ROUTE MAP TO REFORM: DEREGULATION

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CONTENTS

FOREWORD by Dr Eamonn Butler 3

EXECUTIVE SUMMARY 4

1. INTRODUCTION 6

2. EU REGULATIONS AND DIRECTIVES 9
   2.1 Stemming the flow of EU–sourced Regulations and Directives *9*
   2.2 Cutting the burden of existing EU regulation *13*
   2.3 Compliance and enforcement of EU legislation *15*

3. WHITEHALL REGULATIONS 17
   3.1 Stemming the flow of Whitehall–sourced regulation *17*
   3.2 Cutting the burden of existing Whitehall regulation *21*
   3.3 Compliance and enforcement of Whitehall regulation *22*

4. THE UK REGULATORY AGENCIES 24
   4.1 Background and context *24*
   4.2 Stemming the flow of regulatory–office regulations *28*
   4.3 Cutting the burden of existing regulatory–office regulations *31*
   4.4 Compliance and enforcement of regulatory–office regulations *31*

5. CONCLUSIONS 33

APPENDIX A. International comparisons 35
APPENDIX B. Directives: political fudge 39

Bibliographical information

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FOREWORD

By Dr Eamonn Butler

Back in 1982, disappointed by the slow pace of reform by Mrs Thatcher's fledgling government, the Adam Smith Institute commissioned a series of policy reports in what became known as its Omega Project.

The reports involved the work of around a hundred experts, including economists, businesspeople, policy analysts, journalists, and politicians. They covered every aspect of government, from health through education, transport, local government, agriculture, welfare, taxation, employment, and more. The 500–page result formed a complete blueprint for government, calibrated for its political and economic practicality; and over a hundred of the ideas it contained later became government policy, though not all of them in Mrs Thatcher's time.

It is time to do the same again. New Labour's promised reforms have also been slow to become reality. So once more, we have assembled teams of experts to cut a series of routes through the policy jungle, and help make reform a deliverable reality. Again, we are setting out those policy pathways in a series of practical reports that an incoming minister could use as an office manual for effective change.

In this report, we tackle the growing and serious problem of regulation. Both individuals and businesses feel that regulation has become both too burdensome and too complicated, and politicians are starting to agree; but in office, they find it extremely difficult to simplify or lighten the burden. We have identified practical measures by which they can; and thereby, can unleash growth and enterprise in the economy.

The lead authors of this report are Keith Boyfield and Tim Ambler. They wish to acknowledge the help, advice and comments they have received from Sir Ian Byatt, Professor Francis Chittenden, Nigel Hawkins, Chanyeon Hwang, Anthony Hilton, Simon Walker and others. These were lively exchanges and we must make it clear that this acknowledgement in no way implies that they agree with this report and its conclusions.

EXECUTIVE SUMMARY

For many reasons, governments find it easier to add new regulations than to eliminate the unnecessary ones. Hence the accumulated pile of regulation grows and grows. Meanwhile, lawyers and civil servants demand that regulatory rules should be clear and precise, so the complexity of regulation grows too. Now, however, there is an increasing realisation that regulation has become too burdensome.

We use a nine–cell matrix to analyse the problem and its solutions. On one axis, there are three main sources of regulation, namely:

- the European Commission;
- Whitehall;
- UK regulatory offices.

On the other axis, we show that the burden can be tackled in three ways:

- fewer new regulations;
- cutting back existing regulations;
- more sensible compliance and inspection regimes.

The EU is becoming the main source of new regulations that have a significant impact on business. That the EU is the source is not of itself a bad thing, provided that new rules apply and are enforced equally across Member States so as to curb gold–plating and create a truly common market. The commonality of the market means that EU regulation will continue to grow in importance relative to the regulation and elaboration from Whitehall. The problem is not that a high proportion of regulation stems from Brussels; the problem is the amount of regulation from any source.

This also implies we should not have more than one level of government regulating the same issue. We do not need both local and Whitehall governments tackling one topic, nor Whitehall and Brussels regulating one another. The concept of Directives (Framework Laws in the new Constitution) provides some national flexibility; but since flexibility is only additive (you can do more than the minimum demanded, but not less) Directives give rise to gold plating. This adds to the burden on business in certain Member States, and means that the precise trading rules are different in each country, adding to the information burden on business. Accordingly, the UK government should press for EU legislation to appear as Regulations only, not as Directives.

The EU is poor at evaluating and auditing the impact of its legislation on business and society. We recommend that all new EU Regulations should be subject to cost–effectiveness analysis and sunset clauses.

To reduce the burden of existing regulation, the 16,000 pages of existing EU legislation should be reviewed, consolidated, and simplified, particularly those on labour markets and financial services. The EU needs the equivalent of Britain's National Audit Office to help in this task.

The logic of the common market implies that any business regulation not required by the EU is by definition gold plate. We should not need Whitehall–sourced business regulation at all. To the extent that we do, the UK needs more active challenge for new regulations, not just passive consultations. Regulatory Impact Assessments do not follow the UK government's own guidelines and government departments act as prosecution, judge and jury. We propose a panel to appoint assessors, along the lines of ACTAL in the Netherlands, which should answer to Parliament, not government. Such a reform should rebalance regulatory impact assessment and, in the process, make it more independent. New UK regulation should also have sunset clauses and be subject to post–implementation audit.

UK regulation has crept beyond 'economic' regulation and is forcing business to pay for politicians' social objectives. Properly, some or all of the cost of social regulation should be borne by all taxpayers, not by businesses.

In areas well covered by EU regulation, existing UK regulation should be presumed unnecessary and subjected to a one–year sunset clause. Government should seek to establish the overall cost of regulation, and then establish targets to reduce it. Regulators who cut or simplify regulations should be rewarded.

Small businesses are especially burdened by regulation. They should deal with a single inspector for tax and a single inspector for all other regulation. If a single person cannot explain the rules a small business has to follow, it is obvious that those rules are too complicated to be effective. Small businesses should be compensated for the administrative burden that regulation imposes upon them. This is not state aid but simply a partial reimbursement for the information that businesses are forced to provide; and a measure to impose some discipline on government departments regarding the burden they impose.

The size and cost of UK regulatory agencies — and statutory consumer groups — is growing. The statutory consumer groups should be abolished, with wider competition being used to as the best mechanism to promote consumer interests. Regulators should be more accountable to Parliament. And they should be rationalized so businesses deal with only one sector regulator.

Market systems, such as insurance, should be used as an alternative to regulation.

Government's goal should not be 'better regulation'. It should be freer and more competitive markets so that business can become more responsive to its customers and the needs of society as a whole. This is more likely to be achieved by a few general rules of good conduct and the marketplace, than by thousands of pages of detailed prescriptions.

1. INTRODUCTION

In his classic 1859 essay *On Liberty*, John Stuart Mill warned against the dangers of government becoming too interventionist in peoples' daily lives:

> 'Every function superadded to those already exercised by the government causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers–on of the government, or of some party which aims at becoming the government.'[1]

Regulatory intervention inevitably makes people dependent on government. Each year, the phenomenon Mill warned of becomes more apparent. How do we correct this remorseless trend towards bigger and bigger government?

1.1 The changing debate on regulation

While both Labour and Conservative politicians claim to want to cut 'red tape', their record in office has been to produce more regulation, rather than less. Perhaps having regulations in place makes politicians feel less vulnerable to uncertainty; perhaps the concentrated interest of those who demand new regulations are politically stronger than the diffused interests of the public who will pay for them. Perhaps the idea that liberty itself has value, needs to be reinstated.

The accretion of regulations seriously hampers the way an economy functions. Regulations are invariably created to achieve some ostensibly laudable aim, such as improved health and safety standards in the workplace. Yet all too often, regulations (and their enforcement by officials) become over–burdensome or even counterproductive. Over–regulation depresses corporate profits, consumes valuable management time and saps entrepreneurial morale. It makes the UK less attractive to multinationals. Far from adding value, the 'regulated state'[2] erodes wealth creation — and reduces the taxable base on which government services depend.

Yet sentiment is beginning to change. A vigorous campaign by the British Chamber of Commerce and the CBI has obliged the current government to rethink its attitude towards regulation. These campaigns have drawn on the experience of member firms and academic research (such as the studies exposing the costs of new regulation undertaken by Tim Ambler of London Business School and Francis Chittenden of Manchester Business School). The findings of think tanks (such as the study on the rapid growth of statutory consumer bodies by the European Policy Forum)[3] have also had an influence.

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[1] *Utilitarianism, Liberty & Representative Government*, J S Mill, Everyman Edition, 1971, p. 165.
[2] Professor Lord Norton of Louth's (Chairman of the House of Lords Constitution Committee on Regulators) term, CRI Occasional Lecture, 8 September 2004.
[3] *Employment Trends in Public Agencies*, by Keith Boyfield, European Policy Forum, April 2004.

The politicians are beginning to respond. Senior figures from the main political parties have joined the chorus in favour of greater deregulation, not only within the UK, but Europe–wide.[4] In August, the Conservatives received strong support from business when they published a report[5] setting out ideas for reversing the drivers of regulation, beginning with the EU. In October, the Prime Minister told the CBI that regulation was a 'major concern of yours and mine'. Along with Gordon Brown, he has given his personal support to the Better Regulation Task Force (BRTF), based in the Cabinet Office.

In another welcome initiative, the DTI plans to make deregulation a central feature of its five–year plan, which has now been agreed at Cabinet level. According to this Plan, the Government aims by 2009 to 'reduce the regulatory burdens on business arising from DTI regulations by more than £1bn'.[6] The DTI also promises to evaluate all its regulation with the aim of identifying the scope for simplification or more radically, removing all existing legislation before new legislation is implemented.[7] In addition, it is considering a pilot scheme aimed at co–ordinating official inspections of business premises.

The Treasury too set out a number of initiatives in its pre–Budget report,[8] and commissioned a review team, led by Sainsbury chief Philip Hampton, to overhaul regulatory enforcement and inspection procedures. His interim report[9] concluded that outside big risk areas, the regulatory focus should be on advice, not inspection, and proposed that government should aim for 'fewer, simpler forms' and 'a single data–set on businesses in the long–term'. Hampton plans to issue a final report in Spring 2005.

In the European context, Peter Mandelson used one of his first speeches as incoming EU Trade Commissioner to say that what the EU needs is 'less regulation, but more effective regulation',[10]reckoning that regulatory costs account for about four percent of the EU's gross domestic product. In his address to the CBI's annual conference in November 2004, he estimated the cost of EU–generated red tape at roughly double the economic benefits generated by the single European market.[11]

1.2 The aim of this report

The apparent readiness among British politicians to tackle the problem of regulation is encouraging. But on past evidence one is bound to ask whether this will translate into positive action. Accordingly, this report seeks to give the politicians of all parties a

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[4] Gordon Brown: "That is why the EU must now also set a new and more urgent timetable for specific and credible reforms to complete the single market" and the need to "ensure that competition policy becomes genuinely independent of politicians and pro-actively focused at driving up competition". *Financial Times*, 10th September 2004.

