

ANACOM

# Regulatory Impact Analysis

Objectives, Methodologies and Relevant Case Studies  
in the Electronic Communications Sector

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## 1. EXECUTIVE SUMMARY

In the communications sector, the set of best practice commonly referred to by experts as "better regulation" can have very positive effects on the national economy, in particular by:

- a) Reducing transaction costs for operators and end-users;
- b) Reducing uncertainty about the functioning of markets, while facilitating investment;
- c) Simplifying processes and improving their transparency;
- d) Increasing capacity for implementation of public policy objectives for the sector.

With these concerns always present on the horizon of its activities, in its Multi-Annual Activities Plan 2015-2017<sup>1</sup>, Autoridade Nacional de Comunicações (ANACOM) set out, under the strategic priority to promote open and competitive market (Line of Action "2.7 Assess the impact of adopted regulatory measures"), to conduct a study on Regulatory Impact Assessment (RIA) with a focus on a comparative analysis of the approaches taken by different National Regulatory Authorities (NRAs) on this matter.

It is in this context that ANACOM's present exercise in reflection focuses on RIA - one of the most important aspects of better regulation. The aim of RIA is to assist decision-makers in choosing – with the use of a systematic and consistent process - the most effective alternative to achieve a specific policy and/or regulatory objective.

After an introduction to the object of the study (Section 2), the objectives of RIA are explained in Section 3. It is noted that RIA is a methodology which - sometimes in conjunction with methods, such as international comparisons ("Benchmarking") and technical expertise - often assists decision-makers and government officials in determining the best options to accomplish public policy and regulatory objectives;

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<sup>1</sup> [Multi-Annual Activities Plan 2015-2017](#)

however, RIA does not substitute political responsibility in decision-making (in relation to the overall objectives of public policy and regulation).

More specifically, the following are often cited as objectives of RIA with respect to regulation in general:

- a) Improve understanding of the real-world impacts of government action, including both the benefits and the costs of proposed measures;
- b) Integrate multiple policy objectives, revealing synergies or lack of synergies in the relationship between these objectives;
- c) Increase transparency and improve stakeholder consultation procedures;
- d) Further clarify the accountability of governments and/or regulators.

Then, in Section 4, the methodologies of RIA implementation are set out, which may comprise a process of several steps. As such, at the outset, the policy context of a specific draft decision is ascertained and the policy public objectives which this draft decision seeks to accomplish are defined and clarified. Subsequently, the regulatory options which are considered appropriate for the accomplishment of the previously established objectives are identified. An evaluation is then made of the potential costs, benefits and impacts of the possible application of each of the regulatory options considered. Afterwards, stakeholders are consulted. Once the RIA has been reviewed, in view of the consultation results, mechanisms are designed for its implementation, monitoring and supervision. After the results of the RIA are known, the decision is made.

In Section 5 of the document, the advantages and disadvantages arising from the implementation of RIA are discussed.

The main potential advantages associated with RIA include enhancing the credibility and accountability of the regulatory process, increasing the competitiveness of the sector and the national economy, reducing the costs of preparing and implementing regulatory measures, and greater involvement and accountability of stakeholders in decision-making processes.

As regards the main potential disadvantages of RIA, it has been mentioned that while, superficially, RIA appears to be an open and neutral process, in reality it

facilitates regulator "capture" by pressure groups. Another potential disadvantage stems from delays in the decision-making process, given the need to collect data and information and given the complexity inherent to the RIA process.

Seeking to extract the most relevant "lessons" from each case, in Section 6, case studies are presented on the European Commission (EC), United Kingdom (The Office of Communications - Ofcom) and the Republic of Ireland (Commission for Communications Regulation - ComReg). In response to a questionnaire prepared by ANACOM, in 2015, for the purposes of this study in the context of BEREC (Body of European Regulators for Electronic Communications)<sup>2</sup>, four NRAs reported having formally implemented an RIA programme (NRAs of the United Kingdom, Ireland, Italy (Autorità per le Garanzie nelle Comunicazioni - AGCOM) and Sweden (Post - och telestyrelsen)). In a previous edition of this questionnaire, conducted in mid-2011, only the NRAs of the United Kingdom and Ireland gave a similar response<sup>3</sup>.

