Regulatory Policy in Perspective

A READER'S COMPANION TO THE OECD REGULATORY POLICY OUTLOOK 2015

OECD

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2015

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Foreword

This report compiles the background papers on regulatory policy, stakeholder engagement, regulatory impact assessment and *ex post* evaluation that contributed to the development of the 2015 *OECD Regulatory Policy Outlook*.

The papers were drafted by Martin Lodge (Chapter 1), Andrea Renda (Chapter 2), Alberto Alemanno (Chapter 3), Steven Balla and Susan Dudley (Chapter 4), and Lorenzo Allio (Chapter 5) under the supervision of Céline Kauffmann (overall publication and Chapter 1), Manuel Gerardo Flores Romero (Chapter 2), Daniel Trnka (Chapters 3 and 4) and Faisal Naru (Chapter 5) of the OECD Regulatory Policy Division. Nick Malyshev, Head of the Regulatory Policy Division, provided overall guidance. The report was prepared for publication by Jennifer Stein.

The work on regulatory policy is conducted under the supervision of the OECD Regulatory Policy Committee whose mandate is to assist both members and non-members in building and strengthening capacity for regulatory quality and regulatory reform. The Regulatory Policy Committee is supported by staff within the Regulatory Policy Division of the Public Governance and Territorial Development Directorate. The OECD Public Governance and Territorial Development Directorate's unique emphasis on institutional design and policy implementation supports mutual learning and diffusion of best practice in different societal and market conditions. The goal is to help countries build better government systems and implement policies at both national and regional level that lead to sustainable economic and social development. The directorate's mission is to help governments at all levels design and implement strategic, evidence-based and innovative policies to strengthen public governance, respond effectively to diverse and disruptive economic, social and environmental challenges and deliver on government's commitments to citizens.

Table of contents

Acronyms and abbreviations 7

Executive summary 9

Chapter 1. **Trends and challenges in regulation and regulatory policy** 11

Introduction 12
Deficits in regulation 13
Tensions in regulation and in regulatory policy 16
Agenda for advancing regulatory capacity 23
Conclusion 29
Bibliography 31

Chapter 2. **Regulatory Impact Assessment and regulatory policy** 35

Introduction 36
The case for RIA: Historical and emerging motivations for the introduction of RIA and smart regulatory policy 39
A phenomenology of RIA: Navigating the variety of RIA systems around the world 43
Challenges in introducing RIA, and possible solutions 49
Challenges in running a RIA system, and possible solutions 73
Summary and key conclusions 100
Bibliography 107

Chapter 3. **Stakeholder engagement in regulatory policy** 115

Introduction 116
What is stakeholder engagement? 118
Typologies of stakeholder engagement 122
Obstacles to stakeholder engagement 132
The risks of a failed engagement policy 135
The role of information and communication technology (ICT) in stakeholder engagement 136
Evaluating the effectiveness of stakeholder engagement 141
Policy recommendations and conclusions 144
Conclusions 147
Bibliography 151

Chapter 4. **Stakeholder participation and regulatory policy making in the United States** 159

Introduction 160
Origins of regulatory authority 161
Administrative Procedure Act and public commenting 163
Early stages in the regulatory process 164
Post-promulgation of stakeholder participation 166
Evolution of the notice-and-comment process 167
Operation of public commenting 168

Innovations in stakeholder participation 172
Implementation and enforcement 175
Retrospective review of agency regulations 176
Conclusions: Stakeholder participation now and in the years ahead 177
Bibliography 183

Chapter 5. ***Ex post*** **evaluation of regulation: An overview of the notion and of international practices** 191

Introduction 192
Ex post evaluation in the regulatory policy cycle 193
The nature of *ex post* evaluation 201
Ex post evaluation in practice 215
Concluding remarks and issues for considerations 234
Bibliography 238
Annex 5.A1. ***Ex post*** **regulatory review and evaluation at the central government level** 245

Tables

1.1. Overview of different meanings of "better regulation" 15
1.2. Overview of advantages and problems with consultation 26
2.1. Main functions of a regulatory oversight body 69
2.2. Types of costs and regulatory options: An example 77
4.1. Modes of stakeholder participation in the regulatory process 164
5.1. Forms of policy evaluation 212
5.2. Types of standards and guidelines for *ex post* evaluation (selected countries) 223

Figures

2.1. Federal rule-making process in the United States: Main steps for significant rules 44
2.2. Trend in RIA adoption across OECD countries 46
2.3. The "policy cycle" 57
2.4. A map of regulatory costs and benefits 74
2.5. Cost-benefit analysis within the impact assessment process 89
4.1. Stakeholder participation and the regulatory process 162
5.1. A generic causal map of regulation and its effects 195

Acronyms and abbreviations

ACUS	Conference of the United States
AFMA	Australian Fisheries Management Authority
AMS	Agricultural Marketing Service
APIs	application programming interfaces
CAA	Clean Air Act
CAPEX	Capital Costs
CBA	cost-benefit analysis
CCAs	Cumulative Cost Assessments
CEA	cost-effectiveness analysis
CEPS	Centre of European Policy Studies
CGE	Computable General Equilibrium
COFEMER	National Regulatory Improvement Commission (Mexico)
CoPS	Centre of Policy Studies
CORE	Centre of Regulatory Expertise
DC	direct costs
DOT	Department of Transportation (United States)
DSGE	Dynamic Stochastic General Equilibrium models
EC	enforcement costs
EPA	Environmental Protection Agency
FACA	Federal Advisory Committee Act
FCC	Federal Communications Commission
GAO	Government Accountability Office
HEC	*Hautes Études Commerciales*
IA	impact assessment
IC	indirect regulatory costs
ICT	information and communication technology
IMPA	Impact Assessment
MMRF	Monash Multi-Regional Forecasting
NPRM	Notice of Proposed Rulemaking
OIRA	Office of Information and Regulatory Affairs
OPEX	Operating and Maintenance Costs
PIR	post-implementation review

PLS	post-legislative scrutiny
RCM	Regulatory Cost Model
REFIT	Regulatory Fitness and Performance programme
RIA	Regulatory impact assessment
RIS	Regulatory Impact Statement
ROB	Regulatory Oversight Bodies
SCM	Standard Cost Model
SIPs	State Implementation Plans
UOC	ultimate outcome of concern
USDA	Department of Agriculture (United States)
WKB	Unit for the quality of regulatory policy (Netherlands)

Executive summary

Based on the results of the 2014 Regulatory Indicators Survey, the 2015 *OECD Regulatory Policy Outlook* notes that OECD countries have come a long way in improving regulatory quality over the past two decades. They have done this by adopting a whole-of-government approach to regulatory policy, by establishing oversight institutions and by making the tools of good regulation, such as Regulatory Impact Assessment (RIA) and public consultation, necessary steps for the executive branch in the development of new regulations.

Nevertheless, the Outlook also notes the gaps and shortcomings of regulatory policy and identifies how countries can further improve regulatory quality in practice. There is notably important scope for promoting more evidence-based policy making by using RIA more strategically to support decisions by policy makers. While most OECD countries have a formal requirement to engage stakeholders, it has yet to become part of the day-to-day work of policy makers and citizens. Despite its widespread use in other policy fields, *ex post* evaluation is practiced sporadically in regulatory policy.

This report gathers the contributions of well-known academics on the use of regulatory policy to improve the quality of regulation. Each of these contributions focuses on a specific aspect and tool of regulatory policy and for each it systematically reviews related trends and practices, challenges and solutions.

Chapter 1 was developed by Martin Lodge. It focuses generally on the role of regulation and regulatory policy in addressing policy objectives. It identifies the challenges that impede the progress in further embedding regulatory policy in law and practice. It suggests that the contemporary agenda regarding regulation and regulatory policy is characterised by certain deficits and faces a number of tensions. The chapter also highlights the debates about regulatory institutions, co-ordination and consultation and argues that a focus is required on strengthening regulatory capacities across institutions.

Chapter 2 was drafted by Andrea Renda. It focuses on the application, success and challenges of regulatory impact assessments. It highlights the fact that almost all OECD governments, as well as many emerging and developing countries, have introduced RIA. However, the lack of a more comprehensive long-term strategy to mainstream RIA within the policy process has often led to a loss of momentum. At the same time, growing emphasis on policy coherence provides a new context for the use of RIA, in which it becomes a piece in a complex puzzle where monitoring and *ex post* evaluation, along with the analysis of the stock of existing legislation, play an increasingly important role.

Chapter 3 was written by Alberto Alemanno. It provides a comparative analysis of the policies, institutional mechanisms and structures as well as methodologies and examples of stakeholder engagement in regulatory policy across OECD countries. It argues that stakeholder engagement is increasingly pursued to help policy makers to collect more information and resources, increase compliance and render more legitimate the outcome of the regulatory process. However, despite the impetus, evaluations of current practices suggest that stakeholder engagement has not yet become part of the policy process. Lack of awareness, low participation literacy and information overload represent major obstacles to effective engagement. While civil servants need to acquire new skills so to

actively channel, engage and moderate public inputs, the public must develop a new orientation towards the public good.

Chapter 4 was co-authored by Steven Balla and Susan Dudley. It lays out the processes through which US regulations are made, implemented, and evaluated, highlighting the instruments through which stakeholders participate in these processes. It demonstrates that there are extensive opportunities for stakeholder participation at all stages of the regulatory process. These opportunities, however, are typically oriented toward facilitating the provision of information on the part of stakeholders. Instruments of participation do not generally advance stakeholder engagement in deliberative decision making, where deliberation is characterised by reflection on positions held by others and the possibility of changes in one’s own preferences as a result of such reflection.

Chapter 5 was written by Lorenzo Allio. It focuses on *ex post* evaluation of regulation. It argues that the importance of evaluating policies and regulatory interventions is generally appreciated among governments and parliaments. However, until recently, this dimension has received comparatively less attention in the regulatory reform agenda and post-implementation evaluations have not yet been systematically implemented in most countries. The experience of conducting *ex post* evaluation varies considerably across countries and also internally across different ministries or agencies in governments. Against this background, the chapter identifies a number of core principles and good practices which, taken together, increase the chances of mainstreaming a well-performing regulatory *ex post* evaluation system.

Chapter 1

Trends and challenges in regulation and regulatory policy

by Martin Lodge[1]

This chapter seeks to contribute to broader OECD-level discussions about the role of regulation and regulatory reform in promoting inclusive growth. It builds on the background material developed for the Regulatory Policy Committee in the framework of the series of OECD Roundtables on Regulatory Reform for Inclusive Reform that took place in 2012-14. It identifies the deficits in regulation, the tensions in regulatory policy and an agenda for advancing regulatory capacities.

1. Martin Lodge is Professor at the Centre for Analysis of Risk and Regulation, London School of Economics.

Introduction

This chapter focuses develops arguments about *i)* diagnosed deficits in the design and operation of regulation, *ii)* tensions in the existing regulation and regulatory policy agendas, *iii)* challenges for regulatory institutions, and *iv)* areas for further exploration.

The premise of this paper is that Regulation is in crisis in a range of meanings – regulation is dealing with sectors that have and are experiencing considerable crisis, such as those of finance, food and healthcare; regulation is in crisis as approaches to regulation have been found wanting during these crises; and regulation is also increasingly in crisis as it has become a field of inherent party political contestation. For some, regulation is accused of being toothless and resource-light. For others, regulation is about over-reach and "strangulation" (Carpenter, 2010a, pp. 825-46). Regulation in crisis can be further diagnosed in the light of some countries' considerable "backsliding" from earlier commitments towards, for example, regulatory independence and non-party political appointments.

Systems of regulation have been affected by the "age of austerity", whether it is because of changes in the economic activities of target populations, or in the resources available to regulatory actors. Any demands for enhanced regulatory capacities need to consider the background of declining, if not depleted resources. The effects of austerity following the financial crisis need to be considered in light of increasingly prominent pressures on public finances arising from demographic and climate change.

If this understanding of regulation in crisis is accepted, then this warrants a critical review of contemporary approaches towards regulation, especially in the light of their contribution to inclusive growth.

Many definitions of regulation exist, focusing on intended "sustained and focused" oversight over activities valued by a given community. The OECD's definition focuses on rules imposed on businesses and citizen that are set by governments (or by bodies with delegated powers). Regulation is understood here as consisting of *i)* standards (which express the goals that are to be achieved), *ii)* information-gathering (such as reporting and inspections), and *iii)* behaviour-modification (sanctioning) (Black, 2002; Baldwin, Cave, and Lodge, 2012, Chapter 1; Lodge and Wegrich, 2012, Chapter 1).

The contribution of regulation, broadly defined, to inclusive growth agendas can be distinguished across a range of different areas:

a. The wider "better regulation" (or "regulatory policy") agenda that seeks to enhance the quality of standard-setting, information-gathering, and behaviour-modification.

b. Economic regulation in the context of infrastructure industries.

c. Inspection-heavy regulatory activities in the areas of health and safety, environmental and other areas of conduct regulation.

d. Wider legislative/regulatory approaches relating to market opening and market correcting provisions.

The focus of this chapter is primarily on a)-c) in the above list of understandings of regulation.

Each one of the four areas of regulation offers cross-cutting insights into questions about how regulation can contribute to inclusive growth and it is important to recognise that regulation has become siloed across sectors. At the same time, these different areas raise distinct issues. Thus, the four areas of regulation noted above all have shared and distinct ways in which they impact on inclusive growth. A shared concern across these areas are the traditional functional problems that affect regulation (and other governmental activities), namely time inconsistency and information asymmetry problems.

The advances in the regulatory policy agenda should also be acknowledged. These advances are recognised by the visible role of regulation in social and economic life and the institutionalisation of the regulatory policy agenda across OECD member state.

The reform debate at the national and international level has moved from a consideration of instruments and strategies towards a concern with institutions (i.e. the "governance of regulatory institutions"). The current state of play is one in which the existing institutions seem established and embedded, but are not producing the kind of outputs and outcomes that were expected. Partly this may be due to insufficient attention to organisational learning, and to unintended consequences, pre-requisites and "Achilles' Heels" (Black, 2007, pp. 58-73; Lodge, 2008, pp. 280-301).

One key challenge for the world of regulatory policy practice is how to ensure that criteria of "good regulation" become embedded in regulatory policy making. Such a process will always be characterised by demands for greater control and consistency, on the one hand, and by demands for greater discretion and decentralisation, on the other. Too little oversight is likely to lead to neglect, too much oversight is likely to undermine essential informal relationships and likely to incur resistance.

The OECD documentation highlights some of the key challenges for introducing regulatory reform and regulatory policy reforms as part of governmental agendas for economic growth. Partly these have to do with opposition on the basis of substance (losers and winners of policy change), partly these have to do with difficulties in aligning political preferences, electoral timetables and "rational" sequencing. Any debate about regulatory reform needs to consider the capacity implications that arise from proposed reform, as well as the political nature of regulatory reform.

Deficits in regulation

The field of regulation suffers from four main deficits, namely an *oversight*, *participation*, *incentive*, and *adaptation* deficit. These deficits arise from issues that could be defined as the "political economy" of regulation, namely the processes in which regulation is being produced and operated. This section considers how the field of regulation at large is shaped by these deficits, before discussing how these deficits are also present in the field of regulatory policy (i.e. "better regulation").

The *Oversight Deficit* relates to criticism about a lack of consistency, predictability and, indeed, oversight over economic and social activities. Regulation is accused of lacking consistency over time, and across different regulatory actors, leading those exposed to multiple regulatory regimes to deal with inconsistent, if not contradictory demands. Furthermore, oversight is said to be limited because of a lack of resources, whether these relate to legal, financial or staff resources. Contemporary crises (such as in finance and food) have highlighted the challenges for regulators to develop a good understanding of the capacities and motivations of regulated actors. As regulatory

standards increasingly move towards management-based and performance-based approaches, the demands on regulators to establish reliable mechanisms for the identification of compliance patterns become ever more challenging. Indeed, in some contexts the oversight deficit points to the lack of enforceability, largely because of the ability of regulated actors to frustrate these attempts due to superior resources and their ability to engage in extensive legal challenges. The challenges for centralised oversight are further magnified because of the rise of private and transnational regulatory regimes.

The *participation deficit* refers to concerns about the inclusiveness of regulatory processes. There is, as noted in the documentation, the concern about the "top down" nature of regulation that does not sufficiently take into consideration the concerns of the affected parties. The contemporary "cost to business" emphasis is also questionable in terms of economic growth as it seems to conflate "business interest" with "economic interest" (i.e. reducing transaction costs in exchange relationships). As noted by "capture" and other regulation-related literatures, regulation is, at least in some cases, about concentrated, well-organised interests successfully framing and shaping regulatory approaches (Carpenter and Moss, 2014, pp. 1-24). Accordingly, too little emphasis has been paid to engaging with diffuse interests, namely those whose encounter with particular regulated sectors is not on a sustained basis.[1] Furthermore, the participation deficit refers to wider consultation efforts. Here the concern is that consultation is good at involving the "usual suspects", but that these processes have difficulties in engaging with new or "non-standard" participants. Such controversies extend further to questions about expertise, and how to deal with conflicts between different types of expertise when it comes to "evidence-based" decision making. Finally, the participation deficit also refers to a lack of engagement with the role of third parties in supporting regulatory activities.

The *incentive deficit* is defined by the argument that contemporary regulation suffers from a lack of attention to individual incentives. One strain of this argument refers to the perception that regulation does not provide for sufficient discretion for regulators and regulatees alike. This over-prescription facilitates risk aversion and tick-box compliance rather than engagement with the actual problem. In other words, fossilisation (juridified procedures used for defensive risk management) leads to a lack of responsiveness and, therefore, a reduced sense of "ownership". In utility regulation, the argument has been made that, for example, RPI-X has developed into such a complex methodology that it encourages considerable gaming. Incentive deficits also refer to over-prescriptive provisions for consumer behaviour that thereby reduce the opportunities for market-type discovery processes. In other words, regulation incurs undesirable opportunity costs. The interest in "incentives" has also emerged in the area of utility regulation given the realisation that regulation of private monopolies proved more problematic than structural reform pre-market liberalisation. Attention to consumer "choice" has been advanced by insights from so-called behavioural economics with its interests in bounded rationality and other barriers that might encourage sub-optimal consumer behaviour. Separately, regulators may also be said to be affected by an incentive deficit in the sense of not benchmarking their approaches, and/or considering the "value for money" of their own activities.

The *adaptability deficit* is defined by a lack of diversity. Regulatory approaches are criticised for being too uniform, too predictable and insufficiently diverse in their approach. Accordingly, regulators are accused of being too risk averse by following procedural guidelines rather than applying their expertise. Too little attention is paid to potential "warning signs" regarding emerging risks as these warning signs are not compatible with established standard operating procedures. It is argued that too little

reliance is placed on cross-linkages and cross-sanctions. This argument also suggests that too little attention is being paid to unintended consequences of regulation. It warns against over-confidence in the long-term viability of any one single regulatory approach.

These four diagnoses of deficits in regulation are partly overlapping, partly in competition with each other. It is unlikely that any one regulatory reform approach will be able to resolve all of the above issues. For example, there may be agreement that regulation suffers from too much prescription and "protocolisation"; however, whether this then leads to a shared agreement as to whether this can be resolved via greater reliance on incentives or on participation is questionable. Similarly, it is likely that there will be conflict between those who seek "greater consistency and predictability" and advocates of the other three perspectives on regulation. There will similarly be conflict between those that demand greater attention to incentives with those that advocate participation or enhanced oversight procedures.

All four perspectives on deficits have different perspectives on regulatory policy, i.e. the "better regulation" agenda. The "oversight deficit" view regards the support for more expertise and consistency in regulation as the appropriate role for regulatory policy, the "participation deficit" perspective advocates professional conversation and consultation to enhance the quality of regulation, the "incentive deficit" argument supports tools that eliminate regulation or places an emphasis on market-type alternatives to regulation, while the "adaptability deficit" perspective suggests that an emphasis on any one strategy will incur gaming and side-effects.

The four diagnoses disagree on the way in which the "stock and flow" of regulation can be addressed. One core problem for regulatory policy is that advocates seek different goals. A second core problem is that while the more general policy literature suggests that it is easier to agree on the means than the ends, the "better regulation" approach couples means and ends. The advocated tools and procedures cannot be separated from underlying goals and objectives. Put differently, the means of regulatory policy cannot be separated from ideas regarding the role of regulation within economic and social life.

Table 1.1 provides an overview of these four views as to what "better regulation" is to achieve. The contrasting goals make it difficult, if not impossible, to address the four problems at the same time. For example, calls for more consistency and expertise through procedural devices clash with views about encouraging professional conversations or market-type arrangements.

Table 1.1. **Overview of different meanings of "better regulation"**

Reduce perverse effects and unintended effects Regulation will always have side-effects and trade-offs, but "better regulation" might offer one way to reduce the extent/impact of these effects	**Reduce inconsistency, unpredictability and lack of expertise** Regulation suffers from knee-jerks, "better regulation" slows down process, enriches information, and leads to better expert judgement on costs and benefits of different proposals
Reduce regulatory "burden" via de-regulation and "alternatives to regulation" Regulation seen as "last resort" and needs to be limited; alternatives, such as "benchmarking", market-type mechanisms, and naming and shaming, offer superior solutions	**Reduce siloes and lack of professional conversation in regulation** Regulation seen as lacking professional conversation and institutional memory; requiring mechanisms that encourage exchange of knowledge and experiences

Regulatory policy is involved in addressing a large variety of criticisms, ranging from those that associate regulation with a tendency towards "knee jerking" and inconsistent regulatory responses to scandal, regulators and legislators seeking to "go the last mile" in order to reduce uncertainty and risk, while businesses not only demand "flexibility" but also "predictability" at the same time.

When considering the country responses in the OECD survey, regulatory policy's instruments are usually advocated as offering either "better" or "reduced" regulation. How and why "better" and "reduced" are to be achieved is usually not illustrated; it is likely that this relates to the multiple agendas that surround the "better" and "reduced" terms. In representing a universally agreeable term that hides contradictory meanings, "better regulation" represents a typical "administrative proverb" (Simmon, 1946, pp. 53-67).

All four logics of "better regulation" offer important insights into the role of regulatory policy for inclusive growth. However, any strategy needs to consider administrative and political feasibility.

Tensions in regulation and in regulatory policy

As noted already, regulation is understood in a broad set of meanings, ranging from all legislative measures dealing with market access/restrictions to "better regulation" (i.e. "regulatory policy"), "economic regulation" and "inspection". While country responses include measures about broad policy settings ("competitiveness"), the following concentrates on the other three dimensions of regulation.

In terms of "economic regulation", it appears that reform questions are not particularly central to regulatory reform discussions apart from concerns regarding the governance of regulatory bodies (OECD, 2014a). In this area considerable contestation about the boundaries of regulatory policies is taking place, especially in energy regulation. Three questions that relate to wider regulatory reform discussions have emerged:

- What is the role of quasi-independent regulation in an area of contested priorities? Energy regulation in particular has shown the limitations of "independent" regulation with boundary issues emerging between the areas of regulatory decision making and areas of ministerial policy making. These issues arise when it comes to challenges regarding investment needs, rising customer prices, and/or choices with long-term policy consequences. More broadly, utility regulation highlights the trade-offs in regulation between the values of efficiency, equity and security.
- What is the role of competition policy in the sphere of economic regulation? The UK, for example, has an explicit and formal commitment towards concurrency between competition authority and economic regulators. Other jurisdictions rely on the formal allocation of responsibilities in their respective laws, without considering issues of over-and underlap explicitly (i.e. through memorandums of understanding or other devices) (Koop and Lodge, 2014, pp. 1311-29). More broadly, questions can be asked about the institutional division of labour between competition and economic regulators, and about the policy implications of moving economic regulation increasingly towards competition law principles as markets are liberalised.

- What is the role of instruments of economic regulation that might have proven useful in an age of liberalisation and sufficient "slack", but that might need revision and review in an age of growing investment needs due to capacity bottlenecks? (Helm, 2009, pp. 411-34)

In terms of "inspection"-heavy regulatory activities, challenges usually refer to compliance cost to "business" (OECD, 2014b). Many of the challenges relate to "better regulation" (see below), but particular challenges that deserve attention are:

- How can regulatory capacity to inspect be maintained in an age of budgetary restrictions and headcount cutbacks? Even without the context of staff cutbacks, questions about the capacity of inspection staff are critical, in particular when regulatory approaches are supposed to increasingly rely on discretionary decision making (and avoid formalistic box-ticking) (Ayres and Braithwaite, 1992; Coglianese and Mendelsohn, 2010; Coglianese and Lazer, 2003, pp. 691-730; May and Winter, 2000, pp. 143-73; May, 2003, pp. 381-401).
- While compliance cost is certainly important, it is questionable how an "impact on growth" (or related) requirement can improve inspection-related activities when these are mandated by, for example, international obligations. The problem of fragmented authority is therefore twofold, one is that there is a lack of attention to the dispersed nature of regulatory obligations that require attention, and the other is the cumulative nature of compliance burdens rather than the "burden" of any specific activity or oversight function.
- The dispersion of authority raises issues about information exchange and co-ordination, especially in the context of emerging risks. Apart from issues arising from institutional fragmentation, there are also questions about instruments. For example, risk-based regulation has, despite its colossal failings during and after the financial crisis, not been questioned and continues to be promoted. While it might be the case that regulatory enforcement activities require a formula for allocation resources and attention, too little attention has been paid to the capacity-requirements of risk-based regulation (including its political feasibility).

In terms of regulatory policy, a related range of tensions exist:

- While much has been said about the "costs of regulation", less attention has been paid to the administrative cost of regulatory policy itself. Countries report extensive procedural provisions and organisational oversight arrangements, as well as potential cost savings from "improving" or "cutting" "red tape", but it is not clear whether there has been much attention to the administrative cost of these measures.
- There is also little knowledge as to the benefits of "cutting red tape", who benefits from these efforts, and whether they actually contribute to inclusive growth. In addition, debates have largely focused on the "cost" of regulation without engaging either with questions of broad benefits, or, the distribution of benefits and costs across different groups.
- As noted in the documentation on Roundtable discussions, there are debates about key actors in "better regulation" and, in particular, about the role of "better regulation units" within executive government and, increasingly, of supreme audit institutions. In New Zealand, the Productivity Commission has offered a

contribution on the review of regulation, raising the question about who should be in charge of review and advocacy of "better regulation" beyond the day-to-day activities of impact assessments and other instruments (Productivity Commission, 2014). The role of such productivity commissions might be focused on wider issues of market concentration, whereas the role of audit offices could be reserved as an *ex post* review of actual regulatory activities. Other oversight bodies may be involved in the day-to-day production of "better regulation" (i.e. impact assessment oversight). The creation of "better regulation" oversight bodies is central to the regulatory policy proposals. Two key challenges emerge. One is the location of this unit (see below). The other is about the relationship with regulators and those drafting regulation. Across OECD countries, such relationships have been characterised as one of (at least occasional) mutual distrust.

- There are also questions about the instruments of better regulation (see below), not just in terms of their design and ambitions, but also in terms of the kind of responses they receive. The challenge of embedding "better regulation" in the day-to-day life of ministerial bureaucracies and regulators faces a constant conflict between the tension of discretion versus centralisation, oversight versus "co-ordination", and the need to encourage a meaningful process versus the temptation to respond in box-ticking ways, especially when political attention is high. Finally, there is also the issue about the combined effect of better regulation instruments, not just in terms of potentially competing logics, but also in terms of their prioritisation.

Cutting across these areas of regulation are questions of institutional and inter-institutional relationships, the role of broad policy settings, and the capacity requirements of regulatory strategies. These are discussed further below.

The agenda to embed regulatory policy in the name of "better regulation" or "high quality regulation" has gone through a number of iterations. There are few governments that do not announce "red tape bonfires" and other measures to signal their commitment towards "high quality", "better" or "less burdensome" regulation. Better regulation can be separated into three different areas of attention. It appears that attention in the better regulation discourse has mostly concentrated on standards for rule-making (or "standards for standards"). Only more recently more attention has been paid to issues of information-gathering and behaviour-modification.

One of the key challenges of the regulatory policy agenda is how to account for the dispersed character of regulatory activity. It is argued that many of the "regulatory burdens" do not emerge from the activities of any one regulatory actor, but as a result of the interaction between actors involved in regulation, for example, between standard-setting and enforcement bodies, between inspectors and supervisors, and between inspectors and target populations (Hood et.al., 1999).

Better Regulation of Standards: The key argument here is that the flow of regulatory quality needs to be checked. Accordingly, devices such as impact assessment are used to avoid the side-effects and perversities that have been associated with "command and control" regulation, namely over-prescriptiveness, over- and under-inclusion, over-zealous enforcement and infeasible enforceability, and over-intrusiveness. Impact assessments are to establish more informed choices regarding regulatory instruments and strategies by offering more considered choices among alternatives, more opportunities for consultation, and they are meant to avoid the adoption of unnecessary regulation.

The diagnosed problems with impact assessments have been well-documented (ignoring here differences as to whether impact assessments apply primarily to regulatory bodies or to ministerial bureaucracies). One is the selection of alternatives: it is often the case that there is no real competition between alternatives, but that some alternatives are presented as straw men to legitimise the preferred option further. The quality of impact assessments have been regularly assessed by the UK National Audit Office and found to be of varying quality. Tensions in the methodology of impact assessments relate to breath versus depth of criteria and analysis, the weighting of monetised benefits and costs, the balancing between short-term costs (that can be defined with relative certainty) and far more uncertain long-term benefits, and the late timing of impact assessments in the overall decision-making process. More generally, the advocacy of impact assessments reflects different logics, ranging from those that seek "more rationality", to those that seek more professional conversations about regulatory approaches, those that see impact assessments as deregulatory measure, and those that regard impact assessments as means to "control" regulatory tendencies among bureaucrats and politicians alike (Baldwin, 2010, pp. 259-78; Radaelli and de Francesco, 2010, pp. 279-301).

Organisational responses to impact assessments also have an impact. For example, there are questions as to whether devoted specialists should be conducting impact assessments or whether these should be performed by those officials tasked with developing the proposed changes in the first place. Furthermore, impact assessments are said to suffer from problems when it comes to the assessment of complex issues ("wicked issues"). Finally, the need to perform impact assessments is accused of shaping initial consideration of alternatives in the first place.

Some jurisdictions have introduced "one-in, one-out", or even "one-in, two-out" proposals. This measure is intended to "reduce" regulation or make the adoption of "new" regulation more difficult. It is questionable whether such an approach can lead to more informed choices and avoid extensive gaming. Such an approach pays no attention to the inherent benefits of a regulatory proposal, it potentially hinders the adoption of a potentially beneficial regulatory change due to resistance elsewhere to "sacrifice" a regulation, and it also invites gaming on the existing stock of regulatory provisions (by inflating provisions). Whether cutting "zombie" regulations (i.e. outdated regulation with no effect, or where there is no initial knowledge about its existence) enhances inclusive growth is open to debate.

To deal with the "stock" of regulation, review provisions are being advanced, ranging from those relating to mandatory reviews by specified authorities (such as the monitoring of regulated markets by competition watchdogs or economic advisory councils), to sunset clauses. The key rationale for such provisions is that "tombstone" effects are to be avoided where initially enthusiastic regulatory interventions are "forgotten" over time and continued to linger on regardless of the actual irrelevance. Outdated legislation and regulation are therefore continuously under challenge.

Reviewing the stock of regulation requires the involvement of affected constituencies. Lack of attention/mobilisation is said to be an indicator for lack of relevance. However, a lack of mobilisation might simply point to the dispersed character of affected constituencies (i.e. the "collective action" problem). In other words, a reliance on official review procedures (as provided for by sunset clauses), may encourage the mobilisation of concentrated and well-resourced interests, but not the mobilisation of diffuse interests. Furthermore, it has not been shown that modern technologies, such as crowdsourcing and

other digital platforms attract a different type of actor constellation (Balla and Daniels, 2007, pp. 46-67; Lodge and Wegrich, 2014).

Better Regulation of Information-Gathering: The central theme here is on the administrative costs of regulation, in particular those arising from inspection and other reporting requirements. The Standard Cost Model has been introduced to offer a method to measure and reduce the administrative burden arising from regulation without challenging the substantive goals of regulation. It represents a tool that forces those designing rules to consider the "coalface", i.e. those that have to comply with reporting requirements (National Audit Office, 2008; Wegrich, 2009).

As such, the Standard Cost Model offers an uneasy compromise between those who are mostly interested in reducing administrative costs of regulation and those who see this method as the first step towards a much more extensive move towards reducing compliance costs arising from the substantive content of regulatory provisions.

There has been a boom in the adoption of standard cost models to measure and reduce administrative burdens. For some, the administrative cost aspect of compliance is only a relatively minor part of the overall compliance burden of regulation. The main issue regarding standard cost models is the calculation of the base rate and the problem of balancing the need for a degree of flexibility to allow for re-calculations with the potential for extensive gaming on the baseline.

Better Regulation of Behaviour-Modification: The key argument relates to reducing the costs of enforcement activities, especially the costs incurred by business. It does so by developing approaches that encourage self-compliance and avoid high-cost formalistic procedures. While reference is also being made to ideas of "responsive regulation", the key theme in contemporary enforcement is "risk-based regulation", namely the idea that inspection activities should be allocated on the basis of impact and probability (Baldwin and Black, 2008, pp. 59-94; Black and Baldwin, 2010, pp. 181-213; Black, 2005, pp. 512-49; Grabosky, 2013; McAllister, 2010, pp. 61-78; Parker, 2013) This is to allow for systematic regulatory oversight activities, which, in turn, is to reduce the regulatory burden for those businesses who do not represent a systemic risk to economic life (OECD, 2014c). Risk-based regulation has enjoyed widespread currency across sectors, and has become mandatory for UK regulators following the "Hampton Review" of 2005.

Despite the widespread commitment towards risk-based regulation, a number of key challenges have emerged. One is the question as to how the lessons of the financial crisis can be incorporated into the operation of risk-based regulation. This relates to a number of concerns: one is how assigned risk profiles to financial institutions are being assessed and classified; another is how risks and risk assessments can be challenged (in light of the challenge that financial regulation′s risk regulation prior to the financial crisis focused on the "wrong risks"), and, third, how tighter regulatory provisions can be implemented in the face of a wider political climate that might discourage "tough" regulatory action.

Two further challenges have been illuminated by the financial crisis. One is that systemic risks may emerge as a result of failure in other jurisdiction. The inter-dependency of regulated markets that is accompanied by often decentralised regulatory decision making points to the need for international regulatory co-operation (OECD, 2014c), regardless of a trend towards "re-nationalisation" in electoral politics, especially in EU member states (Lodge, 2013, pp. 378-90). The other challenge is the nature of systemic risk. While it has often been problematic to identify which activities and institutions represent "systemic" risks, it is even more problematic to identify those risks

that might pose systemic risks in other systems (for example, failure in financial systems having catastrophic impact on health and safety).

While it is doubtful that such risks will ever be officially acknowledged, it is likely that any risk-based enforcement approach will be driven by political risk, namely the risks to the organisation that emerge from negative media headlines.

More broadly, risk-based regulation faces problems in the context of "emerging risks". Emerging risks define those areas where changing technologies, behaviours and markets may lead to the rise of new types of risks that would be "off the radar" of existing regulatory frameworks. Emerging risks usually occur in areas that will not be under the spotlight if a calculus of "impact and probability" is being rigorously applied. One source for updating regulatory knowledge is complaints. How complaint-handling mechanisms can separate significant from less relevant information requires further investigation. Complaint-handling requires potentially immense capacities in order to handle flows of input and to analyse which inputs offer relevant insights and which not. Some areas of regulation may be able to rely on complaints by the target populations of regulation, others are less likely to be able to do so (for example, slaughterhouses or animal testing establishments).

Enforcement has become a key concern in the debate about regulatory policy (OECD, 2014b). There are distinct challenges to enforcement, for example, the likely decoupling between those framing regulatory standards and those undertaking inspection and enforcement activities. Furthermore, models such as "audits" do not sit easily with existing enforcement approaches. For example, demands to "verify" inspection results lead to continuous challenges about the consistency of regulatory decisions; and demands for "online" naming and shaming requires enhanced regulatory capacity to not just record enforcement actions, but also to remove that information following remedial action.

A further challenge for any enforcement approach is the response to crisis and scandal. Concern with blame and risk aversion are inherent in any policy activity, and it is therefore essential to acknowledge the limits of "better regulation" in the case of problems in detecting wrong-doing, regardless of the potential cause for the lack of regulatory success. For example, expecting inspectorates to detect and act on wrong-doing is highly problematic when regulatory tasks have been expanded, financial and organisational resources cut, and where the wider policy climate demands "light handed" regulation.

Enforcement raises a number of central issues that go beyond the calls for "reduced" compliance burdens:

- The quality of inspection and the ability to recruit capable staff.
- The development of capable systems of enforcement that are not exposed to undue biases arising from political and/or economic interests.
- The interplay between private and public sources of enforcement in areas of overlap.

While much has been said about bringing responsive regulation and risk-based approaches towards regulatory enforcement together, it has to be questioned as to how the tensions between the two approaches can be managed, especially in a climate of dwindling financial and staff resources. For example, responsive regulation relies on frequent interactions that understand enforcement as a mostly advice-driven process. Responsive regulation requires the threat of formal sanctions (Parker, 2006, pp. 591-622).

The need to make the threat of formal sanctions credible (especially in the political context) is essential for the functioning of responsive regimes. Risk-based enforcement reduces the number of advice-giving enforcement activities that are largely covering low-level risks. Instead, it focuses on high-level risks which arguably are already situated at the top end of the "enforcement pyramid".

One key challenge is to consider risk in the context of "restorability/reversibility" rather than impact and probability. This arises in particular in the context of emerging risks that are associated with large degrees of uncertainty. Such a perspective points to perspective on risk that incorporates potential societal sensitivities. However, it might clash with the broader preference for the more quantitative analysis of "impact" and "probability".

Across tools of "better regulation", a number of tensions exist. One is, as noted, the tension between the different aims of better regulation and the potentially countervailing logics incorporated into particular better regulation instruments. This may lead to a "barred combination" effect overall. There are tensions between the degree to which quantitative goals are "hardened" up, the potential for gaming, the meaningfulness of such "hardening" for its own sake, and concerns that such approaches reduce the ability of regulators to act independently and with discretion. There is furthermore the challenge to accommodate demands for "hard" quantitative goals with calls for more qualitative assessments about regulatory interventions. Finally, there is also the risk that ever more complex and demanding regulatory policy instruments reduce overall transparency and accountability. Accordingly, rather than being directed at substantive questions involving the proposed regulatory changes, the main attention turns to the processing of better regulation instruments themselves. The complexity of assessment methodologies threatens to make the evaluation of regulatory options all but impenetrable to the non-expert stakeholder. In other words, better regulation instruments threaten to reduce overall transparency rather than enhance it.

As noted by the OECD documentation, the locus of better regulation oversight bodies varies across governments. Placing regulatory policy oversight in a line ministry is problematic in that it is detached from central government oversight and support, and is also not aligned to the priorities of the line ministry. Placing regulatory policy oversight at the heart of government has the advantage of signalling highest political support for regulatory reform, but is likely to be accused of being detached from the concerns affecting line ministries. The tension between substantive policy concerns and demands for "better regulation" will not be resolved regardless of approach towards "better regulation". For example, in Brazil, the PRO-REG initiative has long been seen as driving the "regulatory policy" agenda in the Brazilian federal government. In recent years, the resources for this initiative have dwindled and its role has been diminished. At the same time, the actual regulatory policies of regulatory agencies (such as the Brazilian oil and petroleum regulator, ANP), may have, arguably, been improving. In other words, the challenge is to assess properly the institutional embeddedness of central initiatives (in terms of staffing, financing, organisational initiatives) while also accounting for regulatory policy initiatives carried out elsewhere.

In sum, the regulatory policy agenda in terms of advancing "better regulation" is arguably in crisis. It is divided by different goals and values. Different instruments are supported for conflicting reasons. This means that there will never be agreement on good "better regulation". Furthermore, regardless of their ultimate goal, the better regulation instruments themselves have been found wanting in important respects. This finding has

to be linked to the argument that OECD member states have increasingly adopted these instruments. In light of the extensive adoption of these instruments, a future agenda should focus on the pre-requisites and capacities associated with these instruments.

Agenda for advancing regulatory capacity

Regulation at large and regulatory policy require a focus on capacity requirements to provide for an agenda that can contribute to inclusive growth. One way to consider regulatory capacity is the concern with mechanisms to prevent "capture" by regulated industries, another to reduce the opportunities for politicisation. However, the quest for regulatory capacity goes beyond formal mechanisms to prevent capture or politicisation and requires an emphasis towards issues such as regulatory institutions and their governance and the consideration of the dispersed character of regulatory activity in the contemporary context. This therefore requires attention to be placed on the kind of capacities that are required to facilitate *i)* consultation and *ii)* co-ordination.

One of the traditional challenges in regulation has been to establish institutions that ensure that processes are not "captured". In the strong version of capture, regulation has such a negative impact that the public would be better off without the regulation or with a very different regulatory arrangement. Less strong versions of capture might reflect particular biases, but the wider public still derives some benefits that go beyond a state of the world without regulation (Carpenter and Moss, 2014, pp. 11-2).

Debates about "capture" theory and the power of corporate interests have returned to the forefront in the context of the financial reform and subsequent regulatory reforms. Whether traditional capture accounts have offered a valid explanation for regulatory politics is questionable, as the basic mechanisms of "capture" are only of limited applicability, and as the empirical evidence in support of "capture" is limited. Nevertheless, the concern with "capture" has given rise to a number of mechanisms to introduce potential checks on powerful interests, these include:

- the creation of whistleblowing and other information-generating devices that are low cost and alert decision-makers to potential wrong-doing.
- the provision of procedural devices that require regulatory decision-makers to consult and engage with diverse stakeholders.
- the organisation of regulatory governance so as to empower particular interests (and/or their representatives).

Apart from capture, one of the key challenges in the design of regulatory institutions has been to ensure that they offer "credible commitment", i.e. how institutions can be designed that are less likely to be vulnerable to policy reversal. As a result, regulatory institutions have attracted considerable attention over the past few decades. Reducing the likelihood of policy reversal is said to encourage investment (Levy and Spiller, 1994, pp. 201–46). Furthermore, institutional design is concerned with reducing information asymmetries, i.e. the notion that regulated parties have more information than regulators, and are therefore able to exploit this asymmetry to their advantage ("shirking" and "drifting"). Similarly, there has been concern about how political oversight over agency behaviour can be exercised effectively.

Much attention has been paid to the problems of credible commitment in the context of debates about "politicisation" and "independence". Credible commitment is supposed to protect private investors. Conflicts over credible commitment relate to the tension

between requiring stability and consistency on the one hand, and flexibility and adjustment on the other (for reasons of economic change and/or electoral change). Concern about information asymmetries has been largely channelled into debates about transparency and accountability. This section considers in more detail three themes that have emerged more prominently (again) in contemporary debate, the governance of regulatory institutions, consultation, and co-ordination. Finally, this section argues that the agenda should be oriented towards developing regulatory capacity.

Governance of Regulatory Institutions: The issue of how regulatory agencies should be designed has attracted considerable attention (OECD, 2014a), for example among those seeking to develop indices of regulatory independence (Hanretty and Koop, 2011, pp. 198–216). Standard features of these indices include modes of appointment, tenure, decision-making rules (such as ministerial veto), funding arrangements, and jurisdictional boundaries. Funding is usually seen as problematic if it is tied to governmental budget cycles. It might be argued, however, that the source of funding is less important as is potential volatility of funding.

One key question is the rationale for considering the governance of regulatory institutions. Put differently, is the primary concern one of "credible commitment", i.e. the significance attached to signalling quasi-independence from elected governments, or one of "information asymmetry", i.e. one of holding unelected bodies with considerable decision-making powers more to account? Whatever the logic underlying the governance of regulatory institutions, this debate is shaped by the following issues:

- The inherent contradictory nature of regulatory objectives. Regulatory institutions have to combine a number of different objectives, ranging from those of economic efficiency, to social equity, environmental concerns to issues of security of supply. Even without an explicit (statutory) commitment to diverse goals, regulatory decisions will always have a variety of impacts (Prosser, 2010). In other words, regulatory decision making is inherently about dealing with competing values and "wicked issues". It might be feasible to require regulators to transparently report on their decision making in the light of these trade-offs; however, such reporting may be seen as highly political. Similarly, it is questionable whether ministers/ministerial departments can be or should be expected to offer clear indications as to how regulators are to approach particular goals, and in which order of importance. There will also be always tensions regarding "appropriate" political framework decisions, such as performance agreements or "statements of expectations".
- The blurred boundary line between legitimate political interest and demands for "autonomy". The functional argument that "independence" provides for further commitment (and advantageous policy outcomes) offers insufficient consideration for the different ways in which formal autonomy can be undermined (either through formal acts or more informal actions). There are different insights across policy sectors as to variations in political interest in electorally sensitive policy sectors, such customer prices, competing demands for investment or political advantages for supporting or discouraging rival market providers. Inherent interdependence exists between political and regulatory decision making.

- The importance of reputation for explaining autonomy. Recent research has suggested that autonomy of regulators has less to do with formal institutional provisions, but with reputation. This suggests that emphasis should be placed on the capacity of regulators and regulatory regimes rather than on formal procedures or legal provisions.
- The availability of different accountability and transparency provisions. Instruments to encourage accountability and transparency have highlighted different mechanisms. Accountability is defined as the requirement to report on set issues, usually backed by sanctions. Transparency is defined as the openness of processes to external scrutiny. Some regulators have gone beyond mandatory requirements in reporting on their activities, for example in the Netherlands (Koop, 2014, pp. 565-81). In the United Kingdom, there has been the rise of pre-appointment hearings of select regulators in front of departmental select committees. However, while such mechanisms, and other reporting duties, may be seen as strengthening political accountability, it is questionable whether such instruments advance the legitimacy of regulatory regimes in the eyes of citizens (i.e. the user of public services). A focus on the transparency of public services (i.e. encouraging the use price and quality information) might offer considerable benefits in terms of improving choices, thereby contributing to inclusive growth. Other regulators may be in a position where seeking publicity is less desirable as it might lead to concerns about the quality of regulated services and goods. More generally, there are limits to accountability and transparency, for example in the regulation of high level risks. The literature on performance management also suggests that "hard" accountability and transparency provisions encourage gaming.
- The presence of judicial checks and balances. Judicial reviews and appeals are an important source of legitimacy and accountability of regulatory regimes. At the same time, they represent considerable costs to regulators, and adversarial regulatory relationships are seen as undesirable. Whether (successful) persecution is a good indicator of regulatory quality is debatable, but reflects to some extent at least the risk appetite of regulators. While a defeat in an appeal case does not necessarily imply criticism of the quality of the work of regulators, there are nevertheless issues regarding the opportunity costs that are incurred due to extensive review proceedings.

Consultation: There is near-universal agreement that consultation is a "good thing". Four key rationales have been traditionally highlighted. Consultation is said to improve the evidence base for regulatory decision making. Second, consultation encourages participation among diverse stakeholders. Third, consultation is a way of controlling decision making in that external input and scrutiny are being placed on routine decisions. Finally, consultation is also regarded as crucial in advancing the legitimacy of decision making.

How, however, more evidence, more participation, more control and more legitimacy can be organised through consultation is more contested. One of the key challenges is to encourage diverse stakeholders to contribute to consultations. Consultations are costly and how regulators and other decision-makers make choices as to who to consult, when, and how, matter. Thus, consultation processes are accused of only encouraging the views of "usual suspects" (i.e. well-established interests), of providing only limited detailed evidence that actually enhances decision making, of delaying decision making, and of

only limited use in adding legitimacy. Such concerns arise in particular in areas of risk regulation where challenges regarding expertise arise ("whose science"?), and in the area of liberalising markets where interests between incumbent and new entrants need to be balanced. Table 1.2 provides an overview of the suggested benefits and problems with consultation.

Table 1.2. **Overview of advantages and problems with consultation**

"More diversity" + More unexpected information: diversity of consultation channels reduces risk of capture - Difficulty of detecting "relevant" information	**"More rationality"** + More expertise: thereby enhancing rationality of policy making - Difficulty to define cost parameters of consultation (length/time/depth)
"More challenge" + More involvement among business actors – reduces incentives for politicians/bureaucrats to over-regulate - Difficulty to balance well-organised and non-organised interests	**"More participation"** + More participation – thereby enchanting legitimacy and involving of non-traditional actors - Difficulty to maintain order over process and weighting of opinions/stakeholders

In addition, consultation processes face the problem of timing. Early consultation is likely to allow for greater flexibility in considering different options, but may prove to be of limited interest among stakeholders as parameters are seen as too vague. Late consultation may suffer from the problem that options have already been chosen.

A number of ways have been explored to institutionalise consultation processes. One is by providing for procedural guidelines that need to be complied with. Another is to encourage the use of new technologies to accompany consultation processes. Such attempts at crowdsourcing (or other "digital" means to reduce the costs of submitting evidence) have featured in various jurisdictions. In the area of "red tape", the UK government has run a high-profile "Red Tape Challenge". Digital government-type processes might be said to have multiple advantages, they reduce the costs of participation, they allow for more decentralised approaches, and they are therefore likely to enhance the evidence and legitimacy base for regulatory decision making.

The evidence suggests that these activities do not encourage a different quality of consultation process. The traditional concerns remain as to how to differentiate between high- and low-quality information, how to ensure that not just highly mobilisable actors will contribute, how to safeguard the quality of information that is being provided, and how to ensure that there is any interest in the consultation in the first place.

Co-ordination: The theme of co-ordination has become increasingly prevalent in contemporary debates about better regulation. Co-ordination is understood as both a process and as an outcome. Co-ordination needs emerge due to the fragmented nature of regulatory authority. Regulatory decision making is dispersed between supranational/transnational, national, regional and local levels of government. Similarly, at the national level, authority is often dispersed between different organisations (Wegrich and Stimac, 2014; Lodge, 2014).

Such dispersion gives rise to the need for co-ordination.[2] Co-ordination is a perennial issue in public administration as difficulties arise due to the partial attention to different organisational agendas and priorities, concerns about autonomy and "turf", as well as competing interests regarding priorities. An example of such biased attention to sectoral

concerns over system-wider interests might be economic regulators who may be concerned about dynamics within their sector rather than the wider development of competition policy.

While it is widely acknowledged that co-ordination is a problem, less has been said about the reasons as to why co-ordination is a problem. Similarly, too little attention has been paid to the areas in which co-ordination problems emerge:

- The concern with issue portfolio allocation where "emerging issues" are likely to experience problems of over- and underlap. Overlap emerges when different organisations claim responsibility in the same area, often leading to contradictory advice or demands. Such problems are said to exist in enforcement in particular. Underlap is defined as the absence of organisational attention and the "nobody in charge" problem. This might either emerge because of the lack of the assignment of formal responsibility, or it might be due to a lack of interest of regulators and others to engage with a particular issue.
- The concern with information exchange across different organisations so that the evidence-base for decision making can be enhanced. One of the key issues is to embed the practice of information exchange between different regulatory bodies. Apart from issues regarding confidentiality agreements, the problem of information exchange is about partial attention: some information that is being held by one actor might be highly important for other regulatory actors, but not for the actor who holds this piece of information.
- The concern with consistency in decision making as different organisations approach problems differently and therefore encourage inconsistency. This problem emerges when different regulatory and competition bodies develop different methodologies and principles to deal with similar problem. This generates overall uncertainty.

A separate issue regarding co-ordination is the issue of multi-sectoral regulation. Some jurisdictions have cross-sectoral utility regulators (the Netherlands merging communications and competition authorities; Germany having incrementally created an infrastructure regulator). Other jurisdictions have maintained a sectoral focus (with some mergers within sectors, such as communications or energy). Whether cross-sectoral agencies "perform" better than sectoral ones is a question for exploration. However, the key questions for regulatory "performance" should be primarily based on questions of managing technical expertise and dealing with generic questions of regulation rather than wider issues of encouraging investment.

The above issues apply not just to relationships among regulators bodies at any one level of government. Regulatory regimes, especially in the context of the European Union, are characterised by their multi-level character, and diversity of actors involved. Co-ordination challenges therefore emerge both on the vertical and horizontal basis, with different sectoral experiences offering evidence of variation despite broadly similar formal arrangements. There has to be, therefore, recognition of co-ordination challenges in the area of "regulation beyond the border". Such challenges can be analysed according to the problems identified above.

This paper argues that a future agenda for developing regulation and regulatory policy should focus on regulatory capacity. *Regulatory capacity* concerns the ways in which actors are able exercise their formal powers. It follows the recognition that formal institutional provisions are of limited relevance when it comes to explaining

organisational behaviour (Carpenter, 2010b). As noted, the notion of "reputation" has become increasingly influential in accounting for why some agencies are granted more autonomy than others. Sources of reputation are seen as residing in four properties:

- technical: the ability to provide for expert judgement;
- performative: the achievement of desired outputs and outcomes;
- procedural: the compliance with required processual demands;
- moral: the reaching of decisions that reflect "moral" consensus.

Apart from offering a new perspective on assessing "regulatory performance" (OECD, 2014d), the challenge for an agenda interested in advancing regulatory policy is to address more than just reputational gains that arise from compliance with procedural requirements. Technical capacity can be partly understood as the disciplinary expertise that is being brought to bear on any one question ("subject expertise"). Conflicts can arise between different disciplinary perspectives regarding particular problems (lawyers vs economists). More generally, technical capacity can be further differentiated in a number of key capacities that are required for any regulatory regime to be regarded as "capable":

- organisational and legal capacity: the skill and capability to set standards, to gather information, and to change behaviour. This includes, for example, the capability to consider different regulatory alternatives in standard-setting, or to devise inspection and enforcement strategies which are sensitive towards understanding the motivation and capacities of regulated actors;
- analytical capacity: the skill and capability to assess information, to understand future trends, and to understand the "state of the art". Such skills and capability are particularly important to reflect on economic and social trends, changes in the market place that might lead to changes in business behaviour, and it is also required for the assessment of performance management systems (for example, the monitoring of re-offending rates of former prisoners);
- co-ordination capacity: the skill and ability to provide "boundary-spanning" activities. As expertise (of different kinds) usually is located outsider regulatory offices, different sources of expertise need to be brought together, and capacities need to exist to be able to communicate with diverse stockholders in a credible way.

The challenge for developing an agenda for regulation and regulatory policy to support inclusive growth is to acknowledge that these capacities reside across different actors within any given field. A focus on any one single regulator, or organisational unit supporting regulatory policy is therefore only of limited value.

Much has been achieved in terms of developing an agenda for improving regulation and regulatory policy. However, the challenges identified in this paper require an approach that goes beyond the adoption of formal instruments that will only witness limited enthusiasm by those having to apply these instruments. The future agenda has to consider these instruments in the light of their political feasibility and their resource implications. More broadly, an agenda towards developing regulatory capacity could include the following initiatives that "de-silo" regulation:

- starting with problems rather than solutions. One of the key problems in any reform debate is that solutions are searching for problems. A problem-focused approach would focus on the generic challenges that affect regulatory activities in general, such as how regulators update their knowledge, how they affect behaviours, how they assess costs and benefits of regulation for reducing economic transaction costs, and how they handle diverse types of risks. This would also allow for an enhanced interest in recruitment.
- thematic peer-review. Much has been learnt from the OECD's regulatory reviews. To build on this agenda, regulatory reviews could focus on particular generic challenges in regulation rather than overall "approach". Such an approach would, for example, focus on how regulatory agencies develop their understanding towards "emerging risks" and incorporate these into their day-to-day practices, or towards price-setting in utilities.
- the bringing together of different regulatory experiences. Much regulatory attention and training is focused on particular silos (such as "regulatory policy", "energy regulation" etc). However, many of the generic regulatory challenges are shared among different regulators, and there is scope for developing areas for bringing together actors from different sectors and levels of regulation. The challenge here is to encourage open discussion, which might require the establishment of "off the record" settings. One such initiative might be the "network of economic regulators" in the United Kingdom, or the Brazilian PRO-REG initiative to bring together different federal and regional regulators for training courses in generic questions in regulation.
- more general reviews of regulatory architectures and instruments. In line with New Zealand's Productivity Commission (noted above), it is noticeable that only few jurisdictions have sought to develop a comprehensive review of economic and non-economic regulation. The German Monopolkommission also plays a role in reviewing the regulation of economic markets.

Conclusion

Regulatory policy has become embedded within systems of government. It has also, across governments, been linked to wider policies towards promoting economic growth. National governments have embarked on different growth strategies, and the role of regulatory policy within those strategies varies. This means that the extent and direction of pressure of those favourable and those opposed to reform proposals will vary accordingly (beyond the variation introduced by different political systems).

Regulatory policy will always face ambivalent support. On the one hand, political and economic interests will approve of "better regulation", especially for symbolic reasons. On the other hand, any attempt at "better regulation" will lead to opposition from those that argue that any government intervention is "burdensome" to those that are particularly affected by regulatory change.

Similarly, establishing indicators that focus on the take-up of regulatory policy instruments is insightful and can cause naming and shaming effects to facilitate the introduction of instruments and policies that facilitate inclusive growth (such as the liberalisation of product markets). However, the challenge is to move beyond adoption to meaningful practice of "better regulation", broadly defined. In doing so, regulatory

policy′s contribution is neither about simply reducing administrative costs or compliance costs to business, nor about liberalising market access, but about establishing an infrastructure of administrative capacities to facilitate economic and social activities. Such an approach also means that regulatory policy will not be decoupled from "real" decision making regarding regulation in the sense that "better regulation" rituals are performed but without any impact on the actual quality of regulation. Such an approach also reduces the potential problem that regulatory policy comes to distort decision making to such an extent that compliance with "better regulation" reduces the quality of actual regulation.

Reflecting on process-driven implications offers the benefit that it can suggest potential pathways to support reform. However, to advance the capacity of regulatory policy, a *problem*-focused approach is required. Such an approach focuses on those generic challenges that regulatory policy seeks to address by asking how and *why* certain mechanisms seem to produce desired effects. Such a focus builds on a peer-review process that, however, will necessarily require a degree of confidentiality. A second implication is that the regulatory policy agenda should move beyond the counting of reform initiatives, and move towards an analysis of the kind of capacity pre-requisites that the proposed instruments imply. So-called innovations in regulatory governance have proven to be highly demanding on regulatory capacity, but these demands have been rarely acknowledged. Such an approach offers an opportunity to address the diagnosed deficits in regulation noted at the outset.

Notes

1. For example, estate agents will always be exposed to the "cost" of regulation that may impede their usually questionable business practices, individual home sellers and buyers only rarely face (not insubstantial) costs due to a lack of regulation, and are partly benefitting from the absence of regulation.

2. Some of these challenges are covered in debates about international co-operation (www.oecd.org/gov/regulatory-policy/irc.htm) and about multi-level regulation (www.oecd.org/gov/regulatory-policy/successful-sub-national-practices.htm).

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Chapter 2

Regulatory Impact Assessment and regulatory policy

By Andrea Renda[1]

This chapter looks at the application, success and challenges of RIA mostly by governments, with brief mentions, where appropriate, of experience within parliaments, independent agencies and other institutions (e.g. in trade negotiations). It provides a comparative analysis of the policies, institutional mechanisms and structures, methodologies and case study examples of applying RIA. It also reflects current situation across OECD and other countries in the implementation of Principle 4 in the 2012 OECD Recommendation of the Council on Regulatory Policy and Governance.

1. Andrea Renda is Senior Research Fellow at the Centre for European Policy Studies and the George C. Lamb, Jr. Regulatory Fellow at Duke University.

Introduction

Regulatory impact assessment (RIA) is defined at the OECD level as “a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives”.[1] Such a general definition is needed, since what is defined as RIA – or some of its variants, such as impact assessment (IA) in the United Kingdom or the European Union, Regulatory Impact Statement (RIS) in Australia, etc. – encompasses a wide range of methods, procedures and governance arrangements, which can be so different that an authoritative academic has defined a comparative exercise as equivalent to comparing “apples with pears” (Radaelli, 2009, pp. 31-48).

Despite existing differences in the purpose, scope and methods of RIA systems around the world, RIA documents tend to follow a similar structure. The key steps of a typical *ex ante* RIA are the following:

- ***Problem definition***. This phase normally entails the identification of the problem. Administrations wishing to propose a new regulation are asked to identify and describe in detail the problem and its drivers. Policy problems are normally classified in two different groups: *market failures*, including informational asymmetries, barriers to market entry, monopoly power, transaction costs and many other market imperfections that lead to inefficient outcomes; and *regulatory failures*, which include all cases in which an existing set of rules is not achieving desirable outcomes, and as such warrants an update or a repeal. Another case in which a policy problem can be identified occurs whenever the proposing administration is confronting *new policy targets or objectives*, and this requires new regulatory intervention: for example, if the government has set new goals in terms of broadband penetration by 2020, then – even in the absence of a market or regulatory failure – intervention might be needed in order to ensure that the new target is met. Similarly, when RIA is applied to secondary legislation, justification of policy action might be rooted in the fact that the Parliament has adopted a new piece of primary legislation, which requires implementation acts.
- ***Identification of alternative regulatory options***. In this phase, the need for intervention has to be translated into concrete policy options. Often, available guidelines at international and national level recommend that alternatives to “heavy-handed” regulation, such as light-touch regulation, regulation through information, principles-based regulation, and alternative forms of intervention such as self- and co-regulation are duly taken into account, in order to ensure that the remedy chosen is not disproportionate to the problem at hand.
- ***Data collection***. This is a crucial phase, which may entail (besides desk research) a variety of empirical methods, from telephone and face-to-face interviews to the distribution of questionnaires, organisation of online surveys and consultations, co-operation between regulatory authorities (e.g. ministries, custom authorities, police, etc.), focus groups, Delphi methods, stopwatch methods (especially in administrative burdens measurement), etc.[2] The amount of data needed and the method used to collect it vary from case to case, and should not be disproportionate to the RIA: data and information available are normally intended as functional to the accuracy of the assessment phase that follows. When data is missing, economic modelling is also possible, especially through behavioural models such as those used in the law and economics literature,[3] and through econometric modelling.

- ***Assessment of alternative options***. This is a core phase of the RIA, and can be carried out through different techniques – the most common being cost-effectiveness analysis (CEA), cost-benefit analysis (CBA), and risk analysis. Options scrutinised always have to include the "zero option", sometimes referred to as "baseline" or "no policy change" scenario, which should not be confused with the "status quo" scenario, since it captures the evolution of the policy problem absent new regulatory intervention.[4] Depending on the available data and the depth of the RIA exercise, the assessment can be qualitative or quantitative, or a mix of the two.

- ***Identification of the preferred policy option***. Once the available options have been carefully scrutinised, the comparison leads to the identification of the most preferred option. This is not necessarily the options that should be undertaken, as RIA *per se* is only a support to, not a replacement of, the policy maker's role in selecting the most appropriate action. International guidance documents often recommend that the preferred option is subject to a more in-depth assessment, mostly aimed at quantifying the prospective impacts.

- ***Provisions for monitoring and evaluation.*** As increasingly required in national RIA systems, the RIA document should also specify the ways in which the impact of the selected policy action can be monitored overtime, and a clear and efficient time horizon for revision of the action in the future. In addition, whenever indicators can be selected at the *ex ante* stage, this facilitates the *interim* and *ex post* evaluation of the selected action, which should follow the *ex ante* phase.

This chapter looks at the application, success and challenges of RIA mostly by governments, with brief mentions, where appropriate, of experience within parliaments, independent agencies and other institutions (e.g. in trade negotiations). It provides a comparative analysis of the policies, institutional mechanisms and structures, methodologies and case study examples of applying RIA. Moreover, this chapter aims at reflecting the current situation of the implementation of Principle 4 in the *Recommendation of the Council on Regulatory Policy and Governance* (see Box 2.1 below, OECD, 2012), and provides an input on RIA in the *OECD Regulatory Policy Outlook 2015* (OECD, 2015) and for the development of best-practice principles on RIA.

