporting institutional conditions are in place. In the United States, for instance, jury duty is mandatory. Government and quasi-government organizations give their employees a paid-leave status for the duration serving as a juror, and employers in general are not allowed to fire an employee for being called to jury duty. If broad stakeholder engagement in the problem-solving stage of policymaking is desired as civic service consistent with the ideal of participatory democracy, similar institutional adjustments may have to be made. Of course, just as the interpretation of constitutional law is left to Supreme Court justices and legal scholars, not members of the general public as jurors, there is a limit to extending stakeholder engagement in the problem-solving stage of policymaking.

In the policy implementation and enforcement stage, examples of stakeholder engagement are relatively scarce. In general, members of the public have neither the authority nor the capability and incentive to implement and enforce policy. Also, the rule of law and democratic accountability suggest that there should be clear limits in this regard, because policy implementation and enforcement implies placing restrictions on individual freedom and those who are legally authorized to exercise such power should be subject to strict qualification and accountability standards. In a related vein, entrusting business associations to implement and enforce regulatory policy against their members (so-called "self-regulation") is problematic due to conflicts of interest.

In the policy monitoring and feedback stage, however, members of the public can play a useful role. They can monitor how effectively policy is implemented and enforced on the ground and help identify emerging bottlenecks and problems, especially if they have the needed capability and incentive. The government can verify information provided by the public and make policy adjustments, if needed. A recent example of stakeholder engagement in the policy monitoring stage in Korea is *Ran-parazzi*, who, seeking a government reward, take photos of any activity potentially in violation of the Improper Solicitation and Graft Act (popularly known as the Kim Young-Ran Act, named after a former Supreme Court justice who advocated this legislation). Although this type of stakeholder engagement may be justified on the ground of public interest (fight against corruption) and limited enforcement resources, some may find it a little spooky to have citizens "spying" on one another. An improved delivery of social services based on people's comments and suggestions may be a more palatable example of stakeholder engagement in the policy monitoring and feedback stage.

Stakeholder engagement mechanisms in Korea

Korea has a long tradition of involving business representatives in the development of trade and industrial policy. For example, Korea held monthly export promotion meetings from 1965 to 1979 to monitor progress on exports and detect and mitigate constraints as they emerged.9 However, broad stakeholder engagement in policymaking has been quite rare. Aside from a separate provision for a mandatory referendum on a constitutional amendment (Article 130), the Constitution contains a provision on national referendums (Article 72), but it is up to the President to submit "important policies relating to diplomacy, national defence, unification and other matters relating to the national destiny" to a national referendum if he or she deems it necessary. Other issues such as social welfare and education cannot be submitted to a referendum, and even if a large number of voters demand a referendum, it cannot be held unless the President decides to call for it. In other words, Korea's national referendums are quite different from those based on the notion of direct democracy such as Switzerland's.10 In the regulatory sphere, there have been recent innovations to go beyond traditional private consultations and engage the general public in policymaking. The Public-Private Joint Regulation Advancement Initiative builds on the traditional narrow engagement model. Regulatory reform *Sinmungo* (petition drum) provides an example of broad stakeholder engagement.

Private-public joint group on regulatory improvement

The Public-private joint regulation advancement initiative is led by the Korea Chamber of Commerce and Industry (KCCI), Korea Federation of SMEs (KBIZ) and the Prime Minister's Office, with representatives from business associations for small and medium-size enterprises, construction companies, trading companies, and others.[11] It holds regular consultations with businesses by sector and region to identify regulatory problems and recommend solutions. There are primarily two types of consultations: *Ttok Ttok Talk* and *Majung Talk*.

Ttok Ttok is a homonym for "knock, knock" in Korean; it also means "being smart." *Ttok Ttok Talk* is a monthly consultation meeting organized by the Public-Private Joint Regulation Advancement Initiative with businesses in a specific region on a specific regulatory theme. The Group chooses a region to visit and regulatory topics for discussion before each meeting.

Majung means "come to meet or welcome a visitor" in Korean. *Majung Talk* is a consultation meeting organized by the Group on regulatory matters by sector. Essentially, the Group invites sectoral stakeholders to discuss regulatory issues.

Regulatory Reform Sinmungo (petition drum)

Historically, *Sinmungo* was a petition drum set up inside a gate tower in front of the royal palace in 1401. It is now used as the name for online and offline petition channels for the general public. Regulatory reform *Sinmungo* uses an online portal (better.go.kr), and a task force at the Prime Minister's Office (PMO) handles petitions submitted by citizens.

Regulatory Reform *Sinmungo* proceeds in three stages:

- After receiving a petition, the PMO task force relays it to the relevant line ministry, which must give a reply within 14 days among the following three choices: accept, mid- to long-term review, or reject.

- If the PMO judges the petition to be a reasonable suggestion despite a non-acceptance reply from the relevant line ministry, it asks the ministry to explain and either accept / propose an alternative or maintain the regulation as before.
- If the PMO still believes that there is room for improvement despite the ministry's rationale for maintaining the regulation, it can advise the Regulatory Reform Committee to review the regulation.

The PMO calls the petitioner at least three times, to acknowledge receipt of the petition, notify that it is under review, and deliver the response. The petitioner can monitor what is happening to his or her petition through the online portal in real time, and request an explanation when the petition is not accepted.

Some examples of regulatory reform initiated through this channel include the following:

1. **Foreign patient quota at high-class general hospitals.** To ensure that Korean patients, covered by national health insurance, are not crowded out of Korean hospitals by foreign patients, the government imposed the quota for foreign patients at 5% of hospital beds in high-class general hospitals. However, many single-patient rooms remained vacant because they were much more expensive for patients than, say, four- or six-patient rooms. Through Regulatory Reform *Sinmungo*, high-class general hospitals indicated that there was room for improvement in the regulation that would help them to provide services to more foreign patients without crowding out Korean patients. Based on their request, the government decided to change the regulation so that the number of hospital beds in single-patient rooms would not be included in the calculation of the 5-percent quota. Thus, hospitals, foreign patients, and Korean patients were able to find a win-win-win solution based on a petition submitted through *Sinmungo*.
2. **Zone-based regulation in industrial complexes.** For health and safety reasons, given the limits of prevailing technologies at the time, the government strictly separated industrial, support, public facility zones within an industrial complex and restricted the types of facilities that could be sited in each of the zones. With improvements in technology, however, it became more feasible to ensure the health and safety of workers without having to resort to the strict separation of zones, and workers' well-being could be improved by placing industrial and support facilities in the same building complex. Based on a petition submitted through *Sinmungo*, the government changed the regulation so that industrial and support facilities could be established in the same zone.
3. **Illegally registered vehicles.** If a vehicle registered under an individual or a company is sold or transferred to another individual or company without a formal change in registration and the vehicle is then used in a crime, it would be difficult to track down the individual or company that actually committed the crime. Due to a loophole in the rules regarding the registration of vehicles, the government had no authority to cancel the registration for such an illegally registered vehicle. The government introduced a new regulation providing the government the authority to cancel the illegal registration, prohibit the vehicle's operation, and impound the license plate on the basis of the registered owner's request. In this case, if a petitioner had not alerted the government, the legal loophole might have gone undetected.

4. **Long-term savings accounts for housing.** The government provided the holder of a long-term savings account for purchasing a house a tax deduction for interest income if the purchase is made within 3 months *prior to* closing the account. This made it difficult to use the money from the savings account to purchase a house without incurring the loss of the tax deduction. Through Regulatory Reform *Sinmungo*, a citizen suggested that the regulation be changed to within 3 months *after* closing the account. However, the government felt this would lead to a significant verification cost and complicate the tax procedure. Instead, the government opted to provide a tax refund if the holder of such a savings account provided evidence for the purchase of the house. In this case, building on the idea submitted by a petitioner, the government was able to craft a practical solution to the problem.

5. As these examples indicate, broad stakeholder engagement such as *Sinmungo* can provide useful information that may have been overlooked by government officials and even lead to tangible solutions to problems. Although information collected through crowd sourcing may be idiosyncratic and uneven in quality, such a "complaint-driven" exercise can play a useful role in regulatory reform. In 2015, more than 2,200 petitions were submitted through *Sinmungo*. Ordinary citizens contributed 56.2% of these petitions, whereas the self-employed and businesses contributed 26.0% and 15.3%, respectively. 920 out of the more than 2,200 petitions led to policy changes. In 2016, 3,737 out of 9,492 petitions submitted through *Sinmungo* led to policy changes, for an acceptance rate of 39.4%. Back in 2013, the acceptance rate had been only one-fifth of this figure. This seems to reflect a significant improvement in the quality of information submitted through *Sinmungo*.

Conclusion

Despite its intrinsic value based on democratic principles, broad stakeholder engagement in policymaking remains a challenge. To achieve both representativeness and effectiveness legitimacy, it should be designed in such a way to account for the capabilities and incentives of participants. The government should go beyond being open to the public and promote co-creation and co-production of policy, but there are practical limits to such stakeholder engagement given the public's knowledge and interest in relevant issue areas and the costs and benefits involved. Although it has become popular to talk about "the death of experts," there should be redoubled effort to go beyond prejudice-based policymaking, and procure scientific evidence and communicate this evidence to the general public. The government also should not outsource policymaking to the public to avoid accountability. To achieve "fair representation" and "robust evidence-based discussion," the risk of manipulation and capture should be mitigated by requiring transparency on interests and affiliations and enforcing due process standards. Cross-examination and international benchmarking could be useful as well.

Switzerland provides a useful example, with carefully defined roles for voters and their representatives and experts. Both voters and their representatives can initiate a legislative agenda. In the case of a voter-led constitutional modification, a minimum of 100,000 citizens (approximately 2.5% of the electorate) is needed to qualify for a popular initiative. 1) On the basis of a legislative agenda, experts prepare the first draft of a new law. 2) Citizens are then asked to comment on the draft and propose changes in a formal consultation process. 3) Their representatives in the parliament in turn take up the result

of the consultation and craft the new law after extensive discussions. 4) Voters have a final say on the new law through a referendum, if a minimum of 50 000 citizens within three months demand it. The threat of a referendum helps to ensure that the formal consultations and parliamentary debates are carried out in good faith and that new laws secure majority support. Perhaps broad stakeholder engagement in policymaking could be enhanced if well-informed and fairly represented stakeholders are invited to participate in rulemaking, particularly when cost-benefit calculations justify it. Because structured consultations involving sector or functional champions (e.g., business associations) may create biases in information collected and raise the risk of regulatory capture, it is imperative that stakeholder engagement involve pro-competition and pro-consumer experts in vetting information, and have them work with relevant ministries to produce better regulation. Also, as Korea's Regulatory Reform *Sinmungo* shows, crowd sourcing and open policymaking can provide useful information that may have been overlooked by government officials and even lead to practical solutions to problems. Although information collected through crowd sourcing may be idiosyncratic and uneven in quality, such a "complaint-driven" exercise can play a useful role in regulatory reform. Moreover, as there is learning from accumulated experience, the quality of information is likely to improve over time.

Notes

1. For a good overview of stakeholder engagement, see Alberto Alemanno (2015), "Stakeholder engagement in regulatory policy," in OECD Regulatory Policy Outlook 2015 (Paris: OECD), pp.115-158.
2. See "Open Government" in OECD (2005), Modernising Government: The Way Forward.
3. For a discussion on embedded autonomy in the context of industrial policy, see Peter Evans (1995), Embedded Autonomy: States & Industrial Transformation (Princeton: Princeton University Press).
4. For a discussion on the evolution of the notice-and-comment process in the U.S. since the enactment of the Administrative Procedure Act (APA) in 1946, see Steven J. Balla and Susan E. Dudley (2015), "Stakeholder participation and regulatory policy making in the United States," in OECD Regulatory Policy Outlook 2015 (Paris: OECD), pp.159-190.
5. For a discussion on the negative potential effect of stakeholder engagement on proactive policymaking by the government, see Lorenzo Allio (2017), "Improving Regulatory Governance: Stakeholder Engagement" in this volume.
6. The Swiss system traces its origins to the country's tumultuous political situation in the first half of the 19th century, when it was split between conservatives and liberals. After the tensions culminated in a brief civil war in 1847, Switzerland opted for a confederation with limited federal powers and affirmed the fundamental rights of the individual. The Swiss Federal Constitution of 1848 was established on the basis of a double majority of the electorate and the canton votes. This was the first Swiss referendum. See Clive H. Church and Randolph C. Head (2013), A Concise History of Switzerland (Cambridge: Cambridge University Press).
7. Switzerland's referendums on its relationship with the European Union provide an interesting contrast to the Brexit vote. The Swiss electorate participated in a referendum in December 1992 on whether or not Switzerland should join the European Economic Area (EEA), whose membership provisions were clearly spelled out ahead of the vote. After the electorate rejected EEA membership by a narrow margin, Switzerland and the EU started bilateral negotiations for a special relationship based on mutually agreed conditions for Switzerland's economic integration with the EU. These negotiations resulted in two sets of treaties, each of which was subjected to a referendum in Switzerland. Each prospective treaty clearly defined what the yes-or-no vote meant in the respective referendum, and the regularity with which referendums were held in Switzerland implied that a referendum on a specific issue could be separated from a general referendum on the government's performance and that voters were relatively well-informed about the issues.

8. For more detail, see "Press Release—FAA Unveils Effort to Expand the Safe Integration of Unmanned Aircraft," February 24, 2016, at: https://www.faa.gov/news/press_releases/news_story.cfm?newsId=20015.

9. Chaired by the President and attended by high-ranking government officials and business representatives, monthly export promotion meetings provided a forum to monitor progress and devise institutional innovations and solutions to emerging problems. At each monthly meeting, the Minister of Commerce and Industry gave a progress report on export performance by region and product relative to the targets set out in the annual comprehensive plan for export promotion. The Minister of Foreign Affairs gave a briefing on overseas market conditions. Government officials and business representatives then tried to identify emerging bottlenecks and constraints that impeded export performance and devise solutions to these problems. Subsequent meetings monitored progress and ensured implementation. Export insurance was one of many institutional innovations that were introduced as a result of recommendations from monthly export promotion meetings. See Wonhyuk Lim (2012), "Chaebol and Industrial Policy in Korea," *Asian Economic Policy Review*, Vol. 7, pp. 69-86.

10. In fact, aside from referendums on constitutional amendments, the only national referendum held in Korea was called under repressive conditions in 1975 by then-President Park Chung Hee to legitimate his authoritarian Yushin Constitution of 1972.

11. For more detail, see www.smartregulation.or.kr.

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PART III

Regulatory impact assessment

Chapter 7

Regulatory impact assessment: Incentive structures in the UK better regulation framework

by Ken Warwick and Faisal Naru[1]

This chapter presents practices and experiences in designing and implementing regulatory impact assessment in the United Kingdom. It focuses on the United Kingdom experience with regulatory reform and documents the history of the United Kingdom's better regulation agenda and then examines how recent initiatives affect the incentives in place to undertake good regulatory impact assessment (RIA). It also critically assesses the control mechanisms used in the United Kingdom to limit the amount of regulatory cost imposed on business. The chapter sets out how the chosen measure of business impact – the Equivalent Annual Net Direct Cost to Business – is calculated and assesses its merits as a target for policy. It also draws on United Kingdom experience to set out some principles for undertaking good regulatory impact analysis and briefly discusses some alternatives to cost-benefit analysis.

1. Ken Warwick is a consultant in economics and a member of the UK Regulatory Policy Committee, an independent scrutiny body. He is writing in a personal capacity and the views expressed in the paper do not necessarily represent those of the Regulatory Policy Committee. Faisal Naru is a Senior Economic Adviser at the OECD, Paris. The authors would like to thank Sue Bide, Ian Bishop, Filippo Cavassini, Wonhyuk Lim, Phil McCrea, and Hiroko Plant for helpful input and comments on earlier drafts.

Introduction

Since the late 1980s, successive governments in the United Kingdom have had policies in place to improve the quality of regulation and reduce its impact on business. Although an international trend, the United Kingdom was one of the first to introduce a systemic tool for improving the economic analysis of new regulatory interventions. In the late 1990s the requirement for conducting regulatory impact assessment was made compulsory by Prime Minister Tony Blair for any new regulatory proposal from any government department. This was followed by a number of transformative reviews and initiatives that have shaped the current regulatory management system. These reforms have changed the infrastructure and methodology around regulatory impact assessment (RIA) in ways designed to improve the incentives faced by policymakers and regulators.

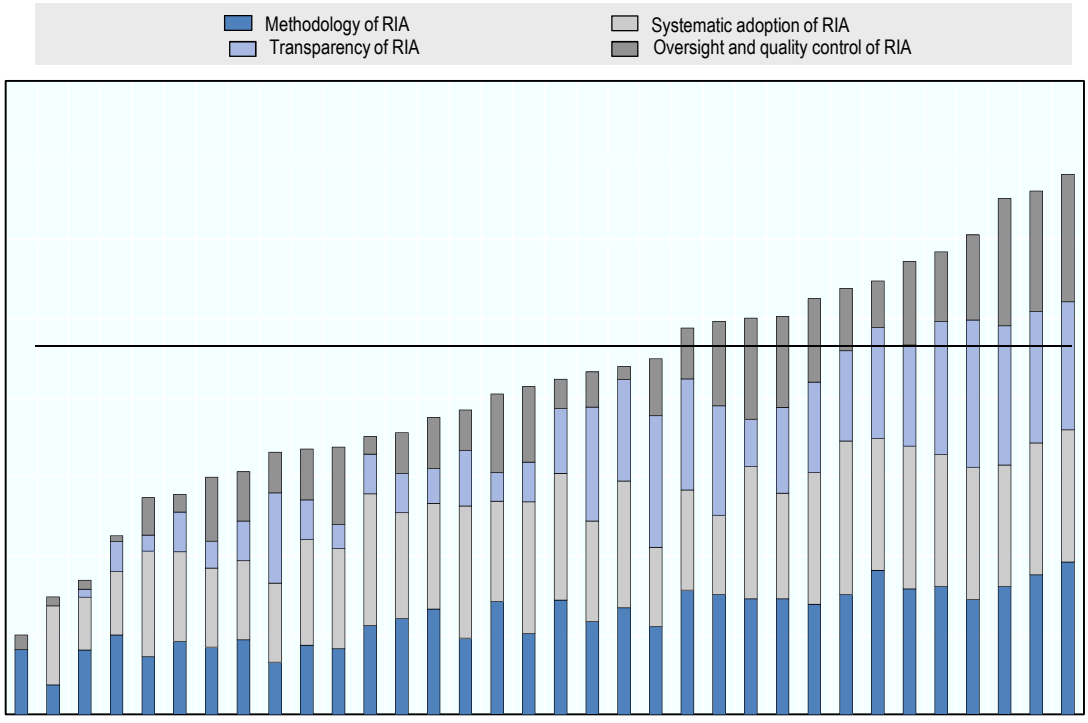
In any market economy, a system of regulation is essential to underpin a fair and competitive market, promote economic growth, support business and protect consumers, society and the environment. Regulation, however, imposes costs on business as they implement and demonstrate their compliance with the regulatory requirements of government. If unchecked, regulation can become more complex and cumbersome over time and the costs to the economy can be significant. Excessive regulation impedes innovation and creates unnecessary barriers to trade, investment and economic efficiency. Moreover, this tendency can be exacerbated if policy makers seek to deliver policy objectives through regulation rather than public spending at a time when public finances are under pressure.

This chapter does not consider in any detail the evidence around the contribution better regulation can make to enterprise, growth and employment (for a review, see Frontier Economics, 2012). Nor does it consider the evidence on how improved RIA affects policy. It is taken as axiomatic that better impact assessment makes for better policy and that better regulation is conducive to enterprise and growth. Instead we focus on the incentives in place to undertake proper Impact Assessment and to limit the amount of regulatory cost imposed on business. The purpose of the chapter is to focus on how RIA is implemented and the control mechanisms in place to make sure regulation is appropriate.

The justification for focusing on the United Kingdom is that there is evidence that the regulatory environment has improved in the United Kingdom in recent years and that the United Kingdom is lightly regulated by OECD standards. A survey of business perceptions, undertaken jointly by the National Audit Office with the Department for Business, Innovation and Skills (NAO and BIS, 2014), found that although 51% of businesses saw the level of regulation in the United Kingdom as an obstacle to business success, this was down from 62% in 2009. The latest survey published in August 2016 revealed a further slight fall to 49% in 2016 (BEIS, 2016).

In 2013, United Kingdom product market regulation was the second least restrictive among developed economies (Koske et al, 2015). A report commissioned by BIS (Frontier Economics, 2012) concluded that "the United Kingdom is a highly deregulated economy when compared to other OECD countries". The United Kingdom is also seen as a leader in the implementation of Regulatory Impact Assessment[1] and its system much studied and admired.[2] Figure 7.1 shows that the United Kingdom scores highly in the OECD composite indicators for the effectiveness of regulatory impact assessment.

Figure 7.1. **Composite indicator: Regulatory impact assessment for developing primary laws**



Note: The results apply exclusively to processes for developing primary laws initiated by the executive. The vertical axis represents the total aggregate score across the four separate categories of the composite indicators. The maximum score for each category is one, and the maximum aggregate score for the composite indicator is four. This figure excludes the United States where all primary laws are initiated by Congress. In the majority of countries, most primary laws are initiated by the executive, except for Mexico and Korea, where a higher share of primary laws are initiated by parliament/congress (respectively 90.6% and 84%).

Source: OECD (2014).

It is, therefore, instructive to examine more closely the United Kingdom system. If business and external observers believe that government policy on regulation is moving in the right direction, are there features of the institutional set up and methodology that help promote this? This chapter provides a critical analysis of "how" RIA is implemented in the United Kingdom and the institutional and methodological factors that contribute to its effectiveness. Some pointers are also given in passing to ways in which the system could be improved and to comparisons with other countries. The chapter summarises and critically assesses the current practices of RIA in the United Kingdom including:

- the policy or legal requirements/frameworks;
- the mechanisms for institutionalisation;
- methodologies applied;
- evaluation or impact of RIA; and
- the role of key stakeholders (e.g. business/citizens and their associations, parliaments, audit offices, productivity commission) in making RIA successful.

The structure of the chapter is as follows. It first considers the history of regulatory reform from the 1980s until around 2010. It then examines the current institutional infrastructure around RIAs in the United Kindgom system, and the hard and soft levers that are in operation. It then move on to consider some of the methodological questions that arise in a RIA system; in particular, the choice of metric for target/budget, what constitutes good practice in RIA methodology and the limitations of cost-benefit analysis.

Drawing on the analysis, the final part suggests preliminary policy findings regarding the design, implementation and management characteristics of RIA programmes that might help improve the efficiency and effectiveness of regulatory policy and governance. A final section offers some concluding observations.

History of regulatory reform in the United Kingdom

Before examining in detail the current United Kingdom RIA system, this section provides the contextual basis for how RIA was first introduced in the United Kingdom and how it evolved over time along with the better regulation agenda as a whole. It demonstrates the many iterations and reinventions of regulatory reform and the sustained efforts that are still under way today.

In the late 1980s a Deregulation Unit was established under the Thatcher Government in the Department for Trade and Industry (DTI). Its focus was solely on reducing the regulatory burdens on businesses. Departmental Deregulation Units were also established to "support ministers in driving forward the review of regulations to ensure abolition of those which are unnecessary and to minimise the burden on business of necessary regulation.[3]

The DTI Deregulation Unit first introduced an analysis of the impacts of new proposals but was focused narrowly on the administrative costs of regulation. In addition there was no analysis of benefits. Analysis was conducted by the unit in DTI or Departmental Deregulation Units and efforts were made across government departments to utilise the analysis to prevent unnecessary administrative costs on businesses from new regulations.

The DTI unit was moved to the Cabinet Office in 1996 where there began a marked shift from reducing existing burdens to focusing efforts towards the overall quality of new regulations and in particular a greater focus on assessing the impacts of new regulations. A whole-of-government approach was an important part of this change.

In 1997, the central deregulation unit was transformed into the Regulatory Impact Unit (RIU) and in August 1998 Regulatory Impact Assessments were introduced under the Blair Government. The requirement was mandatory and was applicable to any new law, regulation or policy that would have an impact on businesses, charities or the voluntary sector. The RIA framework introduced the requirement to assess both the costs and the benefits of regulatory proposals.

The RIU's remit was to reduce the existing regulatory burdens (*stock*) and enhance the regulatory quality of new regulatory proposals (*flow)* affecting both the private and public sector. The unit also had a dedicated team for the European Union that not only addressed regulatory proposals from Brussels but also supported the "regulatory reform" agenda across Europe. The RIU also had a "regulatory innovation" directorate that began looking at new areas to improve the regulatory environment such as at the local government level. The number of staff in the RIU was around 50, mainly civil servants

with a few secondees from the private sector and some from similar oversight units in other countries.

The Better Regulation Task Force (BRTF), which was an independent advisory group, was also established in 1997. The members were appointed by the Minister for the Cabinet Office. Appointments were unpaid and for two-year renewable terms. Members were from a variety of backgrounds, including large and small businesses, citizen and consumer groups, unions, the public sector, not-for-profit and voluntary groups and those responsible for enforcing regulations.

One of the first outcomes from the BRTF was to develop the United Kingdom's five principles of good regulations[4] which were:

- Proportionality – Regulators should only intervene where necessary and should choose the delivery option which will achieve the desired results while minimising costs and burdens.
- Accountability – Regulators need to account for their decisions, including the chosen option for delivery and its subsequent impact.
- Consistency – All types of intervention from regulations to voluntary agreements need to be joined up and implemented to a consistent standard.
- Transparency – Regulators need to ensure that those being regulated understand the process and are invited to suggest alternative delivery options, where appropriate.
- Targeting – All types of intervention from regulations to voluntary agreements need to be focused on the problem and avoid burdensome side effects.

The BRTF conducted studies on particular regulatory issues. These reviews were undertaken by sub-groups of the BRTF members and were the subject of consultation with key organisations and individuals, as well as with ministers and government departments. The BRTF stated that it worked "through consensus and all reports are endorsed by the full Task Force before being sent to the relevant ministers for their response." The Prime Minister asked all ministers to respond to Task Force reports within 60 working days of publication. The BRTF also responded to consultation exercises on regulatory proposals, RIAs and provided comments on live regulatory issues[5].

During this time Departmental Regulatory Impact Units (DRIUs) began to emerge in ministries as the first contact points for policy officials for regulatory quality. The Cabinet Office RIU provided coordination, guidance and advice to DRIUs in complying with the requirements for RIA and public consultation as well as working on the various public and private sector deregulatory projects with both the RIU and BRTF.

The RIU's European Team worked with other members of the United Kingdom Government and were active in the Mandelkern Group, whose report on a regulatory reform strategy for the EU[6] was the basis for the European Commission's June 2002 Action Plan on better regulation[7].

In January 2003, the better regulation agenda was further enhanced. In the Cabinet Office's Better Policy Making guide for RIA, Tony Blair said "I have charged the Cabinet Office to ensure departments deliver better regulation through full compliance with the RIA process. Where regulations or alternative measures are introduced….decisions should be informed by a full RIA…which also includes the wider economic, social and environmental impacts.[8]"

During 2003 to 2004 a number of new initiatives began and results were achieved. In particular it was in this period that rates of compliance for departments conducting RIAs for significant regulatory proposals increased from 66% to 97%. Subsequently the United Kingdom's focus for RIA changed from a focus on administrative costs towards increasing quality across the whole of government. This included streamlining the types of specific impact test that were required by policy makers (e.g. local impact, environmental impact, gender and race equality impact, etc.) into the three stated by the Prime Minister, i.e. wider economic social and environmental impacts.

The Panel for Regulatory Accountability was also established at this time, chaired by the Prime Minister with members of the panel including the Chancellor of the Exchequer and the Chair of the Task Force. This was a new Cabinet Committee which met regularly to discuss regulatory issues with ministers and in particular their department's "regulatory performance".

The attention to regulatory quality during this time was extended to Cabinet meetings for major proposals and the RIU coordinated briefings on regulatory issues with the Prime Minister's No.10 Downing Street office, HM Treasury and the Cabinet Office's Economic and Domestic Secretariat. This ultimately placed RIA at the centre of the policy making and decision making processes of government.

In 2005 the RIU was transformed into the Better Regulation Executive (BRE) now with almost 100 staff. Departments had to submit their RIAs for approval by the BRE as directed by the Prime Minister. Ministerial and Senior Civil Servant champions for Better Regulation were appointed in departments and given responsibility for spreading good regulatory practices across their departments.

In 2005 there was also the publication of two influential reports: i) the Hampton Review[9] and ii) "Regulation - Less is More" by the BRTF[10]. The Hampton review examined regulatory delivery mainly enforcement and inspections but also regulators. The BRTF report recommended that the United Kingdom undertake an administrative burden reduction programme, implement a system of post-implementation reviews, start a rolling programme of simplification, and introduce a one-in-one-out system as well as giving future consideration to automatic sunsetting and the introduction of regulatory budgets.

The Government accepted the reports and the BRE was tasked to implement the recommendations. The BRTF was replaced by a permanent body, the Better Regulation Commission (BRC), on 1 January 2006 to provide advice and oversight of the implementation of the "Less is More" recommendations and give further support to better regulation in the United Kingdom.

In July 2007, the BRE moved from the Cabinet Office to become part of the Department for Business, Enterprise and Regulatory Reform (BERR), and then its successor, the Department for Business, Innovation and Skills (BIS) which is now the Department for Business, Energy and Industry Strategy (BEIS)[11].

In 2008, the BRC was closed and work was being fully implemented by the BRE. At the same time the Risk and Regulation Advisory Council was established by the Prime Minister until 2009. The Risk and Regulation Advisory Council was an independent advisory group which aimed to improve the understanding of public risk, and how best to respond to it, in making and implementing policy.

By 2010, many of the BRTF and Hampton review recommendations had been implemented including a baseline measurement of burdens, simplification plans by departments and the establishment of the Local Better Regulation Office with a particular focus on local regulatory delivery. The recommendation on regulatory budgets was not implemented but laid the foundation for the introduction of a "one-in, one-out" system.

The RIA system evolved during this time with the various activities of the BRE that converged into a more focussed regulatory management system that linked the compliance costs in the simplification plans and introduced greater economic consideration and methodologies in the RIA process. The legal underpinning of better regulation was reviewed and an independent review body for RIA was considered.

From 2010 onwards, a number of initiatives followed including changing the Local Better Regulation Office first to the Better Regulation Delivery Office and then to Regulatory Delivery. A "Red Tape Challenge" followed the simplification plans and a "one-in-one-out" system was first superseded by a "one-in-two-out" and then "one-in-three-out" system.

In particular, the United Kingdom's Regulatory Policy Committee (RPC) was set up in 2009 and in 2012 it became an independent advisory non-departmental public body. The RPC remains the main oversight body for RIA in the United Kingdom system and the remainder of this chapter examines in detail the development of the regulatory reform agenda in the United Kingdom since 2010, the current RIA system, and the role of the RPC.

Infrastructure around RIAs in the United Kingdom system

In this section we examine specific features of the institutional infrastructure around RIAs in the United Kingdom system, and the hard and soft levers that are in operation. Some of the key features of the United Kingdom system that help promote good quality impact assessment are:

- legislative basis for the better regulation framework;
- role of independent scrutiny;
- leverage of a budget constraint or target;
- buy in from stakeholders;
- importance of codified methodology.

Legislative basis

The legal framework for the current system of regulatory control in the United Kingdom is set out in an Act of Parliament, namely the Small Business, Enterprise and Employment (SBEE) Act 2015.[12] The SBEE Act received Royal Assent in March 2015. The Act contained many provisions designed to promote enterprise, innovation and growth but the main measure of interest for regulatory reform related to the establishment of a Business Impact Target, backed up by a series of measures to ensure transparency and independent scrutiny. The Act entrenches in law, for the first time in the United Kingdom, the setting of a deregulation target and the transparent reporting of new regulatory burdens on business. In so doing, the Government's intention was to assure business and Parliament that its assessment of regulatory performance is robust and

economically sound and that future governments will continue to set a limit on regulatory burdens.

Among the specific features of the regulatory scrutiny process legislated for in the SBEE Act were the following requirements:

- Publication of an overall target for the economic impact of new legislation for each Parliamentary term, as well as a mid-point milestone target.
- Publication of annual reports and a final report on performance against the agreed target.
- An assessment of the actions taken by departments to mitigate the impacts of new regulations on small businesses as part of the annual and final reports.
- An assessment of any instances of 'gold plating'[13] of EU legislation as part of the annual and final reports.
- Strengthening the accountability of individual departments for their regulatory performance by including detail on departmental performance in the annual report.
- Independent scrutiny of the economic impact estimates used in the government's assessment of their performance against the target, in order to give confidence to Parliament and others that reporting is based on figures that are accurate and robust.

The arrangements set out in the SBEE Act build on, and consolidate with a clear legislative basis, mechanisms and structures that have evolved over the last five years or so. Independent scrutiny has been in place since the creation of the Regulatory Policy Committee in November 2009, later formalised in April 2012 as an independent non-departmental public body (NDPB). Transparent accounting for regulatory cost and a metric for calculating and expressing the business impact have been in place since 2010. At the start of the 2010-15 Parliament, the then Prime Minister made a commitment that the Government would be the first in modern history to end a parliamentary term with the burden of regulation lower than at the start. This was later supplemented by a "one-in, one-out rule", under which departments were expected to find savings in regulatory cost to business for each extra pound of regulatory cost introduced. In 2013 the "one-in, two-out" rule replaced one-in, one-out, and other reforms introduced including a requirement for *ex post* evaluation of regulation through Post Implementation Reviews (PIRs).

The SBEE Act represents a further evolution of these elements of the regulatory control system, with a legislative basis underpinning greater transparency, more explicit reporting requirements, independent regulatory scrutiny and a target for the control of regulatory cost. The first reports under the new system were published in the summer of 2016, together with a critical analysis by the NAO on the first year of the system (BIS, 2016; RPC 2016; NAO, 2016).

In addition to the legislative basis provided by the SBEE Act, the institutional infrastructure supporting the regulatory control system includes a number of different bodies each with different roles, as shown in Table 7.1 below (Annex A has more detail on the resources devoted to better regulation):

- The Better Regulation Executive, reporting jointly to the Business Department and the centre of Government, is responsible for developing and implementing a framework for achieving the target.
- Policy teams in government departments prepare Regulatory Impact Assessments, assess the cost to business and seek to reduce it through better regulation or deregulation. RIAs are signed off by the senior departmental analyst and the responsible Government Minister, who is required to confirm that he has read the RIA and that he is satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.
- Better Regulation Units in government departments champion better regulation principles and act as a contact point between the BRE and departments.
- The Reducing Regulation Cabinet sub-Committee (RRC)14 provides strategic oversight of the government's regulatory framework and provides the mechanism for clearance and scrutiny of any measure that regulates or deregulates business and requires collective agreement.
- The Regulatory Policy Committee (RPC) provides independent scrutiny of RIAs verifies the cost to business and publishes annual reports on departmental and Government performance. Unless a measure qualifies for the 'fast track' (see below), an Impact Assessment cleared by the RPC needs to be submitted to the RRC before it can be given clearance. Only in exceptional circumstance may a department seek RRC clearance without a 'fit for purpose' rating from the RPC. This provision helps gives the RPC leverage in its scrutiny function

Table 7.1. **Key government bodies involved in achieving the Business Impact Target**

Government body	Role
Better Regulation Executive (BRE)	Unit reporting to BEIS and Cabinet Office ministers that leads deregulation across government
Departmental and regulator policy teams	Expected to make regulatory decisions to cut the costs of regulation for businesses
Better Regulation Unit (BRU)	Individual departmental teams responsible for promoting principles of better regulation and advising departmental policymakers
Regulatory Policy Committee (RPC)	Independent verification body responsible for providing external challenge of the evidence and analysis presented in impact assessments
Reducing Regulation Cabinet sub-Committee (RRC)	A cabinet sub-committee established to take strategic oversight of the government's regulatory framework

Source: National Audit Office (2016), "The Business Impact Target: cutting the cost of regulation", NAO, London; based on BIS (2015), "Better Regulation Framework Manual: Practical Guidance for UK Government Officials", Department for Business, Innovation and Skills, London.

In addition, the National Audit Office and Parliament also have an oversight role in the better regulation framework. The NAO conducts regular value-for-money reviews of the better regulation programme. The NAO makes recommendations on how to achieve better value for money for the resources used and, without questioning Government policy objectives, on how to strengthen regulation in order to help markets work more effectively, for example encouraging greater use of post-implementation reviews and giving a critical assessment of progress against the Business Impact Target. NAO value for money reports are presented to Parliament, mostly for consideration by the Public

Accounts Committee (PAC) in hearings at which members take evidence from the senior officials of organisations under scrutiny. The PAC then publishes its own report and recommendations, to which the Government must respond. The PAC has recently published the findings from its own inquiry into better regulation in response to the NAO report (House of Commons, 2016).

In addition to the PAC, which has a cross-cutting role, there are Parliamentary Select Committees covering the business of each government department and they have access to and use RIAs and RPC Opinions in their scrutiny of specific policy initiatives. Impact Assessments and RPC Opinions are also cited in consultation documents which are regularly reviewed by Select Committees and in briefing papers prepared by the House of Commons library researchers to brief MPs. Recent examples include the consultation on the relationship between pub companies and their tenants (BIS, 2013), cited by the BIS Select Committee (House of Commons, 2013) and a briefing paper on the National Living Wage (McGuiness and O'Neill, 2016). The BIS Select Committee was replaced by the Economic Affairs and Industrial Strategy Committee, shadowing a new Cabinet Committee on the Economy and Industrial Strategy set up by the Prime Minister in August 2016.[15]

Other Parliamentary Committees that review RIAs and RPC Opinions include the Regulatory Reform Committee, the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee. Box 7.1 briefly describes their roles.

Box 7.1. Parliamentary Committees and their roles

Commons Select Committees: There is a Commons Select Committee for each government department, examining three aspects: spending, policies and administration. They decide on lines of inquiry and gather oral and written evidence. Findings are reported to the Commons, printed, and published on the Parliament website. The government then usually has 60 days to reply to the committee's recommendations.

Lords Select Committees: While House of Commons Select Committees are largely concerned with examining the work of government departments, committees in the House of Lords concentrate on six main areas: Europe, science, economics, communications, the United Kingdom constitution and international relations.

***Public Accounts Committee*:** The PAC is a cross-cutting Commons committee that scrutinises the value for money – economy, efficiency and effectiveness – of public spending and generally holds the government and its civil servants to account for the delivery of public services.

***Regulatory Reform Committee*:** The Regulatory Reform Committee was appointed to consider and report to the House on draft Legislative Reform Orders under the Legislative and Regulatory Reform Act 2006. It has not issued a report since 2009-10, but the current chairman has plans to revive it. There is a parallel committee in the House of Lords.

***Joint Committee on Statutory Instruments*:** Re-established after the 2015 election, the JCSI is appointed to consider statutory instruments (SIs) made in exercise of powers granted by Act of Parliament. It meets most weeks that Parliament is in session and issues weekly reports to both Houses on SIs. It does not comment on policy.

Select Committee on Statutory Instruments: SCSI carries out the same duties as the Joint Committee on Statutory Instruments in respect of those instruments laid before and subject to proceedings in the House of Commons only.

Box 7.1. **Parliamentary Committees and their roles** (*cont.*)

***Secondary Legislation Scrutiny Committee*:** The SLSC is a House of Lords Committee that examines the policy merits of regulations and other types of secondary legislation that are subject to parliamentary procedure. Through its reports, the Committee draws to the "special attention of the House" SIs laid in the previous week which it considers may be interesting, flawed or inadequately explained by the Government.

Source: www.parliament.uk/about/how/committees/select/.

Independent scrutiny

Recognising the importance of independent scrutiny to better policymaking, several countries have established an Independent Scrutiny Unit to validate RIAs, improve the quality of regulatory impact assessment, and increase the credibility of the RIA as part of the policy making process (Box 7.2).

In the United Kingdom, the Regulatory Policy Committee (RPC) is the independent advisory body providing external, real time scrutiny on the quality of evidence and analysis for all regulatory proposals, whether domestic, EU or international in origin, that have an impact on business and voluntary and community bodies.[16] For all such measures, the RPC confirms or rejects either:

- the government's estimated costs and benefits to business of the final policy proposal; or
- its assessment that the proposal will not count towards the government's deregulatory target and is likely to have a limited impact.

For legislative measures with a significant impact on business, the RPC also assesses the quality of the evidence supporting the proposal before consultation.

Box 7.2. **Independent Scrutiny in Europe**

A number of other EU member states have introduced a better regulation agenda similar in approach to the United Kingdom. Together with the RPC, four other independent scrutiny bodies from the Netherlands, Germany, Sweden and the Czech Republic set up a collaboration under the banner of RegWatchEurope. RegWatchEurope exists to enable the independent bodies of these member states to speak with one voice to influence the EU institutions on the development of Europe's better regulation agenda. RegWatchEurope draws on the network's expert knowledge to improve the quality of RIAs in respective member states, emphasising the potential benefits of independent scrutiny at the European level in particular. The roles and powers of these bodies in scrutinising RIAs differ from country to country – see Annex B for a more detailed tabular comparison.

Other European countries are also establishing independent scrutiny bodies. Finland and Norway have recently established independent councils to review RIAs for their respective government's proposals and the two councils have joined RegWatchEurope. Iceland is also in the process of establishing an independent scrutiny body. In 2014, following RPC engagement with French authorities, the French government announced its intention to establish an independent scrutiny body. The RPC has also worked closely with the internal impact assessment body of Poland whose purpose is to improve the quality of RIAs in Poland. The RPC has also hosted a number of economists from overseas to provide direct experience of the United Kingdom's approach to impact analysis and scrutiny.

Box 7.2. **Independent Scrutiny in Europe** (*cont.*)

The Commission has also established the Regulatory Scrutiny Board, an independent group of officials and experts whose role is to check the quality of all impact assessments and major evaluations that inform EU decision-making. The Regulatory Scrutiny Board replaces the former Impact Assessment Board and has wider responsibilities. In principle, a positive opinion is needed from the board for an initiative accompanied by an impact assessment to be tabled for adoption by the Commission.

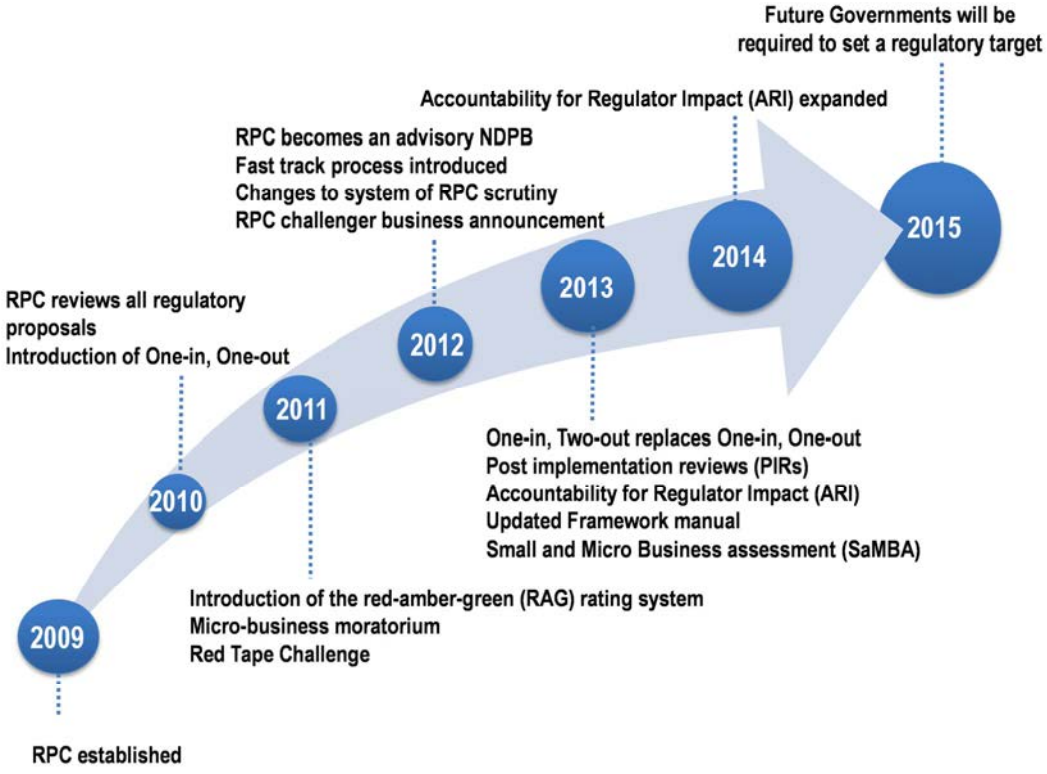
Source: Based on RPC (2015a), "Securing the evidence base for regulation: Regulatory Policy Committee scrutiny in the 2010 to 2015 Parliament", Regulatory Policy Committee, March; and RPC (2016b), Regulatory Policy Committee Corporate Reports 2015-16, July, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538414/rpc_corporate_report_15-16_final.pdf.

