HOW TO LEARN FROM THE INTERNATIONAL EXPERIENCE:

IMPACT ASSESSMENT IN THE NETHERLANDS

FINAL REPORT

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EXECUTIVE SUMMARY

How to learn from the international experience provides a design for the reform of regulatory oversight in the Netherlands. Specifically, the report looks at the main instrument and procedure for regulatory oversight, commonly referred to as regulatory impact assessment (RIA). Over the past two decades, the Netherlands has experimented successfully with tools, models and organisational structures for regulatory oversight. In particular, it has developed administrative capacity for regulatory quality, and has accumulated considerable experience in the areas of administrative burdens reduction, checklists for the quality of legislation, and regulatory cost assessment. However, the progress made with the systematic assessment of a wide range of costs and benefits has been limited. A recent report by the OECD has shed light on some limitations of the checklist approach pursued up until recently, observing that 'there are no standard or compulsory analytical methods. The contents of the impact assessment are "form free". The emphasis remains (...) on capturing side effects rather than a consolidate weighing up of overall impacts' (OECD, 2009a:53). The OECD report suggests RIA reform along the lines of a 'strategic perspective' to better regulation, to be announced by a White Paper addressing a large number of stakeholders and 'all angles' - including the benefits of regulation and stakeholders different from the firm (OECD, 2009a, 18; 45).

This report provides a design for the reform of RIA in the Netherlands in line with the strategic perspective to better regulation suggested by the OECD. It draws on evidence on mechanisms at work in a number of political systems that have engaged with the implementation of impact assessment, and makes recommendations about how to learn from the international experience. Our underlying hypothesis is that the way a

country approaches learning is fundamental to the successful 'import' and 'editing' of lessons from abroad. Although there is intense transnational activity and several dedicated venues for learning, successful implementation of the lessons has been limited. Hence the choice of a new approach to the problem of learning from abroad, based on extrapolation models recently put forward by public management scholars.

The report assists the Dutch government in deciding how to shape the future RIA system by investigating the logic of impact assessment practice. Specifically, it identifies the key mechanisms in place in other jurisdictions. It relates the 'lessons' provided by international experience to the Netherlands, by reflecting on project planning and issues that should be at the core of deliberation within the Dutch government.

The report includes five country case studies: Canada, the European Union, Germany, the UK and the USA. Chapter 2 places emphasis on their political-institutional context, providing information also on Denmark. The political-institutional context influences the performance of RIA, but it does not determine it. Indeed, within the same jurisdiction there are cases of high quality RIA in some departments but not in others, even if the departments obviously belong to the same executive and carry out the RIAs during the same period. Focussing on mechanisms beyond the macro comparison of chapter 2 is therefore useful since they shed light on how RIA produces one outcome instead of another. Accordingly, chapter 3 considers the lessons from the implementation of RIA, by systematically analysing the strengths and limitations.

By following this approach, the reports seeks to overcome two limitations of previous studies – namely, the excessive emphasis on formal adoption of RIA, rather than its implementation, and the tendency to analyse it in isolation from mechanisms and context.

THE POLITICAL-ADMINISTRATIVE REGIMES

Chapter 2 analyses the political-institutional context by using a set of indicators covering (i) the administrative model, (ii) the degree of centralisation, (iii) horizontal coordination within government, (iv) the nature of executive government, (v) the relations between politicians and the upper tier of civil servants, and (vi) the market for ideas and policy advice. As the adoption and implementation of regulatory oversight

constitute a policy reform, these indicators provide information on the potential for effective reforms, and more pertinently for a type of reform instead of another.

The report argues that the UK and the USA have the highest fit with the type of RIA that has been often presented as the gold standard of impact assessment by the OECD and the World Bank: a tool managed by a strong centre (either the Presidential executive or the Prime Minister) to exercise control on regulatory bureaucracies. The indicators show that the fit of this type of RIA with the political-administrative context of countries like the Netherlands is lower. It does not mean that control and other mechanisms cannot be achieved, since in political systems there are several functional equivalents. But it means that the design for RIA has to proceed from a different context, and take into account these context features.

WHAT MAKES RIA WORK: IDENTIFYING THE MECHANISMS

In chapter 3, the emphasis shifts from context to the examination of five RIA systems. There is variability between sectors and types of RIA (in lawmaking processes, agencies' rulemaking styles and procedures, and so on) within the same country. Nonetheless, the analysis tries to capture the essential features of the systems. Further work will arguably have to be done on RIA variation within countries. The evidence is then reviewed, the pros and cons of each system appraised, and the core mechanisms discussed.

Mechanisms are cause-effect relationships that provide RIA outcomes. Four types of mechanisms are presented: (i) Mechanisms that trigger accountability, distinguishing between accountability within government and accountability to parliament and stakeholders; (ii) Behavioural mechanisms, covering incentives and hindrances to learning; (iii) Relational mechanisms that revolve around RIA as a process; and (iv) Environmental mechanisms, that is, pressures and incentives provided by the environment external to regulatory oversight. Successful RIA systems differ in their legal and administrative properties, but are grounded in the same mechanisms. We infer from our five country case studies that the key mechanisms for successful RIA implementation are accountability, behaviour, social interaction and pressure from the environment.

Chapter 4 provides more details on the mechanisms and discusses some key issues for the reform of RIA. In particular:

- There are three types of mechanisms that trigger accountability. They point towards control, democratic scrutiny, and dialogue. In the mechanisms for accountability as control, the principal is the government, and the bureaucracy is the agent. RIA provides the type of information that is necessary to the principal to rein in agencies and departments when they try to exercise autonomy by deviating from the preferences of the elected officers. In a democratic accountability mode, RIA is used by citizens and firms to monitor and evaluate the behaviour of the executive. Dialogic accountability provides public administrations with feedback-based inducements to increase their effectiveness and their efficiency. The dialogic accountability mechanisms open up administrations to regulatory encounters with citizens and firms, essentially by using RIA, and more generally better regulation, to structure the interaction between regulator and regulatee. There are trade-offs among the three types of mechanisms. The key is to get the balance right between control and dialogic-democratic principles. Some kind of tension is physiological in order for democratically elected policymakers to control regulators and regulation, bearing in mind that the Netherlands has less structural capacity for control from the core executive than for the other two dimensions (democratic accountability and dialogic regulation). Dialogue without the shadow of political control does not foster convergence; it is a recipe for chaos in public management. Control for the sake of control transforms RIA in a series of hurdles for rulemaking, a mechanism to make regulatory action more difficult, slow and rigid. When neither dialogue nor control 'bite', there is the risk of having a RIA system that only produces signals and campaigns, but is not rigorously implemented.

- Behavioural mechanisms revolve around how to make individuals learn. At the individual level, the motivation for learning is higher if there are clearly identifiable rewards and perceptions of opportunity. Positive feedback embeds RIA practice in the policy formulation process. It shows how experience can feed on itself and how people can move quickly up the learning curve. This experience has to be nurtured with recruitment policies, training, work on the hearts and minds, and insistence on irrefutable claims. Individual propensity to learn is also boosted by showing the connections between RIA procedures and the values and norms of a modern

administration - this is a mechanism that connects the RIA to public management values and norms. At the aggregate level, the report makes two observations. First, to maximise the benefits of these mechanisms, *planning* RIAs are more effective than *predictive* RIAs. The process of appraisal should not be entirely focused on predicting costs and benefits of regulations. RIA as evolving document should more fundamentally be used as the major tool for planning and monitoring policy over the policy life cycle, from formulation to implementation and enforcement. Guidance on economic analysis is fundamental in this respect, especially in relation to problem definition and decision-making criteria. Second, the target learning populations are not the small better regulation communities in central offices, but the policy networks that, in individual sectors such as environment, transport, energy and so on, formulate policies. These are the networks that should have ownership, discover new ways to use policy appraisal tools, adapt them to the evolution of the sectors and new challenges, and improve on methods. The overall strength of RIA is ultimately the strength of the networks that use it.

- Relational mechanisms are about RIA as a system of social interaction. The report identifies actor's certification as mechanism at work in the five systems examined. In relation to RIA, it refers to who has 'certified' influence on whom (like a central unit that has the open support of the PM or Finance Minister), who has the leadership of the process, and ultimately who has the authority to act. The key is NOT about writing laws and decrees about the 'power' of different actors. It is about making certification emerge from a system of interaction in lawmaking processes. A second important relational mechanism is joined-up coordination: but management has to be designed and deliberately built into the system in order for RIA to help in this respect. The RIA systems examined have created oversight bodies whose job description is to manage the system. An institutional design that does not foresee a specific actor in charge of management and quality assurance (and possibly nothing else, to avoid confusion and lack of certification of this actor) is flawed.

- Indicators and measures of regulatory quality in general are powerful tools to structure the system of interaction. Measures provide focus, and dissolve the ambiguity around what exactly is meant by 'high quality regulation'. In Europe, there has been a discussion on possible systems of indicators to be adopted jointly

by the Commission and the Member States – yet another meaningful and very promising way to think about the integration of the Dutch system with the EU. The Dutch implementation of RIA would gain in credibility and transparency if the coalition agreement setting the system could also pin down the political commitment to a set of regulatory measures on which progress will be judged over the years. This would also put the Netherlands in a position of leadership in the EU discussion.

- Environmental mechanisms cover the relations between the RIA system and the environment external to it. A powerful environmental mechanism is anchorage. RIA is successful when anchored to a major problem-challenge of the community or a major target. Another mechanism is bringing the stakeholders directly into the RIA system. Stakeholders are indispensable to break-down the tendency of public management innovations (like RIA) to become entirely absorbed by administrative routines and bureaucratic logic, or suffer from inertia. Hence, stakeholders have to be organically inserted in the system, so that they gain maturity, sense of ownership and responsibility. Consultation and participation are another way to give, essentially, policy formulation rights to people outside public administration. This way, the routine of each individual RIA can be challenged. The minister (or chief economist) signing off the RIA should also certify that the document explains transparently whose inputs were rejected and / or retained, and why. The openness of the procedure reduces vulnerability. In the Netherlands, an independent scrutiny office and advocacy bodies have already been successfully established - although Actal was conceived as a temporary body and it is not envisaged that it will carry on beyond its 'expiry' date. Finally, external pressure from parliament reduces the likelihood that better regulation and RIA become un-accountable to those outside the inner core of government and departments. In this final respect, the Dutch parliament has a tradition of having manifested interest in better regulation themes, and it would be advisable to build on this political interest. One way forward is to involve the parliament in an annual session on regulatory priorities – a sort of regulatory agenda that should on the one hand keep track of the coalition agreement's progress in the area of better regulation, on the other (and we go back to accountability here) gradually emulate the features of the annual session on the finance bill.

The following table sums up the findings about mechanisms:

Mechanisms that trigger accountability	• Control and monitoring • Democratic accountability • Dialogic mechanisms **[Trade-offs and tensions]**
Behavioural mechanisms	• Perceptions of opportunity and reward • Positive feedback • Learning from evidence-based analysis and planning RIAs • Targeting learning populations beyond the better regulation community
Relational mechanisms	• Actor's certification • Coordination • Strategic and operational management
Environmental mechanisms	• Anchorage • Bringing stakeholders inside the system • Scrutiny from outside the system
Measuring regulation	Indicators reinforce the other mechanisms

TOWARDS A DESIGN FOR THE FUTURE DUTCH RIA SYSTEM

Finally, the report makes suggestions to design the future RIA system. We proceed from seven key issues that should be at the core of deliberation within the Dutch government. These refer to (1) the overall purpose of RIA; (2) the sequencing of reform; (3) the scope of RIA in the Netherlands; (4) the degree of integration; (5) the governance infrastructure of RIA as a process of evidence-based policy formulation and oversight (in short, the RIA architecture); (6) the management of the system; and (7) how to manage RIA as public management innovation.

These key issues should be addressed by considering the following options.

(1) On the overall purpose of RIA, *accountability* alongside a more *evidence-based* policy formulation are the main benefits to secure. The coalition agreement to be signed after the next general elections should enshrine such purpose explicitly, so as to take RIA out of narrow partisan competition. For the Netherlands, RIA can improve on the state of corporatist practice of consultation, and open up policy formulation to a wider range of scrutiny mechanisms. At the same time, the vision as to be communicated from the early days throughout the process of reform, raising awareness of what the economic analysis of regulation delivers to stakeholders and parliament. The emphasis on accountability and evidence-based policy – the report suggests – would most likely build on (and improve on) recent trends in Dutch central public administration.

(2) On timing, the choice is between introducing some elements of impact assessment to build capacity gradually, i.e., over the time-horizon of two elections, or roll out a comprehensive programme already within the time-horizon of the next government and experiment with the full system in place. The Netherlands has enough capacity to roll out a comprehensive type of RIA, but consultation and vision are critical, including speaking to those who will resist the innovation. The RIA reform plan will naturally complement the steps undertaken in the recent past in terms of better regulation tools and their quality assurance mechanisms. We therefore not advise to introduce only some components of RIA - the so-called light approach. The RIA-light approach seems the wrong choice because the Netherlands has enough capacity to plan a comprehensive system, and de facto the RIA-light phase has already taken place between 2002 and now.

(3) On the scope of RIA, and considering the political-administrative context of the Netherlands, an option is to use RIA for both primary and secondary legislation, including the implementation of EU legislation. We therefore concur with the OECD, which has suggested to strengthen the handling of the transposition of EU-origin regulation (OECD, 2009a, 18). There has to be a proportionality element (that is, the depth of analysis should be proportionate to the importance of the regulation), however, otherwise resources would not be targeted and there would be a risk of degeneration into paralysis by analysis. Thresholds are one option - only policy changes with considerable effects would be subjected to the full assessment.

(4) The template for RIA should be integrated. The assessment of major proposals should cover costs and benefits, sustainability, trade impacts and competition tests.

This implies cooperation with competition authorities and regulatory authorities in the RIA process and in oversight. Yet again, it is important that integration is seen from the perspective of proportionate analysis. Large-scale analytical efforts have to be targeted towards major rules. The cases examined point towards RIA as a single template based on benefit-cost principles, within which a cost is a cost and a benefit is a benefit – no matter if it is an 'economic' benefit that triggers an 'environmental' cost or vice versa. Given the current economic priorities at the international and domestic level, economic and sustainability impacts should be jointly considered. Since the Netherlands has a considerable track-record in the ex-ante analysis of administrative burdens, this dimension should also be considered. Competition policy is yet another dimension that can be usefully integrated. Given the characteristics of the Netherlands as an open economy, written guidance should include a mandatory test on the impact of policy proposals on international trade. The Dutch RIA should also cover the appraisal of EU legislation. This will enable domestic policymakers to interact with the EU-level impact assessment process, both at the stage of policy formulation and at the transposition-implementation stage – drawing on the German approach. Last but not least, the Dutch system would profit more from integration with the EU system if the designers were to adopt a comprehensive analytical approach, focused on the benefit-cost principle. This is also the principle that has inspired Canada, the USA and the UK. It is a natural evolution of the Dutch approach to better regulation, up until now clearly focused on costs and therefore in need of more balance. This approach should build on the recent trends towards integrated appraisal and be seen as the natural evolution of what has already been done on burdens, risk-based regulation, quality of legislation and the IAK project (*Integraal afwegingskader voor beleid en regelgeving).*

(5) A central oversight unit is a fundamental option in all cases examined. The previous Dutch experience of the BET checklist was limited by the lack of resources for incisive oversight at the Proposed Legislation Desk of the Ministry of Economic Affairs (OECD, 2009a:45). The evidence does not give precise instructions of how to build this unit, although there are clear common trends about its authority, functions, and resources. Since there are several better regulation instruments in the Netherlands, there is also the problem of integrating quality assurance for RIA with other types of quality assurance & legal standards for policy formulation. Our recommendation is that the central oversight unit be relatively independent from political micro-management but sufficiently accountable to elected politicians. The oversight unit should possibly bringing together some of the skills and experience of the Regulatory Reform Group

and the Ministry of Justice. It should have the authority to issue guidelines and review impact assessments, as well as prompting the development of new regulations to respond to economic shocks or emerging risks. Thus its function should not be restricted to preventing 'bad' regulation. It should also have an advocacy role, that is, the function of promoting 'good' rules and show how citizens and the business community benefit from regulatory oversight. We also recommend that the oversight unit be active in promoting capacity building across the system and strategic planning of key policies. The core power of the oversight unit hinges on the analytic methods used to review proposed regulations (whether it is committed to benefit-cost appraisal or risk-risk analysis for example) and on its resources. However, it would be wrong to make it an 'economists-only zone' within government, since other types of expertise are needed, including law, comparative policy analysis, risk analysis, organisational theory and political science. A panel of experts should assist the body in its own strategic planning.

(6) On the management of the system, we observe that oversight units, especially in the UK and the USA, belong to a multi-actor oversight system. The system is therefore characterised by pluralistic scrutiny and evaluation. The UK and Germany have an independent scrutiny unit, but Canada, the USA and the European Commission don't. Granted that there is not a single trend, our suggestion is to focus on the function of oversight first, and then on the bodies. Oversight works better if it originates from different parts of the system. The central RIA unit is a fundamental source of oversight. Parliament provides another fundamental type of oversight. Court of auditors, or national audit offices depending on legal traditions, generate yet another element of scrutiny. A fourth source of scrutiny is provided by specialist advisory independent bodies of the type that characterise the UK Regulatory Policy Committee - a valuable example for the post-Actal scene in the Netherlands. A fifth source of oversight is, at least in countries like the USA and in the case of the European Commission, a vibrant network of independent research institutes that routinely challenge the costs and benefits produced by the official bodies, and provide annual reports on the state of regulatory reform. External oversight can be usefully built in the system by engaging professional contractors in strategic evaluations, every four years or so. Contractors provide evaluation according to standards certified by professional associations. The government should take the commitment to a strategic review of the new system every four years, among other reasons to understand how the new RIA system builds on and fits in on the mix of better regulation instruments used in the Netherlands. This strategic

review should be based on an external evaluation by professional, independent contractors, and discussed by the government in the *Tweede Kamer*. Last but not least, external oversight is stronger when there is a tradition of judicial review of regulation. Article 8:2 of the Dutch General Administrative Law Act (GALA) establishes that individuals cannot appeal regulation, and therefore Dutch courts do not engage in straightforward review of regulation. The new Lisbon Treaty, however, gives citizens standing to appeal EU regulations, even the ones that are directly applicable in the Netherlands. This may re-kindle the discussion on the repeal of article 8:2 of the GALA - which was already once, in 1995, the target of a plan for a phased repeal, never carried out however.

(7) On innovation, the key is to balance monitoring and learning within an experimental strategy. There is tension between learning as innovation, discovery and adaptation to circumstances, and monitoring as predictability, stability of roles, and safe routines of oversight. The report recommends an experimental strategy featuring several moments in the process of innovation in which the RIA system can learn from evidence from its own implementation.

Note:

All chapters arise out of collective research work in the team, but chapter 1 has been authored by Claudio Radaelli, chapter two by Lorna Schrefler and Claudio Radaelli, chapter 3 by Lorenzo Allio, Andrea Renda and Lorna Schrefler, and chapter 4 by Claudio Radaelli.

The framework presented in chapter 4 is a component of an (evolving) theoretical enquiry on learning made possible by Claudio Radaelli's Advanced Grant of the European Research Council, project on Analysing Learning in Regulatory Governance (ALREG), http://centres.exeter.ac.uk/ceg/research/ALREG/index.php .

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Chapter 1

1.1 Introduction

This report provides a design for the reform of regulatory impact assessment in the Netherlands. We take as a background that the Dutch government has decided to deliberate about how to fulfil the functional requirements of impact assessment, as conceived in the international experience. The issue at the centre of deliberation within the government is what approach to impact assessment to choose and implement. The design contained in this report draws on evidence on mechanisms at work in a number of political systems that have engaged with the implementation of impact assessment tools, and makes recommendations about how to learn. In order to support deliberation and to assist in learning how to learn, our design is based on a thoughtfully crafted outline of the logic of impact assessment practice that (a) identifies key mechanisms, and (b) relates the case of the Netherlands to the 'lessons' provided by international experience in terms of project planning issues and issues that should be at the core of deliberation within the Dutch government.

The Netherlands is a country that has been so successful in better regulation to have generated imitation of its tools, especially the standard cost model. Countries that have lagged behind the Netherlands are now trying to complete their policy by adopting the tools and regulatory oversight institutions that this country has developed at an early stage and so successfully. In a sense, the standard cost model and independent scrutiny bodies like Actal have now become successful export products. But competition in the field of regulatory reform is a very dynamic game. Recent regulatory reform processes in the OECD countries show a trend towards adopting a more holistic, comprehensive approach to better regulation, one that includes some features

of the Dutch approach but looks beyond administrative burdens. According to the OECD, regulatory impact assessment or regulatory impact analysis (RIA, in short) is a key instrument for policy coherence in regulation and lawmaking (OECD, 2009b).

Outside Europe, countries such as Australia, New Zealand, Canada and the USA have approached better regulation from the perspective of consistent approaches to cost-benefit appraisal of regulatory proposals. Robust methodologies and oversight bodies have been developed accordingly. Better regulation policy is an important component of the business environment as well as a determinant of the trust that citizens and firms have in the public sector. Consequently, a coherent approach to better regulation has implications for global regulatory competition. Perhaps counter-intuitively, the Netherlands is under pressure to keep up the pace of international competition in regulatory reform. A recent report by the OECD based on peer review (OECD, 2009a) has shed light on the limitations of the RIA system in the Netherlands and suggested reform.

Whilst the Netherlands acted as a leader in some areas of better regulation, experience with RIA has matured in other countries, and can offer some important elements of auto-evaluation and project planning – what we will call 'design' later in this chapter - in this phase of reflection on the Dutch RIA system. Thus, it is useful to look at international experience on RIA.

This experience shows that RIA is a systematic and comparative appraisal of how proposed primary and-or secondary legislation will affect certain categories of stakeholders, economic sectors, and the environment. "Systematic" means coherent - not episodic or random. "Comparative" means that more than one option is appraised, including the option of not altering the status quo (baseline). Essentially, RIA is a type of administrative procedure.

Cross-nationally, RIA complexity and analytic breadth vary, depending on the items to be appraised and the resources available - the degree of complexity should be *proportional* to the salience and expected effects of the regulation. The effects analyzed via RIA are generally economic effects – social, environmental, lives saved and distributive dimensions matter, but they are often measured in relation to their economic costs and benefits, although they can also be quantified but not monetized. The economic effects include administrative burdens or basic compliance costs, or more complex types of costs and benefits, such as environmental benefits,

distributional effects, and the impact on trade. The economic activities covered by RIA also vary - from specific sectors or types of firms to the whole economy, competitiveness and the overall economic impact of regulations. Further, RIA is used by some countries to appraise the effects of proposed regulations on public administration (e.g., other departments, schools, hospitals, prisons, and universities) and sub-national governments.

RIA is often used to estimate the expected effects of proposed regulations. However, there are international experiences of RIA dealing with the effects of regulations that are currently in force, for example with the aim of eliminating some burdensome features of existing regulations or to choose the most effective way to simplify regulations. In ex-post evaluation of public policy, RIA provides the baseline document for comparisons with the results achieved. Process and document are equally important, since processes that are not documented are not transparent and cannot be challenged by stakeholders.

Throughout the report, we will follow the definition of the UK National Audit Office and define RIA as a process and a document that enables the stakeholders to *understand, challenge and manage* (a) the reason(s) why the government or agencies intervene (b) how the new regulations are most likely to affect a broad range of stakeholders and the environment and (c) the estimated economic impact of alternative options and of the actual measures.

Lessons are already available from benchmarking studies and academic comparisons of RIA systems (Formez Report 2004, ENBR and EVIA projects 2008; Mancini and Scharrenborg 2007). These provide useful insights. Yet one cannot only rely on a cookbook approach to benchmarking. Indeed, learning from the experience of others is a complex process, involving the intelligent construction of the lessons to be learned and the capacity to decode them and adapt them to the domestic political and administrative context. The OECD, the World Bank as well as academics have pointed towards the necessity to situate cross-national learning in an (i) institutional, (ii) legal, and (iii) administrative context in order to draw the right lessons for the development of RIA.

The cross-national learning problem is compounded by the fact that although there are general features that are common to all RIA systems, there is great cross-country

variability and even within single countries there are different types of appraisal. Often there is more similarity between the RIA approach within a sector in two countries (for example, the RIA framework of energy regulators of two European countries) than between the national and regional RIAs within the same country, or between the RIA used for primary legislation and the agency-level appraisal of delegated legislation. Some countries use RIA for delegated/secondary legislation only, others eminently for primary legislation. Some systems like the one of the European Commission, Canada, the UK and the USA are integrated, other systems have partial approaches to RIAs.

This variability exists because RIA can be used to gain different benefits, or, to put it differently, to pursue different aims. Specifically, RIA is used in different contexts to:

- exercise political oversight of bureaucracies
- achieve sustainability goals
- support processes of learning from empirical evidence in policy formulation
- stimulate dialogic governance and reflexivity in public policy, and
- support architectures of joined-up government and forward planning of the legislative-regulatory agenda.
- In developing countries, RIA is seen as a tool to enhance competitiveness and improve on the business environment.

The interest in RIA is also linked to the evolution of accountability (from internal, Weberian accountability, to performance accountability) and to the pressures on government in terms of responsive regulation, trust and social legitimacy of public policies. Some countries like Canada are looking into regulatory agendas to promote an open political discussion between parliament and government on multi-annual regulatory priorities. Obviously, not all benefits have been reaped, and not everywhere - this is where a critical, reflective approach to benchmarking is essential to learn cross-nationally.

In short, the rich international experience shows that we have to approach benchmarking with a context-sensitive orientation, since there are different types of RIA across countries, and they perform different functions depending on, among other variables identified by previous research, administrative styles, the presence or

absence of innovations complementary to RIA, and the characteristics of the political system. It is also possible that two types of RIA in the same country perform differently, if for example the RIA process and control systems differ. Finally, we have cases of equifinality – the same level of performance can be achieved by two or more approaches to RIA.

This limits the possibility of using static information about tools, supporting devices and structures, such as the presence of a RIA ordinance or a guide to cost-benefit analysis, to identify criteria for benchmarking. Lessons can be learned instead by examining the mechanisms at work in the implementation of RIA.

1.2 How to learn: key concepts used in this report

Considering these caveats, it is fair to say that (for the Netherlands at least) the lesson-drawing is not one of simple imitation of a clearly, internationally-established approach to RIA. The Dutch problem-opportunity is one of extrapolation, that is, how to learn from the experience of others (the source cases) focusing not on formal structures but on the mechanisms that have produced success elsewhere. The challenge for cross-national learning is one of intelligent adaptation in the target case (the Netherlands in our study), not imitation or replication. To illustrate, if we say that the Netherlands would like one type of RIA, say a RIA that has features A, B and C, our work will have to help the Netherlands in understanding what is it that makes A, B and C desirable, and how A, B and C are produced.

Extrapolation is a term introduced by Eugene Bardach (2004) and developed by Michael Barzelay (2007). In extrapolation problems, the emphasis shifts from defining successful features to understanding their logic, functions and purposes and to design reform accordingly. We therefore see our task in this report as supporting a deliberation process where the key is understanding the mechanisms that make RIA produce some desirable outcomes. A social mechanism 'is a precise, abstract, and action-based explanation which shows how the occurrence of a triggering event regularly generates the type of outcome to be explained' (Hedström and Swedberg, 1998; Hedström, 2005: 25). Mechanisms define tendencies and probabilities of certain outcomes.

In client-oriented extrapolation analysis, the most important thing is not that 'RIA in countries like the USA and Canada reaches objectives A and B' but 'what are the relational, political, legal and administrative, mechanisms that enable the USA and

Canada to reach these objectives?' The four types of mechanisms considered in this report are:

(i) Mechanisms that trigger accountability. Accountability is not a mechanism, it is a goal. However, there are mechanisms that trigger accountability throughout the chain of delegation
(ii) Behavioural mechanisms, including the incentives for learning at the individual and organisational levels
(iii) Relational mechanisms
(iv) Environmental mechanisms, covering the range of incentives and pressures airing out of the environment.

The report also reflect on the intrinsic vulnerabilities of 'smart practices' found abroad - to make sure that these vulnerabilities will not hinder the implementation of RIA in the target case.

To understand mechanisms and context and 'learn how to learn', one needs a *design* for reform. The design is a conceptual artefact we use to achieve some goals – in our case the design is our conceptual map to understand a RIA system in operation in source sites and plan a new one in the target site. Designs provide recommendations based on evidence, but they also acknowledge that there are questions that only the client, in our case the Dutch government, can and has to address in a process of deliberation. For this reason our report provides a design that also includes some questions for the government to answer in the appropriate political *fora*. In short, for us to provide a 'design' to our client means to provide a tool for auto-evaluation and project planning.

Throughout the report, we will use the language of source sites and target site. A source site is where RIA is operating with some outcomes; a target site is where a mutation of the RIA is supposed to operate in the future. Emulation is often based on superficial learning where the actors try to reproduce in the target site the surface characteristics seen in the source sites (Barzelay, 2007). Cognitive psychology tells us that in doing so, we often forget some features that are inconvenient, we use analogy as shortcut to draw conclusions, and we use heuristics that bias our inferences. Barzelay argues that, instead of following causal emulation, designs should meet institutionally, organisationally, or socially relevant standards of deliberative argument.

To create these justified designs, we need to look at source sites beyond the description of certain organisational features associated with certain outcomes. Rather, we need to include the mechanisms that conceptualize and account for causation. The report will therefore examine the following source sites (Canada, the European Union, Germany, the UK and the USA) with the aim of illustrating the main mechanisms that explain why a certain RIA system works the way it works in a given country.

1.3 Methods

The report is based on multiple sources, including international benchmarking studies carried out in the past by international organisations and consultants, and comparative research on regulatory impact assessment (RIA). As mentioned, implementation studies are richer than cross-national comparisons based on formal adoption. Implementation studies on RIA are fairly developed in the USA but only recently have European implementation studies appeared. We have gathered data on RIA, drawing on our previous experience with ENBR - European Network for Better Regulation - as well as from the recent OECD work on the implementation of RIA in the EU-15 (some reports, including the Dutch report, are available on line) and a possible 'index of RIA effectiveness'. We have interrogated research papers on (a) RIA implementation in different countries and the European Union; and (b) complementary innovations, such as Administrative Procedure Acts and Freedom of Information Acts. We have looked at the findings of major public evaluations, the work of the Audit Offices on the two sides of the Atlantic, and the inquiries of the House of Commons and House of Lords in the UK. Governmental websites have been searched systematically to get the most up-to-date information on RIA guidance and instrumentation such as guides to cost benefit analysis.

No original interviews and fieldtrips were carried out for this work, given the budgetary limits of the study but also the opportunity provided by the fact that we recently completed fieldwork for other projects on the EU as well as Canada, Germany, the UK, and the USA, funded in some cases by the OECD, in others by the European Commission, Ceps, and the Economic and Social Research Council of the UK.

We have also found that some general lessons about reforms in New Public Management have highlighted a limited number of variables that may have some interesting implications for RIA. Our reference is to the large program of research on

"new" public management reforms in political science. We have therefore derived somewhat deductively the implications for RIA of variables such as administrative styles, the type of political system, the organisation of executive power, the relationship between ministers and the top civil service, and the market for ideas and advice.

Finally, we need to justify our cases. The ideal choice is to examine a large number of systems, understand the main pattern at work, and then focus on special cases by dint of qualitative analysis. This is not possible since as yet we do not have large datasets of RIA that go beyond the stage of adopting certain features of RIA or others. Measurement in this area is still problematic, as shown by the discussion under way on 'regulatory quality indicators' (Radaelli and De Francesco, 2007). Consequently, we had to focus on a limited number of cases. In principle, both cases of success and cases of failure can provide useful lessons. We used a relevance criterion to choose the cases by looking at countries that are objectively relevant to the Netherlands either because they are reform champions or because they have strong economic and political relations with the Netherlands. Since the Danish RIA system is well-known to the client, we were asked to consider Denmark only in relation to the characteristics of the administration and political systems that influence RIA – not the RIA *modus operandi* but its context. Thus, Denmark features in chapter 2 but not elsewhere. This left us with the obvious choice of Canada, Germany, the EU, the UK and the USA. We wish to add that Australia and New Zealand are very promising cases, but budgetary limitations and the fact that no member of the team has carried out original fieldwork in these two countries forced us to leave them outside our study.

1.4 Organisation of the report

The report is based on four chapters. After this introductory chapter, chapter 2 examines the political and administrative context for RIA in the systems chosen for comparison, Denmark and the Netherlands. The major result of this chapter is to highlight a set of political and administrative conditions that facilitate or hinder the implementation of a type of RIA or another. Chapter 3 provides facts and generalising arguments about the implementation of RIA in the source sites, that is, Canada, Germany, the European Union, the UK and the USA. For each RIA system, we first present the facts, then discuss the limitations as well as the strengths, and conclude with generalising arguments about mechanisms. Chapter 4 contains the lessons about

how to learn about impact assessment by drawing on international experience. In this chapter, we present the coordinates of our design for RIA.

Chapter 2: The Political and Administrative Context

2.1 The indicators

This chapter introduces the administrative and political context for the analysis of RIA. One problem with current research on RIA is that this tool is examined in isolation from broader trajectories of public management reform and the administrative context. To avoid this problem, we introduce and discuss some indicators of different politico-administrative regimes, following the work of Pollitt and Bouckaert (2004) on public management reform. As the adoption and implementation of RIA are core elements of administrative and regulatory reform, we believe that these dimensions can shed additional light on the scope conditions that are likely to facilitate or hinder the success of a RIA strategy in each of the countries surveyed in this study. This does not mean that, absent some conditions, a country cannot implement RIA. Rather it means that the conditions may facilitate RIA, or may suggest designing a type of RIA that is different from the one in operation elsewhere – more or less integrated, covering primary or secondary legislation, with an oversight structure reporting to the President or to one of the Ministers, and so on.

Specifically, we use the following indicators:

- *Administrative model*: namely, civil servants' expectations as to what is considered 'normal' and 'acceptable' within their organisation. This dimension is normally reflected in rules, symbols and rituals of an organisation, and more broadly in its culture (Pollitt and Bouckaert 2004:41). In *Rechtsstaat* models, civil servants are trained in law, and change often means a change of legal provisions. In our sample, the quintessential *Rechtsstaat* template is provided by Germany and the French-inspired EU, whilst Canada, the USA and Britain fall at the other pole of the continuum, the so-called public interest model - and therefore have advantages on RIA implementation. The shift to a performance and economics-oriented regulatory management perspective – this is the expectation – should be more difficult for the EU then, a system that for a long time has been impermeable to the ideas and the vocabulary of the new public management and the public interest model.

- *Decentralisation*: it refers to the vertical dispersion of authority between the different levels of government. This dimension stretches from unitary systems

where powers are concentrated at the centre to very fragmented ones. In decentralized countries, the central government is less involved in delivery and service-specific output, and more strategically concerned with policy impact and outcome. The essence of RIA is indeed about strategic approaches to 'impact' rather than micro-management of specific sectors.

- *Horizontal coordination within government*: this covers the degree of coordination between ministries and a government's ability to ensure that different departments 'pull together in the same direction' (Pollitt and Bouckaert 2004:41). The presence of a Prime Minister, a President in charge of federal executive agencies, or a strong core executive of two or three Ministers that 'call the shots' for reform is predictor of more incisive reforms. It follows that systems that gravitate around the core executive and the Presidential administration are facilitated in the implementation of RIA.

- *Executive government*: this dimension reflects the working habits of a particular executive. The basic features commonly used to classify different systems range from single-party executives where one party holds more than 50% of the legislative seats to grand coalitions where executives include additional parties beyond the number required for a minimal-winning coalition. Single-party systems, presidential systems, and Westminster-types of political regimes are in a strong position to promote and institutionalize reforms like RIA. Coalition and minority governments have a clear problem since they have to accommodate different policy preferences, and once accommodated, these preferences are not easy to challenge via RIA.

- *Relations politicians-civil servants*: this dimension is related to the interaction between the political establishment and the top civil service, and is normally reflected in the degree of separation between the career paths of these two groups, the volatility of senior positions in the civil service, and so on. It is difficult to formulate neat predictions about RIA and its usage. But one can say that the presence of separate elites and a high degree of legitimate political control on non-elected officers and agencies provide a favourable environment for RIA. Lack of separation makes things worse when it degenerates in favouritism, the political patronage of the bureaucracy. A separation of politics and administration is explicitly postulated in RIA guidance across the world. Most of the guides to RIA assume that the bureaucracy is given autonomy to develop policy proposals based

on evidence. This evidence is later used as an input to decision-making by the 'politician'.

- *Market for ideas and advice*: we refer here to better regulation related aspects. As far as the substance of policy proposals is concerned, outsourcing expertise is common practice by ministries. An open market for ideas, where the views of business and civil society organisations are actively sought, should facilitate the gathering of evidence and perspectives typical of RIA. Our cases have a fairly open market.

Below we provide a short comparative analysis of each indicator in the five systems surveyed in this study, plus Demark and the Netherlands. Our aim is to uncover the key differences between these systems. The final section illustrates the potential impacts of these different features on the adoption and implementation of RIA to highlight the possible challenges and favourable conditions that are likely to impact on the mechanisms presented in chapter 4.

2.1.1 Administrative model

The 'Anglo-Saxon countries' (the UK, Canada, the USA) have an administrative culture oriented towards the public interest. Such administrative model attributes a limited role to the state in managing society and is grounded on values such as fairness, independence, flexibility, and pragmatism rather than on the respect of law and procedures. In other words, while law remains a key element in this group of countries, its impact on the functioning of the public administration is less evident than in other systems. As a result, civil servants are not seen as a separate 'élite' but rather as citizens working for the government with the aim of furthering the public interest (Pollitt and Bouckaert 2004: 53).

