Better Regulation: The Search and the Struggle

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Robert Baldwin
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Edited by Robert Baldwin, Martin Cave, and Martin Lodge

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Abstract and Keywords

Most governments around the world face unrelenting demands for reforms and regulatory improvements — mainly from commentators, regulated organisations, elected representatives, and oversight bodies. As a result, such administrations often seek to deliver 'better regulation' through initiatives that are designed to improve the delivery of high quality regulation. Such efforts, however, tend to come up against three central challenges which are discussed in this article. This article looks at responses to these three challenges — which can be referred to as those of: benchmarks, strategies, and measurement. It considers the approaches that have been taken in the literature and in governmental policies and draws attention to a number of ongoing difficulties that are presented by the search for better regulation. The argument presented here is that current approaches involve a number of worrying tensions and contradictions which are of both a philosophical and a practical nature.

Keywords: commentators, regulated organisations, elected representatives, oversight bodies, better regulation

12.1 Introduction

Most governments around the world face unrelenting demands for reforms and regulatory improvements — mainly from commentators, regulated organisations, elected representatives, and oversight bodies. As a result, such administrations often seek to deliver 'better regulation' through initiatives that are designed to improve the delivery of high quality regulation (Radaelli and De Francesco, 2007). Such efforts, however, tend to come up against three central challenges or questions: What, exactly, is 'better regulation'? How can 'better regulation' be achieved? How can one assess whether a given regulatory arrangement is 'better'?

This chapter looks at responses to these three challenges — which can be referred to as those of: benchmarks, strategies, and measurement. It considers the approaches that have been taken in the literature and in governmental policies and draws attention to a number of ongoing difficulties that are presented by the search for better regulation. The argument presented here is that current approaches involve a number of worrying tensions and contradictions which are of both a philosophical and a practical nature.

12.2 Benchmarks: What is 'Better Regulation'? 

For many decades after the Second War, debates on regulatory quality were dominated by economists (mostly sited in the USA) and, as Mike Feintuck has noted in Chapter 3, there was a tendency, particularly within the law and economics school, to associate regulatory improvements with measures that would foster efficient outcomes. A focus, accordingly, rested on the virtues of lowering transaction costs, relying on private law controls, allowing markets to operate competitively, and regulating so as to conduct to the achievement of allocative efficiency — as measured with reference to the Kaldor-Hicks criterion (Foster, 1992; Majone, 1996; Ogus, 2004: 24). By the
seventies, however, such normative stances had considerably given way to the view that good regulation involved a trade-off between efficiency and other goals (Freedman, 1978; Okun, 1975). Commentators came to argue with increasing conviction that regulation could be justified and evaluated with reference to a series of non-efficiency— or 'social'—objectives. Thus, in 'reconceiving the regulatory state' in 1990, Cass Sunstein set out a range of non-economic substantive goals that would justify intervention according to a 'civic republican' viewpoint (Sunstein, 1990). These goals included: redistribution of resources; furthering collective aspirations; promoting diversity; and reducing social subordination. By 2006, Tony Prosser was arguing that regulation could be seen as prior to markets and that it might properly be instituted not merely to correct market failures but in order to create and sustain markets as well as to achieve certain social objectives that can be attributed value in their own right (Prosser, 2006).

As simple concerns for allocative efficiency were superseded by more broadly-positioned analyses, commentators began to wrestle to identify the nature of the social objectives that 'good' regulation should further. As we have seen in Chapter 3, however, it has been difficult to produce a convincing and agreed notion of the public interest that can serve to identify and supply content to such social objectives. For some scholars, the response to this difficulty came through presenting the case for a particular vision of the optimal society, or a concept of social justice (e.g. Rawls, 1971), or by deriving regulatory prescriptions from basic notions such as autonomy and welfare (Sunstein, 1990). The practical limitation of such an approach, however, was that, within a pluralistic society, it was rash to assume that citizens and regulated parties could be brought to subscribe to a single view of regulatory quality through conversion to the Rawls, Sunstein, or some other given perspective on society, justice, or citizenship.

Some commentators, accordingly, sought to provide bases for justifying regulation without advocating a particular substantive position on regulatory objectives. They did so by focusing on the nature of evaluative discourses that take place between parties of different persuasions and interests. Thus, Prosser (1986) built on Habermas and suggested that regulatory systems can be evaluated, at least in part, with reference to the procedures that are used in such systems to allow participation—so that the assumed consensus of the ideal speech situation provides a standard against which to assess institutions (Prosser, 1986).

Other commentators sought to circumvent the need to advocate a particular substantive position by seeing the evaluative issue in terms of the rationales that have currency in debates about regulatory quality, legitimacy, and justification. They suggested that a series of factors might be commonly prayed in aid in efforts to portray regulation as acceptable or good (Mashaw, 1983; Freedman, 1978; Frug, 1984; Baldwin and McCrudden, 1987). Such factors were frequently said to include: the degree to which regulation implements the relevant legislative will (in a cost-effective manner); the expertise brought to bear in decision and policymaking; the fairness of decisions and policies; the openness, transparency, accessibility, and due process evident in regulation; and the accountability of the relevant actors.

