

Revising the Regulatory Impact Assessment: Response to the BRE's consultation

Preliminary remarks

1. Members of the Regulatory Policy Institute have been longstanding supporters of Cabinet Office initiatives to promote better regulation, from the earliest days of these exercises. The Institute has on occasion also undertaken research projects that have contributed to the initiatives. Whilst the following remarks are critical of the current proposals, they are nevertheless the views of 'friends of the process'.

2. Progress on the 'better regulation agenda' has been slow, and concrete results have been hard to demonstrate. The pace of observable change reflects, in large part, the Herculean nature of the mission: consummate compliance with the spirit of the RIA process – and RIA is a *process*, not a document or set of documents – would amount to a radical transformation/revolution in the ways that much of public policy is currently developed.

3. Notwithstanding the slow pace of change, there has been significant progress on these matters, at least up to two or three years ago – and, given the nature of the mission and the institutional changes that it calls for, it has always been unreasonable to expect that the going would be anything other than slow and heavy, at least until some sort of 'tipping point' is reached.

4. Our perception is that there has been some loss of patience with this strategy in the more recent period, and it is this impatience that is a major factor in driving recent proposals. Impatience (aka short-termism) should, however, be recognised as a source of risk for the policy making process. Improving regulatory processes requires that a long game be played, and distraction from the central, very difficult challenges risks the loss of ground gained to date. We believe that this is happening now.

The new proposals

5. Taken as a whole, and based on a large number of years of experience of regulatory policymaking, it is our view that the proposals:

- might at best have a very marginal positive impact overall;
- can, on a strong balance of probabilities, be expected to have a negative overall impact;
- create a risk of major, negative impacts.

6. One of the major problems in the development of the proposals appears to be that scant regard has been paid to the principles of regulatory impact assessment, as summarised in guidelines developed to date. Paragraph 2 of the document states that RIA is required for "codes of practice or guidance", and an obvious, immediate question is: where is the RIA that underlies the current proposals concerning guidance? Put another way, what is being preached to others appears to have been largely ignored in the development of these proposals. It is difficult to see how this ('talking the talk' but not 'walking the walk') can do other than help undermine the credibility of the better

regulation agenda, and the fact that RIA guidelines have been ignored provides a more than sufficient basis for concluding that the BRE should return to the beginning, reflect carefully, and start again with a clean sheet.

7. It would be possible to develop this point at great length, taking each of the major components of RIA – as set out, for example, in previous guidelines – and showing how *The Tools to Deliver Better Regulation* takes a different road, or at least deviates from the straight and narrow, at each point along the way. However, a quick look at the first fences to be jumped – clear and precise identification of the relevant problems and issues, and of the relevant objectives – should suffice to demonstrate the more general point.

8. At para 3 of the Executive Summary (ES) there is a citation from the work of the NAO, which summarises some of the problems encountered in RIA and which might provide a jumping off point for an ‘identification of the problem’ analysis. In the event, the NAO’s analysis is, so far as we can see, simply used as a pretext for introducing changes (“there is a problem, something must be done”). There appears to be little linkage between the proposals developed and the particular and precise problems summarised by the NAO.

9. It is true that the NAO notes that there is an issue concerning the clarity of presentations in RIA documents, and para 2 of the ES (and the Ministerial Foreword) suggest that presentation of information in a transparent way is one of the two, key objectives of the current proposals (the other being regular updating of information). It is also very clear, however, that the “lack of clarity in the presentation of the analysis” identified by the NAO is not one of the more fundamental problems. When policymakers do not conduct RIA in “the right way”, when “the purpose is not always understood”, and when there are “persistent weaknesses in the assessments” – these are all the words of the NAO – unclear presentation is an almost inevitable *consequence*, and it can be expected to persist until the underlying issues are addressed. No author of a RIA document (RIAD) is likely to put up signposts saying “look how flawed and superficial this analysis is”; and it is highly unlikely that tinkering around with the requirements for the formatting of information will change this propensity. A different format will likely do no more than induce a different way of covering the tracks.

10. Going further, it is arguable that para 1 of the ES misrepresents the purpose of RIA (which might arise in part from a confusion between RIAs and RIADs – that is, between processes and documents). It is stated that: “Their aim is to present to decision makers the costs and benefits of policy options to ensure that new policies and regulations are introduced only where the benefits exceed the costs.” As we understand matters, that is not the usual purpose of RIADs in the EU. Rather, their purpose is to present decision makers with information relevant to the decision, not themselves to attempt to impose a particular decision *criterion* (such as that the favoured option is the one that best meets a subjective, maximum net benefit test – and such tests are always subjective). There is a fundamental issue at stake here: what is the purpose of RIA? Particularly given the NAO finding that purposes are not well understood, this is an issue that needs to be addressed explicitly, in depth, in a way and to an extent consistent with its crucial importance. At the moment, the issue is being glossed over (i.e. it is not being presented in a transparent way).