The RPC's role in the regulatory control system has been evolving since its foundation in 2009. Its role in independent scrutiny of RIAs was confirmed when it was named in July 2015 as the Independent Verification Body, as defined in the SBEE Act. In this capacity, the RPC is charged with verifying the costs and savings of changes in law introduced by the Government and independent regulators[17] that affect business – large and small – and civil society organisations. The RPC will provide independent assurance on the Government's progress in meeting its commitment to cut £10 billion of regulatory cost over the course of the parliament. This complements the RPC's role as the independent quality assurance body scrutinising the evidence and analysis. The Committee is appointed by the responsible minister in the Business Department, following an open public process. It consists of eight members with business, academic and other experience, including two economists. Committee members are independent of government and work on a part-time basis, supported by a Secretariat of 15 civil servants, including policy officials and economists (Annex 7.A).

The RPC is very clear that it does not comment on policy, only on the quality of the impact assessment.[18] The Committee agrees and issues Opinions, which are generally published, on the quality of RIAs prepared by department. Since 2011, Opinions have featured a 'traffic light' rating and league tables of departmental performance in terms of Red, Green and Amber ratings[19] have been published in the Committee's annual report. Opinions are generally published at the same time as the RIA on which they comment, but if a department chooses to respond to a Red Opinion by revising the RIA, then the Opinion will not usually be published. It will of course be seen by the officials responsible for the policy and usually by the Minister, and departments generally respond by revising either the policy or the Impact Assessment until it comes up to the required standard and receives a Green opinion. It is only in the rare cases when a department proceeds with a measure without a Green Opinion that the RPC will publish a Red Opinion. This only happened 14 times out of just over 2000 Opinions issued during the 2010-15 Parliament (RPC (2015a: 12 and 22). For example, in July 2015, the RPC issued red-rated Opinions on three Impact Assessments covering a package of Trade Union reforms. The Government proceeded to consultation without amending the RIAs and the Opinions were duly published on 18th August 2015 on the RPC website.[20]

Since the inception of the better regulation framework, there have been a number of important changes, illustrated in Figure 7.2. The most important changes are discussed in the following paragraphs.

Figure 7.2. **Evolution of the better regulation framework**



Source: RPC (2015a), "Securing the evidence base for regulation: Regulatory Policy Committee scrutiny in the 2010 to 2015 Parliament", Regulatory Policy Committee, March, p. 35.

The introduction of the fast track process

Departments had expressed concern over the amount of time they needed to build into their timetable for RPC scrutiny of impact assessments and to receive a fit for purpose opinion. Cost-benefit analysis should of course be guided by the principle of proportionality. In other words, the effort to undertake the cost-benefit analysis should be commensurate with the level of expected impacts.[21] Up to 2012, there existed a single process that took no account of the size or significance of proposals. In August 2012, the Government introduced a new fast track procedure for proposals with a gross cost to business and civil society organisations below £1 million a year and for all deregulatory measures. This process sought to ensure that i) the collective efforts of Whitehall and the RPC are focused on the most significant regulatory changes; and ii) deregulatory proposals are brought forward more quickly. The RPC estimates that approximately 70% of in-scope proposals have a cost or saving to business each year of less than £1 million but little impact on the overall account. This suggests that the introduction of a more streamlined and focused process has been worthwhile, given the large number of small regulatory changes going through the system.[22] In the current Parliament, the fast track process continues for deregulatory measures and measures with low gross costs to business (provided in the case of EU legislation that there is no gold-plating). An important difference, however, is that departments are now free to self-certify measures for the fast track, although this right may be withdrawn if the RPC finds at validation stage that any department is not able to consistently apply the fast track criteria.[23]

Initial Review Notices

A further simplification of the process was the introduction of Initial Review Notices (IRN) after a pilot exercise carried out during 2015. An Initial Review Notice is issued to a department as soon as possible after the RPC first identifies a problem in an IA that would lead to a red-rated Opinion. Departments were concerned that when they received a red rating after the RPC had completed its full scrutiny process; taking up to 30 working days, their timetable for parliamentary passage of the measures could be compromised. Under the IRN system, the department receives early warning of potential red points and has 15 days in which to respond. In most cases the department is then able to resolve the problem and receives a Green Opinion on resubmission, although the scoring of departmental performance will be based on the initial submission rather than the resubmission. Evidence from RPC stakeholder surveys and discussion with departments suggests that the IRN process is generally welcomed.

Increased transparency of out of scope measures

Transparency has been enhanced by a number of initiatives, including increased scrutiny by the RPC of measures that are not in scope of the Government's deregulation target. A substantial proportion of United Kingdom regulation originates in the EU or other international institutions and this remains out of scope of the Government's target. Nevertheless, in the interests of transparency and balanced reporting, the Government asked the RPC to validate, from 2013 onwards, the impact of the transposition of all significant EU regulatory measures that affect business. The RPC now scrutinises new EU measures with the same degree of rigour as domestic regulation and expects RIAs supporting EU requirements to provide a robust assessment of the costs and benefits.

Bringing independent regulators into the picture

Until 2013, proposals by independent regulators to change their operational policies, processes or practices were outside the scope of RPC scrutiny. To improve transparency and accountability of regulators' decisions, the Government first introduced the Accountability for Regulator Impact (ARI) process in July 2013.[24] However, ARI was superseded by the extension of the RPC's scrutiny role in the current Parliament to include the validation of the costs and benefits of regulatory changes made by independent regulators. Extending the requirements to the activities of regulators will help the reported figures for business impact to reflect more closely how businesses experience regulation.[25]

Impacts on Small and Micro Business

It is widely accepted that, for well-established economic reasons, small and micro businesses are often disproportionately affected by the burden of regulation. In order to address this, in April 2011, the United Kingdom Government introduced a three-year freeze on new United Kingdom regulation for businesses with fewer than ten employees and start-up businesses. Known as the micro-business moratorium, the freeze applied to business regulation that came into force up to 31 March 2014. Subsequently, for any new regulatory proposal coming into force from 1 April 2014, departments are now required to undertake a small and micro-business assessment (SaMBA). Such assessments identify whether proposals are likely to have disproportionate impacts on smaller businesses and are expected to set out proposals to exempt small businesses or mitigate the impacts on

them. The RPC was given a new role in checking these assessments and is empowered to issue a Red Opinion if the SaMBA is inadequate.

In summary, the independent scrutiny system that has evolved over the last 7-8 years in the United Kingdom provides a powerful incentive for good quality impact assessment to be undertaken on new regulations with significant impacts on businesses, large and small, particularly for the assessment of direct costs and benefits to business. Even measures that are not covered by the Government's Business Impact Target are subject to transparency requirements, enabling external observers to draw their own conclusions about trends in the cost to business of new regulation. Process improvements have, over time, encouraged a focus on the more significant measures and those affecting small firms disproportionately.

Budget constraint and target

While independent scrutiny is important in promoting good impact assessment and giving added credibility to Government claims about the business burden, it will not necessarily deliver a more efficient regulatory regime. Businesses may still be faced with what they perceive to be over-regulation. Independent scrutiny and other features may improve regulatory quality and prevent bad regulation from being imposed, but this will not in itself reduce the stock of regulation or stem the flow of new regulation with which businesses have to comply.

One way of addressing this is the introduction of some form of regulatory budget or target limiting the amount of regulation that can be introduced. Such a limit serves two purposes. First, just as the Government is constrained in its fiscal expenditures by public spending rules reflecting the capacity of the economy to pay tax and absorb debt, controls on the amount of regulatory cost can help prevent the burden of regulation rising without limit (or reduce it to a desired level if that is the Government's priority).

Second, a regulatory budget or constraint interacts with the scrutiny function, giving more power and influence to the independent scrutiny body. If the government as a whole or government departments have to observe a regulatory budget constraint, or meet a target, then the assessment of regulatory impact becomes more than a routine exercise – it directly affects the ability of policymakers to achieve their policy objectives through regulatory means (as is the intention). In the United Kingdom context, the controls introduced over the last few years on the amount of regulatory cost that can be imposed by departments serve to enhance the RPC's role in independent scrutiny.

Since 2010, the United Kingdom has had two forms of regulatory control target. For the 2010-15 Parliament, the Government set a target that the cost of domestic regulation to business would be lower by the end of Parliament than at the beginning. The RPC was able to verify (RPC, 2015a) that, for the proposals in scope of the target, the burden of regulation on businesses and civil society organisations was reduced by the equivalent of £2.2 billion per annum by the end of the Parliament. For the next Parliament, the Government adopted a Business Impact Target with a definition and degree of ambition set by the Government itself, planning for a £10 billion reduction over the five years of the Parliament, similar in magnitude to that for the previous Parliament.

These Government targets are buttressed by controls on regulatory costs imposed by departments. This started in 2010 with the commitment in the Coalition Government programme for 2010-15 to adopt a "one-in-one-out" rule under which no new regulation could be brought in without other regulation being cut by a greater amount. The aim was

to bear down on the volume and cost of regulation and promote a culture change across the United Kingdom Government in its approach to regulation. Departments were expected to meet the one-in-one-out rule across their regulatory activity as a whole, not for each individual measure. Some departments were more successful than others and the degree of ambition was raised in 2013 when the one-in, one-out rule was replaced with one-in, two-out.

In the current Parliament, the degree of ambition has been raised further with the introduction of a one-in, three, out rule (OI3O). Departments now also have their own regulatory 'budgets' – targets for deregulation, totalling £15.8 billion for the current Parliament – more than the Government's overall target to allow for slippage in meeting departmental targets. According to the NAO (2016), departments are not yet confident that they will meet their targets, partly because many of the easier options for reducing regulatory costs have already been taken, but they say the setting of targets has helped raise the profile of better regulation in departments.

The Business Impact Target, OI3O and departmental regulatory budgets all use figures which have to be taken from impact assessments validated by the RPC. This is one of the key institutional features cementing the role of independent scrutiny in the United Kingdom system and promoting better regulatory impact assessment.

Buy-in from stakeholders

An effective regulatory impact assessment process needs to secure high-level buy-in from politicians, civil servants and wider stakeholders to improve both the information used within RIAs, and their contribution to the wider policy development process. Stakeholder engagement can be vital in building confidence that the Government only regulates for good reason. It can also, through consultation, improve the availability and robustness of the information regarding potential impacts, as businesses are often best placed to provide evidence of the economic impact. By extension, greater involvement of stakeholders should result in more robust assessments of the likely impact of regulatory reform proposals and promote shared ownership of the policy objectives and delivery.

In the United Kingdom system, the main business groups and a number of civil society organisations, including the Trades Union Congress (TUC), support the need for an independent scrutiny function and have expressed support for the RPC[26]. The RPC communicates directly with business groups and other stakeholders, through press releases, correspondence, bilateral meetings and attendance at each other's events. In particular, business groups and representatives of civil society see value in the work done by the RPC to help ensure that the Government brings forward new regulation only when it is supported by a robust evidence base and that the Government's claims about the savings to business generated by one-in, one-out and one-in, two-out are accurate. Indeed, the Federation of Small Businesses (FSB), Confederation of British Industry (CBI), Institute of Directors (IoD), Engineering Employers Federation (EEF) and British Chambers of Commerce (BCC) were among those arguing for the RPC to be put on a statutory footing (RPC, 2015a).

Engagement of stakeholders is perhaps made easier in the United Kingdom context by the long history of better regulation initiatives in the United Kingdom. De Francesco et al. (2011) identify the United Kingdom as one of the countries that has set the agenda for this regulatory innovation since the 1980s with some form of compliance cost assessment. Government departments have had better regulation units and better

regulation champions in place for some time, and departments have long been conditioned to lead concerted efforts to improve regulatory performance.

The RPC publishes an Annual Report and other periodic reports and invites stakeholders to attend its monthly meetings and launch events. About 40 attended the July 2016 launch of its annual report (RPC, 2016a). Wider stakeholder engagement is also facilitated by the publication of IAs and Opinions, which often prompt comments from business organisations and others.[27] Five red-rated assessments generated significant interest in parliamentary debates and public discussion of the proposals, namely those relating to the Financial Conduct Authority cap on payday lending, reforming the regulatory framework for employment agencies and employment businesses, trade union registers of members, biodiversity offsetting and capping the charges in auto-enrolment pension schemes. The RPC has warned that taking forward policy proposals in the absence of a Green opinion has the potential to undermine the credibility of the framework, particularly where cases are high profile or politically contentious (RPC, 2015a).

The National Audit Office also plays an important role in the oversight of the RIA process. Its primary role is to scrutinise public spending on behalf of Parliament, helping it to hold government departments to account. It regularly reviews the regulatory reform agenda and the resource devoted to it as part of its value-for-money programme and has reported on aspects of the regulatory reform process annually since 2004. Recent reports suggest that use of quantification in analysis for impact assessments has been improving, and that departments have increased the resources and analytical expertise allocated to preparing impact assessments. NAO (2011) assessed that the Better Regulation Executive, created in 2005, and departments have developed important elements of a structured approach to achieving sustainable reductions in regulatory costs and have delivered significant benefits. However, the NAO remains critical in other respects. For example, NAO (2011) found that departments are not communicating effectively with businesses, who find it difficult to keep up with the extent of new regulation and changes to legislation. Partly in response, the NAO, together with the Better Regulation Executive (BRE) and the Better Regulation Delivery Office (BRDO) and Department for Environment, Food and Rural Affairs (Defra) have commissioned surveys to determine business views on the extent of the burden of regulation, both in general and in specific regulatory areas. Such surveys (for example, NAO and BIS, 2014) are themselves a way of engaging with stakeholders and, as indicated in the introduction, reveal an encouraging trend.

Stakeholder engagement could be further encouraged by better use of *ex post* evaluation, or post implementation reviews (PIRs). The NAO has expressed concern that departments have not been taking a systematic approach to the evaluation of the impact of regulation and no overall attempt has been made to review the total number of regulations that businesses face. Best practice would be for departments to set out their plans for undertaking PIRs when taking forward new proposals, but this is rarely done in any detail. Too often, departments do not give enough attention to data collection and analysis as part of policy proposals from an early stage. If planned and undertaken correctly, PIRs can contribute to a cycle of continuous improvement for policy-makers, resulting in improved and more accurate analysis over time. But by 2016, the RPC had only received a handful of PIRs for review and has expressed concern about the slowness with which PIRs for the most significant measures are coming forward (RPC, 2015a; 2016a).

Of course, government departments are important stakeholders too. The system is not costless to run and the NAO has reported (NAO, 2016) that some departments complain that the bureaucracy and complexity associated with the better regulation framework diverts resources away from what they see as genuine deregulatory activity. The NAO estimate that departments' Better Regulation Units cost £2.3 million per year, while the BRE and RPC together cost £4.1 million in 2015-16. Further unquantified costs are incurred by departmental policy teams or regulators. Although these costs are small compared with departmental budgets and the total costs and benefits of regulation, if the system becomes excessively costly, this will reduce buy-in from departments and Ministers.

Codified methodology

Stakeholders will have greater reassurance that there is a rigorous framework and systematic process for regulatory scrutiny if there is transparency about the methodology and consistency in the way it is used across, and within, Departments and regulators. In order to promote greater transparency and consistency, a number of guides have been published which together codify the methodology and how it should be applied.

The basic source of guidance for departments is the *Better Regulation Framework Manual* (BRFM). The manual, last published in March 2015 (BIS 2015), is intended for departmental policy-makers, statutory regulators, members and staff of the RPC, and others including economists, social researchers, lawyers and those specialising in better regulation. The requirements set out in the manual, supplemented by Q&A documents available to departments, provide all the guidance needed to comply with the regulatory framework.

The technical guidance on cost benefit analysis in the manual derives in turn from the *Green Book* (HM Treasury, 2011b), the United Kingdom Government's standard guide to the techniques and issues that should be considered when carrying out cost-benefit assessments. The Green Book is a best practice guide for all central departments and executive agencies, and covers projects of all types and size. It aims to make the appraisal process throughout government more consistent and transparent. The guidance emphasises the need to take account of the wider social costs and benefits of proposals, and the need to ensure the proper use of public resources.

Complementing the Green Book, the *Magenta Book* (HM Treasury, 2011a) is the recommended central government guidance on evaluation setting out best practice for departments to follow. It presents standards of good practice in conducting evaluations and seeks to provide an understanding of the issues faced when undertaking evaluations of projects, policies, programmes and the delivery of services. While the Green Book covers the whole policy cycle, the Magenta Book provides further guidance on the evaluation stage of the policy process. Central government departments and agencies are asked to ensure that their own manuals or guidelines are consistent with the principles contained in the Green Book and Magenta Book, which are widely accepted in Whitehall as the key references.

While the framework and methodology is thoroughly codified in the BRFM, Green Book and Magenta Book, inevitably new issues arise that require interpretation of the guidance and decisions on its practical application. The Regulatory Policy Committee has therefore developed a series of case history documents (RPC, 2016c) which provide practical guidance, with case study examples, of how the better regulation framework methodology has been interpreted. This is intended to provide policy makers and analysts

with a practical guide on how novel or contentious methodology issues have been approached in the past, and the outcomes of the RPC scrutiny in those cases. The intention is to help departments interpret the formal guidance and promote consistency in its use. An example is given in Box 7.3.

Box 7.3. **Amendments to the Pension Schemes Bill (private sector defined benefit transfers)**

The proposal required employers to provide free independent financial advice for employees when they are moved from a defined benefit to a defined contribution pension scheme. The department originally counted the additional income to independent financial advisers (IFAs) as a benefit to business, offsetting the costs to employers.

The RPC decided that the income to IFAs was simply the counterpart of the compliance cost to employers and should not be used to offset it. In other words resources used in complying with regulation should not be counted as a benefit to the service provider. In explaining its reasoning, the RPC noted that if an employer had its own in-house financial advice team, and could use it to meet the requirement, it would be perverse to conclude that the regulation had no net cost to that business.

Source: RPC (2016c), "Case Histories web page", http://regulatorypolicycommittee.weebly.com/case-histories.html (accessed 25 August 2016).

The existence of clearly written and codified methodology and guidance is one of the bulwarks of the regulatory control system. It contributes to transparency and consistency and builds confidence, although of course it does not completely dispense with the need for judgement in some circumstances. Specific methodological issues, together with some other case study examples of how the framework has been applied, are discussed in the next section.

Methodology issues

In this section, we consider some of the methodology issues in a RIA system. In particular, we examine:

- definition of business impact target
- choice of metric for target/budget – the EANCB
- alternative metrics
- direct versus indirect impacts
- good practice in IA methodology
- limitations of CBA.

Definition of Business Impact Target

As mentioned in the preceding section, the SBEE Act requires the Government to publish an overall target for the economic impact of new legislation for each Parliamentary term, as well as a mid-point milestone target. For the 2015-20 Parliament, the United Kingdom Government has set itself a target of a saving of £10 billion in net costs to business from qualifying measures that come into force or cease to be in force during this Parliament. An interim target of £5 billion was set for the savings to be achieved in the first three years of the Parliament.

Under the Act, the measures that are in scope for the Business Impact Target are described as "regulatory provisions", defined as statutory provisions that either:

- Impose or amend requirements, restrictions or conditions, or set or amend standards or guidance in relation to the activity; or
- Relate to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance.

The Government must then decide the categories of regulatory provision that are to be scored against the target ("qualifying regulatory provisions"). The scope of the qualifying measures included within the definition of the target was set out in a written statement submitted to Parliament on 3 March 2016 (United Kingdom Parliament, 2016). Qualifying regulatory provisions are defined as those that do not fall within any of the exclusions listed in the statement, and reproduced as Annex C.

The definition used by the Government has attracted some criticism (NAO, 2016; RPC, 2016a). In the first place, the definition of "regulatory provisions" specifically excludes taxes and duties, tax administration, conditions associated with procurement contracts or grants and short-term provisions that have effect for a period of less than 12 months. Businesses might generally regard these as just as burdensome as regulations falling within the definition and the NAO has pointed out some of the exclusions are quantitatively more important than included measures. Against this, the Government states that HM Revenue & Customs has a target to reduce the annual cost of tax administration to businesses by £400 million by 2019-20. Thus the cost of tax administration, which is most similar to the regulatory cost included within the BIT, is subject to a separate target. But some business organisations have called for the RPC to scrutinise tax administration costs as well as regulatory cost. As regards tax and other charge, taxes paid by business and fees and charges are documented elsewhere in the Government accounts and so, from a transparency point of view, there is some justification for excluding them if the Business Impact Target account is seen as a complement to the tax account.

Self-regulation and co-regulation are also explicitly excluded. As long as they do not result from an implicit threat from Government to regulate in the absence of such self-regulation, it seems justifiable to view these as being outside the scope of a regulatory target or budget.

Some exclusions have been carried over from the one-in, one-out system adopted in the 2010-15 Parliament, principally those relating to fines and penalties, measures to promote competition, large infrastructure projects, the National Minimum Wage, EU regulations and systemic financial risk. RPC analysis (RPC, 2015a) has shown that EU regulation and regulation to reduce systemic financial risk (much also stemming from the EU, but required to deal with the aftermath of the financial crisis) accounted for some of the largest burdens in the 2010-15 Parliament. However, EU measures are excluded on the grounds that they are not fully within the control of United Kingdom ministers. A similar argument may be made for the National Minimum Wage, where the recommendations originate from an independent body the Low Wage Commission, and year-on-year increases generally consist of a routine uprating based on the state of the labour market.

Although EU regulation is outside the target, the estimates of business impact are published and the Government has sought to encourage reductions in the costs incurred by business as a result of European Union regulation. It has supported the European

Commission's REFIT programme (European Commission, 2015), which has the goal of making EU law lighter, simpler and less costly.

Other exclusions carried over from the earlier parliament, and codified more clearly, relate to regulations designed to promote competition or implement large infrastructure projects. Part of the justification for excluding these is that the longer term indirect benefits to business and the economy are expected to outweigh any short term direct cost, as competition and infrastructure investment drive improved business productivity and innovation.

Many of the new exclusions arise from the extension of the target to include regulator activity. Certain activities related to economic regulation are excluded for similar reasons to the exclusion of competition measures. Many of the other exclusions derive from the broad definition of regulator activity that has been adopted in the Act. In order to capture all relevant regulator actions, the statutory definition of a regulatory provision has been drafted in such a way that every action of a regulator in the discharge of its statutory duties potentially falls within scope. The exclusions are intended to ensure that the qualifying provisions scored under target are focused on regulator policies and practices that impose regulatory burdens on business rather than day-to-day activities.

An important new exclusion is the new National Living Wage (NLW), despite the fact that, in going beyond the minimum wage recommendations of the Low Pay Commission, it would normally have scored as a form of 'gold-plating'. The Government claims that introduction of the National Living Wage was offset by changes to national insurance and tax, which are excluded from the target under the Act.[28] However the Government's exclusion of the National Living Wage has been criticised by the RPC and NAO on the grounds that the regulatory account is meant to complement other Government accounts, not reflect all changes affecting business, and that the changes in national insurance and tax are only loosely related to the change in the NLW. Moreover, the introduction of the National Living Wage alongside cuts in personal tax credits, could equally well be portrayed as transferring the burden of support for low paid workers from state spending to business regulation, something a system of regulatory control should be designed to discourage.

Choice of metric – the EANCB

Having defined the target and the qualifying regulatory provisions, a metric is also required. Since the introduction of the one-in-one-out system in 2010, the chosen metric is the direct cost to business (including civil society organisations) as measured by the equivalent annual net cost to business (EANCB).[29] The EANCB of a measure is defined as the annualised equivalents of the present value of its net costs to business, calculated with reference to the counterfactual. Policymakers are required to quantify impacts in accordance with Green Book Guidance (HM Treasury, 2011b) with direct impacts identified and separated. The EANCB is then defined as the constant annual stream of costs that would give the same result as the calculated NPV of (direct) costs to business over the appraisal period. The EANCB is calculated from the NPV of costs, starting from the implementation date (Box 7.4).

Box 7.4. **EANCB**

$$EANCB = \frac{PVNCB}{a_{t,r}}$$

Where $a_{t,r}$ is the annuity rate given by:

$$a_{t,r} = \frac{1+r}{r}\left[1 - \frac{1}{(1+r)^t}\right]$$

Where:

PVNCB = Present Value of Net (Direct) Costs to Business

t = Time period over which the policy is active in the appraisal

r = Discount rate (assumed to be a single discount rate over t, in practice this is invariably the 3.5% rate recommended in the Green Book)

$a_{t,r}$ = Annuity Rate

EANCB = Equivalent Annual Net Cost to Business

According to the methodology adopted by the Government (United Kingdom Parliament, 2016), the impact of each qualifying measure coming into force in the 2015-20 Parliament is assessed on the basis of its Equivalent Annual Net (Direct) Cost to Business adjusted using the GDP deflator to 2014 prices and discounted back to a 2015 present value base year. A worked example is given in Annex D. The contribution to the business impact target is then calculated as the sum of the EANCB over the first five years for which the measure will be in force, or the sum of the EANCB over the full lifetime of the measure for measures that are in force for less than five years. So, having expressed the EANCB in 2014 prices and a 2015 base year, the EANCB is multiplied by a factor of five, unless the measure is in force for less than five years, in which case the factor is the number of years the measure is in force (Box 7.5). (The rationale for multiplying the EANCB in this way is not clear, other than it gives a figure comparable to the amount recorded during the first Parliament for the deregulation savings over five years.)

The EANCB is also used as the basis for Department's "one-in, three-out" (OI3O) accounts and regulatory budgets. Departments calculate their OI3O account by trebling their "INs" (positive EANCBs, measures[30] that are net costly to business) and subtracting their "OUTs" (negative EANCBs, net beneficial to business). If the balance is positive, then the department needs to find more OUTs to balance its OI3O account. Some of the larger departments also have deregulatory budgets, designed to help assure delivery of the BIT through departmental accountability. As previously indicated, the agreed individual budgets total to £15.8 billion, much more than the £10 billion target for the Parliament, a degree of over-programming designed to provide greater challenge to departments and a degree of leeway in case departments fall short of their budgets.

In contrast to the BIT which is the public target, OI3O and deregulatory budgets are designed as internal administrative controls which help departments to deliver the target. The RPC does not validate the OI3O account or departmental budgets, but it does validate the EANCB which is used as the metric for all three control mechanisms.

Box 7.5. **Calculating the contribution of a measure to the Business Impact Target**

For each IN or OUT, the contribution it will make to the Business Impact Target needs to be calculated. The BIT has been set so that the net saving to business over the first five years of the lifetime of each measure introduced this Parliament should be at least £10bn. The contribution is based on the EANDCB expressed in 2014 prices and a present value base of 2015 (see Annex D).

- **Example – A ten-year IN introduced in 2017 with an EANDCB of £12m**

The first five years of the measure will be 2017, 2018, 2019, 2020 and 2021.

Contribution to BIT = 5 x 12 = £60m

- **Example – A two-year time-limited OUT starting in 2016 with an EANDCB of -£20m**

The full impact of the measure will be felt over 2016 and 2017.

Contribution to BIT = 2 x -20 = -£40m

The approximate[1] value of the measure over the two years it is in force, expressed in 2014 prices and a present value base of 2015, is a £40m saving.

1. Approximate because the NPV of the measure is the sum of the discounted stream of EANDCBs over the full appraisal period (e.g. 10 years). Also over the first 5 years of a 10 year measure, the discounted sum of EANDCBs would only approximate the true NPV up to that point if there are no upfront costs/benefits (which EANDCB smoothes out).

Alternative metrics

Alternative metrics have been discussed from time to time because of concerns about focusing on the EANCB and the possible distortions that might arise. At the inception of the system, consideration was given to using the undiscounted costs to business or the present value of net costs to business. Both suffer from disadvantages, the former because it ignores the time profile of costs and benefits and the latter because of the presentational disadvantage of being an order of magnitude larger than the annual costs/benefits. Extending the metric to include indirect costs and benefits to business was also considered but, as discussed more fully below, indirect costs and benefits are often less well evidenced and there is likely to be greater inconsistency in the application of the metric if a wider measure is used. Business experience also suggests that it is the initial impact effect of regulation that is the main concern rather than the longer term residual effects once it is diffused through the economy.

Perhaps the most serious issue about the metric is a concern that a focus on business deregulation could have harmful wider effects. Seven of 14 departments interviewed by the NAO said that there were conflicts between deregulation and their overall policy objectives (NAO, 2016). A wider measure of net present value to society could be used instead but this would not meet the objective of limiting the overall cost of regulation to business. Theoretically, a case could be made for a system which maximises the net present value of the impact of regulatory policies subject to a constraint on the gross or net costs to business, which, if all the required data and control mechanisms were in

place, would be optimal. In fact, despite its imperfections, it could be argued that the current system – with departments empowered to achieve their wider objectives subject to a BIT target and departmental budgetary controls measured in terms of net direct cost to business – does to some extent generate incentives similar to those that would be in place under the notional idealised system.

Direct vs indirect impacts

In the United Kingdom system of regulatory control, the Equivalent Annual Net Direct Cost to Business (EANDCB) metric is designed to capture only the direct costs and benefits to business or civil society organisations. It focuses on those impacts immediately felt by those businesses directly impacted by the regulatory change. Distinguishing between direct impacts and other (indirect) impacts can prove challenging and has been the subject of much debate.

A direct impact on business is defined (United Kingdom Parliament, 2016) as:

"an impact that can be identified as resulting directly from the implementation or removal/simplification of the measure".

Subsequent effects that occur as a result of the direct impacts are indirect. Only direct impacts are scored for the BIT. Indirect effects are not scored in the BIT but may be included in the net present value of the policy to society as a whole. To some extent, distinguishing direct and indirect effects is a general problem in cost benefit analysis. In analysing the impact of spending decisions, issues arise over whether to consider displacement effects, multiplier effects, impacts on employment and unemployment, effects on other regions or on international transactions. But these decisions are even more difficult in the context of the analysis of regulatory impact.

NAO (2016) commented that businesses and departments often do not understand the measure or the complex rules that determine which costs and benefits count are direct. As a result, they expressed concern that the measure does not sufficiently support policymakers' efforts to reduce costs to business. However, it is clearly necessary to draw the line somewhere. Over time, the impact of a regulatory measure will have general equilibrium effects across the economy, as economic behaviour changes, costs are passed on to customers or along the supply chain and businesses enter and exit. Ultimately, all costs to "business" are borne by customers, employees or shareholders. Even if it were possible to identify the final impact of a measure just on shareholders, it is far from clear that this is what businesses understand by the burden of regulation.

In early 2015, the Department for Business, Innovation and Skills (BIS) and the RPC commissioned an independent research project (Titley, 2015), which aimed to:

- set out the different definitions of direct and indirect impacts in the literature;
- present a microeconomic framework for thinking about the treatment of direct impacts within the OIOO/OITO system; and
- develop some criteria that could be used to help officials classify direct and indirect impacts.

The literature review did not identify a single clear definition of the direct impacts of regulations; nor did it point to a clear set of factors to determine the boundary between direct and indirect impacts on business. While the research was not able to identify a strong grounding in economic theory or business experience for the distinction between

direct and indirect impacts, the RPC has, nevertheless, developed guidance on where the line should be drawn, building on the findings of this research project. A summary of practical steps and criteria to distinguish between direct and indirect impacts of regulation on business is presented below, with some examples. The summary of practical steps is based closely on RPC case histories documentation (RPC, 2016c).

Identify the broad type and scope of the regulatory measure

Departments should consider whether the anticipated impacts are consistent with the type of measure being proposed. For instance, an impact is more likely to be direct if it:

- bans, restricts, liberalises, increases or decreases the cost of a particular activity; and/or
- displaces or restricts specific business activities designed to maintain or create sales, e.g. product differentiation and promotional activities.

In addition, impacts falling on those businesses actually subject to the regulation and accountable for compliance are more likely to be considered direct than impacts on businesses elsewhere in the supply chain.

Distinguish between first round and subsequent impacts

Immediate and unavoidable (first round) effects of a measure in the affected market are more likely to be direct. This could involve a shift in either the supply curve (eg due to a change in production costs) and/or demand curve (e.g. from removing a restriction on purchasing a product) or a regulated change in the market price (e.g. imposing a minimum price which moves price away from the market clearing price).

Subsequent effects in the regulated market beyond the immediate implications of the measure are likely to be indirect. These effects occur subsequent to the adjustment to a new equilibrium immediately following the measure. For example, it could be the result of:

- a significant reallocation of resources;
- product and/or process innovation by existing businesses;
- the creation of new firms/institutions; and/or
- productivity gains due to changes in business models or working practices.

It may be useful to think about a 'theory of change' or logic chain along which the regulatory intervention may be expected to impact on the economy. The more complex the logic chain leading from the intervention to the effect, the more likely the impact is to be indirect. Examples of RPC reasoning are given in Boxes 7.6. and 7.7.

Box 7.6. **Amendment to the Energy Act 2008 powers to implement and direct the rollout of smart meters**

Smart meters are a new form of gas and electricity meter that provide the customer with more information about their energy use. The smart meter also provides the supplier with more information, allowing for more targeted tariffs. The policy was to mandate the roll out of smart meters. If smart meters result in more efficient use of energy, this could have large benefits for business users. However, these benefits were considered to be indirect because they result only if business customers choose to act on the information and change their behaviour, rather than as a

Box 7.6. **Amendment to the Energy Act 2008 powers to implement and direct the rollout of smart meters** (*cont.*)

direct result of having a smart meter. This case is purely about giving customers more information on which they can choose whether or not to act. The required behavioural change was, therefore, considered to be an indirect effect.

Source: RPC (2016c), Case Histories web page, http://regulatorypolicycommittee.weebly.com/case-histories.html (accessed 25 August 2016).

Box 7.7. **Standardised packaging of tobacco products**

The measure aims to reduce tobacco consumption by mandating the standardisation of tobacco pack colour, shape and the removal of all branding except brand name in a standardised type face. In this case, the impact of the loss of profit to manufacturers and retailers was classified as direct as it: restricts economic activity from use of branding, prohibits a form of promotional activity, and has a reduction in cigarette consumption of cigarettes as its primary objective. Moreover, if loss of profits from the removal of branding had been regarded as an indirect cost, the measure would have scored as net beneficial to tobacco companies (due to savings in production, branding and packaging costs). Such an outcome would have been widely considered counter-intuitive.

Source: RPC (2016c), Case Histories web page, http://regulatorypolicycommittee.weebly.com/case-histories.html (accessed 25 August 2016).

Identify whether the impact is a partial equilibrium or general equilibrium effect

It may be helpful to distinguish between partial equilibrium and general equilibrium effects. In the case of regulatory interventions, partial equilibrium effects occur in the regulated market while general equilibrium effects occur in related markets and/or the wider economy, as a reaction to first round effects in the regulated market large enough to affect the rest of the economy. Generally, cost, price and/or quantity effects that occur in related markets or the wider economy as a result of changes in the regulated market are second round, general equilibrium effects and, therefore, indirect and non-qualifying against the business impact target.

Consider whether the impact is "pass through"

When a regulatory burden is placed on businesses they have to decide how to respond. They may increase prices, cut wages, reduce investment or reduce dividends. The EANDCB metric is an attempt to capture the burden on business of regulation. If a mechanism exists that enables some or all of this burden to be passed on to other businesses and/or consumers, this subsequent effect is generally regarded as being indirect for the purposes of the BIT. The BRFM (BIS, 2015) states that pass through should be ignored in calculating the EANDCB. The first round impact of the regulatory change, for example the compliance costs to business, is the direct impact of the regulation. The second round impact, after pass through (such as higher prices to consumers) would be an indirect impact of the regulation. Only the direct impact should be included in the EANDCB. Without this rule, any increase in regulatory requirements on business could potentially score as zero on the basis that the cost is ultimately borne

by consumers in the form of higher prices. Exceptions are made, however, when pass through is required by the regulation or where additional costs to an industry-funded regulator are automatically passed on to business.

Although the process and criteria set out above are designed to help distinguish between direct and indirect impacts, it will often remain difficult to judge where the boundary lies between the two. NAO (2016) criticised the current focus on direct costs and benefits as potentially misleading (e.g. in failing to score benefits to business from regulation promoting consumer confidence or the more effective functioning of markets). However, they did not propose any alternative metric in place of direct net costs. Moreover, the NAO concern is to some extent met by some of the exemptions in the system, such as those for financial systemic risk, economic regulation and competition. In the development of these exemptions, it was recognised, explicitly or implicitly, that a metric focused on direct costs could be inappropriate. While the costs to regulated businesses are clearly direct, the wider benefits to new and existing firms, whether from more competition or greater financial stability, would generally be considered indirect and yet there are good reasons from economic theory and analysis to think that such measures should produce a net benefit not just for the economy but for business in general.

The RPC therefore continues to develop, publish and update case study evidence (RPC, 2016c) aimed at giving those undertaking RIAs more guidance on the distinction between direct and indirect effects. While this may seem an esoteric topic, in practical terms, the quantitative significance of this distinction and its importance for the credibility of the system should not be understated.

Good practice in IA methodology

There are many guides available on good practice in RIA methodology, including OECD recommendations (OECD, 2012). In the United Kingdom, as previously indicated, methodology is codified in the form of the Green Book, the Better Regulation Framework Manual (which incorporates advice on Impact Assessment methodology) and RPC guidance and case histories. The following recommendations are based closely on the "principles of good impact assessment" published by the RPC.[31]

Don't presume that regulation is the answer

A good impact assessment should begin by identifying clearly the market, regulatory or systems failure that necessitates government intervention, or in the case of a deregulatory measure, why intervention is no longer justified. The policy objective should be set out clearly and in specific terms, with a clear statement of the nature of the problem to be solved and an indication of its scale. The costs, benefits and risks of not intervening should be discussed, including whether market forces might resolve the problem without government intervention. Lastly, the ability of the regulatory intervention to correct the causes of market failure should be clearly demonstrated and any potential adverse consequences and/or behavioural impacts taken into account.

Take time and effort to consider all feasible options

At consultation stage, it is important that the RIA should consider a sufficiently wide range of realistic options to allow stakeholders to comment on the best approach. Each of the lead options should be appraised with a sufficient level of detail, proportionate to the impacts of the measure and the likely efficacy of the option. In selecting options,

policymakers should draw on evidence from other countries or jurisdictions to achieve similar policy objectives. Where appropriate, consideration should be given to whether non-regulatory alternatives could achieve the policy objectives. In addition, policymakers should include information on any policy options ruled out earlier in the policy cycle and explain the reasons why. The IA should not rule any option out of detailed appraisal without substantive reasoning or clear evidence.

Box 7.8. **Closing the gender pay gap**

The regulations require companies with more than 250 employees to publish the following figures annually: a) mean and median gender pay gaps; b) mean and median gender bonus gaps; and c) the number of men and women in each quartile of the company's pay distribution.

The Government previously pursued alternatives to regulation and the results were considered in the Impact Assessment. In particular, since 2011 the Department encouraged large employers to voluntary publish gender pay gap information through the "Think, Act, Report" initiative. However, only 5 out of almost 280 employers who signed up to the voluntary initiative published the information. The Impact Assessment explains that while the gender pay gap has slowly fallen over the last five years, decreasing from 19.85% in 2010 by 0.75% to 19.1% in 2015, the voluntary approach would be very unlikely to achieve the policy objective of accelerating the reduction in the gender pay gap over time.

Source: RPC (2016c), Case Histories web page (accessed 25 August 2016). Available at http://regulatorypolicycommittee.weebly.com/case-histories.html.

Gather substantive evidence

Evidence must be included explaining how markets currently work and how any identified market or regulatory failure is causing the behaviour and adverse impacts that the proposal seeks to address. Evidence based on statistical sources, empirical studies or *a priori* economic or other analysis should be included, where available. If a public or stakeholder consultation has taken place, evidence gathered during the consultation should be used to inform the estimates of impacts. Where evidence has not been provided, the IA should explain what steps policymakers have taken to seek to fill the evidence gap. In addition to consultation evidence, information from relevant other government departments or public bodies should be used to inform the estimates of impacts presented in the RIA. Of course, data and access to good data is always an issue. Even in countries with good data systems, the data required for an Impact Assessment may well not be readily available. Policymakers must therefore start gathering evidence, speaking to key stakeholders and drafting the RIA early in the policy development process. Too often, data strategies are not considered until the last minute, making it more likely that the evidence base will not meet better regulation requirements and clearance will be refused or delayed. It is recognised that data availability will vary depending on the subject area. Where good quality data is readily available, it would be expected that this would be used in analysis. However, where new research would need to be commissioned to gather the required data, this should only be undertaken where this is cost-effective. The Better Regulation Framework Manual gives some guidance on the degree of quantification required at different stages of the policy development process (Table 7.2).

Table 7.2. **Illustration of levels of quantitative analysis by policy stage**

Policy development stage	Progression of quantitative analysis – assuming full quantification is possible and proportionate				
	Identify	Describe	Quantify	Partially monetise	Fully monetise
Development	✓	✓	?	?	x
Options	✓	✓	?	?	x
Consultation	✓	✓	?	?	?
Final	✓	✓	✓	✓	✓
Enactment	✓	✓	✓	✓	✓

Source: Better Regulation Framework Manual BIS (2015), "*Better Regulation Framework Manual: Practical Guidance for UK Government Officials",* Department for Business, Innovation and Skills, London.

Produce reliable estimates of costs and benefits

The RPC will be looking for supporting evidence and analysis in the Impact Assessment to underpin the estimates of costs and benefits. It is one of the Committee's key roles. The most important requirement at the outset is to establish and assess the correct counterfactual scenario (the "do nothing" option) – how the market would evolve in the absence of the policy intervention. This will not necessarily be a continuation of the status quo. Building on this, the RIA should ensure that all relevant impacts of the regulatory proposal have been identified, including any indirect consequences. To the extent possible, all costs and benefits should be monetised, based on sound evidence, with a particular focus on direct impacts and particularly, in the current United Kingdom context, the costs to business that are to be scored against the Business Impact Target. Given the central role of this metric in the United Kingdom regulatory scrutiny and control system, the Equivalent Annual Net Direct Cost to Business (and other Present Value measures) should be calculated correctly, using appropriate discount rates, price deflators and appraisal periods. Finally, the most likely and most significant risks and uncertainties should be identified and their potential effects on the measure's impacts should be analysed, for example through sensitivity analysis.

Assess non-monetary impacts thoroughly.

Not all impacts can be measures satisfactorily in money terms, but it should still often be possible to give some indication of the scale of non-monetary impacts. Where possible, the non-monetised impacts should at least be presented in a way that enables them to be systematically and clearly considered and compared across the different options. Techniques are available for the appraisal and quantification of non-monetised impacts and should be used where proportionate to do so. It is also good practice to consider wider impacts, for example on income distribution and inequality and impacts relating to the public sector equality duty.[32]

Explain and present results clearly

Impact Assessments should be drafted to include all necessary information and omit extraneous detail. In the United Kingdom system, Government officials responsible for completing Impact Assessments are encouraged to use a standard template to ensure that results are presented in a standard form.[33] The magnitude, timing and incidence of costs and benefits should be clearly set out for each option, including setting out the reasoning and calculations clearly. Sources should be given for the data, research and evidence used and the robustness of each of these clearly demonstrated. The IA should explicitly

acknowledge any areas where the evidence is lacking or where analysis is partial or lacking on grounds of proportionality. It should describe the efforts taken to gather relevant information, even if those approaches were not successful

The IA should also include the detail needed to assess the measure against any regulatory control target or budget. Specific to the United Kingdom's regulatory control regime, the IA should include a classification for the measure under the Business Impact Target. It should demonstrate clearly how the EANDCB and the Business Impact Target Score been calculated for each option. If the measure is considered to be a non-qualifying provision, it should be explained clearly why this is the case. If the measure is of EU origin, the IA should demonstrate that it has been implemented at minimum cost with no "gold-plating".