In particular, these case studies highlight the importance, in each organisation, of staff with expertise to review RIA, in order to propose concrete improvements and provide advice to its authors.

Another relevant aspect is that, as a rule, the thoroughness of RIA depends on the complexity of the objectives which the regulatory decisions seek to achieve and on the likely magnitude of their social, economic and environmental impact.

It must also be highlighted that RIA should be performed, as far as possible, at the outset of the regulatory process, so that all regulatory impacts are properly estimated and that any regulatory measures can be cancelled while costs are still incipient.

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<sup>2</sup> The last responses to the questionnaire were received in July 2015.

<sup>3</sup> In the case of ComReg, the regulator mentioned in its reply to ANACOM's 2011 questionnaire that, although it had not formally adopted a legally binding RIA programme, it operated according to a set of guidelines that set out the steps to be followed when RIA is deemed necessary. In response to ANACOM's 2015 questionnaire, ComReg reported having a formally adopted RIA programme in place since 2007.

A fourth point to be stressed is that RIA is a very participatory process, both in terms of gathering input from various departments in the same organisation and, above all, in terms of hearing and consulting stakeholders.

The case studies also highlight the importance given to the proper training of staff involved in the RIA process and the development of an organisational culture with increase receptivity to RIA implementation.

Based on previous work, a reflection is presented in Section 7 focusing on the conditions of a possible application of RIA to the activity of regulating the electronic communications sector in Portugal.

This reflection highlights aspects related to the need for widespread and continued staff training, the systematic identification and compilation of data enabling execution of RIA, the necessity of setting out measures to monitor and enforce adopted regulatory measures and to estimate the corresponding cost and finally the merit of commencing any implementation with a pilot project.

At the end of this document, the conclusions of the analysis are presented. It is of note that in order to ensure the success of an RIA programme, there needs to be a participatory organisational culture in which the act of questioning decisions taken sits well, with appropriate levels of training and experience exchange with other organisations implementing RIA.

It will be important to highlight the ten key elements which, according to the OECD (1997a), are central to the successful implementation of RIA:

- a) Maximise political commitment to RIA;
- b) Allocate responsibilities for RIA programme elements carefully;
- c) Train regulators<sup>4</sup>;
- d) Use a consistent but flexible analytical method;
- e) Develop and implement data collection strategies;

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<sup>4</sup> According to OECD (2009a) data, there are 57 public sector employees in Portugal directly involved in initiatives related to better regulation.

- f) Target RIA efforts;
- g) Integrate RIA with the policy-making process, beginning as early as possible;
- h) Communicate the results;
- i) Involve the public extensively;
- j) Apply RIA to existing as well as new regulation.

In the analysis made, it is noted that the principles of RIA are already broadly followed by ANACOM in its regulatory decision-making (in particular as regards analysis of relevant markets susceptible to ex-ante regulation) and in other decisions impacting the market, for example in terms of spectrum management. In the case of these market analyses, EU Directives (transposed into national law) and European Commission guidelines constitute a certain *vade mecum*, to a great extent incorporating important elements of RIA, which is also conditioned by certain harmonisation measures at Community level (e.g. European Commission regulations and recommendations). It is still generally the case that regulation is asymmetric, focusing on the operator with significant market power; as result there are always costs for this operator and benefits for the others (and presumably for end-users). This greatly complicates the analysis and may entail collection of a large quantity of data and inherently speculative forecasts, in particular as regards benefits.

Nevertheless, as stated in the public consultation report on the strategic guidelines governing its 2016-2018 Multiannual Activities Plan, ANACOM stated that "since there is no single methodology that serves to assess the impact of all measures, it is considered that RIA must be performed on a case-by-case basis, focusing on matters which, for the purpose, are identified as relevant." In short, given the evolution of the RIA practices and methodologies discussed in this document, ANACOM will continue to employ the resulting best practices whenever necessary and periodically consider possible adjustments in its processes and procedures to monitor ongoing advancements in terms of these best practices. As such, ANACOM



will continue to conduct a careful assessment of the effectiveness of proposed and adopted decisions.