Such 'benchmarking' approaches brought the advantage of adhering to procedural concerns (for accountability, transparency and so on) and also to substantive issues (notably the degree to which legislatively designated ends are achieved). They did, however, leave a thorny issue hanging—how to justify any particular balancing or weighting of such benchmarks. They offered policymakers and members of the public no single vision of justice/society to guide them when considering trade-offs between the pursuit of the different criteria. What is clear is that actors and organisations with different interests or political perspectives might have quite different views on the optimal way to prioritise the attributes of regulatory quality. Such parties, it is also apparent, might also give weight to criteria of a more idiosyncratic nature—such as the propensity of regulation to encourage the international competitiveness of the relevant domestic industry.

In spite of such difficulties, however, the search to identify the benchmarks for good regulation has been taken on—particularly in governmental circles. Towards the end of the last millennium, many national regulators, and their governmental overseers, sought to establish benchmarks for evaluating regulatory quality. In doing so they often made reference to the criteria noted above—but they frequently combined statements on regulatory benchmarks with advice on those processes and strategies that might be deployed in order to further those benchmarks.

Representative of such efforts were those of the UK's Better Regulation Task Force (BRTF)—a body set up in 1997 within the Cabinet Office. The BRTF was an independent advisory body that, within a year of its establishment,
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published a set of principles of better regulation which were subsequently endorsed by the government (BRTF, 2003a). The principles adopted were that good regulation should be: proportionate; accountable; consistent; transparent; and targeted. A year later, in Eire, the Department of the Taoiseach, similarly published a list of benchmarks—this time looking to the desiderata of: necessity; effectiveness; proportionality; transparency; accountability; and consistency (Department of the Taoiseach, 2004). Nor were these the first such efforts—some years earlier the Canadian and Australian governments had produced benchmarking statements—the former’s Treasury Board dubbing these: ‘Federal Regulatory Process Management Standards’ (Treasury Board of Canada Secretariat, 1996) and the latter’s Department of Industry, Tourism and Resources referring to: ‘Regulatory Performance Indicators’ (DITR, 1999). These indicators measured whether regulation: conferred net benefits; achieved objectives without unduly restricting business; was transparent and fair; was accessible to business; created a predictable regulatory environment; and ensured responsive consultation. Again in Australia, the Office of Regulatory Review identified seven qualities of good regulation. It had, on this view, to be: the minimum action necessary to achieve objectives; not unduly prescriptive; accessible, transparent, and accountable; integrated and consistent with other laws; communicated effectively; mindful of compliance burdens; and enforceable (Argy and Johnson, 2003).

In the USA, the Office of Management and Budget (OMB) uses a Program Assessment Rating Tool (PART) that evaluates not merely the purpose and design of the scrutinised regulatory regime but also their planning and programme management performance as well as their success in achieving substantive goals (OMB, 2002; Radaelli and De Francesco, 2007: 80–1).

At the supra national level, regulatory standards have been published by the World Bank (World Bank, 2004) and, in the EU (European Union), by the Mandelkern Report of 2002 (Mandelkern, 2002). The OECD (Organisation for Economic Co-operation and Development) has also been highly influential in driving forward its programme of better regulation. The OECD issued a Recommendation on Improving the Quality of Government Regulation in 1995 (OECD, 1995) and, ten years later, the Organisation produced revised Guiding Principles for Regulatory Quality and Performance (OECD, 2005). Good regulation, according to these pronouncements, should: serve clearly identified policy goals and be effective in achieving those goals; have a sound legal and empirical basis; produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental, and social effects into account; minimise costs and market distortions; promote innovation through market incentives and goal-based approaches; be clear, simple, and practical for users; be consistent with other regulations and policies; and be compatible, as far as possible with competition, trade, and investment-facilitating principles at domestic and international levels (OECD, 2005: 3).

A number of conclusions can be drawn from the above academic and governmental efforts to identify the appropriate benchmarks for identifying ‘good’ regulation. First, it is clear that the various prescriptions on offer can be claimed to offer a sort of consistency in so far as they cluster around the furthering of a relatively small number of desiderata—notably: the adoption of lowest cost, least intrusive, methods of achieving mandated aims; the application of informed (evidence-based) expertise to regulatory issues; the operation of processes that are transparent, accessible, fair, and consistent; the application of accountability systems that are appropriate; and the use of regulatory regimes that encourage responsive and healthy markets where possible. Second, it is also plain that the use of multiple benchmarks, and the lack of a single vision, creates the potential for highly divergent approaches to the pursuit of better regulation—both within and across jurisdictions. It also makes for tensions of philosophy, policy, and implementation. Third, it raises the prospect that efforts that are designed to satisfy certain benchmarks will cut across actions that are undertaken in order to serve other benchmarks.