Assess impacts on small and micro businesses

Given the disproportionate burden that regulation can impose on smaller firms, there is a case for giving special attention in IAs to the impact of regulation smaller firms. In the United Kingdom regulatory control system, this is formalised as a Small and Micro Business Assessment (SaMBA). Regulatory measures should only extend to small and micro-businesses where any disproportionate burden is fully mitigated. In order to limit any disproportionate effect, the default is that there will be a legislative exemption for small and micro-businesses where a large part of the intended benefits of the measure can be achieved without including them.

In undertaking a SaMBA, policymakers should consider in the IA the size of businesses and distribution of sizes in the affected markets, analyse the percentage of the policy's costs that accrue to small and micro businesses and estimate what proportion of the policy's benefits could be achieved while exempting small and micro businesses. If the evidence shows that a sufficient proportion of the intended benefits from regulation can be achieved without including small and micro businesses in the scope of the regulation, an exemption should be applied (Box 7.9. for example). If an exemption is not given, the policy should include mitigating measures for smaller firms or the IA should explain why exemptions or mitigations are not possible.

Box 7.9. Legislation to require energy suppliers to provide key, personal information on consumer bills in a machine readable format

The objective of the proposal was to require energy providers to place a small machine readable image, such as a bar code or Quick Response (QR) code, on all domestic retail consumers' paper energy bills. When scanned by a generic reader, this image will provide access to 12 key pieces of consumption data in a manner that is easy to understand.

The Department's original final stage IA was red-rated by the RPC on the basis that the Department had not provided sufficient evidence that the objectives of the proposal required the inclusion of small and micro businesses.

On re-submission, the Department provided data indicating that 10 energy suppliers are believed to be small or micro businesses, with a total market share estimated to be around 0.2%. The same businesses were, however, expected to bear 3.2% of the costs associated with this policy. The impact on small businesses was therefore considered to be disproportionate. The Department accepted that a full exemption should be applied because the vast majority of the policy benefits could still be achieved.

Source: RPC (2016c), "Case Histories web page", http://regulatorypolicycommittee.weebly.com/case-histories.html (accessed 25 August 2016).

Include a review plan

Ex post evaluation of regulation is as important as for spending policies. Good evaluation can provide information on the design and implementation of a regulation and its effectiveness, promoting not only accountability for the regulatory cost imposed but also lesson-learning that can help inform future policy. For proper *ex post* valuation to be possible, it is imperative that the IA include a review plan to update the quality of evidence available after the measure has been implemented. The IA should specific information on how the policy's success in meeting its objectives will be measured and on how the costs of the policy will be monitored. The post implementation review Plan should specify what data need to be collected before and during implementation phase and what data should be collected as the policy is being implemented, including how stakeholders will be consulted and their feedback reflected.

Limitations of CBA

Cost benefit analysis (CBA) is consistently promoted by the OECD as the desirable standard in conducting RIAs, but in practice the experience varies considerably internationally. Even amongst countries and administrations with a tradition of regulatory scrutiny, there is some variation (Table 7.3). In the United Kingdom, regulatory impact analysis is firmly rooted in CBA, based on Treasury Green Book guidance originally developed for spending decisions. It is also the preferred method in Australia, United States and Canada (Tiessen et al, 2013; Treasury Board of Canada Secretariat, 2007) and other OECD countries. EU Impact Assessment guidelines encourage "cost-benefit thinking", though CBA is only one approach for comparing impacts. Germany and some other European countries put more emphasis on counting the costs of regulatory change and less on quantifying or monetising the benefits. However, even those countries who aspire to full CBA acknowledge the difficulty in monetising and quantifying all impacts of a regulatory proposal and thus also allow for partial CBA or the use of other techniques, such as cost effectiveness analysis or multi-criteria decision analysis.

Analysis by RPC (2016a) suggests that United Kingdom Government departments could do better in quantifying wider impacts on society of regulatory proposals. The RPC warns that failure to do so could have adverse consequences for the quality of policymaking. RPC (2015a) highlighted concerns regarding the rigour with which societal impacts are appraised in impact assessments. During 2014, only one third of proposals seen by the RPC provided a quantified assessment of the effects on wider society. For measures that have come into force in the current parliament, RPC (2016a) states that the proportion has increased to around 60% (24 out of the 41 measures requiring full impact assessments). But eight of these 24 were assessed by the department as having a net cost to society, which would suggest that either society as a whole is worse off as a result of the government intervention, or that the benefits are not being quantified in full.

One problem is that the better regulation framework currently provides weak incentives for departments to assess the wider effects of regulation on society, as the RPC is unable to reflect concerns about the assessment of wider impacts in its fitness for purpose ratings. The RPC has consistently asked to be given this power in its annual reports (RPC, 2016b).

Table 7.3. **Summary of methods used for quantification and monetisation**

Method/approach	Australia	European Commission	United Kingdom	United States	Germany
Analytical frameworks					
Cost Benefit analysis (CBA)	X	X	X	X	X
Cost-Effectiveness Analysis (CEA)	X	X	X	X	X
Multi-criteria analysis (MCA)		X	X		X*
Methods for quantification ad monetisation					
Willingness to pay/Willingness to accept	X	X	X	X	
Revealed Preferences	X	X	X	X	
Stated Preferences	X	X	X	X	
Value of Statistical Life 'VOSL) and Value of a Statistical Life Year (VOLY)	X	X		X	
Quality Adjusted Lfe Years (QALY)	X	X	X	X	
And Disability Adjusted Life Years (DALY)	X	X			
Healthy Life Years (HLY)		X			
Cost of Illness		X		X	
Human Capital Approach		X			
Subjective Well-Being Approach			X		
Costs of carbon emission and social costs of carbon		X	X	X	
Life Cycle Assessment Approach		X			

Source: Tiessen, J. et al. (2013), "Quantifying the benefits of regulatory proposals: International practice", Study prepared for the Nationaler Normenkontrollrat, April 2, Berlin.

Strengthening the analysis of societal benefits would provide insight to Government on where to focus business regulation and inform the trade-off between societal benefit and business cost and help Government focus business regulation. These wider considerations could also inform better regulation policy design, for example in relation to small business assessments and exemptions. Both the RPC and the NAO (2016) have said they would like to see greater emphasis placed on the appraisal of societal benefits by departments and in the better regulation framework.

There is, however, a common fallacy that CBA is only about producing a single number, such as the NPV or EANCB. It is important to recognise that the process, analytical framework and accounting system are in many ways just as important as the final result. It may not always be possible to quantify everything – for example, the benefits of financial stability may be substantial, big enough to have a macroeconomic impact, and yet it is always hard to calculate with any precision the contribution that any particular financial regulation will make to the security of the financial system. There

may also be benefits which are especially hard to quantify in money terms such as child protection, national security, civic pride, trust, etc. In these circumstances, CBA can still be used as a framework but it may be unrealistic or even misleading to produce a single number for the NPV of the proposal to society as a whole.

Moreover, sometimes regulation is driven by distributional concerns rather than efficiency considerations, for example when changing the balance of rights between businesses and customers, between workers and employers, between claimants and defendants in insurance, patent disputes, bankruptcy proceedings and the like. In such circumstances, cost benefit analysis on its own will not tell us much about whether the policy is a good use of resources or not. In some circumstances, it may help identify any deadweight cost or other resource inefficiencies when the balance of rights is changed by regulation but in general the impacts will be dominated by a transfer from one group to another. Sometimes it may be possible to gain insight by using distributional weights, based on the declining marginal utility of income.[34] However, other distributional impacts may also need to be considered, for example differing impacts according to age, gender, ethnic group, health, skill, or location. And a degree of judgement will be required as to whether the distributional changes are in line with society's preferences and how much weight is to be given to those impacts.

Aside from the difficulty of quantifying benefits and wider impacts including distribution, other limitations to cost benefit analysis encountered in its application to regulatory change include the following, not all of them unique to regulatory policy making:

- The importance of implementation in *ex ante* assessments and process evaluation in *ex post* assessments should not be overlooked. An excessive emphasis on the EANCB or NPV or any other single number runs the risk of diverting attention from implementation or from lesson learning from process evaluation, which should be an equally important objective of appraisal. Policy design and implementation issues deserve as much attention in RIA as conventional cost benefit analysis. In the United Kingdom system, Impact Assessments are generally weak on implementation issues but these are considered elsewhere in the policy development process and the Better Regulation Framework Manual does specify that departments preparing a new measure should consider options for how it will be implemented and enforced, taking account of the principles set out in the Hampton Report (Box 7.10).

Box 7.10. **Hampton principles**

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most;
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take;
- No inspection should take place without a reason
- Businesses should not have to give unnecessary information, nor give the same piece of information twice;
- The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions;

Box 7.10. **Hampton principles** (*cont.*)

- Regulators should provide authoritative, accessible advice easily and cheaply;
- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work;
- Regulators should recognize that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

Source: http://webarchive.nationalarchives.gov.uk/+/http:/www.bis.gov.uk/policies/better-regulation/improving-regulatory-delivery/assessing-our-regulatory-system.

- Handling risk and uncertainty is a common problem in Cost-benefit analysis, but it is often integral to regulatory impact assessment, particularly for regulations that relate to public risk, i.e. those risks that Government seeks to manage on behalf of the citizen (Bartle and Vass, 2008; Better Regulation Commission, 2008). Examples of public risk would include financial stability, climate change, public health, flooding and animal disease. In all these cases, important externalities are present, justifying Government intervention (though not necessarily regulation) and the benefits must be weighed in terms of the contribution that regulatory and other measures can make to reducing the 'tail risk' of low-probability, high-impact outcomes. Cost benefit assessment is inherently difficult in such circumstances, as the quantitative impact of alternative policy measures on the risk is difficult to assess and yet the choice of policy, including whether to act at all, may be highly sensitive to the assumption made. In these circumstances, some advocate the adoption of a precautionary approach but others express concern that this may produce a bias to over-regulation.[35]
- While it is desirable to put more emphasis on the analysis of alternatives to regulation, constraints on resources are such that it may be disproportionate to undertake an appraisal of all the policy options, even when a distinct set of options is available. However, rarely is the choice facing policymakers a simple one. Typically, in practice, policy packages consist of many elements and countless options can be generated by considering them in different combinations. For example, the 2013-14 reforms to consumer protection undertaken in the United Kingdom and other EU countries in response to the Consumer Rights Directive comprised a raft of individual measures designed to promote confident and informed consumers, with short-term costs to business but longer term benefits in the form of enhanced competition and trust in the market place. Given the complexity of the package, despite the publication of a large number of impact assessments, it was difficult to appraise all the possible variants still less to consider radically different alternative means to achieving the same goals. Cost-benefit analysis can only take policymakers so far in such circumstances. A degree of pragmatism is required in dealing with this – for example encouraging policymakers to reserve the analysis of alternative options for discrete policy choices and make more use of sensitivity analysis rather than options analysis when considering varying parameters. In some cases, it may make sense to disaggregate or aggregate elements of policy packages in a way that allows structured choices among options. In other cases, on grounds of proportionality, a

qualitative account of the reasons for making a policy choice or selecting a policy setting may suffice.

- Finally, one danger (Wegrich, 2011; Tiessen et al, 2013) is that the technical and methodologically sophisticated information provided in RIA reports may lead to less, not more, transparency as far as lay readers are concerned. While it is only right that economists should use state-of-the-art techniques in CBA, analysts and policymakers should take care to avoid spurious precision and to ensure that both the analysis and the caveats around it are explained in clear and simple terms accessible to a general audience.

Given the limitations of CBA, it is often necessary to resort to cost effectiveness analysis where the costs of alternative ways of reaching a given outcome are compared and ranked. In many cases, this may be the proportionate solution. In practice, in RIAs that fail to consider wider impacts, the analysis reduces to a form of cost effectiveness analysis, with little attempt to differentiate policies according to their impact on the policy objective or other benefits. An example of cost effectiveness analysis is given in Box 7.11.

Box 7.11. Cost-effectiveness analysis

The outputs to be ranked by cost-effectiveness analysis will often be social or environmental in nature, for example, work in health economics looking at the cost-effectiveness of different treatments. As with CBA, the level of detail for the analysis will typically depend on the specific issue being addressed, but should take a broad view of costs and benefits to reflect all stakeholders.

In 2005 the United Kingdom Government undertook a value for money analysis of Government investment in different types of childcare. The choice was between higher cost "integrated" childcare centres, providing a range of services to both children and parents, or lower cost "non-integrated" centres that provided basic childcare facilities.

The analysis used a variant of cost-effectiveness analysis to allow the comparison of the cost-effectiveness of childcare to other policy areas such as employment, education and crime, where the evidence allowed the analysts to quantify intermediate outputs from the policy (e.g. improved educational attainment aged 18) but not the final outcomes of the policy (e.g. better overall life chances, higher skilled workforce and higher economy wide productivity growth)

Source: http://betterevaluation.org/evaluation-options/CostEffectivenessAnalysis.

However, in cases where the costs and benefits are large and the size and the nature of the benefits differ depending on the intervention, cost effectiveness analysis will not suffice. Another technique often promoted as an alternative to cost benefit analysis is multi criteria decision analysis (MCDA). MCDA is intended to help rank options in contexts where there are multiple criteria, where some may be monetary but others are expressed in non-monetary form. MCDA allows the different elements of the problem to be assessed separately but also provides an overall picture of the performance of all options across all criteria to enable a well informed decision to be made. Maxwell et al (2011) report that MCDA is now widely used throughout the United States, at all levels of government, and DCLG (2009) report that it is increasingly being used in the United Kingdom as a complement to CBA or cost effectiveness analysis. DCLG (2009) includes three case studies on the use of MCDA in the United Kingdom: an evaluation by the National Audit Office of Overseas Trade Services provided by the Department of Trade and Industry; an appraisal for United Kingdom Nirex Limited of potential United

Kingdom sites that might be suitable as radioactive waste repositories; and use of MCDA modelling and decision conferencing by a new unitary local authority to develop a three year strategic plan for the management of their social care budget.

MCDA accepts that benefits are often inherently multidimensional and not always monetisable. Rather than a single score, such as NPV, multi-criteria analysis evaluates projects and proposals by multiple standards – typically six to eight criteria. The strength of multi-criteria analysis is its transparency in reporting complex evaluations, where the scores on the different criteria may vary greatly. It may be particularly well suited to situations where different stakeholders emphasize different objectives. However, the other side of the coin is that the choice of criteria and their relative weighting is subjective and open to debate, so it is by no means certain to lead to unambiguous or unbiased outcomes.

In view of their limitations, CBA, cost effectiveness analysis and MCDA should be used with care. They are best used as an analytical and accounting framework for considering costs and benefits, monetary and non-monetary, and a guide to structured decision making, rather than a tool that is expected to produce a single metric or a unique ranking of policy options. In the United Kingdom RIA system, it is rare to find any example of formal cost effectiveness analysis or multi criteria decision analysis. The guidance steers departments in the direction of full cost benefit analysis and this is the approach used in the majority of cases. When monetisation of wider impacts (usually benefits to wider society such as financial stability, consumer confidence, security, environmental impacts) is not possible, departments default to using a form of cost effectiveness analysis or a multi-criteria approach, though the discussion is almost always qualitative without any use of formal ranking or weighting techniques.

Policy implications

This concluding section draws on the preceding analysis of the United Kingdom system of regulatory control, together with OECD Recommendations on good practice in regulatory policy and governance (reproduced at Annex E), to suggest some preliminary policy findings. The aim is to provide Korea and others with some pointers in respect of the design, implementation and management of programmes of regulatory impact assessment in order to help improve the efficiency and effectiveness of regulatory policy and governance.

The lessons from the United Kingdom experience suggest some institutional prerequisites for deeper embedding of regulatory impact assessment and some methodological challenges which need to be addressed in the design of a system of regulatory control.

The most important prerequisite for a successful system is stakeholder support. First and foremost, political commitment is needed, in particular buy-in from Ministers, Parliament, senior Policy makers and analysts. The OECD recommendations (Recommendation 1) call for commitment at the highest political level to an explicit whole-of-government policy for regulatory quality. This is an area where the United Kingdom already has an established tradition and reputation. To some extent, achievement of buy-in across institutions is facilitated by the United Kingdom's Parliamentary system and the institutional structure that supports better regulation. However, the degree of political commitment is also manifest in, and strengthened by, the creation, from 2015, of a legislative basis for the system of regulatory control. Although it

is early days, the strengthening of the legislative basis through the SBEE Act appears to have added to the credibility of the United Kingdom system and enshrined the role of the independent scrutiny body. However, the RPC had the benefit of having played a similar role for a number of years prior to the SBEE Act and had established a track record and modus operandi. The context and institutional setting is therefore important in judging the appropriate legislative basis and the effectiveness of legislating for budgets, targets and independent scrutiny. The institutional, historical and cultural context must always be taken into account in seeking to learn from other countries.

It is important to build stakeholder support more widely as well. The OECD recommends (Recommendation 2) that the system of regulatory governance should be in line with the principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. The OECD has previously identified (OECD, 2010) that the United Kingdom has a well-established culture of open consultations aimed at maximising transparency in the process. In the current setting, transparency is further served by the adoption of a Business Impact Target, publication of annual reports on progress against the target and publication of Impact Assessments by Departments and Opinions and Annual Reports by the RPC.[36] An open approach such as that adopted in the United Kingdom raises the profile of better regulation, helps build confidence in the system and also fosters greater stakeholder involvement at the consultation stage of policy development.

More generally (OECD Recommendations 7-10), it is important to have a network of departments, agencies and other bodies responsible for delivering the system of regulatory control and better regulation agenda, with clear divisions of responsibility and lines of accountability. This includes having the relevant analytical capacities and competences in departments and a strong central body with a coordinating role. At the same time, the cost in terms of resources and bureaucratic burdens needs to be kept manageable, hence the need for streamlining aspects of the system, such as fast track and proportionate treatment for low cost measures and early warning signals (such as IRNs) when the regulatory scrutiny process reveals problems in an impact assessment.

Another pillar of the United Kingdom system is independent scrutiny. The OECD advises (Recommendation 3) that countries should establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality. The experience of the RPC, as the United Kingdom's official independent verification body and other independent bodies such as NKR in Germany and Productivity Commission in Australia, points to the value of independent quality assurance and oversight. It is also important that the body responsible for scrutiny has some form of sanction appropriate to the policy-making context and culture, for example the power to delay the passage of a policy proposal. In the United Kingdom, this is secured by requirement for RRC clearance and an understanding that this will only be given in exceptional circumstances if the RPC has not validated the assessment of business impact.

In the United Kingdom, the RPC's role in validating the target focuses minds in departments and regulators on the need to bear down on regulatory cost. The need to obtain RPC validation also adds further leverage to the role of the scrutiny body. This is one of the positive side-effects of a system of regulatory budgets or targets.

The experience of the United Kingdom also suggests a number of lessons in the design of a regulatory budget or target. Although other metrics are possible, a target focused on the business impact would seem to be the most consistent with the needs of competitiveness and the desire to constrain the burden of regulation on the economy. Ideally, the business impact target should be drawn as widely as possible and the degree of ambition set accordingly. Businesses do not generally distinguish between the sources of regulation according to whether it is in the direct control of the Government and would prefer to have a more inclusive target, calibrated according to what can realistically be achieved. Another desirable design principle, which should not be overlooked, is that the regulatory account should serve as a complement to other accounts such as the tax and expenditure accounts so that together they give a complete picture of the impact of Government decisions on business.

Business impact should be defined in terms of a net value measure of the net cost or benefit to business, not by the number of regulations or a categorisation of measures into those which are regulatory or deregulatory. The choice of the exact metric is less important – it can be EANCB, NPV or a stream of annual costs. But it is desirable to avoid frequent changes to the target and to have a consistent framework over time, so that accounts from one regulatory period to another are comparable, allowing progress to be tracked and an overall account maintained.

OECD Recommendation 5 calls for systematic programme reviews of the stock of significant regulation. In the United Kingdom one of the manifestations of this is in the form of "red tape reviews", undertaken by the Cabinet Office.[37] In Australia, the Productivity Commission plays a similar role (OECD, 2010a). There are also incentives in any system of regulatory or budgets for departments and regulators to keep the stock of regulation under constant review in order to find savings to keep to budgets or meet targets. In the United Kingdom, the NAO has criticised departments for not having estimated the size of the total stock of regulation, as opposed to the new flow. But, as long as the stock of existing regulation is regularly reviewed, it is not clear that it is helpful to try to estimate the size of the stock, mainly because that is a conceptually difficult exercise to carry out. It is difficult to imagine a counterfactual of a "no regulation world" and even if the impact of successive regulations could be cumulated over time, it is not clear that this would give a meaningful estimate of the overall burden, as society and the economy adjust in response to the regulatory framework over time.

The other practical challenge in the policy-making process is to make sure that RIAs are integrated with the policy development process (OECD Recommendation 4). Too often, the policy making process proceeds independently and regulatory impact assessment is only done at the end of the policy process as an afterthought. One way to discourage this is to require RIAs to be carried out at each stage in the decision-making process. It also helps if evaluation and monitoring are built in at the beginning of the impact assessment process rather than addressed only at the time of post-implementation reviews.

Another important point to bring out is that RIAs will command more attention and be taken more seriously if they are part of the decision-making process and parliamentary scrutiny. In some countries, RIAs are undertaken as part of the policy-making process but this counts for little if the RIA is then sidelined when it comes to Cabinet decisions. In the United Kingdom, the requirement for RRC clearance, which is normally contingent on the Impact Assessment receiving a fit-for-purpose rating from the RPC, ensures that RIAs are at the heart of decision making. Publication of the Impact Assessment and Opinion

also then ensures that the evidence and analysis contained therein can inform and support parliamentary debate on new primary legislation.

Finally, there is scope to improve benefit modelling within a more integrated approach to impact assessment. Good impact assessment requires an acceptance that, for significant measures, an attempt should be made to monetise as much as possible, using standard techniques e.g. for the valuation of time savings, quality-adjusted life years, modelling, contingent valuation, international evidence and so on. But cost-benefit analysis also has its limitations and it may not always be possible to reduce everything to a single number. For these reasons, the quality of an impact assessment should be judged not only on whether it produces the correct figure for any control total but also on the way in which CBA or other tools are used as an accounting framework and a guide to structured decision making.

Conclusion

This review of United Kingdom experience with regulatory reform and the incentives created by the better regulation framework suggests that there are a number of key features that help promote good quality RIA: a legislative basis for the better regulation framework; an independent body responsible for scrutiny; the additional leverage provided by some form of regulatory budget constraint or target; buy in from stakeholders; and the existence of an agreed and codified methodology.

Implementation of a system of regulatory control and oversight, such as that practised in the United Kingdom, must overcome a number of methodological challenges. In addition to the usual difficulties of undertaking good cost-benefit analysis for regulatory impacts and the broader limitations of CBA as an analytical tool, the challenges include agreeing the precise definition of the business impact target, the metric to be used and distinguishing direct and indirect impacts. The chosen measure of business impact – the Equivalent Annual Net Direct Cost to Business – is not perfect but it has proven to be a useful analytical tool and establishes a common 'currency' for the assessment of business impact

This paper draws a number of conclusions about good practice in regulatory scrutiny and governance that may be relevant for Korea. The importance of buy-in from policymakers and business is stressed and this can be bolstered by greater openness to help build credibility. Independent scrutiny, preferably backed by sanctions and the additional leverage of a regulatory target or budget, has further strengthened the United Kingdom framework. A network of agencies with relevant competences is also needed to run a system of regulatory impact assessment and oversight successfully.

Some lessons may also be drawn on good practice in managing and undertaking regulatory impact assessment. RIAs should be integrated with the policy development process and not undertaken as an afterthought; and they should inform decision-making and scrutiny by Parliament and not just be a process for the Executive. There is also plenty of scope to improve benefit modelling, even in frameworks, such as the United Kingdom's, that require full cost-benefit analysis rather than cost-effectiveness analysis. Finally, while the overall quality of a RIA should be judged on its consideration of the society-wide impact, a focus on the net (value) impact on business may be justified if the objective is to constrain the cost imposed on the business sector and thereby contribute to improved competitiveness.

Notes

1. "Recent developments to strengthen ex-ante impact assessment signal clearly the energetic promotion of a new culture for rule making. There has been considerable progress on ex-ante impact assessment. The United Kingdom is doing far more to promote this than many other OECD countries" (OECD, 2010a).
2. "The vigour, breadth and ambition of the United Kingdom's Better Regulation policies are impressive. This makes the United Kingdom especially well placed among EU and other OECD countries to address complex future regulatory challenges" (OECD, 2010a).
3. http://hansard.millbanksystems.com/written_answers/1993/mar/09/dti-deregulation-unit-social-action
4. Annex A: www.eesc.europa.eu/resources/docs/routes_to_better_regulation.pdf.
5. www.regulation.org.uk/library/2005_less_is_more.pdf.
6. http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf.
7. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al10108
8. www.dei.gov.ba/bih_i_eu/RIA_u_BiH/default.aspx?id=6595&langTag=bs-BA
9. http://webarchive.nationalarchives.gov.uk/20130129110402/www.hm treasury.gov.uk/bud_bud05_hampton.htm
10. www.regulation.org.uk/library/2005_less_is_more.pdf.
11. http://discovery.nationalarchives.gov.uk/details/r/C17921.
12. www.legislation.gov.uk/ukpga/2015/26/pdfs/ukpga_20150026_en.pdf.
13. As defined in the Better Regulation Framework Manual (BIS, 2015), gold-plating is where implementation of an EU regulation, decision or directive goes beyond the minimum necessary to comply with the Directive (BIS, 2015)
14. A sub-committee of the Economic Affairs Committee, the RRC chaired by Oliver Letwin until July 2016 met regularly during the 2010-15 Parliament but since 2015 RRC clearance has generally been sought and given through a write-round process. Under Teresa May's Government, the RRC continues, with a similar role and a slightly expanded membership, as a sub-Committee of the Economy and Industrial Strategy Committee.
15. www.gov.uk/government/news/new-cabinet-committee-to-tackle-top-government-economic-priority

16. With regard to the RPC, references to "business" in the context of better regulation, also include, unless otherwise specified, civil society organisations (voluntary and charitable organisations not in the public sector).

17. In May 2016, the scope of the business impact target, and the RPC's role in verifying it, was extended to cover the regulatory activity of over 80 statutory regulators.

18. According to its terms of reference, the RPC may publish any insights it gains, through its scrutiny function, on the operation of the better regulation framework and how well it meets Ministers' stated policy intentions, but it may not comment publicly on any other aspect of Government policy. This protects the independence of the RPC and ensures clear separation between the scrutiny of analysis and evidence (which is the role of the RPC) and policy-making (which is the responsibility of Ministers).

19. Amber ratings were originally used either to indicate changes that "should" be made to an Impact Assessment prior to consultation for a consultation stage IA or prior to publication for a final stage IA. Following a BRE review of the process, the RPC was required to give either a red or green rating at final stage, based only on whether it could validate the final figure for the net impact on business. Ambers were still used at consultation stage, but there was little evidence that departments were revising Impact Assessments prior to consultation in response to an Amber rating. With the introduction of Initial Review Notices (see below), Amber ratings have, since early 2016, been dropped altogether.

20. www.gov.uk/government/collections/red-rated-impact-assessment-opinions-since-may-2015

21. Guidance on what constitutes a proportionate approach can be found in the Better Regulation Framework Manual (BIS, 2015). Authors of impact assessments are advised to ensure that the resources devoted to RIA are proportionate by considering factors such as the scale of the expected impact, stage of the policy, sensitivity of the policy and the feasibility/cost of doing further analysis relative to the benefits it may yield.

22. For similar reasons, Canada introduced a Framework for the Triage of Regulatory Submissions in 2006 (Government of Canada, 2006).

23. So far there is no evidence of departments making inappropriate use of the fast track in this way.

24. Under ARI, non-economic regulators planning a significant change in policy or practice were expected to assess and quantify the impact of that change on business. The assessment was to be shared with representatives of businesses affected, and, if possible, agreed before making the change and then published. The RPC's role was expanded to allow it to assess the best means of resolving disputes in cases where the regulator and business were unable to agree the assessment. However, no such cases came to the RPC. ARI was superseded with the extension in 2016 of the RPC's scrutiny role to include independent regulators.

25. Since the extension of the BIT to cover the regulatory activities of statutory regulators came only in the Enterprise Act 2016, it is still too early to tell how much this will affect the account, but the increase in caseload for the RPC is expected to be substantial.

26. In the view of the FSB, the RPC "provides rigorous testing of the quality of Impact Assessments (IAs) by government departments regarding new regulatory proposals. We believe that the work of the RPC and the high degree of transparency with which

it carries it out has introduced a discipline and rigour to the IA process that has not always been evident in the past. We welcome the overall improvement in IAs to date and want to see it continue." (Quoted in RPC, 2015a)

27. For example, the CBI, in its written evidence to a parliamentary inquiry on the introduction of a statutory register of lobbyists, cited the RPC's Opinion that the impact assessment for the policy did not explain how the proposal would address the causes of market failure or its significance and went on to recommend that the Government should address this point before taking its proposals further.

28. The Government has however accepted that future annual changes to the National Living Wage that do not follow the recommendations of the Low Pay Commission will be in scope for the Target (UK Parliament, 2016).

29. Or equivalent annual net direct cost to business (EANDCB) in the terminology adopted from 2016. The two terms are used interchangeably in this report.

30. The Government has decided that OI3O does not apply to qualifying regulatory provisions that stem from manifesto commitments

31. In the UK, the Public Sector Equality Duty, set out in the Equality Act (2010), requires Ministers to have due regard to the need to advance equality of opportunity, eliminate discrimination and foster good relations between those with and without certain protected characteristics. For an example, see the Impact Assessment prepared in November 2015 by BIS for the introduction of the National Living Wage, Annex 1, pp. 32-37, which can be found at www.legislation.gov.uk/ukia/2016/3/pdfs/ukia_20160003_en.pdf

32. The template can be found at www.gov.uk/government/publications/impact-assessment-template-for-government-policies

33. Guidance on this for UK policymakers is set out in the Green Book, HM Treasury, 2011: 25 and Annex 5.

34. Public risk has been the subject of reports by the Better Regulation Commission (eg, Better Regulation Commission, 2008) and the Risk and Regulatory Advisory Council in the UK (eg, RRAC, 2009).

35. Public risk has been the subject of reports by the Better Regulation Commission (eg, Better Regulation Commission, 2008) and the Risk and Regulatory Advisory Council in the UK (eg, RRAC, 2009).

36. The results of successive business surveys show some evidence of increasing transparency. The 2014 business perceptions survey (NAO and BIS, 2014) showed a significant improvement on all measures related to fairness, clarity and straightforwardness of regulation against 2012 and, to a lesser degree, against 2010. However, the 2016 findings for these measures were generally less positive than in 2014 (BEIS, 2016).

37. https://cutting-red-tape.cabinetoffice.gov.uk/.

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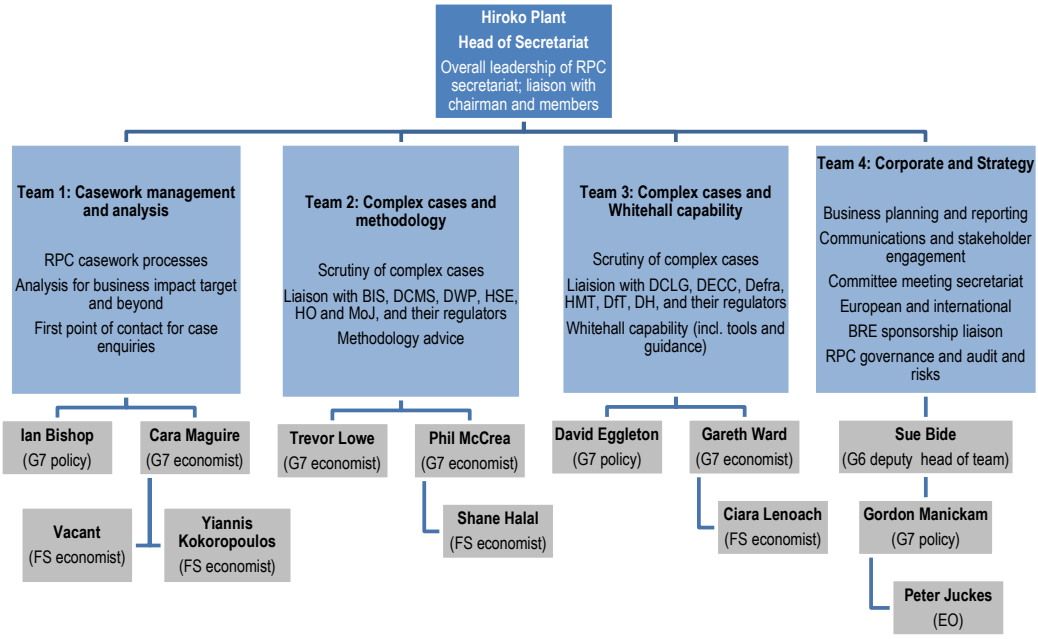
Annex 7.A

Resources involved in United Kingdom better regulation framework

The BRE is currently (December 2016) undertaking a review of the efficiency of the better regulation framework, including costs to departments and regulators of complying with its processes. It is estimated that the BRE cost £3.1 million in 2015-16, and the RPC about £1 million.

The organisation of the RPC Secretariat is shown in the diagram below. The Secretariat provides support to the Chairman and the other seven members of the Committee.

In addition to the cost of the BRE and RPC, the NAO (2016) estimates that the activities of departmental Better Regulation Units cost another £2.3 million per year. There is considerable variation between departments, from an estimated £20 000 to nearly £500 000, depending partly on the scale of the department's regulatory activities. However, this is not a full estimate of administrative costs, since it does not include costs incurred by departmental policy teams or by regulators.



Annex 7.B

Independent scrutiny bodies in Europe

	Regelrådet (Sweden)	Actal (Netherlands)	RIAB (Czech Republic)	RPC (United Kingdom)	NKR (Germany)
Mandate and tasks	• Reviews IAs: YES. Quality reviews IAs accompanying proposals for new or amended laws, ordinances and regulations. Assesses IAs to proposals from the EU Commission upon requests from ministries and recommends what is needed for a complementary Swedish IA • Institutions advised: Govt, Government agencies	• Reviews IAs: YES, in two phases – formal and informal • Institutions advised: Government, Parliament and on request municipalities	• Reviews IAs: YES. Quality reviews RIA reports accompanying draft legislation; consultative role to ministries in preparing proposals and drafting RIA reports • Institutions advised: Government	• Reviews IAs: YES. Scrutiny of new regulatory and deregulatory proposals and Post Implementation Reviews (PIR); scrutiny of both Consultation stage and Final Stage IAs • Institutions advised: Government	• Reviews IAs: YES, scrutiny of IAs accompanying new or amended draft regulations • Institutions advised: Government, in a few cases also Parliament
Organisation set-up	Relationship with Govt: independent decision-making body under the umbrella of the Swedish Agency for Economic and Regional Growth (Govt agency)	Relationship with Govt: external, it's not part of a Govt agency	Relationship with Govt: advisory board functioning within the Government Legislative Council, advisory body to the Government	Relationship with Govt: Independent Non-departmental Public Body (NDPB) sponsored by the Department for Business, Energy and Industrial Strategy (BEIS)	Relationship with Govt: The NKR is an independent advisory body. Only regarding organisational issues, the NKR is part of the federal chancellery.
Powers	Advisory role	Advisory role	Advisory role	Advisory role	Advisory role
Transparency	• Opinions on website • annual report	• Annual reports and work programmes • All opinions are published • All ongoing research is announced on the website to allow stakeholders to provide input	Opinions on website	• Opinions on website • Publication of reports and documents on Govt's better regulation agenda • Runs own Twitter feed	• The most important opinions are published on the NKR's website. • All opinions are published together with the government proposal on the website of the council of constituent states (German Bundesrat) • Annual report

	Regelrådet (Sweden)	Actal (Netherlands)	RIAB (Czech Republic)	RPC (United Kingdom)	NKR (Germany)
Composition	• 5 part-time external experts • Background: business, academia or union sectors • Selected and appointed by the government • Mandate: initially 1 year, but probably longer as from next year • Supporting staff: 10 civil servants	• 3 part-time external experts • Background: strong links with business, civil society and politics • Recruited through an open competition, then appointed by government; parliament is informed • Mandate: 4 years renewable twice • Supporting staff: 12 civil servants • Further Advisory board made up of volunteers	• 16 part-time external members • Background: economists and lawyers • Appointed by the Government Legislative Council • Mandate: no limit • Supporting staff: 5 officials	• 8 part-time members (paid on a pro rata basis) • Background: economists, lawyers and representatives from business, civil society and academia • Recruited through open competition • Mandate: at least 2 years • Supporting staff: 15 civil servants	• 10 members on honorary basis • Background: former or current representatives of administration, politics, business, organisations, unions, academia • Members are recommended by the Federal Chancellor and appointed by the Federal President • Mandate: 5 years • Supporting staff: 15 civil servants
Annual No. of opinions issued (2014 or average)	177 (2014)	50 (average)	65 (2014)	500 (average)	300 (average)
Annual budget	€1 million	€2.1 million	n.a.	Almost £1 million	Around €1 million

Annex 7.C

Business Impact Target exclusions

a) Exclusions carried over from last Parliament

- Regulatory provisions that implement new or changed obligations arising from European Union Regulations, Decisions and Directives, and other changes to international commitments and obligations, except in cases of gold-plating.
- Regulatory provisions specifically relating to civil emergencies.
- Regulatory provisions concerning fines and penalties, and redress and restitution.
- Regulatory provisions that promote competition (where these result in an increase in a direct net burden on business).
- Regulatory provisions that enable delivery of large infrastructure projects.
- Regulatory provisions that implement changes to the classification and scheduling of drugs under the Misuse of Drugs Act 1971, or to National Minimum Wage hourly rates, where these follow the recommendations of the relevant independent advisory body.
- Regulatory provisions relating to systemic financial risk.

b) New exclusions applied in this Parliament

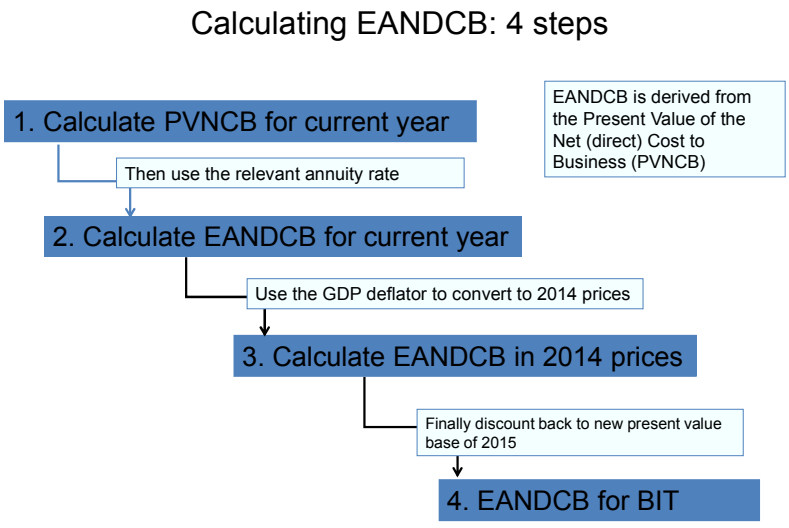
- Regulator casework including specific investigation and enforcement activity, individual licence decisions, and individual advice.
- Education, communications activities, and promotional campaigns by regulators, including media campaigns, posters, factsheets, bulletins, letters, websites, and information / advice help lines.
- Policy development by regulators, including formal and informal consultations, policy reviews, and ad hoc information requests.
- Changes to the organisation and management of regulators, except for those resulting from legislative changes or another policy change that is a qualifying regulatory provision.

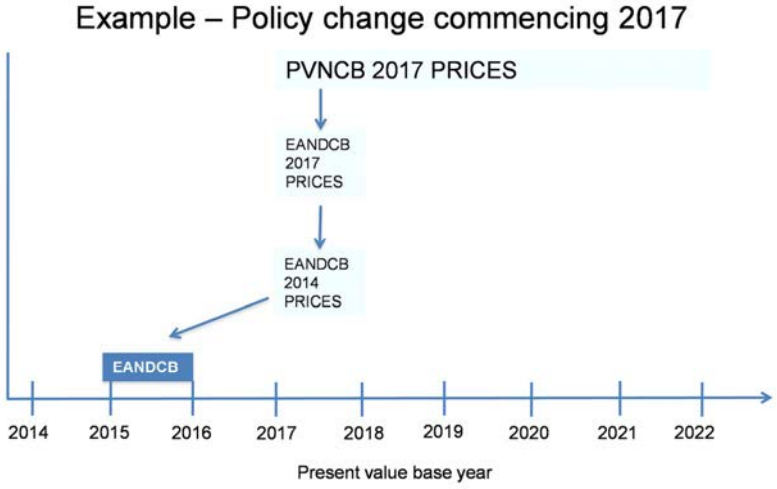
- Regulatory provisions applying to certain business activities of operator(s) of a network or system where the operator(s) are deemed to be a monopoly or to have significant market power, specifically:
  - regulatory provisions that concern the terms upon which access is provided to those networks and systems; and
  - regulatory provisions that concern effective network and systems operation and co-ordination.
- Regulatory provisions that are price controls, except for the introduction of price controls to previously unregulated activities, or removal of pre-existing price controls.
- Changes to Industry Codes, except those arising from regulator action or new legislation.
- Regulatory provisions that introduce the National Living Wage

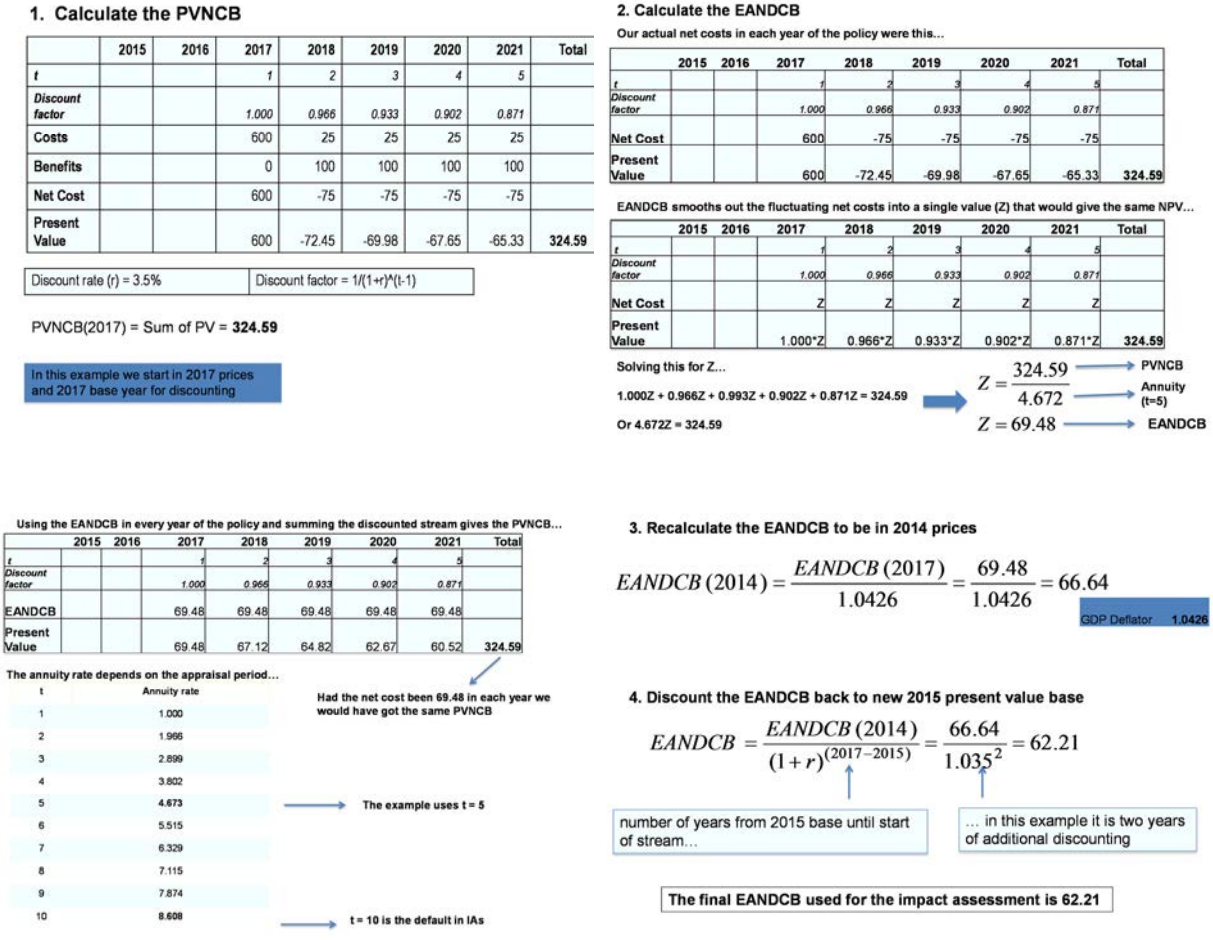
Source: United Kingdom Parliament (2016).

