The Burden of Regulation: Who is watching out for us?

Tim Ambler, Francis Chittenden and Deming Xiao

THE BRITISH CHAMBERS OF COMMERCE

April 2007

A report prepared by the British Chambers of Commerce (BCC)

The British Chambers of Commerce

The British Chambers of Commerce (BCC) is the national voice of local business.
The BCC is the national body for a powerful and influential nationwide network of Accredited Chambers.
The BCC serves not only its 100,000 member businesses, which in turn employ well over 5 million people, but also the wider community.
No other business organisation has the geographical spread across extensive multi-sectoral, multi-sized businesses achieved through local Chambers of Commerce. Lying at the heart of their local community, Chambers reach and serve all businesses, with special emphasis on providing services to their members.

Editorial note

The opinions expressed in this report are those of the authors and may not necessarily represent those of the British Chambers of Commerce.

Sally Low Director of Policy & External Affairs
Natalie Evans Head of Policy
Kieran O'Keeffe Policy Adviser Regulation
Karen Clements EU Consultant

The British Chambers of Commerce
65 Petty France
St. James's Park
London
SW1H 9EU
Tel: 0207 654 5800
Fax: 0207 654 5819
Email: info@britishchambers.org.uk
Website: http://www.chamberonline.co.uk

Contents

Foreword

Welcome to our 5th Annual Regulatory Impact Assessment report. This publication along with our annual Burdens Barometer, has helped to place the British Chambers of Commerce at the forefront of the debate on regulation and red tape. We are indebted to Tim Ambler (London Business School) & Francis Chittenden (Manchester Business School) for their diligence in tracking and monitoring a highly complex system.

There are three points that immediately strike me on reading their report.

First, is that the RIA at an EU and UK level is manifestly failing to provide the kind of evidence based scrutiny of regulation that it is supposed to. There are several reasons why this is the case, which the authors set out eloquently, but it is worth reiterating that the raison d'être of the RIA is to head off burdensome regulation. Our Burdens Barometer figure in 2007 was over £55bn; up from £10bn in 2001 when we first compiled it. The fact that the regulatory burden continues to increase so dramatically would suggest that the RIA is not doing its job.

Second, it is worth mentioning the authors' analysis of the parliamentary scrutiny of regulation. If politicians are serious about the UK's competitiveness then making full use of the tools available to them to challenge regulation is vital.

Finally, it is all too clear that government, again at both an EU and UK level, still fails to understand the economics of Small to Medium-sized Enterprises. Small businesses will always be impacted disproportionately by regulation and the analysis in this report makes it clear that officials are failing to get to grips with this concept.

If we are serious about creating the conditions for business to thrive in the UK then ensuring that the RIA process is applied rigorously and in a timely fashion is crucial.

David Frost

Director General

British Chambers of Commerce

Executive Summary

This is the fifth annual report examining how regulatory impact assessments (RIAs) work in practice and whether they follow the Government's own guidelines. The conclusion from this year's review of RIA practice is that little has changed and therefore nor have most of our recommendations (below). In order not to weary readers with repetition, we consider the problems within a wider context. If the RIA system does not work in practice, how should new regulations be challenged? This could be seen as more of a European than a UK matter. Of the main regulations affecting business since 1998, 73% of the costs to business arose from EU legislation. This review shows why the RIA system works even less well in a European context and we suggest how that could be improved.

Neither the UK nor the EU Impact Assessment systems are working effectively to challenge, inform and shape new regulations and this is compounded by the absence of synchronisation between the EU and member state impact assessment systems. It is not enough to publish the first impact assessments after the decisions have effectively been made.

Part of the problem arises from the complexity of the paperwork and the bodies who are involved in the process. Impact assessments overlap with explanatory memoranda at both EU and national levels. Directives require two layers of legislation and transposition notes between the two. EU Regulations and UK Statutory Instruments are mostly administrative orders and thus obscure the minority which are legislative in nature.

Finally we question whether the UK government is looking after its own interests with little concern for business and therefore the future well being of the UK community as a whole. Maybe we should not expect a government to be watching out for us, but Parliament certainly should. Statutory Instruments, the main legislative vehicle for UK regulation, provide Peers and MPs with the opportunity to challenge new regulation but they have not done so – in some cases for 30 years. Instead, they assist government with the transition of the regulations. We suggest Parliament has been asleep at the wheel.

Recommendations

1. EU Regulations and UK Statutory Instruments should both be divided into two categories : laws and administrative orders.

2. Parliamentary challenge should be focused on proposed new laws informed by Explanatory Memoranda and Impact Assessments combined into single documents. Explanatory Memoranda should be replaced by one page summaries of RIAs prepared by the independent expert (see 5 below).

3. The UK bodies monitoring and advising on regulation should be consolidated to just one independent unit, either as part of the NAO or an equivalent body, answerable to a remodelled Regulatory Reform Committee of the House of Commons.

4. The other UK Parliamentary committees should be rationalised to give clear authority to the one with primary responsibility.

5. Generalised consultation should be partially replaced by forensic testing of the RIA by an independent expert employing targeted consultation as needed.

6. The EU and member state impact assessments should be synchronised both as to timing, data provision and methodology, e.g. the Standard Cost Model should be harmonised across the EU to provide best practice and comparative data. RIAs on EU legislation should be in good time for consultation or independent challenge (see 5 above) to influence EU, as well as UK, legislation.

7. Data on costs and benefits in EU Impact Assessments should be based upon national RIAs. National RIAs are prepared to inform negotiations with the Commission, and these figures should be aggregated at the level of the EU economy and included in the EU IAs.

8. The BRE should have stronger quality control over RIAs sourced both from the EU and UK legislation.

9. UK civil servants should support the Commission and press for EU Regulations in place of Directives wherever possible in order to simplify legislation and give effect to the single market.

10. All new regulations should have performance criteria, e.g. extent of implementation, costs and benefits and sunset clauses, or at least fixed review dates after which the regulation would lapse if the formal review is not laid before parliament.

11. The ministerial sign-off on RIAs should state explicitly the basis for his/her judgement which should also state that the costs and benefits are being judged on behalf of UK citizens as a whole.

12. The BRE should maintain a web-based RIA database keyed to Bills/Acts, Statutory Instruments, earlier partial RIAs as well as EU legislation and IAs. It should be the source of Command Papers and be a public access point for RIAs (and the earlier partial RIAs which change character as legislation moves from Brussels to Whitehall) and business influences proposed legislation.

The Burden of Regulation: Who is watching out for us?

This is the fifth annual report examining how regulatory impact assessments (RIAs) work in practice and whether they follow the Government's own guidelines. We have previously established[1] that practice has evolved from poor to fair so far as box-ticking is concerned, but the original purpose of RIAs, namely challenging the need for the regulation and the serious consideration of alternatives, has not been met. The National Audit Office has reached similar conclusions.[2]

This introduction outlines the structure of our report.

The conclusion from this year's review of RIA practice is that little has changed. The Better Regulation Executive (BRE), part of the Cabinet Office, has been reformed and strengthened and much of their energies, in the past year, have been occupied with the new costing of admin burdens and consultation, including that for the impact assessment system itself to which the authors[3] and the BCC[4] have contributed. The RIA consultation results are due out shortly. Our previous recommendations have also been acknowledged and some may be leading to change.

In order not to weary readers with what would be largely a repetition of last year's report, we have minimised the verbal content, banished data tables to Appendices. We have developed last year's recommendations in as simple a manner as we can.

We do however consider the problems within a wider context. If the RIA system does not work in practice, how should new regulations be challenged? This could be seen as more of a European than a UK matter. Of the main regulations affecting business since 1998, 73% of the burden arose from EU legislation[5]. This review will show why the RIA system works even less well in a European context and we suggest how that could be improved.