12.3 Strategies: How Can ‘Better Regulation’ Be Achieved?

In OECD countries there have been sustained efforts to produce better regulatory systems. Those efforts, however, have been applied through different streams of policy. One focus has rested on the improvement of prospective regulatory policies and instruments, another on improving the existing stock of regulations. Some initiatives have sought to deal with the need to reduce regulatory and administrative burdens and still others have been aimed at reforming enforcement. Those efforts have been made, moreover, in the context of the kind of multi-benchmark approach to good regulation that has been described above. As might have been expected, this has produced confusions and contradictions as governments and regulators have sought to serve different ends that are at
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tension with each other. Thus, espousals of more rational approaches to policymaking have sat uneasily with the fostering of lower intervention styles of regulation. Similarly, desires for better informed, better evidenced, regulatory processes have been difficult to reconcile with hopes for less burdensome regulation, and key regulatory improvement tools have been difficult to operate alongside improved regulatory policymaking processes. These three particular tensions have been encountered across areas of the OECD membership and are worth looking at in a little more detail.

12.3.1 Rational policymaking and low intervention regulation

Two core messages of the better regulation movement are that regulation can be improved by applying rational approaches to policymaking and that better regulation involves a predisposition to apply informal, low-intervention control styles rather than old-fashioned command methods (OECD, 1997; BRTF, 2003b). What the broad better regulation message delivers, however, is a potential clash between the promotion of more expert, evidence-based regulation and the desire for less intrusive styles of control.

The push towards more rational regulation has come through the placing of the Regulatory Impact Assessment (RIA) at the centre of the regulatory improvement process. The OECD's flagship report on regulatory reform (OECD, 1997) suggested that Member States should pursue better regulation through: the adoption, at the heart of government, of regulatory improvement as a policy; the establishing of institutions dedicated to regulatory improvement; and the application of a series of regulatory improvement tools. Those tools include: RIAs; consultation and transparency processes; exercises to reduce burdens and red tape; simplification measures; using alternatives to traditional regulation; and legislating sunset provisions.

The RIA is, however, the centrally important tool of regulatory improvement in the OECD better regulation scheme (OECD, 1997, 2002) and also that of the EU where impact assessments have been undertaken, in qualified form, since the Business Impact Assessment System was introduced in 1996 (Meuwese, 2007; Radaelli, 2005; European Commission, 2002, 2009: 6; Radaelli and De Francesco, 2007: 36; Chittenden, Ambler, and Xiao, 2007). The RIA is also seen as the key regulatory improvement tool in many OECD countries, including the United Kingdom (Cabinet Office, 2003; Better Regulation Executive, 2006: 4). A typical RIA process involves an assessment of the impact of policy options and sets out the purposes, risks, benefits, and costs of the proposal. It will also consider: how compliance will be obtained; the expected impacts on small business; the views of affected parties; and the criteria to be used for monitoring and evaluating the regulatory activity at issue. The usual RIA process will demand that different ways of reaching regulatory objectives should be compared and that the alternatives to regulatory options for achieving policy objectives must be dealt with.

RIAs are intended to inform decision-making, not to determine decisions or to substitute for political accountability. The expectation is that the RIA process will encourage better, more rational, regulation by, inter alia, clarifying objectives; indentifying the lowest cost ways to achieve objectives; considering alternatives and increasing transparency (see typically: Cabinet Office, 2003).

All so good but the OECD and many governments around the world also see better regulation as the fostering of user-friendly, low intervention methods of regulation together with a movement away from state-issued command regimes and towards greater reliance on controls that are imposed by professional bodies, self-regulators, and associations as well as constraints that operate within corporations (OECD, 1997; BRTF, 2003b).

An important issue is whether there is consistency between the two better regulation messages—concerning the use of RIA processes and the need for low intervention controls. A fear is that the RIA process may disincentivise the use of lighter touch controls—as these are envisaged by the advocates of ‘smarter’ regulation (Gunningham and Grabosky, 1999). The idea of ‘smart’ regulation is to look to find optimal mixes of control methods as these are applied not merely by state agencies but by other institutions and actors including trade associations, pressure groups, corporations, and even individuals. Smart regulation also advocates a predisposition to use low intervention modes of control wherever possible.

The problem with the RIA process is that it may not conduce to the choice of smart regulatory designs—and it may not do so for a number of reasons. First, it may not always encourage the use of policy mixes that incorporate a broader range of instruments and institutions. This may seem surprising since the ‘better regulation’ message
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repeatedly emphasises the need to consider alternative, more imaginative, ways of regulating (OECD, 2002: 51, 57; BRTF, 2003b). RIA processes, however, are not well-tuned to the consideration of cumulative regulatory effects and the coordination of regulatory systems with widely varying natures—they are best suited to analysing the costs and benefits associated with a single, given, regulatory proposal rather than combinations of approaches. It would, for instance, be difficult for the RIA to test a proposal involving, say, a combination of state, trade association, and corporate laws, codes, and guidelines and to predict how all the relevant actors will draft, design, and apply their different control strategies. Calculations of costs and benefits would involve heroic guesswork and the prevalence of imponderables would undermine the value of the RIA. The worry, in short, is that smart regulation involves too many variables, estimates, and judgements to lend itself to the RIA process.