Annex 7.D

Worked example of calculation of EANDCB







Source: Training pack for UK Government economists.

Annex 7.E.

OECD Recommendations on Regulatory Policy and Governance

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised.
2. Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.
3. Establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality.
4. Integrate Regulatory Impact Assessment (RIA) into the early stages of the policy process for the formulation of new regulatory proposals. Clearly identify policy goals, and evaluate if regulation is necessary and how it can be most effective and efficient in achieving those goals. Consider means other than regulation and identify the tradeoffs of the different approaches analysed to identify the best approach.
5. Conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.
6. Regularly publish reports on the performance of regulatory policy and reform programmes and the public authorities applying the regulations. Such reports should also include information on how regulatory tools such as Regulatory Impact Assessment (RIA), public consultation practices and reviews of existing regulations are functioning in practice.
7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence.

8. Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner.
9. As appropriate apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.
10. Where appropriate promote regulatory coherence through co-ordination mechanisms between the supranational, the national and sub-national levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of regulations.
11. Foster the development of regulatory management capacity and performance at sub-national levels of government.
12. In developing regulatory measures, give consideration to all relevant international standards and frameworks for co-operation in the same field and, where appropriate, their likely effects on parties outside the jurisdiction.

Source: OECD (2012), *Recommendation of the Council on Regulatory Policy and Governance*, OECD Publishing, Paris, www.oecd.org/gov/regulatory-policy/2012-recommendation.htm.

Chapter 8

Korean practices and challenging issues in regulatory impact analysis

by Jongyearn Lee[1]

This chapter looks at the different practices and experience of Korea in designing and implementing regulatory impact assessments (RIA). It provides a comprehensive account of the history and evolution of its adoption and implementation and focuses on the different methodological issues and challenges in managing and undertaking RIA. First, if a target or budget is adopted, it should focus on net (value) impact on business, though the impact on the wider economy and society should not be neglected. Second, while reviews of the stock are helpful, estimating the size of the stock is fraught with conceptual and practical difficulties. Third, RIAs should be integrated with the policy development process and not considered as an "add-on". Fourth, RIAs should also inform decision-making and scrutiny by Parliament and not just be a process for the Executive. Finally, there is plenty of scope to improve benefit modelling and to consider alternatives to CBA.

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Introduction

Korea introduced the use of Regulatory Impact Analysis (RIA) two decades ago as a key apparatus to regulatory reform initiatives. However, its implementation was considered unsatisfactory for a considerable period of time due to the lack of appreciation and capacity among implementing line ministries. However, noticing RIA's significant role in enhancing regulatory quality, the Korean government has consistently attempted to increase the effectiveness of RIA, including through amendments in the law to secure the legal basis for a mandatory RIA, the introduction of a review process, and the creation of an electronic documentation system. In fact, Korea was ranked above the OECD average in its implementation of RIA in (OECD, 2015) as shown in Figure 8.1 of the previous chapter. Nevertheless, despite the recent progress made, challenges in the practice and implementation of RIA still remain.

The purpose of this chapter can be summarized in three points:

- Introduce Korean practice regarding RIA for those who are not familiar with it.
- Introduce the contents of a RIA in Korea in detail.
- Share the challenges that Korea faces in conducting RIA. It is expected to serve as a reference of a country case that provides insights to countries confronting similar challenges and those wanting to institutionalize RIA more systematically.

This chapter aims to present Korea's practices in conducting RIA, including the opportunities and challenges in its implementation. In doing so, the chapter provides an overview of the recent developments in the institutional setting and the recent reforms in the RIA process. Moreover, it aims to discuss emerging issues in the implementation of RIA, identify the challenges, and draw policy implications.

Regulatory impact analysis system in Korea

RIA was established in August 1998 through the enactment of the Framework Act on Administrative Regulations, which introduced RIA as a key apparatus to regulatory reform initiatives. All new or strengthened regulations required a RIA. This included a statement of the need for government intervention, a review of regulatory alternatives, a Cost-Benefit Analysis (CBA), and a review of the adequacy and effectiveness of regulatory measures. Ministries are mandated to complete the information required, which are then submitted to the presidential Regulatory Reform Committee (RRC) for review.

Unfortunately, during the initial rollout of RIA, the performance of operations to enhance regulatory quality was deemed unsatisfactory for a considerable period of time. Line ministries complained about the lack of available raw data, as well as in-house human resources and time. Consequently, RIAs were poorly conducted and the review process became a mere formality.

To enhance the quality of RIAs, the Framework Act on Administrative Regulations was amended twice in June 2006 and June 2008. The first amendment adopted the disclosure principle so that all RIA reports are publicly disclosed, and the second added the assessment of restrictiveness of competition to RIA. Moreover, the guideline on RIA was revised in August 2013 to recommend the additional assessment of the impact on small and medium-sized enterprises (SMEs). Current law states the mandate, disclosure, and governance of RIA as follows:

Box 8.1. The Framework Act on Administrative Regulations and the Enforcement Degree of the Act on RIA

(Article 7, Clause 1 of the Framework Act on Administrative Regulations) When the head of a central administrative agency intends to establish a new regulation or reinforce existing regulations (including the extension of the effective period of regulations), he/she shall conduct a RIA taking account of the following matters comprehensively, and prepare a RIA report:

1. Necessity of establishing a new regulation or reinforcing existing regulations;
2. Feasibility of the objectives of regulations;
3. Existence of alternative means to a regulation, or possible overlapping of existing regulations;
4. Comparative analysis on costs and benefit which are to be borne by or enjoyed by the citizens and groups subject to regulation following the implementation of regulations;
5. Effects arising from the implementation of regulations on small and medium-sized enterprises under Article 2 of the Framework Act on Small and Medium Enterprises;
6. Whether competition-restricting factors are included;
7. Objectivity and clarity of regulations;
8. Administrative organization, human resources, and required budget following the establishment or reinforcement of regulations;
9. Whether documents required for relevant civil affairs, procedures for handling thereof, and other similar matters are appropriate.

(Article 7, Clause 2 of the Framework Act on Administrative Regulations) The head of a central administrative agency shall issue a general public announcement concerning the RIA report under paragraph (1) during the pre-announcement period of legislations, supplement the RIA report after reviewing the submitted opinions, and notify the persons who have submitted their opinions of the results of handling the submitted opinions.

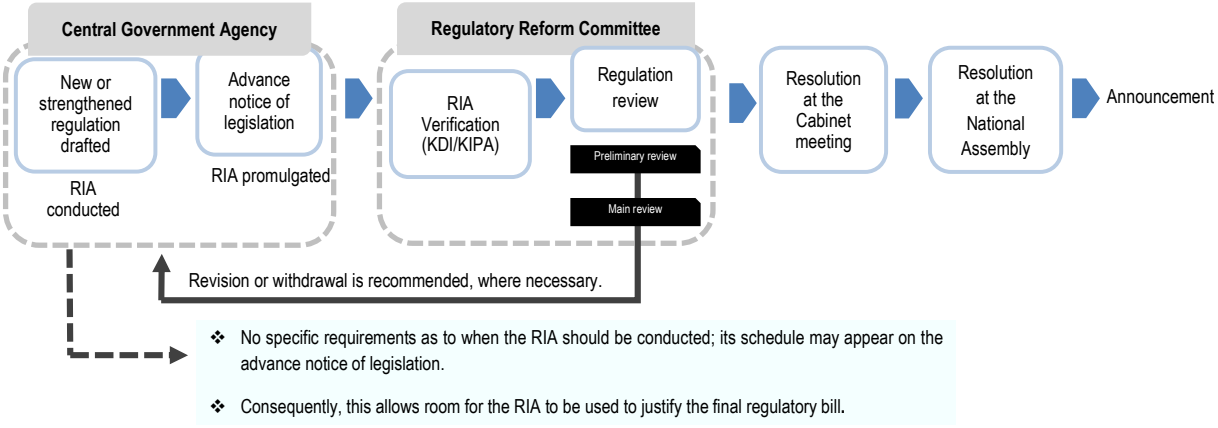
(Article 7, Clause 4 of the Framework Act on Administrative Regulations and Article 6, Clause 4 of the Enforcement Decree of the Framework Act on Administrative Regulations) The Regulatory Reform Committee shall give central administrative agencies a guideline on the preparation and publication of RIAs.

In May 2015, the Korean government, in particular the Prime Minister's Office (PMO), devised a new way to improve and strengthen the quality of RIA with the support of the Centers for Regulatory Studies at government-funded independent think tanks, namely the Korean Development Institute (KDI) and Korea Institute of Public Administration (KIPA). Both Centers are responsible for reviewing the draft RIAs on selected major regulations to scrutinize the contents and give advice on correcting errors and raising the rigour of analyses. The Center at KDI covers "economic" regulations while that at KIPA deals with "social" ones. The division of labour is determined by the expertise of each institution. The type (economic/social) of each regulation is determined by the managing line ministries, not by the objective or characteristics of the RIA.

As mentioned, RIAs are conducted on all new and strengthened regulations drafted by the ministries at the central government level. During the drafting stage, an advance notice of the RIA is circulated in order to gather opinions from relevant stakeholders. Once this is completed, the RIA is submitted to the RPC and some are verified by KDI or

KIPA depending on its category as discussed above. The review process of the RPC consists of preliminary and main reviews. When necessary, revision or withdrawal is recommended at this stage. Once reviewed, the regulation bill should pass the resolutions at the Cabinet meeting and the National Assembly in order. The whole process is illustrated in Figure 8.1.

Figure 8.1. **The RIA system in Korea**

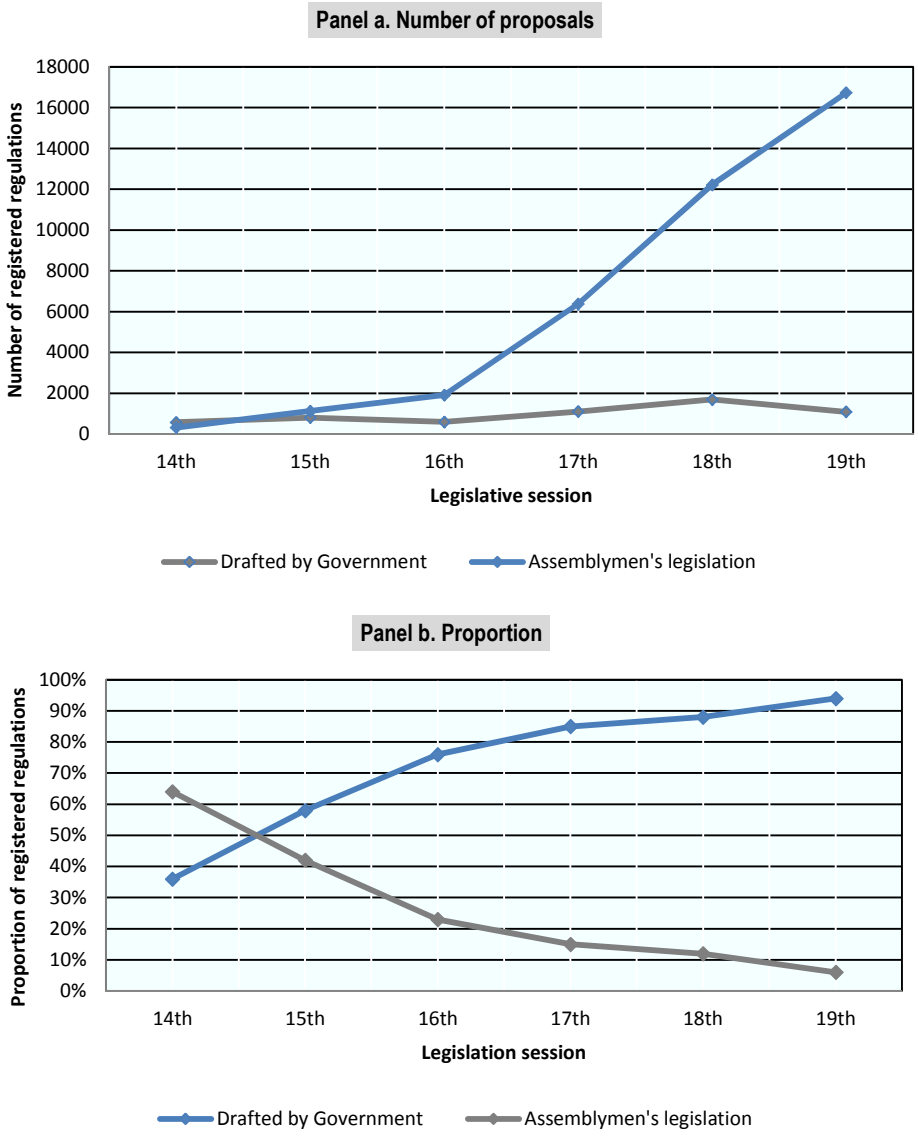


The drawback in the aforementioned process is the fact that there are no specific requirements as to when the RIA should be conducted; even if its schedule may appear on the advance notice of legislation. Consequently, this allows room for the RIA to be used merely to justify the final regulatory bill.

To facilitate the use of RIA, the PMO developed the "e-RIA" system, a fully computerised tool to help improve the quality of RIAs. The system intends to ease the burden of calculations and minimises the chances of making errors and/or leaving the blanks that have to be filled in.

As mentioned, RIAs are conducted on all new and strengthened regulations drafted by the ministries at the central government level. Consequently, the frequently argued weakness of its practice in Korea is that there is no RIA conducted on the repeal or easing of regulations by government as well as the introduction of new legislations originated from the National Assembly. It may be possible to easily introduce RIA for repeals made in the legislation through social consensus. However, this may not be easily stretched to its institutionalisation of RIA in the National Assembly. Even so, most of the recent bills are in the form of assemblymen's legislation, as shown in Figure 8.2. It implies that most regulations in Korea are set without any formal *ex ante* evaluation or structured justification for choosing the best alternative.

Figure 8.2. **Proposal of bills in recent Korean National Assemblies**



Source: National Assembly bill information system.

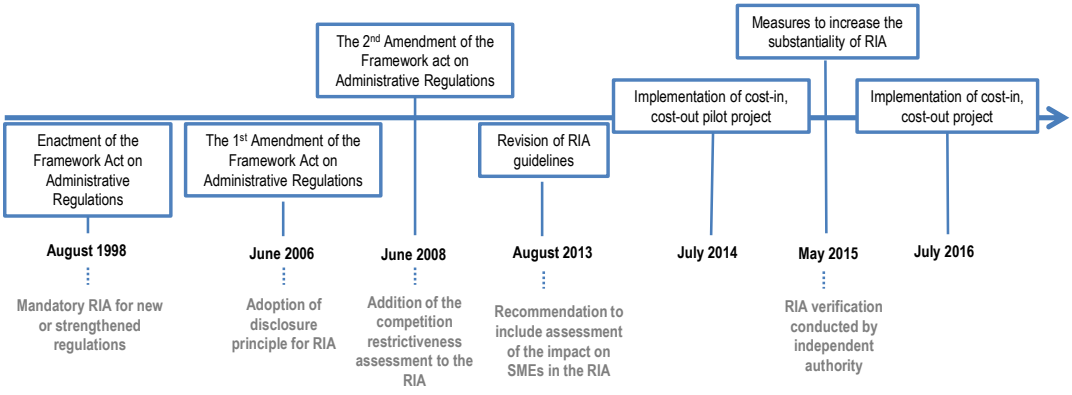
The "Cost-In Cost-Out (CICO)" system is a unique system in the practice of *ex ante* analysis on the impact of changes in regulations in Korea. It intends to at least maintain (and ultimately reduce) the total amount of cost burden on stakeholders—mainly firms—by all regulations managed by a line ministry. Therefore, it requires calculating the change of burden on stakeholders as a consequence of the revisions in regulations including introduction, strengthening, repeal, and easing. For any changes in regulation subject to the CICO system, line ministries submit a report of regulatory cost analysis similar to RIA. The difference between benefit-cost (net benefit) estimations in regulatory cost analysis and RIA is the coverage. The former sums up the cost to stakeholders only, while the latter includes all cost burdens in view of national economy as compared in Table 8.1. The system was initiated in July 2014 as a pilot project and was formally implemented in the country in July 2016.

Table 8.1. **Calculation of net benefit in RIA and CICO systems**

	Benefit		Cost	
	Direct	Indirect	Direct	Indirect
Regulatees	*A*	*B*	*W*	*X*
Others (general public and government)	*C*	*D*	*Y*	*Z*
RIA system: $(A+B+C+D) - (W+X+Y+Z)$ CICO system: $A-W$				

The history of the Korean RIA system as stated above is summarised in Figure 8.3.

Figure 8.3. **History of the RIA system in Korea**



Contents of RIA in Korea

In this section, we introduce what constitutes a RIA in Korea. There are two versions of RIA: standard and short forms. They are separated by the magnitude of the ripple effects and issues. The standard form of RIA should be written when the effect of a regulation is large (annual regulatory direct cost and number of regulates are greater than or equal to 1 billion KRW and 100 000, respectively) or when related issues or stakeholder confrontation are severe. On the other hand, regulations subject to short form include: those with low level of net cost; those setting a minor or detailed standard as a result of the delegation of the higher-level law; those related to incidental procedure of the beneficial administrative act; and administrative orders and sanctions.

As will be described in more detail below, the standard form of RIA requires CBAs by alternative. Exceptionally, if quantitative CBA is not feasible, it can be absolved. In contrast, the short form exempts from the estimation of indirect cost and benefit incurred to regulated corporates and micro enterprises (areas *B* and *X* in Table 8.1.) as well as the CBA for non-regulated private sector when the impact is insignificant. At least two regulatory alternatives should be surmised in the standard form while only one regulatory alternative can be dealt with in the short form. The administrative orders and sanctions are exempted from the CBAs by alternative because the regulatory cost accounts for the compliance costs only.

Table 8.2. **Contents of RIA in Korea**

Category	Detail
Overview	Overview of regulation
Contents	Comparisons between old and new provisions
Need for regulation	A. Current status & issues B. Need for government intervention C. Objectives of introducing regulation & desired outcomes
Discovery & review of an alternative	A. Considered alternatives 1) existing regulation 2) non-regulatory alternative 3) alternative to regulation #1 4) alternative to regulation #2 B. Analyses of the alternatives 1) application of negative-list approach 2) inference with autonomy and creativity of private sector 3) case studies from other countries 4) similar cases in other legislations 5) review of the grounds for delegation 6) stakeholder engagement 7) difficulties in achieving the regulatory objective with existing regulation 8) conclusion
Cost-benefit analysis	A. Comparative analysis of alternatives 1) table of comparing analysis results for alternatives #1 and #2 2) results of CBA for each activity for alternatives #1 and #2 (i) regulated corporates & micro enterprises (ii) regulated general public (iii) non-regulated corporates & micro enterprises (iv) non-regulated general public (v) government (vi) total cost, net cost to businesses, and equivalent annual net cost 3) Regulatory alternative #1 4) Regulatory alternative #2 B. Cost-benefit analysis by activity of each alternative
Conclusion	A. Enforcement resources and capabilities by alternative 1) administrative and financial enforceability 2) technical enforceability 3) enforceability of the local government, etc. B. Need for RIA by sector 1) SMEs RIA 2) competition impact assessment 3) technology impact assessment C. Choice of regulatory alternative and the rationale D. Desired outcomes of the preferred alternative E. Stakeholder opinions on the preferred alternative and actions taken

Let us explore the case of standard form more in detail. As shown in Table 8.2, the main body of a Korean RIA consists of introducing the necessity of governmental intervention along with objectives and expected effects, identifying and reviewing alternatives, and CBAs for considered alternatives. In the appendix, an example of a RIA is enclosed.

The overview part of the RIA is in the form of a summary table. It starts with the title of the regulation, the department in-charge, and the personal information of the author. It is then followed by the related act and public notification. The regulated party and stakeholder(s) are also summarised in a sub-table. The duration of the regulation is also included, which is automatically set at 10 years unless otherwise specified. The author subsequently specifies the classification indicating whether the regulation is new or reinforced and summarises the contents of the newly introduced (or reinforced) regulation. A comparison table of the current and revised provisions is included by placing the articles alongside each other. This method makes it easier for the reviewers to see the changes made at a glance. The regulatory structure and legislative hierarchy are also cited in the overview.

The next part focuses on justifying the need for regulation. This first requires a description of the socio-economic background or process in which the problem is to be solved – either through the establishment or reinforcement of a regulation, e.g. the occurrence of accidents or disasters. In doing so, the authors would need to provide credible data, in the form of examples and statistics that can effectively and sufficiently demonstrate the severity or urgency the problem. In order to further justify the need for government intervention, the authors are also requested to explicitly explain why it is difficult to solve the problem by leaving it to the market or to the private sector. If new regulations need to be created that did not exist, it should also be clearly explained. Finally, a description of the goals of the regulatory adoption and the expected future situation is also provided.

The subsequent part refers to the identification and review of a variety of alternative regulations to solve the problems presented. More specifically, this includes existing regulation(s), and non-regulatory and regulatory alternatives. Existing regulation is the case when no action is taken. In the case of a new regulation, this describes the situation without regulation; whereas, in the case of reinforced regulations, it describes the current regulations or the relevant regulations that exist to achieve the same policy objectives. Non-regulatory alternatives include economic incentives such as tax cuts and low interest loans, subsidies, and social movements such as campaigns and public advertisements. Alternatives to regulation are different regulatory measures considered by the regulator. In general, the first alternative to the regulation is the preferred alternative that the regulating authority attempts to introduce. On the other hand, the second alternative to regulation is a different approach than the first alternative, which is often a less (or more) restrictive alternative.

When analyzing the alternatives, a comprehensive scrutiny is called for. First, to fully utilize the autonomy and creativity of private sector and to minimize distortions from government intervention, one should compare and contrast the alternatives based on four criteria: 1) self-regulation; 2) market-style incentives rather than command-control; 3) negative-list approach rather than positive-list approach; and 4) performance-based regulation rather than input-based regulation. Second, to check if the regulation meets the global standard, case studies from other countries are requested. Third, before selecting a preferred alternative, the validity and appropriateness should be compared and evaluated by collecting opinions from the regulated entities, stakeholders, and experts and engaging them in the review of the different alternatives. Fourth, the alternatives should clearly state the difficulties in achieving the policy objectives if the existing regulations and non-regulatory alternatives are chosen.

Rigorous CBAs are also required for each alternative: the existing regulations and alternatives to the first and second regulation. As a general rule, the period of the relevant regulations should be set at the period of analysis but the default is set to 10 years. The social discount rate is set to 5.5% in real term. The groups affected by the regulation, and thus those should be considered in CBA include regulated corporates and micro enterprises, regulated general public, non-regulated corporates and micro enterprises, non-regulated general public, and the government.

The direct cost incurred to regulated corporates and micro enterprises (area *W* in Table 8.1.) includes 1) administrative burden such as reporting cost, authorisation fee, and documenting cost; 2) labour costs for additional labour input and new employment; 3) education and training cost including the opportunity cost, i.e. decrease in corporate profits due to the inability of the workforce for education and training that has not been done before; 4) external service fee; 5) purchasing and disposal costs for equipment and raw materials; 6) operation and management cost; and 7) reduced profits arising from delays in operations. On the other hand, the direct benefit to regulated corporates and micro enterprise (area *A* in Table 8.1.) are grants directly provided by the government or agencies, financial benefit by decreased uncertainty, and newly created added value.

The indirect cost incurred to regulated corporates and micro enterprises (area *X* in Table 8.1.) is composed of the decreased profit due to decrease in demand, increase in production cost, and changes in production, supply and sales methods. The indirect benefit to them (area *B* in Table 8.1.) is the increased profit via raised awareness and credibility in the market and enhanced quality of product and service, to name a few.

The cost incurred to regulated general public includes administrative burden, increase in household expenditure, and the opportunity cost arising from not being able to work or do business, among others. In contrast, the benefit to them consists of the decrease in household expenditure, improved safety and environment, and enhanced health and wellness.

The non-regulated corporates and micro enterprises refer to those that supply raw materials necessary for the production of goods and/or services of regulated companies, purchase goods and/or services from regulated companies, or are engaged in industries related to the regulation. The costs to them consist of the decrease in demand and increase in production cost. The benefits refer to those gained through the introduction or reinforcement of regulation. For example, a new regulation aimed at monopolistic suppliers of raw materials will induce the decrease in production cost of non-regulated firms that purchase raw materials.

Similarly, the costs to the non-regulated general public consist of the increase in household expenditure and decrease in employment, safety, environment, health, and wellness. The examples of non-regulated general public include consumers of regulated products and drivers of regulated logistics companies.

Finally, the cost to the government accounts for the additional monetary inputs needed for the enforcement and oversight of the regulation. The enforcement cost includes the announcement cost, education and training cost, developing and operating cost of system, and surveillance and supervision cost to name a few. Moreover, the increase in subsidy and decrease in government revenue such as administrative fees are also included.

Once the CBAs are done for each alternative, the overall conclusion follows. The part starts with checking if the resources and capabilities are sufficiently secured by alternative. First, in the part of administrative and financial enforceability, one has to check if it is possible to enforce the regulation by current administrative manpower and budget, and if the authority has a budget ready or a detailed budget plan available when it needs to expand the workforce and budget. Second, in terms of technical enforceability, the possibility to enforce the regulation with generally spread technology has to be confirmed. Third, in case that the enforcement of regulation is delegated to a local government or entrusted to related agencies and organisations, one also needs to state clearly whether the necessary manpower and budget can be secured and/or they are taking supportive measures.

Then, the RIAs by sector analyse impacts specific to SMEs, market competition, and technical standards. First, the RIA identifies the SME-related regulations, surveys the status of market by company size and the ratio of regulatory burden to sales, lists the opinions of the regulated companies, and examines the differentiation method by company size such as timing and method of enforcement. Second, the competition impact assessment examines the degree of burden that the regulation places on market participants such as charge amount and limitation to market entry and sales activities, discrimination between incumbents and entrants, influence to consumer welfare, and existence of other similar or overlapped laws and regulations. Third, the technology impact assessment deals with the comparison to (1) other technical standards according to national standards or other legislations; (2) similar tests, inspections, and certification systems that are already in operation; (3) international standards (e.g. ISO, IEC, and ITU); and (4) equivalences and differences to foreign regulations from the technical point of view.

The conclusion ends with the statement of choice of regulatory alternative and the rationale, expected or desired outcomes of the preferred alternative. It also includes stakeholder opinions and actions taken if there is any.

Methodological issues

Coverage

We have discussed in the aforementioned several issues regarding the uncovered area – that no RIA is conducted on the repeal or easing of regulations drafted by the government as well as on assemblymen's legislation. At the same time, however, line ministries are endowed with insufficient manpower and budget to implement RIA even if RIA is mandated to all of new and strengthened regulations and bills. A thorough RIA requires enormous resources. This therefore calls for a strategy to discern certain regulations in need of RIA and to distribute available resources based on these needs.

More specifically, we know that RIA is required for all types of regulations issued by central government agencies, e.g. legislation, decrees, and ordinances. Consequently, administrative power is being wasted and therefore creates a weaker RIA system. Other than a RIA on primary law, a separate RIA should be conducted on subordinate law or single regulation that deals with entrustment and other details. To underscore this issue, from May to October 2015, only one quantified CBA was conducted in 230 RIAs sent to KDI for the request of verification.

A remedy to this issue may include adopting the "principle of proportionality". OECD recommends the principle of proportionality for the decision on the scope and subject of the RIA. Diversifying the type of RIA into two may help apply the principle to full and expedited RIAs. Important regulations expected to cause large social and economic impacts should be subjected to a full RIA so that sufficient manpower and budget could be injected. On the other hand, an expedited RIA would be enough for those with relatively less spillover effects.

The type of RIA used would depend on a number of conditions: the magnitude of the impact in monetary terms, affected number of companies or people, and so on. For example, regulation whose regulatory compliance cost exceeds 10 million USD per year or which causes impacts on over 1 million people per year. In the United States, a full RIA is conducted on economically significant regulations whose impact is estimated over 1 billion USD per year.

To implement the approach, development of a review procedure to determine whether to apply a RIA or not should be introduced. A good example is the threshold test: a system determines whether to conduct a full RIA at the phase of drafting a regulatory bill. Canada's Triage System can be a useful benchmark to consider. In this system, a triage statement is formulated at the initial phase of drafting a regulatory bill, and is used to determine whether a full or expedited RIA should be applied.

One might further think of narrowing down the coverage of regulations or bills that require a RIA, so that some are exempted from it. Applying it this way, however, should take into account the risk of deteriorated regulatory quality for exempted regulations.

Adoption of CBA-based regulation with positive net benefit

The key purpose of RIA is to enhance the efficiency of the regulation through a CBA. Several OECD countries have pursued the principle of accepting regulations whose net benefit turns out positive. However, it is difficult to entrench the principle of CBA-based regulation, since some of the outcomes are not easy to monetize or quantify.

The CBA contains all three types of analysis items: 1) monetisable; 2) quantifiable but not monetisable; and 3) not quantifiable nor monetisable. Certainly, most benefits are neither monetisable nor quantifiable. Given this, what makes it possible to adopt the principle of CBA-based regulation with positive net benefit? Should it be allowed to adopt regulations whose net benefit is found negative in quantitative analysis, taking potential qualitative benefits into account? Is this going to hinder the effectiveness of quantitative analysis?

In Korea, most of the RIAs conducted on regulations that are not subject to the CICO system only provide a simple qualitative analysis. Even in the case when the regulation is subject to the CICO system, the focus is mainly on quantifying the direct benefit and cost to be borne by the regulated entities. Indirect benefit and cost for the regulated entities and the benefit and cost for government and the third party are analysed mostly in a qualitative way. Current RIA simply displays a list of outcomes from quantitative and qualitative analyses without being based on the Cost-Effectiveness Analysis (CEA) and/or Break-Even Analysis (BEA), making it difficult to adopt regulations that have positive net benefit.

The CEA helps select preferred alternatives, assuming that various measures under consideration can produce similar benefits in size. This method still leaves us the question as to how to ensure the adoption of regulation that has positive net benefit. In the BEA, a

qualitative judgment is made regarding the scope of benefit that can justify the quantitatively estimated cost of preferred alternatives selected through the CEA.

Integration of various socio-economic effects

Regulations could result in various socio-economic effects. Unfortunately, many regulatory items are non-market goods, meaning the only possible method is a qualitative analysis, e.g. distribution (by region, social class, and company size), employment, competition, market openness, innovation, environment, and sustainable growth. Valuing non-market goods adopts a revealed or stated preference analysis. The former relies on data collected from past activities of businesses or people, while the latter adopts survey methodology to elicit preferences of stakeholders. If this is the case, what type of information should be offered to policy decision makers so that the efficiency of their decision making process will be enhanced?

Other than the analysis of general socio-economic effects, separate analyses are required to examine the impact on competition, technology compatibility and innovation, and SMEs introduced in 2005, 2009, and 2013 respectively. These analyses however do not go beyond simply seeking opinions on the impact of each regulatory alternative from ministries involved and there is no current recognition of the need to integrate several diverse qualitative and quantitative analysis items and policy goals. This implies that the RIA does not serve to provide information to policy decision makers, but simply as a tool to justify the already determined policies.

To overcome these challenges, one option is to adopt a Multi-Criteria Analysis (MCA) when drafting RIAs. The MCA draws out integrated outcomes for each alternative by giving weights and scores to various qualitative and quantitative analysis items. The advantages of the approach include: promoting robust consultation, encouraging consistency and rigor in the analysis, and providing better information to political decision-makers. However, integrated analysis through an MCA is exposed to various potential problems.

First, MCA may be exposed to possible manipulation. The regulatory authority may distort the analysis result by adding weight or score. To address this, each analysis item should have a setting of its own scope of weight beforehand.

Second, the issue of "quantification aversion" exists. That is, the regulatory authority may neglect efforts for quantitative analysis. Restraining measures are necessary so that higher weight can be given to quantitative analysis.

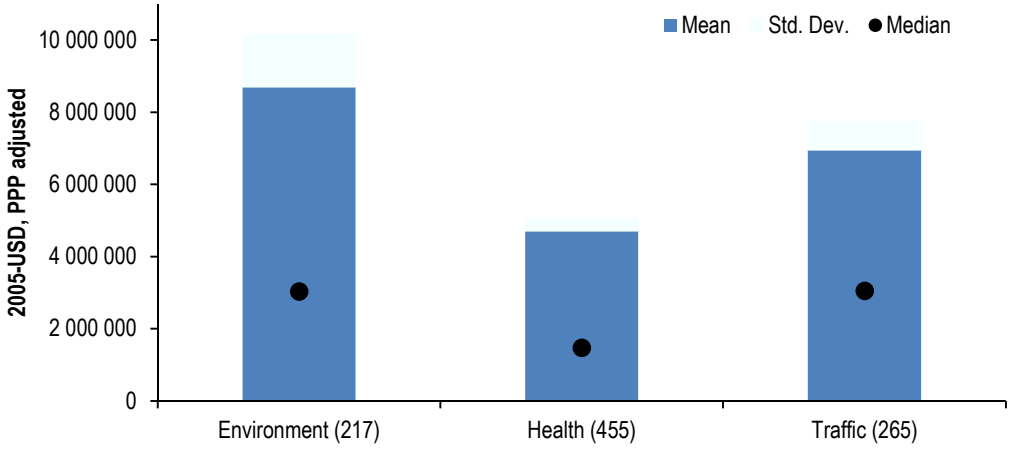
Third, the information may be inefficiently provided, which is a fundamental problem. In the context of providing information as to whether to adopt regulation or not, it is necessary to integrate various social and economic effects. Thus, it is important to clearly and carefully predetermine who is in charge of managing weight and score between regulatory authority and policy decision-makers.

Value of life

Estimating the (per-unit) value of a benefit or cost item is essential when conducting CBAs. Some items can be measured easily and accurately, e.g. average wage of a specific sector, average cost of additional equipment to meet the quality standard, and fare of a transportation mean. However, the values of many items are either difficult to monetize or face controversies in the method of valuation.

A representative example is the value of life. It is a direct benefit gained from safety regulations that attempt to decrease casualties. In health economics, it is expressed as the value of statistical life (VSL). The benefit estimation methods vary, and so do their results. The methodology includes the contingent valuation method (CVM) and human capital approach (HCA). The former is a stated preference approach to estimate the willingness to pay (WTP) according to changes in mortality risks. The latter estimates the present value of the future earning of a person—who avoided accident—over an expected lifetime. Figure 8.4 shows the results from a meta-analysis comparing different approaches to estimate the VSL.

Figure 8.4. **Value of life by sector**



Source: OECD (2012), "The Value of Statistical Life: A Meta-Analysis", env/epoc/wpnep(2010)9/final, OECD.

In Korea, the Office for Government Policy Coordination released "Guidelines for the Preparation of Regulatory Impact Statement" in 2013 and recommended to reflect the VSL as a benefit item. In the medical sector, the VSL is estimated as the benefit earned from the decrease in the cost for emergency death since 2012. The costs for emergency death consist of wage loss as well as the pain, grief and suffering resulting from accident (PGS cost). On the other hand, in traffic sector, the VSL is the benefit earned from the decrease in traffic accident death. The cost of traffic accident death includes the production loss (wage loss), insurance administration cost, funeral expenses, medical expenses, traffic police costs, and PGS cost.

The main concerns for its implementation are twofold: how to accept the estimates of the VSL given the different methodologies and is the methodology adequate in estimating the VSL? First, the difference among sectors and methods is somewhat unavoidable since they focus and emphasize on their own perspectives. Second, it needs to be argued deeper whether the CVM can provide the accurate ratio of mortality risk resulting from the adoption of a regulation and that the HCA can embrace social values such as individual's leisure activities and the diversity of values in each sector.

Social discount rate

One of the key parameters used in the CBA is the social discount rate (SDR). Discounted benefits and cost values are determined by the social discount rate and, as a result, the Benefit-Cost Ratio and Net Present Value.

A few perspectives to the magnitude of the SDR exist. First, those who advocate high value of the SDR argue that people strongly prefer that the benefit occurs today in contrast to future benefits, especially when the budget is tight. Applying a higher SDR is interpreted as valuing immediate benefits more as opposed to future benefits.

Second, supporters of a low SDR claim that CBAs in general cannot measure all impacts. For example, estimating the overall regulatory cost and benefit to the general public, including all ripple effects, is almost impossible. However, acknowledging all ripple effects as benefit is controversial. Even though some potentially significant impacts are not monetized, it is argued that they should be considered in a way other than adjusting the SDR.

Third, those who pay attention to the behavioural aspects of CBAs conclude that both high and low values of the SDR are acceptable. When conducting CBAs, analysts tend to over- and under-estimate the benefit and cost, respectively (Flyvbjerg, 2009; Flyvbjerg, Holm, and Buhl, 2002). Taking into account this fact, some argue that a higher SDR is needed. On the other hand, others advocate lowering the level of the SDR since a high SDR often leads to the over-estimation of the benefit.

Korea's RIA borrows the SDR applied to the economic feasibility appraisal of public investment projects, namely the preliminary feasibility study (PFS). After studying the basic interest rate, social rate of time preference (SRTP), financial discount rate and others to estimate an appropriate social discount rate, the PFS uses the SRTP for estimation as it can calculate an appropriate rate with a relatively small number of parameters, and the value estimated as such can be considered the lowest limit of the social discount rate (KDI, 2008: p.62). The SRTP can be calculated as:

$$SRTP = \rho + \mu \cdot g$$

where ρ refers to a discount rate of future consumption under the assumption that per-capita consumption does not change, g is an annual rate of per-capita consumption increase, and μ is the elasticity of marginal utility of consumption. Finally, the term $\mu \cdot g$ is to reflect the diminishing effect of marginal utility due to consumption change. The estimated values of parameters ρ, μ, and g are 1.5%, 1, and 4%, respectively. Consequently, the real SDR in PFS is set at 5.5%.

The rate is judged to be relatively high for Korea given its recent economic conditions. To compare the estimated value with international practices, Table 8.3 displays the SDRs in selected countries.

The countries use different approaches in calculating the social discount rate. First, the social rate of time preference (SRTP) approach, as discussed above, is used in countries including Korea, France, Italy, Spain, and the United Kingdom and institutions in the U.S. Second, the marginal social opportunity cost (MSOC) approach reflects the rate of return from private investment crowded out by those of public investment. Developing economies that have adopted this approach include India, Pakistan and the Philippines. Third, the weighted average (WA) approach considers the sources of funding, both domestic and overseas, and takes the weighted average of two funding

sources. In practice, the SDR using the WA approach is considered unrealistically high, and thus use of the approach is limited. Fourth, the approach using the capital asset pricing model (CAPM) applies the cost of "systematic risk" to public investment, considering them hypothetically as private investment. For discussions on the theory and practice of choosing the SDR for CBA, refer to Zhuang et al. (2007).

Table 8.3. **Social discount rates used in cost-benefit analysis**

Country	Social Discount Rate	Theoretical Background
OECD Countries		
Australia	Varies by state/type e.g. 7% (NSW), 4%, 7%, or market rate of return (VIC)	MSOC or CAPM
Canada	10% (1998) → 8% (2007)	MSOC
France	8% (1985) → 4% (2005)	SRTP
Germany	4% (1999) → 3% (2004)	Federal refinancing rate
Italy	5%	SRTP
Korea	**7.5% (1999) → 6.5% (2004) → 5.5% (2008)**	**SRTP**
New Zealand	8% (base), 5% (construction), 7% (SOC), 9% (technology)	CAPM (SRTP)
Norway	7% (1978) → 3.5% (1998) → 4% (2005)	risk-free rate + premium (CAPM)
Spain	6% (transportation), 5% (environment), 4% (water management)	SRTP
U.K.	8% (1967) → 10% (1969) → 5% (1978) → 6% (1989) → 3.5% (2003)	MSOC (until 1980s) → SRTP
U.S. (Office of Management & Budget)	Before 1992: 10% After 1992: 7%	Mostly MSOC
U.S. (Congressional Budget Office & General Accounting Office)	"the interest rate for marketable Treasury debt with maturity comparable to the program being evaluated"	SRTP
U.S. (Environmental Protection Agency)	2010: 3% (when all costs & benefits are incurred by consumption flow)	SRTP, MSOC
Non-OECD Countries		
China	8% (short- & mid-term) and <8% (long term)	WA
India	12%	MSOC
Pakistan	12%	MSOC
Philippines	15%	MSOC

Source: adopted and augmented from KDI (2015), p. 33, Table III-4.

As discussed above, the RIA merely borrows the SDR from a different area, namely project appraisals. Even though the methodology estimates the SDR rigorously, issues remain to be resolved. First, due to its origin, no explicit consideration was given to the characteristics of regulations, e.g. the effective period of regulation, characteristics varied by sector, and reversibility of the regulatory policy. A common annual discount rate has been used with limited consideration of characteristics such as sector type and length of term (long/short). As mentioned, in practice, the time period for an analysis is set as 10 years, unless otherwise noted. In the particular case of long-term regulations, one may think of whether different SDR values should be applied in the context of term structure.

Second, the methodological improvement is consistently required. In Korea's case, the SRTP approach is used, but several applicable methodologies in the estimation of parameters exist including those that appear in Table 8.3.

Risk and uncertainty

Lastly, the issue of treating risk and uncertainty appropriately in the RIA emerges. The main question may be if the risk threshold can substitute the CBA as an alternative method of analysis. More specific questions related to this issue include:

- What criteria in the "needs review" stage serve to determine whether the concerned regulation contains unacceptable risks or not?
- If found true (meaning it has unacceptable risks), is it still necessary to conduct the CBA and compare the sizes of cost and benefit arising from tackling the risks?
- When variables show high uncertainty, a sensitivity analysis is recommended. What are the criteria and implementation methods of the sensitivity analysis?

The concept of unacceptable risks has not been firmly settled in Korea yet, hence not considered in the regulatory CBAs. Meanwhile, regulations involving public safety and security are not going to be subject to the CICO system, which implies that the Korean public is aware of the concept of unacceptable risks. Oftentimes, the assessment of uncertainty in RIAs has been substituted with qualitative analyses.

In principle, the analysis should not consider anything other than objective risks, but there is little mechanism that can verify that. The risk neutrality assumption has been used, but no explicit expressions are available as to whether to adopt precautionary principle or not, and what are its standards.

Policy implications and conclusion

So far, we have seen the background, process of institutionalisation, and current system of RIA in Korea. We also introduced the contents of RIA in detail and provided a reference to a real RIA case (see appendix). Finally, we discussed the methodological issues that the Korean practice in RIA has encountered and/or is currently facing.

From a policy making point of view, the experience in Korea draws attention to the following considerations. First, when institutionalising RIA, an adequate coverage needs to be secured. Of course, it does not necessarily need to mandate RIA to all or most changes in regulation, given the cost and time needed to conduct RIA. However, RIAs on major, important, and controversial regulations are almost absolutely necessary. While setting the coverage of compulsory RIA depends on the political, socio-economic, and cultural context in each country, a critical and universal criterion for deciding on the scope and subject of the RIA is the principle of proportionality.

Second, not only should the overall impacts to the national economy be explored when changes to regulations are made; but, it should also consider the asymmetric impacts to specific sectors and stakeholders. Korea's RIA adopts additional assessments on disproportionate impacts on SMEs and micro businesses, competition, and technological feasibility. To integrate various perspectives including efficiency, distribution, and technology, one might consider adopting the MCA.

