
BETTER REGULATION IN THE CONTEXT OF ENVIRONMENTAL ENFORCEMENT

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SUMMARY

Better regulation is a major challenge and opportunity for environmental regulators. It is important to ensure that 'better regulation' is not seen as a deregulatory agenda, but one which seeks to improve the efficiency and effectiveness of environmental protection measures while reducing burdens for business. Regulators need to approach better regulation across the whole of the regulatory cycle, from legislative development to permitting, inspection, and the imposition of sanctions for non-compliance. To assist in completion of this task, a number of tools are available and approaches adopted by regulators in different countries provide valuable lessons to others.

1 INTRODUCTION

Better regulation is an important policy driver providing challenges and opportunities to the work of environmental regulators. However, the nature of what is meant by better regulation and how this is reflected in regulatory activity varies significantly between countries and even between bodies within countries. This paper examines the interaction between better regulation and environmental enforcement and considers how regulators can ensure that delivering better regulation results in improved environmental outcomes and increased efficiency and effectiveness across the range of the activities that they undertake.

2 BETTER REGULATION

Better regulation has become an important agenda in many countries. Better regulation goes by many different names, such as 'cutting red-tape', reducing the administrative or regulatory burdens on companies, streamlining regulation, paperwork reduction, smart regulation, and simplification. As a result, many public authorities have introduced regulatory reform programmes to improve the efficiency and effectiveness of regulations in a variety of ways, *e.g.* removal of obsolete and contradictory legal requirements, consolidation of overlapping legal requirements, application of new tools with the support of information technology, and introduction of organisational and structural changes.

The aim of better regulation should be to reduce regulatory burdens wherever possible, but without removing necessary protection for the environment or

workers. However, there are also pressures for deregulation. This questions the need for environmental protection and can be seen explicitly or implicitly in a number of contexts. Environmental enforcement authorities should resist an agenda that increases risks to health and the environment.

The term 'better regulation' is, therefore, not synonymous with 'less regulation.' While much better regulation activity might reduce the regulatory burden on businesses, it is important to focus on the central principles of regulation. Regulations are necessary to protect the environment and new regulations may be required to achieve this and can lead to economic opportunities for businesses, as recognised in the Prague Statement.¹ Better regulation requires that such regulation is efficient, cost-effective, and imposes the minimum burden necessary to achieve its objectives. Thus, where countries have adopted near blanket bans on new regulation (sometimes through pressure from external agencies) on the basis that this is 'business friendly,' this is counter to the principles of what regulation is about and is not *better* regulation. It is for this reason that the term 'better regulation' is preferred to the others listed above.

3 BETTER REGULATION ACROSS THE REGULATORY CYCLE

For environmental regulation, it is important to consider better regulation across all of the elements of the regulatory cycle: legislative development, strategic planning, permitting, monitoring, inspection, and non-compliance responses. Where the emphasis of 'better regulation' is largely on reducing legal regulatory obligations, most of the emphasis on action is often on legislative and permitting requirements. However, it is also important to focus on other parts of the cycle, as it is here that burdens are often applied to businesses and regulators can undertake efficiency measures.

3.1 Legislative Development

Legislative development is a central part of better regulation activity. New laws should be scrutinised so that they are deemed to be necessary and their requirements are efficient in application, such as considering whether alternatives to regulation are appropriate and whether the benefits outweigh the costs. Existing legislation can be similarly reviewed. This is often the major focus of better regulation activity, as seen at European Union level.² Legislation should ensure that regulators have the legal and administrative means at their disposal to encourage or, in the event of wilful non-compliance, compel those being regulated to comply with their obligations. Effective regulation is better regulation. Such regulations must also be able to be implemented efficiently, with minimum costs to business. Thus, legislation should ensure:

- The obligations on those being regulated need to be clear and understandable and must be achievable through available techniques and within a realistic timescale.

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- The obligations need to be communicated effectively to those being regulated.
 - Compliance with the regulatory obligations must be viewed as more beneficial than breaking the law, *e.g.* through fear of sanctions.
 - Ways of avoiding compliance must be reduced, through controlling fraud in reporting, effective inspections, etc.
 - The options for enforcement action by environmental enforcement authorities and others need to be clearly defined.