Whilst the main new regulations by value (burden) arise from Brussels, the majority, 65% in 2005/6, of the 301 regulations by number are wholly UK matters. That may seem odd in two respects. Whilst we are not there yet, the EU has made strides to becoming the single market originally envisaged. A single market requires a single set of regulations. If a regulation is not required by the EU, then we have to ask why it is required at all. Every extra business regulation for the UK not shared with its European trading partners, is a further burden business should not carry. On the other hand, most of the UK only regulations are not about EU matters. For example, they cover tax, welfare benefits, crime and education some of which have RIAs because of a marginal impact on business. Where UK regulations that affect business, other than taxes, are not instigated by the EU they may place burdens on UK business that companies in other EU member states do not face. This fact should be highlighted in the RIA and the responsible Minister should be required to provide a full justification for these additional burdens that will inevitably weaken UK competitiveness.

1 T Ambler, F Chittenden and K Ahuja, Regulators: Box Tickers or Burdens Busters? (British Chambers of Commerce, London, 2006);
T Ambler, F Chittenden and C Hwang, Regulation: Another Form of Taxation (British Chambers of Commerce, London, 2005);
T Ambler, F Chittenden and M Obodovski, Are Regulators Raising Their Game? UK regulatory Impact Assessments in 2002/3, (British Chambers of Commerce, London, 2004);
T Ambler, F Chittenden and M Shamutkova, Do Regulators Play By the Rules? An Audit of UK Regulatory Impact Assessments, (British Chambers of Commerce, London, 2003).

2 Evaluation of Regulatory Impact Assessments 2005-06, Report by the Comptroller and Auditor General, HC 1305 Session 2005-2006, 28 June 2006

3 Tim Ambler and Francis Chittenden, Revising the Regulatory Impact Assessment: A Consultation, London and Manchester Business Schools, September 2006

4 BCC Submission: The Tools to Deliver Better Regulation, October 2006

5 British Chambers of Commerce Burdens Barometer, London, February 2007.

The second apparent oddity is that the annual number of new UK-only regulations has increased in proportion to government rhetoric about reducing regulation. When we initiated these reports six years ago, new regulations, as evidenced by RIAs, were running at about 200 per year. The last two years have seen 300 in each year. Some of this is explained by "RIA inflation", e.g. the Education and Inspections Bill 2006, which has only slight impact on business, spawned 26 RIAs.

We cannot therefore tell, from the overall number of RIAs, whether the system is working but only from a more detailed look at the RIAs themselves and the adequacy of the challenge to legislation at UK and EU levels. Here we find systematic failure but also, at least for the EU, signs of hope.

Finally we question whether the UK government is looking after its own interests with little concern for business and therefore the future well being of the UK community as a whole. Maybe we should not expect a government to be watching out for us, but Parliament certainly should. We suggest how.

UK Regulatory Impact Assessment in 2005/6

301 RIAs were issued by 17 government departments, comparable with the 314 RIAs in 2004/05. Despite perseverance with departments and the BRE and their considerable efforts to be helpful, we were unable to locate 11 RIAs listed in Command Papers[6] from the Better Regulation Executive either because it was stated that no online copy was available, or because the web-link was not functioning, e.g. *the Regulatory Reform (Registered Designs) Order 2006. SI 1974/2006* - DTI. In addition our research identified 10 more RIAs that were explicitly stated to be full or final RIAs but were not included in the Command Papers e.g *Final RIA on proposed changes to Civil Aviation Working Time Regs 2004*, published in March 2006. Subsequent follow up e-mails to the BRE and the responsible ministries led to the resolution or an explanation of most of these items, but they are symptomatic of the grit that exists in a system where there are many departments producing RIAs and there is continued weak (some would say "light touch") central monitoring and control of the process.

Normally, the Command Paper for RIAs issued in the second half of a year is published the following June, and those for the first half in late October or November. Taking five or six months to collate published RIAs would not seem much of a challenge but the one due in June 2006 was unfortunately overlooked and not published until December.

As in previous years[7], the RIA process does not appear to be conducted with the rigour originally envisaged when the discipline was introduced. In January 2006, the Chairman of the Better Regulation Commission expressed it thus: "the principles of better regulation ….have yet to get to the point of deeply influencing the behaviour of the departments."[8] On the other hand, it is ahead of practice in most other countries, e.g. the EU in general, as discussed later, and Sweden in particular.[9]

6 Cabinet Office (2006) Regulatory Impact Assessments 1st July – 31st December 2005
Cabinet Office (2006) Regulatory Impact Assessments 1st January – 30th June 2006
7 T Ambler, F Chittenden and K Ahuja, Regulators: Box Tickers or Burdens Busters? (British Chambers of Commerce, London, 2006);
T Ambler, F Chittenden and C Hwang, Regulation: Another Form of Taxation (British Chambers of Commerce, London, 2005);
T Ambler, F Chittenden and M Obodovski, Are Regulators Raising Their Game? UK regulatory Impact Assessments in 2002/3, (British Chambers of Commerce, London, 2004);
T Ambler, F Chittenden and M Shamutkova, Do Regulators Play By the Rules? An Audit of UK Regulatory Impact Assessments, (British Chambers of Commerce, London, 2003).
Evaluation of Regulatory Impact Assessments 2005-06, Report by the Comptroller and Auditor General, HC 1305 Session 2005-2006, 28 June 2006
8 The Management of Secondary Legislation, Volume II: Evidence. House of Lords, 29th Report of Session 2005-06, p.165.
9 Red Tape for Business in Sweden, Board of Swedish Industry and Commerce, Stockholm, August 2006.

Appendix A sets out the data arising from the analysis of RIAs and the specific criticisms. Overall, both the good and the bad news is that the level of compliance is encouraging but leaves plenty of room for improvement from a process, or mechanical, point of view. More substantively we question whether RIAs have changed the political reality that ministers introduce regulations because they want them as distinct from being able to justify them. RIAs continue to be used to facilitate regulation rather than challenge the need for it or the quantum. We make recommendations later.

Statutory Instruments

In the UK, most regulations are enacted in the form of statutory instruments (SIs) i.e. through secondary legislation. SIs are also used to incorporate the provisions of EU Directives into UK law[10]. The vast majority of statutory instruments are not permanent laws at all but are transient arrangements, e.g. for establishing prices or road closure orders[11]. There are two main forms of Statutory Instrument: "General", which include most UK regulations, and "Local". Table 1 provides a recent analysis.

Table 1: The number of Statutory Instruments from 2003 to 2006

	General	Local	Total
2003	1721	1633	3354
2004	1683	1769	3452
2005	1767	1832	3599
2006	1644	1865	3509

Source: www.opsi.gov.uk

We established that more than 60% of RIAs from July to December 2005 were enacted by SIs where links to the legislation were shown. We were not able to establish the division of the remaining RIAs between primary legislation and lack of linkage, e.g. the RIA failed to note the SI or was produced before the SI was registered. But even if all regulations represented by RIAs were enacted by SI, they would still account for less than 20% of SIs.

Most SIs have to be approved by both Houses of Parliament and this approval takes one of two forms.[12] About 15% require both Houses of Parliament (or just the House of Commons for financial matters) positively to approve the legislation although, due to pressure of business, this may be delegated to Committees. This is the "affirmative process". Negative process SIs (about 85%) are laid before both Houses and are taken as approved unless a peer or MP raises objection within 40 days. They have to be laid at least 21 working days before they come into effect.

Given the volume of SIs it is no surprise that Parliamentary oversight is somewhat superficial. The House of Lords Merits of Statutory Instruments Committee was created on 17th December 2003 and diligently reviews over 1,000 SIs per annum but for quality and process rather than as a potential challenge to substance. They see their role as supportive to the Executive.[13] They do refer about 8% of SIs to the House but for minor revision rather than withdrawal. The last times SIs were annulled by Parliament were:

10 *Statutory Instrument Practice* Office of Public Sector Information www.opsi.gov.uk
11 *Evidence to the Select Committee on the Merits of Statutory Instruments Inquiry into the management of secondary legislation* Tim Ambler and Francis Chittenden. The Management of Secondary Legislation, Volume II: Evidence. House of Lords, 29th Report of Session 2005-06. (Paper 149-II), pp.192-195.
12 Much of this section is drawn from Statutory Instrument Practice: A manual for those concerned with the preparation of statutory instruments and the parliamentary procedures relating to them, Office of Public Sector Information, 4th edition (November 2006), and is not separately referenced.
13 The Management of Secondary Legislation, Volume I: Report. House of Lords, 29th Report of Session 2005-06. (Paper 149-I)

- 2000, negative SI in the House of Lords: *Greater London Authority Elections Rules* (SI 2000/208).
- 1979, negative SI in the House of Commons: the *Paraffin (Maximum Retail Prices) (Revocation) Order 1979* (S.I. 1979, No. 797). Clearly an inflammatory issue.
- "The last time a draft Statutory Instrument subject to affirmative procedure was not approved by Resolution of the House of Commons was on 12th November 1969 when House agreed to Motions that the draft *Parliamentary Constituencies (England) Order 1969, the draft Parliamentary Constituencies (Wales) Order 1969, the Parliamentary Constituencies (Scotland) Order 1969 and the Parliamentary Constituencies (Northern Ireland) Order* 'be not approved'.