[5] *Reversing the Drivers of Regulation: The European Union*, by John Tate and Greg Clark, Policy Unit, Conservative Research Department, August 2004.

[6] *DTI Five Year Work Programme: Creating Wealth from Knowledge*, November 2004, p.31.

[7] *Ibid.*

[8] *See 2004 Pre-Budget Report*, Chapter 3, pp37-69.

[9] *Reducing Administrative Burdens: Effective Inspection & Enforcement* , published December 2004.

[10] 'Mandelson comes out fighting on state aid', *Financial Times*, 9 November 2004.

[11] *Ibid.*

politically practicable set of strategies aimed at the reduction of avoidable regulatory burdens on business and the public.

We use a framework, in the form of a simple nine–cell matrix, to analyse the problem of over–regulation. This matrix, set out as Table 1, identifies the various ways in which the regulatory burden can be reduced. It highlights the three main drivers of regulation, namely (1) the European Commission (EC), (2) the Whitehall and Westminster legislative machine, and (3) the cluster of regulatory bodies, many of which have been set up in the last 20 years in the wake of successive privatization measures.[12]

From Table 1 it can be inferred that there are three main ways in which the regulatory burden can be lifted. One can pass fewer new regulations. Secondly, one can reduce the raft of existing regulations. And thirdly, one can adopt more sensible methods of compliance and enforcement with regard to the existing body of regulations. In the rest of this report, we will go through this table, row by row.

TABLE 1: A REGULATORY MATRIX
(with references to the following sections in this paper)

Reducing regulatory burden due to:	**Fewer new regulations (Input)**	**Cutting existing regulations (Deregulation)**	**More sensible compliance/ Enforcement**
EU Regulations and Directives	Section 2.1	Section 2.2	Section 2.3
Whitehall sourced regulations	Section 3.1	Section 3.2	Section 3.3
UK regulatory offices	Section 4.2	Section 4.3	Section 4.4

[12] Devolved, regional and local governments are not covered by our matrix. While we make some general recommendations concerning devolved and local government, local governments are mostly concerned with compliance and enforcement issues, rather than the creation and maintenance of regulations.

2. EU REGULATIONS AND DIRECTIVES

2.1 Stemming the flow of EU–sourced Regulations and Directives

In value terms, i.e. cost to business, the Treasury estimates that approximately half of all new legislation with a significant impact on business now derives from EU law.[13]

From relatively humble beginnings in 1958, when the fledgling European Commission passed a mere 20 Regulations and no Directives[14], the annual count of new Regulations and Directives has soared over the subsequent near half century (Table 2). In its role as a legislation factory, Brussels reached a peak, so far, of production in 1998, when no fewer than 158 new Directives were passed along with a staggering 3,008 new Regulations. Together with the 735 Decisions taken at an EU level this added up to a total of 3,725 measures, compared with 43 back in 1958.

TABLE 2: The Brussels Legislation Factory
EU legislation produced annually from 1958 to 2003

Year	Regulations	Directives	Decisions	Total
2003	2,461	153	804	3,418
2002	2,537	120	896	3,553
2001	2,769	136	820	3,725
1998	3,008	158	735	3,901
1993	1,566	166	707	2,439
1988	1,801	133	546	2,480
1983	1,454	84	514	2,052
1978	1,329	116	615	2,060
1973	1,110	57	254	1,421
1968	443	37	182	662
1963	96	8	266	370
1958	20	0	23	43

Source: Extracted from CELEX by Chanyeon Hwang, Manchester Business School

Undoubtedly, Britain's entry into the EU has led to a step change in the amount of regulatory oversight in our lives. Instead of one large legislation factory (Whitehall), we now have two (Whitehall and Brussels).

[13] *Budget 2004*, p. 60.
[14] A Regulation applies through the EU. A Directive sets out the framework, purpose and intention of an EU law (or set of laws) but leaves Member States to introduce their own regulations in order to implement it.

No Member State acting alone can hope to make much of an impression on the volume of regulation from the European Commission. However, enough Member States working together could be successful. In this context, we welcome the 'Four–Presidency' initiative by Britain, Luxembourg, the Netherlands and Ireland,[15] to make a concerted effort during their consecutive presidencies of the EU to tackle what many observers generally agree is a serious case of regulatory overload.

In our view, this initiative needs to be supported by a pan–European grouping of business and independent organisations, who can suggest practical ways of achieving that objective. They can do this by commissioning research, undertaking surveys and by asking leading think tanks, academic centres and other experts to think through ways in which market principles can be used to solve the problems that regulation seeks to address.

The Four–Presidency initiative, now joined by Austria and Finland, makes a joint commitment to carry forward European regulatory impact assessments (EIAs) on Commission proposals, new standards for public consultation, progress on updating and simplifying the community *acquis communautaire* (i.e. the accumulated regulatory rulebook) and the conclusion of an inter–institutional agreement on better law making.

To date, however, progress on implementing any meaningful regulatory reform has been slow. The Commission introduced a formal method of regulatory impact assessment in 2002 but as yet no full implementation data have been published. In all fairness, the Commission are learning from the Dutch, and from the UK's experience with its own Regulatory Impact Assessment (RIA) experience that began in 1998.[16] In the wider, European context, where there are differing approaches to the problems, one must expect the pace of reform to be slow. To date 30 percent of all EC proposals have been subject to EIAs and 65 percent of the highest–priority EU proposals have been through the same review process.

EIAs have also been criticised for lack of rigour and failure to compare one set of risks with another.[17] A recent survey of the initial group of extended EIAs revealed that only around half had quantified both costs and benefits.[18] In this context, the EU has much to learn from the United States. One of the key requirements of Executive Order 12,866 passed by President Clinton in 1994 was that the benefits associated with a regulation must exceed its related costs.[19] Indeed, the aim was to maximise net benefits. In order to assess how this can be done some form of cost–benefit analysis is necessary. Consequently, one of the essential elements in regulatory reform is the need to implement a robust form of regulatory impact assessment.

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[15] The Netherlands, Ireland, Britain and Luxembourg will each hold the presidency of the EU over the next two years. Each of these Member States has agreed to participate and promote a deregulatory initiative in their term as president. Finland and Austria have now joined this initiative, so perhaps it is better now to call it the Six-Presidency initiative.

[16] This followed the publication of *Action Plan on Better Regulation* published by the Commission in 2002.

[17] *See Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis*, European Policy Forum, July 2004, City Research Series, No 2., Corporation of London.

[18] *The EU's New System of Regulatory Impact Assessment — A Scorecard*, European Policy Forum, 2004.

[19] See *'Counting Regulatory Benefits and Costs: Lessons for the US and Europe*, by Robert Hahn and Robert Litan, Regulatory Analysis 04-07, AEI — Brookings Joint Center for Regulatory Studies, October 2004, p.3.

The Commission is aware that things must improve. In *its Report on Better Lawmaking 2003*, the Commission called for improvements in four key areas:

- The way in which feedback mechanisms operate for third parties involved in consultation procedures;
- Raising the completion rate for extended impact assessment studies;
- Upgrading the quality of extended impact assessments;
- Widening and improving public access to the extended impact assessment procedure.

Cost–effectiveness analysis could be improved. In the words of Frank Vibert, a specialist on EU affairs who has studied EIAs, cost–effectiveness analysis 'compares a set of alternative policy options to achieve the same outcome using a single numerical index (for example, tons of reduced pollutant emissions). The cost side raises the same measurement issues as traditional cost/benefit analysis while the effectiveness calculation measures various indicators of performance.'[20]

Vibert argues that this offers a method of examining alternative ways of implementing regulations so as to minimise compliance and other costs. In theory, it should also enable one to identify where costs outweigh benefits. However, on a technical level, accurate performance indicators must be chosen (never an easy task), and these different indicators must be combined into a single measure. And on a political level, when governments have taken the political decision to regulate, it may be hard to dissuade them on the basis of cost.

The EU already advises that cost–effectiveness analysis should be used alongside efficiency (cost–benefit) analysis in assessing the impact of new laws.[21] But Vibert's research suggests that this advice is not followed in practice.

Another innovation that would be relatively easy to implement is to **publish information on the EU website**, showing how regulatory analysis and review processes are carried out. In the United States, the Office of Management and Budget has been publishing such information for some years. The Commission could also publish the results of regulatory impact assessments and invite interested parties and individuals to submit their comments on these findings. This would help to make the whole process of regulatory review more transparent.

A further desirable reform would be to **introduce sunset clauses on all new EU legislation that places a regulatory burden on business**. Sunset clauses require the legislation to be reviewed after due interval to establish whether the regulation is achieving its stated aims, and whether the benefits to be derived from the regulation outweigh the total costs.

A fourth initiative would be to **tackle 'gold plating'**. Gold plating as it relates to EU–sourced legislation is a well–known problem that has been discussed widely in

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[20] *See Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis*, European Policy Forum, July 2004, City Research Series, No 2., Corporation of London, p.18.
[21] *A Handbook For Impact Assessment In The Commission: How to do an impact assessment*, EU Commission, undated. This handbook provides a detailed description, with examples, of how practically to undertake an impact assessment.

the media. The Better Regulation Task Force defines it as occurring when 'implementation goes beyond the minimum necessary to comply with a Directive'.

Ambler and Chittenden have shown[22] that in far too many cases, Whitehall civil servants add significantly to the complexity of EU Directives when transposing them into UK law and regulation. Often, lawyers ask officials to incorporate greater precision, which again adds to the detail and complexity of the final result.

What is not widely recognised is that gold plating, or at least elaboration, is part and parcel of the Directives system. Directives require Member States to legislate at least to the level set out by the Directive. If Member States legislate to exactly the same level ('copy–out') then the Directive may as well be a Regulation, a rule which is the same for all Member States. But if the national regulation requires more than the Directive, it is by definition gold plating.

Most business people, lawyers and civil servants claim that they like the flexibility provided by Directives. Of course, such flexibility keeps lawyers and civil servants in work. But business people have mostly not yet made the connection between that same flexibility and the gold plating it inevitably involves. In order that this important topic does not distract us, the rest of the discussion forms Appendix B.