## 2. INTRODUCTION

The economic and social costs inflicted by poor quality regulation are often high; as such, governments, public bodies and regulators must seek to ensure that the regulatory measures which they adopt are effective.

In particular, in the communications sector, poor quality regulation can give rise to a number of factors likely to have negative impacts (direct and indirect) on the national economy:

- a) Increased transaction costs for operators (resulting in particular from measures taken to ensure compliance with regulatory decisions)<sup>5</sup> and for end-users;
- b) Rising costs of coordination, especially in cases where responsibility for implementing and or overseeing and sanctioning non-compliance with a given regulatory measure is shared across a number of authorities;
- c) Increased uncertainty about the evolution of markets, reflected in business risk and, as a consequence, lower investment;
- d) Unnecessarily complex rules and/or rules which lack transparency and which are excessively costly to enforce, with a risk of increased levels of litigation;
- e) "Superfluous findings" that create artificial business opportunities, particularly on the basis of distorted cost structures;
- f) Diminished achievability of public policy objectives for the sector.

This focus on effective regulation, particularly with a view to increasing the legitimacy<sup>6</sup> and transparency of the regulatory process, cuts across various sectors of activity and has become increasingly important at an international level over the last 15 years, affecting areas as diverse as the legislative process, public

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<sup>5</sup> Costs increases, particularly in terms of human resources required to carry out activities necessary to ensure compliance with regulatory decisions, in terms of administrative resources and in terms of hiring external consultants required for the implementation of specialised solutions (Mägli *et al*, 2010).

<sup>6</sup> Under an institutionalist approach (not strictly legalistic), certain institutional contexts strongly encourage organisations to justify and give basis to their activities, encouraging them to find added legitimacy ("moral", expert, statutory legitimacy etc.) in line with such contexts.

consultation procedures, ex-post evaluation of regulatory tools and institutions, administrative simplification and regulatory transparency (OECD, 1995; Mandelkern *et al*, 2001).

In the terminology of organisations such as the EC, the OECD and the World Bank, the problems associated with effective regulation have been systematically collated into a body of work commonly known as "better regulation", of which RIA is a fundamental part. Some authors (Radaelli and Francesco, 2010) also associate RIA with the school of New Public Management, which came to the fore during the 1980s and was focused on modernising the management of public agencies and companies and reducing associated bureaucracy.

In this context, RIA is a "process of systematically identifying and assessing the expected effects of regulatory proposals, using a consistent analytical method, such as benefit/cost analysis" (OECD, 2008). This process is comparative - that is, after the intended regulatory objectives have been identified, various alternative means of accomplishing these objectives are defined; these are then compared using the same method. As a result, decision-makers are provided with information about the most effective and efficient alternatives and are able to choose accordingly.

In any case, it should be noted that, as an instrument, RIA *per se* is neither necessary nor sufficient, and in ANACOM's case not mandatory, when defining public policies and or regulatory decisions. It is merely an empirical method which can be seen as a complement to other methods commonly used in regulatory decision-making, such as political decision<sup>7</sup>, benchmarking<sup>8</sup>, consensus<sup>9</sup> and expert opinion<sup>10</sup> (OECD, 1997a).

RIA has been formally adopted into the policy-making processes of many developed countries, especially since 1974, and even a significant number of developing

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<sup>7</sup> Decisions taken by representatives with political legitimacy to decide on important issues as part of the political process.

<sup>8</sup> Decisions based on an external model, for example, comparison with the regulatory practices and results achieved in other countries.

<sup>9</sup> Decisions taken on the basis of a common position that reflects general agreement among stakeholders.

<sup>10</sup> Decisions based on an opinion of a technical expert or a group of credible technical experts, with the professional judgment necessary to decide what should be done.

countries, for example, Albania, Algeria, Botswana, the Philippines and Jamaica (Kirkpatrick and Zhang, 2004).

Among the countries most experienced in the application of RIA, the United States stands out, along with Canada, United Kingdom and Australia (OECD, 2008b).