In the Commons, the Joint Committee on Statutory Instruments considered 1,371 SIs in 2003/4. Of these less than 90 were marked as being referred for special grounds (the figure was 88 but the same SI can be referred for more than one reason). So far as one can tell[14], all the reasons were technical, i.e. none was challenged on substantive grounds.

Their Lordships noted in their 2006 report (referenced below) that there was no overall control programme in Whitehall for SIs. They suggested each department should have an annual plan for SIs due in the following year and that this should be coordinated centrally. Their concern is with smoothing the process. Our concern is with keeping track of the different aspects of UK and EU legislation and RIAs.

Why, for example, are there 300 RIAs, 1,200 SIs laid before Parliament, and 500 General SIs not laid before Parliament? The HMSO maintains an electronic database of SIs and we have one for RIAs but both have incomplete information. EU and UK legislation, notably SIs, and RIAs are inadequately cross referenced, i.e. the trail cannot always be followed. It would be sensible for the SI database to be extended to include EU legislation, primary UK legislation and RIAs so that proper links can be made.

We and others have long complained that business-related regulations do not receive adequate challenge. The Better Regulation Commission is theoretically independent but their Secretariat is located within the Cabinet Office and claims that they can be more effective working within the tent. For similar reasons, responsibility for RIAs has been left wholly with the Departments themselves. The BRE is responsible for the system overall but, for individual RIAs, it has an advisory role.

So who is watching out for us? We suggest that Parliament has erected insurmountable barriers to deregulation whilst maintaining a supine posture when facing new regulation. Let us examine those charges.

The Deregulation and Contracting Out Act 1994, inter alia, allowed SIs to be used to repeal or amend existing primary or secondary legislation (SIs). This was superseded by the 2001 Regulatory Reform Act. Rather than making deregulation simpler, Regulatory Reform Orders made it more difficult. The House of Commons Information Office, Statutory Instruments paper explains:

"The exacting procedure for Parliament's examination of regulatory reform proposals and draft orders was introduced in response to concern that the sweeping powers given to Ministers in the original Act [1994] should be properly accountable."

The problems were recognised by government with the Legislative and Regulatory Reform Act 2006. Whilst it is too soon to judge the effectiveness of the new approach, there are grounds for pessimism.[15] The 2006 Act modifies Regulatory Reform Orders, which also require all the surrounding bureaucracy of new regulation, e.g. RIAs. It does not take us back to the simplicity of the 1994 Act. What is clear is that Parliament has been given no positive role: it can only block deregulation.

14 16 were "other".
15 Tim Ambler and Francis Chittenden, Deregulation or Déjà vu, British Chambers of Commerce, January 2007.

The discussion of SIs above makes it clear that Parliament has the authority and opportunity to reject new regulations, apart from those required by the EU, but does not do so. Whether "prayers" (the term for proposing an annulment of a SI) would be successful in the House of Commons is secondary; the challenge itself would be enough to make Departments think again.

We acknowledge that the volume of SIs and the complexity of the surrounding paperwork makes objection difficult and will later recommend how it can be simplified so that challenge would be more likely.

To illustrate the complexity, Parliament has at least eight committees on SIs with members doubtless fighting to join.[16] It seems a shame that so much effort has so little to show for it.

a) the Statutory Instruments Reference Committee;

b) House of Commons Delegated Legislation Committees;

c) the Joint and House of Commons Select Committees on Statutory Instruments;

d) the House of Lords Select Committee on the Merits of Statutory Instruments

e) the Hybrid Instruments Committee of the House of Lords; and

f) the House of Lords Delegated Powers and Regulatory Reform Committee and the House of Commons Regulatory Reform Committee

In short, we are suggesting that SIs which are really secondary legislation are distinguished from administrative orders and receive much more active scrutiny as to their substance and necessity, and if necessary occasional rejection, by Parliament.

The next section examines the links between EU Impact Assessments (IAs) and UK RIAs. In doing so an attempt is made to answer the question, do the existing impact assessment systems in the EU and UK provide adequate appraisal and consultation on proposed EU legislation and its impact on UK business?

How well do EU and UK Impact Assessments integrate?

The European Union introduced a system of impact assessment (IA) for legislation in 2003 (extended impact assessment) and by July 2006, 160 IAs had been produced. EU Impact Assessments are intended "to enhance the empirical basis of political decisions and to make the regulatory process more transparent and accountable".[17] Appendix B contains the detailed data and comments on the EU system in a similar format to that adopted so far for UK RIAs.

There are about 100 Directives each year (but 140 in 2006) compared with 2,200 Regulations. As with SIs in the UK, only a small number of Regulations are actually legislative, the vast majority being administrative orders. The Draft, but ill-fated, Constitutional Treaty sensibly proposed to divide EU Regulations into "Laws" and "Administrative Orders" in order, one presumes, to focus legislators' attention on substantive matters.

IAs are currently conducted at a very high level of analysis. They are largely conceptual in the way that they evaluate likely impacts and, as might be expected, these are discussed and judged at the level of the EU, rather than as the sum of impacts on Member States. As currently operated EU Impact Assessments cannot be said to provide effective appraisal of the impact of proposed EU legislation on businesses in Member States and the EU

16 Statutory Instrument Practice: A manual for those concerned with the preparation of statutory instruments and the parliamentary procedures relating to them, Office of Public Sector Information, 4th edition (November 2006) Section 5.1.1, p.79
17 Claudio M. Radaelli The diffusion of regulatory impact analysis – Best practice or lesson-drawing? European Journal of Political Research, 43, 2004.

has recently conducted an external evaluation of the IA system, the results of which are due to be published shortly[18].

Relatively few IAs quantify the costs of the proposed legislation, where they do so quantification tends to focus on a narrow range of issues. Another challenge is capturing raw data from affected groups. Commission guidelines have defined[19] a methodology for collecting and using expertise, and the credibility of quantified data would be improved if it were obtained from national representative bodies in the affected industries.

IAs tend to be prepared without detailed input from governments of Member States[20], unless that country is very pro-active in presenting its views. Conducting Impact Assessment at the national level is very difficult, as the UK experience has shown. Carrying out meaningful analysis of the aggregate effects on 27 countries is very much more difficult. The obvious solution, surely, is for National RIAs, that are prepared by member states in order to inform their discussions with the Commission about the proposed new legislation, to act as the basis of cost benefit data in EU Impact Assessments? National RIAs should be prepared in a parallel process with each EU IA so that it should be a simple matter to gross up EU figures on the basis of the sample of member state RIAs that have coherent data.

Although the EU has recognised the contribution of SMEs to employment and economic growth and, in accordance with the re-affirmed Lisbon agenda, intends to take a series of initiatives to support SMEs, regulatory impacts on SMEs are rarely discussed in IAs. The current impact assessment guidance in the EU mentions SMEs only four times.

The vast majority of IAs end with a very brief implementation plan. Impact assessments should provide detailed implementation plans and the baselines for ex-post evaluation. Ideally implementation and monitoring should be conducted in stages, so that the EU could continuously correct any problems during implementation and so improve the quality of legislation.

The EU has recognised that the IA system prior to 2007 has provided inadequate challenge and an 'independent' challenge committee now reports directly to the EU President.[21] The members of the committee are drawn from the Directorates and time will tell how effective their challenges will prove. If this committee turns out to be as ineffective as the UK equivalents (e.g. the Panel for Regulatory Accountability) as may be the case, then it should be replaced by a truly independent body that reports directly to the EU Parliament.

