



Roinn an Taoisigh
Department of the Taoiseach

Regulatory Impact Analysis

AN OPERATIONAL REVIEW



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Department of the Taoiseach

Review of the Operation of Regulatory Impact Analysis

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All errors or omissions are the responsibility of the authors.

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1 Executive summary

This Review of the Operation of Regulatory Impact Analysis (RIA) in Ireland was carried out in line with the Government commitment in the Social Partnership Agreement, *Towards 2016*¹ to review the operation of RIA in order to refine and amend RIA requirements and processes. The report examines the history of the introduction of RIA in Ireland and internationally, compares the design of the Irish system with international best practice, and examines in detail how RIA works in practice. Views of those who are impacted by regulation, as well as those who carry out RIAs or who provide supports to the RIA system, are taken into account. The report makes recommendations for the improvement of the system itself and its operation.

The fundamental purpose of Regulatory Impact Analysis is to improve the quality of regulation. This means that regulation should have clearly defined objectives, and should be the most effective means of achieving those objectives. Decisions on regulations should be taken transparently – that is to say, the data and reasoning on which decisions are taken should be made public, and should be consulted on before the final decision is taken. An effective RIA system means that:

- ▶ the quality of advice to Government is improved, with clear identification of options for achieving the desired result (including the option of not regulating), and with the costs and benefits of the different options identified and quantified;
- ▶ democracy is strengthened, as more informed parliamentary debate is possible, with legislators aware of, and thus able to debate, the impact of proposals; and
- ▶ those affected by regulation (be they businesses, individuals or voluntary organisations) can participate in the process of developing it and, once it has been put in place, can evaluate and critique its efficacy.

RIA therefore benefits legislators, since it makes more and better information available to them on which to base their decisions. It benefits citizens, since it strengthens democracy by making plain the basis on which decisions are taken and allowing those affected to influence the process. It benefits business, since it ensures that regulations are both effective (in that they achieve the desired outcome) and proportionate (in that they are the minimum necessary to achieve that outcome). And it benefits civil servants, by offering a clear framework for policy development.

The RIA system in Ireland was introduced following the publication of the OECD's Peer Review report, "Regulatory Reform in Ireland", in April 2001. The report found that, while the Strategic Management Initiative (SMI) was fostering a new regulatory culture, slow reform of Ireland's regulatory governance could be a bottleneck to sustained growth. While significant improvements had been made to consultation and transparency, RIA had not yet been introduced, and economic assessment of proposed rules was missing. In welcoming the report's findings, the Taoiseach announced a number of regulatory reform initiatives, including:

¹ *Towards 2016: Ten-Year Framework Social Partnership Agreement 2006-2015*, Department of the Taoiseach, 2006 (also available to download from "Publications Archive" at www.taoiseach.gov.ie)
http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf

“[The] development of a **new mechanism (Regulatory Impact Analysis)** by which Government Departments and Public Bodies will be required to analyse and measure the impacts on society of any regulations being proposed.”

The Regulatory Reform Review of Ireland also led to the publication of a Government White Paper, “Regulating Better”, which included a commitment to pilot the RIA model. Piloting commenced in June 2004. The experience was broadly positive and supported the extension of RIA across all Government Departments and Offices. The report of the pilot exercise² proposed a number of changes to the RIA model to ensure that the use of RIA is proportionate, flexible and effective. These proposals were taken into account in the development of a revised model.

In June 2005, Government agreed that this revised RIA model would be introduced across all Departments and Offices. In order to provide practical assistance to officials involved in using the new model, RIA Guidelines³ were published by the Department of the Taoiseach in October 2005. The *Report on the Introduction of Regulatory Impact Analysis*⁴ established the current RIA model, and included a commitment to review its operation and report to Government within two years. This commitment was strengthened by its inclusion in the Social Partnership Agreement, *Towards 2016*. There is equally a fundamental commitment from Government to publish RIAs, in the interests of transparency and accountability.

This review is therefore timely, since the system has now been in operation for two and a half years. The review has involved the following:

- ▶ Examination of international best practice, both of other countries’ approaches and of that of supra-national bodies such as OECD and EU
- ▶ Quantitative analysis of all RIAs produced since the establishment of the model. A total of 74⁵ RIAs were examined
- ▶ Qualitative assessment of the content of RIAs and of the processes associated with their production. This involved an interview programme with those involved within Departments in producing RIAs; with external stakeholders who had participated in the consultation process or who were impacted by regulation generally; and with those involved in inter-departmental co-ordination

Good progress has been made in establishing the use of RIAs in all Government Departments. Within two years of introducing the RIA system, more than half of all primary legislation enacted in 2007 was accompanied by a screening RIA, and this should increase further in 2008. Given that RIAs were not applied retrospectively, so that any measure which had already begun in 2005 did not have a RIA, this represents a quick adoption within a relatively short timeframe. While RIAs are now carried out routinely on primary legislation, the approach is less well-established in its application to secondary legislation and to major EU Directives while they are being negotiated.

However, from the point of view of external stakeholders, and especially of business groups, progress has been disappointing. In interviews, representatives of the business sector expressed strong criticism of the lack of visibility of RIAs; they felt that either they were not done, or, if done, many were not published, which meant that opportunities for critiques of RIA by business or academics had not developed. Where RIAs had been done, there was a lack of credible consultation; risk assumptions and estimates of costs and benefits had not been consulted on, and timescales in some cases were unrealistic. The timing of RIAs was frequently criticised; they were seen as an “add-on” which happened at the end of the regulatory process,

² *Report on the Introduction of Regulatory Impact Analysis*, Department of the Taoiseach, 2005

³ *RIA Guidelines - How to conduct a Regulatory Impact Analysis*, Department of the Taoiseach, 2005

⁴ See footnote 2

⁵ This corresponds with the number of RIAs completed in the period June 2005 to the end of February 2008

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rather than a fundamental part of it. The quality of published RIAs was considered poor – a criticism which was related both to timing and to lack of consultation, as assumptions had not been tested and cost estimates were considered incorrect.

As might be expected in the initial phase, the quality of the RIAs we examined was variable. Some were highly detailed and internally consistent, while others made little real attempt to examine impacts. While, formally, only one full RIA has been published to date⁶, some of the screening RIAs represent a substantial amount of work, and little more would be needed to complete a full RIA.

The introduction of the RIA approach has required significant support. This has involved the preparation of guidance and training material, and active co-ordination and management support for implementation. The *RIA Guidelines* are considered excellent, and the training courses, presentations and helpdesk functions are all valued and held in high regard. The RIA Network is valuable, both for its members and for those within their Departments who are conducting RIAs.

The aim of producing RIAs as part of regulatory measures has been achieved, at least for primary legislation, although the extent to which the RIA approach is integrated into the overall decision-making process is debatable. The challenges now are to ensure that it is embedded into that process, and to ensure that the RIA model evolves to balance the need for a considered assessment of impacts against the need to ensure proportionality – that the level of analysis is appropriate to the scale of the issue being considered. Publication of RIAs, to ensure that they achieve their purposes in terms of improving parliamentary debate and participation of stakeholders generally, needs to be strengthened. The recommendations summarised below address those challenges.

Note: Numbers refer to the numbering of recommendations within the body of the report, to facilitate cross-referencing.

Recommendations aimed at strengthening high-level support for RIA:

Greater high-level support for RIA is needed if it is not to become pigeon-holed as a purely technical exercise. Senior management commitment to RIA will raise its profile and promote quality. While some countries have legislative backing for the requirement to produce RIA, this is not considered necessary at this time, provided that senior management support ensures that RIAs are produced, consulted on appropriately, and published as soon as possible. However, if this does not transpire, the issue of legislative backing (which would mean that laws or regulations could be legally challenged if they were not accompanied by a RIA, or if the RIA did not meet the correct standard) could be re-considered.

Extending the requirement to produce RIAs to areas where policy development has been delegated to policy review groups is a rational consequence of the Better Regulation agenda. Policy groups whose recommendations involve the introduction of legislation, changes to the regulatory framework or the creation of a new Sectoral Regulator are required by the terms of the Government Decision to conduct RIAs; however, the number produced by such groups is small. It is suggested that all such groups set up since June 2005 should be reminded of this obligation.

- ▶ **Strengthen the high-level support for RIA, with increased focus on secondary and EU legislation (I.1)**
- ▶ **Reinforce requirement that Policy Review Groups produce RIAs (I.2)**

⁶ Building Regulations Part L and Technical Guidance Document L, Department of the Environment, Heritage and Local Government, available at www.environ.ie/en/Publications/DevelopmentandHousing/BuildingStandards/FileDownload,16644,en.pdf

Recommendations on changes to the RIA system

The main thrust of these recommendations is to ensure that the RIA is timely and proportionate, while retaining its broad scope. Both external stakeholders and many of those who carried out RIAs felt that its association with the Memorandum for Government meant that it happened too late in the process, after the main regulatory issues had already been decided. It is recommended, therefore, that a first draft of the RIA should be produced at a much earlier stage, to encourage thinking about, and analysis of, options. The workplan for each Bill should include an early draft of the RIA from the start. The draft would be developed as the legislative proposal progressed, including via consultation.

In terms of the current, two-stage system of screening/full RIAs, given the broad scope of the Irish RIA system (in that it covers legislation with social as well as purely economic effects), it appears appropriate to maintain different levels of analysis for different proposals. However, the fact that only one full RIA has been completed and published to date is a concern. Our research suggests that screening RIAs are frequently shaped by a desire to prove that the threshold for a full RIA is not met, rather than a proper evaluation of impacts. In this respect, the screening/full distinction appears not to be helpful. Rather than an arbitrary distinction between different types of RIAs, it may be preferable to identify a point on a spectrum of possible levels of analysis on a case-by-case basis. Departments would have discretion over the depth of analysis considered appropriate for each RIA, having regard to the significance of the measure. Other procedural proposals set out in this Report, such as the increased transparency afforded by the early publication of the draft RIA, and increased quality control measures, should address the need to ensure that the impact analysis is appropriate and proportionate.

- ▶ **Embed RIA thinking earlier in the policy development process and in divisional planning via an early draft of the RIA, with oversight by senior management and integration into Departmental Workplans (I.3).**
- ▶ **Maintain current broad interpretation of impacts (IV.1)**
- ▶ **Remove distinction between full and screening RIAs, but identify proportionate level of analysis on a case-by-case basis having regard to the significance of the measure. (IV.2).**

Recommendations on changes to *RIA Guidelines*:

The objectives of the proposed changes to the Guidelines are (1) to fill in gaps in areas where practitioners currently have difficulty in interpreting or applying the Guidelines; (2) to update them to incorporate improved tools and methodologies developed since they were produced; (3) to ensure that the costs to the public service, and hence to the taxpayer, of implementing legislation (as well as the cost to business of complying with it) are taken into account; and (4) to provide greater guidance on impact assessment for those producing legislation in non-economic areas. The broad scope of application of the Irish RIA system is a strength, but it must involve a recognition of the difficulties in applying economic concepts to legislation where the impacts may be broader than economic, and provide appropriate guidance. There is a thirst for more and more practical examples of how impacts are evaluated and compared, and a need to share these, both within and across Departments; of course, the examples must be carefully chosen so that bad practice is not perpetuated.

- ▶ **Provide more details in Guidelines on how the RIA should be integrated into the EU policy-making process, based on current best practice (I.4)**
- ▶ **Revise Guidelines to incorporate the standard approach to calculating administrative costs currently being developed by the Department of Enterprise, Trade and Employment (V.1)**
- ▶ **Revise Guidelines to incorporate advice on calculating public service implementation costs (V.2)**
- ▶ **Extend discussion of methodologies in RIA Guidelines, in particular, techniques which facilitate integration of quantitative and qualitative data (V.3)**
- ▶ **Provide additional supporting material designed to be used in the evaluation of impacts where cost-benefit analysis is problematic (V.4)**
- ▶ **Develop specific advice on identifying and calculating benefits (V.5)**
- ▶ **Include more practical examples, drawn from published Irish RIAs, in the Guidelines (III.4)**

Recommendations on other supports:

More detailed supports could form part of the Guidelines or be accessed through them. It is suggested that the RIA Network could take a role in deciding on the form of other supports needed. A more specific training module for the limited number of people involved in EU legislation might be of benefit, with involvement from those who have been through the process. It may be useful to consider alternative training delivery mechanisms, such as a short introductory e-learning RIA course, particularly as decentralisation proceeds. Starting the RIA process as soon as possible, via an early draft associated with the work programme item, should allow a more structured consideration of what depth of analysis is needed and what data is required to support this. Where inputs external to the Department (either from other Departments, or from outside consultants) are required, this can be factored into the plan. At present, economic consultants are retained centrally by the Department of the Taoiseach to assist with RIA. Where these consultants were used in the RIAs examined to date, the experience was very positive. It is recommended, therefore, that this expertise should be retained and reviewed again after three years.

- ▶ **Consider additional training on the EU legislative process to clarify how it interacts with RIA, with someone experienced in the process involved in training delivery (III.5)**
- ▶ **Consider e-learning for introduction to RIA (III.6)**
- ▶ **Maintain use of economic consultant, with review after 3 years (V.6)**

Recommendations on publication and transparency

In order to maximise the benefits of the RIA system in terms of strengthening democracy, improving transparency and participation, and leading to better government, the RIA documents themselves must be published. This is reflected in the commitment in “Towards 2016” that Government will:

“Continue to monitor levels of compliance with requirements in relation to Regulatory Impact Analysis. Government Departments will publish within their Annual Reports details of legislation and regulations published during the relevant year and how RIA was applied in such cases”.

This commitment has been met, in the sense that Annual Reports⁷ detail where RIAs have been carried out. It is not always clear, however, whether or when they were published. It is also not clear, in relation to some secondary legislation and EU legislation where RIAs were not carried out, why this was so. It is recommended,

⁷ See, for example, Annual Reports for 2006 for the Departments of Agriculture and Food; Arts, Sport and Tourism; Community, Rural and Gaeltacht Affairs; Defence; Environment, Heritage and Local Government; Foreign Affairs; Justice, Equality and Law Reform; Social and Family Affairs; Taoiseach; and Transport.

therefore, that the commitment regarding publication should be made more specific, to require annual reports (a) to show whether/where RIAs are available, and (b) if RIAs were not carried out, why not.

It is difficult to over-estimate the benefits which stem from publication. The knowledge that a document is to be published in itself acts as an incentive to quality. Availability of RIAs provides practitioners with examples of how to deal with specific problems relevant to their own policy areas as well as more general issues. Ex-post analysis of published RIAs provides feedback as to their quality and can also suggest ways of finding data for the next revision. Publication should always be the default option, and if RIAs are not published, or not published in a timely fashion, reasons should be given.

Publication while the regulation is evolving also has benefits. The more information on options and their implications is provided to external stakeholders at consultation stage, the better they can provide detailed information on costs and benefits of various options, thus improving the quality of decision-making. Publishing a draft RIA at an early stage will assist stakeholders to make constructive inputs; publishing a RIA with draft legislation will improve the quality of parliamentary debate and governance generally. The RIA should be thought of as a living document, which should be updated as appropriate at various stages throughout the process.

RIAs should therefore be published, and made easy to find on Departments' websites. At present they tend to be associated with the subject matter, rather than grouped together, which makes them difficult to find for those seeking to analyse or critique the RIA process, or those developing RIAs who are seeking examples. It is recommended, therefore, that Departments should create a dedicated RIA page on their websites. Mere passive publication is not enough, however; it is recommended that, when a RIA has been completed, Departments should actively seek out and notify those who contributed to the consultation process, or those directly impacted by the proposed regulation, and inform them of its publication.

- ▶ **Building on the commitment contained in *Towards 2016*, require Annual Reports to show what legislative proposals have been accompanied by a RIA and, if not, why not. (II.5)**
- ▶ **Encourage the use of early draft of the RIA as the basis for consultation (VI.1)**
- ▶ **Ensure that finalised RIAs are published, at the latest, when draft legislation is published; update as necessary throughout the legislative process (III.7)**
- ▶ **Make published RIAs easier to find by ensuring that each Department has a dedicated RIA page on its website (III.8)**
- ▶ **Require Annual Reports to include links to where published RIAs are available and, if RIAs have been done but not published, to state why this is so (III.9)**

Recommendations on managing the RIA within the Department

Improvements could be made to RIA implementation through relatively minor changes to the existing system, without incurring any great expenditure or creating bureaucracy. Greater senior management focus on, and support for, RIAs would assist those responsible for creating them, improve their quality and consistency, and further the Better Regulation agenda. RIAs should be integrated into the normal planning and reporting system of the Department: Assistant Secretaries should therefore be required to include their proposals for RIAs in Divisional Business Plans and should report regularly to the Management Advisory Committee on developments in this regard.

While the application of RIA to primary legislation is by now well established, evidence suggests that the same may not be true of secondary legislation. RIA should be applied to "significant" secondary legislation

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and “significant” EU legislation (draft Directives and significant draft Regulations); however, “significance” may not be interpreted consistently even within Departments, as well as across them. Oversight is needed within Departments at a sufficiently senior level to ensure that RIA is consistently applied. There is also a need for cross-Departmental co-ordination in this context.

It is recognised that, in some cases (for instance, emergency legislation, or some of the exceptions outlined in the RIA Guidelines), it may be impractical for a RIA to be produced. However, where RIAs are not done, it is important that senior management should be willing and able to explain this.

Where trained resources are available in-house, it is important that their expertise should be leveraged to maximum advantage in the production of RIAs. It is up to Departments themselves to decide whether these resources should be placed in line units or in a dedicated central unit, depending on the volume and frequency with which RIAs are required; however, the advantages of having regulatory options scrutinised and questioned by individuals or units independent of the policy area should be borne in mind. Departments should also plan ahead to ensure that sufficient staff are being given the right training to meet future needs for RIA, and should plan for the use of external economic consultants where this is likely to be needed.

- ▶ **Make RIA planning and reporting (both on RIAs in progress and on proposed RIAs) a normal part of the management system (II.1)**
- ▶ **Ensure consistent application of RIA within Departments and, in particular, that the “significance” threshold is interpreted consistently (II.2)**
- ▶ **Where legislative proposals are brought forward without a RIA, senior management should be prepared to explain the reasons (II.3)**
- ▶ **Maximise benefit from trained resources, such as those with an MScEcon in Policy Analysis from the IPA; ensure that training is provided to meet future needs (II.4)**

Recommendations on managing the RIA system across Government

A modern RIA system needs a quality control mechanism, preferably with both ex-post and ex-ante elements. Ex-ante control – ensuring that individual RIAs meet appropriate quality standards as they are produced - is primarily the responsibility of the Department concerned, but also involves a body independent of the Department or Office carrying out the RIA charged with scrutinising it from a quality perspective. At present in Ireland, this role is carried out by the Better Regulation Unit of the Department of the Taoiseach in relation to primary legislation; however, RIAs on secondary legislation and EU legislation as well as those prepared by policy groups are not systematically forwarded to them.

In addition to the requirement set out in the previous section for Departments to ensure consistent application of the RIA framework, there is a need for co-ordination across Departments. The existing RIA Network would appear to be the most efficient way of achieving this. It is proposed, therefore, that RIA Network members should be empowered to present to the Network their Departments’ plans and activities in relation to RIAs for secondary and EU legislation, and to provide feedback to their Departments as necessary. In order to provide for greater quality control without creating an undue bureaucratic burden, it is suggested that the Department of the Taoiseach, in co-operation with the RIA Network, should review a sample only of such RIAs, in the same way as it does for primary legislation.

Ex-post control can be achieved in a number of ways, in all of which publication is an important element; the aim of ex-post scrutiny is not to “catch out” poor RIAs, but to discourage their production in the first place. A formal system of commissioning ex-post external reviews at regular intervals, resulting in publication and public discussion of the analysis, should be set up as a means of kick-starting this scrutiny mechanism.

- ▶ **Department of the Taoiseach, in co-operation with the RIA Network, to conduct quality assessments of, and comment on, a sample of RIAs on secondary and EU legislation (III.1)**
- ▶ **Actively disseminate RIAs; commission external ex-post reviews every two years and publicise the results via publication and seminars (III.2)**
- ▶ **The RIA Network should be used to improve co-ordination and promote best practice. In particular, Network members should present their Departments’ current and planned RIA activities at the Network; including draft RIAs on secondary and EU legislation (III.3)**

2 Introduction

The agreed terms of reference for the Review are:

- (i) To assess the effectiveness of the current RIA model having regard, in particular, to the principle of proportionality and current international best practice;
- (ii) To assess RIA outputs from Departments and Offices on a quantitative and qualitative basis having regard to the requirements of the RIA model itself;
- (iii) To examine the effectiveness of current supports available to officials involved in preparing RIAs and recommend how best to support the RIA process into the future;
- (iv) To consult with key relevant internal and external stakeholders; and
- (v) To recommend any necessary changes to the model itself or to its operation.

Our approach to this was carried out in three stages as follows:

- Stage 1: map current status
- Stage 2: analyse implementation and identify issues
- Stage 3: propose way forward.

This report makes recommendations on the operation of RIA in Ireland in terms of:

- ▶ the place of RIA in the overall decision-making process;
- ▶ possible changes to the Guidelines to reflect changes in the system and feedback from Departments;
- ▶ supports for RIA from both top-down and bottom-up perspectives;
- ▶ the management of the RIA process, both within and across Departments;
- ▶ publication and transparency.

The report is structured as follows:

Section 3 examines the international and Irish context for the development of the current RIA model.

Section 4 compares the design of the Irish RIA model with international best practice. This comparison is based on high-level issues such as the legal basis, the scope of the system (what types and subjects of legislation are covered), and the question of proportionality. More detailed implementation issues such as consultation processes and how different options are evaluated are considered in Section 7, where the views of those who operate the system and those who are impacted by legislation are taken into account.

Section 5 summarises the views of those impacted by regulation, representing large and small business and employees. Since, in many cases, they had not seen specific RIAs in their areas (either because they had not been done, or because they had not been published), their views are grouped around the principles of Better Regulation as set out in the Government White Paper, *Regulating Better*⁸.

Sections 6 and 7 contain the results of quantitative and qualitative research and analysis of the state of RIA implementation in Ireland. They are based on analysis of RIAs carried out to date by Government Departments and offices, which involved a review of all RIA documents and in-depth interviews with those

⁸ Department of an Taoiseach, 2004

involved (RIA practitioners, other civil servants, groups impacted by the regulations proposed in the specific RIAs and business representative groups generally). Section 6 examines how the RIA process operates in practice, and makes recommendations for improving it. Section 7 deals with the content of the RIA as a published document, and again makes recommendations for changes to the system. The views of RIA practitioners and of stakeholders are reflected at relevant points throughout these sections.

Section 8 sets out the study's conclusions and also summarises the recommendations by topic.

3 Context

3.1 The genesis of Regulatory Impact Analysis

Regulation – the setting of rules by local or national governments, or by delegated agencies, for the conduct of individuals or firms – is generally aimed at improving the welfare of society. The alternative to regulation is to allow the operation of market forces, a system which works well for many aspects of the economy. However, as market forces are not always perfect, regulation may be used to address different forms of market failure, especially as regards achieving desired societal outcomes. For example, market power – where a firm is so powerful that neither its customers nor its competitors can disadvantage it, so that it can charge what it likes – can be addressed by controlling the firm's prices, or by requiring it to provide its competitors with access to its facilities, as in telecommunications or electricity. Information asymmetries, where a consumer may be disadvantaged because the technicalities of the product or service are difficult to understand, may cause the authorities to require suppliers to meet a certain standard – for example, doctors and accountants must be properly qualified. Regulation may also be aimed at changing behaviour in non-economic ways, for instance, by promoting the achievement of social goals such as public health, education or the availability of information.

