

Company law reform: the role of regulatory impact assessment

Dr Stephen Copp
Bournemouth Law School

5th September 2006

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Why conduct the research?

- Curiosity at significance of RIA documents so often attached to consultations and bills
- Controversy over OFR and potential for better scrutiny of legislation
- Interest in law and economics implications

The Companies Bill

- Exceptionally protracted and controversial
- Lack of clarity as to values, e.g. enlightened shareholder value concept
- Surprising amount of public attention
- But required assessment largely in cost benefit terms

The technique of Regulatory Impact Assessment (RIA)

- Origins in Compliance Cost Assessment in 1980s
- RIA adopted 1998
- Technique developing not settled

Main RIAs leading to Companies Bill

- July 2002
- March 2005
- November 2005
- June 2006

Questions over RIAs

- Repeal of OFR just months after RIA confirmed benefits justified costs
- Lord Sainsbury's defence of Companies' Bill based on RIA estimate of £250 million savings

Aims of paper

- To examine RIA process and its application to company law reform
- To focus on issues of:
 - Purpose and scope
 - Methodology
 - Accountability
- Especially by reference to codification of directors' duties and shareholder remedies

RIA: Purpose and Scope

- A deregulatory tool?
- A mechanism for embodying economic and other analysis in policy making?
- A mechanism for resolving political principal-agent problems
- “Box-ticking”?

A deregulatory tool (1)?

- Economic theory suggests legislative process flawed so will be excessive supply of legislation
- Deregulation key element of Thatcher policy with CCA; similar process in US with Reagan Executive Order 12291
- Ideology irrelevant, e.g. Blair's Panel for Regulatory Accountability

A deregulatory tool(2)?

- Scope of RIAs appears deregulatory because of cost benefit analysis
- Yet from 2000 onwards other goals added, economic, social and environmental impact
- Specifically, race equality, rural communities, human rights, gender equality, disabled people, children and young people, older people, etc.
- Compare Bill Clinton's Executive Order 12866

Mechanism for embedding analysis in policymaking?

- Given unpredictability of Parliamentary scrutiny an economising measure to embed analysis in policymaking ex ante
- Cabinet Office says RIAs should start early and be used to project manage process

A mechanism for resolving political agency problems?

- In simple version of public choice theory, RIAs not exist or exist in flawed fashion as a fig leaf
- Posner: RIA not to ensure decisions efficient but enhance control of elected officials over agencies
- Consistent with additional requirement for RIS where high costs, high media topicality/ sensitivity or disproportionate impact

Box ticking?

- Hampel usage for an interest only in compliance regardless of circs or experience
- Complexity of requirements for initial/ partial/ full/ final RIAs
- NAO classification of RIAs into proforma, informative and integrated

Development of the Bill

- Problems of categorising Companies Bill RIAs
- Frequency and timing
- Evidence of influence on policy development
- Extent to which concerned with efficiency/ non-efficiency goals
- Lord Sainsbury's statement

RIA Methodology

- Risk assessment/ rationale for state intervention
- Identification of a wide range of options
- Use of consultation
- Cost benefit analysis

Risk assessment to rationale for state intervention

- Change of focus provides potentially powerful tool for analysis
- Company law reform RIAs identified divorce of legal framework from needs of business, stifling entrepreneurship and competition for incorporations
- Wording changed little!

Identification of wide range of options

- Cabinet Office requires identification of wide range of options including “do nothing” option
- July 2002 RIA two main options (1) continue amending law and consolidate (2) comprehensive new Act
- Later RIAs simply offered (1) which provisions required reform and (2) how

Options on codification of directors' duties

- Continue with current law
- Abolish common law duties
- Provide guidance to directors
- Codify and provide guidance to directors

Use of consultation

- Cabinet Office requires consultation, e.g. to gain information
- Development of Companies Bill involved extensive consultation (generally, less on RIA s) yet strong opposition through Parliamentary process
- Lord Sainsbury's statement

Use of cost benefit analysis

- “Central”/ “main” RIA analytical component
- Problematic in company law because of issues of causation/ complex interactions
- Strong claims for savings, e.g. benefits £165 – 340 million, costs £3 – 11 million
- Serious qualifications included as to lack of research base

Codification of directors duties

- Initial savings of £65 million restated as £30 – 105 million (38.7% of total for Bill)
- Heroic assumptions made that companies would save average £500pa on advice
- Lord Sainsbury statement

Accountability for RIAs

- Theoretical and practical framework
- The role of the DTI
- Parliamentary criticisms

Conclusions

- Paper limited to RIA process; does not draw conclusions as to MCLR or Companies Bill
- RIA function not effective; appears little more than “box-ticking” exercise
- Methodology for cost benefit flawed because of lack of rigorous research
- Mechanisms for RIA quality assurance fairly robust in principle
- Parliament ultimately provided better scrutiny