Third, the methodologies and values of benefit and cost items and parameters used when conducting CBA in RIA have to be consistently elaborated and updated to elicit more accurate and reliable results. Depending on the cases, it requires to choose a preferred methodology (e.g. VSL), collect and manage related data (e.g. average wage of a specific profession), and determine for policy purposes (e.g. SDR).

Finally, RIA is the *ex ante* evaluation of the change in regulations from the perspective of its background, necessity, cost effectiveness, and consequences among others. It is supposed to serve mainly at the stage of designing new regulation and checking existing regulation. However, the forward-looking perspective is substantially requested while conducting RIA. More specifically, it needs to clarify the ways and indicators in relation to how we monitor regulations that have been introduced and enforced, and how to evaluate when sunset clause expires. In view of the policy cycle, a well-designed monitoring and evaluation roadmap in RIA can make it possible to identify policy issues for government actions easier and clearer when the regulation is being enforced and at the end of the effective period of the regulation.

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Annex 8.A

Example of RIA in Korea

Regulatory Impact Assessment

FRAMEWORK ACT ON BROADCASTING COMMUNICATIONS DEVELOPMENT

< Table of Contents >

1. Collection Rates for Broadcasting Communications Development Fund

Ministry of Science, ICT and Future Planning

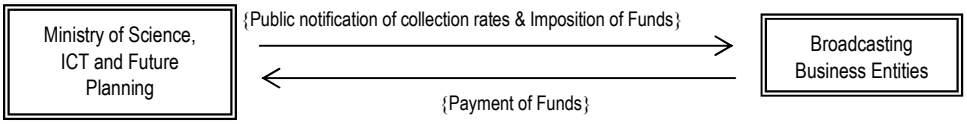
Overview of Regulation

1. Title of Regulation	Collection Rates for Broadcasting Communications Development Fund				
2. Department in Charge and Personal Information of Author	Department in Charge	Ministry of Science, ICT and Future Planning	Author	Name	□□□, □□□
	Division in Charge	ICT Policy Division		Title	Deputy Director
	Director General	ooo, ooo		Tel.	##-####-####
	Director	xxx, xxx		email	aaaa@aaa.aaa
3. Related Act, Public Notification, etc.	Article 25 of *the Framework Act on Broadcasting Communications Development* and Article 12 of the *Enforcement Decree* under the same law *Details on Calculating and Imposing Broadcasting Communications Development Fund* (Public Notification)				

4. Regulated Party and Stakeholder(s)

Classification		Number or Size of the Regulated	Engagement Method	Details of Feedback
Regulated Party	CATV Broadcasting Service Provider	92 Operators	Advance Notice of Proposed Administrative Plan	Revision to lower current collection rate from 1.0232810 1.0202 3
	IPTV Broadcasting Service Provider	3 Operators		Revision to raise current collection rate of 0.5% to 1.0%

5.Duration of Regulation	Expires on 31 December 2016 (Expected to be amended to 31 December 2017)
6.Classification (New or Reinforced)	Reinforced Regulation
7.Summary of the Newly Introduced (Reinforced) Regulation	○ Previous Regulation – The collection rates for CATV broadcasting service provider are applied through a 3-step progressive stage system, in which under 10 billion KRW are charged 1.0%, 10 to 20 billion KRW are charged 2.3%, above 20 billion KRW are charged 2.8% – Collection rate of 0.5% is applied to an IPTV Broadcasting Service Provider ○ Summary of Newly Introduced (Reinforced) Regulation – The collection rates for CATV broadcasting service provider are applied through a 3-step progressive stage system, in which under 10 billion KRW are charged 1.0%, 10 to 20 billion KRW are charged 2.0%, above 20 billion KRW are charged 2.3% – Collection rate of 1.0% is applied to an IPTV Broadcasting Service Provider

8.Regulatory Structure and Legislative Hierarchy	Article 25 of *the Framework Act on Broadcasting Communications Development* (Creation of Fund) Article 12 of *Enforcement Decree of the Framework Act on Broadcasting Communications Development* (Collection of Charges) *Details on Calculating and Imposing Broadcasting Communications Development Fund* (Public Notification from Ministry of Science, ICT and Future Planning)  * The responsibility of collecting the funds is delegated to Korea Communications Agency (KCA)

Details of the Newly Introduced (or Reinforced) Regulation

- Previous Regulation
  - The collection rates for CATV broadcasting service provider are applied through a 3-step progressive stage system, in which under 10 billion KRW are charged 1.0%, 10 to 20 billion KRW are charged 2.3%, above 20 billion KRW are charged 2.8%
  - Collection rate of 0.5% is applied to an IPTV Broadcasting Service Provider
- Details of the Newly Established (or Reinforced) Regulation
  - The collection rates for CATV broadcasting service provider are applied through a 3-step progressive stage system, in which under 10 billion KRW are charged 1.0%, 10 to 20 billion KRW are charged 2.0%, above 20 billion KRW are charged 2.3%
  - Collection rate of 1.0% is applied to an IPTV Broadcasting Service Provider

Comparison of the Provisions

Current Provision

<Supplementary Table>

Criteria for Fee Imposition & Collection Rates (Related to Article 2)

Classification	Criteria for Fee Imposition	Collection Rates	
CATV Broadcasting Service Provider	Sales Revenue from Broadcasting Services	Sales less than 10 billion KRW	1.0/100
		Sales exceeding 10 billion KRW and below 20 billion KRW	2.3/100
		Sales exceeding 20 billion KRW	2.8/100
Satellite Broadcasting Service Provider	Sales Revenue from Broadcasting Services	General Satellite Broadcasting Service Provider	1.33/100
Internet Multimedia Broadcasting Service Provider	Sales Revenue from Broadcasting Services	IPTV Broadcasting Service Provider	0.5/100
Home Shopping Network Broadcasting Service Provider	Operating Profits Related to Broadcasting Business	1. Television Program Provider (Including service operators who also provide data programs among other services)	13/100
		2. Data program providers excluding the operators that fall under the first category	10/100

Note: The charges to CATV broadcasting service providers are collected in the amount calculated by multiplying the sales revenue from broadcasting services by a determined collection rate.

Revised Provision

<Supplementary Table>

Criteria for Fee Imposition & Collection Rates (Related to Article 2)

Classification	Criteria for Fee Imposition	Collection Rates	
CATV Broadcasting Service Provider	Sales Revenue from Broadcasting Services	Sales less than 10 billion KRW	1.0/100
		Sales exceeding 10 billion KRW and below 20 billion KRW	2.0/100
		Sales exceeding 20 billion KRW	2.3/100
Satellite Broadcasting Service Provider	Sales Revenue from Broadcasting Services	General Satellite Broadcasting Service Provider	1.33/100
Internet Multimedia Broadcasting Service Provider	Sales Revenue from Broadcasting Services	IPTV Broadcasting Service Provider	1.0/100
Home Shopping Network Broadcasting Service Provider	Operating Profits Related to Broadcasting Business	1. Television Program Provider (Including service operators who also provide data programs among other services)	13/100
		2. Data program providers excluding the operators that fall under the first category	10/100

Note: The charges to CATV broadcasting service providers are collected in the amount calculated by multiplying the sales revenue from broadcasting services by a determined collection rate.

1. The Need for Regulation

A. Current Status and Issues

- **(Outline of the System)** The development fund is a statutory fee levied on the broadcasting business entities that have been granted permission and approval, with the purpose of supporting and promoting broadcasting communication. All broadcasting business entities are charged with differential rates responsive to their specific conditions to promote development in the broadcasting industry.
  - In accordance with Article 25 of the Framework Act on Broadcasting Communications Development, differential rates may be applied for broadcasting communications service providers in light of public nature, profitability, and the financial condition of the provider.

* The Ministry of Science, ICT and Future Planning installs and develops the funds and delegates the detailed responsibilities like imposition, collection, and operation to Korea Communications Agency (KCA).

- **(Current Status)** Starting with the home shopping network broadcasting service providers in 2001, the funds to the broadcasting business entities have been imposed to the CATV broadcasting service providers in 2003, to the satellite broadcasting service providers in 2008, and to the IPTV broadcasting service providers in 2015.
  - In the case of satellite broadcasting service providers, the minimum collection rate of 1% was applied considering their financial status in 2008, which was raised to 1.33% since 2013.
  - In the case of the CATV broadcasting service providers (SO), the initial fixed rate system was revised to a 5-step progressive stage system in 2005 and to a 3-step progressive stage system in 2015.
  - For the IPTV broadcasting service providers, the collection rate of 0% was applied from when it was approved in 2008 until 2014, which was raised to 0.5% for the first time in 2015.

    * Exemption for a total of six years—three years due to the statutory exemption upon its business approval in 2008 and three years due to the policy exemption (0%).
  - For the home shopping network broadcasting service provider, 12% of their operating profit was charged from 2007 to 2010, and the collection rate has been adjusted to 13% since 2011.
  - **Current Status on Collection of Broadcasting Communications Development Fund**

Broadcasting Business Entities	Classifications	Criteria for Fee Imposition	Collection Rate (%)	Note
Satellite Broadcasting Service Provider	General Satellite	Sales Revenue from Broadcasting Services	**1.33**	Maintaining the 2013 collection rate
CATV Broadcasting Service Provider	SO		**1~2.8**	-Maintaining the 2015 collection rate -Differential rates for each sales revenue intervals
Internet Multimedia Broadcasting Service Provider	IPTV		**0.5**	-Maintaining the 2015 collection rate
Home Shopping Network Broadcasting Service Provider	TV	Operating Profit	**13**	-Maintaining the 2011 collection rate
	Data		**10**	-Maintaining the 2009 collection rate

- **(Problems)** In order to enhance the equity among the broadcasting business entities, there is the need to adjust the collection rate of the development fund by holistically considering various factors like the business conditions of each business entity.

- As SO service subscribers shifted to other paid broadcasting services like IPTV and satellite broadcasting services, the broadcasting business sales revenue declined while the operating profit also declined due to rising contents supply costs.
- Meanwhile, IPTV broadcasting service providers currently bear the collection rate of 0.5%, and its relatively lower contributions to development fund despite the rapid growth of its competitiveness due to surges in its sales and subscribers has caused a dispute over fairness.

B. The Need for Government Intervention

- Broadcasting service providers are required to contribute to the development fund as they are granted certain limited benefits including approvals from the government that allows the providers to sustain business with vested rights.
- In accordance with Article 25 of the Framework Act on Broadcasting Communications Development, government intervention is needed to apply differential rates to each broadcasting communications service provider consistent with its public nature, profitability, and the financial condition.

C. Objectives of Introducing Regulation and Desired Outcomes

Objectives of Introducing Regulation

- The development fund is a statutory fee levied on the broadcasting business entities that have been granted permission and approval, with the purpose of supporting and promoting broadcasting communication.
  - Differential rates are applied for broadcasting communications service providers in light of public nature, profitability, and the financial condition of the provider.

    * Article 25, Section 5 of the Framework Act on Broadcasting Communications Development: "*…may apply differential rates for broadcasting communications service provider in light of the public nature and profitability of broadcasting communications and financial conditions of each broadcasting communications service provider*…"
- In order to enhance the equity among the broadcasting business entities, there is the need to adjust the collection rate of the development fund by holistically considering various factors like the business conditions of each business entity.
  - Article 12, Section 1 of Enforcement Decree of the Framework Act on Broadcasting Communications Development: "...comprehensive consideration shall be given to the public nature of broadcasting operation, the status of competition in the broadcasting market, the scale of profit and financial condition of the relevant business entity, etc..."

Desired Outcomes

- Enhanced regulatory equity among the broadcasting business entities in competitive relationship with one another by imposing a reasonable collection rate through a comprehensive consideration towards various factors including competition situation in the sector.

2. Discovery and Review of an Alternative

A. Considered Alternatives

Existing Regulation: Collection Rates for Broadcasting Communications Development Fund

- Maintaining the sectional collection rates for the CATV broadcasting service providers as the 3-step progressive stage system is now (1.0/2.3/2.8).
- Maintaining the collection rates for the IPTV broadcasting service providers as the current rate of 0.5%.

Non-Regulatory Alternative: Not Applicable

- It is not appropriate to replace the current regulation to a non-regulatory alternative, since the funds are collected to support the development of the broadcasting communications and the law ensures that the collection rates are reasonably calculated through a comprehensive consideration towards the financial condition of the service providers.

Alternative to Regulation #1: Collection Rates for Broadcasting Communications Development Fund

- Lower the collection rates for the CATV broadcasting service providers in the 3-step progressive stage system from 1.0/2.3/2.8 to 1.0/2.0/2.3, given their gradually worsening market situation due to factors like the competition with the IPTV services and the difficulties in introducing a new product bundled with mobile.
- Raise the collection rates of the IPTV broadcasting service providers from 0.5% to 1.0%, given their continuously increasing competitiveness from the increase in number of subscribers by 15.8% and the surge in its turnover by 27.4% compared to the previous year.

B. Analysis of the Alternatives

Application of Negative-list Approach

- N/A

Interference with Autonomy and Creativity of Private Sector

- N/A

Case Studies from Other Countries

- In some countries like Canada, for the purpose of creating a development fund to support the productions of contents and regional as well as national programs, the collection rates are set around 1% to 5% for the contributions from the broadcasting service providers who are also the beneficiaries of the fund.
  - **(Canada)** 5% of the turnovers from the broadcasting services is collected from the cable and satellite broadcasting service providers towards Canada Media Funds to support programme productions, etc.

- **(Germany)** In the case of movie development fund, a collection rate of 1.8% to 3% is charged to the movie screening service providers that earn sales revenue of 75 000 euros and above.

* Source: Study on Improvement Measures for Collection System of Broadcasting Communications Development Fund (KISDI, 2011).

Similar Cases in Other Legislations

- In accordance with the Framework Act on the Management of Charges, there are a total of 94 charges installed domestically.
  - Under each of its respective legislation, each charge specifically and clearly prescribes matters such as persons imposing and collecting charges, purpose of creating charges, requirement for imposition, standards for calculation, methods of calculation, rate of imposition, etc.
  - In the case of "the charges to a casino operator" stipulated in Article 30 of Tourism Promotion Act, the amount of payment is set at a certain rate specified within 10/100 of its turnover to the Tourism Promotion and Development Fund
  - In the case of the "Motion Picture Development Fund" stipulated in Article 23 of Promotion of the Motion Pictures and Video Products Act, 3% of the entrance fee of the movie theater is collected as a contribution from the management of movie theater.

    Source: 2015 Comprehensive Reports for the Charges (The Ministry of Strategy and Finance, 2015)
- There also exists the cases in which the charges are imposed on the domestic paid broadcasting service providers (CATV and satellite broadcasting service providers) after 7 years of business licensing on average and also collection of the funds even in the state of operating profit deficit.*

* In the case of the 4th SO, the charges were collected even though most of the operators were in the deficit for two years after the launch of the businesses. The national public broadcaster of KBS (2006 to 2008, 2011 to 2012) and an educational network of EBS (2006 to 2008, 2012) were also imposed of the charges while in the deficit state.

Review of the Grounds for Delegation

- Article 25 of the Framework Act on Broadcasting Communications Development stipulates the grounds for delegating the creation and collection rate of fund in the forms of public notification.

Legislations related to collection of charges	Main contents
Framework Act on Broadcasting Communications Development	
Article 25, (Creation of Fund) Section 3 & Section 4	**<Delegating the details regarding determination of collection rates through public notification>** • A charge shall be collected from each CATV broadcasting service provider and each satellite broadcasting service provider and each Internet multimedia broadcasting service provider, in the amount calculated by multiplying the sales revenue from broadcasting services for the previous year by a collection rate determined and publicly notified by the Minister of Science, ICT and Future Planning.

	• A charge shall be collected from each service provider using a broadcasting channel for specialized content such as introduction and sales of products, in the amount calculated by multiplying the operating profit at the closing of accounts for the previous year by a collection rate determined and publicly notified by the Minister of Science, ICT and Future Planning.
Article 2,5 (Creation of Fund) Section 5	**<Differential Calculation of Collection Rate and Considerations>** • The charge may be applied differential rates for broadcasting communications service provider in light of the public nature and profitability of broadcasting communications and financial conditions of each broadcasting communications service provider.
Enforcement Decree of the Framework Act on Broadcasting Communications Development	
Article 12, (Collection of Charges) Section 1	**<Considerations in Collection Rate Determination>** • In determining the collection rates for charges, comprehensive consideration shall be given to the public nature of broadcasting operation, the status of competition in the broadcasting market, the scale of profit and financial condition of the relevant business entity, etc.

Stakeholder Engagement

- Meeting with the Research Task Force Team on the Statutory Charges for Broadcasting Communications Service Providers in June 2016.

Meeting summary

• The collection rates of IPTV broadcasting service providers need to be raised.
  ◦ Considering the strengthened competitiveness of IPTV broadcasting service providers given the increases in its sales and subscribers, there is the need to increase the collection rate to ensure the fairness of the effects from the same regulation within the same market.
• The collection rates for CATV broadcasting service providers need to be lowered in response to their worsening market situation.
  ◦ There is the need to reduce the collection rates for CATV broadcasting service providers given the continuous decrease in its number of subscribers (down by 2.6% on average for the past 3 years) and the fact that a relatively higher collection rate is imposed on these providers compared to other competitors in the market.
• In the case of the home shopping network broadcasting service providers, the collection rates need to be maintained since the decline in their operation profits are due to a temporary reduction in sales.
  ◦ Considering the fact that the collection rates were not adjusted for the home shopping network broadcasting service providers when their businesses thrived, it is not logical to accept their demands to lower the collection rates in this temporary sales downturn.
• The collection rates for satellite broadcasting service providers need to be maintained since the increase in its number of subscribers is similar to the previous year.

- Collecting opinions from the CATV broadcasting service providers represented by Korea Cable TV Industry, the IPTV broadcasting service providers represented by Korea IPTV Broadcasting Association, the satellite TV broadcasting service providers represented by KT Skylife, and the TV home shopping network broadcasting service providers represented by Korea TV HomeShopping Association via written statements.

Category	Meeting summary
CATV Broadcasting Service Providers	☐ **Lower the Current Collection Rate (1.99%)** ○ There is the need to apply the same specifics of the regulation among the competitors that offer the same service (SO, IPTV, and satellite service providers). ○ Thus, the collection rate for the CATV broadcasting service providers needs to be lowered given the continuously reducing sales revenue due to competition and worsening business conditions for SO caused by the increased retransmission fee.
IPTV Broadcasting Service Providers	☐ **Maintain the Current Collection Rate (0.5%)** ○ The burden of the service providers is increased by 27% when the collection rate is kept at 0.5%. ○ IPTV broadcasting service providers have continued to contribute to the development of the broadcasting and communications industry through UHD investment, digital conversion, set-top box advancement, etc. ○ Excessive increase in the charge may discourage the investors from further investments and developments.
Satellite TV Broadcasting Service Providers	☐ **Lower the Current Collection Rate (1.33%)** ○ The increasing trend in the number of subscribers slowed down due to the intensified competition in the paid broadcasting services market. ○ Sales revenue from broadcasting services declined due to the lowered prices of broadcasting products and a decrease in the number of net subscribers. ○ Contributed to the development of broadcasting industry by leading the UHD broadcasting services and supporting the activation of the contents business, and to the welfare of viewers by eliminating the irregularities and improving the digital reception environment.
TV Home Shopping Network Broadcasting Service Providers	☐ **Lower the Current Collection Rate (13%)** ○ Sales revenue from TV home shopping network broadcasting services has been gradually declining and the competition in the industry has been intensified due to an increase in the number of service providers ○ On the other hand, the commissions to the paid broadcasting service providers have continuously increased. ○ Operating profits fell sharply due to the domestic economic slowdown and in the aftermath of the MERS, and profit structure continues to deteriorate.

Difficulties in Achieving the Regulatory Objective with Existing Regulation

- The collection rates should be adjusted in consideration of the financial status of the broadcasting service providers, to the extent specified by law
  - If the existing collection rates are maintained, there would be a difficulty in collecting the appropriate amount of contribution adjusted to the financial condition of the paid TV broadcasting service providers and securing the regulatory equality among the service providers. Thus, it would be difficult to achieve the regulatory objective with the existing regulations alone.

Conclusion

- This development fund is a statutory contribution to be collected from a broadcasting communications service provider that has been granted permission and approval to support the promotion of broadcasting communications industry.
- Hence, it is necessary to enhance the equity in the amount of the charges among the service providers by adjusting the collection rates of CATV and IPTV broadcasting service providers in consideration of various factors including the business condition of each respective service provider.

3. Cost-Benefit Analysis by Regulatory Alternatives

A. Comparative Analysis of Alternatives

Price Base Year	Present Value Base Year	Appraisal Period (Year)	Discount Rate (%)	Unit
2016	2016	1	5.5	1 million KRW Current Value

Maintaining Current Regulation: Collection Rates for Broadcasting Communications Development Fund

Stakeholders		Costs	Benefits	Net Costs
Regulated Corporates & Micro Enterprises	Direct	52 000		52 000
	Indirect			
Regulated General Public				
Non-Regulated Corporates and Micro Enterprises				
Non-Regulated General Public				
The Government				
Total		52 000		52 000
Net Costs to Businesses		52 000	Equivalent Annual Net Cost (EANC)	52 000

Regulatory Alternative #1: Collection Rates for Broadcasting Communications Development Fund

Stakeholders		Costs		Benefits		Net Costs	
		Total (Including Current Reg.)	Variation (Alt.#1 – Current)	Total	Variation	Total	Variation
Regulated Corporates & Micro Enterprises	Direct	55 500	3 500			55 500	3 500
	Indirect						
Regulated General Public							
Non-Regulated Corporates and Micro Enterprises							
Non-Regulated General Public							
The Government							
Total		55 500	3 500			55 500	3 500
Net Costs to Businesses		55 500		Equivalent Annual Net Cost (EANC)		55 500	3 500

B. Cost-Benefit Analysis by Activity of Each Alternative

Maintaining Current Regulation: Collection Rates for Broadcasting Communications Development Fund

- Regulated Corporates & Micro Enterprises:
  - ☐ Direct Costs: 52 000 million KRW

Task Subject Description	Amount of Charges According to Collection Rate by Broadcasting Service Provider Amount of Charges Imposed on CATV and IPTV Broadcasting Service Providers

Subcategory	CATV Broadcasting Service Providers
Title of Activity	Collection Rates of Broadcasting Service Providers (1.0%/2.3%/2.8%)
Cost Item	Others
Cost	43 600 000 000 KRW
Characteristics of Activity Cost	Repetitive/Annually Equivalent
Calculation Formula	Collected Amount of Charges [43 600 000 000]
Explanation for Provided Figure	☐ Broadcasting service sales revenues in the previous year: 2 554.4 billion KRW (Combined sales revenues from 92 SO service providers) ○ Differentiated collection rates through a progressive stage system: 1.0% for sales less than 10 billion KRW; 2.3% for sales exceeding 10 billion KRW and below 20 billion KRW; 2.8% for sales exceeding 20 billion KRW ☐ Sales revenues from 15 service providers with sales less than 10 billion KRW (98 655 451 401 KRW) x Average collection rate (1.00%)** – Abatement of charges for two service providers (36 624 794 KRW)* = 949 929 656 KRW ☐ Sales revenues from 30 service providers with sales exceeding 10 billion KRW and below 20 billion KRW (463 752 724 442 KRW) x Average collection rate (1.44%) – Abatement of charges for three service providers (134 393 870 KRW)* = 6 562 918 730 KRW ☐ Sales revenues from 47 service providers with sales exceeding 20 billion KRW (1 693 031 151 160 KRW) x Average collection rate (2.13%) = 36 133 489 180 KRW → ①+②+③ = 43 646 337 565 KRW * Abatements due to the deficit pursuant to Article 13 of the Enforcement Decree of the Framework Act on Broadcasting Communications Development. ** Collection rates are indicated as an average collection rate since the sales revenues from broadcasting service are summed up with the amount calculated by multiplying the sales revenues by the collection rate from each interval.

Subcategory	IPTV Broadcasting Service Providers
Title of Activity	Collection Rates of Broadcasting Service Providers (0.5%)
Cost Item	Others
Cost	8 400 000 000 KRW
Characteristics of Activity Cost	Repetitive/Annually Equivalent
Calculation Formula	Collected Amount of Charges [8 400 000 000 KRW]
Explanation for Provided Figure	☐ Broadcasting service sales revenues in the previous year: 1 908.8 billion KRW (Combined sales revenues from 3 IPTV service providers) ☐ Collection Rate: 0.5% ○ Sales revenues generated by the IPTV broadcasting service providers in the previous year (1 908.8 billion KRW) x Collection rate 0.5% – Abatement of charges for one service provider (1 144 million KRW) = 8 400 million KRW * Abatements due to the deficit pursuant to Article 13 of the Enforcement Decree of the Framework Act on Broadcasting Communications Development.

☐ Indirect Benefits: N/A

(Quantitative) Subject	
Amount	
Calculation Formula	

Explanation for Provided Figure	

(Qualitative) Subject	○ Pursuant to Article 26 of the Framework Act on Broadcasting Communications Development, it is utilized to support the development fund for promotion of broadcasting communications.
Analysis	By adjusting the collection rates by taking the competition situation and financial status of each paid TV broadcasting service provider into account, it enhances the equity of the burden among the service providers from the same market and utilizes the development funds to support the businesses for promotion of broadcasting communications.

Explanation for Provided Figure	

Qualitative Analysis	.

Regulatory Alternative #1: Collection Rates for Broadcasting Communications Development Fund

□ Regulated Corporates & Micro Enterprises:

☐ Direct Costs: 55 500 million KRW

Task Subject	Amount of Charges According to Collection Rate by Broadcasting Service Provider
Description	Amount of Charges Imposed on CATV and IPTV Broadcasting Service Providers

Subcategory	CATV Broadcasting Service Providers
Title of Activity	Collection Rates of Broadcasting Service Providers (1.0%/2.0%/2.3%)
Cost Item	Others
Cost	38,600,000,000 KRW
Characteristics of Activity Cost	Repetitive/Annually Equivalent
Calculation Formula	Collected Amount of Charges Compared to Current Regulation [38,600,000,000]
Explanation for Provided Figure	☐ Broadcasting service sales revenues in the previous year: 2,255.4 billion KRW (Combined sales revenues from 92 SO service providers) ○ Differentiated collection rates through a progressive stage system: 1.0% for sales less than 10 billion KRW; 2.0% for sales exceeding 10 billion KRW and below 20 billion KRW; 2.3% for sales exceeding 20 billion KRW □ Sales revenues from 15 service providers with sales less than 10 billion KRW (98,655,451,401 KRW) x Average collection rate (1.00%)** – Abatement of charges for two service providers (36,624,794 KRW)* = 949,929,656 KRW □ Sales revenues from 30 service providers with sales exceeding 10 billion KRW and below 20 billion KRW (463,752,724,442 KRW) x Average collection rate (1.35%) – Abatement of charges for three service providers (92,675,539 KRW)* = 6,182,378,791 KRW □ Sales revenues from 47 service providers with sales exceeding 20 billion KRW (1,693,031,151,160 KRW) x Average collection rate (1.86%) = 31,419,716,270 KRW → ①+②+③ = 38 552 024 717 KRW * Abatements due to the deficit pursuant to Article 13 of the Enforcement Decree of the Framework Act on Broadcasting Communications Development. ** Collection rates are indicated as an average collection rate since the sales revenues from broadcasting service are summed up with the amount calculated by multiplying the sales revenues by the collection rate from each interval.

Subcategory	IPTV Broadcasting Service Providers
Title of Activity	Collection Rates of Broadcasting Service Providers (1.0%)
Cost Item	Others
Cost	16,900,000,000 KRW
Characteristics of Activity Cost	Repetitive/Annually Equivalent
Calculation Formula	Collected Amount of Charges Compared to Current Regulation [16,900,000,000 KRW]
Explanation for Provided Figure	☐ Broadcasting service sales revenues in the previous year: 1,908.8 billion KRW (Combined sales revenues from 3 IPTV service providers) ☐ Collection Rate: 1.0% ○ Sales revenues generated by the IPTV broadcasting service providers in the previous year (1,908.8 billion KRW) x Collection rate 1.0% – Abatement of charges for one service provider (2,188 million KRW) = 16,900 million KRW * Abatements due to the deficit pursuant to Article 13 of the Enforcement Decree of the Framework Act on Broadcasting Communications Development.

☐ Direct Benefits: N/A

(Quantitative) Subject	
Amount	
Calculation Formula	

Explanation for Provided Figure	

☐ Indirect Benefits: N/A

(Quantitative) Subject	
Amount	
Calculation Formula	

Explanation for Provided Figure	

(Qualitative) Subject	○ Pursuant to Article 26 of the Framework Act on Broadcasting Communications Development, it is utilized to support the development fund for promotion of broadcasting communications.
Analysis	By adjusting the collection rates by taking the competition situation and financial status of each paid TV broadcasting service provider into account, it enhances the equity of the burden among the service providers from the same market and utilizes the development funds to support the businesses for promotion of broadcasting communications.

Explanation for Provided Figure	

Qualitative Analysis	.

4. Overall Conclusion on Regulatory Alternative Analysis

A. Enforcement Resources and Capabilities by Alternative

Administrative and Financial Enforceability

- No additional administrative burdens from changing the collection rates for the broadcasting service providers.

- Therefore, any increases in budget and personnel are unnecessary.

Technical Enforceability

It is possible to effectively enforce technical execution of the regulation as the calculation standards and the collection rates of the development funds for the paid-TV broadcasting service providers are explicitly stated.

Enforceability of the Local Governments, etc.

- N/A

B. Need for Regulatory Impact Assessment by Sector

SMEs Regulatory Impact Analysis

- Pursuant to Article 13 of the Enforcement Decree of the Framework Act on Broadcasting Communications Development, exemption (Section 1, Item 2) and reduction (Section 1, Item 3) of charges can be made for a business entity whose deficit under the statement of financial position for the previous year amounts to at least the total amount of capital.
- A written comment was received from the Korea Cable TV Industry (KCTA) regarding the revision of the collection rates in June 2016.

Competition Impact Assessment

- Statutory exemption for three years from the initial year of the CATV broadcasting communications service
- Statutory exemption on the payment of development funds for three years for the IPTV broadcasting service provides from the initial year of the service
- Adjustment on the collection rates through a comprehensive consideration of the financial situation of the broadcasting company, the size of sales revenue, etc.

Technology Impact Assessment

- N/A

C. Choice of Regulatory Alternative and the Rationale

- The development fund is a statutory fee levied on the broadcasting business entities that have been granted permission and approval, with the purpose of supporting and promoting broadcasting communication. All broadcasting business entities are charged with differential rates responsive to their specific conditions to promote development in the broadcasting industry.
  - In accordance with Article 25 of the Framework Act on Broadcasting Communications Development, differential rates may be applied for broadcasting communications service providers in light of public nature, profitability, and the financial condition of the provider.
- The charges on the CATV broadcasting service providers need to be partially eased, given their gradually deteriorating market situation and the fact that these service providers bear higher burdens than others.

- Collection rates need to be lowered from the current average of 1.99% to a new rate of 1.73%, given that the mid- to long-term market growth outlook for the CATV broadcasting service providers is expected to decline by 2.5% while their collection rate is still relatively higher than other service providers at the average rate of 1.99% in 2015.

  * Collection rates of IPTV and satellite broadcasting service providers in 2015 were 0.5% and 1.33, respectively.

- The charges on the IPTV broadcasting service providers need to be raised, given certain factors including the regulatory objective of the development fund, their high growth rate, and the fairness in regulatory enforcement.
  - Such decision holistically takes various factors into account, such as their rapidly growing number of subscribers and sales compared to other service providers like SO and satellite and their business situation in which the operation deficit is drastically shrinking.

Growth Rates for IPTV Subscribers and IPTV Business Sales Revenue

(Unit: 10,000 receivers, 100 million KRW, %)

Category	2010	2011	2012	2013	2014	2015	Compared to 2014	CAGR* for Past 3 Years
Number of Subscribers	309	457	631	874	1 063	1 231	15.8%	18.7%
Sales Revenue from Broadcasting Services	3 196	5 274	8 324	11 272	14 984	19 088	27.4%	30.1%

* indicates a compound annual growth rate (CAGR)

- In the cast of the CATV broadcasting service providers, the number of subscribers decreased by an annual average of 1.1% over the past three years, while their broadcasting business sales revenue have fallen by an annual average of 2.6%.

D. Desired Outcomes of the Preferred Alternative

- Enhanced regulatory equity among the broadcasting business entities in competitive relationship with one another by imposing a reasonable collection rate through a comprehensive consideration towards various factors including competition situation in the sector.

E. Stakeholder Opinions on the Preferred Alternative and Actions Taken

PART IV

Ex post evaluation

Chapter 9

Improving regulatory governance: *Ex post* evaluation

by Lorenzo Allio[1]

This chapter builds on recent OECD work, to offer some general considerations on the application, success and challenges of ex post evaluation of regulations by governments. The chapter provides some reflective thinking on a number of issues to inform the refinement of the governance underpinning the design, implementation and management of ex post evaluation and the related reforms. There are two potential tensions that may emerge when organising and carrying out ex post evaluations. The first tension spans along the centralisation – de-centralisation – outsourcing spectrum. This requires properly organising the plurality of the channels, of the actors and of their "entry points" that form the evaluation regime. A second tension may by reflected by the trade-off between quantity and quality – i.e. between the number of the evaluations and their relevance to decision-making in terms of comprehensiveness (depth), timing, and hence usefulness and of the analysis.

1. Director, Allio-Rodrigo Consulting. The author would like to thank Claudio Radaelli and Katarina Staroňová for the insightful discussions when preparing the draft.

Introduction

This chapter builds on recent work by the OECD in relation to *ex post* evaluation, most notably as consolidated in the *OECD Regulatory Policy Outlook 2015* (OECD, 2015a). It expands on the application, success and challenges of *ex post* evaluation by governments. As such, the chapter provides a comparative analysis of the policies, the institutional and procedural arrangements, the tools as well as the methodologies on the basis of case study examples.

The chapter is to be considered as a "thought piece" rather than a descriptive outlook. It is, in other words, not a full repository of practices but seeks to trigger reflective thinking on a number of issues to inform the refinement of the governance underpinning the design, implementation and management of *ex post* evaluation and the related reforms. Inevitably, the chapter is selective.

The chapter can be read through two possible axes of analysis, which explore potential dichotomies and trade-offs when organising and managing retrospective evaluation. The first axis considers alternative approaches to mandate, conduct and oversee evaluations, whether on a centralised or a more de-centralised basis, or even through outsourcing. In that respect, regulators need to face challenges and seek opportunities when organising the various channels and actors involved in the evaluation exercise. A second axis of tension refers to the possible trade-off between covering a wide evaluation scope (quantity) and ensuring high-quality, usable and useful findings (quality). Finding the right balance between the number of the evaluations and their relevance to decision-making in terms of the depth, comprehensiveness and timing of the analysis is a further challenge to account for.

At the same time, the chapter has a strong operational character, as it includes suggestions on "how to" address specific issues linked to *ex post* evaluation. It includes evidence and insights from case studies included in recent literature – i.e. academic work published during the preparation or after the publication of the *OECD Regulatory Policy Outlook 2015*.

Finally, the chapter introduces an innovative interpretative lens to design and manage regulatory policy – the so-called "ecology of instruments" approach promoted by recent academic research, as an alternative to the traditional political economy of launching, mainstreaming and running individual regulatory tools. The chapter presents the participatory elements that characterise the REFIT Programme of the European Commission to illustrate the feasibility and the potential of connecting regulatory tools – in that case, *ex post* evaluation and stakeholder engagement.

The conceptual framework of *ex post* evaluation: A primer

The *2012 Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012a) explicitly underscore the pivotal role played by *ex post* evaluation for regulatory quality. It states that "The evaluation of existing policies through *ex post* impact analysis is necessary to ensure that regulations are effective and efficient."

This section shortly presents the rationale for and the forms of *ex post* evaluation and summarises findings from the comparative analysis carried out by the OECD in the framework of the OECD *Regulatory Policy Outlook 2015*.

The what, why and how of *ex post* evaluation

Ex post evaluation goes well beyond a technical exercise. It seeks to appraise the effects of regulatory decisions that are in force with the goal of justifying government action and, above all, to responsibly connect past decision with ongoing decision-making.

Through evaluation and *ex ante* impact assessment policy-makers seek to close the policy cycle and stimulate policy integration. Retrospective analyses may differ in scope and they may pursue various goals. They nonetheless all strive to reconstruct a possible "causal chain" of inputs, outputs and more or less direct outcomes that might require further government intervention (Coglianese, 2012) – Allio (2015: 194-196) refers to this as "tracing back impacts". In so doing, it is vital that the original goals of the regulatory object evaluated were plainly spelled out, so that the evaluation is properly designed and it is clear what conclusions it can deliver and what not. In turn, the findings from *ex post* analyses should provide evidence to define a regulatory problem or mischief; to set out the baseline scenario – which supports the work carried out during subsequent Regulatory Impact Analyses. In principle, *ex post* evaluations help also achieve better policy integration.

A further important contribution that *ex post* evaluations tend to make to regulatory policy is enhanced stakeholder engagement and potentially enhanced effectiveness. Collaborative, participatory and empowerment evaluations (Fetterman et al., 2014) are means to increase transparency, accountability and hence also trust in public action. This is likely to contribute to mitigating controversies, smothering further implementation and improving compliance rates. It does not go, however, without a re-calibration of the role of the public regulator in society. The chapter on stakeholder engagement in this publication also addresses the need for regulators to rethink their role and tasks when deploying new approaches to problem solving such as co-production and design thinking.

Academic literature and practice guidance converge defining the criteria underpinning retrospective evaluations and in framing the possible types of evaluation. As to the evaluation types, so-called "compliance tests" assess whether the regulatory quality tool, institution or programme are formally applied in compliance with the procedural requirements, as set out in laws, policies or guidelines as appropriate; "performance tests" measure the quality of the analysis undertaken, going beyond the question of formal compliance with procedural requirements; and "function tests evaluate to which extent the regulatory tool, institution or programme actually contributes to improving the decision-making process and its outcomes (Harrington/Morgenstern, 2003).

When it comes to the evaluation criteria, the most commonly used ones (either alone or in combination) are:

- Relevance: "Do the policy goals cover the key problems at hand?"
- Effectiveness: "Has the regulation successfully addressed the needs and solved the problem?"
- Efficiency: "Do the results justify the resources used?"; "Could the results be achieved with fewer resources?"
- This typology may then be tailored to best serve specific purposes also in the light of resource and time constraints. In this respect, it is useful to consider the approaches defined by the Australian Productivity Commission (APC, 2011; OECD, 2015a:126-127), which differentiates between:

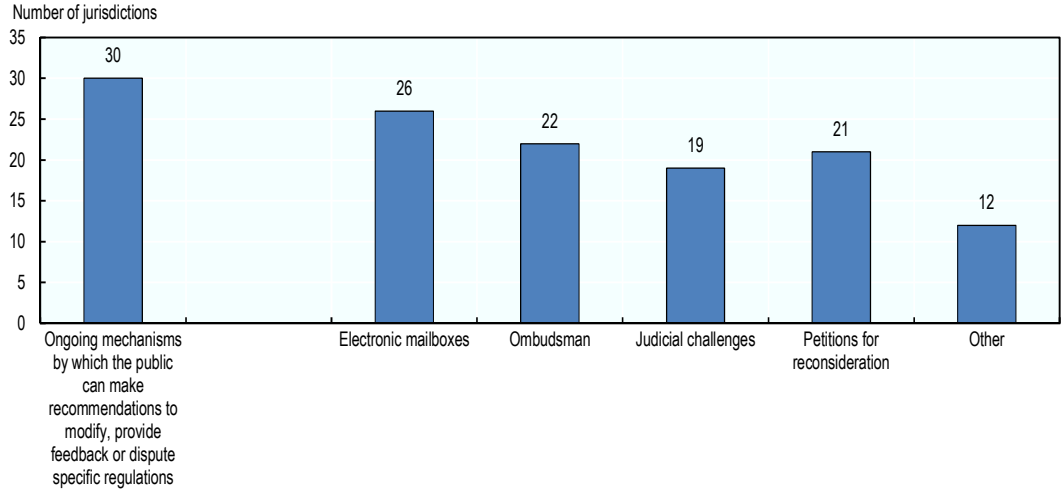
- Stock management approaches have an ongoing role that can be regarded as "good housekeeping".
- Programmed review mechanisms, which examine the performance of specific regulations at a specified time, or when a well-defined situation arises; and
- Ad hoc and special purpose reviews, taking place as a need arises.

Key findings from the *OECD 2015 Regulatory Policy Outlook*

Post-implementation reviews of legislative and regulatory interventions have been included relatively late in the regulatory policy programmes of the OECD member countries. The diffusion and modes of application of the tool reflect the various possible combinations that *ex post* evaluations may feature, as the OECD *Regulatory Policy Outlook 2015* highlights (OECD, 2015a).

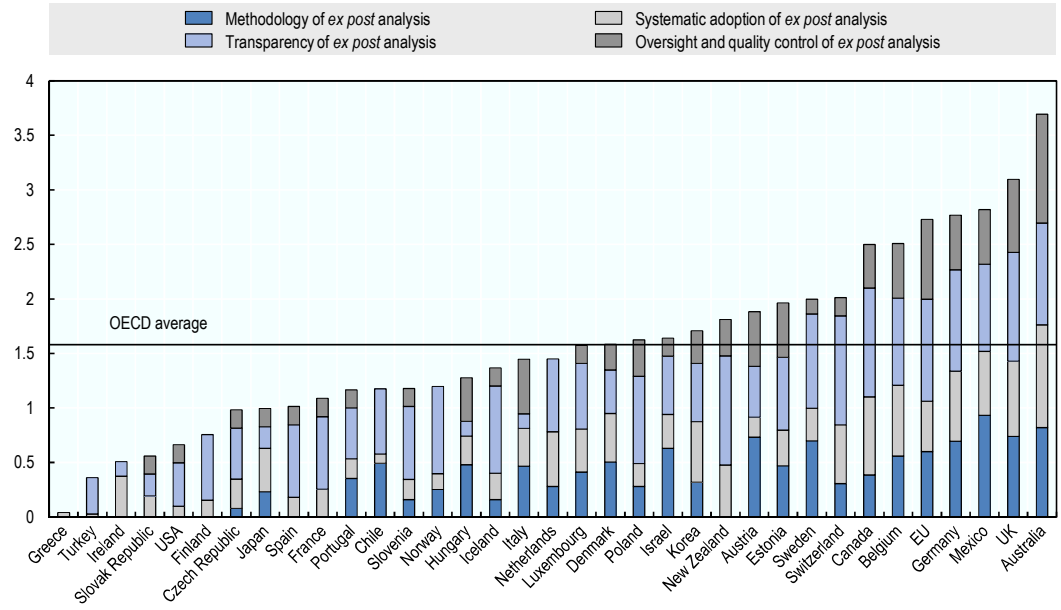
A common feature of the *ex post* evaluation practices appears to be the commitment to involve, in different degrees and at various stages of the process, of stakeholders. As mentioned above, the deployment of *ex post* evaluation helps nurture the interface to open government practices. Findings from the OECD surveys indicate that only five OECD countries do not report engaging stakeholders in *ex post* evaluation. Several mechanisms are at play to seek the participation of stakeholders, including recourse to ICT channels, ombudsman offices and formal petitions (Figure 9.1).

Figure 9.1. **Mechanisms by which the public can make recommendations**



Other aspects nonetheless point to a less convergent trend in applying *ex post* evaluations across the OECD. Measured through the four main lenses of the OECD composite indicator,[1] international practice suggests that most OECD countries have legal requirements for *ex post* evaluation for both primary and subordinate legislation – but actual implementation and oversight are frequently lacking. Very few OECD countries have actually deployed *ex post* evaluation systematically and no dedicated governance structure is usually at hand to support the *ex post* evaluation function (Figures 9.1. and 9.2.).