26 proposals for Directives were subject to EU impact assessment, during 2004 and 2005. Nine of these have subsequently been assigned a reference number and published officially. Eight came into force before January 2007, and one will come into force in January 2008. From 2005 to date, more than 200 Directives have been published and come into force at the EU level. Consequently, to date only around 10% of Directives have been subject to an EU impact assessment. So far we can only identify 10 of the 26 IAs for proposed Directives that have an equivalent partial or final RIA in the UK. The main reason for the discrepancy will be the UK limited requirement for RIAs, i.e. primarily where business is affected. For similar reasons not all Directives will be subject to EU IAs on an ongoing basis.

The UK should prepare partial RIAs, in these cases, when proposals for Directives are available, for consultation and to inform the UK negotiating position. The responsibility for preparing partial RIAs at this stage already exists but they are often prepared too late to influence EU processes and decisions.

18 See http://ec.europa.eu/governance/impact/new_en.htm
19 COM(2002)713, see http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0713en01.pdf
20 Chittenden F, Ambler T and Xiao D, 2007, Impact Assessment in the EU, forthcoming in Better Regulation, Weatherill S (editor) Hart Publishing , Oxford.
21 EU Vice President Ginter Verheugen, presentation at European Policy Forum seminar, Brussels, 23 February 2007.

Because of the timescales involved, there are presently only partial RIAs available for most of the Directives that have been subject to EU IAs as these are still in the process of being implemented in the UK. There is only one final RIA. Most UK partial RIAs (from the dates on the documents placed on departmental web sites) have been initiated within a period of six months after publication of the EU Impact Assessment. To function effectively, the two layers of impact assessment i.e. both the EU Impact Assessment and UK partial RIA, should run in parallel in order to fully inform discussion of the proposal and the subsequent Directive. Thereafter, the system also requires a UK RIA on the transposition of each Directive into UK law.

At least in theory, the original partial RIA for the Directive evolves also to become the RIA for the transposition which is sensible in some ways, e.g. reduction in paperwork, but confusing in others since the EU and UK legislative acts are separate and with separate goals. The choices at the first stage become more limited at the second so the later versions of the RIA will lose the original options available. It is therefore important that the earlier versions, with dates, are maintained as part of the public record.

We found considerable confusion over timing with some RIAs being completed too late for consultation. Whilst it is possible that partial RIAs were available sooner, that is not recorded and the presumption is that RIAs were completed for form's sake. We will recommend later that successive versions of RIAs reference the dates of earlier versions which have been superseded and these earlier versions should remain on the record. This is standard practice for legislation.

Specifically, six RIAs (10%) were completed more than one month later than the date the relevant Directive was implemented (came into force) in the UK. Two others were re-issued RIAs that had been prepared more than five years earlier without any apparent updating: *The Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (England and Wales) Amendment (No. 3) Regulations 2004 and The Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (England and Wales) Regulations 2000* both from DEFRA. Consequently 52 (87%) of RIAs were published at the same time that the Directive was implemented in the UK.

Moving from Directives, the EU has conducted 29 IAs for proposed Regulations. As far as we can identify[22], seven of these have been assigned Regulation numbers and published in the Official Journal of European Union, and enforced in UK. 12 are in the consultation stage, two of which have partial RIAs. We cannot identify the remaining 10 proposals that had IAs, probably because the IAs were finished in 2005/2006 and the proposed Regulations are not yet in force.

In 2005/2006, the UK prepared 102 RIAs relating to EU legislation. 55 RIAs, or nearly 54% were prepared for Directives, and 35 RIAs (33%) were prepared for Regulations (three RIAs were for Decisions and the source of another eight RIAs have not been identified). 25 (80%) RIAs prepared for EU Regulations were initiated before the Regulations came into force although final RIAs were often published quite late. Thus in seven (20%) cases UK consultation on Regulations was carried out too late to have made a meaningful contribution to the outcome.

Conclusions

Neither the UK nor the EU Impact Assessment systems are working effectively to challenge, inform and shape new regulations. Other research draws much the same conclusions,[23] although expressed in more encouraging terms. Vibert suggests that the net result of policy-making in the Parliament and Council of Ministers, combined with a

22 Annex IV Regulations having IAs
23 F Vibert, The EU's New System of Regulatory Impact Assessment – A Scorecard, (European Policy Forum, London, 2004)
F. Vibert, The Itch to Regulate: Confirmation Bias and the EC's New System of Impact Assessment (European Policy Forum, London, 2005)
F. Vibert, 'The limits of Regulatory Reform in EU', 26 Journal of Institute of Economic Affairs 3, at 17–21.
Risk, Responsibility and Regulation: Whose risk is it anyway? Better Regulation Commission, October 2006.

politicised Commission is that the institutional setting is not one within which IAs are likely to be effective in stemming the flow of regulation that may have the potential to damage market competitiveness. Indeed the IA guidance acknowledges that the rationale for impact assessment is to ensure that legislation is fit for purpose. Only as a last resort should the necessity for the proposed legislation be questioned. At both EU and UK levels, the systems are under active review and it would be good to believe that challenge will become more effective. Our recommendations below are in that direction.

The elephant in the room is the absence of synchronisation between the EU and member state impact assessment systems. This has been acknowledged, at least informally. For example, the time lines for the production of impact assessments at EU and member state levels should be consistent, and sufficiently early to allow full consultation and review not just by government officials but by business and other parties affected by the proposed legislation. It is not enough to publish the first impact assessments after the decisions have effectively been made.

Part of the problem arises from the complexity of the paperwork and the bodies who are involved in the process. Impact assessments overlap with explanatory memoranda at both EU and national levels. Directives require two layers of legislation and transposition notes between the two. As the European Commission itself has suggested, it would be simpler to use Regulations in place of Directives.[24] EU Regulations and UK Statutory Instruments are mostly administrative orders and thus obscure the minority which are legislative in nature.

As this report has shown, the complexity drives out effective consultation particularly for EU legislation. As we have pointed out in our previous reports, even for purely UK regulation, consultation is conducted by the "Counsel for the Prosecution", i.e. the department promoting the new regulation, and contributes to facilitation rather than challenge. We here repeat our previous recommendation that forensic examination is required from an independent expert who should prepare a one page summary for legislators, e.g. Parliament. The BRE has now adopted our earlier recommendation that there be a one page summary, which is progress, but we go further. The summary proposed here would be from an independent perspective and provide legislators with both sides of the picture. Explanatory Memoranda, precursors of IAs, would thereby become redundant. Eliminating them would be a small contribution to simplification.

Where does this leave us? Clearly both the EU and Whitehall law factories are beavering about their businesses with the best of intentions. The Impact Assessment systems are fine examples of that. The boxes are being ticked but their fundamental rationale of challenging the need for new legislation and, if so, finding the most cost effective solution is being missed at both levels. Meanwhile, the UK Parliament which does have the power to intervene effectively, through the SI process, is asleep at the wheel. Who is watching out for us, the UK economy, either in Brussels or in Whitehall?

We finally bring together our recommendations.

[24] EU Comm 535, 25 October 2005: "**From Directives to Regulations**: As the Commission made clear in its Communication on Better Regulation for Growth and Jobs, the choice of the appropriate legal approach must be based on a careful analysis. Replacing directives with regulations can under certain circumstances be conducive to simplification as regulations enable immediate application, guarantee that all actors are subject to the same rules at the same time, and focus attention on the concrete enforcement of EU rules. This contribution to simplification was widely recognised in the consultations underlining the view that it would prevent divergent national implementation. In conformity with Treaty provisions and taking into account the Protocol to the Treaty on subsidiarity and proportionality, the Commission intends to further exploit, on a case by case basis, the potential for simplification through substituting directives with regulations."

Recommendations

1. EU Regulations and UK Statutory Instruments should both be divided into two categories: laws and administrative orders.

2. Parliamentary challenge should be focused on proposed new laws informed by Explanatory Memoranda and Impact Assessments combined into single documents. Explanatory Memoranda should be replaced by one page summaries of RIAs prepared by the independent expert (see 5 below).