This chapter looks in-depth at the evolution of RIA in light of the principles and prescriptions contained in the 2012 OECD Recommendation, and provides a number of suggestions for the future evolution of RIA and, more generally, regulatory policy in light of more recent academic insights and also in view of future technological and market developments. In order to avoid repetition, we make reference to previous OECD publications and assume a medium to advanced understanding of RIA by the reader.[5]

The remainder of this chapter is structured as follows. The first section summarises the case for RIA, the main "official" motivations that can lead and have led to the introduction of RIA in developed and developing countries over the past years: these are distinguished into efficiency and/or burden reduction, transparency and accountability, and policy coherence and effectiveness. The section also comments on less publicly stated reasons that contributed in the past decades to the launch of RIA in some countries, such as pressure from industry for simplified rules and a better business climate, pressure from counter-parties in trade negotiations, and pressure from international donors. The next section surveys a number of national RIA systems and provides a taxonomy based on the scope, purpose, methodology, publicity and governance of the analysed systems, showing a remarkable degree of fragmentation and heterogeneity, coupled with a

significant adoption-implementation gap in many countries. Against this background, the section on "Challenges in introducing RIA and possible solutions" summarises the main present and emerging challenges of introducing RIA, in particular for what concerns the need to secure political commitment, wide multi-stakeholder consensus, the right human skills and methodological arrangements and overall policy coherence. The section "Challenges in running a RIA system and possible solutions" discusses the challenges associated with running a successful RIA system, including the need to ensure that all impacts and a broad set of public policy objectives are taken into account, beyond the traditional (neoclassical) notion of efficiency considered in cost-benefit analysis. The section "Summary and key conclusions" draws from the previous sections to draw some concluding remarks.

Box 2.1. **Principle 4 of the *Recommendation of the Council on Regulatory Policy and Governance***

Principle 4 of the Recommendation provides that governments should seek to:

"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".

The Recommendation, in providing guidance on Principle 4, contains a number of additional, rather specific prescriptions, such as:

- The need for some form of proportionality in the assessment, i.e. a criterion that makes the depth of the RIA dependent on the significance of the regulation;
- The need to start any *ex ante* RIA with a clear identification of a specific policy need, as well as the objective of the regulation;
- The need to consider, before selecting the most suitable regulatory remedy, alternative ways of addressing the public policy objectives, including regulatory and non-regulatory alternatives, including the "baseline scenario" should always be considered.
- The need to adopt a fairly comprehensive cost-benefit analysis that consider the welfare impacts of regulation taking into account economic, social and environmental impacts;
- The need to consider the distributional effects of regulatory proposals over time, identifying who is likely to benefit and who is likely to bear costs;
- The need to identify approaches likely to deliver the greatest net benefit to society, including complementary approaches such as through a combination of regulation, education and voluntary standards.
- The need to quantify costs, benefits and risks whenever possible and whenever the magnitude of expected impacts justifies the effort; and provide qualitative descriptions of those impacts that are difficult or impossible to quantify, such as equity, fairness, and distributional effects.
- The need to make RIA publicly available along with regulatory proposals, possibly as part of a consultation process.
- The need to identify solutions that, generally speaking, enhance competition and consumer welfare.

Source: OECD (2012), *Recommendation on Regulatory Policy and Governance*, OECD Publishing, Paris, http://dx.doi.org/101787/9789264209022-en.

The case for RIA: Historical and emerging motivations for the introduction of RIA and smart regulatory policy

The introduction of RIA has proven not to be an easy task, and not necessarily the most attractive for a government, since results will be both difficult to communicate, and visible only in the medium- to long-term.[6] In addition, RIA can be time-consuming and normally requires changes in the institutional setting and in the behaviour of civil servants, away from procedure-oriented and towards a more performance-oriented, results-based mind-set. This is why RIA requires a sustained commitment by governments at the highest level. That said, governments have introduced RIA for a variety of purposes: while it would be impossible to capture all the differences observed in each country, the most recurring motivations for the introduction of RIA at the government level have been the following:

- **Efficiency/burden reduction**. When RIA makes use of methods such as cost-benefit analysis (CBA) and cost-effectiveness analysis (CEA), its use should help administration decide in favour of more efficient policy options, discarding less efficient alternatives. Over time, if it is correctly implemented, this should lead to greater social welfare through an increase in the net benefits of public policies. However, as will be explained in more detail below, it must be recalled that the notion of efficiency in economics often disregards distributional impacts. At the same time, some governments have focused more specifically on one type of efficiency, i.e. the reduction of administrative burdens and compliance costs. As will be explained below, this led these governments to develop specific methodologies and to pursue a narrower scope when performing *ex ante* policy appraisal, which appear easier to communicate and implement than a full-fledged RIA based on a broader cost-benefit analysis, but are less comprehensive in economic terms.

- **Transparency**. RIA can increase the transparency of public policy since it forces public administrations to motivate their actions in writing, and by explaining why the proposed course of action is more desirable than available alternatives, including the option of doing nothing. This way, administrations do not present themselves anymore as “black boxes”, which take decisions with no explicit, structured justification. Of course, the transparency effect of RIA is more significant whenever RIA documents are made public: without adequate publicity of RIA documents, most of the added value of the procedure might fade away, as the possibility for stakeholders to access the content of the RIA (possibly when the document is still in progress) provides stimulus to the administrations that draft the document. In some countries (e.g., Italy), the quality of RIA has remained low also since the government has never decided to publish documents online.

- **Accountability**. The use of RIA also promotes the accountability of governments, i.e. their responsibility for the outcomes generated by policy. This occurs in particular when administrations that propose new regulations or legislation draft their own RIA, and the latter becomes a key input for the drafting of the rules. The accountability effect is also stronger when governments commit to monitor the impacts of the proposed rule and evaluate it over time, within the so-called “policy cycle”. And it is even stronger if governments use RIA and its underlying methodology to assess the coherence of individual new pieces of legislation with medium- to long-term policy goals: this normally requires the use of multi-criteria

analysis rather than cost-benefit analysis (see below, under effectiveness and policy coherence).

- **Controlling bureaucracies**. One of the possible (although often less explicitly stated) reasons for the introduction of RIA is the need to establish a means to control the activity of specialised bureaucracies. Modern government is based on the principle of delegation and oversight, and as such implies that specialised agencies, to which important government tasks must be delegated, are overseen by the centre of government (OECD, 2015). RIA has been used as a means to provide the centre of government with a tool that enables more effective control of what agencies do, without the need for the centre of government to acquire the same level of specialised knowledge as their agents (Posner, 2001; Sunstein, 1981). This "principal-agent" setting has *been* studied in the academic literature, especially with respect to the United States RIA system, as will be illustrated in the section "The US RIA model: A brief introduction" below, and has resulted in more control of the centre of government over its agencies, or even in the possibilities for agencies to claim more regulatory space as a result of their superior capacity to motivate regulatory decisions through RIA (Livermore, 2014).

- **Effectiveness and policy coherence**. This implies the use of RIA as a tool to achieve the government's long-term plans and realise the government's agenda. This can be considered as an emerging motivation for introducing RIA: as a matter of fact, many countries have attempted to introduce RIA over the past decades with limited reference to the government's long-term goals. This can create significant problems, especially if RIA is applied to primary legislation and makes use of methodologies, such as cost-benefit analysis, which typically focus on efficiency and do not incorporate the variety of policy goals that governments might legitimately set for the medium- to long-term. As will be stated in more detail below, using RIA to strengthen the coherence and the effectiveness of the government agenda for the long-term has both advantages and drawbacks: on the one hand, it requires the use of less standardised, more discretionary methodologies (multi-criteria analysis, rather than cost-benefit analysis); on the other hand, it directly links the daily regulatory activity of government with the long-term goals set by governments as a result (in many countries) of a democratic process.

Against this background, a number of *caveats* have to be put forward. First, RIA was introduced in many countries with little attention being devoted to its compatibility with the national legal and institutional context, and with insufficient reflection on the regulatory governance arrangements that should accompany the introduction RIA, or on the need to account for the full direct and indirect impacts of legislation (e.g. a relatively strong centre of government, [Castro and Renda, 2015]). Among these instances it is possible to name cases in which RIA was adopted exclusively as a result of pressure from industry for less red tape, or as a result of pressure from counter-parties in trade negotiations, or pressure from international donors that resulted in badly conceived, short-term regulatory reform. These instances coincide, almost always, with examples of failure to successfully introduce RIA.

Second, in many countries more than one motivation has been referred to when introducing the RIA system. As will be explained in more detail below, in the section "A phenomenology of RIA: Navigating the variety of RIA systems around the world", the United States. introduced RIA mostly to reduce regulatory burdens stemming from

federal regulation, but at the same time adopted a comprehensive cost-benefit analysis (rather than a narrower tool focused on red tape); created a governance structure conducive to policy coherence; and limited the scope of RIA to secondary legislation by government agencies, without extending it to independent agencies and to Congress. The consistency motive has also been repeatedly emphasised in the United States: President Obama has been perhaps the most vocal in this respect, stating that regulatory review should "ensure consistency with Presidential priorities" (Mendelson and Wiener, 2014, p. 459).

More generally, the underlying motivation for the introduction of RIA has proven important for the design of the RIA system itself. It is important to state, already at this stage, that:

- **The choice of the scope and methodology of RIA chiefly depends on which motivation dominates**. Using RIA to boost efficiency requires the adoption of cost-benefit analysis as the default methodology and one that in principle fosters the alignment of policy decisions with long-term ***societal*** welfare (subject to the *caveats* that will be specified below, in the section "Challenges in running a RIA system, and possible solutions"); at the other end of the spectrum, some countries might want to use RIA to achieve a more diverse range of policy goals, which cannot be captured by the use of cost-benefit analysis. In the latter case, a well-designed multi-criteria analysis is preferable, provided that it is coupled with the choice of sound criteria and a complete set of verifiable indicators.
- **The role of RIA also changes depending on the methodology**. It is relatively easy for politicians to explain why RIA based purely on cost-benefit analysis does not replace political decisions: as a matter of fact, RIA only represents the efficiency stance, whereas political decisions very often depart from this rather narrow focus. However, when RIA is based on a multi-criteria ***assessment*** that fully represents the government's long-term agenda, departing from the result of a RIA is potentially more difficult for governments. More specifically, choosing to introduce RIA as an element of policy coherence means essentially that the results of a RIA document are presented as the most aligned with the long-term goals of the government: accordingly, absent extraordinary reasons for deviating from the outcome of a RIA, governments would normally feel more constrained by what emerged from the analysis (if the latter is sufficiently accurate): as a matter of fact, any deviation would be likely to make the achievement of the government's program less likely.
- **The concept of "efficiency" is currently being reconsidered in economics and public policy**, especially after the financial and economic crisis, but also due to the contribution of a number of academics. In particular, the economic relevance of income inequality, the need to expand the goal of public policy to capture "well-being" measures and methodological problems with cost-benefit analysis suggest a thorough revisiting of the efficiency concept, and a potential prevalence of the policy coherence motivation in the future practice of RIA (Stiglitz, 1969; pp. 382–397; Stiglitz, 2012; Adler, 2012). Furthermore, especially for what concerns developing countries, the new "shared prosperity" agenda of the World Bank calls for an explicit consideration of distributional impacts in government regulatory reform (aimed at improving the situation of the "bottom 40% of the population"): this calls for the use of cost-benefit analysis backed by non-linear

welfare functions, rather than an un-weighted monetisation of costs and benefits (World Bank, 2014).

- **Growing** emphasis on policy coherence also explains the emergence of a new context for RIA introduction, the so-called "policy cycle" or "regulatory governance cycle", which places RIA in the context of a cycle in which the *ex ante* phase is followed by a monitoring phase and ultimately an *ex post* evaluation phase, which leads back to *ex ante* evaluation (European Commission, 2010; OECD, 2011). Adopting a policy cycle approach enables a more effective regulatory management, especially if *ex ante* and *ex post* analyses are coupled with periodical re-assessments of the whole RIA system, as well as periodical evaluations of cumulative impacts of regulation in various policy domains. As will be explained more in detail in the next sections, both the United States and the EU have emphasised the importance of retrospective reviews (or *ex post* evaluation) as a necessary complement to *ex ante* policy analysis.
- While RIA traditionally refers to an individual proposed regulatory measure, governments have increasingly engaged with the evaluation of the stock of legislation, as well as the interactive and cumulative **effects** of legislation. Examples started with the comprehensive measurements of administrative burdens launched in the Netherlands and, later in many other legal systems including the United Kingdom and the European Union; and lately included the EU "fitness checks" and the UK analyses of the cumulative cost of regulation in specific sectors.[7]

These emerging trends are essential to understand how RIA has evolved after more than three decades from its first introduction. The next section looks more closely at the current national experiences with RIA, and provides more detail on the underlying purpose of RIA and methodological and governance choices.

Section 1: Main findings

- Governments have introduced RIA for a variety of purposes: these include the need to improve efficiency and cut red tape; promoting the transparency and accountability of administrations; the need to control bureaucracies; and the promotion of effectiveness and policy coherence. In many countries more than one motivation has been referred to when introducing the RIA system.
- The underlying motivation for the introduction of RIA has proven important for the design of the RIA system itself. The choice of the scope and methodology of RIA chiefly depends on which motivation dominates.
- After the first success stories (mostly in anglo-Saxon countries), RIA was introduced in many countries with little attention to its compatibility with the national legal and institutional context, and with insufficient reflection on the regulatory governance arrangements.
- The concept of "efficiency" is currently being reconsidered in economics and public policy, and this bears significant consequences for the design and implementation of RIA systems.
- At the same time, growing emphasis on policy coherence also explains the emergence of a new context for RIA introduction, the so-called "policy cycle" or "regulatory governance cycle". While RIA traditionally refers to an individual proposed regulatory measures, governments have increasingly engaged with the evaluation of the stock of legislation.

A phenomenology of RIA: Navigating the variety of RIA systems around the world

RIA was first introduced in the United Stated in 1981 by the Reagan administration. A few years later, it was adopted also in Australia (1985). These early experiences became widely acknowledged as successful, and the OECD started promoting the use of RIA in all its Member Countries, an effort that culminated in the adoption of the first *Recommendation on Improving the Quality of Government Regulation* already in 1995 (OECD, 1995). By the mid-1990s approximately 12 OECD countries had implemented RIA requirements of some form, although the scope of the required analysis varied considerably. By 2000, 20 of 28 OECD countries had implemented RIA requirements. Currently, virtually all OECD countries use RIA. RIA requirements had also begun to be strongly promoted to its client countries by the World Bank. As a result, an increasing number of developing countries have now adopted RIA requirements. Below, we describe the US RIA system as paradigmatic of a specific approach to RIA; and then move to the analysis of other RIA models in both developed and developing countries.

The US RIA model: A brief introduction

The main reasons that led to the introduction of RIA in the United States were: *i)* the need to ensure that federal agencies belonging to the government in the United State. would justify the need for regulatory intervention before regulating, and would consider light-touch means of intervention before engaging into heavy-handed regulation; *ii)* the need for the centre-of-government to control the behaviour of agencies, to which regulatory powers have been delegated (Posner, 2001); and *iii)* the need to promote the efficiency of regulatory decisions by introducing an obligation to perform cost-benefit analysis within RIA.

Underlying the introduction of RIA was, from a more general viewpoint, the idea that policy makers should be led to take informed decisions, which are based on all available evidence. In the case of the United States, this idea was initially coupled with a clear emphasis on the need to avoid imposing on the business sector unnecessary regulatory burdens, a result that was in principle guaranteed by the introduction of a general obligation to perform cost-benefit analysis of alternative regulatory options and justify the adoption of regulation on clear "net benefits". Although the US system has remained almost unaltered since 1981, the initial approach was partly modified, and the emphasis shifted from cost-reduction to achieving a better balance between regulatory costs and benefits.

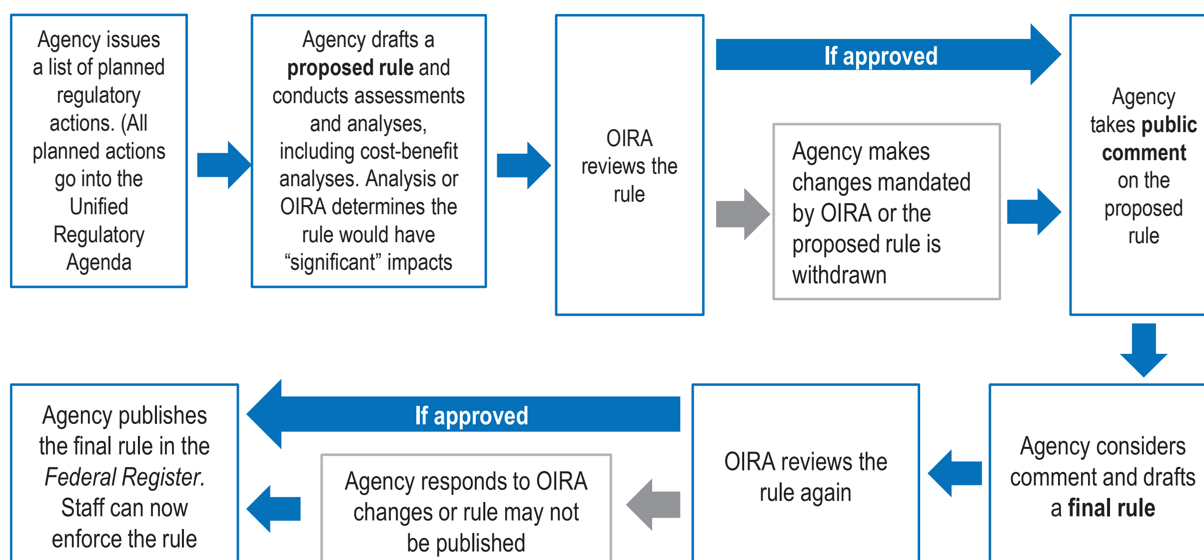
The first steps of RIA were also accompanied by a reform of the governance arrangement adopted by the US administration for the elaboration of regulatory proposals. As a matter of fact, as will be recalled more in detail below, RIA cannot exist in isolation, and requires suitable institutional and organisational arrangements. In the case of the United States, the most notable features of the system were the following:

- ***RIA was introduced as a mandatory procedural step in an already existing set of administrative rules***. In particular, the 1946 Administrative Procedure Act already mandated that draft regulatory proposals presented by Federal agencies ("Notice of Proposed Rulemaking", NPRM) be published for consultation period termed "notice and comment". From **1981**, the RIA document has to be attached to the NPRM as an explanatory document, which can enable more structured and informed comments on the side of stakeholders.

- The introduction of RIA required the creation of a central oversight body in charge of scrutinising the quality of RIAs produced. Put simply, the center-of-government cannot pretend to have the same level of specialisation of Federal Agencies such as, e.g., the Environmental Protection Agency for environmental issues or the Department of Transportation for transport-related issues. However, if these agencies are asked to complete a cost-benefit analysis in support of their policy decision, an economist would be able to read it and evaluate its quality. This is why the Office of Information and Regulatory Affairs (OIRA) was created, which since then receives and scrutinises all regulatory proposals filed by the agencies and issues an opinion which – although not binding – normally strongly affects the decision whether to move on with the regulatory proposal, or revise it together with the underlying RIA.

Figure 2.1 shows the basic rule-making process for significant rules in the United States.

Figure 2.1. **Federal rule-making process in the United States: Main steps for significant rules**



Source: US Center for effective government.

Since 1981, thousands of RIAs have been produced by US agencies, and many of them have gained considerable knowledge in the practice of cost-benefit analysis. Our brief analysis of the US RIA model, however, reveals a number of peculiarities, which should be duly taken into account in assessing the possibility to "export", or "transplant" the US model into other countries.

- ***Narrow scope.*** In the United States, RIA is mandatory only for Federal agencies and thus only for secondary legislation proposed by these agencies. Neither regulation by independent agencies (e.g. the Federal Trade Commission, the Securities and Exchange Commission, the Federal Communications Commission), nor primary legislation discussed in Congress (e.g. the Affordable Healthcare Act or "Obamacare") are subject to an obligation to perform RIA. Moreover, since the Clinton administration the scope of the system has been further narrowed down as only "major" new federal regulations were made subject to the obligation to carry out RIA. These are regulations that meet certain

qualitative and quantitative criteria, including an expected impact of at least USD 100 million.[8]

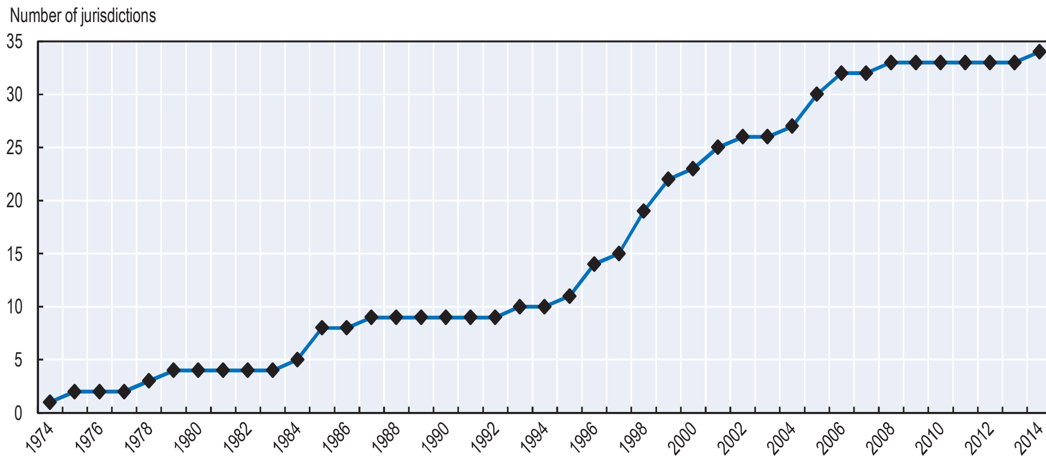
- ***A focus on cost-benefit analysis***. The US RIA system is clearly and explicitly based on the practice of cost-benefit analysis (CBA). This is intimately related to the rather narrow scope of the system: as a matter of fact, as will be illustrated below, CBA is often considered unfit for primary legislation, since it does not take into account distributional impacts, and requires the monetisation of all costs and benefits associated with the proposed regulation. Using CBA for secondary legislation is, to the contrary, more widely accepted given that the distributional consequences of regulation are less apparent and are normally rooted in the underlying piece of primary legislation: that said, the use of CBA in the US RIA system is still subject to a hectic debate in the United States.[9] More recently, OIRA placed new emphasis on the use of qualitative methods in the new Executive Order 13 563, adopted in 2011 during the chairmanship of Cass Sunstein.
- ***A presidential democracy***. The introduction of RIA in the United States, as well as the specific features of the US system, strongly depend on the fact that in the United States, as was remarked by authoritative scholars, the RIA system became a fundamental element of a "principal-agent" mechanism, in which the principal (the White House) sets priorities and outcomes, and agents (the Federal Agencies) regulate to meet those priorities and outcomes. RIA is thus a way to better control the agents, and ensure that their incentives are aligned with those of the principal (Posner, 2001).

These and other circumstances – *inter alia*, the fact that CBA can be scrutinised by courts, the existence of remarkable competences and skills in both OIRA and the agencies, and the outstanding development of universities, research centres, think tanks and other stakeholders able to contribute their opinion to the "notice-and-comment" procedures – make the US RIA system a rather peculiar experience, very difficult to replicate in other countries. However, this has been often disregarded in the international experience, as will be made clearer below.

RIA around the world: Developed economies

In the past three decades, several governments have adopted procedures aimed at ensuring a more regular and structured use of economic analysis in support of regulatory decisions. As shown in Figure 2.2 below, between 1974 and 2012 the number of OECD countries with a formal requirement to perform RIA in support of public regulatory decisions increased from 1 to 33. Also, many developing countries – often funded by international donors such as the World Bank, the Asian Development Bank or the Inter-American Development Bank – have experimented with RIA in the past two decades. Most often, in these countries emphasis was placed on reforms aimed at the simplification of business-related legislation, rather than on individual sectors such as ICT. We will get back to this in more detail in the sections "Challenges in introducing a RIA system, and possible solutions" and "Challenges in running a RIA system, and possible solutions" below.

Figure 2.2. **Trend in RIA adoption across OECD countries**



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.

Among the most successful RIA experiences to date, besides the US one, it is possible to mention the United Kingdom, Canada and Australia. In all these countries, RIA is used systematically and has been successfully mainstreamed into the policy cycle of government.

In **Canada,** almost all new federal regulations are required to undergo a Regulatory Impact Analysis Statement (RIAS), which are made up of six parts: Description, Alternatives, Benefits and costs, Consultation, Compliance and enforcement, and Contact. A detailed seven-step procedure exists the pre-publication phase of regulatory proposals, which includes a "triage" procedure for the determination of the level of impact generated by the proposal, co-ordinated by the Regulatory Affairs Sector of the Canadian Treasury Board Secretariat. Interestingly, the Canadian Treasury Board Secretariat follows a life-cycle approach to regulatory management and has created a Centre Of Regulatory Expertise (CORE) to assist in the gradual development of expertise on better regulation inside the administration. CORE provides expert advice and services to help departments build their internal capacity to develop sound, evidence-based regulatory proposals. CORE experts offer guidance on analytical services (especially risk assessment, cost-benefit analysis, performance measurement, evaluation plans), coaching and advisory services, workshops and presentations, and peer review services.[10]

In **Australia**, Regulatory Impact Statements follow seven steps: problem definition, objectives, options, impact analysis, consultation, conclusion and Recommended Option and provisions for implementation and review. The Government has agreed that, in the absence of exceptional circumstances as confirmed by the Prime Minister, a regulatory proposal with likely impacts on business or the not-for-profit sector that are not minor or machinery cannot proceed to the Cabinet or other decision makers unless it has complied with the RIA Framework requirements. Currently, where a RIS is required for a regulatory proposal to be considered by Cabinet, the RIS (assessed as adequate by OBPR) must be circulated to agencies preparing co-ordination comments on the Cabinet submission. The RIS is to be made available to Cabinet, preferably attached to the final Cabinet submission or memorandum (see Borthwick and Milliner, 2012).

In **Mexico,** RIA has been applied for more than a decade and was recently reformed to align it with OECD best practice. The National Regulatory Improvement Commission (COFEMER) exercises quality controls of new and existing regulations by issuing opinions on the draft rules and related RIAs prepared by line ministries and regulators.[11] COFEMER's opinions are not legally binding: nevertheless, given that all of COFEMER's opinions, as well as the draft regulations and RIAs, are public, in the majority of cases, line ministries and regulators do follow its opinions. In addition, COFEMER's final opinion is a requisite to publish regulation in the Official Journal of the Federation (DOF), which is absolutely necessary to provide the regulation with binding power and legality.

In the **United Kingdom,** Impact Assessments are generally required for all government interventions of a regulatory nature that affect the private sector, civil society organisations and public services. The procedure was initially limited to the assessment of compliance costs for the business sector, and since 1998 evolved into a full-fledged system of cost-benefit analysis. Today, RIA is a common practice in many sectors, including ICT: a peculiarity of the United Kingdom is that the telecommunications regulator OFCOM has published in 2005 a document describing its own approach to RIA (Ofcom, 2006).

In the **European Union,** an impact assessment system was introduced in 2002. The EU peculiarity is that the system applies to all major new policy initiatives of the European Commission, from soft law documents (Communications, recommendations) to far-reaching, cross-cutting new EU directives and regulations.[12] Since 2003, almost 900 impact assessments have been completed by the European Commission, and from 2012 onwards also the European Parliament has created an internal Directorate for Impact Assessment (IMPA), which started to commission in-depth analyses of European Commission RIA documents, and performs RIAs on major amendments proposed by members of the European Parliament, including of course all proposals that affect the ICT sector.

In **the Republic of Korea,** a few months after taking office, President Kim directed the cabinet to cut the existing regulations by half. The initiative was driven by the newly-created Regulatory Reform Committee following the 1997 crisis. In Korea, political support did not wane as time passed, as this policy agenda was supported by a strong constituency. When a few months later RRC reported lukewarm results achieved by ministries and agencies, the President ordered them to resubmit the plans so that the existing regulations could be cut down by more than 50% by the end of 1998 (OECD, 2007). According the basic Act on Administrative Regulation, every regulatory body in Korea is compelled to conduct RIA whenever proposing new or revised regulations. RRC is in charge of guiding, advocating and reviewing regulatory bodies to conduct RIA through publishing the RIA guidance. In order to increase regulatory transparency, since July 2006 the Korean government has opened RIA reports to the public through ministries' websites during the public notice period of proposed regulations (20 days). If proposed regulations affect foreign parties, ministries are recommended to extend the public notice period to 60 days.

In **Sweden**, an independent government-appointed Better Regulation Council (Regelrådet) examines since 2008 the formulation of proposals for new and amended regulations that may have effects on the working conditions of enterprises, their competitiveness or other conditions affecting them. The Regelrådet also has to consider whether the Government and administrative agencies under the Government have carried

out the statutory RIAs and assess whether new and amended regulations have been formulated so as to achieve their purpose in a simple way and at a relatively low administrative cost for enterprises. The Regelrådet also has to assess the quality of the RIAs and follow development in the area of better regulation, as well as provide information and advice that can promote cost-conscious and effective regulation. During the period 2009–2014, Regelrådet delivered 1 053 opinions on government RIAs, finding that only 39% them were found to be of sufficient quality.[13] From the first of January 2015, Regelrådet became a permanent independent decision-making body within the Swedish Agency for Economic and Regional Growth.

In **New Zealand,** the government explicitly stated that it expects that departments will not propose regulatory change without clearly identifying the policy or operational problem it needs to address, and undertaking RIA to provide assurance that the case for the proposed change is robust; and careful implementation planning, including ensuring that implementation needs inform policy, and providing for appropriate review arrangements. The government's RIA framework encourages an evidence-based approach to policy development which helps ensure that all practical options for addressing the problem have been considered and the benefits of the preferred option not only exceed the costs, but will also deliver the highest level of net benefit. RIA should be undertaken for any policy work involving regulatory options that may result in a paper being submitted to Cabinet. "Regulatory options" means the potential introduction of new legislation (bills or regulations) or changes to/the repeal of existing legislation. This analysis involves the preparation of a Regulatory Impact Statement (RIS) that summarises the RIA that has been undertaken. Certain information about the RIA undertaken must also be included in the Cabinet paper. A RIS is normally provided when papers are submitted to Cabinet committees for policy approval. In rare circumstances, the policy proposal and draft regulations may be submitted together. In these cases, the usual procedure is for the paper to be submitted to the relevant "policy" Cabinet committee, rather than directly to the Cabinet Legislation Committee.

RIA around the world: Emerging and developing countries

Among emerging economies and developing countries, there are several examples of attempts to introduce RIA as a systematic assessment of the impacts of proposed new legislation or regulation. Back in 2005, Ladegaard (2005) observed that "a quick scan of easy-available sources suggests that RIA in one form or the other is carried out in, among others, Tanzania, Uganda, Bulgaria, Croatia, Serbia, Romania, Estonia, Lithuania, Latvia, Poland, Mexico, South Korea, the Philippines, Algeria, Botswana, Jamaica, Albania, South Africa, Sri Lanka and Ghana". Since then, new countries have added to the list. More in detail:

- In Latin America, countries like **Brazil, Chile, Colombia, Costa Rica, Ecuador** are currently trying to introduce more systematic use of RIA in their administrations (COFEMER, 2011).
- In Asia, inter alia, **Cambodia, Lao PDR, Malaysia, Mongolia, Philippines** and **Vietnam** are piloting RIA to assure quality of new regulations and improve the business climate. The Philippines and Malaysia have also established national level bodies made up of senior figures from the public and private sectors to assist in various regulatory reform efforts (OECD, 2014b).

- In Africa, among others, **Botswana, Egypt, Uganda**, **Ghana, Nigeria** and **Tanzania** have run pilot projects to implement RIA. In **South Africa,** RIA was approved by Cabinet in February 2007, following a detailed joint study commissioned by the Presidency and the National Treasury to investigate the possibility of introducing RIA. Guidelines are available since 2012.[14]

In many of these countries, the introduction of RIA occurred within the context of "ease of doing business" reforms, in particular in support of legislation on streamlining business licensing systems. The problem that emerged in most of these cases is the lack of a more comprehensive long-term strategy to mainstream RIA within the policy process of the country at hand. This inevitably led to the loss of momentum of RIA once those initial pilots have expired. A recent workshop organised in Pretoria, South Africa by the EU-funded project LIAISE led to similar conclusions.[15]

Section 2. Main findings

- RIA is spreading across the globe, but with a myriad of variants. In OECD countries, a full-fledged RIA system is now in place in many common law systems (United States, United Kingdom, Australia, New Zealand), and increasingly in other countries (Canada, Sweden).
- Emerging and developing countries are also introducing RIA, both in South-East Asia and in Latin America. In many of these countries, the introduction of RIA occurred within the context of "ease of doing business" reforms, in particular in support of legislation on streamlining business licensing systems. However, often the lack of a more comprehensive long-term strategy to mainstream RIA within the policy process led to the loss of momentum of RIA once those initial pilots have expired.

Challenges in introducing RIA, and possible solutions

As is widely acknowledged, RIA has not always been a success story in the countries that have attempted its introduction. The reasons behind this unfortunate development are various. This section illustrates the main challenges emerged over time in the introduction of RIA, with the aim of singling out, by means of examples, countries that have successfully managed to address the challenges, and countries that are yet to effectively address the problem at hand. The section distinguishes between the need for continuous political commitment, and major challenges in designing the governance of a RIA system.

Securing political commitment and broad consensus

As already observed above, introducing RIA is not an easy task. Results are mostly emerging over the long-term (and are difficult to communicate), whereas the short term has meant, for many countries, the need to trigger a change in the attitude of civil servants, the need to introduce economic analysis in contexts often dominated by legal experts, the difficulty of introducing an additional administrative requirement in an already complex pipeline and many other perceived obstacles. This is why the successful introduction of RIA chiefly depends on the level of commitment expressed by political leaders. As will be explained in the next sections, any political commitment must also be

coupled with support from stakeholders, which often constitute a key source of motivation for governments to keep investing in the adoption and mainstreaming of RIA. In addition, public officials have to be motivated to embrace the RIA challenge. All three ingredients appear essential for a successful introduction of RIA in the government policy process; in addition, all three appear inter-dependent, since effective, credible political commitment is key for stakeholder involvement, and demand for better regulation through RIA form stakeholders and from the political leadership also motivates civil servants in taking RIA seriously.

Political commitment in the long term

There are many ways in which governments can show their commitment towards RIA in the long run. This comes to no surprise, also given the variety of motivations that can inspire governments to introduce RIA in their own administrations (see above, the section "The case for RIA: historical and emerging motivations for the introduction of RIA and smart regulatory policy"). Despite this variety, it is possible to highlight a number of ways in which governments can show their commitment towards RIA and its introduction over time. These include the following:

- **Introducing RIA as part of a comprehensive long-term plan to boost the quality of regulation**. As will be recalled in the next sections below, RIA alone will never be successful in improving the quality of regulation, unless coupled with additional regulatory reform tools such as the use of consultation, the adoption of a "policy cycle" approach with use of monitoring and *ex post* evaluation alongside with regular reviews of existing legislation, etc. Especially when RIA applies to primary legislation, the government regulatory reform plan should ideally be launched in combination with a structural reform plan in countries in which such reforms are still lacking. When RIA has a narrower scope, this seems much less necessary, as the focus will be on the efficiency of implementing measures, rather than related to the content of structural reforms.
- **Creating an oversight unit for RIA and locating it at the centre of government.** The level of political commitment for RIA is maximised whenever governments create an institutional setting that is conducive to enhanced control over the development of the RIA system. This aspect is central to the effectiveness of RIA introduction, and is also related to the need for governments to "signal" their commitment to external stakeholders, and civil servants within the administration and other institutions (e.g. Parliaments). A typical way to signal commitment in this respect is the creation of a strong central oversight unit, dedicated to a number of functions, which include the drafting and dissemination of guidelines on RIA, the provision of training to civil servants in charge of drafting RIAs, the possibility to scrutinise draft RIAs and request changes or even veto them, and other functions such as co-ordination consultation, advocating reforms, etc.[16] In more theoretical, technical terms the creation of a powerful oversight body is a concrete example of what in economics would be termed "credible entry", or "committed entry": governments, by making an almost irreversible choice and sustaining sunk costs, show that they do not perceive RIA as a temporary experiment; rather, they show that they will be sustaining their effort towards the introduction for RIA in the medium to long term, even if early results will not be encouraging or fully satisfactory.

- **Creating credible "internal constraints"**. A commitment to RIA is more credible the more governments create internal procedural constraints that make RIA an (almost) inevitable requirement. Such internal constraints include: *i)* a well-structured system of regulatory planning, which encourages (or, forces) administrations to start their work on regulatory proposals early enough that RIA can be accommodate in the regulatory process; *ii)* a requirement that all new (major) regulatory proposals be coupled with a RIA document, to be presented in due time to gather comments from the oversight body (see above); *iii)* the creation of dedicated RIA units for each department, in charge of co-ordinating RIA work, with a clear incentive to promote the drafting of sound RIAs inside their administrations; *iv)* budgetary incentives related to the number of regulatory proposals coupled with sound RIAs. The key in introducing such internal constraints is the creation of a genuine, virtuous "tension" between institutions and within the same institution: the existence of conflicting interests (e.g. between the RIA unit and the rest of a given ministry staff) can lead to a quicker mainstreaming of RIA in the policy-making activity of the administration.

- **Creating "external constraints", which guarantee that RIA will effectively be implemented.** Along with internal constraints, also constraints of external nature are important to enhance the level of political commitment signalled to external stakeholders. These include the following: *i)* a commitment to "open government", and in particular to a timely, sufficiently extended, fully open and participatory consultation process on major decisions; *ii)* the publication of yearly reports based on clear indicators, which track the government's current progress in implementing RIA (e.g. US costs and benefits of federal regulation, EC IAB yearly report); *iii)* the creation of dedicated representation bodies in charge of representing specific external interests as attached to the administration, or external to it (e.g. the UK Better Regulation Task Force and then Regulatory Policy Commission, the *Normenkontrollrat* in Germany, *Actal* in the Netherlands, the *Regelrådet* in Sweden, the Czech Regulatory Impact Assessment Board, the HLG on administrative burdens and now, at least partly, the REFIT Stakeholder platform at the European Commission); *iv)* the adoption of specific "screens" in the RIA methodology, which ensure that governments will be considering specific interests in all policies, and that failure to consider such interests could even be seen as grounds for invalidation (e.g. think small principle, consumer impacts, trade impact assessments, fundamental rights IA etc.); *v)* contemplating a role for non-government bodies in the regular or *ad hoc* scrutiny of the quality of the RIA process, and/or in-depth analysis of the quality of individual RIAs (e.g. GAO in the United States, NAO in the United Kingdom, the ECA in the European Union, Parliament committees in other countries); *vi)* carrying out regular perception surveys on the government's ability to carry out high quality RIAs in support of better regulatory outcomes.

- **Securing "bipartisan" backing of RIA**. An extreme version of what we have termed "external constraint" is the assurance of political support for RIA and regulatory reform. A key element that helps the consolidation of RIA and the credibility of government commitment towards regulatory reform is the stability of the reforms proposed. In addition to what we already explained above, on the usefulness of reforms that are perceived as permanent and not ephemeral, it is important to recall that, should civil servants and external stakeholders perceive that the next government will not endorse the proposed reforms, then the

credibility of the reform itself will be severely undermined. This is why securing bipartisan (or "multi-party", depending on the level of fragmentation of the political landscape) consensus is fundamental to regulatory reform. Possible ways to achieve such a widespread endorsement are the following: *i)* focusing regulatory reform on a specific objective, which is agreed upon by all parties (e.g. cutting red tape) makes it easier to create consensus on RIA, contrary to what occurs when more controversial issues are brought into the RIA system (e.g. reduction of inequalities, taxation and redistribution issues, etc.); *ii)* seeking the broadest possible political agreement on the proposed regulatory reform plan as well as on the RIA methodology; *iii)* appointing an independent oversight body or a parliamentary committee on regulatory reform and asking a member of the opposition to chair it, or members of non-government parties to sit in the body's board; or *iv)* introducing the requirement for RIA in the country's constitution as a general rule that will apply to the regulatory process in the coming generations (e.g. France).

Importantly, as has already surfaced in our discussion, these choices and the type of political commitment to be shown significantly depend on the underlying scope and methodology of the RIA system that is being introduced. Governments that introduce RIA in secondary legislation as a means to cut red tape and improve the business climate will normally emphasise their commitment towards the private sector and in particular business stakeholders: this might entail *inter alia* a widespread use of consultation, both on the methodology to be used in RIA as well as on individual draft RIAs, to ensure that legal certainty and sound, market-oriented regulatory decisions are adopted. To the contrary, governments that wish to use RIA to co-ordinate and secure the achievement of a comprehensive long-term plan for the nation's well-being will have to stress their permanent commitment through a series of other measures, from the creation of a comprehensive set of indicators to be regularly monitored and publicly evaluated, to the development of budgetary and non-budgetary incentives for administrations that achieve such objectives over time, to the involvement of civil society organisations in the monitoring of the achievement of certain specific goals.

Needless to say, the broader is the scope of RIA, the harder it will become to show political commitment and achieve bipartisan consensus: divergences between political parties, as a matter of fact, tend to emerge more on high-level political issues compared to technical implementation measures. In the case of RIA applied to Parliament bills and independent agencies, the political commitment to be shown will be even more difficult since the government, alone, will not be able to express sufficient political will. This being the case, legislative reform backed by a large majority in parliament, or a constitutional reform aimed at introducing RIA as a basic requirement of any major legislative initiative become even more important to show the right level of political commitment. The difficulty of achieving this result is such that, to date, no legal system can be said to have fully succeeded in introducing RIA in a parliamentary assembly and in very few legal systems this has even been attempted.

Securing stakeholder support

Stakeholder support is essential not only as a way to create consensus on a given better regulation strategy and secure support by key constituencies over time. The "external dimension" of RIA, most notably its publicity and the reliance on extensive consultation practices as a tool to gather information during the preparation of regulations, is also a very effective way of creating "demand for better regulation", and

thus consolidating the better regulation strategy also in the eyes of bureaucrats. In most of the countries that have successfully introduced RIA, the centre-of-government has managed to convince bureaucrats of the need to draft high quality RIAs also by creating expectations among, and a constant dialogue with, external stakeholders. Importantly, publicity of RIA and adequate consultation of RIA drafts can also increase the quality of the debate and of the final RIA document, and stimulate the birth and development of think tanks, industry and consumer associations, who need to strengthen their ability to respond quickly to government consultations.

Another important aspect of securing stakeholder support is the avoidance of too high expectations from the very beginning. Governments must explain to stakeholders that RIA and better regulation are a medium- to long-term investment for the quality of regulation and of the political debate in a country: rather than being a panacea that solves all problems within a short timeframe, RIA and related better regulation tools such as *ex post* evaluation can trigger a learning process that will improve legislation over time, with the help of all stakeholders. A "humble" government does not mean, of course, a "weak" or a "captured" government. A humble government must just clarify that governments will try, through RIA, to adopt the most informed, evidence-based decision after hearing what stakeholders have to contribute to the quality of the final decision: no partisan arguments, nor biased information, can be accepted during the RIA process.

Furthermore, stakeholders can be involved more easily whenever they perceive that they will be able to contribute to the strengthening of regulatory quality by playing a role throughout the policy cycle. This can happen in many ways, which broadly correspond to the so-called "external constraints" we have identified in the previous section. For example, the creation of an external oversight body or even simply an advocacy body composed of business representatives within government can motivate the business sector to adopt a constructive attitude towards the government's better regulation strategy. Similarly, some governments have managed to motivate stakeholders by establishing minimum standards for consultation, for example by setting a minimum duration of consultation procedures (e.g. 12 weeks as occurs at the EU level); by choosing a suitable timing of consultation procedures (early enough in the policy process; and also by introducing the obligation for administrations to consider all suggestions and motivate publicly which ones were taken on board, which ones were not, and why. Stakeholders can also, and should more often, be fruitfully involved in the later stage of the policy cycle, including in particular the monitoring and implementation phases of regulation, and the *ex post* evaluation of regulations (see Box 2.2).

Box 2.2. **The Fresh Produce Consortium's review of regulatory activities in the United Kingdom**

In the United Kingdom, the Fresh Produce Consortium (FPC) is carrying out a review of regulatory activity in England by national regulators and local authorities which affects fresh produce imports. FPC is the United Kingdom's fresh produce trade association, and stands at around 700 members including retailers, distributors, importers, wholesalers, processors, packers, food service and a large number of associated members including freight handling, ports, embassies, laboratories, business solutions, lawyers, packaging, recruitment and trade media. The project will focus on the impact of charges for official controls in relation to EC Regulation 669/2009 implemented by the Food Standards Agency and the Port Health Authorities, including an assessment of additional costs incurred through delays in clearance of highly perishable products.

Source: http://discuss.bis.gov.uk/focusonenforcement/files/2014/07/FPC-Scope-Document.pdf.

Convincing public officials

Competent and committed public officials have shown to be a key ingredient of a successful RIA system: after all, they are the main actors of a RIA system since they draft RIA documents, co-ordinate the drafting of RIAs with various inputs (consultation, external studies, other services) and use the results of the analysis in their final regulatory proposals. And there is more, if one considers that many other public officials can contribute to the success of regulatory reforms, especially the ones involved in the monitoring and implementation phases of the regulation.

Convincing public officials has proven to be far from easy in some countries, and certainly not an instantaneous effort, but rather a continuous endeavour. That said, getting public officials on board can only happen if the following factors are present:

- **A widespread belief that RIA is not a temporary attempt, but is rather "there to stay"**. As explained in more detail in the previous section, government commitment is crucial not only for external stakeholders, but also to generate the right expectations among civil servants, that they need to cope with RIA as it is there to stay, and not a temporary storm. This is why all measures surveyed above, from institutional settings to internal and external constraints, up to constitutional reform, bipartisan consensus and other "irreversible choices" are important to signal to the administration the permanent nature of the attempted reform.
- **No "easy escape" through avoidance tactics, and no legal exceptions to the general rule that RIA is required**. Too many exceptions to the obligation to perform RIA can become an alibi for administrations, whose role could become that of looking for the best excuse to put forward for not carrying out the analysis. In the United States, a rather extensive literature on the practice of "agency avoidance" has emerged over the past years, fostering a lively debate on the need for counter-strategies (Nou, 2013; Bolton et al., 2014; Mendelson and Weiner, 2014; Graham and Liu, 2014; Brito, 2014; Liu, 2014; Butler and Harris, 2014).
- **Adequate training for civil servants** that will potentially be charged with the drafting of RIA documents, as well as to reading it and using it in their daily activities. Skills are essential for RIA: knowing how to draft and also how to read a RIA document is a very challenging activity, which requires good expertise and the ability to communicate and trigger adequate learning. At the same time, training too easily ends up being a one-off experience: training will only become useful to motivate civil servants if they know they will be rewarded to their ability to master RIA in their daily work.
- **Accountability- and performance-oriented arrangements** such as: *i)* making draft RIAs public and subject to public consultation; *ii)* specifying the name of the responsible person for every regulatory proposal that is tabled by government and published online; *iii)* including the evaluation of RIA work as an element in the evaluation of the performance and the determination of productivity of the civil servant; *iv)* specifying that skills in RIA are an element to be considered for career promotion to specific high-responsibility positions in the administration.
- **Governance setting conducive to efficient incentives for all players involved in the RIA system**: in particular, as will be observed in the section "RIA around the world: Developed economies", in addition to external stakeholders that have

access to the RIA document at the right time, it is essential to put in place an oversight body able to scrutinise effectively the content of RIA documents, and is effectively positioned to exercise sufficient influence on the incentives of the civil servants to devote efforts in the drafting of high quality RIAs. In addition, incentives for civil servants can be strengthened through the establishment of a network of other gatekeepers (e.g. Courts of Audits, Congressional offices, the judiciary) that provide immediate or *ex post* assessments of the quality of RIAs (e.g. the European Parliament Research Service, the Government Accountability Office and courts in the United States).

Finally, it must be recalled that countries differ noticeably for hat concerns their ability to attract skilled workforce to public administrations. While many administrations in countries like the United States, the United Kingdom or Australia are able to offer sufficiently attractive contracts to their employees in specialised agencies (e.g. the Environmental Protection Agency in the United States), in many other countries the level of skills available in the administration is not sufficient to ensure the sound application of state-of-the-art economics to outstanding regulatory issues: in this case, depending on budgetary resources, it is essential that civil servants are not only challenged, but also assisted by a dedicated body that concentrates more multi-disciplinary expertise in economics, law, and various technical matters. This might occur in many ways, e.g. through the creation of a roster of external consultants, with whom framework contracts can be established for a specified number of years (e.g. the European Parliament); the possibility to require sophisticated analysis from a public body devoted to research on policy issues in the national interest (e.g. CPB in the Netherlands, WIFO in Austria); or the creation of special high-level units inside government (e.g. to some extent the European Political Strategy Centre and the Joint Research Centre, both created by the European Commission).

Governance: Getting planning and oversight right

Apart from building consensus around the introduction of RIA by showing political commitment and securing backing from stakeholders and public officials, another key element in the design of a successful RIA system is governance. Making the right choices with respect to a number of governance-related aspects is essential to trigger virtuous dynamics and efficient incentives inside government, as already recalled in the previous sections. Typical mistakes that have been made by governments around the world include introducing RIA without a well-established regulatory planning system; implementing RIA "in isolation", without a thorough public management reform and a holistic view of the policy cycle; failing to establish a strong oversight body in the most suitable position within (or outside) the administration; failing to adopt clear objectives and a clear methodology, or adopting a methodology that does not match the corresponding scope; and failing to provide the RIA system with an adequate level of transparency throughout the process, which in turn triggers the administration's accountability.

RIA and regulatory/legislative planning: towards a better understanding of the policy cycle

The first and foremost idea governments should keep in mind when seeking the introduction of RIA, together with the ultimate goal pursued with such introduction, is the need to consider RIA as a key element of a more complex picture, often termed "policy cycle" or, at the OECD level, "regulatory governance cycle" (OECD, 2011). The policy cycle includes both tools for the *ex ante* analysis and for the *ex post* evaluation of public

policies; and both tools for the analysis of the flow of individual policy measures, and the *stock* of the existing corpus of legislation in given sectors.

For what concerns the life of an individual rule, figure 3 below shows both the policy cycle (outer circle) and the cycle of smart regulation tools that accompany each phase (inner circle). As shown in the figure, the outer circle distinguishes between the following phases of the life of a legal rule:

In order to fully map the relationship between regulation and innovation, we rely on a simple conceptualisation of the main phases of EU legislation, which partly echoes the one used by the European Commission, as well as the "ANIME" framework developed (mostly for private regulation) by Abbott and Snidal (2009). We distinguish between:

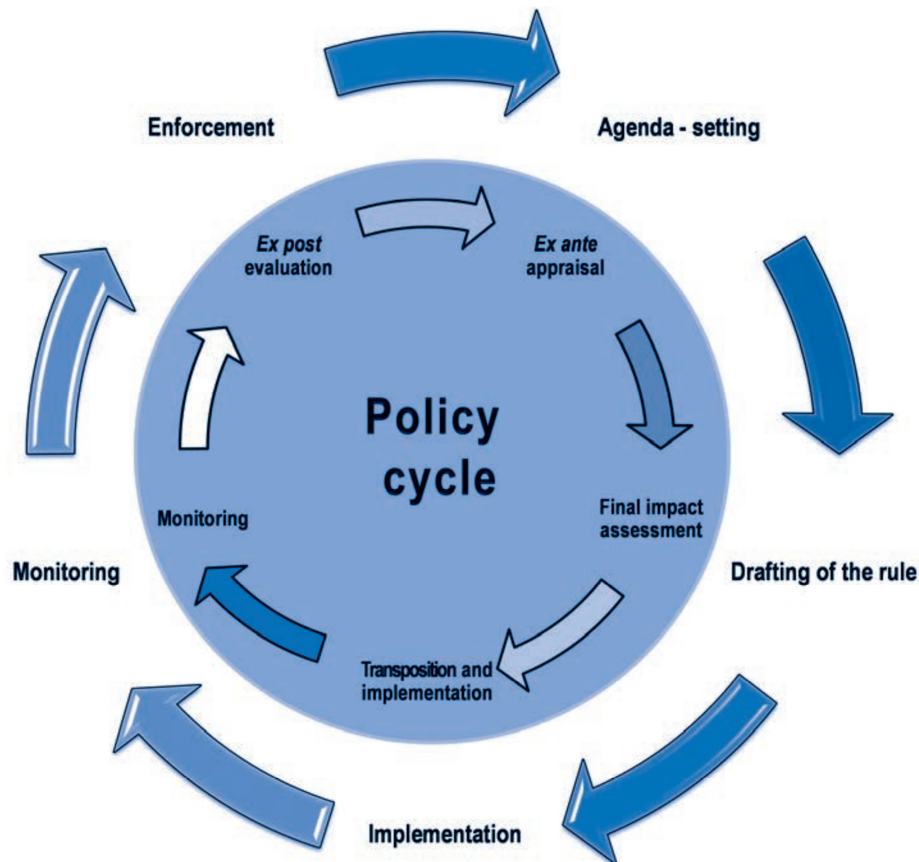
- The **Agenda-Setting** phase of regulation: during this phase, the main preparatory documents are prepared and adopted. This can include "umbrella" regulations (e.g. framework regulations) that are binding, but which still require the adoption of further implementation measures.
- The **implementation** phase can entail the formulation and adoption of secondary legislation measures, in the form of specific regulations, or delegated acts. This phase can typically imply the setting of standards, which might be kept fixed or changed throughout the lifespan of the legal rules. In some cases, depending on the type of regulatory alternative chosen, implementation measures might have to be adopted by private organisations in the execution of a co-regulatory arrangement.
- The **compliance** phase is not a regulatory phase, but rather refers to the set of actions and behaviour that have to be put in place by targeted stakeholders when having to comply with a specific set of rules. As will be illustrated below, different types of regulatory interventions can have a very significant impact on innovation when it comes to compliance.
- The **enforcement** phase refers to the monitoring of compliance with the rules. It often entails the involvement of local administrations, which perform inspections and might impose sanctions for non-compliance. Also this phase can be delegated to specific agencies, or even private parties depending on the type of regulatory approach chosen.

Against this background, a responsive administration performs an *ex ante* RIA of preliminary phases, but also provides for monitoring and evaluation indicators and an *ex post* evaluation, which itself leads to the identification of the need for further action and a new *ex ante* assessment phase.

Awareness of the entirety of the policy cycle is very important for a government that considers the introduction of RIA. In particular:

Too often, governments have started experimenting with RIA by adopting this ex ante procedure as a stand-alone tool, often relying on it as a panacea.[17] The truth is different: RIA should accompany the first steps of the life of a legal rule, and its depth, methodology and degree of confidence in the result should be made dependent on the specifics of the regulatory proposal at hand. As a result, many countries have failed in regulatory reform not because of the bad design of RIA, but due to a lack of co-ordination between the various phases of the policy cycle. Even the best RIA system, in isolation, cannot succeed in making reform happen.

Figure 2.3. **The "policy cycle"**



As the first step in a comprehensive cycle of better regulation tools, RIA cannot be expected to deliver all the answers. To the contrary, depending on the amount of information available and the predictability of regulatory outcomes, governments will have to make decisions as to how much to invest in the *ex ante* analysis, and how much to rely on the monitoring of regulatory outcomes and regulatory review after a number of years. This type of trade-off has remained so far almost ignored in the literature and in the practice of regulatory reform.

It is an emerging good practice, when drafting a RIA document, to include a choice of indicators that will form the basis of a future monitoring and evaluation activity. The European Commission considers this as a standard practice as of today, and even more after 2010, when the concept of "policy cycle" was introduced officially in the EU jargon on smart regulation (European Commission, 2010).

Awareness of the various phases of the life of a legal rule facilitates the decisions by policy makers of which activities to perform publicly, and which ones to delegate to third parties. As already observed above, many governments are relying on self- and co-regulatory practices to address public policy problems, whereas in some cases only specific phases of the life's rule can be delegated (e.g. enforcement, see the example of the UK FPC in Box 2.2 above): this practice can at once save money and lead to better enforcement whenever incentives are well designed.

Awareness of the importance of the policy cycle also allows governments to attribute responsibility to various institutions for different phases of the life of a rule. For example, in the United Kingdom the notion of "delivery" has become gradually more prominent, first with the creation of the Local Better Regulation Office, and then with the Better Regulation Delivery Office. Part of the motivation for this move is the need to focus on the "end of the pipeline", i.e. the moment in which public administrations monitor compliance with legislation, and firms and citizens decide on whether and how to comply with the legal rules. In some countries, monitoring and *ex post* evaluation are performed by Parliament rather than by the government, which creates a potentially virtuous institutional tension towards drafting of rules that are easy to implement and ultimately effective.

Looking at the whole policy cycle, it becomes clear that RIA can only be successful if it is embedded in the cycle, albeit with a prominent role. RIA, as a means to reach an evidence-based decision on possible remedies to an identified policy problem, needs all available information (better if unbiased) and the backing of sufficient competence to organise that information to reach a balanced and effective decision. This is why RIA will on average be of better quality, and will trigger better regulatory outcomes, if it incorporates the results of a sound consultation process, it contains indicators for monitoring the legislation at hand over time, and it carries a "review clause" which sets a timeframe for evaluating the performance of the legislation over time (e.g. after 5 years). This way, RIA becomes a very important piece of a broader puzzle, in which administrations behave responsible in all phases of the policy cycle and learn from possible mistakes in the adoption of policies by reacting promptly to policy failures and communicating to stakeholders the reasons for changes in policy. And as a side effect, RIA is also freed from the image of "panacea", or scientific litmus test, that can predict with high precision the outcomes of a regulatory course of action.

Accounting for diversity in legal systems, finding new means of institutionalisation

The time in which economists looked at legal systems as basically equivalent and drew a line across system to compare specific phenomena without taking into account existing diversity is long gone.[18] Likewise, the time in which a recipe that had worked in one country was thought to be transplantable to another legal system is equally gone. For what concerns RIA, these early elaborations have marked a generation in which governments thought they could easily adopt, say, the US or the Australian RIA models into their systems, pretending it would work exactly in the same way. Today, comparative lawyers have developed refined tools to predict the outcome of legal transplants, and even economists have embraced complexity theory, which moves from the basic assumption that any jurisdiction is a complex ecosystem, in which the success of a reform chiefly depends on the reaction of institutions, organisations, markets and individuals that are strictly interconnected.[19] Scholars such as Claudio Radaelli have devoted significant efforts in sharpening our understanding of the preconditions that have to be met, as well as the underlying mechanisms that are at play, when RIA is introduced in a legal system (see *inter alia*, Radaelli, 2004).

That said, how should governments account for their peculiarities when introducing RIA? Legal systems around the world exhibit a significant degree of diversity, and different levels of readiness to implement a RIA system. Traditionally, for example:

- Civil law countries have experienced more difficulties than common law countries in introducing RIA.
- Presidential systems have succeeded more broadly in introducing RIA compared to parliamentary systems.
- Relatedly, Countries having undergone a public management reform that led civil servants to be more results-oriented and performance-based have shown to possess an advantage with respect to countries where civil servants are essentially "procedure-oriented".
- Countries with more skilled staff in the public administration will have an advantage.
- Countries with a tradition of public consultation (e.g. an administrative law that foresees the publication of draft regulations for consultation) will have an advantage.

How to devise a strategy for countries belonging to those different groups? The advice that can be given to governments considering the introduction of RIA is to: *i)* establish the basic conditions for RIA to work, which do not change significantly across administrations; and then *ii)* start from their own strengths rather than from their own weaknesses.

The basic preconditions for RIA to work, as already mentioned in the previous sections, include legal backing;[20] the introduction of RIA as part of a broader plan for regulatory reform, based on regulatory planning, other better regulation tools and the view of strengthening the "policy cycle"; the adoption of RIA through widespread political consensus, especially if the government is at the end of its mandate and/or under significant pressure or political instability; the attribution of responsibility within government and the management of incentives through the creation of "internal" and "external" constraints to properly manage expectations and trigger the quality of RIA documents; and the investment on skills (see, for more details, the section "Securing political commitment and broad consensus" above).

That said, the remainder of the recipe depends on a government's motivation and underlying political vision, level of skills and resources, the location of skills within (or outside) the administration, the level of consensus among external stakeholders, the existence of a culture of open government within the administration and among stakeholders. Below, those aspects that are related to the overall governance of the system are discussed, with a *caveat*: introducing a RIA system must not be equated with introducing a general obligation to perform cost-benefit analysis on a large scale within government, or to motivate all decisions through CBA. A RIA system, especially at the beginning, might well be limited to motivating (qualitatively) the choice of a given regulatory option over potential alternatives, and doing it publicly at the right time (before the adoption of the legal rule). This is why there are countless paths towards the establishment of a successful RIA system: as diverse as RIA systems are, even more diverse are the paths to each of the variants of RIA available on a global scale.

Getting started with RIA: "Big bang" versus gradual introduction

A typical question that is addressed by governments wishing to introduce RIA is whether the tools should be introduced through a "big bang", "shock therapy" approach; or whether a more gradual introduction is more likely to be successful. This question,

after three decades of experience, appears a bit too simplistic. On the one hand, very few countries, if any, have managed to implement a shock therapy approach. Even the United States, where RIA became adopted in government in 1981 with no experimental period, had undergone a previous period in which a narrower test was applied.[21] Rather, once the basic preconditions are met or at least planned (in particular, strong regulatory planning), there are different possible paths to the gradual introduction of RIA, as described below.

- **A pilot phase, then the institutionalisation of RIA for all regulations**. This has been a largely recurrent way of seeking the introduction of RIA. However, many countries have failed to capitalise on the pilot phase towards a more general application of RIA as a mandatory administrative requirement. Italy is a good example of a country in which the pilot phase, run in 2000-01, has brought no lessons to be learnt, and ended up drowning together with political commitment. In the European Commission, a two-year pilot phase (2003-04) has led to a major reshaping of the methodology in 2005, in 2009 and in 2015, and can be said to have paved the way for the mainstreaming of RIA in the whole administration; the pilot phase, most importantly, has also convinced the Commission that absent an oversight body in charge of quality assurance, the system would never produce desirable results (Renda, 2006; European Court of Auditors, 2010).
- **Starting with the least intrusive methodology, and then expand**. For example, the measurement of administrative burdens through the Standard Cost Model is widely seen as a less intrusive method to assess a specific set of impacts of legislation (see below), since the measurement phase is mostly left to external consultants, and no major revolutions in the administrative culture of civil servants are needed in order to bring clear results. That said, the move from the SCM towards a more complete RIA system might take years and a careful management of expectations inside and outside of the administration. Some countries, such as the Netherlands and Germany, are currently on their way to expanding the SCM to cover compliance costs (in Germany, regulatory costs), and possibly benefits in a not-so-distant future, subject to political agreement. A too quick transition from the SCM to full-fledged RIA in the Netherlands failed due to the lack of consensus and commitment.[22]
- **Starting from some institutions, and then expand RIA to others**. Government might decide to introduce RIA – whether complete or limited to specific tests e.g. administrative burdens – by looking at the administrations in which the most advanced skills and the most concentrated external stakeholders are located. This would typically be a department or minister in charge of business regulation, of retail trade. In some countries (e.g. Italy) an attempt was made to start from independent agencies, although in most cases the attempt backfired (the only exceptions so far, and to a limited extent, being the energy authority and the commission on stock markets, CONSOB). The successful introduction of RIA in one of those authorities, however, does not necessarily lead to an easy expansion of the RIA system to other administrations: here too, the path is often tortuous, and incentives have to be managed carefully, possibly leading to a growing demand for the adoption of RIA based on the observation that the system works well in other ministries. In the United States, a long-standing, lively debate has emerged on the possibility to expand the applicability of RIA beyond government, to cover at least independent agencies, and maybe even Congress.[23]

- **Starting from major regulatory proposals, and then lower the threshold to cover less significant regulations**. The European Commission has launched its RIA system by focusing (after two years of pilot phase, as recalled) on major proposals included in the yearly agenda in the European Commission as subject to mandatory RIA. Recently, however, the system has been extended to cover the thousands of implementing and delegated acts that every year shape the EU *acquis* and make it applicable at the local level.[24] This inverted trend (compared to path 3 above) shows how peculiar can the diffusion of RIA be in a given legal system, and also how dependent on existing political commitment and available skills.

- **Starting with binding regulation and the moving to soft-law.** Some countries have realised after years of implementation of the RIA system that soft law, private standards, self- and co-regulation are sometimes more important that traditional, command and control legislation in terms of impacts on the economy and on the incentives of economic agents. In the United States, recent literature has uncovered that the replacement of federal regulation with soft(er) law has become a widespread practice of "OIRA avoidance": this has led the George W. Bush administration to expand the applicability of RIA also to codes of conduct and other forms of soft law.