In the UK, the civil service is mostly composed of generalists and is separate from the political sphere. The Conservative governments of Thatcher and Major considerably reformed and downsized the administration to reduce the proportion of GDP represented by public spending. A visible consequence of this administrative reform was the liberalisation and privatisation of several economic sectors and the creation of dedicated independent agencies and a considerable number of executive agencies in charge of policy implementation. The mode of functioning of the civil service was also reformed, in line with the tenets of the New Public Management movement, and new

procedures (e.g. performance targets and indicators) increasing the accountability of the public administration were adopted. This trend has continued under the Labour governments in power since 1997. These reforms have not altered the administrative culture and orientation of the civil service. The North-American administrations have a similar administrative model.

Conversely, Germany's institutional and legal system rests on a longstanding and strong tradition of "legal state" (*Rechtsstaat*) and co-operative federalism. The law plays a central role in the public administration, and any reform should normally be supported by legislative change.

The federal administration is comparatively strong. Most of the legislative initiatives are elaborated and drafted by the officials in the various ministries, also those that originate from the legislative (the *Bundestag* and the *Bundesrat* have a right of initiative). Federal agencies are not directly involved in drafting legislation, and in any case they are quite closely tied to the parent ministry. Horizontal mobility within the federal administration is relatively weak. For this reason, federal officials often become experts on their dossier, and develop a network of personal contacts with colleagues in other ministries and administrations (e.g. their counterparts in the *Länder*), as well as external stakeholders ("golden triangle") (Veit, 2008).

This model is also found in the European Union, where the rule of law and procedures play a central role in the stability, functioning, and legitimacy of the system. This feature stems from the French origin of the European administrative system, where clear hierarchies and a strong legalistic and regulatory mindset (as in Germany) are prominent features.

In between those extremes, one can find Scandinavian countries such as Denmark and Sweden, and the Dutch administrative model. These countries moved from a predominantly juristic culture towards an administrative model that can be described as pluralistic consensual evolving towards the public interest model. Civil servants come from different backgrounds and are relatively autonomous from politicians. The upper civil service's mandate includes satisfying the demands of key actors in specific sectors, typically large unions and federations of employers. These corporatist practices are still strong in different policy sectors in Scandinavia and the Netherlands – the civil servants are supposed to work within corporatist practices rather than challenge them (Pollitt and Bouckaert 2004:54). But the overall evolution, partly

facilitated by the New Public Management, is towards the public interest model. This is true of both the Netherlands and Denmark.

Country	UK	USA	Germany	The Netherlands	Denmark	EU	Canada
Administrative model	*Public interest*	*Public interest*	*Rechtsstaat*	*Corporatist tradition evolving towards the public interest*	*Corporatist tradition evolving toward the public interest*	*Rechtsstaat*	*Public interest*

2.1.2 Decentralisation

The UK is a unitary state albeit with significant devolution of powers to regions, namely Northern Ireland, Wales, Scotland, and England. Local authorities also have some legislative powers but only on very limited areas directly affecting the life of their constituencies. They have the right to table local acts before Parliament and ask for an extension of their powers. However, local authorities are primarily responsible for the enforcement of national regulations, in some cases in cooperation with national regulatory agencies.

Since 1997, the Local Government Association (LGA) is the national representative body for all councils, and represents their interest at the national level. Additionally, the Local Authorities Co-ordinators of Regulatory Services (LACORS)[1] ensures the uniform application and enforcement of regulations and standards in specific policy areas (e.g. food safety, gambling, civil registration) and promotes good practice in regulatory and related services provided by local authorities (OECD 2009c). The Central-Local Government Concordat of December 2007 outlines the responsibilities of national and local authorities and the principles that should guide their cooperation.[2] To sum up, the unitary, albeit devolving, UK makes use of RIA to improve on delivery and service-specific output. A note of caution is in order, however, since the UK has moved regulatory tasks 'horizontally' to a web of regulatory agencies, especially economic regulators.

In the USA the division of powers between the federal and state level is enshrined in the Constitution and has lead to a relatively fragmented system where states have a significant autonomy in several key policy areas.

[1] The LACORS is the successor of the LACTOS established in 1978.
[2] For further details, see: http://www.communities.gov.uk/documents/localgovernment/pdf/601000.pdf

In Germany, the federal structure consists of three levels of government (federal, *Land* and local). It implies that all levels are responsible for performing legislative, executive and judicial tasks. The sixteen *Länder* are states in their own right, exercising state authority in the areas set out in the Basic Law. Each state has its own constitution, parliament, government, administrative structures, and courts. The municipalities comprise 301 districts and some 12,200 cities and communes. While they are integral part of the *Länder* structure, municipalities have some residual own responsibilities and a certain independence. The Netherlands are a unitary state albeit with decentralized features. Denmark has a unitary state with several powers being delegated to specialized agencies and local government. Often municipalities have significant decision-making authority in policies linked to welfare and as a result, local governments may end up being more autonomous than in a federal state. Canada is a federal state and the coordination between the central and local level of government has been at the core of recent government reforms, to avoid potential duplications and overlapping of procedures, and ensure greater policy coordination. In general the prevailing culture remains one of compromise and negotiation with provinces, an approach that may attenuate the effects of administrative reforms (Radaelli 2010).

The EU has a unique structure with some quasi-federal features as regards the interaction between the supranational level and the member states. For example, for all policy areas where the Community does not have exclusive legislative competences, the principle of subsidiarity applies: decisions must be taken at the level of government (EU, national, sub national) that is likely to achieve the best results.

Country	UK	USA	Germany	The Netherlands	Denmark	EU	Canada
Decentralisation	*Unitary devolving*	*Federal*	*Federal*	*Unitary but decentralized*	*Unitary but decentralized*	*Quasi-federal elements*	*Federal*

2.1.3 Horizontal coordination within government

In the UK, coordination within government is fairly centralized and the Cabinet Office and the Treasury hold a key position, particularly as regards the introduction of administrative reforms.

In the USA, horizontal coordination within government is centralized with the core executive and the Presidential administration controlling the activities of federal executive agencies.

In Germany, despite relatively strongly formalised coordination procedures between ministries during the policy formulation process in the form of inter-ministerial bodies and working groups, there is a general tendency in the federal administration to coordinate only at a late stage. Ministers enjoy substantial freedom in shaping their own legislative agenda. Legislative initiatives are often discussed with close stakeholders before being shared with other ministries. The obstacle of diverging political preferences within the governing coalition (especially during the grand coalition 2006-2009) may be a reason.

In the Netherlands, Ministries are fairly autonomous. There is a tacit rule of non interference or 'negative coordination' between departments. Denmark's structure is very similar, as Danish cabinet ministers are quite powerful in their own jurisdiction and are subject to little interference from other departments. As a result, the introduction and diffusion of new instruments such as RIA or more generally administrative reform are likely to face greater challenges in such an environment than in a more coordinated state. In Canada, coordination is ensured at the central level and the current Conservative government has strengthened the centralization of powers and coordination around the Prime Minister.

In the EU, horizontal coordination between the various Directorate Generals of the European Commission lead to a fragmented system, where DGs tend to focus on their policy field of competence with limited interaction with other services except for polices having a cross-sectoral impact. As explained below, this feature of the EU system can play both in favour and against reform and the introduction and implementation of RIA.

Country	UK	USA	Germany	The Netherlands	Denmark	EU	Canada
Horizontal coordination	*Coordinated*	*Coordination within the unitary executive; fragmented elsewhere*	*Coordinated*	*Fairly autonomous*	*Fairly autonomous*	*Fragmented*	*Coordinated*

2.1.4 Executive government

The British executive government is Majoritarian with a single-party majority that leads to the formation of single-party Cabinets. As a result, British politics have been dominated by the alternation of the two main political parties, the Conservatives and Labour. The third biggest presence in British politics is constituted by the Liberal Democrats.

The direct consequence of a Majoritarian executive government is the relative ease with which reforms can be imposed almost "top-down" by the government, including reforms of the public administration and of the policy-making process (Pollitt and Bouckaert 2004). On the other hand, this also means that discontinuities can be expected as soon as elections lead to a change in the ruling majority.

This Majoritarian-type of system is also found in Canada. However, in that specific case the features of the executive have to come to terms with the federal structure of the State and the need to accommodate different preferences. In this respect, although Canada is undoubtedly a Majoritarian system, the executive has a less central and decisive role than in the UK as far as reform and policy change are concerned.

The US Presidential system, with its centralized control of policy actors such as federal executive agencies, also offers an advantage in term of introducing reforms, especially thanks to the links between politicians and the upper tiers of the civil service (on this point, see below). Depending on its composition, Congress can act as a counterbalance to the concentration of powers in the hands of the presidential administration. This may lead to different outcomes as regards the continuation or discontinuation of reforms. Hence, the US system can be described as intermediate on the Majoritarian/consensual continuum (Pollitt and Bouckaert 2004).

In Germany, the federal executive is led by the Federal Chancellor, who is elected for a period of four years. As the Head of Government, the Chancellor bears the responsibility for government and sets the general guidelines of policy, including the number of ministers and their portfolios. The Chancellor personally chooses his/her Federal Cabinet (federal ministers).

The actual powers of the Chancellor are more limited than those of other heads of government (such as the British Prime Minister) for a number of reasons. First, Germany has been traditionally ruled by coalitions of parties which elect a Chancellor,

and coalition negotiations concern influential issues such as the allocation of ministerial portfolios in the Federal Cabinet. The coalition also issues the policy programme determining the broad course of action during the term. Moreover, the election cycle in the *Länder* does not necessarily match the federal parliamentary term. The political composition of the *Bundesrat* can therefore vary during the mandate of the federal government and supporting majorities can therefore shift. In this respect, the federal government needs to steadily seek new support depending on the political dossier at hand.[3] A second factor limiting the powers of the Chancellor is the so-called "principle of ministerial autonomy", according to which the federal ministers are free and fully responsible for running their respective portfolios and initiating legislation. The Chancellor cannot intervene in individual policy issues but only ensure that his/her general policy guidelines are respected. As a result, the German system can be described as intermediate, but closer to the 'consensual' end of the spectrum than the USA.

In the Netherlands, the power of the executive is limited by the fact that the country is ruled by coalition governments where different policy preferences have to be accommodated, and where policies are often agreed upon in the coalition agreement in the beginning of the legislature. The system can thus be labelled 'consensual'.

Denmark has very similar features; additionally and as in other Scandinavian countries, the fluctuation between socialist-governments and non socialist minority coalitions strengthens the consensual approach to policy-making. As a result, this set of countries starts from a less advantageous position than Majoritarian systems when it comes to introducing regulatory and administrative reforms (Radaelli 2010).

Because of its complex institutional structure and different tiers of government, the EU's executive also works in a consensual fashion. The European Commission operates as a collegial body, and voting of proposals by the College of Commissioners has decreased since the recent enlargement of the EU (Renda et al. 2009), thus reinforcing the consensual approach to decision-making. Moreover, the executive

[3] On the other hand, there is close political complicity between the executive and the parliamentary (*Bundestag*) majority, which may allow for fundamental decisions (radical reforms) to be taken and implemented.

power of the Commission is counterbalanced by the Council of Ministers and the growing importance of the European Parliament.

Country	UK	USA	Germany	The Netherlands	Denmark	EU	Canada
Executive government	*Majoritarian*	*Intermediate*	*Intermediate*	*Consensual*	*Consensual*	*Consensual*	*Majoritarian*

2.1.5 Relations politicians-civil servants

The top civil service in the UK tends to be separate from the political level (Pollitt and Bouckaert 2004). Civil servants are "generalists" and have separate career paths from those of the politicians, even at the highest levels of the civil service. This is also the case of Canada, where 'mandarins' and politicians operate on separate tracks, with a very limited politicisation of the federal administration.

In contrast, the USA are well-known for the 'spoils system' whereby the upper ranks of the civil services are very politicized, most often politically appointed, and thus destined to abandon their post as soon as the electoral wind changes. Conversely, lower ranks of the public administration are separate from the political sphere and remain fairly stable through time.

In Germany, "Parliamentary State Secretaries" (one or two) and one or more "Permanent State Secretaries" support each federal minister. The former are members of the *Bundestag* that assist the minister in his/her parliamentary work in addition to their mandate. The latter are top civil servants supporting the minister in leading the ministry. Together with the heads of department,[4] these are political posts, usually appointed or confirmed at the beginning of a new government mandate.

In the Netherlands, the careers of politicians and the civil service are separate; however Pollitt and Bouckaert (2004) describe their relationship as fairly politicized. The existence of coalition government leads to a certain politicisation of the top civil-service, as often policies are the result of compromises between different members of the governing coalition and thus require a 'responsive' ear in the civil service. In Denmark, politicisation is fairly low and this is reflected in the number of separate

[4] Formally speaking, heads of department are career officials, but their appointment and confirmation depends on political conditions.

agencies in charge of implementing legislation with regulatory powers exercised independently form the political establishment.

In the case of the EU, one must distinguish between the different layers of the civil service. EU Commissioners are clearly political figures, as they are appointed at the end of a political process involving other EU institutions and the member states and are often former politicians in their home country or in the European Parliament. Each Commissioner has a Cabinet of temporary officials which are also political figures in charge of liaising with the permanent staff of the relevant Commission service (known as Directorate General). The latter is headed by a permanent head, the director general, who is also politically appointed. As reported by Pollitt and Bouckaert (2004:60) the two layers below the director general are also fairly politicized, while the remainder of the EU's civil service remains separate from the political establishment.

Country	UK	USA	Germany	The Netherlands	Denmark	EU	Canada
Relations politicians-civil service	*Separate not politicized*	*Separate very politicized*	*Separate fairly politicized*	*Separate, top level politicized*	*Separate*	*Separate, top level politicized*	*Separate*

2.1.6 Market for ideas and advice

Until the 80s, the British public administration relied mostly on the expertise of its staff as a source of policy ideas and advice. This has considerably changed in the last two decades with the creation of advisory bodies such as the Better Regulation Task Force, and more generally with a greater openness to input from academia, think tanks, specialized consultancies, and so on. As a result, the UK market for policy ideas can be described as fairly open in comparison to other European countries.

In the USA, the market for ideas and advice is much diversified and input can be sought among think-tanks, academia, task forces of business representatives and so on. It remains to be seen whether the absorption capacity of this external input by the administration really happens in practice.

While Canada also showed some openness to external ideas particularly from business in the past, the main source of policy advice is still found in the civil service (Pollitt and Bouckaert 2004). It should also be noted that both in the case of the USA and Canada, business views have often been sought by politicians to challenge the bureaucracy. This approach is less common in other systems (Radaelli 2010).

Traditionally, the German bureaucracy has not drawn extensively and systematically from independent academic advice. The influence held by the German Council of Economic Experts or the Council of Environmental Affairs is small compared to that of their counterparts in the UK or the USA (Bertelsmann 2009).

However, the situation has changed since a few years. Most federal ministries rely also on external academic and non-academic expertises. Not only have universities become more outspoken on public management practices in Germany (e.g., the Freie Universität Berlin, the Hertie School of Governance), but also think tanks and research institutes – often supported by foundations – have acquired awareness over the recent past. Ministries are thereby provided with a richer basis for policy analysis, but they are also more challenged.

In the Netherlands, policy advice tends to remain a function of the top civil service with some exceptions of recruitment from the private sector. However, external consultants, accountants, and management specialists have not migrated into top-position of ministerial advice like in the UK. The market for ideas revolves around the tradition of hearings and consultation - thus creating certain rigidity to new ideas. Recently, however, some departments have experimented with mixed committees of public and private-sector managers in order to widen the peripheral vision of the department in policy formulation. The Netherlands is also a unique country in Europe for the high number of academics (in percentage of the populations) dedicated to the study of public administration and public management. It also features a very open market for ideas and advice in the area of policy evaluation and other types of policy appraisal. A similar situation is also found in Denmark, where policy advice comes mostly from the civil service. However, this country has also a strong culture of policy evaluation and this has an impact on the type and novelty of ideas introduced in policy-making.

In the EU, the market for ideas and advice comprises both internal input from the civil service and external expertise, often provided by think-tanks, academia and non-governmental organisations. As the EU system is close to a technical model of administration, this has opened up several opportunities for the representation of expertise, business ideas and - in areas like sustainability - ideas put forward by non-governmental organisations.

Country	UK	USA	Germany	The Netherlands	Denmark	EU	Canada
Market for ideas & advice	*Diverse*	*Very diverse*	*Mainly civil service*	*Diverse*	*Mainly civil service*	*Civil service and outside*	*Mainly civil service*

2.2 Context indicators and RIA

Each of the features outlined above create a combination of factors and systemic characteristics which are likely to facilitate, or instead to create difficulties in terms of administrative and regulatory reform. In table 1, + shows a facilitating factor, and the sign - the opposite. Strong facilitating factors are shown as ++, and vice versa. Since RIA can take many forms, the indicators should be carefully considered. It would be wrong to think that a series of negative signs means that it is impossible to implement RIA - and in any case none of our systems seems to fall in the category of too many negative signs. Our interpretation of table 1 is that the UK and the USA have the highest fit with the type of RIA that has been often presented as the gold standard of impact assessment by the OECD and the World Bank: a tool managed by a strong centre (either the Presidential executive or the Prime Minister) to exercise control on regulatory bureaucracies. The indicators show that the fit of this type of RIA with the political-administrative context of countries like the Netherlands is lower. It does not mean that control and other mechanisms cannot be achieved, since in political systems there are several functional equivalents. But it means that the design for RIA has to proceed from a different context, and take into account these context features. We will show how in chapter 4. Now, however, we need to enter the facts and our generalising arguments about the RIA systems of Canada, Germany, the European Union, the UK and the USA. It is to this task that the entire chapter 3 is dedicated.

Table 1 - Indicators of the political-administrative context

	UK	USA	GERMANY	NL	DK	EU	CANADA
Administrative model	**+ +** Public interest	**+ +** Public interest	**– –** Rechtsstaat	**+** Originally Rechtsstaat, but evolving towards the public interest	**+** Originally Rechtsstaat, but evolving towards the public interest	**– –** Rechtsstaat	**++** Public interest
Horizontal coordination	**+** Centralized Coordinated	**+** Coordination within the unitary executive	**+/–** Coordinated with centrifugal forces	**-** Fairly autonomous	**–** Fairly autonomous	**–/+** Fragmented but changing with RIA	**+** Coordinated
Decentralisation	**–/+** (Devolving trend)	**++** Federal	**++** Federal	**–/+** Unitary but decentralized	**–/ +** Unitary but decentralized	**+** Quasi– federal features	**++** Federal
Executive government	**++** Majoritarian	**+** Majoritarian except in case of divided government	**–** Intermediate	**–** Consensual	**–** Consensual	**–** Consensual	**+** Majoritarian
Min-Mand. Relations	**+** Separate not politicized	**+** Separate very politicized (note role of the OMB)	**–** Separate fairly politicized	**+** Separate with top level politicized	**+** Separate	**+** Separate with top level politicized	**+** Separate
Market for ideas	**++** Civil service open to think tanks, consultants, political advisers	**++** Political appointees, think tanks, consultants	**–** Mainly civil service (plus a few academics)	**+** A broad mixture. Open market for policy advice in the area of evaluation and appraisal	**–** Mainly civil service	**+** Civil service and outside	**–** Mainly civil service

Chapter 3: Exploring RIA implementation in Five Systems

In this chapter we review the RIA systems of Canada, the European Union, Germany, the UK and the USA, starting from the North-American experience. Previous research seems to indicate that North-America and the UK have some of the most interesting lessons to be extrapolated. Australia and New Zealand are also promising cases, but we did not have the resources to cover them. The European Union (EU) is particularly important for the target case, the Netherlands, given the growing role of EU legislation and multi-level governance issues. Finally, Germany has not been portrayed as a success case in previous studies, but lessons can also be drawn from the experience of those who have struggled in the past. Further, Germany has accelerated regulatory reform over the last five years or so, and has targeted RIA as one of the key dimensions of reforms.

For each source case, we examine the following:

- Consultation, including styles and traditions that pre-date the emergence of RIA
- Design, scope and targeting
- Internal accountability
- External accountability
- Economic sophistication
- Multi-level issues
- Guidance and support
- Special tests
- Strengths and limitations
- Mechanisms

We endeavoured to focus not so much on how RIA systems are supposed to work according to the official documents of the government, but, when possible, on how they work in practice. We examined both official documents and the publications of

international organisations, but we also looked at individual RIAs - our team has previous experience of scoring individual RIAs, case studies analysis, and indicators of regulatory quality in the countries included in our survey. More importantly still, we drew heavily on the findings and insights of the academic literature on RIA in the source cases, covering work in law, political science, and economics. The literature is heavily biased towards the USA (meaning that there are many more studies on this country than on the others). However, recent research has now become available for the European countries, the EU, and, to some extent, Canada.

Finally, the Sections on 'strengths and limitations' and on 'mechanisms' are obviously evidence-based but have more interpretative characteristics. They reflect the opinions of our team, given all the evidence we have seen. They provide the major insights for the extrapolation exercise about mechanisms to be developed in chapter 4.

3.1 The United States

3.1.1 Consultation

- *Style and traditions that pre-date RIA*

Public consultation was already part of the decision-making process before the introduction of RIA, as it is required by the 1946 Administrative Procedure Act (APA). This Act introduced a 'notice and comment' procedure, under which agencies are required to give the public advance notice of the contents of proposed rule and to offer the public an opportunity to express their views of the proposed rule before the agency. Notice and comment is considered as a core ingredient of the US administrative rulemaking since 1946, hence its importance goes beyond impact assessment. Notice and comment is not panacea, but over the last twenty years it has worked well in combination with oversight exercised by the Office of Information and Regulatory Affairs, OIRA.

- *Consultation in RIA: standards and guidance*

Proposed regulations are published with the accompanying RIA both at the proposal and at the final stage. The texts are published in the *Federal Register* and serve as a basis for an open process of consultation that follows 'notice and comment'

procedures. It increases transparency, accountability, and ultimately ensures the quality of the decision-making process and of the final rule.

- *Obligation to address the issues raised by those who have been consulted*

US regulators are obliged to give feedback on the answers received during the consultation process, and explain to what extent and how responses have influenced policy developments (Jacobs 2006).

- *How consultation is implemented*

The 1946 APA established a legal right for citizens to participate in rule-making activities of the federal government, based on the principle of open access to all. It sets out the basic rule-making process to be followed by all agencies of the US government. The path from proposed to final rule affords ample opportunity for participation by affected parties. At a minimum, the APA requires that in issuing a substantive rule (as distinguished from a procedural rule or statement of policy), an agency must: (i) Publish a notice of proposed rule-making in the Federal Register, which must set forth the text or the substance of the proposed rule (ii) Provide all interested persons an opportunity to participate, (iii) Publish a notice of final rule-making at least thirty days before the effective date of the rule. This notice must include a statement of the basis and purpose of the rule and respond to all substantive comments received[5]. All regulations and consultations are open to the public at the regulations.gov website[6]. Recently, the eRulemaking Program has launched a significant upgrade to the Web site that provides one-stop, public access to information related to current and forthcoming regulations issued by the federal government. Enhancements to regulations.gov include improved search capabilities, new navigation tools, and easier access to areas for the public to provide comments on proposed regulations. The Environmental Protection Agency is

[5] Exceptions to the thirty-day rule are provided for in the APA if the rule makes an exemption or relieves a restriction, or if the agency concerned makes and publishes a finding that an earlier effective date is required “for good cause”. In general, however, exceptions to the APA are limited and must be justified.

[6] The site supports more than 160 federal agencies accounting for 90 percent of all federal rulemaking production. On average, federal agencies, departments, and commissions issue 8,000 regulations annually. To date, the public can access more than 2 million documents on regulations.gov, and in the first half of 2009, visitors to the Web site submitted more than 200,000 comments on new or existing regulations.

the managing partner of the inter-agency eRulemaking Program, which operates regulations.gov. These enhancements were previewed publicly on Regulations.gov Exchange, an online forum featured in the White House Open Government Initiative.

3.1.2 Design, scope and targeting of the RIA process

- *Who does RIA and when according to written guidance (departments, agencies, some types of agencies)*

RIAs were introduced by the Reagan administration and must be used by federal departments and agencies to which regulatory powers have been delegated. The whole RIA system is based on Executive Orders issued by the President, the latest being Executive Order 13497 of January 30, 2009. According to OECD estimates (2002), approximately 100 RIAs are prepared every year. RIAs follows a principle of proportionate analysis - major analytical efforts concerning a wide range of costs and benefits are reserved to major regulations. Low-impact regulations are subjected to lighter tests and limited forms of assessment, in the framework of OIRA exercising oversight.

- *Scope: what is subjected to RIA, for an early assessment or for a full RIA?*

RIA is applied only to secondary legislation, namely agency-made rules. Since the enactment of EO 12,866 under the Clinton administration, RIAs are mandatory for government agencies only when they entail 'significant regulatory actions'. 'Significant regulatory actions' under EO 12,866 were those that: i) had an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; ii) created a serious inconsistency or otherwise interfered with an action taken or planned by another agency; iii) materially altered the budgetary impact of entitlements, grants, user fees, or loan programmes or the rights and obligations of recipients thereof; or iv) raised novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in EO 12,866.

Although Congress is not obliged to perform RIA, in the past years the practice of drafting and publishing cost estimates for specific proposals or amendments has

become commonplace. Today, the Congressional Budget Office (CBO) is required to develop a cost estimate for virtually every bill reported by Congressional committees to show how it would affect spending or revenues over the next five years or more. CBO's cost estimates have become an integral part of the legislative process, and committees increasingly refer to them at every stage of drafting bills. Although mostly focused on costs for government, increasingly these documents report also the impact on the private sector[7].

- *Targeting: what is caught in the RIA "net", exclusion criteria*

Besides the exclusion of primary legislation, also secondary legislation produced by independent regulatory agencies is not subject to RIA. This is for example the case of the US Securities and Exchange Commission and of the Federal Trade Commission. In addition, as stated below, only significant regulatory actions by government agencies are subject to RIA, whereas all other actions are not caught in the RIA "net".

3.1.3 Internal accountability

- *Oversight actors (central units, bodies with an arm's-length relation with the executive like IAB and Risk and Regulation Advisory Council)*

The US RIA system follows a logic of control of delegated regulatory powers, whereby political principals (the US Congress and the President) need adequate instruments to monitor the regulatory choices of agents (federal departments and agencies) tasked with promulgating federal rules. Although US agencies have multiple principals, the centralized structure of oversight through the Office of Information and Regulatory Affairs (OIRA) - located in the Office of Management and Budget (OMB) - suggests that the balance of power is tilted in favour of the President (Kagan 2001). The OIRA benefits from a strong political support given that the centralized enforcement of regulatory principles and procedures is considered a core ingredient of the US approach to regulatory policy (OECD 2006).

Oversight is attributed to the OIRA that reports to the White House. Under the current system, the OIRA can challenge individual rules by preventing agencies from

[7] See http://www.cbo.gov/CEBrowse.cfm.

publishing draft rules if the accompanying RIA does not show that the benefits are likely to justify costs. This amounts, *de facto*, to a veto power on draft regulations, and is viewed as one of the strongest RIA oversight systems currently in place. In particular, between the Clinton and the Bush Jr administrations the role of the OIRA has been transformed from a “consultant" to the agencies, into a more aggressive “adversarial gatekeeper” (Renda 2006). Accordingly, the OIRA has made more frequent use of its powers, and 20 rules were returned to agencies in the first year of the George W. Bush Administration, more than the total number of rules returned in the previous eight years (OECD 2006).

RIA guidelines are issued by the OIRA; this body also undertakes studies of the costs and benefits of federal regulations and can suggest review priorities to other departments. Since 1994, OIRA has reviewed between 500 and 700 significant proposed and final rules each year, and can clear the rules with or without changes, return the rules to the agencies for reconsideration, or encourage the agencies to withdraw them. As reported by the OECD (2006) the OIRA currently reviews about 30 to 40 “major” federal initiatives every year and has played for several years a leading role in regulatory innovation, due to the long term RIA experience of the USA. For example, ideas such as the adoption of regulatory budgets to aggregate the impact of regulation across different sectors, the use of quality of life measures, and the introduction of peer review originated in the OIRA. Conversely, the OIRA has been less successful in ex-post monitoring of regulation, partially because of the reluctance of departments to reopen complex regulatory debates or review rules resulting from a political compromise (OECD 2006).

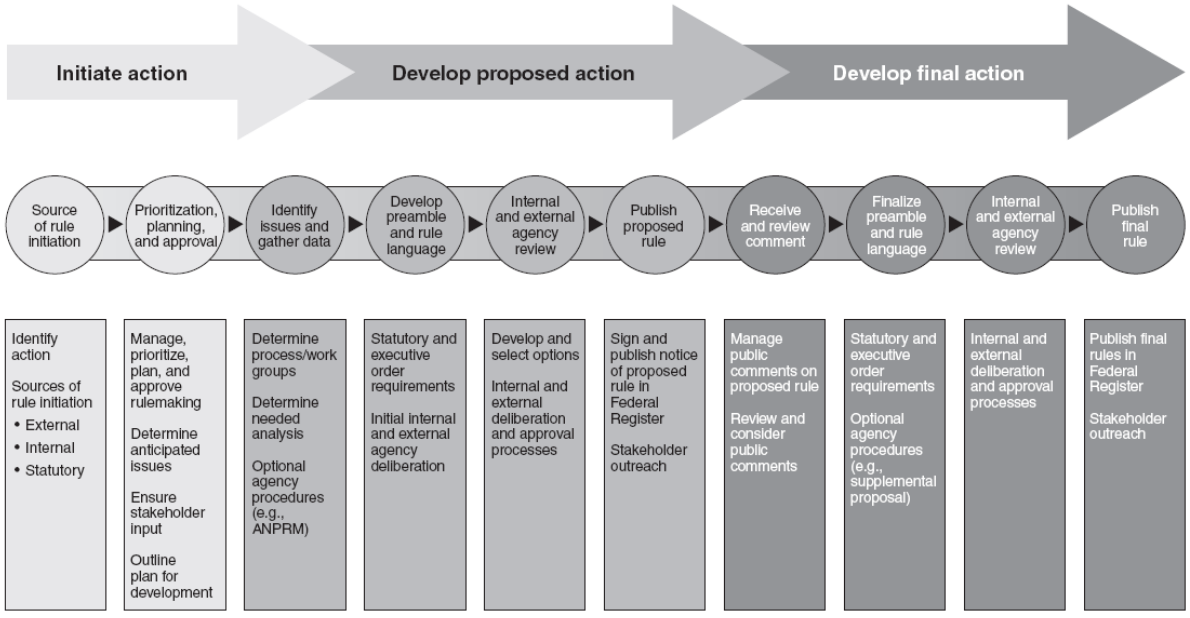
It should be noted that the OIRA can also issue ‘prompt letters’ requiring federal departments and agencies to look at a specific policy field and explore whether additional regulation is necessary. This procedure may act as means to overcome the bureaucratic inertia of some agencies (Kagan 2001, Radaelli and De Francesco 2007), and contrasts with the traditional image of the OIRA as an instrument for deregulation (Graham 2007).

Additional scrutiny is provided by the presence of a special type of administrative law - the Administrative Procedure Act (APA) – and by judicial review.

- *Requirements for RIA preparation / involvement of central unit*

RIA is prepared by the analytical office of the federal agency promulgating a rule, and is then submitted to the OIRA for review. During the first phases of RIA drafting, the OIRA acts as a helpdesk to provide feedback and advice before formal review of the RIA is undertaken (Jacobs 2006). The RIA is then published together with the draft rule in the *Federal Register* for a notice and comment period of 60 days. As the OIRA has a veto power over the publication of RIAs where analysis is insufficient, of poor quality, or does not demonstrate that the benefits of the draft rule are likely to justify ensuing regulatory costs, the responsible agency is often called to review the RIA before publication. OIRA's negative comments are included in what are known as 'return' letters. Following the notice and comment period, the RIA is revised and finalized and the OIRA has 90 days to approve or reject the proposed rule on the basis of the quality of the cost-benefit analysis performed by the agency (Renda 2006: 20). If the proposal is accepted the process continues; if not, negotiations between the agency and OIRA start and the latter can refuse the rule until a satisfactory analysis is presented (fig.1 and fig 2).

Figure 1 – phases of the rulemaking process

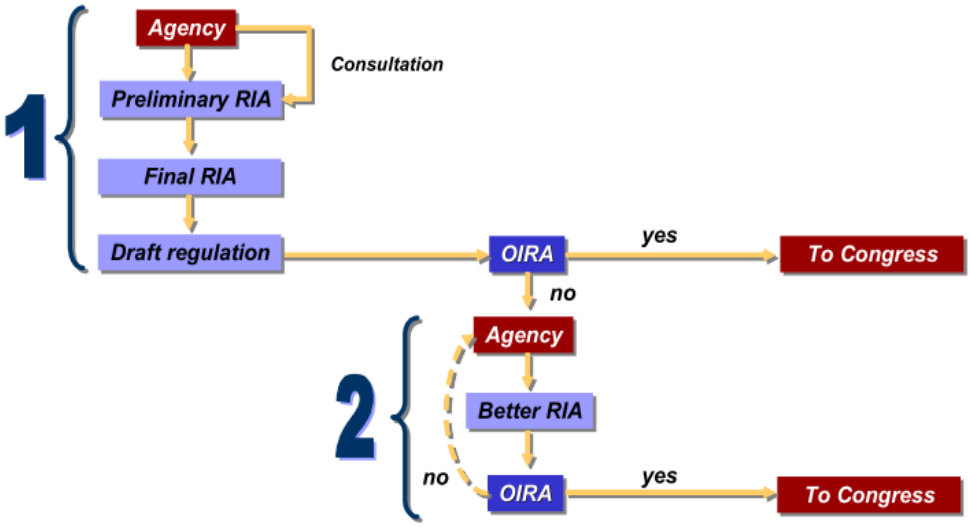


Source: EPA

In fact, OIRA reviews the most significant rules three times: i) at the planning stage during the preparation of the Regulatory Plan that agencies submit to Congress on an

annual basis (see below); ii) before the publication in the *Federal Register* for notice and comment; and iii) before the publication of the final rule.

Figure 2: The US RIA model



Source: Renda (2006:21)

Past evidence (McGarity 1991, Morgenstern 1997) suggests that the OIRA's oversight role was not always transparent, as its comments on draft RIAs were not published and in some cases this played in favour of the deregulatory/pro-regulatory stance of the Government of the day. This issue was addressed by Executive Order 12,866 promulgated under Clinton that increases the transparency of the oversight process during RIA preparation (fig. 3). The executive order requires OIRA or the rulemaking agencies to disclose certain elements of the review process to the public, including the changes made at OIRA's recommendation.

In a memorandum of January 30, 2009, President Obama directed the head of OMB, in consultation with representatives of regulatory agencies, to produce within 100 days a set of recommendations for a new executive order on federal regulatory review. The

memorandum stated that, among other things, the recommendations should offer suggestions for the relationship between OIRA and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interest of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of behavioural science in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.

Figure 3 – Rulemaking requirements generally applicable to major rules

Source of requirements	Characterization of agencies' responsibilities
Requirements applicable to rules of all agencies	
Administrative Procedure Act	Procedures required for informal rulemaking, also known as notice-and-comment rulemaking
Congressional Review Act	Submission of rules to Congress for review
Endangered Species Act	Analysis of impact on endangered or threatened species
National Environmental Policy Act	Analysis of environmental impacts
National Technology Transfer and Advancement Act	Use of voluntary consensus standards
Paperwork Reduction Act	Analysis of paperwork burden and submission to OIRA for approval of new information collections
Regulatory Flexibility Act	Consideration of regulatory alternatives to lessen the burden on small entities
Requirements applicable to rules of cabinet departments and independent agencies, but not to rules of independent regulatory agencies	
Unfunded Mandates Reform Act	Analysis of costs and benefits of federal mandates and consideration of alternatives
Executive Order 12372	Consultation with state and local elected officials
Executive Order 12630	Analysis of impact on constitutionally protected property rights
Executive Order 12866	Submission of significant rules for OIRA review and analysis of costs, benefits, and regulatory alternatives
Executive Order 12898	Consideration of environmental justice impact on minority and low-income populations
Executive Order 12988	Ensuring clarity of regulatory language regarding legal rights and obligations
Executive Order 13045	Evaluation of environmental health or safety effects on children
Executive Order 13132	Consultation with state and local officials on federalism implications
Executive Order 13175	Consultation with Indian tribal governments
Executive Order 13211	Analysis of effects on energy supply, distribution, or use

Source: GAO.

- *Monitoring and evaluation from within the executive*

Besides scrutinizing quality, the OIRA also reviews RIAs to identify rules that are not consistent with the President's policies, principles and priorities; to ensure coordination among agencies; discuss inconsistencies with regulators and suggest alternatives that would be consistent.

Recently, the OIRA has increased its scrutiny powers by setting a higher level of data quality standards and by introducing scientific peer review of analyses. Although the OIRA lacks formal powers to oblige an agency not to proceed when a RIA is inadequate (Jacobs 2006), its recommendations and return letters are always taken into account by the agencies.

- *Triage mechanisms*

Until 1994 RIAs were applied to all regulations, thus resulting in about 2200 analyses per year (Jacobs 2006) with predictable consequences for the quality of individual assessments. To counter this problem a quantitative threshold was introduced: RIA with full cost-benefit analysis is required for major rules, i.e. those expected to impose annual costs above USD 100m or likely to impose major increases in costs for a specific sector or region, or have significant adverse effects on competition, employment, investment, productivity or innovation. As result, the system is now much more targeted, and of the roughly 4500 regulations adopted each year, only approximately 500 are considered to be significant (requiring RIA up to the point that shows that benefits justify costs), and about 70 require a full cost-benefit analysis (Jacobs 2006).