In the longer term, the aim should be to **stop multiple levels of government dealing with the same legislation**. The doctrine of subsidiarity requires clarity with regard to which tier of government should handle a legislative area. Different levels of government all regulating in the same area is wasteful and a huge burden on the regulated. In this respect, EU Directives are a good example since they require legislation at both EU and Member State level. But either a matter requires harmonised EU legislation (in which case it should be addressed in a Regulation), or it does not (in which case it should be left to Member States).[23]

The principle that only one level of government should legislate in any specific area should be recognised explicitly within the subsidiarity doctrine and the new EU Constitution. The Constitution should clearly delineate which areas are for EU legislation; while all others would fall to the discretion of Member State legislatures. The objectives of EU Directives, which would then become unnecessary, should be achieved by EU Regulations where these are justified by EIAs.

Recommendations

Regulatory Impact Assessments (EIAs) should be introduced immediately for all new Directives and Regulations that significantly affect business. The guidelines for EIAs and national RIAs should be rendered consistent, and practice should comply with those guidelines.

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[22] *How much regulation is gold plate: a study of UK elaboration of EU directives*, British Chamber of Commerce, 2004.

[23] Under the proposed new EU Constitution EU Directives are to be replaced by "framework laws". See the Appendix A for further discussion of the background to this recommendation.

EIAs should include cost–effectiveness analysis, i.e. the likelihood and extent of achieving the intentions of the regulation at various cost levels.

EU legislation which imposes burdens on business should have sunset clauses so that its effectiveness can be reviewed after a suitable interval.

Gold plating and elaboration should be reduced by pressing for Directives to appear as EU Regulations or for the issue in question to be left for national governments to deal with on the subsidiarity principle.

The EU should emulate the system that has operated in the US since 1997 whereby the Office of Management & Budget issues annual reports to Congress and to the general public on the total costs and benefits associated with government regulations.[24] This report should list and summarise the EIAs of the previous year.

The European Commission should establish a regulatory oversight unit to evaluate all significant regulatory proposals. As Claudio Radaelli[25] has pointed out, the EU has no such capability at the moment. In order to exert any influence, such a unit will need to have real decision making authority, have sufficient funding to perform its role, and be separate from the regulatory agencies it monitors. In the US, the Regulatory Oversight Office offers a model.

2.2. Cutting the burden of existing EU regulation

Given the chorus of pledges by politicians and EU Commissioners to tackle the Brussels regulatory jungle, we should seize the opportunity to cut back as much as possible. Only in this way will EU citizens begin to have any confidence in work of the European Commission. But there would need to be a radical change of gear. The Commission regulatory reform programme does not even claim to have a deregulatory agenda. In a final communication issued in December 2001 the last Commission, presided over by Romano Prodi, stated: 'Our aim is not to deregulate or to interfere with the executive's or the legislator's prerogatives, and certainly not to restrict [the EU's] freedom of action'. [26]

The new, apparently more market–orientated Commission headed up by EU President Jose Manuel Barroso, needs to rethink this entire approach. What is urgently needed is **radical pruning of the accumulated body of EU legislation** (the *acquis communautaire*). That should not be as difficult as it may first appear. At the

[24] For details of the US system see Conceptual Overview in *Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis*, European Policy Forum, July 2004, City Research Series, No 2., Corporation of London. This initiative is also discussed by Robert Hahn and Robert Litan in their article' When the Rules are the Real Risks', published in the *Wall Street Journal Europe*, 1 November 2004.

[25] Professor Radaelli, currently Professor of Politics at Exeter University, is an Italian political scientist who has written extensively about regulatory impact analysis. Professor Radaelli is the author of a study on the implementation of regulatory impact assessments in the EU context, see 'The Diffusion of Regulatory Analysis' in *the European Journal of Political Research'* No 43, pp725-749, 2004. One of his on-going research interests is the first pan-European study on regulatory quality, an exercise he is undertaking on behalf of the Enterprise Directorate General of the European Commission.

[26] European Commission, 5 December 2001, communication 726 final, p.4.

beginning of December 2004, the *acquis* ran to 16,000 pages. Nevertheless, it is worked through by each new applicant to join the EU, and if it can be reviewed by an applicant country it can also be reviewed by the Commission with an eye to consolidation and simplification.

The biannual scorecard produced by the European Commission noted that 134 EU laws, or almost 9 per cent of the total, have yet to be transferred into national legislation by each Member State. The Commission's scorecard comments that France's record has 'gone from bad to worse'. In May 2004, it was behind schedule on adopting 62 EU Directives. Greece was not much better at 59, while Germany's score was 53 and Italy's 47. In contrast, the UK had yet to implement only 18 Directives, the third best performer in the EU.[27]

In March 2004, the UK government set out ideas for a simplification programme, consolidating some legislation and codifying it. The UK initiative was particularly valuable since it derived from a market research survey of British business undertaken by the Better Regulation Task Force. The survey revealed widespread concern about the burden of EU environmental regulation, especially in the field of waste, air quality and pesticides in plant protection.

Other priority areas for reform identified by the UK government (in an effort to make EU labour markets more flexible and to make work more attractive) include employment and social affairs. In this context, a review of six health and safety Directives is being carried out. This is the sort of initiative which needs to be extended across the whole spectrum of EU legislation.

Financial services regulation is another area that requires attention. Despite claims that legislation aimed at creating a single EU financial services market should be proportionate, transparent and flexible, the EU's Financial Services Action Plan threatens, unnecessarily, to tie up London's large and thriving financial centre in red tape. The crucial Directives that need to be simplified here are the first Investment Services Directive, the Capital Adequacy Directive, the Money Laundering Directive, the Transparency Directive and the Insurance Mediation Directive. The present trend is not to simplify so much as gold plate them The Financial Services Authority says, for example, "the Transparency Directive is a minimum harmonisation Directive so the UK may choose to impose additional requirements where it deems appropriate to do so and market impact analysis supports this."[28] We know whose analysis will be used to build this new superstructure on top of the regulations the FSA has spent the last seven years adding.

Other areas of serious concern to UK business include the operation of the Common Agricultural Policy, the Data Protection Directive, EU legislation on the Transfer of Undertakings (TUPE), and EU legislation as it impacts on the motor vehicles sector.

To cut back this regulatory leviathan will require determination by Member State governments and their parliamentarians. In this regard, the accession of ten new countries, many of whom were only recently freed from the yoke of Soviet central planning, should begin to exert an immensely supportive influence. Having only just

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[27] Source: *Wall Street Journal Europe*, 'France Ranks Last in Deregulation', 14 July 2004
[28] International Regulatory Outlook 2005, January, Financial Standards Authority, p.24

liberated themselves from unwelcome state intrusion in their business and personal lives, the last thing that Poland, the Czech Republic, Hungary or Slovakia should want is a raft of EU regulatory measures forced on them by Franco–German social democrat politicians.

At a more philosophical level, we must **review the precautionary principle that underpins a great deal of EU regulation**. In a nutshell, this principle holds that it is better to be safe than sorry; but in its increasingly extreme form, it works to inhibit any new initiatives; an example is the length of time it takes to introduce new and potentially life–saving medicines. Alarmingly, the European Commission has never sought to define what it means by the precautionary principle, and no precise definition has been offered when applying it to regulatory decision–making.[29]

Recommendations

A large amount of EU legislation is even more confusing than it appears because it is amending prior legislation. The leading de–regulators among EU Member States should agree with each European Directorate whether it would be more efficient to consolidate existing legislation with any possible eliminations and simplification, or simply to repeal all business–burdening legislation as a whole and rescue only those regulations that are still required. Action dates would also need to be agreed.

The EIA system should be applied to the consolidated and rescued legislation.

The EU should have the equivalent of the UK's National Audit Office (NAO) answerable to the European Parliament. Among other things, the NAO now reviews the effectiveness of the RIA system and comments the work of the regulatory offices.

2.3. Compliance and enforcement of EU legislation

It has long been conventional wisdom that other Member States are far less vigorous in enforcing EU regulations than the UK. British business has long believed that compliance and enforcement regimes are lighter in other parts of the EU.[30] While often difficult to prove, there is a mass of anecdotal evidence to suggest that this remains the case.

As far as enforcement and compliance are concerned, the European Commission relies mainly on national governments, sometimes working through regulatory agencies or local authorities, to ensure that its regulations are observed. In certain areas (such as major business mergers or state aid investigations), the Commission's own staff deals with the enforcement of EU law and regulations. But in most others it is entirely dependent on civil servants working for Member State governments.

[29] See 'Europe's Precautionary Principle: Promise and Pitfalls' by John Graham and Susan Hsia in *Journal of Risk Research*, vol. 4, p.380, 2002.

Compliance and enforcement arrangements should form an integral part of the initial EIA studies carried out by the European Commission, as recommended above under the heading of cost–effectiveness. The aim should be to make them as light and even–handed across Member States as possible. Regulation is not a goal in itself: the objective is for business to flourish competitively without damage to health, safety or society. Regulation should happen only when that is the most cost–effective means of securing that objective. Quite often, self–regulation, or the extension of greater competition into the relevant industry, will prove much more cost–effective.

Recommendations

The European Commission should arrange regular probe[31] sampling research in those areas of particular concern to regulated businesses and citizens. The aim would be to establish how specific regulations are enforced across the 25 Member States of the EU, focusing on where there are substantial differences in approach. An adequate budget needs to be assigned to this initiative and priorities should be set to reflect the legitimate concerns of those burdened by the regulations.

[31] That is, small samples probed at some depth. Whilst not necessarily reliable statistically, they show qualitatively where problems may lie and would allow some cross-country comparison. Because samples are low, costs are also low.

3. WHITEHALL REGULATIONS

3.1 Stemming the flow of Whitehall–sourced regulation

If rules are need for business, then they should apply equally across the whole EU. Any additional national regulation is gold plate. In that sense, the whole of this section should be redundant since Whitehall should no longer be producing business regulation at all. We recognise that to be an unlikely scenario in the short–term. Yet, looking to the future, it underpins the need to challenge far more strongly Whitehall–sourced business regulation.

Regulatory Impact Assessments, a concept imported from the United States, were introduced into Britain in 1998. The aim was laudable — to challenge the need for, and content of, regulation. Since then, regulations should have been justified, and preferably justified on net benefit grounds. But critics argue that this welcome initiative has failed to deliver better regulation. And even where it does, there is no evidence that it *reduces* regulation. In any event, the aim of *better regulation* is a false one: we want *better business* with *less regulation*.

In research undertaken for the British Chambers of Commerce, Tim Ambler and Francis Chittenden have shown that the consultation surrounding each new regulation has in itself become a new burden. 'RIAs allow government to rationalise regulation but show no evidence of materially changing the quantum or content of regulations,' they observe. In theory, RIAs are the best methodology available; the problems lie in the way they are operated in practice. They have stymied objections to regulation and, judged overall, they may have thereby facilitated more regulation.