However, regulation, while generally having laudable aims, may not achieve what it sets out to do. To continue the examples set out above, in a network industry it may set retail prices too high (in which case consumers pay over the odds) or too low (in which case the firm does not make a return on its investment and quality suffers in the long term). Or, in a profession, entry standards may be set so high that a shortage develops, demand exceeds supply and prices become very high. Regulation may fail because it is poorly designed, because implementing it is so expensive and resource-consuming that the cure becomes worse than the disease, or simply because it is not perceived as legitimate and is therefore not obeyed and not implemented.

The cost of unnecessary red tape is a burden which falls initially on companies, but in many cases is passed on to society as a whole. The quality of regulation is therefore all-important. In recent years, attention has turned to the quality of regulation – in particular, business regulation – as a tool for international competitiveness. Regulatory Impact Analysis, or RIA, has been developed to examine the efficacy of proposed or existing regulations. It can be defined as:

“... a tool used to assess the likely effects of proposed new regulations or regulatory change. It involves a detailed analysis to ascertain whether or not the new regulation would have the desired impact. It helps to identify any possible side effects or hidden costs associated with regulation and to quantify the likely costs of compliance on the individual citizen or business. It also helps to clarify the cost of enforcement for the State.” (RIA Guidelines)

RIA usually involves the use of economic analysis – in particular cost-benefit analysis or cost-effectiveness analysis – to examine the impact of government regulations. RIA was introduced as a formal government requirement in the USA in 1981: each major proposed regulation was required to be accompanied by an

examination of regulatory options and an assessment of benefits and costs. The Office of Management and Budget exercised a central oversight and quality control role. Since then, many OECD and EU countries have adopted a form of Regulatory Impact Assessment or Analysis.

The form, coverage and content of analysis have generally evolved over time. The UK first introduced Business Compliance Cost assessments in 1985; by 1998 this had developed into a requirement for RIA for all significant regulation. In Australia, Regulatory Impact Statements (RISs) were first required in some cases from 1985; the process has been strengthened and new Guidelines produced at intervals since then. The European Union's system has also evolved over time, from a requirement for a Business Impact Assessment on new legislation from 1986, through the development of various sectoral Impact Assessments (health, environment, consumer protection, etc) during the 1990s, to the current system of a general Impact Assessment procedure applicable to all types of regulation. This covers economic, social and environmental impacts as well as an examination of the principle of subsidiarity (whether the action would be better taken at Member State level), proportionality and the choice of instrument. The EU system is constantly evolving, and recent changes have been made to better reflect the principle of proportionality and ensure that the greatest effort and attention are focused on areas of greatest impact. Policy and regulatory proposals are now systematically assessed, and a wide range of options – regulatory and non-regulatory – are examined for each initiative. The quality of these assessments is overseen by an independent Impact Assessment Board.

The EU has also been anxious to spread the Better Regulation agenda to Member States, and the work of the Mandelkern Group has been instrumental in this⁹. In a recent Communication¹⁰, the Commission noted that progress on the Better Regulation agenda had accelerated significantly since the adoption of the Integrated Guidelines for Growth and Jobs in March 2005, with 19 Member States having introduced or about to develop a Better Regulation Strategy and 17 Member States having measured or in the process of measuring administrative costs. Several had set global targets for the reduction of administrative burdens. Impact assessments were being conducted more widely, although they were often partial. Consultation was obligatory in nine Member States. However, the Commission also noted that only a relatively small number of countries systematically carried out integrated impact assessments for new legislative proposals, and the results were often not available to outside scrutiny.

International experience suggests that there are several benefits associated with a sound Regulatory Impact Analysis process. The necessity for decision-makers to work through the impacts of possible new regulations in a formal, structured way improves the regulatory process and results in better outcomes. If started early enough, RIA should not delay the legislative process or make it more difficult to introduce necessary legislation, but it does place the onus on regulators to make transparent their thinking and to offer improved advice to Government, which should improve decision-making. If published in a timely fashion – for instance, for primary legislation, with the publication of the relevant Bill – RIA can also strengthen democracy by informing parliamentary debate and improving transparency and participation generally. Secondary benefits are that RIAs require regulators to gather relevant information about the sector, thus improving their knowledge base, and that they encourage capacity building, since forms of expertise which may be new to public servants – notably economics expertise – are required. In addition, the completed and published RIA provides useful information to industry sectors, academics, consumers and the general public, thus raising the general standard of debate and enabling critiques of regulation by stakeholders.

⁹ The Mandelkern Group of Member State experts on better regulation was set up by Ministers of Public Administration, in November 2000. Its task was to develop a coherent strategy to improve the European regulatory environment. The Group's report makes recommendations to the Member States and the Community Institutions in the areas of Impact Assessment, Consultation, Simplification, Organisational structures for better regulation, Alternatives to regulation, Access to regulation, and National Implementation of EU legislation.

¹⁰ communication from the commission to the council, the european parliament, the european economic and social committee and the committee of the regions: Second strategic review of Better Regulation in the European Union - COM (2008) 32 final 30.1.2008

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Most RIA systems have a number of common features: a mechanism which allows the depth of analysis in the RIA to be tailored to the significance of the proposed regulation; requirements for a statement of the objectives of the regulation; the identification of alternative methods of achieving the objectives (including alternatives to regulation) and a formal evaluation of these options; a consultation process; and a consideration of how the regulation will be enforced. At the same time, there is considerable variation amongst RIA systems internationally. Some, like the Irish system, are broad in scope, applying to most forms of regulation, including that with social, cultural or “common good”-type aims; others are more narrowly focused on economic effects. Some require a high degree of formal cost-benefit analysis, while others encourage a range of approaches. The current Irish system is described, and the formal system compared against international best practice in Section 4, below.

3.2 Development of RIA in Ireland

In 2000-2001 Ireland participated in a Peer Review by the OECD which culminated in the publication of its report, “Regulatory Reform in Ireland”, in April 2001. While recognising that the Strategic Management Initiative (SMI), in particular was fostering a new culture in government regulatory practices, the report found that reform of Ireland’s regulatory governance lagged behind dynamic market and social changes, and hence could be a bottleneck to sustained growth. While significant improvements had been made to consultation and transparency, RIA had not yet been introduced, and economic assessment of proposed rules was missing. Alternatives to regulation, such as economic instruments, had replaced few traditional command-and-control approaches.

In welcoming the report’s findings, the Taoiseach announced a number of regulatory reform initiatives, including:

“The development of a **new mechanism (Regulatory Impact Analysis)** by which Government Departments and Public Bodies will be required to analyse and measure the impacts on society of any regulations being proposed.”

The Regulatory Reform Review of Ireland also led to the publication of a Government White Paper, “Regulating Better”, which included a commitment to pilot the RIA model. Piloting commenced in June 2004. The experience was broadly positive and supported the extension of RIA across all Government Departments and Offices. The Report of the Pilot exercise¹¹ proposed a number of changes to the RIA model to ensure that the use of RIA is proportionate, flexible and effective. These proposals were taken into account in the development of a revised model.

In June 2005, Government agreed that this revised RIA model would be introduced across all Departments and Offices. In order to provide practical assistance to officials involved in using the new model, RIA Guidelines¹² were published by the Department of the Taoiseach in October 2005. Staff from the Better Regulation Unit provide a helpdesk service to officials drafting RIAs, and a dedicated RIA training course has been developed by the Unit in co-operation with the Civil Service Training and Development Centre (CSTDC). A total of 245 officials have now attended this course and targeted presentations also continue to be delivered by the Better Regulation Unit. Another 583 officials have also attended the policy analysis and the legislative process courses in which a module on RIA is included.

¹¹ *Report on the Introduction of Regulatory Impact Analysis*, Department of the Taoiseach, 2005

¹² *RIA Guidelines - How to conduct a Regulatory Impact Analysis*, Department of the Taoiseach, 2005

A RIA Template was also included on the Better Regulation website¹³ in May 2007 to further assist officials. The publication of the template coincided with the introduction of new features to the eCabinet system designed to assist users in observing the requirements relating to RIA. The new Cabinet Handbook¹⁴, published in May 2007, also contains information on RIA. The Social Partnership Agreement, *Towards 2016*¹⁵, under the heading “Better Regulation”, contains a commitment to review RIA in 2007:

“The Department of the Taoiseach to review the operation of RIA by the end of 2007 and use the findings of this review, to refine and amend RIA requirements and processes. This will help to ensure that RIA continues to support the development of proportionate, effective and targeted regulations”

¹³ www.betterregulation.ie

¹⁴ *Cabinet Handbook*, Department of the Taoiseach, 2006 (available to download from “Publications for the current year” on www.taoiseach.gov.ie)

¹⁵ *Towards 2016 - Ten-year Framework Social Partnership Agreement 2006-2015*, Department of the Taoiseach, 2006 (also available to download from “Publications Archive (2006)” on www.taoiseach.gov.ie)

4 The Irish RIA model and international best practice

This section assesses the Irish RIA model itself (as opposed to its implementation), against international comparators. It draws on the methodology used by the OECD in its RIA Inventory¹⁶, which compares key elements of RIA systems in OECD countries. The elements considered here are those which relate to the overall design of the system, rather than its detailed implementation, which is considered in later sections. It covers three aspects: the legal basis, scope of the system, and proportionality.

4.1 Legal basis

The legal basis on which RIAs are carried out varies across countries. The requirement to carry out a RIA may be based on a government decision, on a presidential order, or on a law, and generally this will depend on historical background, administrative culture and the commitment of high-level officials. A paper by the European Policy Centre¹⁷ notes that critical success factors for RIA include a political commitment at the highest levels within government, and legislative backing for the requirement to carry out RIA. Ministerial accountability for compliance with RIA requirements and for the quality of RIAs produced is also essential.

In Ireland, the requirement to carry out a RIA is based on a government decision, supported by guidelines of the Prime Minister. This constitutes a strong enough legal basis, and compares with other countries which have well-established RIA systems. It could be argued that a legislative requirement to carry out RIAs would provide a stronger basis for implementation – for instance, by allowing interested parties to mount a legal challenge to regulation, on the basis that a RIA was not performed, or not performed well. However, it is also possible that the system could be strengthened without the need for legislation – for example, by increasing high-level support for RIA, and improving its integration into the policy-making process. At present, therefore, if initial implementation difficulties can be ironed out, we would see no necessity for change. However, if current difficulties with RIA implementation persist, Ireland could consider enacting legislation to provide a statutory basis for RIA.

4.2 Scope of coverage

The concept of “scope” deals with what type of legislation is typically covered by the requirement for RIAs. It has two aspects: firstly, the level of legislation (whether primary, secondary, EU transposition, etc) and, secondly, its content (whether legislation with economic or business impacts alone is considered, or whether the system extends to legislation with broader impacts).

Most OECD countries require RIA for primary laws and subordinate regulations. Denmark requires RIA only for primary laws. The Czech Republic and Ireland require RIAs for primary laws and major secondary legislation, the Netherlands for major laws and major secondary legislation, Portugal for selected laws and secondary legislation, and Sweden for primary laws and secondary legislation that might have an effect on small business. Until a recent review of its Better Regulation agenda, Canada applied RIAs (Regulatory Impact Analysis Statement) only to secondary legislation, on the grounds that the Memorandum to Cabinet

¹⁶ Regulatory Impact Assessment (RIA) Inventory: Note by the Secretariat, GOV/PGC/RD(2004)1, OECD, Paris, 2004

¹⁷ “Regulatory Impact Analysis: Improving the Quality of EU Regulatory Activity”, Occasional Paper, The European Policy Centre, 2001 (“the EPC Paper”).

required for primary legislation already encompassed most of the elements of high-quality legislation. The United Kingdom requires RIAs in primary laws and secondary legislation which have a non-negligible impact on business, charities and the voluntary sector.

The Irish *RIA Guidelines* state that RIAs should be carried out for all primary legislation (with the exception of the Finance Bill and certain emergency, criminal or security legislation); on all draft EU Directives and significant EU Regulations; and on significant Statutory Instruments (secondary legislation). Guidance is provided on the interpretation of “significant”.

There is some variation amongst countries on the types of impacts which are considered. In the UK, for example, economic impacts are of prime concern, and the focus of RIA is quite narrow. Other countries identify a wide range of possible rationales for government intervention, not just economic (market failure). For example, according to the Australian RIA Guidelines, the possible problems which regulation may address include:

- ▶ market failure (such as a lack of, or misleading, information, presence of externalities or public goods, or use of excessive market power);
- ▶ regulatory failure (such as a government imposed restriction on competition that is not in the public interest);
- ▶ unacceptable hazard or risk (such as human health or safety hazards, person or entity bearing risks ill equipped to do so, or threat of damage to the physical environment); or
- ▶ social goals/equity issues (such as individuals or groups being unable to access available market information, goods or services).

Similarly, the EU’s RIA Guidance Document (2005, updated March 2006) proposes both economic (i.e. market failure-based) approaches to deciding whether or not regulation is necessary, and an assessment of whether there is a “Discrepancy between the fundamental goals of the Union and the existing Situation”. The guide enumerates 11 such fundamental goals, with most being derived directly from EU Treaties: they include social, environmental and foreign policy goals.

The EU system therefore takes a broad approach to the question of content. Historically, it has equally taken a broad approach to the level of regulation covered. However, a recent external evaluation of the Commission’s Impact Assessment system found that its broad scope of application (it applied to all (priority) Work Programme items) did not necessarily ensure optimal use of resources, or systematic assessment of all proposals with the most significant impacts. The President of the Commission has therefore noted that the scope of application of impact assessments needs to be re-assessed¹⁸ - a point which is discussed further under “Proportionality”, below.

In Ireland, the approach considers a range of potential impacts which regulation can have. This scope is broader than in some countries where RIA is reserved for regulation with purely economic effects; however, as the examples of Australia and the EU indicate, the application of RIA principles can improve the quality of decision-making for all types of legislation. It is recommended, therefore, that the broad scope of the Irish RIA system should be maintained. With a broad scope, however, it is even more important to ensure that the analysis is proportionate (see below) and that resources are directed towards the regulations with the greatest impacts. The Guidelines should also be interpreted in the context of the six Principles of Better Regulation set out in the 2004 White Paper: necessity, effectiveness, proportionality, transparency, accountability and consistency.

¹⁸ Mieux Légiférer à l’aide d’analyses d’impact de meilleure qualité: Note d’information de M le Président, OJ 1795 – point 16.1.

4.3 Proportionality

Proportionality - whether the RIA system is flexible enough to deal with different types of legislation, in different sectors and with various levels of importance – is probably the most important element of any RIA model. The main practical issue in assessing proportionality is the extent to which the evaluation of options – the most difficult and important part of RIA – is carried out, and in what cases. The evaluation of options involves assessing the potential costs and benefits of alternative regulatory paths. In 2002, the OECD stated:

“The best practice is that a RIA system should require use of the benefit-cost principle for all regulatory decisions, but the form of analysis employed should be based on practical judgements about feasibility and costs.”

Research in the United States indicates that, in most cases, quantification of all costs and benefits is not carried out – this despite the fact that the system has been in operation for over 25 years. This implies that adequate criteria to screen the cases which require a fully quantified RIA are needed. Many countries adopt a threshold criterion as a strategy of targeting efforts on RIAs where they will be most beneficial.

The EU has been reviewing its system of Impact Assessment (IA) within an overall Strategic Review of Regulation. Previously, the EU used a 2-step approach, where a preliminary RIA was required for all proposed regulations, followed by a more detailed RIA for selected proposals. The EU has now moved to a broader, simplified first stage (Roadmap) which is used to identify significant proposals, and is also used to plan out how to conduct a full RIA. Each RIA receives individual analysis of what constitutes a proportionate examination of impacts. There is a quality control body which decides which proposals merit an extended RIA, which would include full quantification of costs and benefits.

Currently, the Irish RIA Guidelines provide for a two-phase approach. All proposed regulations are initially subject to a screening RIA – a preliminary, less detailed analysis. If the impact of the regulations is identified as being relatively low, the screening RIA suffices. Formal cost-benefit analysis is not necessary for a screening RIA, but wherever possible costs, benefits and impacts should be monetised and/or quantified. The level of detail should be proportionate to the significance and likely impact of the proposal. The screening RIA should also specify whether there are significant impacts in any of the following areas:

- ▶ national competitiveness
- ▶ the socially excluded or vulnerable groups
- ▶ the environment
- ▶ whether the proposals involve a significant policy change in an economic market including an examination of the impacts on consumers and competition
- ▶ the rights of citizens
- ▶ whether the proposal involves a significant compliance burden

The identification of significant impacts in any of these areas triggers a full RIA. A cost threshold equivalent to initial costs of 10 million, or cumulative costs of 50 million over 10 years, also triggers a full RIA. This involves more extensive and detailed evaluation (in particular, cost-benefit analysis).

The purpose of the two-phase approach is to ensure that RIA is proportionate and does not become overly burdensome. Since it is left to the individual drafter to decide whether or not the “significance” threshold (for determining whether or not a full RIA needs to be done) is met, there may be an incentive to downplay the level of significance. The challenge for the *RIA Guidelines* is to lay down rules that do not require

extensive CBAs where they serve no useful purpose, but equally do not allow the evasion of a full CBA where it is appropriate.

The broad scope of the Irish RIA system means that it encompasses legislation whose intended effects are not purely economic. This can range from some criminal legislation, to the consolidation of statute law, to a strengthening of the legal basis for certain Ministerial actions in response to constitutional or EU developments. While the development of any type of legislation will benefit from the structured approach of RIA, it must be recognised that the impacts of such forms of legislation are not easily monetised. This means not only that a full and meaningful cost-benefit analysis is likely to be difficult, but also that even quantifying costs and benefits may pose a challenge. It is important, therefore, that the type of analysis proposed is flexible enough to recognise and accommodate this – an issue which is dealt with in section 7.4.

Our review of international practice indicates that all bodies involved in RIAs have to deal with balancing a systematic evaluation of all policy proposals against pragmatic resource constraints. The attempt to find a means of concentrating resources on proposals which are likely to have most significance depends on having a means of identifying those proposals as early as possible in the process. This in turn suggests a need to apply some type of filter to all proposals. Our view is that this can only be achieved by having some kind of graduated approach. This does not necessarily mean that there has to be a break in conditions which triggers a different type of analysis, but rather that there has to be a spectrum of acceptable levels of detail which recognises the requirements of different types of potential impacts. The level of discretion left to individual Departments, however, should not be so great as to allow the evasion of a full cost-benefit analysis where one is clearly appropriate.

In considering the current model in the international context, it is concluded that the principle of having a threshold for progressing from a screening RIA to a full RIA (the monetary aspect of which was increased after the pilot programme) was reasonable at the time the RIA was introduced. However, the fact that only one full RIA has been completed and published to date¹⁹ raises concerns about how the threshold is interpreted and applied in practice. Given the experience to date in conducting RIAs, and international developments (notably in the EU model) since the system was introduced, it may be appropriate to move away from the “two sizes fit all” approach represented by the Screening/Full distinction, towards a more graduated tailoring of the level of analysis to the nature and importance of the legislation. This issue is discussed further in Section 7.

¹⁹ Building Regulations Part L and Technical Guidance Document L, Department of the Environment, Heritage and Local Government, available at www.environ.ie/en/Publications/DevelopmentandHousing/BuildingStandards/FileDownload,16644,en.pdf

5 Operation of the Irish RIA system: overall views of those impacted

As outlined in the Introduction and detailed in Annex 1 (“Methodology”), both quantitative and qualitative research was carried out on the current state of implementation of Regulatory Impact Analysis in Ireland, two and a half years after the Government Decision introducing it. Through a series of structured interviews, we sought the views of those consulted in relation to the six RIAs selected for in-depth analysis, and also of those in Government Departments who carried out RIAs and who provided support for those who did so. Their views on different aspects of the RIA system are reflected in the relevant sub-sections of Chapters 6 and 7. Given the genesis of the RIA system in the Better Regulation agenda, and its purpose, we also found it useful to seek the views of representatives of business and employees, not necessarily on individual RIAs but on the overall system. A summary of these views is reflected in this chapter.

Overall, the business community, in particular, was disappointed with the state of implementation of RIA. They felt that few RIAs had been carried out, even fewer had been published, and those that were published were hard to find. They also felt that they had not been properly consulted on those which had been done, that the quality was poor and that the RIAs represented too little, too late. The Small Firms’ Association (SFA) referred to one RIA as “half-hearted” and “cosmetic”, with no cost-benefit analysis and poor data.

Employees’ representatives felt that the introduction of RIA had little impact on their role, or on Social Partnership discussions. Both employees’ representatives and, to some extent, employers, such as the Construction Industry Federation (CIF), were somewhat wary of proposals for RIA at too early a stage in the policy development cycle, feeling that it could be used as a tactic to delay or prevent regulation which was necessary – for instance, in the health and safety area.

Both union representatives and the CIF agreed that RIA was not an appropriate approach at the level of social partnership talks – these should be broad-brush, examining issues at the policy level and not their detailed implementation. In all cases, there was a clear understanding of the distinction between developing policies, and considering options for their implementation.

The lack of publication meant a lack of awareness of individual RIAs among stakeholders. Thus, in many cases, interviews were focused on consultation, or on interactions with Departments in general, rather than about the detail of specific RIAs or the RIA system. However, the issues which emerged in discussion were very relevant to the Better Regulation agenda. They are therefore discussed below under the headings of the five principles of Necessity; Effectiveness; Proportionality; Transparency, and Consistency. (Accountability, which is concerned mainly with managing the delegation of functions to independent regulators, is not considered here).

5.1 Necessity

The Necessity principle means that higher standards of evidence are required before regulating, and red tape will be reduced. Business representatives felt strongly that the RIA system, as currently operated, did not comply with these principles – RIAs, insofar as they were done and seen to be done, were “too little, too late”. The CIF said that RIAs should be part of the early decision-making process – part of the decision

whether to regulate or not, before a commitment had been made. RIAs were currently being done after the event, which was pointless. This was echoed by IBEC: RIA had to be done before the proposal was finalised, otherwise there was no real consideration of “necessity”. The CIF also felt that as industry representatives they were frequently brought in to the policy-making cycle too late, so that they were “on the back foot”. Dialogue should occur at the point where the regulation was first thought of; if the issue had already been decided, then dialogue was too late.

Another CIF representative felt that, while many new regulations had laudable aims, such as improving the quality of housing, they often had unforeseen impacts. It was important to consult widely and openly before decisions were taken on new regulations, so that interested parties could comment, not just on the impacts the relevant Department had foreseen, but on wider impacts which they had not taken into account and which might affect the viability of the regulation.

IBEC were particularly concerned that RIAs were carried out containing assumptions or figures on which they had not had the opportunity to comment. In some cases they disagreed strongly with the cost estimates given.

Overall, those who were supportive of the RIA process were clear that it had to be part of the process of developing regulation, not an “add-on” at the end of it. They supported the publication of RIAs in draft form, early enough so that industry could comment on the regulatory proposal and have it adapted. They recognised the difficulty in having sufficient data at an early stage to make possible the comparative evaluation of options: the challenge was to have a process which enabled the RIA to be done, not so early that it was impossible to go into detail about options, not so late that industry was just commenting on the micro-details of something already decided, but at a stage when it was still possible to influence which option was decided. Early sight of the detail meant that it was possible to give much more constructive feedback.

5.2 Effectiveness

The Effectiveness principle encompasses:

- ▶ targeting new regulations effectively;
- ▶ ensuring that regulations can be adequately enforced and complied with; and
- ▶ ensuring that regulations in key areas are still valid.