3. The UK bodies monitoring and advising on regulation should be consolidated to just one independent unit, either as part of the NAO or an equivalent body, answerable to a remodelled Regulatory Reform Committee of the House of Commons.

4. The other UK Parliamentary committees should be rationalised to give clear authority to the one with primary responsibility.

5. Generalised consultation should be partially replaced by forensic testing of the RIA by an independent expert employing targeted consultation as needed.

6. The EU and member state impact assessments should be synchronised both as to timing, data provision and methodology, e.g. the Standard Cost Model should be harmonised across the EU to provide best practice and comparative data. RIAs on EU legislation should be in good time for consultation or independent challenge (see 5 above) to influence EU, as well as UK, legislation.

7. Data on costs and benefits in EU Impact Assessments should be based upon national RIAs. National RIAs are prepared to inform negotiations with the Commission, and these figures should be aggregated at the level of the EU economy and included in the EU IAs.

8. The BRE should have stronger quality control over RIAs sourced both from the EU and UK legislation.

9. UK civil servants should support the Commission and press for EU Regulations in place of Directives wherever possible in order to simplify legislation and give effect to the single market.

10. All new regulations should have performance criteria, e.g. extent of implementation, costs and benefits and sunset clauses, or at least fixed review dates after which the regulation would lapse if the formal review is not laid before parliament.

11. The ministerial sign-off on RIAs should state explicitly the basis for his/her judgement which should also state that the costs and benefits are being judged on behalf of UK citizens as a whole.

12. The BRE should maintain a web-based RIA database keyed to Bills/Acts, Statutory Instruments, earlier partial RIAs as well as EU legislation and IAs. It should be the source of Command Papers and be a public access point for RIAs (and the earlier partial RIAs which change character as legislation moves from Brussels to Whitehall) and business influencing proposed legislation.

Appendix A

UK Regulatory Impact Assessment in 2005/6

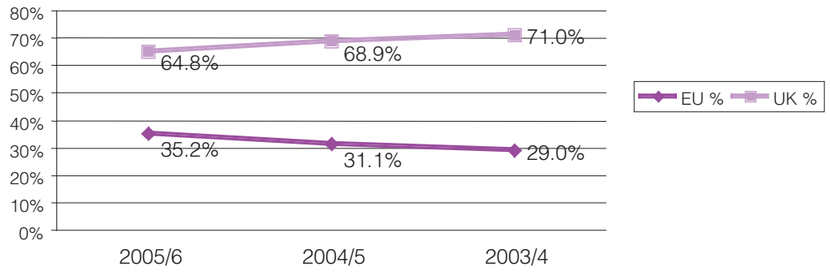
The distribution of RIAs among departments remains similar to previous years, except for a reduced level of activity by the Home Office.

Table A1: RIAs distribution among departments - 2005/6

No	Department	RIAs in 2005/06	Percent of total	Change compared with 2004/05
1	DEFRA	53	18	3
2	Transport	44	15	1
3	DTI	42	14	1
4	HMRC	37	12	17
5	DCLG	29	10	8
6	Health	22	7	-5
7	Food Standard Agency	17	6	-4
8	DCMS	13	5	4
9	Work and Pensions	10	3	8
10	Constitutional Affairs	9	3	3
11	Education and Skills	8	3	-9
12	Home Office	5	2	-33
13	Health and Safety Exec	5	2	-3
14	Treasury	4	1	-4
15	Cabinet Office	1	0	0
16	Foreign and Commonwealth Office	1	0	0
17	Defence	1	0	0
	Total	301	100	-13

UK driven RIAs still form the majority although this proportion has declined in recent years. Figure 1 shows the trend.

Figure A1 EU and UK sourced RIAs Growth Trend



Ninety-seven RIAs (33% of the total) quantified business[1] costs. The majority of RIAs (54.8%) stated either that costs to business were insignificant or could not be quantified because there was no data available. Almost one in eight RIAs (11.7%) do not mention business costs. The majority of RIAs (71.7%) claim benefits to business, but only 39% quantify them. Overall, as may be seen from Table A2 (below), one off and recurring costs exceed the quantified benefits, by a substantial margin.

Table A2 Business costs and benefits for each department

	Business Costs £M		Business Benefits £M	
Dept	One-off	Recurring	One-off	Recurring
Trade and Industry	192	1,328	0	1,035
DCLG	60	1,237	0	319
Transport	90	345	0	105
DEFRA	90	133	210	165
Work and Pensions	1,299	131	0	0
Food Safety Agency	36	97	0	47
HMRC	303	74	13	311
Education and Skills	0	23	0	0
Health	16	20	0	12
HSE	5	4	0	1
Home Office	21	4	0	2
Constitutional Affair	1	2	0	0
DCMS	18	0	0	31
Total	2,131	3,398	223	2,028
Net Costs to Business	1,907	1,370		

The Department of Work and Pensions was responsible for two thirds of the one-off costs although, as we discuss in the main paper, this seems an underestimate. Two departments, the DTI and Department for Communities and Local Government, were responsible for 75% and 88% of the gross and net cost to business respectively.

The DWP RIA for The Occupational Pension Scheme (equal treatment) rules contributes the most significant one-off costs to business £1,250million. For DEFRA, the RIA for the Transposition of the EU *Foot-and-Mouth Disease Directive 2003* results in one-off benefits of £210million. As noted above the large costs and benefits for business from both DWP and DEFRA are caused by only one or two RIAs. In contrast the costs and benefits arising from DTI RIAs are spread over more than ten individual RIAs, for example, National Minimum Wage RIA, *Increasing adult and youth rates in October 2005 and 2006*, produced significant recurring business costs £383million. While the RIA *for Recruitment, training and promotion of employment relations* generated estimated benefits for business of £382million.

[1] "Quantified" Quantified and figures provided including zero costs/benefits

Table A3 Quantification of costs to business

Number (#) and proportion (%) of RIAs obtained (after the 2nd row)	Quantification of Costs to Business									
	2005/6		2004/5		2003/4		2002/3		1998-2002 (Sample)	
	#	%	#	%	#	%	#	%	#	%
Number of RIAs	301	100%	314	100%	223	100%	194	100%	200	100%
Number of RIAs obtained	290	96%	305	97%	217	97%	165	85%	200	100%
Yes quantified, with substantial impact	96	33%	99	32%	144	66%	95	58%	109	55%
Yes quantified, but figures insignificant	99	34%	110	36%	28	13%	31	19%	30	15%
Yes, quantified	195	67%	209	69%	172	79%	126	76%	139	70%
Not quantified	95	33%	96	31%	45	21%	39	24%	61	31%

Table A4 Quantification of benefits to business

Number (#) and proportion (%) of RIAs obtained (after the 2nd row)	Quantification of Costs to Business									
	2005/6		2004/5		2003/4		2002/3		1998-2002 (Sample)	
	#	%	#	%	#	%	#	%	#	%
Number of RIAs	301	100%	314	100%	223	100%	194	100%	200	100%
Number of RIAs obtained	290	96%	305	97%	217	97%	165	85%	200	100%
Yes quantified, with substantial impact	41	14%	23	8%	37	17%	40	24%	36	18%
Yes quantified, but figures insignificant	72	25%	130	43%	5	2%	8	5%	3	2%
Yes, quantified	113	39%	153	50%	42	19%	48	29%	39	20%
Not quantified	177	61%	152	50%	175	81%	117	71%	161	81%

Tables A3 and A4 (above) show the trend in quantification of costs and benefits from 1998 to date. There is little change over the last two years in terms of the quantification of costs, however quantification of benefits to business has declined from 50% to 39%. In contrast, the proportion and number of RIAs identifying substantial benefits to business has risen to 41 (14%) from the low observed in 2004/5.

92 RIAs (32%) quantified benefits for government or the public sector. Nearly 60% (173) either qualitatively discussed benefits accruing to government and the public sector or stated that such benefits were insignificant. RIAs from DCMS generate most of the costs and benefits for government; the RIA for the BBC Charter Review identified the most significant recurring costs for government, about £3.6bn., and benefits of £5.5bn. The net recurring benefits accruing to government from regulations introduced in 2005/6 justify, so far as they are concerned, the costs incurred.