- Starting with single- or multi-criteria qualitative analysis, and then gradually moving to quantitative analysis (CBA or other). When a country lacks specific quantitative skills that would enable cost-benefit analysis or similar, this does not mean that no RIA can be introduced, or that RIA will ultimately lose its "scientific" appeal. As a matter of fact, the scientific nature of RIA is highly contestable and challenged in many jurisdictions: this is why adopting a general procedure based on qualitative analysis and requiring administrations to motivate the adoption of a specific course of action as opposed to available alternatives in words or through quali-quantitative analysis (e.g. scorecards) is a very valuable step in the introduction of RIA. With the right governance and institutional settings, the move towards more evidence-based, quantitative analysis (if needed) will be dictated, over time, by the need to make the case for regulation against counter-analyses provided by stakeholders, experts or other institutions.

- **From concentrated RIA expertise to more distributed responsibilities.** An administration might well lack RIA skills, and the gap might be difficult to fill in the short term. That said, many governments can rely on public or private institutions that can assist in the performance of specific calculations, thus supporting regulatory proposals with evidence. The role of the CPB in the Netherlands, of WIFO in Austria, of various research centres in Germany, and of the Joint Research Centre at the EU level (various locations) can be very useful, especially in the first years of implementation of a RIA system. For example, recently the EU Joint research Centre has proposed to create a common baseline scenario for all regulatory proposals, thus lifting the responsibility on other administrations to develop complex forecasts, and promoting consistency in the way the future economic, social and environmental outlook is viewed by different Directorate Generals of the Commission. Likewise, some countries have started piloting RIA by training a limited number of employees in the central oversight body, and have then moved towards the appointment of contact persons or reference units for RIA in each of the departments with regulatory power.

In summary, and more generally, there are many paths towards successful RIA implementation, all of the reasonably gradual, and all disseminated with perils. The key issues are to manage expectations, avoid promising immediate results, and understanding that a cultural shift has to accompany the pervasive introduction of RIA and smart regulation tools in a government administration.

Human resources and skills: adopting viable methodologies in public administrations

Another very important aspect of any strategy to get started with RIA is how to secure the presence of sufficient analytical skills in administrations that will be asked to perform impact analyses. This aspect is so important that some countries have decided to start only from specialised regulatory agencies (even if independent) to ensure that someone inside the administration could be charged with RIA drafting. In many countries, including most notably civil law countries, administrations are dominated by employees with a legal background, and very few employees with advanced university training. This is often the most important constraint on the way towards mainstreaming RIA into the policy cycle. An aggravating factor is the lack of specific skills also outside the administrations. RIA requires an inter-disciplinary set of skills, which in most countries are not directly part of university curricula. This is why relying on academics as external experts has often proven to be insufficient to support government's attempt to introduce RIA. The diffusion of inter-disciplinary law and economics across developed countries has been patchy and often disappointing: in Europe, an enormous gap still remains between theoretical studies in law and economics and practical advice to policy makers seeking help in how to assess the impacts of regulation.

Countries have various options available to strengthen the skills dimension of regulatory reform, and RIA in particular. The first is organising training sessions for civil servants: such sessions normally rely on external expertise and contemplate both front teaching and interactive sessions, in which civil servants are asked to approach a specific policy problem from the perspective of RIA, thus implying problem definition, discussion of potential alternatives, supplication of specific decision-making criteria, etc. However, training sessions are unlikely to be sufficient, given their inevitably short duration and the fact that some of the participants are in most cases unlikely to be given responsibility for the drafting of a RIA more than once in their career. Accordingly, while rotation of personnel inside administrations could in principle bring benefits in terms of knowledge diffusion and "fresh thinking", avoiding excessive rotation can prove essential to consolidate the knowledge accumulated by employees on RIA.

Second, modifying academic curricula to include training on RIA is potentially useful, especially when a country trains its future civil servants through a dedicated school of administration (e.g. the *École nationale d'administration* in France, the *Scuola Nazionale d'Amministrazione* in Italy).

Third, creating inter-disciplinary groups where possible is essential for RIA to be balanced and drafted by people with a diverse range of expertise. Economists or project managers alone might create disasters if they do not co-operate and share their different knowledge and sensitivities.

Fourth, appointing sub-units with RIA expertise within relevant ministries or departments can prove essential, as it concentrates the need for advanced skills in the hands of a few experts per administration. This, in turn, requires that a strong oversight body is able to challenge the results these experts have reached.

Fifth, and similarly, governments can also manage well their human resources by training individual department employees on specific methods, and then establishing, whenever appropriate, inter-service steering groups that can handle, altogether, the regulatory issue from a multi-disciplinary, multi-methodological perspective.

Sixth, asking for help on early RIA work from established consultants or foreign administrations from countries with superior RIA expertise, or from skilled international organisations, could be a successful sort term strategy. The European Parliament Research Service (at that time still called "IMPA Directorate"), for example, has successfully employed this strategy in a recent case in the field of trade policy, by asking as many as four external consultant to support it in its advisory role to the relevant committee in charge of deciding whether, and how, to amend the Commission's original proposal (see European Parliament, 2013). Of course, availability of sufficient budget is essential in this case.

More generally, training and diffusion of skills depends crucially on the type of methodology chosen at the outset. The simpler the methodology, the more linked to the government's own agenda, the easier it will be to establish a good level of knowledge (and knowledge-sharing) between the centre of government and the competent administration.

Finally, governments should recall that two issues are important and should be kept separate: one is how to train civil servants that will have to draft RIA: the other is training civil servants and politicians (or their assistants) on how to "read" a RIA, and when and how to request external expertise if the budget allows.

Publicity: Opening up the government black box

Even the most sophisticated RIA system, applied by the most skilful civil servants, will not lead to desirable outcomes if RIA is not given enough publicity. This is why good regulatory practice, as constantly highlighted and updated by the OECD, places so much emphasis on transparency and consultation practices. More specifically, there are many reasons for linking RIA to a sound, timely and comprehensive consultation process. First, opening up the government's "black box" to collect opinions from stakeholders is often a very good idea: not only external stakeholders can often count on superior information and data availability on the likely impacts of a policy alternative under scrutiny; but prompting external stakeholders with potential alternatives to solve a specific problem is also a way to create that "external constraint" that is essential to pave the way for successful RIA introduction. Second, explaining in a transparent way the rationale behind a specific regulatory decision, and subjecting this provisional choice to consultation, can very often reduce the possibility that an agency is captured by particular interests.

That said, too often consultation is approached my administrations as a formal requirement, the results of which are unlikely to be considered for amending the pre-selected regulatory proposal. This was argued even for the US "notice and comment" procedure, which had a much longer history before the introduction of RIA in 1981; and also for the European Commission's consultations on various documents (Green Papers, White Papers, Communications, etc.) that have for many years left sufficient discretion to European Commission's administrations when deciding whether to take on board any of the submissions.

Available strategies to ensure that consultation can deploy its value for the quality of public decision-making, as well as the consensus on the whole RIA system, are at least three. First, government should consult as early as possible on the content of regulatory proposals to start collecting the views of stakeholders and the risks associated with a specific type of regulatory intervention.

Second, it is essential to differentiate between consultation on the content of the proposal, and consultation on the RIA document itself. Both types of consultation can be very useful, but while the former is more often used in OECD countries, the latter has had a more timid diffusion. Consultation on the draft RIA document is particularly useful since it can focus on the structure of the document, the data used, the alternative options selected, the criteria applied for comparing options, and the overall quality of the analysis adopted to select a specific preferred policy option. It is, in other words, a technical consultation process, rather than a political one, and as such can help administrations collect valuable information and avoiding macroscopic mistakes from the outset. The United States have made consultation on draft RIAs mandatory since 1981, as part of the "notice and comment" procedure already mandated by the 1946 Administrative Procedure Act. The European Commission has recently announced (on 19 May 2015) that it will start drafting "Inception IAs" on major new initiatives, and that it will consult on all elements of the inception IA for a period of 12 weeks (see Renda, 2015). In addition, to facilitate the work of the European Parliament, the Commission will also run an eight-week consultation once it finalises its proposals.

Third, the consultation document should specify which aspects of the proposal (or of the RIA) are considered by the government to be mostly needing input from stakeholders. This can help stakeholders focus on the most relevant questions: however, comments on other aspects of the document and the RIA should also be allowed, provided that they are well motivated.

Fourth, it is important that stakeholders are given sufficient time to respond to the consultation. So-called minimum standards for consultation incorporate most often a minimum length (in weeks). At the EU level, the minimum duration was recently increased to 12 weeks, whereas in the United States the minimum duration for a notice and comment procedure is 30 days, although agencies often allow much longer periods for complex issue.

Fifth, **the government should provide feedback** to each party that submitted its opinion during the consultation, explaining why the comment was/was not taken on board.

Oversight: Internal, external, or both?

Since the late 1990s, OECD reports have stated the importance of linking impact assessment to an oversight body as a key enabler of the success of regulatory impact analysis models.[25] The *Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012) recommends that member countries "establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy, and thereby foster regulatory quality"; and recommends that governments "consider assigning a specific Minister with political responsibility for maintaining and improving the operation of the whole-of-government policy on regulatory quality and to provide leadership and oversight of the regulatory governance process", in particular by monitoring and reporting on the co-ordination of regulatory reform activities across portfolios; reporting on the performance of the

regulatory management system against the intended outcomes; and identifying opportunities for system-wide improvements to regulatory policy settings and regulatory management practices. The OECD also recommends creating the oversight body "close to the centre of government, to ensure that regulation serves whole-of-government policy"; to set forth its authority in mandate, such as statute or executive order, and to make it independent from political influence when exercising its mandate (OECD, 2012). The functions to be played by the regulatory body include quality control (e.g., through the review of the quality of impact assessments and returning proposed rules for which impact assessments are inadequate), examining the potential for regulation to be more effective including promoting the consideration of regulatory measures in areas of policy where regulation is likely to be necessary; contributing to the systematic improvement of the application of regulatory policy; co-ordinating *ex post* evaluation for policy revision and for refinement of *ex ante* methods; and providing training and guidance on impact assessment and strategies for improving regulatory performance. In addition, the *2012 Recommendation on Regulatory Policy and Governance* hints at the need to periodically assess the performance of the oversight body, including its review of impact assessments.

Based on the above, it is possible to state that:[26]

- **The key role of the ROB is to co-ordinate and supervise the effective realisation of the policy cycle**, and its consistency with the overall goals set by government while introducing regulatory reform (be that efficiency, well-being of a more articulated set of policy goals). The more complete the set of instruments in the "inner circle" of the policy cycle, the more comprehensive can the role of the ROB be.
- **In order to fully play this role, a ROB needs to be given a consistent mandate**, which entails a full range of powers to control, supervise and influence the activity of the administrations in charge of policy portfolios. Depending on the circumstances, a veto power on regulatory proposals might not even be needed or relevant, especially if a ROB is located at the centre of government and fully represents the "principal" (for example, OIRA does not have a formal veto power): moral suasion would be strong enough to allow for a more "negotiated" relationship between the ROB and the agencies.
- **The mandate must be accompanied by suitable instruments.** These include, *inter alia*, RIA and related guidance, *ex post* evaluation, recall/recast letters, prompt letters, advocacy powers, powers to request the opinion of other institutions (e.g. the competition authority, an anti-corruption authority, the tax administration), etc. Depending on the cases and on the specific institutional setting, a ROB might be called to act as an "adversarial gatekeeper" or as a more friendly "advisor"; also, some ROBs are asked to play a major role in the performance of policy appraisal and in the co-ordination of consultation, whereas others act as mere supervisors and delegate more smart regulation functions to the individual administrations. At least two possible approaches exist: *i)* a more common system in which the ROB provides an independent assessment on the quality of a regulation either to the regulator directly or to the government in general, and either directly or by publication of its results (probably with a higher persuasive effect under a "name and shame" system); and *ii)* a less recurrent system in which the ROB is granted special powers to enforce either a general or a specific program in the light of its proposed goals, with the consequence that the ROB acts as a gatekeeper with veto powers based on the quality of the regulation

to be assessed.[27] There are countries in which ROBs cannot fully challenge the regulations proposed (e.g., the Japanese MIC).

- **Different roles, mandates and instruments call for different degrees of independence of the ROB**. If smart regulation is implemented as a form of whole-of-government co-ordination, as can be the case mostly in presidential democracies, then the principal-agent scheme requires that the principal exercises its oversight role through a dedicated agency located as close as possible to the centre of government. The more the dominant motivation for regulatory reform becomes the need to enhance stakeholder involvement and government accountability for results, the stronger the incentive to set up a more hybrid or external ROB in charge of ensuring that government action keeps specific interests in the "radar".

- The role, mandate and degree of independence of a ROB determine the choice of where to locate it. Two different choices can be distinguished here:

  – *Where to locate the ROB inside the government administration*. Typically, a ROB can be located in the cabinet office, in the Ministry of Economy/Finance, or in the Ministry of Justice/Law. The choice depends on two major factors: *i)* the administration in which most of the skills and expertise is located; and even more importantly, *ii)* the scope of the oversight activity to be provided and the mandate of the ROB. For example, in some countries like the Netherlands or Italy the Ministry of Finance has traditionally hosted more skilled and also more numerous economists and policy analysts compared to the cabinet office. In the United States, the creation of the OIRA within the OMB has met the resistance of the most skilled (although necessarily specialised) agency, the EPA (see Livermore, 2014). For what concerns the type of oversight, a common trend, *inter alia,* in Central and Eastern Europe has been the decision to focus oversight activities on the quality of the legal drafting (alongside or independently of economic impact analysis), and this has led countries such as Estonia and Ukraine to locate most of the oversight efforts into the Ministry of Justice; at the same time, countries that have almost exclusively focused on monitoring and reducing administrative burdens tend to see a major involvement of the Ministry in charge of business development.

  – *Whether to locate the ROB inside or outside government.* The more regulatory reform is aimed at regulatory coherence and the realisation of the government's agenda for the electoral period, the more likely and appropriate it will be that the oversight body is located inside government. At the same time, there are circumstances in which independent, external bodies could be an appropriate choice, for reasons such as the following: *i)* a parliamentary democracy might locate the oversight body inside the parliament to enhance the scrutiny capacity of the assembly with respect to government's legislative decrees (especially when the scope of smart regulation tools such as RIA includes primary legislation); *ii)* when regulatory oversight is mostly focused on the quality of public spending, it might make sense to empower the audit office or a court of audit; *iii)* when regulatory reform targets a particular group of stakeholders, which is sufficiently concentrated (and/or expected to possess relevant information available to the policy makers), it might make sense to establish a hybrid or a totally external ROB with a more limited

mandate (the UK Regulatory Policy Committee, *Actal*, the *Normenkontrollrat*, the *Regelrådet*, the EU High Level Group on Administrative Burdens, the Australian SBAC, etc.); *iv)* when governments want to signal their commitment to high quality regulatory reform, they may have an incentive to appoint a high-level academic committee in charge of supervising the choices made by government (e.g. a Competitiveness Council like in the United States).

Wiener (2013) summarises the main options by pointing out that ROBs can be appointed: at the center of government in the executive branch (reporting to the President or Prime Minister); as an interagency working group; as an independent government watchdog office, such as an auditor or ombudsman or inspector general; as an external advisory group; as a government ministry for reform of regulation or state reform; as a legislative committee; as a technical body attached to the legislature; in the form of judicial review by the courts; and as external nongovernmental actors such as advocacy groups, think tanks, academic researchers, and the news media (Wiener, 2013).

- The role, mandate, degree of independence and location of a ROB determine its accountability and the mode of evaluation of its performance. Depending on the choices made above, the degree and modes of accountability of a ROB would change significantly. ROBs located at the centre of government and in charge of overseeing full-fledged RIA systems would normally be accountable to the Prime Minister and can be subject to *ex post* evaluation by audit offices (government or judiciary). Ad hoc external bodies that represent specific stakeholders would normally be accountable to their specific constituencies, e.g. SMEs. More generally, accountability can be ensured in two ways: *i)* through transparency, i.e. making the ROB's activities visible to external stakeholders and imposing a motivation for their actions and opinions expressed; and *ii)* through specific evaluation by government or independent bodies. Most often, countries display a combination of the two modes.
- The comprehensiveness of the policy cycle, the complexity of oversight and the need to ensure the achievement of a wide variety of goals can determine the "optimal" number of oversight bodies. Two main factors are at stake here. On the one hand, economies of scale and scope in the performance of oversight functions, the need to reduce transaction costs and the need to ensure an effective principal-agent relationship would call for centralisation of oversight functions in the hands of a single administration. On the other hand, the need for specialised knowledge and the need to secure checks and balances in the performance of oversight and account for specific regulatory outcomes (e.g., protection of SMEs, competition, protection of human rights, sustainable development, etc.) can lead to the appointment of additional bodies empowered with oversight functions, in co-operation or in parallel with the main ROB. Examples of multiple oversight bodies include two main types: *i)* multiple bodies that work "in sequence" in the policy cycle include the IAB and the IMPA Directorate at the EU level (assisting the Commission and later the European Parliament, respectively, during the EU ordinary legislative procedure), and also the BRE and BRDO in the United Kingdom, in charge respectively of policy design and implementation/delivery; *ii)* multiple bodies that work "in parallel", addressing (partly) different aspects of the same regulation: this is the typical case of the interaction between the SBA and OIRA under the Flexibility Act in the United States, and between the IAB of the

European Commission and the High Level group on Administrative Burdens in the European Union.

In the majority of OECD countries, regulatory oversight bodies are placed at the centre of government – in a prime minister's office or a presidential office with some form of interdepartmental co-ordination. Ministries of finance and ministries of justice also play a significant role in hosting these functions (OECD, 2010a). For instance, the Australian Office of Best Practice Regulation (OBPR) recently moved from the Department of Finance and Deregulation to the Department of the Prime Minister and Cabinet. Likewise, the Canadian Regulatory Affairs Sector was also transferred from the Privy Council Office to the Treasury Board Secretariat (a Cabinet Committee of the Queen's Privy Council), which is another central agency in the Centre of Government. In Japan, the Council for Regulatory Reform (established on 23 January 2013) is situated in the Cabinet Office. Likewise, in Korea, the Regulatory Reform Committee is located in the Prime Minister's Office, are both in charge of designing and implementing the whole-of-government regulatory reform plan.

In some countries, ROBs are located in the Economy or Finance Ministry, as it is the case in New Zealand, where the Treasury is responsible for managing and monitoring the regulatory management system, complemented by the work of the Ministry of Business Innovation and Employment, which focuses on the impact of regulation on firms.

The degree of independence of ROBs from the Ministry where they are located, can also diverge. In Mexico, the Federal Commission for Regulatory Improvement (COFEMER), is an autonomous body of the Ministry of Economy with competences to review existing and new regulations and advocate reforms for the whole government, and its Head is appointed directly by the President.

Some other countries, have located ROBs in the Ministry of Justice, giving further emphasis to consistency with legal and constitutional frameworks as well as to legal drafting. This is the case for instance of Canada's Legislative Counsel, which belongs to the Department of Justice and has a broad mandate for conducting an examination of all proposed regulations as regards legal and constitutional consistency.

In Estonia, competences are divided among different ROBs: *inter alia*, the legislative quality division located in Ministry of Justice has broad competences regarding the RIA system; the Strategy Unit, which belongs to the Government Office has co-ordination, reporting and network roles, including to check the quality of RIAs regarding development plans; and the European Secretariat, which also belongs to the Government Office, is responsible for co-ordinating and checking the quality of RIAs in the development of Estonian positions within the EU. In the Netherlands, the Unit for the quality of regulatory policy (WKB) is also located in the Ministry of Justice whereas the Regulatory Burdens Units for businesses and citizens are situated in the Ministry of Economic Affairs (businesses) and Ministry of the Interior (citizens).

As reported above, several factors can affect the decision whether to locate the ROB inside or outside the government, and where exactly in either case. Here too, we will test a number of hypotheses in our cross-country analysis:

- The more a country possesses a whole-of-government strategy encompassing the whole policy cycle, the more likely it will be that the ROB is located at or close to the Centre of Government.

- The more the focus of regulatory reform is on businesses and SMEs, the more likely that the ROB will be located in an economic ministry, or as an ad hoc body (either hybrid or) independent of government;
- The more the focus is on the quality of the legal drafting, the more likely it is that the ROB is located in the Ministry of Justice;
- The more countries focus on primary legislation rather than only on secondary legislation, the more likely it is that the ROB is located outside government.

The key functions and responsibilities of oversight bodies in regulatory policy

The functions and responsibilities attributed to the ROB have to be analysed in terms of their consistency with the overall role and mandate given to the ROB. The table below offers a slightly more articulated list of functions and activities compared to the one identified in previous OECD papers (e.g. Cordova-Novion and Jacobzone, 2011).

Table 2.1. **Main functions of a regulatory oversight body**

Powers/functions	Description (not exhaustive)	Timing
Advocacy	• Participate to the advocacy process by identifying areas in which regulatory reform would be needed. • Issue "prompt letters". • Issue suggestions on the choice of regulatory options to be considered, by promoting the assessment of self-regulatory and other "light touch" options. • Gather opinions from stakeholders on areas in which regulatory costs are excessive and submit them to individual departments/ministries.	Ongoing
Consulting	• Provide assistance to ministries at an early stage of drafting the preliminary and extended impact assessment forms. • Intervene on early drafts by suggesting more in-depth assessment of competitiveness, proportionality, reduction of administrative burdens requirements etc. • Help ministries/departments in performing competition assessments. • Help parliaments in assessing the impact of major amendments to Commission proposals.	Ongoing
Guidance	• Issue guidelines on methodological issues, such as testing the compliance with competitiveness, proportionality, reduction of administrative burdens requirements etc. • Issue guidelines on RIA, *ex post* evaluation, consultation, competition assessment, cumulative/retrospective impacts, etc. • Collaborate with individual ministries in defining sector-specific assessment methodologies and in their periodical reviews.	Periodical
Challenge	• Power to reject/veto proposals not accompanied by a satisfactory assessment. • Power to impose the drafting of an in-depth appraisal if the administration has performed only a preliminary RIA. • Power to impose amendments to the RIA in terms of more extensive stakeholder consultation, screening for administrative costs, proportionality, competitiveness etc. • Power to mandate the calculation of net benefits	When needed

Table 2.1. **Main functions of a regulatory oversight body** (*cont.*)

Powers/functions	Description (not exhaustive)	Timing
Co-ordination	• Co-ordination with other ROBs; • Co-ordination with existing informal stakeholder groups. • Co-ordination with regional ROBs in case of multi-level (federal) governance.	Ongoing
Training	• Organise training sessions for public officials, involving also practitioners and academicians. • Provide training to officials responsible for RIA.	Ongoing
Reporting	• Publish yearly reports on the net benefits of major legislation. • Publish the results of oversight activities on the Internet. • Report on simplification priorities and RIAs/evaluations performed.	Yearly
Institutional relations	• Report to parliament on oversight activities carried out every year and on parliament's request. • Co-operate with other ROBs at the international level and within international fora (e.g. OECD, APEC, etc.).	Periodical

Box 2.3. **Oversight of the RIA system and OIRA in the United States**

In the United States, a degree of oversight on the RIA process is exerted by the CBO through expert reports that look at the activity of specific agencies, for example the EPA (Croot, 1999). More occasionally, the CBO also reviews the functioning of the RIA system in government agencies. For example, in 1997 a comprehensive analysis of the consequences of RIA for the legislative process was carried out (Congressional Budget Office, 1997). Moreover, *ex post* scrutiny is performed by the Government Accountability Office (GAO), which observed that *i)* some administrations have been more collaborative and consultative with agencies, while others have assumed more of a "gatekeeper" role when reviewing agencies' draft regulations; *ii)* despite executive order requirements under successive administrations to improve the timeliness and documentation of OIRA's regulatory review role, GAO identified significant gaps in the transparency of OIRA's involvement in rule making. In addition, GAO raised concerns about the extent to which the cumulative procedural and analytical requirements placed on rule making over the years effectively added value, or instead contributed to the "ossification" of the rule-making process.[1] In addition, according to the GAO several aspects of the OIRA regulatory review process could be more transparent to better allow the public to understand the effects of OIRA's reviews. In particular, the transparency requirements in Executive Order 12 866 applicable to agencies and OIRA could be redefined to include not only the formal review period, but also the informal review period when OIRA says it can have its most important effect on agencies' rules.

The GAO periodically reviews selected rules as regards the appraisal procedure that take place inside the agencies. A recent GAO report issued in April 2009 reviews 139 major rules including 16 case-study rules, and finds that: *i)* OIRA's reviews of agencies' draft rules often resulted in changes (of 12 case-study rules subject to OIRA review, 10 resulted in changes, about half of which included changes to the regulatory text); *ii)* Agencies used various methods to document OIRA's reviews, which generally met disclosure requirements, but the transparency of this documentation could be improved; *iii)* out of eight prior GAO recommendations to improve the transparency OIRA has implemented only one—to clarify information posted about meetings with outside parties regarding draft rules under OIRA review (see United States Government Accountability Office, 2009).

Box 2.3. **Oversight of the RIA system and OIRA in the United States** (*cont.*)

The Courts have played a special role in the process of learning by clarifying principles of risk regulation and by developing jurisprudence on risk regulation (Majone, 2002, Vogel, 2003). Although RIA and risk regulation are not the same, it is important to stress that the progress made in relation to issues such as uncertainty, the level of protection, risk-risk analysis, and proportionality in risk reduction have been made because of judicial review and the very active role played by courts. The courts have in fact used the review of agencies' rule to make the principles and practices of risk assessment more explicit and more rigorous.

In the past decades, federal courts have clearly moved from an initial reluctance to accept cost-benefit analysis by federal agencies to an increased recognition of the need for sound *ex ante* assessment of costs and benefits aimed at motivating the need to regulate and the choice of the regulatory option. E.A. Posner (2001) quotes cases such as *American Trucking Associations, Inc, v EPA*[2] – in which the D.C. Circuit called on the Environmental Protection Agency (EPA) to provide a quantitative justification of the regulation if it wanted to regulate particulate matter pollution – and *Corrosion Proof Fittings v EPA*[3] – in which the Fifth Circuit heavily criticised the EPA's cost-benefit analysis on the merit.[4]

The relevance and desirability of the judicial review of agency rulemaking has been subject to a lively debate in the United States, not limited to benefit-cost analysis but, even more hectically, in the domain of risk assessment and the use of scientific evidence in support of regulatory decisions. According to some authors, the prospect of transparency (through notice and comment) and subsequent review in court transforms the RIA document into a double-edged sword for regulatory agencies, as the document itself may serve as a basis for litigation at a later stage (Wagner, 2009). Likewise, other authors have expressed doubts on the courts' ability to scrutinise technical documents such as RIAs, and pointed at an overly strict interpretation of cost-benefit requirements as having caused suboptimal regulatory decisions and too strict standards in regulation in a number of occasions (see, *inter alia,* Pierce, 1991).

1. GAO-07-791, GAO-05-939T. On the concept of "ossification" of rule making, see McGarity, T.O. (1997), "The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld", *Texas Law Review*, Vol. 75, Issue 3, p. 525 and pp. 528−36; Seidenfeld, M. (1997), "Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking", *Texas Law Review*, Vol. 75 p. 483-490; Pierce, Jr., R.J. (1995), "Seven Ways to Deossify Agency Rulemaking", *Administrative Law Review*, Vol. 47, p. 59, pp. 60−62; McGarity, T.O. (1992), "Some Thoughts on 'Deossifying' the Rulemaking Process", *Duke Law Journal*, Vol. 41, p. 1385, pp. 1385−86.

2. 175 F3d 1027 (DC Cir 1999), reviewed in part by *Whitman v American Trucking Associations*, Inc, 2001 U.S. LEXIS 1952.

3. 947 F2d 1201 (5th Cir 1991).

4. See Posner (2001), stating *inter alia* that the EPA had discounted costs but not benefits, had used inconsistent valuations for statistical lives, refused to quantify certain benefits, refused to repeat the analysis with better data supplied by industry, etc.

Source: Croot, T. (1999), "Cost-Benefit Analysis of EPA Regulations: An Overview", CRS Report for Congress, RL30326; Congressional Budget Office (1997), "Regulatory Impact Analysis: Costs At Selected Agencies and Implications for the Legislative Process", *CBO Papers*; Posner, E.A. (2001), "Controlling Agencies with Cost-benefit Analysis: A Positive Political Theory Perspective", *University of Chicago Law Review*, Vol. 68; Wagner, W.E. (2009), "The CAIR RIA: Advocacy Dressed Up as Policy Analysis", Chapter 4, in Harrington, W., L. Heinzerling and R. Morgenstern (eds.) (2009), *Reforming Regulatory Impact Analysis*, Resources for the Future Report, Washington D.C.; Pierce, Jr., R. J. (1991), "The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s", *Administrative Law Review*, Vol. 43, No. 1, p. 7.

RIA and policy goals: Building ad hoc indicators to align smart regulation with the government agenda

The final challenge of designing and launching a RIA system is at once a fundamental one, and a fairly under-researched one. It is the challenge of understanding how to launch a RIA system as a tool for policy coherence, rather than a tool to devise efficiency-enhancing solutions only. Although coherence has always been a concern of governments that launched RIA (e.g. the US government established OIRA, as already recalled, also to trigger consistency with Presidential priorities), in some cases policy goals require specific choice to be made to adapt the RIA system to the political setting in which government plans to make use of it.

Box 2.4. **Ecuador and the *Plan Nacional para el Buen Vivir***

One very good example, although from a non-OECD country, is Ecuador. This country, governed since 2007 by socialist-oriented President Rafael Correa (who is also an economist), has launched since the very outset a national plan for the "good living" (*Buen Vivir* in Spanish; *Sumak Kawsay* in Quichua) articulated along 12 different objectives of an economic social and environmental nature, and backed by hundreds of indicators that allow, in principle, the monitoring and tracking of progress towards the achievement of the plan's objective by 2017, and later up to 2033.

However, the Ecuadorian government had not, initially, thought of how to ensure that all administrations, central, provincial and local, would pursue a consistent plan when proposing regulation. To the contrary, the overlap between institutions with similar portfolios in key sectors of the economy such as network industries (e.g. telecoms, water, energy, postal services) determined a lack of accountability and a great deal of legal uncertainty.

This is why the Ecuadorian government decided to launch a RIA system in support of well-being. The RIA system that is being launched during 2015 does not foresee the systematic use of cost-benefit analysis. To the contrary, high-level government representatives have clarified at the outset that Ecuador's economic policy and public investment will not be evaluated through a monetisation of costs and benefits. The government guidelines on the evaluation of regulation and public expenditure clarify that "the efficiency of regulations and all measures adopted to pursue the Good Living require that the exclusive reliance monetisation as a measurement technique be abandoned" (see Government of Equador, 2014). That said, administrations will be required to justify regulation, not on the basis of net benefits or a US-like rule that benefits should "justify costs": to the contrary, administrations should prove that the proposed regulation fosters one of the 12 objectives of the *Buen Vivir*, without compromising other objectives: and, after having identified the sub-indicators that would be involved by the proposal, they will also have to demonstrate, even if qualitatively, that there is no alternative policy option that could prove more effective in realising the objectives of the Plan.

With such an approach, depending on the specific context, it could become much more difficult to defend the recurrent statement, based on which "RIA does not replace the role of the policy maker". Such statement can appear logical when RIA is based on cost-benefit analysis; however, when RIA is based on a multi-criteria analysis that represents government priorities, deviating from its results might prove way more difficult for the political actor. At the same time, governments that have committed to the fulfilment of a set of outcomes would be able to manage transition and track progress towards success more easily. Such an approach recently led the Ecuadorian government's national secretariat for planning and development (SENPLADES) to publish a yearly progress report on all objectives of the Plan, such that monitoring becomes more effective and potential adjustments and government counter-strategies can be devised in due time.

Source: Government of Ecuador (2014), "Lineamientos para la inversión de los recursos públicos y la regulación económica", www.buenvivir.gob.ec/lineamientos-para-la-inversion-de-los-recursos-publicos-y-la-regulacion-economica.

More generally, it appears increasingly clear that legal systems that want to use RIA either *i)* outside the boundaries of government, or *ii)* to pursue non-efficiency related goals, will have to depart from the typical structure of RIA as designed in the United States, in Australia and in many other legal systems. It also becomes clear that some executives that have decided to expand the scope of RIA, but have kept cost-benefit analysis based on monetary values as the key pillar of analysis, might have gotten it wrong since the beginning. The section "From cost-benefit analysis to awareness of costs and benefits in multi-criteria analysis: a map of regulatory impacts" below goes back to this issue, discussing potential departures from the typical array of tools and methods that are offered to governments wishing to introduce RIA as a tool for regulatory quality and coherence.

Section 3. Main findings

- The successful introduction of RIA chiefly depends on the level of commitment expressed by political leaders, coupled with support from stakeholders and adequate incentives for public officials.
- RIA must be seen as a key element of a broader "policy cycle", which includes tools for the *ex ante* analysis and for the *ex post* evaluation of public policies; and both tools for the analysis of the flow of individual policy measures, and the *stock* of existing legislation.
- Legal peculiarities and traditions must be taken into account when introducing RIA. That said, very few countries have managed to implement a "shock therapy" approach in introducing RIA. A gradual introduction appears more suited, and can occur through a variety of strategies.
- Involving stakeholders is essential, especially through public consultation. Governments should consult as early as possible on the content of regulatory proposals, and also on the RIA document itself. Stakeholders are given sufficient time to respond to the consultation, and governments should provide feedback to each party that submitted an opinion.
- Getting governance right is essential. In particular, Based on the above, Regulatory Oversight Bodies (ROBs) play a key role in co-ordinating and supervising the effective realisation of the policy cycle. They should be given a consistent mandate, accompanied by suitable powers and instruments.
- Different roles, mandates and instruments call for different degrees of independence of the ROB. The role, mandate and degree of independence of a ROB determine the choice of where to locate it. Finally, the role, mandate, degree of independence and location of a ROB determine its accountability and the mode of evaluation of its performance.

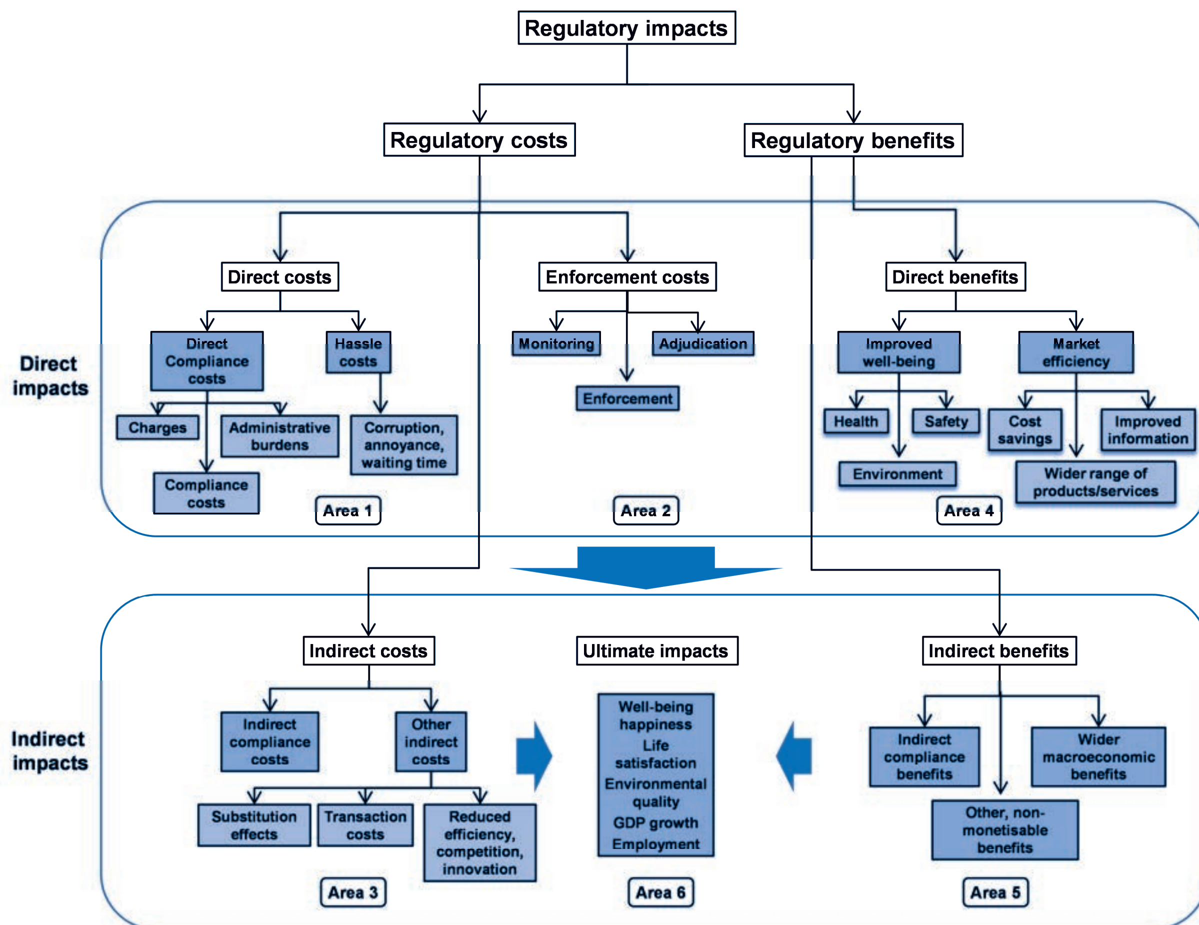
Challenges in running a RIA system, and possible solutions

This section looks at the challenges that emerge, for governments, once the RIA system has been put in place. Obviously, there will be a degree of overlap between the early and subsequent challenges that present themselves: inevitably, every time governments fail to adequately address the mix of challenges that already present themselves at the outset, such challenges will re-present themselves at a later stage, possibly even bigger and more challenging to address for governments.

Below, we distinguish between methodological challenges and governance challenges, although the reader will notice some overlaps with the previous sections. The key methodological challenges that can be identified with respect to the daily activities in running a RIA system include the choice of the best methodology to apply to individual regulatory problems, and how to improve the analysis of individual behaviour in response to specific regulatory interventions. It is important to observe, at this stage, that despite the fact that cost-benefit analysis seems to have lost part of its appeal to policy makers, especially if focused more on well-being than growth, this does not mean that administrations should not be aware of all the potential direct and indirect impacts that a regulation can produce. At the same time, preserving a comprehensive understanding of all costs and benefits that might emerge at the various phases of the life of a legal rule is important to find out whether a specific regulatory alternative is to be preferred to another.

From cost-benefit analysis to awareness of costs and benefits in multi-criteria analysis: A map of regulatory impacts

Figure 2.4. **A map of regulatory costs and benefits**



Source: Renda, A., G. Luchetta, L. Schrefler and R. Zavatta (2014), "Assessing the Costs and Benefits of Regulation", Study for the European Commission's Secretariat General.

Regardless of whether RIA is eventually based on CBA or not, it is always essential to identify all relevant direct and indirect costs and benefits that would emerge if the available regulatory options are implemented. This can enable a more meaningful comparison of regulatory options. Figure 2.4 below shows a general map of the impacts generated by legal rules. This map is intended for ease of visualisation of the full landscape of regulatory impacts: as such, it should be taken as a tentative exercise, not as an attempt to establish once and for all the categories of costs and benefits that can emerge from regulation (as a matter of fact, guidance documents on impact assessment and cost-benefit analysis from all over the world show different taxonomies and typologies of costs and benefits).

As shown in the figure, legislation normally produces both direct and indirect impacts, which in turn can generate second-order effects ("ultimate impacts"). More in detail, Figure 2.4 above highlights six main areas of regulatory impacts. For what concerns costs:

- ***Area 1 includes direct costs from regulation (DC)***, such as direct compliance costs and hassle/irritation burdens.
  - Direct compliance costs include:
    - Regulatory charges, which include fees (such as spectrum and licensing), levies (e.g. copyright levies), taxes, etc.
    - Substantive compliance costs, which encompass those investments and expenses that are faced by businesses and citizens in order to comply with substantive obligations or requirements contained in a legal rule (e.g. the need to install new equipment to avoid interference between co-primary uses of the 700 MHz band); and
    - Administrative burdens are those costs borne by businesses, citizens, civil society organisations and public authorities as a result of administrative activities performed to comply with information obligations included in legal rules (e.g. keeping records of security incidents and notify each breach of security to public authorities).
  - *Hassle costs* are often associated with businesses, but they apply equally well to consumers: they include costs associated with waiting time and delays, redundant legal provisions, corruption etc.
- ***Area 2 refers to enforcement costs (EC)***. These costs are often downplayed in *ex ante* RIA. They refer to key phases of a rule's life such as monitoring, enforcement and adjudication. They include costs related to dispute resolution, litigation, appeals, government inspections, etc.
- ***Area 3 encompasses indirect regulatory costs (IC)***, which refer to costs incurred in related markets or experienced by consumers, government agencies or other stakeholders that are not under the direct scope of the regulation. These costs are usually transmitted through changes in the prices and/or availability and /or quality of the goods or services produced in the regulated sector. Changes in these prices then ripple through the rest of the economy, causing prices in other sectors to rise or fall and ultimately affecting the welfare of consumers.[28] This costs also include the so-called "indirect compliance costs" (i.e. cost related to the fact that other stakeholders have to comply with legislation) and costs related to

substitution (e.g. reliance on alternative sources of supply), transaction costs and negative impacts on market functioning such as reduced competition or market access, or reduced innovation or investment. For example, if a given auction design generates costs for telecom operators, which are likely to be passed-on downstream in the form of higher retail prices for consumers, this should be counted as an indirect regulatory cost.

Performing an *ex ante* RIA requires constant awareness of the fact that total costs arising from a given regulation are given by the following sum: (**DC** + **IC** + **EC**). Any assessment that partly or fully, intentionally or inadvertently omits the analysis of one or more of these categories of costs is likely to provide an incomplete, and thus inaccurate account of the costs generated by the legal rule.

For what concerns benefits, Renda et al. (2014) suggest the following categorisation:

- ***Area 4 includes direct regulatory benefits***. Here, the following categories of benefits can be distinguished:
  - The improvement of the well-being of individuals, which in turn encompasses social and economic condition as well as health, environmental and safety improvements; and
  - Efficiency improvements, which include, notably, cost savings but also information availability and enhanced product and service variety for end consumers, and greater productivity (as is often the case when a proposal generated enhanced access to, and usage of, ICT).
- ***Area 5 includes indirect regulatory benefits***, which encompass:
  - Spillover effects related to third-party compliance with legal rules (so-called "*indirect compliance benefits*");
  - *Wider macroeconomic benefits*, including GDP improvements, productivity enhancements, greater employment rates, etc.; and
  - O*ther non-monetisable benefits*, such as protection of fundamental rights, social cohesion, international and national stability, etc.
- ***Area 6 contains a list of "ultimate impacts" of regulation***, which overlap with the ultimate goals of regulatory intervention: even if some regulations directly aim at achieving these benefits (in which case, we would include them in Area 4), normally all regulations aim, as an ultimate impact at achieving some advancement in social welfare, which can be described in terms of efficiency or in others terms: these ultimate impacts encompass well-being, happiness and life satisfaction, environmental quality, and more economic goals such as GDP growth and employment. This area lies at the intersection between regulatory impacts and regulatory goals. It is important to highlight it in a visual representation of regulatory impacts for at least two main reasons. First, while the first applications of cost-benefit analysis to legal rules (as in the US RIA system) chiefly looked at efficiency and thus at the calculation of net benefits for the justification of action in regulation, many governments today adopt a wider variety of regulatory goals when regulating, which leads to the measurement of distributional effects and, more generally, at more subjective outcomes such as life satisfaction. Second, a number of methods are being developed to track directly the ultimate impact of a given future state of the world (e.g. life

satisfaction), rather than developing the analysis from the comparison of costs and benefits. These approaches (often termed "measurement of subjective well-being", or "happiness metrics") try to avoid some of the methodological shortcomings of neoclassical cost-benefit analysis to measure: among others, an important feature of these methods is that instead of relying on income as a proxy of happiness, they try to measure the latter directly (Renda, 2011; Fujiwara and Campbell, 2011). The availability of broadband for all citizens, for example, can generate impacts in terms of life satisfaction, due to the elimination of administrative burdens and to enhanced possibility of communication. The transition towards tele-work is another good example, as it leads to enhanced possibilities for those wishing to enjoy family life and reconcile it with working duties.

Box 2.5. **Why all costs should be considered in a RIA**

Performing an *ex ante* RIA requires constant awareness of the fact that total costs arising from a given regulation are given by the following sum.

Total cost of a regulation : DC + IC + EC

Any assessment that partly or fully, intentionally or inadvertently omits the analysis of one or more of these categories of costs is likely to provide an incomplete, and thus inaccurate account of the costs generated by a legal rule. The reason is easily explained: imagine that in the assessment of proposal x, option A features a direct cost of USD 500, indirect costs of USD 2 500 and enforcement costs of USD4 000, whereas option B has a direct cost of USD 750, indirect costs of USD 1 500 and enforcement costs of USD 6 000. This is typically the case whenever one option (in this case, A) is more demanding on businesses to produce information, whereas the other tasks public authorities with more fact-finding. Assume, further, that the level of benefits reached by the two options is the same. In this case, as shown in Table 2.2 below, if one looks only at direct costs the preferred option would be A. However, if one considers direct and indirect costs, but not enforcement costs, then the preferred option would be B. And if one looks at the full picture, the preferred option would be again A. In addition, it must be noted that, should direct and indirect costs fall on different stakeholders, say consumers (direct costs) and industry (indirect costs), the choice of option A or B would matter also in terms of distributional impacts: the former affects consumers less than the latter, and industry more than the latter.

Table 2.2. **Types of costs and regulatory options: An example**

	Direct costs	Indirect costs	Enforcement costs	Total costs
Option A	0.5	2.5	4	7
Option B	0.75	1.5	6	8.25

Source: Author's calculations.

Types of regulatory costs

This section introduces a taxonomy of regulatory costs that the author developed for the European Commission in 2014, and was later introduced in the new EU Better Regulation Guidelines adopted on 19 May 2015. This taxonomy is broadly consistent

with previous work done by the OECD (2014a). A cost can be defined as "any item that makes someone worse-off, or reduces a person's well-being", and as such includes also those opportunities that are forgone because a particular policy measure has been implemented (Renda, 2011; Fujiwara and Campbell, 2011). The practice of impact assessment entails the use of a number of different cost concepts. Of these, as suggested by several authorities around the world, the most comprehensive measure is that of "social cost", intended as a reduction of social welfare arising as a consequence of a legal rule. Simply put, social cost represents "the total burden that a regulation will impose on the economy" and is defined as "the sum of all opportunity costs incurred as a result of a regulation", where an opportunity cost is the value lost to society of any goods and services that will not be produced and consumed as a result of a regulation (United States Environmental Protection Agency, 2010).

To be complete, an estimate of costs should include both the opportunity costs of current consumption that will be foregone as a result of the regulation, and the losses that may result if the regulation reduces capital investment and thus future consumption. The strong focus of impact assessment on the concept of opportunity cost is explained by the fact that the ultimate impact of policies should be measured based on individuals' well-being: and the latter depends also on foregone opportunities.

Moreover, it must be recalled that all costs generated by a new legal provision (just like benefits) are by definition incremental costs, i.e. they are additional with respect to the existing situation, as well as additional to the costs that would emerge absent legislative intervention. This means that all costs considered for the purposes of an impact assessment should exclude the so-called "business as usual" (BAU) costs, i.e. those costs that would materialise anyway, even in absence of a new policy measure.

Typically, costs can be distinguished based on various parameters:

- The type of cost per se (administrative, compliance costs, charges, non-monetary costs).
- The relation between the legislative act and the cost considered (direct and indirect costs).
- The frequency of occurrence of the costs (one-off costs, and recurring costs).
- The degree of certainty of the costs (costs v. risks).
- The nature of the addressee/target of the costs (businesses, citizens/consumers, public authorities, third country actors, etc.).
- Whether then cay be described as economic, social or environmental costs.

As explained above, direct costs can be broken down into compliance costs and hassle costs. Below, we describe more in detail each of those types of costs.

Compliance costs

Compliance costs are often the bulk of all direct costs generated by legislation: over time, they have become the subject of specific assessment methods in various countries (e.g. Netherlands, Germany). Within this category, it is possible to distinguish between direct charges, substantive compliance costs, and administrative burdens.

Charges

Regulation often affects businesses and consumers by imposing the payment of fees, levies, or taxes on certain stakeholders. These costs are often easy to calculate, as their extent is by definition known. What is sometimes more difficult to assess is who will bear those costs, as this might depend on the extent to which these costs are passed-on to entities other than those targeted by the legal rule. For example, copyright levies might be passed-on downstream on end consumers in the form of higher prices for certain hardware devices.

Substantive compliance costs

Regulation normally also entails less explicit costs than direct charges. This is the case of substantive compliance costs which emerge as a result of "obligations" included in legislation, defined as "individual provisions inducing direct changes in costs, time expenditure or both for its addressees", which "oblige addressees to comply with certain objectives or orders, or to refrain from certain actions", or also "demand co-operation with third parties or to monitor and control conditions, actions, figures or types of behaviour (Federal Government of Germany, *Normenkontrollrat* and Destatis, 2012, p. 8).

Compliance costs can be further broken down into the following categories:

- ***One-off costs***: these are faced by actors targeted by regulation since they have to adjust and adapt to the changes legal rule. For example, if a new environmental standard imposes the use of new equipment, the purchase of such new equipment would be needed immediately after the legal rule enters into force. Also, personnel will have to be re-trained as a result of the changes legal regime. All these costs are not likely to be borne by the targeted stakeholder on a regular basis in the future: to the contrary, they occur only once, after the entry into force of the new regulation.
- ***Recurrent costs****:* these are those types of substantive compliance costs that are sustained by the targeted stakeholders on a regular basis as a result of the existence of a legal rule that imposes specific periodic behaviours. For example, if a new regulation imposes the periodical re-training of employees in a specific economic sector (e.g. hospitals, schools), then the cost of training courses and the opportunity cost (see below) of the time spent by employees being trained will become a regular cost. Similarly, if a new regulation imposes the periodical roadworthiness tests for cars, mandating that they take place every second year after the purchase of the vehicle, the cost of the test for the car owner becomes a periodical compliance cost.

Compliance costs are most often calculated as a sum of capital costs, financial costs and operating costs.

- ***Capital costs (CAPEX)*** occur when a company acquires or upgrades physical assets such as property, industrial buildings or equipment. This type of outlay is made by companies to maintain or increase the scope of their operations. These expenditures can include everything from repairing a roof to building a brand new factory. Once the asset is in place, capital costs generally do not change with the level of activity and are thus functionally equivalent to "fixed costs". In cost-

benefit analysis, capital costs are usually "annualised" over the period of the useful life of the equipment.

- ***Operating and maintenance costs (OPEX)*** include annual expenditures on salaries and wages, energy inputs, materials and supplies, purchased services, and maintenance of equipment. They are functionally equivalent to "variable costs."
- ***Financial costs*** are costs related to the financing of investment, and are thus normally considered in relation to CAPEX. However, they can also emerge with respect to OPEX whenever a new legal provision changes the structure of the working capital.

Administrative burdens

Administrative burdens are those costs borne by businesses, citizens, civil society organisations and public authorities as a result of administrative activities performed to comply with information obligations included in legal rules. More specifically, administrative burdens are the part of administrative costs which is caused by regulatory requirements: accordingly, they do not include so-called "BAU costs", i.e. costs that would emerge also in absence of regulation.

"Hassle" or "irritation" costs

Often linked to administrative burdens measurements, irritation costs are a residual category of direct cost, which is more difficult to quantify or monetise, and also difficult to relate to a specific information obligation. These are more subjectively felt costs that are related to the overlapping of regulatory requirements on specific entities, be they citizens or businesses. By definition, these costs are important for subjective well-being, but very difficult to quantify or monetise (as such, they are kept as a separate, qualitative item in administrative burdens or compliance cost measurement, e.g. in the Netherlands). Hassle costs can include costs related to administrative delays (when not directly attributable to an information obligation) and relatedly, the opportunity cost of waiting time when dealing with administrative or litigation procedures. At the same time, irritation burdens are often accounted for in the measurement of administrative burdens (although they are normally not quantified) whenever they are related to specific information obligations, and especially in case of overlaps, redundancies or even worse inconsistencies between legislative provisions.

Indirect costs

Indirect costs are costs incurred in related markets or experienced by consumers, government agencies or other stakeholders that are not under the direct scope of the regulation. These costs are transmitted through changes in the prices, availability and/or quality of the goods or services produced in the regulated sector. Major indirect costs include indirect compliance costs such as regulation-induced price increases, quality/availability reductions and other, negative impacts related to the fact that someone other than the entity at hand is complying with legislation; increased transaction costs; and also other, secondary costs that include unintended effects, "risk/risk trade-offs", etc.[29]

Indirect compliance costs

Indirect compliance costs arise to a given agent due to the fact that other agents comply with legislation. This type of indirect costs is usually transmitted through changes in the prices of the goods or services produced in the regulated sector. Changes in these prices then ripple through the rest of the economy, causing prices in other sectors to rise or fall and ultimately affecting the welfare of consumers. Government entities can also incur indirect compliance costs. For example, if the tax base changes due to the exit of firms from an industry, revenues from taxes or fees may decline. One example of indirect compliance cost is found in heavy industries such as steel and aluminium: there, the cost of electricity supply for producers is significantly high – among many other factors – also since price levels incorporate the cost of emission allowances purchased by electricity companies in order to be able to generate electricity: in a recent report on the aluminium industry led by CEPS (2014), these indirect costs were estimated at approximately EUR 60/tonne, i.e. approximately 45% of regulatory costs for aluminium producers (Renda et al., 2013).

Other indirect costs

Other types of indirect costs, often termed “secondary costs”, are in most cases difficult to typify since they are inherently specific to the case at hand. Below, we offer a description of some common types of costs that arise are as a result of regulatory intervention, with no ambition to be exhaustive.

Substitution effects

Regulation will often cause people to change their behaviour, and it is crucial that policy makers understand and anticipate these changes. If regulation results in an increase in the price of a product (for example, by increasing product standards), people will usually respond by buying less of that product and switching instead to other substitute goods. Such substitution activity reduces the costs in utility terms to consumers, at least in the first instance. However, substitution effects may also create unintended problems. For example reducing the risks in one area may create higher risks in another.

An example of this is increasing the stringency of airline safety regulation. Such an action can be expected to reduce the number of deaths due to plane crashes. However, it will also increase the cost of flights. This increase in the cost of flights will cause some people to decide that they can no longer afford to fly and to drive to their destination instead. However, because car travel is much less safe than air travel, the increase in the number of road crash victims may well be greater than the reduction in air crash victims.

Because of the importance of these substitution effects in determining the overall impact of the regulation, officers in charge of an impact assessment should try to identify likely changes of this sort and estimate how significant these changes are likely to be, before they draw any conclusion as regards the effectiveness of the regulatory options they are assessing.

Transaction costs

Transaction costs are the costs associated with transactions between individuals on the marketplace. The smaller the amount of transaction costs, the more market exchanges are considered to be potentially efficient. Accordingly, some scholars have advocated in the past that the role of government regulation is essentially that of facilitating market transactions by minimising the impact of transaction costs (the so-called “Coase

theorem”). Today, the vision of the role of government is more articulated, but it can still be argued that, other things being equal, regulation that reduces transaction costs is likely to increase efficiency.

Transaction costs relate to many different aspects of a transaction: from the search of a counter-party to the acquisition of information related to the transaction, to the opportunity cost of the time spent negotiating the agreement, the costs related to the strategic behaviour of the parties in a contract, etc. Whenever a policy option affects these variables by increasing the cost of identifying counter-parties and negotiating with them, the possible inefficiencies generated by transaction costs have to be taken into account.

Transaction costs are often downplayed or even neglected in the analysis of regulatory costs, also due to the difficulty of calculating them. In most cases, the measurement of transaction costs can take place only through approximations such as the opportunity cost of time spent performing given activities (e.g. looking for a counter-party); or through losses of surplus and welfare associated with the dissipation of resources (e.g. in the case of strategic behaviour).

Reduced competition and inefficient resource allocation

Some regulations can reduce the amount of competition in markets, thus affecting the efficiency of resource allocation. This is a particularly important cost impact. For example, regulation can reduce competition by:

- *Making it more difficult for new competitors to enter the market*, by creating regulatory requirements that are difficult for them to meet or simply discouraging entry by artificially reducing the profitability of a given market.
- *Preventing firms from competing aggressively* – for example by setting rules that reduce price competition or restrict advertising (e.g. rules that prohibit sales below cost, or set minimum prices); or depriving market players of their minimum efficient scale by imposing market fragmentation.
- *Inducing collusion*, by making it easier for market players to co-ordinate their strategies, e.g. through increased market transparency, imposed price changes, mandatory standard adoption, etc.

Reduced market access

Certain regulations might also have, as an indirect negative impact, the loss of market access opportunities for both consumers and businesses. For example, practices and conducts such as the abuse of economic dependence can reduce the possibility, for small suppliers, to have their products distributed by large supermarket chains: the weaker bargaining position of these players vis-à-vis large retailers might lead to a loss of market access for them, and a consequent loss of product variety for consumers. These behaviours are normally not tackled by competition law, but several Member States of the European Union have regulation in place to avoid that smaller market players are harmed by the superior bargaining strength of their counter-parties.

Reduced investment and innovation

In addition to reducing allocative efficiency, regulation can also reduce dynamic efficiency – i.e. the ability of the economy to grow and innovate in the longer term – by reducing incentives to invest in research and development or, more generally incentives to produce innovative products. A typical example can be found in network industries, in

which access policies can be ill designed causing a reduction of incentives to invest in infrastructure for the incumbent players, and sometimes a reduced incentive to invest in new infrastructure for new entrants, thus reducing dynamic efficiency in the market.

Uncertainty and investment

A related negative impact that might emerge as a result of regulation is regulatory or legal uncertainty, which might affect expectations as regards return on investment, and as such limit the extent of investment in the economy. In this respect, too frequent changes in legislation can generate uncertainty among investors, thus either discouraging them altogether from investing in a given country/sector, or inducing them to postpone their investment to a later date.

Enforcement costs

Legal rules have to be monitored and enforced to be effective. And, when controversies arise, courts have to solve them speedily and consistently for a rule to be reliable and effective. Depending on the type of rule and the regulatory option chosen, enforcement might be very cheap or very costly for public authorities. Consider the examples below:

- Speed limits enforced via street police require a lot of policemen on the road. The use of cameras and centralised control from police stations reduces the cost of enforcement by replacing the cost of street police with a one-off cost (camera installation) and the recurrent cost of maintenance, an increase in the cost of central police control and different administrative behaviour in treating fines and claims.
- Abolishing businesses reporting obligations on health and safety measures does not remove the desirability of monitoring the safety and health on the workplace: this will most likely lead to enhanced monitoring and inspection costs on the side of public authorities.
- Enabling citizens to report holes in city streets through a dedicated "App" reduces the cost of monitoring street-by-street and the corresponding labour costs.
- Enabling rules that encourage private antitrust damages actions also creates potential enhanced enforcement costs for the use of the legal system. This means potentially more backlog in cases handled by courts and potential indirect costs (waiting time, reduction of legal certainty, loss of credibility of the court system, etc.).

In summary, enforcement costs are an essential element to be considered in any cost-benefit analysis, as their magnitude can tilt the balance in favour of regulatory options that would not be chosen in a more partial assessment. We divide enforcement costs in the following categories:

- *One-off adaptation costs*: this is typically the case in which a new legal rule forces administrations to re-train their personnel or change equipment (e.g. buy personal computers, cars, etc.)
- *Information costs and administrative burdens*. These are the costs of gathering and collecting information needed to effectively monitor compliance. When these activities entail the production of information to be delivered to third parties

according to a legal provision, they are called “administrative burdens”; however information costs can also be related to activities that are essential for carrying out enforcement actions, but do not entail any information obligation.

- *Monitoring costs*. The cost of monitoring compliance with the legislation, e.g. patrolling streets, collecting statistics, etc.
- *Pure enforcement costs*. These include the cost of running inspections, processing sanctions, handling complaints by the enforcing authority.
- *Adjudication/litigation costs*. These are the costs of using the legal system, or an alternative dispute resolution mechanism, to solve controversies generated by the new legal rule.

Enforcement costs are not only borne by public authorities: private actors face costs related to litigation when in need to use the legal system, as in the case of lawsuits: these are not strictly classified as administrative burdens, nor as compliance costs. They are costs that can be defined as the sum of the opportunity costs of the time spent dealing with litigation, plus the legal expenses that must be sustained (depending on the procedural rules that apply) in order to litigate a case as claimant or defendant.

The benefits of regulation

As already explained above, available taxonomies of benefits are not as sophisticated as the ones developed for costs, probably since benefits are at once the most apparent aspect of a regulation (they are often stated as the reason for regulating) and the least easy to classify, since they tend to be very specific to the regulation at hand. That said, just like costs, benefits can be classified as direct and indirect, meaning that they can affect the stakeholders targeted by the legislation or go beyond the target groups and affect other groups, or even become diffuse, societal benefits (e.g. increased safety). Apart from this, available guidance documents at the international level spend very little time discussing types of benefits, and normally move directly to measurement techniques. As a result, in this section we will provide our own view of how the identification of benefits should be approached in carrying out an impact assessment.

More specifically, from a methodological viewpoint (and taking into account that there might be overlaps), direct benefits can be expressed in terms of:

- *Additional citizens’ utility, welfare or satisfaction* – as we will see in the section “Choosing the right methodology: Towards more sophisticated RIA methods?”, these are mostly valued through techniques aimed at capturing the sum of individual preferences for a future state of the world, whereas these preferences are often modelled through an approximation of individuals’ willingness to pay for such state of the world. Such benefits include, most notably, health, safety and environmental benefits, which we treat separately in the following sections.[30]
- *Improved market efficiency*, which might include improvements in the allocation of resources, removal of regulatory or market failures, or cost savings generated by regulation. Within this category, cost savings can be approached following the taxonomy of costs introduced in the previous sections. For example, a given regulation might lead to a reduction of administrative burdens or compliance costs: in this case, the identification process and the related definition of (saved) costs follows the same criteria described in the previous sections dedicated to costs.

Indirect benefits include the following:

- *Spillover effects related to third-party compliance with legal rules (so-called "indirect compliance benefits")*. These include all those benefits that accrue to individuals or businesses that are not the addressees of the regulation, but that enjoy positive effects due to the fact that other have to comply with the regulation. For example, the fact that mandatory safety standards are imposed (and enforced) to food producers might lead to important savings in monitoring costs by retailers. Also, the fact that more individuals comply with legislation mandating more healthy behaviour (e.g. no consumption of junk food) can lead to indirect benefits in the form of lower healthcare costs for society over time. This category also include difficult to monetise, but nevertheless important benefits such as enhanced legal certainty, positive externalities and spillover effects, deterrence and corrective justice.
- *Wider macroeconomic benefits* such as GDP increases, competitiveness and productivity effects, etc. For example, although with a significant degree of approximation and some rather heroic assumptions, a 25% reduction of administrative burdens has been estimated to trigger a GDP increase of up to 1.5% in the Netherlands, 1% in the United Kingdom and 1.4% at the EU level. This second-order effect depends, in particular, on the assumption that reduced red tape would lead to the reallocation of freed resources to more productive uses, and as such incorporates the concept of opportunity cost.
- *Other non-monetisable benefits*, such as protection of fundamental rights, social cohesion, international and national stability, etc.

Direct benefits: Improved well-being

Benefits from "lifesaving regulation"

A specific category of benefits accruing from increased social welfare or individual utility, which has been extensively covered in the literature, includes those benefits that are related to the so-called "lifesaving regulation", a term used mostly to indicate regulation that can create positive effects on human health and the environment.[31] The usual *caveat* applies: since costs and benefits are the flips of a same coin, which we can term "impacts", cases in which regulation can lead to a reduction of these benefits can be treated as cases of costs of regulation.

Benefits from lifesaving regulation include the following:

- *Reduction of mortality*: this is the case when regulation can reduce the number of fatalities, for example by imposing stricter safety requirements (e.g. seat belts when driving), or more generally increase life expectancy and reduce the risk of premature death.
- *Morbidity benefits*. A morbidity benefit is the reduction in the risk of non-fatal health effects that can be characterised by duration and severity. This easily translates into improvements of the health of those living with diseases. This category also includes the reduction in tension or stress, and improvements in mental health.

- *Environmental or ecological benefits*: regulation can lead to several beneficial impacts on the environment, ranging from broad impacts (reduced pollution, preserving biodiversity) but including, most notably, very specific effects such as:
  - Reduction of emissions of pollutants.
  - Waste disposal and recycling.
  - Soil protection.
  - Noise reduction.
  - Air quality.
  - Water quality and availability.
  - Promotion of use of renewable resources.