Most business representatives felt that new regulation was not targeted effectively. According to the CIF, this represented a failure to really consider whether the stated benefits would actually occur. Cost-benefit analysis (CBA) was not carried out often (a claim borne out by our analysis of RIAs carried out to date – see Chapter 7), and, where it was done, it did not reflect “joined-up thinking” about who bore the costs and who gained the benefits. For instance, in the transport area, the Dublin City Business Association (DCBA) felt that impacts on existing business of different options for building infrastructure were not taken into account, although there could be drastic effects on the local economy and on jobs. This imposed costs on the host community, who felt they were not given any real say in the matter. In its submission on Transport 21, Dublin Chamber of Commerce made a similar point: “Furthermore, just as planning regulations now require environmental impact analysis, Dublin Chamber believes that economic assessments of all tenders received for large scale transport project developments should also focus on the construction approaches being applied. Any initiatives or practices proposed that will minimise disruption to the city centre business environment should be recognised and their economic value acknowledged.”

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ISME and the SFA, both representing small business, were particularly concerned that the specific impacts on their members were not measured.

Some felt that the lack of CBA reflected a lack of resources within Government. The SFA, in its submission to the Business Regulation Forum, noted the Government's promise that "significant resources" would be devoted by all Departments to the RIA system. It stated, however, that it was also "essential that there are *sufficient resources* for all Departments to allow RIA to be carried out on all major regulatory proposals, with regard to their impact on competitiveness. This should include, where necessary, cost impact analysis." In their interview, the SFA pointed out that, while CBA was expensive to do properly, the "sunsetting" of regulations which were no longer necessary or valid would also save money.

Several interviewees felt that there was a need for more economic expertise in Departments. An industry trade body, however, pointed to the relatively low rate of utilisation of the economic consultants retained by the Department of the Taoiseach to assist Departments with economic analysis of proposed regulations, including cost-benefit analysis, perhaps indicating that the lack of CBA was more due to inadequate planning than inadequate resources.

In the context of effectiveness, delays in finalising regulations were raised by several respondents, although no clear proposed solution emerged; some felt that it was simply a reflection of the consensus-based nature of Irish society, where the political system tried to avoid having "winners" and "losers". This made it difficult to take into account the common good.

Targeting new regulations effectively requires an understanding and quantification of the impacts of different options, which in turn requires data. Industry views were mixed on how data should be gathered. On the one hand, publishing draft RIAs, even with incomplete data, was viewed as necessary to allow industry to comment on, and correct, erroneous statements or assumptions, especially about costs. On the other hand, as the SFA pointed out, industry itself did not want the burden of essentially providing all the necessary data for the RIA. IBEC felt that there was a need for a simple means of surveying stakeholders to determine impact on business and on the public sector. Survey data should, however, be treated with caution, since those in different positions in the same firm might easily give different responses. Surveys needed to be carefully designed in order to ensure that valid conclusions could be drawn. The quality of data, both quantitative and qualitative, was an issue. The CIF, however, was less concerned about the burden of commenting on costs, since they had a good nationwide network of branches and associations.

Representatives of small firms were acutely concerned about costs – both the costs of implementing new regulations, and the cost/burden of responding to questionnaires, consultations and requests for information. The SFA pointed out that the burden on business of meeting information requests was cumulative, across all sectors, but felt that there was little co-ordination across Government Departments and Offices. Employment law and environmental law were particularly burdensome on small businesses. The SFA said that the CSO should introduce a maximum limit to the number of surveys which any small business is required to complete in one year, and the CSO should also remind Government Departments of their obligation to consult with the CSO when establishing new administrative systems.

The SFA also felt that, where costs were assessed, there was too much emphasis on administrative costs, as opposed to compliance costs – that is, the actual burden on business of complying with the substantive regulation, as opposed to form-filling, was under-estimated.

5.3 Transparency

There were mixed views among industry representatives on the degree of transparency shown in the development of new regulations. The DCBA felt that consultation processes were not credible or genuine; proposals were not accompanied by the level of analysis that would allow for a comparative evaluation of options, and timescales were often unreasonable given that membership-based organisations had to consult with their members to reach a view. On the other hand, the Irish Concrete Federation (ICF) were happy with their ongoing engagement with Departments and felt that they had good access to civil servants' thinking. They recognised that they would not always get what they wanted from the process, but felt that they had been listened to by well-informed people who understood their industry.

There was concern about the lack of transparency around the RIA documents themselves, as well as around the whole process of developing regulations; the SFA pointed out that, in their submission to the Business Regulation Forum in May 2006, they had requested that "All impact assessments from Government Departments should be published and the quality of the impact assessments should be tested in a transparent fashion by an independent body."

While it was acknowledged that Departments did consult (and it should be noted that this is by no means universal practice within the EU), there was a degree of suspicion expressed about how they did so. One interviewee felt that the Government devoted a lot of time and energy to discussions with particular interest groups behind closed doors, and that this reflected a lack of transparency. An employee representative, on the other hand, viewed a Government decision to go to public consultation on an issue, bypassing the "normal" consultation mechanism, as intended to elicit a certain response and result in the watering-down of the proposal. ISME noted that consultation tended, in the main, to only go to the social partners, where not all forms of business were equally represented. Since many Departments did not specifically address the arguments put forward in responses to consultation, those who submitted responses had no idea whether or not their arguments were taken seriously or had been taken into account in the final decision. The ICF, while happy with the responses of the particular Department they had been dealing with, thought some Departments felt that getting close to industry, by engaging with and addressing their arguments, would compromise them. Their own view was the opposite: that if civil servants were confident and strong, they should have no fear of engaging. They could be loyal to their principles but practical at the same time.

5.4 Consistency

Consistency, in this case, means ensuring that regulations in particular sectors/areas are consistent. Several interviewees, including the CIF, expressed concern about the dependence of Departments on a few key individuals. While relatively happy with their level of interaction at present with individuals who understood their industry, they did not feel confident that this would continue if key individuals retired or were moved. This was particularly so where a degree of technical expertise was needed. Two interviewees spontaneously raised decentralisation as a threat to consistency and quality of regulation. Other concerns were staff being rotated out of the area to broaden their expertise, lack of cover for critical staff during illness or leave.

Where there were relatively senior civil servants in the area who had developed a specialism, interviewees, including the CIF and ICF, were generally happy with the level of access they had to them. They were realistic in terms of expectations: they did not expect to convince Departments that their point of view was right 100% of the time, but they did appreciate engagement with their arguments. In other areas, they had found Departments unhelpful, opaque and unprofessional (e.g. not returning phone calls). A representative of the ICF said: "Good regulation is as much about people as about systems." While the openness and accessibility of many senior civil servants is welcome, industry's emphasis on their personal expertise is a concern, and suggests the need for a more systematic development of regulation, such as that embodied in RIA.

5.5 Proportionality

Even where the “necessity” hurdle was passed, many industry representatives felt that regulation was frequently disproportionate. The ICF felt that, in some cases, disproportionate legislation had only been avoided because industry groups had good lawyers, technical people and planning people to contest the principles and effects proposed. However, there was a cost to industry in paying advisers to counteract such proposals; better consultation, more openness and transparency on both sides would make this unnecessary. The DCBA complained of a lack of intellectual analysis, and also of international experience so that comparisons could be made.

IBEC referred to the “Safe Pass” card (a measure to improve safety on construction sites by requiring compulsory training, paid for by the employer) as an example of disproportionality. While the training was indeed valuable for those who actually needed it, the number of those trained was far in excess (by one estimate, about triple) of the number employed in the construction industry. From the employers’ point of view, costs had been greatly under-estimated. Similarly, where a RIA had been carried out for another set of regulations related to the construction industry, business representatives felt that costs had been greatly underestimated. The issue was the wide scope of the definition of “the construction industry”, which meant that the net was wider than reflected in the RIA and costs would consequently be higher. If some of the logic had been seen earlier, it could have been challenged. ICTU, on the other hand, felt that Safe Pass had made a great contribution to improving safety in construction. The regulation clearly defined those categories to which it applied in a mandatory way and was proportional; the problem arose where consultants misled workers who were not covered by the regulation to believe that they required Safe Passes, which in most cases they paid for themselves.

Three interviewees (ISME, the SFA, and IBEC) were concerned about the way in which EU Directives were transposed in Ireland. They felt that there was a tendency towards “gold-plating”, meaning that transposition tended to include everything it possibly could, rather than being tailored towards the Irish economy and environment.

6 Operation of the Irish RIA system: process

6.1 Introduction

The previous sections of the report discussed the international context within which RIA is developing, how it has evolved in Ireland, and the overall views of those impacted by the process. This section focuses on the detailed operation of RIA in Ireland, examining where RIAs sit within the overall process of developing regulations and within the Better Regulation agenda. The concern here is to locate the RIA within the decision-making process, and to examine how internal processes and supports impact on the formulation of the RIA. Process issues are discussed under three headings: RIA and the decision-making process, Managing the RIA within the Department, and Managing the RIA across Government.

The analysis draws on quantitative and qualitative research on RIAs which have been produced in Ireland over the last two years, and is informed also by examples of how RIAs are being implemented in other countries. A description of methodology is provided in Annex I.

6.2 RIA and the decision-making process

6.2.1 Current situation

Since the introduction of the RIA model in mid-2005, a total of 74 RIAs have been produced (see Table of RIAs in Annex 2, and footnote 45)²⁰. This represents good progress in establishing RIA as part of the legislative process, in a relatively short time. All Memoranda to Government regarding primary legislation are now required to be accompanied by a RIA (although it must be acknowledged that the urgency of political matters may occasionally make it impractical for a RIA to be produced), as are selected EU transpositions and secondary legislation.

The following table provides a numerical breakdown of RIAs in terms of the type of regulation they related to:

Table 1. Breakdown of RIAs by type of regulation	
Type of regulation	No. of RIAs
Primary legislation only	43
Primary legislation on foot of review group	2
EU Directive or Regulation (pre-transposition)	3
EU Transposition only	12
Secondary legislation (unrelated to EU Transposition)	8
Transposition with additional elements via primary legislation	4
Transposition with additional elements via secondary legislation	2

²⁰ The period under review is June 2005 to the end of February 2008

It is clear that the RIA system effectively began to feed through into primary legislation only in 2007. The Government Decision on RIA was prospective: it only applied to cases where permission to bring forward legislation was sought from Government after June 2005. Any legislation already “in the pipeline” did not require a RIA. Conversely, many RIAs have been carried out for legislative proposals which have not yet made it to the Oireachtas. There can be a considerable delay between the consideration of Heads of a Bill by Government and the enactment of the legislation. Thus there is not a full overlap between the list of RIAs on primary legislation, and the list of primary legislation itself. However, the proportion of primary legislation accompanied by a RIA has increased from 2% in 2006 to 55% in 2007, and can be expected to increase further in 2008, as all proposals to Government for primary legislation should now be accompanied by a RIA.

The roll-out of RIA associated with primary legislation represents good progress. The map of implementation associated with secondary legislation is not so clear. This is partly because the lack of an integrated system for managing secondary legislation means that it is difficult to check the state of implementation of RIAs for Statutory Instruments.

Twelve of the RIAs related to the transposition of EU Directives alone. Most of the Directives could be expected to be transposed via secondary legislation. Another two had elements of transposition but also of stand-alone secondary legislation. Eight RIAs related to statutory instruments which were not transpositions of EU law, so that, in all, twenty-two related wholly or partly to secondary legislation. A further three had been carried out on EU legislative proposals which had not yet reached the transposition stage.

6.2.2 Compatibility with best practice

Among the ten Best Practices identified by the OECD²¹ for successful RIA implementation are:

- ▶ Maximise political commitment to RIA; and
- ▶ Integrate RIA with the policy-making process, starting as early as possible.

The EPC Paper (see footnote 15) states that good quality RIAs are characterised by good quality and complete analyses (especially with regard to the benefits and indirect costs arising from regulation); assessment of alternative options; full consultation; and **the complete integration of RIA into the decision-making process** (emphasis added). Critical success factors include a political commitment to RIA at the highest levels within government, and legislative backing for the requirement to carry out RIA. Legislative backing implies that laws or regulations could be legally challenged on the basis that they were not accompanied by a RIA, or that the RIA was not of sufficient quality. Ministerial accountability for compliance with RIA requirements and for the quality of RIAs produced is also considered important.

Based on interviews with those who carried out RIAs and those impacted by them, we have identified a number of issues about how they could be better integrated into the decision-making process. These are (1) “retro-fitted” RIAs, (2) RIAs and the role of external policy groups, (3) RIAs and secondary legislation, (4) RIAs and EU legislation and (5) RIAs on politically sensitive issues. These are dealt with in turn below.

(1) “Retro-fitted” RIAs:

The *RIA Guidelines*²² and the Report on the Introduction of Regulatory Impact Analysis²³ emphasise the importance of carrying out RIA as early as possible in the regulatory process. In relation to primary legislation, RIAs should be conducted before a Memorandum is brought to Government seeking permission to regulate, and a RIA should accompany the Memorandum seeking approval for the General Scheme of a Bill.

²¹ OECD: Regulatory Impact Analysis: Best Practice in OECD Countries, Paris, 1997

²² *RIA Guidelines - How to conduct a Regulatory Impact Analysis*, Department of the Taoiseach, 2005

²³ *Report on the Introduction of Regulatory Impact Analysis*, Department of the Taoiseach, 2005

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While this provision was necessary for initiating implementation, and has ensured the successful roll-out of RIA across Departments, it does not appear sufficient to ensure early integration of RIA into the policy-making process. The Memorandum for Government may represent the result of a long process of policy formulation, and requiring a RIA at that stage may be too late to influence the outcome. Almost all of those whom we interviewed who had carried out a RIA, as well as those who were impacted, felt that it should have been started earlier. Civil servants were also concerned about the interaction with political decision-making. They felt that the legislative process could be more complex and non-linear than the Guidelines depicted (for example, that consultation might precede the development of options), and were unsure how to reflect this in the written document.

Despite these difficulties, those civil servants who carried out RIAs recognised the value of a way of structuring or formalising the policy process. They simply felt it would be better if costs and benefits were already being assessed when Departments were engaged in talks with stakeholders or Ministers were developing policy. There was concern that the RIA process lost credibility where there really were no options. One UK civil servant involved in the preparation of RIAs described a similar situation as “producing policy-based evidence rather than evidence-based policy”. In particular, civil servants felt that there was no point in going to great lengths to analyse costs and benefits of policy options which had already been ruled out.

(2) RIAs and the role of external policy groups

Review Groups (either inter-departmental or involving internal and external shareholders) and agreements under Social Partnership were cited as examples of where civil servants felt that new legislation or policy changes had already been decided on, and that the RIA could not affect it, since those who carried out the RIA were not responsible for, or even involved in, developing and evaluating policy options.

From the point of view of external stakeholders, some who were consulted about proposed regulations and legislation saw the Social Partnership forum as the real focus for negotiations: RIA did not impact on these and costs and impacts had never been discussed. Some also thought this was the right approach; they felt that their role in Social Partnership talks was to establish broad policy aims, and that it was inappropriate at that stage to get involved in the details of costs and benefits. Implementation options were the responsibility of Government Departments, but there was a perception of a gap in the dialogue between the two stages (agreement of broad policy aims, and the production of detailed regulations), where a stage involving consultation on regulatory options had been missed out.

The *RIA Guidelines* state that, when any Policy Review Group is formed, its terms of reference must include a requirement to take account of the principles of Better Regulation: necessity, proportionality, consistency, effectiveness, transparency and accountability. Also, where primary regulations or significant regulatory change is being proposed, consideration should be given to conducting a RIA as part of the work of the Review Group. The Table of RIAs (Annex 2) contains two examples of RIAs carried out by a review group – both by the Company Law Review Group under the aegis of the Department of Enterprise, Trade and Employment. However, a number of other legislative initiatives have had their origin in some form of internal (e.g. cross-Departmental) or external policy review group, but RIA had not formed part of the group’s deliberations.

(3) RIAs and secondary legislation

In Ireland, RIAs are required for significant secondary legislation, with the interpretation of “significance” left up to individual Departments. This flexibility seems to have resulted in a lower than expected number of RIAs in these areas, given the volume of purely domestic statutory instruments (several hundred) laid annually

before the Oireachtas. Some members of the RIA Network also expressed concern about the lack of a mechanism within Departments to ensure consistency, particularly in the application of the “significance” threshold, or even to keep track centrally of what secondary legislation is being developed. We have considered whether there should be some external oversight of the decision to conduct or not to conduct a RIA on secondary legislation, given the discretion currently allowed to individual Departments to decide for themselves whether the “significance” threshold for requiring a RIA is met. Given the lack of an integrated system for tracking and measuring the significance of secondary legislation, however, we concluded this would be difficult to do without duplication of effort and the risk of adding bureaucracy without achieving the desired effect. Individual Departments are best placed to assess significance in the context of their own areas of expertise. However, if ex-ante scrutiny of SIs is not feasible, an ex-post system whereby Departments are required to publish an account of whether secondary legislation was accompanied by a RIA and, if not, to give reasons why, may be more desirable in the long run: it should leave discretion with Departments to decide on the issue of “significance”, while creating an incentive for decisions to be justifiable. This point is further discussed in Section 6.4; no recommendation on the subject is made in this section.

(4) RIAs and EU legislation

The *RIA Guidelines* emphasise the importance of conducting RIAs on proposed EU Directives and significant Regulations before they are agreed, so that the information they generate can inform Ireland’s negotiating position and minimise potentially negative effects. They note that even when the EC has carried out a RIA, its focus will (correctly) be on the European impact, which is not necessarily the same as the impact on an individual Member State. It could therefore be used as an input to the national RIA, but cannot replace it. The *Guidelines* also indicate that the RIA should be updated as required during the negotiating process and transposition into Irish law, to take account of significant changes.

The quantitative evidence on the number of RIAs conducted on EU Directives and Regulations alone (as opposed to their transposition via primary or secondary legislation) indicates that only three such RIAs have been carried out. This is a matter of concern, given the volume of such legislation and its importance for Ireland. It is not clear why the numbers are so low, but clearly there is a need for greater senior management involvement within Departments to ensure that the Guidelines are enforced. While some EU instruments are purely technical in nature (for example, the amendment of existing Directives to reflect the accession of new Member States to the EU), others are highly significant. As with secondary legislation, we have examined whether there is a method available of easily making visible which “significant” EU Directives and Regulations are being considered at any time. We have considered whether linkages could be created between the RIA process and either the EU Scrutiny process or the system of updates on EU Statutory Instruments for Cabinet provided by the Office of the Parliamentary Counsel to the Government, but have come to the conclusion that this would also be difficult at this time, for similar reasons to those given under “RIAs and secondary legislation”, above.

In interviews with those involved both in negotiations on EU Directives, and on their transposition, two difficulties emerged: how to keep the RIA up-to-date as the process developed, and how to deal with transposition of the final Directive²⁴. The first arose because of the nature of the negotiation process, during which up to 100 new provisions (most of which do not appear in the final text) may be proposed to the European Parliament, and the gap between receiving proposed amendments and attending Working Groups

²⁴ It should be noted that, despite the difficulties discussed here, some of the most complete screening RIAs to date, and the forthcoming full RIA on the Proposed Surface Water Classification (including Environmental Quality Standards) Regulations, were carried out on EU Regulations and their transposition. It is intended that this full RIA will be published with the draft Regulations. The Screening RIA on the Environmental Liability Directive was initiated to inform the making of the transposing instrument (i.e. before the making of the transposing instrument). This RIA issued with a consultation paper on the Directive. It is now proposed that a revised RIA, taking into account observations received in the initial consultation phase, will issue shortly with the draft Regulations.

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to negotiate can be as little as two working days. Some interviewees felt that, given the complex and iterative process involved in negotiating Directives, updating the RIA for every significant proposed amendment could create an unsustainable administrative burden.

This difficulty seems to arise from an interpretation of “the RIA” as a complete, published (or publishable) document, as opposed to RIA as a living document or process which informs the negotiating stance taken on issues. The requirement in the *Guidelines* that RIAs should be updated as required during the negotiating process may need to be clarified, since it seems to be interpreted as a requirement for a new RIA in publishable form every time a new provision is proposed for a draft Directive.

In relation to transpositions, it was suggested in some cases that there was little flexibility left at the end of the process, so that RIAs became “pointless” or “a box-ticking exercise”. However, Directives purposely allow a certain degree of flexibility to Member States to implement them in a way which suits their national systems, so that there should be options for their transposition. When finalised, the Directive should be published with the RIA developed during negotiations, which should explain what the proposal is and how it impacts on Ireland. It should also provide some explanation of what other options were considered during the process of developing the Directive. Those responsible for transposition can then use this as an input to the RIA on implementation options. If a RIA was carried out on initial publication of the legislative proposal and on the final document, there should be little additional burden in completing a RIA on the transposition. The RIA therefore progresses alongside the legislative process, but formal publication is required only at specific points.

The UK has a useful section in its guide to transposition²⁵, looking at how impact assessment fits into the transposition process. It deals explicitly with this issue, distinguishing between prescriptive elements and those which allow some discretion.

Case study: UK on transpositions

The UK Government Transposition Guide highlights the way in which impact assessment should be used throughout the transposition process. The Guide recommends that impact assessment should begin when a proposal is adopted by the European Commission, and that at this stage, options should be developed for the UK negotiating position. The impact assessment should include an assessment of risks, costs and benefits. The Guide suggests drawing on any impact assessment carried out by the EC, but the focus should be on the impact on the UK. The impact assessment is revised as the proposal goes through readings in the European Parliament and European Council. Once the Act is adopted, a project plan for transposition is finalised, and implementation options are identified.

At this stage, the impact assessment is “refocused”. The Guide distinguishes between elements of a Directive which are prescriptive, and those which contain some discretion as to how they are implemented. There is a clear Government aim to avoid “gold-plating” where implementation goes beyond the minimum required by a Directive. The impact assessment is expected to consider this as part of the evaluation of risks, costs and benefits.

The Guide emphasises the following:

Supporting evidence should clearly identify all the feasible options which have been considered in order to implement the Directive. Where the Directive is ambiguous and different interpretations of how it should be applied are possible, the Impact Assessment should set out those different interpretations as possible options for implementation and assess the costs and benefits and risks of each option.

²⁵ http://bre.berr.gov.uk/regulation/documents/europe/pdf/transposition_guide.pdf

The evidence should state clearly whether any of the proposed implementation options will result in more burdens being imposed than are required by the Directive. If the selected policy option involves over-implementation, it should be justified by a strong cost-benefit analysis and extensive consultation with business.

The final part of the impact assessment sets up the process of post-implementation review. This is intended as a check on how legislation works in practice, and as a means of evaluating whether actual costs and benefits are close to those proposed in the ex ante assessment. The Guide recommends that the post-implementation review should be linked to the EC review where practicable.

(5) RIAs on politically sensitive issues

One group of civil servants interviewed made the point that political decisions sometimes had to be based on what was the best achievable option at a given time, rather than a reasoned consideration of policy options. Previous decisions could be re-visited, or seemingly unrelated issues could become part of the same negotiation process. In this context it was sometimes difficult to adhere to the principles of Better Regulation – for instance, the final content of a Bill might never have been subject to public consultation. In some cases there was a reluctance among civil servants to include sensitive or confidential information in a RIA, for publication with the draft legislation, as it might cause unnecessary controversy. Some were also unclear how confidential information provided in the course of consultation should be treated in the RIA. Thus there was more information available within Departments (both on costs and on the impacts of existing and proposed policy) than was reflected within a RIA.