Table A5 Government costs and benefits for each department

	Costs to Government (£m)		Benefits to Government (£m)	
Dept	One-off	Recurring	One-off	Recurring
DCMS	0	4162	0	9,293
Education and Skills	506	544	0	3,839
Trade and Industry	7	400	0	567
Transportation	8	312	0	32
Health	1	291	0	23
DEFRA	36	191	0	527
HMRC	68	187	127	2,607
Work and Pensions	1,383	186	0	0
Constitutional Affair	51	151	0	50
DCLG	407	38	1253	229
Home Office	1	6	0	6
Health Safety Executive	1	0	0	0
Food Safety Agency	1	0	0	0
Total	2,471	6,469	1,380	17,173
Net Cost (Benefit)	1,091	(10,704)		

Table A6 (page 20) shows the trend in RIAs quantifying costs and benefits for government. In 2004/2005, 87% and 66% of RIAs quantified costs and benefits for government, this year these numbers fall back to the pattern observed in earlier years.

Fewer than 8% of RIAs (20) quantified additional costs for SMEs. The majority only mention SMEs in a few sentences and conclude that there are no disproportionate effects for small firms. 16% of RIAs (45) do not comply with RIA guidance as there is no analysis of the impact on SMEs, even though the proposed regulations create additional business costs.

As noted by the National Audit Office report[2] RIAs seem to be executed as a routine task rather than in accordance with their original objective which was to shape and inform the process of deciding whether and in what form regulations should be introduced. Some of the criticisms observed in this study are:

- Published RIAs frequently do not contain a signature or date of approval, or provide information on their status e.g. full or final.

[2] Evaluation of Regulatory Impact Assessments 2005-06, Report by the Comptroller and Auditor General, HC 1305 Session 2005-2006, 28 June 2006

Table A6 Government costs and benefits

Number (#) and proportion (%) of RIAs obtained	Costs to Government									
	2005/6		2004/5		2003/4		2002/3		1998-2002 (Sample)	
	#	%	#	%	#	%	#	%	#	%
Number of RIAs	301	100	314	100	223	100	194	100	200	100
Number of RIAs obtained	290	96	305	97	217	97	165	85	200	100
Yes quantified, with substantial impact	76	26	66	22	90	41	38	23	16	8
Yes quantified, but figures insignificant	91	31	198	65	7	3	16	10	7	4
Yes, quantified	167	58	264	87	97	45	54	33	23	12
Not quantified	123	42	41	13	120	55	111	67	133	67
Number (#) and proportion (%) of RIAs obtained	**Benefits to Government**									
	2005/6		**2004/5**		**2003/4**		**2002/3**		**1998-2002 (Sample)**	
	#	**%**	**#**	**%**	**#**	**%**	**#**	**%**	**#**	**%**
Number of RIAs	301	100	314	100	223	100	194	100	200	100
Number of RIAs obtained	290	96	305	97	217	97	165	85	200	100
Yes quantified, with substantial impact	40	14	33	11	31	14	15	9	8	8
Yes quantified, but figures insignificant	52	18	167	55	0	0	8	5	2	4
Yes, quantified	92	32	200	66	31	14	23	14	10	12
Not quantified	198	68	105	34	186	86	142	86	190	67

- Large numbers of RIAs do not include detailed implementation plans, as required by the guidance.
- RIAs, or the Department's websites, do not always disclose when the regulation will come into force.
- Officials preparing RIAs assume no disproportionate impact on SMEs with very limited data. This may be despite representations to the contrary made by the Small Business Service.
- Although some departments assign a specific page in their website to store all their RIAs, in other cases, for example the DTI, there is no central web page that collects all RIAs. In addition, on the DT website, RIAs are published in several sections. An example of good practice is HMRC, that not only highlights "better regulation" on their homepage, but publishes final RIAs and initial and partial RIAs in different sections .
- Even where Departmental web-sites are well organised, the BRE should maintain a central electronic database of RIAs, as departmental web-links to individual RIAs are often broken. It will be impossible to conduct meaningful ex post reviews on a regular basis without the original RIAs.

- Over half the RIAs ignore the 'do nothing' option. Of course with European Directives "doing nothing" is not usually feasible unless equivalent UK laws already exist, as the UK is bound to transpose the Directive into UK law.
- If any sunset clauses were employed, they failed to show up on our radar.
- RIAs do not always show the links to UK primary or secondary legislation, e.g. SI numbers, nor, where relevant to EU legislation distinguishing Directives from Regulations and Decisions.

It is currently each department's responsibility to store RIAs at a designated place in their website, in that way it will be accessible for post monitoring and evaluation. In this respect HMRC are exemplary as they segment RIAs into the final, initial and partial versions by year. However few other departments are as helpful and in some cases (e.g. DTI and DT) there is more than one RIA site. Final RIAs from all relevant departments should be collectively deposited at either the Better Regulation Executive[3] (as suggested in the recent BRE consultation) or in a special section of the website of the Office of Public Sector Information that is becoming increasingly useful[4].

However, it has been argued that the current BRE proposal does not go far enough[5]. The RIA process is presently a "closed system". In other words if a business person or representative body is not directly party to it, or is not invited to comment in the consultation then, even with access to the online database, it is unlikely that the proposal would be known about until the regulation or final RIA are published. This is unhelpful. There should be a central database of proposed regulations that provides access to the text of the first draft proposal, and the initial, partial and final RIAs as well as the consultation documents and the regulation in its latest form. This will improve access to information on proposed regulations and also provide a useful means to demonstrate the changes made prior to implementation or eventual withdrawal. The current EU system, where the Work Programme is made public in advance, together with the Roadmap and Final Impact Assessment achieves some of these objectives and the UK would do well to follow suit.

Although the current RIA guidance highlights the importance of implementation plans and clear enforcement dates, these tend to be completed in a very summary way. Although some departments will issue guidance for businesses or industries later than the RIA, a detailed implementation plan in the RIA would help to inform business and enable them to prepare as early as possible. In addition, well designed monitoring and evaluation plans will reinforce the opportunities to learn from practice and so inform future regulatory initiatives.

Practical and meaningful evaluation of the impact of proposed regulations on SMEs, including effective consultation, remains a weakness in many RIAs[6]. Following the recent disbandment of the Small Business Service regulatory unit, it may well be anticipated that this already weak element in RIAs will decay further. Some research[7] has already discussed potential solutions, for instance, exemptions for SMEs.

3 Better Regulatory Executive http://www.cabinetoffice.gov.uk/regulation/about_us/index.asp
4 www.opsi.gov.uk/
5 Ambler T and Chittenden F, response to BRE consultation on RIAs, October 2006
6 Personal accounts: a new way to save, Regulatory Impact Assessment, DWP, December 2006
7 The Tools to Deliver Better Regulation, Revising the Regulatory Impact Assessment: A Consultation Response by Tim Ambler and Francis Chittenden, London and Manchester Business Schools

Appendix B

EU Impact Assessment

The European Commission provides a specific microsite for all IA related documents, including all planned and completed IAs and guidance. The site also contains the approved toolkits for impact assessment. Copies of all IAs published to date have been obtained and loaded into a new BCC database of EU Impact Assessments, that will be updated annually. Although the scale of the EU IA system is much smaller than the UK, the availability of completed and planned IAs and the existence of a central website that is updated regularly and contains copies of all IAs, is much more efficient and open than the current UK system. Table B1 shows the growth in the number of IAs from 2003 to mid 2006.