3.1.4 External accountability

- *Publication requirements*

Since 1984, the USA has a regulatory planning process whereby very preliminary RIA summaries are published every six months in the *Unified Agenda of Federal Regulations*, in order to increase transparency on the regulatory activities of federal agencies. Moreover, the review of draft and final RIAs by the OIRA is public as both 'prompt' and 'return' letters are available on its website. This transparent approach in reviewing RIA is unique and is closely linked to the very structure of the US system; the *equilibria* in a parliamentary system would render such transparency much more difficult to achieve.

- *Scrutiny and oversight*

The OMB is indeed tasked with overseeing the RIA process through the OIRA, as described above. Every year, the OIRA compiles the results of the RIAs that quantified costs and benefits of new rules in its Annual Report to Congress on the benefits and costs of federal regulation.

Ex-post scrutiny is performed by the Government Accountability Office (GAO). The GAO has repeatedly observed that presidential oversight of federal regulation, primarily through the mechanism of reviews of agencies' draft rules by the OIRA has become well-established under successive administrations over the past 30 years. However, the GAO pointed out that (i) some administrations have been more collaborative and consultative with agencies, while others have assumed more of a "gatekeeper" role when reviewing agencies' draft regulations; (ii) despite executive order requirements under successive administrations to improve the timeliness and documentation of OIRA's regulatory review role, GAO identified significant gaps in the transparency of OIRA's involvement in rule making.

In addition, GAO raised concerns about the extent to which the cumulative procedural and analytical requirements placed on rule making over the years add value or contribute to the "ossification" of the rule-making process (GAO-07-791, GAO-05-939T). In addition, according to the GAO several aspects of the OIRA regulatory review process could be more transparent to better allow the public to understand the effects of OIRA's reviews. In particular, the transparency requirements in Executive Order 12,866 applicable to agencies and OIRA could be redefined to include not only the formal review period, but also the informal review period when OIRA says it can have its most important effect on agencies' rules.

The GAO periodically reviews selected rules as regards the appraisal procedure that take place inside the agencies. A recent GAO report issued in April 2009 reviews 139 major rules including 16 case-study rules, and finds that: (i) OIRA's reviews of agencies' draft rules often resulted in changes (of 12 case-study rules subject to OIRA review, 10 resulted in changes, about half of which included changes to the regulatory text); (ii) Agencies used various methods to document OIRA's reviews, which generally met disclosure requirements, but the transparency of this documentation could be improved; (iii) out of eight prior GAO recommendations to improve the transparency

OIRA has implemented only one—to clarify information posted about meetings with outside parties regarding draft rules under OIRA review[8].

- *Scrutiny by parliament and role of courts*

As one of the political principals delegating regulatory powers to federal agencies, Congress has a clear interest in scrutinizing regulatory activities, and RIAs are a means to that end. Specifically, the Congressional Budget Office oversees both the quality of regulation and the activities of the OMB. Congress has also responded to Presidential review of regulation by directing the OMB not to interfere with special-interest legislation (Moe and Wilson, 1994: 39) and by securing Senate confirmation of OIRA heads, as well as more public information and precise deadlines on the review process.

Regulatory agencies must send their proposals to Congress for evaluation, and any draft regulation can be repealed within 60 days. This scrutiny also extends to congressional bills. Congress can also commission reports or invite experts to testify on the general RIA system, on presidential Executive Orders, and on specific RIAs.

A degree of oversight on the RIA process is exerted by the CBO through expert reports that look at the activity of specific agencies, for example the EPA[9]. More occasionally, the CBO also reviews the functioning of the RIA system in government agencies. For example, in 1997 a comprehensive analysis of the consequences of RIA for the legislative process was carried out[10].

The Courts have played a special role in the process of learning by clarifying principles of risk regulation and by developing jurisprudence on risk regulation (Majone, 2002, Vogel, 2003). Although RIA and risk regulation are not the same, it is important to stress that the progress made in relation to issues such as uncertainty, the level of protection, risk-risk analysis, and proportionality in risk reduction have been made because of judicial review and the very active role played by courts. The courts have in fact used the review of agencies' rule to make the principles and practices of risk assessment more explicit and more rigorous. This is an important element of difference

[8] See GAO-09-205, at http://www.gao.gov/highlights/d09205high.pdf.
[9] See *Cost-Benefit Analysis of EPA Regulations: An Overview*, CRS Report for Congress RL30326, 1999.
[10] http://www.cbo.gov/doc.cfm?index=4015&type=0.

when we compare the USA to the European cases and think about mechanisms of oversight and learning (chapter 4).

- *Transparency requirements*

As explained above, transparency is a core element of the US RIA system and is enacted through a 'notice and comment' procedure. Before a new regulation in is adopted in the USA, it must be: (i) published in the Federal Register in proposed form, with an opportunity for public comment and, in some cases, a formal public hearing; and (ii) published again in the Federal Register in final form, with written explanation of any important revisions that have been made and the official response to public comments. As already recalled, the US Congress mandated the process of public comment already in the 1946 Administrative Procedure Act. This process entails creation of a public docket of information that Federal judges can review if a regulation is challenged through litigation (Graham 2007). Relevant studies and data used by the regulator are generally included in the public docket and cited in the Federal Register.

Executive Order 12,866 requires both agencies and OIRA to disclose to the public certain information about OIRA's regulatory reviews. After the regulatory action has been published in the Federal Register or otherwise issued to the public, an agency is required to: (1) make available to the public the information provided to OIRA in accordance with the executive order; (2) identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA and the action subsequently announced; and (3) identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

The order also requires OIRA to maintain a publicly available log that includes the following information pertinent to rules under OIRA's review: (1) the status of rules submitted for OIRA review; (2) a notation of all written communications received by OIRA from persons not employed by the executive branch, and (3) information about oral communications between OIRA and persons not employed by the executive branch. After the rule has been published or otherwise issued to the public (or the agency has announced its decision to not publish or issue the rule), OIRA is required to make available to the public all documents exchanged between OIRA and the agency during the review by OIRA. However, as reported by the GAO (2009), "an OIRA official … pointed out that OIRA does not monitor, on a rule-by-rule basis, compliance by rulemaking agencies with their disclosure obligations under Executive Order 12,866".

In 2003, a GAO report found that the transparency of OIRA reviews could be significantly improved. The GAO issued eight recommendations to OIRA, and in 2009 found that OIRA had followed only one (improve the clarity of OIRA's meeting log to better identify participants in OMB meetings with external parties on rules under review by disclosing the affiliations of participants). However, OIRA did not agree with the seven remaining recommendations in the 2003 report and did not implement those recommendations. Accordingly, the 2009 GAO Report reiterated the seven recommendations, which read as follows:

1. Define the transparency requirements applicable to the agencies and OIRA in Executive Order 12,866 in such a way that they include not only the formal review period, but also the informal review period when OIRA says it can have its most important impact on agencies' rules.

2. Change OIRA's database to clearly differentiate within the "consistent with change" outcome category which rules were substantively changed at OIRA's suggestion or recommendation and which were changed in other ways and for other reasons.

3. Re-examine OIRA's current policy that only documents exchanged by OIRA branch chiefs and above need to be disclosed because most of the documents that are exchanged while rules are under review at OIRA are exchanged between agency staff and OIRA desk officers.

4. Establish procedures whereby either OIRA or the agencies disclose the reason why rules are withdrawn from OIRA review.

5. Define the types of "substantive" changes during the OIRA review process that agencies should disclose as including not only changes made to the regulatory text but also other, non-editorial changes that could ultimately affect the rules' application (for example, explanations supporting the choice of one alternative over another and solicitations of comments on the estimated benefits and costs of regulatory options).

6. Instruct agencies to put information about changes made in a rule after submission for OIRA's review and those made at OIRA's suggestion or recommendation in the agencies' public rulemaking dockets, and to do so within a reasonable period after the rules have been published.

7. Encourage agencies to use “best practice” methods of documentation that clearly describe those changes.

3.1.5 Economic sophistication

- *Analytical models for RIA*

OIRA circular A-4 contains the methodological guidance to government agencies for carrying out RIA. Cost-benefit analysis (CBA) and cost effectiveness analysis (CEA) are the main analytical models for US RIAs (See Circular A-4, Section D). The two approaches are required in different circumstances (OECD 2006): CBA is the norm for all regulations, except for health and safety rules where CEA is recommended, as it is believed that decisions in this specific policy area should not be based on cost/benefit considerations. However, for major health and safety rules where monetisation of the primary expected health and safety outcomes is possible, CBA can be used. Along the same line of reasoning, CEA can be chosen for non health and safety proposals, whenever the “primary benefit categories” cannot be monetised. Reportedly, the use of CBA in health and environmental regulation has considerably increased in recent years (Harrington et al. 2009)

Available empirical evidence on the use of analytical methods in RIA shows that there is still room for improvement. For example, Morgenstern, Pizer, and Shih (2001) have assessed the actual relationship between the costs reported in a sample of RIAs and the actual economic costs of a rule, and found that regulatory costs are generally overestimated. This is often the result of the unanticipated use of new technology to comply with regulation, as testified by Harrington, Morgenstern, and Nelson (2000: 314). According to an AEI-Brookings review of RIAs (2004), a significant percentage of assessments does not contain some basic economic information (e.g., net benefits and policy alternatives), and over 70% of the analyses fail to provide any quantitative information on net benefits. Hahn and Tetlock (2008) found that costs and benefits are often poorly estimated but that it is difficult to find clear evidence of systematic biases in RIAs. The authors also conclude that the quality of economic analysis has remained relatively stable across RIAs and tends to be below the standards set in the RIA guidelines. Moreover, it seems difficult to establish a clear link between economic analysis and regulatory output in the USA. However, a marginal effect on the content of final rules is undeniable and this may actually amount to significant cost-savings in the

case of major rules. A deterrent effect of RIA and economic analysis on low quality rules is also plausible, but more difficult to establish.

- *Decision-making criteria*

Decision-making criteria in the US RIA system consist of a broad 'soft net benefit' approach whereby regulatory agencies should choose policy options that maximize net benefits, including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity. When assessing possible regulatory alternatives, agencies should also take into account economic incentives to encourage the desired behaviour (e.g. user fees, marketable permits, information requirements).

Harrington et al. (2009) explain that when the law and CBA conflict (i.e., in cases such as health and safety regulation, where cost/benefit considerations should not apply), the law prevails. As a result, if Congress states that a specific performance level must be achieved by a given rule, but some monetisation can nonetheless be included in the analysis and ends up questioning those targets, the resulting mismatch can lead to legal conflict. Moreover, in some cases, CBA has not significantly contributed to the RIA as it was often applied/applicable to a limited range of costs and benefits, thus leading to the consideration of a limited set of regulatory alternatives (Harrington et al. 2009). As result, the complex analytical tools included in the RIA turn out to be less informative than simpler techniques. This 'complexity trap' - Harrington et al. argue - can be attributed to the process of judicial review that leads agencies to prepare RIAs for surviving judicial challenges and less as an aid to decision-making.

- *Quality standards for the use of expertise and peer review of economic analysis*

All information input should respect the principles of objectivity, utility and integrity. RIA guidance requires that the best available data be used, and that the procedure for collecting and using data be grounded in policy directions provided by the OIRA and not decided by departments on a case by case basis. As reported by the OMB, the data quality problem often derives from confusing inadequate treatment of uncertainty and accuracy of information. Both problems need addressing to ensure that RIA fulfils its informative purpose. The *Information Quality Act* adopted in 2001 has significantly increased data quality standards (Jacobs 2006).

Moreover, RIA guidance recommends the use of formal external peer review (OECD 2009). While this has undoubtedly strengthened the overall quality of the analyses included in RIA and clarified the underlying assumptions made in each case, this has also increased the length and technicality of RIAs and paradoxically diminished transparency for external users (Harrington et al. 2009).

- *Treatment of uncertainty*

Risk assessment is required in all cases (OECD 2009) and RIA guidance discusses issues of uncertainty and sensitivity analysis. Guidelines recommend that RIA authors assume a risk neutral attitude in their analyses, but also recognize that this may not happen in all cases. The neutral approach to risk validates the use of expected value analysis as the fundamental tool for weighing different alternatives (OECD 2007). Suggested values of a statistical life (VLS) adopt different real and nominal rates in respect to different time horizons. The real rates vary from 3.0% (3 years) to 5.5% (30 years) and are based on the pre-tax rate of return on private sector investments in recent years (OECD 2004). A discount rate of 7% is required together with sensitivity analysis using a discount rate of 3% (OECD 2006).

According to Hahn and Litan (2005), the practical impact of using different VSL on final benefit/cost tests is not very significant: out of a sample of over 100 sets of rules, 47% pass a costs benefit test using low VLS and a high discount rate, while 62% pass the same test with a higher VSL and lower discount rates. However, the authors also explain that the important point is not so much the choice of a given discount rate but its consistent use throughout the analysis to improve the cost effectiveness of regulation.

- *Administrative burdens*

Since the 1980 Paperwork Reduction Act (which created the OIRA), administrative burdens generated by 'paperwork' are assessed separately and are then included with the other cost items in the RIA statement accompanying a proposal. No special weight is attributed to administrative burdens in RIA (Jacobs 2006).

- *M&E standards for individual RIAs*

The current RIA system tracks a range of input measures and has specific targets to ensure that at least 80% of economically significant rules includes monetisation of

benefits and/or costs; and that 60% of economically significant rules are subject to systematic *ex-post* assessment of the contribution of RIA (as per OMB Circular A-4). However, *ex-post* assessment of RIAs is not the strongest point of the US system (Jacobs 2006). This latter point was stressed recently also by the GAO (2009).

3.1.6 Multi-level government issues

- *Trade*

The US system focuses on internal impacts of proposed rules. Should trade be among them, it will be assessed together with the other economic impacts, as there is no separate template for trade assessments.

- *Provincial-federal relations*

US RIA guidance contains the equivalent of the European principle of subsidiarity: it requires that RIA demonstrates that a federal rule is likely to achieve better outcomes that intervention at the State or local level (OECD 2009b).

3.1.7 Guidance and support for RIA

General RIA guidance is subject to regular updates and innovation and is reviewed with the input of relevant actors such as the President's Council of Economic Advisers, and through inter-agency consultation (OECD 2009b). Additionally, individual agencies must issue their own guidelines to ensure the quality, utility, and integrity of the information they distribute (Jacobs 2006). Information is considered objective if the data have undergone independent external peer review.

3.1.8 Competition analysis

The analysis of impacts on competition is included in the general RIA and should be applied to all alternatives included in the proposal. Guidance requires the analysis of the market structure and market power and the expected consequences of government's intervention through a given rule. Regulations that increase market power for selected entities should be avoided but in some cases a monopoly can be validated, notably when the market can be served at lower costs if only one player is present (e.g., natural monopoly). However, that situation should be monitored and

technological advance should be taken into account to decide whether the situation has changed.

3.1.9 STRENGTHS AND LIMITATIONS

Strengths:

The USA has one of the most institutionalised, robust, and comprehensive systems of RIA. Institutionalisation means that RIA has not been caught by Presidential politics and the partisan vagaries of policymaking. All Presidents since Reagan have confirmed their faith in RIA. A recent comparative study (Radaelli 2010) has found that this system is multi-purpose. It delivers on key aims of RIA, notably policy learning, control of the bureaucracy, and administrative reform. There is debate on whether the OIRA can be trusted to play both the role of a Presidential bureau and the function of analytical control, but most observers would agree that in any case the OIRA performs high-quality analysis of the RIAs submitted by agencies.

Another feature of comprehensiveness is that each year the US citizens are provided with a consolidated report on the benefits and costs of federal regulations. In turn, this report triggers debates in Congress and elsewhere, thus generating an important precondition for a wide social debate on the regulatory agenda of the administration and on how agencies go about implementing it.

Moreover, notice and comment is grounded in administrative law. Administrative law is an important pre-condition for the successful implementation of RIA. The executive orders on RIA are the natural implication of requirements set in the Administrative Procedure Act of 1946. In turn, these requirements have been clarified and specified by the courts, in an evolutionary process of judicial review of rulemaking. Over the years, additional administrative law innovations have made the system of consultation more robust, including federal provisions on access to information and the usage of advice and expertise in federal rulemaking.

As a result, the transparency requirements for government agencies and OIRA are particularly high and robust.

The oversight structure is particularly strong. The possibility to issue prompt letters and the clear Presidential mandate (OIRA is a bureau of the federal administration) has enabled OIRA to stimulate rulemaking as much as to delay it. As shown by the

experience of the Clinton administration, OIRA can also play a pro-regulatory role, by pushing agencies beyond bureaucratic inertia (Kagan 2001).

In addition, the accountability system is quite clear. There is a unitary executive (Blumstein 2001), composed of the President and his/her federal executive agencies, that uses RIA to generate accountability (Kagan 2001). Judicial review of rulemaking has vastly increased the scope of accountability of federal executive agencies, beyond what was originally foreseen by the 1946 administrative procedure act.

The USA is also a leader because of its smart approach to administrative and legislative simplification (since the 1980 PRA).

Limitations:

On the other hand, there has been a heated discussion on the proper role of OIRA, too close to the President to perform the function of dispassionate quality assurance body for the RIAs produced by federal executive agencies. Over the years, some observers have argued that there should be a truly independent body for quality assurance, a sort of Regulatory Quality Office, whilst OIRA should focus more on getting the Presidential agenda implemented by agencies across the sectors.

There is also potential to improve the transparency of OIRA reviews. In particular, the GAO suggested that the transparency requirements in Executive Order 12,866 applicable to agencies and OMB/OIRA should be redefined to include not only the formal review period, but also the informal review period when OMB/OIRA says it can have its most important effect on agencies' rules.

Another debate concerns the so-called limited scope of RIA. Due to the clear constitutional setup of the Presidential administration (Kagan 2001), Reagan introduced RIA only for 'his' executive agencies, and did not include federal independent agencies. This was done because of the fear of opposition from Congress - opposition raised by the threat of extending Presidential power beyond federal executive agencies. All other Presidents have confirmed the initial choice made by Reagan. De facto, the limited scope of RIA (there is no RIA obligation for independent agencies) has created problems in a number of sectors (*e.g.* most financial regulations 'escaped' RIA since they were enacted either by the SEC or by Congress).

There is also uncertainty with the use of cost benefit analysis in health and safety regulation and other similar rules, due to a stall in the approval of risk regulation

guidance. As a result, the extent to which CBA and monetisation can be applied for rules in these policy fields is still unclear and may lead to legal conflict (see above, section on decision-making).

Tracking of milestones in government agencies is still limited. Only a limited number of agencies seem to fully track their progress in regulatory practice by keeping tracks of milestones, which in turn triggers learning and monitoring of performance. With better internal tracking of milestones, the potential for learning inside administrations could be further unlocked.

Ex post evaluation is weaker than *ex ante* RIA and outside the competence of OIRA, which may create duplications in costs (need to build in-house knowledge in more than one agency) and jeopardizes the possibility of linking ex ante RIA with ex post evaluation, *e.g.* through the definition of indicators already at the RIA stage.

3.1.10 MECHANISMS

The key mechanisms at work in the US system are various forms of accountability, learning mechanisms triggered by positive feedback and emphasis on economic analysis, relational mechanisms related to system management, and environmental mechanisms due to pressure from stakeholders and independent research institutes[11].

An evident feature of the US system is the strong focus on accountability as control. In the USA, the President controls agencies through OIRA, and OIRA uses benefit-cost analysis and, more broadly, the requirements of Circular A-4 as tools to keep the behaviour of bureaucrats under control. By requiring that agencies pass only secondary legislation that is justified in terms of net benefits, OIRA can overcome the problem of the informational asymmetry between the Presidential administration and specialized agencies: procedural requirements re-establish symmetry and make control from OIRA possible.

At the same time, the US system allows for strong democratic accountability, as it involves the monitoring of executive behaviour by elected policymakers (OIRA is an executive office of the Presidential administration and the President is the only policymaker in the USA elected by a nation-wide constituency). Even if OIRA's recommendations are not binding, the pivotal position of OIRA in the government team

[11] See Chapter 4 for a full explanation of mechanisms and Chapter 1 for the definitions.

ensures that its recommendations have a very strong moral suasion power. In addition, the yearly report on the benefits and costs of federal regulation compares the behaviour of the government agencies. This report is discussed in Congress and triggers a debate in the specialised press.

Moreover, in the USA dialogic accountability exists in the form of constant reliance on 'notice and comments' procedures, where stakeholders have the possibility of exerting pressures on government agencies by directly observing the economic foundations of rules that are being formulated, and the economic rationale behind them. Failure to use sound economic arguments to support proposed policies can lead to a name and shame exercise by external commentators, associations and private businesses. This often triggers a very early debate on proposed policies.

As regards behavioural mechanisms, learning seems to take place mostly as a result of two factors: (i) positive feedback – since bureaucrats have increasingly gotten to grips with the technicalities of RIA and have reached a higher level of sophistication in their analysis overtime; and (ii) the strong emphasis on economic analysis put by OIRA Circular A-4, which has put pressure on agencies to use sophisticated measurement tools such as VSL and VSLY, inter-temporal discount rates, hedonic pricing, etc. At the same time, a number of GAO reports have found problems in the agencies' internal tracking of milestones, which could affect learning in these administrations.

Also relational mechanisms are present in the USA. In particular, while joined-up coordination, the use of regulatory quality indicators and more generally the practice of *ex post* evaluation are still quite weak in the USA, a key feature of the US system is actors' certification, especially as regards the role of the OIRA in leading and steering the whole policy appraisal process. The fact that OIRA has been managing the system since the early years of the Reagan administrations confers to it a high credibility. The US system is a typical case in which management is designed and built into the system, although this can be stated only for the government team, whereas independent agencies and congress fall outside of the scope of the US RIA system.

Finally, the transparency of the US RIA system has led to the emergence of environmental mechanisms. First, stakeholders are involved in all phases of the regulatory process, from the early stages of annual planning of regulatory activities to the draft RIA stage, and to the final 'notice and comment' procedure that follows the publication of the NPRM. Agencies and the OIRA are also exposed to external

pressure from Congress, especially through the scrutiny of the Congressional Budget Office and the Government Accountability Office. But a more evident feature of the US system is the pressure exerted from professions, independent research institutes and consultants: in particular, think tanks such as RFF or the AEI-Brookings joint centre of regulatory studies have significantly affected the evolution of the system, as well as the incentives of agencies. This has been the case, in particular, for the Environmental Protection Agency, which has been at the core of a hectic debate on the use of benefit-cost analysis in the past decades, and is still targeted by countless publications and position papers from the academia, think tanks, and industry or consumer representations.

3.2 The United Kingdom

3.2.1 Consultation

- *Style and traditions that pre-date RIA*

Before the administrative reforms of the 80s and the introduction of impact assessment in the 90s, consultation was not particularly widespread in British policy-making. For example, even the 1991 Citizen's Charter was only subject to limited public consultation, thus being described as a top-down exercise (Pollitt and Bouckaert 2004:293). However, the 'public interest' connotation of the British administration (Pollitt and Bouckaert 2004) and the progressive emphasis on value for money, and the transparency and accountability of public institutions led to a greater involvement of the public and to the adoption of well defined consultation procedures and other means to involve civil society in the decision-making process. These are described in greater detail below.

- *Consultation in RIA: standards and guidance*

In the UK, consultation is embedded in the RIA process and a dedicated Code of Practice for Consultation is in place since 2000 and is being regularly reviewed and improved.[12] The Code clearly sets out the requirements for a formal, written, public consultation exercise. This includes a recommendation for the duration of the

[12] The latest (third) version of the Code is available at : http://www.berr.gov.uk/files/file47158.pdf

consultation, which is of at least 12 weeks, with possibly longer periods if deemed necessary and feasible.

While the Code has no legal force and Ministers can decide not to conduct a formal consultation, it is generally respected. Whenever there is a deviation from the standards established criteria, the Code recommends justifying openly the reasons for that choice (OECD 2009c: 46).

A list of all the Departments and agencies that have adopted the Code is publicly available on the Better Regulation Executive's website. As regards RIA, the latest guidance document was subject to public consultation (OECD 2008).

Notwithstanding these visible improvements, in some instances the RIA consultation process remains closed (Hertin et al. 2009; Russel and Turnpenny 2009), as explained below.

- *Obligation to address the issues raised by those who have been consulted*

The sixth criterion of the Code recommends that appropriate feedback be given to those who responded to the consultation. After a public consultation is closed, a summary document containing information on who responded to the consultation and a summary of the responses to each question should be published. The documents should also outline what decisions have been taken on the basis of the information gathered through the consultation process. This information should be made public before any further action is undertaken. Additionally, the criteria set out in the Code should be mentioned on all consultation documents so that consulted parties can provide feedback on how these standards are implemented in practice.

However, Russel and Turnpenny (2009:349) found that often consultation responses are weakly integrated in the RIA and that the analysis does not effectively resolve differences between stakeholders' positions.

- *How consultation is implemented*

According to the latest OECD national report (2009c) there seems to be an implementation gap between the requirements of the Code and actual practice in the UK, at least from the stakeholders' perspective. Reported problems include the fact that the 12 weeks consultation period is not always respected; in some cases the government is described as using too much discretion on the choice and timing of

consultation; the quality of consultations is uneven and the methods employed are not always satisfactory; the excessive number of initiatives and the absence of a single point/website for consultations tends to generate fatigue among stakeholders. Additionally, the classical concern about the prevalence of responses from business and the gap between the ability to respond of organized lobbyist and individual stakeholders was also raised.

Empirical research on representative samples of RIAs across different departments seems to confirm these findings (Russel and Turnpenny 2009; Hertin et al. 2009): while consultation is increasingly embedded in the RIA process and involves a variety of stakeholders in several cases (44% of the sample examined by Russel and Turnpenny, 2009: 347), for a sizeable portion of RIAs (again 44% of the sample in Russel and Turnpenny 2009) consultation targets a very narrow range of stakeholders, mainly industry. Additionally, informal consultation is still frequent and runs in parallel with the formal process or most often before the formal public consultation is launched. This has the effect of narrowing the range of views that are included in the appraisal process and leads stakeholders to focusing more on the policy than on the RIA itself (Russel and Turnpenny 2009:347), thus undermining the rationale of opening the RIA process to the wider public to garner additional insights on the potential trade-offs between different policy options.

3.2.2 Design, scope and targeting of the RIA process

- *Who does RIA and when*

RIA is performed by the policy officials (in a given department or agency) responsible for a given policy initiative. For cross-cutting policies, an inter-ministerial group is normally in charge of drafting the RIA.

Written guidance on how to perform a RIA is provided by the Better Regulation Executive (BRE); in some instances, individual departments and regulators have adopted their own guidelines for impact assessment. This is for example the case of Ofcom, the British regulator for the communications sector.[13] Additionally, RIA drafters in individual policy teams can count on the support of the Better Regulation Unit of their own department.

[13] For further details, see : http://www.ofcom.org.uk/consult/policy_making/

It should be noted however that the frequent revision of the RIA guidance have created a sense of confusion among civil servants (Russel and Turnpenny 2009:249) who were left with little time to understand and get familiar with RIA guidelines. Moreover, the recent change in the role of the BRE and what some departments call an 'initiatives overload' (House of Commons 2008) have led to some inconsistencies in the implementation of the regulatory reform agenda, with new approaches being introduced before the old ones had the time to deliver their intended benefits.

- *Scope: what is subjected to RIA, for an early assessment or for a full RIA*

Impact assessment, in an integrated form, is mandatory for primary laws and subordinate regulations having a non-negligible impact on business, charities, and the voluntary sector (OECD 2008). Moreover, regulations affecting only the public sector are subject to a Policy Effects Framework (PEF) assessment.

There seems to be some margin of discretion as to whether impact assessments should be performed and particularly as regards the depth of the assessment. Mechanisms to prevent significant impacts from being overlooked are in place (see below, section on executive oversight).

- *Targeting: what is caught in the RIA "net", exclusion criteria*

Independent agencies and regional and local authorities are not obliged to follow the integrated RIA policy adopted at the central level; while these authorities may carry in-depth assessments regularly or on an *ad hoc* basis, this leaves some of these initiatives potentially outside the RIA net in the UK.

3.2.3 Internal accountability

- *Oversight*

The UK has strong institutional structures and mechanisms to oversee the implementation of the national regulatory agenda and of impact assessment. Specifically, the Better Regulation Executive (BRE) established in 2005 within the Cabinet Office and now located in the Department for Business, Innovation and Skills (BIS) is in charge of coordinating and delivering the regulatory reform agenda. This includes monitoring compliance with RIA requirements.

The BRE undertakes performance assessments of individual departments twice a year, whose results are communicated to the Prime Minister but not made public. Additionally, a 'decentralized' system of internal oversight is ensured by the Better Regulation Units established within each department to facilitate the implementation of better regulation initiatives and liaise with the BRE. These Units - that comprise a Better Regulation Minister supported by a Board Level Champion (NAO 2009) - were initially set up to provide advice on impact assessment to policy officials. The evolution of the regulatory reform agenda has broadened their role, which now includes mainstreaming regulatory issues in different policy areas, increasing understanding and awareness among officials on regulatory reform initiatives, and reporting on progress on specific initiatives undertaken within their department (NAO 2009).

Oversight is also provided by Parliament, through the House of Commons Select Committee on Regulatory Reform and the House of Lords Select Committee on Regulators.

The National Audit Office holds the government to account for performance, and since 2001 examines various aspects of the regulatory reform agenda. In this context, the NAO publishes regular reports on the quality and implementation of RIA in the UK by looking at a sample of assessments across departments and monitors the evolution of another key initiative in the regulatory reform agenda, the Administrative Burdens Reduction Programme. NAO's findings are reported to Parliament.

Between 2005 and 2007, a Better Regulation Commission (replacing the former Better Regulation Task Force) provided an independent view on and challenge to the government's better regulation performance. Since the appointment of Gordon Brown as Prime Minister, the role and tasks for the BRC have partially changed; the Commission is now replaced by the Risk and Regulation Advisory Council[14] with the mandate of finding means to improve the government's understanding and management of 'public risk'. An advisory Regulatory Policy Committee was established in 2009 to intensify the efforts on regulatory reform and the impact of the better regulation agenda on the business community.

- *Requirements for RIA preparation / involvement of central unit*

[14] For further details : http://www.berr.gov.uk/deliverypartners/list/rrac/index.html

As explained, each policy team is in charge of preparing the RIA for its own initiatives with the assistance of the departmental Better Regulation Unit. As a central Unit, the BRE monitors the quality of RIAs and the consistency in the implementation of regulatory reforms initiatives across departments.

- *Monitoring and evaluation from within the executive*

This task is performed by the Better Regulation Executive that can also issue opinions on the quality of individual assessments and check for compliance with the written RIA guidelines. Reportedly (e.g. NAO 2009), this form of scrutiny provides an effective incentive to individual departments, more than the internal monitoring performed by the Better Regulation Units. The latest evolution of the BRE's role into that of champion of the broader regulatory reform agenda and the partial shift of monitoring tasks to individual departments could potentially undermine this 'external accountability' incentive of the oversight system.

- *Panels for ministerial accountability*

The compliance of individual departments with RIA guidelines is ensured through the dedicated Better Regulation Units in each department and by the coordinating and monitoring function of the Better Regulation Executive. According to the OECD (2006) the rate of compliance with RIA requirements is systematically monitored and is very close to 100%. However this figure should be taken with a caveat, as the tests for evaluating compliance are not clearly outlined. Additionally, compliance with the guidelines is a necessary but not sufficient condition to ensure the effectiveness of the RIA process. High compliance does not automatically mean that the RIA was carried our early in the policy process and provided a contribution to decision-making: empirical evidence (Hertin et al. 2009; Russel and Turnpenny 2009; Russel and Jordan 2009) still shows that in several cases RIA is made ex-post to justify a preferred policy choice and that the different policy options included in the analysis are "artificial constructions created to comply with the requirements" (Hertin et al. 2009:1192).

As far as the content of the analysis is concerned, proposals and the accompanying impact assessment are sent to the Cabinet Office for 'Cabinet clearance' during dedicated ministerial meetings. Decision are seldom taken immediately on a proposals and frequently Ministers are given some additional time to consult their department and write a letter with suggestions/objections on the policy or on the impact assessment, particularly if some impacts seem to have been insufficiently analysed.

3.2.4 External accountability

- *Publication requirements and how they work in practice*

RIAs should be and are published online in a dedicated RIA library available at http://www.ialibrary.berr.gov.uk/. Departments comply with this requirement, and reportedly this is a welcome improvement in the transparency and accessibility of the RIA process for external actors (NAO 2009; Ambler and Chittenden 2009).

- *Scrutiny by audit office / what is scrutinized and how*

The NAO holds the government to account for its performance in implementing the better regulation agenda, and disseminates good practice. As mentioned, since 2001 the NAO has been scrutinizing the implementation of RIAs across departments and publishes regular reports to indentify best practices and areas for improvement. However, it should be noted that these reports generally focus on a sample of departments, individual assessments or policy areas, namely from a perspective of efficiency and effectiveness, in line with the NAO's mandate. A more general appraisal of the regulatory reform strategy and the performance of crucial institutions such as the BRE is not yet available (OECD 2009; House of Commons 2008).

- *Reports and inquiries by parliament.*

Besides being involved and consulted by the government, the Parliament can influence the better regulation agenda through standing or select committees scrutinizing the activity of specific departments and regulatory agencies. Key committees for better regulation are the House of Commons Committee on Regulatory Reform, the House of Lords Delegated Powers and Regulatory Reform Committee, and the House of Lords Merits of Statutory Instruments Committee.

Besides scrutinizing individual pieces of legislation, Parliament Committees publish regular reports on specific aspects of the regulatory reform agenda: for example, the House of Commons Committee on Regulatory Reform published a report on the BRE in 2008, while the House of Lords published a report on regulators in 2007.

As regards the integration between EU and UK legislation, both chambers of the UK Parliament have EU Scrutiny Committees. As reported by Ambler and Chittenden (2009) the potential of this additional oversight mechanism is not fully exploited: decisions appear to be mostly driven by the Executive and often RIAs on EU measures

are added when the legislation is already a *fait accompli*. As a result, the Parliament's power to challenge or modify EU legislation, also on the basis of additional information provided in the RIA, is limited.

- *Transparency requirements*

Transparency requirements such as the online publication of individual RIAs and the rules on public consultation are clearly enshrined in the general RIA guidance documents and are respected in practice, albeit with some room for improvement, for example as regards public consultation (see comments above). Conversely, targeted assessments such as those performed every six months by the BRE to scrutinize the regulatory performance of individual departments remain internal documents.

- *Participatory tools in RIA*

The most visible participatory tool in RIA is public consultation. Additionally, other means of involving stakeholders and relevant parties are foreseen and mentioned in the Code of Practice on Consultation and include dedicated workshops, the involvement of specialist interest groups in the preparation of the RIA and before the launch of the formal public consultation. As stated above however, in several cases opinions gathered from a selection of stakeholders in the phase preceding the consultation are the real drivers behind policy decisions: this undermines the effectiveness of opening the RIA process to scrutiny in earlier phases and its potential to gather additional insight and information on the trade-offs embedded in the policy options under examination.

3.2.5 Economic sophistication

- *Analytical models*

Analytical models such as cost-benefit analysis are foreseen in the RIA guidelines and implemented in practice, although some difficulties with quantification and monetisation of identified impacts remain, as testified by the OECD (2006) and the annual NAO reports. Multi-criteria analysis is also mentioned as a possible analytical approach by the Treasury but is not explicitly included in the RIA guidelines.

If one uses the classification of appraisal tools provided by Nilsson et al. (2008:338) whereby RIAs can include analytical instruments ranging from simple models

(checklists, questionnaires, impact tables), to more formal tools (scenario techniques, cost-benefit analysis, multi-criteria analysis) and advanced tools (simulation or computer-based models), the vast majority of UK RIAs seem to rely on simple tools. Advanced tools are seldom used (Nilsson et al. 2008; NAO 2009), while among formal tools cost benefit analysis and the Standard Cost Model are the most widespread, in line with the focus on competitiveness and economic growth of the UK better regulation agenda.

As noted by Nilsson et al. (2008) this highlights the existing discrepancy between the declared objectives of evidence-based policy-making embedded in the national better regulation agenda and the lack of formal modelling found in individual assessments. For the authors, one of the explanations for the limited use of formal and complex analytical models is the fact that RIA drafters mostly rely on in house expertise to perform assessments, thus facing a problem of skills/capacity as is also reported by Jordan and Russel (2009). The dedicated training on cost-benefit analysis and risk assessment provided by the National School of Government and on impact assessment and the Standard Cost Model offered by individual Better Regulation Units and the BRE may partially solve this problem.

However, there is also an issue of departmental culture and commitment to analysis (Jordan and Russel 2009: 1214), and more broadly the question of incentives provided to RIA drafters if the role and impact of this appraisal tool in the general decision-making process is not adequately clarified (Nilsson et al. 2008).

- *Decision-making criteria*

While the UK adopts an integrated impact assessment system where decision-making criteria should encompass economic, social and environmental considerations, empirical evidence indicates that RIAs focus mostly on the economic dimension (Russel and Jordan 2009; Hertin et al. 2009) in line with the focus on competitiveness and the reduction of regulatory burdens embedded in the better regulation agenda.

Cost-benefit analysis is indicated as the means to scrutinize different policy options within a RIA and identify the most effective one. The result of this analysis and of the test on administrative burdens must be included in the standard form annexed to a proposal to justify the selection of the preferred policy option.