While some of these issues may require further guidance, others are not unique to the RIA process, and there are existing solutions available in the public domain. For example, treatment of confidential information is dealt with briefly in the Government's Guidelines on consultation²⁶, and a number of developed examples of guidelines for dealing with the issue are available (see, for example, the Commission for Communications Regulation's Guidelines on the treatment of Confidential Information, available at http://www.comreg.ie/_fileupload/publications/ComReg0524.pdf). Issues of sensitivity and confidentiality should be considered in the context of the Freedom of Information Act, which provides for exemptions for, inter alia, the functions and negotiations of public bodies; information obtained in confidence; commercially sensitive information; and personal information. Where RIAs contain information which is exempt under the provisions of the Act, they can be partially published or, in exceptional circumstances, withheld in their entirety; however, any such exemptions should be narrowly construed. Since it is felt that application of the Consultation Guidelines and of Departmental Guidelines on the Freedom of Information Act should be sufficient to deal with this issue, no specific recommendation is made.

6.2.3 Recommendations on better integration of RIA with the decision-making process

1.1 Strengthen the high-level support for RIA, with increased focus on secondary and EU legislation

The basis for RIAs in Ireland is a government decision, rather than legislation. Many important implementation considerations are set out in the Department of the Taoiseach's Guidelines and not in the Decision itself. A striking feature of the current state of RIA implementation is that its “bottom-up” aspects appear to be stronger than its “top-down” aspects – an unusual feature in this type of regulatory reform

²⁶ *Reaching Out: Guidelines on Consultation for Public Sector Bodies*, available at http://www.betterregulation.ie/attached_files/Pdfs/Consult%20english.pdf

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initiative. Individuals carrying out RIAs were generally well-motivated and had access to a good range and quality of supports. There was a perception, however, of a lack of higher-level management commitment to them, and that the policy-making process is separate to, and happens before, the RIA.

While a legal requirement to carry out RIA may provide a stronger basis for its implementation, it may not be necessary as many countries have successfully implemented RIA without it. However, in order to demonstrate political commitment and to increase accountability, it is proposed that senior management should raise the profile of RIAs and promote quality. This should ensure greater focus on RIAs and act as an indirect quality control mechanism. If this does not transpire, however, the issue of legislative backing for the requirement to produce a RIA should be re-considered.

1.2 Reinforce requirement that Policy Review Groups produce RIAs

The commitment to the Better Regulation agenda needs to encompass the entire political process. While some Review Groups – notably, the Company Law Review Group - have taken on board the Better Regulation approach and have included a chapter on RIA in their reports, it appears, from the interviews carried out and from the RIAs examined, that other group responsible for important policy recommendations and proposed legislation have not carried out RIAs and have not taken their decisions on the basis of any structured analysis of costs, benefits and impacts. In some cases, this may have been because the group was established prior to the RIA Decision; however, two and a half years on from the Decision, carrying out a RIA should now be standard practice. The Guidelines, while an excellent document for their purpose, do not provide an adequate level of political backing. It is recommended, therefore, that the Government Decision in relation to policy groups should be brought to the attention of all such groups set up since June 2005, reminding them of their obligation to conduct a RIA where their recommendations involve the introduction of legislation, changes to the regulatory framework or the creation of a new Sectoral Regulator. All RIAs should be published.

1.3 Embed RIA thinking earlier in the policy development process via an early first draft of the RIA, with oversight by senior management and integration into Departmental Workplans

At present, RIA is regarded as a document, to be attached to the Memorandum for Government. In order to become fully embedded in the policy development process, it needs to be regarded as a process, and needs to start earlier. Both business representatives and those who prepared RIAs felt that, by the time a Memorandum for Government is prepared, options have been narrowed down and choices already made. RIA thinking needs to start at the time when the issue which might lead to regulation first emerges. Even if the necessary information is not available to assess impacts at that stage, policy makers should be considering the sort of information required and what strategies might be used to access it.

For this reason, it is suggested that a brief analysis, in the form of a first draft of the RIA, should be initiated as early as possible in the process. The purpose of this approach is to broaden out the options considered, and to start the thinking about their impacts, from the beginning, so that the rest of the process is informed by this mindset. The early-draft RIA would both address the problem identified, and begin to consider planning the solution. It would be essential for such a draft to be seen and approved by senior management at an early stage. However, it must be recognised that any such draft will be subject to change. New information and ideas may arise during the process of developing regulation, which mean that some options will be dropped while new ones emerge. The purpose of the early draft RIA is not to set in stone options which may turn out to be irrelevant or inappropriate, but to start internal debate about options.

An advantage of the current system is that the RIA is tied to a definite stage in the process of preparing legislation – the Memorandum for Government. It is important that RIA thinking should be integrated into existing systems, but at an earlier stage. In the EU system, Roadmaps are prepared by the various services at the start of each year for initiatives which are anticipated for the following year; in the autumn, they are revisited, integrated into the Commission's Legal and Work Programme, and decisions made on an inter-service basis about the scope of analysis required. RIAs here should be integrated with Department's Annual Plans and Strategic Plans, for those initiatives which may result in a requirement for regulation. The workplan for each Bill should also include a first draft of the RIA from the start. This would be developed as the legislative proposal progressed, including via consultation. Urgent issues will inevitably arise during the course of the year, but as far as possible draft RIAs should be available for all foreseeable major initiatives.

1.4 Provide more details in Guidelines on how the RIA should be integrated into the EU policy-making process, based on current best practice

In the spirit of Better Regulation, the important issues are (i) that Ireland's negotiating position should be informed and evidence based and (ii) that the impacts of the final Directive or Regulation should be clearly understood. This would involve formally carrying out a RIA on the initial Commission proposal and on the final, adopted text, with the interim process more fluid and case-dependent. Where civil servants have to observe the principles of Better Regulation "on the hoof", clearly it may not be either possible or necessary to produce an updated RIA in publishable form in the time available; however, where time permits and the information is available, the RIA should be kept as up-to-date as possible. One RIA dealt with such issues clearly and simply by indicating, in a different colour font, where proposals had been withdrawn or amended following negotiation.

It might be more helpful to those charged with transposition, if they are not the same individuals who have negotiated the legislative proposal, to have a narrative-style summary of how the proposal has evolved over time, and the implications for Ireland, rather than a large number of versions of the RIA with only certain sections changing from one to the next. It would also be helpful if, as in the case of the UK, implementation options were identified when the Directive is finalised, with the Guidelines distinguishing between those elements which are prescriptive and those which allow some discretion. Our opinion, after interviewing several individuals from different Departments involved with EU negotiations, was that in many cases the principles of Better Regulation were well understood and applied, and that any perceived difficulties in applying the Guidelines could be overcome by clarifying the application of the Guidelines to the real-life process.

If numbers are sufficient, it may also be appropriate to consider further/specialised training for those closely involved with EU negotiations and transpositions; this is dealt with under the Recommendations on "Managing the RIA across Government", in Section 6.4, below.

6.3 Managing the RIA within the Department

6.3.1 Current situation

This section examines how RIAs are managed within Departments, drawing on the experience of those who have carried out RIAs and of members of the RIA Network. The next section deals with how the RIA system operates across Government generally, and in particular with quality control systems and the supports available.

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In all the Departments we surveyed, RIAs were carried out by the line unit responsible for preparing legislation or regulations. In some cases the Department had a legal unit, or a legal adviser, who provided assistance in the preparation of legislation, but mostly there was no central unit involved in preparing the legislation, the Memorandum for Government or the RIA. Some Departments produced legislation very often, and individuals might already have done several RIAs. In others, legislation was produced infrequently, which militated against the acquisition of a critical mass of experience and learning in carrying out RIAs. This suggests that, in some Departments, there may be potential either to maximise the use of existing staff trained in RIA techniques such as cost-benefit analysis, or to ensure that training programmes are in place to develop such resources. It was recognised that RIAs could result in additional work, particularly where existing resources and supports were not fully utilised from as early a stage as possible in the process, having regard to the time constraints which may exist.

RIAs were carried out either by individuals or by small teams. In one example of good practice, the process had featured in-house discussion and debate involving senior individuals within the Department, as well as the use of consultants and consultation with industry. Several interviewees felt that, if legislation was prepared purely by the team working on the issue, there was a danger that the full range of options would not be considered. Alternative models were cited to improve objectivity and thereby increase the possibility of the RIA changing the outcome. These included the model used for Environmental Impact Statements (EISs), with two teams, one designing the legislation and the other assessing impacts via an iterative process; and the Value for Money reviews, which involved assessors from outside the policy area.

Only one of the six RIAs studied in depth had made use of the economic consultants retained by Department of the Taoiseach to assist in carrying out RIAs. The impressions were very positive: the consultants had made helpful inputs to the template for impact assessment, highlighting key impacts, and editorial changes. Specialised economic experience was seen as absolutely necessary, even though one member of the team had carried out Environmental Impact Assessments previously and had already had economic training. Another interviewee had used other outside consultants on technical aspects of their proposed legislation.

6.3.2 Compatibility with best practice

The RIA system in Ireland is, by comparison with many other OECD countries, still at a relatively early stage of implementation. Considerable effort has gone in to providing supports, training and guidance to those who carry out RIAs. Line Departments have accepted responsibility for producing RIAs, as reflected in the number and, in some cases, the quality of RIAs produced. The current system is in line with international best practice: the EU recommends that regulators themselves should be responsible for carrying out RIAs, subject to quality control, availability of training and other supports (see 6.4, “Managing the RIA across government”). It is also necessary that regulators are given the financial resources and the physical capacity to carry out high quality RIAs. This does not necessarily mean that each civil servant carrying out a RIA must be capable of doing a full cost-benefit analysis; this would not necessarily represent the best use of resources. However, they should be able to recognise when such an analysis is justified, and be able to procure expertise (either within the Department, from a central Government resource, or externally) where needed.

The main issues which arose in interviews with those who had conducted RIAs were:

- ▶ Feedback: awareness of existing cross-Departmental feedback mechanisms was low, and there was a lack of feedback and review within Departments
- ▶ Senior management commitment was needed to back the Better Regulation agenda and ensure that RIAs were carried out when they should be

- ▶ Tools such as the RIA Bulletin and RIA information posted on Departmental Intranets were important in terms of awareness
- ▶ Use of resources: people trained in Cost-Benefit Analysis, such as graduates of the IPA Masters' Degree in Policy Analysis, were scarce resources and their expertise should be deployed to sections within Departments and Offices involved in carrying out RIAs
- ▶ It was crucial to have more and more examples of Best Practice available, in the form of actual RIAs, to promote learning within and across Departments.

Overall, those whom we interviewed were very committed to the RIA process and recognised that it improved decision-making. However, there was a feeling that they needed more support from within their own Departments. A more formal internal quality control system may be required to provide feedback and enable Departments to improve their output.

6.3.3 Recommendations on managing the RIA within the Department

II.1 Make RIA planning and reporting (both on RIAs in progress and on proposed RIAs) a normal part of the management system

RIA practitioners whom we interviewed had, in many cases, produced high quality work within a short timescale. However, in some cases they felt that RIA was not a priority within their Departments. Comments on the lack of feedback from within Departments suggest that there is a lack of scrutiny by management. The variable quality and depth of the RIAs we examined supports this view. No external quality control body can substitute for the normal management function of a Department, either in ensuring that RIAs are carried out where appropriate, or in assuring their quality, particularly in relation to cost-benefit analysis.

Visible senior management commitment to the process is necessary. It is therefore proposed that carrying out good quality RIAs where required should be part of every manager's goals and objectives; that performance evaluation should include RIAs; and that reporting on RIAs should be an item on the agenda for senior management meetings within Departments. This should be backed up by the formal requirement for Divisional Business Plans to include RIAs and for Management Advisory Committees to consider regular reports on progress.

II.2 Ensure consistent application of RIA within Departments and, in particular, that the "significance" threshold is consistently applied

While the application of RIA to primary legislation is by now well established, evidence suggests that the same may not be true of secondary legislation. RIA should be applied to "significant" secondary legislation, EU Directives and "significant" Regulations; however, "significance" may not be interpreted consistently even within Departments, as well as across them. Some RIA Network members also raised concerns about the lack of a mechanism within some Departments to keep track of what secondary legislation is being developed. Oversight is needed within Departments at a suitably high level to ensure that RIA is consistently applied. There is also a need for cross-Departmental co-ordination (see "Managing the RIA system across Government") in this context.

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II.3 Where legislative proposals are brought forward without a RIA, senior management should be prepared to explain the reasons

It is recognised that political imperatives or pressure of events may occasionally mean that it is impractical for a RIA to be produced. However, provisions for exceptions should not be abused. It is considered that acknowledging this fact, but encouraging senior management to justify the non-production of RIAs in a transparent fashion, should prevent any possible exploitation of what may be perceived as a “loophole”.

II.4 Maximise benefit from trained resources, such as those with an MScEcon in Policy Analysis from the IPA; ensure that training is provided to meet future needs

The carrying out of RIAs by the line unit responsible for preparing legislation or regulations appears to be appropriate and in line with best practice. However, where a Department has a low workload in areas involving RIAs, it may be appropriate to have some expertise available, via a central unit, to provide support on RIAs, and particularly on CBA and other evaluation techniques. Such a unit would help ensure quality and consistency in the Department's RIAs. It could perhaps be integrated with the provision of support across the wider legislative process. To maximise efficiency, this Unit should include people with the appropriate expertise, such as those with an MScEcon in Policy Analysis from the IPA. Alternatively, it may be more efficient for Departments with relatively few legislative proposals to ensure that a number of officials have completed the Policy Analysis course or an equivalent, and that their expertise can be made available to other units on a short-term basis as needed, without the need to create a separate unit.

A central unit may, or may not, involve members of the RIA Network, depending on their current role; at present, some network members are deeply involved in the preparation of RIAs, while others do not feel that they have the necessary expertise to advise on RIAs and operate in more of a liaison role with the Department of the Taoiseach.

In the UK each Department has a Departmental Regulatory Impact Unit (DRIU) responsible for helping policy officials draw up a RIA. The Cabinet Office Regulatory Impact Unit (RIU) is also on hand to offer help and support, as well as quality control.

Departments should also attempt to recognise early where input from external consultants may be required – in particular, for the evaluation of impacts, whether or not this takes the form of a full CBA. They should ensure that enough time is allowed within the process to avail of such external expertise where necessary.

The internal process should preferably also involve reviews by individuals independent of the policy area concerned, to provide an objective view of the options. These reviews should provide a forum for robust internal questioning and debate.

II.5 Building on the commitment contained in Towards 2016, require Annual Reports to show what legislative proposals have been accompanied by a RIA and, if not, why not

In order to maximise the benefits of the RIA system in terms of strengthening democracy, improving transparency and participation, and leading to better government, the RIA documents themselves must be published. This is reflected in the commitment in *Towards 2016* that Government will:

“Continue to monitor levels of compliance with requirements in relation to Regulatory Impact Analysis. Government Departments will publish within their Annual Reports details of legislation and regulations published during the relevant year and how RIA was applied in such cases”.

This commitment has been met, in the sense that Annual Reports²⁷ detail where RIAs have been carried out. It is not always clear, however, whether or when they were published. It is also not clear, in relation to some secondary legislation and EU legislation where RIAs were not carried out, why this was so. It is recommended, therefore, that the commitment regarding publication should be made more specific, to require annual reports to show (a) whether/where RIAs are available and (b) if RIAs were not carried out, why not. This proposal is aimed at increasing awareness of, and giving higher priority to, the RIA process within Departments, and also indirectly at improving the quality of the RIAs themselves. The latter point is dealt with more fully under “Formalise publication requirements” in Section 6.4 below.

It is also proposed that, where a regulatory proposal is not accompanied by a RIA, the reasons should be made public. This proposal is an attempt to resolve the current lack of transparency, highlighted in Section 6.4, about when or whether RIAs are carried out on secondary legislation. Our review of the RIA landscape suggests that the term “significance” is interpreted liberally, given the low volume of full RIAs and of RIAs on non-EU Directive-related secondary legislation. If such decisions are left to those responsible for preparing the legislation, clearly there is an incentive to avoid the extra burden of RIA by downplaying the significance of the proposal. However, the volume of regulations, and their specificity to Departments, are such that it is difficult to see how any outside body could sensibly have a role in deciding on “significance” on their behalf in an *ex ante* fashion – i.e. deciding before the event which regulations should be subjected to RIA/full RIA.

While it seems more feasible to scrutinise these decisions *ex post*, so that Departments retain discretion over the implementation of RIA, this needs to be balanced by a requirement for transparency of decision-making, and by a greater integration of RIA within the overall management of the Department.

6.4 Managing the RIA system across Government

6.4.1 Current situation

This section describes and evaluates the systems and supports available across Departments to ensure the successful implementation of RIA. These consist of:

- ▶ Guidelines
- ▶ Training
- ▶ Other support
- ▶ Quality control
- ▶ Publication
- ▶ RIA Network

Guidelines

The Department of the Taoiseach has produced very comprehensive *RIA Guidelines* which are published in book form, available on the website and widely used. These describe the context of Better Regulation, explain the RIA model, provide detailed advice on how to conduct both screening and full RIAs and give worked examples of specific issues. All of those we interviewed who had carried out RIAs were aware of, and used, the *Guidelines*. The *Guidelines* also refer to the Government’s guidelines on public consultation. The Better Regulation website (www.betterregulation.ie) provides easy access to all the main documents concerning Better Regulation.

²⁷ See, for example, Annual Reports for 2006 for the Departments of Agriculture and Food; Arts, Sport and Tourism; Community, Rural and Gaeltacht Affairs; Defence; Environment, Heritage and Local Government; Foreign Affairs; Justice, Equality and Law Reform; Social and Family Affairs; Taoiseach; and Transport.

Training

A two-day training course on RIA is organised by the Civil Service Training and Development Centre; at the time of preparing this report, 245 staff had participated in it. The course covers the following topics:

- ▶ Economic and Social Regulation
- ▶ RIA Model: First steps (Objectives and Options; Alternatives to Regulation)
- ▶ Costs, Benefits and Impacts
- ▶ RIA Model: Final Steps (Consultation; Enforcement and Compliance; Review)
- ▶ RIA Model: Impact Analysis and Introduction to Analytical Techniques
- ▶ RIA and EU Legislation
- ▶ Independent Sectoral Regulators

As well as lectures, the course involves group activities such as analysis of RIA and a workshop on the application of RIA. It is delivered by staff from Department of the Taoiseach, Department of Finance and external consultants. Staff from the Department of the Taoiseach have also travelled to other Departments to deliver a series of introductory presentations on RIA. Another 583 officials have also attended the policy analysis and the legislative process courses in which a module on RIA is included.

Other support

The Better Regulation Unit (BRU) in the Department of the Taoiseach provides a central support function for the implementation of RIA. As well as producing the *RIA Guidelines* and training, the BRU acts as a helpdesk, providing advice and support to all Departments when undertaking RIAs. This function was very positively regarded by RIA practitioners; several mentioned that the Better Regulation Unit had provided advice and examples which improved the quality of the RIAs. This was especially useful where the individual had not been able to attend the formal training before carrying out the RIA. The BRU produces a RIA Bulletin which provides updates on developments and examples of Best Practice from within the Irish system. Access to economic advice is available through a central consultancy contract administered by the Department of the Taoiseach.

Quality control

The Government White Paper, *Regulating Better*, states that “RIAs will be scrutinised by the Departments of the Taoiseach and Finance (Public Expenditure Division) from a quality perspective. RIAs will also be examined by relevant Departments/Offices in respect of particular policy impacts, e.g. by the Department of Enterprise, Trade and Employment in respect of business and consumer impacts or by the Department of Social and Family Affairs in respect of impacts on poverty.” The Better Regulation Unit comments on all draft RIAs brought to Government, in line with Cabinet procedure. At present, RIAs on secondary legislation and EU legislation, as well as those prepared by policy groups, are not systematically forwarded to the BRU, and so, unlike the situation with primary legislation, the BRU does not always have the opportunity to comment on them.

Publication

Of the 74 RIAs we examined, 31 had been published to date (including one draft RIA which was published for consultation). The Guidelines state that the RIA should be published with the legislation. We are aware that, in many cases, the legislation has not yet been published, so this may not yet be a cause for concern; however, publication should be monitored to ensure that draft legislation is accompanied by a RIA. Since Departments' websites are all designed differently, RIAs may be in different places on each, and difficult to

find. There is no central repository of RIAs, either within or across Departments. Of the six cases we examined in depth, no draft RIAs had been published for consultation (in many cases, because of the timing issues explained earlier), although a screening RIA for the Environmental Liability Directive had been.

The RIA Network

At the beginning of 2007, a RIA Network was set up to bring together officials from each Government Department/Office in order to share experience and develop best practice on conducting RIAs. The RIA Network meets quarterly and also has a role in ensuring that the commitments on RIA contained in *Towards 2016* are met. The Network is supported by officials from the BRU. This is an example of a co-ordination mechanism aimed at sharing experiences and finding common solutions, rather than a “hard” quality control mechanism.

6.4.2 Compatibility with best practice

Introduction

The EPC paper²⁸ emphasises the need for the use of common, standard, practical operating procedures that ensure consistency of analysis throughout all parts of government. Regulators need to be given training in how to carry out high quality RIAs, how to make use of the results, how to involve the public and affected parties effectively, and how to communicate the outcome. Effective RIA processes form an integral part of a wider regulatory reform process, designed to improve regulatory quality including law drafting standards and the assessment of alternatives to regulation. In most OECD countries, Guidelines have been produced by some central organisation for carrying out RIAs. Also, in most cases, these Guidelines are supplemented by additional information designed to address specific aspects of the process.

Canada has recently established a Centre of Regulatory Expertise, which provides specialist-level analytical expertise to Departments in risk assessment, cost-benefit analysis, performance measurement and evaluation. Experts from CORE can be assigned to Departments to work on particular regulatory initiatives, to act in a coaching and advisory role, to deliver workshops and presentations and to provide peer review.

Guidelines

The Guidelines were highly regarded by interviewees. They were variously described as “good”, “excellent”, “invaluable” and “a really well-written document”. The best amongst the RIAs we examined were the ones which adhered most closely to the Guidelines; however, these were generally also carried out by Departments whose remit was most susceptible to an economic approach. The need for more examples of best practice, especially ones specific to their own policy area, was highlighted by almost all the interviewees who had conducted RIAs. One interviewee felt that a supplement to the Guidelines was needed, such as a writer’s guide with lots of examples. Some of those who conducted RIAs had contacted the Better Regulation Unit and been directed to examples for use in writing RIAs. In considering the detailed contents of RIAs and discussing them with practitioners, a number of suggestions were made for changes to the Guidelines: these are dealt with in Section 7.

²⁸ See footnote 15

Training

Two of the interviewees who had carried out one of the six selected RIAs had received training from the Civil Service Training and Development Centre, as had the members of the RIA Network we interviewed. A further two had done Masters level work which included RIA modules (for example, IPA MScEcon in Policy Analysis) and training on cost-benefit analysis. It should be noted also that, in some cases, the initiation of the RIA preceded the introduction of the training programme; in another, the timescale did not allow the individual to attend a course before preparing the RIA. Those who had attended training were very positive about it. One said that it was not only useful in itself but had also led to awareness of the availability of consultancy on economic analysis, which was needed. Where staff from the Better Regulation Unit had travelled to Departments to give shorter presentations on RIA, these were also found to be very useful for awareness-raising. One interviewee noted that presentations within the Department helped both those who may at some point work on RIAs, and those who may be asked to input information to a RIA being carried out elsewhere in the Department.

The main problem experienced with training was timing – in most cases RIAs were required urgently, so that if the individual had not already attended a course, there was little chance of fitting one in within the timescale. However, as RIA becomes embedded in the system, managers should, in general, know well in advance that their unit will be required to conduct a RIA, and should plan to have trained resources available. This problem should diminish over time; however, in order to ensure a basic level of awareness, even for those peripherally involved in RIAs, other training delivery mechanisms should be considered. The UK's Better Regulation Executive (BRE) has produced a short (1-hour) e-learning course which introduces the concept of RIA, as shown in this extract from the BRE's website:

This programme provides a short overview of the Impact Assessment process to help you in the creation of an Impact Assessment. Throughout the programme you will be encouraged to refer to the Impact Assessment Guidance and Impact Assessment Toolkit on the Better Regulation Executive web site which provides comprehensive advice on every aspect of the process. In addition, you are encouraged to speak to colleagues in your Departmental Better Regulation Units and to involve economists at the early stages of the development of the policy.