Direct benefits: Improved market efficiency

A typical benefit of regulation is achieved whenever the latter contributes to addressing a factor due to which the interaction of market forces does not lead to an efficient outcome, a distortion that is often termed "market failure". The underlying assumptions to this statement are: *i)* that market forces, when they are not hampered by market failures, would achieve efficient outcomes; and *ii)* that regulation can do something about it, i.e. that the cure to market failures is not worse than the disease.

The European Commission Impact Assessment Guidelines already address the issue of market failures, which are summarised as follows:

- *Externalities (positive or negative).* Market prices do not reflect the real costs and benefits to society ("externalities").
- Insufficient supply of public goods.
- *Missing or weak competition* (including abuse of market or monopoly power).
- Missing or incomplete markets.
- *Information failures*, such as imperfect information or lack of access to information for decision takers (including consumers and public authorities), unless caused by a regulatory failure.

More specifically, economists normally define three different concepts of efficiency:

- *Productive efficiency* relates to the optimal use of resources in production processes, i.e. a more efficient outcome would be the possibility of producing the same quantity of output with less input.
- *Allocative efficiency* refers to the allocation of resources to those economic actors that value them the most. This is typically a result achieved through perfect competition, but can be challenged since in most cases it relies heavily on individuals' willingness to pay, which is a rather controversial measurement technique when used to approximate individual preferences.
- *Dynamic efficiency* refers to incentives to invest and innovate, which might imply the availability of funds for R&D investment, and an investment-friendly environment.

The three concepts of efficiency are not always consistent and complementary. There has been a very long debate in economics as regards the market structure that is most conducive to allocative and dynamic efficiency, with many economists firmly believing that the latter can be achieved only at the expense of the former.

Indirect benefits from third-party compliance with legal rules

Regulation and legislation can often produce spillover effects, which go beyond active compliance behaviour by the addressees of the regulation. Respect of the law can indeed create benefits for other stakeholders, especially if located along the same value chain. Just as regulation can produce indirect compliance costs, in some cases it can also produce indirect compliance benefits: for example, regulation that mandates safety standards for food producers can lead to cost savings for retailers; regulation that leads to productivity improvements on the workplace can lead to lower prices for downstream market players and end consumers; etc.

In addition, third parties can benefit from enhanced compliance with legal rules also in other, less monetisable ways. This is the case when legislation discourages or deters criminal behaviour, thereby increasing safety – and more generally, every time legislation leads to the achievement of a public good.

Finally, more widespread compliance with legal rules can also produce benefits to all those players that were already complying with rules before the enactment of a new policy: this occurs whenever more widespread compliance leads to a more level-playing field between all market players, avoiding cases of free riding, or distorted competition.

Wider macroeconomic benefits

Macroeconomic benefits are an important area of benefits for impact assessment, especially in those cases in which regulations have cross-cutting effects across sectors, and as such require that the assessment goes beyond partial equilibrium and approaches general equilibrium analysis. That said, two scenarios can emerge in an impact assessment:

- In most cases, macroeconomic benefits are to be considered as indirect benefits of legislation that aims at more specific sectoral results. When this occurs, and as will be explained in more detail in the next section, our advice is to retain a partial equilibrium analysis, and if proportionate and appropriate use “ready-made multipliers” to assess how sectoral, specific benefits might translate into macroeconomic benefits.[32]
- *In some cases, macroeconomic benefits can be the direct goal of given policy initiatives*. This is the case, *inter alia,* for impact assessments of government medium- to long-term sectoral or cross-sectoral strategies, for which the use of computational general equilibria becomes appropriate and proportionate, as it allows for the simulation of long-term impacts on the economy.

Macroeconomic impacts include impacts on GDP, productivity and growth, financial and macro-economic stability. The relative weight of these elements of course will depend on the specific proposal that is subject to impact assessment.

Choosing the right methodology: Towards more sophisticated RIA methods?

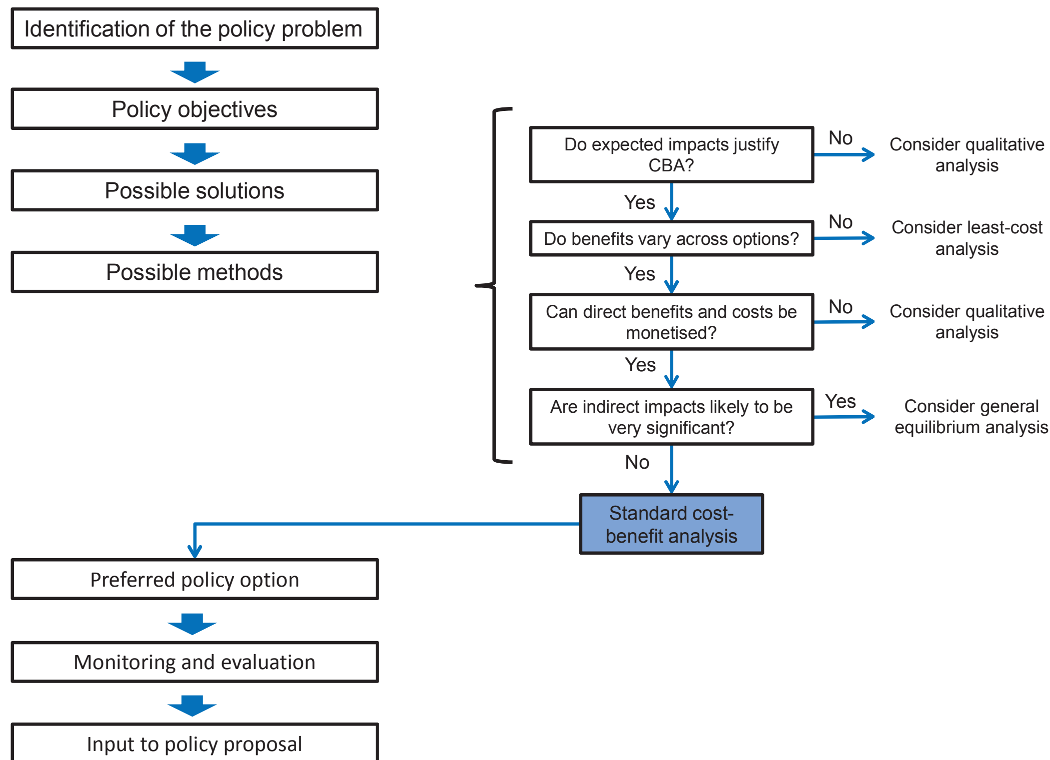
One of the key challenges in performing RIA is the choice of the most appropriate methodology to assess the impacts and compare alternative regulatory options. A first important choice to be made is the choice of whether to perform a partial equilibrium analysis or a general equilibrium analysis. The former typically requires modelling abilities, and as such can and should be chosen only when a number of specific conditions are met: in particular, indirect impacts have to appear significant, and spread across various sectors of the economy; in addition, there must be sufficient skills within the administration, or the possibility to commission a general equilibrium modelling analysis from a high-quality, reliable group of researchers inside or outside the administration. General equilibrium analysis is preferred by many scholars for its ability to capture very dispersed indirect impacts of regulation. For the time being, however, it is likely that the overwhelming majority of administrations will continue to use partial equilibrium analysis in RIA. When performing partial equilibrium analysis, typically the methodological choices available to administrations are the following:

- *Least cost analysis* looks only at costs, in order to select the alternative option that entails the lowest cost. This method is typically chosen whenever benefits are fixed, and the administrations only needs to choose how to achieve them.
- *Cost-effectiveness analysis* (CEA) entails that the administrations quantifies (not monetises) the benefits that would be generated by one USD of costs imposed on society. The typical method used to compare options is thus the so-called benefit-cost ratio, which means dividing the benefits by costs. This method is normally used to all expenditure programs, as it leads to identifying the "value for money" of various expenditure programs. A typical question that can be answered through cost-effectiveness analysis is "how many jobs will be created for every Dollar invested in this option?"; or, "how many lives are saved by every Euro spent on this option?".[33]
- *Cost-benefit analysis* (CBA) entails the monetisation of all (or the most important) costs and benefits related to all viable alternatives at hand. In its most recurrent form, it disregards distributional impacts and only focuses on the selection of the regulatory alternative that exhibits the highest net benefit. Accordingly, the most common methodology in cost-benefit analysis is the "net benefits" calculation, which differs from the "benefit/cost ratio" method that is typically used in cost-effectiveness analysis (being benefit minus costs, rather than benefits divided by costs).
- *Multi-criteria analysis* allows a comparison of alternative policy options along a set of pre-determined criteria. For example, criteria chosen could include the impact on SMEs, the degree of protection of fundamental rights, consumer protection, etc. Multi-Criteria Analysis is particularly useful when Impact Assessment has to be reconciled with specific policy objectives, and as such is used as an instrument of policy coherence. This method is more likely to capture distributional impacts, although this crucially depends on the criteria chosen for evaluating options.

Against this background, there are pros and cons of choosing CBA as the method to be used in comparing policy proposals. The pros mostly lie in the ability of CBA to use an objective unit of measurement (monetised values) to compare alternative options and choose the one that maximises the "size of the pie", i.e. societal welfare as described in

mainstream economics. The shortcomings, however, are often quite critical for CBA, and mostly refer to the assumption that income can be a proxy for happiness or satisfaction, the fact that it willingly ignores distributional effects (despite some attempts to adjust the methodology to reflect them), and its lack of objectivity when it comes to the selection of certain parameters (e.g. the inter-temporal discount rate), which can tilt the balance in favour of certain regulatory options over others.

Figure 2.5. **Cost-benefit analysis within the impact assessment process**



Based on these descriptions, cost-benefit analysis can be chosen as the method to be used to compare alternative policy options if:

- ***Both benefits and costs vary*** depending on the regulatory alternative chosen (if not, consider least-cost analysis).
- ***At least all direct benefits and direct costs can be monetised***, covering where possible the economic, social and environmental impacts of the proposal at hand (if benefits can be quantified, but not monetised, consider cost-effectiveness analysis): this requires an assessment of data availability in order to understand whether CBA will be feasible within a reasonable time frame.
- ***The expected magnitude of impacts justifies the effort and time needed to perform CBA*** (as a full-fledged CBA is normally more time-consuming than other, more qualitative techniques). Similarly, the choice to perform cost-benefit analysis must be read also in light of the application of the principle of proportionate analysis, which means that the depth of the cost-benefit analysis exercise, as well as the time and the resources devoted to it, must be made dependent inter alia on the type of proposal at hand (e.g. whether binding or not

binding, whether cross-cutting or narrow), as well as on the *prima facie* expected impact of the proposal.

- ***Distributional impacts are unlikely to be substantial*** (otherwise, consider multi-criteria analysis, or break down CBA by affected stakeholder without aggregating costs and benefits into a net benefits analysis).

Figure 2.5 above summarises the factors to be considered before you decide to undertake cost-benefit analysis.

How to "fix" cost-benefit analysis: Emerging trends

This section discusses possible ways to improve the practice of cost-benefit analysis, without replacing it with multi-criteria analysis. A more sophisticated interpretation of cost-benefit analysis can bring it more in line with modern economic theory, and in particular with recent contributions on behavioural economics, the relevance of inequalities and distributional impacts for overall economic growth and well-being.

- **"Fixing" CBA to account for distributional impacts.** For example, Zerbe et al. (2005) attempted a revision of the Kaldor Hicks test, aimed at correcting its complete and explicit ignorance of ethics. More recently, Graham (2008) provided a thorough analysis of the use of Pareto and Kaldor-Hicks principles as the basis for what he calls "lifesaving regulation", i.e. mostly environmental, health and safety regulation. And even more recently, Matthew Adler (2014) has brought this debate forward by showing the types of non-linear welfare functions that could be adopted within a cost-benefit analysis. His paper provides a systematic overview of the specification of distributional weights. It shows, in detail, how to "put structure" on the problem. Two kinds of weights are described: utilitarian weights, which correct for the diminishing marginal utility of money; and isoelastic/Atkinson weights, which embody an aversion to inequality in the distribution of well-being itself. Both kinds of weights can be captured in simple and quite implementable formulas. Importantly, Adler observes that "Although the choice to adjust CBA with weights does involve a contestable ethical/moral judgment, that is equally true of the decision to use CBA in the first place — which remains intensely controversial outside the community of economists" (Adler, 2013).
- ***Distinguishing impacts based on affected groups.*** Following our description in figure 4 above, it is possible to categorise costs also based on the type of stakeholder affected, e.g. consumers, businesses, governments, non-EU countries, etc. In particular, it is important to differentiate between citizens and/or specific segments of the population, businesses, specific industry sectors, SMEs, third country nationals and businesses, trade partners etc.[34] Reflecting on the groups that are affected by regulatory costs and benefits is important also in order to understand if any of those groups is likely to be affected by a regulatory proposal in a disproportionate way. While cost-benefit analysis is by definition aiming at net benefits, it is likely that most policies or regulations will result in winners and losers. More specifically, the fact that a given regulation deprives a group of stakeholders of certain resources to the advantage of another group of stakeholders is not necessarily a zero-sum game in impact assessment. This can be due to the following causes: *i)* individuals can display different valuations for the same asset;[35] *ii)* income features decreasing marginal returns;[36] *iii)* the imposition of new rules creates inconsistencies, redundancies or overlaps with

previously enacted legislation, in a way that creates undesirable burdens; *iv)* certain categories have already been targeted by too much existing regulation, and the cumulative impact of all this regulation could lead to undesirable effects. In 2012, the US administration recognised the need to account for cumulative impacts in the United States. RIA system: a new memorandum of the Office of Information and Regulatory Affairs, OIRA, explained to federal agencies that "consideration of cumulative effects and of opportunities to reduce burdens and to increase net benefits should be part of the assessment of costs and benefits".[37]

Other methods and models

In the impact assessment practice, a number of methods and models are used to assess the impact of regulation. All these models can enable a more comprehensive coverage of Figure 2.4 above, but are also quite complex and difficult to use for non-skilled experts. We briefly list some of these methods and models below.[38]

- ***Perception surveys*** can be used as a starting point to gather data on regulatory burdens. For example, The Danish Government used 'business panels' (surveys of firms and focus groups) to gauge *ex ante* the possible burdens of proposed regulations. The rule of thumb for determining whether a business panel was justified was simple: If the total administrative burden across all firms was estimated to exceed 2 000 hours per year, a business panel would be conducted. So, if a regulation was proposed that would affect 100 firms, and they would have to spend one hour per week on administering the regulation (52 hours per year), the total administrative burden would be estimated at 5 200 hours, and a business panel would proceed. Perception surveys are often used in Australia in Victoria and New South Wales (Australian Government, 2011).
- ***Econometric models*** can be used to test whether there is a mathematical relationship between two (or more) variables, what effect the variables have on each other, and the robustness of the relationship. They can be used to measure the marginal effect of changes in the independent variables on the dependent variable(s). Where an econometric model includes several independent variables (a multivariate analysis), the statistical techniques "hold constant" all the variables except the one that represents the reform to provide an estimate of the direction and magnitude of the effect of the reform on the dependent variable. For example, it might be found that increasing a person's education level from year 11 to year 12 leads to an average 13% increase in their earnings (compared with the counterfactual of a year 11 education). In the case of *ex ante* impact assessment, the choice of a dependent variable depends on the objectives of the proposal. For example, if the objective was to increase labour productivity in a particular industry, the dependent variable would be an indicator of labour productivity. If the objective was to reduce the incidence of workplace injuries, the dependent variable would be the incidence of accidents at firms affected by the reform or a suitable proxy.
- ***Computable General Equilibrium (CGE) Models*** are designed to analyse how changes in one industry, market or region lead to a reallocation of resources (across regions, industries and different time periods). They can be used to disaggregate the broader effects of reforms. The results of partial equilibrium modelling can be used as an input into a general equilibrium model to trace the

broader distributional effects of a reform across the economy. Good examples of CGE models used are (Dixon and Jorgenson, 2013):

– Worldscan, a recursively dynamic general equilibrium model for the world economy, developed for the analysis of long-term issues in international economics by CPB in the Netherlands. The model is used both as a tool to construct long-term scenarios and as an instrument for policy impact assessments, e.g. in the fields of climate change, economic integration and trade.[39]

– The US Environmental Protection Agency has used econometric models in several occasions in the analysis of environmental regulation. Examples include estimation of the costs of the Clean Air Act (CAA), the impacts of domestic and international policies for GHG abatement, and the potential for market-based mechanisms to reduce the costs of regulation. A CGE model may contain several hundred sectors or only a few, and may include a single "representative" consumer or multiple household types. It may focus on a single economy with a simple representation of foreign trade, or contain multiple countries and regions linked through an elaborate specification of global trade and investment.

– The Monash Multi-Regional Forecasting (MMRF) model is a multi-regional general equilibrium model developed by the Centre of Policy Studies (CoPS) at Monash University in Australia. Within the model each state and territory is treated as a separate region, and over 50 industry sectors are present in each jurisdiction. The model contains explicit representations of intra-regional, inter-regional and international trade flows based on regional input-output data developed at CoPS. It also includes detailed data on government budgets (state, territory and Commonwealth). Second round effects are determined on the basis of the model's input-output linkages, assumptions about the economic behaviour of firms and households, and resource constraints.

– GEM-E3 (General Equilibrium Model for Economy-Energy-Environment) is an example of a successful CGE model developed with EU funds. It is an applied general equilibrium model for the EU Member States, taken individually or as a whole, which provides details on the macro-economy and its interaction with the environment and the energy system. The model is being used to evaluate policy issues for the European Commission. Applications of the model have been (or are currently being) carried out for several Directorate Generals of the European Commission (economic affairs, competition, environment, taxation, research).[40]

– Macroeconometric models and Dynamic Stochastic General Equilibrium models (DSGE). These models can be used for the study of the global effects of a wide range of policy measures ensuring a coherent framework for analysing inter-linkages between variables and countries. They consider agents' expectations (usually using a backward-looking approach) and are not subject to the "Lucas critique", i.e., they cannot account for policy induced shifts in the parameters.[41] The specification of the decision behaviour of economic agents can be used to study welfare-relevant questions. They are usually used for *ex ante* evaluation, but can present a number of problems: they are not easy to adapt to consider new policy questions, and fail to

consider specific reforms affecting consumers' and firms' behaviour. These kinds of reforms are only considered through assumptions.

Accounting for human behaviour: Keeping law simple

Another important new feature in the analysis of the impact of legal rules is the introduction of criteria imported from behavioural economics. Laws that directly affect individual behaviour often display varying degrees of effectiveness due to the behavioural response of individuals. In particular, rules that try to promote healthy or safe behaviour such as refraining from smoking, getting vaccination or wearing helmets while riding motorbikes have often failed to achieve full compliance due to the difficulty of convincing individuals to adapt their behaviour. This is often due to both individual behavioural biases and social norms. The literature on "de-biasing through law" looks mostly at the former type of distortions, and tries to devise strategies to limit the impact of behavioural biases in the decision to comply – i.e. it takes the imperfections of our brain as a given, and tries to minimise their impacts just as Coase advocated the minimisation of the impact on transaction costs (see *inter alia*, Jolls and Sunstein, 2006).

A different approach to policy making that draws on behavioural sciences, but recognises the need for weak paternalism and objective judgments is what Sunstein and Thaler (2003) have termed "Libertarian Paternalism", and is similar to what Camerer et al. (2003) call "asymmetric paternalism". Sunstein and Thaler, in particular, have used this overall approach to justify policy intervention aimed at nudging individuals towards choices that correspond to desirable outcomes in the mind of the policymaker. The term libertarian refers to the fact that individuals are merely nudged, but they can still choose whether to follow the nudge, or make their own choice. The nudging approach is controversial since it abandons the preference-based approach that have characterised cost-benefit analysis for many decades, and characterises all methods analysed in this report, which form the core of the toolkit used in cost-benefit analysis around the world. Put more simply, nudging entails that policy makers depart from the pure observation and aggregation of individuals' WTP and use "choice architecture" and "framing" techniques to steer behaviour towards a pre-determined outcome. More in detail, there are two different versions of nudging:

- Nudging can be an attempt to inspire individual behaviour by showing citizens which courses of action would be good "for themselves" at the moment of choosing: in these cases, the application of nudging is likely to be confined to all those case in which systematic behavioural biases lead consumers to make undesired mistakes, which they may regret afterwards (such as eating junk food, smoking, not wearing helmets or seat belts, etc.);
- However, nudging can also imply a more "intrusive" form of libertarian paternalism, meaning that, while preserving the possibility for individuals or businesses to choose whatever course of conduct, governments take action to persuade them to adopt a socially sustainable behaviour, i.e. what would be "good for society", rather than "good for themselves". This latter version is of course much more debatable in political terms: not only it implies a potentially more intrusive role of the state in individual decisions; it also implies that governments formulate independent value judgments, and use those judgments to steer individual behaviour. However, in certain policy domain (e.g. environment) an evaluation of long-term benefits that departs from the mere sum of normally biased and self-interested individual WTPs for certain future states of the world –

e.g. the preservation of biodiversity by 2050 – appears well-grounded in social sciences.

The consequences of these developments are indeed far-reaching. We list some of them below by following the same order that impact assessments normally adopt, from problem definition to the analysis of alternative options, and then through the life of a legal rules.

- ***Better understanding of the problem.*** Understanding behavioural biases enables officers to define more accurately the drivers of a given problem. For example, behavioural economics helps to explain why drivers are likely to be distracted when talking on the phone, regardless of whether they hold a cell phone or use a hands-free system: many governments have banned the use of cell phones while driving, and then discovered that accidents had not dropped.
- ***Alternatives to command and control regulation***. The nudging approach, in certain cases, can offer policy makers an alternative to banning certain actions. In a recent book, Sarah Conly argues that coercion should be used in public policy only when certain conditions are met: *i)* the activity "must genuinely be opposed to people's long-term ends as judged by people themselves"; *ii)* the "measures must be effective rather than futile"; *iii)* "the benefits must exceed the costs"; and *iv)* "the measure in question must be more effective than the reasonable alternatives" (Conly, 2013).[42] In a recent review of the book, Cass Sunstein has commented that "when people are imposing serious risks on themselves, it is not enough to celebrate freedom of choice and ignore the consequences. What is needed is a better understanding of the causes and magnitude of those risks, and a careful assessment of what kind of responses would do more good than harm".[43]
- ***Effectiveness, enforcement and compliance***. Accounting for behavioural responses and the context in which compliance decisions will be made enables policy makers to make better decisions on how to enforce certain laws: the use of peer pressure is a useful reference in this respect. Moreover, understanding the relevance and importance of social norms for the adoption of certain behaviours enables a better understanding of the patterns and likelihood of compliance: a good example is the limited effectiveness of "graduated response" laws in the field of online copyright enforcement (see Renda, 2011, Section 5.8 for an account).
- **Ex post *evaluation and reversible choices***. The consequences of relaxing the assumptions of rationality, constant marginal utility of income and methodological individualism in cost-benefit analysis are severe. On the one hand, the approach becomes more tentative, as the "rocket science" nature of economics cannot be defended anymore. At the same time, the possibility of crafting good policy increase. To be sure, this also means that policy makers might decide "not to decide everything" at the *ex ante* impact assessment stage, and rely on interim and *ex post* evaluation to check the viability of the proposed solutions, especially when their effectiveness chiefly depends on the behavioural responses of individuals. This, in turn, might lead policy makers – other things being equal – to favour "reversible choices" in *ex ante* impact assessment, rather than irreversible actions that might be impossible to remedy if *ex post* evaluation suggests that they were wrong.

- ***From efficiency to coherence.*** The difficulty of relying only on monetised cost-benefit analysis to reach policy decisions suggests that the future of impact assessment is more "relativist" that many economists would want to see. In most cases, given the relevance of distributional impacts and the distance between what current cost-benefit practice can offer and the complexity of the values pursued in EU policy making, it is wise to couple cost-benefit analysis with an assessment of the extent to which the proposed policy option furthers the achievement of long-term policy goals of the EU, such as the targets set by the Europe2020 strategy. These targets include elements of efficiency (e.g. smart growth), sustainability as well as distributional concerns: taking them seriously in an impact assessment also seems to imply taking impact assessment seriously.

Jobs and innovation: The new frontier of RIA

The more governments make use of RIA for primary legislation, the greater the temptation to rely on multi-criteria analysis and focus on specific impacts that are considered to be a priority for the agenda of the government. This is leading to an unprecedented series of studies of specific impacts, such as the impact of regulation on employment, on innovation, on fundamental rights, on specific territories, and on well-being. At the same time, this is bringing new attention towards the cumulative and interactive impacts of legal rules. Among the most heavily debate issues, the following are worth being mentioned, even if briefly, for the purposes of this report.

- **The jobs effect of regulation: beyond the "broken window" approach**. Whether jobs can be created through regulation is still a heavily debated issue in economics and in policy: many scholars still tend to deny that creating real jobs through policy is possible at all. The main reason for this is that regulation can transfer jobs from a market to another, but not create new jobs. And indeed, when regulation creates false incentives to hire people and allocate them to jobs in an inefficient way, the opportunity cost of diverting people from one job market to another will create a net social loss. A popular way of explaining this specific application of the concept of "opportunity cost" is the so-called "broken window fallacy": if a stray baseball breaks a shopkeeper's window, no net new productive employment will be generated simply because money is spent to replace the broken window. The same money could have been spent more productively elsewhere absent the break, and the foregone spending destroys jobs as surely as replacing the broken window creates them. As a matter of fact, this explanation is not always convincing. In particular, when regulation manages to create more social welfare, for example by enhancing consumer surplus, leading to an increase in production output, of facilitating innovation, the ultimate effect might be to create new jobs. In other words, when regulation helps the economy fix "market failures" and pushes forward the efficiency frontier of a given society, then regulation can create new jobs. To the contrary, simply stating that one activity has to be performed twice rather than once, or mandating that firms have at least 10 employees can only lead to distortions in the job market, but not to the creation of net new jobs. This is similar to stating that, when regulation has positive macroeconomic effects (e.g. growth), it can also create new jobs. This being the case, new jobs have to be accounted for as an indirect benefit of that regulation. In a recent book edited by Cary Coglianese, Adam Finkel and Christopher Carrigan, the issue of job creation through regulation has been thoroughly analysed. What emerges from that collection of essays is that regulations do not "kill" jobs as is

often denounced by politicians: rather, individual regulations can at times induce employment shifts across firms, sectors, and regions—but regulation overall is neither a prime job killer nor a key job creator. The challenge for policy makers is to look carefully at individual regulatory proposals to discern any job shifting they may cause and then to make regulatory decisions sensitive to anticipated employment effects. In particular, regulations can have significant impacts on employment that can affect workers' well-being and should be taken into account in order to make better regulatory decisions.

- **Accounting for innovation in RIA**. Apart from jobs, can regulation stimulate innovation? And, how can this effect be taken into account when drafting a RIA? A key contribution in the literature has been provided, since the late 1970s, by Nicholas Ashford from the Massachusetts Institute of Technology. In particular, a number of MIT studies led by found that regulation could stimulate significant fundamental changes in product and process technology which benefited the industrial innovator, as well as improving health, safety and the environment, provided the regulations were stringent, focused, and properly structured (Ashford, 1976; Ashford et al., 1985; Ashford, 2000). This work largely preceded what would later become known as the "Porter Hypothesis". This implies that firms at the cutting edge of developing and implementing technology to reduce pollution would benefit economically by being first-movers to comply with regulation (Porter, 1990; Porter and van den Linde, 1995a, 1995b). MIT research found paradoxically that the only government policy that affected innovation was in fact health, safety and environmental regulation, not strategies devised by government as a part of its industrial policy. Moreover, the effects of regulation on innovation turned out to be positive, not negative as expected by the conventional wisdom at that time. Stringent regulation could stimulate entirely new products and processes into the market by new entrants with the displacement of dominant technologies rather than the transformation of technologies by existing firms.[44]

Governance and organisational challenges

During the implementation phase of RIA, it is important that governments work to keep the momentum high for the adoption of this tool in the *ex ante* phase of policy making. To be sure, the most effective way to keep the momentum high is to make draft RIAs public, so that the public opinion and interested stakeholders can organise a meaningful policy debate on the RIA document itself, and not on less transparent forms of lobbying. Another important issue to be addressed during the implementation phase is the level of investment in RIA, and how to use most effectively the human and financial resources allocated to RIA. Finally, no RIA system is sustainable over time, if it is not accompanied by the gradual introduction of all other tools that complete the policy cycle, such as consultation, monitoring and *ex post* evaluation, and even the cumulative analysis of whole policy domains or industry sectors.

Targeting RIA resources: Coverage, depth, and ex ante *v.* ex post

Using RIA resources properly is not an easy task. As a matter of fact, the decision of how much to invest in an *ex ante* RIA is very much a case-by-case one, which does not lend itself very easily to generalisations or the introduction of specific thresholds. The United States have adopted since 1993 a set of conditions that would determine the exemption of a given regulatory proposal from the obligation to perform RIA. The

European Union, to the contrary, has established a general principle of proportionate analysis, under which the depth of the RIA is made dependent on the magnitude of expected impacts. The former approach reportedly created incentives for federal agencies in the United States to break down proposals into smaller actions, in order to avoid the need to perform RIA (Mendelson and Wiener, 2014, p. 459). The European Commission's principle of proportionate analysis is potentially very meaningful, but is not linked to any specific accountability on the side of the Commission: in other words, the RIA cannot be invalidated or brought to court for failure to choose the right "depth" of analysis.

Today, there is growing recognition of the fact that the choice of how deep should the RIA be should be left to the administration itself, based on a principle of proportionality. At the same time, such choice requires the scrutiny of an oversight body able to intervene and suggest a deeper analysis in case the proportionality principle has been interpreted in a too loose manner. More specifically, the OECD 2014 regulatory indicators survey revealed that a number of OECD members apply some form of threshold, often expressed in qualitative terms, to determine whether a given regulatory proposal should undergo RIA. For example, in Australia regulatory proposals are subject to a Preliminary Assessment, in order to determine whether a RIA should be carried out: this applies to both primary and subordinate regulation, and also to quasi-regulatory proposals if there is an expectation of compliance. In Belgium, of the 21 topics that are covered in the RIA, 17 consist of a quick qualitative test based on indicators, whereas the other four (gender, SMEs, administrative burdens, and policy coherence for development) require a deeper analysis. In Canada all subordinate regulations go through a Triage System, in which the scope and depth of the analysis is determined: this include a decision on whether the proposal will require a full or expedited RIA, based on costs and other factors.[45] In Mexico, regulators and line ministries must demonstrate zero compliance costs in order to be exempt of RIA, otherwise, a RIA must be carried out: for ordinary RIAs a qualitative and quantitative test is run (the so-called "calculator for impact differentiation", which entails a 10-questions checklist) to determine whether the regulation should be subject to a High Impact RIA or a Moderate Impact RIA, where the latter contains less details in the analysis. In the United States, Section 3(f)(1) of Executive Order 12866 mandates that RIA is needed for all federal regulations that "have an annual effect on the economy of USD 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Generally speaking, the adoption of a qualitative and/or quantitative threshold appears almost inevitable for countries that apply RIA on a large scale: that said, it is very important that the application of the threshold is transparent, and that the results of the application of the threshold are publicly shared.

To be sure, under a "policy cycle" approach, the choice of the depth of the analysis is not the only one that has to be made when drafting a RIA. Another very important choice crucially depends on the level of certainty reached by the administration for what concerns the preferred policy option. Here, three solutions typically surface for the administration:

- Invest as much as possible in the *ex ante* RIA to minimise the probability of gross mistakes, and then perform an *ex post* evaluation after a specified period of time (e.g. 5 years);
- Invest less in *ex ante* RIA but adopt a tighter schedule for *ex post* evaluation (e.g. two years), a pilot phase and/or a well-detailed monitoring plan.

- Select the most "reversible" policy option, so that in case of gross mis-evaluation at the outset, it will be easier to change the direction of policy.

The latter case, i.e. the possibility to select more reversible options, is now becoming a key aspect of policy making in constantly changing fields. For example, Whitt (2007, 2009) has argued that policy making has to become more "adaptive", especially in cases in which information is not easily collected by the administration, and whenever the underlying context for regulation is complex and/or fast-changing. Whitt proposed that adaptive regulation should have the following characteristics: cautious, macroscopic, incremental, experimental, contextual, flexible, provisional, accountable and sustainable. These insights await systematisation especially in light of the so-called "complexity economics" (Newman, 2011; Farmer, 2012; Beinocker; 2007; Arthur, 2014), but also of more established domains of economics and other social sciences, including Brian Arthur's work on path dependence (Arthur, 1994); behavioural economics and neuroeconomics (Allais, 1952; Simon, 1956; Kahneman and Tversky, 1979; Glimcher et al., 2009); evolutionary game theory (Maynard Smith, 1982); the interaction between regulation and innovation (Pelkmans and Renda, 2014); and other social sciences that have looked at interactions between and within complex systems more than neoclassical economics has done to date.

Expanding the scope of the analysis to cover the policy cycle

In Section 2.3 above, we have mentioned that governments have various available paths to arrive to a full-fledged regulatory policy strategy, and that this does not necessarily entail a first pilot phase that is later expanded into a mainstreamed procedure for *ex ante* analysis. Many countries are currently in their transition towards a more complete better regulation system: the United States has been experimenting with retrospective reviews of regulation only in the past few years, after the Executive Order 13563, which stated that "Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan ... under which the agency will periodically review its existing significant regulations." At the same time, the United States is still debating the possibility of extending RIA beyond federal regulation: as a matter of fact, some independent agencies (e.g. the FCC) already make use of rather sophisticated cost-benefit analysis (Renda, 2014). In the EU, after five years from the introduction of a RIA system a comprehensive analysis of the stock of existing legislation was launched, in February 2007, with exclusive focus on administrative burdens. This experience led, three years later, to the launch of the first "fitness checks", dedicated to entire policy domains, and not exclusive focused on regulatory burdens but also extended to the benefits produced by the legislation in place. Since them in 2013 the European Commission also started launching pilot "cumulative cost assessments" in specific industry sectors, in order to understand the impact of EU legislation on specific cost items in the balance sheet of European Companies. Other countries in transition include Germany (from regulatory costs to benefits, at least as a planned transition).

When is the time ripe for moving on with regulatory reform? Although a one-size-fits-all recipe cannot be said to exist, it is possible to argue that governments should not wait too long before climbing the ladder of regulatory reform. As soon as stakeholders have learned how to handle RIA as an opportunity to get engaged in the public policy debate with substantial contributions, the overall effort should move towards consulting the private sector to identify areas in the whole stock of legislation that could be subject to simplification. The same applies to countries that have experimented for years with

programmes of administrative burdens reduction: scaling up the co-operation with stakeholders to focus on the costs and benefits of the stock of regulation is a unique opportunity to go beyond the rather narrow focus of the administrative burdens measurement programmes (OECD, 2010b).

Data availability: Involving academia, the private sector and institutes of statistics

As already mentioned in the previous sections, policy making should be based on evidence today and will increasingly be based on (big) data tomorrow. It is becoming increasingly important to involve all potential sources of unbiased data (academics, institutes of statistics, etc.) in order to ensure that governments take the best possible course of action, based on the most complete information set. The availability of data is essential for a meaningful problem definition, for a careful analysis of the alternative solutions available, and also for an estimate of the compliance and enforcement costs associated with each of the alternative policy options. At the same time, the availability of suitable data can prove even more essential – as observed above – during the enforcement phase of legislation, as it can provide real-time data that allow nowcasting of potential infringements of the rule.

Examples of policy domains in which nowcasting has already been successfully tested include (beyond policy patrolling, already mentioned above under "predPol") food safety, transport, data protection and telecommunications policy. As a matter of fact, everything that happens online will be regulated and enforced more effectively in the future through the use of data-driven automated applications.

In order to realise this ambitious task, regardless of the level of sophistication chosen to start with, it is increasingly important that policy makers rely on their institutes of statistics in order to ensure that they have a complete and constantly evolving data-set on the performance of existing legislation, on the perception of citizens and industry on the quality of existing rules, and on the potential impact of exogenous factors in the short- to medium-term. This is currently not happening in many OECD countries. A good example of co-operation in this respect is Germany, where the institute of Statistics (Destatis) played a key role in the determination of the parameters to use in the various tables that enable government measurement of regulatory burdens. Rather than relying on an external consultancy firm, the German government decided that it would be more sustainable to work with a public institution: the choice seems to have been rewarding in the end.

Measuring the impact of RIA

One element that is often missing in National better regulation strategy is a regular, comprehensive evaluation of the impact of RIA on the (perceived) quality of regulatory decisions. This is not surprising after all. First, the impact of RIA is often very difficult to measure, due to the difficulty of establishing a counter-factual scenario (what decision would have been taken without a RIA?). As already mentioned, the impact of RIA is more easily demonstrable whenever RIA leads to discarding a regulatory proposal; however, this does not occur very often.

Second, in some countries proposals that are subject to RIA can be amended before they enter into force. For example, in the European Union the European Commission carries out RIA on its major initiatives and the European Parliament increasingly performs RIA on its major amendments; but the Council typically does not assess the impact of its own amendments: this makes it very difficult to evaluate the impact of RIA

over time, as the original RIA document does not coincide with the final text of the proposal.

That said, in some countries an *ex post* appraisal of the RIA system is performed, although not on a regular basis. For example, the Government Accountability Office in the United States provides *ex post* assessments of the overall quality of the cost-benefit analysis performed by federal agencies in RIA, often focusing on specific areas such as environmental regulation, or specific issues such as the social cost of carbon.[46] In the United Kingdom, the National Audit Office has issued reports on the use of impact assessments, including reports on the quality of a sample of RIAs.[47] In the EU, in the 2010 the European Court of Auditors completed an evaluation of the extent to which impact assessments contribute to EU policy making. However, even these countries have so far not contemplated a systematic, comprehensive evaluation of the working of the RIA system.

Similarly, as noted by Castro and Renda (2015), there is no systematic evaluation of the performance of the regulatory oversight bodies that, in most OECD member countries, co-ordinate and supervise the regulatory governance cycle, and oversee the quality of RIAs. Such an evaluation process could contribute to the understanding of emerging problems and to the continuous learning of how to improve the practice of regulatory oversight.

Section 4. Main findings

- Rather than always engaging in quantitative cost-benefit analysis, it is essential that officials in charge of RIA identify all possible direct and indirect impacts of alternative options that can in principle address and solve the identified policy problem.
- Importantly, RIA should go beyond specific categories of costs and/or benefits: a too narrow focus could lead to a suboptial choice in terms of societal welfare.
- Various methodologies can be used to compare positive and negative impacts of regulation, including qualitative and quantitative methods, cost-benefit analysis and multi-criteria methods, partial and general equilibrium analyses.
- RIA can become more useful when it takes into due account behavioural aspects of compliance with legislation, and awards preference to legislative approaches that are as simple as possible to comply with.
- The next frontier of RIA studies is how to account for the impact of regulation on innovation and on employment.
- It is essential that resources devoted to RIA are targeted and well spent. The use of minimum thresholds, the involvement of national institutes of statistics to ensure regular supply of relevant data and regular measurement of the added-value of the RIA system are ways to maximise the potential of RIA within the administration, given existing resources.

Summary and key conclusions

Almost all OECD governments have introduced RIA over the past few years, starting with the United States, where this instrument was introduced as early as in 1981. Since then, RIA has spread across industrialised and developing economies. In OECD countries, a full-fledged RIA system is now in place in many common law systems (United States, United Kingdom, Australia, New Zealand), and increasingly in other

countries (Canada, Sweden). Emerging and developing countries are also introducing RIA, both in South-East Asia and in Latin America. In many of these countries, the introduction of RIA occurred within the context of "ease of doing business" reforms, in particular in support of legislation on streamlining business licensing systems. However, often the lack of a more comprehensive long-term strategy to mainstream RIA within the policy process led to the loss of momentum of RIA once those initial pilots have expired.

Governments have decided to introduce RIA for a variety of purposes, including: *i)* the need to improve efficiency and cut red tape; *ii)* the need to promote the transparency and accountability of administrations; *iii)* the need to control bureaucracies; and *iv)* the promotion of effectiveness and policy coherence. The dominant motivation for the introduction of RIA has proven important for the design of the RIA system itself, including in the choice of the scope and methodology of RIA. However, after the first success stories (mostly in Anglo-Saxon countries), RIA was introduced in many countries with too little attention being devoted to its compatibility with the national legal and institutional context, and with insufficient reflection on the regulatory governance arrangements. This has led to disappointing results, and to an overall adoption-implementation gap in many OECD countries.

While governments struggle to mainstream RIA in their policy process, the underlying economics of RIA and its related governance are also being subject to thorough revisiting. The concept of "efficiency" is currently being reconsidered in economics and public policy, and this bears significant consequences for the design and implementation of RIA systems. At the same time, growing emphasis on policy coherence also explains the emergence of a new context for RIA introduction, the so-called "policy cycle" or "regulatory governance cycle", in which RIA becomes a bit of a more complex puzzle, in which monitoring and *ex post* evaluation, along with the analysis of the stock of existing legislation, play an increasingly important role.

A closer look reveals that the successful introduction of RIA chiefly depends on the level of commitment expressed by political leaders, coupled with support from stakeholders and adequate incentives for public officials. In addition, legal peculiarities and traditions must be taken into account when introducing RIA. Getting governance right is also essential: in particular, Regulatory Oversight Bodies play a key role in co-ordinating and supervising the effective realisation of the policy cycle, but they should be given a consistent mandate, accompanied by suitable powers and instruments.

For what concerns methodological aspects, the report argues that RIA should not always be interpreted as requiring a full-fledged, quantitative cost-benefit analysis of legislation. Various methodologies can be used to compare positive and negative impacts of regulation, including qualitative and quantitative methods, cost-benefit analysis and multi-criteria methods, partial and general equilibrium analyses. Rather than always engaging in quantitative cost-benefit analysis, it is essential that officials in charge of RIA identify all possible direct and indirect impacts of alternative options that can in principle address and solve the identified policy problem. Also, RIA should go beyond specific categories of costs and/or benefits: a too narrow focus could lead to a suboptial choice in terms of societal welfare.

Furthermore, RIA becomes more useful when it takes into due account behavioural aspects of compliance with legislation, and awards preference to legislative approaches that are as simple as possible to comply with. In this respect, the application of sound (law and) economics to RIA appears as a practice that should be developed further in the future. Likewise, the next frontier of RIA studies entails a more thorough understanding

of the relationship between regulation and innovation, as well as between regulation and employment.

Finally, the report calls for efficiency in the allocation of resources to the drafting of RIA. It is essential that resources are targeted and well spent. The use of minimum thresholds, the involvement of national institutes of statistics to ensure regular supply of relevant data and regular measurement of the added-value of the RIA system are ways to maximise the potential of RIA within the administration, given existing resources.

Notes

1. See the definition at www.oecd.org/regreform/regulatory-policy/ria.htm.

2. The Delphi method is a structured communication technique, originally developed as a systematic, interactive forecasting method which relies on a panel of experts. The experts answer questionnaires in two or more rounds. After each round, a facilitator provides an anonymous summary of the experts' forecasts from the previous round as well as the reasons they provided for their judgments. Thus, experts are encouraged to revise their earlier answers in light of the replies of other members of their panel. It is believed that during this process the range of the answers will decrease and the group will converge towards the "correct" answer. Finally, the process is stopped after a pre-defined stop criterion (e.g. number of rounds, achievement of consensus, stability of results) and the mean or median scores of the final rounds determine the results. A stopwatch method entails the simulation of a given activity aimed at measuring the time needed for each of the activity's phases.

3. An example is found in the Impact Study "Making private antitrust damages actions more effective in the EU", co-ordinated by Andrea Renda at CEPS, where the impact of fee-shifting rules has been estimated through benchmarking with other jurisdictions (United States) and through law and economic models. (If parts of this is based on previous work done, say it up front.) See Renda et al. (2007).

4. The *status quo* option refers to the situation at the moment in which the IA is carried out. The "no policy change" option implies an assessment of the likely evolution of the market at hand absent specific regulatory intervention.

5. For a more general introduction and relevant OECD documentation, see www.oecd.org/gov/regulatory-policy/ria.htm.

6. It must be recalled that the wider benefits of adopting RIA are often very difficult to communicate, especially since it is very difficult to establish a counter-factual scenario. Ironically, RIA demonstrates its value added more clearly whenever it leads to the rejection of a proposal, rather than when it leads to adoption. Unfortunately, the former case is uncommon at best. Against this background, it is possible to state that the benefits of RIA, although difficult to communicate, are evident whenever RIA provides an input to a proposal that will not be modified at a later stage, for example in Parliament. For example, the European Commission performs RIA on its major proposals, but the latter are most often heavily amended by the European Parliament and the Council of the EU before they become legislation: the discrepancy between

the text of the proposal and the text of the final adopted set of rules also weakens the accountability of the European Commission for the impacts of the rules themselves.

7. On Cumulative Cost Assessments, see Renda et al. (2013), *Assessment of the cumulative costs of EU legislation in the steel sector*, Study for the European Commission, at http://bookshop.europa.eu/en/assessment-of-cumulative-cost-impact-for-the-steel-industry-pbNB0413083/; and Renda et al. (2013), "Assessment of the cumulative costs of EU legislation in the aluminium sector", Study for the European Commission, http://ec.europa.eu/DocsRoom/documents/3864/attachments/1/translations/en/renditions/pdf. See also the UK DEFRA's assessment of the cumulative impact of regulation on farming in England (2013), www.gov.uk/government/publications/cumulative-impact-of-regulation-on-farming-in-england.

8. More specifically, RIAs are mandatory for government agencies only when they refer to 'significant regulatory actions' – i.e., those that: *i)* have an annual effect on the economy of USD 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; *ii)* create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; *iii)* materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or *iv)* raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in EO 12 866.

9. See Section 4.1 below for an illustration of the methodological challenges of using cost-benefit analysis.

10. See www.regulation.gc.ca.

11. The COFEMER was created in year 2000, through a reform to the Federal Administrative Procedures Law. It is an autonomous agency of the Ministry of the Economy, and is supported by the Federal Regulatory Improvement Council which is comprised by five ministries, a number of government agencies, as well as representatives of the private and social sectors, and scholars. It employs 60 professionals, mainly experienced on fields such as Economics and Law.

12. From May 19, 2015 it also applies to delegated and implementing acts. See Renda (2015).

13. www.regelradet.se/en.

14. See Guidelines for the implementation of the Regulatory Impact Analysis/assessment (RIA) process in South Africa (2012), available online at the following website: www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/RegulatoryImpactAssessment/Guidelines2/Regulatory%20Impact%20Assessment%20Guideline%20February%202012.pdf.

15. See http://beta.liaise-toolbox.eu/content/liaise-workshop-regulatory-impact-assessment-developing-and-emerging-countries-held-pretoria.

16. See the companion paper by Castro and Renda (2015).

17. A good example is Italy, where RIA was introduced already in 1999 and subject to a pilot phase in 2000, but since then the institutional framework has never accompanied the use of this tool: in particular, the lack of an orderly regulatory planning and the lack of public consultation procedures embedded in the regulatory governance cycle

have doomed the use of RIA to an early failure. A similar argument can be developed for other countries, e.g. France (before and to some extent also after 2009) and Spain.

18. The debate on the use of numerical comparative analysis to compare legal systems heated up at the end of the 1990s after the publication of the first "law and finance" work. See La Porta et al., 1998; Shleifer and Vishny, 1997; and La Porta et al., 1999. See, for an assessment of the evolution of the debate since 1997, Kaplan and L. Zingales, 2014.

19. See, for an application of complexity theory to economics, Arthur (2013).

20. The type of document required depends on the form of government and the scope of RIA. In presidential systems, where RIA is limited to government, an internal circular or administrative decree will suffice (e.g. Circular A-4 by OIRA, the 2002 Communication on impact assessment in the European Commission). The broader the application of RIA, the more important and official the legal source has to be (up to France, which adopted a constitutional reform to back the widespread adoption of RIA).

21. Under the Ford administration, the US government showed an increased interest in promoting the use of cost-benefit analysis in assessing the prospective impact of proposed regulations. Executive Order 11 821, issued in 1974, mandated an Inflation Impact Assessment by federal agencies. Such procedure introduced an *ex ante* assessment of the expected impact of new regulatory measures on the inflation rate. The creation of the Council on Wage and Price Stability aimed at ensuring that proposed regulations that were likely to exert a significant upward impact on nominal prices could be rejected in case they carried an incomplete or insufficient assessment of the inflationary impact. The Inflation Impact Assessment procedure can indeed be considered as a first version of what would later become the US Regulatory Impact Assessment (RIA) model. As a matter of fact, economists in the Council on Wage and Price Stability gradually transformed the mere estimation of the inflationary impact into a real cost-benefit analysis, to be used as a "counter-argument" during public consultation processes mandated by the 1946 Administrative Procedure Act.33 U.S. President Gerald Ford amended the inflation Impact Assessment model by issuing Executive Order (EO) 11 949, and stating that "[t]he title of Executive Order No. 11 821 of November 27, 1974 is amended to read 'Economic Impact Statements'". See Renda (2006, 2011).

22. See OECD (2010) and the pilot study written by Radaelli et al. (2010).

23. See, for a summary of the application of analytical requirements to independent agencies, Carey, M. P. (2014), "Cost-Benefit and Other Analysis Requirements in the Rulemaking Process", Congressional Research Service Report, R41974, December.

24. See European Commission (2015). For a comment, see Renda (2015).

25. Amongst the many OECD publications on this issue, see in particular OECD, 2005.

26 See the companion paper by Castro and Renda (2015).

27. In practice, some systems may be in the middle of either approach, for instance, Cordova and Jacobson mentioned that in; "some countries like Australia, approval of the adequacy of each RIA is required from the oversight body before the regulatory action proceeds. Depending on the power of the oversight body some opinions can in effect become nearly impossible to ignore. In the United States, OIRA has the authority to return draft regulations to agencies for reconsideration.

28. For example, if a given regulation increases the cost of energy production, this will be reflected in the cost structure of a number of industries, which might then pass-on part of this additional cost downstream along the value chain and eventually to end consumers. Similarly, if a certain regulation on the safety of chemical substances entails the withdrawal of certain products, downstream users will have to face replacement costs.

29. A risk-risk trade-off is a situation that requires choosing between options that each may cause some harm: i policy analysis a risk-risk trade-off can occur if, as a result of the implementation of a policy option, the remedy chosen reduces some risks but creates others. See, *inter alia*, Viscusi, 1994, pp. 5-17, making several examples including the following: "Chlorination of water is beneficial since it reduces the spread of a wide variety of diseases, but chlorinated water is also carcinogenic".

30. A different, controversial issue is whether one could include in this group a category of benefits *per se*, which contribute to societal welfare regardless of whether stated or revealed preference techniques testify of the existence of demand for them. See Sunstein and Thaler (2008).

31. For a more technical introduction to life-saving regulation, see Graham (2007). The term "lifesaving" is understood to encompass rules that curtail risk of nonfatal injury and illness (morbidity) as well as the risk of premature death (mortality). This use of the terminology "lifesaving" is attributed to Zeckhauser, 1975, and Zeckhauser and Shepard, 1976, p. 5.

32. The use of multipliers is, anyway, very controversial in the field of policy impact assessment. If multipliers are used, the scientific evidence behind them has to be carefully scrutinised and quoted in the analysis.

33. A variant of the CEA is the so-called cost-utility analysis method (CUA), which measures the relative effectiveness of alternative interventions in achieving two or more given objectives.

34. See Renda et al. (2014), for a detailed discussion of the categories of costs and benefits that affect specific categories of stakeholders.

35. The willingness to pay (WTP) for a given good is the maximum amount an individual is willing to sacrifice to procure a good or avoid something undesirable, whereas WTA is the amount that a person is willing to accept to abandon a good or to put up with something negative, such as pollution. When a regulation forces the transfer of resources from citizen A to citizen B, the transfer might entail a cost if A's WTA is greater than B's WTP.

36. On a partly different issue, administrative and compliance costs are often said to affect smaller firms in a disproportionate way: this means that regulations that shifts such costs from a public administration or a large company to a smaller company might not be zero-sum exercises, but might create a net cost.

37. Memo on cumulative effects of regulation, 20 March 2012, OIRA.

38. We also highlight the ongoing development of a very useful web portal, LIAISE, which will in the future act as a repository of methods and models that can be used to perform Impact Assessment. See www.liaise-noe.eu/ and http://beta.liaise-toolbox.eu/.

39. See the list included in the webpage of the project MODELS. MODELS is a specific targeted research project running from 2006 to 2009, co-funded by the European

Commission and co-ordinated by E3MLab of Institute of Communication and Computer Systems (ICCS) at National Technical University of Athens, Greece. The project involved four major general equilibrium and macroeconomic models developed in Europe namely GEM-E3 (E3MLab), WorldScan (CPB), MIRAGE (CEPII), NEMESIS (ERASME). www.ecmodels.eu/index_files/Page979.htm

40. http://147.102.23.135/e3mlab/gem%20-%20e3%20manual/manual%20of%20gem-e3.pdf.

41. In 1976, Robert Lucas argued that the parameters of traditional macroeconometric models depended implicitly on agents' expectations of the policy process and were unlikely to remain stable as policy makers changed their behaviour (see Lucas, 1976, pp. 19-46).

42. Conly apparently approves of New York's ban on trans fats under her criteria, while remaining ambivalent about New York City Mayor Michael Bloomberg's effort to persuade the US Department of Agriculture "to authorise a ban on the use of food stamps to buy soda."

43. See The New York Review of Books, March 7, 2013, www.nybooks.com/issues/2013/mar/07/.

44. One of several vivid examples is the displacement of Monsanto's PCBs in transformers and capacitors by an entirely different dielectric fluid pioneered by Dow Silicone. Regulation can thus encourage disrupting innovations by giving more influence to new 'value networks' or 'customer bases' in which demands for improvements in both environmental quality and social cohesion are more sharply defined and articulated. Of course, industries that would fear disrupting new entrants would not be expected to welcome this regulation. This explains in part their resistance to regulation and their propensity to try to capture regulatory regimes, surreptitiously or through direct negotiation (Caldart and Ashford, 1999).

45. Low impact proposals entail costs of less than USD 10 million (present value over a 10-year period) or less than USD 1 million annually. Medium impact proposals entail costs of USD 10 million to USD 100 million (present value over 10 years) or USD 1 million to USD 10 million annually. High impact proposals entail costs greater than USD 100 million (present value over ten years) or greater than USD 10 million annually.

46. See e.g. www.gao.gov/products/GAO-14-519, and www.gao.gov/assets/670/665016.pdf.

47. www.nao.org.uk/report/better-regulation-making-good-use-of-regulatory-impact-assessments/.

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Chapter 3

Stakeholder engagement in regulatory policy

By Professor Alberto Alemanno[1]

This chapter provides a comparative analysis of the new policies, institutional mechanisms and structures, as well as methodologies of stakeholder engagement in regulatory policy within the overall framework of representative democracy. It reflects on current practices in stakeholder engagement in regulatory policy in OECD member countries and provides some insights and recommendations for the future.

1. Alberto Alemanno is a Jean Monnet Professor of European Union Law and Risk Regulation at the *École des Hautes Études Commerciales* (HEC), Paris and Global Clinical Professor at the New York University School of Law.

Introduction

If the central objective of regulatory policy is to ensure that regulations pursue the public interest, this can only be identified and achieved with the help of those affected by regulation: the stakeholders – citizens, businesses, consumers, NGOs, the public sector, international trading partners and others. While this assertion states the obvious, the value of open and inclusive policy making has only been widely accepted parallel to the renaissance of participatory democracy. Amid contemporary challenges of representative democracies, such as the increased distrust of political parties and civic disaffection (Altman, 2013), OECD countries have only recently acknowledged the importance of "pay[ing] more attention to the voice of users, who need to be part of the regulatory development process" (OECD, 2010). In 2012, this sentiment was officially adopted as part of the *Recommendation of the Council on Regulatory Policy and Governance*, which urges OECD members to:

> *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.* (OECD, 2012a)

The OECD suggests that an open and inclusive approach to policy making "offers a way for governments to improve their policy performance by working with citizens, civil society organisations … businesses and other stakeholders to deliver concrete improvements in policy outcomes" (OECD, 2009a). Similarly, studies by the UK Institute for Government indicate that developing policies in an open way leads to better policy outcomes (Hallsworth and Rutter, 2011; Rutter, Marshall and Sims, 2012). Yet, despite the growing recognition of the importance of public engagement, as it will be illustrated in this report, stakeholder involvement still cannot be said to be sufficiently valued or integrated into policy making. For the time being, engagement processes in policy making are treated "as a nuisance at worst and as an optional extra or nice-to-have at best" (House of Commons, 2013).

This report provides a comparative analysis of the new policies, institutional mechanisms and structures, as well as methodologies of stakeholder engagement in regulatory policy within the overall framework of representative democracy. It reflects on current practices in stakeholder engagement in regulatory policy in OECD member countries and provides some insights and recommendations for the future.

This report builds upon the extensive literature regarding public engagement in policy making, then systematises the major stakeholder engagement techniques along the Regulatory Governance Cycle. The literature includes both academic and policy reports by think tanks and governmental agencies. While it does not include interviews with relevant experts and stakeholders, it is based on the state of the art's debate on public participation as it stems from an extensive offline and online research. On the one hand, the report collects news, blog posts and other relevant contents produced by individuals who experienced public engagement. On the other, the report also collects the current stakeholder engagement opportunities by visiting the major websites dedicated to this purpose. Due to the lack of data from OECD countries, it wasn't possible to provide a meta-study based on existing reviews of engagement practices. That being said, this

report does complement an on-going OECD survey on regulatory policy that will provide evidence on trends and concrete country practices.

Stakeholder engagement is a phenomenon that originates from the intersection of national regulatory reform efforts intended to promote more effective policy making with open government (participatory democracy) initiatives whose objective is to promote more transparent and inclusive policy making.[1] As such, it belongs to the broader trend of "democratic experimentalism" and complements traditional parliamentary and administrative policy making (Dorf and Sabel, 1998). The emergence of stakeholder engagement has been portrayed as a part of a wider shift from "government" to "governance", in which vertical and hierarchical forms are giving way to more horizontal and co-operative structures of policy making. As a result of this shift, a process of communication, consultation and engagement that allows for the public participation of stakeholders in different phases of the Regulatory Governance Cycle (OECD, 2011) is increasingly perceived not only as fundamental for understanding citizens' and other stakeholders' needs but also for improving trust in government. It is indeed now recognised that making decisions without public support may lead to confrontation, dispute, disruption, boycott, distrust and public dissatisfaction (Rowe and Frewer, 2004). While the rationales underpinning stakeholder engagement varies among countries, its goal is, on the one hand, to help policy makers collect more information and resources, thus enhancing the evidence base of regulations (input legitimacy), and, on the other hand, to increase compliance and, eventually, render more legitimate the outcome of the regulatory process (output legitimacy).

Yet, with great promises come challenges too. Lack of awareness, low participation literacy, and information overload act as barriers to genuine and effective stakeholder engagement, and thus threaten its declared goals. This is a concern for all policy sectors and areas, not merely for regulatory policy itself. Moreover, any form of engagement presupposes an active role not only of the public, who – despite being increasingly informed – is increasingly disengaged from the policy process, but also of policy makers, who are exhorted to reach out, not merely consult and respond.

In parallel with the international trend toward increased involvement of the public in policy making has come a growing number of processes, techniques and methods of participation – generally defined as mechanisms – for enabling engagement (OECD, 2013). These innovations are increasingly introduced at different levels of policy making and either aim at institutionalising participation or seek it through the introduction of accountability or monitoring mechanisms (Woodford and Preston, 2001; Institute on Governance, 2005). In particular, following the advancement of information and communication technology (ICT), the rapid emergence of digital-enabled mechanisms is forcing the reconsideration of stakeholder engagement in regulatory policy making. Historically, stakeholder engagement mechanisms were introduced to cope with "political conflicts surrounding the development projects, siting-decisions, new technology, risk environmental impacts, and the distribution of the associated burdens and benefits",[2] but have now been extended to a broader range of policy areas, thus becoming more mainstream.

While the existence of different rationales and mechanisms for stakeholder engagement suggests its multidimensional nature, it also indicates uncertainty as to how its various objectives may be effectively achieved. The semantic confusion and methodological variance surrounding the concept of public participation add to this uncertainty. As will be illustrated, stakeholder engagement is not only defined widely, but

also implemented in a variety of ways: according to various mechanisms, at different stages of policy making, with different objectives (e.g policy idea, proposal, impact assessment, etc.), and with distinct types of participants, requirements, and goals. Given the level of variance in engagement practices, there is no single theory or model that prescribes how to enable effective stakeholder engagement (e.g. which mechanisms, how, etc.) in any particular situation (see Fung, 2006). While the aim of this policy report is not to advance such a theory, it provides an exhaustive overview of the major stakeholder engagement practices, their major challenges, and the opportunities they present before formulating a few final recommendations.

What is stakeholder engagement?

Definition of stakeholder engagement

Before illustrating and systematising the major stakeholder engagement mechanisms, it is necessary to define the concept underlying these mechanisms: engagement. Generally speaking, stakeholder engagement – which is also indifferently referred to as public participation, open policy making,[3] or engaged governance[4] – indicates the practice of involving members of the public in the process of policy making.[5] As such it may be differentiated from and contrasted with nonparticipation situations typical of more traditional models of government in which elected representatives, assisted by appointed experts, are left alone in enacting policies. This is, however, a very broad notion of engagement that needs further refinement to be employed in a meaningful way. Since the public may be involved in policy making in a number of different ways and at different levels, it is appropriate to break down the concept of engagement based on the nature and flow of information between participants and policy makers. As a result, one may identify within the concept of engagement three different components: *i)* public communication, *ii)* public consultation, and *iii)* public participation.

1. In public communication, policy makers convey information to the public. Due to the one-way information flow, the public is not involved. Public input is neither foreseen nor expected.

2. In public consultation, policy makers receive information from members of the public within the framework of a government-initiated process. The input gathered is perceived as representative of societal opinions on the subject.

3. Finally, in public participation, members of the public and policy makers exchange information. As a result, unlike with the previous two forms of engagement, public participation involves some forms of dialogue between policy makers and stakeholders. By involving some deliberation, public participation may lead to change in the opinions of both parties.

Ideally, stakeholder engagement mechanisms should comprise elements of all three. As such, stakeholder engagement, by requiring a commitment to the active involvement of citizens in policy making through citizen deliberation, can be contrasted to traditional consultation methods which only capture opinions and do not provide an understanding of citizen perspectives (Wyman, 2011). The reality is, however, that the majority of today’s engagement mechanisms, being foreseen at different stages of policy making, operationalises just some of the different components contributing to stakeholder engagement. Since each of its components is crucial to enhance governance, stakeholder engagement exists only when the three components of engagement are ensured, while each one alone is insufficient.

The OECD has endorsed this three-part approach. According to the OECD Guiding Principles for Open and Inclusive Policy making, inclusion means not only that all citizens should have equal opportunities and multiple channels to access information, but also that be consulted, and participate. Moreover, it is submitted that policy makers should make every reasonable effort should to engage with as wide a variety of people as possible. And, in case of organisations speaking on behalf of a given class of interests, these entities should be as representative as possible of the holders of those interests.

Genesis of stakeholder engagement

Stakeholder engagement is a relatively new term hardly used before the 1990s. It finds its philosophical roots in the idea of participatory democracy, was operationalised by new public management techniques and eventually has become part of the broader Open Government movement.

The philosophical underpinning of a citizen-centric worldview in policy making is offered by the idea of "participatory democracy", which is generally ascribed to Athenian democrats living in the 5th century BCE. This theory has been taken up and developed by contemporary social theorists such as Hannah Arendt and Jürgen Habermas, among others. New public management injected business-world concepts such as entrepreneurialism, output and metrics, into public administration, and suggested that policy makers should see citizens as "consumers" of the business of government. As a result, concepts such "co-creation" and "co-production" have emerged to describe the systematic pursuit of continuous co-operation between government agencies and stakeholders.

At the theoretical level, the concept of inclusive policy making through stakeholder engagement largely overlaps with that of open government. The OECD defines open government as "the transparency of government actions, the accessibility of government services and information and the responsiveness of government to new ideas, demands and needs" (OECD, 2005). In particular, inclusion is one of the two dimensions of Open Government, as defined by the OECD (OECD, 2009a). As a result, openness and inclusion represent the two pillars to deliver better policy outcomes not only for, but with, citizens. Today, inclusive policy making through stakeholder engagement is set to enhance government accountability, broaden citizens' influence on decisions and build civic capacity.