- *Quality standards for the use of expertise and peer review of economic analysis*

The repeated emphasis on the importance of the economic analysis underpinning RIAs has led to an increasing involvement of government economists in the early stages of RIA drafting by departments (OECD 2009b; NAO 2009). Before a proposal is submitted to the Minister for political sign-off it now has to be signed-off by the Chief Economist in the relevant department. Moreover, the BRE can propose the review of individual assessments by the Panel for Regulatory Accountability if it considers that the analysis and evidence included in the RIA are inadequate.

- *Treatment of uncertainty*

Risk assessment is included in the UK RIA guidance that requires policy-makers to:

- "consider risks and how likely they are to occur and their likely impact on meeting the objective of the policy;
- calculate an expected value of all risks for each option, and consider how exposed each option is to future uncertainty; and
- consider risk management for the delivery and implementation of each option" (OECD 2009:68).

Key assumptions, sensitivity, and risk analysis included in the RIA must be clearly outlined and reported on the front page accompanying each RIA. Some departments, as the Health and Safety Executive (HSE), have been using a series of quantitative thresholds since several years.[15]

According to the latest NAO report (2009:15), among the RIAs that included quantified costs or benefits, the proportion of RIAs containing some sort of sensitivity analysis increased from 13 to 24%.

[15] As reported by the OECD (2006), the HSE uses the following thresholds, in line with recent academic writing on people's attitudes regarding the voluntary assumption or avoidance of risk: a) Fatality risks of 1 in 1 million years should be regarded as broadly acceptable; b) Fatality risks of 1 in 10 000 years should be regarded as at the boundary between tolerable and unacceptable risks for members of the public who have a risk imposed upon them in the broader interests of society; c) Fatality risks of one in 1 000 years should be regarded as the boundary between tolerable and unacceptable risks for workers to voluntarily assume a risk.

- *Administrative burdens*

The measurement of administrative burdens is a core element of the UK Regulatory Reform strategy and is based on the application of the Standard Cost Model (SCM). As stated above the implementation of the Administrative Burdens Reduction Programme is closely monitored by oversight institutions, in particular the BRE and the NAO. The SCM was used to establish a May 2005 baseline of £ 13.2 million of administrative burdens on the private and third sector (OECD 2009c: 75) to be reduced by 25% by 2010, with specific reduction targets for individual departments and agencies.

- *M&E standards for individual RIAs*

The final version of an impact assessment should contain a date for monitoring and evaluating what happens with respect to prediction after a policy/regulation has been enacted. The evaluation period is normally set after three years since the enactment of a given policy. As reported by the NAO (2009), several RIAs are still weak on this point, and particularly as regards the disclosure of the methods to be employed for monitoring and evaluating a proposal, and the use of the evaluation findings for the appraisal of future legislative proposals.

3.2.6 Multi-level government issues

- *EU-domestic relations*

As regards impact assessment, coordination with the EU level is provided by the BRE's Europe team in partnership with the Cabinet Office to ensure that the better regulation agenda is taken into account also when devising and transposing EU rules. The UK requires an impact assessment of EU regulations before they are transposed into national law. Additionally, the recommendations of the 2006 Davidson review, which highlighted several pending issues related to the implementation and transposition of EU rules (e.g. gold-plating), have been turned into clear negotiation and transposition guidance for departments. However some problems persist, as outlined in the latest OECD report (2009), particularly as regards the capacity of individual departments challenged by an increasing amount of work. Additionally, as reported by Ambler and Chittenden (2009), there is a gap between theory and practice: RIAs on EU measures are often carried out late in the process when decisions have already been taken, thus

showing a persistent lack of integration between the EU and the UK RIA strategies and decision-making processes.

- *"Federal" relations*

Following devolution, Scotland performs its own RIAs on proposed rules within the jurisdiction of the Scottish parliament. In Scotland, RIA is integrated with other core executive activities - a special body called 'analytical services' has the mandate to increase the usage of evidence-based policy across departments.

The implementation of better regulation initiatives through the various layers of government in the UK has been pursued via the recent establishment of the Local Better Regulation Office (LBRO) with the power to designate a lead authority, and streamline enforcement priorities. A pilot exercise to improve the delivery of regulatory enforcement services and reduce administrative burdens on business in the retail sector was set up in 2005 by the Department of Trade and Industry and transferred to the BRE in 2007. After a few years of cooperation between the central and the local level, in 2008 the LBRO assumed full responsibility for the continuation of the programme. LBRO has the mission to reduce burdens on business without compromising regulatory outcomes and working in partnership with local authorities, national regulators and departments to drive up the quality of local authority regulatory service. It reports to the Cabinet Office. Its special role is to work on enforcement - in this connection, it has an arbitration role in disputes. Finally, it ensures that local authority regulatory services, including trading standards, environmental health, and licensing are included within the scope of the Hampton Code of Practice.

3.2.7 Guidance and support

The quality of written guidance is high and documents such as the Code of Practice on Consultation and RIA guidance have been revised several times. Training on impact assessment and specific aspects, ranging from cost-benefit analysis to stakeholders consultation, is provided both within departments and by the BRE. The National School of Government also includes training on impact assessment. As noted by the OECD (2006) some problems can potentially emerge if the treatment of complex and technical aspects such as risk assessment are not dealt with in a coordinated way across departments: for example, if not fully understood or correctly applied by other

departments, the quantitative threshold used by the HSE (see above) could potentially become problematic.

3.2.8 Competition

Since 2002, the UK RIA system contains a competition filter structured as a simple test to evaluate the degree of analysis needed and leading to a more in-depth assessment of the competition effects of a proposal if several criteria are met. The Office of Fair Trade has produced a detailed set of guidelines for all departments that have to perform a competition assessment within RIA.[16] This guidance is broadly articulated around three steps: market definition, market analysis, and assessment of the impact of regulation on the market. The filter has been revised to take into account developments in RIA best practice and economic ideas. There are also special tests mandated by legislation outside the RIA framework such as rural proofing of regulation and tests on citizens' rights.

3.2.9 STRENGTHS AND LIMITATIONS

The UK provides an example of a better regulation policy that has put emphasis on RIA as a pivotal tool. Not only has the government insisted on the role of RIA in policy formulation, it has also adopted the main principles of cost-benefit thinking and the economic analysis of regulation in the design of other tools, such as risk analysis tools and enforcement tools. Consultation practice in the UK is often presented in the official documents of the governments as very successful in getting stakeholders' preferences to be addressed by the regulators in rulemaking. It is indeed a case of success across Europe, although empirical studies and the National Audit Office offer examples of uneven practice across departments.

Recently, some scholars have argued that the administrative burdens campaigns have somewhat deviated these principles (Baldwin 2007; Helm 2006) but the overall trajectory is clear. There is also plenty of evidence on RIA and better regulation having remained a high-priority for all governments since the early 1980s. Specifically, the government has shifted from an agenda based on de-regulation in the 1980s to a regulatory quality agenda in the 1990s, based on better regulation as governance

[16] The latest version of the guidelines (2007) is available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft876.pdf

architecture geared towards net benefits for the economy and society as a whole. Since 2004, however, the major efforts seem to have targeted regulatory quantity - with ideas like 'one in one out', targets for the reduction of burdens and the 'less is more' paradigm - rather than quality (Humpherson 2009)[17]. The 2009 conference of the Conservative Party signalled the intention of this party to keep RIA on track should they be elected to office at the next elections, with a promise to increase the involvement of the National Audit Office in the scrutiny of RIA and the creation of a powerful Star Chamber. "To give the process teeth, the IA will be produced by the Department sponsoring the new law but audited & signed off by an external body such as the National Audit Office (NAO) or the Audit Commission. If the audit opinion is not adequate it will not come before the Star Chamber. This is particularly important because, at present, too many IAs are of extremely poor quality and do not provide accurate or thorough information on the true costs of each new piece of red tape" (Conservative Party 2009:15).

It should be noted that the better regulation units operating in individual departments have a difficult job. It is not easy for these officers to persuade their colleagues to take on board the increasing number of tests and procedures arising out of the better regulation agenda. Typically, officers in departments and agencies have the primary aim of developing regulations. Hence, they encounter better regulation procedures as hurdles standing in their way. The better regulation officers in departments and agencies have to persuade these colleagues that the 'hurdles' are indeed useful tools. But this becomes difficult when too many new initiatives, tests, and checks on new regulation have been put in place in a short time-span. Policy officers developing regulation have to comply with the new RIA guidance, take into account the Davidson review for the EU part of their job, implement Hampton, measure and reduce burdens at source, engage creatively with consultation, and so on. By adding requirements at an accelerating rhythm, better regulation might appear unrealistic to the policy teams that formulate and implement rules. One important lesson is to be aware of the risk that better regulation can increase regulation inside government.

The Better Regulation Executive has decided to operate at arm's-length from the departmental RIAs – whilst in the past they entered departmental RIAs more directly.

[17] Presentation at the IRRC conference, Berlin, 2009, videostream available at http://www.irr-network.org/videos/session/39/Session-2.3-Regulatory-metrics-From-measurement-to-management.html)

This has created in some departments the impression of 'being left alone' at a time when the number of better regulation procedures to be implemented is increasing. One problem here is administrative capacity. Whilst investments have been made at the centre, in the Better Regulation Executive, capacity for better regulation remains distributed unevenly across departments. In the typical department, with the exception of Defra and the Department for Business-Innovation-Skills, good RIA desk officers are not promoted, their professional identity is not visible (they may be seen as economists, but not as 'better regulators' or 'good evaluators of proposed legislation'), and they have an endemic problem of fulfilling procedures for which there are no resources around the house.

Another strength of the model adopted in England and Scotland is the integrated template for the economic analysis of proposals, supplemented by a few special tests like the competition filter and rural proofing. At the same time, the integrated approach might become weaker - should the number of special tests continue to increase. It has been noted that too many assessments integrated in a single template may lead to a 'choose and pick attitude' in some cases, often to the detriment of the analysis of environmental and social aspects (Jordan and Russel 2009).

The UK has also made a special effort to balance the need to provide usable advice to policy-makers (often cited as the reason for using simple rather than advanced analytical tools, Nilsson et al. 2008) and the degree of analysis that is needed to perform a good RIA for complex policy problems. There is still room for improvement on RIA knowledge that can be used by policymakers, however. Russel and Turnpenny (2009) found that 98% of RIAs in their sample do not appear to drive policy. Systematic analysis of alternative options is often lacking, giving the impression that most RIAs started at a late stage, with one option already chosen outside the RIA. Transparency on data sources is on average low. One cannot conclude that sound economics regularly informs regulatory decisions systematically (Bartle, 2008 Section 4; NAO 2006; Russel and Turnpenny 2009), although we do not have the counterfactual evidence of how many bad decisions have been avoided by entering economic analysis (albeit imperfect) into the decision-process via RIA. The fact that RIA is standard practice in policy formulation should not be under-estimated.

The oversight system and architecture is yet another strength. However, observers feel that the BRE has not been very accountable to Parliament. Indeed, a weakness of the existing oversight architecture lies in the absence of a mechanism to hold the BRE accountable (OECD 2009). As a result, the overall goals of the better regulation agenda are not assessed and no real evaluation of the degree of achievement of intended objectives is available. This generates some inconsistencies and the perception of a lack of direction from the top among departments (House of Commons 2008; NAO 2009). To tackle this problem, the BRE and the regulatory reform agenda should be subject to better regulation principles and practices such as consultation and impact assessment; clear priorities and a timetable for delivery should be communicated (House of Commons 2008:18) to guide oversight actors and RIA implementers and keep the momentum for regulatory reform.

Compliance with RIA guidelines is high, but we have no systematic and comprehensive information on whether by using better regulation tools the departments (or perhaps some departments but not others, as hinted by the NAO reports) have become smarter and regulatory quality has increased. We should not however underestimate the achievement of having learned about better regulation tools – RIAs are a standard practice in policy formulation processes, whilst most EU countries are still struggling with this stage.

Measuring activities and results of better regulation policies is difficult, but not impossible. There are at least twenty years of research on regulatory quality indicators. The UK has adopted some indicators of quality - a clear strength when compared with other countries. However, we have not seen the adoption of a coherent, fully-fledged system of regulatory indicators yet. The Better Regulation Executive is under pressure to report regularly on output and outcome. This would give citizens and business an opportunity to discuss how progress should be measured – following on and extending what has been done with the administrative burdens reduction plan. This is a clear but far from being implemented trend towards regulatory accountability.

No matter how good regulatory innovations look on paper, when implemented they run the risk of being captured by the administrative system - a lesson that emerges from the comparative literature on the new public management (Pollitt and Bouckaert 2004). This is why a robust network of better regulation actors is essential to the development of this policy. In the UK, the network is more sophisticated than in other European countries. Recently the Parliament, the quality press and the business community have

entered the scene alongside many institutional bodies. A profession of better regulation experts and RIA professionals is slowly emerging, but at the moment the UK does not have a body with its shared professional standards that can press on the government to secure high quality better regulation activities.

3.2.10 MECHANISMS

The mechanisms at work in the UK model are actor's certification, learning, control and challenge, accountability, and multilevel mechanisms.

- Actor's certification - The actors that lead the process are clearly identifiable, and are certified by the top political level. Although the BRE has changed location from the cabinet office to the Department of Business, Innovation and Skills, it has remained at the heart of the better regulation policy of the UK. It is also been identified across the years as the body that has consistently pushed for high quality RIAs. Each department has a better regulation Minister whose activity is supported by a Board-level champion. Ministerial involvement with the RIAs goes on with a Ministerial-level Panel where the most important regulatory proposals are discussed. This implies that a Minister can have a hard time in defending a proposal if the underlying RIA is of poor quality. Other actors have gradually found a clear role in the system, such as the National Audit Office. By contrast, advisory and advocacy bodies have been re-shuffled over the years. It is too early to decode the 'policy identity' of the newly-established Regulatory Policy Committee.

- Behavioural mechanisms: learning. The UK has evolved from an early emphasis on the assessment of compliance costs faced by business to a template informed by the systematic analysis of how benefits and costs affect different stakeholders. This is a major learning trajectory. Since the mid-1990s, the UK has looked at cost-benefit criteria for inspiration on how to set better regulation policy, although it has not gone as far as the USA in the implementation of cost-benefit techniques. Departments such as Defra, Transport, and the Department of Business, Innovation and Skills have invested resources in the analysis and in some cases monetisation of benefits. There is a single, coherent template for RIA. In the period we are examining, the UK has been the only country in Europe to insist that benefits of regulatory proposals justify the costs. Obviously this does not mean that the mechanism is working perfectly, as shown by NAO and other studies.

- Relational mechanisms: control and challenge. In the UK, there are several empirical observations that point in the direction of political control. One is that at least since 2004, better regulation has been steered directly by top political actors. It was a letter of the Prime Minister to the Better Regulation Commission that triggered a spectacular re-orientation of better regulation with the *Less is More* report (details in Radaelli, 2010). Another is the establishment of the most powerful central unit for better regulation across Europe. With a staff of 89 and an operating budget of £10.59M, the BRE is a giant when compared to other European countries. Another is the habit of challenging departmental regulatory agendas in ministerial panels by using the RIAs as main documentation. The BRE and Treasury have accelerated the pace of regulatory innovations with no less than five independent reviews since 2004, with an exponential increase in the number of recommendations and guidelines that departmental regulators have to take into account. Thirdly, there is challenge from the external environment, as shown by the reports of the NAO. It is possible that with the new Conservative Government challenge will increase with the idea of using a Star Chamber.

- Accountability - Although this mechanism is not as yet working properly, there is a clear trend towards more accountability of RIA and more generally better regulation. In 2008, the House of Commons recommended "regular parliamentary scrutiny of the BRE through annual reporting to parliament" (Regulatory Reform Committee, HC 474-I, 2007-2008: 3). The government agreed (November 2008), asking BRE to publish an annual overview of the whole regulatory reform agenda. As mentioned, the NAO provides an annual report on RIA, which is sent to Parliament and may even have a greater role under a possible Conservative government in the future. The Regulatory Reform Committee of the House of Commons completed an inquiry into the better regulation agenda (HC 474-I 2008) and one on themes and trends in regulatory reform (2009). The House's Environmental Audit Committee discussed the role of the BRE in its report on climate change (HC 740 2007, EV 10-11). The Public Accounts Committee had a session in February 2008 to hear about progress with the administrative burdens reduction plan. The House of Lords produced a substantial report on economic regulators highlighting RIAs (HL 189-I 2007) and is completing an enquiry on better regulation in Europe (focused on the EU however). In short, parliamentary accountability of the better regulation agenda is increasing.

- Multi-level mechanisms - There are several strategies for bringing the better regulation agenda across different levels of governance, including enforcement policies, risk-based inspections, the creation of a special-mission body like LBRO and the intense networking with other member states to coordinate the EU better regulation agenda.

3.3 The European Union

The European Commission performs impact assessment activities on regulatory and non-regulatory proposals, as will be shown below. For this reason, the EU, like the UK, uses the notion of IA, thus dropping the 'R' from RIA. For consistency across the various Sections of the report, we will use RIA throughout, although the difference between the European systems and the North-American systems, where impact assessment is used for rulemaking but not for primary legislation, should be noted.

3.3.1 Consultation

- *Style and traditions*

The European Commission is required by the EC Treaty to carry out wide consultations before proposing legislation. Hence, stakeholder consultation was already part of the EU-decision-making process before the introduction of RIA, albeit in a less inclusive form. For example, the Business Impact Assessment (BIA) procedure in use in the 80s foresaw the consultation of relevant stakeholders. In practice, due to the relatively narrow focus of the BIA, consultation basically amounted to considering compliance costs (Renda 2006:46). A Business Test Panel was created in 1998 as a permanent body for the consultation of firms affected by EU regulations. However it was only with the 2001 White Paper on European Governance that the European Commission launched the idea of a broad online consultation procedure. As a result, the Commission adopted the Communication on the general principles and minimum standards for consultation in 2002[18].

The current RIA system and the minimum standards for consultation are core components of the EU Action Plan for Better Law-Making, together with a series of other instruments. This is one of the most holistic approaches to better regulation currently in force. Moreover, the 2009 RIA guidelines were subject to public consultation, an innovative approach for the European Commission but also for several other RIA systems.

[18] COM(2002)704.

- *Consultation in RIA: standards and guidance*

The minimum standards for consultation were revised in 2007 to improve feedback mechanisms and ensure the inclusion of a greater plurality of views in the process. The latest version of the RIA guidelines lists the following steps to guide public consultation within the RIA (European Commission 2009:18):

- Provide consultation documents that are clear, concise and include all necessary information;
- Consult all relevant target groups;
- Ensure sufficient publicity and choose tools adapted to the target group(s) – open public consultations must be publicised on the Commission's single access point for consultation;
- Leave sufficient time for participation;
- Publish the results of public consultation;
- Provide acknowledgement of responses;
- Provide feedback: report on the consultation process, its main results and how the opinions expressed have been taken into account in the impact assessment;
- Report in the RIA report and in the explanatory memorandum accompanying the Commission proposal.

Compliance with these requirements is high, and the Impact Assessment Board in charge of overseeing RIA also checks that consultation standards are adequately applied.

- *Obligation to address the issues raised by those who have been consulted*

According to the 2009 RIA guidelines consultation responses must be clearly presented and addressed in the impact assessment document. RIA drafters should specify the object of the consultation, who was consulted and how. The RIA should also specify how different stakeholders' positions have been taken into account in the process. This does not only apply to opinions on the proposal but also on factual data obtained through consultation.

- *How consultation is implemented*

Empirical research on the RIAs performed by the European Commission between 2006 and 2008 on binding EU rules (Regulations, Directives and Decisions) shows that

consultation is regularly performed, in line with the minimum standards.[19] However, there are still instances where key aspects of a proposal have not been subject to consultation (see for example the case of the 2006 review of the EU Regulatory Framework for electronic communications). The Impact Assessment Board (IAB) has recommended in a number of occasions (almost 10% of the cases in 2008) that the RIA document reports more clearly the results of stakeholder consultation[20].

Findings are reported in the final RIA, although the level of detail varies: in some cases a summary of responses is included in the text; in others the RIA features a dedicated annex including the consultation questions and a detailed report of individual answers.

In contrast to other RIA systems (e.g. USA and Canada), EU draft RIAs are not subject to public consultation as they are only published in their final form together with the European Commission's legislative proposal. This limits the possibility of gathering additional information and feedback on the data and methodology used in earlier stages of the RIA process, particularly before the IAB delivers its opinion on the draft RIA document (Renda et al. 2009).

It should also be noted that the consultation steps and findings reported in RIA documents do not necessarily reflect consultation done on the RIA itself but in general the consultation rounds carried out during the preparation of the proposal (TEP 2007:74).

3.3.2 Design, scope and targeting of the RIA process

- *Who does RIA and when according to written guidance*

According to the 2003 "Inter-Institutional Agreement on Better Lawmaking" and the 2005 "Common Approach to Impact Assessment" (now under revision) the key EU legislators, the European Commission, the European Parliament and the Council of Ministers are required to perform impact assessments on legislative proposals. Specifically, the European Commission, because of its right of initiative in the EU law-making process, drafts the first impact assessment, while Parliament and Council should use RIA to assess the possible economic, social and environmental impacts of the 'substantive' amendments they put forward. The European Economic and Social

[19] The research was performed in the framework of the project European Network for Better Regulation (ENBR), financed by the European Commission between 2006 and 2008. For further details: www.enbr.org.
[20] See IAB Report for 2008, Sec (2009)15 final, 28 January 2009.

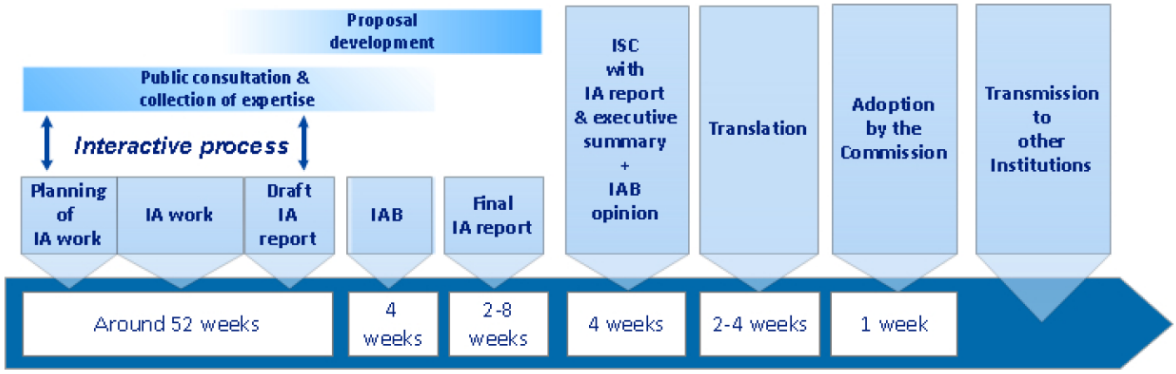
Committee and the Committee of the Regions should be consulted in the process where relevant. Research shows that the implementation of the 2003 agreement is poor and that the Commission has not as yet found a proper model to use better regulation and specifically RIA in the complex system of inter-institutional relations that characterizes EU lawmaking (Meuwese 2008). Meuwese indeed concludes that for the EU the usage of impact assessment is much more problematic that its production (Meuwese 2008), although it must be added that for Council and EP 'production' of RIA on major amendments is as problematic as 'usage'.

The current system requires that RIAs be carried out only on items previously included in the Community Legislative and Work Programme (CLWP), with the exception (introduced by the 2009 RIA Guidelines) of major comitology decisions that by definition fall outside the CLWP, and other few cases. The link between the production of RIAs and the CLWP is justified by the annual budgetary cycle of the Commission. As a result, RIA planning is also structured on an annual basis, and in principle, the Commission does not report a proposal that has not been adopted by the end of the year to the following year. The practical consequence of this approach is that DGs sometimes speed up the production of a RIA when approaching the CLWP deadline. This may be detrimental to the quality and thoroughness of the analysis and feeds the concerns about RIAs being ex-post justifications of chosen options. Recently, the link between RIAs and the CLWP is not always respected and some proposals included in the CLWP are not subject to RIA and vice-versa.

The pressure for greater transparency and accountability in decision-making generated by the European Parliament and the Member States has led the European Commission to develop a comprehensive RIA strategy, whereby each Directorate General (DG) initiating legislation is now in charge of drafting the accompanying RIA with the support of other services within the Commission. A dedicated RIA institutional architecture in now in place, with RIA Units in each DG and the Secretariat General's Impact Assessment Unit and the Impact Assessment Board providing additional support. As reported by Radaelli and Meuwese (2009) all the major DGs have invested in human resources, expertise, as well as in background studies and input for the process. For each RIA, a Steering Group is convened and should always include a member of the DG's IA Unit and a representative from the relevant policy coordination unit in the Secretariat General (European Commission 2009). This system is meant to ensure that

all the necessary expertise from different DGs is available since the beginning of the RIA process. The work of the Steering Group is also intended to pave the way for inter-service consultation at a later stage.

Figure 4 - Typical countdown for preparing an impact assessment



Source: European Commission (2009:8)

Conversely, the European Parliament and the Council of Ministers - although formally required to undertake RIA for the substantive amendments they add to a proposal - have been rather slow in committing to the RIA framework. As a result, the RIA process is currently 'unfinished' in the sense that the final piece of legislation is still accompanied by the original RIA although the text of the law may have changed significantly in the meantime.

As regards available guidance for RIA, the 2009 Commission RIA guidelines contain advice on how and when to prepare RIA, a template for the assessment, suggestions on where to seek help, and on how to consult. An online library of best practices structured around the key steps of the RIA process (problem definition, policy objectives, policy option, impact analysis, compare the options, monitoring and evaluation, proportionate level of analysis, public consultation, and presentation) was added as Annex 14 and is also available at:
http://ec.europa.eu/governance/impact/commission_guidelines/best_pract_lib_en.htm

- *Scope: what is subjected to RIA, for an early assessment or for a full RIA*

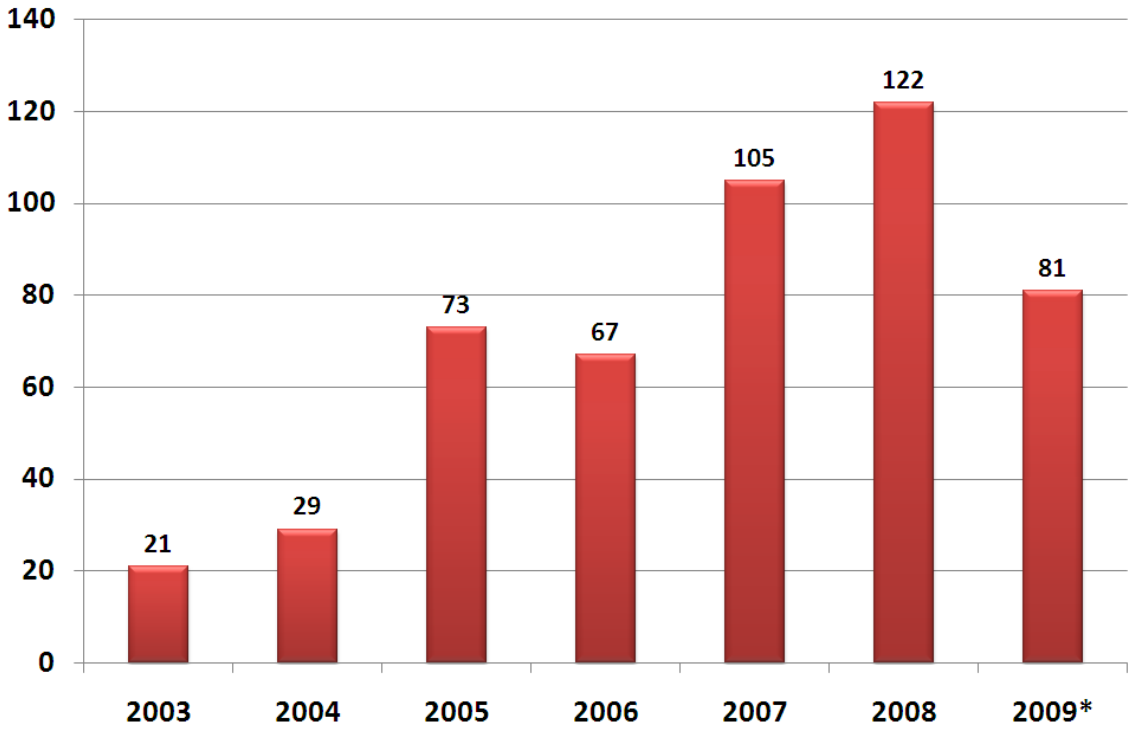
All legislative proposals included in the Commission's Legislative and Work Programme (CLWP) should be subject to RIA. Additionally, all legislative proposals which are not in

the (CLWP) but are expected to have clearly identifiable economic, social, and environmental impacts should also be assessed. The European Commission has the right to ask for additional RIAs on an *ad hoc* basis for items falling outside the CLWP.

Non-legislative initiatives that should be subject to an RIA are white papers, action plans, expenditure programmes, and negotiating guidelines for international agreements. Following the adoption of the 2009 RIA guidelines, some implementing measures, known as 'comitology items', are also subject to RIA when expected to have significant impacts

In practice, the Secretariat General, the Impact Assessment Board and individual Commission DGs decide each year which initiatives should undergo an impact assessment. The number of RIAs carried out since 2002 has significantly increased, as shown in the figure below.

Figure 5 – Number of IAs per year



Source: Renda 2009.

- *Targeting: what is caught in the RIA "net", exclusion criteria*

Green papers, consultations with social partners and routine implementing legislation are currently excluded from the RIA obligation together with the majority of items that are not included in the CLWP.

3.3.3 Internal accountability

- *Oversight actors*

The overall RIA strategy is coordinated by the Commission's Secretariat General which is also responsible for drafting the RIA guidelines and for convening the Impact Assessment Working Group where representatives from most of the Commission services meet regularly to steer the RIA process.

Since 2007 an Impact Assessment Board (IAB) is in place as an independent quality control body. The IAB reviews the quality of individual RIAs and the overall soundness of the RIAs produced by the European Commission. The IAB can make negative comments, ask for additional analysis, and provides a learning forum for senior officials and the Secretariat General as regards the purpose of RIA and its future development (Radaelli and Meuwese, 2009). While the opinions of the IAB are not binding, they accompany the draft RIA and the proposal throughout the decision-making process within the Commission and are also published on the website with the final RIA and the proposal adopted by the Commission. This internal control body works as a part of a more articulated quality control system, which includes as mentioned the RIA unit in each DG, the Steering Group and ISC, and the scrutiny (at least formally and often only procedural) of the SecGen. The IAB provides additional incentives for rigorous assessment (Radaelli and Meuwese 2009; Renda et al. 2009).

The Board reports to the President of the Commission and is chaired by the Deputy Secretary General of the Commission – thus making a link between the mechanisms of control that flow through the Secretariat General and the IAB.

At the moment, the IAB includes 4 directors from the following DGs: Economic and Financial Affairs, Enterprise and Industry, Employment and Social Affairs, and Environment. Members of the IAB act in their personal capacity and not as

representatives of their service. The human resources of the board are quite limited and include 4 officials for support, 2 for training and 20 in follow-up activities (EVIA, 2008).

Within short time, the IAB has established itself as a credible and legitimized internal actor. Its credibility outside the Commission is increasing but less straightforward as it still has to prove that it is rooted in the institutional setting of the Commission and that its performance goes beyond the commitment and expertise of its Chair and individual Members.

To date, there is no external oversight body; however the structure of the EU legislative process involves scrutiny from the European Parliament and the Council of Ministers. More details on each are provided below.

- *Requirements for RIA preparation / involvement of central unit*

RIAs are prepared by the DG with lead responsibility for a given policy. As stated above, for cross-cutting proposals, an RIA steering group is normally convened and includes officials from other departments to ensure that the relevant information and expertise is available for RIA drafting. Additional support and advice can be provided by the desk officer following the work of each DG within the Secretariat General's policy coordination units. Dedicated units for support on SMEs policy, the assessment of administrative burdens and the application of the Standard Cost Model are available in DG Enterprise and Industry; while DG Justice, Freedom and Security can assist for the assessment of possible impacts on fundamental rights, including data protection (European Commission, 2009). The IAB can provide advice on methodology.

As reported in the external evaluation of the Commission's RIA system (TEP, 2007), RIA steering groups are key to integrate inputs from different DGs in the RIA work. Moreover, the traditional 'suspicion' that DGs have towards proposal coming from other services seems to play in favour of impact assessment: strong administrative cultures and the close ties with a specific policy field and set of interests (e.g. environment, health, business) provide a useful set of incentives to scrutinize proposals from other DGs, question assumptions and data, and ultimately discipline and improve the process of policy-formulation (Radaelli and Meuwese, 2009). This virtuous mechanism may reduce the risk of compartmentalizing policy initiatives.

While judgment on the quality of EU RIAs is still open, there is widespread consensus that : (i) the quality is increasing on average; (ii) RIA is still concentrated in a subset of DGs; and (iii) use of Commission RIA is increasing in the Council and the Parliament (Cecot et al. 2008; TEP 2007; Jacob et al. 2008).

- *Monitoring and evaluation*

Monitoring and evaluation within the European Commission is provided by the IAB and the Secretariat General. In particular, the IAB examines and issues opinions on the quality of individual draft impact assessments and can also seek external expertise to perform its mandate, although we have no evidence that the latter option has been used to date.

The RIA follows the development of the proposal within the Commission. As soon as the Commission concludes that action is necessary, the proposal - together with the RIA and the IAB's opinion - is subject to inter-service consultation. The IAB's opinion can lead to the revision of the RIA before it is submitted to inter-service consultation.

Once the inter-service consultation is over, the RIA is finalized and submitted together with the proposal and the IAB's opinion to the College of Commissioners for discussion and approval. Following the approval by the College of Commissioners, the proposal is published and the European Parliament and Council of Ministers become co-legislators (if co-decision applies), thus adding an additional layer of accountability in the RIA process. However, it should be noted that these two institutions use the Commission's RIA document as a starting point for their impact assessment work, which should concentrate only on the substantive amendments tabled by these two institutions.

As stated above, the production of RIAs in the Parliament and Council remains limited. Conversely, discussion of Commission RIAs by parliamentary committees and working groups in the Council is growing, and the Commission may be invited to describe the criteria used to appraise certain costs and benefits, and more broadly to explain how RIAs should 'inform the legislator' (Meuwese 2008). For example, in the EP Committee on Internal Market and Consumer Protection (IMCO), Commission's proposal are not considered without a discussion on the accompanying RIA and Commission officials are often invited to comment on the RIA.

- *Triage mechanisms*

The selection of proposals that should undergo RIA is taken on a yearly basis by the Secretariat General, the IAB and individual DGs.

As regards the level of depth of each assessment, RIA guidelines adopt the 'principle of proportionate analysis' that applies to the different steps of the RIA process, including data collection, stakeholder consultation, the level of ambition of the options to be considered, the degree of quantification of impacts, arrangements for monitoring and evaluation (European Commission 2009).

The RIA guidelines suggest answering the following questions to decide on the appropriate level of analysis for each case:

• How significant are the likely impacts?

• How politically important is the initiative?

• Where is the initiative situated in the policy development process?

Existing initiatives are categorized to provide additional guidance on proportionate analysis: i) non-legislative initiatives/Communications/Recommendations/ White papers, setting out commitment for future legislative actions; ii) 'cross-cutting' legislative actions, such as regulations and directives that are likely to have significant impacts in at least two of the three dimensions of RIA (economic, environmental and social) and on a wide range of stakeholders in different sectors; iii) 'narrow' legislative action in a particular field or sector with limited impact beyond the immediate policy area ; v) expenditure programmes; and vi) comitology decisions.

Empirical research (Renda 2006; Cecot et al. 2008; Renda et al. 2009, and ENBR and EVIA projects 2008) seems to indicate that the level of analysis is not always related to the binding nature of a proposal and that several RIAs are not about new policy initiatives but are instead closer to interim reports or ex-post evaluations of existing proposals. Finally, some DGs tend to perform several RIAs for non legislative measures (Renda et al. 2009:42): for example AGRI (9 out of 12), COMM (1 of 1), COMP (2 of 3), DEV (11 out of 13), and RELEX (4 out of 5).

Compared to the previous edition, the 2009 guidelines provide additional clarity and support to RIA drafters on the principle of proportionate analysis, but they seem to confuse legal and economic formats in the approach to this issue. The guidelines

suggest that the analysis should be proportional to the type of legal instrument chosen (directive, soft law, and so on), whilst an economic principle would state that analysis should be proportional to the impact of the proposal (large or narrow, concentrated on first round effects or with important dynamic effects, and so on). Indeed, it should depend on the marginal benefit of the extra resources invested in further analysis compared to the chances of the findings to change the current line of judgment or action.

Further, it is not clear why the analysis of the 'zero/doing nothing' option is downplayed in the first phases of the process, exactly when the need to intervene should be carefully scrutinized. The same is true for the application of the subsidiarity principle to decide at which level of government intervention is more appropriate (Renda et al. 2009).

This relatively flexible application of the proportionality principle makes the evaluation of the Commission's performance more difficult (Cecot et al. 2008) thus raising the question of whether adopting a threshold on the economic significance of a given proposal to decide on the depth of the required analysis wouldn't be more appropriate.

3.3.4 External accountability

- *Publication requirements*

RIAs must be published together with the Commission's proposal and the IAB's opinion on the EU website (http://ec.europa.eu/governance/impact/ia_carried_out/ia_carried_out_en.htm). This requirement is respected.

As mentioned, the procedure differs from the one adopted in the USA or Canada where draft RIAs are also made public in order to gather additional input in earlier phases of the RIA process.