Table B1 EU Impact Assessments produced 2003 to mid 2006

No.	Dept	2003	2004	2005	2006 by End of July	Total
1	AGRI	2	1	2	2	7
2	ECFIN	1	0	0	3	4
3	EMPL	2	3	2	1	8
4	ENTR	1	2	5	1	9
5	ENV	4	4	10	5	23
6	FISH	2	2	1	0	5
7	INFSO	2	2	4	4	12
8	JAI	1	2	0	0	3
9	MARKT	1	4	3	2	10
10	RELEX	1	0	2	0	3
11	SANCO	1	0	4	2	7
12	TREN	3	1	12	2	18
13	EAC	0	4	3	0	7
14	JLS	0	1	12	6	19
15	DEV	0	3	5	0	8
16	REGIO	0	1	1	1	3
17	TAXUD	0	0	4	3	7
18	TRADE	0	0	1	0	1
19	RTD	0	0	1	0	1
20	COMP	0	0	2	0	2
21	ELARG	0	0	2	1	3
	Total	**21**	**30**	**76**	**33**	**160**

2005 was a milestone for impact assessment in the European Union. The number of Impact Assessments (IAs) produced grew to 76 an increase of 153% compared with 2004. However, this number still did not meet the target of around 100 IAs as foreshadowed by the EU[1]. In 2005 the European Union also announced the decision to adopt IA in place of Extended Impact Assessment, and provided updated guidance for the assessment process and methodology. In 2006, by the end of July, the EU had produced 33 IAs, however by the end of 2006 110 IAs had been posted on the EU web-site[2]. DG Environment, DG Justice, Freedom and Security, DG Transport and Energy are the most active DGs, producing 38% of all IAs up to mid 2006, the time when our analysis was conducted. As can be seen from Table B1 (above) the distribution of IAs among the DGs has varied across the first 3 and a half years of the system, and only five DGs have produced 10 or more IAs in total.

Table B2 Costs and Benefits Quantified in EU IAs

Ref No	DG	Costs to EU Business (€m)		Benefits to EU Business (€m)		Costs to EU (€m)		Benefits to EU (€m)	
		One-off	Recurring	One-off	Recurring	One-off	Recurring	One-off	Recurring
1	AGRI		6000			4133			
2	EAC				2284				
3	ECFIN			2390					
4	ENTR	560	474		2648	1428	163		
5	ENV		4976		2335	311	10746		43910
6	FISH					5	6		6
7	INFSO		4000				113		
8	JLS					251	859		
9	MARKT		1100		87108				18750
10	SANCO						6		
11	TAXUD		0		930		121		
12	TREN	6000			19700	140000	205000	94000	700
	Total	**6560**	**16550**		**112721**	**144386**	**223430**	**94000**	**63366**

Table B2 summarises the costs and benefits identified by IAs, and shows that only twelve DGs have quantified costs and benefits in their impact assessments. Even where the costs and benefits have been quantified this has usually been done in a rather limited way. Such estimates typically reflect just one aspect of the impact or are only roughly estimated. Consequently, it would be imprudent to use these data to argue whether the proposed regulations will create significant costs or benefits to business or other stakeholders. DG Transport and Energy (TREN) has estimated the most significant costs to both business and the EU, contributing nearly 40% of business costs and more than 90% of EU Commission costs. But as noted above, these data can only be taken as a broad reference point.

A typical example is the *Directive of the European Parliament and of the Council concerning measures to safeguard security of electricity supply and infrastructure investment*, which states that , "increased transmission interconnection improves the scope for competition which will contribute to cost savings". There is no attempt to quantify either the cost of the investment or the potential benefits that may result.

1 Better Regulation for Growth and Jobs in the European Union, (SEC 2005/175).

2 As at 10th January 2007.

However, two IAs from TREN, the *Electricity from renewable source and the Action plan for biomass*, generate significant costs to the EU. There are both both one-off and recurring costs, amounting to Euros 64 billion and Euros 9 billion, respectively.

The vast majority of IAs contain only qualitative analysis. Table B3 (below) shows the extent of quantification and non-quantification of all IAs. Less than 10% of IAs estimate costs and benefits to business while 24% quantify the costs to the EU. The table shows that 50% of IAs recognise that costs and benefits will accrue to business but do not quantify this data. Almost the same proportion of IAs do not mention an impact on business. We can see that 109 IAs (more than 90%) have a section to assess benefits to the EU, but most of these discuss the benefits qualitatively. Only 20 IAs do not identify any benefits to the EU itself. It appears that the EU Impact Assessment system is particularly concerned with assessing new policies in terms of their impact on the EU, with potential impacts on business attracting less attention.

For example, in SESAR air traffic management from DG Transport and Energy and *Thematic strategy in air pollution* from DG Environment, business costs / benefits are acknowledged to be substantial but are not quantified, but the EU stands to gain substantially (Euros 20 billion and Euros 35.6 billion annually). There is no evidence in the IAs examined to date that quantification of business costs and benefits is becoming more commonplace over time.

Table B3 Quantification and Non-Quantification of costs and benefits

Costs to Business			Benefits to Business			Costs to EU			Benefits to EU		
Q	NQ	NA	Q	NQ	NA	Q	NQ	NA	Q	NQ	NA
11	64	62	12	79	46	33	68	36	8	109	20
8%	47%	45%	9%	58%	34%	24%	50%	26%	6%	80%	15%

Q Quantified and figures provided including zero costs/benefits
NQ Discussed but neither quantified nor stated as "not significant"
NA Not available or not discussed

Only one IA, the pilot *Home state taxation scheme for SMEs* from DG Taxation and Customs Union (TAXUD), quantifies the impact on SMEs. Another 38 IAs identify additional costs for SMEs but do not quantify these. Ninety-eight IAs do not consider the impacts on small and medium enterprises. Fifty-six of these 98 identify business costs that will result from the proposed action, and some of these IAs relate to actions that will probably impose extra costs on SMEs. For example, the *Directive on data retention* from DG Justice and Home Affairs, seeks to prevent organised crime and terrorism. The IA identifies that the resulting extra costs will have to be borne solely by business even if there is a cost reimbursement scheme. However, there is no further analysis of how to mitigate the impacts for SMEs.

When the European Community chooses to regulate, they have the following options: regulations, directives, decisions and recommendations[3]. Regulations are directly applicable to all member states without national implementing legislation. In contrast, member states must transpose Directives into national law but with discretion over how to achieve the objectives. Decisions delegate powers to member states and could address all or any member states, industries or individuals. For example, Council Decision 2005/767/EC, dated 24th October 2005 *authorises France to apply differentiated levels of taxation to motor fuels in accordance with Article 19 of Directive 2003/96/EC*.

Recommendations are without legal force but are negotiated and voted on according to the appropriate procedure. Recommendations differ from regulations, directives and decisions, in that they are not binding on Member States. Though without legal force, they do have political weight. Recommendations are an instrument of indirect action aimed at stimulating preparation of legislation in Member States, differing from Directives only by the absence of obligatory power.

3 EU legislation process : http://europa.eu.int/eur-lex/en/about/pap/index.html

Communications are non-legislative instruments that are not binding, and tend to be used when situations are diverse and not mature enough to regulate via legislation, for example, the *Communications on EU strategy for the Caribbean* from DG Environment, aims to translate the objectives of such strategy into relevant policies, but without any practical plan.

Table B4 provides an analysis of the legislative instruments for which IAs have been conducted:

Table B4 Legislative instruments for which IAs have been conducted

2003 to mid 2006		
Regulation	29	18%
Directive	37	24%
Decision	21	13%
Communication	61	39%
Recommendations	2	1%
Unknown	7	5%
Totals	157	100%

As shown in Table B4 (above), 61 IAs were conducted on Communications, which are not binding. Eighteen were conducted on Decisions and for Directives and Regulations, the numbers of IAs are 37 and 29 respectively. Thus between 2003 and 2006 nearly 40% of IAs were conducted on non-binding instruments.

To place the volume of IAs into perspective, Table B5 presents data on the number of regulations approved annually by the EU.

Table B5 EU Legislation 2003 to 2005

Year	2003	2004	2005
Directives	153	177	133
Regulations	2461	2462	2331
Decisions	804	1095	849

Source: Chittenden F, Ambler T and Xiao D[4]

It can be seen that annually the EU produces around 150 Directives and over 2,000 Regulations. However, in a somewhat similar way to UK Statutory Instruments, the vast majority of EU Regulations are actually administrative orders, relating, for example, to routinely establishing the price of certain foodstuffs.

Until mid 2006 the EU Impact Assessment system has considered only a very small proportion of the total legislation introduced in the EU and, almost 40% of IAs prepared to date have related to non-binding instruments, especially Communications. The rationale for using IAs in this way escapes us.