Scope of stakeholder engagement

Since regulation is seen as one of the fundamental powers of the state – together with fiscal and monetary authorities – one may expect that stakeholder engagement be part of all stages of the Regulatory Governance Cycle (see OECD, 2011; OECD, 2001). As previously anticipated, this is far from being the case in most experiences of stakeholder engagement. Stakeholders should not only be consulted when new regulation is being developed (through consultation procedures), but should actively participate all along the policy process. When managing the stock of regulations, stakeholders should be engaged in the processes of prioritisation as well as evaluation of individual regulations and/or regulated areas. Stakeholders – being the users of regulation – should also be at the centre of monitoring and measuring performance of regulations and regulatory frameworks. Last but not least, stakeholders may also be engaged in shaping and evaluating the overall regulatory policy framework.

While it appears undisputed that stakeholder engagement should take place along the whole policy cycle, it remains more arguable how to actually ensure that. As mentioned above, stakeholder engagement was originally developed in the framework of the preparation of policies governing new technologies so as to promote their public acceptability (Holzinger, 2001). That is the context that gave rise to the birth of the "minipublic" technique, which today has been expanded to a broader number of participatory experiences. According to this engagement technique, selected groups of citizens are invited to express their opinions on policy questions after having being exposed to evidence and argument. This has been then operationalised through citizens' juries and deliberative polls. Although this is just one of the many techniques available to engage stakeholders in policy making, it appears – as of today – one of the most widely used across OECD countries.

Box 3.1. **Mini-publics**

Deliberative mini-publics are "citizen forums" in which individuals representing different perspectives come together to deliberate on a particular issue. Generally speaking, mini-publics operate by providing the participants with information, scheduling meetings with experts and stakeholders, and creating space for small-group discussions. Mini-publics encourage democratic participation, help to bridge gaps between citizens and policy makers, and assist policy making with regard to the public acceptability of complex or evolving issues (Grönlund, Bächtiger and Setälä, 2014).

A number of states have used different types of mini-publics to promote democratic decision-making on various issues. In Ontario, Canada, for example, a Citizens' Assembly on Electoral Reform made up of 104 Ontarians was tasked with examining the electoral system and providing suggestions for reform (www.citizensassembly.gov.on.ca/). In Denmark, the Danish Board of Technology relies on "consensus conferences" to assist in developing regulation for ethically complex technological subjects, such as gene therapy, GMOs, and electronic surveillance (www.tekno.dk/?lang=en). And Belgium's "G1000" programme attempted to use mini-publics to establish a citizen-based political agenda during a time when the elected government remained deadlocked (www.g1000.org/en/).

Source: Grönlund, K. A. Bächtiger, & M. Setälä eds. (2014), Deliberative Mini-Publics: Involving Citizens in the Democratic Process ECPR Press 2014; Citizens' Assembly on Electoral Reform, www.citizensassembly.gov.on.ca/ (accessed 13 October 2014); Teknologi-Rådet, www.tekno.dk/?lang=en (accessed 13 October 2014); G1000, www.g1000.org/en/ (accessed on 13 October 2014).

Rationales for stakeholder engagement in regulatory policy

Since its early days, public participation has been broadly considered to be a defining feature of democracy (Dahl, 1998). Unless citizens and other societal actors deliberate about public policy and policy makers allow their choices to structure and inform governmental action, democratic processes are meaningless (Habermas, 1984, p. 86). While public participation has historically involved voting in free and fair elections to select representatives, now the idea is spreading that citizens should also take a more active role in government decision-making between elections. As previously illustrated, these "additional" forms of participation are collectively defined as stakeholder engagement. Before the last two decades, the debate about the virtues of stakeholder engagement in government decision making was predominantly academic (Dryzek, 2000). Today, however, it has moved into the political and societal arena. Driven initially by new public management techniques in both the developed and developing countries, it

has become a practical enhancement to representative democracy and a keystone of democratisation.[6] It is now commonly recognised that making decisions without public support may lead to confrontation, dispute, disruption, boycott, distrust and public dissatisfaction (Rowe and Frewer, 2004). As a result, the range of stakeholder engagement techniques has been expanding in recent times and – amid the spread of digital-enabled technologies – is set to further develop.

In view of the actual enhancement and potential expansion of public participation, this section explores the different rationales accompanying increasing stakeholder involvement in regulatory policy.

OECD governments pursue a range of different yet largely complementary goals when they promote stakeholder engagement in policy making. Their aims are not only diverse, but they are also subject to change over time (OECD, 2009a, p. 27). It is however possible to systematise the different rationales underpinning governmental efforts to encourage public engagement on the basis of whether they pursue intrinsic or instrumental values.

In a democracy, public engagement presents *intrinsic value* by ensuring accountability, broadening the sphere in which societal actors can make and shape decisions, and building civic capacity and trust. This is what is often referred to as the "democratic performance" of governments, i.e. the degree to which government decision-making processes live up to democratic principles (Klingemann and Fuchs, 1995). In particular, under this perspective, it is believed that engaging citizens and other stakeholders is necessary to develop and maintain public confidence in governmental institutions and decision-making processes. According to the United Nations, enhanced civic engagement in public affairs has the potential to yield pro-poor benefits, re-arrange political decision-making institutions, deepen democracy, create new citizenship values, enhance accountability and transparency in public governance, and, indeed, build trust in government (UNDESA, 2008).

Stakeholder engagement also presents *instrumental value* by requiring transparency, strengthening the evidence base of policy making by tapping a broader reservoir of ideas and resources (Bourgon, 2007), and reducing implementation costs by favouring compliance. This coincides with what is often referred as "policy performance", i.e. the ability of governments to deliver tangible positive outcomes for society (Klingemann and Fuchs, 1995). While for policy performance, the focus is on output, for democratic performance (or intrinsic value) the focus is mainly on the input and the overall process. Stakeholder engagement is today increasingly recognised as a driver of innovation. The hypothesis that collaboration enhances the potential to discover novel and innovative solutions in policy making was originally developed in the 1980s and subsequently tested (see Gray, 1989; Roberts and Bradley, 1991). Given the mounting complexity and scale of governance challenges, governments are increasingly aware that their efforts aimed at designing effective policy responses are doom to fail without the input of a wide variety of stakeholders. In these circumstances, public engagement, by progressively materialising into another level of governance, is becoming part of the standard governmental toolbox (OECD, 2009a, p. 24). There is a growing belief that the policy making needs to become more inclusive and participatory as standard practice.

The experience acquired within the OECD suggests that the dominant attitude vis-à-vis stakeholder engagement is instrumental rather than intrinsic (OECD, 2009a, p. 27). This suggests that the actual commitment towards engagement is more likely to contribute to the legitimacy of the policy process than to its overall democratic credibility

and accountability. However, the two aspects of intrinsic and instrumental value are closely interrelated. As it was noticed, "poor practice, shallow commitment and a lack of tangible results or feedback breeds public cynicism and undermines trust in government" (OECD, 2008). Therefore without a broader commitment to the intrinsic value of public engagement, there is a risk that governments will continue to fall short in reaping the instrumental benefits they seek.

Stakeholder engagement is today increasingly recognised as a driver of innovation. But there are more instrumental reasons behind the diffusion of engagement practices. In particular, policy makers seem to believe that in order to decide whether government intervention is really necessary in a given area and what kind of solutions would be most suitable, they should gather and analyse as much information, including scientific expertise, as possible. However, it is obvious that governments cannot have all the information available, and need to use input from users and interested parties.

The benefits of stakeholder engagement extend beyond the information-gathering phase as well. Involving stakeholders in the rulemaking process can point regulators to difficulties, inefficiencies, and solutions that so far have not been taken into account. Furthermore, public participation increases the likelihood of compliance by building legitimacy into regulatory proposals and may therefore improve the effect of regulation and reduce the cost of enforcement (OECD, 2009b). It can also lead to increased creativity and innovative policies, as stakeholders outside the government are more likely to come up with non-traditional solutions. Finally, interested parties whom the potential regulation will directly impact will likely provide better input for assessing this potential impact.

While hopeful and promising, however, most of these claims of the benefits of stakeholder engagement are – as will be illustrated – yet to be fully empirically substantiated.

The next section describes the different approaches to engaging stakeholders in the regulatory process and strives to provide an attempted systematisation.

Typologies of stakeholder engagement

This section provides an overview of approaches and good practices in engaging users of regulation in designing regulatory policies in OECD countries.

As a result of the growing commitment towards more inclusive and participatory decision-making processes, a significant number of countries promote stakeholders engagement in regulatory policy (OECD, 2013). Novel forms of public participation and engagement are emerging that open new avenues for citizens to participate more fully in policy making within the framework of representative democracies. Many more are proposed and partly experimented at different scales across the world (for an overview, see Bull, 2013, pp. 11-13).

A wide range of engagement mechanisms may be used to engage a broad diversity of stakeholders within society. Unfortunately, these mechanisms are not only numerous but also generally poorly defined, which makes their review particularly challenging.

It is proposed to systematise these mechanisms according to the stage of the policy cycle they engage or in which they are made available to stakeholders. The Regulatory Policy Cycle includes:

1. Policy Initiative and Agenda Setting;
2. Policy Preparation and Design;
3. Policy Implementation and Monitoring.

This section also identifies for each mechanisms that forms of engagement – whether information, consultation or participation – it intends to operationalise. As will be illustrated, even when these mechanisms are offered within the same stage of the policy cycle, such as for instance at the level of policy preparation, they might focus on different aspects of a policy proposal, such as policy options, legislative drafts, impact assessments, etc. While this review predominantly focuses on institutionalised forms of stakeholder engagement, it also refers to some ad hoc experiences susceptible to be institutionalised in the future.

Policy initiation and agenda setting

Policy initiation and agenda setting is the very first stage of policy development. It consists of identifying and possibly determining the existence of a problem for which a policy response may be warranted.

Traditionally, the initiation of the policy process has been a prerogative of the political process. As a result, the direct input of stakeholders into setting policy agendas has largely been disregarded (Altman, 2013). However, given the increasing emphasis on participatory democracy, stakeholder engagement as a means for initiating policy action is set to acquire increasing importance. Already today a significant number of countries entrust the public with the possibility of prompting policy initiation by submitting ideas, proposals or requests to governments. Referenda, petitions and popular initiatives typify those forms of direct participation into policy making. Contrary to conventional wisdom, these citizen-initiated mechanisms of direct democracy are not intended to supplant representative democracy, but rather complement them (Frey et al., 2011. For a EU perspective, see for e.g., Alemanno, 2014). They enable citizens and other stakeholders to put issues on the political agenda that policy makers would prefer not to discuss (Blankart, 1992; Qvortrup, 2014). These types of mechanisms are available in the vast majority of OECD countries (Cuesta-Lopez, 2012), and can be interpreted as an expression of direct citizen decision-making in contemporary democracy. Depending on how these pre-legislative mechanisms are governed within each legal system, they involve different forms of engagement (For an overview, Roberts and Bradley, 1991).

Referenda

A referendum is a direct democracy mechanism that provides for a vote by the electorate on an issue of public policy and includes the citizens in decision making (see, for an exhaustive study, Altman, 2011). Depending on the country's legal system, referenda may be initiated by the citizens, generally through a citizens' initiative, or by legislative act or by governmental executive order. Referenda can be used to initiate policy, but are more frequently used for consultative purposes or to obtain popular approval of a governmental policy (Qvortrup, 2014). They can therefore enter the policy process at different levels and cover very different subjects.

Referenda come in a variety of shapes and sizes. They may aim at institutional alterations (such as changing rules about the length of presidential terms), at adopting new policies [such as the privatisation of public utilities in Uruguay or the approval by Costa Rica of a trade agreement with the US (Durán-Martínez, 2012)], or at constitutional

shift (such as the Irish referendum on the EU's Lisbon Treaty). Moreover, their legal status (mandatory vs voluntary), requirements (collection of signatures, etc.), as well as consequences (consultative or legally binding) vary considerable across countries.

Petitions

The right to petition is the right of a citizen to ask government to right a wrong or correct a problem. Although a petition is only as meaningful as its response, the petitioning right allows blocs of public interests to form, harnessing voting power in ways that effect change. The right to petition allows citizens to focus government attention on unresolved ills; provide information to elected leaders about unpopular policies; expose misconduct, waste, corruption, and incompetence; and convey popular frustrations without endangering the public order. This may in turn prompt a legislative response.

In the EU, citizens enjoy the right to address a petition to the European Parliament. Indeed, any individual "has the right to address a petition to the European Parliament if it concerns a matter that comes within the European Union's field of activity and affects them directly".[7] Moreover, in certain cases the Committee on Petitions may refer a petition to other European Parliament committees for information or further action. Consequently, a committee might take a petition into account in its legislative activities, which essentially consists of examining European Commission's proposals for adoption.

In the United States, the White House has set up a platform for citizen petitions. It is called "We the People". US citizens may initiate a petition through the submission of a short abstract. If such a petition gathers more than 25 000 signatures in 30 days,[8] the White House identifies an expert in the government to respond to the petition. The responses are then published on the White House website.

Initiatives

Another instrument that can be used to get policy making started from the bottom is the "initiative", also called an "agenda initiative".

Only a few countries in Europe foresee citizens' initiatives,[9] but – as will be illustrated – the EU has recently established its own mechanism: the European Citizens' Initiative (ECI). The ECI is the first transnational instrument of participatory democracy in world history.[10] It allows one million citizens from at least seven EU Member States to invite the European Commission "to submit a proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".[11] There are several steps before an ECI can be submitted to the Commission. To launch an initiative, a citizens' committee has to be set up. A citizens' committee is composed of at least seven EU citizens, who must live in at least seven different EU countries. Prior to the collection of signatures, this committee has to register its proposal on the Commission's website. Then, initiators have to collect one million signatures across the European Union, face-to-face or online. The time limit for collecting signatures is 12 months from the date of registration. Moreover, organizers need to have a minimum number of signatories in at least seven EU countries. Once these steps are completed, the Commission receives the organizers in order for them to explain in detail the matters raised by the initiative. Within three months, the Commission sets out in a communication its legal and political conclusions on the initiative, the action it intends to take and its reasons for taking or not taking that action. Then, the organizers are given the opportunity to present their initiative at a public hearing in the European Parliament. As

from late August 2014, only two initiatives have successfully completed the ECI process from registration to Commission acceptance and reply.[12]

In the United States, direct democracy is only found at the state and local level.[13] Twenty-four states have one or two types of initiatives,[14] which allow citizens themselves to vote to pass initiatives into law. The more powerful form of American initiative is the *direct initiative* as found in states like California[15] and Nebraska.[16] As with all initiatives, direct initiatives are citizen-designed legislative proposals through which citizens can express their support by signing petitions. What makes the direct initiative such a powerful tool for citizenry is that after collecting the required number of signatures, the proposal goes directly before all the registered voters of the state for a vote of approval and enactment. Slightly weaker, an *indirect initiative* works the same way, except that after signature collection the state legislature must approve the proposal before citizens may vote on it. Some states like Massachusetts[17] and Ohio[18] even provide that further signature collection can override this legislative veto. Sometimes, American courts exercise judicial review over ballot initiatives and referendums, as with the cases of *Hollingsworth v. Perry* where the issue was eventually appealed to the Supreme Court.[19] In that case, citizens successfully filed suit against a ballot initiative banning gay marriage. The case raised questions over whether courts should have the power to review direct democracy campaigns – a debate that also exists in the EU at national levels.

Box 3.2. **eParticipation**

A relatively new and still experimental way of engaging stakeholders in policy initiation and agenda setting is through the use of information and communication technologies (ICT). Various recent initiatives have attempted to bring citizens and politicians into contact with each other in developing public policy. The EU's Demos@Work program, or instance, seeks to facilitate discussions between civil society and elected representatives in Europe on the harmful effects of smoking. The initiative currently has two pilots ongoing in Catalonia and Lithuania. Another example is the EU's eCommittee project which seeks to gather suggestions and questions from citizens in 10 Member States and deliver them through webconference technology to Members of the European Parliament working on issues related to environmental protection and climate change. Both of these examples are part of the larger EU eParticipation initiative.

Source: Koussouris, S., Y.Charalabidis and D. Askounis (2011), "A review of the European Union eParticipation action pilot projects", *Transforming Gvoernment: People, Process and Policy*, Vol. 5, pp. 8-19.

Policy preparation and design

The stage of policy making that traditionally hosts the most stakeholder engagement mechanisms is that of policy preparation and design. Having established the existence of a problem warranting policy action, policy makers work on a first draft proposal that is subject to public scrutiny in order to obtain information and comments from stakeholders.

Although the way in which external input is channelled into the policy preparation varies depending on the engagement mechanism, this generally consists of a consultation mechanism.

Consultation during policy preparation is a well-established mechanism across OECD countries. Its criticisms and limitations are well documented, and generally revolve around consultations (Woodford, and Preston, 2001). Usually consultation takes the form

of publishing a legislative draft on a ministry/department's website and enabling the submission of comments through email or a web form. Many countries are now using centralised, government-wide web portals to make all the ongoing consultations accessible in one place.

Public consultation might therefore accomplish or operationalise two forms of engagement: information and consultation. Consultation procedures inform the public about incipient policy initiatives and offer the opportunity to comment on draft proposals. Typically, however, these forms of engagement fall short of activating participation as: *i)* the communication between regulators and stakeholders is unilateral; *ii)* stakeholders are usually not interconnected (some forms of public consultation, such as advisory groups or preparatory public commission, may however allow participants to communicate among each other); and *iii)* they generally come too late in the legislative process, as the draft is more or less ready and there is not enough room for substantial changes. What is more, stakeholder organisations typically do not foresee participatory mechanism ensuring representativeness of their input into the consultation process.

The following sub-sections discuss the major stakeholder engagement mechanisms and experience acquired with these tools so far.

Public consultations during policy preparation and design may generally be organised in different ways (e.g. open vs closed) and have different objects (legislation vs executive acts). For example, while the US notice-and-comment procedure apply exclusively to proposed rules (i.e. acts of execution of previously adopted legislation), other forms of consultation, such as the EU consultative practice, apply predominantly to the legislative process (Parker and Alemanno, 2014).

Notice-and-comment

Notice-and-comment is one of the oldest and most articulated stakeholder engagement mechanisms currently in existence. In the United States, the Administrative Procedure Act (APA) originally introduced notice-and-comment in 1946 in the context of the rapid growth of federal agencies and programs during the New Deal era, which was accompanied by the increasing use of regulations. One must observe that this stakeholder engagement mechanism does not apply to the legislative process, but only to rulemaking.

Under notice-and-comment, virtually all federal agency rulemaking is governed first and foremost by APA §553, which contemplates a three–step rule-making process:

1. The agency publishes a Notice of Proposed Rulemaking (NPRM) in the Federal Register. This NPRM contains a proposed draft of the rule backed by a brief explanation and a request for comments.
2. The agency receives comments and modifies the draft rule as appropriate.
3. The agency issues a final rule accompanied by a preamble in which it explains the rule and responds to comments. In APA parlance, all final rules must be supported by a "concise general statement of their basis and purpose."

Notice-and-comment accomplishes the first two forms of engagement: information and consultation. It informs the public because in most instances, the NPRM offers the first official glimpse that the public at large gets of the agency's approach to the rule.[20] Consultation occurs as the NPRM is immediately followed by a public comment period of a length that is set by the agency in the NPRM itself. The third form of public engagement – participation – is absent.

Negotiated rule making

There is, however, an important variant of notice-and-comment that aims at injecting some participation into the consultation process so as to pave the way to some co-creation. This is called "negotiated rule making" and was introduced in the United States in the 1990s as a way of increasing stakeholder involvement in the rulemaking process by creating a forum for direct dialogue between selected representative stakeholders and government rule writers.

After some agency experimentation with this process, it was codified into law in the Negotiated Rulemaking Act of 1996, which expressly authorises it and encourages agencies to use it.[21]

In this process, an outside convenor and mediator is brought in to convene and preside over negotiations for a balanced group of representative stakeholders – public interest groups, industry interests and government regulators – as they analyse the data, examine the issues, and try to negotiate the text, or at least the main terms, of a proposed rule. The group is proactively balanced so that no one interest can dominate.[22] Its goal is to reach consensus on a proposed rule. All plenary meetings of negotiated rulemaking committees are open to the public, with either transcripts or detailed minutes posted online shortly after each meeting. If the committee does reach consensus, the agency agrees to propose that consensus as the NPRM and take comments on that consensus proposal as it would in any rulemaking process. After the comments come in, the agency sifts through them and decides what changes, if any, to make before issuing the final rule.

Even when the process does not yield consensus, agencies find that the opportunity for direct dialogue between stakeholders and regulators greatly improves the quality of the agency analysis of technical issues, and builds relationships and trust among stakeholders and between stakeholders and regulators. Thus, negotiated rulemaking does not have to reach consensus in order to serve as a valuable tool in the rulemaking process.

Consultative approaches such as negotiated rulemaking need not be confined to development of rules and acts. Collaborative techniques are readily adaptable to virtually any kind of regulatory co-operation dialogue: they simply entail convening balanced groups of representative stakeholders to exchange information, meet periodically, and search together for solutions to regulatory co-operation problems, be they issues of mutual recognition or development of new standards. In whatever setting such techniques are used, they bring the advantage of much more rapid, efficient, transparent and robust exchange of information than is possible using conventional decision-making processes.

EU consultation practice

To ensure that "the Union's actions are coherent and transparent", the European Commission – the sole initiator of EU legislation – is mandated to "carry out broad consultations with parties concerned".[23] While the EU Commission has been carrying out some forms of stakeholders consultation since its inception [24], this procedural duty – which was introduced in 2009 – is the first acknowledgement of the constitutional relevance of consultation practices. Reliance on well-known practices such as the preparation of green and white papers reflects the Commission's commitment to the consultation of interested parties.[25]

Under the European Commission Impact Assessment Guidelines (EU Commission, 2009), consultation with interested parties is foreseen for – and embedded in – every Impact Assessment (IA). Consultation must follow the Commission's guidance on

minimum standards.[26] These non-binding guidelines call for clear, concise consultation documents that include all necessary information for stakeholders. Consultation can be carried out on any or all of several distinct elements of the impact assessment: determining the nature of the regulatory problem, identifying policy objectives and policy options, and assessing the costs and benefits of each option.[27] Consultation is not a one-off event. It runs throughout the preparation phase of both the draft IA and the proposal. Thus, it requires the preparation of a consultation plan by the IA support unit and the IASG that determines:

- the objective of the consultation;
- the elements for which this is necessary (nature of the problem, policy options, etc.);
- the target group (general public or a special category of stakeholders, etc.);
- the appropriate consultation tool (consultative committees, expert groups, ad hoc meetings, consultation via internet, etc.);
- and the appropriate time frame for consultation.

The Commission's Guidelines foresee a minimum period for written public consultations of 12 weeks, and 20 working days' notice for meetings.[28] While the Guidelines encourage the Commission to provide feedback and take into account the comments received, unlike the US system, the Guidelines do not require that comments or Commission responses be incorporated as such in the Preamble or the text of the rule (though they do need to be reflected in the IA report). In practice, the Commission publishes a report that sums up the main findings gathered via the consultation and circulates it among stakeholders before finalising its draft IA and accompanying proposal.

One of the most interesting examples of participatory mechanism enabling stakeholder engagement in policy development exists in New Zealand. In New Zealand bills are – after the first reading – open to public comments. The public is invited to make submissions on the bill, hears evidence and recommends amendments to the legislator, who is expected to reprint a copy of the bill alongside a report explaining the reasons for any recommended amendment bases on the evidence gathered.[29]

Box 3.3. **New Zealand Marine Reserves Act**

The New Zealand Marine Reserves Act of 1971 allows for the establishment of Marine Protected Areas (MPAs) in which no fishing, removal of materials, dredging, or other activities that would disturb the natural environment are permitted. The Act came into being after a successful lobbying campaign led by researchers at Auckland University, and today has led to the protection of 35 reserves, with additional proposals currently going through the planning process (Ballantine, 2014). Under the Marine Reserves Act, public bodies such as universities and scientific organisations are permitted to propose areas for conservation as MPAs. In addition, regional community-based planning forums made up of publicly nominated community representatives deliver independent recommendations for establishing MPAs in their regions (New Zealand Department of Conservation, Marine Protected Areas, 2014).

Source: Ballantine, B. (2014), "Fifty Years On: Lessons from Marine Reserves in New Zealand and Principles for a Worldwide Network", *Biological Conservation*, Vol. 176, pp. 297–307, https://www.deepdyve.com/lp/elsevier/fifty-years-on-lessons-from-marine-reserves-in-new-zealand-and-zdvypbojmx; New Zealand Department of Conservation, Marine Protected Areas, www.doc.govt.nz/conservation/marine-and-coastal/marine-protected-areas/consulting-the-community (accessed 13 October 2014).

Policy dialogue

Another instrument enabling stakeholder engagement in policy preparation is called *policy dialogue*. It involves people from different interest groups sitting together around one table to focus on an issue in which they have a mutual, but not necessarily common, interest. It assumes that people in different positions will have different perspectives on the same problem.

Box 3.4. **The Dutch Energy agreement on sustainable growth**

The Dutch Energy agreement on sustainable growth, signed in 2013 between the Dutch government and 48 different stakeholders, seeks to reform the Dutch energy sector and make it more sustainable through 10 major commitments by the government and the stakeholders aimed at reducing energy use, increasing the percentage of green electricity production, and increasing jobs. The agreement was negotiated and signed within an advisory body to the Dutch government on socioeconomic matters, which was the initiator and organiser of the agreement. 48 different organisations representing a wide variety of interests participated in the negotiations and signed the eventual agreement. These organisations varied from environmental protection organisations, to employers' organisations, labour unions, and sectorial interest groups. Scientists, politicians and citizens also participated in the discussions and negotiations that led up to the agreement. A particular feature of the agreement was the commitments undertaken by private parties outside of the public policy framework, pre-empting the necessity of governmental intervention.

Source: Sociaal-Economische Raad (2013), Energieakkoord voor duurzame groei, www.ser.nl/nl/publicaties/overige/2010-2019/2013/energieakkoord-duurzame-groei.aspx (accessed 13 October 2014).

Implementation and evaluation

Stakeholders are rarely engaged in the final stages of the Regulatory Policy Cycle: implementation and evaluation, and even less at the level of policy enforcement. It is, however, intuitively important to involve the users of regulations in the implementation and evaluation phases. The involvement of stakeholders in the implementation of policies might induce a sense of ownership in the interested parties. The evaluation of policies, as well, might be difficult to achieve without engaging stakeholders who have better information on the real-life effect of regulation and provide invaluable insights.

Stakeholders' involvement in policy implementation

One of the few illustrations of stakeholder engagement in policy implementation is offered by the EU mechanism of co-regulation. The 2003 EU Interinstitutional Agreement on Better Lawmaking defines co-regulation as *"*the mechanism whereby a EU legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)" (European Union, 2003). In order to simplify EU documents and free up legislative channels, EU institutions can restrict themselves to promulgating the basic requirements of a rule. As partners who share responsibility, the interested parties in the field contribute to fulfilling objectives, and refining the details of EU texts. Their contribution goes beyond mere consultation. Nevertheless, agreements between recognised interested parties have an *inter partes* (between signatory parties) and not an *erga omnes* (general application) character.

Box 3.5. **The European Union's Emissions Trading Systems**

The EU's Emissions Trading System (ETS) is one of the centrepieces of the European Union's climate change policy framework (European Commission, 2014). Its aim is to reduce industrial greenhouse gas emissions in a cost-effective way by using market tools to efficiently distribute greenhouse gas emission allowances. The EU ETS is a "cap and trade" system. The EU sets a "cap" on the total amount of greenhouse gas emissions that may be emitted by industry during a certain period of time. It then issues permits for precisely that amount of emissions. Companies receive or purchase these permits (known as "allowances") and trade them amongst themselves, with the expectation that those for whom it is cheaper to reduce emissions will do so, while those for whom it is more expensive will pay for the permits instead. Over time, the "cap" is reduced so that total emissions fall. However, companies are able to decide for themselves what is the most cost-efficient way of implementing the change—whether to adapt immediately by purchasing low-emission technology, or to purchase permits instead.

Source: European Commission (2014), "The EU Emissions Trading System (EU ETS)", http://ec.europa.eu/clima/policies/ets/index_en.htm (accessed June 2015).

Box 3.6. **The "Partnership Approach" in Australian Fisheries Management**

The Australian Fisheries Management Authority (AFMA) is responsible for ensuring the sustainable and efficient use of Australian federal fisheries. In conducting its activities, AFMA is required to emphasise a "partnership approach" under which fisheries managers work in consultation with scientists, industry representatives, and conservationists to design and implement policy (Smith, Sainsbury and Stevens (1999). Management, industry, scientific, and environmental representatives are involved at nearly every level in the decision-making process. Though the AFMA Board is ultimately responsible for approving policy, regulatory details such as management arrangements, quota levels, by-catch numbers and other rules are all set using the partnership approach. Partners also play a key role in liaising between the AFMA and stakeholders with an interest in particular fisheries.

Source: Smith, A.D.M., K.J. Sainsbury and R.A. Stevens (1999), "Implementing Effective Fisheries, Management Systems, Management Strategy Evaluation and the Australian Partnership Approach", *ICES Journal of Marine Science*, Vol. 56, pp. 967–979.

Stakeholders' involvement in policy evaluation

Engaging stakeholders who have better information on the real-life effects of regulation can also provide invaluable insights into any effort to evaluate the outcome of policy making *ex post*. These insights, which complete expert advice, could be particularly valuable insofar as they help policy makers to understand the real impact and performance of the policy. Stakeholders' input, for example, may help better targeting regulatory review, saving both costs and time in the review process.

There exist a number of experiences aimed at capturing the wisdom and experience of those subjected to, or affected by, regulation well beyond traditional consultation mechanisms. Again, participation of stakeholders at this stage of the regulatory policy cycle can vary – from mere consultation, to more deliberative forms of participation. A stronger role in the evaluative process generally leads to a stronger sense of ownership by the stakeholders and, as a result, can lead to better evaluative results. On the other hand, one must be careful not to disregard clear data as a tool for evaluation and get a clear

sense what stakeholder participation at the evaluation stage is for: improving results of policy or making policy more legitimate by making it more inclusive. In case of the latter, dialogue with a wide variety of stakeholders can be more important than obtaining critical information from a number of experts in the field (Plottu and Plottu, 2011).

Box 3.7. **The Red Tape Challenge and the use of crowdsourcing**

The Red Tape Challenge launched by the UK government in 2011 was designed to "crowdsource" the views from business, organisations and the public on which regulations should be improved, kept or scrapped. The comments received influenced the decisions to scrap or modify over 1 100 regulations out of the 2 300 examined by November 2012 (House of Lords, p. 14). Crowdsourcing is a means of decentralising decision-making by asking the "crowd" to express their views, propose solutions and give insights on a particular issue and then using these views in public policy (Afuah and Tucci, 2012, p. 355). The crowdsourcing in the Red Tape Challenge programme consisted out of inviting the general public to comment via the internet on the usefulness of regulations within a set time limit. People could comment (anonymously) both publically or privately on the rules in question. Those comments were then used to assess whether regulations should be kept, scrapped or improved. Overall, the use of crowdsourcing was only partially successful (Lodge and Wegrich, 2015, pp. 30-46). Although crowdsourcing did give government officials additional information on the utility of rules and regulations, the nature of the comments given by the general public were generally not of a deliberative nature, hampering the use of crowdsourcing as a tool to substantially assess the rules in question. Moreover, there was a lack of public participation, with detailed rules and rules of limited application attracting fairly little attention.

Source: House of Lords, *Public Engagement in Policy-making*, p. 14; Afuah, A. and CL. Tucci (2012), "Crowdsourcing as a Solution to Distant Search", *Academy of Management Review*, Vol. 37, p. 355; Lodge, M. and K. Wegrich (2015), "Crowdsourcing and regulatory reviews: A new way of challenging red tape in British government?", *Regulation & Governance*,pp. 30-46.

Perception of regulation

Knowing how stakeholders perceive regulation enables regulators to verify if improvements or changes to regulation have been noticed and understood, to identify areas of concern, and to inform future regulatory reforms.

In European consumer law, for example, much of the focus of consumer protection legislation has been on protecting the ideal "circumspect and reasonably well informed" consumer by expanding companies' information disclosure requirements. However, behavioural studies suggest that increased information availability does not automatically lead to more informed consumers (Helberger, 2013). To the contrary, depending on how information is transferred, information disclosure can be ineffective and even counterproductive. Therefore, looking at how consumers use information in daily life and acknowledging bounded rationality, can enable more effective consumer protection measures. One way this is done is by making consumer information requirements "smarter" by reducing the amount of information and creating more user-friendly tools, such as easily recognisable symbols, to transfer essential information to the consumer.

Furthermore, knowing how regulation is perceived can also help bridge potential gaps between what stakeholders expect from the government and what the government actually does. The public's perception of how and on what basis decisions are made by the government may differ from actually existing or desired practice, and this may unnecessarily compromise the legitimacy of governmental actions. For instance, a recent

survey on GMO regulation in Spain showed that approximately half of Spanish food consumers believed that the decision to authorise certain GM foods by the European Commission was the result of pressure by industry, whereas a third of those consumers believed that the decision ought to be based on scientific opinion and another third on consumer preferences (Todt et al., 2009).

The most common method of verifying public perceptions of regulation is the use of perception surveys, which monitor citizens' perceptions of regulations by asking them questions about their views on regulatory performance on certain issues. The Eurobarometer, for instance, is a series of public surveys conducted by the European Commission relating to the European Union and its work. However, such surveys need to be designed carefully in order to obtain usable results, as the order of questioning, question priming, complexity, social desirability and cultural differences may influence the outcomes of surveys (OECD, 2012b).

Concluding lines on typologies

Given the current revival of participatory democracy mechanisms aimed at complementing representative democracy, stakeholders' engagement opportunities are set to increase, all along the policy process. As such, it is important to identify and discuss what have been and remain the major barriers to effective public engagement in policy making.

Obstacles to stakeholder engagement

Although an increasing number of countries allow stakeholders to engage in policy making, evaluations of current practices suggest that public engagement has not yet become part of the policy process. In particular, there still "seems to be a significant unsatisfied demand for effective consultation" (OECD, 2010).

This section explores the major factors that contribute to making stakeholder engagement practices difficult to implement. Although most of those obstacles were identified – due to their wider diffusion – in relation to consultation practices (Woodford and Preston, 2001, pp. 349–352), they generally act as barriers to other engagement avenues existing at other stages of the policy cycle. More critically, although public engagement emerged in response to the shortfalls of public consultation, it does not seem to have addressed and overcome them (Woodford and Preston, 2001, pp. 349–352).

An initial consideration is that stakeholder engagement practices, unlike conventional forms of public involvement, require active and not merely passive involvement from both the public and policy makers. Voting and other forms of public participation, such as signing petitions or responding to opinion polls, merely ask stakeholders to express their opinions, rather than requiring an understanding of the relevant facts and policy implications as stakeholder engagement does. Moreover, virtually all forms of stakeholder engagement expect stakeholders to motivate their expressed preferences, which often means engaging with opposing views. Similarly, stakeholder engagement mechanisms, unlike conventional and most familiar forms of public involvement, require stakeholders to consider and evaluate a range of possible outcomes. In sum, the various forms of stakeholder engagement demand significant time, attention and cognitive abilities that not everyone has or is willing to devote to the cause. In other words, the new forms of public participation in policy making tend to be more demanding of stakeholders than conventional forms of public involvement, such as voting. The same is true from a

policy maker's perspective. Having lost the monopoly of policy making, policy makers are expected to act as guardians of this engagement process by proactively ensuring representation, moderating, analysing the input coming from stakeholders.

While the demanding nature of stakeholder engagement acts as significant disincentive to participation for the public and for policy makers, there exist other major obstacles to effective public participation and engagement:

- lack of awareness
- low participation literacy
- information overload and capture
- cynicism due to past record.

Lack of awareness

"The Internet is the tool of choice for OECD member countries in providing citizens with access to government information anytime, anywhere" (OECD, 2001, p. 52). It is therefore not surprising that OECD countries provide the public with relevant information regarding legislative and regulatory decision making (Ubaldi, 2013). They generally establish a one-stop shop – frequently also available online – to provide this information to the relevant stakeholders. Governments also supplement these official forms of communication with press releases and other statements, including press conferences, susceptible to be taken up by the press and thus conveniently communicated to the public. Yet neither national official notification systems, such as the Official Journal of the EU and the US Federal Register, nor the information conveyed by the media is effective in spreading the word to most individuals and other small actors who have a stake in the process. In particular, the press reports the news in a selective fashion, typically conveying to the public that the government is taking action but without providing context nor explaining the engagement opportunities.

Low participation literacy

There is another major factor that explains why opening the policy-making process through stakeholder engagement mechanisms is not sufficient to attain inclusive policy making. Aside from lobbyists and professional players, few actors know how government works and how its various decision-making processes are organised. This knowledge gap is referred to as "low participation literacy".[30] Low participation literacy explains why the provision of information about policy making and the opportunities to get involved along its majors phases are insufficient to make stakeholder engagement effective. It first suggests that even when stakeholders learn about policy making through the media, a blog or an email advocating for action, they might not realised that this is an ongoing process in which policy makers look for their participation. In other words, even when information spreads this might not be enough to trigger engagement.

If the opportunities for informing the public and promoting public engagement are greater today than ever before, why then do people not engage more? Even where information is combined with awareness about possibilities for engagement two other scenarios appear common: first, that people are willing to contribute but are unable; and second, that people are able but unwilling (OECD, 2009a, p. 16).

Those who are willing might be unable to engage in participatory initiatives for a variety of reasons, such as cultural, language barriers, socio-economic status or disability (see OECD, 2009a, p. 49). Those who are instead potentially capable of engaging might fail to do so because they lack time, do not trust the policy-making process or, more generally, lack incentives to participate. Overall, most of the individuals in OECD countries attribute a lack of interest in policy issues as being “important” or “very important” factor affecting people’s reticence in participating in policy making (OECD, 2009a, p. 50).

Information overload and capture

The dominant stakeholder engagement practices, which are embedded in bureaucratic, highly technical process of decision-making, tend not to be user-friendly. The documents announcing and framing policy action, implementation and monitoring are typically lengthy and complex. Thus, for instance, the previously mentioned US notice of proposed rule making (NPRM), which explains what policy makers are proposing and why, consists of a long and complex document whose understanding requires a college level of education. Similarly, a Regulatory Impact Assessment document, explaining policy makers’ predictions about the impact of a proposal, is a lengthy analytical document containing plenty of data difficult for non-expert audiences to understand. Documents of such lengthy and complex nature discourage rather than motivate broader stakeholder engagement thus contributing to its decline. More critically, due to their technocratic nature, these documents and procedures favour or privilege those stakeholders who can leverage the excessive use of information and related information cost as a means of gaining control over decision-making. This phenomenon, called information capture, typically translates into a continuous barrage of letters, telephone calls, formal comments, memoranda by powerful groups of stakeholders who may take control of the policy-making process by reducing the number and diversity of affected parties by the policy process (Wagner, 2010, pp. 1325-1326). Lack of awareness combined with information load and capture provide a dangerous mix that, by negatively affecting engagement, reduces the pluralistic engine that is so fundamental to any stakeholder engagement exercise.

Cynicism due to past record

There is another major barrier to effective stakeholder engagement. Due to the past record, there is significant diffuse scepticism towards governments’ efforts at promoting public engagement. Experience has shown that public engagement mechanisms are often used, at worst, as a “deficit model” (to sell difficult ideas to the public) or, at best, as a “tick-box” exercise. Consultations, in particular, are all too often used to legitimise decisions that have already been taken. Some believe engagement can be used not only cosmetically but also as “fig-leaf of legitimacy for bad policy”.[31]

There is indeed significant room for manipulation in framing public engagement. Due to insights of behavioural studies, it is apparent that consultation processes can be affected by the type of questions asked, what information is given, how the stakeholders are primed, and how engagement is facilitated (for an introduction, see, e.g., Kahneman, 2011; Ariely, 2008).

There is a further danger. The government is not the only entity that could instrumentally use public engagement to attain its pre-determined political objectives. Third parties could also hijack the engagement procedures to steer the policy process towards their interests.

The risks of a failed engagement policy

The obstacles previously identified to effective stakeholder engagement seem particularly worryingly, as they not only run against the various rationales previously identified, but they also raise more immediate *equity* and *efficacy* concerns. Efficacy because, according to the traditional instrumental rationales pursued by stakeholder engagement, the inherent value of opening up the regulatory governance cycle is to channel a wider range of views as input into evidence-based policy making. Equity because failing to effectively engage with all stakeholders may threaten the ability of policy makers to identify the "public interest" that should guide democratic policy making. As has been said, "even if the consequences are unintended, the parties with resources to feed the information monster will benefit, to the detriments of actors with fewer resources and the administrative system as a whole" (Wagner, 2010, pp. 1325-1326).

Both efficacy and equity concerns are epitomised by the phenomenon of the "missing stakeholders" (Farina and Newhart, 2013). Due to the combination of lack of awareness, low participation literacy and information overload, there are individuals and small entities who, despite being directly impacted by policy making, are unlikely to engage effectively in stakeholder engagement processes. This is particularly problematic because their input is among the most potentially valuable for policy makers along the whole policy cycle. This is because missing stakeholders are likely to contribute to policy making with a different sort of information than do sophisticated stakeholders. Although these entities generally cannot afford to bring in new data or hire lobbyists to act on their behalf, they contribute with "situated knowledge" (Farina and Newhart, 2013, pp. 15-16). Unlike conventional knowledge channelled through stakeholder engagement mechanisms, their situated knowledge is based on experience gained on the ground rather than through theoretical models. As a result, it illustrates in greater detail the rich and nuanced experiences, practices and operation of the stakeholders impacted by the policy. Situated knowledge cannot replace more traditional input provided by stakeholders acting through organisations. However, insofar as these entities pursue their own agendas and priorities (autonomous from those of their members) and in the absence of internal participatory mechanisms, their input often hides the range of opinions of those who they claim to represent (For an in-depth analysis of situated knowledge, see Farina and Newhart, 2013, p. 16).

The obstacles to effective stakeholder engagement are many and cannot realistically be addressed all at once. However, any effort aimed at addressing the major barriers to effective participation should start from an evaluation of the existing stakeholder engagement mechanisms. As such, they provide much inspiration for efforts to enhance engagement in regulatory policy today. In particular, while the intention to open up the policy-making process to new voices is to be welcomed, it must be accompanied by greater awareness of the inherent cognitive and operational challenges inherent to any effort of listening to others. The wider the range of inputs collected – at the level of actors, type of evidence, and information received – the harder is the task of combining those inputs into a meaningful chain of reasoning.

Given the many expectations surrounding the use of ICT in policy making, it appears crucial to examine the extent to which the barriers to public engagement can be effectively remove by the rapidly spread of ICT technologies.

The role of information and communication technology (ICT) in stakeholder engagement

The advancement of ICT and the ensuing influence of digital communication and networked media have been forcing the reconsideration of stakeholder engagement in regulatory policy making.

The technologies that impact, affect and shape how people engage in civic life have evolved rapidly and boasted the types and the number of online opportunities for civic empowerment. The acquisition of information, the space of deliberation and the process whereby stakeholders act have been not only transformed but also potentially enhanced by a new media landscape that is progressively changing the individual's experience of the social sphere. This has led many observers to predict that digital tools, by virtue of the democratising force of the Internet, are set to expand the context of civic life and boost the motivations for civic engagement (Noveck, 2009). This is the theoretical premise underpinning the open government movement.

The open government movement is widely understood as the leveraging of information technologies to generate participatory, collaborative dialogue between policy makers and citizens (Evans and Campos, 2013, p. 173). Thus, in the framework of the Open Government initiative, US President Obama directed government agencies to utilise new technologies, collectively defined as Web 2.0,[32] to increase transparency and openness in government.[33] By sharing these premises, the UK Government's Digital Strategy announced the intention for the government to become "Digital by Default" in order make open policy making the default (UK Cabinet Office, 2012a, pp. 5 and 37). More and more countries are following this trend (Hong, 2013, pp. 346–356; Bertot et al. 2014, pp. 5–16; OECD, 2014b).

The great promise of web-based tools is not only to facilitate but also to simplify access to governmental activities: one no longer needs to know all the details about how government is structured and works to petition or contribute to its operation. Yet it must be said from the outset that a gap exists between the use of the emerging technologies for commercial use and for civic purposes.

When discussing the use of ICT in public engagement, it is important to distinguish between two eras of digitalisation of public participation.

The first generation, which overlaps with the notion of "e-government", essentially transferred traditional engagement mechanisms to an online format (McNutt, 2014, pp. 54–55; Farina and Newhart, 2013, pp. 11 and 15-16; Roy, 2006). All the materials kept in paper form related to policy making have been put online, generally through the establishment of government-wide and individual agency websites (Evans and Campos, 2013, pp. 172-175). Moreover, submissions to consultation procedures are now generally accepted via email or a dedicated webpage. Also institutional blogs and RSS feeds[34] have been created with the aim of facilitating the spread of information from government to the public. In essence, this evolution has been part of a wider modernisation of traditional government processes.

Despite these efforts, while the mechanisms of engagement have changed, the nature of the process has remained essentially the same as in the pre-digital era (McDermott, 2010). ICT participation mechanisms typically focus on providing information to or collecting information from the citizens. The ensuing bilateral exchange is characterised by the use of highly specialised jargon and supported by limited explanatory documents. As a result, while these advances have clearly made it easier and more convenient to gain access to and potentially engage in the policy process, they have failed to significantly increase the level of engagement in policy making (Coglianese, 2006, pp. 943–968; Balla and Daniels, 2007, pp. 46–67; Hertz, 2013; Evans and Campos, 2013, p. 178). Moreover, the basic information level, such as knowledge about major new policy events, seems to have increased only minimally over time (Pew Research Center, 2007).

Most of the hope for enhanced public engagement in policy making derives instead from new forms of digitalisation of policy making. Indeed, new technologies and use patterns of the "participative web" are – due to their inherent participatory nature (McNutt, 2014, p. 54) – progressively paving the way to a new era of digitalisation of stakeholder engagement mechanisms. According to the OECD, the "participative web" is based on intelligent web services and new Internet-based software applications that enable users to collaborate and contribute to developing, extending, rating, commenting on and distributing digital content and developing and customising Internet applications... New web software tools enable commercial and non-commercial service providers to draw on … the "collective intelligence" of Internet users, to use information on the web in the form of data, metadata and user resources, and to create links between them" (OECD, 2007).

The idea this time is not only to digitalise traditional engagement mechanisms, but to transform them so as to create an online environment that not only enables but also promotes collaboration and enhances the quality of engagement (see, e.g., Administrative Conference of the United States, 2012). This could be done by tapping into the exponential outreach offered by non-institutional channels of communication, such as blogs, social media and wikis. These are generally defined under the broad concept of "social media". While definitions of social media abound and several taxonomies have been proposed (OECD, 2007), these essentially encompass any online tool or application that goes beyond merely providing information, instead allowing collaboration, interaction and sharing.

Thus, while emailing or blogging about proposed policy initiatives might reach potential new participants, dedicated platforms and wikis might convert them into effective commenters by enabling them to engage.[35] The goal pursued by this incipient new generation of engagement tools is to achieve the most articulated form of engagement, which has however thus far being neglected: co-production. This consists in enhancing the public sector's policy process through the joint and direct involvement of citizens in the creation of value and meaning.

Several countries are experimenting with these new forms of engagement – generally within the framework of broader open government initiatives – by tapping into the potential of digital communication and relying on its ubiquitous nature. The commitment to embrace digital engagement is, however, generally not backed up by precise guidance on how policy makers could accomplish their objective (Bertot et al., 2010; Evans and Campos, 2013, p. 178). This is problematic insofar as this second generation of digital engagement mechanisms tend to require more sustained commitment on the part not only of stakeholders but also the policy makers themselves. To ensure the operation of these

mechanisms, policy makers are expected to go to the electronic venues where citizens prefer to meet, exchange and collaborate with others.

Types

Given the constant evolution of this new generation of digital mechanisms, this section focuses on general types of tools rather than on particular applications. In particular, it focuses on social networks, crowdsourcing, wifi, social voting, wikis and other Participative Web Applications. A brief overview follows.

Social networks

There is an incipient debate about whether existing social networks, such as Facebook, Twitter and Google+, could be used to engage with the public (Aen Chun et al., 2010; p. 1; Mergel and Greeves, 2013, pp. 14–15). Social networks are the places in the virtual world where most people can be found.[36] As such, their use in promoting effective participation seems obvious. But other less apparent reasons justify their appeal: the promise of interaction and coproduction. In contrast to traditional media, social networks promise collaborative discussion among the many and enable them to produce contents (Mergel and Greeves, 2013, pp. 14–15).

Social media have low initial costs, and government services are increasingly relying on social networks to broadcast and reach out to stakeholders (see, e.g., Snead, 2013, p. 56; US Government Accountability Office, 2010; Demos, 2014). Senior (as well as younger) civil servants are embracing these types of digital platforms. While governmental use of social networks to have conversations with the public is growing, the use of social media in policy making – and for deliberation purposes – appears limited. Governments and civil servants predominantly use social networks to push information out to the public, rather than to gather information. It is generally a complement to their media relation efforts, rather than a way of engaging public input into policy making.

Moreover, the lack of clearly defined communication policies, limited skills of civil servants – and familiarity – in using social media curtail the potential of these modes of stakeholder engagement.

Crowdsourcing

Although crowdsourcing cannot entirely be considered a new approach, it has been revamped by the digital revolution. It is a method that enables anybody to participate in a task open online (Howe, 2008; Brabham, 2010, pp. 1122–1145). Among its many applications, crowdsourcing can be used to open policy making as well as to apply principles of direct democracy. The underlying idea is to channel the cognitive surplus of citizens and other stakeholders into online processes. Cognitive surplus refers to the cognitive resources that remain after we have accomplished all mandatory tasks (Shirky, 2011). In this modern exercise, communication occurs in real-time, is dynamic and multi-way: the flow goes back and forth between stakeholders and institutions. Moreover, this form of engagement is also participatory to the extent the stakeholder input is published online and therefore anybody can see and comment on it. Any actor involved in crowdsourcing is in principle both a sender and a producer. However, crowdsourcing does not automatically give rise to co-production. For the time being crowdsourcing in policy making focuses on gathering, circulating, and commenting upon people's opinions and ideas, rather than on establishing spaces for deliberation. Moreover, there are

examples suggesting that crowdsourcing and other digital engagement tools can also function as "drastic counterforces to traditional policy making" (Aitamurto, 2012).

The most often cited example of crowdsourcing in policy making is its use in the preparation of the new Constitution in Iceland in 2008 in the aftermath of the financial meltdown. Other illustrations of crowdsourcing come from the UK. Under the Red Tape Challenge (described above) government "crowdsources" the views from business, organisations and the public on which regulations should be improved, kept or scrapped. The comments received have influenced the decisions to scrap or modify over 1 100 regulation out of the 2 300 examined by November 2012 (House of Lords, p. 14). A similar experiment was conducted through two "dedicated engagement spaces to invite public comments on the draft" Care and Support White Paper and Draft Bill in the United Kingdom (House of Lords, p. 14).

Social voting

Social voting is a process that allows citizens to vote for their preferred policy options. It is generally conducted through social networks or dedicated platforms. While policy makers are not necessarily obliged to opt of the most preferred option, they will take into account what the majority of the stakeholders expressed while adopting its final decision.

Box 3.8. **Social voting: The Citizen's Briefing Book**

When US President Obama entered office in 2009, the administration reached out to US citizens, asking them to contribute ideas and feedback to the President via the Change.gov website. For several months, the public was encouraged to submit questions and comments on policy, and more than 125,000 people ultimately participated in this forum. One of the online engagement tools the website used to solicit opinions from the public was social voting. Users were able to "vote" for particular issues that the administration should prioritise. All in all, citizens cast 1.4 million votes (Nam, 2012, p. 16). The outcome of this process was the creation of a Citizen's Briefing Book, which consolidated the results of the engagement tools on Change.gov into a document that was presented to the President for consideration (Obama administration, 2009).

Source: Nam, T. (2012), "Suggesting Frameworks of Citizen-Sourcing via Government 2.0", *Government Information Quarterly*, Vol. 29, Issue 1, pp. 12-20 at p. 16, www.sciencedirect.com/science/article/pii/S0740624X11001092; Obama administration (2009), "Citizen's Briefing book", www.whitehouse.gov/assets/documents/citizens_briefing_book_final.pdf (accessed 13 October 2014).

Wikis and other participative web applications

According to a "wiki" approach to policy, this is one in which stakeholder engagement input is sought and welcome at all stages of the policy cycle, continually to guide, inform and orient the strategy of government. Its emphasis is on the quantity of public input received. While this might appear the ultimate stage of stakeholder engagement, it requires overcoming the current citizens' disengagement and the marginalisation of some groups of society. More critically, as illustrated by the literature on network governance, wikis and other new forms of co-operative schemes involving civil society actors in policy making conflict with the classic top-down approaches, generally bilateral in nature, run by a government endowed with uncontested authority (Papadopoulos and Warin, 2007, pp. 445–472, at p. 452.

Limits of ICT in promoting engagement

Studies of civic engagement and deliberative democracy have long inquired about the intersection between information and action, but they have encountered some difficulties in examining this phenomenon in the digital arena (see, e.g., Evans and Campos, 2013, pp. 172–203; Pasek et al., 2009, pp. 197–215; Zuniga et al. 2012, pp.319–336). To what extent does ICT effectively promote engagement by capturing also new voices? And, more broadly, to what extent does ICT address the shortcomings identified above, which are inherent to any effort at promoting civic engagement?

The starting point in any attempt at integrating ICT into policy making lies in the perceived democratising nature of the Internet (Shirky, 2008). However, there is growing evidence suggesting that the online discourse promotes, rather than addressing, existing inequities in engagement. Inequities have much to do with accessibility of technology (not everybody has access to the internet), low participation literacy (not everybody knows about the possibility to participate), and more importantly they are based on a lack of or limited discussion diversity within social networks (Benhabib, 1996; Jung, Kim and de Zuniga, 2011, pp. 407–430). Discussion diversity promotes knowledge-building processes that can lead to action, even when knowledge exposure is selective (Hechter and S. Kanazawa, 1997).

Reliance of ICT in public engagement, and in particular the "participative web", must be seen as means to an end. Thus, for instance, harnessing the potential of social networks implies more than opening a Facebook page or uploading content on YouTube. The use of ICT in public engagement requires embracing the proactive and interactive spirits that animate the Internet. Organisational culture might therefore act as a barrier to their implementation. Moreover, these tools cannot by themselves overcome entrenched problems of apathy and lack of co-ordination and engagement OECD, 2009a, pp. 65 et seq.). They can, however, help in informing, consulting and engaging the public by transforming the typically bilateral exchanges between policy makers and stakeholders into a common resource for engagement.

This is where the current practices of digital engagement have failed to deliver. With the exception of a few experiments, policy makers have not embraced digitally enabled technologies to promote new forms of public engagement, but have rather turned to digital technologies to make pre-existing procedures more efficient. In other words, they have largely remained in the world of Web 1.0, even when implementing more innovative tools such as social networks and Internet-based platforms aimed at promoting participation (McNutt, 2014, pp. 49-70).

A further difficulty is that although many participative web tools are already available, they are in continuous transformation. Evidence suggests that policy makers must rethink their current practices and aim at transforming data-driven open government efforts into mechanisms that provide information and analysis and create context for how and why data is collected (Evans and Campos, 2013, p. 179). As has been stated, a government's capacity to go digital depends on its organisation, culture, and administrative willingness to shift public engagement activities away from the "broadcast paradigm" associated with Web 1.0 towards the "communicative paradigm" associated with Web 2.0. In addition, further challenges relate to information management, privacy and security, which, although not new, present themselves more acutely in the digital arena.

Conclusion on ICT and stakeholder engagement

The digital revolution is set to disrupt both the scope and nature of stakeholder engagement. In particular, as the potential for digital engagement to allow citizens who are digitally enabled to interact with the government in innovative ways is significant, it is expected to play a large role in the future of public engagement. While there is a case for further experimentation, evidence suggests that digital engagement presents – at its current stage of development – a number of weaknesses, such as exclusion (what about the people who are left out?), deliberation (how to create participation?), conflict (how to facilitate conflicting and dispersed views?), and ownership (who owns the exercise?) (see, e.g., Bertot et al., 2010; Dawes, 2009, pp. 257–264). More critically, while the vast majority of OECD countries have embraced some forms of digital engagement, there seems to have been little consideration for some fundamental questions behind those efforts: why policy makers collect inputs and data, how are those inputs used, what their relevance is in policy making, and how policy makers are going to use them.

In light of the above, there appears to be an agreement that digital engagement tools should supplement rather than substitute other forms of engagement.

The role of digital should be considered within each particular engagement mechanism, and should follow – not precede – the problem in question. Deciding whether to go digital and which mechanism to use digital requires some contextualisation. In particular, the choice of which digital engagement should be determined in relation to its potential to contribute to and support a solution to the problem. Finally, to ensure the effective use of ICT in promoting public engagement, government self-understanding must change from a managerial model of online state/citizen interaction to a more participatory, e-governance model of continuous interaction (Chadwick and May, 2003, p. 271). This is a much broader challenge for public administrations and transcends the issue of public engagement.

Evaluating the effectiveness of stakeholder engagement

While public trust in government and quality of policy making may increase as a result of the use of participatory mechanisms, they may also decrease if those efforts are not evaluated (OECD, 2001, p. 85; Ginsberg, 2011; Meijer, 2009). In other words, stakeholder engagement not only presents opportunities but also inherent challenges for our democratic systems. Expectations must also be considered and possibly managed when setting up stakeholder engagement mechanisms. In particular, insofar as the design and implementation of public engagement processes involve the use of public resources and nurture expectations among the public, there is a clear case for assessing and measuring the success of engaging the public in policy making. The key challenge, however, is how to actually do so, both in relation to offline and online forms of participation.

We know that insofar as public engagement contributes to a healthy democracy, success means more informed and meaningful engagement on a given policy. Likewise, insofar as public engagement aims at making better policies, success means that engagement contributes to better policy outcomes. However, given the great number of public engagement forms and mechanisms in policy making, it follows that success or failure can be measured in several ways.

Historically, much of the attention has been devoted to developing engagement tools rather than measuring their effectiveness. Despite some efforts, evaluation remains a challenge for stakeholder engagement. As a result, there is a significant "evaluation gap" in public engagement: after years of experimentation with engagement practices, there is a striking imbalance between the amount of resources that governments invests in engaging stakeholders in policy making and the efforts aimed at evaluating the effectiveness of these mechanisms (OECD, 2001). This is true for both offline and online forms of engagement.[37]

Today the primary argument for evaluating public participation relates to accountability (see e.g., OECD, 2009a, p. 59). Insofar as the design and implementation of public engagement processes require the use of public resources, including citizens' time and efforts, there is a demand for evaluation. But there are additional reasons that call for evaluation.[38] There is a learning rationale: evaluation provides an opportunity to establish whether a practice achieved its objective and how it is improvable. Ethical and moral reasons may also justify evaluation to determine whether an engagement mechanism materialises into a fair and egalitarian process. There might also be a behavioural component in evaluation when its object is to describe, explain and predict human behaviour and social processes.[39] In sum, the evaluation of engagement practices appears important for all the parties involved: the policy makers, those who take part as well as the uninvolved-yet-potentially-affected public (including both those willing but unable and the able but unwilling).

Regardless of the method chosen to measure success, any evaluation effort requires substantial investment in tracking and mapping public engagement outputs and their impact on policy making. This last section of the report focuses on the issue of evaluating the impact of stakeholder engagement on the quality of regulatory frameworks and individual regulations.

Four major difficulties exist in evaluating engagement:

1. Concept: the complexity and value-ladden nature of the concept of engagement;
2. Evaluation method: the lack of agreed-upon evaluation methods;
3. Evaluation criteria: the absence of widely shared criteria for judging success and failure, starting from its "end-point" (i.e. the ultimate objective pursued); and
4. Measurement: the paucity of reliable measurement tools (Rosener, 1981, pp. 583-596).

Concept: What is evaluation and what are its challenges?

While any form of evaluation is fraught with political and methodological challenges, they seem particular acute in the area of public participation due to very different evaluation perspectives that might coexist within the same engagement practice. Policy makers and participants may disagree on what constitutes a "good" process if they nurture different expectations vis-à-vis that particular exercise.

It appears therefore particularly urgent to define what should be meant by evaluation. This is generally understood as the analytical process enabling the sponsors of an engagement exercise to determine its success when measured against a set of predetermined criteria. As such, it should be differentiated from assessment, which refers instead to a relatively unstructured analysis of an engagement exercise without pre-set

effectiveness criteria. The latter generally occurs when conducting descriptive case studies (OECD, 2005b).

After numerous attempts at addressing these concerns, some progress has been made in understanding how engagement can be more rigorously undertaken. As will be illustrated, this has occurred chiefly through the identification of more explicit and agreed-upon evaluation criteria that focus on both the process and the outcome of the engagement exercise.

Evaluation method

There exists a plurality of methods for evaluating public engagement.[40] Largely due to their different disciplinary perspective, they vary both conceptually and methodologically. Generally they are classified according to the following three approaches:

1. user-based evaluation, which assumes that different participants pursue different goals and that the evaluation must take these different perspectives into account;
2. theory-based evaluation, which applies normative criteria universally to any public participation effort; and
3. goal-free evaluation, which does not pursue any pre-established goal. The vast majority of the literature falls under the category of user-based evaluation.

Another distinction that is generally made is between process and outcome evaluations. While the former study the engagement exercise while it is in progress, the latter assess whether the exercise has attained its intended objective. Outcome evaluation is by definition the preferred[41] and preferable form of assessment as it comes closer to the intended objective of the exercise. However, it requires defining the end-points, also called “distant outcomes”, of the participation exercise (e.g. at time of completion, integration, or final decision?) as well as identifying how and when influence occurred in the policy process. Moreover, it presupposes the ability to disentangle the influence coming from the engagement process from other variables affecting the process. Given the obvious difficulties in undertaking these analyses, process evaluation may often serve as a proxy for the outcome of the exercise. An engagement exercise whose process can be positively judged seems more conducive to a good outcome than one whose process is negative.

Evaluation criteria

As has sharply been said, “unless there is a clear definition of what it means for a participation exercise to be effective, there will be no theoretical benchmark against which performance may be assessed” (Rowe and Frewer, 2004). Yet effectiveness in this domain is not a uni-dimensional and objective quality that can be easily identified, described and measured. The first challenge is to identify who is expected to define effectiveness and undertake the evaluation. In other words, the many parties involved in an engagement exercise might have different expectations, understandings and objectives. A review of participation evaluation studies indicates some lack of precision about the purpose, features and dimensions of engagement (Rowe and Frewer, 2004). While the search for a set of agreed-upon effectiveness criteria has been elusive until now, some progress seems to have been made. There appears to be some consistency among the many evaluation criteria identified by early and more recent theoretical frameworks,

public participation practitioners, and the public (Abelson et al., 2002, pp. 70-97). Among those:

- representativeness
- the design of open, inclusive and engaging processes
- open and easy access to information so as to promote understanding and knowledge among participants, and
- the legitimacy of the process.

It appears that in order to overcome the inherent difficulty of identifying common evaluation criteria policy makers must capture and assess as objectively as possible the different views that are part of the engagement exercise.

Measurement: The paucity of reliable measurement tools

Having agreed on a definition of success or effectiveness, there is a need to operationalise it. In other words, it is necessary to develop a toolkit of measurement instruments capable of capturing whether and to what extent a particular public engagement exercise has attained its declared aim. This presupposes examining the exercise from a variety of perspectives: of participants, the general public, as well as the policy makers. However, the vast majority of measurements of the effectiveness of public engagement ascertain the opinions of participants through interviews, questionnaires or surveys (see, for an overview, Rowe and Frewer, p. 98). In other words, participation satisfaction is routinely used as a measure of success. Unfortunately, despite being perceived as a good proxy for the quality of both the process and the outcome, satisfaction "on the demand side" does not equate with good public policy. Moreover, participation satisfaction – being highly contextual – fails to capture the reality of the engagement exercise by automatically excluding those who did not participate. If progress in the development of measurement tools remains a priority, the usability of those tools must also be considered and possibly be balanced against the objectives of validity, reliability and practicability (Abelson and Gauvin, 2006, p. 15).

Conclusions on evaluation

Notwithstanding the methodological and practical efforts to develop effective evaluation frameworks for public engagement mechanisms, evaluation remains a challenge. Several factors, ranging from the political to the methodological, are responsible for the current state of affairs. Despite the uncertainty surrounding the evaluation of engagement, a set of attributes that need to be present to consider an engagement exercise successful seems to emerge.