- *Scrutiny / external accountability*

The European Court of Auditors assesses the collection and spending of EU funds and examines whether financial operations have been properly recorded and disclosed, legally and regularly executed and managed so as to ensure economy, efficiency and effectiveness. This also includes a review of how the resources devoted to RIA are

spent and an assessment of the results obtained by the current RIA system. In the second half of 2009 the Court of Auditors has completed a thorough evaluation of the EU RIA system, based on screening five DGs [report still embargoed].

- *Reports and inquiries by parliament*

While the European Parliament increasingly scrutinizes Commission RIAs as a basis for decision-making (Meuwese 2008), it is still lagging behind in assessing the impacts of its own amendments and is not expected to develop sufficient in-house capacity for RIAs overtime (Renda et al. 2009). As for monitoring the general EU better regulation strategy, the attention of the Parliament is fairly high following the expansion of its legislative powers brought about by several EU Treaty revisions.[21] From the Parliament's perspective the better regulation agenda entails a trade-off: on the one hand it can make the Commission more accountable to Parliament by increasing the transparency of internal decision-making; on the other hand, the evidence accompanying Commission proposals may make potential amendments more difficult to accept in some cases (Radaelli and Meuwese 2009). So far, due to the limited resources available for RIA inside the Parliament, the second option may be slightly prevailing (Radaelli and Meuwese 2009). This could be countered by giving more weight to the EP in the selection of the proposals to be subjected to RIA (Renda et al. 2009).

- *Transparency requirements*

All impact assessments and opinions of the IAB are published on the EU website together with the final version of the Commission proposal. The documents however, cannot be accessed before this stage; this has led industry to describe the Commission as a 'black box' in the early phases of the RIA process.

- *Participatory tools in RIA*

The key participatory tool in the EU RIA system is public consultation. As explained in the RIA guidelines, stakeholders' input should be sought in the earlier phases of the RIA process and the results of this exercise should be summarized in the final RIA document. As is often reported in individual RIAs, other participatory tools used in the RIA process include the organisation of workshops with experts and/or with parties

[21] See for example, Parliament Resolution 2004/A5 -0221 of March 24, 2004 by MEP Doorn, and the reports by MEPs Gargani, Frassoni, Doorn, Kaufmann and McCarthy.

potentially affected by the proposal, and the consultation of different tiers of government where appropriate, (e.g., national or local administrative authorities).[22] Additionally, the Commission can rely on a set of networks to gather additional information on specific topics.

For the measurement of administrative burdens, a dedicated portal where businesses and citizens can put forward suggestions to reduce red tape caused by EU legislation is available at: http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/online-consultation/submit-an-idea/index_en.htm

3.3.5 Economic sophistication

- *Analytical models for RIA*

The RIA guidelines suggest a broad set of methods and tools for analysis, and divide them into quantitative and qualitative approaches. Suggested quantitative techniques range from simple extrapolation to full-fledged quantitative modelling and multi-criteria analysis. The guidelines also recommend monetizing costs and benefits as much as possible. Since different models and techniques should be chosen 'when appropriate', officers have several degrees of freedom – an opportunity but also a risk since demanding techniques may be always considered 'not appropriate'. In other words, it may happen that more complex but suitable techniques may be discarded with the justification that they are inappropriate for the case at hand. The problem is compounded by the lack of additional specific guidance on cost-benefit analysis – in contrast to what happens in Canada and the USA. The latest version of the RIA guidelines contains some improvement however, for example as regards the use of the Value of Statistical Life (VSL), the Value of Life Years (VOLY), and risk assessment techniques.

The Commission has invested considerably in the development of indicators and other means to improve the quantification of impacts in RIA, including an internet based tool (IA-tool) to support the impact assessment process by providing information on good practices, models and tools for quantitative analysis, and guidance for identifying the potential effects of policy actions on the economic, social and environmental dimensions (EVIA project 2008).

[22] For further details, see TEP (2007: 74).

Empirical research (Cecot et al. 2008; TEP 2007) shows that the quantification of impacts is improving although some imbalances still remain. For example, economic and environmental impacts tend to be better analyzed than social ones (Hertin et al. 2008). While undoubtedly on the increase, the quantification of impacts is not uniform throughout an impact assessment and the chosen option often receives more attention that the suggested policy alternatives (Cecot et al., 2008). Specifically, a scorecard analysis of RIAs performed in 2006 and 2007 for binding initiatives shows that costs are monetized in about 80% of cases (Cecot et al. 2008: 414) but costs for alternatives are monetized only in 60% of cases.

In contrast, the quantification of benefits - which have always been described at least qualitatively in EU RIAs - has slightly decreased in 2005 and is now increasing again. Here again the monetisation of the benefits of a proposal occurs in 40% of the cases while the monetisation of alternatives is performed in 20% of the cases only. Although the monetisation of benefits is difficult, it is plausible to expect that in those cases were quantification was feasible for the proposed option this should probably apply also to the alternatives examined in the RIA (Cecot et al. 2008). Finally, currency years used for monetisation are not always specified. As a caveat, it should be noted that RIAs concern a wide range of legislative and non-legislative proposals which, by their very nature, do not always allow full quantification and monetisation.

As stated above, quantification should also be linked to the expected impact of a proposal, in line with the principle of proportionate analysis. The RIA guidelines indicate that full cost-benefit analysis should be used when most parts of costs and benefits can be quantified and monetized. However this recommendation does not have a clear link with the expected impact of a proposal, thus providing little direction to RIA drafters as to what would be a proportionate degree of analysis in each case. On the other hand, empirical research seems to indicate that there is an increase in analytical quality over time, with costlier proposals being accompanied by more detailed analysis (Cecot et al. 2008).

It should also be noted that the results of quantification are not always adequately reflected in the executive summary of the RIA (Renda 2006; Cecot et al. 2008) and this diminishes the ‘usability’ of these analytical efforts by policy-makers.

- *Decision-making criteria*

The guidelines specify that policy options should be evaluated, in relation to the intended objectives, according to the following criteria (European Commission 2009):

• Effectiveness: the extent to which options achieve the objectives of the proposal;

• Efficiency: the extent to which objectives can be achieved for a given level of resources/at least cost (cost-effectiveness);

• Coherence: the extent to which options are coherent with the overarching objectives of EU policy, and the extent to which they are likely to limit trade-offs across the economic, social, and environmental domain.

The RIA guidelines also specify that the most effective and efficient option is likely to produce the highest benefits and thus be credibly chosen, with the caveat that non quantified benefits may still tilt the balance in favour or against the option. Where little difference between options emerges from the analysis, guidelines suggest redesigning the options.

Overall, the guidelines are ambiguous on decision-making criteria, since by letting officers use efficiency, effectiveness and coherence there is no clarity on how to choose between options. Put differently, it seems relatively easy to justify the preferred option by navigating among the three criteria.

- *Quality standards for the use of expertise and peer review of economic analysis*

The RIA guidelines suggest referring to the economic analysis unit of the DG preparing the proposal for support and peer review. Besides the additional scrutiny of the IAB and the internal system of checks through the RIA Steering Group and inter-service consultation, there are no other mechanisms to peer-review economic analysis internally and the draft RIA is not subject to open consultation.

External expertise can be sought for preparing an IA and this is normally achieved through open tendering procedures.

- *Treatment of uncertainty*

The RIA guidelines provide indication on how to deal with risk and attach probabilities to different possible outcomes. They also suggest referring to a scientific committee for

the assessment of risks whose consequences are not yet fully scientifically established. The 'precautionary principle' is suggested as a first step for the management of risk, especially when human, animal, or plant health is concerned.[23] No explicit mention is made to ancillary risk analysis and the risk-risk trade-off (Wiener and Graham, 1995).

Risk analysis should be articulated in three steps:

- Risk identification
- Determination of the probability of risk and extent of the expected harm
- Description of alternative ways to reduce the identified risk, to be included in the option section of the RIA report.

Additional technical details and examples on how to assess risks are provided in the annexes to the RIA guidelines.

- *Administrative burdens*

The EU Standard Cost Model was originally conceived as a methodology for calculating administrative burdens in individual RIAs (and is included in the RIA guidelines as Annex 10 since March 2006), and later evolved into a tool for completing a baseline measurement of the 'stock' of administrative burdens. The first round of measurement focused on 42 legislative acts in thirteen priority areas that allegedly account for 80% of all burdens generated by EU legislation, and was undertaken by a consortium of consultancy firms (Renda et al. 2009). At the same time, the European Commission has worked on a number of 'fast track actions' to achieve immediate reduction by amending or repealing existing legislation. The measurement is now being translated into concrete reduction proposals with the contribution of the High Level Group of independent stakeholders (the 'Stoiber group'). The overall reduction target is set at 25% by 2012. A Commission Communication adopted on October 22, 2009 outlines sectoral reduction plans and identifies new pieces of legislation that will be measured in the next months.

As regards the RIA process, the RIA guidelines state that in principle it is sufficient to measure the administrative burden only for the preferred option. However, if

[23] As stated in the guidelines this means that « temporary decisions may need to be taken on the basis of limited or inconclusive evidence, and that more permanent arrangements are postponed until the necessary scientific assessment is available" (European Commission 2009).

information obligations are at the core of the proposal (e.g. changing labelling or reporting requirements) then the administrative burden should be assessed for all policy options considered. Following a qualitative estimation of the categories and number of affected stakeholders, administrative burdens should be calculated with the Standard Cost Model. Examples and details for calculation are provided in the annex to the RIA guidelines.

While the programme for the reduction of administrative burdens at the EU level has received considerable support and attention, also at the political level, the quantification of burdens in individual RIAs is only slowly gathering pace. The IAB has intervened in a number of occasions to recommend that the IA document contains an assessment of administrative burdens: this has led to a more widespread use of the methodology in Commission RIAs, after a very patchy implementation at the outset. As could be expected, the RIA documents related to fast track actions and reduction measures normally contain an application of the SCM.

- *M&E standards for individual RIAs*

According to the RIA guidelines, each assessment should outline specific arrangements for monitoring and evaluation as well as core indicators for measuring the implementation of the main policy objectives. Indicators should serve a clear purpose and also point at sources of data relevant for the evaluation of the policy.

In line with Commission's rules, all activities should be regularly evaluated. Specifically, evaluation is compulsory for spending proposals, and review clauses should be envisaged for other initiatives. In a limited number of cases, the IAB intervened to recommend the use of indicators for monitoring and evaluation in individual RIAs. Overall, most of the RIAs completed between 2008 and 2009 contain a detailed section on M&E at the end, with an increased use of indicators.

Many DGs have established evaluation mechanisms, which will use original RIAs as a starting point for monitoring initiatives.

3.3.6 Multi-level government issues

- *EU-domestic relations*

For EU legislation, the European Commission has the unique right of initiative. In some area (trade) the Community has exclusive competence; for all areas where legislative

competence is shared with the Member States, the subsidiarity and proportionality principles apply.

- *Trade*

Impacts on trade are assessed within the context of the general RIA. Additionally, DG Trade launched Trade Sustainability Impact Assessments in 1999 to determine the likely economic, social and environmental impacts of a trade liberalisation agreement. These assessments are part of EU trade negotiations and are based on a specific methodology.[24] Normally Trade Sustainability Impact Assessments are performed by external consultants chosen through a tendering procedure.

As regards the standard RIA documents, the 2009 Commission RIA Guidelines include the impact on 'competitiveness, trade and investment flows' in the list of economic impacts that may be assessed by individual DGs where appropriate. In these cases, the RIA should respond to questions such as "What impact does the option have on the global competitive position of EU firms? Does it impact productivity? What impact does the option have on trade barriers? Does it provoke cross-border investment flows (including relocation of economic activity)?"

Finally, in May 2008 the Commission produced a joint paper with the US Office of Management and Budget (OIRA) in the framework of the Transatlantic Economic Council (TEC), to compare the respective systems for assessing impacts on international trade and investment[25].

- "*Federal" relations*

While this dimension is not applicable in the case of the EU, the better regulation agenda - and RIA as a consequence - is also the result of increasing pressures from the national level for greater accountability of EU institutions and decision-making. As explained by Radaelli and Meuwese (2009) EU-national relations are closely linked to the issue of the political control of the 'Brussels bureaucracy' by national governments. In the European context however, the notion of control is conveyed through softer terminology such as 'improvement in law-making', 'modernising the Commission', 'streamlining policy formulation', and 'enhancing regulatory capacity'.

[24] For further details, see European Commission (2006) : http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf

[25] http://ec.europa.eu/governance/better_regulation/documents/eu_us_consult/joint_paper_sg_oira_050808.pdf.

3.3.7 Guidance and support for RIA

The Commission RIA system was introduced in 2003 and guidelines were revised and improved in 2005 and 2009. The last revision of the guidelines was subject to public consultation.

As regards internal support for RIA, while the number of assessments increases every year, the allocated resources tend to remains stable across departments, with potential negative consequences on quality over time (Renda et al. 2009).

3.3.8 Competition analysis

The EU RIA system does not have a dedicated competition filter; impacts on competition are addressed indirectly through a set of questions for assessing economic impacts.

3.3.9 STRENGTHS AND LIMITATIONS

Strengths:

The major strength of the EU's RIA system is its institutionalisation. Between 2005 and now, RIA has been embedded in the process of policy formulation. It is required by the inter-institutional agreement on better regulation, but most importantly it has become common practice for the officers of the Commission, a sort of 'taken for granted' feature of the process leading to the proposals.

This is partly explained by another strength, that is, the strong political commitment at the level of the President and, for the first time in the history of the Commission, the existence of a Vice-President with a specific better regulation portfolio.

Moreover, the RIA system was introduced as the cornerstone of the Better Regulation Action Plan, and is linked to a parallel reform of the management/planning (CLWP, ASP). Thus, there is a connection between RIA and reforming the Commission. This has helped the institutionalisation of RIA.

Turning to the RIA details, the current system has replaced the previous practice of several partial appraisals with a single template for the analysis of options. The template is coherent, although more could have been done in terms of guiding officers on key issues such as proportionality of analysis, decision-making criteria, and analytical methods (see below).

The system has secured consensus both internally and (to some extent) among stakeholders as it is grounded on three pillars: the governance debate, the Lisbon Agenda, and the Sustainable Development Strategy. It is fair to say that a cost is a cost, no matter whether it is 'economic', 'social' or 'environmental'. But the three elements of competitiveness, social cohesion and sustainability have helped the Commission to achieve internal consensus and a high degree of commitment from key regulatory DGs. Turning to stakeholders, the situation is complex. Most stakeholders seem to recognize that RIA is taken seriously by the Commission, but there has been an explosion of expectations about this tool, to the point that it is difficult to manage the gap between the administrative capacity of the Commission and all the expectations (good governance, fair consultation, participatory policy analysis, helping SMEs to make their voice heard in the policy process and so on).

Another positive feature of this system is the degree of transparency of the policymaking cycle that is guaranteed through the use of roadmaps attached to the CWLP.

Moreover, the current system creates enough room for learning on policy coordination, administrative capacity, and policy formulation (see below on mechanisms).

Finally, there are active and multiple external pressures on the Commission to improve the system.

Limitations:

To begin with, guidelines can be improved in the treatment of proportionality, illustration of analytical methods, and decision-making criteria. As they currently stand, there is a risk of giving too many degrees of freedom to policy officers in justifying their preferred option.

According to the current guidelines of the European Commission, all items included in the annual Commission legislative work program (CLWP) are subjected to impact assessment. There are two problems with this. First, the Commission does not follow this criterion. Several items in the annual work program 'escape' RIA, whereas RIAs have been performed on some comitology proposals and other items outside the annual CLWP. This potentially weakens the accountability of the Commission for deciding to perform a RIA or not, and may hinder a cost-effective use of RIA. Proposals differ in terms of their visibility, the number of stakeholders and economic sectors that are affected, and also in terms of their time-plan (some have a long history of policy formulation; others are relatively new and unexplored and require much more analysis). International experience shows that targeting and selection criteria enable governments to spend more RIA resources on those proposals that really deserve the most in terms of consultation and economic analysis. The selection criteria are often monetary – but problematic for the Commission, given that (tentative) monetary values of impacts on 27 jurisdictions are hard to quantify at an early stage. But there are more legal-political criteria. If the Commission does not target RIA, resources can be wasted on appraisals of white papers, pilot projects, and items that are not-regulatory. This is not to deny that some appraisal should accompany all items in the annual work program. But good regulatory management means being able to recognize priorities and focus the efforts on these priorities – i.e., targeting. RIA costs time and resources, and the opportunity costs of extensive RIA should be acknowledged.

This of course brings us to the well-known issue of proportional analysis within RIA – we should not start from the assumption that 'more' analysis of any proposal is always better since we live in a world of scarce resources. A possible solution to the status quo is to adopt threshold criteria based on substance instead of the formal inclusion in the CWLP. More importantly still, some observers have suggested that the Commission present an annual regulatory agenda to the European Parliament (EP) and the Council. The Commission and the assembly could debate the priorities for RIA every year, as well as receive input from the Council.

On a different topic, there are still criticisms of oversight, especially in relation to the IAB. The criticism revolves around the fact that the IAB is not independent enough from the Commission, and its technical work is too dependent on the officers of the

Secretariat General. Over the years, there has been a discussion as to whether the EU should follow countries like Sweden, the UK, Germany and of course the Netherlands and establish an independent oversight body. We shall return to this discussion in chapter 4, where the issue of balancing monitoring and learning will be addressed.

It should also be noted that currently the RIA process is always a somewhat unfinished business if RIAs are not updated after EP and Council amendments. The usage of RIA in concrete lawmaking is much more problematic that its production. This is a responsibility of the Commission as much as it is due to resistance from the Council's working parties and to some misunderstandings at the EP, as shown by the case studies analysed by Anne Meuwese (2008).

Above, we mentioned an important (negative in our view) difference with other RIA systems (e.g. USA and Canada): EU draft RIAs are not subject to public consultation (that is, publication of the RIA for notice and comment) as they are only published in their final form together with the European Commission's legislative proposal. This makes it difficult to get additional information and feedback on the data and methodology used in earlier stages of the RIA process, particularly before the IAB delivers its opinion on the draft RIA document. Only the final RIA is published, limiting input from stakeholders on data and methodology to the early stages of RIA work.

Add to this that the relation with the stakeholders has been complicated by capability-expectation gaps. Since the White Paper on Governance of 2001, the Commission has 'sold' RIA as a solution to different problems, from governance to the legitimacy of EU regulation. Stakeholders have added their own expectations about this tool, often asking for RIA properties that cannot be simultaneously achieved. Stakeholders, finally, are still learning how to use RIA, and there are contradictory trends in their approach to the RIA process, as shown by studies camouflaged as 'counter-RIAs'.

As regards guidance to RIA drafters, the question of subsidiarity is dealt with more clearly in the guidelines, but there is room for improvement for its assessment in individual RIAs. Moreover, there is a lack of clear quality standards for collection and use of data.
As a result, analyses often does not address 'complex' indirect impacts such as change in investment flows, responses in terms of R&D, and so on.

Finally, there is a challenge for the SG, traditionally called to coordinate policies, to increasingly manage and indeed lead on RIA and better regulation.

3.3.10 MECHANISMS

Pressure and challenge from the external environment – For good or for worse, much of what the EU and the Commission 'do' with RIA is connected to principal-agent relations. In the EU, we can theorize regulatory oversight as a relationship between the European Commission (as agent) and the Member States (as principal). The Member States have coordinated initiatives of successive EU Presidencies to shape the overall trajectory of better regulation. By intervening on the Commission's assessments at an early stage, governments can also shape individual RIAs. And by asking for more 'external review', more reporting, and evaluation, Ministers of Finance have activated multiple sources of challenge. The system is likely to evolve as a different principal-agent mechanism in which the EP and the Council also act as principals and the Commission as agent. Industry is also increasingly influential, through specialized channels such as the Stoiber group.

Relational mechanisms within a complex organisation - Control and challenge also feature within the Commission as a complex organisation. The introduction of an integrated system is the result of struggles for power between DGs. The final format is a compromise between the 'SIA' (a tool to rather integrate policies, championed by DG ENV) and the 'RIA' (a tool to economically rationalize regulatory activity, championed by DG ENTR) (Allio 2009). RIA is used by the Secretariat General to exercise oversight on the Directorates-General that formulate policies in specific areas. Finally, the Impact Assessment Board (IAB) provides yet another source of control and challenge, although some observers think that the IAB is too close to the Secretariat General, and too dependent on its expertise, to fully exercise its important quality assurance functions. Additionally, increased time pressure may limit the IAB's ability to 'think outside the box' when scrutinizing IAs.

Behavioural mechanisms (i): Using RIA to build administrative capacity - All the major regulatory DGs have invested in human resources, expertise, and background studies. Framework contracts with consultancy firms have been activated by the DGs that carry out a high number of RIAs per year. The participation of DGs to RIA working groups with officers from other Directorates has created new networks for appraising policy

proposals from different points of view and using different criteria. All major cross-cutting initiatives are assessed in terms of their impacts by groups comprising officers from different DGs such as DG Enterprise and Industry, DG Environment, DG Health and Consumer Protection, and the Secretariat General. Tellingly, the traditional 'Inter-Service Steering Groups' have been renamed 'Impact Assessment Steering Groups' (European Commission 2008a).

Behavioural mechanisms (ii): Transforming turf battles into virtuous mutual adjustment and some degrees of coordination- Policy teams from a certain DG have a natural hair-splitting tendency when proposals from other DGs are concerned. Commission officers are naturally sceptical of proposals emanating from other quarters. The fact that DGs have strong administrative cultures and in most cases represent single (but important) interests like environment, public health, business, agriculture is an organisational feature of great importance for RIA. DG Enterprise has organisational incentives to look at how proposals from DG Environment or DG Health and Consumer Protection may damage firms. In turn, DG Environment is the organisational unit that checks on whether sustainability principles are really mainstreamed in what comes out of proposals originating elsewhere in the Commission. RIA practice in the Commission naturally draws on these organisational interests. By disciplining the participation of different DGs in the early appraisals of proposals, 'doing RIA' increases the probability that cross-cutting issues are considered, that neither sustainability is entirely sidelined nor the business effects of proposals are underestimated. In a sense, RIA at the Commission is a good exemplification of how partisan mutual adjustment can lead to improvement in the process of formulating policies. There is increasing – but as yet somewhat anecdotal – evidence that the risk of thinking about policy formulation in silos has been reduced (Radaelli and Meuwese, 2010, TEP, 2007: case studies). For instance in the REACH case, although it is usually mentioned in a negative way, interviewees stated that DG Enterprise and Industry and DG Environment would never have been able to reach agreement, had they not been forced to work together on the RIA. On occasion, RIA has even helped the discussion in the College of Commissioners, as was the case with the Thematic Strategy on Air Quality (CAFE), where the RIA laid bare the implications of the more ambitious option in terms of environmental benefits (favoured by DG Environment) on the one hand and the less costly option (favoured by DG Enterprise and Industry).

Actor's certification - Through its central role in the RIA process, the Secretariat General has increased its synoptic understanding of what is being formulated, how proposals have cross-sectoral implications, and where the major hurdles may lie. When proposals seem to contradict the regulatory philosophy of the President, the Secretariat General can ask for more caution and more analysis by simply stating that "this idea will most likely not survive a thorough impact assessment process".

Organisational incentives – The integrated nature of RIA has enabled the Commission to motivate the major DGs to go beyond formal adoption and invest resources in the implementation of impact assessment (Allio 2009). For its part, the Secretariat General has drawn on RIA to evolve from a sort of *primus inter pares* with loose coordination power to a UK-style cabinet office that effectively steers policy formulation. Arguably, this means that there is a trend towards an enhancement of the administrative role of the Commission. Perhaps the Commission is in decline as an engine of integration. Yet its administrative role has been strengthened by RIA, possibly in connection with other reforms that have increased coordination from the top of the Commission, that is, from the Secretariat General. The administrative silos and 'collection of baronies' that beleaguered the Commission at the time of the interviews carried out by other researchers like Hussein Kassim have not disappeared, but are less powerful than in the past.

Imperfect 'relational' mechanisms - As mentioned, case-study evidence shows that both the Commission and the EP are still learning how to use RIAs properly in the legislative process. The Commission has sometimes used RIA to water-proof its own proposals ("the RIA is the best possible evidence-based rationale for our proposal, so the EP should not touch the proposal now that it has been armoured with the RIA"). Overall, the major challenge for the inter-institutional agreement on better regulation is one of using RIA *dialogically*. Regulation is always an incomplete contract when it is designed. In the case of the EU, the real impact of regulation depends on how it will be implemented by domestic administrations, how 27 markets will respond, and how the Courts will decide in the future. In these circumstances, the role of RIA is not to perform the perfect calculations but to provide the platform for evidence-based policy dialogue and planning.

(Far from perfect) Multi-level learning - The Commission and member states have not yet learned how to use the RIA to engage in regulatory conversations and policy

dialogue. This is obviously a tall order. Yet there is too much confusion as to whether the preparation of the RIA is yet another opportunity to make the interests of the member states heard, to produce counter-RIAs, or to respond to domestic pressure groups that feel harmed by the RIA of the Commission. In other words, RIAs is often seen instrumentally as an advocacy tool that anticipates battles to be fought in the Council with other means. Additionally, most member states simply do not have enough administrative capacity to engage with the Commission's RIA dialogically. It is not their fault, the fact is that they do not know how to handle RIAs at home, so the best they can hope for is to build capacity by engaging with the Commission's RIA, but often this engagement is quite messy. The fact that the Commission's RIAs are not updated to represent the final proposal makes it even more difficult for member states to use this tool effectively. Faced with these challenges, the Commission has responded defensively, using legal arguments about the Treaty right to initiate policy to keep the member states at bay when the RIA is being prepared. The result is lack of effective and formalized dialogue between the Commission and the national administrations during the phase of RIA preparation. Some countries like Germany have also codified their approach to RIA with guidelines. This is a useful step, although if there is limited capacity to carry out evidence-based exercises at home, even the best guideline won't help much.

3.4 Germany

3.4.1 Consultation

- *Style and traditions that pre-date RIA*

Public consultation in Germany is established and legitimate. Consultations are rather understood as institutionalised negotiation and bargaining between the public administration and key stakeholders. They seek more to reach consensus than to fully explore the variety of issues raised by an initiative. Probably because they are little formalised and relatively opaque, follow selected channels, and are largely based on mutual trust, consultation rounds meet with the general expectations and satisfaction of those involved. They are not inclusive, however, and forms of e-consultation are emerging only slowly.

- *Consultation in RIA: standards and guidance*

The Joint Rules of Procedure Public regulate the consultation practice of the federal government. While they include provisions for both primary legislation and subordinate regulations, it is up to the lead ministry to determine the timing, scope and channels of the consultation, and select the concerned stakeholders.

The Joint Rules of Procedure indicate as sole consultation deadlines the ones related to the final examination period of draft bills (normally four weeks). As to the other parts of the procedure, there are no set deadlines for consultations or for replies, only the recommendation to start consulting as early as possible. The form and intensity of the feedback to the stakeholders on the consultation are also left to the discretion of each ministry.

Not only on paper, but also in practice, consultation in the RIA process is limited. In particular, there is no explicit ‘participatory tool’ (EVIA project 2008). No or little mutual learning is triggered through RIA. Any relevant interaction and discussion between the public administration and stakeholders occurs at the stage of the ‘normal’ consultation, or through those informal channels that surrogate and partly compensate for the formal RIA process.

Because of the specific nature of consultation, often early drafts of the legislative proposal are already agreed between the lead ministry, the officials in the *Länder*, and the representatives of key stakeholders. Such informal mutual endorsement, which may draw from political argumentations, makes subsequent changes to the proposal difficult. The analysis carried out in the framework of the RIA process does not escape this phenomenon, and RIAs are often used as *ex post* justifications (Hertin et al. 2009:8-9; Nilsson et al. 2008:346).

- *Obligation to address the issues raised by those who have been consulted*

The lead federal ministry should consider the comments and objections of those involved in the draft bill 'in an adequate manner'.

- *How consultation is implemented*

Consultation is activated at a comparatively early stage, with ministries involving in particular the *Länder*, municipalities, the expert community and associations. These initial results are used to draft the first version of the bill, on which the same parties are then formally consulted for a second time. If necessary, a meeting follows. The Federal Chancellery must be informed of the involvement of the various parties.

3.4.2 Design, scope and targeting of the RIA process

- *Who does RIA and when*

The rather long tradition of conceptualisation and procedural requirements for a German RIA system was launched by the so-called *Blaue Checklist* (Blue Checklist) in 1984 to address regulatory quality by focussing on consideration of alternatives to 'command-and-control' regulation and legal clarity. However, the lack of guiding and control mechanisms and weak institutional support reduced the impact of the tool. In 1996, the Joint Rules of Procedure were revised and made the requirement for the 'assessment of the effects of law' (*Gesetzesfolgenabschätzung, GFA*) mandatory for federal ministries. In 2000, the Ministry of the Interior complemented them with RIA Guidelines and a comprehensive RIA Handbook.

According to the 2000 RIA model (Böhret and Konzendorf 2001), the RIA process differentiates into three types of analysis to be carried out at different stages (see

below). The Joint Rules of Procedures were upgraded in 2000 to take this model into account, which still holds.

The renewed commitment to reduce administrative burdens[26] on business has prompted a further revision of the RIA Guidelines in 2006. Since December 2008, the SCM has become the default methodology for the standard *ex ante* assessment of administrative costs. Such complements constituted the main recent change in the RIA practice at the federal level.

Discussion on the nature and role of RIA in the executive continues nonetheless, and covers the introduction of a Sustainable Impact Assessment[27] as well as the extension of the mandate of the NRCC to monitor other costs beyond burdens related to information obligations. Possible options could be the assessment by the federal ministries of compliance costs, according to the so-called 'Regulatory Cost Model' (Bundestag 2009; Bertelsmann Foundation 2009).

The RIA guidelines apply to the federal executive only. Each *Land* has its own RIA policy (procedures and tools) and practice. At the federal level, the regulatory powers lay primarily with the federal ministries. Federal agencies have no formal regulatory powers of their own. As a consequence, most of the RIAs at the federal level are carried out by the ministries, which are responsible for initiating and carrying out RIAs on their own proposals.

The Joint Rules of Procedure do not specify when RIA should be started, although they point out that it should occur as early as possible. A period of at least four weeks is indicated for the examination period, which should include RIA, consultation and legal checking.[28] In practice, the time dedicated to undertaking RIAs varies substantially, but it usually quite short, generally lasting a few weeks rather than months (EVIA project 2008).

The process normally unfolds as follows:

[26] The focus of the programme is limited to burdens originating from information obligations included exclusively in federal legislation.
[27] In winter 2008, the federal government decided to expand the scope of RIA to reflect its Sustainable Development Strategy. This decision followed a recommendation made in March 2008 by the Parliamentary Advisory Council on Sustainable Development. The Joint Rules of Procedures and the general RIA Guidelines are being amended accordingly.
[28] See Section 50 of the Joint Rules of Procedures.

- The lead departments carry out the assessment of the various impacts, also in consultation with other relevant ministries;
- The other ministries examine and comment on those aspects of the RIA that relate to their specific area of responsibility. In any case, the Ministry of Finance and the Ministry of Economics must check the quality of the financial implications on the public administration and the general costs on the economy, respectively.
- For joint proposals, a statement is obtained from the relevant other ministries.
- The lead ministry summarises the results in a cover sheet and an explanatory memorandum, which are circulated to the other ministries for the examination of the aspects relating to their area of responsibility.
- If deemed necessary, ministries may ask for a further assessment. They can even withhold their consensus for the proposal to be forwarded to Cabinet, which means that they have a *de facto* veto power.
- The Ministry of Justice and the Ministry of Interior proceed to a legality check, which in case of doubts entails a scrutiny of the constitutionality of the proposal. The Ministry of Justice is primarily responsible for the clarity of the language.
- The draft bill is finally checked by the Chancellery for compliance with the Joint Rules of Procedure before it is submitted to the Federal Cabinet for decision, together with a summary of the assessments.

- *Scope: what is subjected to RIA, for an early assessment or for a full RIA*

In accordance with the 2000 analytical model, federal ministries are required to follow these steps:

- the *preliminary RIA* tests whether regulation is necessary and identifies and compares alternatives;
- the *concurrent RIA* should be used to check whether the selected options are proportionate and compatible; and
- the *retrospective RIA* seeks to assess whether the regulatory objective were achieved after implementation (i.e. *ex post* evaluation).

As the term indicates (*GFA*), the procedure applies essentially to all *legislative* proposals of the federal government. The Rules define 'regulatory impact' as the main impact of a law. The main rationale behind the tool is to inform decision-makers and reducing the costs of regulation. RIA therefore should cover both the intended and unintended consequences of a proposal, including all economic, environmental, and social impacts.[29]

Specifically, RIAs should:

- explain the intended effects and unintended side-effects of the proposed legislation;
- identify and assess impacts on gender equality; on the federal public budget and the public budgets of the *Länder* and municipalities; on private industry, in particular small and medium-sized enterprises (SMEs); on consumers; on unit prices and the price level in general; as well as on administrative costs under the SCM methodology; and
- provide details of any further impacts, if so requested by a federal ministry, a Federal Government Commissioner (including the Federal Performance Commissioner), or the NRCC.

Academic research shows that the formal compliance with the provisions and the approach outlined in the Joint Rules of Procedures is quite high. However research on actual compliance indicates that German RIAs fail to meet the required criteria and standards (Veit 2008:81-84).[30] This is also confirmed by empirical research done in the framework of the EU-funded EVIA project: "RIA procedures are only partially and often formalistically implemented. However, only a minority of RIAs are carried out in line with requirements, in many cases a serious assessment is not done at all. RIA statements frequently describe impacts as 'uncertain', 'impossible to determine' or 'insignificant' without further explanation or detail. The exact level of implementation cannot be determined because the Ministry of the Interior does not keep a record of implementation or quality. It is important to note, however, that there are informal

[29] See Section 44 (1), second sentence of the Joint Rules of Procedure.
[30] Veit (2008) considers the following elements of the RIA analysis: coverage of alternatives, assessment of impacts on public budget, implementation costs, administrative burdens on businesses implications on the economy, as well as *ex post* evaluation.

assessment activities which can be far more extensive than formal RIA and often involve stakeholder participation and the use of external advice" (Hertin 2006).

Moreover, when compared to impact analyses carried out on legislative proposals dating back to 1977, it appears that procedural requirements like the Joint Rules of Procedures or other guidelines have indeed increased formal compliance, but not necessarily improved the overall depth and quality of the assessments (Veit 2008:85).

- *Targeting: what is caught in the RIA "net", exclusion criteria*

The procedure is, in principle, mandatory for all federal primary laws and secondary regulations with substantial impacts. There are no formal selection criteria. The lead ministry decides whether and what kind of assessment is required, but other affected ministries can insist on further assessment if they consider it necessary. The procedure does not apply to strategies, action plans and other 'soft' policy instruments. The guidance requires an analysis that is proportionate to the scope and complexity of the legal initiative (EVIA project 2008).

3.4.3 Internal accountability

Because ministries enjoy wide-ranging autonomy, they are the sole responsible for the content and quality of RIAs and for inter-service consultation, which is compulsory but not binding. The gate keeping role of the ministries in the inter-service consultation is effective but vetoes have occurred very rarely. Discussions between clashing ministries are usually settled before reaching that last resort. At the moment, no single dedicated unit exist for the coordination or monitoring of RIAs.

There are centralising and unifying elements, though. The Interior Ministry is responsible for drafting guidance and administering the system. Together with the Chancellery, it also performs a final (though mainly procedural) check before the proposal is tabled to the Cabinet. In the framework of the administrative burden reduction strategy, the Better Regulation Unit (BRU) of the Chancellery plays a

coordination role and the National Regulatory Control Council (NRCC) serve as a gatekeeper.[31]

However, no equivalent systematic check on the quality of other assessments is performed on normal RIAs, which are distinct from the administrative burden measurement. And the resources of these coordinating bodies are small, and there is no formal budget for RIA. Time resources dedicated to RIA in practice vary substantially, but they tend to be small, consisting typically of days rather than weeks or months (Hertin 2006).

3.4.4 External accountability

- *Publication requirements and how they work in practice*

For further details, see the section "Transparency requirements" below.

- *Scrutiny by audit office / what is scrutinized and how*

Federal RIAs are not formally and systematically scrutinised externally.[32]

The only exception relates to the assessment of administrative burdens on business, since 2006. Both the Act establishing the NRCC and the Joint Rules of Procedure oblige the federal ministries to submit their draft bills to the NRCC as a part of the inter-ministerial coordination four weeks before they are forwarded to the Cabinet.[33] As such, the NRCC is set on an equal footing as any other federal ministry. Upon invitation by the *Bundestag*, the NRCC also advises and comments on initiatives of the House.

The law limits the mandate of the NRCC to exclusively check administrative costs arising from information obligations included in federal legislation. Its scrutiny does not cover substantive compliance costs, direct financial costs, or so-called 'irritating' burdens. Within its remit, the NRCC assists the line ministries in examining and

[31] In addition to these two bodies, the quality control system in the field of administrative burden assessment is ensured by a network of SCM officials in the line ministries.
[32] The primary task of the German Court of Audit (*Bundesrechnungshof*) is to examine federal financial management. With regard to the broad agenda of Better Regulation and the reform of the public administration, the President of the Court of Audit acts *ex officio* as Federal Performance Commissioner (*Bundesbeauftragten für Wirtschaftlichkeit in der Verwaltung*). This mandate includes putting forward proposals, recommendations, reports and opinions to stimulate and enhance the efficiency of and accordingly organise the federal administration.
[33] Cfr. Section 45 of the Joint Rules of Procedures.

measuring the costs both *ex ante* (for new legislation) and *ex post* (for existing legislation); in identifying possible reduction measures; it supports the development of the SCM; and follows relevant initiatives at the EU level.