Another reason why ‘better’ regulation—as centred on the RIA—may not be conducive to the best use of the full array of potentially useful regulators is because empowering quasi-regulators or corporate self-regulatory controls within combined (or ‘networked’) regimes of control may require an incremental approach to regulatory design in which key actors negotiate and adjust the roles of different controlling institutions. This kind of regulation involves a reflexive, dynamic, approach in which regulatory strategies are constantly revised and ‘tuned’ to changes in circumstances, preferences and so on. Such ongoing processes are not amenable to evaluations in a ‘one-shot’ policymaking process. The better regulation toolkit does envisage the use of a variety of regulatory controls but it is difficult to see how ongoing regulatory coordination with all its dynamics, can be tested in advance by a RIA process that takes a ‘one-shot’ guess at the nature and operation of a future regulatory system.

Note should also be taken of the incentive effects that RIA processes may give rise to within policymaking communities. Those putting forward regulatory designs, and who know that the RIA process has to be undertaken, will experience little impetus to propose complex combinations of regulatory institutions and strategies with all the attendant predictable and calculative difficulties. Rather than aim for a ‘smart’ form of regulation, they will incline towards a simpler regime that can be fed successfully through the machinary of the RIA process. Such bureaucratic incentives may, moreover, militate against the application of a high level of ‘regulatory craft’ and the placing of problem-solving at the centre of regulatory design (Sparrow, 2000). The incentive to adopt a problem-centred approach may be weak, not merely because this would require the evaluation of costs and benefits regarding a variety of institutions and strategies, but also because it may demand an unpacking of the way that a host of existing regulatory regimes impinge on a problem and an examination, within the RIA process, of potential ways to reshape and re-deploy those regimes in combination with any new regulations (Sparrow, 2000: 310). The proponent of the RIA would often be questioning the way that numbers of established regulators go about their jobs in order to evaluate his or her proposed regulation. A far more attractive proposition will be to take any existing control as given and to consider whether the addition of a new regulation will pass a cost-benefit test. The consideration of alternatives is liable, accordingly, to be straitjacketed by existing regulatory frameworks. Overall, then, if RIA processes are retained at the centre of ‘better regulation’, a worry is that they may not conduce to ‘smarter’ mixes of regulatory instruments.

A second concern about the RIA process is whether that process will encourage the use of low-intrusion, less prescriptive, regulatory styles. RIA processes, as noted, are more attuned to measuring the effects of traditional ‘command’ systems of control than ‘alternative’ methods and this may positively discourage the canvassing of more imaginative regulatory strategies—especially those ‘softer’ strategies involving voluntary and incentive-driven controls where predicting effects (and hence, calculating costs and benefits) is particularly difficult. Smart regulation, moreover, demands that attention is paid to enforcement strategy and a favouring of less coercive modes of applying regulatory laws. It is, however, the case that very many RIAs do not attend to implementation and enforcement issues at all well (NAO, 2006). There are, moreover, structural reasons why RIAs cannot be expected to come to grips with enforcement strategy in a routinely well-informed manner—RIAs tend to focus ex ante on the general design of regulation and it may be impossible to predict how any regulator or set of regulatory bodies will go about deploying the powers that they are to be given in a proposed regulation.

It is difficult, moreover, to argue that ‘better regulation’ approaches sit easily alongside low intervention modes of initiating enforcement such as are advocated by the proponents of ‘responsive regulation’ (Ayres and Braithwaite, 1992). The RIA process, as noted, encounters difficulties in dealing with either questions of enforcement or with ‘combined’ strategies of regulation. These difficulties are likely to be compounded by attempts to evaluate the costs and benefits of enforcement responses that are escalatory as well as highly discretionary.
To summarise, the above reasoning suggests that there may, indeed, be tensions between the better regulation messages that relate to RIA processes and those that advocate low-intervention methods of control. Other messages may, however, also involve tensions.

12.3.2 ‘Less’ versus ‘better’ and ‘risk-based’ regulation

The ‘better regulation’ message, as noted, emphasises the pursuit of improved regulation by means of a number of linked strategies. This is seen in the extensive OECD toolkit for regulatory improvement as described above. Not only are policymakers encouraged to apply RIA processes, but they are urged, inter alia, to cut red tape, reduce regulatory burdens, and structure enforcement policies—notably by adopting risk-based regulatory methods (see, e.g., Hampton, 2005). A resultant difficulty is that reconciling desires to advance the ‘more rational’ strand of the better regulation initiative with policies of burden reduction may prove extremely challenging—as when governments try to ensure that regulators target their enforcement activities more precisely and, at the same time, seek to reduce the powers of regulators to impose information-supplying burdens on businesses.