Even if one of those attributes were lacking, no matter how good the record is on the other attributes, no one would probably consider that exercise as successful.

Policy recommendations and conclusions

Promoting stakeholder engagement in policy making is a relatively new task for governments as they are the aims pursued. The growing consensus around the need to open the policy process and engage stakeholders is progressively leading OECD countries to reconsider traditional engagement practices, especially in the light of the rapid ICT developments. Yet despite the emergent recognition of the importance of stakeholder

engagement in regulatory policy, its mechanisms are not yet an integral part of the day-to-day work of policy makers and politicians or of the daily life of citizens.

The predominant model of policy making continues to be to develop policy in a "black box", where policy options are developed and decisions taken within a sole government department, with public engagement restricted to assessing the acceptability of a policy idea during policy development or after a policy has been developed through traditional consultations. This limited interpretation of stakeholder engagement increasingly reveals inadequate in the light of the expectations of the public to "have a say" in the policy process. It is also responsible of many of the major shortcomings of current public participation exercises.

While there seems to be mounting awareness about the need to integrate engagement practices into the entire policy cycle, this requires embracing a significant cultural shift in both the policy makers' mind-set and that of stakeholders. In time, governments should be able to place all stakeholders, including citizens, in the position to contribute ideas, suggestions and opinions all along the policy cycle if they are to be seen to move away from traditional processes and establish a new relationship with their people.

Drawing on the above analysis, this conclusive section provides OECD countries with some preliminary policy findings for consideration on how to design, implement and evaluate their policies on stakeholder engagement. In particular, it suggests how to address some of the major flaws of today's stakeholder engagement practices.

Recommendations

To maximise the benefits of stakeholder engagement, governments should be encouraged to go beyond the actual approaches and possibly consider the following recommendations.

A bottom-up understanding of stakeholder engagement

Governments should view stakeholders no longer as target, but beneficiaries of their policies. Understanding policy making in such a way will shift public engagement from nice-to-have status to an integral part of policy making. To achieve such an objective, public engagement needs to start with the question: "what's in it for them?". It should also be designed with long-term impact in mind so as to focus on developing an ongoing relationship. By engaging citizens on the issues that matter to them, stakeholder engagement should rely upon and build the capacity of citizens to problem-solve themselves. It is indeed becoming increasingly clear that if governments want to regain the trust of their societies, they must listen to the perception of regulation by its users all along the Regulatory Governance Cycle.

Beyond the tick-box exercise

Governments should not only recognise but also capture the value of public opinion in helping to identify problems and identify solutions so as to turn citizens in valued partners in the policy-making process. In order to do so they must design cost effective and useful public engagement mechanisms tailored not only to their needs but also to those of all stakeholders, especially those who lack expertise and who have limited government literacy. To sum up, governments should engage people where they are and on their terms and possibly be tailored to the needs of those least represented.

Scope of stakeholder engagement

Stakeholder engagement should not be restricted to the preparation of a policy proposal, but extend both upstream (at the initiation stage of a proposal) and downstream of the policy cycle (at the monitoring and evaluation stages) so as to coexist all along of the regulatory governance cycle.

Civil service and engagement

Civil servants need to integrate public engagement into their "day job". To ensure that ongoing public engagement becomes a reality requires a cultural shift in the day job of the civil service. Having lost the monopoly of policy making, they must be able to act as guardians of this process, by ensuring representation, moderating and analysing the input coming from the stakeholders. While it is legitimate for governments not to accept the input and recommendations received within the engagement process, policy makers should set out openly and transparently the reasons for rejecting those in order that it may be hold accountable for their decision. Given the current cynicism dominating the perception of engagement practices, this commitment by the sponsors of engagement exercises is a sine qua non for its success.

Stakeholders and engagement

Typically stakeholder organisations' input is assumed to be representative of the interests they represent. However, stakeholder organisations generally lack internal participatory mechanisms enabling them to ensure the representativeness of their input into the policy process. No stakeholder engagement could attain its goal unless its stakeholder organisations are genuinely representative of the interests at stake.

Stakeholder engagement mechanisms

In the absence of a one-size-fit-all engagement mechanism, the choice of the tool depends upon a combination of purpose (what for?), actors (who) and context (how?).

Engagement processes must remain – to the extent possible – policy neutral. In designing the engagement mechanism, policy makers must be aware that the way questions are asked, information provided and the debate facilitated might affect the nature of the input and the outcome of the process.

Design

The design of stakeholder engagement mechanisms should attract, empower and manage the expectations of the public. To incentivise engagement and enhance trust in the process, policy makers should always be clear about the purpose of engagement, its scope and foresee feedback mechanisms on the findings of engagement activity the reasons behind the final decision.

Experimenting: Beyond consultation

Governments should not limit their commitment to engagement by merely informing, consulting and allowing participation through conventional approaches. They should progressively explore opportunities for "co-production" according to a "wiki" approach to policy. This is one in which stakeholder engagement input are sought and welcome at all stages of the policy cycle, continually to guide, inform and orient the strategy of government. While this might appear the ultimate stage of stakeholder engagement, it

requires overcoming the current citizens' disengagement and the marginalisation of some groups of society.

Digital engagement

Despite its enormous potential in democratising civic involvement in policy making, digital engagement is a complement not a substitute of conventional practices. Its success in promoting participation cannot be assumed but requires optimal design – taking into account the needs of both policy makers and the public – and investment of resources. To ensure the effective use of ICT in promoting public engagement, government self-understanding must change from a managerial model of online state/citizen interaction to a more participatory, e-governance model of continuous interaction (Chadwick and May, 2003, p. 271).

Evaluation matters

While it is not possible to identify a one-size-fit-all best practice of engagement in policy making, a robust evaluation system may enable define better methods than others. These could then be recommended for different definable engagement contexts.

Conclusions

This report does not offer prescriptions or ready-made solutions. Rather it sought to identify the rationales underpinning stakeholder engagement and clarify the key issues faced by governments when they design, implement and evaluate frameworks promoting stakeholder engagement in policy making. Eventually every government must find and maintain a delicate balance between participation by the general citizenry and decision making by the representatives. In any event, in systems of representative democracy, stakeholder engagement should effectively be promoted and attained, but ultimate responsibility and accountability for policy making must remain with the political and administrative systems (who are inter alia responsible for public spending).

Ultimately, the future of stakeholder engagement lies as much as in the hands of citizens who could press for further opportunities as in those of the political class and their administrations.

Notes

1. The Open Government movement has been somehow institutionalised by the creation of the Open Government Partnership in 2011. This provides an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens. Since then, OGP has grown from 8 countries to the 64 participating countries.

2. K. Holzinger (2001). The issue of public acceptability has been approached through the use of the "minipublic" technique: selected groups of citizens are invited to express their opinion on policy question after having being exposed to evidence and argument.

3. According to the UK Cabinet Office (2012b), p. 14 "open policy making will become the default. Whitehall does not have the monopoly on policy-making expertise".

4. According to the UN Public Administration Glossary, Engaged governance is "an institutional arrangement that links people more directly to the decision-making processes in a manner that does not by-pass the representational democracy but complements it."

5. Stakeholders are parties with an interest or stake in a common issue. They include all individuals, groups and organisations directly influenced by policymaking. See, for e.g., Gray (1989).

6. UN Public Administration Glossary, "Engaged Governance" entry www.unpan.org/DPADM/ProductsServices/Glossary/tabid/1395/language/en-US/Default.aspx.

7. Article 227 TFEU.

8. Given the unexpected success of the initiative, the threshold for signature was raised from the initial 5 000 to the current 25 000 signatures.

9. The agenda initiative is nowadays recognised in Austrian, Hungarian, Italian, Latvian, Lithuanian, Polish, Portuguese, Slovenian and Spanish constitutions.

10. The legal basis of the citizens' initiative is set out in Article 11§4 of the Treaty on European Union (TEU) and Article 24§1 of the Treaty on the Functioning of the European Union (TFEU) and its implementation is governed by Regulation No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the European Citizens' Initiative.

11. Treaty of the European Union, Article 11§4.

12. On 28 February 2014, the "One of us" initiative was also accepted as having collected the requisite number of signatures, but it has not been followed up by the Commission. For more information, see the official register on the ECI website, http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003.

13. In the United States, only Member of Congress can begin the legislative process, by introducing a draft law, or "bill." Neither the President nor his Administration enjoys the power to introduce a bill in Congress, nor can any citizen do so. In contrast to the practice surrounding legislative policymaking, US rulemaking is instead characterised by extensive opportunities for stakeholder engagement. J. Gildersleeve, "Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment", 107 *Colum. L. Rev* 2007, 1437, at 1437.

14. For more general information about direct democracy in the United States, see Initiative & Referendum Inst., I & R Factsheet: What is the Initiative and Referendum?, www.iandrinstitute.org/new%20iri%20website%20info/drop%20down%20boxes/quick%20facts/handout%20-%20what%20is%20ir.pdf.

15. California Constitution, Article II, Sections 8 & 10, www.leginfo.ca.gov/.const/.article_2.

16. Nebraska Constitution, Article III, Sections 2 & 3. These rules are summarised in the state ballot initiative guide distributed by the State of Nebraska, www.sos.ne.gov/elec/pdf/init_ref.pdf.

17. Massachusetts Constitution, Article LXXX, Section 2, https://malegislature.gov/laws/constitution#cart081.htm.

18. Ohio Constitution, Article II, Section 1(b), www.legislature.state.oh.us/constitution.cfm?Part=2&Section=01b.

19. Hollingsworth v. Perry, 133 S.Ct. 2652 (2013).

20. In some cases, earlier glimpses of the agency's thinking may be obtained by drawing inferences from an (optional) ANPRM (though such advance notices are often quite general). In addition, interested individuals may learn more about the agency's thought process by meeting with agency staff or examining the queries that such individuals or entities may receive from the agency, or following industry news reports.

21. Pub. L. No 101-648 (codified at 5 U.S.C. §§ 561-590). It was made permanent in 1996.

22. The agency participates as just another member of the group, formally, though everyone at the table is aware that the agency has the final say at the end of the day.

23. Article 11(3) TFEU.

24. Commission Communication: "An open and structured dialogue between the Commission and special interest groups", SEC/92/2272. For a detailed and insightful account of the institutional practices of participation in EU decisional processes, see Mendes (2011).

25. Reliance on well-known practices such as the preparation of green and white papers reflects the Commission's commitment to consultation of interested parties (see, e.g., Hoffman, Rowe and Turk, 2012).

26. Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final.

27. See IA Guidelines 2009, p. 19.

28. Ibid.

29. New Zealand Parliament, "Parliament Brief: Select Committees", How Parliament work Fact sheets, www.parliament.nz.

30. This has been defined as lack of understanding of the nature and importance of rule making/policy making, and how to participate effectively in the process. See, Farina and Newhart (2013).

31. Submission by Involve to UK, ev 59.

32. Contrary to conventional wisdom, Web 2.0 does not refer to a technical improvement in web processing but rather to a shift in how software developers and users behave and communicate online. The web is no longer a publishing medium but a communication medium (McNutt, 2014, p. 52).

33. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, Federal Register. A subsequent memorandum of the Office of Management and Budget (OMB) to the Federal Agencies reiterated three open government principles, "transparency, participation, and collaboration," and gave agencies four months to create an "open government plan," which would address each "cornerstone" of open government.

34. A web application that can pull the content from sources that are structured in standard metadata format called Really Simple Syndication (RSS) feed.

35. IBM, pp. 9-10; McDermott, 2010, pp. 401–413.

36. Data suggest that almost two billion citizens worldwide are active on social networks. The most widely used is Facebook, followed by qZone, Google+, Linkedin and Twitter. See www.statista.com/statistics/278414/number-of-worldwide-social-network-users/.

37. For an overview of the evaluation of efforts of digital engagement from a US perspective, see Evans and Campos, (2013), pp. 178–179.

38. For an overview of the rationales of evaluation of engagement practices, see Abelson and Gauvin (2006), pp. 3–4.

39. Rowe and Frewer (2004), p. 85 in OECD evaluation.

40. For an overview of evaluation methods of stakeholder engagement, see OECD (2014a), pp. 53-57.

41. This was the outcome of the OECD survey published in OECD (2009a), p. 60 and can be derived from the available literature surveys. See, e.g., Rowe and Frewer (2004), p. 517.

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Chapter 4

Stakeholder participation and regulatory policy making in the United States

Steven J. Balla and Susan E. Dudley[1]

This chapter lays out the processes through which US regulations are made, implemented, and evaluated, highlighting the instruments used for stakeholder engagement in these processes. It demonstrates extensive opportunities for stakeholder participation at all stages of the regulatory cycle. These opportunities, however, are typically oriented toward facilitating the provision of information on the part of stakeholders and do not generally advance stakeholder engagement in deliberative decision making.

1. Steven Balla is Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs at The George Washington University, and a Senior Scholar with the George Washington Regulatory Studies Center. Susan Dudley is Director of the George Washington Regulatory Studies Center and Distinguished Professor of Practice in Public Policy and Public Administration at The George Washington University, http://regulatorystudies.columbian.gwu.edu/scholars.

Introduction

Regulation is one of the most common and important ways in which public policy is made and implemented in the United States.[1] Agencies of the federal government issue thousands of regulations on an annual basis (Carey, 2013, p. 5). Although many of these actions deal with routine matters, impose minimal burdens, and in some instances reduce or eliminate existing regulatory requirements, agencies annually promulgate hundreds of new regulations with significant effects on the economy and political system.[2]

Given the importance of regulation, an underlying concern regards the nature of stakeholder participation in the regulatory process. In one respect, stakeholder participation is salient as a means through which information about the economic and political ramifications of regulations is generated (Coglianese, 2005, p. 40). In another respect, stakeholder participation serves as a vehicle through which stakeholders become deeply involved in regulatory policy making, by, for example, engaging in a "deliberative process that aims toward the achievement of a rational consensus over the regulatory decision" (Coglianese, 2005, p. 39). With this range of possibilities in mind, to what extent does stakeholder participation in practice bring principles of information provision and deliberative engagement to bear in the regulatory process?

Two central questions are salient when evaluating stakeholder participation in the regulatory process (Gormley and Balla, 2012). First, who participates through various instruments of stakeholder involvement? Second, does stakeholder participation affect regulatory decision making? On both dimensions, it is difficult, if not impossible, to utilise a single standard of evaluation, and therefore to construct an overarching, uncontested assessment of stakeholder participation.

In considering the nature of stakeholder participation itself, two standards of evaluation are immediately relevant. One standard is the quantity of stakeholder participation. To what extent do stakeholders take advantage of opportunities to participate in regulatory processes? A second standard is the composition of participating stakeholders. For example, do representatives of business firms and industry associations participate more frequently than consumers, environmentalists, and non-governmental organisations (NGOs)? To what extent do individual stakeholders, as opposed to organisational representatives, participate in regulatory processes?

In one respect, value can be attached to high levels of stakeholder participation in democratic policy making (Coglianese, 2005, p. 40). Similarly, participation by diverse arrays of stakeholders can be seen as superior to involvement on the part of narrow sets of interests. Such assessments, however, are far from certain and universal across standards of evaluation. Additional increments of stakeholder participation and diversity might, for a variety of reasons, add little to nothing to regulatory processes in terms of information provision and deliberative engagement.

Evaluating the impact of stakeholder participation on regulatory decision making is fraught with even greater uncertainty. Instruments of stakeholder participation occur within regulatory processes that are procedurally multi-faceted, making it difficult to connect specific agency decisions with particular manifestations of participation. Even if and when linkages can be made between stakeholder participation and regulatory outcomes, larger normative questions regarding the efficacy of stakeholder participation are naturally raised. For example, if regulation is not a plebiscitary process, then what should be the role, if any, of the respective quantity of participation by stakeholders representing divergent viewpoints in informing agency decisions?

In this chapter, we lay out the processes through which U.S. regulations are made, implemented, and evaluated, highlighting the instruments through which stakeholders participate in these processes. Our review demonstrates that there are extensive opportunities for stakeholder participation at all stages of the regulatory process. These opportunities, however, are typically oriented toward facilitating the provision of information on the part of stakeholders. Instruments of participation, in other words, do not generally advance stakeholder engagement in deliberative decision making, where deliberation is characterised by reflection on positions held by others and the possibility of changes in one's own preferences as a result of such reflection (Bohman, 2000; Dryzek, 2002).

Origins of regulatory authority

Under the U.S. Constitution, regulatory authority is divided among three branches of government. The legislative branch is granted the power to enact laws, the executive branch is charged with administering and enforcing these laws, and the judicial branch is responsible for settling conflicts arising from laws and their enforcement. This separation of powers, and the corresponding checks and balances that the legislative, executive, and judicial branches impose on one another, is central in characterising regulatory policy making and stakeholder participation in regulatory processes.

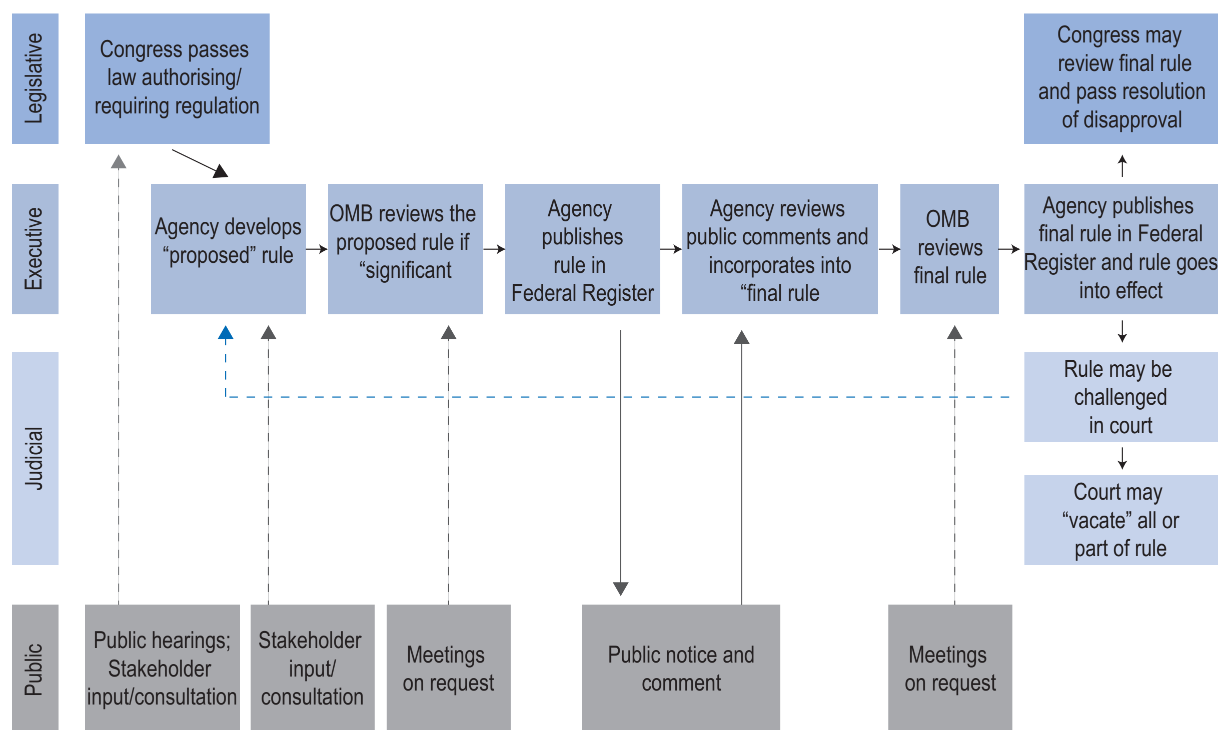
Congress enacts legislative statutes by a majority vote of both the Senate and House of Representatives, followed by the signature of the president or a super-majoritarian override of a presidential veto.[3] Over the course of each two-year Congress, thousands of bills are introduced, but only a small fraction become law (GovTrack.us, website). As of 1 September 2014, with approximately four months remaining in the 113th Congress, 6 244 bills had been introduced in the House, and 3 396 had been introduced in the Senate. A total of 146 of these bills have thus far been enacted into law.[4] Furthermore, only about 10% of these enacted laws have regulatory consequences (Dudley and Wegrich, 2015).[5]

Legislative statutes with regulatory consequences confer authority upon executive branch agencies. Most of these organisations are cabinet departments, including the Department of Agriculture (USDA) and Department of Transportation (DOT), or executive branch agencies, such as the Environmental Protection Agency (EPA). Such agencies are subject to strong presidential oversight. Other agencies, such as the Securities and Exchange Commission, are more independent of the president, and are generally headed by bipartisan commissions of three to five members. All types of agencies, however, are closely monitored and often strongly influenced by legislators, judges, and stakeholders. Figure 4.1 illustrates the main steps in the development of regulations, from congressional passage of enabling legislation to implementation, and highlights the opportunities for stakeholder participation at each stage.

In the initial stage, Congress delegates legislative authority to agencies. The nature of this delegated authority varies substantially across statutes. Some statutes assign deadlines by which specific regulatory actions must be taken and specify the frequency with which existing regulations must be reconsidered. For example, under the Patient Protection and Affordable Care Act of 2010, agencies such as the Department of Labor (DOL) and Department of Health and Human Services were assigned deadlines by which dozens of regulations were to be promulgated (Batkins and Goldbeck, 2012). By contrast, other statutes grant broad authority to agencies to take regulatory actions. The Clean Air Act of 1970 directed the EPA to establish national standards to "protect public health"

with an “adequate margin of safety,” thus granting the agency not only wide latitude in setting standards but also ongoing responsibility for updating standards on a periodic basis.[6] In such instances, agencies have the authority to issue regulations in a manner consistent with broad statutory delegations.[7] Additionally, individuals and organisations from outside government have the authority to petition agencies to develop regulations consistent with existing legislative authority or to take legal action against agencies for failing to regulate pursuant to statutory delegations (Biber and Brosi, 2010, pp. 321-400).

Figure 4.1. **Stakeholder participation and the regulatory process**



Source: Dudley, S.E. (2014a), “Opportunities for Stakeholder Participation in U.S. Rulemaking,” George Washington Regulatory Studies Center, 23rd September, http://regulatorystudies.columbian.gwu.edu/opportunities-stakeholder-participation-us-regulation.

Information about regulatory actions is available from a number of sources. Many agencies maintain a “laws and regulations” link on their website, which typically provide information about pending regulations and opportunities for stakeholder participation.[8] The *Federal Register* is the “official daily publication for rules, proposed rules, and notices of Federal agencies and organisations, as well as executive orders and other presidential documents.”[9] Issues of the *Federal Register* are available on the Internet dating back to 1994.[10] The Unified Agenda of Federal Regulatory and Deregulatory Actions is an online inventory of forthcoming and ongoing regulatory actions that is updated twice a year.[11] The Unified Agenda provides a variety of information about regulatory actions, including title, abstract, legal authority, expected publication dates for notices, regulations, and public comment periods, whether the action is economically significant or expected to affect small entities or international trade and investment, and contact information for the responsible agency personnel. An annual *Regulatory Plan*, published once a year with the fall *Unified Agenda*, provides additional details on agency priorities and significant planned regulatory actions.

Administrative Procedure Act and public commenting

Since its enactment in 1946, the Administrative Procedure Act (APA) has served as the legal foundation for stakeholder participation in the development of regulations by agencies of the United States federal government.[12] One of the central elements of the APA is rule making via the notice and comment process. Under the APA, agencies are generally required, subject to a number of exemptions, to publish in the Federal Register notices of proposed rule making, provide stakeholders with opportunities to comment on these notices, and respond to issues raised in comments. These exemptions include when an agency "for good cause finds…that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," as well as agency organisational rules and issues pertaining to military or foreign affairs.[13]

Approximately one-third to one-half of all regulatory actions are issued without prior publication of a notice of proposed rule making (Balla, 2005, p. 89; United States Government Accountability Office, 2012, p. 8). Many such exempt actions deal with routine matters and impose minimal burdens. Regulations with significant economic impacts are more likely to be preceded by notices of proposed rule making than smaller scale actions (United States Government Accountability Office, 2012, p. 8). Less than 20% of economically significant actions are exempt from the requirements of the notice and comment process (Scherber, 2015).

For actions with exemptions, agencies may promulgate interim final rules and direct final rules (Carey, 2013, p. 13). In the aftermath of a disaster such as a hurricane or terrorist attack, for example, agencies will issue emergency regulatory waivers via interim final rules. With interim final rules, comment periods are held after the action has been promulgated. Agencies are expected to consider public comments and eventually issue a permanent final regulation. Direct final rules are also issued with accompanying comment periods, typically in the context of actions that are not anticipated to provoke controversy. For example, the EPA routinely issues direct final rules to approve revisions to state implementation plans under the Clean Air Act. As long as no adverse comment is received, direct final rules remain in effect. If, however, an adverse comment is submitted, then the agency retracts the rule and follows the notice and comment process.

Although submitting comments in response to notices of proposed rule making is the most formal channel for stakeholder engagement in the development of regulations, opportunities exist at other steps in the process as well. These opportunities are summarised in Table 4.1. Agencies, for example, may solicit public comments prior to rule promulgation in other contexts during the regulatory process (Balla, 2005, p. 79). Advance notices of proposed rule making provide agencies with opportunities to receive feedback on initial ideas and questions surrounding prospective regulatory actions. Supplemental notices of proposed rule making are utilised when agencies seek additional information about specific issues that were not resolved during preceding comment periods.

Table 4.1. **Modes of stakeholder participation in the regulatory process**

Stage in regulatory process	Mode of stakeholder participation
Authorising legislation Must pass both houses of Congress and be signed by the president.	Interested stakeholders may work with elected officials to influence legislation that will authorise regulatory action.
Regulation initiation The Unified Agenda is the official compendium of upcoming federal regulatory activity, published online twice a year.	The Unified Agenda often provides the first public notice of agency activity. It is a searchable electronic database that allows the public to identify upcoming regulations of interest.
Draft proposal Agencies analyse alternatives and draft a regulatory proposal.	Stakeholder participation on technical basis for regulatory approach is often sought at this stage, sometimes through an Advance Notice of Proposed Rule making, or through more targeted inquiries.
Small entity impacts Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996	Small entities can participate in panels organised by the Small Business Office of Advocacy to evaluate early draft proposals (applicable to EPA, Occupational Health and Safety Administration, and Consumer Financial Protection Bureau).
Executive review Executive Order 12866.	Officials at the White House Office of Information and Regulatory Affairs (OIRA) meet with members of the public upon request while a regulation is under interagency review.
Publication in Federal Register Regulations.gov contains Federal Register notices of proposed rule making and final rules, as well as supporting documentation.	Agencies invite public comment on all aspects of regulation. Commenting is not limited to stakeholders. To be considered in final regulation, comments must be filed on the public record, through channels such as Regulations.gov.
Paperwork Burden Assessment Paperwork Reduction Act (PRA) of 1980.	Agencies must seek public comment on "burden" (time and cost) involved in reporting requirements (including information collected to comply with regulations) every three years.
Draft final rule	Under the APA, agencies must consider public comments filed on the record during the comment period as they develop their final regulation.
Final regulatory review Executive Order 12866.	OIRA review of draft final rule and opportunity for meetings.
Publication of final rule	Under the APA, regulations are generally not binding until at least 30 days after publication in the Federal Register.
Congressional review Congressional Review Act of 1996.	Congress can issue a joint resolution of disapproval to overturn a final regulation (very rare).
Judicial review	Parties affected by rules may seek judicial review of final agency actions.
Retrospective review	Executive Orders 13563 and 13610 ask agencies to develop plans for analysing effects of existing regulations and to share plans and analyses with public.

Source: Dudley, S.E. (2014a), "Opportunities for Stakeholder Participation in U.S. Rulemaking", George Washington Regulatory Studies Center, http://regulatorystudies.columbian.gwu.edu/opportunities-stakeholder-participation-us-regulation.

Early stages in the regulatory process

The utility of advance notices of proposed rule making points to the fact that agencies sometimes spend long periods of time working on regulatory issues before drafting notices of proposed rule making. Another indication is that the *Unified Agenda* includes a section for long-term actions, issues for which agencies do not expect to take a regulatory action for at least 12 months.[14] At the EPA, it is not uncommon for nearly two years to elapse between the initiation of a regulatory action and the publication in the *Federal* Register of a notice of proposed rule making (Cornelius and Furlong, 1992, pp. 113-138). In an extreme case, the OSHA announced in 1998 that crystalline silica was among its top

regulatory priorities, but did not issue a proposed rule for public comment until 2013 (Dudley, 2014b, p. 7).

Early in the regulatory process, agencies conduct analyses required by statutes and executive orders. Such analysis can include regulatory impact analysis of benefits and costs, impacts on small entities,[15] and environmental impact analyses.[16] Agencies often consult with stakeholders prior to the development of notices of proposed rule making. In addition to commenting on advance notices of proposed rule making, agency officials interact with stakeholders via ex parte communications (Sferra-Bonistalli, 2014). According to the APA, ex parte communications consist of "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given."[17] An analysis of DOT regulations finds evidence that "ex parte contacts between third parties and agency decision makers do, at times, affect the content of regulatory policy outputs," serving as both "agenda building" and "agenda blocking" mechanisms.[18] Agency policies regarding the acceptance and disclosure of ex parte communications vary widely, with some agencies being rather permissive and others operating under significant restrictions (Sferra-Bonistalli, 2014, p. 5). The Administrative Conference of the United States (ACUS), an agency charged with improving the administrative process, recently observed that "informal communications between agency personnel and individual members of the public have traditionally been an important and valuable aspect of informal rule-making proceedings conducted under section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553," and that they "convey a variety of benefits to both agencies and the public" (Administrative Conference Recommendation, 2014a). ACUS also expressed, however, concerns that a lack of transparency could harm the integrity of the regulatory process and recommended that all agencies develop guidelines for handling ex parte communications, including "procedures for ensuring that, after an NPRM has been issued, all substantive written communications are included in the appropriate rulemaking docket" (Administrative Conference Recommendation, 2014a, Recommendation 2).

One systematic manner in which agency officials interact with stakeholders early in the regulatory process is through advisory committees. Advisory committees are organisations composed of members from outside government, charged with "furnishing expert advice, ideas, and diverse opinions" to decision makers in the executive branch.[19] Governed by the Federal Advisory Committee Act (FACA) of 1972, there are approximately one thousand advisory committees currently in operation.[20] The FACA mandates that advisory committees be balanced in membership across different types of stakeholders. For example, the National Drinking Water Advisory Council, which advises the EPA on regulations issued under the Safe Drinking Water Act of 1974, consists of equal numbers of representatives of state and local water agencies, water utilities and other supplier organisations, and the general public.[21] In general, advisory committees provide opportunities for stakeholders to participate in the setting of agency regulatory agendas and contribute to early discussions regarding the content of notices of proposed rule making (Balla and Wright, 2001, pp. 799-812; Balla and Wright, 2000, pp. 167-187).

As noted in Table 4.1, before publication in the *Federal Register,* notices of proposed rule making with significant effects on the economy and political system must be reviewed by OIRA, a White House agency located in the Office of Management and Budget.[22] OIRA is charged with assessing regulatory actions on cost-benefit and other analytical grounds, as well as for consistency with presidential priorities. During the course of review, OIRA's policy analysts often suggest that notices be amended to include additional options or questions on which comments will be sought, and

sometimes negotiate the length of the public comment period.[23] It is only after OIRA has concluded its review of an agency submission that the action can be published in the *Federal Register*. This review process is required not only for notices of proposed rule making, but for final rules as well.

During the review process, OIRA officials accept requests for meetings with interested parties.[24] Such communications most regularly consist of meetings with business firms and industry associations, although meetings with consumers, environmentalists, and NGOs occur as well.[25] It is meetings where both economic interests and broad societal constituencies are represented that exert the most pronounced influence over OIRA's review of regulatory actions (Balla et al., 2011, p. 166).

As highlighted in Table 1, the PRA and SBREFA provide early avenues for stakeholder participation in the development of regulations. The PRA requires agencies to "provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information."[26] Both the issuing agency and OIRA accept public comment on *i)* "whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility" and *ii)* "the accuracy of the agency's estimate of the burden of the proposed collection of information," as well as ways to improve the value of the information or minimise reporting burdens.[27] Agencies must receive approval from OIRA, in the form of a control number, before collecting information from ten or more members of the public, and must renew control numbers at least every three years.[28]

The SBREFA requires that two agencies—EPA and OSHA—receive input from affected small businesses through the Small Business Office of Advocacy before publishing notices of proposed rule making. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 added the newly-created CFPB to the agencies subject to such Small Business Advocacy Reviews (SBARs).[29] When a prospective regulation is expected to have a significant impact on a substantial number of small entities, SBREFA requires the EPA, OSHA and CFPB to convene a SBAR panel with representatives from the agency, OIRA, and the Office of Advocacy to review the proposed rule and related agency analyses. The panel also solicits advice from small business representatives and prepares a report. This report must be considered during the development of the regulation and must be included in the public record of the rule making (Dudley and Brito, 2012).

Post-promulgation of stakeholder participation

Regulations do not typically take effect for at least thirty days after publication in the Federal Register. Congress requires that this duration be at least sixty days for major rules.[30] Agencies must submit completed regulatory actions to the GAO and Congress at the time they are sent to the Federal Register.[31] Congress has the authority to enact a joint resolution of disapproval under expedited procedures in the sixty working days following the receipt of a regulatory action.[32] Although only one action, a DOL regulation on ergonomics, has been nullified by the enactment of a resolution of disapproval,[33] Congress has introduced dozens of resolutions of disapproval.[34] In some instances, the threat of passage of a resolution of disapproval has compelled agencies to modify regulatory actions (Balla, 2000, pp. 424-448).

Stakeholders commonly seek redress from the courts regarding the requirements of regulatory actions. For example, approximately one-fourth of EPA regulations are challenged on legal grounds (Coglianese, 1997, p. 1298). The APA allows courts to set aside agency actions on a number of grounds (Dudley and Brito, 2012, pp. 48-50). These criteria include actions that are arbitrary and capricious, unconstitutional, exceed statutory authority, and not developed in accordance with procedural requirements.[35] Judicial review places great emphasis on the administrative record developed by the agency during the regulatory process, including its analyses and consideration of public comments (Beck, 2013). Under judicial review, regulations are often remanded to agencies for reconsideration.

The APA provides stakeholders with the opportunity to petition agencies to issue, amend, or repeal regulatory actions.[36] Agencies are expected to establish procedures for receiving, considering, and responding to stakeholder petitions.[37] Little is known about stakeholder and agency practices with respect to submitting and addressing petitions.[38]

Evolution of the notice-and-comment process

The notice and comment process has been called one of the "greatest inventions of modern government" (Kenneth, 1976, p. 65). By mandating that agencies give public notice in advance of the promulgation of regulations, the APA institutionalises a measure of transparency in the rule-making process. By allowing interested parties to submit comments on agency proposals, the APA establishes a participatory environment grounded in principles such as openness and fairness.

Over the decades, the notice and comment process has evolved considerably. Although the basic template of agency notice and public comment remains, additional elements have been superimposed on APA requirements. These elements have been instituted through judicial decisions, congressional legislation, and presidential executive orders. The APA's general requirement that agencies solicit public comments on notices of proposed rule making has been interpreted by the courts to imply that agencies must respond to comments passing a "threshold requirement of materiality" (McGarity, 1992, p. 1 400). Congress, in the Regulatory Flexibility Act (RFA), mandated that agencies prepare analyses for all significant rules, describing their impact on small businesses and exploring less burdensome alternatives.[39] OIRA regulatory review has been called one of the most important developments in contemporary administrative law and process (Pildes and Sunstein, 1995, p. 3).

By some accounts, these developments have transformed the "flexible and efficient" process created by the APA into a "rigid and burdensome" endeavour (McGarity, 1992, p. 1385) According to this view, it is not uncommon for agencies to spend years crafting actions that pass judicial, congressional, and presidential muster ((McGarity, 1992, pp. 1387-1391). Despite such examples, it is nevertheless the case that agencies continue to issue rules at an overall pace that has not appreciably slowed down over the decades (Yackee and Yackee, 2010, pp. 261-282).[40]

One way in which agencies take actions outside of the notice and comment process is through channels such as the issuance of guidance documents. The APA exempts from its notice and comment procedures "interpretive rules" and "policy statements." While such documents do not carry the force of law and are not legally binding, they are often binding in practical effect (Dudley and Brito, 2012, pp. 38-39). Through guidance documents, agencies offer stakeholders advice regarding how to interpret existing

regulatory requirements and implementation practices (White House Office of Management and Budget, 2007). Because they have historically not been subject to APA requirements, guidance documents have provided agencies with opportunities to take actions that may have binding effects outside of the notice and comment process under circumstances in which stakeholder scrutiny, as epitomised by the submission of large numbers of comments on notices of proposed rule making, is most pronounced (Hamilton and Schroeder, 1994, pp. 111-160). This opportunity to evade the notice and comment process has been somewhat reduced in recent years, ever since President George W. Bush mandated that guidance documents with particularly large economic impacts be subject to APA requirements before taking effect (White House Office of Management and Budget, 2007).

Operation of public commenting

Given the sustained centrality of the notice and comment process as a means of stakeholder participation in the regulatory process, it is important to consider a number of facets of the operation of public commenting. These facets include both agency and stakeholder behaviour in establishing and utilising comment periods.

Submission and posting of comments

Historically, stakeholders have submitted public comments to agencies via postal mail and in-person delivery. Such traditional modes of communication continue to be utilised in the notice and comment process. For example, in a notice of proposed rule making published in the Federal Register on 6 October 2014, the EPA provided stakeholders with an array of options for submitting comments on emissions standards for ferroalloys production.[41] These options included mail, fax, and hand/courier delivery. Executive Order 13563, issued by President Obama on January 18, 2011, encourages agencies to make use of the Internet in accepting comments.[42] Consistent with this encouragement, stakeholders could also choose to submit comments on proposed ferroalloys standards through Regulations.gov or a designated EPA email address.

Agencies vary in their practices for accepting public comments. Two agencies other than the EPA published proposed rules in the Federal Register on October 6, 2014. One of these agencies, the USDA's Agricultural Marketing Service (AMS), provided stakeholders with three options—mail, fax, and regulations,gov.[43] Another agency, the National Aeronautics and Space Administration, instructed stakeholders that comments must be submitted through Regulations.gov.[44]

Executive Order 13563 also calls for an "open exchange" of information, whereby the views of participants in regulatory processes, including individuals and organisations that submit comments on proposed rules, are made public prior to the finalising of agency decisions. Agencies typically make comments available to the public through two main mechanisms. Comments submitted to the EPA can be viewed over the Internet via Regulations.gov or in hard copy at the agency's docket in Washington, DC.[45] The same holds for comments submitted to the AMS.[46]

Duration of comment periods

The APA does not establish a statutory requirement regarding the minimum length of time that comment periods are to remain open. Executive Order 12866 defines a "meaningful opportunity" to comment on most significant agency notices as a period of

"not less than 60 days."[47] Reaffirming this principle, President Obama, Executive Order 13563, has called for comment periods to last for "at least 60 days."[48]

Despite these underlying expectations, neither executive order mandates sixty-day comment periods in all circumstances. For example, Executive Order 13563 encourages comment periods to last for sixty days "to the extent feasible and permitted by law."[49] Given the prevalence of legal deadlines and other situations in which agencies face internal or external impetus for expedited action, the duration of comment periods varies substantially across agencies and regulatory processes.[50]

Some agencies state a standard operating procedure of offering comment periods of more than sixty days. According to the EPA, comment periods on its notices typically last sixty to ninety days. The DOT's policy is to allow for comment periods of sixty days or longer and provide justifications for periods of shorter duration.[51] Despite such statements by certain agencies, the average duration of comment periods across federal agencies is 39 days, short of the sixty day minimum period called for by recent presidents (Balla, 2011a, p. 5). The average duration of the comment periods for notices of proposed rule making that are economically significant is 45 days (Balla, 2011b).

Volume of public comments

Given the current environment within which regulations are developed, to what extent does public commenting on notices of proposed rule making occur? On occasion, stakeholders collectively submit hundreds of thousands or millions of comments in response to agency notices. For example, the Food and Drug Administration's notice of proposed rule making defining tobacco to include smokeless tobacco and other products received 79 286 public comments.[52] The Federal Communications Commission (FCC) received well over one million comments on its proposed net neutrality regulation (Nagesh, 2014). The EPA received 2.5 million comments on its proposal to regulation greenhouse gas emissions from electric generating units (United States Environmental Protection Agency, 2014, pp. 1352-1354).

Apart from such atypical high-volume regulatory proceedings, to what extent do stakeholders submit comments in response to agency notices? Notices of proposed rule making for the most part generate fairly limited numbers of comments. For example, the Department of Energy's notice of proposed rule making setting energy conservation standards for dishwashers, while considered economically significant, received seventy comments.[53] A seminal analysis of 11 rules issued by three agencies during the Clinton administration reveals that no notice of proposed rule making received more than 268 comments (Golden, 1998, p. 252). The median number of comments submitted on these rules was 12. Other studies of public commenting have uncovered similar results. An analysis of 42 rules issued by 14 agencies in 1996 finds that the median number of comments submitted in response to the notices of proposed rule making was 19 (West, 2004, p. 79). An analysis of 463 actions completed by the DOT during two three-year periods—1995-97 and 2001-03—reveals that a median number of 13 comments were submitted in response to the notices of proposed rule making (Balla and Daniels, 2007, p. 57). In recent years, information and communication technologies (ICTs) have made it much easier for the stakeholders to comment on proposed regulations, which may lead to a substantial increase in the volume of comments. Such possibilities are addressed later in this chapter.

Participation across types of stakeholders

In addition to overall levels of commenting, a salient facet of the notice and comment process is variation in the propensity to comment across types of stakeholders. A central issue in this regard is the extent to which regulated entities and industry interests are more active in commenting than consumers, environmentalists, and NGOs. Evidence suggests that although business organisations are in certain contexts more active than other segments of society, it is not uncommon for agencies to receive comments from diverse arrays of stakeholders.

The aforementioned analysis of 11 rules issued by three agencies during the Clinton administration reveals that business participation is not uniformly higher than commenting by other types of stakeholders (Golden, 1998). For rules issued by the EPA and National Highway Traffic Safety Administration, industry interests submitted between two-thirds and 100% of the comments on the respective notices of proposed rule making. For the majority of these agency notices, representatives of citizen interests did not submit a single comment. By contrast, notices of proposed rule making circulated by the Department of Housing and Urban Development resulted in the submission of relatively large numbers of comments by citizen advocacy and other NGOs, with minimal participation on the part of corporations, trade associations, and business coalitions. Similarly, an analysis of thirty notices of proposed rule making issued by agencies inside the DOT and DOL finds that businesses submitted over 57% of the comments (Yackee and Yackee, 2006, p. 133). Non-business and non-governmental interests, by way of comparison, accounted for 22% of the comments.

More recently, there are instances in which notices of proposed rule making have generated large numbers of comments from consumers, environmentalists, and NGOs. For example, more than half of the comments EPA received on its 2012 proposal to limit greenhouse gas emissions from electric utility generators were submitted by individuals and environmental organisations arguing in support of stricter standards.[54] OSHA received 1 675 comments on its proposed lowering of permissible exposure levels for crystalline silica, about one quarter of which were submitted by construction industry employers and employees objecting to the stringency of the proposal.[55]

Timing of comment submission

It is often asserted that stakeholders typically wait until immediately before the close of comment periods to submit comments to agencies. As one expert has noted, interested parties "often are large organisations, which may need time to co-ordinate an organisational response or to authorise expenditure of funds to do the research needed to produce informed comments" (Lubbers, 2006, p. 297). Comments that are submitted immediately prior to the close of comment periods are naturally shielded from the scrutiny of other stakeholders, including opposing interests that might subsequently communicate substantive criticisms to agency decision makers. Although exposed to such criticisms, comments submitted at the outset of comment periods offer stakeholders the opportunity to set the agenda and influence the nature of the arguments and evidence that are considered by agency decision makers during comment periods.

Research demonstrates that the largest single concentration of submissions occurs on the day that comment periods close (Balla, 2011a, p. 31). Approximately one-fifth of comments are submitted on closing days. One-third of comments are submitted on closing days and the three days prior to the close of comment periods. On the other

extreme, about 20% of submissions are filed fifty days or more in advance of comment deadlines.

These percentages vary across types of stakeholders (Balla, 2011a, p. 31). Approximately one-fourth of comments filed by individuals are submitted on closing days and one of the three days prior to the closing of comment periods. For comments submitted by organisations, 50% of submissions were filed on one of these days.

Circulation of comments and reply comment periods

One limitation of stakeholder participation through commenting on notices of proposed rule making is that communication is limited to the provision of information on the part of stakeholders to agency decision makers. Two approaches to facilitate deliberative engagement within the notice and comment process consist of the timely circulation of comments and the utilisation of reply comment periods.

The timely circulation of comments during comment periods provides stakeholders with opportunities to examine and respond to arguments and evidence that have been submitted by other stakeholders. The DOT aims to post comments within eight working hours of submission to Regulations.gov.[56] Other agencies, such as the FCC, share the aim of posting comments to the Internet in short order after submission (Balla, 2011a, p. 15).

An analysis of the posting of comments demonstrates that the average comment is posted to Regulations.gov in 14 days (Balla, 2015). Approximately one-fourth of comments are posted either on the day the agency received them or on the following day. More than half of comments are posted within a week of submission. Agencies vary substantially in the timeliness of posting comments. The average DOT comment is posted within four days. By contrast, the Animal and Plant Health Inspection Service, an agency in the USDA, typically posts comments within eight days. For the EPA, the mean posting duration is 38 days.

Agencies on occasion provide stakeholders with opportunities to submit comments during reply comment periods. Reply comment periods are specified intervals of stakeholder participation that extend beyond the closing dates of comment periods attached to notices of proposed rule making. The aim of reply comment periods is to circulate information that stakeholders have previously submitted and solicit responses to this information from other stakeholders. With respect to such circulation, it has been asserted that "comments are much more likely to be focused and useful if the commenters have access to the comments of others" (Lubbers, 2006, p. 312).

According to FCC officials who have direct experience with reply comment periods, reply comment periods encourage the submission of initial comments that provide decision makers with accurate information about stakeholder preferences (Balla, 2011a, p. 12). For example, given the presence of reply comment periods, stakeholders are less likely to submit initial comments that make maximalist claims. In other words, stakeholders are more likely to directly state which of their arguments and evidence are most crucial to their immediate interests and which points are simply their preferred outcomes in an ideal world. The reason for such differentiation is that reply comment periods open initial submissions up to the possibility of being challenged on factual and analytical grounds. When it comes to reply comments themselves, FCC officials make the argument that these submissions are often more immediately useful than initial comments in that it is during reply periods when issues are narrowed to their most essential elements.

Impact of public comments

Research demonstrates that there are instances in which public comments exert significant influence over agency decision making. In a regulatory action on the marketing of organic products, the USDA instituted wholesale changes after receiving hundreds of thousands of comments on its notice of proposed rule making (Shulman, 2003, p. 255). According to the Secretary of Agriculture, "If organic farmers and consumers reject our national standards, we have failed" (Shulman, 2003, p. 255).

An analysis of three regulatory actions taken by the Federal Election Commission, Nuclear Regulatory Commission, and Department of the Treasury reveals that agency responsiveness occurs in proportion to the sophistication of the information contained in comments (Cuellar, 2005, p. 414). Sophisticated comments are distinguished by a number of characteristics, including knowledge about the statutory underpinnings of regulatory actions and provision of logical arguments and legal, policy, and empirical information that is directly relevant to the comments being submitted.

This finding that agency decision makers routinely respond to sophisticated comments naturally begs the question of the magnitude of agency responsiveness. As a general matter, the changes that agencies make to proposed rules in response to comments "tend to be small and painful, and they are often subtractive rather than innovative or additive" (West, 2004, p. 67). The aforementioned analysis of 11 rules issued by three agencies during the Clinton administration reveals that although most proposed rules were altered in some way, only one notice changed in a manner that can reasonably be considered significant (Golden, 1998, p. 260). Other research finds that wholesale changes in proposed rules were unusual during the administrations of Bill Clinton and George W. Bush (Shapiro, 2007).

The evidence is mixed regarding the extent to which comments filed by regulated entities and industry interests exert greater influence over agency decision making than arguments and evidence submitted by consumers, environmentalists, and NGOs. Some research finds that "undue business influence" is not generally manifested in the commenting process (Golden, 1998, p. 262). One reason for such limited influence is that business interests are frequently internally divided and therefore do not exert unambiguous pressure on agency decision makers. Other research, in contrast, reveals that "agencies appear to alter final rules to suit the expressed desires of business commenters, but do not appear to alter rules to match the expressed preferences of other kinds of interests" (Yackee and Yackee, 2006, p. 135). Such differences may be a function of the relative sophistication of comments submitted by different types of stakeholders, rather than a direct reflection of commenter identity.

Innovations in stakeholder participation

In recent decades, two innovations in the regulatory process have promised to fundamentally transform stakeholder participation. These instruments are negotiated rule making and ICTs. For both instruments, experiences have not unambiguously corresponded with expectations.

Negotiated rule making

A central limitation of stakeholder participation through commenting on notices of proposed rule making is that comments are submitted relatively late in the process, after agency proposals have been developed and decision maker positions have hardened.[57] One approach to soliciting stakeholder participation earlier in the regulatory process, and

making participation more deliberative and deeply engaged, is through negotiated rule making.[58] In negotiated rule making, which is codified in the Negotiated Rulemaking Act of 1996,[59] agencies publish a notice in the *Federal Register* establishing a negotiated rule making committee that is charged with reaching a consensus on a proposed rule. Stakeholders respond to agency notices by applying for membership on negotiated rule making committees, which typically consist of no more than twenty-five members. Once the agency constitutes a negotiated rule making, committee members are charged with crafting a proposed rule that enjoys unanimous consent among the membership. Once the committee reaches a consensus, the agency then publishes the negotiated agreement as a notice of proposed rule making. This notice is then subject to the ordinary notice and comment process.

One presumed advantage of negotiated rule making is that subsequent notice and comment processes will pass quickly and uneventfully. Given that stakeholders engage in collective deliberation as a means of generating notices of proposed rule making, comment periods are expected to generate few deeply critical comments and, as a result, agencies should experience little difficulty in finalising regulatory actions. In terms of specific metrics, it is expected that negotiated rules are associated with comment periods of relatively short duration and are subject to relatively little litigation after promulgation (Harter, 1982).

In some respects, experiences with negotiated rule making have been positive. For example, stakeholders give negotiated rule making strong marks in terms of generating high quality information and increasing stakeholder learning during the regulatory process (Langbein and Kerwin, 2000). The benefits of deliberative engagement are apparent in that stakeholders, after participating in negotiated rule making, better understand the complexities of government decision making and positions taken by other stakeholders (Langbein and Freeman, 2000). Despite these benefits, there is little evidence that negotiated rule making reduces either the time it takes agencies to develop regulations or the prevalence of stakeholder litigation after the promulgation of regulations (Coglianese, 1997, pp. 1255-1349).

Over the decades, agencies have not utilised negotiated rule making on a regular basis, in part because of the relatively high costs to stakeholders and agency decision makers of arranging and participating in negotiations (Lubbers, 2008; Kerwin and Furlong, 2011). Furthermore, OIRA officials have generally resisted negotiated rule making, due to concerns that this approach to developing regulations might diminish OIRA's ability to hold agencies accountable for meeting analytical requirements (George Washington University, Regulatory Studies Center and the Bertelsmann Stiftung, 2011). OIRA has also been concerned that not all types of stakeholders might be present on negotiated rule making committees, thereby undermining the representativeness of the process.

Information and Communication Technology

Given the continued importance of the notice and comment process as a primary institutionalised vehicle for stakeholder participation, attention has turned in the last several decades to the possibility of ICTs in bringing about change in the regulatory process. From one viewpoint, the Internet holds the promise of facilitating participation, both as a means of information participation and stakeholder engagement in deliberative decision making (Coglianese, 2005). As one policy maker put it, "technology throws open the doors of a government relationship to every American with an opinion to

express. E-rulemaking will democratise an often closed process and enable every interested citizen to participate in shaping the rules which affect us all" (Balla and Daniels, 2007, p. 47). In contrast, others are concerned that the Internet will have pernicious effects on the regulatory process, by devolving into a costly and counterproductive cycle of "notice and spam" (Noveck, 2004, p. 441). Still others suggest that the relationship between technology and the regulatory process is likely to vary systematically across regulatory and participatory contexts (Shane, 2004, pp. xi-xx).

In assessing the relationship between technology and the regulatory process, it is crucial to distinguish between two broad classes of ICTs. One class digitises existing paper-based processes (Coglianese, 2005, p. 41). Notices of proposed rule making and final rules, for example, have for years been accessible through the *Federal Register's* online portal.[60] Prior to the mid-1990s, however, the *Federal Register* was publicly available only at libraries that subscribed to the hard copy of the daily publication. Similarly, contemporary public commenting mainly occurs through online portals such as agency websites and Regulations.gov, in contrast to earlier eras in which comments were delivered to agencies via courier and postal mail. In these regards, ICTs that have digitised existing functions have greatly enhanced public access to the regulatory process, as well as the ability of stakeholders to participate in agency decision making.

The other class of ICTs transforms the nature of aspects of the regulatory process (Coglianese, 2005, p. 43). Such transformations occur, for example, by incorporating new stakeholders into the regulatory process and deepening the deliberative engagement of participating stakeholders. In this regard, there is substantial uncertainty concerning the transformational effects of ICTs. When the DOT moved its commenting submission and storage system online, the total number of comments received by the agency increased dramatically (Skrzycki, 2003). This increase, however, was mainly driven by the presence of two outlying notices of proposed rule making that each received tens of thousands of comments through the mail and over the Internet (Balla and Daniels, 2007). When the submission of comments is compared more generally across the pre-Internet and post-Internet periods, the overall distributions of comments are strikingly similar. The median number of comments is 12 in the pre-internet period and 13 in the post-Internet period. Most notices of proposed rule making in both periods received one hundred or fewer comments (Balla and Daniels, 2007).

In general, the primary impact of ICTs on comment volume is manifested in the context of notices of proposed rule making that receive unusually large numbers of comments. In previous eras, mass comment campaigns of tens or hundreds of thousands of comments occurred on occasion. For example, in 1991, the Health Care Financing Administration published in the Federal Register a proposed schedule of fees for Medicare physician services (Health Care Financing Administration, 1991, pp. 25792-25978). Approximately 95 000 comments were received in response to this notice (Balla, 1998, p. 666). More recently, as highlighted earlier, agencies including the EPA and FCC have received more than one million comments on especially salient regulatory actions.

ICTs have not fundamentally transformed the deliberative nature of stakeholder participation in the notice and comment process. Research suggests that electronic comments are not more deliberative — as measured by elements such as seeking out information, reviewing the comments of other stakeholders, and changing established positions — than traditional, paper-based comments (Schlosberg, Zavestoski, and Shulman, 2007, pp. 37-55). A lack of deliberation is particularly apparent in mass

comment campaigns that are initiated, both offline and online, by organised interest groups.

In recent years, a number of projects have sought to transform the notice and comment process and how public commenting is analysed in more fundamental ways. For example, Regulations.gov offers application programming interfaces (APIs) for regulatory documents and dockets.[61] These APIs enable users to develop applications that are integrated with regulations.gov. Such applications hold the promise of enhancing the "way the public discovers, understands, and participates in the federal regulatory process using agencies' regulatory documents, and the related public comments submitted during the regulatory process."[62] Docket Wrench, a project of the Sunlight Foundation, is one such application. Docket Wrench enables users to search millions of regulatory documents. By grouping textually similar documents together, Docket Wrench facilitates distinguishing unique, substantive comments from duplicative comments that are part of mass comment campaigns organised by interest groups.[63]

Agencies make regular use of social media such as Facebook and Twitter during the course of regulatory processes. For example, thousands of social media accounts are registered to agencies, and the EPA alone operates dozens of pages and feeds (Herz, 2013). This turn toward Web 2.0 has been encouraged by President Obama's Open Government Memorandum, which acknowledges that knowledge is "widely dispersed in society, and public officials benefit from having access to that dispersed knowledge."[64] In practice, however, agency efforts generally fall well short of the social media ideal, in that Facebook pages and Twitter feeds are oriented toward the transmission of agency information (Herz, 2013). Agencies, in other words, devote little social media attention to collecting stakeholder information or facilitating deliberative engagement in the regulatory process.

One of the most sophisticated applications of social media to regulatory decision making is Regulation Room. Regulation Room is a project based at Cornell Law School that applies human effort and Web 2.0 technology to enhance the quantity and quality of stakeholder participation in the regulatory process.[65] Prior to the publication of a notice of proposed rule making, Regulation Room advertises—via both traditional media and social media—to individuals and organisations that are likely stakeholders (Solivan and Farina, 2013). On its own website, Regulation Room translates the often highly specialised texts of notices of proposed rule making into language that is accessible to broader audiences. Regulation Room also initiates and moderates online discussions about notices of proposed rule making. At the conclusion of these discussion periods, Regulation Room compiles the core elements into a single document that is submitted to the issuing agency as a public comment. Through this approach, Regulation Room aims to increase the types of stakeholders who participate in the notice and comment process, as well as facilitate deliberative engagement among stakeholders. Although Regulation Room makes innovative use of various Web 2.0 technologies, the human effort required to implement the project is substantial. As a result, the Regulation Room protocol has thus far been applied to a total of six regulatory actions.[66] In general, despite the transformational prospects of ICTs, the notice and comment process has thus far remained fundamentally unaltered two decades into the age of electronic rule making.

Implementation and enforcement

As a general matter, the agency that issues a regulation is responsible for implementation and enforcement. Agencies have dedicated enforcement offices responsible for ensuring that regulated entities comply with regulatory actions. For

example, the EPA utilises civil administrative actions to notify regulated entities about violations. If such noncompliance continues, the agency pursues, in co-operation with the Department of Justice, civil judicial actions or criminal actions that can result in fines or imprisonment.[67]

Regulatory enforcement often entails co-operation between federal agencies and state governments. For example, the EPA establishes ambient air quality standards (NAAQS) at the national level.[68] States must develop State Implementation Plans (SIPs) that identify control measures and strategies for bringing and keeping their jurisdictions in compliance with NAAQS. SIPs are developed through transparent processes that include the opportunity for public commenting, and are ultimately subject to EPA approval.

Almost all major environmental statutes include provisions allowing private citizens to sue violators of regulatory standards in federal court.[69] Such provisions permit "private suits against private parties that violate federal law, as well as against the EPA Administrator for failing to perform her statutorily mandated duties" (Adler, 2001, p.46) Such litigation must be announced sixty days in advance and cannot proceed if the EPA has already begun pursuing an enforcement action against the target of the lawsuit (Adler, 2001, p.47).

Retrospective review of agency regulations

A number of statutes and executive orders have established requirements for reviewing regulations after promulgation and implementation. The RFA requires agencies to review rules with significant economic impacts on small entities every ten years.[70] Presidents since at least Jimmy Carter have directed agencies to assess the extent to which regulations continue to achieve policy goals in a manner consistent with analytical principles and presidential priorities. For example, Executive Order 12866 requires each agency to "periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities."[71] Further, as noted earlier, the PRA requires agencies to solicit public comment on the reporting burdens associated with regulation every three years.

Despite such requirements, agencies have devoted little attention to evaluating the impacts of existing regulations. Recognising the importance of this task, OIRA, in its annual reports to Congress on the benefits and costs of regulation, has solicited public input on existing regulations, and, in 2002, received approximately 1 700 responses identifying a total of 316 distinct reform nominations (White House Office of Management and Budget, 2003). OIRA worked with agencies to revise approximately one hundred regulations under this public nomination process (Graham, Noe, and Branch, 2005, pp. 101-148).

In 2011, President Obama called upon agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[72] In response to this executive order, agencies made their draft plans for retrospective review available for public comment in 2011, and have continued to maintain an open docket, webpage, and/or email address to provide a continuing opportunity for the public to comment on regulations that would benefit from retrospective review (ACUS, 2014c). President Obama reinforced this requirement two

years later, emphasising the importance of public participation in retrospective review of agency regulations: "agencies shall invite, on a regular basis (to be determined by the agency head in consultation with the Office of Information and Regulatory Affairs [OIRA]), public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations."[73]

Initial assessments of the Obama administration's effort at promoting retrospective evaluation of regulations suggest that agencies' "retrospective reviews mostly reflect business-as-usual management, with little discernible new work on the retrospective analysis and measurement called for in the executive order" (Lutter, 2012). Retrospective review, including both analysis and stakeholder participation, is far less robust than established practices for the initial development of regulations (Dudley, 2013). As one researcher has observed, "retrospective review is today where prospective analysis was in the 1970s: ad hoc and largely unmanaged" (Coglianese, 2013, p. 59). ACUS has offered recommendations to institutionalise retrospective review of regulations, including the development of criteria and guidelines for retrospective review and an emphasis on the role for regulatory co-ordination, including internationally, and public participation.[74]

Conclusions: Stakeholder participation now and in the years ahead

Contemporary democracies place great value on transparent, evidence-based regulatory policy making that results in outcomes addressing the concerns of society broadly construed, as opposed to catering to specialised interests. The OECD finds that "formalised consultation processes are an important feature of regulatory transparency," observing that "participation of stakeholders in the regulatory process ensures that feedback about the design and effects of regulation is taken into account when preparing new regulation. It increases the likelihood of compliance by building legitimacy in regulatory proposals and may therefore improve the effect of regulation and reduce the cost of enforcement" (OECD, 2009).

In many respects, the process of developing regulations in the United States is a model of transparency, as it institutionalises a wide array of opportunities for stakeholder participation. All regulatory actions are taken under authority initially delegated to executive branch agencies by legislatively-enacted statutes. The content of regulations is constrained by the language of authorising statutes, executive principles for regulatory analysis, and procedural rules regarding the consideration of public comments. Agencies must, as a general matter, solicit public comment on proposed regulations and base final rules on the administrative record, including comments that have been submitted. During the notice and comment process, both the proposed rule and extensive justifications for alternative courses of action are available to the public, and any interested party may submit a comment. Once rules are finalised, issuing agencies are responsible for enforcement and facilitating retrospective reviews of the effects of regulations.

Despite nearly seven decades of institutionalised stakeholder participation through the notice and comment process and other instruments, challenges and opportunities remain for regulatory policy making in the United States. It has been argued, for example, that "by the time the NPRM is issued, the agency has made a very substantial commitment to the draft rule it is proposing, and will be understandably reluctant to modify it very substantially afterwards" (Parker and Alemanno, 2014, p. 47). Furthermore, public comment is largely oriented toward the provision of information and, as a result, does not do as much as it could to maximise deliberative engagement in the regulatory process. As highlighted earlier, stakeholders have relatively short windows between publication of

notices of proposed rule making and deadlines for filing comments, and therefore the majority of comments are submitted on or close to the last days of comment periods. In such an environment with limited opportunity for reflection on positions held by others, stakeholders often craft comments with an eye toward future litigation if the final rule is inconsistent with their preferences (Dudley and Gray, 2012). Such public comments serve as legal documents rather than as instruments for fostering deliberative engagement among stakeholders with varying perspectives. In the end, such legal documents are often of limited utility to agency officials seeking to finalise regulatory decisions (Elliott, 1992, pp. 1490-1496).

ICTs, despite limitations thus far in their impact on regulatory policy making, offer the potential to harness the wisdom of dispersed knowledge and facilitate stakeholder participation that is deliberative in orientation. Agencies and stakeholders might utilise open source workflows in the regulatory process (Balter, 2014). Open source software, such as Git,[75] provides a platform, not unlike a collaborative wiki, for individuals to build upon one another's contributions, by adding, editing, updating, and correcting information and interpretations (Dudley and Gray, 2012). Such engagement would operate not as a replacement, but as a supplement to the notice and comment process, especially early in the development of regulations before agency and stakeholder positions have hardened.

Another area of the regulatory process where there is strong potential for enhancing stakeholder participation, both in terms of information provision and deliberative engagement, is retrospective review of rules after they have been promulgated and implemented. As discussed earlier, President Obama has reinforced long-standing executive requirements for retrospective regulatory review and has emphasised the role of the public in exchanging information on the impacts of agency rules. Such ambitions have not yet been fully realised, an indication that stakeholder participation in retrospective review may not enhance the reduction of existing "unjustified regulatory burdens and cost."[76] Retrospective review, and in particular stakeholder participation in this process, may, however, contribute to the design and implementation of future regulations that meet the needs of transparency and evidence-based policy making espoused by democracies in the 21st century.