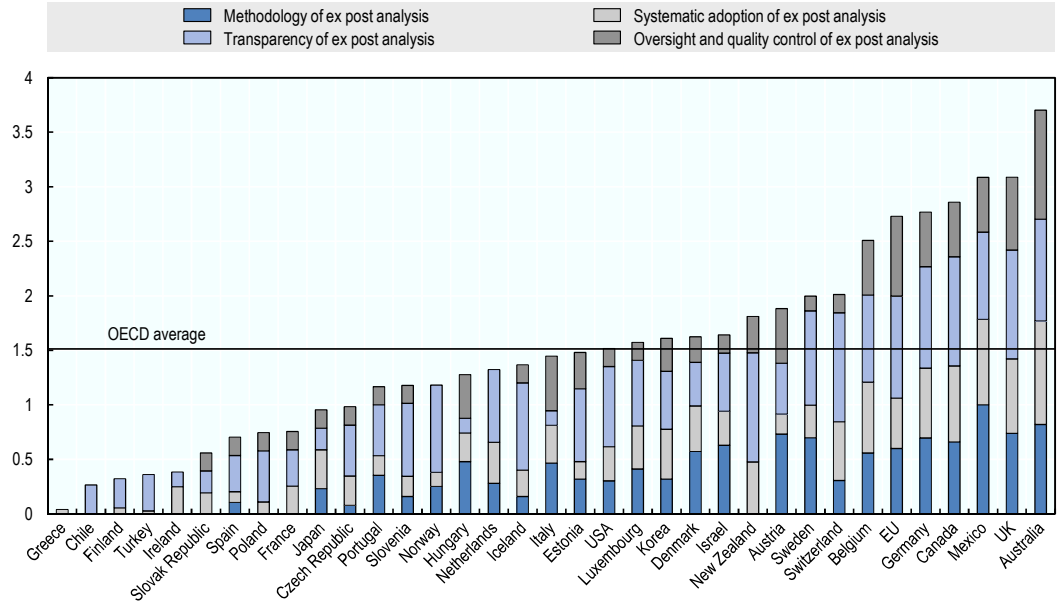
Figure 9.2. **Composite indicators: *Ex post* evaluation for primary laws**



Note: The vertical axis represents the total aggregate score across the four separate categories of the composite indicators. The maximum score for each category is one, and the maximum aggregate score for the composite indicator is four.

Source: 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

Figure 9.3. **Composite indicators: *Ex post* evaluation for subordinate regulations**

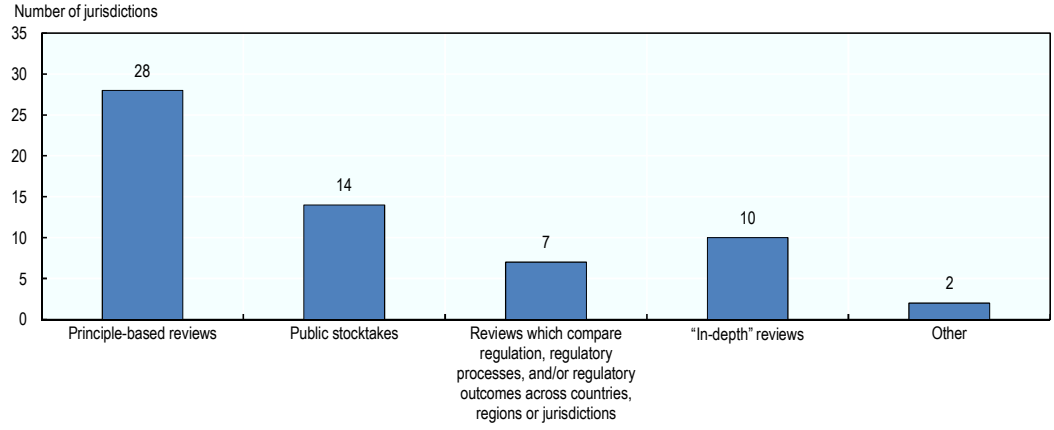


Note: The vertical axis represents the total aggregate score across the four separate categories of the composite indicators. The maximum score for each category is one, and the maximum aggregate score for the composite indicator is four.

Source: 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

One possible reason for such scattered development may be the different interpretations and purposes that countries attribute to *ex post* evaluation. The majority of post-implementation reviews have been principle based, focussing especially on administrative burdens, competition and compliance costs (see Figure 9.4). This confirms the tendency by countries to opt for partial *ex post* assessment of regulatory burdens, whereas only seldom do they assess whether underlying policy goals of regulation have been achieved. In particular, there is room for diffusing the practice of evaluating regulatory impacts across sectors; cumulatively; and in terms of wider economic and societal implications. This is particularly the case in risk management of areas such as food safety and public health; environment protection; or safety at work (Allio, 2015).

Figure 9.4. **Ad hoc reviews of the stock of regulation conducted in the last 12 years**



Note: Based on data from 34 countries and the European Commission.

Source: 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

The 2015 Regulatory Policy Outlook (OECD, 2015a:121-122) hence pleads for further progress in:

- prioritising and sequencing *ex post* evaluations so as to maximise the efficiency of (scarce) resources and address potential "evaluation fatigue";
- integrating retrospective analysis into the policy-making process;
- moving away from the assessment of the impact of individual regulations and seeking to capture the overall coherence within the existing regulatory framework;
- building organisational and administrative capacity to support evaluations;
- establishing quality standards as well as information systems for ease of data sharing and building a "good practice library" to facilitate institutional learning;
- promoting stakeholder involvement in the strategic planning of *ex post* evaluation and execution; and
- timely publishing retrospective analyses.

Insights from international practices

This section proposes some considerations on developments of deploying *ex post* evaluation.

A steadily evolving scope for ex post *evaluation?*

A possible trend emerging from the international usage of *ex post* evaluation in the recent past is the evolution of the rationale for deploying it – from ensuring financial accountability to government's value for money, to increasingly foster innovation or other policy goals. In most OECD countries, *ex post* evaluations have been primarily introduced to reporting on public spending performance. Financial accountability has often been the principal trigger to develop methodologies for public policy reviews, most notably when it came to appraising procedural and substantial compliance with the implementation of public investments – a typical example being evaluation of the EU structural funds implementation. Within this wake, the evaluation discipline has been progressively developed moving from mere financial audit to more sophisticated methodology to ensure sound financial management.

Over the past two decades, that traditional usage of *ex post* evaluation has been increasingly broadened. Not only did governments (and parliaments) want to appraise expenditure programmes and individual projects. The logic applied also to the overarching organisation and functioning of the decision-making process. Ensuring "value-for-money" in government action became a priority to prove the capacity of reinventing themselves and meet the challenges of budgetary constraints.

Retrospectively looking at what governments do; what they achieve and how; and what they do not achieve and why – these have been integral parts of the reforms that aimed for better quality of services at lower costs. This may also include investigating whether it is desirable to keep specific public services fully internalised or whether they (or parts thereof) may be outsourced to third parties. In that respect, the work performed by *ex post* evaluators has come closer to functional reviews carried out to streamline organisational arrangements as well as, proactively, policy developers (OECD, 2015b, Box 9.1).

Box 9.1. **Value for money for policy development: *ex post* evaluation in Canada and the United Kingdom**

The New Public Management approach to reforming public sector in general, and governments in particular, has progressively highlighted the need to account for the core function of "policy development". Involving and making public managers responsible (again) for the design of public policy under the paradigms of modern government requires launching comprehensive reforms that encompass revisiting competences and building capacities and skills.

One strand of such reforms refers to establishing and enforcing whole-of-government standards for *ex post* evaluation. The inspiration for such an approach could stem from Canada and the United Kingdom, which committed to having line ministries holding primary responsibility for planning, conducting or commissioning policy evaluation.

In particular, core ministries need to ensure they have access to independent and relevant policy research, although this work does not need to be undertaken inside government. Uniform standards help ensure that all evaluations are methodologically rigorous and relevant to the policy concerns of both the ministry and the overarching agenda of the government. Ministerial responsibility minimises the possibility of capture by those who have vested interest in the *status quo*, or lack a whole-of-ministry or whole-of-government perspective.

Box 9.1. **Value for money for policy development: *ex post* evaluation in Canada and the United Kingdom** (*cont.*)

Both the United Kingdom and Canada have budgetary rules requiring all proposals for policy expansion be supported by evaluations that adhere to these standards, and Canada requires all evaluations be submitted to Cabinet and made publicly available. In addition, all line ministries in Canada must now appoint a Head of Evaluation to oversee and guarantee the quality of evaluations conducted within the ministry. In doing so, evaluation is recognised as a discrete activity in policy development that requires professional skills and adequate funding.

Source: OECD (2015b), *Building on Basics. Value for Money in Government*, Chapter 3, esp. pp.66ff OECD Publishing, Paris.

A third dimension in designing and implementing evaluation strategies builds on that experience gathered with financial evaluations and value-for-money appraisals. It has explicitly complemented the appraisal of expenditures to embrace the assessment of the performance of regulatory measures. The rationale for this latter approach to *ex post* evaluation is clearly geared towards ever better regulatory outcomes – most often in relation to minimising administrative burdens and direct compliance costs on businesses, the APC's principle based approach to reviews.

This specific "mode" of *ex post* regulatory evaluation arguably requires a more top-down approach, as line ministries have in principle little incentives to revisit what they have delivered in the past and, if that is the objective, possibly reduce the associated regulatory burdens. In addition, line ministries are rarely held accountable by Parliament for their efforts in this respect. For these reasons, the allocation of roles and responsibilities and the organisational arrangements may well vary across institutional contexts (OECD, 2015b: 75).

Castro and Renda (2015:34ff), for instance, report on the practice of entrusting dedicated bodies other than line ministries, which do not oversee nor coordinate regulatory policy, but can perform analyses of individual regulations or entire areas of law, as the case of the Australian Productivity Commission illustrates.

In some jurisdictions, post implementation reviews of regulatory measures are outsourced. This does not necessarily mean, however, that they remain atomised and narrow exercises. Quite the opposite: governments tend to increasingly consider *ex post* evaluation within the general framework of reviewing the stock existing regulations. The European Commission for instance, has recently developed a system for systematic legislative screening resting on two tools – the REFIT programme (managed by the Secretariat General) and the so-called cumulative cost assessment methodology (developed by DG Grow, which target specific industry sectors rather than policy areas (Box 9.2.).

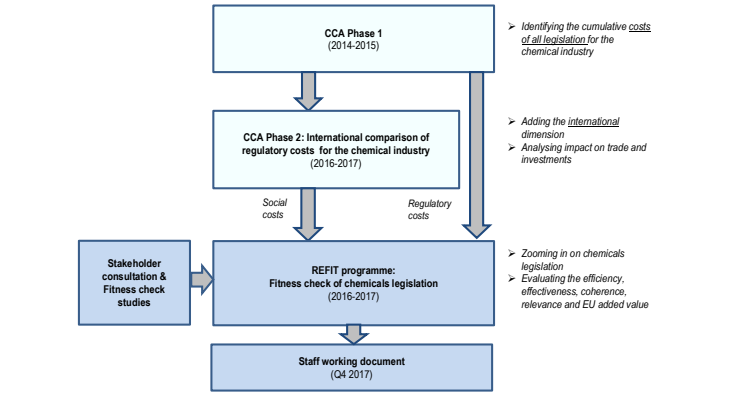
Box 9.2. Evaluating by sectors and by policy area: The European Commission

Launched as a comprehensive set of reform in 2002, the Better Regulation initiative of the European Commission has been progressively complemented and refined through revisions in 2005, 2009 and latest in May 2015.[1] The development of the methodology and the governance of *ex post* evaluation of regulatory measures has nonetheless been rather slower than for other tools (for instance RIA and public consultation), with an acceleration since 2010 only, when the so-called "evaluate first principle" was launched.[2] Since then, the Commission evaluation approach basically relies on two pillars:

The REFIT (Regulatory Fitness and Performance) Programme, which seeks to evaluate entire regulatory frameworks through so-called "fitness checks". The Programme is comprehensive and considers entire policy areas, with the ambition to cover the entire EU *acquis*. Policy areas to be reviewed are announced in the Commission work plan. Although being methodologically quite comprehensive, the checks are embedded in a narrative of regulatory simplification and cost reduction. A multi-stakeholder REFIT Platform assists the evaluation programme. A REFIT scoreboard tracks the progress of each individual initiative and the changes introduced by Parliament and Council during the legislative procedure.[3]

Cumulative Cost Assessments (CCAs) are led by DG GROW. Unlike fitness checks, they focus on all policies having an impact on one class of addressees. CCAs respond to the question "How burdensome is the EU *acquis* for a given industry?" The approach is limited to cost identification and quantification (i.e., it neglects benefit assessment), with a view to possibly understanding whether and how much the costs of EU regulation impact on the cost structure of a European industry and on its global competitiveness. By their very nature, CCAs depend on a close collaboration between the assessor (the regulator) and the regulated parties, often in the form of direct visits in production plants, and it heavily draws on the firm's cost structure, directly. If successful, CCAs hence help grasping the actual functioning of policies on the ground, for instance allowing for a differentiation between operational expenditures and capital expenditures. On that basis, CCAs in principle continue to appraise the competitiveness level playing field of the European industry as benchmarked against international equivalents.

Figure 9.5. **CCA as part of a longer evaluation process**



Schrefler et al. (2015:69) see, as a result, two inherent advantages in deploying CCAs: they create a methodological bridge between policy and competitiveness assessment; and they clarify empirically how a wide array of policies and regulatory measures interact with one another when they are implemented – a question that is often a weak link in policy appraisal.

Box 9.2. Evaluating by sectors and by policy area: The European Commission (*cont.*)

CCAs remain mere fact-finding tools if kept in isolation. The Commission considers Fitness Checks and CCAs as complementary tools. As Figure 9.5 illustrates on the example of the chemical sector's evaluation, the CCA provides one set of "raw data" that is used for a series of further appraisals. Industry sectors that have been assessed through CCAs include steel, aluminium, chemicals, furniture, glass and ceramics, and oil refinery.

1. See http://ec.europa.eu/priorities/democratic-change/better-regulation_en.

2. This is a political rule that conditions any new proposal and ex ante impact assessment to previously carrying out a post implementation appraisal aimed at identifying the need for new regulatory intervention (see EC, 2010; 2013).

3. See http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less_en.

Source: Schrefler et al. (2015); EC (2015a;d). For the Figure, European Commission presentation, April 2016.

The example of the European Commission is all the more worth considering because of the evolving scope of the evaluations: from measuring administrative burdens and direct compliance costs to potentially also capturing regulatory impacts on innovation – an approach relevant to the regulatory context of many OECD countries (Box 9.3.).

Box 9.3. Better Regulation for innovation in the European Commission

In the wake of stalling economic growth and fiscal constraints, suffering also from increasing legitimacy crisis, the EU institutions are called upon to revitalise decision-making. One possible avenue to leverage is to enhance incentives to invest in innovation in Europe – arguably the single most important factor for economic recovery and prosperity in modern economies.

Against this background, growing attention is being paid to the regulatory framework as one of the enabling factors for thriving innovation. Enhancing the predictability, effectiveness and proportionality of regulatory decisions is critical in this respect. The European Commission Better Regulation Strategy is putting more emphasis on the linkages to innovation, as an internal working document of late 2015 and a recent *ad hoc* report illustrate (EC, 2015c; 2016). Private stakeholders and think tanks have also highlighted the necessity to better understand the impacts that regulatory decisions have on innovation-related investments, not least by introducing an "innovation principle" (Meads/Allio, 2015, Pelkmans/Renda, 2014).

Post implementation reviews is thereby seen as a promising way forward. Specifically, the REFIT Programme could provide a framework to assess existing policies and regulatory decisions, with the view to increasing return of (private) R&D expenditure in the EU (EC, 2015c:9). A so-called "InnoREFIT" tool managed by the DG for Research and Innovation would contribute to drawing attention to EU regulatory bottlenecks on innovation-based business cases; and contributing with the other lead DGs to the Commission efforts on the Regulatory Fitness exercise.

Such new instrument would add to a series of tools already deployed in the Commission Better Regulation Guidelines (EC, 2015b) that are related to appraising innovation impacts:

- Risk assessment and risk management (Tool #12)
- How to identify policy options (Tool #14)
- Choice of policy instruments (Tool #15)

Box 9.3. **Better Regulation for innovation in the European Commission** (*cont.*)

- Identification/screening of impacts (Tool #16)
- Impacts on sectoral competitiveness (Tool #17)
- Impacts on Research and Innovation (Tool #18)
- ICT assessment, the digital economy and society (Tool #23)
- Resource Efficiency (Tool #31)

Evaluations should address competitiveness, including the impacts on capacity to innovate (Tool #43).

Source: Mentioned in this box.

Ex post evaluation to support regulatory budgeting?

These considerations are particularly interesting in the light of the (so far) parallel debate about the usefulness and feasibility of implementing "regulatory budgeting", possibly taking the form of substitutive, offsetting approaches such as the so-called one-in one-out model.

The regulatory budgeting debate is far from being new (DeMuth, 1980; Crandall et al., 1997), but sheds an interesting light in the context of expanding and enhancing *ex post* evaluation practices. Also in that context, the debate has recently resurfaced again[2] (Rosen/Callanan, 2014; Pierce, 2016).

Regulatory assessment as the Achilles' heel of regulatory budgeting?

The notion of "regulatory budgeting" is primarily a response to the concern of allegedly uncontrolled increase in regulatory costs, and progressive accumulation of regulations. While governments are required to account in detail for their fiscal spending, regulatory costs are still largely hidden and there is no direct accountability for the total amount of regulatory expenditure which a government requires. The regulatory budgeting concept would require that governments account for regulatory expenditures in a similar way to fiscal expenditures.

The regulatory budget regime rests on the establishment of upper limits set upon regulators on the costs of their regulatory activities to the economy, with more or less flexible allocation of contingencies both over time and across individual regulatory entities. In its most ambitious form, the regime would require all regulators to take account of the total costs of all regulation, both those in force and the ones proposed, and offset the costs of new regulations with savings made by reducing existing expenditures. In principle, besides enhanced transparency, this would provide incentives for agencies to re-examine their regulatory stock, as simplification or removal of regulation would be treated as a credit and provide additional space to spend on new regulations.

In order for regulatory budgeting to work, a fully-fledged regulatory assessment system needs to be in place to best support consistent and strategic regulatory planning. Regulatory costs (and benefits) need to be measured on an estimated, *ex ante* basis at the moment of their adoption, arguably through a comprehensive regulatory impact

assessment programmes. At the same time, impacts need to be measured on an actual, *ex post* basis after the regulations had taken hold (Rosen/Callanan, 2014; Pierce, 2016).

Indeed, while acknowledging the discipline that regulatory budgeting would promote regulatory policy, many critics of the model caution against the considerable analytical challenges that it generates. Evaluating the effects of all existing regulations to determine a baseline budget would be an onerous process resulting in unreliable numbers.[3] Conditioning regulatory activities to regulatory impact assessments (both *ex ante* and *ex post*), exclusively, could render policy-making excessively mechanistic: major policy choices cannot be explained solely by mechanical reliance on numerical formulas and estimates.

Offsetting mechanisms as partial approaches

Partial applications of the regulatory budgeting logic have been developed to mitigate the burdensome information requirements required by a fully-fledged regime. It is the case of offset mechanisms that prevent regulators to adopt new regulatory measures unless they replace equivalent (or proportionate) statutes already in force. The information requirements are thereby considerably reduced because they are generally limited to assessing the costs of those regulations being reformed and those being introduced.

Many countries have adopted so-called "one-in, one-out" mechanisms, or equivalent, often with a strong focus on measured regulatory costs (and, in particular, administrative burdens). It is the case, for instance, of the Australian regulatory cost offset rule; Canada's "one-for-one" rule. Recently, the United States President issued an Executive Order imposing a regulatory cap and the cost offset principle to the executive agencies.[4]

While these approaches simplify assessment methodologies and in principle also the choice of which regulations to repeal, neglecting regulatory benefits would fundamentally distort the rationale and implementation of most public policy choices. Helm (2006) provides a general critique to pivoting Better Regulation around regulatory costs (and administrative burdens in particular), exclusively. With regard to including benefit calculations, Pierce (2016:252) on the other hand reports that if the United States had implemented a cost-only budget instead of a regulatory budget based on Benefit-Cost Analysis during the 2003-2013 period, the country would have been deprived of net benefits worth 133 to 806 billion dollars. Applying Benefit-Cost Analysis enables governments to account for – and hence realise – regulatory benefits in the form of lives saved and illnesses, injuries, and property damage avoided.

The United Kingdom Government has developed a "one-in, one-out" (now become a "one-in, two-out", OITO) regime based on the net impact ratio. Accordingly, no government department can issue a new regulation that would impose a direct net cost on the private sector and the economy without reducing existing regulatory burdens to offset twice the new cost (United Kingdom-BIS, 2013). Although the United Kingdom requires due consideration of all costs and benefits, "direct impacts" are so narrowly defined that the calculations neglect benefits to the public at large (such as improved health or safety); indirect economic effects, i.e., any second-order costs or benefits not resulting directly from the implementation or removal/simplification of the regulation; as well as non-monetisable costs and benefits (Rosen/Callanan, 2014:857).

Focusing offset mechanisms on specific sets of regulatory costs is a legitimate choice. However, governments need to be aware of the implications and communicate them

transparently to the public. Mitigating arrangements may also be considered. The United Kingdom Government, for instance, sought to compensate the analytical limitations of its approach by deploying organisational and procedural arrangements that govern the OITO rule (see Box 9.4.). The United Kingdom's established methodology for designing and carrying out reviews further clarifies the boundaries of evaluation and how to handle existing evidence and data (United Kingdom-Treasury, 2011). The resulting governance underscores how valid and topical the conclusion by DeMuth (1980:37) still is, that "the logic of the regulatory budget is ultimately political rather than economic".

Box 9.4. Mitigating analytical limitations: The governance of the United Kingdom OITO regime

The United Kingdom "one-in, two-out" (OITO) rule is not applied mathematically. A series of arrangements and procedural steps are in place to ensure the controlled and most balanced functioning of the regime. Specifically, there are two **institutional "filters" (oversight)** and a series of **decisional margins**.

Institutionally, departments planning to adopt a new "IN" (i.e. a proposed regulatory measure with a direct net cost) must first submit it to an independent oversight body, the Regulatory Policy Committee (RPC). This is charged with reviewing, challenging and eventually validating the calculations of the proposed measure as well as those of the identified "OUT" (the matching de-regulatory measures). Second, the Cabinet Office's Reducing Regulation sub-Committee (RRC) reviews each department's analysis as well as the RPC's comments.

Departments, moreover, enjoy a certain discretion and flexibility in identifying the offsetting measures:

- When their proposed IN takes effects, for instance, departments must have merely identified the envisaged OUTs. OUT measures need not be finalised, although plans must be developed to do so as soon as possible.
- The comparison of savings from OUTs and new costs from INs are based on the so-called "Equivalent Annual Net Cost to Business". This is a formula that averages short-term and long-term costs and benefits.
- Departments may "bank" OUTs to be used against future INs. They may also use OUTs from elsewhere in Whitehall if the RRC agrees.
- Whitehall may in any case, upon petition, reallocate OUTs from one department to another or issue a waiver in specific cases.

Accountability for compliance with OITO rests entirely with the individual departments and RRC, which publishes semi-annual reports on regulatory and deregulatory actions.

Source: United Kingdom (BIS) (2011), "One-In, One-Out (OIOO) Methodology", London, http://ec.europa.eu/smart-regulation/refit/admin_burden/best_practice_report/docs/5.pdf; United Kingdom (BIS) (2015), "Better Regulation Framework Manual", London, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468831/bis-13-1038-Better-regulation-framework-manual.pdf.

Challenges to design and implementation

This section addresses two specific sets of challenges that emerge from the considerations presented above – the first refers to closing the policy cycle; the second to accounting for indirect impacts in *ex post* evaluation.

Tying up loose ends? Reconciling ex post evaluations with ex ante assessments

Evaluation as the "glue" to close the policy cycle?

As highlighted both in the conceptual framework and when presenting international experiences, one major rationale for enhancing the governance of *ex post* evaluation and mainstreaming evaluation practices is to "close the policy cycle". *Ex post* evaluations are supposed to feed *ex ante* impact assessments, while the latter should, in turn, draw from *ex post* reviews. Underscoring this as the critical step in closing the policy cycle might well sound pleonastic, but it conceals a set of practical challenges (Allio, 2015:197ff and 205ff).

A central issue pivots around avoiding the duplication – or even multiplication – of biases, limitations and distortions, since both *ex post* and *ex ante* analyses are imperfect exercises. If not deliberately and carefully crafted, the two tools present significant misfits between the type of information gathered through *ex post* evaluation and the information needed for *ex ante* assessment. Inherently conceived with a different rationale in mind – namely, providing information on the cost-effectiveness of expenditure programmes and financial interventions or on the efficiency of organisational functioning, *ex post* evaluation might serve little the purpose of assessing prospective regulatory interventions. Even when *ex post* evaluation provides in depth assessment of implementation, it tends to be in relation to the objectives (or part of them) set out in the initial policy measure, and as a reflection of the specific evaluation mandate as procured by the commissioning authority (Smismans, 2015).

Such discrepancy may jeopardise efforts to allow a smooth transfer of information from one closing end of the cycle to the opening one. This increases the risk of distorted interpretation of evidence and, equally importantly, it may limit the possibility to draw lessons from implementation and from information on the current context. If policy learning is thus hampered, the question arises as to the usefulness of closing the evaluation cycle altogether in order to inform new initiatives. These considerations are all the more critical if we consider the potentially divergent objectives that triggered the policy measures in force and those at the origin of the new initiatives.

A possible way to overcome these challenges may lie with the establishment of an organisational framework for data collection and sharing at the interface between *ex post* and *ex ante* analyses. In this respect, the initiative of an Evidence-Based Policymaking Commission in the United States might provide a basis for further reflection across OECD countries (Box 9.5).

Box 9.5. **Smoothing the way the evaluation cycle closes: The United States Evidence-Based Policymaking Commission Act**

In March 2016, President Obama signed into law the "Evidence-Based Policymaking Commission Act",[1] establishing thereby a bipartisan commission to review the inventory, infrastructure, security, and protocols related to data from federal programs and tax expenditures while developing recommendations for increasing the availability and use of this data in support of rigorous program evaluation and policy-making. The law directs the Commission to focus on four topics:[2]

- Evaluation and research: "the optimal arrangement for which administrative data on Federal programs and tax expenditures, survey data, and related statistical data series may be integrated and made available to facilitate program evaluation, continuous improvement, policy-relevant research, and cost-benefit analyses by qualified researchers and institutions."

Box 9.5. **Smoothing the way the evaluation cycle closes: The United States Evidence-Based Policymaking Commission Act** (*cont.*)

- Programme design: "how best to incorporate outcomes measurement, institutionalise randomised controlled trials, and rigorous impact analysis into program design."
- Methods: "how data infrastructure, database security, and statistical protocols should be modified."
- Data clearinghouse**:** "whether a clearinghouse for program and survey data should be established and how to create such a clearinghouse" as well as determining the appropriate administrative and survey data content, approaches to linking records, business model, participation protocols, access protocols, and confidentiality protections.

The Commission consists of 15 members representing an array of disciplines relevant to program evaluation, program administration, and data management, including expertise in economics, statistics, and data security. Several agencies are expected to provide assistance to the Commission, including OMB, Census, and the Departments of Health and Human Services, Education and Justice.

The creation of the Commission signals a shift from input-based to outcomes-driven decision-making.[3] Linking data sources allows researchers and policymakers to look for multidimensional solutions to challenging social problems. For instance, different programmes – say, on housing policy and social care provision – may generate outcomes across different policy areas. Knowledge management through better data governance enhances evidence-based policy-making throughout all its stages.

1. See https://www.congress.gov/bill/114th-congress/house-bill/1831.
2. See https://regulatorystudies.columbian.gwu.edu/evidence-based-policymaking-commission-act-opportunity-improved-regulatory-assessment.
3. See http://waysandmeans.house.gov/what-the-evidence-based-policymaking-commission-will-do/.

Source: mentioned in this Box.

Planning to ensure proportionality in the evaluation efforts

While all policy cycles need to be closed, it is utopian to envisage a universal recourse to fully-fledged *ex post* evaluations. Similar to what happens with regard to *ex ante* assessments, prioritisation and proportionate allocation of resources are needed. Allio (2015:221ff) addresses mechanisms that governments have deployed to avoid making the requirement for analysis an unmanageable burden that eventually ossifies decision-making. Planning evaluation strategically is one effective option, and may intervene at both ends of the policy cycle – the management of the "flow" of new initiatives and the management of the "stock" of existing policy measures and regulations.

- Canada provides an example where prioritisation of evaluation efforts occurs during the elaboration of new statutory acts. When they initiate new legislative and regulatory proposals, departments and agencies may or are obliged to produce a Performance Measurement and Evaluation Plan (PMEP) to be included in their RIAs. The submission of the PMPE depends of the filtering mechanisms applied to the initiative, through the so-called "triage" approach.5 Amongst other things, the PMEP contains a logic model illustrating the relationship between inputs,

outputs and outcomes to targets groups and outcomes, out outlining the foreseen evaluation strategy.

- New Zealand and Mexico have worked on prioritising evaluation initiatives from the stock management perspective. The New Zealand Regulatory Review Work Programme seeks to overcome ad-hoc approaches to *ex post* evaluation and identifies regulations that have pervasive and significant impact on productivity and the economy6. In Mexico, formal plans were created for the development of sectorial reviews of the regulatory framework. COFEMER Guidelines for the Biennial Programs for Regulatory Improvement include a specific requirement for a full initial diagnostic of the regulatory framework of each Ministry. This diagnostic is open to public consultation and the final version is presented by Ministries and becomes the basis for the Biennial Programmes.

Controlling indirect, "complex" costs to strengthen innovation-friendlier regulation

The previous section has highlighted the increasingly focused efforts by some OECD jurisdictions – the European Commission was taken as an example – to deploy regulatory policy tools in general and *ex post* evaluation in particular to foster innovation. At the same time, the discussion around regulatory budgeting draws attention to the fact that a narrow scope of application and simplified impact assessment methodologies may yield imperfect evidential justification of government action. This is particularly the case if regulatory budgets are implemented through the proxy of related offsetting mechanisms based exclusively on direct cost considerations.

Recognising and somehow accounting for indirect impacts represents a fundamental challenge in any regulatory assessment. Ignoring indirect costs, in particular, may lead to massive understatements of actual regulatory costs. The remainder of the paper does not seek to convey the message that the analytical basis of offsetting mechanisms should be expanded from direct compliance costs (and benefits) to indirect regulatory costs. Rather, it offers some considerations on the importance that indirect regulatory impacts have on economies, most notably when the regulatory framework is acknowledged to be an enabling factor for innovation-related investment.

The risks from neglecting indirect cost assessment

In their attempt to formalise evidence-based decision-making, OECD governments typically tend to identify, measure and control direct substantive compliance costs incurred by business or other target groups, together with the costs to government of regulatory administration and enforcement. In many cases, governments have even narrowed their analyses (and methodological quest) to a specific sub-set of compliance cost – administrative burdens. The reasons for limiting the thorough and systematic assessment of indirect impacts lie with the fact that the latter are subject to significant uncertainty; they pose major analytical challenges; and require a different level of investment (OECD, 2014).

However, grasping indirect impacts is fundamental. Indirect costs, in particular[7], are likely to arise as a result of behavioural changes prompted by the "first order" impacts or changed incentives because of the regulations. They result when regulation reduces otherwise desirable economic activities by raising development, production or delivery costs, by making products less desirable or, in the extreme, by banning products or making them unprofitable to produce. Major indirect costs include value lost when people

cut back purchases in response to regulation-induced price increases, reductions in quality or convenience caused by regulation, and risk/risk trade-offs (Renda et al., 2013:25ff; Graham/Wiener, 1997).

An important class of indirect costs is the decline in innovation that may occur with some types of regulation, because of the alteration of investment allocation decisions by private operators. When public attitudes and regulatory requirements change, businesses revise their decisions on where to locate activities, to allocate capital, to invest in production factors. This category of costs tends to be misunderstood and neglected by regulators in their *ex ante* and *ex post* impact assessments. To best illustrate the underlying logics, it is proposed here to consider the case of risk regulation and decisions to management risk from technologies and hazardous substances.

The importance of innovation

Innovation is the single most important driver of societal prosperity in developed economies. In many OECD countries, the persistent fiscal constraints and the impracticability of steadily reducing labour costs make improvements in productivity the most immediate factor to ensure economic recovery and sustained growth.[8]

Innovation encompasses the creation of new products and services and the use of new processes and operating methods. It includes revolutionary changes as well as changes resulting from continuous improvement. Innovation is not limited to advances in technology and science, although these inputs are fundamental. It also results from the type and intensity of the linkages among actors in the production cycle; customers; and the market environment.[9]

To a large extent, technological innovation is led by the private sector, not least because of the scale of its investments in R&D. It is for instance calculated that some 64% all of R&D carried in the EU in 2013 stems from direct industry funding (Eurostat, 2015:52), while approximately half of the remaining portion of investment takes the form of public-private partnerships (e.g. between the private sector and research institutes or universities). The private sector is thus involved in more than four fifth of the R&D investments in Europe.[10]

Governments have a major role to play in creating a business environment that is supportive of innovation. A stable and supportive macro-economic environment is important, and this is heavily influenced by fiscal and monetary policies. Further "enabling conditions" exist that are critical for stimulating innovation, and which government can have an impact upon. Regulation is one of such conditions.

Badly designed or implemented regulation can stifle incentives to invest and innovate. Understanding the consequences of such regulatory failure is an important element in the quest for promoting economic growth. In turn, this contributes to enhancing legitimacy and trust in public decision-making. Considering the regulation of risk, i.e. the way in which societies expect governments to protect them from actual or potential threats, in particular, provides useful insights to explore underlying logics. Societal choices about the way in which potential risks are managed by governments affect in fact three important aspects of the business environment: i) attitudes to risk-taking, science and technology; ii) market conditions, including regulatory barriers to retaining existing products and to bringing new ones to market; and iii) access to knowledge and ideas. Over time, this affects incentives to innovate (Meads/Allio, 2015; Meads, 2016).

Considering private capital investment decisions

One way to strike the appropriate balance between managing risks and supporting innovation is to strengthen the regulators' capacity for evidence-based decision-making – principally by relying on high quality science, a rigorous understanding of benefits and costs, and using processes that meet global standards of good administration.

Measuring and taking account of how regulatory decisions affect private sector's choices to allocation investment on innovation is not straightforward and tends to fall outside the typical evidential enquiries of regulators. OECD countries rarely carry out such analyses, and impact assessment methodologies tend to neglect these costs. Yet, they are critically relevant both in the *ex ante* and in the *ex- post* stages of the evaluation cycle. In the following, a number of topical issues are highlighted in this context:

- **Capitalised Development Costs** – Many innovation projects require investment over lengthy periods of time. The total cost of such investments includes cash expenditures along with the risk-adjusted opportunity cost of capital. If regulatory factors delay the project, increasing the time to market or the cash costs required, then the total capitalized cost of the innovation increases. The higher the capitalized cost of the project, the larger the market opportunity that must be exploited, if the value of the business is not to be eroded. Such factors are regularly taken into account in the investment appraisal models used by companies. Regulatory uncertainty (the concern that political or social factors may affect product approval or availability) is also taken into account by companies and further increases capitalized costs. Excessively high costs, however, limit the range of investment options, and, through a feedback process, distort future decisions on innovation (Box 9.6.).

Box 9.6. R&D costs and innovation patterns in the United States pharmaceutical industry

A sectoral empirical analysis of the phenomenon is the model developed by Tufts University to explain the cost of developing new human pharmaceutical products. The model analyses private sector R&D activities as long-term investments. Researchers have conducted several studies using compatible methodologies over the past few decades. The cost of compound failures is linked to the cost of the successes (investigational compounds that attain regulatory marketing approval), and a representative time profile is utilized along with an industry cost of capital to monetize the cost of the delay between when R&D expenditures are incurred and when returns to the successes can first be realized (date of marketing approval).

The analysis is based, in part, on information provided by 10 pharmaceutical companies on 106 randomly selected drugs that were first tested in human subjects anywhere in the world from 1995 to 2007.

Findings indicate a steady increased in R&D costs in the United States pharmaceutical industry, with capitalised costs increasing by 145% during the 2000s and early 2010s. At the same time, the success rate (i.e. the proportion of drugs eventually approved over the total developed drugs) has decreased by nearly 10%.

The authors do not come to firm conclusions as to the causes of such trend in R&D costs over time. Multiple factors are at play, including changes in regulatory and guidance requirements. They refer in this respect to occasional exogenous shifts "in the types and amount of information perceived as necessary for regulatory approval for particular classes of drugs can be instructive. For example, during our study period the FDA issued guidance for the development of drugs to treat diabetes in late

Box 9.6. **R&D costs and innovation patterns in the United States pharmaceutical industry** (*cont.*)

2008 that highlighted a need to better assess and characterise cardiovascular risks for this class of compounds, after a number of cardiovascular concerns emerged regarding a previously approved drug (…). [Research suggests] that average United States clinical development times increased from 4.7 to 6.7 years for diabetes drugs approved in the United States from 2000–2008 to 2009–2014, respectively."

The latter example illustrates the impact that not only regulatory decisions but also administrative decisions (through technical guidelines and protocols, for instance) have on innovation patterns. It is important for regulators to be aware of such implications.

The problem is recognised by some regulators and steps are being taken to reduce the regulatory impact on capitalized cost of new product development. An example is the adaptive approach to licencing explored by the United States FDA and the EU EMA to improve the economics of new drug development for human illnesses (Eichler et al., 2015; Oye et al., 2015).

Source: DiMasi, J.A. et al. (2016), "Innovation in the pharmaceutical industry: New estimates of R&D costs", in *Journal of Health Economics*, Vol. 47, pp.20–33.

- "Defensive R&D" – Defensive R&D occurs when new safety, quality, or efficacy requirements must be applied to existing products. The costs of testing, registration and reporting, for instance, are normally met out of existing R&D budgets diverting resources away from innovation and towards the "defence" of existing (old) products. Such transfer of capital is to a great extent inherent to regulatory compliance. When well designed, regulatory requirements are predictable and targeted; based on high quality scientific evidence and a robust understanding of real world exposures; and, informed by extensive knowledge of costs and benefits. Traditionally, businesses have been able to absorb such requirements without major distortions in the allocation of capital for innovation.

The additional regulatory requirements become problematic when they make defensive R&D investment disproportionately high, especially against poorly proven evidence of increased benefits in protecting human health or the environment. Expenditures on R&D are, in general, determined by global norms set by capital markets and, as such, do not take account of national or regional regulatory requirements. The process of complying with regulatory requirements rarely triggers the release of additional capital from investors.

So-called "de-listing" is a typical consequence of the phenomenon. If the mandatory costs of ensuring that existing substances and their uses meet new standards of safety (or quality or efficacy) exceed the capitalised future contribution margin of a substance then, in general, it will be de-listed. Downstream users will lose access to it, along with all of its embedded technologies. This loss of existing substances and processes (and the knowledge embedded within them) distorts innovatory activity and inhibits the development of new products and operating processes, especially incremental innovations by smaller companies operating close to end users.

Defensive R&D may reduce consumer protection. In a context of less innovation, reduced product availability, and a focus on older technologies, citizens lose out. Productivity growth is lower, reducing wealth, taxes and employment. Product choice is reduced, limiting consumer satisfaction and surplus. Prices are, moreover, likely to be

higher: less competitive intensity, high barriers to entry, and limited incentives to innovate tend to create rents for existing competitors. Risks to consumers also increase. Reduced availability of substances and products because of Defensive R&D leads to the loss of existing product benefits. In some cases, this has triggered "risk-risk" outcomes, whereby new harms have been created or existing ones exacerbated. Examples include veterinary medicines and loss of availability of treatments for minor uses or species; reduction in biocides creating health risks in the personal and household care sectors; and the impact of the reduced arsenal of crop protection products on the environmental impacts of agriculture (Meads, 2016b).

As such, both capitalised development costs and defensive R&D may derail to become one of the most important unintended consequences of public risk management decisions. Governments need to refine their understanding of the underlying mechanisms when proceeding to *ex ante* regulatory impact assessments. If designed correctly and carried out rigorously, *ex post* evaluation can in their turn, highlight past decisional patterns and provide insights for controlling indirect costs more confidently. Because of the expanded role of the so-called "administrative State", those refined tools need to be applied both in to regulatory decisions and administrative decisions.

Gearing up capacities for evaluation

The above discussion highlights one core problems in several administrations – the capacity by policy officials to manage and control the life-cycle of evaluations. While some (more technical) parts of the evaluation might be outsourced to external experts, it is important that the overall ownership, responsibility of the evaluation product remain in the hands of the contracting institution. This manifestly applies in those situations where *ex post* evaluations are internalised (Allio, 2015:211ff).

Box 9.7 reports two examples of programmes that potentially respond to these challenges. They complement direct capacity building initiatives (direct training, as referred to by Allio, 2015:223) by focusing on the benefits that can be obtained from closely matching the objectives and needs of the organisation with the management of the existing staff. The Box illustrates also the importance of enhancing capacities across levels of government.

Box 9.7. **Strategically enhancing human resources capacities at all levels of government**

In the United States, human resources are considered as a strategic partner. The United States Strategic Alignment System[1] promotes a close matching between human capital management strategies and the agency's mission, goals, and objectives through analysis, planning, investment, measurement, and management of human capital programmes. As such, it serves both as a management tool to facilitate the effective allocation of relevant resources and as an accountability tool to enforce meritocracy and professionalism.

Each system is based on "critical success factors", i.e. areas on which agencies and human capital practitioners should focus on to achieve a system's standard for success and operate efficiently, effectively, and in compliance with merit system principles. The factors include human capital and workforce planning and best practice and knowledge sharing. Activities and outcomes of this system are assessed through documented evidence of a strategic human capital plan that includes human capital goals, objectives, and strategies; a workforce plan; and performance measures and milestones. Agencies are required to submit the strategic human capital plan described by this system to the United States Office of Personnel Management on an annual basis (OECD, 2012b:198).

Box 9.7. Strategically enhancing human resources capacities at all levels of government (*cont.*)

Mexico provides an example of enhancing capacities at the local level. The National Professionalisation Forums (*Foros Nacionales de Profesionalización*) organised by the National Institute for Federalism and Municipal Development (*Instituto Nacional para el Federalismo y el Desarrollo Municipal*), which started in 2001, is a place where participants discuss technical issues regarding the professionalisation of municipal public servants and the implementation of a career service in municipal governments. In these forums participants have the opportunity to exchange experiences, and proposals. The forum organises regular national meetings, regional and/or local workshops, and fosters co-operation between local governments via electronic means, etc. Moreover, the National Conference of Municipalities of Mexico (*Conferencia Nacional de Municipios de México*) is another channel of lesson-drawing and to put forward proposals for improving public management. It is integrated by municipalities from the three main political forces in the country (OECD, 2013:252).

Source: See https://www.opm.gov/policy-data-oversight/human-capital-management/strategic-alignment/.

An alternative way forward is to develop specialised professionals and locate them in dedicated posts or units in key government services. These evaluation specialists may be more or less institutionalised in networks, as Box 9.8 illustrates.

Box 9.8. Connecting specialised evaluation capacities: Examples from Switzerland and Ireland

The "Evaluation Network" in the Swiss federal administration[1] is a voluntary, not official initiative of a group of civil servants active and interested in policy evaluation. It is a place for exchange of experience and information between evaluation specialists, principals and users, open to officials working at all levels of management and executive offices, departments, Parliament and the Federal Audit Office.

The Network seeks to contributing to enhance the evaluation capabilities of the federal administration and diffuse an evaluation culture. It also contributes to quality assurance in the field of evaluation, not least by promoting multi-disciplinary learning and the adoption of the latest insights from academic research. The Network is active since 1995 and currently includes some 120 members. It meets three times a year on average, and the chair is traditionally held by the Federal Office of Justice.

The Irish Government Economic and Evaluation Service (IGEES)[2] pushes the in-house evaluation network concept further, for it professionalises the evaluation function. Established in 2012 as an integrated cross Government service, IGEES enhances the role of economics and value for money analysis in public policy making. It signals the commitment of the government to a high and consistent standard of policy evaluation and economic analysis throughout the civil service, supported by a small monitoring group in charge of management tasks.