The problems are, first, that targeting enforcement demands that inspections and other actions are based on intelligence, and, second, that, if the obligations of businesses to supply information to regulators are reduced, it is increasingly difficult for regulators to engage in targeting without generating intelligence independently. Such independent generation of data may, of course, prove much more expensive for regulators—indeed far more expensive for them than for the businesses that they are controlling (who may have the information quite readily to hand). This is especially likely to prove an issue when regulators are expected to target their enforcement actions at those businesses or service providers who pose greatest risks. Risk-based systems are information-intensive; they are built on risk analyses, which are founded on the collection of quantities of good data.

Yet more serious difficulties arise when different policy strands within the better regulation initiative develop in a manner that challenges the foundations of the ‘better regulation’ initiative. This has occurred with both the burden-reducing and the risk-based streams of policy. Thus, in the period following the millennium, many OECD countries, including the UK, changed political emphasis so that the pursuit of better regulation (as a package of functionally-directed regulatory improvement tools and policies) significantly gave way to the pursuit of something more simple: less regulation and the imposition of lower administrative burdens on business (BTF; 2005; Dodds, 2006).

In the case of the risk-based strand of policy, the undermining of the ‘better regulation’ concept has been exemplified, again, in the UK where it has been argued that during the last decade a ‘better regulation’ emphasis on regulating with reference to risk has turned into a policy of risk-averse deregulation that is at odds with the philosophy of ‘better regulation’. Thus, Dodds has described how, from 1998–9 onwards, the UK Cabinet Office, and Prime Minister Blair, consistently stressed the dangers flowing from the public’s irrational over-estimation of risks, the impossibility and undesirability of a risk-free society, and the need to regulate so as to allow businesses to take and create risks in a way that allows economic progress to be made (Dodds, 2006: 534–5; BTF, 2001; BRC, 2006). The business-friendly answer to the public’s alleged over-reliance on the regulation of all risks was to encourage personal responsibility and for Britain to ‘safeguard its sense of adventure, enterprise and competitive edge’ (BRC, 2006). The product was a ‘new risk-tolerance’ policy approach and an emphasis, not on better regulation as functionally improved regulation, but (again) on better regulation as less regulation. As with the emergence of less burdensome regulation, the arrival of risk-tolerant regulation further weakened any conceptual underpinnings that the ‘better regulation’ initiative might have rested upon.

12.3.3 Better regulation and the policy process

If better regulation is to succeed as a policy initiative, it has to possess the capacity to impact on the policy and legislative processes. The difficulty here is that there is some evidence, to date, that the main tool of regulatory improvement, the RIA, has not proved to have influenced those processes in the way that the proponents of better regulation might have anticipated.

As for the reasons for such a lack of impact, certain lessons may be gleaned from the UK experience—a case study that is, perhaps, favourable to the use of RIAs since the UK holds itself out to be a world leader in carrying out such assessments. That experience suggests that, even after a number of years of using RIAs, there are questions whether RIAs can be carried out to a sufficiently high technical standard to be attributed an influential
role within the policy process. A succession of reports from the National Audit Office (NAO) and the British Chambers of Commerce (BCC) have revealed a number of weaknesses. The NAO looked at 23 'test case' RIAs in 2001 (NAO, 2002) and reported on ten further sample RIAs in 2004 (NAO, 2004). The NAO revealed in 2004 that only half the RIAs examined included 'a reasonably clear statement of objectives' and seven out of ten did not consider any option for regulation other than the one preferred by the department. None of the ten RIAs considered what would happen in the absence of the regulation. All acknowledged a level of uncertainty about the data that were used for estimates but such uncertainties were not always reflected in the cost and benefit figures used, which presented single point estimates rather than ranges. Only one out of ten gave the results of sensitivity tests and only three out of the ten contained quantified estimates of benefits (often no market for benefits existed, making quantification difficult). Most RIAs, accordingly, did not offer a quantified comparison of expected costs and benefits. As for analysing the likely effects of regulations on the ground, only half of the sample RIAs considered enforcement and sanctioning effects. Most RIAs, moreover, described how the regulation would be monitored but 'often in a very brief and vague way'; and only four stated that there would be a formal review to evaluate the success of the regulation. The NAO's 2005–6 evaluation of RIAs stated that only two out of twelve RIAs analysed levels of compliance well and the same report produced the finding that: 'The purpose of RIAs is not always understood; there is a lack of clarity in the presentation of the analysis; and persistent weaknesses in the assessments' (NAO, 2006: 2).

The NAO's findings were broadly in line with, though perhaps less critical of UK governmental practice than the studies carried out for the BCC in 2003 and 2004, which looked respectively at 499 and 167 RIAs produced by government in the two periods researched (1998–2002 and 2002–3—see Ambler, Chittenden, and Shamutrova, 2003 and Ambler, Chittenden, and Obodovski, 2004). The BCC studies noted that a series of problems had afflicted RIAs and concluded that ministerial statements that benefits justified costs were not in general supported by the evidence in the RIAs. Some departments, indeed, were said to have been under-resourced or badly managed for conducting RIAs. On choice of regulatory strategy, the BCC found that the option of not regulating was considered in only a minority of cases (11% in 1998–2002 and 23% in 2002–3) and less than half of RIAs (44%) quantified all the options considered. RIAs are supposed to pay due attention to business (and especially Small and Medium Size Enterprises—SMEs) compliance costs but the BCC reported that costs for business were only quantified in 23% of RIAs and a quarter of RIAs did not consider effects on SMEs at all. A substantial minority of RIAs contained little factual data about consequential costs and benefits and 'scant attention' was given to 'settlement clauses or to subsequent monitoring or evaluation. Nor was the BCC impressed by new efforts to improve RIAs—it found that the RIA process showed little recent evidence of improvement.