More and better consultation is part of the RIA process and is meant to protect enterprise. But while civil servants have plenty of time to discuss these things, people running small businesses have not. Furthermore, larger businesses, being better able to afford the necessary compliance costs, may even welcome (and lobby for) new regulation as something which conveniently protects them from new market entrants. The current process is like a criminal court where only the prosecutor is heard after he has consulted with the accused.

While cost–benefit analysis is an important part of the process, like any such tool it can be used well or poorly. If poorly applied it can be employed selectively to support whatever case the proposers wish to make. As matters stand currently, no independent challenge is built into the process. This needs to be remedied urgently.

New ideas and techniques on how to improve cost–benefit analysis are being suggested all the time. But this can never be more than an aid to judgement and a guide for comparing alternatives. Benefits tend to be difficult to quantify,[32] and at least three different stakeholders are considered separately: the general public (who

[32] For a detailed discussion of the issues involved, see *'Counting Regulatory Benefits and Costs: Lessons for the US and Europe*, by Robert Hahn and Robert Litan, Regulatory Analysis 04-07, AEI — Brookings Joint Center for Regulatory Studies, October 2004.

are also consumers); the government (including the Exchequer);[33] and business. The costs and benefits for government are usually the easiest to assess, and in net benefit terms government department s are usually the winners. It appears that they may carry more weight than they should, relative to the other groups.

In seeking to improve the quality of regulation, and in the process adopting pro–active measures to address specific problems, there are three options for policymakers:

- Continuing with the status quo, whereby new regulatory impact assessments are almost wholly for the departments concerned albeit with some scrutiny by the Prime Minister's Panel for Regulatory Accountability (PRA).[34]
- An outside, independent unit could prepare RIAs. This would address criticisms that departments are not sufficiently impartial. A beefed–up Regulatory Impact Unit (RIU) could also ensure quality standards and mediate where relationships between the independent assessors and the departments break down.
- Thirdly, Whitehall Departments could continue to be responsible for RIAs, but with an outside, independent body charged with responsibility for ensuring that RIAs are correctly carried out, and that they take into account best–practice techniques. Such an independent body could also supervise executive summaries provided to the key decision takers (including ministers, officials, parliament, cabinet and parliamentary committees) who judge whether a regulation or regulations are justified. In this context, it is worthwhile noting that the National Audit Office has called for the post–implementation auditing and evaluation of RIAs.

Each of these options has merits and drawbacks. However, it is worth recognising that the second option, which would involve removing government departments completely from the evaluation process, would cause difficulties with subject expertise and ownership. Moreover, it is important for departments to learn from the RIA process and not find themselves permanently in an adversarial position. A strong case has been made to us that departments are so biased in favour of their own proposals that the RIA process should be taken out of their hands altogether, i.e. we should adopt the second option. This may be correct; but we would prefer — at least initially — to opt for the third option. This route is still tough compared to the status quo: if the assessor's executive summary found against the need for regulation, but the minister still wished to proceed, they would have to justify their position before MPs on the floor of the House of Commons. If this check is also subverted, we should move to the second option.

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[33] Some argue that government [departments] should not be treated as a stakeholder but as representatives of the people. This may be true in theory but in practice RIAs are constructed using these three groups.

[34] As announced in the 2004 budget the Prime Minister's Panel for Regulatory Accountability (PRA) scrutinises all new regulations that are judged to impose a significant cost on business prior to them becoming law. According to the *2004 Pre Budget Report*, "Clearance is based on a thorough impact assessment of the proposal agreed by the Regulatory Impact Unit. The PRA has already rejected or delayed a significant proportion of regulatory proposals, where departments had not properly justified extra burdens on businesses, and will increasingly provide strategic oversight of regulatory activity, challenging departments to tackle the cumulative burdens of their regulations", p.47.

In this context, we have much to learn from the Dutch, where an independent agency, ACTAL, advises the Government on proposals and regulations that can be removed. According to the World Bank[35]: 'ACTAL has only nine staff members [and] is empowered to advise on all proposed laws and regulations. To date, simplification of administrative procedures has been achieved in the areas of corporate taxation, social security, environmental regulations, and statistical requirements. The estimated savings are $600 million in streamlining of the tax requirements alone.'[36]

The Regulatory Impact Unit works very closely with the supposedly independent Better Regulation Task Force: for example, they share offices. They are also united in preferring to describe best practice in theory rather than monitoring real practice. Although they do monitor practice to a limited extent, evaluating RIAs is left to the National Audit Office and the British Chambers of Commerce.

Part of the problem with regulation is that there is little effective counter–balance to the sponsoring government department. If a department wishes to spend taxpayers' money it needs the sanction of the Treasury; but if it wants to promote a new regulation (which also imposes costs on the public), there is no equivalent counter–balance.

A number of solutions to this deficiency have been proposed:

- **One in, one out:** i.e. the department has to find at least one old regulation that it can repeal to make room for the new one. This is being considered by the Better Regulation Task Force. But we must be careful that the regulations that are repealed should be at least as burdensome as the new one.
- A **regulatory budget** that would limit the total burden a department can place on business in one year. The idea is that the budget would be reduced from year to year.
- **Compensation:** The view here is that while some 'economic regulation' (promoting competition, for example) can perhaps be justified as benefiting business as a whole, much other regulation aims to force business to pay the costs of some wider social objective (shorter working hours, for example). But the proper business of business is business; civics is the business of government. If we want social benefits, we should pay for them through the market or general taxation; burdening business with their cost is disguised and unfair taxation. If business is required to act as an agent for the government's social policies, it should be compensated by the government for so doing.

It is probably not practical for government to offer 100% compensation and it might lead to unintended consequences, such as firms deliberately taking the more expensive option. On the other hand, having to fund a percentage of the costs would at least make departments more wary of imposing additional burdens on business.

[35] World Bank report: *Doing Business in 2004.*
[36] Further information is available in ACTAL's annual report to the Dutch Parliament.

Recommendations

In addition to consultation, a more robust filter is required in order to test proposed regulations. An independent assessment panel of suitably qualified individuals should be set up to review new regulation, along the lines successfully pioneered by ACTAL in the Netherlands. This panel would effectively be managed by a merged and re–tasked Better Regulation Task Force and Prime Minister's PRA group. We do not need both but we do need a more challenging approach to new regulation.

A lead assessor for this panel would be appointed by a reformed BRTF/PRA , which would answer to Parliament, not the government. The assessor would take evidence from informed sources on a time–efficient basis. In performing this role, the assessor should consider not only costs and benefits but also whether the goals are justifiable and likely to be achieved and whether the regulation provides the most cost–effective solution.

Individuals on the independent assessment panel should be drawn from recognised specialists in the field, for example, consultants with a track record in regulatory economics, or academics, or seconded business executives. Although the RIA as a whole would remain the responsibility of the department, a one–page summary of each RIA should be jointly agreed and circulated to all MPs.

The Regulatory Impact Unit's role should be strengthened throughout, from laying out the theory to monitoring actual RIA practice. We can learn from US experience and institute a similar system.

To help it in this expanded role, the database prepared by the British Chambers of Commerce (BCC) should be transferred to, and maintained by, the RIU (or the Treasury) and made available on its website.

RIAs should include sunset clauses after appropriate intervals. Each RIA — available on the web — must answer the question 'how could this problem be solved without regulation?' These already form part of RIAs guidelines but not practice.

The assessor should conduct a post–implementation audit of each regulation three years after enactment and publish a comparison of the objectives, costs and benefits specified in the RIA against what has happened in practice. In the light of this review, a recommendation should be made on whether the regulation is best repealed or amended.

New social regulation should include partial compensation for businesses, negotiated by their trade associations. Negotiating the full amount of costs would be immensely difficult and time–consuming, but a quick estimate paying between one–third and one–half of the costs would provide some compensation and make regulators aware of the burden they are imposing

Since over–regulation has proved such an intractable problem, a dedicated Cabinet Minister should be appointed to push through the reforms suggested in this study. He or she should have no other responsibilities.[37]

3.2. Cutting the burden of existing Whitehall regulation

A succession of British governments, including the present one, has set up de–regulation initiatives full of good intent. However, all too often relatively little has come of them. It seems likely that any effort to de–regulate — piece by piece — will suffer the same fate.

Unless political leaders are wholly committed to deregulatory initiatives, little progress will be made. But our EU colleagues in the Netherlands have demonstrated how deregulation can work. In 1994 the Dutch government set a target to reduce the informational administrative burden on business (the cost of providing the information required by public regulatory bodies) by 25 percent. The new government elected in May 2003 re–stated the commitment, with a target of reaching a 25 percent reduction from 2002 levels (equivalent to one percent of GDP) within four years. To ensure that this target is achieved, it has made ACTAL responsible for monitoring progress. While outturn performance has not been as good as targeted, the Dutch claim to have achieved savings of 18 percent.[38] (It should be noted that the Dutch are considering only the costs to business of providing the information they would not otherwise provide to public bodies and the public. They are not considering the cost to business of regulation as a whole.)

Following on from this Dutch initiative, the Danish and Swedish governments are both proposing to implement a similar scheme with specific targets for reductions in administrative costs.

Recommendations

In areas well covered by EU legislation, notably agriculture, health and safety, additional UK legislation should be presumed to be unnecessary and a one–year sunset clause applied to all these regulations *en bloc*.[39] It would then fall on Whitehall departments to justify those UK regulations that are still considered necessary with new RIAs.

Government should seek to establish the overall costs of the burden of regulation, perhaps initially by sector, and then establish annual targets for the reduction of these costs. If that cannot be done as a whole, the Dutch model could be followed in reducing informational costs.

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[37] Simon Walker told us that Roger Douglas' New Zealand proposals included a "Minister for killing things". He was to have no "positive" role but would range across government looking for agencies and budgets to scrap or radically reduce.

[38] Better Regulation Task Force private briefing, December 2004.

[39] Some people may think this to be impractical but it was very successfully applied by Peter Walker's local government reforms in the 1970s. He introduced legislation that all local government regulation lapsed in 1975 unless it had been effectively renewed by parliament. (Source: Simon Walker email 31 January 2005).

Each year an awards ceremony should be held where a range of prizes are awarded to (1) the ministers, (2) the officials, and (3) the regulators who have done most to simplify, improve or abolish regulation. We have already put this suggestion to the Better Regulation Task Force and a possible sponsor.