Notes

1. A regulation is the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organisation, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganisations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." www.archives.gov/federal-register/laws/administrative-procedure/551.html.

2. Carey (2013), p. 11. As defined in Executive Order 12866 (www.archives.gov/federal-register/executive-orders/pdf/12866.pdf), issued by President Clinton on 30 September 1993, "significant" rules include actions that "may have an annual effect on the economy of USD 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." The George Washington University Regulatory Studies Center tracks significant, economically significant, and major regulations issued on an annual basis. http://regulatorystudies.columbian.gwu.edu/reg-stats.

3. To override a presidential veto requires a two-thirds vote in each chamber.

4. Information on bills introduced and laws enacted is available at http://thomas.loc.gov/home/thomas.php.

5. This count is based on a review of enacted laws. Laws without regulatory consequences deal with such matters as appropriations and the naming of bridges and post offices.

6. www.law.cornell.edu/wex/clean_air_act_caa.

7. Although Congress has not enacted climate change legislation, the EPA claims the authority to issue regulations restricting emissions of greenhouse gases on the basis of existing authority in the Clean Air Act.

8. See, for example, the "laws and regulations" link at www.epa.gov.

9. www.ofr.gov/Catalog.aspx?AspxAutoDetectCookieSupport=1.

10. https://www.federalregister.gov/.

11. www.reginfo.gov/public/do/eAgendaMain.

12. www.archives.gov/federal-register/laws/administrative-procedure/.

13. www.archives.gov/federal-register/laws/administrative-procedure/553.html.
14. www.reginfo.gov/public/do/eagendahistory?operation=operation_get_publication&showstage=longterm¤tpubid=201404.
15. Evaluation of such impacts is required by the RFA. www.sba.gov/category/advocacy-navigation-structure/regulatory-flexibility-act.
16. Such analyses are required by the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321-4347, 1 January 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, 9 August 1975, and Pub. L. 97-258, § 4(b), 13 Sept. 1982). http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html.
17. www.archives.gov/federal-register/laws/administrative-procedure/551.html.
18. State and federal governments "represent the largest category of ex parte participants at 39%," while business interests and nonbusiness/nongovernmental actors each provide 31% of the ex parte communications. Yackee (2012), pp. 373–393. p. 387.
19. Federal Advisory Committee Act, www.gsa.gov/graphics/ogp/without_annotations_r2g-b4t_0z5rdz-i34k-pr.pdf.
20. www.gsa.gov/portal/content/101010.
21. http://water.epa.gov/drink/ndwac/.
22. This requirement was established by President Reagan in Executive Order 12991, issued on 17 February 1981 (www.archives.gov/federal-register/codification/executive-order/12291.html) and maintained by President Clinton in Executive Order 12866, issued on 30 September 1993 (www.archives.gov/federal-register/executive-orders/pdf/12866.pdf).
23. Authors' experience. Ultimately, it is the courts that determine whether agencies meet notice and comment requirements.
24. These meetings are governed by the disclosure requirements of Section (6)(b)(4) of Executive Order 12866.
25. OIRA outside communications are documented at www.whitehouse.gov/omb/oira_meetings/.
26. www.gpo.gov/fdsys/pkg/PLAW-104publ13/html/PLAW-104publ13.htm.
27. 44 U.S.C §3506(c)(2)(A).
28. 44 U.S.C. §3507(a)(3).
29. The Small Business Office of Advocacy lists SBAR consultations on its website. www.sba.gov/category/advocacy-navigation-structure/regulatory-policy/regulatory-flexibility-act/sbrefa.
30. This requirement is articulated in the Congressional Review Act (CRA) of 1996. www.law.cornell.edu/uscode/text/5/part-I/chapter-8. Major rules are similar to economically significant rules, in that one defining characteristic is an expected annual impact on the economy of at least USD 100 million. www.gao.gov/legal/congressact/cra_faq.html#3.
31. Agencies do not always comply with this requirement. Copeland (2014).
32. This authority is provided in the CRA.

33. www.gao.gov/legal/congressact/cra_faq.html.
34. www.gao.gov/legal/congressact/cra_faq.html.
35. www.law.cornell.edu/uscode/text/5/706.
36. www.archives.gov/federal-register/laws/administrative-procedure/553.html.
37. www.acus.gov/sites/default/files/documents/86-6.pdf.
38. ACUS is currently investigating issues in petitioning. www.acus.gov/research-projects/petitions-rulemaking.
39. The text of the RFA can be accessed at www.gpo.gov/fdsys/pkg/statute-94/pdf/statute-94-pg1164.pdf.
40. The George Washington University Regulatory Studies Center provides various statistics on trends in regulatory activity. http://regulatorystudies.columbian.gwu.edu/reg-stats.
41. https://www.federalregister.gov/articles/2014/10/06/2014-23266/national-emission-standards-for-hazardous-air-pollutants-ferroalloys-production.
42. www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
43. https://www.federalregister.gov/articles/2014/10/06/2014-23739/patents-and-other-intellectual-property-rights#addresses.
44. https://www.federalregister.gov/articles/2014/10/06/2014-23739/patents-and-other-intellectual-property-rights#addresses.
45. https://www.federalregister.gov/articles/2014/10/06/2014-23266/national-emission-standards-for-hazardous-air-pollutants-ferroalloys-production.
46. https://www.federalregister.gov/articles/2014/10/06/2014-23524/irish-potatoes-grown-in-colorado-and-imported-irish-potatoes-relaxation-of-the-handling-regulation.
47. www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
48. www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
49. www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
50. https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.
51. United States Department of Transportation, "The Informal Rulemaking Process." http://regs.dot.gov/informalruleprocess.htm#What%20are%20the%20legal%20requirements%20for%20the%20informal%20rulemaking%20process.
52. An analysis of these comments is available through Docket Wrench, which builds on information in Regulations.gov to allow users to view comments, the timeline of comment submission, and commonality among comments. http://docketwrench.sunlightfoundation.com/docket/fda-2014-n-0189.
53. http://docketwrench.sunlightfoundation.com/docket/eere-2010-bt-std-0011.
54. http://docketwrench.sunlightfoundation.com/docket/EPA-HQ-OAR-2011-0660/similarity/cutoff-50/document-13826.
55. http://docketwrench.sunlightfoundation.com/docket/OSHA-2010-0034/similarity/cutoff-90/document-1026.
56. www.regulations.gov/#!home.

57. As noted earlier, stakeholders regularly engage with agencies before proposals are issued for notice and comment. These interactions, however, can be less transparent than communications during the comment periods, and may influence regulatory decisions before other stakeholders have had the opportunity to submit comments.
58. Negotiated rulemaking is also known as regulatory negotiation, or "reg neg."
59. www.epa.gov/adr/regnegact.pdf.
60. https://www.federalregister.gov/.
61. www.regulations.gov/#!developers.
62. www.regulations.gov/#!developers.
63. http://sunlightfoundation.com/press/releases/2013/01/31/sunlight-foundation-debuts-docket-wrench/.
64. www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.
65. http://regulationroom.org/.
66. http://regulationroom.org/.
67. http://www2.epa.gov/enforcement/enforcement-basic-information.
68. www.epa.gov/oar/urbanair/sipstatus/overview.html.
69. See Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604(a) (1994);Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(a) (1994); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9659(a) (1994); Emergency Planning and Community Right to Know Act (EPCRA) 42 U.S.C. §11046(a)(1) (1994); Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6972 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994 & Supp. IV 1998); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994). The one major environmental statute without a citizen-suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1994).
70. www.archives.gov/federal-register/laws/regulatory-flexibility/602.html.
71. www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
72. www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
73. www.gpo.gov/fdsys/pkg/FR-2012-05-14/pdf/2012-11798.pdf.
74. ACUS *Recommendation 2014-5 – Retrospective Review of Agency Rules,* https://www.acus.gov/research-projects/retrospective-review-agency-rules, December 2014.
75. http://git-scm.com/.
76. Executive Order 13 610. www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo_13610_identifying_and_reducing_regulatory_burdens.pdf.

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Chapter 5

Ex post evaluation of regulation: An overview of the notion and of international practices

By Lorenzo Allio[1]

This chapter examines the place of ex post *evaluation within the regulatory policy cycle and its purpose for regulatory governance. It discusses the understanding and definitions of evaluation and then details country experiences of conducting* ex post *evaluations. The chapter concludes with some common themes and principles to be considered when implementing* ex post *evaluation systems.*

1. Lorenzo Allio is Director at allio|rodrigo consulting, Switzerland.

Introduction

The importance for evaluating policies and regulatory interventions is generally appreciated among governments and parliaments. However, until recently, this dimension has received comparatively less attention in the regulatory reform agenda and post-implementation evaluations have not yet been systematically implemented in most countries. The *2012 Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012a) provides a framework for evaluating regulatory interventions after they are implemented.

This chapter defines *ex post* evaluation as understood by the OECD and situates it within the overall regulatory policy framework. The chapter is a contribution to the *OECD Regulatory Policy Outlook 2015*.

The chapter starts by revisiting and highlighting some of the reasons for *ex post* evaluation in general, and evaluation of regulatory interventions in particular, based on academic, practitioner and OECD literature. It discusses the case for *ex post* evaluation, providing the rationale for why governments have policies to implement it in their regulatory system (see section on the nature of *ex post* evaluation).

The section on *ex post* evaluation in practice *investigates* the nature of *ex post* evaluation. Elaborating on the concept, this section explains how evaluation of regulations links to general policy evaluation, where tools are the same and where they differ. Moreover, the section looks at the criteria generally applied when conducting evaluation such as relevance, effectiveness, efficiency and utility. Finally it discusses conceptual and practical considerations in setting an "evaluation framework".

The experience of conducting *ex post* evaluation varies considerably across countries and also internally across different ministries or agencies in governments. The section entitled concluding remarks and issues for consideration accounts of this by taking a critical look at the different tools and mechanisms used by selected OECD countries to evaluate regulations. These include periodic stocktaking, in depth reviews, simple and packaged sun setting reviews and automatic review requirements. Consideration will also be given to the assessment of cumulative regulatory impacts, for instance with reference to evaluating sectoral legal frameworks or individual regulations. The section further considers the advantages and disadvantages of relying on those approaches. Finally, the section identifies the challenges and lessons from country examples, of conducting *ex post* evaluation effectively and outlines common solutions and emerging trends.

Drawing on the above analysis, the chapter concludes by offering some preliminary policy findings on the critical success factors for *ex post* evaluation and indicates possible avenues to mainstream and institutionalise them.

Ex post evaluation in the regulatory policy cycle

Towards a definition of evaluation

In general terms, "evaluation" may be defined as the process of "determining the merit, worth, or value of something, or the product of that process" (Scriven, 1991, p. 139). An OECD definition refers to evaluation as "a systematic, analytical assessment addressing important aspects of an object (be it policies, regulations, organisations, functions, programmes, laws, projects, etc.) and its value, with the purpose of seeking reliability and usability of its findings." (OECD, 2004a:4)

When applied to policy and regulatory interventions, the evaluation activity may take place before their actual implementation (*ex ante*), during the implementation (interim) or after the implementation (*ex post* evaluation). It is only after implementation that the effects and implications of a law can be fully assessed, including direct and indirect effects and unintended consequences. Furthermore, laws may become outdated as circumstances change and regular review is needed to guard against this possibility.

As such, *ex post* evaluation is an essential step of the policy and regulatory process. It can be the final stage of the cycle when new policies or regulations are introduced and it is intended to know the extent of which they met the goals they served for. It can on the other hand also be the initial point to understand a particular situation as a result of a policy or regulation in place, providing elements to discuss the shortcomings and advantages of its existence. Appraising the effects of regulatory decisions in force is the task of "*ex post* evaluation", and this goes beyond issuing an examination report to justify government action – it constitutes a deliberate and responsible "loop back" into the regulatory cycle. It is on such retrospective character of evaluation that this chapter will mainly focus.

Box 5.1. **Disentangling the notion of retrospective analysis: The United Kingdom**

Committed to consider reviews of both primary and secondary legislation as forming part of an integrated approach to policy evaluation, the UK government has the relationship between policy evaluation, post-legislative scrutiny (PLS) and post-implementation review (PIR):

- Evaluation is the general term referring to a systematic evaluation which may be carried out at any time, using methods of review as appropriate.
- PIR refers to the review of regulatory policy that complements the *ex ante* appraisal contained in the Impact Assessment.
- PLS is a review of how primary legislation is working in practice. Its primary location is parliament. Unlike PIR, it includes a review of the extent to which the legislation and the supporting secondary legislation has been brought into force.
- Evaluating the extent to which legislation is working as expected is common to both. Ideally, PLS (review of a statute) and PIR (of the underlying policies) should be carried out in parallel.

Source: UK Government (2010a), "Clarifying the relationship between Policy Evaluation, Post-Legislative Scrutiny and Post-Implementation Review", Department of Business, Innovation and Skills, London; UK Government (2010b), "What happened next? A study of Post-Implementation Reviews of secondary legislation: Government Response", Department of Business, Innovation and Skills, London.

An evaluation of regulation may focus either narrowly on how well an individual rule works or more broadly on the impacts of collections of rules. In light of the range of different types of regulatory and legislative interventions, the United Kingdom has delineated a typology of retrospective analyses (see Box 5.1 above).

Evaluation should not be confused with "monitoring". The latter refers to the continuous assessment of implementation in relation to an agreed schedule. Monitoring activities are concerned with the systematic collection of data on specified indicators to provide management and main stakeholders with an indication of the extent of progress and achievement of the objectives, and delivery of outputs/outcomes.

Evaluation should furthermore not be confused with "research", "audit" and "control". These activities differ primarily in their purposes. "While evaluation is intended to generate information on impact performance and of specific policies, research lays stress on the production of knowledge, control puts the emphasis on compliance with standards and audit judges how employees and managers complete their mission" (OECD, 2004a, p. 3).

Impact tracing and regulatory effects

"With regulation responding to problematic conditions in the world, understanding and mapping the state of the world helps in understanding how a regulation can lead to desired outcomes." (Coglianese, 2012:9). This concept well synthetises the logic underpinning modern approaches to regulatory *ex post* evaluation.

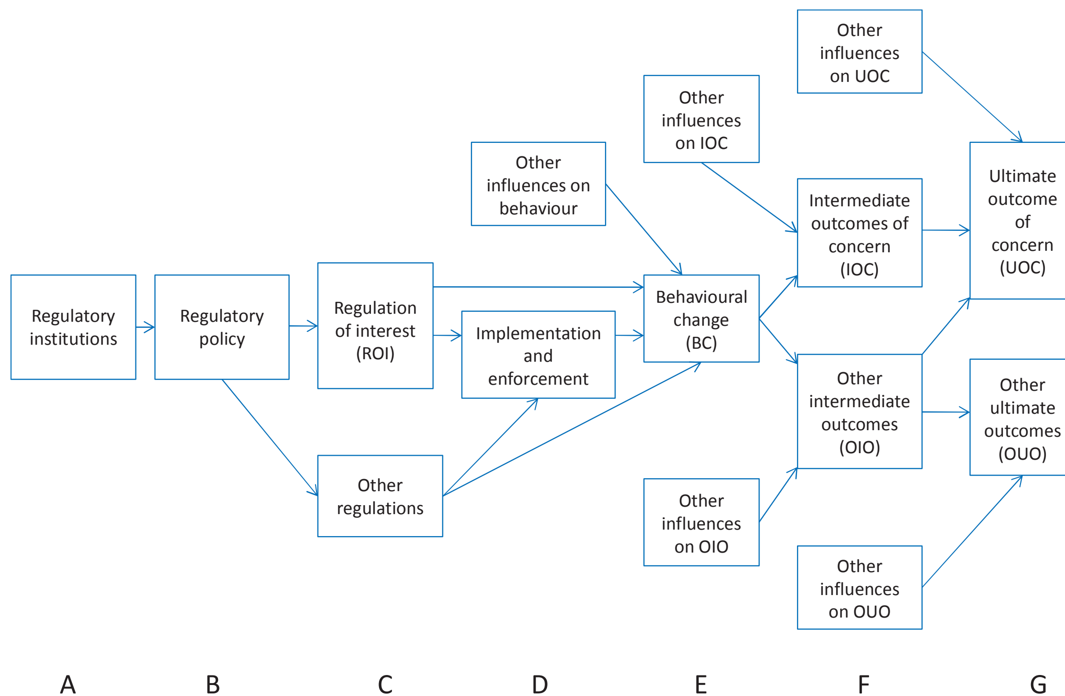
Social and economic reality is shaped by the concomitant interplay of various factors, which in turn depend on numerous and complex causal relationships affecting individual and collective behaviour. Some of those patterns may generate societal problems, which government may intend to address for a number of reasons. Regulations aim at one or more steps on the causal pathways leading to those problems.

Because policy interventions unfold over time, they may have different impacts on different populations (targeted addressees as well as untargeted groups) at different moments in time. Not all effects are observable and can be evaluated simultaneously when the evaluation occurs. Even a well-defined, individual regulation will often comprise a complex chain of interventions, interactions, and impacts.

Ex post evaluation reconstructs and "looks back" at how this chain has operated. In order to proceed structurally and systematically, evaluators investigate the constitutive components of the model – actors, inputs, outputs and outcomes.

Figure 5.1 presents a causal model of how a regulation is generally supposed to work (Coglianese, 2012, pp. 10-13). At the right end of the chain are the conditions of the world that trigger the regulatory intervention in the first place – for instance an excessively high criminal rate; too much pollution; increased accidents at work, or any other imaginable societal problem. Because these are the problems that regulation seeks to solve, they can be labelled "ultimate outcome of concern" (UOC).

Figure 5.1. **A generic causal map of regulation and its effects**



Source: Coglianese, C. (2012), "Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy", *Expert Paper*, No. 1, August, OECD, Paris, p. 11, www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf.

In principle, any intervention occurring on the left half of the chain should be leading to improvements in the severity of the UOC. The chain begins with *regulatory institutions* (Step A in the figure). These are the bodies formulating and issuing the regulatory intervention, with their organisational and procedural features and their performance under political, social (cultural) and economic financial) pressure and constraints. The *regulatory policy* frames the regulator's activity (Step B), which is embodied in the specific *regulation of interest* (ROI,) that is the object of a given retrospective evaluation. Most likely, other regulations already exist that affect the behaviour of the individuals or organisations targeted by the ROI. These other regulations could emanate from the same or different regulatory institutions (Step C).

Individual or collective *behavioural change* (Step E) results from the initial effects caused by the enforcement of the ROI (or its anticipated *implementation* – Step D). Sometimes the registered change in behaviour is a direct, intended consequence of ROI. Sometimes however it can be unintended, un-expected, and even un-desired.[1] In addition, behavioural change may be triggered by other non-regulatory factors influencing behaviour, such as social or peer pressure or by un-related events.[2] Steps F and G refer to the *intermediate outcomes* and the *ultimate outcomes*, respectively. The first derive from outputs generated by the registered change in behaviour and they contribute to define the latter.[3]

Impact tracing is the process of re-constructing a logical pattern that identifies the causal links between the constitutive elements of policy evaluation, and identifying the actors involved.[4] Impact tracing does not intend to describe how well a policy intervention actually works. It is used rather as a guide to understand the regulatory cycle – how the various policy phases are interlinked; what actors intervene at what stage, and why; and what are the respective observable effects.

Allio and Renda (2010:96-97) point out that there are several advantages in using impact tracing in policy evaluation:

It helps categorise the types of observable effects resulting from the policy intervention. Constructing a typology of the observable effects may help structure and streamline the evaluation process. Effects are usually first divided into anticipated and un-anticipated effects. Both categories include effects falling either inside or outside the target area. A further level of analysis seeks to qualify the nature of the effects. Sometimes it is not meaningful to determine whether effects are "beneficial" or "detrimental". Especially in the case of un-anticipated effects, it may be easier or sufficient to ascertain whether they are direct or indirect effects.

Impact tracing allows a targeted approach to policy evaluation, making it easier to precisely design the evaluation according to the given rationale; to differentiate and prioritise between the effects that need to be considered; and to organise the collection of relevant data. This is nowadays particularly helpful as policies tend to become increasingly complex and evaluations more and more comprehensive, ranging from assessing efficiency to encompass the quality of governance.

Once the evaluation is completed, impact tracing assists with the interpretation of the results. Policy interventions often address complex problems and have a wide range of implications. Many external factors may affect the outcomes and are often changing constantly. Impact tracing enables a structured consideration of the actual causal mechanisms at work.

Rationale for policy evaluation in general, and evaluation of regulatory interventions in particular

While understanding that retrospective evaluation is only part of a broader approach to understand the effects of laws and regulations, the OECD has consistently included *ex post* evaluation as one of the key components of the regulatory reform agenda. This forms part of the concept of life-cycle management of regulations, in which principles of good regulation are applied in initial decisions on new regulations and in continuing reviews throughout the life of the regulation.

A recommendation to "review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively" featured second of the seven OECD 1997 Policy Recommendations for Regulatory Reform (OECD, 1997, p. 29).

In 2005, the concept of *ex post* evaluation was fleshed out further as a core "guiding principle" for regulatory quality and performance (OECD, 2005, p. 4). Also the *APEC-OECD Integrated Checklist on Regulatory Reform* makes explicit and regular reference to the importance of reviewing the stock of legislation as well as individual pieces of legislation (APEC-OECD, 2005).

In 2012, the OECD Recommendation expands the approach to *ex post* evaluation of regulations to form a comprehensive and consistent review "programmes". Recommendation 5 in facts reads: "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" (OECD, 2012a, p. 12).

In particular, the Recommendation specifies that:

- Retrospective analysis should be integrated into the policy-making process in all its dimensions, starting with a close integration of *ex post* and *ex ante* (RIA) evaluation methods;
- Post-implementation reviews should be adequately planned and efficiently scheduled to inform ongoing decision-making; avoid duplication; and rationalise investment on evaluation;
- Permanent review mechanisms such as automatic review or sunset clauses should be considered;
- Bridges should be built between regulatory review and administrative simplification measures, including through information and communication technologies (ICT); and
- Such evaluation programmes should be envisaged for sectoral regulators; be open to citizens and stakeholders' review; and be themselves subject to periodic performance reviews.[5]
- Insights from academic literature and international practices indicate that *ex post* evaluation serves a number of purposes and ensures benefits for both regulators and the end-users. The following paragraphs outline some of the reasons why regulatory decisions should be reviewed once implemented.

Bridging the regulatory cycle's ends through evidence and analysis

There is no single entry point for policy interventions in the real world. In modern society, most of the most ubiquitous facets of economic activities and the daily lives of citizens are already regulated. Often, problems emerge because of bottlenecks arisen with implementing existing regulation. As an integral part of the efforts to look back to what the current legal environment delivers, *ex post* evaluation helps generate relevant information that is essential for planning, designing, updating and implementing policies and further regulatory interventions. As such, it contributes to more rational, structured and evidence-based policy making by highlighting policy trade-offs and synergies (policy integration) and streamlining efficiencies (reduction in regulatory failures).

Ensuring that regulations are adopted on the basis of thorough *ex ante* impact analyses is not sufficient. As the Australian Productivity Commission (2011, p. XII) argues, "even if all new regulations were subjected to rigorous assessment, uncertainties about their effects in the longer term would remain in many cases. And even if a regulation were initially appropriate and cost effective, it may no longer be so some years hence. Changes can occur in markets and technologies, or in peoples' preferences and attitudes. Moreover, the accumulation of regulations leads to interactions that in themselves can give rise to increased costs and other unintended consequences."

As part of the "loop back" notion in the regulatory cycle, post implementation reviews should in principle consider the objective(s) and constraints that were faced by the decision-maker and those implementing the regulation *ex ante*. For instance, an evaluation of whether a particular regulation led to an increase in consumer welfare may be inappropriate if such objective was not meant to be pursued *ex ante* – or alternatively, if constraints emerged during the implementation which restricted the pursuit of that objective. In other words, the metric *ex post* should be consistent with the decision making problem *ex ante*.

In order to be effective, *ex post* evaluation requires clarity of the intended policy objectives, impact and outcome. Regulatory Impact Assessment (RIA) is central to this process (OECD, 2015, Chapter 4). *Ex ante* assessment and *ex post* evaluation are hence closely linked. The OECD consistently stresses that in the regulatory policy cycle, both stages have to provide feedback to each other:

It is during the *ex ante* assessment that the problem should properly be defined and the intervention's objectives spelled out clearly, ideally directly associated to measurable performance indicators. The assumptions, methodologies and assessments set out in RIAs should be used to determine the questions around which *ex post* evaluation is to be conducted. Furthermore, RIA should outline the logic and strategy for future monitoring and evaluation activities of the recommended option.

In their turn, findings from *ex post* analyses should provide evidence to define the regulatory problem or mischief; to set out the baseline scenario; and support the identification of options then used during subsequent RIAs. More explicitly, *ex post* evaluations should set out clearly possible further actions arising as a result of the review.

The responsibility of the executive for ensuring the timely co-ordination between the *ex ante* and the *ex post* phase is pivotal. However, parliamentary assemblies also play an increasingly important role along the regulatory policy cycle (see Box 5.2).

Box 5.2. **The role of the legislature in the interface between *ex ante* and *ex post* analysis**

Parliamentary committees, and evaluation units and other parliamentary bodies supporting committees, are ideally placed to fulfil a constructive oversight function and to communicate any concerns about RIAs by the executive and sectoral regulators.

As part of the broader legislative process, the legislature should seek commitments from the government about how it will evaluate the outcomes of the distinct elements of the RIA, including which resources and bodies the executive will devote to this work.

Parliamentary committees and units should place themselves at the apex of the accountability structure and make efforts to be widely known as the prime location and focus of *ex post* legislative evaluation so that information, research and analysis is submitted to them as a matter of routine.[1] In some countries, like Australia or Canada, one central motivation of *ex post* evaluation by the legislature is to make a judgment on the effectiveness of the RIA and seek improvement from the executive when this is shown to be required.

The parliamentary process as a whole should reflect the approach that the legislature expects to use all available means to seek explanation and justification from the executive. All possible forms of scrutiny mechanisms e.g. questions, debates, statements, should be encouraged for this purpose.

The two branches of government should seek to find common purpose in ensuring that mechanisms and commitments promote high quality regulation. The executive should commit to

Box 5.2. The role of the legislature in the interface between *ex ante* and *ex post* analysis (*cont.*)

best practice in regulatory practice and put in place formal *ex ante* policies and procedures; the legislature should have the scrutiny and accountability mechanisms in place to monitor and evaluate what the government has done and seek explanation, information and justification for its actions.

1. Examples of such functions are provided by the organs in the Swedish, Swiss, and UK Parliaments (see OECD, 2012b, pp. 26ff.)

Source: OECD (2012b), *Evaluating Laws and Regulations: The Case of the Chilean Chamber of Deputies*, OECD Publishing, Paris, pp. 25-26, http://dx.doi.org/10.1787/9789264176263-en.

Enhancing accountability through participatory decision-making

The evaluation of implemented regulations is furthermore instrumental to increase transparency and accountability – and hence also trust in public action. Approaches to evaluation can promote forms of stakeholder engagement in the regulatory process (OECD, 2015, Chapter 3). In this respect Fetterman et al. (2014, p. 145) differentiate between three possible forms of evaluation (they address the concept of programme evaluation, but the logic can be applied to retrospective regulatory reviews as well):

- *Collaborative evaluation* is one where the evaluators are "in charge of the evaluation, but they create an ongoing engagement [with] stakeholders, contributing to stronger evaluation designs, enhanced data collection and analysis, and results stakeholders understand and use." This type of evaluation covers "the broadest scope of practice, ranging from an evaluator's consultation with the client to full-scale collaboration with specific stakeholders in every stage of the evaluation."
- In *participatory evaluations*, evaluators "jointly share control of the evaluation." Evaluators and evaluated participate in some or all phases of the evaluation and both are invited "to become involved in defining the evaluation, developing instruments, collecting and analysing data, and reporting and disseminating results".
- *Empowerment evaluation* lies at the end of the spectrum. Under this approach, evaluators "view program staff members, program participants, and community members as in control of the evaluation." Participants determine how best to meet those external requirements and goals, while the evaluators "serve as critical friends or coaches to help keep the process on track, rigorous, responsive, and relevant."

Because it ties the two ends of the policy and regulatory cycles as well as, potentially, various levels of government, evaluation can provide a strategic leverage to open up decision-making (Cousins and Chouinard, 2012; Bryk, 1983). Evaluation can provide an opportunity to receive stakeholder feedback and requests for change. On the other hand, it is also a possible channel for regulators to prompt targeted input from affected parties. At a time when the regulatory policy agenda is increasingly attentive to the local level in relation to community-based problem solving and co-produced public service delivery (Allio, 2014; Bason, 2010); and rationalised enforcement (OECD, 2014; Blanc 2012; Monk, 2012), this acquires political and operational relevance. Making the evaluation phase (more) participatory hence bears great potential to promote citizen and stakeholder

engagement in regulatory policy, and make them into active actors within the regulatory cycle beyond their role of end-users.

If undertaken also with such a purpose in mind, evaluation offers a number of benefits. First, it broadens involvement and makes it pluralistic when identifying and analysing change – thereby providing a potentially clearer picture of what has really happened on the ground. Second, it allows people to be direct witnesses of successes of good regulatory design and implementation; and learn more from failure (as a greater sense of ownership of the evaluated regulation is triggered). Finally, it can be a very empowering process, since participatory evaluation puts all actors involved in charge; helps develop skills; and shows that their views count in policy making. Overall, this can contribute to enhance the public trust in and the legitimacy of public interventions

This does not go without a re-calibration of the role of the public regulator in society. As it has been aptly pointed out, as a partnership approach, "participatory monitoring and evaluation is not just a matter of using participatory techniques within a conventional monitoring and evaluation setting. It is about radically rethinking who initiates and undertakes the process, and who learns or benefits from the findings" (IDS, 1998, p. 2).

Other benefits from ex post evaluation of regulations

The institutionalised, systematic deployment of *ex post* evaluations offers a wide range of further benefits, which complement the ones mentioned above to a large extent. They can be summarised as follows:

- **Controversy mitigation and smoother further implementation.** Retrospective evaluations may contribute to soften conflict that might have existed at the moment of the preparation or the adoption of the regulatory intervention. This might be especially relevant in policy areas often subject to litigation, such as environment protection. Understanding where achievements and bottlenecks are as well as the underlying causes can help better accept the status quo and contribute to improving regulatory performance through corrected implementation patterns;
- **RIA quality check and credibility.** *Ex post* evaluations can corroborate the accuracy of *ex ante* impact analyses or identify gaps originally made. Importantly, they can define the emergence and extent of unintended consequences, which were not expected during the policy formulation phase. This is a fundamental additional quality control channel at disposal of regulators in their efforts to continuously improve the effectiveness of the RIA system and its credibility;
- **Policy integration and benchmarking** – By disentangling regulatory failures and virtues as well as expected and unintended impacts, post implementation reviews can contribute to single out critical success factors for good regulatory policy management. A virtuous benchmarking may moreover be triggered if lessons are drawn from effective policy-making and spilled over across different areas of interventions. The reality check provided by *ex post* evaluations can also significantly enhance the capacity by government to achieve inter-sectoral integration, minimising duplications and maximising the potential for policy synergy and economies of scale; and
- **Efficient and prioritised planning** – As an important decision-supporting tool, retrospective evaluations contribute to rationalise and design future public policy and regulatory interventions along priority lines dictated by the severity of

societal problems and stakeholders needs; or the political agenda of government. As a result, public resources are allocated more efficiently across interventions and between the different elements of the same intervention.

The nature of *ex post* evaluation

This section elaborates on the notion of *ex post* evaluation – what it is and how it ought to be conducted. Drawing from existing literature on evaluation methodologies, it summarises the main criteria normally understood as forming part of evaluation. This section then addresses the notion of the "evaluation framework", which is grounded in conceptual (design) as well as practical (implementation) considerations.

The scope and types of evaluation

Evaluation is a complete analytical exercise that does not assess just "what" has happened. It also investigates "why" something has occurred (or not), "who" was affected by the intervention, and "how much" has changed as a consequence.

Evaluation criteria

To reflect determined purposes of the evaluation exercise, evaluators typically structure reviews along the lines of evaluation criteria (see Box 5.3). Evaluations criteria are also instrumental to organise the various phases of the analysis – from the elaboration of assumption to the target population, through the types and methods to collect data. The criteria may be combined with each other in a relatively flexible manner, depending on the rationale of the evaluation and the degree of sophistication desired.

Box 5.3. **Evaluation criteria: A synthesis**

Policy evaluation can take various shapes. A multi-criteria approach allows evaluators to diversify the analysis and achieve a more comprehensive assessment. Besides some general criteria, which should always be present, a number of additional criteria may be applied. The list provided is by no means inclusive, but it includes the most important criteria.

General criteria

- Relevance – This dimension measures the extent to which the objectives of public intervention correspond to the needs and problems identified at the outset. It helps answer the question: "Do the policy goals cover the key problems at hand?".
- Effectiveness – This dimension refers to the extent to which (a) the objectives of a given policy were achieved and (b) whether the effects observed were due to the specific interventions evaluated. This should help answer the questions: "Was the policy appropriate and instrumental to successfully address the needs perceived and the specific problems the intervention was meant to solve?".
- Efficiency – This dimension is to be interpreted as "cost-effectiveness", i.e. how economically have the various inputs been converted into outputs and have produced outcomes; and whether the (expected) effects have been coherent, and obtained at a reasonable cost. This helps answer the questions: "Do the results justify the resources used?", or, alternatively, "Could the results be achieved with fewer resources?", and "How coherent and complementary have individual parts of the intervention been? Is there scope for streamlining?".

Box 5.3. **Evaluation criteria: A synthesis** (*cont.*)

- Utility – This dimension considers the extent to which the impacts achieved by an intervention correspond to the needs and problems identified at the outset. This helps answer the questions: "To what degree do the achieved outcomes correspond to the intended goals?".

Additional criteria

- Transparency – This dimension assesses the degree to which the outputs and outcomes of the policy intervention as well as the processes linked to implementation are visible to outsiders (stakeholders, the citizens). It helps answers the questions: "Was there adequate publicity? Was the information available in an appropriate format, and at an appropriate level of detail?".
- Legitimacy – This dimension addresses the extent to which individuals and organised stakeholders accept the policy instrument and are satisfied with it. It helps answers the question: "Has there been a buy-in effect?".
- Equity and inclusiveness – This dimension considers the distribution of benefits and costs among the targeted groups, and outsiders more in general. It may also refer to the degree to which various stakeholders participate in the policy process and have equal access to information. This should help answer the questions: "Where the effects fairly distributed across the stakeholders? Was enough effort made to get the appropriate access to information?".
- Persistence and sustainability – This dimension considers the likelihood that the policy effects will have a lasting impact, and whether this depends on the continuation of the) policy intervention. It also addresses the effects that the policy intervention has had on the functioning of public administration (learning). This should help answer the questions: "What are the structural effects of the policy intervention? Is there a direct cause-effect link between them and the policy intervention?" and "What progress has the administration made from reaching the policy objectives?".
- Not all effects are relevant for all criteria. Some criteria become more useful when applied to a subset of the effects only. For instance, the efficiency criterion is commonly applied on anticipated effects falling in the target area. Similarly, equity usually focuses on output and outcomes, but if it refers to the involvement of stakeholders in the development and implementation of the policy intervention, it may focus rather on the linkage between inputs and outputs. It is up to the evaluator to work intelligently and effectively

Source: Adapted OECD (2010f), "Annex B. Evaluating Administrative Burden Reduction Programmes and their Impacts", in OECD, *Why Is Administrative Simplification So Complicated?: Looking beyond 2010*, OECD Publishing, Paris, pp. 98-99, http://dx.doi.org/10.1787/9789264089754-8-en.

The scope of an evaluation must be tailored to the particular intervention and is influenced by the type of intervention and the point the intervention has reached in its own development cycle. The evaluation literature tends to recommend the use of evaluation approaches based on several methods rather than only one. Possible ways to do so are combining different methods; using multiple data within a single method; having recourse to various analysts; and apply on different theories. The many methods available include varying the level of aggregation of statistical data; considering diverse statistical samples; combining quantitative with qualitative analyses, not least through questionnaires and interviews (Patton, 1998; 2002).

Types of evaluation

The purpose that triggers an evaluation determines the nature and shape of the exercise. Broadly speaking, it is possible to distinguish three main types of evaluation. These reflect the specific objects treated by the evaluators (see Box 5.4).

Box 5.4. **Types of evaluation**

Conceptually, three types of evaluation tests may be performed, depending on whether attention is put on assessing compliance (process), performance (outputs) or function (outcomes):

- 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.
- Function tests evaluate to which extent the regulatory tool, institution or programme actually contributes to improving the decision-making process and its outcomes.

Source: Harrington, W. and R.D. Morgenstern (2003), "Evaluating Regulatory Impact Analyses", Paper prepared for the OECD project on *ex post* evaluation of regulatory tools and institutions, OECD, Paris, www.rff.org/rff/documents/rff-dp-04-04.pdf.

The Australian Productivity Commission (2011) identified and reviewed a number of "approaches" to reviewing and reforming the stock of regulation. These can be loosely divided into three broad categories: approaches that involve relatively routine or ongoing 'management' of the stock; those that are 'programmed' to occur at certain intervals or in particular circumstances; and those of a more ad hoc character, which may be triggered by various influences or emerging issues (see Box 5.5).

Box 5.5. **Approaches to regulatory review**

The Productivity Commission issued a research report that provides an assessment of frameworks and approaches for identifying areas for further regulation reform and methods for evaluating reform outcomes. The report also lists a number of good design features for each review approach which help ensure that they work effectively, drawn from Australian and international good practices.

The Commission considered the following main approaches:

Stock management approaches (have an ongoing role that can be regarded as 'good housekeeping'):

- Regulator-based strategies refer to the way regulators interpret and administer the regulations for which they are responsible – for instance through monitoring performance indicators and complaints, with periodic reviews and consultation to test validity and develop strategies to address any problems. Ideally, the use of such mechanisms is part of a formal continuous improvement program conducted by the regulator.
- Stock-flow linkage rules work on the interface between *ex ante* and *ex post* evaluation. They constrain the flow of new regulation through rules and procedures linking it to the existing stock. Although not widely adopted, examples of this sort are the "regulatory budget" and the "one-in one-out" approaches.

Box 5.5. **Approaches to regulatory review** (*cont.*)

- Red tape reduction targets require regulators to reduce existing compliance costs by a certain percentage or value within a specified period of time. Typically, they are applied to administrative burdens reduction programmes.

Programmed review mechanisms (examine the performance of specific regulations at a specified time, or when a well-defined situation arises):

- Sunsetting provides for an automatic annulment of a statutory act after a certain period (typically five to ten years), unless keeping the act in the books is explicitly justified. The logic can apply to specific regulations or to all regulations that are not specifically exempted. For sunsetting to be effective, exemptions and deferrals need to be contained and any regulations being re-made appropriately assessed first. This requires preparation and planning. For this reason, sunsetting is often made equivalent to introducing review clauses.
- "Process failure" post implementation reviews (PIR) (in Australia) rest on the principle that *ex post* evaluation should be performed on any regulation that would have required an *ex ante* impact assessment. The PIR was introduced with the intention of providing a 'fail-safe' mechanism to ensure that regulations made in haste or without sufficient assessment — and therefore having greater potential for adverse effects or unintended consequences — can be re-assessed before they have been in place too long.
- Through *ex post* review requirements in new regulation, regulators outline how the regulation in question will be subsequently evaluated. Typically, this exercise should be made at the stage of the preparation of the RIA. Such review requirements may not provide a full review of the regulation, but are particularly effective where there are significant uncertainties about certain potential impacts. They are also used where elements of the regulation are transitional in nature, and can provide reassurance where regulatory changes have been controversial.

Ad hoc and special purpose reviews (take place as a need arises):

- "Stocktakes" of burdens on business are prompted or rely on business' suggestions and complaints about regulation that imposes excessive compliance costs or other problems. This process can be highly effective in identifying improvements to regulations and identifying areas that warrant further examination, but their very complaint-based nature might limit the scope of the review.
- "Principles-based" review strategies apply a guiding principle being used to screen all regulation for reform – for instance removal of all statutory provisions impeding competition (unless duly justified), or the quest for policy integration. Principles-based approaches involve initial identification of candidates for reform, followed up by more detailed assessments where necessary. Approaches of this kind are accordingly more demanding and resource-intensive than general stocktakes. But if the filtering principle is robust and reviews are well conducted, they can be highly effective.
- Benchmarking can potentially provide useful information on comparative performance, leading practices and models for reform across jurisdictions and levels of government. Because it can be resource-intensive, it is crucial that topics for benchmarking are carefully selected. Benchmarking studies do not usually make recommendations for reform, but in providing information on leading practices they can assist in identifying reform options.
- "In-depth" reviews are most effective when applied to evaluating major areas of regulation with wide-ranging effects. They seek to assess the appropriateness, effectiveness and efficiency of regulation – and to do so within a wider policy context,

Box 5.5. **Approaches to regulatory review** (*cont.*)

in which other forms of intervention may also be in the mix. In the Australian context, extensive consultation has been a crucial element of this approach, including through public submissions and, importantly, the release of a draft report for public scrutiny. When done well, in-depth reviews have not only identified beneficial regulatory changes, but have also built community support, facilitating their implementation by government.

Source: Australian Productivity Commission (2011), *Identifying and Evaluating Regulation Reform*, Research Report, Canberra, www.pc.gov.au/inquiries/completed/regulation-reforms/report/regulation-reforms.pdf.

Challenges with evaluation

The conduct of evaluation is not a straight-forward exercise, unless it is structured consciously and systematically. Care is required in relation to all phases of the evaluation – its mandate and design, the collection and validation of data; and the elaboration and communication of the findings. This paragraph shortly outlines some of the most common conceptual, methodological or sheer practical challenges that evaluators are likely to face.

Managing evaluation biases

As an activity involving multiple actors at various stages, evaluation is not immune from potential biases. Evaluation sponsors, those called upon to make use of the evaluation findings (including the public at large) and indeed the evaluators themselves need to make sure that the necessary procedures and mechanisms are in place to controlling and mitigating such biases (Scriven, 2010).

A source of possible bias in evaluation is hindsight (Anderson et. al., 1993), which occurs when individuals overestimate the extent to which an outcome could have been anticipated prior to its occurrence. The so-called selection bias is also quite well acknowledged (GiveWell Blog, 2010). Social science evaluation literature commonly recommends comparing people who participated in the program to people who did not, with the implication being that any differences are caused by the program. However, program participants are different from non-participants, by the very fact of their participation. Selection bias may skew a study in a positive or negative direction, as it gives the evaluator substantial room for judgment calls in their choice of comparison group.

Certain study designs are much less vulnerable to selection bias than others. A randomised evaluation, also known as a randomised controlled trial, generally avoids the problem of selection bias by using random assignment to assign some people and not others to a program; then people who were "lotteried in" (randomly assigned) to the program are tracked and compared to people who were "lotteried out". Intuitively speaking, this methodology seems to significantly reduce the risks that there will be any systematic differences between program participants and non-participants, other than whether they participated in the program (Cook et al., 2008; Bloom, 2005).

Biased evaluation also results from three further sources – the tendency to favour preference-consistent information; the inclination to accept as socially validated information that also others on the evaluation group possess (thereby potentially affecting

objective scrutiny and appraisal); and the inclination to favour information that group members know before the discussion (Mojzisch et al., 2010).

Identifying relevant stakeholders

It is important also to recognise that various stakeholders, individuals or groups may hold competing and sometimes combative views not only on the rationale and form of the regulatory intervention at stake, but also on the appropriateness of the evaluation exercise itself (and whose interest can be affected by its findings). Several categories of stakeholders can be considered as potentially gravitating around an evaluation. These are policy-makers and decision-makers, evaluation sponsors, target participants, programme managers and staff (i.e., with reference to regulatory retrospective analysis, those actors involved in the institutional regulatory process), evaluators, contextual stakeholders and the evaluation community as a whole (Rossi et al., 1998).

Hanberger (2001:52) advises evaluators to differentiate between active (or principal) stakeholders and passive. Among the first are those that try to directly influence the course of the policy and regulatory intervention, whereas the latter are those affected by the intervention without actively participate in the process. It is important for the evaluator to include the views of this latter group as well in the evaluation framework. If only key actors' perceptions are scrutinised, there is a risk that indirect or more structural consequences are overlooked. Methods exist to assist evaluators with the identification of stakeholders – for instance by relying on the "stakeholder matrix" or the so-called "snow-ball method".

Timing evaluation adequately

Determining "how *ex post* is *ex post*?" is not a pleonastic question. Sometimes it is objectively difficult to proceed to evaluating the effects of a regulatory intervention because the timing is inadequate. Two dimensions need to be considered with regard to timing. The first one relates to the possible discrepancy between the moment at which the mandate to evaluate is conferred and the course of the regulatory intervention. One possible source of difficulty is for instance the presence of mandatory review or sunset clauses enshrined in the law which require an evaluation to be carried out although "on the ground" part of the implementation is still pending or not fully completed for a number of reasons.

This might particularly occur in federal and quasi-federal systems, where the implementing authorities are not at the same government level as the ones adopting the regulation. In addition, the implementing authorities might have discretion in choosing the means and modalities to best transpose the general provisions, thereby creating multiple implementation patterns. This is the case for instance for EU Directives and their application by EU Member States. Patchy implementation may on the other hand occur also within the same jurisdiction, for example because of un-even or diverging compliance by key affected parties or the presence of appeals with a suspensive effect.

The second dimension is "internal" to the evaluation design and refers to apply correct methodological approaches to determine causal relationships between inputs, outputs and outcomes. As outlined above, reality is composite and it is shaped by both (intended and un-expected) factors directly triggered by the regulation under examination and other external (regulatory or non-regulatory) factors. Some laws may take considerably longer than others before evaluation can begin. Some may have immediate effects, others will have cumulative effects and others involve long term changes in

behaviour and attitude. Whether regulation achieves the set objectives critically depends on the time frame considered and on the presence of facilitating factors or the adverse constraints faced during implementation. The evaluator is expected to grasp reality and set the boundaries of its evaluation so that it is clear what is legitimate to be considered as regulatory achievement and what as failure.

Accounting for evaluation costs

Evaluations are often considered to be a costly (and not necessarily cost-effective) endeavour. Results can be difficult to interpret and, if not undertaken well, evaluations can be misleading. Ensuring the right type of evaluation is applied consistently and at the right time is crucial. For both evaluation sponsors, who commission (outsourced) evaluations, and evaluators the fundamental question is twofold: "how much does an evaluation cost?" and "how much should it cost?" (Rieder, 2011).

The first question is linked to the empirical allocation of resources in the various phases of an evaluation – for instance in relation to the type and frequency of direct field research compared to investment in organising focus groups or conducting interviews, or again the efforts to disseminate the findings once the report is finalised. The second question concerns rather the overall evaluation planning and requires a strategic approach to prioritise and time various evaluation initiatives across time.

No standard is available to answer the questions, as any evaluation case has its one purpose and political and policy context that influence the overall costing. It is important that the cost allocation is transparent and clearly defined.

Typically, evaluations generate direct costs in the form of expert staff costs (fees), various administrative costs (including translation, publication and dissemination costs) as well as costs linked to the development of computing modelling; the collection of data and stakeholders feedback.

Indirect evaluation costs can results from opportunity costs (the budget allocated to a determined evaluation or evaluation component cannot be invested elsewhere) and from "biased implementation". The authorities and stakeholders responsible for implementing a piece of legislation might deliberately focus on complying with those measures that they know will be most easily reviewed during the evaluation, thereby jeopardising the regulatory potential. A possible metric to apply in order to maintain comparative investments may be to allocate to evaluation a budget reflecting a weighted percentage of the total costs generated by a policy or a regulation.

In addition, more general "political costs" need to be considered in relation to the follow-up process. Irrespective of the type of findings produced by the evaluation, acting (in one way or the other) or non-acting to reform regulation may trigger controversies among affected parties and civil society circles.

The "evaluation framework"

Approaching evaluation on the basis of a structured framework helps control these challenges and make the most out of a fully-fledged *evaluation function* (Patton, 1998; 2002). The notion of evaluation function puts emphasis not on pre-determined organisational arrangements and methodological approaches, which may not fit optimally everywhere and at any time. Rather, attention is given to core principles for evaluation that may be adjusted according to the institutional, administrative and cultural feature of

any given jurisdiction or policy area, as well as the political context in which evaluation takes place.

This section illustrates a number of steps that help design a comprehensive evaluation framework. They can be distinguished in conceptual and practical.[6]

The conceptual dimension (design)

Setting the context

Evaluation does not intervene in a vacuum but is necessarily informed by pre-existing knowledge as well as concomitant factors. Evaluation sponsors are usually better off if they have a clear picture of the underlying contexts in which both the policy intervention has been implemented, and the subsequent evaluation will take place. What was the baseline scenario leading to the decision to intervene? What has changed over the years since implementation? Here again, integrating the exercise with the RIA process might be instrumental. Such an analysis is critical for it enables a better definition of the policy problem, and to clarify the purpose of the exercise. At the same time, setting the context helps better considering the implications that the evaluation process bears with it. Because any evaluation has constraints (be them linked for instance to limitations of resources, or due to the chose conceptual, methodological approach and scope), it is important to build and manage the expectations accordingly and start an effective, transparent and objective communication campaign.

Setting the context also means identifying the main actors concerned by the policy intervention, and determining their linkage with the evaluation exercise. Actors play different roles, from funding the evaluation to carrying out the assessment and communicating the findings. Knowing the constellation of actors, their mutual relationships and their degree of involvement in the policy area helps ascertain their relevance, representativeness, expertise, and agendas.

Structuring the evaluation

After setting the context, evaluators must proceed to the design of the scope and methodology. Structuring the evaluation is arguably one of the most challenging tasks, and it bears direct implications on the overall process downstream.

The "why" – The primary element to consider is the rationale for conducting an *ex post* evaluation on a determined regulation. After all, all laws are essentially experimental and their effects are uncertain and unknown. There are a number of different and equally legitimate motivations for conducting *ex post* evaluation. They may include:

- determining outcome, impact and effectiveness;
- determining costs and benefits;
- investigating problems identified with the law;
- assessing implementation, compliance, awareness and enforcement;
- meeting requirements for evaluation made within the legislation;
- enhancing the process of law making and the future quality of legislation with a view to political and governance benefits;

- building relationships and strengthen networks between the stakeholders involved in law making and implementation e.g. executive and officials, agencies and regulators, legislature, civil society and NGOs, academics and evaluators themselves.

The "what" – A second element determining the overall exercise refers to the object to be evaluated. When gauging what to evaluate and whether to evaluate or not, it is opportune to consider the following:

- whether to evaluate all laws as a matter of course or to limit evaluation to a certain number of laws each year or to specific sectors;
- determining what kind of tests should be performed (see Box 5.4 above); and
- establishing what kind of impacts are to be considered (for instance: direct compliance costs, only administrative burdens, also benefits) and how those are to be calculated and expressed.
- In the recent past, the think tanks community has critically contributed to the debate by developing innovative methodologies and approach to complement the so-called Standard Cost Model methodology (see Box 5.6).

Box 5.6. **Regulatory cost and cumulative cost assessment: Recent inputs by think tanks**

Acknowledging that information costs only represent a comparably small percentage of the overall regulatory costs of business or other groups of norm addressees, the German Bertelsmann Stiftung commissioned work to develop a more comprehensive "Regulatory Cost Model" (RCM) (Riedel, 2009; Schatz, 2009). The RCM looks at regulatory costs incurred directly in the fulfilment of statutory duties requiring action. It builds and expands in the traditional SCM in four aspects:

- it not only considers information duties but all types of duties requiring action;
- it captures all types of costs which could be incurred when carrying out these duties;
- it considers also "subjective" burdens (such as irritation costs); and
- it accounts for all conceivable areas of application.[1]

The RCM approach also includes a method for estimating the opportunity costs of regulation. Opportunity costs are estimated as the profits that are foregone as a result of regulatory obligations. They are calculated by multiplying the additional expenses of regulations by the prevailing market interest rate.

In the framework of European Commission's REFIT exercise, the Brussels-based Centre of European Policy Studies (CEPS) was tasked to develop and perform two so-called "Cumulative Cost Assessments" (CCAs).[2] The objective of a CCA is to identify, assess, and where possible quantify, the cumulative costs imposed by EU legislation on a selected industry. Importantly, it seeks to shed light on the interaction (or lack thereof) of different policy areas and cumulated effects on different sectors (Schrefler et al., 2013).

CCA is not a new technique to assess *ex post* outcomes of a regulation. Rather, it is a set of existing tools, used in combination to meet the requirements of a new approach to policy appraisal: focusing on all policies having an impact on one class of addressees, rather than focusing on all addresses of one policy (or one small set of closely-knit policies), as traditionally done. Accordingly, the CCA combines approaches to measurement of:

Box 5.6. **Regulatory cost and cumulative cost assessment: Recent inputs by think tanks** (*cont.*)

- administrative costs (stemming from information obligations);
- compliance costs, which include substantive obligations and monetary obligations; and
- indirect costs, which impact producers not as direct addressees, but as counterparts of direct addressees.

In the United States, the Mercatus Center at George Mason University created a series of tools which, taken together, contribute to deepen the knowledge of the amount and type of US federal regulation. The databases provide an estimate of its overall costs and on sectoral industries. The Center's Regulatory Cost Calculator is a tool designed to help businesses and their trade associations assess prospective costs of individual proposed regulations before they become final regulations. Joint with another resource, "Openregs.org", business has the possibility to track and file a public comment on regulations. The Mercatus Centre also launched "RegDATA.org", which provides an estimate of the degree of federal regulation faced by each industry in the United States from 1997 to 2012. Finally, the "Regulatory Report Card" is an in depth evaluation of the quality of regulatory analysis agencies conduct for major executive branch regulations. The Report Card evaluates agencies' economic analyses, known as Regulatory Impact Assessment (RIAs), which have been required for all major regulations since the early 1980s.[3]

1. Nonetheless, the RCM approach does not include all of the costs of regulation. Excluded are for instance the legislative costs (the costs of enacting regulations); administrative enforcement costs (the costs incurred in enforcing regulations, although if these costs are passed on through cost recovery measures, they will be captured as 'financial costs' to regulated parties); and costs to the national economy (distortions).

2. The two CCAs were carried out in 2013 on the steel and aluminium sectors (see http://ec.europa.eu/enterprise/sec-tors/metals-minerals/files/steel-cum-cost-imp_en.pdf; and http://ec.eu-ropa.eu/enterprise/sectors/metals-minerals/files/final-report-alu-minium_en.pdf, respectively).

3. See http://mercatus.org/research/regulation-0.

Source: Riedel, H. (2009), *International Methods for Measuring Regulatory Costs*, Bertelsmann Stiftung Gütersloh; Schatz, M. et al. (2009), *Handbook for Measuring Regulatory Costs*, Bertelsmann Stiftung Gütersloh; Schrefler L., G. Luchetta and F. Simonelli, (2013), "A new approach to *ex post* evaluation in the EU: The Cumulative Cost Assessment", in *European Journal of Risk Regulation*, Vol. 4/2013, pp. 539-541.

The academic literature has further refined the consideration of regulatory impacts, providing insights on wider and "more complex" costs and benefits that regulatory interventions may trigger (see Box 5.7). It is important that government elaborate techniques to identify and analyse causal relations, as well as to evaluate and compare (cumulated) impacts. Especially when covering risk management decisions, moreover, evaluators should adequately consider uncertainty (OECD, 2010e).

Box 5.7. **Grasping wider regulatory impacts: Adjustment costs and ancillary impacts**

Some recent research suggests that assessments of regulatory impacts should recognise "adjustment costs". These are the lags and delays in shifting economic activity, one of the consequences of regulatory-induced behavioural change, between markets, geography, and workers with different skill levels. It is now recognised that these lags could be of particular significance when economies have spare capacity, challenging the utility of the traditional 'equilibrium' models often used by regulatory economists (Masur and Posner, 2012; Davis and von Wachter, 2011).

The field of risk regulation has also been researched in-depth, for instance with reference to the phenomenon of substitution effects and, more precisely, of ancillary benefits (co-benefits) and ancillary harms (countervailing risks). Some of these impacts come from substitute products or price-induced shifts in behavior (for instance, opting for road instead of air travel), some other by so-called risk-risk trade-offs (Graham and Wiener, 1995). The literature has identified several different types, and numerous examples, of ancillary impacts and it has discussed the cognitive/behavioral, and the institutional, causes of neglect of ancillary impacts jointly with potential solutions to overcome risk-risk trade-offs by developing superior risk management alternatives (Wiener, 2002; OECD, 2010e).

Source: Masur J.S. and E.A. Posner (2012), "Regulation, unemployment, and Cost-Benefit Analysis", in *Virginia Law Review*, Vol. 98, pp. 579-634; Davis, S.J. and T. von Wachter, (2011), "Recession and the Cost of Job Loss", *NBER Working Paper*, National Bureau of Economic Research, Cambridge MA.; Wiener, J.B. (2002), "Precaution in a Multi-Risk World", in D. Paustenbach (ed.), *Human and Ecological Risk Assessment: Theory and Practice*, John Wiley and Sons, New York, pp. 1509-1531; OECD (2010e), *Risk and Regulatory Policy: Improving the Governance of Risk*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264082939-en.

The "who" – "Who evaluates? And on whose behalf?" are two key questions that may have fundamental repercussions on the results, and their impact on the evaluated policy and institutions. Evaluations can take three different forms, according to who is in charge of designing and carrying them out. Depending on who initiates and who carries out the evaluation process, the scope and focus of the latter may change. For examples, the mandate of audit institutions may limit evaluation to consider the efficiency of the programme, while a stakeholder-driven exercise or a multiple peer-review may encompass the economic impacts of the reduction measures. Moreover, each scenario has its own advantages and challenges (Table 5.1), and a priori it is not possible to prefer a specific form over the other. The choice normally depends on various factors, including the institutional setting; the political context; and the specific policy intervention at stake. Sometimes, decisions on whom to entrust evaluation to must be taken on an ad hoc basis. Often, a combination of the approaches is advisable.

Table 5.1. **Forms of policy evaluation**

Form	Brief description	Advantages	Challenges
Internal evaluation	carried out from within the public administration (self-evaluation)	• relevance • maximises learning and buy-in • long-term capacities • better access to internal information • easily adjustable methodologies	• political commitment • self-referential, partisan character • lack of objectivity • legitimacy • external communication • internal costs
External evaluation[1]	a) commissioned by the government	• enhanced accountability • high credibility, legitimacy • flexibility in planning and allocation of resources • expertise	• acceptance • lack of ownership, reduced learning • information asymmetry between evaluators and evaluated
	b) external own initiative	• enhanced accountability • policy as shared responsibility • diversification of perspectives • expertise • speed	• timing within policy cycle, relevance • legitimacy (possible partisan, partial character, integrity of funding) • lack of ownership, reduced learning • dissemination • limited acceptance
Participatory evaluation	relies on public-private expertise	• mutual learning • legitimacy • diffused acceptance	• speed • politicisation • representativeness

Note: The external body carrying out the evaluation may belong to the state institutional setting (e.g. a parliamentary committee or commission; the Court of Auditors or similar audit institutions, or the Ombudsman office), or be other public and private organisations such as universities and research institutes, think tanks, foundations and other stakeholders. The degree of autonomy of these bodies varies.

Source: OECD (2010f), "Annex B. Evaluating Administrative Burden Reduction Programmes and their Impacts", in OECD, *Why Is Administrative Simplification So Complicated?: Looking beyond 2010*, OECD Publishing, Paris, p. 103, http://dx.doi.org/10.1787/9789264089754-8-en.

Recent research suggests that regulators who create laws and rules may lack the incentive or inclination to revise them (McLaughlin and Williams, 2014). What appears critical is less the identification of specific single entity responsible for carrying out evaluations, either public or private. Rather, biases are likely to be minimised if a range of actors intervene in a pluralistic process, with different scopes of action, various evaluation approaches and at various stages of the policy cycle.

The "when" – As mentioned above, the timescale for evaluation varies in function of the individual regulation under scrutiny, depending on whether general review or sunset clauses exist or rather in relation to specific provision enshrined in the regulation itself. Evaluators will have to clarify whether they account for possible changes in the factors that contributed to the adoption of the regulation and, subsequently, to its implementation and enforcement. For instance, a new government may have introduced new laws that

alter the baseline scenario predicted at the adoption of the regulation under examination or even supersede it, thereby directly impacting on the overall appraisal of the regulatory performance. Evaluation itself takes time and it should take into account the period elapsing between the issuance of the mandate, the appointment of the evaluators, the data collection process (if no effective ongoing monitoring had been carried out) and the elaboration of the findings.

To cover such elements systematically, some good practices help government structure the evaluation and kick off the evaluation framework. The practices can be synthetised as follows:

- **issuing terms of reference** – This initial step is important as the document frames the scope of the evaluation. The terms of references set the specific objectives, tasks, deadlines and resources to the evaluators. At the same time, nonetheless, they should allow a certain room for manoeuvre to the evaluator to pursue its tasks;
- **providing information** – This refers to the methods used to access relevant and reliable data. At this stage, evaluation designers usually include the steps leading to the "impact tracing" process mentioned above, as well as the channels through which information is collected. The channels may be direct interviews, surveys, documentation reviews, and direct observation. One approach does not exclude the other. On the contrary, they usually are mutually supportive and complementary, as each presents advantages and drawbacks. It is usually left to the evaluator to choose among the best ways to collect data, and to filter it to retain as much relevant and reliable information as possible (Brady/Collier, 2004);
- **identifying the type of evaluation** – By categorising the type of evaluation and selecting the appropriate combination of them, evaluators are forced to reflect on what the various evaluation tools and mechanisms are appropriate and how they are instrumental in achieving the underlying objectives of the evaluation exercise; and
- **setting quality standards** – It is best practice to set at the outset the quality standards to be expected from the evaluation process. This allows for intermediate monitoring (if interim reports are foreseen) and facilitates an objective assessment of the evaluator's work.[7]

The practical dimension (implementation)

Capacity building

What capacities and what kind of organisation are needed for carrying out evaluation activities are two elements directly related to the question on whether to carry out an evaluation internally, or to outsource it to external entities. Internal evaluations require building in-house capacities and skills that might be available on the market at a lower cost. So-called sunk costs and initial costs may be particularly high, and because of the dynamic nature of evaluation, investing in evaluation may imply mid- to long-run follow-up costs. For instance, dedicated staff needs to be (hired and) trained to keep up with policy developments and methodological advances. However, government does not always have to face such a choice. External evaluations may be imposed *ex officio* to a given audit institution; or they may originate autonomously among civil society.

Time planning and budgeting of the evaluation are key elements in this regard. The types of costs incurred may be very disparate. Among other things, budgeting should not overlook the costs of:

- winning the necessary political support (if the evaluation is not set exogenously);
- conceiving the evaluation (drafting the terms of reference);
- allocating the internal operational responsibilities;
- providing training (if necessary);
- organising the call for tender and selecting the evaluation team (if necessary);
- carrying out the evaluation (data gathering, preparation, drafting and communication of the report); and
- organising the utilisation of the findings.

Collecting the data is often the main practical challenge for the evaluator. A preliminary enquiry on the availability of reliable data helps determine the scope of the evaluation and the type of approach that it is desirable or feasible. These *ex ante* considerations facilitate the design and budgeting tasks.

Knowledge diffusion and utilisation

The overarching goal of evaluation is to collect and present information in such a way that it can have practical consequences and the broadest impact possible. As a minimum, evaluation influences the policy agenda and it can further spill over into policy learning. The design and use of the existing and new policy instruments should be improved further to policy evaluation. To this end, the way information and knowledge are disseminated and used is crucial (Thoening, 2000). More in general, launching a proper communication strategy from the very beginning is very instrumental (Chattaway and Joffe, 1998).

All actors concerned – be it within the administration, the decision-makers, or the stakeholders – must have an as direct and neutral access as possible to the results of the evaluation. The latter never constitute the only source of information available. Evaluation findings and recommendations are just one piece of the information puzzle inputting policy-making. Preferences, opinions and policy agendas are shaped progressively from multiple and heterogeneous sources. Evaluations are not used alone, but they are synthesised with prior knowledge, concomitant information, and core beliefs (March and Olsen, 1989). Hence, the relevance of evaluations depends as much in the methodologies and the reliability of the data used as in how the process is embedded in the overall policy framework.