This introduction should take about one hour. At the end of it you will be aware of the steps that you will need to take in completing an Impact Assessment, as well as think about who you should involve at the early stages.

Please note that pop up windows are used in this programme and you should ensure that any pop up blocker associated with your internet browser is turned off or you may experience problems viewing the programme.



[Click here to start the course](#)

Impact Assessment

e-Learning Course

Although this is obviously limited in scope, it would be of assistance to anyone starting the RIA process for the first time, and an equivalent could be considered for Ireland. Another advantage would be its location-independence: a concern was raised that decentralisation would make training and awareness-raising more difficult, as Departments became scattered about in different locations, and e-learning could be a way to counter this.

Quality control

The OECD has identified the development of an institutional structure for RIA as a key success factor. An important element of this is a quality control system for proposed regulations. Internationally, quality control bodies perform various functions including consultation on the draft RIA, technical assistance, reviewing the quality of RIA and reporting on ministerial compliance with RIA. The quality control body issues a guideline for drafting RIA in most cases. The relationship between the control body and regulating ministries is an important factor in understanding a country's RIA system.

In nine OECD countries including the UK, Australia and USA, an independent control body can advise Ministries to revise the draft RIA. Many other countries have an independent quality control body whose role is less clearly defined. The quality control level may be compromised when the RIA is controlled by the regulators themselves or by Ministries such as Finance, Justice etc.

The EU recommends as best practice that regulators themselves should be responsible for carrying out RIAs, but that a central unit should be established, close to the centre of government, with strong powers to ensure quality control and compliance. This Unit should also produce guidelines and provide expert resources, support and advice to regulators. The EC established an Impact Assessment Board in November 2006 with a view to improving the quality control of its own impact assessments.

In Ireland, quality control is exercised over RIAs on primary legislation by the Better Regulation Unit in the Department of the Taoiseach, which comments on all draft RIAs brought to Government. These comments are sent to the sponsoring Department, but may not necessarily reach the individual who conducted the RIA. Feedback from other Departments does not seem to be systematic, and systems for tracking secondary and EU legislation in progress seem to vary widely among Departments. The role of the Department of Finance in scrutinising RIAs from a public expenditure point of view appears not to have developed as foreseen: based on discussions with selected individuals, it appears that the focus of Sectoral Policy Division is necessarily on the overall Departmental vote and on selected, "big-ticket" items. One official commented that, if the Department of Finance had made comments on a Memorandum for Government but still had concerns about a proposal after it had been approved by Cabinet, it could request that a cost-benefit analysis be done, and would sit on the Steering Committee for the CBA; however, it is not clear why a major expenditure proposal would reach that stage without a cost-benefit analysis in the first place.

The Australian Government has a clear quality control policy for regulatory impact statements, as described below:

Case study – Australia: Quality control

- ▶ For the Australian Government, Ministerial Councils and National Standards Setting Bodies, RISs (Regulatory Impact Statements) are reviewed by the Office of Regulation Review (ORR), which is part of the Productivity Commission. The Commission has statutory independence from the executive arm of government
- ▶ RIS guidance is issued via A Guide to Regulation
- ▶ Proposing Departments/Agencies should contact the ORR early in the policy development process to decide whether a RIS is required.

- ▶ One of the ORR's key roles is to ensure that the level of analysis in a RIS is commensurate with a regulation's potential impact on business and the broader community. This is part of the Government's policy of regulatory best practice. A key tenet of the policy is to ensure that regulation provides the greatest net benefit to the community, and that it is the most efficient and effective way of addressing a problem.
- ▶ The RIS Guide and ORR training sessions are used to promote the RIS process and enhance co-operation with departments/agencies. When a RIS is being prepared, drafts of the RIS are exchanged between these bodies and the ORR. The ORR endorses a RIS once it meets the requirements of the RIS Guide.
- ▶ If a RIS fails to meet the minimum requirements, the ORR will advise the Department/Agency and decision-maker accordingly. Other sanctions for RIS non-compliance include identification of non-compliance within the ORR's Annual Report, "Regulation and its Review".

Publication

The EPC Paper²⁹ identifies the following as best practice:

- ▶ There is widespread communication of the results of RIAs within government and to the stakeholders and the wider public.
- ▶ Ex post analyses are undertaken on a sample of RIAs, to compare expected and actual impacts. Feedback loops are established to ensure that the results of these analyses are taken into account in future RIAs and in the design of future analytical methodologies.
- ▶ Independent analysts are encouraged to assess and review RIAs carried out by government.

The OECD identifies "Communicate the results" as one of the ten Best Practices which maximise the benefits from RIA. It states that "[It] is desirable for consultation purposes that RIA be publicly disclosed as early as possible". However, it notes that while many countries disclose their RIA for consultation, some disclose it only after consultation or not at all.

Publication of the final RIA contributes to greater transparency in regulation by allowing the public to see the reasons for options chosen and the analysis which underlies the choice. It also allows academics and other commentators to analyse and comment on the quality of RIAs, thus contributing to their improvement. A useful example may be the UK's Department for Business, Enterprise and Regulatory Reform (formerly the Department of Trade and Industry), where the Employment Market Analysis and Research Unit publishes an annual compendium of Regulatory Impact Assessments on employment relations and labour market issues (see, for example, <http://www.berr.gov.uk/files/file34182.pdf>). This is done for two reasons: firstly, to improve transparency, and secondly, to assist in the monitoring and evaluation of regulatory decisions, to provide feedback for the research programme.

Many business representatives, in particular, expressed disappointment at the lack of availability of RIAs. They felt that few RIAs had been carried out, even fewer had been published, and those that were published were hard to find. There was concern about the lack of transparency around the RIA documents themselves, as well as around the whole process of developing regulations; the Small Firms' Association pointed out that, in their submission to the Business Regulation Forum in May 2006, they had requested that "All impact assessments from Government Departments should be published and the quality of the impact assessments should be tested in a transparent fashion by an independent body."

²⁹ See footnote 15

The RIA Network

Members found the RIA Network itself very useful, in terms of raising issues and sharing knowledge across Departments. There were many instances of good practice which were shared with others via the RIA Network:

- ▶ The Department of Social and Family Affairs and the Department of Education and Science have a dedicated RIA Page on their intranets, so that those carrying out RIAs can gain from the experience of others in the same Department;
- ▶ In a similar vein, internal training sessions are planned in the Department of Health and Children to share knowledge specific to the policy area;
- ▶ The Department of Enterprise, Trade and Employment is setting up a system to co-ordinate secondary legislation within the Department to give transparency to decisions to conduct, or not to conduct, RIAs.

Within their own Departments, however, RIA Network members did not necessarily have the expertise themselves to advise on how RIAs should be conducted, and did not have the positional power to ensure that RIAs were done, and done to a good standard. Several members felt that they had difficulty in knowing what primary or secondary legislation was being prepared within the Department which might require a RIA. This made it difficult for them to know what was going on, exercise their co-ordination role and ensure that those carrying out RIA had access to all available resources. In fact, we initially found it difficult to get definitive information on where RIAs had been carried out, which suggests that most Departments have not, to date, had a central repository of such knowledge.

Conclusions on Systems and Supports

The systems and supports provided within the Irish RIA system are generally of a high standard, and very comprehensive. They have ensured the rollout of the RIA system and given individuals the tools required to carry out good RIAs in their own areas. The recommendations below concern relatively minor amendments to, or greater enforcement of, the existing system. This section does not cover suggestions regarding the detailed contents of the Guidelines – these follow from the analysis of the content of RIAs in Section 7.2.3. There is clearly a requirement for more examples of best practice specific to particular sectors: since the Guidelines cannot include all possible examples, this suggests a need for more detailed guidance, possibly as an Annex to the Guidelines. The RIA Network is a good example of a low-cost, but very effective, mechanism for sharing good practice. Publication is an area which is not currently contributing as much as it should to the development of the system.

6.4.3 Recommendations on managing the RIA system across Government

III.1 Department of the Taoiseach, in co-operation with the RIA Network, to conduct quality assessments of, and comment on, a sample of RIAs on secondary and EU legislation

Quality control should primarily be a matter for Departmental management, and many of the “Recommendations on managing the RIA within the Department” are aimed at strengthening this role. In Ireland, as in most countries with a well-developed RIA system, an independent quality control system also operates, via the Better Regulation Unit in the Department of the Taoiseach. A noticeable gap in the current system, however, is the lack of independent ex-ante quality control of RIAs on secondary and EU legislation. In order to fill this gap without creating an undue bureaucratic burden, it is proposed that the Department

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of the Taoiseach, in co-operation with the RIA Network, should review a sample only of such RIAs, in the same way as it currently does for primary legislation. Awareness of draft RIAs should be created through the RIA Network, as set out in Recommendation III.3 below.

III.2 Actively disseminate RIAs; commission external ex-post scrutiny every two years, and publicise the results via publication and seminars

Ex-post quality control requires prompt publication of RIAs, with interested parties encouraged to scrutinise and discuss them. In the US, regulatory and budget processes and policies such as RIA are regularly scrutinised, both by Congressional Committees and by independent advocacy groups such as OMB Watch, which analyses and comments on output from the Office of Management and Budget. In the UK, one of the purposes behind the Department of Business, Enterprise and Regulatory Reform's publication of its annual Compendium of Regulatory Impact Assessments is to make external scrutiny easier; publication also facilitates its own monitoring and evaluation of the effectiveness of regulation. At the present stage of development of the RIA system in Ireland, however, when independent ex-post scrutiny has not yet developed, the process should be "kick-started" by the commissioning of a formal study every two years, and by actively publicising the results via publication and seminars. Publication will also result in increased scrutiny of RIAs by impacted parties such as business representative organisations, which will act as an indirect quality control mechanism. It must be emphasised that the purpose of ex-post scrutiny is not to "catch out" poor RIAs, but to discourage their production in the first place.

Mere passive publication is not enough, however; it is recommended that, when a RIA has been completed, Departments should actively seek out and notify those who contributed to the consultation process, or those directly impacted by the proposed regulation, and inform them of its publication.

III.3 The RIA Network should be used to improve co-ordination and promote best practice. In particular, Network members should present their Departments' current and planned RIA activities at the Network; including draft RIAs on secondary and EU legislation

In addition to the requirement set out in the previous section for high-level scrutiny within Departments, to ensure consistent application of the framework, there is also a need for co-ordination across Departments. From our own experience in compiling the Table of RIAs (Annex 2), it was difficult to obtain information on what RIAs had been carried out and whether or not they had been published. Most Departments appear not to have a central co-ordinating function which keeps track of RIAs, both completed and work-in-progress. The RIA Network members would form a natural base for co-ordinating work on RIAs. It is proposed, therefore, that they be empowered to present to the RIA Network their own Departments' plans and activities for RIA, in relation to primary, secondary and EU legislation, and to circulate draft RIAs in the latter two categories to enable the Department of the Taoiseach to exercise ex-ante quality control on a sample of them.

Another result of this fragmentation is that, despite the best efforts of RIA Network members, a civil servant setting out to produce legislation may not be aware of what RIAs have been done already. A consistent theme in interviews with RIA practitioners was the need for more and more examples to show how techniques such as CBA were applied in different sectors. In fact, with a stock of over 70 RIAs already carried out and others in progress, there are many good examples in existence which could prove very useful to those embarking on RIA for the first time. However, these are not necessarily accessible, even within Departments, still less across them. Making them available on Departmental Intranets would assist others within individual Departments.

III.4 Include more practical examples, drawn from published Irish RIAs, in the Guidelines

The *RIA Guidelines* are of a very high quality: comprehensive, clear and consistent. By nature, however, they are necessarily general rather than specific. Interviews with those who carried out RIAs suggest that there is a thirst for more and more practical examples of how impacts are evaluated and compared, and a need to share these, both within and across Departments. This suggests that there may be a need for additional operational level support, including many worked examples from different sectors. This would act as a supplement to the Guidelines, perhaps in the form of an Annex. Of course the examples would have to be chosen carefully, to ensure that bad practice is not perpetuated. An example is the Canadian Writer's Guide, which supplements its Process Guide but operates at a more micro-level:

Case study: Canada: writers' guide³⁰

The Canadian Government has published a Writers' Guide which accompanies their Regulatory Process Guide. The difference between the two is that the Regulatory Process Guide establishes the principles to be followed, and outlines how the Regulatory Impact Analysis Statement (RIAS) fits into the overall scheme of producing regulation, while the Writers' Guide acts as a "how to" manual.

The Writers' Guide includes lots of examples of every aspect of the RIAs. Real examples are reproduced, and are then discussed, with strengths highlighted. The Guide also comments on improvements which could be made to the quoted examples, and again there is a discussion of why a different approach may be better.

The Guide concludes with a useful checklist of questions for the writer, covering the style of the document as well as practical concerns for each section of the RIAs.

The Department of Enterprise, Trade and Employment has produced an internal RIA Toolkit, to provide support at a very detailed level for those producing RIAs. This could be taken into account if further supporting material is produced.

Given the work under way in individual Departments by RIA Network members to share knowledge and experience of conducting RIAs, perhaps the Network could be asked to consider in detail what further supports are needed and how examples could be gathered and shared.

III.5 Consider additional training on the EU legislative process, to clarify how it interacts with RIA, with someone experienced in the process involved in training delivery

The number of staff involved in the detailed negotiation of EU instruments is relatively limited, and so, rather than modify the generic RIA training course, it may be more cost-effective to develop a module aimed specifically at these staff. The module should be developed jointly by those experienced in RIA and those who have worked through the EU legislative process. It is envisaged that a half-day training course would be sufficient. The changes should be developed in conjunction with the revisions to the Guidelines proposed in Section 6.2.3, detailing how the RIA should be integrated into the EU policy-making process, based on current best practice.

³⁰ RIAs Writers' Guide, Treasury Board Secretariat, Government of Canada, August 1992

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III.6 Consider e-learning for introduction to RIA

The training was highly regarded by those who had completed it. The problem of individuals being asked to carry out RIAs without training should decrease over time, as more staff complete the training and as RIA is incorporated into Departments' training plans. The development of an e-learning overview model should be considered, especially given the context of decentralisation.

III.7 Ensure that finalised RIAs are published, at the latest, when draft legislation is published; update as necessary throughout the legislative process

III.8 Make published RIAs easier to find by ensuring that each Department has a dedicated RIA page on its website

It is difficult to over-estimate the benefits which stem from publication. The knowledge that a document is to be published in itself acts as an incentive to quality. Availability of RIAs provides practitioners with examples of how to deal with specific problems relevant to their own policy areas as well as more general issues. Ex-post analysis of published RIAs provides feedback as to their quality and can also suggest ways of finding data for the next revision. It is important for the credibility of the process that good quality RIAs should be done, and be seen to be done. At least one published RIA has already been the subject of analysis in an industry publication (see Health and Safety Review, October 2006, for a discussion of the RIA on the Construction Industry Regulations).

Case study – UK: public disclosure:

- ▶ The Government is committed to ensuring that RIA is readily available to the public
- ▶ Consultation is mandatory for all regulatory proposals that require RIA, with a minimum consultation period of twelve weeks. A partial RIA must be issued alongside formal public consultations.
- ▶ A partial RIA follows the same format as a full RIA, but the analysis is not as yet complete. For example, by setting out the Government's analysis to date, a partial RIA sent out with a consultation document can encourage input in the policy-making process, particularly in those areas where further information is particularly needed. In addition, a partial RIA can often contain a broader range in the quantification of costs and benefits than a final RIA. In order to secure collective ministerial agreement to proceed with a regulatory proposal, an adequate RIA must have been carried out.
- ▶ Once a decision has been taken to proceed with regulation, a final RIA must be laid in Parliament alongside legislation.
- ▶ The final RIA must be placed on the relevant Department website as soon as possible.

RIAs should therefore be published, and made easy to find on Departments' websites. While 31 of the 74 RIAs listed in Annex 2 have been published, it would be difficult for someone who did not already know exactly what RIAs existed to find them. At present they tend to be associated with the subject matter, rather than grouped together, which makes it difficult for those seeking to analyse or critique the RIA process, or those developing RIAs who are seeking examples, to find them. While each Department should be responsible for publication of its own RIAs, it would be useful to have a standardised format for websites whereby all RIAs published are easy to find. It is recommended, therefore, that Departments should create a dedicated RIA page on their websites. This page might show all RIAs published, by year of publication and by topic.

III.9 Require Annual Reports to include links to where published RIAs are available and, if RIAs have been done but not published, to state why this is so

Another way to make RIAs easier to find would be for Departments' Annual Reports, which already detail RIAs which have been carried out in relation to legislation during the relevant year, to include links to the website where they are published. A large number of RIAs appear to have been written but not published; this may be of concern, although the time lapse between the presentation of a Memorandum to Government and the publication of legislation may explain some. Early publication should be encouraged, and annual reports should highlight where RIAs conducted on primary legislation have not been published with the legislation. As discussed in Section 6.2.2, any exemptions to the publication requirements should be narrowly construed. Concerns about dealing with sensitive or confidential information should be dealt with through the application of the Consultation Guidelines and the principles of the Freedom of Information Act.

7. Operation of the Irish RIA system: content

7.1 Introduction

The section assesses the RIAs which have been produced to date as stand-alone documents, and examines their content. The analysis is based on the overall set of RIAs carried out, with more detailed examples drawn from the six selected for detailed examination. The assessment follows the structure of the RIA, and works through how options are identified and evaluated, how consultation is carried out, and how enforcement and compliance issues are dealt with.

7.2 Identifying options

Current situation

The starting point of the RIA is to clearly identify a set of objectives, and then to consider how these objectives could be addressed. The options could include alternatives to regulation, and could include alternative forms of regulation. Generally, a “do nothing” option would be included, at least as a benchmark.

Considering the RIA purely as a written document, the process of identifying options is generally well-done, and there were examples of good practice in considering alternatives to regulation, and alternative forms of regulation. For instance, the Department of Communications, Marine and Natural Resources’ RIA on the Minerals Development Bill clearly identified a number of key issues affected by the Bill. For each issue, three or four realistic options were identified and their costs, benefits and impacts were assessed. Where a Memorandum for Government would normally describe the proposed legislation clause by clause or section by section, this RIA identified the key issues where there were options for implementation, and dealt with them one by one.

Compatibility with best practice

The main problem identified by those who carried out RIAs and by stakeholders was timing: the fact that options were, in some cases, being “identified” after the decision had been made – in other words the “retro-fitted RIA” issue identified under “RIA and the Decision-making Process” in Section 6.2. In summary, when the RIA is carried out at the earliest stage of the process, the logic of identifying options is clear. However, when a RIA (or the requirement to undertake a RIA) is introduced later in the process, there may be no real options left. In this case, there may be an attempt to artificially introduce some alternative courses of action, which were in fact never considered. It is for this reason that we recommend the introduction of a draft RIA at an earlier stage in the process (Recommendation I.3). No further recommendation is considered necessary.

7.3 Identifying impacts

Current situation

Reviewing whether or not a RIA has included an analysis of impacts in the form of costs and benefits is a good guide to how the process was carried out. The use of this form of analysis is a means of helping to structure the process of decision-making, and so its impact is greater than the actual measurement of costs and benefits. The *RIA Guidelines* have indicated a broad range of types of potential impact which should be considered in a RIA. This can be contrasted with the emphasis on economic impact used in some other countries, and reflects an underlying view that potential regulation may be needed to address a broader set of issues than market failure. In this regard, the *RIA Guidelines* approach is closer to the EU approach of an integrated Impact Assessment. While the EU approach identifies three broad categories of impact (economic, environmental and social), its implementation guidelines include an extensive checklist of possible impacts within each category and it is clear that the aim is to take as comprehensive a view as possible of what effects a proposed measure may have.

There are two key issues:

- ▶ What impacts are considered?
- ▶ How do we measure significance?

What impacts are considered?

Over three-quarters of the RIAs (56) clearly identified who was potentially affected by the action. There was a high degree of variation among different RIAs in how this was done. In some cases, impacted groups and individuals were very clearly identified and there was a strong logical thread linking the identification of impacts with their quantification and with the consultation process. In others, the reasoning was not fully explained. The remaining quarter either did not consider at all who would likely be affected, or had omitted clear and obvious categories of people who would be affected.

For some of the RIAs which were examined, the starting point for assessing impacts was the list from the *RIA Guidelines*, and this was treated as comprehensive. If the measure did not seem relevant to these, then there was often no attempt to think through other areas of potential impact. There were instances where a proposed regulatory measure would impose costs, but because these did not fall on one of the listed groups, they were not considered.

Other RIAs had a more considered approach, and worked through a range of impacts, including but not limited to the list from the *Guidelines*. The RIA on the Safety, Health and Welfare at Work (Construction) Regulations 2006³¹ had a very detailed consideration of costs, and also a detailed, quantified consideration of impacts on national competitiveness and vulnerable social groups. This had been achieved by contacting the Competitiveness Unit in the Department of Enterprise, Trade and Employment, who had given pointers to useful information on national competitiveness, and by drawing on information publicly available from the Central Statistics Office's Quarterly National Household Survey. Another RIA referred to a publication from the National Competitiveness Council in its assessment of effects on national competitiveness. These were good examples of the use of existing information and resources to verify impacts on an area outside the writer's own expertise.

³¹ <http://www.entemp.ie/publications/employment/2006/riaconstregs.pdf>

How do we measure significance?

One of the challenges in implementing a RIA approach is to balance this type of policy development against a need to be proportionate, and to avoid unnecessary burden. This has tended to mean that there is an attempt to identify, as early in the process as possible, those proposed measures which are likely to have the largest impact. In the discussion of best practice, it was noted that the EC has replaced its previous two stage approach with an approach which takes a broader but less intensive examination of all measures, then focuses on those which trigger a set of criteria for full enquiry. While this is still a two stage approach, the first stage has been considerably simplified.

The RIA Guidelines state that a full RIA should be conducted where the Screening RIA suggests that any one of the following applies:

- (a) There will be significant negative effects on national competitiveness
- (b) There will be significant negative effects on the socially excluded or vulnerable groups
- (c) There will be significant environmental damage
- (d) The proposals involve a significant policy change in an economic market will have a significant impact on competition or consumers
- (e) The proposals will disproportionately impinge on the rights of citizens
- (f) The proposals will impose a disproportionate compliance burden
- (g) The costs to the exchequer or third parties are significant, or are disproportionately borne by any one group or sector. Initial costs of 10 million or cumulative costs of 50 million over ten years (to include costs to the Exchequer and third parties) should be considered significant in this context.

The approach which has been implemented in Ireland is very much in line with the way in which a threshold was set up in most countries at the time when the RIA was introduced. However, there is undoubtedly an unintended consequence in implementation which seeks to avoid a full RIA. The threshold for triggering a full RIA is generally seen as arbitrary, but it should be noted that criticism of the threshold through the interview programme was really part of the desire to always avoid a full RIA. That is, criticism of the threshold was not related to views about the level of costs and/or benefits which should be subject to more detailed scrutiny. Rather, it was about setting the bar high enough to rule out most proposed actions.

One of the problems which came out in our assessment of how RIAs are being done is that, if the RIA is done according to the *Guidelines*, there is not much difference in practice between a screening RIA and a full RIA. That is, in order to properly assess whether the criteria for triggering a full RIA would be met or not, the analysis would be very close to that required in a full RIA. Several of the RIAs which were examined, and which were nominally screening RIAs, were close to full RIAs.