3.3. Compliance and enforcement of Whitehall regulation

For UK business the burden of regulation stems mainly from the need to comply with a mounting stack of regulations and the costs associated with the enforcement of these regulations. The burden can be broken down into various constituent parts, including:

- The investment of time, energy and professional fees in learning about new regulations and how these responsibilities should be dealt with as cost–effectively as possible.
- Time spent on form–filling, reporting statistics and other administrative activities not otherwise required by the business. This is the activity that the Dutch are addressing.
- Interactions with government officials.
- Performing a growing range of government responsibilities transferred to the private sector. PAYE was one of the earliest burdens heaped on unsuspecting employers, and this has been followed by VAT and a host of other responsibilities. Tax and employment–related, issues are probably the biggest single business burden: working hours and tax credits are two good examples.[40]
- Complying with economic restraints, such as increasing competition and consumer protection.
- Providing social improvements such as conditions for employees, and extra health and safety measures, where they are not justified on commercial grounds.

Small and medium–sized enterprises (SMEs) suffer disproportionately from regulation.[41] They should not have to deal with a multitude of national, regional and local government inspection and enforcement officials. We believe they should have to deal with one single official for all the regulatory requirements upon them.

We believe that appointing a single official to deal with all the regulatory concerns of an SME would lead both sides to a better understanding and balance between the public interest and the needs of business. Where there is a multiplicity of officials, each regards their own area of concern as paramount; they demand minutely detailed compliance: and they cannot see or appreciate the total burden of regulation on the business. Worse, as many business people complain, different officials or agencies may well contradict each other in terms of how the business should act.

This proposal has met with the objection that no one official could be expected to be familiar with the whole jungle of regulation. But that tells its own tale. If no one

[40] Fortunately, officialdom has recognised this burden and some effort has now been made to redress the balance.
[41] See Francis Chittenden, Saleema Kauser and Panikkos Poutziouris (2002) "*Regulatory Burdens of Small Business: A Literature Review*", DTI Small Business Service Research Series, October, URN 02/1378.

official can grasp the entirety of business regulation, how can someone struggling to run a small business possibly keep up to date with it?

Of course, if specialist sector knowledge is required (as in farming, for example) then a specialist inspector must be appointed. Clearly, farms and shoe–shops need different inspection regimes. But a small business and a single official working together would be best placed to determine what constitutes sensible compliance.

This would present organizational problems linking these composite inspectors with the relevant departments but the civil service is highly skilled in resolving such matters. In any event, since SMEs are essentially small local business we envisage their line reporting being to local government.

Recommendations

SMEs should have to interact with no more than one official dealing with tax and VAT, and one dealing with all others (health and safety, environment, trading standards etc.).

The trend to exempting SMEs from regulation should be taken much further with careful consideration of exactly which regulations are truly critical for SMEs, such as fire hazards. We suggest exempting small businesses from all legislation on employment and company law that is not related to public safety. (The boundary difficulties, such as businesses growing beyond the exemption limit, and large groups operating as a string of multiple small firms, are manageable.)

In addition to following the Dutch model to reduce the burden on business of providing the information required by regulation, we should compensate SMEs (who suffer disproportionately), and perhaps larger firms, for providing information that brings no benefit to them. Government departments may be less inclined to impose information costs carelessly on business, if they have to pay for it themselves.

4. THE UK REGULATORY AGENCIES

4.1 Background and context

The boom in regulatory agencies

Regulatory agencies have enjoyed a boom since 1997. Both in terms of annual budget and staff numbers, they have tended to surge ahead over the last seven years in particular (Table 3). The increase is perhaps attributable to the current government being far more sceptical about market mechanisms than its predecessor.

The Financial Services Authority's budget, for example, increased by a third between 2000/1 and 2003/4, while its payroll numbers surged by 13 percent (although there was some reduction in staff numbers last year). The individual agencies that were integrated into OFCOM, the new communications regulator, also expanded their budgets and staff numbers, despite a concerted attempt to reduce overlapping staff positions when OFCOM was first established.[42] Nonetheless, in its first year of operation, OFCOM spent £145m on running costs, compared with like–for–like running costs of £135m for the five regulators that were consolidated into the new communications super regulator. Staff remuneration has leapt up, with over 75 individuals receiving a benefits package exceeding £100,000 a year.

In its first year of operation, Stephen Carter, OFCOM's CEO, received a total of £370,000 while Ed Richards, the senior partner responsible for competition and strategy received £254,000. Both packages far exceed cabinet ministers' pay. Lord Currie, the part–time chairman, receives a pay package worth £155,000, more than the Prime Minister. There is nothing wrong with paying individuals the rate for the job, but the onus must be on this new breed of regulatory executive to justify their worth.

A detailed analysis of the growth in regulatory budgets and staff levels is contained in a recent study,[43] published by the European Policy Forum. Partly in response to criticism regarding their growing budgets, certain agencies have sought to clamp down on future costs, OFGEM being a good example[44] (see Table 3). But on the whole, the general pattern has been one of continued expansion.

The current government has taken the view that regulation should fulfil a public policy role in addressing social and environmental objectives, in addition to the role marked out by the previous government, where regulation was aimed primarily at providing a proxy for market forces.

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[42] Around 200 staff were made redundant.
[43] *Employment Trends in Public Agencies* by Keith Boyfield, published by the European Policy Forum, March 2004.
[44] OFGEM plans to reduce its spending in real terms by 3 per cent a year between 2005-2010. OFCOM is seeking to reduce its own annual budget by 5 per cent in the next financial year. See 'OFGEM to impose price controls on its own operations', *Financial Times*, 22 November 2004.

Regulation's wider role was detailed in the Utilities Bill. The Act conferred a new primary duty on regulators to protect consumer interests, taking things beyond strictly 'economic' regulation and squarely into 'social' regulation. Examples include the provision of utilities where it is not economic to do so and control of broadcast content. Government added a further 135 duties on top of the 128 duties laid down for the five regulatory bodies OFCOM replaced. This revision to the regulators' statutory duties has gone a considerable way towards meeting an essentially consumerist agenda.

Table 3: Growth in Regulatory Agencies' Budget & Payroll Numbers 2000/1 – 2003/4

	Expenditure £m				rise	Payroll numbers				rise
Year	**00/01**	**01/02**	**02/03**	**03/04**		**00/01**	**01/02**	**02/03**	**03/04**	
FSA	182	195	221	240	**32%**	2039	2234	2313	2200	**13%**
ITC	18.8	18.4	20.1		**8%**	187	166	180		**–4%**
OFTEL	13.3	17	19.5	20.1	**47%**	208	236	236	239	**14%**
Broadcasting St'ds Com.	2	2	3.9		**95%**	21	21	23		**–5%**
Radio Authority	4.1	4.4	4.8	5.2	**17%**	43	47	47	46	**9%**
Radiocomms Agency.	58.8	66.9	71.5		**22%**	535	573	580		**8%**
OFGEM	36.4	37.8	38.5	36	**6%**	434	334	320	300	**–26%**
OFWAT	10.9	10.8	11.5	14.1	**29%**	209	218	233	242	**16%**
POSTCOMM	3.9	6.4	6.5	8.4	**115%**	29	37	40	40	**38%**
Office of Rail Regulator	14.3	10.6	13.3	15.3	**7%**	100	112	124		**24%**

Source: Individual regulatory agencies

However, this new consumerist agenda proved hard to define in legal language. Ministers provided the utilities with hardly any guidance on how to fund their social and environmental objectives. For instance, how far should prices rise in order to address the needs of those who cannot afford fuel? And how high should prices go in order to deal with specific environmental problems? The energy expert Dr Dieter Helm, a Fellow of New College, Oxford, commented that the Utilities Act was one of the 'worst examples of poor drafting in recent times'[45] and showed a woeful ignorance about how utilities operate in the real world.

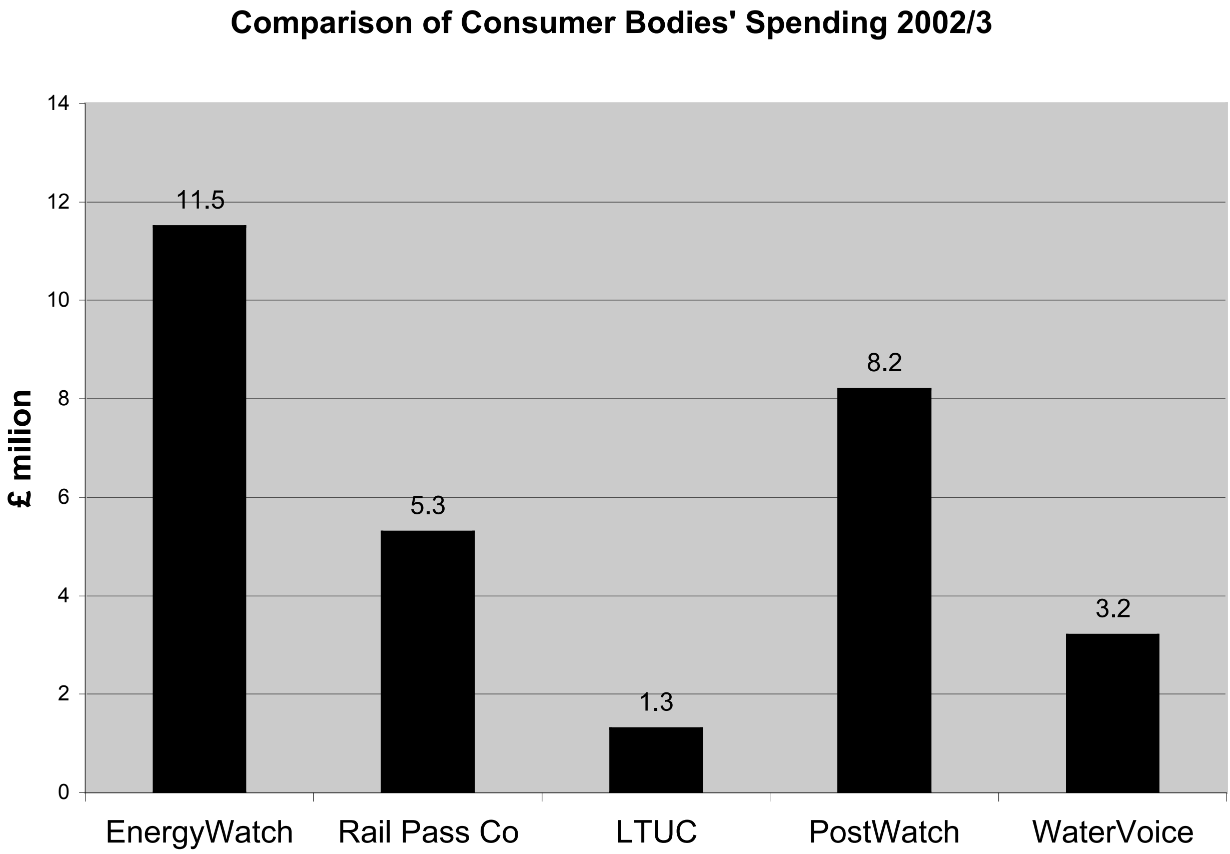
Nonetheless, the Utilities Bill finally won parliamentary approval and with it, the Act imposed a new agenda — strongly influenced by the consumerist lobby — on the privatized energy utility sector. In the process, a new statutory consumer council,

[45] *Energy, the State, and the Market: British Energy Policy since 1979*, by Dieter Helm, Oxford University Press, p.292.