In an attempt to strengthen the IA system, in 2005 the European Commission introduced new initiatives to reinforce the effective application of the principles of proportionality and subsidiarity[5]. The Commission believes better regulation, is an essential element of the Lisbon Strategy, and cannot be achieved by the EU alone and so is actively encouraging member states to introduce systems of impact assessment. The Commission is also embarking on an exercise to reduce the Administrative Burdens of EU regulation and to simplify existing laws.

4 Impact Assessment in the EU, Forthcoming in Better Regulation, edited by Weatherill S; Hart Publishing, Oxford, 2007.
5 Better Regulation for Growth and Jobs in the European Union, (SEC 2005/175)

From another perspective, the single market strategy requires legislative tools that reduce the scope for variation between legislation in member states. It is interesting to note that more than 37% or 52 IAs[6] directly relate to the single market strategy which remains an important issue. The EU Commission prefers Regulations to Directives, and is keen to encourage member states to transpose Directives consistently.

In the IA guidance and good practice[7], there are no explicit definitions of cost models that Directorates should adopt in preparing impact assessments, apart from the case of administrative costs where a version of the "Standard Cost Model" (SCM) has been adopted. The SCM is bottom-up method of measuring the time needed to comply with administrative requirements and extrapolating from firm data to entire economies[8]. Apart from this there are no specified requirements for Directorates to use particular approaches to assess and compare the impacts of proposed policies, e.g. cost-benefit analysis, multi-criteria analysis etc[9]. Rather than specifying one or more quantitative analytical models as preferred approaches, the guidance leaves Directorates to choose whatever they think is suitable and this leads to significant variations in the quality of IAs. It could be useful for the EU guidance to minimise and harmonise a few models working from the different approaches now available[10].

This research has also shown that most IAs address their analysis at a strategic or macro economic level, without providing an implementation plan as suggested by guidance[11]. These IAs define the problems and identify the policy options with high level analysis and then end with a very brief (normally one paragraph) implementation and monitoring plan. As widely discussed and accepted in many papers[12], impact assessment is a mechanism for learning and should be part of an iterative process including implementation, monitoring and improvement. The absence of a designated, independent oversight body may constrain the Commission from taking full advantage of a rigorous impact assessment system.

Consultation is a key component of impact assessment and has been endorsed by the IA guidance. Gathering opinions and information from interested parties is an essential part of the policy development process, enhancing its transparency and ensuring that proposed policy is practically workable and legitimate from the perspective of stakeholders[13]. EU guidance offers a detailed explanation on why consult, whom to consult, when to consult and how to consult, and also defines the minimum standards for consultation. During our analysis, it was found that nearly 80% of IAs have conducted consultation involving a number of interest groups and stakeholders and more IAs produced in 2005 have consultation embedded into assessment than those in 2004 and 2003. Hence, the use of consultation in IAs has been growing and facilities for responding to consultation have improved as well, such as Your Voice in Europe[14].

Quality may also be improved by mixing different consultation methodologies, such as, workgroups, workshops, online and paper communications etc. Member states, as the final recipients of legislation, should be consulted as first tier stakeholders[15]. However, surprisingly only about 60% or 82 IAs have clearly listed member states as part of their target consultative group. Without member states proactively engaging with EU impact assessment, the value of this process is likely to be diminished.

6 See Annex I
7 http://ec.europa.eu/governance/impact/docs/sec_2005_0791_anx_10_en.pdf
8 Current Trends in Regulatory Impact Assessment: The Challenges of Mainstreaming RIA into Policy –making. By Scott Jacobs, Jacobs and Associates. 30 May 2006
9 http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf
10 The Regulatory Burdens of Small Business: A Literature Review, Chittenden, F. Kauser S and Poutziouris P, the DTI Small Business Service Research Series, October 2002, pp. 82,
11 Guidance document online version, P45 ~ 46 http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf
12 The diffusion of regulatory impact analysis – Best practice or lesson-drawing? European Journal of Political Research, Claudio M. Radaelli 43, 2004,
The Limits of Regulatory Reform in the EU Journal of the Institute of Economic Affairs, Frank Vibert, volume 26 No2 June 2006.
13 Towards a reinforced culture of consultation and dialogue- General principles and minimum standards for consultation of interested parties by Commission (COM(2002)704 final)
14 http://ec.europa.eu/yourvoice/ipm/index_en.htm
15 Annex II : Flow chart for IA procedure produced by the authors

In the context of a renewed Lisbon Strategy, refocused on growth and jobs, SMEs are recognised as an important sector[16]. Consequently, both EU and national level administrators should work closely to ensure better regulation principles are applied proportionally to business, particularly to small and medium enterprises. Unfortunately our research found little evidence that SMEs were adequately considered by the EU IA system. In fact, more than 70% of IAs provided no analysis of potential impacts on SMEs , 30% of IAs have analysed the impact on SMEs, but only 4 (10%) included any detailed analysis.

This evidence also reinforces our earlier argument that most IAs analyse and demonstrate legislative impacts at a macro level without drilling down to groups that may be subject to disproportionate impacts. Scott Jacobs argues that SME tests can help to avoid disproportionate regulatory costs to SMEs, but this could be damaging if they divert public policy decisions away from those regulatory proposals that produce net benefits[17]. Given our findings, impact analysis on SMEs is not in danger of unduly influencing regulators' judgements on proper decisions. It must also be borne in mind that the 23 million SMEs providing around 75 million jobs and representing 99% of all enterprises, play a central role in the European economy[18]. Lack of appropriate analysis of the impact of regulations on SMEs could jeopardise the legitimacy of the IA system and deviate from the Lisbon principles that the IA system is intended to support

The EU IA system distinguishes itself from other regulatory impact assessment processes because EU impact assessments include potential impacts on non-EU countries and businesses. Our research shows that 40, or 29% of IAs consider the potential impact on non EU countries. For example, *Sugar Reform* (SEC(2005)808) considers the impact on African, Caribbean and Pacific countries and less developed countries; and the *Kyoto flexible instruments* (SEC(2003)785), cover China, India, Latin America and Africa. Adoption of such an approach in IAs is intended to reinforce the EUs commitment to promoting sustainability in the developing world[19].

The EU has recently reiterated its determination to continue with integrated impact assessment, which should contribute to improving the regulatory environment and to a more coherent implementation of the European Strategy for Sustainable development and the Lisbon initiative that aims to improve the competitiveness of the EU economy.

When analysing the costs and benefits of IAs, our findings confirm that most IAs analyse the impacts on business and the European Union in a qualitative manner, and identify the risks associated with each policy option. Even the 10% of IAs that quantify costs and benefits for business and EU government, either do not provide a complete analysis of costs and benefits, or quantify data relating to macroeconomic impacts, for example, employment and trade. These macro-economic approaches rely on many assumptions and the methodology is not always transparent. Consequently, at the present time, EU IAs do not provide sufficient analysis to evaluate the impact of proposed regulations and, in this regard, there does not appear to be any positive trend in more recent IAs

Given these findings, further substantial improvement is needed before Impact Assessment can genuinely offer the prospect of promoting better regulation in the EU. In addition, as noted above Impact Assessment within each member state should interact with the EU system in order to improve the quality of information on which proposed EU initiatives are based.

16 Communications from the Commission to the Council and the European Parliament: Common actions for growth and Employment, The community Lisbon Programme COM(2005) 330 Final
17 Current Trends in Regulatory Impact Assessment: The Challenges of Mainstreaming RIA into Policy –making. Scott Jacobs, Jacobs and Associates. 30 May 2006
18 The New SME Definition: User Guide and Model Declaration, Office for Official Publications of the European Communities, 2005
19 C Adelle, J Hertin, A Jordan, Sustainable Development 'Outside' the European Union: What Role for Impact Assessment? European Environment,. 16, 57–72 (2006) Published online in Wiley InterScience (www.interscience.wiley.com) DOI: 10.1002/eet.405

Designed and printed by EVC Graphic Design and Print, Pangbourne, Berkshire, UK, a registered 14001 environmental printer. Printed on paper from a managed sustainable source, using pulp that is TCF & ECF, and printed with vegetable soya based inks.

BCC
THE BRITISH CHAMBERS OF COMMERCE

The British Chambers of Commerce
65 Petty France
London SW1H 9EU
T: 0207 6545800 F: 0207 6545819
www.chamberonline.co.uk