Such criticisms suggest prima facie that the way that RIA processes are accommodated within policymaking procedures may not always be conducive to technically impressive assessments. Clearly there is room to improve the technical quality of UK RIAs and such improvements may be necessary if RIAs are to conduct to better regulation. It would be a mistake, however, to assume that technical improvements in RIAs will be sufficient to improve regulation. Those RIAs would still have to be located within legislative and regulatory policymaking processes in a manner that allows them to influence emergent laws and policies. There are, however, a number of reasons to think that RIAs may tend to prove less influential than might at first be supposed.

Governments, for instance, may be committed to certain regulatory steps and strategies for ideological reasons, or because of manifesto commitments or because a political settlement has been made with various interests. They will, accordingly, not be minded to pay too much attention to RIAs that send contradictory signals. Ministers, for example, tend to be predisposed towards legislative solutions and, if they have promised to legislate in order to address a problem, they will not respond enthusiastically to RIAs that propose non-legislative solutions. Legislative bodies, moreover, may take the view (as expressed in the UK House of Lords) that 'considerations about the impact of legislation or regulation on personal liberties and freedoms should be regarded as part of the political process rather than as a matter for formal risk assessment procedures' (House of Lords, 2006: 11; quoted: Bartle and Vass, 2008: 57).

The costs and benefits of regulation, furthermore, tend to be difficult to quantify and the perceived 'softness' of RIAs may reduce their impact on the policy or legislative process. This is liable to be the case especially where costs and benefits can only be calculated on the basis of guesses about the use that various regulatory actors will make of their powers or about the strategies that will be deployed to apply regulatory rules. In 2006 the NAO stated that weaknesses in assessments meant that: 'RIAs are only occasionally used to challenge the need for regulation
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and influence policy decisions' (NAO, 2006: 31).

It is also frequently the case that the full nature of the regulatory proposal is unclear from any given item of legislation (e.g. a framework Act) because the real substance will follow in secondary legislation. The effect will be that regulation escapes a good deal of parliamentary and RIA scrutiny. It might be responded that the secondary legislation will, in all likelihood, be RIA-tested in its own right at a later date, but this may be no complete answer to the point. The framework regulatory strategy within which that secondary legislation is to operate will in most instances be established by the primary legislation that has ‘escaped’ RIA influence. Many key regulatory issues will already have been decided by the time the ‘secondary’ RIA is carried out.

Another concern is that, even when the secondary legislation is RIA-tested, it may be extremely difficult to assess the substance of a regulatory proposal because its nature will still depend on the use that will be made of the delegated powers involved. Additionally, of course, secondary legislation will not be debated in Parliament in the way that primary legislation is and any RIA-based messages are, accordingly, the less likely to influence decisions in the legislature. A further problem that arises in the legislative process is that amendments of laws and rules may be introduced at a late stage in the progression of legislations and the proposals involved may, for that reason alone, escape RIA attention.

The culture of governmental policymaking may itself prove resistant to the influential use of RIAs. This has been a special concern to the NAO, which found in 2006 that RIAs were often seen by officials as a bureaucratic task rather than being integral to the process of policymaking. The NAO, accordingly, recommended, inter alia, that: the importance and necessity of the RIA should be made clear to policymakers; that the impact assessment should be started early in the policymaking process and that RIA should be used to project-manage the decision-making process.

Cultural changes, however, are easier pleaded for than achieved. The recommendation that RIAs should be used earlier in the policy process, for instance, may prove more difficult to implement than might be assumed. A real problem in some areas may arise from tension between the politics of a process and the RIA principles. Within the RIA process, policymakers are supposed to consider and compare the array of regulatory routes to a policy objective but in the real world, a proposal may be the product of a process of political negotiation. It arises when compromises and concessions have been made between different interests and, as such, it may be the only feasible option politically. To compare this proposal with an array of alternatives via the RIA procedure may be to compare a live horse with a number of dead non-runners. (Such a comparison is also likely to be seen by relevant policymakers as an exercise too far.) This is not to say that RIAs have no value, but to point out that there may be strict limits to the extent to which RIAs can be fully ‘embedded’ within policy processes so that they can influence political decision-making.