3.2 Strategic Approaches

Many countries have adopted strategic approaches to better regulation. These have a number of benefits:

- They provide a focus for high level commitment to better regulation.
- They can provide a forum to debate fundamental issues.
- They can identify where the major burdens on businesses are and, therefore, where better regulation initiatives ought to take place.
- They bring better regulation initiatives together into a common framework and provide more 'joined-up' thinking.
- They can keep up the pressure – not allowing environmental enforcement authorities or others to relax once a single initiative has been adopted.
- They are important in reacting to proposals for new regulation (to tackle the adoption of burdensome regulation on one issue while a better regulation measure is being adopted for regulation on another issue).

The smart regulation initiative in Canada is an example of such an approach across government. It is comprehensive in that it covers all governmental regulatory activity and seeks to involve a very wide range of stakeholders. An important aspect of smart regulation is that it establishes, up front, the principles upon which it operates, including a commitment to environmental sustainability. This statement of principles provides a benchmark against which the many specific initiatives can be judged, and through which stakeholders can have more confidence. Smart regulation has also adopted a rigorous process for taking forward its initiatives, including studies and extensive consultation processes. This framework approach is important in its success and it is clear that being systematic in analysis and delivery is a key objective.

The Canadian example is government-wide, but strategic approaches are also necessary at the level of individual institutions, as is demonstrated by a number of environmental regulators. Strategic approaches must ensure buy-in from all relevant stakeholders. This should include different levels of government, business, and community groups. The latter are particularly important if the process is not to be perceived as an unravelling of environmental protection.

3.3 Permitting

Acquisition of a permit can involve different administrative processes which can be complex and impose significant costs on businesses, not least as the time that permit acquisition can take can increase business uncertainty. This is particularly the case where activities are subject to different regulatory regimes each with separate permits. A number of approaches have been adopted to achieve the objectives of better regulation in permitting, including:

- Changing the processes of individual permit regimes to introduce streamlining measures, such as on-line permit application procedures.
- Seeking to combine multiple permitting processes into a single permit.
- Removing the requirement to apply for permits and replacing this with a generally applicable rule or by a notification procedure.
- Accelerated permitting whereby permits procedures for more rapid determinations.
- Reducing the information requirements for permits.
- Linking timetables for permit review requirements to risk-based assessments of activities.

Some better regulation permit initiatives have taken complex analysis to develop, as they seek long-term detailed changes, such as seen in the Netherlands. Bringing permitting regimes together delivers benefits. Thus, leaving complex overlapping regimes in place can be considered as bad practice. In general, the utilization of binding rules in place of permits has benefits, but also limitations. It must be clear that the change would not result in reduced environmental outcomes (*e.g.* for some local sensitive environments) or undermine public confidence/participation (indeed a proposal in this regard in Finland was dropped for the latter reason).

3.4 Monitoring

Monitoring (by public bodies or by enterprises) can be expensive. Unlike obtaining a permit, monitoring and reporting have start-up and recurrent costs. Thus, it is important that what companies are being asked to monitor, and how

they are being asked to report, accurately portray the nature of that activity and the needs of regulators. Unnecessary monitoring is not justified. As a result, it is important to:

- Only monitor those things that are necessary.
- Only require collection of data that can actually be used.
- Ensure that the frequency of monitoring is linked to the required accuracy of the results.
- Replace, where possible, parameters that are expensive to monitor with those that are cheaper that can act as a proxy.
- Standardise monitoring methods, etc, to increase efficiency.

Another approach to better regulation is to make better use of the monitoring processes in a more efficient framework. In Flanders (Belgium) authorities have brought together disparate reporting obligations into a unified framework in order to make monitoring more streamlined and effective through an integrated information technology system. It is important to start from a comprehensive inventory of existing reporting obligations in order to identify those obligations that apply to the largest target group as candidates for inclusion in an integrated reporting system. The system can later be expanded to include other, more specialized reporting obligations, which concern a more limited target group. All administrative authorities with responsibility for the collection and management of environmental data from operators should be involved in the preparation and implementation of the reform, as they will need to revise their respective regulations and operating procedures. Reducing monitoring and reporting obligations can be viewed as one better regulation option. However, this can be controversial, especially if there is concern that this undermines confidence in environmental enforcement.

3.5 Inspection

Inspection is necessary to ensure compliance. There are different opposing pressures on inspection activity. At the EU level there is, for example, increasing emphasis on ensuring inspection activity is undertaken. In contrast, some Eastern Europe, Caucasus and Central Asia countries have introduced significant restrictions on inspections in an attempt to be business friendly, but which can also undermine environmental protection. Better regulation initiatives on inspection must not impede the ability of regulators to ensure the compliance of regulated activities. However, there are steps that can be taken to achieve this, while reducing unnecessary business burdens. Most obviously, these include the bringing together of different types of inspection activity into single inspections. Risk-based approaches are also important – targeting inspection on activities

which pose the greatest risks to the environment, such as seen with the Operator and Pollution Risk Appraisal approach of the Environment Agency of England and Wales. Risk-based approaches to inspection in effect redistribute the burden on businesses.