IGEES is comprised of specialist units operating in government departments. The heads of the IGEES units form the IGEES Management Board, which is responsible for driving the development and performance of the service. A IGEES Oversight Board reviews overall performance and development, whilst also advising on best practice and the future strategic direction of the service. Membership of the Oversight Board comprises senior civil servants, academics and external experts.

Box 9.8. **Connecting specialised evaluation capacities: Examples from Switzerland and Ireland** (*cont.*)

IGEES recruits graduate economists annually. To 'kick start' the service, in 2012 twenty-seven economists were appointed at administrative officer level. After initial training mainly based in the central departments of Public Expenditure and Reform, Finance and Taoiseach, these recruits have gradually been moved into dedicated analytical units in government departments. The intention is that they remain in a department for a couple of years and then move on to another department or office (Boyle, 2014).

1. See https://www.bj.admin.ch/bj/fr/home/staat/evaluation/netzwerk.html.
2. See http://igees.gov.ie/.

Source: mentioned in this Box.

Promoting the evaluation culture to embed evidence-based decision-making

Ensuring that evaluations are read and understood and that their findings do inform decision-making is a further challenge in many OECD countries. Boyle (2014) addresses ways to mainstream the use of evaluation, identifying in particular the following channels:

- **Linking evaluation to budgeting, and planning**. If evaluation is not seen as useful when conducting the budget or audit process or when drawing up plans its role may be questioned. The government evaluation system should also be geared to identifying ineffective or low priority government programs that should be terminated or scaled back to assist either in reducing government expenditure or in creating additional budgetary space for high-priority new expenditures. This clearly determines the choice of evaluation topics and the scope of evaluations, and indeed changes the purpose of policy evaluation to seek policy effectiveness or to simplify the regulatory environment to make it business- and/or user-friendlier. The notion that a single government-wide evaluation system can serve both of these purposes effectively should be reconsidered.
- **Building an evaluation culture**. This is needed in order to boost both the demand for and the supply of evaluation along the axis experts – policy officials – decision-makers. Incentives and sanctions can be deployed to achieve this. Among the latter are "naming and shaming" of departments on the basis of regular monitoring of performance indicators. Political commitment to evaluation and evidence-based decision-making is also key (Allio, 2015:231ff). This can be fostered through awareness raising initiatives as well as, more effectively, for instance by organising opportunities for a dialogue between decision-makers and academics and others who can provide an explanation of the evidence arising from evaluation and research studies and key issues arising. In recent years, one of the most active assemblies in promoting evidence-based deliberations has been the European Parliament (Box 9.9.).

Box 9.9. Embedding evaluation in the legislature: The EPRS

In the light of the expanded competences and powers conferred on it by the EU Treaties and reflected in the inter-institutional character of the EU Better Regulation agenda,[1] the European Parliament has scaled up its capabilities to deliver evidence-based analysis to underpin political deliberations.

The European Parliament Research Service (EPRS) was created in 2012 as the comprehensive in-house research department and think tank. It assists Members in their parliamentary work by providing them with independent, objective and authoritative analysis of, and research on, policy issues relating to the EU. It is also designed to increase Members and EP committees' capacity to scrutinise and oversee the European Commission and other EU executive bodies.

EPRS consists of three directorates: the Members' Research Service; the EP Library; and, most notably, the Directorate for Impact Assessment and European Added Value. The latter includes a unit reviewing ex ante assessments by the European Commission; and one on *ex post* evaluation that assists MEPs by compiling detailed databases of EU legislation requiring follow-up and of all review work on European laws being undertaken by the EU institutions. It also produces assessments of the state-of-play whenever EP committees do implementation reports. Other units in the Directorate are tasked with organizing and conducting scientific foresight and horizon scanning as well as enhanced coordination with the Council.

With regard to the work on *ex post* evaluation, EPRS conducted an overview study on planned and ongoing evaluations of EU legislation and spending programmes carried out by the Commission in December 2015, which highlighted the diversity of information about those activities and the uneven strategic approach followed up to that time.[2]

1. A revised EU Inter-Institutional Agreement on Better Law-making entered into force in 2016, on the basis of the original agreement signed by the European Parliament, the Council of EU Ministers and the European Commission in 2003. The current agreement can be accessed at http://ec.europa.eu/smart-regulation/better_regulation/documents/iia_blm_final_en.pdf.

2. See Schrefler, L. and S. Huber (2015), Evaluation in the European Commission. Rolling Check-List and State of Play, EPRS, at www.europarl.europa.eu/RegData/etudes/STUD/2015/558789/EPRS_STU(2015)558789_EN.pdf.

Source: EPRS website, www.europarl.europa.eu/atyourservice/en/20150201PVL00031/European-Parliamentary-Research-Service.

Seeking mutually reinforcing tools? A case study from the European Commission

Ex post *evaluation in the EU Better Regulation agenda*

As recalled above, the European Commission's Better Regulation agenda dates back to the early 2000s. The first action plan already mentioned all the main components (regulatory tools) of the agenda, including systematic impact assessments, enhanced public consultation and the necessity to carry out *ex post* evaluations (EC, 2002). One characterising feature of the Commission approach to Better Regulation is that policy appraisals are conducted on a variety of initiatives, from policy (programmatic, sectoral or "horizontal") to legislative and regulatory decisions, of both binding and non-binding nature. Also because of that framework, the Commission is often said to be a frontrunner in the field of *ex post* evaluation. Not only has it developed its own evaluation system, but it has also prompted evaluation practices in the EU Member States, not least through conditionality (Stern, 2009; Hoerner/Stephenson, 2012).

Yet, empirical research has casted some doubts as to whether the evaluation practice at EU level has met its promises and matched expectations, especially when it comes to legislative and regulatory reviews (Box 9.10).

Box 9.10. Number, quality and use of *ex post* legislative evaluations in the EU: Promises not fulfilled?

On the basis of 216 *ex post* evaluations of EU Regulations and Directives published between 2000 and 2012, Mastenbroek et al. (2015) note a progressive increase in the number of evaluation over the years, but at the same time an incomplete coverage of the system. Out of all major Regulations and Directives adopted in 2000-2002, only 33% had been evaluated by the end of 2012. Put it in other words, almost seven of out ten major legal acts governing the EU have not been evaluated *ex post* ten years after their adoption.

The same assessment sheds some shadows on the type and quality of the evaluations, when they are carried out. Mastenbroek and colleagues find that while slightly more than half of the evaluations investigate the impact of EU legislation on society in terms of effectiveness, efficiency or side effects, the remaining studies (48%) are limited to process criteria such as transposition, implementation and enforcement. In addition, evidence shows that the methodology used is robust only in 15% of screened sample, while stakeholder consultation and / or their direct involvement occurred in only 39% of the cases.

On the basis of these findings, the authors argue that *ex post* legislative evaluations are mainly a matter of complying with a legal obligation to perform them, rather than the expression of the Commission's initiative to learn and / or close the policy cycle.

A further relevant research question refers to the usage of the evaluations available. Using a different sample of 220 *ex post* legislative evaluations, Zwaan et al. (2016) argue that evaluations are used to ensure accountability only to a limited extent, and this depending on the political sensitivity of the legislation. Only 34 evaluations (16% of their sample) had been used by the European Parliament (EP) to scrutinise the work of the Commission and demand corrections.

When it comes to "closing the policy cycle", van Gholen/van Voorst (2016) find, on the basis of 309 *ex post* legislative evaluations and 225 IAs, that only 9 *ex post* evaluations use IA and only 33 IAs draw in some ways on *ex post* evaluations.

Source: mentioned in this Box.

It was only some ten years after the first Better Regulation Action Plan of 2002 that post-implementation regulatory reviews were brought back to core of the policy cycle and framed in a more comprehensive, institutionalised basis. Two main tools have been designed (the Fitness Checks and the Cumulative Cost Assessments), a dedicated programme launched (the REFIT Programme), and, recently, the mandate of the Regulatory Scrutiny Board has been expanded so as to include also the scrutiny of *ex post* evaluations (EC, 2010; 2013; 2015a).

Leveraging multi-actor representativeness and expertise

The creation of a REFIT Platform (EC, 2015d) is one of the landmarks of the Commission's upgraded Better Regulation Strategy of May 2015. More or less inspired by the Danish Business Forum and the United Kingdom Red Tape Challenge, the system explicitly seeks to contribute to delivering Better Regulation through inclusive work, from a bottom-up approach.

Organisationally, the Platform is chaired by the First Vice President of the European Commission, who is the highest level political referent for Better Regulation in the institution. The chair of the Regulatory Scrutiny Board acts as his deputy and chairs separate meetings of the Platform's two groups. These are:

- a "Government group", consisting of one high-level expert from each of the EU's 28 Member States; and
- a "Stakeholder group", made up of 18 representatives of business, social partners and civil society and two representatives from the European Social and Economic Committee and the Committee of the Regions.

The Commission Secretariat-General acts as secretariat for the Platform and its work is supported by a dedicated website.[11]

The Platform was officially launched in late January 2016. Box 9.11 summarises how it works in practice.

Box 9.11. Roles and tasks of the EU REFIT Platform

The REFIT work that pertains to the Platform is triggered by public and stakeholders' inputs. The Commission collects stakeholder views on how to make EU laws more effective and efficient via the online contact form "Lighten the Load – Have your say!"; through Platform members own submissions and via spontaneous input by means of letters. The new online portal is open for all members of the public to provide their suggestions for reducing the unnecessary regulatory burdens they experience in their daily lives. The original suggestions received are published.[1]

The Commission examines all suggestions from stakeholders and submits those relevant for making EU laws more effective and efficient to the REFIT Platform for advice.

REFIT Platform members assess the merits of the stakeholder contributions and look at practical ways to follow up on their suggestions without undermining policy objectives. With the agreement of the chair, the groups may establish working parties and liaise with existing sectoral Commission expert groups.

While the Commission acts as chair, the work in in principle driven by the members. Specific files are delegated to a "lead member", who then acts as rapporteur. During the deliberations of the Platform or its groups a representative from the Commission service concerned should be present to be able to respond to questions that may arise.

If a Platform group decides not to pursue a suggestion, the reasoned explanation of the group will be communicated by the chair to the person who submitted the suggestion.

The Commission reacts to all the Platform's suggestions and systematically and publicly explain how it intends to follow up.

1. The suggestions are published at http://ec.europa.eu/smart-regulation/refit/refit-platform/index_en.htm#suggestions, while the "Lighten the Load – Have your say!" portal is at http://ec.europa.eu/smart-regulation/refit/simplification/consultation/consultation_en.htm#up.

Source: European Commission (2015d), "The REFIT Platform. Structure and Functioning", C(2015) 3260 final; and http://ec.europa.eu/smart-regulation/refit/refit-platform/index_en.htm.

As such, the REFIT Platform reflects a deliberate attempt at combining various regulatory tools to enhance participation, effectiveness and legitimacy of Better Regulation (simplification) initiatives. Since the Platform machinery is triggered by complaints and suggestions for simplifications from the public, the consultation goes

beyond the simple provision of information. Stakeholders become co-responsible for the initiatives carried out by the program, and these all the more so as the procedure advances through the REFIT stages. It is also worth noting that the intertwining between public consultation, stakeholder direct involvement and *ex post* evaluation practices is complete, as it occurs at the institutional, procedural and methodological level.

Emerging issues for consideration

The system put in place by the European Commission (the REFIT Programme generally, and its implementation through a Platform in particular) triggers a number of considerations, which, extrapolated, may provide food for thought when envisaging experimenting equivalent approaches.[12]

- **The issue of scope.** By launching the REFIT Programme in 2012, the Commission has sought to review the entire acquis – the entire EU's legal framework. This is an ambitious shift in paradigm as far as evaluation is concerned. As mentioned also earlier on in this chapter, Commission's *ex post* evaluations have typically been confined to single initiatives (e.g. structural funds) or, more recently, individual pieces of legislation. It remains to be seen whether REFIT can ensure a "holistic" approach and, in case, how such an approach can deliver. There still appear to be some ambiguity as to the declared scope of the evaluations – and hence their ultimate goal. The Commission's Communication establishing the REFIT Platform illustrates well the multiple purposes attached to it. It first places the Platform firmly in the traditional de-regulatory discourse: "Suggestions should not put into question the objectives of the relevant legislation or concern issues subject to action by the Commission to ensure respect for EU law (e.g. infringement procedures). They should be supported where possible by a quantitative estimate of the regulatory burden involved and targeted reduction sought. Individual Platform members may also make suggestions for burden reduction." On an ancillary basis, then, the Platform is invited to discuss "specific themes (e.g. sectoral legislation or cross-cutting issues such as 'barriers to digitisation' or 'to innovation')". Eventually, the REFIT Platform may be involved on various reform fronts: "The Commission may consult the Platform on any matter relating to its better regulation work and the REFIT Programme." (EC, 2015d:4) As it has been put, REFIT has indeed become "a springboard for a variety of actions: consulting stakeholders, preparing hit lists of regulations to be targeted, reducing administrative burdens and compliance costs for business, slowing down regulatory action in some sectors, and withdrawal of proposals." (Dunlop/Radaelli, 2017) It will be interesting to observe whether the governance of REFIT will eventually be geared towards making the Commission's Better Regulation closer at the service of specific policy goals, reflecting thereby the political priorities of the EU.
- **The issue of politicisation.** The direct inclusion of stakeholders and EU Member States in the elaboration and execution of the REFIT evaluations, and indeed the engagement of the public at the very agenda setting stage of the process, certainly broaden the scope for co-ownership and legitimacy in closing the policy cycle. On the other hand, this arguably also takes *ex post* evaluation away from being a technical exercise and make it embrace a more political connotation. Because of its scope and design, REFIT is much more political an activity than evaluating compliance with spending criteria for cohesion policy and structural funds. Political elements are inbuilt in the very selection of the suggestions; the choice of

the priorities; the appointment of the rapporteurs; the execution of the evaluations; the endorsement of the findings by the Platform groups, individual members and the Commission; and eventually in the way in which the findings are taken into account for the future work programme. Accordingly, *ex post* evaluation is no longer (solely) a mechanism to "speak truth to power", it goes beyond basing decision-making on enhanced evidence. Arguably, that might be seen as being decision-making already.13

- **The issue of (bureaucratic) power.** With the constitution of the Platform, the Commission's Secretariat General (SecGen) has consolidated its pivotal position in the institution's internal chessboard. To be sure, the Better Regulation agenda has unfolded along the path of a progressive centralisation since its very inception in the early 2000s, most notably on impact assessment (Allio, 2008), but *ex post* evaluation has traditionally remained a decentralized activity under the responsibility of the individual DGs, at most with the collaboration of DG Budget. The system put in place in 2015 further centralises evaluation, for example by standardising the requirements for stakeholder involvement and for writing follow up reports (EC, 2015b:264 and 297, respectively). Most evidently, it is the SecGen that filters the stakeholders' inputs in the REFIT process and provides support to the Platform, although individual line Directorates-General are involved to discuss individual analyses. A further question arises with regard to who eventually exerts control and oversight of the different evaluation approaches and tools inside the Commission, the relationship between the Member States and the Commission, and the inter-institutional relations that define power within "better regulation". The Regulatory Scrutiny Board, the Commission's oversight body, is still to get systematic on this front. Who defines "success" is of primary relevance for the whole evaluation function (Dunlop/Radaelli, 2017).
- **The issue of connectivity with the policy agenda**. This issue refers back to an almost in-built challenge of *ex post* evaluation, namely the difficulty to tying up smoothly with the "next policy cycle". This has already been discussed in this paper. The REFIT Platform arrangements nonetheless might exacerbate this difficulty because of the potentially increased disconnection between the stakeholders' and public suggestions and evaluation outputs on the one hand, and the inputs needed for new strategic policy elaboration on the other hand. Both the recourse to the "Light the Load – Have your say!" tank of complaints and the direct involvement of Platform members in the elaboration of the evaluations (or at least the formulation of the simplification proposals) may drift the evaluation agenda towards relatively shorter term, immediate concerns, a sort of "sticking plaster" fixes to specific policy or regulatory problems. This might not necessarily correspond to or be instrumental for achieving longer term policy objectives, unless then "horizontal" lessons are drawn. The question hence arises as to how this form of participatory evaluation impacts on the overall coherence of political and policy choices from one cycle to the other; and how it can contribute to improving the overall regulatory policy of the EU institutions. Understanding such implications is all the more important in the light of the more political character of the REFIT Platform activities compared to narrower compliance evaluations of individual measures.

For these reasons, the evaluation system set up by the European Commission serves as a valuable laboratory model for other jurisdictions. Moreover, the REFIT Platform embodies the efforts to combine procedural arrangements and regulatory tools with a view to reap the potential of closer synergies. As such, it may be considered as testing ground for the "ecology of instruments" promoted by Damonte, Dunlop and Radaelli – notably in relation to mixing public consultation with participatory post-implementation review and, indirectly, *ex ante* impact assessment (Box 9.12).

Box 9.12. Conceptualising an ecology of instruments

Empirical research and academic literature has tended to focus on individual administrative control instruments and regulatory tools. Specifically, literature has analysed i) administrative procedures acts; ii) the adoption of freedom of information laws and associated participation rights, transparency and consultation (notice-and-comment) obligations; iii) judicial review and the role of the courts in regulatory policy; and iv) the economic analysis of law (most notably, Cost-Benefit Analysis and RIA). While today there is relatively sound knowledge of individual instruments, this came at the expense of the bigger picture.

Recent research by Damonte, Dunlop and Radaelli (Damonte et al., 2014a; 2014b; 2016) opens an innovative and promising avenue to design and managing regulatory reform. These scholars propose to consider "ecologies of instruments" instead of the political economy of introducing, mainstreaming and running individual regulatory tools.

The general implication of the ecology theory is the acknowledgment that, if taken in isolation, the existence of a single instrument and indeed its very sophistication and effectiveness account little for the overarching regulatory policy performance. Rather, it is the overall mix of those instruments that generate outcomes affecting the interested parties (businesses, citizens, end-users). In other words, a single instrument is empowered only thanks to its fitting a determined "ecology" of other instruments.

It is therefore important to subject the design and implementation of the instruments' mix to a preliminary understanding of the combination of options and the interactions between the instruments, their sequencing, and the longevity of each reform phase. This is particularly relevant in times where the political and public expectations upon the capacity of "better regulation" to deliver has never been higher.

It is also critical to advance the regulatory reform agenda in many OECD countries, where embedding regulatory reform in routinized behaviour of government services and regulators faces i) a constant trade-off between ensuring sectoral discretion and centralisation; ii) a tension between control and co-ordination (the "carrot and the stick" argument); as well as iii) the temptations to abandon political and administrative investments in mainstreaming buy-in to regulatory quality and accountability in favour of downplaying the reform to a mere tick-box exercise.

Source: mentioned in this Box.

The mechanism set in motion by the Commission is still in its infancy and will probably benefit from the first "field tests" in terms of functioning and performance (relevance of the outputs). Nonetheless, it can already provide useful insights for advancing the governance of both stakeholder engagement and *ex post* evaluation.

Taken together, the issues highlighted above prompt considerations on the need for governments to:

- become aware of the changing nature of *ex post* evaluation, in particular because of its likely politicisation;

- acknowledge and manage shifts in power relations within the administration;
- balance out short term reactive approaches to decision-making with longer-term (and yet still evidence-based) proactive, strategic policy elaboration.

To this end, transparency and clarity as to the ambitions as well as the known implications of establishing such an "ecological" system are critical assets to avoid unintended consequences. The European Commission has in fact geared up its efforts to improve on transparency with regard to REFIT, publicly recording the various evaluation steps and also committing to annual REFIT scoreboards. After all, this is in line with the Open Government rationale.

Summarising from the governance of *ex post* evaluation

Although arguably to a lesser extent than stakeholder engagement and RIA, the organisation and practise of *ex post* evaluation has also been refined by governments in the recent past. The tool is now increasingly at the core of OECD countries' regulatory policies and international comparisons highlight several models and variants (OECD, 2015a; Allio, 2015).

This chapter seeks to isolate a number of selected international experiences with *ex post* evaluation, which either reflect the most recent advances in the governments' reflection on how to improve the governance of the tool, or provide – exactly because they are part of consolidated practices – useful insights for renewed reform. With no ambition to capture the entire possible range of issues, the aim of the chapter is to provide inputs for reflective thinking and possible learning.

The selection of issues presented in this chapter has helped draw attention to the following considerations:

- **The scope of *ex post* evaluation has progressively been expanded over the past two decades, from ensuring financial accountability to government's value for money, to increasingly foster innovation or other policy goals.** When *ex post* evaluations are deployed to assess the performance of regulatory measures, a more top-down approach or outsourcing appear to be needed, as line ministers have in principle little incentives to revisit what they have delivered in the past and, if that is the objective, possibly reduce the associated regulatory burdens. Accordingly, the allocation of roles and responsibilities and the organisational arrangements may well vary across institutional contexts.
- **Tying up the policy cycle's ends through impact assessment is challenging.** A central issue pivots around avoiding the duplication – or even multiplication – of biases, limitations and distortions, since both *ex post* and *ex ante* analyses are imperfect exercises. Even when *ex post* evaluation provides in depth assessment of implementation, it tends to be in relation to the objectives (or part of them) set out in the initial policy measure, and as a reflection of the specific evaluation mandate as procured by the commissioning authority. This increases the risk of distorted interpretation of evidence and, equally importantly, it may limit the possibility to draw lessons from implementation and from information on the current context.
- **Two possible tensions characterise the organisation, planning and execution of *ex post* evaluation function in government.** One axis spans along the centralisation – de-centralisation – outsourcing spectrum. This requires properly

organising the plurality of the channels, of the actors and of their "entry points" that form the evaluation regime. A second tension reflects the trade-off between quantity and quality – i.e. between the number of the evaluations and their relevance to decision-making in terms of comprehensiveness (depth), timing, and hence usefulness and of the analysis.

- **A possible way to overcome these challenges may lie with shifting to a more cohesive reform strategy for evidence-based decision-making, grounded on the so-called "ecology of instruments" approach.** The latter puts emphasis on the mutually reinforcing and spill-over effects that the joined-up design and implementation of regulatory tools can trigger. A further way forward is to enhance knowledge management, possibly through the establishment of an organisational framework for data collection and sharing at the interface between *ex post* and *ex ante* analyses.
- **One area that could significantly benefit from refined *ex post* evaluation methodologies is "regulatory budgeting",** the debate about which has surfaced again in some OECD countries not least in relation to the introduction of offsetting mechanisms such as the one-in, one-out model. Ensuring an adequate regulatory assessment (both *ex ante* and *ex post*) is in fact a significant challenge to the effectiveness of regulatory budgets.
- **Offsetting approaches simplify assessment methodologies and in principle also the choice of which regulations to repeal, but they may not help increase net societal welfare.** Focusing them onto specific sets of regulatory costs is a legitimate choice. However, neglecting regulatory benefits would fundamentally distort the rationale and implementation of most public policy choices and governments need to be aware of the implications and communicate this transparently to the public. Mitigating organisational and procedural arrangements may also be considered, for instance in the form of independent oversight and allowing for (controlled) flexibility and discretion.
- **Accounting for indirect impacts is a fundamental challenge in any regulatory assessment.** Ignoring indirect costs, in particular, may lead to massive understatements of actual regulatory costs. This is critical if we recognise that the regulatory framework is an enabling factor for innovation-related investment.
- **An important class of indirect costs is the decline in innovation that may occur with some types of regulation, because of the alteration in investment allocation decisions by private operators.** Governments have a major role to play in creating a business environment that is supportive of innovation. Badly designed or implemented regulation can stifle incentives to invest and innovate. Understanding the consequences of such regulatory failure is an important element in the quest for promoting economic growth. In turn, this contributes to enhancing legitimacy and trust in public decision-making.
- **Regulators should control for two important unintended consequences – hampered innovation investments because of excessive capitalised development costs and of "defensive R&D".** Governments need to refine their understanding of the underlying corporate mechanisms when proceeding to *ex ante* regulatory impact assessments. If designed correctly and carried out rigorously, *ex post* evaluation can in their turn, highlight past decisional patterns and provide insights for controlling indirect costs more confidently.

- **On a systemic level, *ex post* evaluations are critical in supporting policy learning**. Over time, the evaluation function enriches the database of evidence available for better informed analyses on the one hand, and enhances the regulators' understanding of past failures through horizontal lesson-drawing. In this light, *ex post* evaluations are instrumental not only to improve the effectiveness of public policies but also to refine the overarching regulatory governance.

Notes

1. The composite indicators for *ex post* evaluation measure four main areas; i) oversight and quality control; ii) transparency; iii) systematic adoption; and iv) methodology.
2. In the United States, where the concept was first considered in official studies (United States OMB, 1979; Carter, 1980), a joint hearing was for instance held by the Senate Committee on Homeland Security and Government Affairs and Committee on the Budget in June 2015. See www.hsgac.senate.gov/hearings/measuring-the-true-cost-of-regulations-lessons-from-great-britain-and-canada-on-implementing-regulatory-reforms. The Committee of the Budget held a further hearing on 7 July 2016, see https://www.youtube.com/watch?v=9Uqax_5Xneg. See also Tozzi (2016).
3. See the testimonies at the United States Senate hearing mentioned in the previous footnote.
4. See https://www.dpmc.gov.au/sites/default/files/publications/005-Regulatory-Burden-Measurement-Framework.pdf; www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/0129bg-fi-eng.asp; and https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling, respectively.
5. The Canadian Triage Statement Form can be accessed at https://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/guides/temp-gabar/tsf-fet-eng.asp.
6. See www.treasury.govt.nz/regulation/informationreleases/programme.
7. The chapter addresses in particular indirect costs, acknowledging however that an entire branch of the literature elaborated on the analysis of indirect regulatory benefits.
8. See for instance the work of the OECD Global Productivity Forum at www.oecd.org/global-forum-productivity/.
9. See OECD work at www.oecd.org/innovation/inno/.
10. See also OECD statistics at www.oecd.org/innovation/inno/researchanddevelopmentstatisticsrds.htm; and https://www.innovationpolicyplatform.org/content/statistics-ipp?l=BE_XGDP;v3;s;;EU28.
11. See https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp.
12. This paper does not comment on the validity of the priorities and REFIT actions retained by the Commission and / or the Platform, nor does it seek to assess the effectiveness of the system so far.
13. To mitigate that risk, the REFIT Platforms groups operate on the understanding that they refrain from evaluating items that may be de facto be perceived as pertaining to the EU legislator. This includes dossiers that are still being discussed in the legislative process; as well as those that have been recently implemented (less than two years) and for which therefore there still is need to collect full implementation and compliance data.

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Chapter 10

Ex post evaluation of regulations: Korean practices and challenges

by Yong Hyeon Yang[1]

This chapter looks at some of the issues related to the design and implementation of ex post evaluation in Korea. A practical problem faced by any government is to identify the regulations that need to be reviewed. One approach is through regulatory planning. Sunset clauses can also be used as an automatic, in-built trigger for evaluation. Equally important is the institutional ecosystem where ex post *evaluation is carried out (in part reflected in the centralisation-decentralisation tension highlighted above). Regulatory oversight can help improve quality and efficiency of* ex post *evaluations, by, for example, coordinating different evaluation mechanisms and actors. Stakeholders may assist the regulators to search for better alternatives and analyse the impacts of regulatory changes.*

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Introduction

Regulations could be inefficient for various reasons. They could have been designed inefficient due to factors that cannot be exactly predicted before regulations are in force. Those that were efficiently enforced could become less beneficial to the society as regulatory environments change. They could incur more costs to the society as entries of new products are deterred. There could be less costly regulations as technologies improve. However, regulations tend to persist unless challenged by other forces. In order to keep regulations efficient, it is necessary to evaluate them *ex post* and refine them appropriately. Such a refinement includes abolishment, substitution with self-regulation, improvement in delivery, etc.

One way to perform this task is to evaluate all of existing regulations periodically based on their benefits, costs, implementability, effectiveness, etc., and to search for best alternatives. It would be, however, almost impossible in such a complicated society to evaluate all of existing regulations in a full capacity. Thus it becomes a question of which regulations to review and how to.

There exist many different ways to review existing regulations. Each of these review mechanisms challenges only a small portion of regulations, possibly duplicative or distinct. If uncoordinated, review mechanisms may work inefficiently, by challenging the same regulation too often with different channels, but not some critical regulations with any channel, or by putting more weights on minor regulations than on crucial regulations. Therefore it would be very important to coordinate review mechanisms by knowing how review mechanisms work, how effective and efficient they are, how complementary they are, and what incentives they provide the regulators with.

Efficiency of an individual review mechanism is also important. If badly designed, an *ex post* evaluation may incur too high costs to meet the benefit from it. The principle of proportionality applies here again. Ideally, one can make efforts in proportion to the expected benefit of evaluations, which depends on the impact of regulations and a possibility to be improved. An in-depth analysis is necessary for critical regulations that are likely improved, while a simple review is sufficient for minor regulations and established regulations.

It would not be easy to compute the expected benefit of evaluations. First of all, benefits and costs of regulations are not completely computable in many cases. Some benefits are not quantifiable. Expectation of market conditions and compliance is also difficult. Second, it is necessary to know how implementable regulations are and how hardly they will be enforced. In most cases, cost-benefit analysis of regulations is carried out under the assumption that they are fully enforced. In usual, regulations cannot be enforced in a full capacity, so the compliance rate may not be as high as expected. All of these aspects should, however, be considered in reviewing regulations.

In practice, regulations can be categorized into several groups so that predetermined levels of efforts are made for reviewing each group of regulations. A multi-stage review would also be a good way to attain efficiency of *ex post* evaluations: an analysis gives information on whether to perform a next-stage analysis or not. Some of *ex post* evaluation mechanisms in Korea are designed in such a way, but others are not.

Regulatory oversight may play an important role in achieving efficiency of *ex post* evaluations. Coordination between different evaluation mechanisms needs to be provided by an oversight body. Individual efficiency of evaluation mechanisms can be attained by

managing evaluation processes: selection of evaluated regulations, depth of an analysis, extensiveness of considered alternatives, application of a multi-stage mechanism, etc. An oversight body can give guidance to and control review practices of the government.

It is worth mentioning that stakeholder engagement secures legitimacy of *ex post* evaluations as for the other stages of a policy-making process. When regulations are evaluated without feedback from stakeholders, the evaluation result may mislead the policy-making process. Most of regulatory reviews are initiated by the government, so can proceed without sufficient chances of stakeholder engagement in selection of regulations to be reviewed, an analysis, and search for alternatives. Review mechanisms that take a bottom-up approach are relatively free from such a concern, but might be vulnerable to capture by a specific group of stakeholders. In either case, it is very important to make efforts to reach various groups of stakeholders, but in proportion to the importance of regulations.

In the following sections, *ex post* evaluation mechanisms in Korea will be assessed and discussed in terms of the aforementioned aspects. The Korean mechanisms are classified into two groups, which will be discussed first. The role of regulatory oversight and practices of stakeholder engagement are discussed in the second part of the chapter.

Differences in approaches

Reviews of regulations can be done in various ways. Review methodologies are different in terms of initiation processes, depth of analysis and incentive provisions. These differences make each type of review mechanisms focus on different aspects of regulations.

Some *ex post* evaluations are carried out on a regular basis or automatically triggered by certain events, while others are initiated for a specific purpose by the government and/or a group of stakeholders. We call the former systematic approaches to *ex post* evaluations, and the latter special purpose reviews. Special purpose reviews usually target regulations that are potentially under debate at the time being. Australian Productivity Commission (2011) provides a similar classification guideline, grouping *ex post* evaluations, into management approaches, programmed reviews, and ad hoc reviews as in the following Box 10.1.

Box 10.1. Classification of *ex post* evaluations by the Australian Productivity Commission

There are three broad types of approaches that governments, overseas and in Australia, have used to pursue reforms to the stock of regulation.

- Management approaches have an ongoing role that can be regarded as "good housekeeping". This category includes regulators' "finetuning" of administration, and requirements to take account of existing regulation in proposing new legislation (stock-flow linkage rules), red tape targets and internal stocktakes.
- Programmed reviews examine the performance of specific regulations at a specified time, or when a well-defined situation arises, to ensure regulation is working as intended. The scope of these reviews varies, but they may consider the efficiency, effectiveness and/or the appropriateness of a regulation. This category includes sunsetting legislation, embedded statutory reviews and post implementation reviews (PIRs).

Box 10.1. **Classification of *ex post* evaluations by the Australian Productivity Commission** (*cont.*)

- Ad hoc reviews take place as a need arises. They include public stocktakes and principles-based reviews, that look at a wide range of regulation, and targeted 'in-depth' reviews and benchmarking exercises that look at specific regulations or sets of regulation that might affect a particular industry or outcome area.

Source: Australian Productivity Commission (2011), "Identifying and Evaluating Regulation Reform", Productivity Commission Research Report, Canberra, pp. 24-25.

In Korea, *ex post* evaluations that fall under systematic approaches are regulatory planning and review, sunset rule, Regulatory Reform *Sinmungo*, and Cost-in Cost-out system. The former two systems review regulations on a regular basis. Regulatory planning and review is carried out every year, and sun setting regulations are reviewed at a time specified in advance, no longer than 5 years from the introduction of the regulations. The latter two systems review regulations when a specific event occurs. Regulatory Reform *Sinmungo* reviews regulations that are claimed unreasonable by petitioners. Cost-in Cost-out system makes some regulations abolished (or attenuated) when other regulations are newly introduced or strengthened. To determine which regulations to abolish, a review of existing regulations is carried out.

In Korea, special purpose reviews are proposals from business organisations, thorn under the nail, and principles-based reviews. Proposals from business organisations are to abolish (or attenuate) regulations to promote business activities. Those proposals are collected and investigated approximately twice a year. 'Thorn under the nail' is similar in its goal, but targets regulations on small and medium-sized enterprises mostly. Principle-based reviews are a top-down approach to review regulations in a specific sector. They are designed and performed by the Prime Minister's Office and other ministries related to the sector.

Those review mechanisms have different requirements on depth of analysis, even though they are performed by the same entity. There is a wide spectrum of depth of analysis, from a simple review to a full analysis. The simplest review of regulations is to see whether the regulations are still necessary to achieve their own objectives. At the other extreme, the regulations might be analysed in a full capacity. Performances of the regulations are evaluated considering implementation, compliance, and outcomes. Then a cost benefit analysis is carried out to ensure that the benefits of the regulations are greater than their costs. Finally, the regulations are compared to alternatives that may achieve the same objectives, or even to those which may be less effective. The regulations survive if they are proven to be the most efficient, that is, if they generate the largest net benefits among all the alternatives that meet the requirements.

The following example describes the difference. Suppose regulations (A), (B) and (C) are all effective ways to address a potential problem. Their benefits amount to 10, 12, and 15, respectively, and their costs are 11, 10, and 11, respectively. Assume that the current regulation is (A). When the simplest review is carried out, (A) may survive because the potential problem is effectively addressed. If a cost benefit analysis is required, (A) will be abolished. (B) passes the cost benefit analysis, but is inferior to (C) whose net benefit is the greatest. When the regulations are reviewed in a full capacity, therefore, (C) must be chosen.

Ideally a full analysis would keep the regulations effective and efficient. However the reviewers also face resource constraints. As a full analysis of all the regulations is impossible, review mechanisms in practice would be intermediate-level. For example, sunset rules mostly make the reviewers determine whether the regulations are still necessary, but at the same time, require them to search for better alternatives, probably fine-tuning of the existing regulations. A selected subset of sun setting regulations can be assessed quantitatively in their costs and benefits.

Review mechanisms can be categorized according to incentive provisions. Most *ex post* evaluations do not provide reviewers with incentives to change the regulations more efficiently. Therefore the incentives are given in the form of contest, promotion, and penalties. Regulatory oversight also plays a role to keep regulations efficient. Some review mechanisms, however, do give incentives to reviewers without such external payoffs. Those mechanisms are reviews that set and manage a regulatory budget. Cost-in Cost-out system forces reviewers to change existing regulations in a more efficient way in order to introduce a new regulation. Regulatory cost reduction programs that set the objectives of the reduction amount also make reviewers search for more efficient alternatives in order to keep other important regulations alive.

In the following two sections, we investigate *ex post* evaluation systems in more detail, with a focus on Korean review mechanisms, and analyse the effectiveness of those systems. The sections below provide analysis of systematic review mechanisms, and that of special purpose reviews, respectively.

Systematic approaches in Korea

Regulatory planning and review

The ministries are obliged to submit an annual regulatory improvement plan, carry out the plan, and report the progress and results. For coordination purpose, the Regulatory Reform Committee (RRC) had released a set of national guidelines to assist ministries in reviewing existing regulations. The guidelines include basic direction of regulatory reforms in the corresponding year, criteria for review of existing regulations, focus areas or specific regulations targeted for improvement, and other instructions the RRC deems necessary for an efficient reform process. The guidelines are prepared by 31st December in the previous year.

Following the guidelines, the ministries formulate their regulatory improvement plan to carry out in the corresponding year. The annual regulatory improvement plan must be submitted to the RRC by 31st January in that year. Based on the submitted plans, the RRC develops a comprehensive regulatory improvement plan and releases it to the public through its official gazette and website. Ministry-level plans are, however, not disclosed to the public. After carrying out the regulatory improvement plan, the ministries report the results to the RRC by 31 January in the following year, at the time when the next regulatory improvement plan is submitted.

Reviews are carried out when the regulatory improvement plan is prepared. In order to make the plan, the ministries need to identify regulations that need to be improved. This task requires the ministries to review their existing regulations and to order them in their importance and effectiveness. As most of regulations are evaluated, simple reviews are made for this purpose. In other words, the ministries perform a simple investigation as to whether each regulation is effectively enforced, whether it is still necessary for the purpose it initially aimed at, and whether a slight modification is enough to improve its

effectiveness. At this stage, a cost benefit analysis is rarely carried out, and the set of alternatives considered are very narrow. Hence cost justification of regulations is not ensured, nor is their efficiency guaranteed.

The quality of the identification task can be greatly enhanced when the ministries communicate with stakeholders and experts. Stakeholders may have good alternatives to some regulations, and even try to justify that the alternatives are more effective and efficient than the existing regulations. It is important, however, that the ministries listen to opinions from various groups of stakeholders, not just from a specific group, in order to avoid a bias and a regulatory capture. The ministries can also rely on a poll in identifying questionable regulations.

Regulatory oversight can also play an important role in improving the quality of the identification task. The ministries have low incentives to actively identify and improve regulations if they are not forced to do so. In spite of the guidelines for the regulatory improvement plan, the ministries are tempted to submit a weak plan. Because the progress of the plan is reflected in the performance evaluation of ministries (see Tables 10.1 and 10.2), the ministries have a good reason to submit a weak plan that they anticipate they can accomplish. Such attempts might be prevented to some extent because the Prime Minister's Office may push the ministries to submit a stronger plan, and substantiality of submitted plans is also reflected in the performance evaluation of ministries. In this sense, improving the regulatory governance and establishing powerful regulatory oversight is necessary.

Table 10.1. **Major changes of the evaluation guidelines between 2014 and 2015**

2014		2015
• Performance of the Policy Tasks of the Administration (50 pts)		• Performance of the Policy Tasks of the Administration (50 pts) and core tasks (for weighting; ±1 point per task)
• Performance of regulatory reform (25 pts)		• Performance of regulatory reform (20 pts)
• Performance of the Normalisation Tasks[1] (25pts)	⇨	• Performance of the Normalization Tasks (10pts)
• Common Factors (±15 pts)		• Common Factors (±10 pts)
- Public relation of policies (±5 pts)		- Government 3.0 (±5 pts)
- Government 3.02 (±3 pts)		- Cooperation (±3 pts)
- Co-operation (±3 pts)		- Social procurement (±2 pts)
- Social procurement (±2 pts)		
- Attitude (±2 pts)		
		• Public relation of policies (±20 pts)

1. "Normalisation" means "normalisation of abnormal practices", which is one of the key agendas of the Park administration; 2. A concept that provides customised services to citizens beyond two-way relations (Government 2.0);

Source: Prime Minister's Office (2016), "The Sunset Rule Wipes Out Burdensome Regulations," press release, 11 February (in Korean).

Ex post evaluations can also be made when the regulatory improvement plan is implemented, especially if weaker regulations replace the existing ones. At this stage, the evaluations are merged into the regulatory impact analyses (RIAs). It would successfully implement the plan in theory, as RIAs ensure the effectiveness and efficiency of regulations if carried out thoroughly. However, RIAs are not perfect in practice, especially when the ministries do not have enough incentives to write good RIAs. This is the case for implementation of the regulatory improvement plan. Clearly the ministries have some incentives to carry out the plan as submitted, since the progress of the plan is

evaluated by the Prime Minister's Office. But the performance evaluation scheme only requires that the existing regulations are replaced under an appropriate procedure, but does not ensure that replacing regulations are efficiently designed. Sufficient incentive provisions would be a role of the regulatory oversight.

Table 10.2. **Detailed evaluation guideline about performance of regulatory reform (100+5 pts)**

Index	Items	Nature	Points
Performance of core regulation revision	• Discovering regulations • Revising regulations • Difficulty and efforts	Qualitative and quantitative	15
Performance on Proposals from Economic Organisations	• Acceptance of proposals • Implementation of accepted proposals • Difficulty and efforts	Qualitative and quantitative	15
Performance of existing regulation revision	• Discovering regulations • Revising regulations • Sunsetting performance • Difficulty and efforts	Qualitative and quantitative	10
Solidity of Regulatory Impact Analysis (RIA)	• Solidity of content • Application of RIA TF's opinion • Publication rate of RIA reports	Qualitative and quantitative	10
Performance of CICO	• Adequacy of selection • Solidity and objectivity of cost-benefit analysis • CICO foundation construction	Qualitative and quantitative	10
Performance on Regulatory Reform Sinmungo	• Quantity and solidity of responses • Acceptance and implementation of petitions • Efforts and public satisfaction	Qualitative and quantitative	10
Performance of Regulatory Reform Publicizing	• Publicizing Regulatory Information Portal • News release about regulatory reform • Efforts for publicizing regulatory reform	Qualitative and quantitative	10
Performance on Thorn-under-the-Nail	• Acceptance of proposals • Implementation of proposals	Quantitative	5
Performance of Ministry-level Regulatory Reform Committee	• Frequency of examinations via face to face meeting • Solidity of examination opinions	Qualitative and quantitative	5
Performance of revision of Administrative Investigations and certification system	• Discovering and revising administrative burdens • Revising regulations through certification system reform • Revising local regulations	Qualitative and quantitative	5 (additional)
Regulatory reform satisfaction	• Regulatory reform satisfaction measurement	Qualitative	10

Source: Prime Minister's Office (2016.2).

Cost-in Cost-out System

The Cost-in Cost-out (CICO) system is designed to make ministries abolish (or relax) existing regulations when they enact (or strengthen) regulations. The pilot project of CICO was operated from July 2014 to December 2015, during which 15 ministries analysed and abolished (or relaxed) 24 existing regulations together in exchange for 21 newly-introduced ones. Therefore, the CICO system is deemed to be successfully tested.

Its original form is the one-in one-out system that had been operated in the United Kingdom by 2012. A slightly different version is adopted in Korea. When enacting (or strengthening) regulations, existing regulations with an equivalent net cost shall be abolished (or relaxed). In this system, the net cost of regulations only captures direct costs and benefits to regulated entities. Direct costs and benefits mean what incurs to regulated entities from the activities imposed on them by the regulations. The net cost of regulations is thus different from the business impact.

The CICO system makes the ministries undertake *ex post* evaluations of existing regulations since they are required to find one to abolish (or relax). Nearly a full-package analysis is required for reviews made through the CICO system. The ministries may briefly review their existing regulations, order the regulations in importance and effectiveness, and identify ones to abolish (or relax). They may perform a full cost benefit analysis for the selected regulations to check whether the regulations are justified and efficient in terms of the net benefit. They have incentives to replace the existing regulations with more efficient ones as reducing the net direct cost enables them to enact (or strengthen) regulations in the future. Therefore many alternatives can be considered. The review process is completed by analysing the direct costs and benefits of regulations to be abolished (or relaxed).