Compatibility with best practice

How impacts are considered depends on the underlying rationale for regulation. For some countries, the principal threshold test is economic – the concern is to identify areas of economic market failure. For example, the UK approach focuses heavily on the impact on business, and there is a clear emphasis on market failure as a regulatory rationale. Other approaches, such as Ireland's, the EU's and Australia's, are broader, and may include social concerns, or notions of the public good.

The initial view of potential impacts is, in many countries, used to define the approach to the RIA, notably to define the level of analysis and detail required. In Australia's three-tiered system,³² all regulatory proposals undergo a preliminary assessment of whether they are likely to involve impacts on individuals, businesses or the economy. Proposals which have a potentially medium or high compliance cost on business

³² Office of Best Practice Regulation, Australian Government, available at www.obpr.gov.au

are then assessed using a standardised cost model³³. High compliance costs, or indeed any other “significant” impact, triggers a full Regulatory Impact Statement. The level of “significant” is not defined, but is arrived at in discussion with the Office of Best Practice Regulation.

The EU approach³⁴ suggests that a systematic assessment of policy options is always desirable, but that this does not necessarily mean that a formal Impact Assessment report must be prepared. However, all items on the Commission’s Work programme are currently subject to formal impact assessment, (although this is regarded as problematic and is now under review – see section 4.2) and additional proposals may be included on a case-by-case basis. In its most recent proposed revisions, the Commission expects a “Roadmap” to be prepared. This is an indicative evaluation of possible policy options and their associated impacts, and a plan for whether and how further analysis may be conducted.

Some of the RIAs examined demonstrated excellent practice in assessing impacts outside of the immediate costs and benefits of the proposed regulation. Obviously, not every civil servant can be expected to be expert in every aspect of Government policy. A notable feature of these RIAs was the willingness of their authors to look for help from other units within their Department, or from other Departments responsible for policies such as national competitiveness or poverty strategy. When this help was sought, it was given; in some cases this was as simple as directing the inquirer towards the relevant publication on the website. Broadening the scope of the information basis for the RIA has two advantages: it improves the quality, by ensuring that statements on areas outside the writer’s expertise are well grounded, and it improves consistency, by ensuring that RIAs in different areas refer to the same common information sources.

The RIAs examined did not demonstrate a shared approach to identifying impacts. One area of note is the identification of administrative impacts on business. This is an area where a considerable amount of guidance is available from international sources. The Australian Government³⁵ has recently published new guidelines for RIA. This includes a useful checklist of how to approach identifying the potential impacts on business.

Case study: Australian approach to assessing impact on business

Business Compliance Cost Checklist

As part of a regulatory impact assessment, a practical approach for considering the impacts on business compliance costs potentially flowing from regulatory proposals is through a set of threshold questions (a compliance cost checklist).

Would the regulatory proposal involve one of the following compliance tasks?

Notification

Will businesses incur costs when they are required to report certain events?

- ▶ For example, businesses may be required to notify a public authority before they are permitted to sell food.

Education

Will businesses incur costs in keeping abreast of regulatory requirements?

- ▶ For example, businesses may be required to obtain the details of new legislation and communicate the new requirements to staff.

³³ Business Cost Calculator – an IT tool which is used to estimate business compliance costs

³⁴ Impact Assessment Guidelines, European Commission, SEC(2005) 791

³⁵ Government of Australia *Best Practice Regulation Handbook* August 2007

Permission

Are costs incurred in seeking permission to conduct an activity?

- ▶ For example, businesses may be required to conduct a police check before legally being able to employ staff.

Purchase cost

Are businesses required to purchase materials or equipment?

- ▶ For example, businesses may be required to have a fire extinguisher on-site.

Record keeping

Are businesses required to keep records up to date?

- ▶ For example, businesses may be required to keep records of accidents that occur at the workplace.

Enforcement

Will businesses incur costs when cooperating with audits or inspections?

- ▶ For example, businesses may have to bear the costs of supervising government inspectors on-site during checks of compliance with non-smoking laws.

Publication and documentation

Will businesses incur costs when producing documents for third parties?

- ▶ For example, businesses may be required to display warning signs around dangerous equipment, or to display a sign at the entrance to home-based business premises.

Procedural

Will businesses incur non-administrative costs?

- ▶ For example, businesses may be required to conduct a fire safety drill several times a year.

Other

Are there any other compliance costs (including indirect costs or impacts on intermediaries such as accountants, lawyers, banks or financial advisers) associated with the regulatory proposal?

It is our view that it is useful to identify as early as possible those proposals which have the greatest potential impact, and which should face the greatest level of scrutiny. However, the current two-stage system does not appear to lead to the appropriate level of analysis being conducted, and in our view should be modified as proposed below.

Recommendations on identifying impacts

IV.1 Maintain current broad interpretation of impacts

A narrower focus on any one type of impact, such as market failure, would not reflect the broad rationales for action. It is a strength of the Irish system that it considers comprehensively what might happen if a proposed measure were to be implemented, and in our view, it is in line with the way in which best practice is developing.

IV.2 Remove distinction between full and screening RIAs, but identify proportionate level of analysis on a case-by-case basis, having regard to the significance of the measure

We suggest that the formal thresholds between a screening and a full RIA be removed. The paucity of full RIAs carried out to date indicates that the thresholds are being interpreted in a way which allows the avoidance of full RIAs. The current distinction seems, perversely, to have led to a situation where, in some cases, the purpose of a screening RIA is to prove that a full RIA is not required, rather than to provide a balanced evaluation of options. A more productive approach, in our view, would be to apply RIA as an analytical framework to all proposed measures, while recognising that the effort in undertaking a full analysis should be concentrated on the areas where it is most needed. In practice, this would mean that the somewhat arbitrary distinction between screening and full RIAs would be removed. A unitary RIA approach could be developed which recognised that different types of proposal will require different forms and depths of analysis. For each RIA, a point on a spectrum of possible levels of analysis would be identified, on a case-by-case basis. Departments would have discretion over the depth of analysis considered appropriate for each RIA, having regard to the significance of the measure.

The advantage of this option would be that it returns to the original intention of applying a structured analysis of impacts to all proposals, without the distraction of a threshold. A prerequisite for this option would be that RIA would be started earlier in the process, and that the first draft should identify potential impacts, plan how to measure them, and be embedded in the management of the Department. The discretion left with the Department would be over the depth of analysis considered appropriate. However, other procedural proposals set out in this report, such as the early publication of the draft RIA and increased quality control measures, should address the need to ensure that the impact analysis is appropriate and proportionate.

We would emphasise that this approach is not intended to lead to the production of cursory analyses, nor to downplay the importance of a structured assessment of costs and benefits.

7.4 Evaluating Options

Current situation

With the exception of two full RIAs, only one of which had been published at the time of writing this report, the RIAs which have been carried out in Ireland up till now have been screening RIAs. Therefore, while required to consider potential costs and benefits, they were not obliged to undertake a full cost benefit analysis. In the broad review of RIAs carried out in this project, more than half did not include an analysis of costs and benefits at all, and of those which did, the analysis was partial:

Table 2. Breakdown of RIAs by type of analysis of costs and benefit

Type of analysis of costs and benefits	Number of RIAs
Comprehensive and quantified identification of costs and benefits	3
Cost and benefits quantified within a range (high/medium/low)	3
Quantification of costs only, all options	19
Quantification of costs only, preferred option only	8
Identification of costs and benefits, no quantification	20
No clear identification of costs and benefits	21

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Very few of the RIAs attempted to quantify both costs and benefits. However, it should be noted that where the RIA did use CBA techniques, this was well done, and provided some good examples of ways of measuring both. It is usually the case that data provision is difficult, and unlikely to be in the form required for a formal cost-benefit analysis. However, some of the analyses had found innovative means of estimating or calculating potential costs and benefits. The lack of quantification was widely criticised by stakeholders, with RIAs in some cases being viewed as a cosmetic exercise (see Section 5).

We found few examples of the use of any other evaluation technique, such as multi-criteria analysis. The discussion below therefore focuses on cost benefit analysis, but the possibility of using other techniques is picked up later in the recommendations.

Compatibility with best practice

The evaluation of options is the core of the impact analysis. Increasingly, and in most countries, this analysis is expected to utilise some form of cost-benefit analysis (CBA). The actual form of CBA to be applied varies across countries, and the level of quantification required also varies. The UK approach³⁶, for example, expects annual and total costs and benefits to be monetised where possible, but warns against “spurious accuracy”, preferring ranges of data if this is more appropriate. The approach proposed by the Canadian Government³⁷ is much broader, and includes measures such as willingness to pay/willingness to accept in evaluating potential costs and benefits. The European Commission Guidelines³⁸ indicate that the more significant a proposal is likely to be, the greater level of quantification and monetisation which will be expected. The Commission differentiates between new regulatory proposals; the revision of existing legislation; broad policy-defining documents; and expenditure programmes.

However, while the formal position may be an endorsement of CBA as the preferred methodology, the actual practice may not be so clear. In its RIA Inventory³⁹ the OECD notes that most RIAs which were carried out under a requirement to develop CBA failed to quantify major costs and benefits. In the USA, for instance, research into how well CBA was carried out in the Environmental Protection Agency showed that during the Clinton administration CBA was carried out less than 40% of the time, and under the two previous administrations, the figures were 26% and 13%. It can be noted that this was within an agency which had experience of carrying out impact analysis, and where the requirement to use CBA techniques was well-established. The reasons given for the low success rate of using CBA were because of data limitations, or analytical limitations, or both.

It seems then that across the OECD countries, CBA may be more of an aspiration than a practised methodology.

The guidance provided in the *RIA Guidelines* indicates that, for a screening RIA:

“ ... formal cost-benefit analysis is unnecessary but where possible monetise cost/benefits and impacts (place a monetary value on them) and/or quantify them (express them numerically e.g. number/proportion of lives saved, reduction in traffic volumes etc).”

In other words, although it is not expected that a screening RIA should include a full formal cost-benefit analysis, it is expected that a CBA type approach to the assessment of impacts should be carried out.

³⁶ Better Regulation Executive, Dept for Business, Enterprise and Regulatory Reform

³⁷ Canadian Cost-Benefit Analysis Guide: Regulatory Proposals www.regulation.gc.ca

³⁸ Impact Assessment Guidelines, European Commission, SEC(2005) 791

³⁹ Regulatory Impact Assessment (RIA) Inventory: Note by the Secretariat, GOV/PGC/RD(2004)1, OECD, Paris, 2004

We have identified three types of issue which constrain the use of cost benefit analysis. These issues are:

- ▶ Data
- ▶ Quantification anxiety
- ▶ Lack of skills/expertise

Data

The evaluation of options requires data, both quantitative and qualitative. International best practice is that there should be clear data collection strategies that specify standards of acceptability and suggest methods of collecting high quality data within time and cost constraints. Lack of data and data quality are issues which surface in all reviews of RIA, and Ireland is no exception. However, this cannot be extended to suggest that therefore no analysis should be carried out. Rather, the challenge is to consider what is possible, given the problematic nature of finding suitable data.

The main cost issues we identified concerned (1) data about the administrative costs incurred by business as a consequence of proposed regulations and (2) the potential implementation costs incurred by the public sector. Business representatives were highly critical of the quality of cost data and of the lack of opportunity to comment on detailed costings via consultation. On the other hand, several interviewees who had carried out RIAs noted that industry does not always allocate costs in a way which would be useful. That is, even when the person undertaking the RIA can identify the data to be supplied, and when industry would be willing to provide this data, it may not be possible to provide the type of data which is required without incurring significant costs. There is a question, then, about the acceptable level of costs in acquiring data. In some instances, there may be regulatory powers to request particular types of data, subject to the request being proportionate. One of the interviewees has discussed possible changes to data collection with the CSO, and has explored how central data reporting and collection could better support the RIA exercise.

The EC⁴⁰ has addressed the question of calculating the administrative costs on business by developing a Standard Cost Model (SCM). This is intended to standardise the approaches of the Member States and the Commission, so allowing easier comparison across countries and policy areas, and offering potential economies of scale in data collection and validation. The Australian Government has developed an IT-based means of calculating the cost to businesses of complying with actual and proposed Government regulation. This Business Costs Calculator is based on categories of compliance task, such as education, documentation, and record-keeping. Such models must, however, be carefully designed to ensure that they themselves do not become overly cumbersome and bureaucratic to implement – they must be part of the solution to “red tape”, not part of the problem.

Some work has been done within individual Government Departments in Ireland. For instance, the Department of Enterprise, Trade and Employment is developing a model for calculating the administrative costs to business of proposed measures. It should be noted, however, that, as pointed out by the SFA, administrative costs are not the only costs to business. Actual compliance costs, related to the substantive regulatory measure rather than to assessing compliance with it, may be many times greater and should always be assessed.

The assessment of the internal costs associated with the implementation of the proposed measure is also seen as problematic. It was noted that “Civil servants don’t measure their own time”. At one extreme, there was a view that there was no point in calculating costs unless they were associated with some new structure, or involved new employment. Opportunity costs (where taking on a new activity without an increase in

⁴⁰ *Annexes to Impact Assessment Guidelines, Annex 10: Assessing Administrative costs imposed by legislation*, European Commission, Brussels, updated March 2006.

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resources means that an existing activity will be wholly or partially displaced) were generally not considered. However, there was some recognition that there are costs attached to the implementation of regulation, but they were perceived as difficult to measure.

The evaluation of benefits is even more problematic, and again many of the issues raised concern difficulties in finding appropriate data. Only one of the RIAs examined in detail had quantified potential benefits, and considerable effort had gone into conceptualising what kinds of benefits could be achieved, and how these could be measured. It should be noted that some of the data problems are linked to the focus on cost benefit analysis, as CBA requires specific types of quantitative data.

The example below from Denmark illustrates an innovative approach to the collection of data on the administrative consequences on business of potential legislative measures.

Case study – data collection for cost-benefit analysis: Denmark

Denmark uses Business Panels to involve businesses in the assessment of the administrative consequences of new primary and secondary legislation. Three methods are used:

- ▶ Test Panels: there are three standing panels, each with 500 enterprises that broadly represent the Danish business community. These are used to assess new regulations that will affect all types of enterprises.
- ▶ Focus Panels typically consist of 100 enterprises and are put together specifically for one piece of legislation. They are suitable for industry-specific legislation or specific types of enterprise.
- ▶ Test Groups consist of a small number of affected enterprises, the authority responsible for the legislation and possibly experts such as accountants. Unlike the other two panels, a Test Group takes part in a meeting at which proposals for new legislation are discussed. The advantage of Test Groups is their ability to contribute to complex legislation.
- ▶ Denmark also uses the Model Companies method to measure administrative costs on business. This is done in consultation with 1,000 businesses, who are interviewed about the time spend and the costs they incur in connection with meeting regulatory requirements.

Quantification anxiety

The *RIA Guidelines* discuss and provide examples of various techniques which could be used to evaluate and compare the policy options identified. The *Guidelines* recognise that not all impacts can be monetised, and also recognise the complexity of many legislative proposals. However, common to all techniques is the need to find some means of quantifying potential costs and benefits.

The overview of RIAs and the detailed interviews carried out indicated that methodological unease was not restricted to cost benefit analysis. Nor was the issue restricted to concerns about the availability or quality of data. There was an additional and more general issue raised about the process of quantifying impacts.

One element of the reluctance to quantify costs and benefits is the perception that it constitutes a commitment. This may be linked to a reluctance to publish any information which may be seen as politically sensitive. One interviewee suggested that it was easy for costings to be undermined, perhaps because the assessment depends on assumptions which can then be challenged, and used to undermine the overall analysis. This applied even to the use of ranges rather than absolute figures. Generally, the point is that it is somehow easier to criticise something quantified than it is to criticise something more general and less specific. One Department claimed that detailed analysis of costs and benefits was carried

out, but not put into the RIA. The reason for this was that the publication of estimated costs and benefits would be a hostage to fortune.

It was not always clear in the interviews that there is an understanding that, as explained in the Guidelines, quantification does not necessarily mean the same as monetisation – if a monetary value cannot be placed on impacts, they should at least be expressed numerically. Given that all of the detailed interviews were discussing screening RIAs, and that the Guidelines indicate that CBA is not essential for a screening RIA, it could have been expected that alternative quantitative techniques, or a stronger mix with qualitative techniques, were judged to be more appropriate. Given the broad scope of the Irish RIA system, some of the Bills reviewed related to matters where monetisation would be difficult (criminal law, statute law consolidation etc), but it would be expected that some form of quantification of likely impacts could have been included. This was generally not the case.

Requirement for capacity building

The *RIA Guidelines* recognise that a full impact analysis may need specialist economic input. Some Departments are more likely to have this available than others. One of the interviewees indicated that they had used an external consultancy to carry out a detailed impact analysis, and another had used the services of the economic consultants specifically retained by the Department of the Taoiseach for RIA support. Even where a formal CBA is not done, a RIA still requires quantification of impacts. This is widely perceived as a specialist task to be carried out by trained economists, and avoided where possible.

Some of the interviewees were so concerned to avoid having to do a CBA that they lost sight of the overall objectives of the exercise.

In the RIA where there was a very good cost benefit analysis, it can be noted that the Department is very familiar with other forms of impact analysis, and that skills, for instance in environmental impact analysis, are viewed as transferable. This suggests that the key element is familiarity with, and practice in using, evaluation methodologies, and not necessarily specialist economic expertise. The latter can be brought in as and when needed. Those who had already carried out a RIA with a good level of quantification and analysis were much less daunted by the prospect of repeating the exercise than those who had avoided the issue.

It is clear from the interviews and from the review of other experiences that further work is needed to support the evaluation of impacts, and that this is likely to include methodological work as well as practical assistance. Greater awareness of existing data sources and of estimation techniques such as benchmarking is needed. Data collection needs to be systematized and incorporated into the regulatory process. Starting work on an early draft of the RIA at the very beginning of the legislative process should help to identify potential data requirements early.

Since the publication of the *RIA Guidelines*, there has been further work done at a supra-national level which can provide some useful guidance on impact analysis.

For example, the OECD⁴¹ quotes a US study which suggests alternatives when CBA is seen as problematic:

- ▶ *If monetization of the effects is impossible, explain why and present all available quantitative information along with the timing and likelihood of the effect.*
- ▶ *If quantification of the effects is difficult, present any relevant quantitative information along with a description of the unquantifiable effect, the timing and the likelihood.*
- ▶ *If monetizing of benefits is difficult, “Cost-Effectiveness Analysis” rather than Cost-Benefit Analysis can be used.*
- ▶ *If costs and benefits are not traded in the market, use willingness-to-pay measures to monetize the effects.*
- ▶ *If cost and benefit estimates depend heavily on certain assumptions, make those assumptions explicit and carry out analyses sensitively, using plausible alternative assumptions.*

Recommendations to assist in evaluating options

V.1 Revise Guidelines to incorporate the standard approach to calculating administrative costs currently being developed by the Department of Enterprise, Trade and Employment

In all future proposals for regulations, the administrative costs on business and, in particular, small business, should be measured as part of RIA using the methodology being developed by the Department of Enterprise, Trade and Employment. Departments should assess the proportionality of the burden imposed to the risk foreseen and give consideration to what education and advice is required to achieve compliance with the regulations. It will be important that the methodology which is being developed is incorporated into new RIA Guidelines.

It is important that the approach to calculating potential administrative costs to business is robust and consistently applied across Government if the process is to produce benefits for business and for the public sector. At the same time it should not become overly bureaucratic and cumbersome, and hence unworkable. Some of the difficulties with other models, for example, have arisen due to an overly prescriptive and rigid approach. The work by the Department of Enterprise, Trade and Employment to develop an approach to assessing administrative compliance costs would need commitment, buy-in and involvement from those who would be affected.

V.2 Revise Guidelines to incorporate advice on calculating public sector implementation costs

It is recommended that further guidance is provided on how to calculate potential costs incurred by the Civil Service or agencies in implementing the proposed measure. The nature of these costs needs to be clear, particularly that opportunity costs should be considered as well as any new costs.

Where a measure involves setting up a new organisation, there could be recourse to actual cost examples from previous experience.

There are clearly organisational and financial costs associated with all measures. These may be new costs – for example, if a new body is to be established – or may be opportunity costs, where an activity may displace a previous activity.

The assessment of implementation costs is linked to the consideration of enforcement and compliance in the RIA, as the costs of the implementation of the proposed measure should form part of the assessment of costs and benefits.

⁴¹ Regulatory Impact Assessment (RIA) Inventory: Note by the Secretariat, GOV/PGC/RD(2004)1, OECD, Paris, 2004

V.3 Extend discussion of methodologies in RIA Guidelines, in particular techniques which facilitate integration of quantitative and qualitative data

The overall approach to RIA was discussed earlier, and it was noted that the approach in Ireland has been broader than a focus on the economic. In our view, this is a strength. One of the consequences of a broad approach is that potential impacts are more likely to include qualitative costs and benefits, in addition to quantitative. While a formal CBA can address qualitative measures, it may not always be the most appropriate approach to use.

The *RIA Guidelines*, in common with guidelines from other countries, recognise that one of the major challenges in CBA is quantifying and often expressing in monetary terms an impact which is not experienced in those terms. There is a danger that impacts may not be considered simply because they are difficult to express in monetary terms.

The *RIA Guidelines* currently provide a very good explanation of different techniques and the associated pros and cons. However, we found few examples of techniques other than CBA (or a partial variant) being used. This may partly be because CBA is declared as the preferred option, and partly because in fact all techniques need to have some means of considering costs and benefits, however the technique is labelled.

The selection of evaluation technique should be made on the basis of its suitability in enabling judgements to be made about alternative options. Where options are addressing impacts which are not easy to express in monetary terms, it may be more appropriate to use a technique which is designed to facilitate the integration of quantitative and qualitative material, such as multi-criteria analysis, or to build in some elements of sensitivity analysis.

It is strongly emphasised that the objective of any technique used for evaluating options is to provide a structured analysis of costs and benefits. It should be transparent, in the sense that it is clear what assumptions have been made. Transparency will also allow the reader to judge the reliability of the analysis, and may help to address the issue raised in the interviews regarding criticism of data leading to criticism of the overall analysis. Broadening the types of technique which may be used should not be taken as a means of reducing the rigour of the analysis.

It is likely that a RIA which had considerable economic significance would continue to require a greater reliance on cost benefit analysis as a technique, and on deeper quantitative analysis. However, broadening possible approaches to the analysis of costs and benefits carried out in the RIA would have the effect of applying a potentially more appropriate methodology, and one which was more closely related to the significance of the proposed measure.

V.4 Provide additional supporting material designed to be used in the evaluation of impacts where cost-benefit analysis is problematic

It is recommended that, as well as considering the overall approach to methodologies in the *RIA Guidelines*, there is supporting material produced on evaluation. The additional material suggested would be at a lower level than the *Guidelines*. It could draw, for example, on material produced by OECD which directly addresses practical problems faced in evaluating options. It may also be useful to build a library of references to other approaches. The focus should be on practical problems encountered when trying to evaluate different options.

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It would not be realistic to expect that material could be produced which bypassed the need for any economic skills or training. That is, it is unlikely that sufficient material could be produced which would enable someone with no economic background to undertake a full cost benefit analysis. A constructive approach may be to focus on the ability to direct practitioners to sources of advice and support, and to enable them to judge when there may be a need for specialist input.

V.5 Develop specific advice on identifying and calculating benefits

Our analysis indicates that, to date, the evaluation of options has generally focused on costs. In fact, only one of the six RIAs selected for detailed study attempted to quantify benefits at all. The evaluation of benefits shares most of the problem areas with the evaluation of costs. For example, there is often a lack of reliable data, and difficulties in quantification. In addition, there are areas of difficulty specific to assessing potential benefits. This includes concern that the identification of benefits may be too vague or diffuse to be meaningful, particularly if the costs are quite specific. Nevertheless there are techniques available, ranging from the highly economic (such as the Value of a Statistical Life) to the more subjective (such as breaking down the concept of “broader social value” into a number of different factors, and analysing how well different alternatives contribute to each factor – see, for example, Ofcom’s Digital Dividend Review at www.ofcom.org.uk).