3.6 Noncompliance action

There has been limited focus on the role of better regulation in the area of sanctions for non-compliance. However, it is an important area to ensure that the actions of regulators and others are effective and efficient. Poor use of sanctions, for example, can undermine the whole purpose of regulation. In 2006 the UK completed a review of sanctions undertaken within its better regulation programme.³ Importantly, the review concluded that sanctions, in the context of better regulation, should be sufficient to deter and change behaviour and an effective sanctioning regime should allow for a flexible and proportionate approach with a broad range of sanctioning options, so that authorities can respond to individual cases and the specific nature of the offence. Effective sanctions can also aim to restore the harm caused by regulatory non-compliance and take into consideration the needs of victims, offenders, and communities affected by it. Thus, regulators need to develop enforcement strategies that ensure sanctions are effectively used as a central element of a better regulation strategy.

4 APPROACHES AND TOOLS

There are a range of tools and approaches that regulators can use or engage in to assist in delivering better regulation. Regulatory Impact Assessment (RIA) is increasingly used to examine legislation/regulation prior to its adoption. This can be used to examine options for different implementation approaches⁴ and, therefore, ensure that regulation is both efficient and effective. It is important, therefore, for regulators to ensure that the focus of RIA is not limited to assessments of costs, but also examines the consequences for effective implementation of the regulatory cycle as a whole necessary to deliver environmental objectives.

An element of better regulation analysis has been to quantify the burdens placed upon industry by different regulations. The Dutch standard cost model⁵ assesses burdens to business and administrations, and is becoming more widely used across Europe. In some cases, this has led to ministries having quantified targets to reduce their administrative burdens (*e.g.* VROM had the overall objective of achieving a 30 percent reduction in administrative burdens by the end of 2007). It is important to ensure that the costs of regulatory activity are accurately determined. This will assist regulators in helping to focus resources to more effective ends. More problematic is the fact that simply quantifying burdens does not lead to decisions on regulatory change. Costs must be compared to benefits. For example, in Europe the Integrated Pollution Prevention and Control Directive is often cited as one of the most costly directives to implement. However, it aims to achieve major benefits across a wide range of industrial activities, which

contrast to other directives which are much more limited in scope. Quantifying benefits can be difficult, but regulators have a critical role in undertaking this, particularly to ensure that the results reflect a common sense understanding of the situation.

As noted above, risk-based approaches are also useful in delivering better regulation. In essence, risk-based regulation targets the resources of the regulator at activities that pose the greatest risk to the environment. This also links costs of such regulation to business to risk, which is a principle of better regulation. Risk-based regulation can be used for a wide variety of regulatory activities. For example, in the Netherlands, elements of risk-based assessments have been incorporated into analyses underlying the development of compliance strategies for different sectors.⁶ Risk-based approaches can also be combined with various forms of compliance assistance into an overall Compliance Management System which is reflected in the U.S. Environmental Protection Agency's approach of 'smart enforcement.' To take account of all of the potential risk issues requires a significant quantity of information on the operation of an activity, as is seen with the Operator Pollution Risk Appraisal of the England and Wales Environment Agency, which brings much relevant information together into a single analytical system, which is focused via the permitting procedure and resulting inspection.

5 CONCLUSIONS

Better regulation represents an opportunity for regulators to deliver more efficient systems for protection of the environment. Rarely do regulators suggest that they do not have some form of resource problem in undertaking their functions. Therefore, actions to increase the efficiency of all aspects of regulation (across the regulatory cycle) and the effectiveness of environmental protection should be welcomed. However, some regulators and stakeholders can view the better regulation agenda as a threat. Indeed, where it is poorly understood by governments or is, in effect, a deregulatory agenda, it can be a threat. In such cases, regulators have a duty to emphasise the importance of efficiently designed regulation to protection the environment and health of citizens and for positive economic benefits.

More generally, regulators should engage positively with better regulation initiatives. This should be across the regulatory cycle. Undertaking a major initiative to develop better regulation approaches at any or all parts of the regulatory cycle requires significant investment in staff time and involvement of business. Eventually, this will prove a useful investment. However, up-front commitment is necessary, and failure to complete the process properly could result in problems to the regulator and/or business.

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