The NRCC members organise themselves as 'rapporteurs' (*Berichterstatter*) for specific policy areas. Each rapporteur drafts a proposal for every new draft bill falling in his/her area of competence. The proposals are then discussed by the NRCC board and formalised in the official NRCC opinion.

The criteria used by the NRCC to assess draft bills are:

- Has the responsible federal ministry clearly quantified the expected administrative costs using the SCM?
- Has the responsible federal ministry sufficiently examined less costly alternatives?
- Has the responsible federal ministry chosen the least burdensome alternative while taking the legislative intent into due consideration?

- *Reports and inquiries by parliament.*

Parliament has so far not issued any formal report or launched any inquiry on the state of the RIA regime of the federal government, its procedures and the quality of the RIA reports produced.

- *Transparency requirements*

Ministries are not required to provide feedback to the parties consulted in the RIA process, to explain what has been retained and why. Nor must they publish the RIA report. Only a summary of the assessments needs to be systematically made available as part of the documentation attached to the bill sent to Cabinet and – if approved – forwarded to parliament. Practical accessibility remains therefore limited in practice because the documents are difficult to find in the Parliament's database of legal proceedings (EVIA project 2008).

The opinion of the NRCC is submitted to the lead ministry but also included in the annex to the final draft bill sent to the Cabinet. It will thereby become public once passed on to parliament together with the Cabinet decision.

In terms of reporting, both the federal government and the NRCC are legally required to report annually. While the first reports to the *Bundestag* on the overall status of the programme, the latter submits an annual report to the executive on the status of the *ex ante* administrative burden reduction procedure. No equivalent requirement exists on other aspects of RIA.

There is also no central database or website listing planned and completed RIAs.

- *Participatory tools in RIA*

There are no standard criteria and procedures with regard to consultation and communication of RIAs, although these are considered integral features of the RIA process by both the Joint Rules of Procedures and the guidelines of the Ministry of Interior. However, those provisions remain general and each ministry is free to interpret them differently. Practice varies therefore significantly, depending on the nature of the proposal, the political context, and the kind of analysis and input sought.

Practice with administrative burden assessments differs, as stakeholders are in this case involved on a more active and continuous basis. They help determine relevant administrative costs, and develop options for simplification. In addition, ministries present the results of the administrative burdens measurements to stakeholders before their publication as part of quality assurance proceedings. No formal guidelines exist, however, to regulate such interaction.

3.4.5 Economic sophistication

Economic analysis remains rather narrow, covering direct impacts on business (EVIA project 2008). Beyond legal considerations, economic analysis focuses essentially on budgetary impacts. The Joint Rules of Procedure set requirements to consider and estimate economic costs and benefits, but the only impacts explicitly mentioned in relevant documents are budgetary and administrative costs, costs for the economy and companies (esp. SMEs and industry), effects on prices, price levels and consumers and gender aspects. However, these provisions remain vague, and accompanying guidelines are not elaborated and they indicate little more on how the analysis should unfold. In practice, RIAs typically only address administrative costs, direct economic costs and price effects (EVIA project 2008).

Hertin et al. (2009:7) summarise the situation quite well when they note that "Not surprisingly, good analysis is replaced by standard statements such as 'the costs cannot be quantified' or 'alternatives: none'. This minimalist attitude is, however, not universal. In a considerable number of cases, efforts are made – sometimes due to pressure from the economic affairs and finance ministries - to assess economic and administrative costs much more fully. Where this is done, the assessment tends to rely on figures provided by stakeholders. There also appears to be a strong reluctance to include conditional or uncertain information. Although the exact timing varies, policy assessment is typically a one-off activity undertaken towards the end of the policy formulation process."

- *Analytical models for RIA*

Research in the framework of the EVIA project indicates that the large majority of RIAs only use very simple costs calculations.

The 2008 guidelines of the Economic Ministry[34] refer to a standard sheet that desk officers may use when carrying out the economic analysis, as well as to examples of possible ways of expressing economic results. More importantly, guidelines also list a number of guiding questions which should be addressed in order to obtain determined categories of costs and benefits. They also invite desk officers to consider using CBA, CEA, sensitivity and risk analysis. Nonetheless, they do not provide concrete methodological support on how to apply these approaches. Moreover, these guidelines are not binding and thus not used systematically.

As regard the classification of analytical tools provided by Nilsson et al. (2008:338), the German RIA system does not systematically rely on any in particular (ibid. p.348). Formal tools and advanced tools (e.g., computer-based models) were used in five and in two of the seven cases studied, respectively (ibid. p.345 and 346). For both categories, however, the authors specify that the process did not actually follow the formal, standard procedure as described in the Joint Rules of Procedures. On this point, the authors report a revealing quote: ''for the use of formal method you need commitment by all parties to a certain approach… [But] you don't get this" (Nilsson et al., 2008: 346).

[34] See http://www.bmwi.de/BMWi/Redaktion/PDF/A/arbeitspapier-zu-abs-4-ggo,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

- *Decision-making criteria*

The current RIA system is not necessarily geared towards integrating policies. The fact that no single set of guidelines exist but many line ministries have developed more or less independently their specific guidelines indicate that the final RIA report is expected to be more the sum of individual and autonomous assessments rather than an integrated exercise weighting synergies and trade-offs. Moreover, guidelines do not provide targeted advice on how to compare alternative options and various impacts.

- Quality standards for the use of expertise and peer review of economic analysis

The guidelines do not set any general criteria and standards as regards the quality of the data collected and on how to use it in the decision-making process.

- *Treatment of uncertainty*

While not expanding thoroughly on it, the RIA guidelines issued by the Ministry of the Interior explicitly address risk assessment as an integral part of the process of developing regulations.[35] The expected inclusion of the sustainability dimension means that ministries will soon be required to take account of the interests of future generations when assessing the risks and threats raised by proposed regulations. Other structures and initiatives focus on different aspects of risk, for example the work of the Federal Institute for Risk Assessments serves as the basis for scientific advice to the relevant Federal Ministries and agencies.[36]

- *Administrative burdens*

New guidance on assessing administrative costs using the Standard Cost Model (SCM) was published in 2007 (NRCC, 2007) and in 2008. The NRCC was set up to review all new laws and regulations with regard to their administrative costs and also advises on applying and further developing the SCM methodology to existing

[35] The Guidelines explicitly draw on Section 44 of the Joint Rules of Procedures.
[36] For further details, see http://www.bfr.bund.de/cd/template/index_en.

regulation. Support on how to apply the SCM is provided also by the BRU and the Federal Statistical Office.

- *M&E standards for individual RIAs*

There is no systematic requirement to indicate monitoring and evaluation deadlines on individual RIAs. Selected RIAs[37] have however been evaluated and the resulting report was presented to the Federal Cabinet and approved.

As in principle laws are intended to create permanent regulations, review or sunset clauses for entire legislative acts are not systematically used. However, they may be added following a decision by the lead ministry, for example where a new approach is being tested, or when it is important to check what happened in practice. In such cases, the clause would apply only to specific elements, not to the entire legal act.

3.4.6 Multi-level government issues

- *EU-domestic relations*

The Interior Ministry has issued a guidance document concerning EU Impact Assessment. These guidelines encourage ministries to support and critically review EU Impact Assessments to ensure that German interests are considered at an early stage in the decision-making process.

Each federal ministry is responsible for organising the transposition of EU legislation in its area of competence, on the basis of the provisions included in the Joint Rules of Procedures. Accordingly, the type of RIA and the kind of analysis carried out are not dissimilar to what federal ministries normally do when preparing bills of domestic origin.

[37] RIAs on the following draft bills :

- Federal Ministry of the Interior – Federal Data Protection Audit Act (*Bundesdatenschutzauditgesetz*) and the Act on Electoral Statistics (*Wahlstatistikgesetz*);
- Federal Ministry for Family Affairs, Senior Citizens, Women and Youth – Act on the Organisation of Services for the Elderly (*Altenhilfestrukturgesetz*);
- Federal Ministry of Finance – business taxation;
- Federal Ministry of Labour (ordinance on orthopaedics (*Orthopädieverordnung*) and the evaluation of various acts; and
- Federal Ministry of Justice with regard to the act governing mediation between perpetrators and victims (*Täter-Opfer-Ausgleichsgesetz*) and the Witness Protection Act (*Zeugenschutzgesetz*).

- *Trade*

We did not find evidence of systematic consideration of impacts on international trade.

- *Provincial-federal relations*

Consultation with the *Länder* on the substance of a policy and on information to be included in the RIA is considerable, especially if the law requires the consensus of the *Bundesrat*. The *Länder* are closely involved in federal RIAs through working groups. Nonetheless, the vertical separation of competencies between the Federation and the *Länder*, typical of the German system, constitutes a serious challenge. As the regions are typically responsible for implementing federal laws, federal desk officers may lack detailed relevant technical knowledge, thereby jeopardizing a robust RIA. Although requests for information are frequently directed to the *Länder*, there is no institutionalised linkage between RIA-type activities at the regional and the national level (EVIA project 2008).

Differences between *Länder* are significant, both with regard to the legal framework and procedures for RIA. The *ex ante* assessment of risks in at least one *Land* forms part of mandatory impact assessment in the course of the law-making process. Sunset clauses have been regularly used in many *Länder*, in some cases since many years.

3.4.7 Guidance and support for RIA

The Joint Rules of Procedure remain silent on the methodologies to be used. RIAs should estimate both the costs and the benefits of a proposal, in both monetary and non-monetary terms. While not being explicitly stated, the underlying rationale is to ensure that the costs of the proposed law are justified by its benefits. As a complementary guidance, the Ministry of the Interior has issued guidelines in 2006. Specifically, RIAs should follow these steps:

- Step 1: Analysis of the regulatory area (problem and system analysis);
- Step 2: Identification and definition of policy objectives;
- Step 3: Development of alternatives to regulation;
- Step 4: Examination and evaluation of alternatives to regulation, including the "zero option" (taking no action); and

- Step 5: Result documentation.

In addition, line ministries have developed tailored guidelines on the specific aspects falling under their portfolios.[38] The Federal Economics Ministry has for instance issued guidelines on how to carry out cost-benefit and cost-effectiveness analyses, and estimate prices in a structured way.

Also because of Germany's legal tradition, the majority of German civil servants with university degree are lawyers. They have therefore undergone general legal training, and only recently the individual federal ministries have organised courses on specific topics related to Better Regulation, not least in the SCM area.

Training on RIA is provided by the Federal Academy for Public Administration (Bundesakademie für öffentliche Verwaltung, BaköV) four times a year or upon request by individual ministries. In addition, internal training sessions are organised by individual ministries. A systematic approach to enhance capacity building on RIA is emerging in the federal government.

3.4.8 STRENGTHS AND LIMITATIONS

The following tries to explain the discrepancy found in the German RIA system between the adoption of a fairly robust and comprehensive procedural system and the relatively marginal relevance that RIA reports play in practice. It should be noted that things are progressing in Germany and rather than describing the current situation, we

[38] The ministerial guidance follows the provisions of the Joint Rules of Procedures and include:
- Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2005), Gender mainstreaming in drafting of legislation (*Gender Mainstreaming bei der Vorbereitung von Rechtsvorschriften*) – (in accordance with section 2 of the Joint Rules of Procedures);
- Federal Ministry of the Interior (2000), Guide to regulatory impact assessment (*Leitfaden zur Gesetzesfolgenabschätzung*); and (2009, draft) RIA guide for practitioners (*Arbeitshilfe zur Gesetzesfolgenabschätzung*), – (section 44 (1) of the GGO);
- Federal Ministry of Finance (2006), General requirements of the Federal Ministry of Finance for statements of the impacts of legislative proposals on the income and expenditure of public budgets (*Allgemeine Vorgaben des Bundesministeriums der Finanzen für die Darstellung der Auswirkungen von Gesetzgebungsvorhaben auf Einnahmen und Ausgaben der öffentlichen Haushalte*); and (2008), Regulatory impact assessment in tax law (*Gesetzesfolgenabschätzung im Steuerrecht*) – (section 44 (2) of the GGO);
- Federal Ministry of Economics and Technology (2008), Guide for Practitioners; and Costs to private industry and price impacts (*Kosten für die Wirtschaft und Auswirkung auf die Preise*) – (section 44 (4) of the GGO; and
- Federal government (2008), Guidelines for the ex-ante impact assessment of administrative burdens using the standard cost model (*Leitfaden für die ex-ante-Abschätzung der Bürokratiekosten nach dem Standardkosten-Modell*) – (section 44 (5) of the GGO).

seek here to highlight the paradigms that have led to a sub-optimal implementation of the tool in the past decade.

The main positive features of the system are its anchoring in administrative procedures, which state that the assessment should eventually lead to an integrated analysis (of costs and benefits, direct and indirect, quantifiable or not, in the economic, social and environmental domain). The system is not frozen, and the inputs sparkled by the administrative burden reduction strategy may bear great potential for further, more comprehensive innovation. The introduction of the SCM has raised a general awareness among officials and decision-makers of the need for more and better quantification. The quality control and training systems related to the strategy have brought new institutions and unblocked traditions.

The RIA system in Germany has remained caught in the overall logic and balance of powers of the federal bureaucracy. Certain factors have undermined the spirit of RIA, and jeopardised efforts to instil a more outspoken and systematic evidence-based approach to decision-making. All in all, the main rationale of the system has not become achieving regulatory efficiency. Specifically, the following factors have hindered a full exploitation of RIA in Germany:

- the search for (political) compromise and consensus
- the maximisation of votes
- the political agendas controlling (if not dictating) the pace of the regulatory process
- the corporatist approach to the interface between the administration and the stakeholders (collection and validation of data, consultation).

Against this background, the progressive consolidation of RIA requirements into formal guidance documents was not enough to counter the underlying logic.

A second consideration refers to the structural governance of the federal administration. As mentioned above, the federal ministries enjoy a high degree of autonomy, and they have developed a sort of 'not in my backyard' culture. In contrast to other jurisdictions,[39] where departments are in competition between each other and control each other, German federal ministries tended in the past to pursue own policies and develop their own interpretations of how the procedure should unfold.[40]

[39] For instance the European Commission's DGs, although also this is changing, exactly due to the introduction of an integrated IA system.
[40] Not least because ministers might be of different political colours than the Chancellor and therefore have other (party or personal) agendas.

Accordingly, a culture of policy integration, of evidence-based (rather than value-based) discussion, and of transparent consultation and argumentation has only emerged in the recent past. In the meantime, RIA, despite being provided for on paper, could not find its space.

A further element is the general lack of incentives to produce comprehensive analyses supporting a legislative proposal and to enhance transparency (two of the main added values brought by successful RIA systems). Because of its relative strong position in the federal decision-making, the ministerial administration has little interest in 'opening the box', preferring on the contrary to preserve a certain monopoly of the provision of information to the political class. A similar approach is found among stakeholders involved in the 'inner circle' of the bureaucratic networks. These are usually key sectoral associations, trade unions and NGOs, which have different access to files depending on who the lead ministry is. These stakeholders serve as gate-keepers and their position is legitimate exactly because they can control the flow of information to the administration. For the political parties in government, there are little incentives to provide the opposition in Parliament with more (contradicting) information on a given proposal, as this could jeopardise its final adoption (Veit 2008:86). More generally, politicians consider RIA as a limitation of their discretion as political decision-makers. As a result, RIA has developed slowly and has been internally driven as a relatively inward-looking tool. The transparency of the system remains one of its main limitations.

In addition, there has never been a strong mechanism for quality control of RIAs. Draft RIAs are indeed circulated to inter-departmental consultation, but for the reasons outlined above, discussions on the quality of the evidence presented rarely became confrontational. Veit (2008) argues moreover that the control system suffers from the lack of any institution or body adequately equipped and intrinsically self-interested in improving RIA quality. In a few domains there actually are units within the respective ministries that oversee some elements of the RIAs produced,[41] however, this is not generalised. If not stimulated to continuously improve, desk officers do not have any incentive to invest in preparing more sophisticated RIAs, a tendency that further de-legitimizes RIA. Paradoxically, in a *Rechtsstaat* system such as the German one, informal mechanisms are often preferred and are substantially more effective than the more formalised but 'empty' RIA.

[41] Veit (2008:89) indicates the impacts of new legislation on competitiveness, on large companies, and on the State budget.

A counter-example of such dynamics is the case of administrative burdens (AB). Since 2006, Germany has embarked on a strategy to reduce AB, making remarkable progress within short time both in terms of the factual measurement and the related simplification measures, but also in terms of institutional and procedural innovations. The latter, which are of interest in this paper, refer to the establishment of a central Better Regulation Unit (BRU) within the Federal Chancellery as well as the creation of an external independent body, the National regulatory Control Council (NRCC). Both the BRU and the NRCC constitute a novelty as they bring elements of centralisation and oversight to the activity of the executive. As such, they defy the deeply embedded (and constitutionally rooted) tradition of autonomous ministries around a mere coordinating centre. In addition, the AB reduction strategy is supported by a network of officials in each line ministry responsible for liaising with the BRU and the NRCC on the measurement and simplification proposals, and for providing training.

As a consequence, the AB analysis unfolds relatively smoothly and has been relatively well and rapidly accepted by departments (NRCC 2008). The fact that officials are now controlled by an external body constituted the main challenge. However, this additional element of possible resistance seems to have been neutralised and the NRCC enjoys legitimacy and credibility.

A number of caveats, however, should be retained:

- the AB reduction strategy is based on the Standard Cost Model (SCM), a methodology which is simple, relatively straightforward to apply – and therefore easy for the officials to absorb;
- the scope of the AB strategy is quite narrow, as it covers only costs derived from information obligations included in federal legislation – and therefore affects only in part the concrete work of desk officers;
- more generally, the AB strategy is a relatively technical/technocratic endeavour, which does not fundamentally questions political assumptions – and therefore it does not impinge heavily in the policy and political decisions of the administration.

For this reasons, the results achieved by the AB strategy cannot be representative of the status of RIA in Germany.

3.4.9 MECHANISMS

Accountability - Because of the intense political interaction among the federal ministries, and between the federal executive and the *Länder*, the supporting evidence produced to inform a specific course of action is a powerful leverage used in political discussions. This fiche suggests however that the current RIA system is not the pivotal platform around which this exchange of information originates and unfolds.

Accordingly, it is arguably relatively easy to ascertain whether the RIA process and its outcomes (the RIA documents) are part of an explicit accountability mechanism – notably to monitor and control the bureaucracy. A number of considerations speak for a weak accountability rationale in the use of RIA at the federal level.

First, the Federal Cabinet (and later the Parliament) sees only a marginal part of the RIA process, mostly at the very end. As mentioned above, both institutions consider only a summary of the main results of the analysis produced by the lead ministry.

Second, what is described in the formal provisions of the Joint Rules of Procedure and the various guidance documents supporting the process is not reflected in the standard RIA practice of the ministries. Moreover, the outcome of the formal RIA process is only one source of evidence informing decisions. A parallel, informal and unstructured process often complements or even substitutes the RIA process. This latter point hints to the fact that the desk officers themselves have tended to see RIA rather as an ancillary practice that must be complied with once the main course of action has been determined at earlier stages and through other channels.

Hence, the formal RIA process does not seem to be geared toward enhancing the control of the political over the bureaucratic realm.

On the other hand, the fact that a fully-fledged RIA system has not emerged, also because of the negligence (or boycott) of the political leadership, may be a proof of the strong grip held by politicians over their bureaucracy. RIA in Germany is often an ex post justification of decisions derived from political calculations and negotiations (Veit 2008; Hertin 2009). From this point of view, the weakness of the RIA system is a clear control mechanism.

Behavioural mechanisms - The culture of autonomous ministries with a traditionally weak coordinating centre contributed to hindering the emergence of an institutional champion for leading and managing a new RIA system. This institutional vacuum has

resulted over the years in a slow and partial buy-in by desk officers in the RIA process. This has been accentuated by the fact that the parallel de-centralised approach has proved not to work fully, as it has not triggered a sound competition between departments and ministries to improve their respective RIA practices.

In addition, for many years, policy and regulatory initiatives – and therefore the daily activities of the desk officers – have been determined more by ministerial policy agendas than by a comprehensive evidence-based rationale. Considerations pertaining more to the policy and political realm of their own ministry (and minister) prompted the formulation and preparation of the proposals.

Furthermore, the rather weak quality control system has not created sufficient incentives and sanction mechanisms necessary to drive the reform forward on an individual basis.

As a consequence, learning on and from RIAs has remained limited within the federal executive, and did not manage to overcome the traditional, cautious 'trial and error' approach typical of the German bureaucracy, which abhors quantum leaps (fundamental reforms) and prefers proceeding with incremental changes instead.

The introduction of the federal programme for measuring and reducing administrative burdens – an agenda that enjoyed a far greater political commitment and a stronger legal basis than RIA – has introduced a novel element in the dynamics of regulatory evaluation. Despite its limitations (see above), the red tape programme arguably created the initial conditions for a shift in the regulatory culture, all to the good of enhancing learning and coordination around the RIA process.

Relational mechanisms - Because of the comparatively weak relevance that RIA has had in the political and public debate about regulatory reform in Germany, politicians have traditionally attached relative weight in their attempts to reform the system. At the same time, they have not backed existing good practices with the necessary support. Certification is not a feature of the German system: not only RIAs are not rubber-stamped by senior officials and/or ministers, but also institutionally there is no core validation of RIAs. The only fact that no central record is kept of the RIAs carried out reveals a lack of ownership of the process by a single institutional actor.

In other words, the weak credibility and legitimacy of the actors entrusted with the reform of RIA is a complicating factor in the German federal bureaucratic environment.

While the Interior Ministry is keen to enhance its role as "guardian of the Joint Rules of Procedure" (and therefore of the RIA system), for a number of reasons, including small resources, it is not recognised as the legitimate interlocutor by the operational ministries. Similarly, the Chancellery could be well positioned to take over the coordination and leadership of the system, but federal ministries tend to resist such an evolution.[42] As a result, the RIA system has remained highly fragmented.

Environmental mechanisms - The success story of the development of the SCM and the NRCC in Germany within a short period of time proves that the chances to implement regulatory and administrative reforms increase exponentially if the rationale for reform is not exclusively internal to the administration and inward-looking.

That specific front of action was enshrined in the coalition agreement signed straight after the elections in 2005; it was discussed in Parliament, formalised in a law that simultaneously established a dedicated oversight body, anchored in new institutional procedures within the executive; and it received open, formal as well as practical support from business associations. Efforts have also been made to harmonise SCM processes between the federal and the *Länder* programmes.

The contrast with RIA could not be more striking. Despite a much longer life in the administrative provisions of the executive, RIA still does not enjoy a dedicated scrutiny body, is not subject to open political debates, does not have a legal basis, and its use and benefits are still considered controversial by some stakeholders.

RIA has not emerged as an autonomous, indeed pivotal element in the Better Regulation agenda within the public administration, the political class, and among stakeholders. As it is not linked to forward planning and to consultation, it tends to be done down-stream, behind closed doors, and to abide to internal procedural requirements. As such, the RIA process does not seek to change the *modus operandi* of the public administration, and does not impact decision-making – quite the opposite, it is hostage of it.

[42] Certainly in order to preserve the current degree of discretional autonomy but also considering that for historical reasons Germany has abhorred strengthening the centre of the government.

3.5 Canada

In Canada, RIAs are named Regulatory Impact Analysis Statements (RIAS). For the sake of consistency with the rest of the report, we use the term RIA.

3.5.1 Consultation

- *Style and traditions that pre-date RIA*

In Canada, the analysis of the impact of proposed and existing policies has been discussed since the early 1970s. In 1971, the Law Reform Commission (LRC) proposed to study "the broader problems associated with procedures before administrative tribunals." The Minister of Consumer and Corporate Affairs asked the Canadian Consumer Council to undertake a series of studies of consumer interest in regulatory agencies, including marketing boards and so-called self-governing professions and government monopolies.

One year later, the Parliament passed the Statutory Instruments Act and created the Standing Joint Committee of the House of Commons and Senate on Regulations and Other Statutory Instruments. In 1973 and 1974, the Canadian Consumer Council (later renamed as Consumer Research Council) published reports on regulatory agencies, which dealt with both substantive and procedural issues. This led to the passing, in 1976, of the report “The Way Ahead” issued by the federal government after wage and price controls had been introduced in October 1975. The paper indicated that the government was undertaking a "fundamental examination of the major structural components of our economy and our society." The Report proposed that cost-benefit analysis be applied to government regulation.

The first requirements for a professional Socio-Economic Impact Analysis for major regulations were introduced in 1978, supported by a 1976 Treasury Board guide on how to conduct cost-benefit analyses. This represented one of the earliest uses of a form of systematic RIA in an OECD country.

In the same year 1978, the government of Canada made formally requested the Economic Council of Canada to undertake a series of specialised studies on the processes of regulation and its effects on the economy. The mandate was, in other words, to assess performance. This initiative was important not only because it brought

the awareness of and commitment to regulatory reform at the highest political level, but also because it involved an independent advisory body (the Economic Council) external to government *per se* (OECD 2002).

In the early 1980s, regulatory reform focused on specific deregulatory initiatives and on improving citizen access to the process through publication of an Annual Plan describing current regulatory initiatives. Parliament also actively pushed at that time. In 1980 only, the House of Commons' Special Committee on Regulatory Reform released 29 recommendations for improving regulatory management.

The 1985 Ministerial Task Force on Program Review (Nielsen Task Force) identified 146 federal regulatory and regulatory-related programs, and estimated that in 1985-86 the programs involved 34,500 persons and cost the government, including compliance monitoring and inspection, an estimated $2.7 billion. Canadians, according to the Review, paid hidden costs amounting to at least $30 billion annually. The review also found that public consultation was inadequate, often uneven and inconsistent, because of a lack of procedures to ensure the inclusion of all relevant stakeholders in the regulatory process.

The Task Force put forward a set of recommendations to improve policy appraisal, and RIA was officially introduced in 1986. The tool was developed on the basis of two sets of principles. One the one hand, the *Guiding Principles of Federal Regulatory Policy*, underscored the government's commitment to 'regulate smarter', recognizing the vital roles of an efficient market place, and the need to limit the growth of new regulation by ensuring that benefits exceed costs, without pleading for unconditional de-regulation. Regulatory strategies had to enhance accessibility and transparency, and be based on a tighter collaboration with the provinces. As such, these principles provided a general framework for the regulatory reform strategy, and they were directed at ministers and departments. On the other hand, the *Citizen's Code of Regulatory Fairness* set standards of fairness, accessibility and accountability in the government's use of its regulatory powers. In this respect, this second set of principles was meant to hold regulators publicly accountable for both the substance of regulations and the management of regulatory responsibilities. The principles were directed at Canadian citizens. Since the beginning, therefore, 'responsive regulation' was the underlying goal of the government, and RIA included a requirement for public consultation and greater transparency, as explained below.

Revised regulatory policies were then issued in 1995 and 1999. The rationale behind these reform waves was mainly related to regulatory effectiveness. More could be done in terms of achieving the regulatory net benefits for businesses (notably, SMEs) and for citizens and to demonstrate the relation between policies (including regulations) and outcomes. At the same time, the government sought to improve the regulatory management system and raise compliance by individual departments (OECD 2002).

- *Consultation in RIA: standards and guidance*

Consultation is embedded in the RIA process and departments are required to indentify all interested and affected parties (including First Nations, Inuit, and Métis communities and peoples; national, regional, and local Aboriginal organisations) during the various stages of the regulatory process. Dedicated Guidelines for Effective Regulatory Consultation are available on the website of the Treasury Board of Canada.

When undertaking consultation, departments and agencies should:

- Inform the public on the nature and implication of the policy under examination by relying on available evidence, science or knowledge;
- Ensure that stakeholders have a say in defining policy objectives;
- Set a clear timeframe for the process and provide feedback on the outcomes of the consultation and the priorities considered in decision-making.

Consultation also applies to draft RIAs that are published in the *Canada Gazette, Part I*, for notice and comment. The standard comment period is 30 days, but it can vary based on legislative requirements, international obligations, and other considerations. For proposals for new and changed technical regulations that may affect international trade the comment period is of at least 75 days.

- *Obligation to address the issues raised by those who have been consulted*

Following the notice and comment period, the relevant department is expected to provide feedback, revise the RIA where appropriate and address public comments in a revised regulation. When concerns raised during the consultation have not been addressed, adequate justification should be provided. As a matter of fact, the consultation document should already include information on how feedback will be provided to stakeholders.

Input from stakeholders can be sought through several means, ranging from informal procedures to the use of questionnaires, targeted enquiries, and evaluations. A report should be drafted at the end of the process and should also include an evaluation of how the consultation was implemented in relation to the initial plan. This report is then distributed to consulted parties and published online. Consultation findings are also summarized in the RIA.

- *How consultation is implemented*

According to Jacobs (2006), the quality of consultation in Canada is high and was already qualified as such in previous reviews by the OECD (2002) and the Canadian report *Smart Regulation: a Regulatory Strategy for Canada* of 2004. In particular, it seems that consultation has an impact on proposals, as in several occasions a draft bill was changed following the input provided by stakeholders.
However, the Smart Regulation Committee that reviewed the system in 2004 still found some instances of dissatisfaction, often because stakeholders were involved too late in decision-making; in other cases instead a lack of coordination inside the government caused some problems and put some stakeholders at a disadvantage in the consultation process.

3.5.2 Design, scope and targeting of the RIA process

- *Who does RIA and when according to written guidance*

The latest reform of the federal regulatory agenda was undertaken in 2007 through the *Cabinet Directive on Streamlining Regulation* that replaces the 1999 *Government of Canada Regulatory Policy*. The aim of this revision was to introduce a more rounded approach to regulation, encompassing consultation, and cost-benefit analysis, the choice of regulatory instruments, and the evaluation and review of existing rules.
The reform is the product of two years of cooperation between federal departments and regulatory agencies and was also subject to a broad public consultation through eight public workshops across the country, aimed at involving stakeholders from environmental and consumer groups, local authorities, and the business community.

As a result, all departments must use the new RIA template since April 2008 for all new regulatory proposals to be presented to the Treasury Board.

Usually, RIAs are prepared by the relevant federal department or regulatory agency and the draft regulation is sent for approval to the appropriate Cabinet Committee (currently the Treasury Board) for clearance before being published in the *Canada Gazette* for notice and comment. After that, the draft regulation is sent together with the RIA to the Regulatory Section of the Department of Justice for a legal check.
Until 2006, the main oversight and support body involved in the RIA process was the Regulatory Affairs and Orders in Council Secretariat (RAOIC) of the Privy Council Office (PCO). This competence has now been transferred to the Regulatory Affairs Sector that supports the Treasury Board Committee in its role as the 'Queen's privy council for Canada' by providing advice to the Governor General and by providing management and oversight of the government's regulatory function.

The Regulatory Affairs Sector performs policy research and analysis, provides targeted advice on regulatory policy interpretation and application to individual departments, reviews regulatory and non-regulatory submissions to the Governor in Council (GIC), ensures that the relevant information is provided to decision-makers in the GIC, contributes to strengthening regulatory capacity within government, and facilitates policy coordination and problem-solving through horizontal policy management. Additionally, the Regulatory Affairs Sector has recently opened a Centre for Regulatory Expertise (CORE) to assist departments with more technical aspects of RIA such as cost-benefit analysis, risk assessment, performance measurement and evaluation.

Canada uses regulatory agendas to plan the RIA work of federal departments and agencies. Each year, departments and agencies prepare a Report on Plans and Priorities (RPP) to be tabled in Parliament (Jacobs 2006). The RPP is supplemented by a more detailed Departmental Regulatory Plan, to be published online by the Parliament, departments and other non-governmental associations. This procedure ensures that MPs and stakeholders are informed of forthcoming regulatory initiatives.

- *Scope: what is subjected to RIA, for an early assessment or for a full RIA*

All primary and subordinate regulations of the Canadian Federal Government require a RIA-type analysis. However, RIA is formally required only for subordinate regulations, while primary laws and policies are accompanied by a Memorandum to Cabinet (MC). The preparation of MCs includes stakeholder consultation, discussion of the proposal among government ministries and within the Cabinet, public debates in Parliament. MCs are confidential documents for internal use by the Cabinet and government officials only.

A Business Impact Test must be completed as part of the RIA requirement on the basis of separate guidelines. This is the only specific test currently in use, as Canada seems to have escaped the tendency to fragment RIA in separate assessments (Jacobs 2006).

RIA is also systematically applied to review existing regulations.

- *Targeting: what is caught in the RIA "net", exclusion criteria*

All primary laws and policies are not subject to RIA but to the MC procedure based on steps that are very close to an impact assessment. The main difference between the two procedures lies in the confidentiality of decision-making for primary laws: the early phases of rule drafting occur behind closed doors and a proposal is only subject to public debate once it reaches the Parliament. As explained below, in some cases, individual Ministers can nonetheless decide to perform public consultation on a draft bill without pre-empting the Parliament's decision on the proposal.

3.5.3 Internal accountability

- *Oversight actors (central units, bodies with an arm's-length relation with the executive like IAB and Risk and Regulation Advisory Council)*

The Regulatory Affairs Sector is the main oversight body for RIA: it can provide Ministers with advice and assistance and, when necessary, ask for the revision of individual RIAs. In other words, it plays a challenge function for regulatory proposals. The Regulatory Affairs Sector also monitors consistency with the overall objectives set out in the Cabinet *Directive on Streamlining Regulation* and ensures that all analyses performed effectively support ministerial decision-making. It is also responsible for issuing guidance on all aspects of regulatory reform, from the management of the regulatory process to the drafting of individual assessments.

The Department of Justice of Canada provides legal advice to departments and agencies on the legality of proposals for enabling and subordinate legislation, and on the legal requirements of the regulatory process. This basically amounts to providing drafting services to departments and agencies and ensuring compliance with the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights of 1960. Moreover, the Department in cooperation with the Legal Bureau of Foreign Affairs and International Trade Canada provides advice to RIA drafters on the effects of a proposal on Canada's international legal obligations, including aspects relating to implementation in domestic law.

For Memoranda to Cabinet (MCs), oversight is provided by the Privy Council Office on the following aspects: instrument selection, regulatory implications, and consistency with the *Cabinet Directive on Law-making*. When policy proposals have a regulatory aspect, the Privy Council Office should inform and involve the Regulatory Affairs Sector.

According to Jacobs (2006), oversight in Canada has gradually moved away from a strong challenge/quality control role towards performance management based on certifications by Ministers that RIAs meet regulatory management process standards.

Empirical research (Radaelli 2010) seems to indicate that the purpose of RIA in Canada is transparency and accountability rather than sound cost-benefit analysis of proposals. As a result, the system appears to be based on 'carrots' like the circulation of best practice, rather than on 'sticks' such as the use of naming and shaming approaches (Radaelli 2010). This may change in the future, following the recent reform of the whole RIA system.

- *Requirements for RIA preparation / involvement of central unit*

As explained above, the CORE provides targeted support and input to departments and agencies in their RIA work. This dedicated unit is composed of a Director and five experts, each with a specialisation in one of the different CORE service areas: risk assessment, cost benefit analysis, and performance measurement and evaluation. The fifth expert is a generalist with a strong track record in aspects of regulatory development, ranging from instrument choice, to regulatory cooperation, triage, and regulatory coordination.

In practice, the CORE performs the following tasks:

- Provision of analytical expertise on risk assessment, cost benefit analysis, performance measurement and evaluation which should be seen as an "analysis continuum" whereby sound risk assessment will lay the groundwork for sound cost benefit analysis and performance measurement;
- Cost sharing of external expertise, whenever departments need consulting services and do not have sufficient resources to afford them;
- Targeted training to RIA teams and promotion of best practices;
- Peer review of completed analyses before the regulatory submission.

- *Monitoring and evaluation from within the executive*

Experience with the previous regulatory strategy has shown that the analytical requirements included in the RIA template were difficult to respect for departments lacking the necessary skills (CORE 2009). Hence, monitoring and evaluation by the Regulatory Affairs Sector is now coupled with targeted oversight through the CORE. This includes the provision of coaching services whereby CORE experts meet periodically with interested departments to assess progress in one or several aspect of RIA work, such as risk assessment, or cost-benefit analysis.

For MCs, internal scrutiny is provided by the Cabinet and inter-ministerial meetings and coordination. In some cases, although decision-making for draft bills occur behind closed doors, the responsible Minister can decide to subject the draft bill to public consultation of affected parties. This consultation occurs before the text is debated in Parliament and cannot pre-empt the Parliament's decision on the draft proposal.

- *Panels for ministerial accountability*

Ministers are accountable for the analysis included in a RIA. The relevant Minister or deputy Minister is required to sign off the RIA to demonstrate his/her responsibility. According to Jacobs (2006) Canada is in the forefront in this area.

- *Triage mechanisms*

Specific guidance on triage is provided in the *Framework for the Triage of Regulatory Submissions* finalized in 2007. Triage consists of a two-step approach to determine the level of analysis required in each case (OECD 2008): all proposals undergo a preliminary RIA filter based on a set of questions and those that are above certain thresholds will be subject to a full RIA. The threshold is expressed in monetary terms,

and a proposal is deemed significant whenever the present value of its costs is greater than $50 million. Proposals with a lower value that are expected to have low public acceptance should also be subject to a full RIA.

For each proposal, the Treasury Board also goes through the triage questionnaire and seeks agreement with the relevant department in order to sign off the triage jointly. As explained by Radaelli (2010), triage is at least as much about 'dialogue' and 'engagement' than 'challenge'.

In some cases, triage can also speed up the legislative process by exempting the proposal from publication on the *Canada Gazette Part I* if no major impacts are expected.

3.5.4 External accountability

- *Publication requirements and how they work in practice*

The *Statutory Instruments Act* (SIA) originally enacted in 1971 and subsequently revised, is a general law providing for the examination, publication and scrutiny of a wide range of regulations and other statutory instruments. Specific provisions on either the consultation or the regulatory impact analysis process are addressed in government policy documents, such as the Regulatory Policy and other Cabinet directives.