It is proposed that specific advice is produced for practitioners, outlining how the evaluation of benefits could be undertaken.

V.6 Maintain use of economic consultants, with review after 3 years

Where economic consultants were used in the RIAs examined to date, the experience was very positive. However, this had only occurred in the case of one of the six RIAs examined in detail. This may be related to the fact that several of the RIAs were done within a short timescale, which in turn reflects the link between the RIA and the Memorandum for Government. Introducing the early draft of the RIA at the beginning of the process should enable Departments to plan better how and when they might use external resources.

7.5 Consultation

Current situation

Most of those interviewed for this project who had carried out RIAs were comfortable with consultation and saw it as a routine part of the process of developing legislation. In most cases, officials were in regular contact with industry groups and voluntary organisations, so consultation tended not to raise issues of which they were unaware, but rather to crystallise the views of particular groups. They viewed the consultation process as an extension of existing good work practices, rather than an add-on. Those who dealt frequently with representative groups, on issues including commercially sensitive ones, were comfortable with doing so and clear on what issues could, and could not, be put into the public domain. They were also sure of their ground in dealing with responses, willing to change their proposals where good arguments, supported by data, were made against them, and to stand their ground when they were not convinced by the counter-arguments.

Industry representatives, however, had mixed views. Dublin City Business Association felt that consultation processes were not credible or genuine; proposals were not accompanied by the level of analysis that would allow for a real comparative evaluation of options, and timescales were often unreasonable given that membership-based organisations had to consult with their members to reach a view. On the other hand, the Irish Concrete Federation and Irish Mining and Exploration Group were happy with their ongoing engagement with some Departments and felt that they had good access to civil servants' thinking. They recognised that they would not always get what they wanted from the process, but felt that they had been listened to by well-informed people who understood their industry. The Irish Banking Federation felt that regulators did learn from their mistakes, and felt that the Government Guidelines on Consultation (available on the Better Regulation website) represented best practice and should be followed more closely.

Overall, and with a few exceptions, industry representatives were happy with their level of access to, and interaction with, civil servants. Their concerns related to the timing and the level of detail of information about proposed regulations being put into the public domain, and about the need for realistic timescales for consultation. One commented that, if the Government's own consultation guidelines were followed, they would be happy; the problem was that the Guidelines were not mandatory.

Compatibility with best practice

A consultation process with other Departments, civil groups and stakeholders is a necessary step in the regulatory formation process. RIA is a good tool for consultation because it has a wide range of information on costs and benefits. It is desirable for consultation purposes that RIA be publicly disclosed as early as possible. Many countries disclose their RIA for consultation, but some OECD countries disclose their RIAs only after consultation or do not disclose them at all.

The countries which disclose their RIAs for consultation include Canada, Denmark, EU, Finland, Italy, Mexico, New Zealand, Norway, Poland, Sweden, Switzerland, the UK and the United States. Japan and Portugal disclose their RIA for consultation only in the case of major regulations or in selected cases. Australia, France, Iceland and the Netherlands disclose their RIA when regulations are submitted to their Parliament of the Council of Ministers. Italy circulates RIAs to affected groups in draft form but does not publicly disclose for consultation. Other countries which do not disclose their RIA include Austria, Hungary, Ireland, Korea, Spain and Turkey.

In Ireland, the *RIA Guidelines* require that the RIA should be published with the draft legislation. Formal consultation is not required for a screening RIA, but informal consultation (i.e. consultation which is not necessarily publicly advertised or all-inclusive) should take place and should be balanced – it should include all relevant Government Departments and offices, consumer groups and preferably all affected industry groups and the Social Partners. A summary of the views conveyed through the consultation process should be provided as part of the Screening RIA.

Formal, structured consultation is required for a full RIA: it should be inclusive and accessible, and should be publicly advertised for most issues. Additional guidance on how to conduct a consultation process is provided in Appendix C of the *Guidelines* and in *Reaching Out: Guidelines on Consultation for Public Sector Bodies* (Department of the Taoiseach, 2005: available at <http://www.betterregulation.ie/index.asp?docID=73>).

Among stakeholders representing business, there was concern about the lack of transparency around the RIA documents themselves, and about the whole process of developing regulations. One concern raised was that consultation may be on broad issues, and may not include an assessment of costs and benefits. This is largely a consequence of when consultation happens. If it is restricted to early in the process, then the

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areas of consultation are necessarily less formed, and less specific. While one set of external stakeholders wanted the option to input views on costs and benefits early in the process (for example, by responding to a draft RIA) so as to influence the outcome, representatives of small business raised a cautionary note about the amount of work involved, particularly for small business, in responding to multiple consultations and providing data.

Some civil servants expressed concern about consultation on issues which involved an element of simultaneous negotiation with external stakeholders. They felt that they had to either publicly commit themselves to an outcome which they might not be able to achieve, or act non-transparently by not consulting on all aspects of a regulatory proposal. However, interviews with stakeholder representatives also suggested that the distinction between consultation and commercial negotiations, and between consultation and consensus-seeking, were well understood. They understood that, while certain elements of a proposal for legislation might be suitable for general publication and consultation, others, where the Department involved were trying to reach a negotiated solution with industry, were simply a matter of ordinary commercial negotiations, which of necessity would be confidential to the parties until completed. In this analysis, Departments should not feel obliged unilaterally to put views which would damage their negotiating position into the public domain.

In some cases, the consultation process showed exemplary practice.

Case study: Minerals Development Bill, 2006

A Working Group of the Department for Communications, Energy and Natural Resources and the Irish Mining and Exploration Group (IMEG) of IBEC examined broad issues at the start of the process. Before drafting the Bill, stakeholders were directly invited to comment, and an open call for comment was published in national newspapers.

The RIA includes a very good summary of issues raised in submissions, and notes how these issues were considered, and what the outcome of the consideration was. In some cases, the submissions led to changes in the drafting of the bill. In others, the RIA document explains briefly why the proposed item has not been included.

The consultation process followed in this RIA is based on a habit of consulting – the work of the Department tends to involve the negotiation of licences, and there is a lot of contact with stakeholders. It was noted that “Consultation should be genuine; you need to consult on options not on the preferred choice”.

It is interesting to note that consultation does not necessarily imply that there needs to be a consensus. The strength of the reported consultation in the DCENR RIA is that it clearly explains how the submissions have been treated by the Department, and why conclusions have been reached.

Recommendations on consultation

VI.1 Encourage publication of consultation document with as much detail as possible; consider the use of an early draft of the RIA as a basis for consultation

The availability of concrete data at the time of consultation is an issue for many stakeholders, particularly those who are likely to bear the costs of regulation. Consultation on high-level policies and principles is to be welcomed, but for many stakeholders, particularly those who bear the cost burden of new regulation, “the devil is in the detail”. It is important, in the interests of transparency, that consultation should be on the basis of what is likely to find its way into the final regulation; otherwise stakeholders miss out on the opportunity of making their views known, and providing information, on the real issues.

There will always be a tension between consulting early in the life of a proposal, when costs and benefits may not be well known, and later, when more information may be available but views may have solidified so that the chances of the consultation changing the outcome have lessened. Similarly, for stakeholders, there are benefits in gaining an insight into regulators’ thinking at an early stage, before proposals have been fleshed out, but this may place the onus on them to provide cost information, which can be a considerable burden, particularly on small business. There is no single “right” answer, but the principle of transparency requires that stakeholders should be enabled to have as much input as possible into the creation of the RIA, and this recommendation attempts to achieve that.

7.6 Enforcement and compliance

Current situation

The key elements which should be covered in this part of the RIA are:

- ▶ Implementation of the proposed measure, including enforcement where applicable, and including a consideration of who will implement
- ▶ Link back to costs, which should have been included in the evaluation of options
- ▶ Indication of performance, suggesting how performance could be measured

Two of the RIAs which were examined in detail explicitly considered enforcement and compliance. One of these proposed to set up a new body, which would be charged with the implementation of the measure. This body would therefore be responsible for enforcement. The other calculated likely costs for enforcement in Ireland, and compared this across the EU. In general, however, issues around compliance, enforcement and performance monitoring were not considered in significant detail.

Compatibility with best practice

The consideration of enforcement and compliance is the part of the RIA which assesses how the proposed measure is likely to work in practice. This part of the RIA should cover how the proposed measure will be implemented, and should also set out a preliminary view of how the impact of the actual measure will be assessed. Activities vary widely in the level to which they are associated with monitoring, sanctioning or enforcement. However, all proposed measures are expected to achieve effects, and there should be a preliminary indication of how these effects will be measured.

The *RIA Guidelines* note that the cost of compliance should form part of the assessment of costs and benefits, but suggest that a consideration of enforcement needs to clarify how proposed regulation will be

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enforced, who will do this, and what the budgetary implications are. The *Guidelines* indicate that compliance targets should be set out in the RIA, and that there should be a consideration of how these will be achieved.

The approach proposed in the *RIA Guidelines* is comprehensive, and does cover all relevant areas, but it is not being implemented. This may be because the RIAs which have been done up until now have concentrated on the mechanics of the process, and on carrying out an evaluation of the proposed measure, without going forward to consider what happens when the measure is implemented. Given the short timescale since the RIA process was introduced, there has not been sufficient experience of a measure being subjected to the RIA approach, and then implemented.

As an example of a different approach, the Canadian RIA guidelines⁴² quote a comprehensive checklist developed in the Netherlands which itemises compliance issues. It proposes that these issues are considered in the design phase, and that conformity and compliance are tracked throughout the policy development process.

The Netherlands' Table of Eleven

The checklist evaluates proposals against a table of 11 key determinants of compliance:

1. **Knowledge of rules:** target group familiarity with policies, laws, and regulations
2. **Cost/benefit considerations:** material and non-material advantages and disadvantages arising from violating or observing policies, laws, and regulations
3. **Level of acceptance:** the extent to which the target group (generally) accepts the policy, laws, and regulations
4. **Normative commitment:** innate target group willingness to comply or habit of complying with policy, laws, and regulations
5. **Informal control:** the possibility that non-compliant behaviour by the target groups will be detected and disapproved of by third parties (i.e. non-government authorities) and possibility—and severity—of sanctions imposed by third parties (e.g. loss of customers/contractors, loss of reputation)

Enforcement dimensions (the influence of enforcement on compliance)

6. **Informal report probability:** the likelihood that an offence will come to light other than during an official investigation and may be officially reported (whistle blowing)
7. **Probability of inspection:** risk of an administrative (paper) or substantive (physical) audit/inspection by official authorities
8. **Detection probability:** the likelihood that an offence will be detected during an administrative audit or substantive investigation by official authorities (probability of non-compliant behaviour being uncovered in the event of some kind of scrutiny)
9. **Selectivity:** the (increased) chance of inspection and detection as a result of risk analysis and targeting of firms, persons, or areas (i.e. extent to which inspectors succeed in checking offenders more often than those who abide by the law)

Sanction dimensions (the influence of sanctions on compliance)

10. **Sanction probability:** the likelihood of a sanction being imposed if an offence has been detected through inspection and criminal investigation
11. **Sanction severity:** the severity and type of sanction and associated adverse effects (e.g. loss of respect and reputation)

⁴² www.regulation.gc.ca

It is not suggested that an evaluation or monitoring scheme needs to be developed for all options considered under the RIA. The concern at this stage is to indicate the type of scheme which would be appropriate rather than to define a scheme in detail.

Recommendations on enforcement and compliance

The issues identified in considering the treatment of enforcement and compliance in the RIAs are to do with the lack of implementation of the approach proposed in the *RIA Guidelines*. It is our view that the *Guidelines* are clear and comprehensive, and compare well to international best practice. This is perhaps an issue to be addressed in controlling the quality of RIAs, but no specific recommendation on enforcement and compliance is considered necessary.

8 Overall conclusions and summary of recommendations

Good progress has been made in establishing the use of RIAs in all Government Departments. Over 70 RIAs have been carried out across a wide range of Departments, covering all types of legislation. Within two and a half years of introducing the RIA system, more than half of all primary legislation in 2007 was accompanied by a RIA, and this should increase further in 2008. Given that RIAs were not applied retrospectively, so that any measure which had already begun in 2005 did not have a RIA, this represents a quick adoption within a relatively short timeframe. While RIAs are now carried out routinely on primary legislation, the approach is less well-established in its application to secondary legislation and to major EU Directives while they are being negotiated.

There is now a substantial body of knowledge and experience within most Departments. Staff who had carried out RIAs were generally both knowledgeable and enthusiastic. They were committed to the process and recognised the benefits of applying a rigorous analytical framework to the development of all types of legislation. Even where they had encountered difficulties, they did not see this as a reason not to apply RIA – rather, they sought ways to resolve the difficulties and embed RIA better into the overall decision-making process.

However, from the point of view of external stakeholders, and especially of business groups, progress has been disappointing. In interviews, representatives of the business sector expressed strong criticism of the lack of visibility of RIAs; they felt that either they were not done, or, if done, many were not published, which meant that opportunities for critiques of RIA by business or academics had not developed. Where RIAs had been done, there was a lack of credible consultation; risk assumptions and estimates of costs and benefits had not been consulted on, and timescales in some cases were unrealistic. The timing of RIAs was frequently criticised; they were seen as an “add-on” which happened at the end of the regulatory process, rather than a fundamental part of it. The quality of published RIAs was considered poor – a criticism which was related both to timing and to lack of consultation, as assumptions had not been tested and cost estimates were considered incorrect.

As might be expected in the initial phase, the quality of the RIAs carried out to date is variable. Some were highly detailed and internally consistent, while others made little real attempt to examine impacts. Although only one full RIA has been published to date (and another is due to be published shortly), some of the screening RIAs represented a substantial amount of work, and little more would be needed to complete a full RIA.

A large amount of work has gone into providing support for the rollout of RIAs, and this has borne fruit. The RIA Guidelines were considered excellent, and the training courses, presentations and helpdesk functions were all highly regarded. The RIA Network was a valuable source of support and information, both for its members and for those within their Departments who were conducting RIAs.

The type of problems which were encountered in implementing RIA are similar across all countries with similar systems. In carrying out a RIA, there are often difficulties in implementing cost-benefit analyses, finding appropriate data, and measuring impacts. In the processes put in place to ensure RIAs are applied, there is a need to consider how best to integrate them with the overall decision-making process, and how to manage them both within and across Departments, to guarantee quality and consistency. The challenges

now are to ensure that it is embedded into the overall decision-making process, and to ensure that the RIA model evolves to balance the need for a considered analysis of impacts against the need to ensure proportionality – that the level of the analysis is appropriate to the scale of the issue being considered. Publication of RIAs, to ensure that they achieve their purposes in terms of improving parliamentary debate and participation of stakeholders generally, needs to be strengthened.

The recommendations from the text are collected and categorised below. Numbers refer to the numbering of recommendations within the body of the report, to facilitate cross-referencing.

Recommendations aimed at strengthening high-level support for RIA:

- ▶ **Strengthen the high-level support for RIA, with increased focus on secondary and EU legislation (I.1)**
- ▶ **Reinforce requirement that Policy Review Groups produce RIAs (I.2)**

Greater high-level support for RIA is needed if it is not to become pigeon-holed as a purely technical exercise. Senior management commitment to RIA will raise its profile and promote quality. Legislative backing for the requirement to produce RIA is not considered necessary provided senior management support ensures that the quality of RIAs improves; otherwise, this could be re-considered. Requiring RIAs where policy development has been delegated to review groups is a rational consequence of the Better Regulation agenda; the fact that only two RIAs have been produced by such groups in almost three years suggests that this requirement may need greater publicity and enforcement.

Recommendations on changes to the RIA system

- ▶ **Embed RIA thinking earlier in the policy development process and in divisional planning via an early draft of the RIA, with oversight by senior management and integration into Departmental Workplans (I.3)**
- ▶ **Maintain current broad interpretation of impacts (IV.1)**
- ▶ **Remove distinction between full and screening RIAs, but identify proportionate level of analysis on a case-by-case basis having regard to the significance of the measure (IV.2).**

The main thrust of these recommendations is to ensure that the RIA is timely and proportionate, while retaining its broad scope. Both external stakeholders and many of those who carried out RIAs felt that its association with the Memorandum for Government meant that it happened too late in the process, after the main regulatory issues had already been decided. It is recommended, therefore, that a first draft of the RIA should be produced at a much earlier stage, to encourage thinking about, and analysis of, options. The workplan for each Bill should include an early draft of the RIA from the start. The draft would be developed as the legislative proposal progressed, including via consultation.

In terms of the current, two-stage system of screening/full RIAs, given the broad scope of the Irish RIA system (in that it covers legislation with social as well as purely economic effects), it appears appropriate to maintain different levels of analysis for different proposals. However, the fact that only one full RIA has been completed and published to date is a concern. Our research suggests that screening RIAs are frequently shaped by a desire to prove that the threshold for a full RIA is not met, rather than a proper evaluation of

impacts. In this respect, the screening/full distinction appears not to be helpful. Rather than an arbitrary distinction between different types of RIAs, it may be preferable to identify a point on a spectrum of possible levels of analysis on a case-by-case basis. Departments would have discretion over the depth of analysis considered appropriate for each RIA, having regard to the significance of the measure. Other procedural proposals set out in this report, such as the increased transparency afforded by early publication of the draft RIA, and increased quality control measures, should address the need to ensure that the impact analysis is appropriate and proportionate.

Recommendations on changes to *RIA Guidelines*:

- ▶ **Provide more details in Guidelines on how the RIA should be integrated into the EU policy-making process, based on current best practice (I.4)**
- ▶ **Revise Guidelines to incorporate the standard approach to calculating administrative costs currently being developed by the Department of Enterprise, Trade and Employment (V.1)**
- ▶ **Revise Guidelines to incorporate advice on calculating public service implementation costs (V.2)**
- ▶ **Extend discussion of methodologies in RIA Guidelines, in particular techniques which facilitate integration of quantitative and qualitative data (V.3)**
- ▶ **Provide additional supporting material designed to be used in the evaluation of impacts where cost-benefit analysis is problematic (V.4)**
- ▶ **Develop specific advice on identifying and calculating benefits (V.5)**
- ▶ **Include more practical examples, drawn from published Irish RIAs, in the Guidelines (III.4)**

The objectives of the proposed changes to the Guidelines are (1) to fill in gaps in areas where practitioners currently have difficulty in interpreting or applying the Guidelines; (2) to update them to incorporate improved tools and methodologies developed since they were produced; (3) to ensure that the costs to the Public Service, and hence to the taxpayer, of implementing legislation (as well as the cost to business of complying with it) are taken into account; and (4) to provide greater guidance on impact analysis for those producing legislation in non-economic areas. The broad scope of application of the Irish RIA system is a strength, but it must involve a recognition of the difficulties in applying economic concepts to legislation where the impacts may be broader than economic, and provide appropriate guidance. There is a thirst for more and more practical examples of how impacts are evaluated and compared, and a need to share these, both within and across Departments; of course, the examples must be carefully chosen so that bad practice is not perpetuated.

Recommendations on other supports:

- ▶ **Consider additional training on the EU legislative process to clarify how it interacts with RIA, with someone experienced in the process involved in training delivery (III.5)**
- ▶ **Consider e-learning for introduction to RIA (III.6)**
- ▶ **Maintain use of economic consultant, with review after 3 years (V.6)**

More detailed supports could form part of the Guidelines or be accessed through them. It is suggested that the RIA Network could take a role in deciding on the form of other supports needed. A more specific training module for the limited number of people involved in EU legislation might be of benefit, with involvement from those who have been through the process. Alternative training delivery mechanisms, such as a short introductory e-learning RIA course, may have to be considered as decentralisation proceeds. Starting the

RIA process as soon as possible, via an early draft associated with the work programme item, should allow a more structured consideration of what depth of analysis is needed and what data is required to support this. Where inputs external to the Department (either from other Departments, or from outside consultants) are required, this can be factored into the plan. At present, economic consultants are retained centrally by the Department of the Taoiseach to assist with RIA. Where these consultants were used in the RIAs examined to date, the experience was very positive. It is recommended, therefore, that this expertise should be retained and reviewed again after three years.

Recommendations on publication and transparency

- ▶ **Building on the commitment contained in Towards 2016, require Annual Reports to show what legislative proposals have been accompanied by a RIA and, if not, why not (II.5)**
- ▶ **Encourage the use of early draft of the RIA as the basis for consultation (VI.1)**
- ▶ **Ensure that finalised RIAs are published, at the latest, when draft legislation is published; update as necessary throughout the legislative process (III.7)**
- ▶ **Make published RIAs easier to find by ensuring that each Department has a dedicated RIA page on its website (III.8)**
- ▶ **Require Annual Reports to include links to where published RIAs are available and, if RIAs have been done but not published, to state why this is so (III.9)**

There are some areas where the existing system needs to be better enforced, in order to improve transparency and to disseminate awareness of good practice. Publication of RIAs has huge benefits: it incentivises quality, provides examples to other RIA writers, provides feedback and suggests ways of finding data for the next revision. The more information is provided to external stakeholders at consultation stage, the better they can provide detailed information on costs and benefits of various options, thus improving the quality of decision-making. Publishing a RIA with draft legislation will improve the quality of parliamentary debate and governance generally; publishing the early draft of the RIA will assist stakeholders to make more constructive inputs. Publication should always be the default option, and if RIAs are not published, or not published in a timely fashion, reasons should be given. The RIA should be thought of as a living document and updated as appropriate at various stages throughout the process.

While RIAs should be published, it is not always clear whether they are, or where they can be found. It is also not clear, in relation to some secondary legislation and EU legislation where RIAs were not carried out, why this was so. It is recommended, therefore, that the commitment regarding publication should be made more specific, to require annual reports (a) to show whether/where RIAs are available, and (b) if RIAs were not carried out, why not.

RIAs should be published, and made easy to find on Departments' websites. At present they tend to be associated with the subject matter, rather than grouped together, which makes it difficult for those seeking to analyse or critique the RIA process, or those developing RIAs who are seeking examples, to find them. It is recommended, therefore, that Departments should create a dedicated RIA page on their websites. Mere passive publication is not enough, however; it is recommended that, when a RIA has been completed, Departments should actively seek out and notify those who contributed to the consultation process, or those directly impacted by the proposed regulation, and inform them of its publication.

Recommendations on managing the RIA within the Department

- ▶ **Make RIA planning and reporting (both on RIAs in progress and on proposed RIAs) a normal part of the management system (II.1)**
- ▶ **Ensure consistent application of RIA within the Department and, in particular, that the “significance” threshold is interpreted consistently (II.2)**
- ▶ **Where legislative proposals are brought forward without a RIA, senior management should be prepared to explain the reasons for this (II.3)**
- ▶ **Maximise benefit from trained resources, such as those with an MScEcon in Policy Analysis from the IPA; ensure that training is provided to meet future needs (II.4)**

Greater senior management focus on, and support for RIAs would assist those responsible for creating them, improve their quality and consistency, and further the Better Regulation agenda. RIAs should be integrated into the normal planning and reporting system of the Department: Assistant Secretaries should therefore be required to include their proposals for RIAs in Divisional Business Plans and should report regularly to the Management Advisory Committee on developments in this regard, including the publication of early drafts of RIAs for consultation.

While the application of RIA to primary legislation is by now well established, evidence suggests that the same may not be true of secondary legislation. RIA should be applied to “significant” secondary legislation and “significant” EU legislation (draft Directives and significant draft Regulations); however, “significance” may not be interpreted consistently even within Departments, as well as across them. Oversight is needed within Departments at a sufficiently senior level to ensure that RIA is consistently applied. There is also a need for cross-Departmental co-ordination in this context.