Nevertheless, even while the government of a particular country may have formally adopted an RIA process, this does not necessarily mean that it has also been adopted by the NRA of that country, in particular given the NRA's functional and administrative independence.

The case of the United States is paradigmatic because, although the federal government cannot compel federal agencies to implement RIA processes, the US federal executive has been trying for about 50 years to persuade the FCC (Federal Communications Commission - NRA of USA) and other federal agencies, to adopt an RIA process<sup>11</sup>. Nevertheless, in 2011, the FCC appeared receptive to President Obama's argument that it would be useful to repeal a number of obsolete regulations (although it is unclear if RIA is necessarily applied in this context). In the United States, it is the responsibility of the Office of Information and Regulatory Affairs (operating under the Office of Management and Budget) to conduct oversight and overall monitoring of the results of RIA implementation by various federal government agencies (EC, 2011r).

The legal basis for the implementation of RIA is different from country to country and may be based on a presidential order (USA), a law (e.g. Czech Republic, South Korea and Mexico), a decree or guideline issued by the Prime Minister (e.g. Australia, Austria, France, Italy and the Netherlands) or a legislative initiative of the government.

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<sup>11</sup> In accordance with Executive Order of August 1965 issued by President Johnson, Executive Order 11821 (Inflation Impact Statements) issued by President Ford, Executive Order 11949 (Economic Impact Statements) of President Ford, Executive Order 12044 (Improving Government Regulations) issued by President Carter, Executive Order 12291 (Federal Regulation) issued by President Reagan, Executive Order 12866 (Regulatory Planning and Review) issued by President Clinton, Circular A-4 2003 issued by President Bush (Regulatory Analysis), Executive Order 13422 of President Bush (amending Executive Order 12866, in order to control the regulatory process), Executive Order 13297 of President Obama (Revocation of Certain Executive Orders Concerning Regulatory Planning and Review) - repealing Executive Order 13422 of President Bush and on January 2011, Executive Order 13563 (Improving Regulation and Regulatory Review) issued by President Obama.

According to the OECD, in the case of Portugal, the development of transversal better regulation policy (2009ab), essentially stems from:

- a) The implementation of reforms to modernise the economy and promote growth, in line with the EU's "Lisbon Agenda";
- b) Widespread recognition that government needs to be more cost-efficient and more responsive to public needs, which also requires transformation of administrative culture;
- c) The priority given to boosting and promoting private sector innovation, in order to make the economy more competitiveness of the and attract more foreign direct investment.

In Portugal, after an incipient stage marked by measures such as Law no. 74/98 of 11 November<sup>12</sup> and the “*Programa Nacional de Ação para o Crescimento e o Emprego*” (National Action Programme for Growth and Jobs)<sup>13</sup>, the first phase of better regulation policy was characterised by the administrative and legislative simplification “*Simplex*” programme<sup>14</sup>, subsequently accompanied by the “*Legislar Melhor*” (Better law making) scheme, which aimed to improve the quality of legislative output<sup>15</sup>.

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<sup>12</sup> This piece of legislation established rules governing the identification, drafting and publication of legislation, contributing to an improvement in the transparency and efficiency of legislative procedures. It has since been amended by Law no. 2/2005 of 24 January, by Law no. 26/2006 of 30 June, by Law no. 42/2007 of 24 August and by Law no. 43/2014 of 11 July. See [http://www.parlamento.pt/legislacao/documents/legislacao\\_annotada/publicacaoidentificacaoformulariosdiplomas\\_simples.pdf](http://www.parlamento.pt/legislacao/documents/legislacao_annotada/publicacaoidentificacaoformulariosdiplomas_simples.pdf).

<sup>13</sup> This programme set out guidelines for the implementation of a national strategy of reform and modernisation as part of the Lisbon Strategy, in particular in macroeconomic and microeconomic terms and with a focus on employment, shaping the general recommendations of economic policy and employment policy for Portugal formulated by the European Commission and the priorities identified by the European Commission for Portugal in the framework of preparing the *Plano Nacional de Reformas* (National Reform Plan).