With some limited exceptions (see the above section on triage), all RIAs are published in draft form for notice and comment in the *Canada Gazette Part I*, while the final version of the RIA is published on in the *Canada Gazette Part II.*

Parliamentary legislation is normally made available through the parliamentary process and is published on the Parliament's website.

- *Scrutiny by audit office / what is scrutinized and how*

An independent audit of all governmental operations is performed by the Office of the Auditor General (OAG) through an extraordinarily diverse set of reports, which include accountability reports and performance reviews. In particular, the OAG undertakes every year an independent evaluation of the RIA process and highlights certain difficulties and deficits that need addressing. In addition, the Commissioner on the

Environment and Sustainable Development (CESD, located at the OAG) has criticized departments and agencies sharply for insufficient action regarding the integration of sustainability concerns into RIAs. Specifically, it found that existing tools were poorly used and that the use of strategic environmental assessment was far from adequate to meet its promise in guiding policy and program development (CESD 2004). NGOs have reiterated these critics: all major areas of governmental action, especially the budget, would remain out of the focus of a true sustainability appraisal.

- *Reports and inquiries by parliament.*

Parliament is informed on a yearly basis of the regulatory agendas of departments and agencies and receives RIAs and MCs for debate during the legislative process.

Moreover, a Standing Joint Committee for the Scrutiny of Regulations was established in 1971 to monitor and review all rules and statutory instruments created by government bodies. To carry out its mandate the committee uses a set of non binding evaluation criteria published at the beginning of each Parliament session. This monitoring process covers the legal and procedural aspects of regulations and statutory instruments but not their substance. Since 1986, the Committee also has a 'disallowance' power, namely the ability to reject a regulation or statutory instrument if the responsible government body does not amend the proposed instrument in line with the Committee's recommendations. This option is seldom exercised and requires a specific procedure and the approval of both the Senate and the House of Representatives.

- *Transparency requirements*

Transparency requirements are enshrined in the obligation to publish proposals and draft RIAs on secondary legislation for consultation. As explained above, the process for primary laws and policies is less transparent but involves stakeholders in one form or another and the results of any ex-ante appraisal should be reported to Parliament and are discussed there.

Conversely, as explained by Jacobs (2006), there is no real transparency on the RIA performance of individual departments and agencies, as the comments and challenges from the relevant oversight bodies are not made available to the public.

- *Participatory tools in RIA*

Participatory tools are broadly described as consultation tools on the Treasury Board's website and in consultation guidelines. The latter recommend engaging stakeholders, including the visually or hearing impaired and representatives from ethno-cultural or Aboriginal communities, in pre-consultation to give them the opportunity to suggest the best consultation approach for each case.

Additionally, the use of a proportionality principle based on the size and scope of the proposal, regional considerations, and the types of stakeholders affected, is recommended to decide upon the appropriate consultation tool for each RIA.

3.5.5 Economic sophistication

- *Analytical models for RIA*

Cost-benefit analysis must be undertaken for all significant regulatory proposals since 1999. The analysis should cover both regulatory and non-regulatory options. Each department and agency is expected to show that the recommended option maximizes net economic, environmental, and social benefits to Canadians, business, and government over time more than any other type of regulatory or non-regulatory action. The system is structured around four questions:
(1) What will change as the result of the introduction and operation of each proposed action?
(2) What is the estimated value of the benefits that will come about as a result of each proposed action, and who will obtain them?
(3) What are the estimated costs of each proposed action, and who will pay them?
(4) Given the estimated benefits and costs, should any of the proposed actions be undertaken and, if so, which one?
RIAs should clearly assess the following: economic, social and health impact of the proposal on Canadian society; distributional impacts of the proposal; possible impacts on a region, business or industrial sector, as well as competitiveness impacts. For the assessment of distributional impacts, the analysis should look at fairness and equity implications and evaluate whether a proposal is likely to have a disproportionate effect on a specific area, sector or identifiable social group. A Business Impact Test should also be included in the RIA when the proposal is likely to affect business.

Specific guidelines for the BIT and on cost-benefit analysis are available to RIA drafters. These include instructions from the Treasury Board Secretariat's (TBS), for example on the discount rates to be used in cost-benefit analysis. For long term horizons the recommended default (real) social discount rate is set at 10%, with sensitivity analyses conducted at 5% and 15% (OECD 2007). For proposals with a short-term impact, discount rates are not used. As reported by the OECD (2006) however, the conceptual basis underlying the Canadian values is unknown and the available guidance is rather on cost-benefit analyses *per se* than on the regulatory context.

- *Quality standards for the use of expertise and peer review of economic analysis*

Peer-review of economic analysis included in RIAs is provided by the CORE, as described above. External peer review, especially for risk assessment, is recommended for significant proposals.

- *Treatment of uncertainty*

When proposing a new regulation, Canadian regulatory authorities must provide evidence that a problem has arisen, that government intervention is required and that the proposed regulatory measures are necessary. If environment, health or safety risks are involved, regulators have to consider whether the relative and absolute risks posed are such to warrant intervention. However, the available guidance provides little direction to RIA drafters on how to answer these questions (OECD 2007). Moreover, existing guidelines do not address the issue of market failure, and how it plays a role in making the case for regulation or for identifying the thresholds leading to different degrees of depth in the RIA analysis.

In 2000 an *Integrated Risk Management Framework* was adopted by the Treasury Board of Canada Secretariat but does barely include risk assessment.

Existing RIA guidelines recommend that departments seek independent review of risk assessment for significant proposals, for example by contacting science advisory boards. Special guidance on the use of the precautionary principle in cases where there is a risk of serious and irreversible harm is provided in the *Framework for the Application of Precaution in Science-based Decision Making about Risk*. In practice,

the government recognizes that the absence of full scientific certainty shall not be used as a reason for postponing decisions to protect the health and safety of Canadians, the environment, or the conservation of natural resources.

- *Administrative burdens*

The reduction of administrative burdens is tackled through the so-called *Paperwork Burden Reduction Initiative (PBRI)*, launched in 2005 as a public–private sector partnership aimed at reducing compliance costs from information obligations for SMEs. This initiative involves measuring the costs and impact of regulatory compliance on small business with the aim of reducing, rationalizing and simplifying regulatory requirements across federal departments and agencies. The PBRI builds on the 2004 recommendations of the External Advisory Committee on Smart Regulation (EACSR).

The PBRI has three key components: the Advisory Committee on Paperwork Burden Reduction (ACPBR); the survey of regulatory compliance costs; and annual progress reports to the Minister of Industry.

- *M&E standards for individual RIAs*

All departments are required to use the *Manual on Review, Internal Audit and Evaluation* to set up the review process of adopted measures, and identify performance indicators to evaluate their application of the federal regulatory policy. The RAIOC, now replaced by the Regulatory Affairs Sector, launched a series of initiatives to achieve relevant performance measurement and thus increase the transparency and accountability of Canadian regulatory institutions, and promote discipline in analysis across departments.

3.5.6 Multi-level government issues

- *Trade*

In principle, the impact of a proposal on trade is assessed in the RIA process under the scrutiny of the Department of Justice Canada and the Legal Bureau of Foreign Affairs and International Trade Canada.

- *Provincial-federal relations*

As a federal state, Canada has set up a process to involve sub-national authorities in decision-making. Departments initiating regulation must involve their provincial and territorial counterparts in all federal regulatory initiatives; cooperate with local and territorial authorities to assess relevant impacts, manage cumulative impacts of a proposal and minimize duplication or conflicting requirements, and apply service-oriented approaches when administering regulatory programmes by seeking solutions that reduce administrative burdens and improve compliance (e.g., use of one-stop-shops, adoption of mutual recognition of requirements, ensure consistency in reporting requirements).

As explained by Jacobs (2006), since its adoption RIA was also intended as an instrument to address cross-border issues in the domestic market; however it did not really manage to foster federal-provincial cooperation. It remains to be seen if the latest revision of the system will achieve this goal.

3.5.7 Guidance and support for RIA

As explained above, there are three different sets of guidelines: on RIA, on Business Impact Tests, and on cost-benefit analysis. These provide general guidance on policy-appraisal and include a proportionality test (based on monetary thresholds) to establish the degree of analysis applicable in each case. However, a shortcoming of the current guidelines is the limited amount of practical information on how to answer the core questions of a regulatory impact assessment (e.g., managing trade-offs between policy objectives, risk analysis, treatment of uncertainty).

3.5.8 Competition filter

The likely effects of a proposal on competition and market openness must be considered in all cases when drafting an RIA (OECD 2004).

3.5.9 STRENGTHS AND LIMITATIONS

Strengths

Canada's record with designing, introducing and upgrading RIA is outstanding if compared to the average performance of OECD countries. RIA practices at the federal

level are long rooted, being formally launched in 1986 but having their origins some ten years earlier: this makes Canada one of the RIA pioneers. Not only is the Canadian system consolidated. It also reflects many of the good practices agreed internationally. In the following, we highlight some of its most relevant features.

Since decades, RIA has enjoyed strong political commitment at the highest political levels, both within the executive and in parliament. The practice of ministers signing-off RIAs before they are considered by the Cabinet is unique among the countries covered in this report. The interest of Parliament in RIAs is illustrated not only by the way assessments are considered in the parliamentary debate, but also by the fact that the Parliamentary Standing Joint Committee for the Scrutiny of Regulation performs annual reviews of the regulatory tools deployed by the government, including RIA. Moreover, RIA is also particularly valued by stakeholders, who consider it as an indispensable process to design regulatory activity and frame the debate on economic, environmental and social implications.

One of the success factors of RIA in Canada is certainly the close coordination with other regulatory instruments. Public consultation, in particular, is closely interlinked – if not an integral part – of RIA, and it is supported by a high degree of *publicity*. RIA is used to open up the administrative box and make the regulatory activity of the government more transparent and accountable. Openness commences at the time of 'pre-publication' of a regulatory proposal, which is being published again in amended form prior to the adoption of the final regulation and is also being sent to Cabinet. Publication and consultation of RIAs on subordinate regulations is mandatory, even for drafts, under the notice and comment rule. Conversely, public scrutiny and participation are less intense and systematic for RIAs on primary legislation (Memoranda to the Council).

From the above, it is clear that RIAs is understood as an *evolving document*. RIA is a process informing all stages of the Canadian decision-making, rather than a punctual action within it. In this respect, it is less an 'add on' element after policy decisions have been made than a process seeking full integration in the overall policy cycle.

Institutionally, Canada has managed to combine inter-departmental cooperation and de-centralised operational responsibilities with a strong centre for support. The CORE serves as a valuable, legitimate centre providing expertise and training related to RIA.

Canada has also found innovative ways to address the issue of rational and effective allocation of resources for RIA. The introduction of a triage mechanism allows for a systematic approach to the trade-off between the depth of the analysis on the one hand, and the pressure of political agendas and budgetary and staff constraints on the other. The triage includes elements of the thresholds approach, but allows for a flexible interpretation, providing for instance room for manoeuvre in terms of low, medium and high impacts, including consideration of the level of public support, public perception, political salience and controversy.

Limitations:

Despite meeting criteria for international good practices in many respects, commentators acknowledge that there still is some room for improvement of the Canadian RIA system. The scope of application of the principles and requirements for RIA in Canada is limited exclusively to subordinate regulations. This reflects to a certain extent the North-American approach, which leaves the underlying consideration for primary legislation less explored, and certainly less transparent. Critical elements of the RIA system are described below.[43]

A first limitation stems from the relatively permissive nature of oversight mechanisms, which make the overall oversight function not challenging enough. Within the federal executive, there is a variety of procedures and bodies responsible for oversight and revision depending on the type of proposal. The de-centralisation of responsibility, typical of the system, does not refer only to the task of operationally producing the assessments, but also to monitoring the quality of the resulting RIAs. Ministries are charged with drafting RIAs and also certify that their quality meets established criteria. While in principle this approach is not problematic *per se*, it can only work if it is accompanied by a clear system of checks and balances, with adequately equipped ministries, clear sets of guidelines and quality standards, and an ultimate institutionalised and legitimate gatekeeper. The process of assessing and commenting on RIAs is based on an informal and continuous co-ordination between the proponent department and centre. The process is very pedagogic, and leads to long-term changes in the mindsets of regulators (see mechanisms below). Moreover, thee fact

[43] Most of the following remarks refer to the regime applied to the preparation of secondary regulations, which encompasses the most typical features of the Canadian system.

that ministers put 'their political face' at stake when signing off a RIA might be a sufficient incentive to produce high-quality assessment, but the impression is that overall the balance between 'carrots' and 'sticks' does not ensure sufficient rigour. There are in fact no apparent penalties for departments failing to prepare adequate RIAs, to consult adequately with the Privy Council Office (PCO), or to respond to PCO comments.

As mentioned, the Canadian RIA system is generally characterised by a degree of openness and publicity that go well beyond most OECD countries. However, the same cannot be said with regard to the availability of data on the departmental performance on RIA. This may be linked to a certain reluctance to also engage fully – or at least with the same commitment as it has been done for RIA – on *ex post* evaluation in Canada, be it in relation to individual legislative initiatives, or for the overall assessment of a policy. Monitoring and reporting practices are not developed in Canada. In particular, no centrally designed and managed scoreboards exist and no reports are publicly issued on the matter. As a result, the public cannot track whether progress has been made over time.

Finally, the guidelines for RIA describe the sophistication of the various methodologies for analysis quite extensively and informatively. However, they provide limited practical guidance on some aspects of the RIA process. As a result, officials are not always adequately supported in tackling concrete problems and challenges when drafting a proposal and carrying out the related impact assessment.

3.5.10 MECHANISMS

The mechanisms at work for the Canadian case are typically accountability (notably in relation to the establishment and then softening of control regimes), and learning. Because of the high degree of interaction within the public administration (also vertically, between the federal and the provincial administration) and the clear connection between RIA and other regulatory/sustainability tools, relational mechanisms are also at play. We did not find specific evidence on environmental mechanisms, although the whole initiative for smart regulation in Canada was most likely triggered from the pressure of technological innovation and competitiveness - as reflected in top-level political concerns.

Accountability - Over the past four decades, Canada has undertaken a substantial reengineering of its public administration, covering institutional as well as organisational and procedural aspects. Many of these changes have had significant repercussions on regulatory governance in general, and on the way RIA is understood and used.

Transparency, respect for federal relations and social welfare (specifically the regulatory policy commitment to the net benefit of the Canadians) have traditionally been the overarching goals of the government regulatory policies. The public administration has been shaped along this axis, re-defining the roles and responsibilities of the various institutional actors. With regard to RIA, advanced and innovative requirements have been progressively but consistently introduced. Emphasis was initially put on ensuring as much compliance as possible from individual departments with regulatory innovations.

Accountability as control has fluctuated over the years, with a period in which the capacity to challenge agencies from the centre has diminished. Since 2007, however, Canada has re-interpreted accountability as control in an innovative fashion. On the one hand, the quality of guidance on analytical methods has increased, with new specific guidance on cost-benefit analysis. On the other, the interaction between the central regulatory quality unit and the agencies has been intensified with the introduction of triage mechanisms. Triage has also an important function in setting the scene for a more concrete, less formalistic interaction between agencies and oversight officers. This takes us into the domain of behavioural and relational mechanisms.

Behavioral mechanisms - The long-standing, sustained reform process has yielded a steady process of learning. In particular, learning is not a one-shot episode, but a process of evolution, where guidance, incentives and oversight have been progressively adjusted and in some cases re-defined by the designers of regulatory reform. The whole process of learning about RIA has been facilitated by the fact that RIA is a natural evolution of sustainability assessment models, policy evaluation, and alternatives to command-and-control regulation, three areas where Canada has an experience that pre-dates RIA.

The publication of comprehensive guidelines for regulators has supported the process. The fact that a shift in regulatory culture seems to have taken place, and that the new evidence-based approach is relatively deeply established is proven by initiatives of the

Canadian government to re-adjust oversight mechanism for RIA. The logic, in other word, has been focus on ‘regulatory institutional building’, ‘performance keeping’ and ‘conflict prevention’, rather than ‘dispute remedies’ – to paraphrase the terminology proper to the crisis management domain. This type of system-level learning has thus characterised the encounter of the Canadian federal administration with RIA.

Relational mechanisms - Relational mechanisms refer to the interaction of multiple actors, normally within the public administration machinery. In Canada, a clear element characterising relational mechanisms is certification. In the context of RIA, actor's certification refers to who has ‘certified’ influence on whom (like a central unit that has the open support of the PM or Finance Minister), who has the leadership of the process, and ultimately who has the authority to do what in the system of RIA relations. Ministers sign off each RIA before the proposal lands on the table of the Cabinet for adoption. In this context, RIA serves as the pivotal element on the interface between the political and the bureaucratic realm, a status that makes RIA directly owned by its political master.

Secondly, relational mechanisms are in place in Canada with regard to the intertwined nature of RIA, initiatives for smart regulation, transparency, public consultation, forward planning and – to a lesser extent – legislative simplification. All these constitutive parts of the regulatory reform agenda are joined-up, and complement each other in a rather smooth way under the rubric of regulatory transparency - a concept that has wide implications in the Canadian context and links relational mechanisms to accountability. Regulatory management is therefore conceived in a horizontal, holistic manner, especially for secondary regulations. This finds direct translation in the intense networking and coordination among various administrators charged with different tasks.

Chapter 4: Design and Deliberation

4.1 Introduction

This chapter provides a design for deliberation about RIA in the Dutch government. The components of the design revolve around the notion of 'how to learn' rather than prescribing the specific ingredients of reform. Design is based on self-evaluation and strategic planning. Self-evaluation means that the chapter guides the Dutch government towards deliberation of its own position on what type of RIA to pursue. This aim will be achieved by posing some questions arising out of the evidence presented in the previous chapters and by the options available. We will therefore start this chapter with these 'hard questions' highlighting the major needs and aims of a RIA system to be implemented in the course of the next legislature in the Netherlands.

The strategic planning component of this chapter revolves around some key mechanisms of reform and change that, we submit, should guide the Dutch RIA system. The mechanisms are drawn from the extrapolation approach on which this project is grounded. Having defined the problem of reforming RIA in the Netherlands as one of extrapolation from international experience, the evidence gathered in chapters 2 and 3 is used here to shed light on the key mechanisms that enable other countries to achieve results via RIA.

These mechanisms, in turn, can be activated in different ways and with different RIA architectures, depending on the nature of the political system, the type of administration, and the other contextual factors. But there are common lessons to learn about the mechanisms. True, there are functional equivalents, meaning that mechanism A can be activated and sustained via a different combination of structures. But the cause-effect relationships involved in a given mechanism explain why we have observed what we have observed in the five source cases – this way the extrapolation exercise can connect the sources to the target case.

Having outlined the aims in this chapter, we proceed by considering the following:

a) The questions for self-evaluation
b) The mechanisms
c) How the mechanisms concatenate in the process of change.

4.2 The hard questions

Our empirical analysis has already exposed the complexities of an extrapolation exercise. To begin with, there is no universally 'perfect' RIA system, but different approaches to this tool that deliver on some dimensions of governance and economic efficiency – but perhaps not on others. The pre-conditions for one approach to RIA or another vary markedly in our sample, as shown by our examination of structural indicators of the political and administrative systems (see chapter 2). The macro-features of a country influence but do not explain why policy appraisal works better in some agencies than in others, in certain policy sectors but not in others, and so on. There are some common features of impact assessment in, say, the USA, but the variability around the median RIA is quite high. There are cases of success and cases of failure everywhere, agencies and departments where RIA has worked and others where there are still fundamental doubts about its achievement. Within the European Commission, some DGs have already established a reputation for carrying out high quality RIA, others have found more difficulty, also because their stakeholders do not manifest the same 'demand' for RIA across DGs. In the US, there is considerable inter-agency variation, and even individual agencies are known for both cases of high quality RIA and cases of very controversial RIAs. The National Audit Office of the UK has published several annual reports showing considerable variation across departments - in turn explained by different levels of resources for regulatory quality and different policy characteristics (the Home Office deals with proposals affecting individual rights for example).

Given this variability even within a single system, we need to consider the mechanisms at work in policy appraisal rather than whether a country is federal or unitary or the administrative tradition. We do this with the caveat that in this report we were not able to carry out micro-level work on specific departments and agencies, although we have taken into consideration the reports on regulatory oversight across agencies and departments that are in the public domain.

Further, there are some important trade-offs at work in the practice of policy appraisal via impact assessment. There is tension between RIA as a tool to monitor and control bureaucracies and as a tool for experimentation, learning and exploration of alternatives. There is also a kind of a trade-off between RIA as the document that contains only evidence and objectivity and as support and justification for what an organisation wants to do – this seems to be the cause of the current problems of usage

of RIA between the European Parliament and the Commission. And there is tension between creating trust and dialogue and using RIA “to speak the truth to power” - no matter what the political consequences are (Meuwese 2007).

This endemic tension generates the hard questions portrayed in box 4.1 and explained in the remainder of this section.

Box 1 – Hard questions

1. What is the overall purpose of the system?

2. What is the best sequence and tempo for the roll-out of RIA?

3. What is the optimal scope of RIA in the Netherlands?

4. Should RIA be integrated in a single template, and if so which dimensions should be covered by the ‘integrated’ system?

5. How should the architecture of RIA be designed, considering the scope and degree of integration?

6. How should the system be managed? How should a regulatory oversight body be designed? What is the role of external scrutiny?

7. What is the proper role of innovation in regulatory reform?

The first hard question for deliberation within the Dutch government is ‘what does the reformer want this policy innovation for’? In a country like the Netherlands, agreement on the main aims of RIA should most likely come from the deliberation leading to the coalition agreement. The latter is the place where the main objectives of public policy and changes in governance are codified and agreed upon for the whole duration of the government - beyond partisan competition within the coalition. It is therefore advisable to use the coalition agreement of the next government to specify the broad trajectory of RIA system and lock-in the choice in a high-profile pact among political parties. This cannot be done by simply copying a model from abroad – quite the contrary, a good dose of smart hybridisation is needed. There are compelling reasons not to assume that one can copy an existing model: as shown previously, practically all models

existing in the five source cases come with their own set of vulnerabilities. Intelligent extrapolation should try to minimise the vulnerabilities encountered in the source cases – although of course in political-economic life there is no system or procedure that has zero vulnerability.

There are different rationales for RIA, notably, competitiveness, management reform, accountability, and, in developing countries, a rationale based on RIA as support to an emerging framework of administrative law. Given the strong position of the Netherlands in terms of quality of the business environment, administrative law, and public management reform, we think that the main answer to the question 'what does one want the RIA for?' should focus around the issue of accountability. Looking at our target case, accountability – a property of RIA that features differently in the source cases, but is always present, in one way or another – seems more important than other elements. In fact, for the Netherlands the potential 'value for money' of RIA in terms of accountability is high, in terms of improving on the state of corporatist practice of consultation and opening up policy formulation to a scrutiny. It also has potential for generating awareness of what the economic analysis of regulation can bring to stakeholders and parliament, and making public administration and agencies accountable. The emphasis on accountability and evidence-based policy – we suggest – would most likely build on (and improve on) recent trends in key Dutch departments, where mixed committees of firms and civil servants and other innovations have already increased the quality of public policymaking. There are also venerable traditions of advice committees in the Netherlands. This bodes well for RIA.

If the first 'hard question' is about why a government wants a RIA, the second question is about the time and tempo of the reform. Simplifications are treacherous, but one can distinguish between a big-bang approach, in which the government introduces a fully-fledged system, and a more incremental approach. However, this question is not as hard as it seems *prima facie*. In fact, the Netherlands has already embarked on several policy appraisal missions, and there are a sufficient number of steps that have been successfully completed. The most important of which is certainly the capacity created around the administrative burdens reduction programme and regulatory cost appraisal in general. We have seen that all source cases, especially the European ones, have come a long way in terms of simplification programmes. There is also a greater usage of techniques like the standard cost model to appraise burdens *ex ante*, at the stage of rulemaking.

This experience goes beyond the mere introduction of a new tool (that is, the standard cost model) in public administration. It is also valuable experience in terms of administrative capacity and governance mechanisms – including control, challenge, and scrutiny by Actal, and, in the past, IPAL. In addition, the Netherlands has also developed administrative capacity in the area of *ex ante* appraisal of the environmental effects of major infrastructural projects, and more generally in the area of sustainability appraisal (Volkery & Ehrhardt, 2004). Thirdly, the Netherlands is also one of the flagship countries in Europe for the use of alternatives to traditional command and control regulation – evidence from the literature on 'new' and 'soft' policy instruments is still controversial (Jordan, Wurzel, Zito, & Bruckner, 2003), but the general impression is that the Netherlands is ahead of the European average.

For all these reasons, it is fair to say that the 'hard' question of big-bang versus incremental approaches has already been answered – at least implicitly. The Netherlands has already gone through the phase of using light approaches to RIA - as shown by the implementation of the standard cost model and the experience of the BET checklist managed in the past by the Proposed Legislation Desk at the Ministry of Economic Affairs (OECD, 2009a). Recently, in December 2009, the Dutch cabinet introduced a comprehensive impact assessment for policy and legislation (*Integraal afwegingskader voor beleid en regelgeving, IAK*). This is a method to prepare draft bills and formulate policy to minimise regulatory burdens and to integrate policy aims, legislation and implementation. IAK is the outcome of a critical review of existing checklists and guidelines: all existing quality standards and checklists have been reviewed with a view to mainstreaming and digitalising the system of policy formulation and improve on the connection between ex ante appraisal and implementation. This year the Netherlands is experimenting with IAK in different ministries - two policies per ministry will be subjected to the new system - and collecting views on the organisational conditions for the effective use of policy appraisals. The challenge is to embed the IAK system into policymaking, and avoid the degradation to 'check the box' routines that somewhat damaged the BET checklist. A reform of RIA in a comprehensive direction would assist in the implementation of IAK.

All things considered, the Netherlands has capacity to roll out a comprehensive RIA reform plan which will naturally complement the steps undertaken in the recent past in terms of better regulation tools and their quality assurance mechanisms. We therefore not advise to introduce only some components of RIA (RIA light approach) for the first

4-5 years and move to the full RIA only after 5 years or so.[44] The RIA-light approach seems the wrong choice for the target case because, as we wrote, the Netherlands has enough capacity to plan a comprehensive system, and de facto the RIA-light phase has already taken place between 2002 and now (OECD 2009a).

Different is the issue of how light individual RIAs should be. The level of analysis of individual assessments is determined by the principle of proportionate analysis and targeting - practically all systems except the European Commission use a targeted approach to RIA, where major analytical efforts are concentrated on major regulations. It should also depend on the principle of proportionate analysis, that is, resources invested in proportion to the range of impacts and stakeholders. Instead, the RIA light approach is a reform plan that envisages only some skeleton elements of impact assessment for a given period of time, no matter what the individual rule being assessed is all about. Having said that, the vulnerability to monitor adequately during the reform is the connection between consultation as defined in RIA practice and the corporatist tradition of policy formulation in the Netherlands.

This observation on capacity leads to other questions, this time about the scope of RIA, and, as a consequence of the choices made about scope, the governance architecture. Regarding scope, the main questions are:

- Should RIA be confined to secondary legislation, like in Canada and the USA, cover both primary and secondary legislation, or only primary legislation (possibly above a certain threshold to make sure that impact assessment is targeted)?
- Should RIA follow a single template and 'integrate' different types of analysis, and if so what should integration cover exactly?
- What are the consequences of these choices about scope and integration for the RIA architecture? [45]

Let us start with the scope of RIA. The North-American option of limiting RIA to secondary legislation has been motivated by the fact that, once Congress delegates power to federal executive agencies belonging to the Presidential administration,

[44] A RIA-light approach has been discussed with reference to developing countries, not in relation to countries with high administrative capacity like the Netherlands. In particular, RIA-light has been discussed as one of the options for developing economies in the context of the *Better Regulation for Growth Programme* (http://www.ifc.org/ifcext/fias.nsf/Content/BRG_Papers).
[45] With the term *governance architecture* we refer to the institutional framework for RIA as defined by the OECD (2008).

agencies' rulemaking has to be monitored and controlled via appropriate instruments, that is, RIA. In a recent submission to the OECD, the government of Canada has observed that primary legislation is after all already monitored and controlled by democratic mechanisms of lawmaking (OECD 2009b). The need for a new instrument like RIA is stronger in the case of secondary legislation, that is, agency-level rulemaking. The implications for governance architectures are straightforward. As seen in chapter 3, the function of Presidential oversight of US federal executive agencies follows from the choice made in terms of scope. Those who wish to import the North-American governance architecture should therefore think about limiting the scope of RIA to secondary legislation, since the two variables (scope and governance) are intimately connected one to the other.

By contrast, European countries have followed the model of broadening the scope of RIA, often covering both primary and secondary legislation, always in the context of the principle of proportionate analysis and targeting (OECD 2009b). One way to get the most out of RIA in terms of accountability (see section below on mechanisms of accountability) is to cover both primary legislation as well as secondary legislation - given the trend of the last twenty years or so to delegate rulemaking functions from ministerial departments to agencies. Across Europe, the choice to cover both primary and secondary legislation is common. The complementary choice in terms of governance architecture has been towards a single central body responsible for the quality of RIA across departments and agencies (OECD 2008). It is difficult to imagine a governance architecture based on Presidential control, since, as discussed in relation to the structural indicators in chapter 2, the USA is a Presidential system whilst the Netherlands is not, and by no stretch of the imagination can we compare the President of the USA to the Dutch Prime Minister. In the Netherlands, ministers serve 'with' rather than 'under' their Prime Minister (Andeweg and Irwin 2002: 114).

But scope is also connected to the variable degree of 'integration'. Yet again, the choice made in relation to integration has an implication for the institutional infrastructure for RIA (what we call 'governance architecture'). The issues to consider are several: Should RIA integrate different dimensions, such as economic and environmental? Should it include the assessment of administrative burdens? Should it have room for special tests such as the competition filter in the UK? And, finally, there is the slightly different issue of integration between Dutch RIA and EU impact assessment. There is no single answer, yet it is possible to make a few important

distinctions in order to deliberate about this question. 'Integration' does not mean that the Netherlands should adopt the same three-fold type of RIA of the EU, based on the 'economic', 'social', and 'environmental' dimensions. We have seen in the analysis of the EU that this specific design choice suits the Commission, given its internal organisational complexity. But all the other source cases (especially Canada, the UK and the USA) point towards RIA as a single template, within which a cost is a cost and a benefit is a benefit – no matter if it is an 'economic' benefit that triggers an 'environmental' cost or vice versa.

Given the current economic priorities at the international and domestic level, economic and sustainability impacts should be jointly considered. Since the Netherlands has a considerable track-record in the ex-ante analysis of administrative burdens, this dimension should also be considered. Competition policy is yet another dimension that can be usefully integrated. Finally, given the characteristics of the Netherlands as an open economy, written guidance should include a mandatory test on the impact of policy proposals on international trade. All this within a framework of proportionate analysis, since resources for large-scale analytical approaches should be confined to major regulations. An annual session in parliament on the government regulatory agenda and its priorities should assist in determining what the major proposed rules are - we will get back to the concept on regulatory agendas later on when addressing environmental mechanisms.

The Dutch RIA should also cover the appraisal of EU legislation. This will enable domestic policymakers to interact with the EU-level impact assessment process, both at the stage of policy formulation and at the transposition-implementation stage – drawing on the German approach to this issue. Last but not least, the Dutch system would profit more from integration with the EU system if the designers were to adopt a comprehensive analytical approach to RIA, focused on the benefit-cost principle. This is also the principle that has inspired Canada, the USA and the UK[46]. It is a natural evolution of the Dutch approach to better regulation, up until now clearly focused on costs and therefore in need of more balance.

As mentioned, scope and 'integration' are closely connected to the governance architecture. To recap: broad scope, covering primary and secondary legislation, a single 'integrated' template for economic, environmental, as well as administrative

[46] In October 2009 The Department for Business, Innovation and Skills (UK) produced a strategic report on "Better Regulation, Better Benefits: Getting the Balance Right" http://www.berr.gov.uk/files/file53252.pdf

burdens and competition analysis, and equal attention paid to both costs and benefits require governance architectures where the system can be kept under control. This can be done in different ways, provided that fragmentation is overall low, and there is no proliferation of standards and analytical methods for RIA. To avoid these risks, one option is to have a single point of reference for the quality of RIA, like the Better Regulation Executive in the UK.

Three qualifications seem important to draw the right lessons for the Netherlands. First, the performance of regulatory oversight bodies is contingent on dense information flows with the departments and the agencies. To put it with a slogan, it is not the legal-formal strength of the central unit that matters; it is the strength of the regulatory quality network (Radaelli 2004). It is not a question of giving legal powers to the central unit, and to make it a formal gatekeeper. It is instead a question of embedding this unit in a dense professional network where information about policy formulation is exchanged.

Second, a broad scope is often accompanied by expertise from different ministers and agencies reflected within the central unit, if necessary by seconding officers specialised in sectors of public policy. Third, the Dutch central unit should not be left alone in the exercise of its functions. If competition assessment is expected to play a role in the future system, the competition authority should be involved with a mission to exercise oversight on the quality of competition analysis in RIA, possibly with the power of rejecting RIAs that fall below the analytical standards.

Let us now try to be more specific on this central unit and its functions. We have seen that elements of control and challenge are present in all systems, and we shall say something more below, when we attend to describing specific mechanisms. But the question has to be flagged up here: how should the new RIA system be managed? Who should do what? And who is to drive the reform process?

Our five source cases illustrate how delicate this question is. The key mechanisms lie in this area of RIA design (as detailed below) but it does not provide any strong generalising argument. Thus, we can only submit some observations. The state of play with RIA in the Netherlands has been less than optimal, as shown by the comments (by the OECD and academics) on the under-resourced proposed legislation desk at the department for Economic Affairs (OECD 2009a; Radaelli 2009). Now that a centre of gravity for better regulation activity has been found in the Regulatory Reform Group (OECD 2009a) and the Integrated Assessment for policy (IAK, see above), it would

make sense to have a pilot of the system drawing on the core competences of the Regulatory Reform Unit as well as the expertise of key officers at the Ministry of Justice on the quality of legislation.

Since regulatory reform requires a network, the question arises what is the role of external scrutiny? The source cases provide different lessons. External oversight bodies with some degrees of substantive independence from the government departments are found in the UK and Germany, but not in Canada and the USA. The IAB of the EU cannot be considered independent; indeed it has some similarities with the OIRA-OMB in the USA. One important difference between OIRA and the IAB is that in the former body there is a permanent career staff. OIRA officers are not seconded by agencies. They are headed by a single administrator. By contrast, there are five IAB members - appointed *ad personam* from selected DGs (DG EcFin, DG Enterprise, DG Employment, DG Environment) and the Deputy Secretary General in the chair (Wiener, 2008:20).

The criticisms of the IAB and OIRA are more or less the same: a body that reports to the President cannot exercise both the function of political/executive control and be truly independent in judging the quality of RIA. Thus - the argument goes - political and technical oversight cannot work together. The tension is there, although it can be alleviated by maximising the expertise of the staff working for the regulatory oversight body - highly-qualified experts tend to protect their professional integrity and reputation.

This state of play perhaps explains the recent trend in Europe towards external scrutiny and the establishment of the Regulatory Policy Committee in the UK. This is an advisory independent body that checks on whether the government is assessing costs and benefits of regulation with the accuracy required by the regulatory quality policy in force and by principles of risk assessment.

Granted that there is not a single trend in the cases we described, our opinion is that we have to focus on the function of oversight first, and then on the bodies. Oversight works better if it is pluralistic in that, it originates in different parts of the system. The central RIA unit is a fundamental source of oversight on the system. To make it reflexive and open to innovations in regulatory analysis and oversight, it should have a small body of strategic international advisors - a panel of senior international experts.

Parliament provides another fundamental type of oversight, both by looking at the RIAs in committee work on bills and, most importantly perhaps, via hearings and annual

sessions on the regulatory quality policy of the government, as shown by the recent enquiries in the UK. A third important actor is the court of auditors, or national audit office, with annual reports both on the systems and on specific samples of RIA, as shown by the work of the European Court of Auditors, the GAO in the USA and the NAO in the UK. The Dutch Court of Auditors has already promoted reviews of the administrative burdens plans and has therefore developed some skills in this area.

A fourth source of scrutiny is provided by specialist advisory independent bodies of the type that characterise the UK - their role is to press on one or two key components of the government policy, such as risk-based approach in the UK. A fifth source of oversight is, at least in countries like the USA and in the case of the European Commission, a vibrant network of independent research institutes that routinely challenge the costs and benefits produced by the official bodies, and provide annual reports on the state of regulatory reform. The fact that some of these institutes are close to the business community and others feel strongly about the environment and sustainability is an asset for pluralistic evaluation - although the experience shows that business-inspired think tanks are always better resourced. External oversight can be usefully built in the system by engaging professional evaluators every three or five years. We are thinking of contractors who provide professional evaluation according to standards certified by professional associations like, in Europe, the European Evaluation Society (TEP, 2007). The government should take the commitment to a strategic review of the new system every four years, among other reasons to understand how the new RIA system builds on and fits in on the mix of better regulation instruments used in the Netherlands. This strategic review should be based on an external evaluation by professional, independent contractors, and discussed by the government in the Tweede Kamer.

Last but absolutely not least, external oversight is stronger when there is a tradition of judicial review of regulation. At the end of a systematic report on oversight, Professor Jonathan Wiener (2008:19) concludes: "A plural oversight system could involve several regulatory oversight bodies, each located in a different part of the regulatory structure. Indeed the US has not only OIRA in the executive, but also potent judicial review, and numerous scientific advisory bodies".