Where legislation is required urgently, it may be impractical for a RIA to be carried out. However, where RIAs are not done, it is important that senior management should be willing and able to explain this.

Where trained resources are available in-house, it is important that their expertise should be leveraged to maximum advantage in the production of RIAs. It is up to Departments themselves to decide how best these resources should be deployed; however, the advantages of having regulatory options scrutinised and questioned by individuals or units independent of the policy area should be borne in mind. Departments should also plan ahead to ensure that sufficient staff are being given the right training to meet future needs for RIA, and should plan and budget for the use of external economic consultants where this is likely to be needed.

Recommendations on managing the RIA system across Government

- ▶ **Department of the Taoiseach, in co-operation with the RIA Network, to conduct quality assessments of, and comment on, a sample of RIAs on secondary and EU legislation (III.1)**
- ▶ **Actively disseminate RIAs; commission external ex-post reviews every two years and publicise the results via publication and seminars (III.2)**
- ▶ **The RIA Network should be used to improve co-ordination and promote best practice. In particular, Network members should present their Departments’ current and planned RIA activities at the Network; including draft RIAs on secondary and EU legislation (III.3)**

A modern RIA system needs a quality control mechanism, preferably with both ex-post and ex-ante elements. Ex-ante control – ensuring that individual RIAs meet appropriate quality standards as they are produced – is primarily the responsibility of the Department concerned, but also involves a body independent of the Department or Office carrying out the RIA charged with scrutinising it from a quality perspective. At present in Ireland, this role is carried out by the Better Regulation Unit of the Department of the Taoiseach in relation to primary legislation; however, RIAs on secondary legislation and EU legislation as well as those prepared by policy groups are not systematically forwarded to them.

In addition to the requirement set out in the previous section for Departments to ensure consistent application of the RIA framework, there is a need for co-ordination across Departments. The existing RIA Network would appear to be the most efficient way of achieving this. It is proposed, therefore, that RIA Network members should be empowered to present to the Network their Departments' plans and activities in relation to RIAs for secondary and EU legislation, and to provide feedback to their Departments as necessary. In order to provide for greater quality control without creating an undue bureaucratic burden, it is suggested that the Department of the Taoiseach, in co-operation with the RIA Network, should review a sample only of such RIAs, in the same way as it does for primary legislation.

Ex-post control can be achieved in a number of ways, in all of which publication is an important element; the aim of ex-post scrutiny is not to “catch out” poor RIAs, but to discourage their production in the first place. A formal system of commissioning ex-post reviews at regular intervals, resulting in publication and public discussion of the analysis, should be considered as a means of kick-starting this scrutiny mechanism.

Annex I : Methodology

The assessment of the operation of RIA in Ireland was carried out in two stages. Stage 1 involved a quantitative assessment of all RIAs produced since the model was introduced in 2005. Stage 2 selected six RIAs for detailed scrutiny, and an interview programme covered those preparing RIAs, external stakeholders involved in the consultation process, and those involved in the wider application of the RIA model. Progress reports described work undertaken in each stage, and detailed findings and conclusions.

Stage 1

A total of 74 RIAs were provided to us for examination, sourced from the Department of the Taoiseach and from the various Government Departments. The 74 are broken down by Department as follows:

RIAs by Department

Table 3: RIAs by Department	
Department	Number of RIAs
Agriculture, Fisheries and Food	1
Communications, Energy & Natural Resources	10
Community, Rural and Gaeltacht Affairs	3
Environment, Heritage and Local Government	12
Education & Science	3
Enterprise, Trade and Employment	13
Finance	4
Foreign Affairs	2
Health and Children	5
Justice, Equality and Law Reform	10
Social and Family Affairs	5
Taoiseach	1
Transport	5
Total	74

An additional five RIAs have been carried out but have not yet been released as the relevant legislation has not been enacted (in the case of secondary legislation) or brought to Government (in the case of primary legislation). One of these was carried out by the Department of Justice, Equality and Law Reform, one by Enterprise, Trade and Employment, one by the Department of Health and Children and two by Environment, Heritage and Local Government.

The RIAs provided to us are listed and described in Annex 2.

Type of RIA

As discussed earlier, the *RIA Guidelines* provide for a two-phase approach. All proposed regulations are initially subject to a screening RIA – a preliminary, less detailed analysis. If the impact of the regulations is identified as being relatively low, the screening RIA suffices. If the screening RIA identifies significant impacts, a full RIA, involving more extensive and detailed evaluation (in particular, cost-benefit analysis), is then applied.

All but one of the RIAs which were examined were described as screening RIAs, although in some cases the level of analysis was such that little more would have been required for a full RIA. Two full RIAs (on the Proposed Surface Water Classification Regulations including Environmental Quality Standards, and on Part L (Conservation of Fuel and Energy) of the Building Regulations) have been conducted under the aegis of the Department of the Environment, Heritage and Local Government, although only the latter has been published to date. The former is due for publication shortly with the draft Regulations. The screening RIA which has been published for consultation in relation to the Surface Water Classification Regulations is itself a very comprehensive document (117 pages including annexes); it recommends that, given the findings of the screening RIA, a full RIA be carried out to assess the implications of the proposed Regulation.

Some of the other screening RIAs have considered whether or not a full RIA was more appropriate, and all concluded that it was not. Generally, this was because the potential costs fell below the threshold proposed as indicative of requiring a full RIA. The *RIA Guidelines*⁴³ are quite clear in recommending criteria requiring a full RIA, and cost is only one factor. None of the other screening RIAs which considered the need for a full RIA examined any factors in addition to costs.

The following table provides a numerical breakdown of RIAs in terms of the type of regulation they related to:

Table 4. Breakdown of RIAs by type of regulation	
Type of regulation	Number of RIAs
Primary legislation only	43
Primary legislation on foot of review group	2
EU Directive or Regulation (pre-transposition)	3
EU Transposition only	12
Secondary legislation (unrelated to EU Transposition)	8
Transposition with additional elements via primary legislation	4
Transposition with additional elements via secondary legislation	2

Of the 74 RIAs provided to us, 49 RIAs were associated with Primary Legislation only. Of these, two arose from recommendations of Policy Review Groups. A further four contained elements related to transposition of EU Directives, but also additional elements not necessitated by the transposition. In comparing these with the Acts of the Oireachtas passed in 2006 and 2007, it is clear that the RIA system effectively began to feed through into primary legislation only in 2007. This is because the Government Decision on RIA was prospective in effect, i.e. it only applied to cases where permission to bring forward legislation was being sought from Government after June 2005. Any legislation which was already “in the pipeline” did not require a RIA. Of the 42 Acts passed in 2006, only one (the Energy (Miscellaneous Provisions) Act 2006) matched a RIA. Of the 33 Acts passed in 2007, 18 had RIAs and 15 did not. Of these 15, 5 appear to have been covered by exemptions from the Government Decision⁴⁴, but 10 were not. Many RIAs have, of course, been

⁴³ *RIA Guidelines – How to conduct a Regulatory Impact Analysis*, Dept of the Taoiseach, October 2005

⁴⁴ This figure is based on our interpretation of the Guidelines, which state that “it is not compulsory to apply RIA to the Finance Bill and some emergency, criminal or security legislation”.

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carried out for legislative proposals which have not yet made it to the Oireachtas, and there can be a considerable delay between the consideration of Heads of a Bill by Government and the enactment of the legislation. Thus there is not a full overlap between the list of RIAs on primary legislation, and the list of primary legislation itself. However, the proportion of primary legislation accompanied by a RIA has increased from 2% in 2006 to 55% in 2007, and can be expected to increase further in 2008.

Twelve of the RIAs related to the transposition of EU Directives alone. Most of the Directives could be expected to be transposed via secondary legislation. A further two had elements of transposition but also of stand-alone secondary legislation. Eight RIAs related to Statutory Instruments which were not transpositions of EU law, so that, in all, twenty-two related wholly or partly to secondary legislation. A further three had been carried out on EU legislative proposals which had not yet reached the transposition stage.

The number of RIAs on secondary legislation seems lower than might be expected, given the amount and extent of EU legislation produced annually which requires transposition, and also given the volume of purely domestic Statutory Instruments (several hundred) laid annually before the Oireachtas. While some transpositions are purely technical in nature (for example, the amendment of existing instruments to reflect the accession of new members of the EU), many others are highly significant.

Given the volume of both EU-related and purely domestic secondary legislation produced annually, it would not be possible to examine them individually to decide which of them might have merited a Regulatory Impact Analysis. However, a guide to which of the EU legislative proposals were deemed significant by legislators can be obtained from the decisions of the Oireachtas Sub-Committee (now Committee) on EU Scrutiny.⁴⁵ The information notes include a summary and aims of the proposal, the anticipated negotiation period, the expected implementation date and the implications for Ireland, if any, of the proposal. On the basis of the information provided, the Sub-Committee may, if it concludes that the proposal is “of sufficient importance to require further scrutiny”⁴⁶, decide to refer it to the relevant Oireachtas Committee, which may publish a report on the matter.

Our analysis suggests that over three-quarters of the documents considered are legislative proposals. In 2006, over 550 documents were considered, and 99 referred for further scrutiny. The relevant Oireachtas Committee may then publish a report. As an indication of scale, in 2006 there were 93 referrals and 116 reports published – 43 on referrals in 2006 and 73 on referrals from previous years.

It is by no means suggested that all EU legislative proposals which are referred for further scrutiny under this system automatically merit a RIA, since issues may be politically sensitive without necessarily meeting the criteria for “significance”. However, given that there appears to be an order-of-magnitude difference between the number of items considered important by the EU Scrutiny Committee, and those deemed to warrant a RIA, it may be the case that some important proposals are not being subject to a formal analysis of their impacts.

Considering the types of RIA examined, then, firstly, the fact that only one full RIA has been published to date is a concern, since, interpreted literally, it would imply that no other significant legislation has been proposed and passed since 2005. However, as mentioned above, some RIAs which were described as “screening RIAs” were very comprehensive in their analysis, and would require little further work to become full RIAs. A second full RIA has been completed, though not yet published, and it is understood that others are in the pipeline. Secondly, given the volume of non-EU-related secondary legislation, and what we know of its subject matter, it seems surprising that only eight proposals were considered significant enough for a RIA.

⁴⁵ This Sub-Committee was established following the passing of the EU Scrutiny Act 2002. It requires Government Departments to provide information notes relating to a range of EU-related documents, most of which are legislative proposals, to the Sub-Committee within four weeks of the initiation of proposals.

⁴⁶ Orders of Reference of Joint Oireachtas Committee on European Scrutiny, www.oireachtas.ie

Depth of analysis

The table presented below categorises RIAs by number of pages, within a range (including annexes). It can be noted from the detail in Annex 2 that there is a very wide variation, despite the fact that almost all are screening RIAs – some are 2-3 pages long, while others are over 40 pages. Some have extensive supporting material as annexes. It is certainly not suggested that a lengthy RIA will always be preferable, nor that length alone will ensure depth of analysis. However, it is fair to say that, given the range of factors under consideration, it is unlikely that, if the approach recommended in the *Guidelines* is followed, a RIA can be presented in 2-3 pages of text.

Table 5. Breakdown of RIAs by number of pages	
Number of pages (including annexes)	Number of RIAs
<=4	18
5-10	30
11-20	13
21-40	8
40+	5

Of course, the RIA should be proportionate. Some of the RIAs which were assessed had fairly long sections explaining the policy context, in comparison to the analysis of costs and benefits and of potential impact. Ideally, the weight of the report should be on the analysis, rather than on the description of the background and aims of the legislation.

Stage 2

From the set of 74 RIAs examined, 6 were selected for further analysis. The selected RIAs were those associated with the following legislation:

Minerals Development Bill, 2006	Dept of Communications, Energy & Natural Resources
Nursing Home Support Scheme Bill	Dept of Health & Children
Establishment of a Dublin Transport Authority	Dept of Transport
Safety, Health and Welfare at Work (Construction) Regs 2006	Dept of Enterprise, Trade & Employment
Passport Bill	Dept of Foreign Affairs
Criminal Law (Human Trafficking) Bill	Dept of Justice, Equality & Law Reform

The six were not intended to be statistically representative of the state of implementation of RIA throughout the various Departments, but rather to provide examples of particular approaches to RIA or particular problems which were encountered in producing RIAs. For these 6, interviews were carried out with the people who had worked on the RIA, and often with other people in the sponsoring Department. In addition, interviews have been conducted with some members of the RIA network. Interviews have also been carried out with organizations which had been consulted as part of the RIA process, and with other business representative organizations which were not necessarily consulted in relation to these specific regulations, but would be affected by a wide range of regulatory proposals.

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The purpose of this stage of the project was to review how the RIA system is operating in Ireland, and to assess it both in the context of the overall Better Regulation agenda and of best practice internationally. The focus is on how the RIA model is being implemented, and to assess what lessons can be learned from the wider regulatory environment within Ireland, and from implementation of RIA in other countries.

While the criteria for establishing the success or failure of RIA are not well established in the academic literature⁴⁷, there are three widely accepted bases for evaluation:

- ▶ the academic-style quality, where RIAs are treated as stand-alone documents;
- ▶ the accuracy of the predictions the RIA makes about regulatory outcomes;
- ▶ whether or not they advance the objectives of the overall regulatory process.

Given the early state of implementation of RIAs in Ireland, it is not possible at this stage to check the accuracy of their predicted outcomes. Of the six RIAs studied, only two (the Safety, Health and Welfare at Work (Construction) Regulations 2006 and the Passports Bill) have been enacted, although another one (the Criminal Law (Human Trafficking) Bill) has passed both Houses of the Oireachtas and is expected to be enacted shortly. Given that the effects of the enacted legislation will take some time to become evident and to be measured, this analysis concentrates on the first and third of the bases for evaluation identified above.

⁴⁷ See, for example, "Evaluating Regulatory Impact Analyses" by Winston Harrington and Richard D. Morgenstern, OECD, Paris, 2004 ("Harrington and Morgenstern").

Annex 2: Table of RIAs⁴⁸

No.	Name	Department ⁴⁹	Type ⁵⁰	Published	S/F ⁵¹	Pages
1	Shellfish Waters Designation Process	D/AFF	T/S	N	S	29 + 35 pp annexes
2	Minerals Development Bill 2006	D/CENR	P	N	S	26
3	Single Electricity Market Bill	D/CENR	P	Y	S ⁵²	6
4	Broadcasting Bill	D/CENR	P	N	S	39
5	Review of licensing terms for Petroleum Exploration and Development	D/CENR	S	N	S	4
6	Communications Regulation (Amendment) Bill 2006	D/CENR	P	Y	S	18
7	Safety (Petroleum Exploration and Extraction) Bill 2007	D/CENR	P	N	S	8
8	Establishment of TG4 as a separate statutory body	D/CENR	P	N	S	7
9	DTT Bill	D/CENR	P	N	S	7
10	Energy (Misc Provision) Bill 2006	D/CENR	P	N	S	3
11	Directive 89/552/EEC Television without Frontiers (to be renamed Audiovisual Services) Directive	D/CENR	T	N	S	45
12	Charities Bill 2007	D/CRGA	P	Y	S	25 + 11
13	Draft regulations in relation to stationery, signage and pre-recorded oral announcements (Official Languages Act 2003)	D/CRGA	S	Y	S	5
14	Community, Rural and Gaeltacht Affairs (Miscellaneous Provisions) Bill	D/CRGA	P	N	S	5
15	Electoral (Amendment) Bill 2007	D/EHLG	P	Y	S	7
16	Carbon Fund Bill	D/EHLG	P	Y	S	7
17	Building Regulations for Dual Flush Toilets Part G	D/EHLG	S	Y	S	7

⁴⁸ We are aware of five other RIAs which have been completed but not yet made available. One has been done by the Department of Justice, Equality and Law Reform, but the Scheme has not yet been brought to Government. Two, including a full RIA (on the Proposed Surface Water Classification Regulations including Environmental Quality Standards) have been completed by the Department of the Environment, Heritage and Local Government but have not yet been released as the relevant Regulations have not yet been made. A fourth has been completed by the Department of Enterprise, Trade and Employment and is intended to be published with the relevant Bill. A fifth has been completed by the Department of Health and Children. A further RIA is being carried out by the Department of Social and Family Affairs on a proposed EU Directive on "Minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights"; this RIA is a "work in progress" as the original Directive has been, and continues to be, substantially modified.

⁴⁹ D/AFF = Department of Agriculture, Fisheries and Food; D/CENR = Department of Communications, Energy and Natural Resources; D/CRGA = Department of Community, Rural and Gaeltacht Affairs; D/EHLG = Department of the Environment, Heritage and Local Government; D/ES = Department of Education and Science; D/ETE = Department of Enterprise, Trade and Employment; D/F = Department of Finance; D/FA = Department of Foreign Affairs; D/HC = Department of Health and Children; D/JELR = Department of Justice, Equality and Law Reform; D/SFA = Department of Social and Family Affairs; D/Taoi = Department of the Taoiseach; D/T = Department of Transport.

⁵⁰ P=Primary Legislation; S=Secondary Legislation; EU = EU Directive or Regulation; T=Transposition; R=Review group

⁵¹ S=Screening; F=Full

⁵² This was described by DCENR as a full RIA: however, only a screening RIA was provided so it has been treated as such in the analysis.

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No.	Name	Department	Type	Published	S/F	Pages
18	Social Housing (Miscellaneous Provisions) Bill 2006	D/EHLG	P	N	S	22
19	Environmental Liability Directive	D/EHLG	T	consultation Y	S	14 + 50pp annexes
20	Proposal for a Directive of the European Parliament and of the Council on Waste	D/EHLG	EU	Y	S	5 + 2 pp annex
21	Waste Management (End of Life Vehicles) Regulations 2006	D/EHLG	T	Y	S	10
22	Waste Water Discharge (Authorisation) Regulations 2007 (S.I. No. 684 of 2007)	D/EHLG	T	N	S	8
23	Draft Waste Management (Packaging) Regulations 2007	D/EHLG	T/S	Y	S	13
24	Proposal for a Regulation of the European Parliament and of the Council on the banning of exports and the safe storage of metallic mercury	D/EHLG	EU	N	S	3
25	European Communities (Drinking Water) Regulations 2007 and European Communities (Drinking Water) (No. 2) Regulations 2007	D/EHLG	T	N	S	13
26	Part L (Conservation of Fuel and Energy) of the Building Regulations	D/EHLG	S	Y	F	35
27	Student Support Bill 2006	D/ES	P	N (will be published with draft legislation)	S	10
28	Education (Miscellaneous Provisions) Bill 2006	D/ES	P	N	S	3
29	Directive on Recognition of Professional Qualifications (general system)	D/ES	T	N (will be published with SI)	S	10
30	Chemicals Regulation and Enforcement Bill	D/ETE	P/T	Y	S	13
31	Consumer Protection (National Consumer Agency) Bill 2006	D/ETE	P/T	Y	S	33
32	Amendments to the Employment Protection Act, 1977 and other legislation	D/ETE	P	N	S	3
33	Export Control Bill 2007	D/ETE	P	Y	S	10
34	Safety, health and welfare at work (Construction) regulations 2006	D/ETE	S	Y	S	43
35	Implementation of Directors' Compliance Statement (DCS) (Section 45 of the Companies (Auditing and Accounting) Act 2003)	D/ETE Company Law Review Group	P/R	Y	S	15

No.	Name	Department	Type	Published	S/F	Pages
36	Employment Agencies Regulation Bill 2007	D/ETE	P	N	S	6
37	EC Eco design for energy using products	D/ETE	T	N	S	4
38	Companies Consolidation and Reform Bill 2007	D/ETE - Company Law Review Group	P/R	Y	S	8
39	Impact assessment by ESRI on SI No. 667 of 2006 - National Minimum Wage Act 2000 (National Minimum Hourly Rate of Pay) Order 2006	D/ETE	S	N	S	24
40	Directive 2007/36/EC - Shareholders' Rights Directive	D/ETE	EU	N	S	7
41	Safety, Health and Welfare at Work (General Application) Regulation	D/ETE	S	Y	S	17
42	Safety, Health and Welfare at Work (Quarries) Regulations 2008	D/ETE	S	Y	S	19
43	Markets in Financial Instruments Bill + Regulations 2006	D/F	T	N	S	6
44	Asset Covered Securities (Amendment) Bill 2006	D/F	P	N	S	7
45	National Development Finance Agency (Amendment) Act, 2006	D/F	P	N	S	4
46	Modernisation/ consolidation of financial services legislation	D/F	P	Y	S	10
47	Passport Bill	D/FA	P	N	S	4
48	Amendment of British-Irish Agreement Act 1999	D/FA	P	N	S	3
49	Nursing Home Support Scheme Bill	D/HC	P	N	S	11
51	Pharmacy Bill 2006	D/HC	P	N	S	4
52	Health (HIQA) Bill 2006	D/HC	P	N	S	11
53	Long Stay Charges Repayment Scheme	D/HC /Health Service Executive	P	N	S	2.5
54	Immigration, Residence and Protection Bill 2006	D/JELR	P	Y	S	5
55	Criminal Justice (Forensic Sampling and Evidence) Bill 2007	D/JELR	P	N	S	14
56	Amendment of equality legislation	D/JELR	T	N	S	2
57	Land and Conveyancing Law Reform Bill 2006	D/JELR	P	N	S	5
58	Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006	D/JELR	P/T	Y	S	4
59	Property Services Regulatory Authority Bill	D/JELR	P	N	S	6
60	EC Free Movement of Persons Regs 2006	D/JELR	T	Y	S	3.5

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No.	Name	Department	Type	Published	S/F	Pages
61	Coroners Bill	D/JELR	P	N	S	10
62	European Communities (Eligibility for Protection) Regulations	D/JELR	T	Y	S	4
63	Irish Youth Justice Service and Amendments to Children's Act	D/JELR	P	N	S	5
64	Application of the Pensions Act, 1990, to Retirement Annuity Contracts	D/SFA	P/T	Y	S	21 (13 + 8 annexes)
65	Citizens' Information Bill 2006	D/SFA	P	Y	S	3
66	Supplementary Welfare Allowance	D/SFA	P	N	S	2
67	Registration and audit of pension scheme administrators – Social Welfare and Pensions Bill 2008	D/SFA	P	Y	S	9
68	Automatic training for pension scheme trustees – Social Welfare and Pensions Bill 2008	D/SFA	P	Y	S	8
69	Statute Law Revision (Pre-Union) Bill 2006	D/Taoi	P	Y	S	7
70	Merchant Shipping (Miscellaneous Provisions) Bill 2007	D/T	P	N	S	8
71	Dublin Transport Authority Bill 2006	D/T	P	N	S	16
72	Roads Amendment Bill 2006	D/T	P	Y	S	5
73	Rights of Disabled Persons Travelling by Air	D/T	EU	N	S	6
74	Harbours Amendment Bill	D/T	P	N	S	9 + 2 pp annex

Annex 3: List of Interviewees

Construction Industry Federation
Department of Communications, Energy and Natural Resources
Department of Enterprise, Trade and Employment
Department of Environment, Heritage and Local Government
Department of Finance
Department of Foreign Affairs
Department of Health and Children
Department of Justice, Equality and Law Reform
Department of Social and Family Affairs
Department of Transport
Dublin Chamber of Commerce
Dublin City Business Association
Dublin City Council
Irish Banking Federation
Irish Business and Employers' Confederation:
 Health and Safety Unit
 Irish Mining and Exploration Group
 Transport Council
Irish Concrete Federation
Irish Congress of Trade Unions
Irish Small and Medium Enterprises Association
Small Firms Association