<sup>14</sup> Simplex was a programme which was introduced to achieve administrative and legislative simplification, with the intention of making life easier for citizens and businesses in their dealings with the Public Administration, while helping to increase the internal efficiency of public services. See Detailed information on this programme at <http://www.simplex.pt/simplex.html>.

<sup>15</sup> This scheme was one of the measures included in the *Plano Tecnológico* (Technological Plan), aimed at simplifying and eliminating legislation constituting a disproportionate burden on citizens and businesses, and defining models for ex-ante evaluation of the administrative burden of legislative initiatives and their adaptation to the principles of electronic administration. The strategic objective that this measure sought to achieve was to promote a change in the profile of the industry and services.

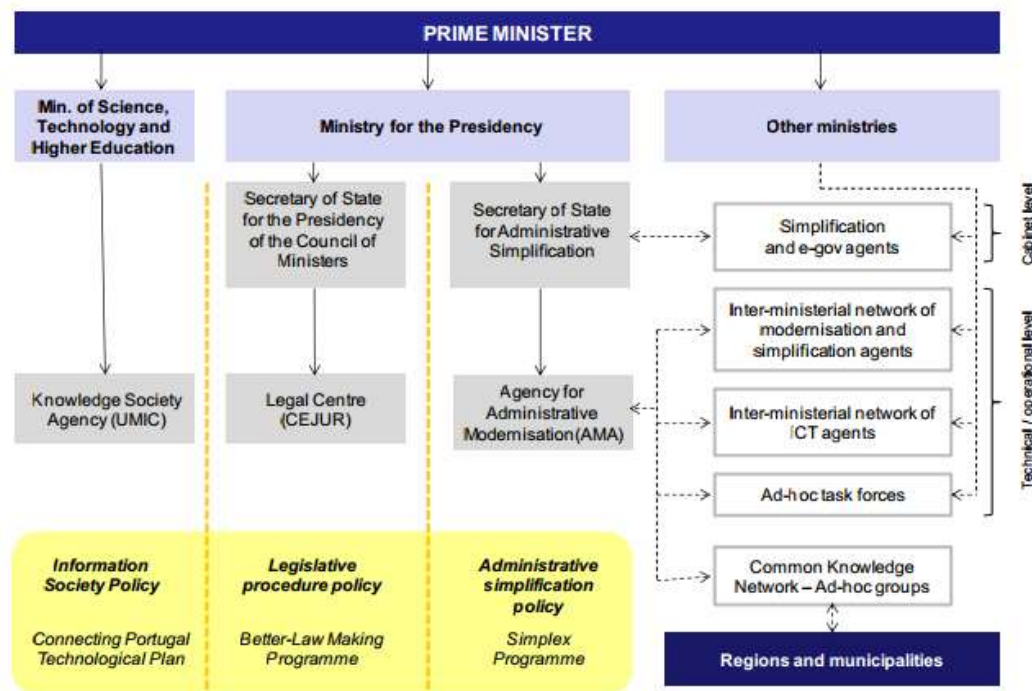
Another important component was provided with Resolution of the Council of Ministers no. 29/2011 of 11 July, which maintained the definition of applicable legislative drafting rules in preparing normative acts (originally approved by Resolution of Council of Ministers no. 77/2010 of 11 October)<sup>16</sup> and, in parallel, made it a requirement to complete an electronic form to accompany drafts of normative acts. This form includes fields such as: a summary of the measures; indication of completed or pending hearings; specification of legislative impact indicators or summary assessment of the resources involved in the implementation of the proposed measures over the short and medium term.

Figure 1 illustrates the institutional framework governing better regulation policies in Portugal, as detailed by the OECD in 2009, highlighting the top political commitment at Prime Minister level and - with regard to the information society - the involvement of the Ministry of Science, Technology and Higher Education and the then UMIC - Agência Para a Sociedade do Conhecimento (Knowledge Society Agency); UMIC has since been abolished and its relevant competence in this area has been transferred to FCT - Fundação para a Ciência e Tecnologia (Foundation for Science and Technology). Specifically, with regard to RIA, the analyses made in Portugal to justify the government's legislative initiatives, seem to focus (as, for example, happens in Austria) fundamentally on fiscal analysis, identifying the effects of measures on the State Budget.