The UK experience with RIAs, accordingly, suggests that it cannot be assumed that the RIA process is easily operated in a manner compatible with the policy and legislative processes that are found within a jurisdiction. Potential tensions exist between the RIA and the policy/legislative processes just as there are tensions between desires for more rational and lower intervention regulation, and between efforts to reduce burdens and desires for more evidence or risk-based regulatory regimes. As for ways to deal with such tensions, these are matters to be returned to in the concluding section below. First it is necessary to consider the third core challenge of better regulation—that of devising methods to assess regulatory performance.


If ‘better regulation’ is to be pursued, it is essential that there is a capacity to measure not merely the quality of regulation but also the performance of regulatory improvement tools, institutions, and policies. Many governments look to assess the quality of regulation but the OECD has also conducted ex post evaluations of regulatory tools and institutions (OECD, 2004). Both kinds of measurement are required because policymakers will need to know both whether regulation is improving and whether this is due to the regulatory improvement steps that they are taking—rather than due to other causes such as the independent activities of regulators or the actions of self-regulatory bodies, regulated firms, or supra-governmental bodies.

The measurement of regulatory quality and regulatory improvement tool performance, however, is extremely
challenging for a number of reasons (Radaelli and De Francisco, 2007). Space here only allows a brief mention of the difficulties involved but the first of these is that measuring regulatory quality (and tool, or policy, or institutional performance) depends not merely on the benchmarks that are seen as relevant but also on the policy objectives at issue and the balance between different objectives or benchmarks that is seen as appropriate (Weatherill, 2007: 4). As has been seen in the discussion above, these are contentious issues and conceptions of quality are likely to vary according to audience, constituency, market position, or even discipline. Professional economists may stress the pursuit of efficiency, citizens and politicians may emphasise the importance of furthering accountability, transparency, and other process values, and firms may place special value on international competitiveness.

Different localities, sizes of firms, sectors, interest groups, political parties and so on may all have different perspectives on regulatory quality (for a small business viewpoint see Federation of Small Businesses, 2008). Such a list of variations in approach could be extended indefinitely. A look at the way that different governments measure regulatory quality shows, indeed, the degree to which they can vary in selecting primary benchmarks. As Radaelli and De Francesco point out, the Dutch and Belgian regimes, for instance, focus their evaluations on administrative burdens and regulatory complexity (see also Torriti, 2007) and this stands in stark contrast with the systems encountered in the USA and Canada, which look more directly to regulatory outcomes and net benefits for citizens (Radaelli and De Francesco, 2007: chapter 4).

A second challenge is independent of issues about chosen benchmarks and can be summarised in the question: Which aspect of regulation is to be measured? Here there is a choice. One potential object of measurement might be the quality of the regulatory design process, another might be the standard of performance seen in the implementation and enforcement of the design (Ogus, 2007). Alternatively, the assessment might look to the regulator's success in producing desired outcomes or even to the rate of improvement or induced reform that is seen in a regulatory programme. Thus, measuring the quality of policies, rules, and rule production is quite different from assessing the regulator's performance in implementing those policies and rules—which in turn is different from achieving outcomes. Other aspects of regulation may also be potential targets of measurement—such as the regulatory regime's dynamism and its capacity to adapt to change. The difficulty is that almost as much contention may arise regarding the objects of measurement as in relation to the benchmark criteria to be used in measurement—or, indeed, the policy outcomes that are to be set up as the overall framework for any assessment.

A third challenge of measurement is encapsulated in the question: Whose regulatory performance is being assessed? As is made clear from numerous regulatory theories ranging from 'regulatory space' and 'smart' to 'network' accounts (Hancher and Moran, 1989; Gunningham and Grabosky, 1999; Black, 2001, 2008) and as Martin Lodge and Lindsay Stratton point out in Chapter 15, much modern regulation is carried out within networks of controls that involve numbers of different kinds of regulators, control devices, and policies. In regimes that are 'decentralised', 'polycentric', or 'networked', it cannot be presupposed that it is possible, unproblematically, to measure the discrete system of control that is operated by a target regulator, regulatory strategy, policy, or tool—regulatory processes and outputs may result from cumulations of regulatory systems that may vary from issue to issue regarding their constituting elements and the degrees of coordination or disharmony within the network. Efforts to measure regulatory quality have, accordingly, to come to grips with complex issues regarding ascriptions of responsibility for those aspects of performance that are focused upon for the purposes of measurement. Such issues will inevitably prove to be not only complicated but politically contentious.

12.5 Conclusion

The 'better regulation' thrust of policy is one that is beset with difficulties of benchmarking, strategy, and measurement. It is arguably a policy initiative that, at heart, is founded on aspiration rather than conceptual clarity.

What constitutes 'better regulation' is difficult to establish and is a matter that is inevitably subject to contention. Commentators and governments alike have tended to avoid setting out precise, substantive blueprints and, instead, have tended to set down lists of qualities that are thought to be desirable in a regulatory regime. This approach possesses an upside and a downside. One advantage is that cumulations of criteria allow different states to take their own approaches to regulatory improvement while subscribing to an apparently common objective. Cumulations of criteria also offer an inbuilt flexibility that allows benchmarks to be adjusted, rebalanced, and adapted to new configurations of regulation. This is useful in so far as any given constituency may well revise the
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way that it conceives of good regulation when it is confronted by changes in the world, adjustments in preferences or networks and mixtures of regulatory systems. A further benefit is that such cumulations allow parties with divergent interests and politics to engage in debates on regulatory quality by sharing some common ground—they agree roughly on the benchmarks even if they disagree on balances between these and final substantive outcomes.