We have now several elements to conclude on the role of the central unit and oversight in general. Our recommendation is that the central regulatory oversight body be independent from political micro-management but in some ways accountable to elected

policymakers - since expert criteria for good regulation 'may or may not coincide with political democratic criteria' (Wiener, 2008:8). It should be part of a multi-actor oversight function characterised by pluralistic evaluation. It should have the authority to issue guidelines and review impact assessments, as well as prompting the development of new regulations to respond to economic shocks or emerging risks. Thus its function should not be restricted to preventing 'bad' regulation, e.g. with return letters like in the USA, although in this country OIRA does not intervene on primary legislation enacted by Congress. It should also have a function of promoting 'good' rules. Another typical function is to promote capacity building across the system and strategic planning of key policies, using 'planning' RIAs as main tool - as explained above. The reach of oversight is typically limited to new rules. However, the Dutch regulatory oversight body could also address decisions not to regulate or to deregulate and scrap old rules - following the suggestion made by Wiener (2008:24). The core power of the oversight unit hinges on the analytic methods used to review proposed regulations (whether it is committed to benefit-cost appraisal or risk-risk analysis for example) and on its resources. We think it would be wrong to make it an economists-only 'zone' within government, since other types of expertise are needed, including law, comparative policy analysis, risk analysis, organisational theory and political science. As mentioned, a panel of experts should assist the body in its own strategic planning.

No matter who is in charge, the next question we wish to tease out is about the role of experimentation and learning. More precisely, the source cases provide different pathways to reform – some are even mixed within a single country, at different times in the history of RIA. A classic pathway can be called presumptive, followed by the UK and the USA, at least during some periods, based on strong guidance, leadership and ultimately control from above. One could argue that this pathway relies deep down on the notion of RIA as a zero-sum game reform between the elected politician and the bureaucracy – crudely put, the politicians want to control, the bureaucracy wants to escape control, so either the principal or the agent wins, not both. The government has a presumption that administrative requirements for cost-benefit analysis and RIA in general are useful to control non-elected bureaucracies, and this presumption is followed up coherently by activating control and oversight by elected politicians.

Another pathway is the diagnostic approach, based on an analysis of the major needs (in terms of demands coming from firms, but also diagnoses of the quality of legislation and rule formulation processes). This sort of enlightened rationalism draws on the

notion of possible win-win RIA solutions that have to be explored and found analytically. It is ideal in principle but it cannot be always pursued in politics. Governments cannot always afford 'to study'. More often than not, they have to act no matter what the level of information is. And they typically blend diagnoses with some presumptions and intuitions.

Indeed, yet another pathway is based on experimentation. We do not have enough information to diagnose, understand problems and formulate a rank order of possible solutions to the problem of regulatory quality. In this approach, RIA is not necessarily a win-win solution, there may be rent-seekers and different notions of what 'high quality regulation' is, depending on the characteristics of the actors involved - the expert, the citizen, the elected politicians, the firms exposed to international competition, and rent-seeking firms and professions (Radaelli, 2005). Nevertheless, in this model or pathway the RIA designers start doing something, look at its results and learn from our experiments with that thing called the reality out there. They roll out reforms in order to create the preconditions for regulatory conversations with firms, and dialogic better regulation with multiple stakeholders (one of the scenarios envisaged by Lodge & Wegrich, 2009). In a sophisticated form, the oversight body mutates from a control-presumptive core to the role of the manager of a radar. The radar (that is, the RIA system) captures regulatory innovations where they happen, validates the smart ways of doing things with other experiences in the radar. Indeed, the standard cost model can be usefully re-tuned to capture smart ways of dealing with information requirements at the level of firms, and diffuse innovations across the system. The managers of the radar, often at the centre of government and distant from the 'sectors' of public policy-making, should transfer ownership of RIA to the policy networks at the sector level – the communities that formulate and implement the various policies in different sectors.

Which one is the best, presumptive, diagnostic or experimental? This is tricky. The Netherlands has structural properties that seem far away from the conditions that make presumptive and diagnostic approaches politically sensible (Westminster and presidential systems, with one or two actors who can call the shots for reform, and peculiar relations between politicians and bureaucrats; see chapter 2). However, not everything is good in experimentalism. Experiments may not be validated correctly if we do not understand the mechanisms. Conversations and discourse are fine, but require polyarchic conditions of power (that is, power diffused among different poles

rather than concentrated at the top of the hierarchy) that may be absent at a time when the core executive wants to exercise control and get the program of the government implemented.

To neglect control is dangerous – 'conversations' may end up in regulatory capture. Some European political systems, including Germany and the Netherlands, are fragmented, for different reasons. The principal-agent relations between Dutch politicians and bureaucrats are negotiated orders more than clear lines of political authority ('T Hart & Wille 2006; Andeweg and Irwin 2009). Being too 'experimental' may result in even more fragmented settings. Capacity building may not find any natural locus of solidification, dispersed as it is around the layers and elements of the RIA-better regulation network. A point that is often overlooked is that experimentation leads to policy learning when courts intervene over the years making precise statements of risk regulation and how to treat uncertainty.

Undoubtedly, this consideration is more appropriate for the discussion of risk assessment than for RIA as described in the experiences reviewed in chapter 3. Yet the two domains (that is, RIA and risk assessment) are contiguous. Without the active involvement of the courts, the quality of risk regulation in the USA would have progressed at a slower pace (Majone 2002; Vogel 2003). It is therefore possible that in the years to come the interplay between the European Court of Justice and the national courts (what is often referred to as 'the community of courts') will bring judicial review of regulations to bear on the specification of RIA principles.

The Netherlands may encourage an approach to judicial review of regulation by Dutch courts that also informs RIA and risk regulation principles. The path for this reform is tight but exists. Article 8:2 of the 1994 Dutch General Administrative Law Act (GALA) establishes that individuals cannot appeal regulation, and therefore Dutch courts do not engage in straightforward review of regulation. There is however an ongoing debate in the Netherlands to allow for direct administrative appeal and review of regulation in the Netherlands. Where the balance always favoured majoritarian/democratic scrutiny of legislation and (in its wake) regulation over non-majoritarian (judicial) scrutiny, the balance seems to be shifting somewhat. In 1995 a provision was added to the GALA, providing for the automatic lapse of article 8:2 after a period of 5-years and – by this – making direct administrative appeal of regulations possible. In 1997 the government sent a policy memorandum to parliament to the effect of postponing the lapse of article 8:2. Parliament agreed to an extension of article 8:2. Now the Lisbon Treaty gives

citizens standing to appeal EU-regulations, even the ones that are directly applicable in the Netherlands. It would be still impossible to have an administrative appeal domestically but have one – on the same regulation – at the Court of Justice. This may rekindle the debate on judicial review of regulation in the Netherlands and the government may revisit its position on article 8:2.[47]

[47] We are grateful to Professor Wim Voermans for having explained the situation.

Box 2 – Features of RIA

1. Purpose of the RIA system:

- Coalition agreement of the next government to specify the broad trajectory of RIA system and lock-in the choice in a high-profile pact among political parties
- Focus on RIA to achieve accountability

2. Best sequence and tempo for the roll-out of RIA:

- The Netherlands has sufficient reform capacity and experience to be able to roll out a comprehensive RIA system
- Consultation is critical

3. Optimal scope of RIA:

- Primary and secondary legislation, following the principles of targeting and proportionate analysis. Major analytical efforts should be concentrated on major regulations
- RIA template to be extended to the implementation of EU legislation

4. Degree of system integration and dimension to include in the RIA template:

- Single template integrating administrative burdens, economic costs and benefits, impacts on the environment, trade and market competition (competition filter), always within a framework of proportionate analysis

5. RIA Architecture:

- Central oversight unit within a network including competition authority, sector-level regulators, and better regulation units in government departments

6. System management: quality control and external scrutiny:

- Resources, authority and functions of the regulatory oversight body
- Oversight as plural function

7. Role of innovation:

- Balancing monitoring and learning in an experimental strategy, possibly supported by judicial review of regulation.

4.3 The mechanisms

Successful RIA systems differ in their legal and administrative properties. However, successful appraisals are grounded in the same mechanisms. Recall that 'a social mechanism is a precise, abstract, and action-based explanation which shows how the occurrence of a triggering event regularly generates the type of outcome to be explained' (Hedström 2005: 25 on this and other definitions). Mechanisms define tendencies and probabilities of certain outcomes. As Mill put it in 1844, they describe a tendency towards a result, or 'a power acting with a certain intensity in that direction' (as cited by Hedström, 2005: 31). A mechanism can be counteracted by other mechanisms – as we shall explain in the final section on concatenation of mechanisms – or may be simply true in 99% of the cases instead of 100%.

With these clarifications, the identification of core mechanisms is arguably the main advantage of having used an extrapolation approach to conventional benchmarking to show how to learn from the experience of others. Specifically, our comparison draws attention to four types of mechanisms that have already emerged in our report, but now have to be examined in detail. The four types of mechanisms are:

- Mechanisms in the chain of delegation that trigger accountability
- Behavioural mechanisms covering the incentives for learning at the individual and organisational levels
- Relational mechanisms
- Environmental mechanisms, covering the range of incentives and pressures airing out of the environment.

4.3.1 Mechanisms that trigger accountability along the delegation chain

Accountability is not a mechanism. It is a goal. It becomes of paramount importance when democratically elected policymakers delegate power to other actors in the political system. Since delegation is widespread, the need to trigger accountability via mechanisms operating at different levels in the delegation chain becomes important.

We can model a democratic political system following the chain of delegation, that is, how citizens delegate power to the political system – and by tracing the chain in terms of accountability mechanisms (Strøm, Müller, & Bergman 2003). Following Marc Bovens, we define accountability as 'the relationship between an actor and a forum, in

which the actor has an obligation to explain and justify his or her own conduct, the forum can pose questions and pass judgement, and the actor may face consequences' (Bovens 2006: 454).

At the outset, citizens delegate power to parliament via elections and the direct representation of citizens via Members of Parliament. In turn, parliament delegates executive power to the government, and, more often than not, within government to the core executive - at least in systems where two or three ministers, or the prime minister, can effectively lead the rest of the executive and call the shots for major policy reforms (see chapter 2). The executive delegates some components of rulemaking and other executive functions to non-elected bureaucracies. Finally, bureaucracies (public administration, quasi-governmental bodies, regulatory agencies, central banks and so on) are made accountable to citizens, often via judicial review of regulation – an example close to RIA is the extensive jurisprudence of US courts on risk assessment and the protection of citizens.

In terms of accountability, this chain of delegation provides different key junctures where an actor is made accountable to a forum. Specifically:

- The relationship between the executive and public administration is the locus of *accountability as control*;
- The relationship between the elected representatives provides the locus for the classic notion of *democratic accountability*, that is, control by citizens' elected representatives, that is the 'principal', on power delegated to the executive, seen as an agent;
- The relationship between public administration, on the one hand, and markets, citizens, society, on the other, is where we find *dialogic accountability*.[48]

Accountability as control is about controlling the regulators. In this case the principal is the government, and the bureaucracy is the agent. In this peculiar principal-agent relationship, administrative requirements like RIA provide the type of information that is necessary to the principal to rein in agencies and departments when they try to exercise autonomy by deviating from the preferences of the ministers (McCubbins,

[48] We do not follow Bovens and his co-authors step by step in their three-fold identification of accountability (that is, democratic, constitutional and learning). Rather, we elaborate on their definitions and previous work on the chain or delegation to identify the three types of accountability that are more relevant to us in the context of the planning of a RIA system.

Noll, & Weingast 1987). As such, the essence of RIA is about controlling the regulators, as explained empirically by the early days of the UK better regulation policy (Froud, Boden, Ogus, & Stubbs 1998). This notion ties in with the relational mechanism of control, to be explored later on with specific reference to RIA.

Democratic accountability means linking government actions effectively to the chain of delegation (Bovens, Schillemans, & 'T Hart 2008: 231). In this connection, regulatory oversight is established essentially to provide responsiveness to the principal. RIA is therefore targeted to provide information about the conduct of executive actors. It effectively creates different ways in which executive behaviour is monitored and evaluated.

Dialogic accountability provides public administrations with feedback-based inducements to increase their effectiveness and their efficiency (Bovens et al. 2008: 232). Some have argued that one possible scenario for the future of RIA is to open up administrations to regulatory encounters with citizens and firms, essentially by using RIA, and more generally better regulation, to structure the interaction between regulator and regulatee (Lodge & Wegrich 2009). This dialogic dimension is linked to the notions of using evidence-based policy as a template for administrative decisions. Countries like the UK, the USA and Canada have linked regulatory reform to their strategies for evidence-based policy. This notion also crosses over to paradigms of administrative action that have been made popular in the discussion of the so-called new public management (Radaelli and Meuwese 2009). The key concept is therefore how to stimulate public organisations 'to focus consistently on achieving desirable social outcomes' (Bovens et al. 2008: 232).

Although research shows that there are RIA systems, like the American system, that score relatively high on the three dimensions of accountability (Radaelli 2010), it is fair to say that there is some tension among the different dimensions. This is particularly true in connection to the relationship between monitoring and dialogue and deliberative democratic governance. On the one hand, the essence of the chain of delegation is about controlling delegated power. This invites a specification of RIA as control tool. Put differently, RIA is fundamentally a sophisticated form of auditing when the rules are being made. As such, it has several advantages when compared to control and audit tools that either operate before rules are made, or after. This type of RIA is used by the government to control public administration.

There is also a different form of auditing and monitoring, when RIA is used by parliament to check on the actions of the government, via reports of audit offices and special inquiries. Monitoring, finally, takes place when member states draw on EU-level RIA to tame the regulatory activity of the Commission – here the relationship is between a democratically chosen government and the Commission as un-elected bureaucracy that does not respond to an EU executive and therefore must be made accountable to the governments of the member states.

On the other hand, the theme of force-free democratic dialogue features prominently in discussions about RIA. In the dialogic perspective it becomes paramount. As shown by Charles Sabel some years ago, we cannot monitor too strictly without putting genuine learning in jeopardy (Sabel 1994). Monitorability requires targets, strict administrative procedures, systematic auditing of what public administration does. By contrast, reflexive governance requires improvisation, deviations from current practice, craft and crucially the possibility, even the liberty, of making mistakes and learning from them.

It follows that the main vulnerability in terms of accountability is about getting the monitoring-dialogue tension right. RIA innovation does take place in the shadow of sanctions and monitoring actions if the monitoring actors have clear 'instructions' and 'teach' effectively. RIA monitoring allows for experimentation, especially if 'authorised' via intense networking and dialogic encounters with firms and citizens – so that a plurality of agents, not just the central 'teacher', contribute to monitoring. We wish to stress that some kind of physiological tension between monitoring/control and reflexivity/innovation/learning is indispensable for a RIA system to really bite and exercise some positive effects on the regulators. Dialogue without any sanction does not foster convergence; it is a recipe for chaos in public management. Control for the sake of control transforms RIA in a series of hurdles for rulemaking, a mechanism to make regulatory action more difficult, slow and rigid. Finally, when neither learning nor monitoring 'bite', there is the risk of having a RIA system that only produces signals and campaigns, but is not rigorously implemented. This scenario has already been portrayed by recent studies on the adoption-implementation gap across some European RIA systems (Jacob et al. 2008; EVIA project 2008).

4.3.2 Behavioural mechanisms

We distinguish the behaviour of an actor, covered in this section, from the mechanisms affecting interaction between actors, covered in the next section under 'relational

mechanisms'. The actions of actors are the product of desires, beliefs, and objectives – in economics these three categories are captured by the notion of 'preferences'. Typically, behaviour changes when an actor updates beliefs on the basis of experience (learning), or as a result of interaction with other actors (see relational mechanisms below).

Beliefs are only part of the story, however. Desires and objectives are equally important (Hedström 2005). Indeed, one mechanism that motivates people to take RIA seriously is the cocktail of support, consensus and incentives (personal and organisational incentives). Support is fundamental not to frustrate individuals when they encounter difficulties, and to encourage reformers during the early steps of change. Consensus on the main objectives is fundamental to avoid misunderstandings of what the key purpose of RIA is. Incentives produce powerful responses. At the individual level, officers take RIA seriously if they know they will be rewarded professionally, and if better regulation objectives will be taken into account for promotions and career progression in general.

Let us go back to beliefs for a moment, and examine learning. The North-American experience shows that good RIAs are used to understand and challenge prior beliefs about policy. For this to happen, the RIA process should start early, and should accompany the various stages of policy formulation, providing a series of opportunities to learn from experience. The discussion of the UK case indicates that learning is not limited to the early stages of policy formulation, however. This is crucial for deliberation in the Netherlands on 'what type of RIA' to pursue. RIA is a *predictive* exercise, in the sense of predicting cause and effect relations that will happen if a regulatory option is chosen. But it is more fundamentally a process that should highlight the key questions about implementation, enforcement, and monitoring that will have to be answered after the rule enters into force. RIA as *planning instrument* throughout the policy cycle generates much more learning than a uniquely predictive RIA (Baldwin 2005).

The very notion of planning has dramatically changed over the last forty years, from a tool to design optimal policy to a set of procedures that make constellations of actors more aware of the consequences of their choices. This approach to planning is rooted in procedures that are not supposed to provide the 'right answers', but to improve on the quality of public debate by opening up policy choice to different arguments. Some go as far as to think of discursive representation - as opposed or complementary to traditional parliamentary representation - as key to democratic control on policy choice

(Dryzek and Niemeyer, 2008). Procedures that expose policy formulation to different 'discourses' and oblige public administration to address the concerns of a plural range of stakeholders and citizens are the essence of contemporary planning. We can therefore see that the type of 'planning RIA' suggested by Baldwin feeds into a more general evolution of planning concepts in modern public administration and government.

In turn, a 'planning RIA' provides consensus and shared visions of the future course of policy. It can be used to help a constellation of actors to frame strategic choice consensually on the basis of reasoned argumentation and evidence-based discussion. It is not necessarily 'technocratic' but makes the most of 'techniques' of economic analysis. By doing so, RIA has potential for a form of strategic planning aiming at a shared vision, i.e. a sufficiently precise image of the desirable future, whose value is immediately tested in the preparation of the action plan. This way, RIA should eventually encounter and build on some of the best traditions of the Dutch political system, especially the orientation towards consensus.

In any case, learning is not limited to belief change generated by the economic analysis included in RIA. It covers consultation too. Consultation in RIA becomes a learning tool. This is the key difference with the corporatist tradition of consultation, where bargaining is more important than learning. Procedures like the notice and comment requirements in Canada and the USA are catalysts of learning, because they expose the regulators to the evidence and arguments raised by organisations outside public administration.

Turning to economic analysis, the strengths and limitations of the source cases suggests that the probability of learning is higher when the following conditions occur:

- Guidelines are not ambiguous as to the choice of decision-making criteria; the guidance of the OIRA in the USA is certainly less ambiguous than the EU guidance on decision-making criteria, as shown above;
- There is clear guidance on analytical methods for RIA, especially cost-benefit analysis. The latter cannot simply be ‘evoked’ in the guidelines; it has to be pursued coherently with specific handbooks that take the generic RIA guidelines one step further. The USA has specific cost-benefit analysis guidance alongside general guidance on the RIA steps, whilst the EU and Germany are at the opposite side of the spectrum;

- There is high-level responsibility in signing off the RIA. Both in the USA and in the UK there has been a long discussion on this, with different choices made during the years. We think that the option of having the chief economist signing off the RIA with an explicit statement on the quality of economic analysis reduces vulnerability. The alternative is to ask the Minister in charge of the proposal to sign off the RIA with a statement like ‘I am convinced that the benefits justify the costs’ – but Ministers already sign too many documents, often without reading them.
- Economic analysis is used to assist networks active at the level of policy formulation to learn. Guidance document should provide resources and control, but should also be open to choice and feedback from those who use them. We cannot imagine a completely top-down process of learning, from those who write the guidance documents to those who are using them. In this connection, experience shows that it is very difficult to pin down ex-ante, in guidance documents, the exact level of proportionate analysis. Going back to the modern notions of planning and 'planning RIA' mentioned above, the process of appraisal should enable a (relatively open and pluralistic) constellation of actors dealing with a specific policy problem to come to an agreement of what is proportionate analysis. The case studies in TEP (2007) and several cases of agency-level RIAs in the UK show that is not uncommon to have three or four rounds of consultation for certain complex policies. In these cases, the concerns raised in the rounds of consultation indicated the right level of depth of economic analysis, and in relation to what aspects of the problem.
- Equally hard is to fix ex-ante the target of RIA. Too much analysis for irrelevant regulatory issues is a waste of resources and an inefficient hurdle on rulemaking activity. It is difficult to get the balance right, as shown by the difficulties of the EU in this respect. Turning to the Netherlands, there is a point in producing recursive, planning RIAs on different types of documents, including early policy documents like white papers, but invest major resources for economic analysis when the regulatory nature of the possible intervention and the range of stakeholders affected becomes clearer in the process of appraisal. At an early stage, RIA is essentially a procedure to open up policy formulation to different arguments and make sure that those who may be affected can put forward their 'discourse'. The same RIA can be revised later in

the process - hence the recursive nature of RIA - and get closer to a proper economic analysis framework.

Another important behavioural mechanism is positive feedback. Experience feeds on itself, in terms of moving people up the learning curve – the more officers carry out RIAs, the more they learn about RIA, and the more the process looks 'normal'. But experience also transforms, gradually of course, innovations in tasks that become 'taken for granted' and therefore much less problematic. And perhaps also less partisan. The whole history of RIA in the USA can be read as transformation from what was a problematic innovation coloured by the deregulatory preferences of Ronald Reagan into the habitual way of doing things that has lost most of its partisan character under Clinton and the successive presidencies. This points to institutionalisation of RIA – beyond partisan effects (Kagan 2001; West 2005; see also chapter 3 above).

New ideas, however, do not get adopted naturally. They have to be nurtured. It is essential to help with the adoption of new ideas, by showing the advantages of changing policy formulation habits and 'think rulemaking' along RIA *forma mentis*. At the same time, and this is where guidance and training in the UK have been exemplary, it is useful to show the simplicity of some RIA steps. RIA procedures follow common sense in the end. The message that RIA reforms help policy officers to think outside the black box – rather than limiting them – is a cornerstone of training programmes. The message is made stronger if accompanied by some irrefutable claims. Examples of these claims are 'we all perform a type of RIA already'; 'we always weigh costs and benefits, when we make a choice' and 'a well-designed regulation is a value in itself, whatever its political content'.

In this connection, let us pause for a moment on the so-called hearts and minds initiatives in the UK championed by the Department for Business, Innovation, and Skills. Yet again, the purpose is to nurture the appetite for innovations. It is not surprising that RIA is 'resisted' from many quarters in public administration and rent-seeking firms that, as one UK better regulation champion famously said one, 'love regulation like their teddy bear'[49]. For this reason, the reformers should not neglect the discontents. They should find who they are and talk to them – if they want to overcome obstacles to the implementation, they must first understand what they are. Talking to the discontents also opens up an important avenue for communication and reasoned

[49] Actually, Rick Haythornwaite said that "Red tape is like an old teddy bear. We are reluctant to admit an attachment, but rather enjoy the reassurance it provides." (*Financial Times*, 9 February 2006).

persuasion. The lesson here is that it is wrong to define the audience of RIA as 'the converts' since the audience has to reach out beyond the 'converts'. Previous work on public administration's reaction to Reagan executive order on RIA has revealed that there are different types of civil servants (McGarity 1991), with different structures of desires-objectives-beliefs. This segmentation of the audience can be most useful when working within the hearts and minds domain.

In countries like Canada and the UK, the implementation of RIA has been assisted by yet another mechanism affecting behaviour via motivation - that is, insisting on the compatibility of RIA with the core values of the new public management. That way, RIA has been put in synch with wider management reforms. In the UK, there is also a close relationship between RIA and the government policy for evidence-based policy. Finally, the UK has yet another characteristic, especially during the Blair governments, that is, the association between RIA and norms of democratic governance, especially transparency and unbiased access to the regulators. In the USA and Canada, the take on democratic governance has been slightly different (but fully compatible with the previous one), being based on the benefit-cost principle as main criterion for collective welfare. The official Canadian statements on regulatory policy make the connection between regulatory tools and the welfare of the community explicit. Thinking of the target case, we think that this anchorage to the benefit-cost principle and governance would strengthen in a major way the accountability properties discussed above.

Finally, there is the issue of who learns? Obviously, RIA is not introduced to make the few people involved in better regulation core activities to learn. The experience of the USA and Canada provides the following valuable lesson: one should give ownership of RIA to the policy networks that, in individual sectors such as environment, transport, energy and so on, formulate policies. These are the networks that should have ownership of RIA, discover new ways to use it, adapt it to the evolution of the sectors and new challenges, and improve on methods. The overall strength of RIA is ultimately the strength of the networks that use it. Indeed, this seems the way forward for Germany. Otherwise there is a risk of ending up with RIA islands in the ocean of policy formulation networks. One negative lesson from the UK is that the core executive has not been able to transfer ownership of RIA. Arguably, this difficulty also explains why the key players in central government (Cabinet Office, Prime Minister, Business Secretary, and so on) have felt the need to constantly re-launch RIA and better

regulation over the years, thus depriving policy networks in individual sectors of stable points of reference.

4.3.3 Relational mechanisms

This category of mechanisms is about interaction, for example between politicians and civil servants, but perhaps there is something else to say on the interactions within public administration – without going back to the previous point.

A crucial relational mechanism is actor's certification (McAdams, Tarrow, Tilly 2001). In the context of RIA, it refers to who has 'certified' influence on whom (like a central unit that has the open support of the PM or Finance Minister), who has the leadership of the process, and ultimately who has the authority to do what in the system of RIA relations. The key is NOT about writing laws and decrees about the 'power' of different actors. It is about making certification emerge from the system of interaction around RIA. The lesson of the Secretariat General of the Commission is arguably the most eloquent in recent years, but the Office for Management and Budget in the USA has a long track record of actor's certification, extremely robust since it has been 'certified' by different administrations with very different regulatory priorities. Germany seems to provide the negative lesson in this case, since a core of certified actors has not emerged yet. The Interior Ministry has the inclination to emerge as the core actor (and to a certain extent is empowered to by the Joint Rules of Procedures), but does not enjoy enough legitimacy and credibility among the line ministries. And the Chancellery is still weak to lead RIA and does not have independent resources.

The second important relational mechanism that emerges from the source cases is joined-up coordination. Canada and the EU provide examples. We have insisted on the case of the EU in the previous chapter since this was a classic case of departments (Directorates General in our case) fiercely jealous of their autonomy. The EU shows that RIA can be usefully employed to create demand and supply of joined-up coordination. We have qualified this statement by observing that this is the trend at the Commission, but it does not mean that cases of thinking in silos have disappeared. According to the evidence we have seen, the progress of joined-up coordination in the UK is much more problematic instead (Russel & Jordan 2009). Turning to the Netherlands, the tacit rule of non-interference or 'negative coordination' among ministers provides a vulnerability of this mechanism (Timmermans & Andeweg 2003).

The third relational mechanism is a straightforward consequence of the analysis of the source cases. RIA as a system of interaction is not self-managed. Management has to be designed and deliberately built into the system. The RIA systems we have examined have created units whose job description is to manage the system. An institutional design that does not foresee a specific actor in charge of management and quality assurance (and possibly nothing else to avoid confusion and lack of certification of this actor!) is flawed. Again, Germany is telling here: The Interior ministry is entrusted to manage RIA (to a certain extent), but all previous attempts to enhance RIA (by the Interior Ministry) were unsuccessful, hence it is no longer credible. Being entrusted with a task in the formal job description is not enough. This management includes challenge and some degrees of oversight of the system.

Finally, indicators and measures of regulatory quality in general are powerful tools to structure the system of interaction (Radaelli & De Francesco 2007). Measures provide focus, and dissolve the ambiguity around what exactly is meant by 'high quality regulation'. The USA is the source case that has moved more coherently in this direction. In Europe, there has been a discussion on possible systems of indicators to be adopted jointly by the Commission and the Member States – yet another meaningful and very promising way to think about the 'integration' of the Dutch system with the EU. The Dutch reform of RIA would gain in credibility and transparency if the coalition agreement setting the RIA system could also indicate the general philosophy of a political commitment to a set of regulatory measures on which progress will be judged over the years. These measures may or may not include targets – they can simply be a set of key regulatory indicators on which progress will be measured year by year. Four types of regulatory quality indicators are important:[50]

- Indicators on the quality of individual RIAs. They can be calculated by the regulatory oversight body on a sample of RIAs or on the entire universe, depending on how many RIAs are produced every year.

- Summative indicators on total costs and benefits as measured in the RIAs. These summative indicators complement the information on other better regulation tools, such as total administrative burdens reduced in a given period of time. The following is an example of how RIA indicators can be computed alongside other regulatory quality indicators:

[50] For details, see Radaelli and De Francesco (2007) and the two papers on indicators produced by the Better Regulation for Growth Program (http://www.ifc.org/ifcext/fias.nsf/Content/BRG_Papers).

[1] Total regulatory costs delivered by regulations for which RIAs were prepared in year t **/** Estimate of total regulatory benefits delivered by regulations for which RIAs were prepared in year t

[2] Net benefits delivered by regulations for which RIAs were prepared in year t **/** Net benefits delivered by regulations for which RIAs were prepared in year t-1

[3] Total cost reduction resulting from simplification in year t

[4] Annual rate of reduction in the total administrative burdens (keeping the baseline alive)

[5] Cost of administrative procedures eliminated in year t **/** Cost of administrative procedures eliminated in year t-1

- Survey-based indicators, based on low-cost surveys of regulators as well as surveys of citizens and firms. As an alternative to surveys, one can consider tracking down over time a small panel of units. The Netherlands has already developed a system of panel data on citizen's burdens on a small range of Dutch families observed across time.

- Indicators of real-world outcomes. Although it is difficult to track down the causality between the introduction of RIA and economic outcomes, in the medium term the effects of the reform should be visible on the economy. Typical indicators in this category measure changes in productivity and innovation.

The commitment to indicators would also put the Netherlands in a position of leadership in the EU discussion. Finally, indicators and measures lead us to the point of policy evaluation and 'value for money' audits of RIA and better regulation policy. We have seen that the demand for scrutiny and independent evaluation is very strong in the UK, and has been strong in Canada and the USA since the inception of RIA. In the EU, the issue is controversial, given the debate on the future role of the Impact Assessment Board, but there is an interesting trend towards audits performed by formal institutions of the EU, such as the European Court of Auditors.

4.3.4 Environmental mechanisms

These mechanisms cover the relations between the RIA system and the environment external to it. We have encountered a powerful environmental mechanism in the source cases: anchoring RIA to a major problem-challenge of the community or a major decision-target like the Lisbon agenda for growth and jobs of the EU. For the target case, the coalition agreement seems the natural point in the political life of the Netherlands where this anchorage can be made. What this anchorage should be about

has to be agreed by the government and the parties in parliament. This goes beyond our report.

The second powerful environmental mechanism revolves around the involvement of stakeholders. We have already mentioned something in this connection. Here we add that stakeholders are indispensable to break-down the tendency of public management innovations (like RIA) to become entirely absorbed by administrative routines and bureaucratic logic. Hence, stakeholders have to be organically inserted in the system. The UK has experimented with several bodies that over the years have taken the 'challenge of the stakeholders' right inside RIA and better regulation. Obviously, consultation and participation are another way to give, essentially, policy formulation rights to people outside public administration so that the routine of each individual RIA can be challenged.

International best practice on consultation goes beyond allowing a number of parties (including those who do not participate in corporatist hearings) to have a say in the RIA process. Consultation is effective when regulators have to show in the RIA how they have addressed the concerns raised during consultation. The minister (or chief economist) signing off the RIA should also certify that the document explains transparently what, whose and why inputs were rejected and / or retained. The openness of the procedure reduces vulnerability. On participation, the plurality of ideas and discourses is more important than the total number of people. The RIA participation rules should aim for a wide representation of discourse and perspectives – high numbers of participants per se are good for referenda, not for participatory practices. Particular attention should be given to the quality of scientific evidence brought into the RIA process by companies, associations, and non-governmental organisations. Transparency on their sources and methods is indispensable, hence they should be asked to commit themselves to a code of conduct on the use of science and expertise. The EU has a good set of standards for the use of expertise and advice, and the USA a strong tradition of scientific risk assessment.

For the Netherlands, the challenge is whether to mould this feature of RIA consultation into the *status quo* (hearings, but also the new initiatives on internet consultation) or devise an autonomous RIA consultation process, with the intention of having an efficient RIA system and also gradually change the status quo. Given this challenge, it is important that quality assurance units (whether in the Regulatory Reform Group or elsewhere) oversee consultation and using indicators to report on its efficacy.

We infer from the source cases that external pressure from parliament reduces the likelihood that better regulation and RIA become un-accountable to those outside the inner core of government and departments. The UK has a recent and strong record in this respect, with clear messages sent to the Better Regulation Executive. The European Parliament has also played a similar role, and in some cases questioned individual RIAs of the Commission – for example for not having used the cost-benefit analysis criteria in selecting a regulatory option (Meuwese 2008). In the USA, Congress has a tradition of being vigilant both on federal executive agencies' practice on RIA and on the Office for Management and Budget – we wish to highlight the testimonies and hearings that take place when a new executive order on RIA is produced by the President (e.g., Katzen 2007).

Turning to the Netherlands, the parliament has a tradition of having manifested interest in better regulation themes. One could usefully build on this political interest. One way forward is to involve the parliament in an annual session on regulatory priorities – a sort of regulatory agenda that should on the one hand keep track of the coalition agreement's progress in the area of better regulation, on the other (and we are back to accountability mechanisms here) gradually emulate the features of the annual session on the finance bill – some of these ideas have been already explored in Canada (Doern 2007).

Europe also features an increase of independent scrutiny bodies that have the mandate to check on the vulnerabilities of policy appraisal (including administrative burdens, RIA, and risk regulation) - Germany and the UK in our source cases, and outside our sample, Sweden. The Netherlands is already well on track with the experience on the standard cost model and burdens built around Actal, although this body was set up as a temporary body and it is not envisaged it will carry on beyond its 'expiry' date. The UK offers examples of advocacy bodies (in the past, the Better Regulation Task Force, more recently the Risk and Regulation Advisory Council, perhaps in the future the Regulatory Policy Committee) that instead of looking at the vulnerabilities of individual RIAs, champion wider issues such as social responses to risk, inspections etc. Britain provides yet another source of inspiration for the high quality of ad hoc commissions of enquiry that look in details at very specific issues and formulate recommendations that later 'percolate' in the RIA process. Illustrations of this feature are the Davidson review on the implementation of EU policy and the Hampton report on inspections (Hampton 2005).

Finally, professions, independent research institutes, and consultants provide pressure on the system by setting the quality standards for RIA and generating professional knowledge on techniques and methods, but also on ethical standards. Up until now, in Europe RIA has been the domain of governmental departments and agencies – perhaps with the exception of sustainability appraisal and a few EU-level research institutes. In the USA and Canada, there is a professional community of RIA experts. Agencies have in a sense to match the quality standards of the profession in their own RIAs; they are permeable to new ideas produced by the most vigorous research institutes; and they are involved in the ethical discussion on the moral implications of risk assessment and the economic analysis of regulation.

4.4 Assembling the mechanisms

Mechanisms are not a shopping list. One cannot choose at random, since there may be a problem with the overall coherence of the mechanisms chosen. One mechanism may counteract another. This chapter has introduced and explained types of mechanisms that seem to play an important role in the source cases, focusing on accountability, behaviour, relations and pressure from the environment. Within these families or types of mechanisms, the designer of an innovation like RIA has to eventually select individual mechanisms. Some trade-offs are important and usefully guide choice. One is the trade-off between monitoring (and ultimately control and 'general' solutions) and learning (and ultimately search for experimental 'local' solutions). We cannot really encourage learning if all the mechanisms (involving individual behaviour, accountability, pressure from the external environment and relations between politicians and the bureaucracy) point towards hierarchy, control, and direction of policy formulation from the 'centre'.

Another trade-off that should not be overlooked is between RIA as objective document and RIA as tool that supports the policy choice made by an organisation. One cannot possibly design RIA by making the fictional assumption that there is a 'technical' stage of policymaking where officers engage in rational and cool analysis, and a second stage where politicians make 'decisions'. In contrast, decisions are the product of evidence, arguments, and deliberation, a complex process where politics and administration interact in several ways and at different points in time (Majone 1989). A wise civil servant is aware of the political priorities of her organisation, the agenda of the government, and the preferences of key stakeholders. For this reason the attempt

to impose a hyper-rationalistic and entirely value-free RIA is often encountered by frustration and resistance from those who operate on the ground (Jacob et al. 2008).

Mechanisms should also be chosen in relation to both production of RIA and its usage. All too often the assumption is made that the main problem is getting administrations (departments and agencies) to produce the RIAs. Accordingly, all incentives-based mechanisms are geared towards the dimension of production. But even the most perfect RIA has little public value if it does not inform a system of political and administrative relations. The objective is not to increase analytical capacities for evidence-based policy and not use it. Usage, however, requires particular attention to how RIA as document is communicated and presented to stakeholders and elected assemblies.

This last point leads us to the role of communication. Reforms are not just parachuted on the ground by selecting some mechanisms. They have to be communicated in a proper language, and reasonable concerns have to be addressed. Language and numbers, however, are closer than one could think. A proper system of indicators that keeps tracks of progress is a powerful device. It enables all the actors involved in the reform to interact and discuss ‘what has been achieved’ and ‘what should be done then’. It encourages dialogic relations and reflexivity, by raising the question of ‘are we looking at the right indicators’? This is arguably the most powerful fuel for meaningful dialogue between government and parliament, and between government and stakeholders.

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