The way forward

11. The opening paragraphs of the Executive Summary, and of the main text, suggest an exercise that has been conducted at some haste, with insufficient time being given at the outset for the clear thinking that is required to prepare the ground for subsequent, detailed consideration of alternative ways forward. This is, in our view, the classic failure of RIA: a rush to the first fence, and a fall that makes subsequent progress a lot, lot harder than it need be.

12. On the other hand, the very fact that the consultation document suffers from the classic failure presents the BRE with a terrific opportunity to do what is virtually never done: make a major adjustment at the next feasible point in time (i.e. in response to the consultation). Our advice to BRE is to reiterate the wisdom that is contained in the 2003 version of the RIA Guidelines and, when considering developments from that high water mark, to set aside the current proposals and to start again. A good starting point would be discussions with the NAO, aimed first at arriving at a common understanding of the purposes of RIA, second at specifying more precisely the most fundamental of the problems identified to date (which are mostly to do with implementation, not guidance), third at beginning to map out alternative strategies for addressing those problems (i.e. the development of options in the manner that is usually considered to be a central feature of best practice assessment).

13. We do not hold our breath on this proposal: almost all past precedent suggests that it will not be adopted – policy makers invariably latch on to a preferred option and become reactionary in its defence. Nevertheless, the BRE has a real choice: it could say that it is going “to think again”, radically, from first principles. Precisely because that decision would be so unusual/surprising in nature, we believe it would have a strongly positive effect on the BRE’s reputation and credibility.

Some detailed comments on each of the proposed revisions (as summarised at para 6 of ES)

14. The new template is unlikely to have any significant impact on performance. We would expect that its structure will simply further encourage the problematic biases that exist already: a box ticking (or filling in boxes) mentality, which subordinates critical analysis to bureaucratic requirements.

15. It seems to us to be folly to eliminate longer, detailed guidance. If it is true that “The 65 page Guidance is often seen by policy makers as bureaucratic”, and if the length of guidance is seen more generally as an impediment to good RIA, then that is a truly shocking indictment of the policy makers concerned. The amount of material involved is only a fraction of what an undergraduate might be expected to absorb for one finals paper, and we cannot believe that the BRE takes this to be a serious problem. At most it might be seen as an excuse (for poor performance), and a bad excuse at that. Of course, there is a strong case for guidance to be provided in summary form, but this should be as a complement to, not a substitute for, the cumulative wisdom that should reside in longer documents.

16. We were not aware that there was a requirement for the consideration of three policy options. There must be at least two, one of which is ‘do nothing’, or, as it is

more accurately stated, ‘do nothing now’ (which better draws attention to the option value of waiting and learning). Whatever the number of options, however, we believe it is wrong in principle to develop a RIAD for each option. Alternatives are to be assessed against each other, and part of the skill in policy making is – among other ways by comparing the detailed characteristics of different options – to develop policy variants (sub-options) that may better meet policy objectives. Thus, the characteristics of one option might inspire adjustments to the characteristics of another option. Putting each option into a separate box is exactly the wrong way to stimulate more creative thinking, and it raises unnecessary benchmarking problems (how, for example, are the costs and benefits of ‘do nothing’ to be assessed?).

17. We are not persuaded that there is any need to make an issue of ‘sign-off’. The responsibilities of the Minister and the relevant senior economist are clear enough anyway. In relation to the economics, if a formal sign-off is to be required, we would suggest something rather different. The Chief Economist should not be a ‘reader’ of the RIAD – which the proposed form of wording implies – he/she should be a fully engaged participant in the regulatory assessment process from the very outset. The Chief Economist should be satisfied that, for any RIA (the process), reasonable endeavours have been made to ensure that all relevant information is collected and assessed (including for accuracy and reliability), and that conclusions reached are substantiated. It would, as a matter of very basic principle, typically be wrong and misleading for an economist to say that the evidence ‘supports’ a particular option.

18. We do not support the comprehensive removal of mandatory requirements. Regulatory impact assessment requires that impacts be assessed, and not just where the costs and benefits can be quantified. The underlying issue is one of proportionality. Any effect that is relevant to the conduct of public policy, at least if it appears to material/appreciable, stands to be assessed.

19. Whilst changing the name from RIA to Impact Assessment appears, *prima facie*, to be a trivial matter, we are of the view that it sends out all the wrong signals. Whatever the intention, it will give out a strong smell of defeatism, suggesting that RIA to date has been a failure and that, contrary to the sentiments in the Ministerial Foreword, the BRE is not intending to build on what has been done to date, but rather aims to go off in some other (unknown and uncertain) direction. Particularly given that frequent changes to RIA guidance are cited as a potential source of weakness (para 14), we do not believe that a case for change has been substantiated.

In conclusion

20. Given the above points, we will not comment in detail on the material contained in the appendices. It suffices to state that, in our view, there are all sorts of detailed problems with both the proposed Summary Sheet and the draft guidance set out in Annex B.

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