It is said that the CICO system is a costly mechanism to implement regulatory reforms. Introduction of regulations only requires the ministries to reform the existing regulations of the same net direct cost. But the ministries need to put large resources into this task as mentioned above. Such a feature lowers the cost efficiency of the CICO system, and thus makes it unattractive. However, the CICO system may not be as burdensome as it appears, when combined with other *ex post* evaluation mechanisms. For example, identification of regulations to abolish requires ordering regulations in their importance and effectiveness, which would have been done already in preparing for the regulatory improvement plan annually. Regulations to be abolished can be identified by the sunset rule as well. An additional role that the CICO system plays would be to have the ministries make efforts to change regulations more efficient. This task incurs additional costs to the ministries, but they are willing to pay the costs under the incentive scheme provided by the CICO system.

Introduction of the CICO system in Korea has another positive side-effect that the quality of RIAs has been improved much. By mid-2014, RIAs had been mostly a short qualitative statement that regulations are necessary and have a positive socio-economic effect. As the CICO system requires the ministries to analyse costs and benefits of regulations, the proportion of RIAs that contain cost-benefit analysis increased. Cost-benefit analyses of regulations under the CICO rule are required to be reviewed by experts, and thus the quality of cost-benefit analyses improved. The e-RIA system that was constructed to assist the CICO system is also helpful in increasing the quality of RIAs. The e-RIA system helps government officials write good RIAs by letting them input contents step-by-step and providing guidelines and examples.

As Instruction No.669 of the Prime Minister has been effective since 19th July 2016, the CICO rule is currently applied to most of government offices. However, there are some challenges in fully operating the CICO system. First, there is a possibility that more than half of enacted (or strengthened) regulations are exempt from application of the CICO rule. Approximately 72% of new regulations established during the pilot project were subject to the exemption of application. Assuming those regulations have similar net regulatory costs with the regulations that the CICO rule was applied to, newly-introduced regulations imposed almost 4 times as high net regulatory costs to regulated entities as abolished regulations did. If such a trend is sustained, the CICO system would not be as effective in abolishing (or relaxing) existing regulations as was intended to be.

Another challenge is that the CICO rule may not be applied in a timely manner. In principle, the ministries are required to submit an estimate of net regulatory costs of candidate regulations to abolish at the time when they submit a regulatory impact analysis (RIA) of new regulations. The ministries do not have sufficient capability to review existing regulations, so lack of their self-assessment of which regulations to let go may cause a delay in regulatory stock management. Banking of net regulatory costs is allowed to make up for such a delay. Net regulatory costs are accumulated when enacting (or strengthening) regulations, and are deducted when abolishing (or relaxing). Upon a delay, the ministries are also required to submit a plan to abolish existing regulations.

Box 10.2. Instruction No.669 of the Prime Minister

Instruction on Administrative Regulations Management for Alleviating Burdens to People

1. (Purpose) This instruction is to alleviate regulatory burdens to people by specifying guidelines necessary for efficient implementation of regulatory reform, in accordance with the Framework Act on Administrative Regulations.

2. (Management of Net Regulatory Costs) ① The head of the central administrative agencies shall minimise regulatory burdens to people by trying not to enact or strengthen regulations as much as possible, except for the cases where regulations are the only way to protect safety of people, etc.

② The head of the central administrative agencies shall alleviate regulatory burdens to people by improving existing regulations, as defined in Article 2, Paragraph (1) 3 of the Framework Act on Administrative Regulations, that have net regulatory costs, defined by the costs incurred directly by regulations less the benefits following directly from regulations, equivalent to or greater than the net regulatory costs of enacted or strengthened regulations when these regulations incur costs to business activities of corporations, organisations, and individuals.

Box 10.2. **Instruction No.669 of the Prime Minister** (*cont.*)

③ The head of the central administrative agencies may not apply Paragraph ② when introduced of strengthened regulations are one of the following.

1. Regulations necessary for dealing with national crisis or danger.
2. Regulations required to implement treaties or international agreements
3. Regulations directly related to maintenance of order or safety of people.
4. Regulations necessary for preventing financial crisis, securing financial stability, dealing with environmental crisis, and fostering fair competition.
5. Regulations that do not incur direct costs, such as levying fees or imposing administrative order, or administrative sanctions.
6. Regulations that are sunsetting within 1 year.

④ The head of the central administrative agencies shall submit to the Regulatory Reform Committee and notice to public, the status of management of net regulatory costs such as the flow of net regulatory costs and the progress of improvement of existing regulations.

3. (Recommendation of Negative-list Approach) omitted

4. (Sunset Rule) Enacted or strengthened regulations, in principle, shall have a sunset provision so that the regulations become ineffective after a specified time period passes, but may have a review obligation provision if sunsetting is inappropriate or periodical review is necessary due to changes in circumstances,

5. (Alleviating Burdens to Small Business Operators) omitted

6. (Administrative Notice) omitted

7. (Combined Management of Related Regulations) omitted

To summarise, the CICO system is expected to make the ministries review existing regulations by requiring them to abolish some regulations in exchange for newly-introduced ones. The pilot project proved such a possibility. However, there are also concerns that too many regulations might be exempt from application of the CICO rule, and that the ministries are not ready to review the existing regulations in preparation to the requirement of the CICO system. Such challenges may attenuate the effectiveness of the CICO system, resulting in failure to maintain the existing regulations efficient and effective. A powerful regulatory oversight needs to play a crucial role in successfully establishing the CICO system.

Sunset rule

The sunset rule was introduced in 1998 in pursuant to the Framework Act on Administrative Regulations. But a very few regulations – only about 100 regulations had been abolished by the sunset rule by mid-2009. One of the reasons would be that the ministries did not want to sunset their regulations, and the Prime Minister's Office had no power to push them to do so.

In 2009, the Korean government decided to introduce sunset for review, in addition to the original sunset, which was renamed as sunset for termination. Sunset for review specifies a time constraint by which regulations shall be reviewed to determine whether to apply another sunset provision, to remove a sunset provision, or to abolish (or relax)

regulations. There is no condition that regulations become invalid when they are not reviewed by the time constraint, but in practice the Prime Minister's Office and the ministries review the regulations and make a decision before the time constraint arrives.

After sunset for review was introduced, a sunset provision was applied to 1,602 regulations in 2009 and 2010, much more than in the past 11 years. Sunset for termination was applied to only 80 regulations, and sunset for review to the rest 1,522 regulations. At the end of 2011, 1,773 regulations out of 7,256 registered ones had a sunset provision, so the sunset rule was imposed strongly compared to the past. In 2013, 816 regulations were reviewed by the sunset rule. As only 26 regulations were abolished, however, the effect of the sunset rule was still limited (figures cited from Regulatory Reform Committee, 2014).

The Korean government made a step forward in enforcement of the sunset rule in 2013. The Framework Act on Administrative Regulations was revised to provide a legal basis for sunset for review and to make the sunset rule applied to the existing regulations. Regulations with a sunset provision were only 15% of registered regulations at the end of 2013, but the government planned to raise the proportion of regulations with a sunset provision to 30% by 2014, and to 50% by 2017. The government also planned to abolish 2 200 regulations by 2016 using the sunset rule. Following the instruction, the ministries applied the sunset rule to part of their existing regulations, and as a result, 31.2% had a sunset provision at the end of 2014. Two years were given for the time constraint to most of those regulations, so more than 4,200 regulations was reviewed in 2016 (figures cited from Regulatory Reform Committee, 2014).

Box 10.3. The Sunset Rule, specified in the Framework Act on Administrative Regulations

Article 8. (Specification of Sunsetting Date or Time Limit for Review)

① The head of the central administrative agencies shall specify a sunsetting date or time limit for review (defined as the date by which regulations are reviewed in terms of the implementation status and possibly relaxed or abolished according to the review result) for enacted or strengthened regulations in the relevant law, decree, order, etc., as long as there is no apparent reason to maintain the regulations permanently.

② A sunsetting date or time limit for review shall be specified at as a short period as possible, just enough to accomplish the objectives of regulations, and shall not exceed 5 years in principle.

③ The head of the central administrative agencies shall request extension of a sunsetting date or time limit for review of regulations, if necessary, to the Regulatory Reform Committee by 6 months before the sunsetting date or time limit for review, following the instructions given in Article 10.

④ The Regulatory Reform Committee may request the head of the central administrative agencies to specify a sunsetting date of time limit for review, if it deems necessary, as a result of the review performed based on Articles 12 and 13.

⑤ The head of the central administrative agencies shall submit a revised bill to the National Assembly, if it is necessary to extend a sunsetting date or time limit for review of regulations stipulated in a law, by 3 months before the sunsetting date or time limit for review.

Box 10.3. **The Sunset Rule, specified in the Framework Act on Administrative Regulations** (*cont.*)

Article 19-2 (Specification of Sunsetting Date or Time Limit for Review for Existing Regulations)

① The head of the central administrative agencies shall specify a sunsetting date or time limit for review for existing regulations, if there is no apparent reason to maintain the regulations permanently according to the inspection result, in the relevant law, decree, order, etc.

② In specification of a sunsetting date or time limit for review in accordance with Paragraph ①, instructions given in Article 8, Paragraphs ② through ⑤ shall apply.

Table 10.3. **Regulations subject to sunset in 2015 and 2016**

	2015	2016
Sunset for termination	21 (17.5)	11 (0.3)
Sunset for review	99 (82.5)	4 240 (99.7)
Total	120 (100)	4 251 (100)

Source: Press releases of Prime Minister's Office (2015.8.27, 2016.7.24, 2016.11.2).

Although the government has enforced the sunset rule strongly since 2013, the effectiveness of enforcement is somewhat questionable. Most of sunsetting regulations are required to be reviewed, and only a few of them are sunset for termination. In 2015, 120 regulations were subject to sunset, of which 21 were under sunset for termination. In 2016, only 11 out of 4 251 sunsetting regulations were subject to sunset for termination (Table 10.3). In principle, regulations under sunset for review can be abolished depending on the review result, but in practice they are under much lower pressures than those under sunset for termination. To address such a concern, the Prime Minister's Office set the goal that at least 10% of sunsetting regulations shall be abolished for each ministry.

In 2016, 201 out of 4,240 regulations under sunset for review are expected to be abolished and 1 398 to be relaxed.[1] Enforcement of the sunset rule is improved much compared to the past, although still limited. The proportion of abolished regulations out of sunsetting ones increased from 3.2% in 2013 to 4.7% in 2016. Approximately 5 times as many regulations were reviewed in 2016 compared to three years ago, but solidity of the review process was no lower, resulting in 38% of sunsetting regulations abolished or relaxed.

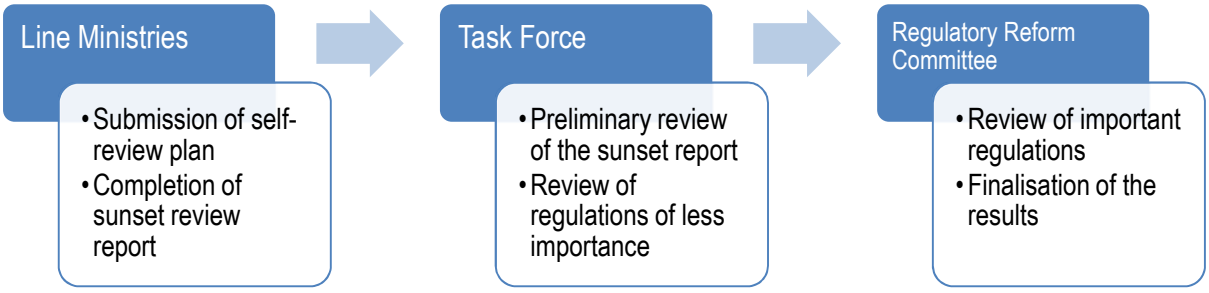
But in terms of efficiency, too many regulations are currently being reviewed, imposing burden to the Prime Minister's Office and the ministries. It is also burdensome that a sunset provision is renewed for approximately 50% of sunsetting regulations on average, and thus reviewing costs will be incurred again for them in next 2-3 years. When the number of regulations subject to sunset is large, the resources that can be used for the review of each regulation would be low, as the total amount of resources is constrained. For example, approximately 2 400 sunsetting regulations were reviewed in the second

half of 2016, and the number of staffs in the Prime Minister's Office in charge of the task was approximately 20. This means that one staff has at most 1.5 days in examining one review report. If only business days are counted, one staff has at most 1.1 days per one regulation. In such a situation that a small number of people must review many regulations, a simple review will be carried out for most of sunsetting regulations, focusing on their effectiveness, but not on cost justification nor on efficiency.

The sunset rule would be more useful if it can force regulations to be reviewed on their costs and benefits, implementation, and compliance, and thus to be reshaped to become more effective and efficient. The sunset rule by itself, however, does not provide the ministries with incentives to voluntarily review regulations and search for better alternatives. Therefore it would be necessary to apply the sunset rule limitedly to important regulations in light of proportionality so that the review quality can be improved. At the same time, regulatory oversight may assist the ministries to properly utilize the sunset rule and improve regulations. It would also reduce review costs to limit the proportion of regulations to set another sunset provision for, at a low level, for example, 10% of sunsetting regulations.

Another proportionality issue that the current sunset rule may have is that all the sunsetting regulations are reviewed only in a qualitative manner. Regulations under review are classified into two groups. The Prime Minister's Office examines the review result for most of sunsetting regulations, so it takes fewer steps to complete the review process for those regulations. But the review report for important regulations is submitted to the Regulatory Reform Committee (RRC) for discussion. Important regulations include i) those under debate among stakeholders; ii) those with a large socio-economic effect; iii) those of which review result the policy makers do not agree on; and iv) those that are agreed to be abolished or relaxed in advance. For types i), ii), and iii), performing a quantitative analysis is helpful in making a decision. For the regulations that are expected to need a quantitative analysis, it is necessary to specify the method and the time of such an analysis, and the requirement of data accumulation.

Figure 10.1. **Review processes of sunsetting regulations**



There might be a loophole in selecting regulations subject to sunset. The ministries have incentives to exclude debatable regulations from application of the sunset rule. If they do, sunsetting regulations are either ones that are not necessary any more, or ones that are inevitable, so the review procedure does not contribute to maintaining regulations efficient and effective. Such a loophole can lower the effectiveness of the sunset rule. There is a guideline as to which regulations to apply sunset to, but the guideline is not sufficient to make the ministries devote to good implementation of sunset. The Prime Minister's Office set the goal on the proportion of regulations subject to sunset by

ministry, but the goal can be filled with trivial regulations unless good regulatory oversight works.

Table 10.4. **Guidelines for application of sunsetting types**

Sunsetting type	Characteristics of regulations
Sunset for Termination	1. Regulations introduced for a limited time period to deal with a specific issue
	2. Regulations introduced based on a specific market condition, so necessary to abolish when the market condition changes.
	3. Regulations that do not exist elsewhere, especially in developed countries.
	4. Regulations of which enforcement is difficult, or of which compliance is low.
	5. Regulations introduced without a thorough analysis to solve an urgent issue or to meet a public opinion in a timely manner.
	6. Regulations introduced for precautionary purposes even though information is incomplete.
	7. Regulations on new technologies, or on issues where administrative circumstances change rapidly.
Sunset for Review	8. Regulations introduced based on statistics, social perspectives, etc. that may change by time.
	9. Regulations for administrative agencies' convenience.

Source: Regulatory Reform Committee (2014).

Regulatory Reform Sinmungo

The *Regulatory Reform Sinmungo (*RRS) is an online petition system through which any person can make a suggestion on a specific regulation. It was introduced in Mar. 2014 to help regulated entities or other stakeholders make suggestions easily. The following steps are taken once a request for regulatory improvement is made through the RRS.

- An officer from the competent authority responds under a real name within 14 days from the date of receipt of the request.
- If the request is not accepted, the Prime Minister's Office may ask the competent authority to explain with regard to the necessity of the regulation within three months.
- If the request is once again refused, the Regulatory Reform Committee (RRC) may directly look into the case and suggest recommendations for improvement.

The RRS is a successful approach to review of the existing regulations. In 2015, 3 201 suggestions were made, and 977 suggestions were accepted.[2] At least 115 of the accepted suggestions were rejected in the first round, but investigated again by the request of the Prime Minister's Office or the RRC and finally accepted. In the first half of 2016, 905 out of 1 112 suggestions were answered. 290 of them were accepted, and 151 of them were completely reflected in policies. As of the end of June 2016, the cumulative acceptance rate is 39.1%, representing 3 549 accepted out of 9 069 suggestions (Prime Minister's Office, 2016.7.13).

Table 10.5. **Acceptance and re-investigation to requests via the RRS**

Area	2014		2015		2016	
	Accepted in the 1st round	Reviewed in the 2nd round	Accepted in the 1st round	Reviewed in the 2nd round	Accepted in the 1st round	Reviewed in the 2nd round
Budget, Finance	224	17	60	12	52	3
Construction, Ship	636	35	210	23	120	28
Agriculture, Marine	235	29	162	12	87	2
Education, Culture	260	21	75	12	59	4
Employment, Welfare	286	13	51	13	48	2
Health, Food	296	34	59	13	114	0
Transportation, Safety, Environment	333	41	133	18	103	7
Science, Technology	27	0	3	0	6	3
Biology, Energy, Climate	45	3	6	0	10	0
Information, Communication	53	5	20	0	14	2
Industry, Trade	135	28	52	6	42	12
Foreign Affairs, Defence, etc.	209	12	35	6	24	1
Total	2 739	238	866	115	679	64

Source: Regulation Information Portal (www.better.go.kr) as of February 2017.

The RRS is the only systematic approach to regulatory improvement taking a bottom-up process. It involves stakeholder engagements by nature. Regulated entities or other stakeholders can directly make a request to improve regulations by using the RRS, while they play only a passive role or submit requests indirectly in the other forms of stakeholder engagements in *ex post* evaluations. Top-down approaches to a regulatory reform process make stakeholders respond to policy makers upon request. Other bottom-up approaches are managed by intermediate organisations such as government offices and business organisations. Moreover, other approaches do not impose the government an obligation to respond in a given time.

Another distinct feature of the RRS is that it makes the suggestions reviewed in three stages, demanding more efforts for the government in later stages. Once the request is made, the relevant regulation must be reviewed within 14 days. Due to the time constraint, the first-stage review simply focuses on whether the regulation is still necessary for the purpose it initially aimed at. Switching to alternative regulations is seldom considered in this stage. If the relevant ministry does not accept the request in the first round but the Prime Minister's Office does not agree with the ministry's decision, the second-stage review may take place. Then the ministry is forced to review the regulation again and explain the reason more concretely in three months if it rejects the request again. The ministry may consider more alternatives and carry out a quantitative analysis in this stage. But it does not have enough incentives to do so, and consequently the review result may not be satisfactory. If the RRC does not agree with the ministry's

second-stage decision, it may suggest recommendations by itself. Since the RRC has incentives to improve regulations, its active role would contribute much to good implementation of *ex post* evaluations. Considering the resource constraints, it is desirable to design the review mechanism in such a way that reviews are made multiple times and regulatory oversight intervenes more heavily in later stages.

Special purpose reviews in Korea

Proposals from business organisations

One of the public stocktakes reviews is 'proposals from business organisations' that major business organisations make regulatory improvement proposals. The Public-Private Joint Regulation Advancement Initiative (PPJRAI) embarks on the review of the proposals. Some of these proposals were called Regulatory Guillotine in 2015, which means regulations to be abolished immediately. Major business organisations include Korea Chamber of Commerce and Industry, the Federation of Korean Industries, Korea International Trade Association, Korea Employer Federation, and Korea Federation of Small and Medium-Sized Enterprises. The PPJRAI is composed of three co-chairs, one vice chair, and government officials dispatched from the ministries. The co-chairs are the director of Regulatory Coordination Division in the Prime Minister's Office, the vice president of Korea International Trade Association, and the vice president of Korea Federation of Small and Medium-Sized Enterprises.

Table 10.6. **Progress of implementation of proposals from business organisations**

	Proposals	Accepted and reflected in the policy	Under review	Submitted to National Assembly
1st round projects	114	103	1	10
2nd round projects	123	120	1	2
3rd round projects	73	61	10	2
Total	310	284	12	14

Source: Regulation Information Portal (www.better.go.kr) as of February 2017.

For the first-round collected in Dec. 2014, 113 out of 114 proposals were accepted, and 103 of them were reflected in the policy. In July 2015, 123 proposals were submitted for the second-round, 122 of them were accepted, and 120 of them were reflected in the policy. In Dec. 2015, the third-round proposals were submitted, and 61 out of 73 proposals were accepted. The acceptance rate is quite high, although showing a decreasing trend, and taking post-review improvement actions is quite quick. So it seems that proposals from business organisations are successfully reviewed and reflected in the policy.

Relatively high-level of efforts are made to reviews of "proposals from business organisations". One of the reasons is that major business organisations have bargaining power, and thus their proposals are reviewed more carefully. Another important reason is that business organisations select impactful and implementable proposals out of those collected from enterprises. This means that their proposals are worth reviewing and cannot be simply ignored. The ministries review effectiveness of the existing regulations,

compare pros and cons of the existing ones to those of alternatives, and search for better alternatives if the suggested ones are not acceptable. But the incentives are not sufficiently provided by the review mechanism itself. 'Proposals from business organisations' would successfully work when incentives are given externally, for example, by regulatory oversight.

Table 10.7. **Proposals from business organisations by area**

Area	1st round projects		2nd round projects		3rd round projects	
	Proposals	Reflected	Proposals	Reflected	Proposals	Reflected
Budget, Finance	12	12	25	25	4	2
Construction, Ship	23	23	19	19	4	3
Agriculture, Marine	1	1	6	6	1	1
Education, Culture	12	9	5	4	0	0
Employment, Welfare	1	1	5	5	2	2
Health, Food	12	8	3	3	3	2
Transportation, Safety, Environment	10	10	19	19	41	33
Science, Technology	3	3	4	4	0	0
Biology, Energy, Climate	6	5	3	3	0	0
Information, Communication	8	8	5	5	4	4
Industry, Trade	19	16	24	22	10	10
Foreign Affairs, Defense, etc.	7	7	5	5	4	4
Total	114	103	123	120	73	61

Source: Regulation Information Portal (www.better.go.kr) as of February 2017.

Thorn under the nail

"Thorn under the nail" program is a regulatory review system that investigates regulations hindering activities of small and medium-sized enterprises (SMEs). This system has been originally carried out by the SME Ombudsman, but by the PPJRAI since Sep. 2013. The PPJRAI has 4 teams inside, and two of them operate 'thorn under the nail' program. 'Regulatory improvement strategy' team is in charge of the program, and 'planning' team performs communication with SMEs. 'Investment boosting policy' team deals with 'proposals from business organisations'.

Discovery of regulations to be improved is attained via three channels. One is a phone call, another is the *Regulatory Reform Sinmungo*, and the other is visiting and having an on-site meeting. Discovered regulations are reviewed by the PPJRAI, which finds a way to improve regulations and discusses with the competent ministries. This program successfully improved regulations as 478 out of 486 proposals made in the first 5 rounds were accepted, and 457 of them were reflected in the policy. The acceptance rate is approximately 98%, even higher than the acceptance rate of 'proposals from business organisations'. One of the reasons would be that regulations proposed to be improved through 'thorn under the nail' are relatively trivial while those through 'proposals from

business organisations' are debatable. This does not mean that 'thorn under the nail' program is less important, since those trivial regulations would not have been improved without the program, imposing nontrivial burdens to SMEs.

While the acceptance rate is high, it seems mysterious that regulated entities' satisfaction towards regulatory reform decreased. According to the survey to SMEs in May 2013, 78.2% of respondents expected a positive effect of 'thorn under the nail' program, but the survey in Feb. 2015 showed that 59.3% of respondents experienced no regulatory improvement. One of the reasons was a decrease in opportunities to appeal, which can be verified by the fact that 28.6% of respondents felt there were few opportunities of appealing to the government about on-site difficulties faced by businesses. After "thorn under the nail" system was transferred from the SME Ombudsman to the PPJRAI in Sep. 2013, private complaints were not received, but only highly refined suggestions specifically related to regulatory improvement were. Focusing on a narrow set of suggestions may, although raising the acceptance rate, lower satisfaction of regulated entities.

The level of efforts made to reviews of regulations is lower in this mechanism compared to that in other stocktakes review mechanisms. It is because suggestions are relatively simple and thus do not require a deep analysis in many cases. The review process is mostly the same with that in 'proposals from business organisations'. Therefore, in terms of incentive provisions, 'thorn under the nail' program also has weakness. Regulatory oversight has to play a role in order to make the program work successfully.

Table 10.8. **Progress of implementation of proposals via Thorn under the Nail**

	Proposals	Accepted and reflected in the policy	Under review	Submitted to National Assembly
1st round projects	92	91	0	1
2nd round projects	100	95	0	5
3rd round projects	96	93	0	3
4th round projects	138	127	2	9
5th round projects	60	51	6	3
6th round projects	100	73	23	4
7th round projects	81	42	32	7
Total	667	572	63	32

Source: Regulation Information Portal (www.better.go.kr) as of Feb. 2017

Table 10.9. **Proposals via Thorn under the Nail by area**

Area	1st round		2nd round		3rd round		4th round		5th round	
	Prop	Acc	Prop	Acc	Prop	Acc	Prop	Acc	Prop	Acc
Budget, Finance	18	18	13	13	27	26	26	25	6	6
Construction, Ship	7	7	6	6	7	7	21	20	17	15
Agriculture, Marine	5	5	7	7	3	3	4	4	1	1
Education, Culture	5	5	1	1	3	2	3	2	2	2
Employment, Welfare	8	8	8	4	18	17	17	17	0	0
Health, Food	17	16	9	8	8	8	8	6	8	7
Transport, Safety, Environment	12	12	23	23	15	15	29	27	10	8
Science, Technology	0	0	0	0	0	0	1	1	1	1
Biology, Energy, Climate	0	0	0	0	0	0	0	0	2	0
Information, Communication	2	2	3	3	1	1	6	5	2	1
Industry, Trade	16	16	15	15	12	12	22	19	8	7
Foreign Affairs, Defense, etc.	2	2	15	15	2	2	1	1	3	3
Total	92	91	100	95	96	93	138	127	60	51

Source: Regulation Information Portal (www.better.go.kr) as of February 2017.

Table 10.10. **Comparison of performance of Thorn under the Nail by two institutions**

	Operated by SME Ombudsman'	Operated by PPJRAI
Begins in	July 2009	Sep. 2013
Suggestions submitted	10 549	486
Cases of regulations improved	1 893	437
Acceptance rate	18%	90%

Source: Websites of SME Ombudsman (www.osmb.go.kr) and PPJRAI (www.smartregulation.or.kr) as of April 2016.

Other stocktakes review

There are other public stocktakes review programs such as *Tok-Tok-Talk*, *Majung-Talk*, and 'on-site standby' project. *Tok-Tok-Talk* and *Majung-Talk* are operated by the PPJRAI, so mostly used to collect suggestions on regulatory improvement. *Tok-Tok-Talk* is the program that the PPJRAI visits SMEs to have on-site meetings, and *Majung-Talk* is the programme that SMEs and their association visit the PPJRAI to make suggestions. *Majung-Talk* is a face-to-face meeting, different from a phone call.

"On-site standby" project refers to the system of discovering and supporting the business investment projects that have been delayed due to consultation among interested parties, regulations, etc. Such an initiative is a part of the Trade & Investment Promotion Meeting. For example, through the 9th Trade & Investment Promotion Meeting in February 2016, "on-site standby" initiative involves six projects to root out unnecessary regulations that are hindering businesses and investments, aimed at boosting corporate and foreign investment.

It is also possible for business operators to make proposals at the meetings chaired by the President, such as the Ministerial Meeting on Regulatory Reform, Trade & Investment Promotion Meeting, Presidential Advisory Council on Science & Technology, and National Economic Advisory Council. For example, in the 1st Ministerial Meeting on Regulatory Reform of the Park administration, 52 proposals were directly made to the ministers and the president by business operators. When proposals are made, the minister of the competent ministry shall provide answers immediately to the on-site suggestions. Then, the ministry develops its own alternatives and action plans, which are finally determined through Economic Ministerial Meetings and discussions, inter-agency working group consultations, working group coordination meeting, vice-ministerial meeting, cabinet meeting and forums. The action plans are posted on the Regulatory Information Portal, and their progresses are monitored. Implementation progress is reported to the following Ministerial Meeting on Regulatory Reform.

Table 10.11. **Progress of implementation of proposals via 1st Ministerial Meeting on Regulatory Reform**

Area	Proposals	Progress	
		Accepted and reflected in the policy	Submitted to Nat. Assembly
Budget, Finance	8	7	1
Construction, Ship	8	8	0
Agriculture, Marine	0	0	0
Education, Culture	9	9	0
Employment, Welfare	4	3	1
Health, Food	10	8	2
Transportation, Safety, Environment	3	3	0
Science, Technology	0	0	0
Biology, Energy, Climate	0	0	0
Information, Communication	2	2	0
Industry, Trade	5	5	0
Foreign Affairs, Defense, etc.	3	3	0
Total	52	48	4

Source: Regulation Information Portal (www.better.go.kr) as of Feb. 2017.

Out of 52 proposals made in the 1st meeting, 41 were accepted immediately, 7 were deferred for further investigation, and 4 were not acceptable, but redirected to other solutions. Seven proposals investigated further were also accepted, and alternatives were

found for unacceptable 4 proposals. In the following meetings, the number of proposals decreased – 25 in the 2nd meeting, 10 in the 3rd, 3 in the 4th, and 2 in the 5th, but many debatable proposals were submitted and discussed in the Ministerial Meeting on Regulatory Reform. In addition, Trade & Investment Promotion Meeting, Presidential Advisory Council on Science & Technology, and National Economic Advisory Council also receive and review proposals at the meetings.

Principles-based reviews

The Korean government has carried out reviews of regulations for specific purposes and those in specific areas. Some projects are managed by a single ministry, but many projects are done by a task force team consisting of all the related ministries. Every year several topics are chosen, but topics usually change over years. The only exception is reviews of anticompetitive regulations, which are continuously carried out by the deregulation task force team in the Korea Fair Trade Commission. The team is not a temporary unit, but this does not mean that all the regulations are reviewed by the team periodically. Rather the team also focuses on a specific set of regulations to see whether they restrict competition, and sends a statement to the relevant ministry that deregulation measures are required if the regulations are considered as anticompetitive.

Table 10.12. **Examples of principles-based reviews in the past governments**

Year	Principles-based reviews
1998	Deregulation on housing and construction industry Deregulation for foreign investment Improvement of regulations on corporate activities Regulatory reform on finance, logistics, and trade
2001	Regulatory improvement on entry barriers and competition restrictions
2005	Deregulation for job creation and economic vitalization
2006	Deregulation for corporate activities Improvement of systems for emergence of new industries Improvement of regulations on environment and safety Deregulation for people's convenience in life
2008	Deregulation for efficient use of land Deregulation on industry complex Relaxing regulation separating finance and commerce Relaxing regulations on capital area
2009	Deregulation for boosting investment and job creation Temporary regulatory relief Improvement of systems in the new areas of growth leadership
2010	Deregulation for job creation, growth, and people's life stability Relaxing burdens to the low-income group Reporting and registration of unregistered regulations Introductions of sunset for review Relaxing mandatory use of authenticated certificate
2012	Deregulation for boosting investment and job creation

Principles-based reviews are planned and implemented with a clear objective that regulations shall be reformed, and thus usually result in massive deregulation. Especially regulations related to many ministries can be reformed only through principles-based reviews. For example, regulations on housing and construction might be related to the Ministry of Environment, and the Financial Services Commission, and even to the Fair Trade Commission. If the Ministry of Land, Infrastructure and Transportation reviews

their regulations only, the effect of deregulation would be limited. Principles-based reviews in the past governments were designed in such a way that bundled regulations were reviewed simultaneously. Selected examples are given in Table 10.12.

The Park Geun-hye administration also made a significant effort to deregulation using principles-based reviews. For example, in 2015, two major principles-based reviews were carried out. One is a review of certification regulations. All 203 certification regulations burdening SMEs were reviewed from scratch, resulting in 36 certifications being terminated in addition to 36 certifications which were already determined to be terminated. In total, 72 certification regulations are supposed to be terminated and 77 to be improved by the end of 2016. For this task, the Prime Minister's Office, Korean Agency for Technology and Standards, Small and Medium Business Administration, SME Ombudsman, and Korea Federation of Small and Medium-Sized Enterprises jointly operated a task force team for 6 months.

Another is review of local regulations. The total inspection of local regulations and the regulatory reform project were implemented as a part of the government's focus projects for 2015. Based on the result of the total inspection, regulatory measures (i) that contradict higher laws; (ii) that are not based on laws (statutes); or (iii) that fail to meet the standards of higher laws were reformed at the local government level. In total, 6,440 local regulations were determined to be improved – 4,201 on construction, land, industry, agriculture, and environment by Oct. 2015, 1,478 on culture, tourism, local administration, ship and fisheries by Dec. 2015, and 761 on transportation, health, welfare, and forest by Mar. 2016. To foster competition for regulatory reform among local governments, the progress of improvement by local governments was open to public, including the ranking, and the regulatory map covering the entire nation was disclosed.

The principles-based review projects in 2016 include a review of entry-deterring regulations in emerging markets, a review of regulations burdening corporate activities, and a review of approval and reporting systems delaying business and life activities. Entry-deterring regulations in emerging markets are reviewed by the Emerging Market Investment Committee, a new institution established in Mar. 2016. If regulations are deemed to deter entry into emerging markets, they are in principle abolished by the committee unless the competent ministry proves that the regulations are necessary. The committee is composed of 70 non-governmental experts. In May 2016, 141 out of 151 proposals were accepted. Temporary regulatory relief was applied to regulations burdening corporate activities, especially in the major industries such as shipbuilding, marine transport, steel, petrochemistry, and construction. Reviewing approval and reporting systems resulted in 261 projects to improve the systems. Accordingly requests are deemed approved unless they are rejected with an adequate reason by the competent authority in a specified time (e.g. 2 weeks) and reporting is deemed received unless it is replied in a specified time.

Principles-based reviews do not require a cost-benefit analysis, and thus a quantitative analysis is not usually performed. But an intensive analysis is required for achieving regulatory reforms, even when it is qualitative. The effectiveness of regulations and their burden to regulated parties are analysed and better alternatives are searched for during the reviews. As a result, efficiency of regulations increases. On the other hand, effectiveness of regulations may be reduced, especially if the objective of the reviews is biased towards the regulated parties. Also there is a possibility that efficiency of regulations is not fully attained. It is because the regulators do not have enough incentives to make regulations

more efficient in this review mechanism. Moreover stakeholders may not have sufficient opportunities to express their opinions in such a top-down approach, resulting in a less desirable alternative chosen. Regulatory oversight should be able to complement these weaknesses in order to successfully utilize principles-based reviews. The Cost-in Cost-out system can provide the regulators with some incentives to search for less burdensome alternatives, so the two mechanisms are complementary.

Regulatory oversight for *ex post* evaluations

Ex post evaluations need to be monitored and managed by regulatory oversight, as discussed in the previous sections. The most important reason is that the regulators have few incentives to voluntarily improve regulations, and thus that incentives need to be provided by external institutions. There are many such channels in Korea. The most impactful two channels are coordination by the Regulatory Reform Committee (RRC) and the Prime Minister's Office (PMO) and reporting to and discussion in the meetings chaired by the President, especially the Ministerial Meeting on Regulatory Reform (MMRR).

The RRC has a control power in many *ex post* evaluation systems. In the annual regulatory planning and review, the RRC provides a guideline to ministry-level regulatory improvement plans, collects the plans, establishes the comprehensive regulatory improvement plan, and monitors the progress. In the Cost-in Cost-out system, the RRC has a final right to determine which regulations to apply the system to, reviews the cost-benefit analysis submitted by the ministries with assistance of Center for regulatory studies in Korea Development Institute and Korea Institute of Public Administration, and monitors management of net regulatory costs of the ministries. The RRC pushes the ministries to apply the sunset rule to regulations with assistance of the PMO, reviews the reports on sunsetting regulations submitted by the ministries, and determines whether to abolish (or relax) regulations, apply another sunset provision, or remove a sunset provision. In the Regulatory Reform Sinmungo system, the RRC has a right to make a suggestion of regulatory improvement when proposals are rejected by the competent authority.

The PMO also plays a significant role in regulatory oversight for *ex post* reviews. Regulatory oversight by the RRC is largely assisted by the PMO, and sometimes substituted by that by the PMO. The PMO also monitors stocktakes reviews and launches and manages principles-based reviews. The PPJRAI which reviews 'proposals from business organisations' and 'thorn under the nail' is an organisation under the PMO, although non-government experts participate in the PPJRAI. Proposals made in the meetings chaired by the President are reviewed by the competent authority and monitored by the PMO. Many principles-based reviews are launched as government's focus projects planned annually by the PMO. The PMO chooses review projects in collaboration with the competent ministries, and manages the progress of the projects. The PMO evaluates the performance of the ministries in *ex post* evaluations and regulatory improvement.

The MMRR is the top decision making institution for regulatory reform. The Park Geun-hye administration acknowledged the importance of such an institution, and thus made the MMRR chaired by the President, which was originally chaired by the Prime Minister in the past governments. The MMRR mostly serves as a place at which principles-based reviews are initiated and monitored, and the progress of regulatory reform is competed for across the ministries. For example, review of certification regulations were initiated in the 3rd MMRR in May 2015, when it was concluded that

termination of 36 certifications would have a positive impact on the economy and that the other certifications shall be reviewed from the scratch.

The 1st MMRR overviewed problems of the regulatory reform system and solutions to solve them, and determined the ways to improve the system, some of which were triggered by proposals made by business operators at the meeting. The 2nd MMRR monitored the progress of improving the regulatory reform system and the result of deregulation on land, construction, information and communications technology, and agriculture. In the 3rd MMRR, deregulation measures for foreign investment and creative economy were reported and it was determined to carry out principle-based reviews on certification regulations and local regulations. The results of the reviews were reported in the 4th MMRR. Deregulation measures for bio health and education were discussed as well. The 5th MMRR was held in May 2016, discussing the performance of the Emerging Market Investment Committee, deregulation measures on agriculture and bio health, and application of temporary regulatory relief to regulations burdening corporate activities.

Stakeholder engagements in *ex post* evaluations

Some *ex post* evaluations entail stakeholder engagements by construction of the mechanism, while others do not. The former is mostly public stocktakes reviews, including the Regulatory Reform *Sinmungo* which is systemized. But communication with stakeholders is no less important in the latter form of *ex post* evaluations. Stakeholders know the impact of regulations on them the best, and their incentives are well aligned with improving the quality of regulations once the necessity of regulations is agreed on. On the contrary, the regulators usually have incentives to strengthen regulations rather than to improve them. In such cases, stakeholder engagements would make a positive effect on the quality of regulations.

Great synergy will be produced when stakeholder engagements are combined with regulatory oversight. Regulated parties try to restrain the regulators from strengthening regulations without reasonable explanation. Other stakeholders who benefit from regulations want the regulators to preserve the effectiveness of regulations. When regulatory oversight pushes the regulators to change regulations more efficient in addition to those constraints, the regulators have no choice but to reduce the burdens of regulated parties without lowering the effectiveness of the regulations.

Stakeholder engagements are required at every phase of *ex post* evaluation processes, that is, selection of evaluation targets, assessment of effectiveness and burdens, searching for alternatives, and an analysis of regulatory impacts by alternatives. Stakeholders provide the regulators with information as to which regulations need to be reviewed and what impacts the regulations have on the society and the economy. Stakeholders may assist the regulators to search for better alternatives and analyse the impacts of regulatory changes. These interactions would enable the regulators to make a right decision and improve the quality of regulations.

Although it is well known that stakeholder engagements are necessary and beneficial, the regulators do not have incentives to communicate with stakeholders. Therefore stakeholder engagements must be enforced by the review mechanisms. The review mechanisms in Korea, however, do not seem to be designed in such a way. It is why there exist few chances for stakeholders to express their opinions in *ex post* evaluations. For example, the annual regulatory improvement plans of the ministries do not reflect stakeholders' opinions. The planning task is supervised by the Prime Minister's Office,

but it is not obliged that the ministries shall communicate with stakeholders. Even the final version of the plan is not open to public, and consequently there is no chance that the plans are previewed or agreed on by stakeholders. Stakeholder engagements are not guaranteed in other review mechanisms as well, except for public stocktakes reviews, across which the degree of stakeholder engagements varies.

Conclusion

Ideally, *ex post* evaluations should be able to keep all the regulations effective and efficient. There are many challenges that cause *ex post* evaluations in practice to be less productive. Such challenges need to be considered in designing and implementing review mechanisms.

First of all, resources are not sufficient. It requires an enormous amount of resources to carry out *ex post* evaluations for all the regulations in a full capacity. This would be partly because it is very costly to analyse effectiveness, benefits, and burdens of all the possible alternatives. Hence it is necessary to review only the regulations whose quality can be improved much. In particular, *ex post* evaluations are justified only if the benefits of the evaluations exceed the costs. A practical problem is how to identify regulations that need to be reviewed. One way is to make a simple review and order regulations in necessities of a further analysis. Regulatory planning and review in Korea plays such a role, although it has other functions as well. The sunset rule can be operated in such a way: a sunset provision is applied only when a review of regulations is expected to be beneficial.

Resource constraints call for efficient approaches in *ex post* evaluations: choice of review depth, introduction of multi-stage reviews, and use of stakeholder engagements. There is a wide spectrum of review depth that can be chosen. A deeper analysis is not always optimal. A simpler evaluation can be better if the net benefits are greater. Therefore regulations need to be classified into subgroups according to benefits of reviews. A quantitative analysis might be necessary if it can greatly improve the review results. But there is no review mechanism in Korea that formally requires a quantitative analysis. Multi-stage reviews are a good way to enhance the efficiency of reviews. The Regulatory Reform *Sinmungo* is currently the only review mechanism that applies multi-stage reviews in Korea. Stakeholder engagements can increase the efficiency of reviews as information costs can be reduced. Most of top-down approaches in Korea do not force the regulators to communicate with stakeholders, possibly lowering the efficiency of reviews.

Another challenge is that the regulators do not have enough incentives to improve the quality of regulations. Such incentives need to be provided from external institutions or by internal mechanisms. Regulatory oversight is a way to provide external incentives. Many review mechanisms are monitored and managed by the Regulatory Reform Committee or the Prime Minister's Office in Korea. The Ministerial Meeting for Regulatory Reform also plays such a role for some review mechanisms. Incentives can be provided internally within the mechanism as in the case of the Cost-in Cost-out (CICO) system in Korea. Under the CICO system, the regulators have incentives to keep regulations efficient so that they bank the costs of regulations abolished (or relaxed) to cancel out the costs of regulations introduced later. This kind of incentive structures exist mostly in the stock management review mechanisms including the stock-flow linkage mechanisms.

Third, some regulations may individually survive reviews, but may not prove rational if reviewed together with other related regulations. This implies that bundled reviews are necessary. Most review mechanisms are suitable for reviewing individual regulations. The CICO system and the sunset rule are designed so that regulations are reviewed on an individual basis. On the other hand, regulatory planning and review and principles-based reviews might be useful for bundled reviews. The former works well for bundled reviews within the ministry, while the latter tackles also bundled regulations across the ministries. Some of the bottom-up approaches may also initiate bundled reviews.

Interaction between review mechanisms needs to be considered as well. *Ex post* evaluations are complementary. It is interesting to see that the CICO system encourages the regulators to improve the quality of regulations in other review mechanisms as the decrease in regulatory costs enables introduction of regulations later. Regulatory planning provides an ordering of the existing regulations in their importance and effectiveness, which can be used for choosing regulations to be abolished in the CICO system. Bottom-up approaches to reviews may reveal which regulations stakeholders are the most uncomfortable with, and such information can be used for regulatory planning. Principles-based reviews complement weaknesses of other review mechanisms by reforming bundled regulations. Therefore, it would be a better strategy to introduce various approaches and choose an optimal mix of those mechanisms.

Notes

1. The numbers were calculated from the Press Releases of Prime Minister's Office (2016.7.24, 2016.11.2).

2. The numbers were calculated from the Press Releases of Prime Minister's Office (2015.7.26., 2016.1.21., 2016.7.13). The number of accepted suggestions in 2015 is different from that in Table 10.5 because some were additionally accepted in 2016.

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