Energy Watch, was introduced, reflecting the government's distrust of market mechanisms. Overall, the Utilities Act has made the regulatory regime less predictable than before, and it is generally agreed to have led to a rise in the cost of capital — a reflection of investors' uncertainty and unease about the UK regulatory regime.

The rise of statutory consumer bodies

In terms of institutions, there are now a whole raft of statutory consumer bodies including PostWatch, WaterVoice, and the London Transport Users Committee, all aimed at 'protecting' consumer interests. As can be seen from Chart 1, their annual expenditure has become substantial.



The growth in statutory consumer bodies' budgets and staff numbers has been extensively documented by members of our team in their previous research.[46] PostWatch, with its £8.2m budget, employs more staff than the regulator, Postcomm. EnergyWatch, on a budget of £13.1m, employs about the same number of people as the energy regulator, OFGEM. The Rail Passenger Council's expenditure hit £5.3m in 2002/3, and the London Transport Users Committee, which publishes such useful pamphlets as why we have nameplates on streets, costs £1.3m.

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[46] See *Do the UK Regulatory Agencies Provide Taxpayer Value?* by Keith Boyfield and Tim Ambler, Centre for Marketing Working Paper No 04-902.1, London Business School, March 2004; and *Employment Trends in Public Agencies* by Keith Boyfield, European Policy Forum, March 2004.

What do all these 'consumer champions' do? Much of the time they appear to be clamouring for attention, yet few consumers know they exist! EnergyWatch proudly claims that unprompted recognition of the agency increased by 100 per cent in the last year: but then one finds that public awareness of the agency has climbed from one to two per cent of the population. It remains the case that 98 per cent seem not to have the foggiest idea what EnergyWatch does.

Statutory consumer bodies are supposed to represent a selection of customers, especially certain groups deemed by ministers to be vulnerable or in special need. In the case of OFCOM's Consumer Panel, these groups include the elderly, members of ethnic minorities, inner city dwellers and people living in remote rural areas. But it remains questionable the extent to which those who are appointed are consumerists with their own agenda, and how far they actually represent the true wants of customers.

There is little if anything in the work of these statutory consumer bodies that could not be achieved through existing consumer legislation and by the normal striving after customer satisfaction that any competitive business organisation would research and aim for. What is more, statutory consumer bodies appear to rely greatly on the media and on parliamentarians. If they did not exist, the media would still highlight instances of poor and inadequate service, and MPs would be spurred to improve consumer legislation where improvement was needed.

The NAO examined EnergyWatch and PostWatch and concluded they 'could be more proactive in seeking to reduce costs'. This is putting things politely![47] More damningly, it is clear from the NAO report that they do not understand their consumers' needs, nor what the DTI expects them to achieve. In short: they do not know what they are supposed to be doing, how to do it, or what it should cost. Therefore the onus should be on statutory consumer bodies to justify their continued existence. If they are unable to show where they add value, they should be wound up.

A great deal of regulation aimed at protecting consumers could be left to the market and the courts, as Irwin Stelzer,[48] the economist and *Sunday Times* columnist, suggests. In the courts, he says 'there are no ups and downs due to changes in political fashion. It's a money driven system and I've always had great faith in the profit motive. The lawyers who do it are entrepreneurs — they take risks.'[49]

In the UK, utility customers' interests could be handled by the small claims courts, which if needs be could draw on more robust legislation protecting consumer rights. On larger cases, expert witnesses can throw light on a problem. And abuse of market power can be exposed to the glare of the media. On balance, we believe consumer redress should be left to the courts, and, where necessary, legislation protecting consumer rights should be strengthened.

[47] Energywatch and Postwatch, NAO Report HC 1076, 15 October 2004.
[48] Dr Irwin Stelzer was the founder of National Economic Research Associates and a past Director of the Energy and Environment Policy Center at Harvard University. He is currently Director of Regulatory Studies at the Hudson Institute, based in Washington DC.
[49] Interview with Keith Boyfield.

Multiplicity and lack of accountability

Some businesses have to deal with a multiplicity of regulators. This is illustrated by the back of a BT telephone bill[50] which refers potential complainants first to itself, then to OFCOM, but alternatively the Office of Telecommunications Ombudsman (OTELO — approved by OFCOM or the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS — industry funded), or the British Approvals Board for Telecommunications (BABT). The consumer may consider this more confusion than protection. There are some encouraging signs that the government is making some moves to address this problem of multiple regulators, best seen in its recent decision to scrap the Strategic Rail Authority.

To whom are regulators accountable? A recent House of Lords select committee inquiry into regulators[51] concluded — paradoxically — they were regulated by everyone and no one. The original aim was to ensure that they were independent of government, but recent demands to make them more accountable has meant that they are now far more answerable to ministers. Sir Ian Byatt, who as the first water regulator remained adamantly independent, suggests: 'It is arguable that developments in regulation since 1997 have created the scope for much more detailed ministerial involvement in what are now privatized industries than was feasible for the nationalized industries.'[52] Byatt supports his argument with evidence carefully drawn from the water, electricity, telecom, rail, London Underground, and postal industries. He concludes that this trend has jeopardised the hard won advantages associated with privatization.

4.2 Stemming the flow of regulatory–office regulations

This report seeks to put the case for an alternative approach to the regulatory agenda, drawing on market remedies that offer real commercial incentives to improve standards. To achieve this goal, we need to make much greater use of insurance markets to deal with risk in all its various forms.

Instead of government departments and regulatory agencies specifying a host of rules and requirements, which in turn requires an army of inspectors to ensure that these regulations are met, it would make more sense to lay down minimum mandatory insurance cover for specific activities and risks.

For a range of risks including fire, health, safety and environmental protection, firms would be obliged to arrange insurance cover to meet certain minimum standards. Already employers are required by statute to insure again any harm they may cause employees (this is known as Employers' Liability Insurance). Similarly, motorists must be insured for third party risks, while professionals, such as accountants, lawyers and architects must take out professional indemnity insurance.

[50] Customer EA 3093 9177 Q064 &L, 14 July 2004
[51] Professor The Lord Norton of Louth's (Chairman of the House of Lords Constitution Committee on Regulators) term, CRI Occasional Lecture, 8 September 2004
[52] Email to authors, 6 September 2004.

The principle of mandatory insurance could be extended to other business sectors, such as manufacturing, hotels and restaurants, which are currently controlled by regulation. One advantage would be that the goal of adequate protection for employees and the public can be achieved through ordinary market mechanisms. Businesses running higher risks would face higher insurance costs, or their insurers would insist that they curb their exposure by (say) installing safer equipment or upgrading their staff training. Unsafe businesses would not be able to get cover and would be forced out of the market. Second, the adjustment is automatic: if the nature of business changes, the insurers' premiums change too, without some new regulatory rulebook having to be drawn up. Third, the insurance industry knows more than regulators about the real risks associated with any business, since they already collect claims data and have a strong commercial interest in assessing risks and adjusting premiums to match.

It also overcomes the common business complaint that regulation revolves too much around officials' rulebooks and too little around common sense. As the Nobel economist Milton Friedman points out: 'By removing the organisation of economic activity from the control of political authority, the market eliminates this source of coercive power.'[53]

That would certainly bring benefits, since regulators live to regulate. Their jobs depend on their continuing to devise, define, extend, and implement rules. Some regulation may be justified on net benefit grounds; but much is not. If we are to succeed in reducing unnecessary regulatory burdens, we must be prepared to put some regulators out of a job.

In an earlier study[54] we advanced two options available to policymakers committed to reducing the regulatory burden. In order to stem the output of new regulations generated by the cluster of regulatory agencies created in the last twenty years, one either could trim their budgets and manpower; or, more radically, one could seek to merge as many of the separate economic regulators (OFGEM, OFCOM, POSTCOMM and so on) as possible into a new single Fair Trading Authority. The idea is that one single agency would generate fewer regulations than a collection of specialist regulatory agencies intent on justifying their continued separate existences.

If one opted to pursue the second, more radical option, one would need to win parliamentary approval for a Bill that:

- merged the Competition Commission and the OFT to form a Fair Trading Authority;
- removed the concurrent powers of a group of economic regulators, namely OFCOM, OFGEM, OFWAT, POSTCOMM and the Office of Rail Regulation (ORR), in favour of a new competition body, the Fair Trading Authority;
- abolished the non–economic objectives set for economic regulators, notably those new statutory responsibilities conferred since May 1997;
- closed down, or introduced sunset clauses for, OFGEM, OFWAT, POSTCOMM, and the ORR;

[53] *Capitalism & Freedom*, Milton Friedman, University of Chicago Press, 1962, p.15.
[54] *Do the UK Regulatory Agencies Provide Taxpayer Value?* by Keith Boyfield and Tim Ambler, Centre for Marketing Working Paper No 04-902.1, London Business School, March 2004.

- transformed the various consumer bodies set up since May 1997 to advisory groups for the companies, including OFCOM's Consumer Panel, ENERGYWATCH, POSTWATCH, the various rail consumer bodies and WATERVOICE;[55]
- required businesses with greater than (say) 40 percent market share in the previously regulated sectors to provide marketing metrics, such as customer satisfaction, as recommended by the Accounting Standards Board.

Our earlier study estimated that if this radical option was pursued it would release approximately 80 percent of the current level of costs represented by these separate agencies or £500m a year on 2003/4. This is probably a conservative estimate.

Within a five–year electoral cycle, many regard this more radical option as too difficult. However, they can make systematic progress towards it as a longer–term goal. The strategy would be to follow the first option, trimming of annual budgets and manpower levels, with progress monitored through annual reports to Parliament (not the Secretary of State as at present). These reports should include cost–benefit analyses overseen by the independent assessor we have proposed, with assessments limited to a single, measurable goal, since multiple objectives make proper assessment difficult if not impossible.[56] The reports should highlight the success or failure that agencies have experienced in streamlining, clarifying and reducing the regulations applied to their sectors.

Since 1997 a host of new non–economic regulatory objectives have been introduced. These goals relate to social and environmental issues that form part of a political agenda. This changes what were previously economic regulators to social engineers, and imposes additional covert taxation on consumers (for example, gas consumers may find themselves having to subsidise those on low incomes). If a government in power believes it is right to provide various forms of financial support to certain targeted consumers, then this should be done through the tax and social services budgets, and voted on by Parliament. Economic regulation should serve merely as a temporary proxy for competition; when competition has become sufficiently established, the regulations and associated regulators can be dispensed with, leaving the enforcement of free and open competition to the competition authorities (see discussion above).