A significant disadvantage of cumulations of benchmarks is, as noted above, that divergent and inconsistent approaches to the pursuit of better regulation can be encountered not merely between different jurisdictions but within individual governmental programmes. There is no 'single vision' and this can lead governments to spin out policies that undermine each other as one strand of policy piles on top of another (see Radaelli, 2008: 191). Thus, it has been argued that there are significant tensions between numbers of initiatives within the UK and the EU—as between the espousal of RIA processes and desires for less intrusive regulatory styles, or between efforts to set enforcement on a data-rich risk basis and prescriptions on the reducing of informational burdens on business.

The way forward is not, perhaps, to abandon the use of multiple criteria in evaluating regulatory quality—numerous governments are wedded to these and a single vision would both prove unacceptable to different states or interests and would be excessively restrictive. What is needed is an effort to deal more rigorously with conflicts of objectives and values rather than a continuing commitment to assuming these away. How this might be done is perhaps best exemplified by returning to the potential conflict between the objectives of reducing regulatory burdens and moving towards more risk and evidence-based systems of enforcement. This can be seen as a conflict between desires, on the one hand, for lower cost schemes of regulation and, on the other, for more expert and rational approaches to regulation. The resolution of this conflict might be founded on an analysis of the nature and extent of the potential tensions involved in pursuing these two objectives: Such an analysis might, for instance, aim to identify the extent to which regulators in any given field can feasibly carry out risk analyses at the same time as they reduce informational burdens on businesses. Sub-issues to be explored might include such matters as the resource implications of demanding risk analyses in a given domain, the ability of the regulator to generate relevant data independently of the regulated industry, and the degree to which information burdens can be reduced in ways that will not undermine the risk analysis. It is only by mapping out the nature of policy tensions in particular regulatory contexts that governments and regulators can progress towards a better regulation initiative that is coherent and harmonious rather than a collection of potentially clashing policies that are thrown together under one banner. The same sort of mapping exercise will also be useful in deciding whether the 'better regulation' initiative should give way in a wholesale manner to another policy (for instance of deregulation) or whether what is desired is a particular balancing of these policies.

It should not, however, be suggested that all conflicts or potential conflicts within the 'better regulation' policy thrust are caused by clashes of values/benchmarks. Other tensions may relate to strategies and arise because of incompatibilities in the tools that are used in pursuit of the same values. An example is the potential danger that the centrality of the RIA within 'better regulation' may cut across the 'better regulation' process of seeking to move to less intrusive styles of regulation. It is arguable that both of these processes tend to be promoted by governments in an effort to forward a single objective or benchmark—the delivery of lowest cost methods of reaching regulatory objectives. Here the policy deficiencly may not be a failure to deal with a clash of values so much as a failure to appreciate that the logics of different instruments may cut across each other (see generally Baldwin and Black, 2008: 71). Again, the way forward may lie in coming to grips more rigorously with those potential strains of logic—for instance by training officials in the use of RIAS so that such assessments are used to evaluate the strongest regulatory schemes rather than to process those types of scheme that RIA procedures can most easily accommodate.

As for measurement issues, it is clear that taking the 'better regulation' initiative forward demands that newly rigorous processes have to be instituted for assessing the performance of both regulatory regimes and regulatory improvement tools, policies, and institutions. Those evaluative processes have to be capable of dealing more openly than at present with the different conceptions of 'good' regulation that are spread across societies and markets and also with differences of view on those aspects of regulation that it is appropriate to measure (be these policies, outcomes, relative performances, or other facets of regulatory regimes). Evaluations, moreover, have to come to grips with the 'ascription of responsibility' issues that were noted in discussing networked regulatory regimes.
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Is the ‘better regulation’ initiative a bad idea? No, ‘better regulation’, indeed, is not so much an idea as a collection of ideas that have been brought together in order to form an initiative. Value might be added to that initiative by a revision of approach designed to rise to the three main challenges discussed above. Conceptually there has to be greater clarity on the links between benchmarks for determining regulatory quality and the relevant regulatory outcomes that effective bodies establish. Strategically there is a need for more harmonious use of different regulatory improvement tools and a greater awareness of the propensities of such tools to further certain objectives but potentially undermine others. Evaluatively, it has to be accepted that the application of benchmarks is inherently contentious, that trade-offs between different values and objectives have to be addressed with a new vigour and transparency and that the ‘networked’ quality of modern regulation has to be dealt with in making assessments.

Bibliography

References


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Robert Baldwin
Robert Baldwin is a Professor of Law at the London School of Economics and Political Science and is Director of the LSE Short Course on Regulation.