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<sup>16</sup> Establishing also that draft normative acts must additionally observe the guidelines of the *Guia Prático para a Elaboração dos Actos Normativos do Governo* (Practical Guide for Preparing Normative Acts of the Government).

Figure 1 Institutional framework of better regulation policy in Portugal



Source: OECD (2009a)

With these concerns always present on the horizon of the activities pursued by ANACOM, the development of a study on RIA was established in the strategic guidelines for the 2015-2017 Multi-annual Activity Plan (as put to public consultation<sup>17</sup>) in the context of the strategic priority to promote open and competitive markets (Line of Action: "Assess the impact of adopted regulatory measures"); the proposed study would focus on a comparative analysis of the approaches taken by different NRAs with regard to RIA programmes.

As such, this document seeks to identify and discuss, in the context of RIA, the objectives to be achieved with such an analysis, the implementation of methodologies, and the advantages and disadvantages with regard to electronic communications markets and their regulation.

After this discussion, an analysis will be made of case studies on implementation of RIA in the EC, the United Kingdom and Ireland (referring to situations, at European level, where implementation seems to be more advanced in the European context

<sup>17</sup> [ANACOM Multi-annual Activities Plan 2015-2017 - consultation](#).

in the electronic communications sector) by indicating briefly the "lessons" given in each case.

Then, based on the preceding work, a study will be presented on the conditions of applying RIA to the activity pursued by ANACOM.

Finally, the main conclusions of the analysis will be presented, with a view to the possible implementation of the RIA process in the regulatory process of electronic communications in Portugal.



### 3. RIA OBJECTIVES

As stated *ab initio*, a fundamental objective of RIA is to help decision-makers set out and choose the most effective option in order to achieve certain policy objectives, using a systematic and consistent process.

To ascertain which alternative is the most effective, account must be taken of the costs and benefits to society as a whole and not merely the costs and benefits affecting certain pressure groups that often try to "capture" the regulatory process (OECD, 2008a)<sup>18</sup>.

This does not necessarily mean that a "Benthamite" welfare function is strictly followed<sup>19</sup> or that a specific regulatory proposal<sup>20</sup> should be abandoned just because it is anticipated that the costs associated with it exceed the sum of the corresponding benefits to society.

To the contrary, it is assumed that, following a welfare function logic of the "Rawls" type<sup>21</sup>, a regulatory measure can be adopted even if its costs exceed the benefits accrued to society as a whole, provided that the benefits given to certain vulnerable groups of users, such as, for example, citizens with disabilities are particularly highly valued.

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<sup>18</sup> The theory of regulatory process "capture" is commonly associated with the Chicago School and is covered for example in the work of Stigler (1971), Peltzman (1989, 1976), Becker (1983), Bohem (2007) and Carpenter (2004). It argues essentially that regulation is "acquired" or "captured" by those being regulated in particular by small interest groups.

<sup>19</sup> "Benthamism" (or "utilitarianism") is a doctrine of normative ethics formulated by the English philosopher and jurist Jeremy Bentham and developed by Scottish philosopher and economist John Stuart Mill; put very simply, according to this doctrine, the happiness of the greatest number of people is considered the greater social good.

<sup>20</sup> However, it should not be assumed, because the regulatory act is covered by a legislative act entailing a balance of the costs and benefits associated with the implementation of the norm, that this exempts the regulator from examining the costs and benefits associated with each of the possible ways in which that implementation might be accomplished.

<sup>21</sup> According to the American philosopher John Rawls, the correction of social injustices can only stem from policy that seeks fairness. Put very simply, the benefits enjoyed by the most disadvantaged social groups (for example, in terms of gender, ethnicity, culture, religion or disability) can be valued more highly than the benefits enjoyed by the most favoured social segments. At the limit, where a contribution is made to greater social justice, measures should be adopted to improve the position of these underprivileged classes, even if the overall result for society as a whole is negative.

In this context, another key objective of RIA is to make it clear exactly which groups are supporting the costs and which groups are enjoying the benefits of the adopted regulatory measures (OECD, 2008a).