Evaluation has a strong pedagogic value, and in principle it would be opportune that those meant to learn from it (often the sponsors) are involved as closely as possible. This however may end up in tautological, self-referential exercises. Moreover, to avoid biases, evaluators should not be made responsible for communicating the results of their work and controlling the way in which this is utilised. A too close relationship between evaluators and users creates serious risks. On the one hand, people tend to prefer those findings that can be associated more directly to their core beliefs and values. This might distort the evaluation, which would end up merely confirming already established views. On the other hand, problems may arise from the fact that often those commissioning the

evaluation are also the primary end-users of it. This raises the question of which actors are ultimately allowed to be involved in determining the design, scope and method of the evaluation; selecting the evaluators; and assessing the findings – and why others are excluded.

Ideally, the various phases of the evaluation process should be kept distinct from each other. Because reality is more complex, and to allow learning, there must be a permeable interface between sponsors, evaluators and users. The relationships between the various actors throughout the evaluation process must be carefully planned and balanced. In practice it is clear that the evaluation design and presentation will affect its utilisation (Weiss, 1998). It is therefore crucial that control mechanisms are in place to minimise the biases. Being aware of the intrinsic pros and cons of the various evaluation scenarios described in Table 5.1 above allows establishing the necessary procedural and methodological checks and balances.

Ex post evaluation in practice

This section reports on relevant practices developed in selected OECD countries to organise and conduct regulatory *ex post* evaluation. It outlines different tools and mechanisms used by OECD countries to evaluate regulations *ex post* and presents examples of policy or legal requirements that contribute to the institutionalisation of the evaluation function. This section also discusses the role that various (institutional, private / civil society, academic) stakeholders and the citizens can play both in individual evaluation exercises and, more generally, in promoting regulatory *ex post* evaluation systems.

The diffusion of regulatory **ex post** *evaluation*

While the rationale, importance and the benefits from carrying out *ex post* evaluations is broadly understood, many governments and parliaments have come relatively late to introducing systematic retrospective reviews of regulation. There has been a tendency over the past decade to move on to the next pressing issue in the regulatory policy agenda and leave the management of the effects of regulatory interventions to the judiciary for interpretation or to future governments to amend the legal framework. Compared to the international diffusion of instruments supporting the preparatory phase of the regulatory cycle (such as RIA) or seeking a simplified regulatory and administrative environment (such as the administrative burden measurement programmes), for instance, *ex post* evaluation has remained relatively side-lined. On the other hand, many jurisdictions have developed considerable experience and expertise over the past decades with evaluating spending programmes and financial interventions, such as structural regional, development or social assistance projects.

The trend is nonetheless positive and OECD surveys indicate an increase in the jurisdictions that carry out regulatory *ex post* evaluation on a more or less institutionalised basis. At least 20 OECD countries acknowledge having automatic review requirements for primary laws. However, systematic *ex post* evaluation is less common and the number and performance of such reviews are rarely measured systematically. Only six OECD countries reported in 2008 that periodic evaluation of existing regulation was mandatory for all policy areas and 12 countries report using sunset clauses, including Australia, Austria, Canada, Finland, France, Germany, Iceland, Korea, New Zealand, Switzerland, the United Kingdom and the United States. Annex 5.A1 shows in more detail the state of the art on *ex post* evaluation in the OECD countries (OECD, 2012b, p. 81).[8]

International practices with elements of the evaluation framework

In the following, elements constituting the procedural, methodological and organisational governance of the evaluation function of a government are presented on the basis of international examples. The elements addressed are:

- Political commitment and legal bases;
- Evaluation planning and linkages to RIA;
- Guidelines and methodological support;
- Stakeholder involvement;
- Role of legislative assemblies
- Minimum standards and quality oversight; and
- Publication.

Committing politically and legally to ex post evaluation

Committing, possibly through binding statements, to reform and good regulatory management practice at the highest political level is one of the preconditions for successfully improving the quality of regulation (OECD, 2012a, Recommendation 1).

In many countries *ex post* evaluation is firmly anchored in legal bases, sometimes even in the national Constitution. This is the case for instance of Sweden and Switzerland, where the constitutional status of *ex post* evaluation has arguably favoured an extension of the evaluation activity (see Box 5.8).

Box 5.8. Granting constitutional character to *ex post* evaluation: Sweden and Switzerland

In **Sweden**, the State Budget Act adopted in 1996 in the framework of performance management reform measures, states that all government activities shall be run efficiently and economically. The Act also states that the Swedish Government shall report to Parliament on the intended goals and the results attained in different policy areas.

In 2001, the Swedish Parliament institutionalised the evaluation function by parliamentary committees by including it in the Riksdag Act and organising it on the basis of an Action Plan.[1] Ten years later, this obligation was included in the "Instrument of Government" (Sweden's Fundamental Law), giving it constitutional status (Sveriges Riksdag, 2015). The obligation to evaluate also binds the executive, through the provisions of the 2007 Ordinance on Impact Analysis of Regulation.

In **Switzerland**, (*ex post*) evaluation is well-established and institutionalised (Klöti et al., 2004; Balthasar, 2007; Mader, 2009). The obligation to evaluate legislation has been enshrined at constitutional level since 1999. Under Article 170 of the Federal Constitution of the Swiss Confederation, for instance, the Federal Assembly shall ensure that federal measures are evaluated with regard to their "effectiveness".[2]

The Swiss Parliament Act substantiates this obligation and entitles designed parliamentary bodies to request the Federal Council to carry out impact analyses and scrutinises those, and to commission own assessments. In its turn, the Executive is empowered to instruct evaluations to be carried out itself, not least on the basis of its overall implementation and supervisory competencies (Art. 182 (2) and 187 (1a) of the Federal Constitution). In addition, there are some 120 review and evaluation clauses in Swiss individual or sectoral laws. Evaluation clauses may be inserted when a law is enacted or amended.[3]

Box 5.8. **Granting constitutional character to *ex post* evaluation: Sweden and Switzerland** (*cont.*)

The Federal Audit Office Act constitutes a further relevant legal base as it authorises the Swiss Federal Audit Office (EFK) to review legal measures not only according to the criteria of compliance, legitimacy and cost effectiveness, but also as to whether the financial contributions of state measures have had the expected impact.[4]

1. See the Parliament decision "The Riksdag in the run-up to the 21st century", Proposal 2000/01: RS1, Report 2000/01:KU23.

2. The term is here understood as capturing the entirety of all relevant effect relationships and outcomes. "Effectiveness, efficiency and impact" serve as evaluation criteria (Mader, 2009, as specified by Prognos, 2013, p. 30).

3. However, in 2011 the Swiss Federal Audit Office assumes that only around half of the evaluation clauses provide for a "real evaluation"; the other half of the evaluation clauses appoint the federal offices to carry out monitoring or controlling systems, for example (Prognos, 2013, p. 31).

4. See Article 5 (2) of the Federal Audit Office Act (SR 614.0).

Source: Prognos (2013), "Expert report on the implementation of *ex post* evaluations: Good practice and experience in other countries", report commissioned by the National Regulatory Control Council, Berlin, www.normenkontrollrat.bund.de/webs/nkr/content/en/publikationen/2014_02_24_evaluation_report.pdf?__blob=publicationfile&v=2; Riksdag (2015), "The committees follow up the Riksdag's decisions", *Sveriges Riksdag*, www.riksdagen.se/en/Committees/The-parliamentary-committees-at-work/The-committees-follow-up-the-Riksdags-decisions/, 30 April; Klöti, U. et al. (2004), *Handbook of Swiss Politics*, Neue Zürcher Zeitung Publishing; Balthasar, A. (2007), "Institutionelle Verankerung und Verwendung von Evaluationen. Praxis und Verwendung von Evaluationen in der schweizerischen Bundesverwaltung", Zürich; Mader, L. (2009), "Die institutionelle Einbettung der Evaluationsfunktion in der Schweiz", in T. Widmer et al. (Hrsg.), *Evaluation. Ein systematisches Handbuch*, Springer Verlag, pp. 52-63.

A number of jurisdictions have explicitly announced the intentions to strengthen the role of post-implementation regulatory reviews as well as to increase their investment in related in-house capacity-building and funding available for outsourcing (see Box 5.9).

Box 5.9. **The European Commission's "evaluate first principle"**

The European Commission is arguably one of the most vocal advocates of the new course given to *ex post* evaluation of regulation. It has introduced the so-called "evaluating first principle", according to which the Commission commits "(…) [not to] examine proposals in areas of existing legislation until the regulatory mapping and appropriate subsequent evaluation work has been conducted." (EC, 2012:4).

The commitment was announced in the Political Guidelines that President Barroso publicly issued in 2009, at the outset of his second term in office (Barroso, 2009:29) as well as in various public speeches. A number of Commission communications have reiterated and outlined the envisaged new approach in the framework of the EU Smart Regulation strategy (EC, 2010; 2013b).

The principle is expected to help the Commission, in the short to mid-term, to re-allocate the services' resources according to priority axes, raising at the same time the relative importance of *ex post* evaluation within the policy cycle. The evaluating first principle, if systematically applied, has clear repercussions on the re-organisation of the planning phase of evaluations.

Source: European Commission (2012), *EU Regulatory Fitness*, COM(2012) 746 final of 12 December, p. 4; Barroso, J.M. (2009), *Political Guidelines for the Next Commission*, http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf; European Commission (2010), *Smart Regulation in the European Union*, COM(2010) 543 final of 8 October 2010; European Commission (2013b), Strengthening the Foundations of Smart Regulation – Improving Evaluation, COM(2013) 686 final of 2 October 2013; and European Commission (2015a), "Evaluation", *Better Regulation*, http://ec.europa.eu/smart-regulation/evaluation/index_en.htm (last update 19 May 2015).

Enhanced engagement in *ex post* evaluation is often driven by selected policy goals. Streamlining the regulatory and administrative environment and relieving business from unnecessary administrative burdens has recently been a powerful rationale in a number of countries. In many cases, the political commitment is accompanied with proposals to create ad hoc bodies dedicated to oversee or directly carry out the reviews (see Box 5.10).

Box 5.10. **Cutting red tape as a rationale for reviewing regulation: The United Kingdom, the United States and Germany**

In the **United Kingdom**, the notion and practice of evidence-based approaches to decision making are deeply rooted in the legislative process. The Government commitment to evaluating both *ex ante* and *ex post* implementation has consolidated over the past decades (UK Government, 2010c; OECD, 2010b) and Parliament also holds the executive firmly into account (see below).

The United Kingdom regards robust evaluation as a key element of the domestic and European policy process. A particular area of engagement by the UK Government is the reduction of regulatory burdens, notably affecting SMEs. It believes that effective evaluation of regulation makes a vital contribution to evidence-based policy-making, effective targeting of limited public resources and risk management. Evaluation also makes a significant contribution to the identification of unnecessary costs for business, disproportionately burdensome obligations for SMEs and overlapping or duplicative regulations. Minimising such factors, the UK government believes, is a key EU growth priority for the United Kingdom (UK Government, 2014).

In October 2013, the Prime Minister's Business Taskforce on EU regulation published a report proposing a series of reforms to minimise burdens on business. In October 2013, the Prime Minister's Business Taskforce on EU regulation published a report proposing a series of reforms to minimise burdens on business. The inclusion of evaluation in the COMPETE principles demonstrates its importance in burden reduction (UK Business TF, 2013).

Recent political commitment in the **United States** is grounded in a similar rationale. In 2011 President Obama adopted Executive Order (EO) 13579 explicitly dedicated to reinforcing "look-back" analyses. EO 13563 later extended the measure to the independent federal regulatory agencies, while EO 13610 focused on reducing regulatory burdens (US Government, 2011a,b; 2012b). While formal requirements to agency to evaluate the impacts and the performance of statutory instruments is by no means a novelty in the federal system,[1] *ex post* evaluation by federal agencies remains patchy and unsystematic (Greenstone, 2009; Lutter, 2013). As Coglianese (2013, p. 59) acknowledges, "it is fair to say that retrospective review is today where prospective analysis was in the 1970s: ad hoc and largely unmanaged". The latest measures taken by the Obama Administration seek to a more explicit institutionalisation of existing evaluation practices.

The commitment stems from beyond the executive, too. Some members of the US Congress have started discussing possible legislation that would establish a new, independent commission dedicated to the retrospective review of regulations. Such a commission would help determine whether certain existing regulations should be repealed.[2]

In **Germany**, despite rich experience with evaluation (Böhret and Konzendorf, 2001; Konzendorf, 2009), *ex post* review of federal regulation is not centrally formalised apart from a provision of the Joint Rules of Procedure of the Federal Ministries (GGO) requiring the memoranda supporting legislative proposals to include information on whether and, if so, after what period of time, a review is to be held.[3]

The situation changed upon the adoption in 2013 of the Committee of State Secretaries Resolution for the Reduction of Bureaucracy concerning the approach for evaluating new legislation (Federal Government of Germany, 2013, pp. 64f). That constituted the first commitment to carry out systematic *ex post* evaluation of laws, to be applied above certain threshold criteria (Prognos, 2013).

Box 5.10. **Cutting red tape as a rationale for reviewing regulation: The United Kingdom, the United States and Germany** (*cont.*)

In particular, future regulatory reviews must be conducted three to five years after regulations after entering into force of regulations for which annual compliance costs exceed:

- EUR 1 million citizens' material costs or 100 000 hours' time expenditure; or
- EUR 1 million in the business sector; or
- EUR 1 million for public authorities.

1. The US Regulatory Flexibility Act requires agencies to review every rule that has "a significant economic impact upon a substantial number of small entities" within ten years after the final rule is published. Further, Executive Order 12866 of 1993 requires agencies to develop a program "under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated. On the matter, see O'Connor Close and Mancini (2007, p. 23) and Steinzor (2014).

2. In particular, see the so-called "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act" – the SCRUB Act (H.R.4874) – introduced in Congress in July 2014, which would set up a "Retrospective Regulatory Review Commission"; or Bill S.1360 introduced in Senate in July 2013, which envisages the creation of a "Regulatory Improvement Commission" with an equivalent mandate. For a critical discussion on these developments, see RegBlog (2014).

3. See Paragraph 44.7 of the GGO. The National Regulatory Control Council can review the presentation of such information on evaluation in the framework of its scrutiny of draft federal legislation (Article 4 (2) of the Law establishing the National Regulatory Control Council.

Source: UK Government (2010c), "The Coalition: our programme for government", London; OECD (2010b), *Better Regulation in Europe: United Kingdom 2010*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264084490-en; UK Government (2014), "UK response to the European Commission's evaluation consultation", http://ec.europa.eu/smart-regulation/evaluation/docs/consultation/uk_government.pdf; UK Business Taskforce (2013), "Cut EU red tape", Report from the Business Taskforce, October; US Government (2011a), "Improving Regulation and Regulatory Review", Executive Order 13563 of January 18, 2011, *Federal Register*, Vol. 76/14; US Government (2011b), "Regulation and Independent Regulatory Agencies", Executive Order 13579 of July 14, 2011, *Federal Register*, Vol. 76/135; Greenstone, M. (2009), "Toward a culture of persistent regulatory experimentation and evaluation", in M. David and C. John (eds.), *New Perspectives on Regulation*, The Tobin Project, Inc., Cambridge, MA; Lutter, R. (2013), "Regulatory policy: what role for retrospective analysis and review?", in *Journal of Benefit-Cost Analysis*, Vol. 4/1, pp. 17-38; Coglianese, G. (2013), "Moving forward with regulatory look-back", in *Yale Journal on Regulation*, Vol. 30, pp. 59; Böhret, C. and G. Konzendorf (2001), *Handbuch Gesetzesfolgenabschätzung (GFA): Gesetze, Verordnungen, Verwaltungsvorschriften*, Nomos Verlag, Baden-Baden; Konzendorf, G. (2009), "Institutionelle Einbettung der Evaluationsfunktion in Politik und Verwaltung in Deutschland ", in T. Widmer et al. (Hrsg.), *Evaluation. Ein systematisches Handbuch*, Springer Verlag, pp. 27-39; Prognos (2013), "Expert report on the implementation of *ex post* evaluations: Good practice and experience in other countries", report commissioned by the National Regulatory Control Council, Berlin, www.normenkontrollrat.bund.de/webs/nkr/content/en/publikationen/2014_02_24_evaluation_report.pdf?__blob=publicationfile&v=2; Federal Government of Germany (2013), "Konzeption zur Evaluierung neuer Regelungsvorhaben gemäß Arbeitsprogramm bessere Rechtsetzung der Bundesregierung vom 28. März 2012, Ziffer II. 3" in "Bessere Rechtsetzung 2012: Belastungen vermeiden Bürokratischen Aufwand verringern Wirtschaftliche Dynamik sichern", pp. 64f, www.bundesregierung.de/Content/DE/_Anlagen/Buerokratieabbau/2013-07-29-jb-2013.pdf?__blob=publicationFile&v=2.

Planning evaluations and linking them to RIA

The initiation of *ex post* evaluation is a critical but often underestimated factor in the overall effectiveness of an evaluation system. The assessment of *ex ante* regulatory impacts improves policy design but it only constitutes one part of regulatory

management. Institutionalising accountability and results in regulation may need to be adjusted to practical outcomes after policy implementation. Closing the loop is essential if regulatory policy is to be performance-driven and politically accountable. This requires ensuring that *ex ante* impact assessment foresees the need of future *ex post* consideration of regulatory impacts. A fully integrated approach to regulatory policy therefore needs to include considerations for *ex post* evaluation at an early stage, with a full approach of regulations "from cradle to grave" (OECD, 2010a, p. 6).

Unlike the actual implementation of evaluations, which tend to be carried out by the responsible department or agency, the initiation of evaluation can be either centralised or de-centralised. With reference to the five jurisdictions scrutinised, Prognos (2013, p. 47) remarks that:

> "*ex post* evaluations are either initiated by or fall within the responsibility of Parliament – as it is the case in Sweden and in Switzerland (centralised initiation), or they can be initiated by and fall within the responsibility of the respective government department, as in the UK, Canada and the European Commission (…). According to expert opinion, both approaches are liable to certain risks. If parliaments are responsible for initiation, then there is a risk of an evaluation agenda being established that is driven by contemporary political debate. If departments are responsible for initiation and if there is no need to amend the act, the likelihood is strong that an evaluation will be delayed for as long as possible or an evaluation will only be implemented to legitimise a department. For this reason, the stipulation of longer term evaluation plans and the external monitoring of implementation are described as being of central importance." Prognos (2013, p. 47)

Linking the *ex post* evaluation process with the planning process is very important. Retrospective analysis should be integrated into the policy-making process in all its dimensions. One way to achieve this is to organise a general government calendar (see Box 5.11).

Box 5.11. **Establishing a regulatory review programme: New Zealand and Mexico**

In **New Zealand**, the government introduced its Regulatory Review Work Programme in 2009. The programme focuses on reviews of regulation that have pervasive and significant impact on productivity and the economy. It was put in place to develop a more systematic approach to *ex post* reviews rather than reviews on an ad-hoc basis. Items that have been reviewed: financial market regulation; local government regulations; occupational licensing (The Treasury, 2013).

In Mexico, formal plans were created for the development of sectorial reviews of the regulatory framework. In 2012, six of such plans were adopted on sectors related to health, energy, competition, ease of doing business and governance of regulators. In 2014, new programmes cover the systematic implementation of these reviews and diagnostics as well as the development of related simplification proposals.

Guidelines for the Biennial Programs for Regulatory Improvement include a specific requirement for a full initial diagnostic of the regulatory framework of each Ministry made by COFEMER. This diagnostic is open to public consultation and the final version is presented by Ministries and becomes the basis for the Biennial Programmes.

Source: The Treasury (2013), "Regulatory Review Work Programme", www.treasury.govt.nz/economy/regulation/programme (updated 18 April 2013); OECD 2014 Regulatory Indicators Survey results for Mexico.

A further way is to develop structured "monitoring and evaluation plans" already when considering and preparing legislative proposals. Indicatively, such plans should outline:

- objectives and scope of the evaluation;
- relevant performance indicators;
- synergies with overarching policy priorities (e.g. competitiveness, innovation, sustainability) and co-ordination with on-going reviews / forthcoming initiatives;
- roles and responsibilities for the monitoring and evaluation activities;
- involvement of and consultation with external actors; and
- expected deadlines.

Because not all initiatives submitted to Government for adoption produce the same effects and have the same political salience, differentiating the efforts and attention to evaluation planning allows allocating time and resources efficiently. The Canadian system presents advanced features in this respect (see Box 5.12).

Box 5.12. **Evaluation plans through the triage mechanism: Canada**

In Canada, the evaluation policy is co-ordinated centrally by the Treasury Board of Canada Secretariat (TBS). Within TBS, the Regulatory Affairs Sector is responsible for regulatory policy and compliance with the Cabinet Directive on Regulatory Management (Treasury Board of Canada).

All federal departments or responsible agencies are required to draw up a Rolling Five-Year Departmental Evaluation Plan, which is submitted every year to TBS. The Head of Evaluation of each department and agency takes responsibility for the operative implementation of the evaluations.

When new legislative and regulatory proposals are initiated, departments must fill the so-called Triage Statement that categorises the initiative as having low, medium or high impacts (Treasury Board of Canada Secretariat, 2014). If the initiative is assessed as high-impact, the lead department or agency must produce a Performance Measurement and Evaluation Plan (PMEP) to be included in the RIA.[1] Amongst other things, the PMEP contains a logic model illustrating the relationship between inputs, outputs and outcomes.

The PMEP is structured around a number of sections and its compilation is supported by a dedicated handbook (Treasury Board of Canada Secretariat, 2009):

- Description and overview of the regulatory proposal;
- Logic model (linking inputs, activities, and outputs to targets groups and outcomes;
- Indicators (qualitative and quantitative);
- Measurement and reporting approaches;
- Evaluation strategy;
- Linkage to Programme Activity Architecture;
- Regulatory Affairs Sector review;
- Assistant Deputy Minister Sign-off; and
- Departmental contact.

Box 5.12. Evaluation plans through the triage mechanism: Canada (*cont.*)

1. If by contrast the initiative is considered to bear medium impacts, the PMEP is optional and the decision to prepare it lies with the lead department.

Source: Treasury Board of Canada, "Regulatory Affairs Sectors", www.tbs-sct.gc.ca/tbs-sct/organization-organisation/organization-organisation-eng.asp#ras (accessed July 2015); Treasury Board of Canada Secretariat (2014), "Guide to the Federal Regulatory Development Process", www.tbs-sct.gc.ca/rtrap-parfa/gfrpg-gperf/gfrpg-gperftb-eng.asp (date modified 17 April 2014); Treasury Board of Canada Secretariat (2009), *Handbook for Regulatory Proposals: Performance Measurement and Evaluation Plan*, Ottawa.

The Australian experience illustrates one possible way to systematically link *ex post* evaluations with *ex ante* analysis of new regulatory proposals (see Box 5.13).

Box 5.13. Bridging *ex post* and *ex ante* analyses: Australia

In **Australia**, government agencies must undertake a post-implementation review (PIR) for all regulatory changes that have major impacts on the economy. PIRs must also be prepared when regulation has been introduced, removed, or significantly changed without a regulation impact statement (RIS). This may be because an adequate RIS was not prepared for the final decision, or because the Prime Minister granted an exemption from the RIS requirements.

The PIR should compare the impacts of the regulation with what is most likely to have happened if the regulatory change had not been made.

Since September 2013 the Australian government has required more comprehensive use of RIA and has introduced a requirement for PIRs to be done for all major regulations five years after they are introduced.

Source: Australian government submission to the OECD 2014 Regulatory Indicators Survey results*;* and Australian Government (2014), "Post-implementation reviews: Guidance note", https://www.dpmc.gov.au/office-best-practice-regulation/publication/post-implementation-reviews-guidance-note.

Providing robust guidance and methodological support

While many governments and regulatory bodies have issued guidelines and internal checklists to undertake *ex ante* regulatory assessments, there are much fewer examples of guidance material explicitly addressing *ex post* evaluations of regulations. This reflects the general delay with which retrospective review as surfaced on the regulatory reform agenda internationally. When existing, the guidelines tend to set out processes that agencies should follow rather than provide detailed methods of evaluation that should be used. The guides and manuals are not necessarily legally binding and are therefore not used in all cases.

Table 5.2 below provides an overview of standards and guides, and their binding force, as well as the units responsible for them, in relation to the countries reviewed by Prognos (2013).

Most reviews of legislative stocks have tended to identifying (unnecessary or disproportionate) administrative burdens originated by information obligations. Typically, countries have deployed the so-called Standard Cost Model or equivalent variants from it (OECD, 2010c).[9] However, as these types of programmes are necessarily limited in scope and purpose, they do not promote an assessment of the performance of regulatory

frameworks in achieving their intended policy objectives. One of the challenges is to identify ways to adapt these administrative burden reduction programmes to deliver more tangible improvements to the regulatory system. What more, the cumulative effect of regulation is progressively emerging as a focus of attention for governments (McLaughlin and Williams, 2014).

Table 5.2. **Types of standards and guidelines for *ex post* evaluation (selected countries)**[1]

	United Kingdom	Canada	Switzerland	Sweden	European Commission
Comprehen-sive standards	• HM Treasury's Magenta Book (methodological manual, not binding) • HM Treasury's Green Book (Binding methodological manual for options appraisal)	• Standard on Evaluation for the Government of Canada • Directive on the Evaluation Function (binding)	• SEVAL evaluation standards (not binding)		• Evaluation standards (binding)
Manuals / Handbooks	• Better Regulation Framework Manual • Practical Guidance for UK government officials Process handbook including binding and nonbinding information regarding the execution of an EPE • Departmental guidance	• Handbook for Regulatory Proposals: Performance Measurement and Evaluation Plan • Directive on Regulatory Management, which picks up on the evaluation cycle of the Policy on Evaluation (for regulation)	• No comprehensive and binding federal guidelines regarding the execution of evaluations • Manual for the federal impact assessment (operationalisin g the SEVAL-Standards) • Manual for the phrasing of evaluation clauses	• No comprehensive and binding federal guidelines regarding the implementation of evaluations • Evaluation task of the Parliamentary Committees (2001 / 2006), but no standards regarding the implementation of evaluations[2]	• Evaluating EU Activities: A practical guide for Commission Services – Process handbook including a methodological appendix • Specific Handbooks in the DGs
Responsible units	HM Treasury and Better Regulation Executive or Departments	TBS-RAS	SEVAL, Federal Office of Justice	Parliament	Secretariat General of the European Commission or DGs

1. The European Commission issued a new set of Guidelines and Toolkits for both *ex ante* impact assessment and *ex post* evaluation in May 2015, which can be accessed at http://ec.europa.eu/smart-regulation/guidelines/index_en.htm. Links to information provided in this table can be found at https://www.gov.uk/government/publications (for the United Kingdom); http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=15024&sec (for Canada); https://www.bj.admin.ch/bj/de/home/staat/evaluation/materialien.html (for Switzerland); and http://ec.europa.eu/smart-regulation/evaluation/index_en.htm (for the European Commission).

2. The Agency for Economic and Regional Growth is currently preparing a directive regarding the evaluation task of the public authorities based on the implementation of the Ordinance on Impact Assessment.

Source: Adapted from Prognos (2013), "Expert report on the implementation of *ex post* evaluations: Good practice and experience in other countries", report commissioned by the National Regulatory Control Council, Berlin, www.normenkontrollrat.bund.de/webs/nkr/content/en/publikationen/2014_02_24_evaluation_report.pdf?__blob=publicationfile&v=2, p. 53.

Increasingly, countries which have focused their resources on administrative burden reviews are searching for ways to assess and reduce the broader compliance costs of regulation, including identifying alternative ways of achieving public policy goals.

In part also supported by these methodological developments, OECD countries are increasingly looking into the cumulative nature of regulatory impacts (see Box 5.14). The potential for governments to design and carry out comprehensive evaluations is nonetheless still untapped, notably when it comes to appraise the impacts of risk management measures on investment and innovation processes; on the diffusion of new technologies; on and levels of sales and margins; and in terms of benefit-risk trade-offs.

Box 5.14. Coping with the accumulation of regulatory impacts: The European Commission, Switzerland and the United States

Where evaluations are undertaken, the total impact of new regulations can be estimated on single regulation, on a sectoral level or in aggregate.

In the **United States**, the OMB's Office of Information and Regulatory Affairs (OIRA) must by law report annually to Congress on the expected costs and benefits of all new "significant" regulation passed in the previous year.[1] To the extent possible, OMB commits to provide an estimate of the total annual benefits and costs (including quantifiable and non-quantifiable effects) of Federal rules and paperwork in the aggregate, by agency and agency program, and by major law.

In 2012, OIRA the issued a two page Memorandum requiring agencies to engage in assessing the cumulative impact of their rules (US Government, 2012a). The memo follows EO 13563 of 2011. The goals of this effort should be to simplify requirements on the public and private sectors (especially SMEs); to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations.

To this end, the directive calls agencies to take nine steps, including engaging in early consultation; using Requests for Information and Advance Notices of Proposed Rulemaking to obtain public inputs; considering, in the analysis of costs and benefits, the relationship between new regulations and regulations that are already in effect; and co-ordinating timing, content, and requirements of multiple rulemakings that are contemplated for a particular industry or sector.

The estimated annual benefits of major Federal regulations reviewed by OMB from 1 October 2003, to 30 September 2013, for which agencies estimated and monetised both benefits and costs, are in the aggregate between USD 217 billion and USD 863 billion, while the estimated annual costs are in the aggregate between USD 57 billion and USD 84 billion (US Government, 2014, p. 1).

The **European Commission** has also embarked in a similar exercise when it launched its Regulatory Fitness and Performance programme (REFIT), with a view to make EU law simpler and to reduce regulatory costs (European Commission, 2015b). The differences with the OMB review are nonetheless remarkable – REFIT it is not grounded in a legal base; the Commission has no obligation to report annually to the European Parliament; and the scope of the review focuses on regulatory burdens on business.

In June 2014, the Commission reported on the progress in implementing REFIT and proposed a number of new initiatives for simplification and burden reduction, repeals of existing legislation and withdrawals of proposals pending in legislative procedure (EC, 2013a; 2014). Among the achievements so far are the withdrawal of 53 pending proposals in 2014 alone (and about 300 since 2006); and a reduction in administrative burdens by 33% since 2006 in 13 priority areas, leading to savings of EUR 41 billion.

Box 5.14. **Coping with the accumulation of regulatory impacts: The European Commission, Switzerland and the United States** (*cont.*)

Switzerland completed in 2013 a comprehensive review of the regulatory costs affecting business, which stem from federal legislation. The review was prompted by an initiative of the federal parliament and covered thirteen main sectors. In the exercise, the Federal Council pioneered a new methodology in Switzerland – the so-called "Regulatory Check-Up" – heavily inspired by the German RCM (SECO, 2013).

This methodology seeks to capture various direct compliance costs, including staff and equipment costs as well as investment and financial costs. A key stage in the assessment process is the identification of the "action obligations" which firms must face when complying with a given regulation or legal framework. Relevant regulatory costs are calculated from the difference between the overall gross costs and the "business-as-usual costs". This implies setting an alternative (counterfactual) scenario, which describes the activities that firms would have undertaken in the absence of the regulation under review.

The evaluation exercise enjoyed the active and steady involvement of the stakeholders most directly affected by the regulation. On the basis of the findings, the Federal Council has identified more than thirty simplification measure for the period 2014-15.

1. See www.whitehouse.gov/omb/inforeg_regpol_reports_congress. The legal obligation upon OMB is enshrined in the US Regulatory Right-to-Know Act of 2000.

Source: US Government (2012a), "Cumulative Effects of Regulations", Memorandum by OMB-OIRA, March 20; US Government (2014), 2014 Draft Report to Congress on the "Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities", Office of Management and Budget, Washington D.C., p. 1; European Commission (2015b), "What is REFIT", Better Regulation, http://ec.europa.eu/smart-regulation/refit/index_en.htm (last update: 10/07/2015); European Commission (2013a), "Regulatory Fitness and Performance (REFIT): Results and Next Steps", COM(2013) 685 final of 2 October; European Commission (2014), "Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook", COM(2014) 368 final and SWD(2014) 192 final of 18 June; SECO (2013), Coût de la réglementation: le conseil fédéral approuve le rapport et présente des mesures d'amélioration, www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=51395, 13 December.

Combining evaluation methods is often the best way to construct evidence. A number of countries, including Australia[10] and the United Kingdom (UK.gov, 2013), have for instance introduced IT-based tools that facilitate the estimation of the change in compliance costs (see Box 5.15). The resulting evidence might be complemented by the use of more sophisticated accounting tools to estimate other 'first round' changes in costs to firms. In turn, those tools could then be used as inputs to partial equilibrium models, to identify how firms in the industry respond to these changes in costs, and other changes resulting from the reforms such as increases in competition, removal of price distortions or market access restrictions. The industry level changes in supply or demand can finally be used in a computable general equilibrium model to estimate the effects on other industries.

Box 5.15. **Using the Business Cost Calculator to estimate changes in compliance costs: An example**

An Australian consultancy, the Allen Consulting Group, used the Office of Best Practice Regulation's Business Cost Calculator to estimate the effects on industry compliance costs of a proposal to develop a National Construction Code (NCC). The NCC would consolidate existing building and plumbing standards into one code.

The first step in the Business Cost Calculator process was to identify the compliance costs that could arise from introducing a NCC. The costs that were identified were:

- transition costs for practitioners;
- costs of technical change, where the NCC would set a different technical standard to existing standards; and
- costs of purchasing the NCC.

The Allen Consulting Group used ABS data to identify the number of practitioners (builders, plumbers, building surveyors and architects) that would incur the costs in each state and territory. The breakdown by state and territory was necessary because the transition costs were expected to differ by jurisdiction. Specifically, some jurisdictions already had performance-based plumbing codes, and plumbers in these jurisdictions would require less time to adjust to the (performance-based) NCC than plumbers in other jurisdictions (two hours compared to five).

The Allen Consulting Group assumed that not all professionals and trades people would incur the costs (60% of builders and 80% of architects and building surveyors). This assumption was based on responses to a survey about the proportion of professionals and trades people that used the existing building code.

To estimate the total transitional costs, the Allen Consulting group multiplied together the:

- number of professionals and trades people in each jurisdiction;
- proportion that would need to become familiar with the NCC; and
- estimated average number of hours required to become familiar with the NCC in each jurisdiction.

Based on this, the Allen Consulting Group estimated that moving to the NCC would cost around $13 million in additional compliance costs.

Source: Australian Productivity Commission (PC) (2011), "Identifying and Evaluating Regulation Reform", Research Report, Canberra, p. 118.

Calculating (cumulative) compliance costs as a proxy for appraising the performance of the regulatory environment presents a number of advantages. According to the Australian Productivity Commission, they meet many of the criteria for a good evaluation framework, namely (2011:J.15):

- "the causal links are clearly set out (a particular task imposes a particular set of costs)
- it is clear what data are needed to identify the effects of reforms (and in many cases the data requirements need not be onerous);
- the assumptions used in the analysis can be made explicit; and

- evidence can be independently verified (although some of the data used to estimate costs may be based on perceptions and assertions that could be difficult to quantify)."

On the other hand, compliance cost calculations have some limitations. First of all – *nomen est omen* – they exclusively focus on the cost side of the regulatory equation. Benefits from regulatory interventions are not investigated and as a consequence these approaches fail to provide evidence of (net) the cost-benefit ratios.[11] In addition, compliance cost calculations rely on the assumption of the "normally efficient business", which is taken to represent the "average" business affected by a regulation. For this reason, their ability to disentangle distributive effects is limited, unless there is an explicit investigative refinement. Because they often draw from survey and focus groups, moreover, these approaches require adequate mechanisms to mitigate possible biases and distortions.[12]

Against this backdrop, it is advisable to use compliance costs approaches in well-defined situations and for determinate purposes, and especially when (Australian Productivity Commission, 2011:J.17):

- "a significant number of organisations are affected by compliance and administration costs (and the costs are material);
- the burdens of compliance and administration costs are regarded as a significant element of the total costs of regulation;
- the activities that impose the costs can be clearly identified;
- information about the labour, materiel and other financial costs of regulations (before and after reforms) are available, or can be estimated with confidence; and
- the distribution of compliance costs across the affected businesses is symmetric and 'short-tailed', so that average costs provide a reasonable empirical proxy for total costs. (Long tails would indicate that regulations impact disproportionately on some businesses".

A further way to appraise the performance of the domestic regulatory environment consists of comparing regulations, regulatory processes and their outcomes across countries, regions or jurisdictions (see Box 5.16).

Box 5.16. **Cross-jurisdictional regulatory reviews: Australia and New Zealand**

In 2009, **Australia and New Zealand** carried out a performance benchmarking of their business regulation, with specific focus on food safety (Australian Productivity Commission, 2009). The evaluation responded to the imperative of removing unnecessary compliance costs, achieving greater consistency and reducing regulatory duplication. The report identified opportunities for all jurisdictions to improve food safety regulation and its enforcement in order to reduce burdens on business and costs to the community. Areas where significant regulatory burdens remain across jurisdictions include:

- some regulatory requirements in excess of national standards;
- slow progress in developing national standards under the Australia New Zealand Food Standards Code for primary production and processing;
- inconsistencies between jurisdictions on the assessment of risks of particular foods;

Box 5.16. **Cross-jurisdictional regulatory reviews: Australia and New Zealand** (*cont.*)

- for businesses operating in several locations, inconsistencies across Australian local councils and across New Zealand territorial authorities in the costs and intensity of regulation; and
- higher costs and regulatory duplication for Australian food exporters compared to the regulation of New Zealand food exporters.

Domestic comparative reviews are also informative. In Australia, a 2010 evaluation identified differences in regulatory requirements and practices pertaining to occupational health and safety (OHS) across national and sub-national jurisdictions. The resulting report informed subsequent efforts to harmonise domestic regulation at a time when governments were making progress towards a national OHS Act. This is expected to introduce nationally consistent core legislative provisions.

Source: Australian Government submission to the OECD 2014 Regulatory Policy Questionnaire; Australian Productivity Commission (2009), *Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety*, Research Report, Canberra, www.pc.gov.au/inquiries/completed/regulation-benchmarking-food-safety/report/food-safety-report.pdf.

Irrespective of the scope of the analysis and the type of impacts that are that retrospective reviews target, often lack of skills limits the potential for informative evaluation. Setting legal obligations and procedural requirements to carry out *ex post* evaluation is only on side of the coin. To ensure high quality and policy relevant deliverables, government need to establish minimum standards and quality oversight, and assist evaluators and desk officers to design, manage and execute the evaluations (see Box 5.17).

Box 5.17. **Building capacity and providing support to evaluators: Canada, European Commission and Switzerland**

In **Canada**, The TBS Regulatory Affairs Sector initiated a number of measures to assist in building evaluation skills across federal departments and agencies, including:

- the development of a core curriculum by the Canada School of Public Service, which features also a course on "Regulatory performance measurement and evaluation";
- the creation of the Centre of Regulatory Expertise (CORE), which provides technical support concerning cost-benefit analysis, risk assessment, performance measurement and evaluation of regulations; and
- the establishment of the Centre of Excellence for Evaluation (CEE), which serves as a help-desk body in the planning and implementation of evaluations. This includes supporting the competent departments and agencies in the implementation and utilisation of evaluations, and helping to promote the further development of evaluation practices, not least through guidelines and manuals.

In the **European Commission**, in the framework of the Smart Regulation strategy, central support and co-ordination is ensured by the Secretariat-General (European Commission, 2015a). The latter issues guidance; provides in-house training; and organises dedicated workshops and seminars. The Secretariat-General oversees the EC's evaluation activities and results and promotes,

Box 5.17. **Building capacity and providing support to evaluators: Canada, European Commission and Switzerland** (*cont.*)

monitors and reports on good evaluation practice. Evaluation units are present in almost all Directorates-General. Several "evaluation networks" dedicated to specific policy areas are also at work (for instance in relation to research policy or regional policy).

Also in **Switzerland**, despite the fact that there is no central control body for the implementation and support of evaluation in the federal administration, experiences and expertise is shared thanks to an informal "evaluation network". The network exists since 1995 and is directed at all persons interested in evaluation questions, and comprises around 120 members from various institutions.[1]

1. www.bj.admin.ch/bj/de/home/staat/evaluation/netzwerk_evaluation.html.

Source: European Commission (2015a), "Evaluation", *Better Regulation*, http://ec.europa.eu/smart-regulation/evaluation/index_en.htm (last update 11/08/2015); Australian Productivity Commission (2011); Prognos (2013), "Expert report on the implementation of *ex post* evaluations: Good practice and experience in other countries", report commissioned by the National Regulatory Control Council, Berlin, www.normenkontrollrat.bund.de/webs/nkr/content/en/publikationen/2014_02_24_evaluation_report.pdf?__blob=publicationfile&v=2.

Promoting stakeholder involvement

Public consultation is a fundamental practice not only in the preparatory phase – for instance with regard to the collection of data and the validation of the assumptions made and methodologies deployed – but also through the entire life cycle of a regulatory intervention. Once regulations are in place, structured dialogue and communication is crucial to the effective administration of regulations, to identifying bottlenecks and intervening with ongoing refinements. At the review stage, such communication is essential to the performance of regulators, particularly with respect to minimising compliance costs and addressing possible unintended consequences.

Several OECD countries adopted public consultation arrangements that are based on principles and standards outlined in procedural guidelines. Their application to *ex post* evaluations of regulation however varies considerably across jurisdictions and stakeholders are not necessarily systematically involved on a structured basis. Rather, their participation and the type of inputs sought from them tend to be tailored to the specific needs of each evaluation exercise (see Box 5.18).

Box 5.18. **Stakeholder participation in *ex post* evaluation**

A number of governments have invited citizens and the business community to denounce particularly burdensome and irritant obligations. In **Italy**, for instance, this approach is used in the framework of their administrative burden reduction programmes to prompt measurement and identify margins for administrative and regulatory simplification. So did the Italian Public Administration and Innovation Department launched "Burocrazia: diamoci un taglio!" ("Let's cut bureaucracy"), an online consultation designed to involve citizens, businesses and their associations in the administrative simplification process (Government of Italy, 2014).[1] Unlike the previous trials, this initiative is permanently accessible to all potentially interested parties (OECD, 2010d; 2013a).

Box 5.18. **Stakeholder participation in *ex post* evaluation** (*cont.*)

Similarly, the **United Kingdom** “Red Tape Challenge” website that seeks broad public feedback on existing laws and regulations which should be abolished or amended (Cabinet Office, 2015). The site received 6 000 ideas and suggestions in the first week. The key question posed to participants is “Which regulations do you think should be removed or changed to make running your business or organisation as simple as possible?”.

Several governments opened web-portals to enhance access to general open consultations on regulation. In **South Korea**, for instance, the People’s Online Petition & Discussion Portal (e.people, 2015) standardised its business procedures for civil petition service, civil proposal service and policy discussion in order to enhance the efficiency of administrative processes and better satisfy citizens. In addition, the Regulatory Reform Committee (RRC) created its own platform for citizens’ participation (Regulatory Reform Committee website). This is an online system that covers the entire process of regulatory reform, ranging from regulatory review to registration, reform task management and access to regulatory information. What is interesting is that the aim here is to engage citizens on a regular basis to discussions on potential and existing rules. Each participant has his own personal “proposal account” and if one of his proposals is actually translated into a regulatory act, the initiator may receive a prize.

Denmark provides a good practice in deploying a user-centric approach to evaluation. An evaluation carried out by the Danish Consumer authority found that a set of regulation, aiming to protect consumers did not have the intended effect as numerous businesses did not comply with the regulation in question. Several reasons were found for this: lack of knowledge of the regulation; misinterpretation of and doubt about the requirements in the regulation; and in some cases intended non-compliance with the regulation as compliance in the view of the businesses would carry a disproportionate administrative burden.

The authority used the so-called Burden Hunter technique for cutting red tape, which relies on principles and methodologies of user-centric innovation. The focus is on the enterprises’ experience of business regulations and on how these burdensome experiences can be reduced. Enterprises are hence invited to play an active role in identifying potentials for the rethinking of business regulations. The aim is not to deregulate but rather to make smarter business regulation (HLG, 2012, pp. 50-51).

In **Switzerland**, the pre-parliamentary phase is crucial in the federal decision-making, not least because of the “referendum uncertainty”. Possibly intervening at the end of the process, this instrument grants the people the possibility to oppose or amend the decisions adopted by Parliament. It is therefore at this stage that critical compromise is achieved on the basis of political considerations and thorough evaluation.

Extra-parliamentary expert commissions are official bodies established by the Federation which assume public tasks on behalf of the Government and the administration (Klöti et al., 2004; Ledermann, 2014). As such, they discharge planning, legislative, monitoring and implementing functions in a variety of policy areas. Membership is composite and the notion of “expert” is understood largely. The commissions hence constitute for the social partner representatives a key platform to input policy and legislative discussions and directly contribute to the pluralistic character of official evaluations.

In the **United States**, President Obama’s EO 13610 of 2012 is a recent example of implementation of the principle of “public participation in retrospective analysis” (US Government, 2012b). The Order explicitly invites the public to help agencies determine whether existing regulations remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.

1. The link to semplifica italia has been disabled.

Box 5.18. **Stakeholder participation in *ex post* evaluation** (*cont.*)

Source: Government of Italy (YEAR), Ministry of Public Administration, www.magellanopa.it/semplificare/; OECD (2010d), "Modernising the Public Administration: A Study on Italy", OECD, Paris, www.funzionepubblica.gov.it/media/602077/modernising_public_administration.pdf; OECD (2013a), *Better Regulation in Europe: Italy 2012: Revised edition, June 2013*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264204454-en; Cabinet Office (2015), "The Red Tape Challenge Reports on Progress, www.redtapechallenge.cabinetoffice.gov.uk/home/index/ (last accessed July 2015); e.people (2015),"The people's voice is the voice of heaven", www.epeople.go.kr/jsp/user/on/eng/intro01.jsp, (last accessed July 2015); Regulatory Reform Committee website, "Greetings", https://www.better.go.kr/fzeng.page.Greetings.laf (last accessed July 2015); High Level Group (HLG) on Better Regulation (2012), "Working Group: *Ex post* Evaluation", Final report, http://ec.europa.eu/smart-regulation/impact/docs/wg3_report_ex_post_evaluation_en.pdf; Klöti, U. et al. (2004), *Handbook of Swiss Politics*, Neue Zürcher Zeitung Publishing; Ledermann, S. (2014), "Evidenz und Expertise im vorparlamentarischen Gesetzgebungsprozess: Die Rolle von Verwaltung und externen Experten", in *Swiss Political Science Review*, Vol. 20/3, pp. 453-485; US Government (2012b), "Identifying and Reducing Regulatory Burdens", Executive Order 13610 of May 10, 2012, *Federal Register*, Vol. 77/93.

Leveraging on parliamentary activity

Legislative assemblies play a crucial role in both holding executive accountable and, increasingly, commission and carry out direct *ex post* evaluation themselves. The institutional organisation for such activities as well as the scope of the analyses performed vary considerably across OECD countries. While some parliaments have created dedicated evaluation units, many others have opted for looser and flexible organisation arrangements – relying on the activity of internal research bodies, libraries, and committees.

The parliamentary evaluation function is allegedly at the apex of the accountability structure (IPU, 2007). Nonetheless, rarely can it seek to capture the entirety of the regulatory retrospective reviews, as staffing and resources are limited. It is thus important that parliamentary evaluation is prioritised and based on objective criteria reflective the economic significance and the political salience of the regulation.

As mentioned above, the *de facto* constitutional status of evaluation in some jurisdictions almost naturally implies a strong involvement and leadership of the legislature in the evaluation function. It is the case for instance of Sweden and Switzerland (OECD, 2012b). Other legislative assemblies have deployed comprehensive evaluation functions. Box 5.19 presents also the experience gathered in Belgium, the United Kingdom and the United States.

Box 5.19. ***Ex post* evaluation by national parliaments: Belgium, the United Kingdom and the United States**

In **Belgium**, the Parliamentary Committee for Legislative Monitoring is charged with evaluating laws that have been enacted for at least three years. It has to identify possible implementation difficulties (due to complexity, loops, incoherence, vagueness, contradictions) and assess how the law has effectively responded to its initial objective.

Requests can be sent by a large number of stakeholders (any administration in charge of implementing law; any authority in charge of law enforcement; any natural or legal person; and deputies and senators). The work of the committee is also to be fed by reports from the Court of

Box 5.19. ***Ex post*** **evaluation by national parliaments: Belgium, the United Kingdom and the United States** (*cont.*)

Cassation and tribunals on difficulties encountered with laws and from the decisions of the Constitutional Court.

In the **United Kingdom** parliament, all laws are considered by committees for post legislative scrutiny since 2008 although only a small minority is chosen for a detailed inquiry and report. *Ex post* evaluation have traditionally been undertaken by experts in the Library of the Houses of Commons and Lords and, since 2002, by a designated Scrutiny Unit that takes on scrutiny and evaluation functions (UK Parliament website). Up to 20 staff strong, the Unit carries out evaluations upon initiative of the chairs of the committees while nonetheless abiding with the principles of political impartiality and objectivity.

The Unit assists and co-ordinates the work of legislative scrutiny by first providing a briefing for the committee that presenting basic sources for analyses. This briefing will enable the Committee to come to a judgment as to whether to hold a full and more detailed inquiry. If that is the case, the Unit, along with the designated Committee staff plans and undertakes a programme of research and evaluation to support the committee's inquiry. The Unit assist with the organisation of hearings, interviews as well as online consultations to gather evidence for affected parties and experts but also provides direct statistical or financial information.

One main area of post evaluation work relates to that Departmental Annual Reports, which outline to parliament and the public how each government department is organised, what it is spending its money on, what it is trying to achieve and how it is performing. Scrutinising these reports is one of the core tasks of departmental select committees, with the collaboration of the Scrutiny Unit.

In the **United States**, the Congressional Budget Office (CBO website) provides the US Congress with evidence-based non-partisan, and timely analyses to aid in economic and budgetary decisions on the wide array of programs covered by the federal budget; and any information and estimates required for the Congressional budget process. CBO is a standing structure established by law in 1974 and currently employs some 250 staff (among those are primarily economists and public policy analysts). The speaker of the House of Representatives and the president *pro tempore* of the Senate jointly appoint the CBO director, after considering recommendations from the two budget committees.

CBO publishes, among others, cost estimates and baseline budget projections but also the so-called "Scorekeeping for Enacted Legislation", which reports provide information about whether legislative actions are consistent with the spending and revenue levels set by the budget resolution.

Source: UK Parliament website, "Scrutiny Unit", www.parliament.uk/scrutiny (last accessed July 2015); CBO website, www.cbo.gov/ (last accessed July 2015); OECD (2012b), *Evaluating Laws and Regulations: The Case of the Chilean Chamber of Deputies*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264176263-en, p. 31ff and Annex B.

Ensuring minimum standards and quality oversight

Mimicking arrangements introduced in the *ex ante* impact assessment system, a number of countries have designed mechanisms for quality assurance of *ex post* evaluations. Irrespective of the organisational and institutional shape that such mechanisms may take, what appears to constitute good practice is the multi-staged and multi-actor character of an "oversight function". Such function can be composed by several elements among which are quality standard requirements (see Box 5.20).

A second set of mechanisms constituting the evaluation oversight function refer to (more or less) independent bodies exercising control (see Box 5.20). In this respect, granting oversight bodies the power to return assessments that are found not to match set quality standards is arguably less relevant in the case of *ex post* evaluation scrutiny than of RIA (Prognos, 2013). Quality oversight certainly contributes by contrast to ensuring that the evaluation debate is supported by an as broad and informed base as possible.

Box 5.20. **Scrutinising the quality of regulatory reviews: The Netherlands and the United Kingdom**

In **the Netherlands**, three main oversight bodies exist: the Impact Assessment Board (*Commissie voor Effecttoetsing*¸ CET), which assesses legislative proposals with substantive impacts on society; the Advisory Board on Administrative Burdens (*Adviescollege Toetsing Admnistratieve Lasten*, ACTAL), an independent regulatory review and complaints body monitoring regulatory pressure on business and citizens and investigating complaints; and the Netherlands Court of Audit (*Algemene Rekenkamer*, NCA), which operates in a similar way to many national audit offices.

The remit of ACTAL was revisited in 2011 to become the watchdog and monitor the progress made in reducing administrative burden, notably by selectively sampling and testing that ministries are consistently applying checks on the regulatory burden. ACTAL also investigates complaints from the business sector (ACTAL website).

In the **United Kingdom**, quality assurance of the Post-Legislative Scrutiny (PLS) is a responsibility of Parliament. After reviewing the PLS memorandum, the latter can decide on the appropriateness to carry out or outsource more detailed evaluation. The National Audit Office (NAO) has no direct role to play in the regulatory retrospective reviews but often conducts overarching studies on evaluation practices partly also in collaboration with the Better Regulation Executive (BRE website). Moreover, the NAO makes annual assessments of the quality and effectiveness of impact assessments, annually reporting to Parliament also on the achievements of the Administrative Burdens Reductions Programme with particular attention to the "value for money" criterion (National Audit Office website). These reports focus on both quantified progress as well as business perception of the burden of regulation and the impact of departmental initiatives to reduce burdens.

Source: ACTAL website, www.actal.nl/ (last accessed July 2015); Better Regulation Executive (BRE) website, https://www.gov.uk/government/groups/better-regulation-executive (accessed July 2015); National Audit Office website, www.nao.org.uk/about-us/our-work/ (accessed July 2015).

Publishing and communicating evaluation findings

The publication of evaluation reports and the communication of findings is a crucial element of the evaluation function. It continues the principle of inclusion (i.e. the involvement of as wide a variety of citizens' and stakeholders voices in the policy making process as possible) and hence it ensures openness (i.e. providing the public with information and allowing for accessible and responsive regulatory process).

The publication of the *ex post* evaluation reports is widespread practice in most OECD countries. Various forms of publications can be envisaged, for instance on the websites of the institutions undertaking or commissioning the evaluations or through central databases (see Box 5.21).

Box 5.21. **Publish evaluation reports on single portals: Canada and Switzerland**

In **Switzerland**, the ARAMIS information system contains information regarding research, development and evaluation projects of the Swiss Federal Administration. It is intended to provide information to interested parties about the research projects funded or implemented by the Swiss Confederation, as well as to improve co-ordination and establish transparency. Information is not published only upon an expressed and justified decision by the Government or Parliament. ARAMIS is equipped with a search engine. More study reports by the Swiss federal administration can be found in the "External Studies" database (The Federal Council website).

Canada also established a central online Audit and Evaluation Database, whose purpose is to provide a single registry for completed audits, evaluations and similar studies from across government. The database helps the Treasury Board of Canada Secretariat with its oversight and assists parliamentarians, departments and Canadians in finding similar work across federal departments.

Source: The Federal Council (2015), "ARAMIS information system", www.aramis.admin.ch/ (last update 7 July 2015); The Federal Council website, "Studies", https://www.admin.ch/gov/en/start/documentation/studies.html?lang=en (last modification 10 April 2015); Treasury Board of Canada (2014), "Audit and Evaluation Database", www.tbs-sct.gc.ca/aedb-bdve/home-accueil-eng.aspx (last modified 2 May 2014).

Concluding remarks and issues for considerations

The place of *ex post* evaluation of regulatory interventions within the overarching regulatory policy is acknowledged internationally. *Ex post* evaluations are broadly considered important and necessary to ensure that regulations are effective and efficient. Moreover, governments are generally aware of the nature of the tool as well as the various shapes and scope that evaluation may take.

Nonetheless, international practices suggest that *ex post* evaluations are often still considered primarily as a testing workbench for the effectiveness of governments and the findings are therefore considered suspiciously. This is a missed opportunity for governments, which instead should embed retrospective analysis more firmly as the indispensable bridge-head within the whole policy cycle.

Very few OECD countries have actually deployed the tool systematically and no dedicated governance structure is usually at hand to support the *ex post* evaluation function. In particular, few countries assess whether underlying policy goals of regulation have been achieved, whether any unintended consequences have occurred and whether there is a more efficient solution to achieve the same objective. Governments moreover have rarely embarked on comprehensive reviews that investigate the regulatory impacts across sectors; cumulatively; and in terms of wider economic and societal implications. This is particularly the case in the field of public management of risks in areas such as food safety and public health; environment protection; safety at work (OECD, 2010e). A more frequent practice in OECD countries is partial *ex post* assessment focusing exclusively on regulatory burdens (OECD, 2013b; HLG, 2012).

Against this background, a number of core principles and good practices can be sketched out which, taken together, may help increase the chances of introducing and mainstreaming a well-performing regulatory *ex post* evaluation system. They can be summarised as follows:

- **Prioritising and sequencing the efforts.** Because of political and technical challenges, evaluations should be geared towards solving contemporary problems, even if they shed retrospective light on what was regulated years ago. This implies prioritising and sequencing so as to maximise the efficiency of (scarce) resource allocation and potential "evaluation fatigue" due to too encompassing exercises. Consultation can greatly assist in the prioritisation process. Combining individual evaluations of sectoral regulation with overarching reviews is likely to strengthen the outcome-driven character of regulatory interventions. Efforts in the analysis should be proportionate.

- **Planning and embedding evaluation into the policy cycle.** To enhance overall government efficiency, retrospective analysis should be integrated into the policy-making process in all its dimensions. As a norm, no new regulatory initiative should be adopted unless it is preceded by a retrospective analysis. To ensure this, a close link should be formally established between the *ex ante* and the *ex post* phases and be embedded in the Regulatory Impact Analysis process. These requirements are generally spelled out in formal guidelines adopted by many OECD countries. If fully abided with, they should help, in the short to mid-term, to re-allocate the services' resources according to priority axes, raising the relative importance of *ex post* evaluation. A calendar of planned evaluations should be discussed with stakeholders and published regularly. This further contributes to structure the official evaluation activity and increases transparency and accountability.

- **Constructing a comprehensive understanding of reality.** It appears important to move away from an incremental assessment of the impact of individual regulations and seek to capture the overall coherence within the existing regulatory framework. This includes assessing the impact of regulations together with other policy tools. The nature of wider regulatory impacts needs to be better understood and methodologies and capacity need to be developed to undertake such targeted but in-depth reviews. When evaluating risk regulation is particular, impacts on investment flows, innovation, technology patterns should be considered along with changes in consumer welfare and the protection of the public.

- **Promoting the creation of an "evaluation function".** *Ex post* evaluation should be integral part of a structured and multi-actor process informing policy-making. Rather than focusing the exercise on a specific single entity responsible for carrying out evaluations, it is advisable to promote a pluralistic evaluation activity which encompasses both public and private actors intervening at various stages of the policy cycle.

- **Building adequate organisational and administrative capacity to support such evaluation function.** This should be implemented on various fronts, including issuing binding and detailed procedural and methodological guidelines for evaluation. Guidelines should provide rigorous and uniform definitions; outline channels for data collection, as well as provide explicit techniques to identify and analyse causal relations, to account for uncertainty and to evaluate and compare (cumulated and more complex) impacts beyond administrative burdens and direct compliance costs. Establishing quality standards as well as internal database systems for easy information sharing and building a "good practice library" can further facilitate institutional learning. From an

organisational perspective, a central co-ordinating and oversight bodies couple with a network of evaluation units helps mainstream good practices and ensure the efficient integration of evaluation initiatives.

- **Leveraging on stakeholders engagement.** Effective consultation is necessary to ensure that reviews are effective and credible publicly. It is important to activate different actors for evaluations and thus build up on composite know-how and capacity. Stakeholders include both institutional entities as well as representative of civil society, of private sector, and citizens. They can be involved both in the process of identifying areas that may require reform and during the actual review process. End-users of regulation that may not be responsive to the usual consultation procedures need also to be pro-actively engaged.
- **Ensuring high levels of transparency and accountability.** Retrospective analyses need, as far as possible, to be open and transparent, in order to facilitate open communication and to maximise the credibility of the review. Their timely publication is therefore crucial. Evaluation reports should be easily accessible in association with the related IAs (and published on the same portal), so as to capture the entire legislative cycle, including reviews. Periodic appraisals of the performance of the evaluation function should be carried out by independent bodies and parliaments should hold the executive accountable for evaluation.

Implemented through these principles and good practices, *ex post* evaluation of regulation would play an essential role within a country's regulatory policy and governance. It would not only boost the regulators' accountability but more generally also significantly enhancing the effectiveness, efficiency and consistency of policy interventions and public service delivery.

Notes

1. Coglianese (2012, p. 12) mentions the example of drivers who slow down because of the newly introduced speed limits (the ROI) but spend more time talking on cell phones on the roads.
2. To follow up with the same example, even with a lower speed limit, the number of accidents may remain unchanged or may increase, perhaps because traffic congestion increases due to the entirely unrelated opening of a major new attraction in the area covered by the new speed limit" (Coglianese, 2012, p. 12).
3. Coglianese (2012, p. 12) continues the example, explaining that "automobile accidents do not constitute the ultimate concern underlying auto safety regulation. Accidents are instead closely-connected precursors to the ultimate problems of property damage, injuries, and fatalities. It is possible that accidents could continue at the same rate or even increase, while at the same time the property damage or injuries or fatalities caused by these accidents could grow less severe (such as due to safety engineering regulations).

4. The literature often refers to "programme" or "intervention theories" in this regard. Intervention theories are defined as a model of "micro-steps or linkages in the causal path from program to ultimate outcome" (Rogers et al, 2000, p. 10). See also Chen (1990); and Vedung (1997).

5. Further to Recommendations 8 and 6, respectively (OECD, 2012a, pp. 15; 13).

6. The section draws from Allio and Renda (2010, pp. 99-105) and OECD (2012b, pp. 15-23).

7. A possible basis for developing such standards are the *Programme Evaluation Standards* (Joint Committee, 1994). The Joint Committee lists "utility", "feasibility", "property" and "accuracy" as the main categories of standards.

8. Further up-to-date statistical information is currently being collected by the OECD Secretariat. Revision of statistics and charts subject to the availability of findings from the ongoing survey**.**

9. OECD work on this topic can be accessed at www.oecd.org/gov/regulatory-policy/administrative-simplification.htm. On the Standard Cost Model approaches, see www.administrative-burdens.com/.

10. See https://rbm.obpr.gov.au/.

11. It shall nonetheless be noted that, if simplification measures are implemented further to the reviews and the reform leaves the beneficial aspects of regulations unchanged, the reduction in compliance costs yields a net to the community.

12. Compliance cost approaches share these critical points with the SCM. For a review of the challenges related to this latter methodology, see Allio and Renda (2010); Torriti (2007).

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Annex 5.A1

Ex post regulatory review and evaluation at the central government level

		Sunsetting		Automatic review requirements	
	Periodic *ex post* evaluation of existing regulation is mandatory	Is used for primary laws	Is used for subordinate regulations	Specific primary laws include automatic review requirements	Subordinate regulations include automatic review requirements
Australia	For all policy areas	●	●	●	●
Austria	Not required	●	●	●	●
Belgium	For specific areas	❍	❍	●	●
Canada	For specific areas	●	●	●	●
Chile	Not required	❍	❍	❍	❍
Czech Republic	Not required	❍	❍	❍	❍
Denmark	For specific areas	❍	❍	●	❍
Estonia	Not required	❍	❍	❍	❍
Finland	For specific areas	●	●	●	●
France	For specific areas	●	❍	●	●
Germany	For specific areas	●	●	●	●
Greece	For all policy areas	❍	❍	❍	❍
Hungary	For all policy areas	❍	❍	●	❍
Iceland	For specific areas	●	●	●	❍
Ireland	Not required	❍	❍	❍	❍
Israel	Not required	❍	❍	❍	❍
Italy	For specific areas	❍	❍	●	●
Japan	For all policy areas	❍	❍	●	❍
Korea	For all policy areas	●	●	●	●
Luxembourg	For specific areas	❍	❍	●	●
Mexico	For specific areas	❍	❍	❍	❍
Netherlands	For specific areas	❍	❍	●	❍
New Zealand	For specific areas	●	●	●	❍
Norway	For all policy areas	❍	❍	●	❍
Poland	For specific areas	❍	❍	❍	❍
Portugal	For specific areas	❍	❍	●	●
Slovak Republic	Not required	❍	❍	❍	❍
Slovenia	Not required	❍	❍	❍	❍
Spain	Not required	❍	❍	❍	❍
Sweden	Not required	❍	❍	❍	❍
Switzerland	For specific areas	●	●	●	●
Turkey	Not required	❍	❍	❍	❍
United Kingdom	For specific areas	●	●	●	●
United States	For specific areas	●	●	❍	❍
Brazil	Not required	❍	❍	❍	❍
Russia	Not required	❍	❍	❍	❍
Total OECD 34		**12**	**11**	**20**	**13**

● Yes
❍ No

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Contents

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Chapter 3. Stakeholder engagement in regulatory policy

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