Recommendations

Insofar as new non–economic regulation is justified, it should be funded by national or local taxpayers.

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[55] They would no longer be a burden on the taxpayer nor on the companies which need market sensing research in any case. If these groups did not then provide value for money for the companies, they would reform them further to provide valuable consumer insights.

[56] See, for example, the academic literature on the defects of a 'multiple scorecard' approach, notably 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', Michael C. Jensen, Tuck Business School Working Paper No. 01-09; Harvard NOM Research Paper No. 01-01; Harvard Business School Working Paper No. 00-058; Journal of Applied Corporate Finance, Vol. 14, No 3, Fall 2001. Earlier versions appeared in the *European Financial Management Review*, Vol. No. 7, 2001, pp. 297-317, and in *Breaking the Code of Change*, M. Beer and Nithan Norhia, eds, Harvard Business School Press, 2000.

Regulatory agencies should become formally answerable to Parliament, whether to a joint committee of the two Houses or a committee of the Commons. Such a parliamentary committee should have the power to close down an agency, clarify its goals and/or reduce its annual budget where the goal–by–goal benefit no longer outweighed the relevant costs.

Appeal procedures should allow regulated parties to have their objections reviewed on the merits of the case.

4.3 Cutting the burden of existing regulatory–office regulations

Regulators should not be in a position to decide their own futures. There is a clear danger that some of them are putting down deep roots. The Financial Services Authority is one example, and OFCOM another: OFTEL was getting close to extinguishing itself when OFCOM took over the role. It is for government, and ultimately Parliament to decide whether separate regulatory agencies have a continued role, based on robust cost–benefit analysis.

Under the Communications Act, OFCOM is supposed to review whether continuing regulation is really necessary in various fields. This is a duty that should be applied to all regulators. OFGEM for example, takes great pride in pointing out that much of the activity it used to regulate is no longer regulated. This is a welcome development and one that is reflected in the downsizing of this energy regulatory agency. These developments are much to be encouraged but we would go further.

Recommendations

We recommend that regulators' responsibilities are rationalized by sector. Accordingly, each business in a sector would only deal with its specialist regulator.

4.4 Compliance and enforcement of regulatory–office regulations

The evidence as to whether regulation actually identifies and catches rogue business figures is not so encouraging. The Enron and WorldCom accounting scandals in the US, and the corporate governance shocks at Shell and Equitable Life in the UK, occurred despite a huge volume of regulatory controls on accounting standards, financial reporting, and corporate governance.

But as Elaine Sternberg has observed, 'Regulation is typically part of the problem, not the solution. Interestingly, the worst scandals have been in industries that have traditionally been heavily regulated: energy, telecoms, defence.'[57] One reason is that regulation is not as efficient as competition in exposing corporate weaknesses.

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[57] *Corporate Governance: Accountability in the Marketplace*, 2nd. Edition, by Elaine Sternberg, Institute of Economic Affairs, Second Edition Hobart Paper 147, 2004, p.157.

Another may be that the very proximity of regulatory agencies to the companies they regulate can lead to them being 'captured'. Who then is to protect the public?

It is not clear to the public that the pronouncements of governments are any more trustworthy than those of the industries they regulate. Consider the covert erosion of state pension benefits in the UK, the parlous state of the social security trust fund in the US[58] or the European Union's accounts (dubbed 'insecure and unreliable' by Colin Maynard of the European Court of Auditors).[59]

Any world–class business in a competitive sector is intensely aware of its obligations to stakeholder groups. It conducts extensive market research in order to monitor their needs and satisfaction and the service it provides. It is probably far more aware of consumer interests, consumer wants, and customer satisfaction levels than any of the consumer[ist] groups created by government, who claim to speak for the consumer, but often do not have the information to do so. The aim should be to extend competition, not to enlarge regulation, the regulatory offices, or the statutory consumer groups.

Recommendations

We recommend that all offices for consumer interests for regulated industries are abolished. Instead, regulated companies would be required to share research and other data on service provision, needs and satisfaction with the regulator, who would be encouraged to verify the accuracy of the data.

As argued earlier, far greater use of market mechanisms should be introduced to improve health and safety standards in the workplace and in residential properties. In place of regulation, insurance markets could be employed to improve health and safety standards. They could also be extended to cover professional indemnity, environmental safety and a host of other matters. Regulated companies would need to comply with statutory minimum standards, but they could shave their annual insurance premiums by demonstrating that they had exceeded these minimum standards. This would provide a real economic incentive to improve standards hitherto monitored by regulatory agencies.

Regulatory agencies impose substantial fines and penalties on organisations and companies, e.g. POSTCOMM has levied significant fines on the Royal Mail. In this case, the government is the shareholder and is fining itself. The costs are passed on, sooner or later, to the consumer, i.e. the taxpayer, either directly by the firms or indirectly via higher taxation to meet the fines. We recommend that alternatives to financial penalties be developed for regulated businesses.[60] More effective means should be found to improve compliance.

[58] *'Don't "Enron" Social Security? It Already Is'* by Andrew G Biggs, Cato Institute, 8 April 2002.
[59] Reported in Guerrera, Francesco and George Parker, 'EU controls over budget slammed as unreliable: leaked audit report condemns "waste of public funds", *Financial Times*, 1 August 2002, page one.
[60] One suggestion was that fines were paid personally by the directors of state-owned enterprises. This might discourage applicants for the boards but the contributor considered that a further benefit.

5. CONCLUSIONS

This paper has laid out a roadmap with 33 recommendations for reducing the burden of paperwork in three ways: fewer new regulations, de–regulation and easing compliance. We have identified three main routes to reform: the EU, Whitehall and the offices of regulators. Devolved, regional and local government have not been considered.

As Gordon Brown pointed out in his 2004 Pre–Budget report, with 50% of regulation (by cost to business) coming from Brussels, Ministers should focus more attention upstream and catch regulation earlier rather than try to rectify matters when Directives reach the UK for implementation. It is profoundly inefficient, and damaging to British interests, to have both EU and Whitehall governments, not to mention Edinburgh, Cardiff and Belfast, legislating in the same areas, especially when the legislation has not been properly challenged at source.

More generally, we recommend that no more than one level of government should legislate in any area. Where common laws cannot be, or should not be, agreed for the wider area, the area should be devolved to the next lower level of government.

As a general principle, what we should remember is that regulation is a constraint on the proper development of business. The newly burgeoning regulation industry appears to think that regulation is an end in itself (for example, the original 'Deregulation' in the original title of the BRTF was changed to 'Better Regulation'). The Hampton enquiry is looking for 'more effective' regulation — potentially making compliance even more burdensome. We should not forget that, in general, business creates national wealth whereas regulation subtracts from it. Better regulation is not an answer to the need for less regulation.

Too many regulators also seem to have forgotten how free markets can be used to provide the protections they seek. Cutting with the competitive grain in this way is more likely to be cost–effective than the old–fashioned authoritarian approach adopted by (for example) the Financial Services Authority, whose own Practitioner Panel 'lambasted' it for an excessively costly compliance regime that inhibited innovation.[61] In free markets, firms build up brand equity, or reputation, which is often their most valuable asset and which they do not wish to damage by the sort of practices the FSA tries, and often fails, to stop. Regulators need a much better understanding of how marketing and markets work.

Our roadmap for regulatory reform is structured into nine cells. 33 recommendations may seem too many for the next government to tackle, which raises the question of priorities. In terms of new regulations, we should focus first on the EU. This is the primary source in future and we need to turn down the tap by making the challenge to regulation real. Secondly the *acquis communautaire* should be critically analysed to remove dead wood and consolidate and simplify the remainder. The third priority is

[61] Patrick Hosking, "City attacks FSA over costs burden", The Times, 17 December 2004, p.48-49.

UK compliance, which now occupies the Hampton enquiry. Whether that will go as far as the recommendations in this report remains to be seen.

Our investigation leads us to a surprising conclusion: the *proportion* of regulation from the EU is not the issue. In order to minimise the *total* amount of (unnecessary) regulation, we have to minimise the sum of EU + Whitehall regulation. UK politicians find it convenient to blame Brussels, but in reality a truly common market requires that any genuinely necessary regulation be truly common. So long as we stay in the EU we have to accept EU Regulations; but at least British business shares that burden equally (compliance aside) with other Member States. **All (additional) Whitehall business regulations are, by their nature, gold plate**. Consequently, minimising the total burden of new regulation probably means increasing the EU proportion; however, that should not be a problem.

APPENDIX A
International comparisons

The international literature can be classified into three broad categories:

- Cost–benefit analysis
- The economic effects of regulations
- Comparative studies of regulatory impacts

COST–BENEFIT ANALYSIS

This literature provides background information on regulations and cost–benefit analysis.

The OECD (1994) defines 'regulation' as: 'A set of "incentives" established either by the legislature, Government, or public administration that mandates or prohibits actions of citizens and enterprises… Regulations are supported by the explicit threat of punishment for non–compliance.'

America's Office of Management and Budget ('OMB') has identified the main areas of government policy where regulation plays a significant role: social, process and economic regulations. John Morrall, an official at OMB, found that only just over half the regulations studied were 'cost–effective' as defined by saving a life at the cost of less than $7m.[62] He claims that environmental regulations generally cost over $1 billion for every life saved, often much more.

American regulators take more of a cost–benefit approach to risk, whereas Europeans put more emphasis on precautions, whatever the cost. John Graham, an official at OMB, argues that bad regulation absorbs money that could be better spent on saving lives in other ways — he calls such inefficiencies of regulation 'statistical murder'.[63]

Europe's approach is called the 'precautionary principle', or 'better safe than sorry'. The EU has recently proposed increased regulation for the European chemical industry, through a programme called REACH (see 'EU Chemicals Policy'), which would require thousands of chemicals to be tested (including many that have been in common use for decades) to ensure that they do not cause cancer and other ailments.

According to Brian Mannix, the OMB guidelines, used by regulatory agencies in preparing Regulatory Impact Analyses, place too much reliance on cost–benefit analysis (CBA) to justify a regulation, instead of demanding a cogent reason for federal intervention.[64] However, CBA suffers from a serious theoretical flaw in presuming that the analyst can make interpersonal comparisons of individual welfare (even if no actual compensation is ever paid).

Mannix argued that while a favourable CBA should be considered a necessary condition for approving a regulatory intervention, it should never be considered sufficient. One reason is that such analyses suffer from an inherent bias, called the Planner's Paradox — the tendency of planned solutions to appear superior to unplanned market solutions in any economic

[62] *The Economist* Jan 2004, 76 American regulations studied for the period from 1960-2001.
[63] Quoted in *The Economist*, January 2004.
[64] *Regulation*, Summer 2003.

forecasting model or CBA. For this reason, the OMB's guidance needs to stress the comparative analysis of market failure and regulatory failure, and not simply rely on the results of CBA to justify regulatory interventions.