As such, it is important to collect information and data enabling analysis of which social groups are affected by certain regulatory decisions, about the size of each group, the nature and extent of the impact of the decision on each group and the length of time that these effects persist (OECD, 2008a).

In relation to the assessment of costs and regulatory impacts, it is possible to identify four particular objectives of RIA (OECD, 2008b):

- a) Improve understanding of the real-world impacts of government action, including both the benefits and the costs of action;
- b) Integrate multiple policy objectives, revealing synergies or lack of synergies in the relationship between these objectives;
- c) Improve transparency and stakeholder consultation procedures;
- d) Improve the accountability of governments and/or regulators.

#### **4. RIA METHODOLOGIES**

Generally, the first step in implementing RIA requires - prior to taking any regulatory decision - answers to the following questions:

- a) What, in general terms, is the problem to be addressed?
- b) What is the specific policy objective to be achieved?
- c) What are the different means of achieving the specific objective?

A common misconception when preparing a response to these issues results from a confusion between policy means and policy objectives.

For example, it may be a policy objective to reduce the total amount of fraud affecting electronic communications service providers. Creating a list of debtors (detailing end-users with accumulated debt to providers above a certain amount) or making verification calls to question end-users in the event of unusual consumption are means of achieving this policy objective but not objectives in themselves.

In another example, another objective of public policy (in addition to participating in the development of the EU internal market and ensuring and protecting the rights of users and citizens) is to promote competition in electronic communications. Carrying out an analysis of markets susceptible to ex-ante regulation is a means (but not an objective in itself) of achieving a greater level of competition in these markets.

In addition to these fundamental questions of a general nature, preparation of an RIA entails prior analysis of the answers to the following specific questions (OECD, 2008b):

- a) Is the problem to be solved correctly defined?
- b) Is government/regulator action justified?
- c) Is regulation the best response to the problem?
- d) Is there legal basis for regulation?
- e) What is the appropriate level of regulatory intervention?
- f) Do the benefits of regulation justify the costs?

- g) Is the distribution of benefits across society transparent?
- h) Is the regulation transparent, consistent, comprehensible and accessible to users?
- i) Have all interested parties had opportunity to express their views on the various options considered?
- j) How will compliance with proposed measures be achieved?

Figure 2 presents the different stages of the RIA process, starting with definition of the political context and the policy objectives that allow clear identification of the problem to be addressed.

This analysis is followed by the identification and characterisation of all regulatory (and non-regulatory) options to achieve the established objectives.