Eric Posner found that the regulatory impact statements accompanying 'transfer' regulations rarely include CBA, or anything resembling them, although federal regulatory agencies are required to provide CBA.[65]

A transfer regulation moves money from the taxpayer's pocket to the beneficiary's pocket while requiring the use of administrative resources; thus, there must be a net loss. But cost–benefit principles can be used to evaluate transfer regulations. In particular, cost–effectiveness analysis is the proper decision procedure for evaluating regulations that have fixed benefit levels. Thus, he argues that routine use of CBA in 'transfer' regulations could dramatically improve their effectiveness while saving taxpayers' money.

ECONOMIC EFFECTS OF REGULATIONS

The literature under this category provides analysis on economic effects of regulations and suggests that regulatory reforms in product markets may lead to economic growth. A major contributor to this area is Giuseppe Nicoletti at the OECD whose December 2002 study revealed:

- Regulatory reforms have positive effects not only in product markets, where they tend to increase investment, innovation and productivity, but also for employment rates;

- The least regulated countries (UK, US, New Zealand, Australia, and Sweden) tended to show the greatest improvement in their rates of multifactor productivity growth over the 1990s compared to the 1980s and those countries also tended to show both the largest increase in the number of new small and medium–sized firms and in the rate of investment in research and development in manufacturing. Both of these factors are thought to be important in increasing the growth rate of productivity and per capita income.

However, his study does not reflect the current situation, particularly the UK, as the data on market and industry structure and industry–level product market regulations that he used are based on the period from 1975–1998. Furthermore, detailed analysis of the database showed that data collection was patchy.

COMPARATIVE STUDY OF REGULATORY IMPACTS

The World Bank report, *Doing Business in 2004*, catalogued the differences in the scope and manner of regulations among over 130 countries based on measures of actual regulations — such as the number of procedures required to register a new business and the time and costs of registering a new business, enforcing a contract, or going through bankruptcy.

The report reached three main conclusions:

- Regulation varies widely around the world
- Heavier regulation of business activity generally brings bad outcomes, while clearly defined and well–protected property rights enhance prosperity
- Rich countries regulate business in a consistent manner. Poor countries do not.

[65] *Regulation*, Winter 2003.

Among the total 22 areas of examination, the UK is better than the US in six areas: number of procedures, duration and procedural complexity of enforcing contracts, and creditors rights, the length of time and the extent of power held by the courts when closing a business. In other areas, the UK compared poorly with the US.

According to a more recent World Bank report (*Doing Business in 2005*), Sweden, a top 10 country in terms of the ease of doing business, incurs regulatory costs of $7bn a year or 8% of the government budget, the burden in the Netherlands is $22bn or 11%. Belgium is $10bn and Norway $6bn which in both countries amounts to about 9% of government spending, i.e. about 5% of GDP.

OMB (2004) reported that, for regulations between October 1993 and September 2003, annual benefits range from $62bn to $168bn, and annual costs range from $34bn to $39bn but these costs appear to be a severe underestimate. However, in a study by the George Washington University the costs of workplace regulations alone are estimated to be at least $91bn per year, in 2000 dollars, i.e. just over 10% of the total costs of regulations (Joseph Johnson, 2001). According to this data the total annual cost of US regulation is about $900bn or circa 2.5% of US GDP.

The costs of regulation can be divided into direct 'compliance' costs and the consequential 'indirect' costs for business. According to a Manchester Business School working paper,[66] there is no widely accepted methodology for determining compliance costs but 'applying the MISTRAL framework in Holland, it was estimated that across the areas subject to regulation (e.g. wages/taxes) just over one fifth of all the administration costs borne by businesses were caused solely by their compliance responsibilities.'

'However, for businesses with less than 20 employees, the compliance costs borne are at least 35% higher than for firms with more than 500 staff (e.g. ENSR 1995). This figure must be seen as an absolute minimum.'

Overall, we conclude that compliance costs range from about 2.5% of GDP in the USA to 5% in Europe. Adding indirect costs would double the estimate. If the UK government were to reimburse business for regulatory costs, we would therefore be looking at a 25% increase in UK government expenditure that would need to be recovered in taxation. That could be a powerful driver toward de–regulation.

[66] Francis Chittenden, Saleema Kauser and Panikkos Poutziouris (2002) "Regulatory Burdens of Small Business: A Literature Review", *DTI Small Business Service Research Series*, October, URN 02/1378.

APPENDIX B

Directives: political fudge

The original European Economic Community (EEC) made limited use of Directives. The goal was to have a truly common market, i.e. one that traded according to shared rules and regulations. Part of the benefit of a common market is to avoid the need for a businessperson having to discover the different rules in different countries. The extent of the difference is less important than there being no difference at all. The trader should not have to stop business to find out what the differences are.

In the 1980s, the mass of 'single market' legislation meant that progress was only feasible, or so they thought, by using directives where 100 percent agreement could not be reached. The Community could pass the frameworks, sketch out the principles and leave individual countries to fill in the gaps as they pleased, provided the national legislation was no less comprehensive than each Directive required.

This played well to the 'turf' card. National departments like making their own laws, and being different. Being different flatters national vanity: the French can think that their interpretation is both superior and preserves sovereignty while the British can feel the same. (The British feel that Directives are better transposed and enforced in the UK but whether this is 'better' from a business perspective is a moot point.) It was fine political fudge but it undermined the commonality of the common market.

Directives had another advantage: in the early days, Brussels was new to law–making and not very good at it. Many Directives were conceived and executed in haste and as a result were poorly drafted. The two–stage process allowed the bugs to be removed in the transposition to national law.

With a 12–member EU, and then a 15–member one, the position was illogical but tolerable. But in a European Union of 25 Member States (and possibly more than 30 by 2007) can we really afford to overlook the cost burden and inefficiencies that 25 different sets of rules and regulations bring?

The new Constitution was, or perhaps is still, an opportunity to streamline law making. To its credit, the EU is trying to do so in the case of Regulations. These have become a mixture of administrative orders on trifling matters, such as yesterday's haddock price, and genuine law–type regulations that account for only about three percent of regulations by number. The new Constitution changes the hierarchy as follows:

- Directives become 'Framework Laws'
- Law–type Regulations become 'Laws'
- Delegated (to the Commission) Regulations are non–legislative, i.e. they are administrative orders.
- Decisions and other specific/temporal orders are unchanged. Although these are non–statutory, they do become case law.

It is widely believed that the different legal systems required Directives to be transposed differently in Member States. Some lawyers, naturally enough, and most civil servants encouraged this belief but:

- In his report to the Foreign and Commonwealth Office Robin Bellis, himself an eminent lawyer, stated that this was increasingly untrue, if it ever had been true.[67] Directives are now being better and more precisely drafted, i.e. they are becoming like Regulations. Furthermore, the solution to a poorly drafted Directive was not to correct it in differing transpositions but to correct the Directive itself, not least because the European Court of Justice will look back to that.
- Scotland and England have different legal systems and yet there were single UK transpositions until the Scottish Parliament arrived. Now Directives have one, two, three or four (England, Scotland, Wales and N. Ireland) transpositions seemingly at the whim of the civil servants involved.[68]
- The arrival of the European Court of Justice has led to increasing convergence of EU Member State legal systems and the new Constitution takes this further. Case law is emerging on the continent, and they look more closely now at the wording just as UK courts now look more closely at intent.

For practical purposes, we can now dismiss differences in legal systems as justifying Directives (or framework laws).

In promoting the demise of Directives in recent months, we expected objections from lawyers and civil servants whose employment and job interests are threatened but we have been surprised by the resistance from business and deregulation–minded politicians. This last group press for the abolition of gold plating without seeming to recognise that gold plating is an inevitable concomitant of Directives. The arithmetic is simple: no country's transposition can be less onerous than the Directive. Therefore they must either transpose the Directive exactly as it stands, making it a Regulation in effect, or add to it in some way (gold plating).

When pressed, these objections are defended by claims of sovereignty, national difference and/or legal system diversity but, as noted above, none of these are valid. Eliminating Directives would both simplify business in the EU, which is what the common market is for, and eliminate gold plating.

A further equally illogical objection from this group was the difficulty of securing pan–EU agreement on complex issues. Of course, this is what gave birth to Directives in the first place, but it should not be a problem for those opposed to regulation. If a new EU Regulation cannot be agreed, then it would not be passed. The EU would still have the option of introducing as much as could be agreed, i.e. in effect achieving the same result as a Directive but maintaining EU–wide commonality and a net reduction.

A final argument against the two–stage Directive (or Framework Law) system is that it simply does not work. Whitehall produces RIAs and much of the scrutiny process after the Directive has been finalised by which time only the potential gold plating is up for grabs. According to the City's EU Regulatory Working Group there is a lack of pre–legislative research and scrutiny before Directives are finalised and Preliminary Impact Assessments are 'lacking in detail and of negligible value'.[69] In other words, the challenge is missing from the stage at which it could make a difference, though Whitehall devotes considerable efforts to RIA process later on, i.e. locking the legislative door after the Directive has bolted.

This view is compounded by another City commentary on the 'Parliamentary Scrutiny of European Communities Legislation'.[70] They point out that scrutiny is patchy and lacks

[67] Robin Bellis, "Implementation of EU legislation", An independent report for the Foreign and Commonwealth Office, November 2003, (http://www.fco.gov.uk/Files/kfile/EUBellis.pdf).
[68] Tim Ambler, Francis Chittenden and Mikhail Obodovski, "How much regulation is gold plate? A study of UK elaboration of EU Directives," British Chambers of Commerce, April 2004.
[69] Letter to Jack Straw, Secretary of State for Foreign and Commonwealth Affairs, 27 May 2004.
[70] Submitted to the Clerk of the Select Committee of the House of Commons, May 2004.

transparency (the website is user unfriendly). 'The Commons Standing Committee does not appear to have discussed any [EU] financial services legislation since at least 2001, although several major proposals have since been produced'. They quote from a Lords' Report on Scrutiny[71]: 'Following our 1998 report, the Government agreed to submit to Parliament comitology legislation[72] that was politically or practically important. We are surprised that they have not done so on any occasion.' In other words, the lack of effective pre–screening applies to EU Regulations as well as Directives.

If the system were simplified with the EU confining itself to Regulations (or Laws) for secondary legislation (primary refers to treaties), there would be some chance that the impact assessment system could work.

[71] Published 3 December 2002.
[72] Roughly equivalent to EU Regulations.