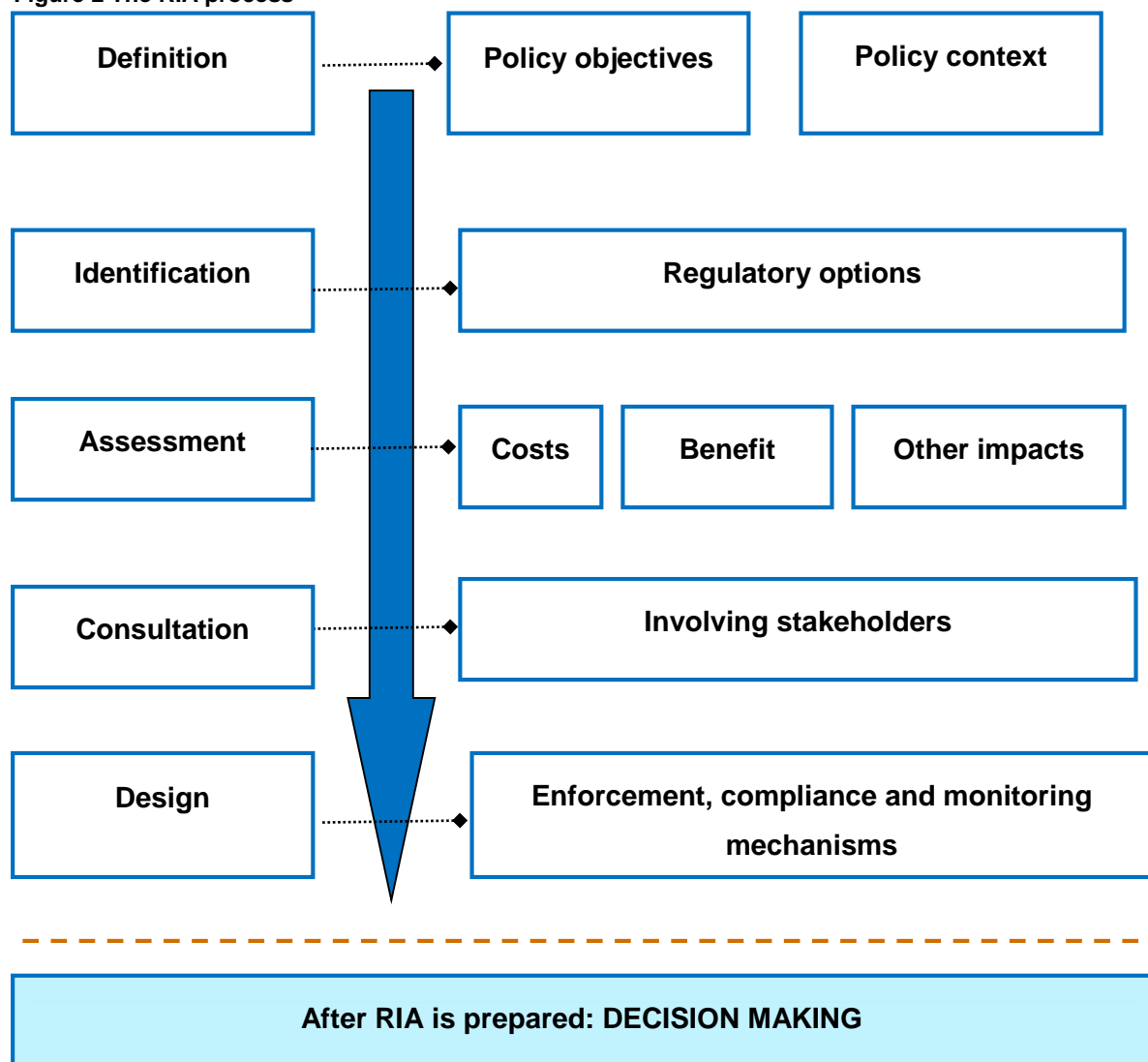
Thirdly, a quantitative and or qualitative estimate is made of the impacts of the options considered, particularly in terms of costs, benefits and redistributive effects.

From there, implementation strategies are developed for each of the options considered, including an evaluation of their effectiveness and efficiency.

In fifth place, the public consultation mechanisms which help make RIA a participatory process are identified, incorporating important information about the costs, advantages and disadvantages of each option considered or even identifying alternative options that have not been considered.

Finally, monitoring mechanisms are developed to evaluate the success of the proposed policy and to feed this information into future regulatory decisions (it should be noted that a draft of the measures may be previously submitted to public consultation). As such, the RIA process is restarted, if and when it is intended to reconsider the taken decision.

Figure 2 The RIA process



Source: OECD (2008b)

Due to its importance, special focus must be given to the phase for evaluating costs, benefits and other impacts.

It should be emphasised in particular that a preliminary assessment, using RIA tools, might even point towards not taking any regulatory measure, in particular where:

- a) The scale of the problem is too small to justify the costs of regulatory intervention;

- b) The costs of implementing a regulatory intervention option are deemed unreasonable *vis-à-vis* the expected benefit arising from this implementation;<sup>22</sup>
- c) Undertakings affected by the regulatory decision have capacity to undertake adopt actions that satisfactorily solve the identified problem on their own;
- d) The problem is essentially of a temporary nature;
- e) Available and known resources for supervision and inspection make it unlikely that it will be effectively implemented.

To understand what incentives stakeholders will have to comply or not comply with certain regulatory decisions, it is useful to answer the following questions (OECD, 2008a):

- a) How well aware of the regulatory decision is the target group and how well do they understand it?
- b) What are the relative benefits and costs to the target group of complying and not complying with the regulatory decision?<sup>23</sup>
- c) To what extent does the target group accept the regulatory decision as appropriate and legitimate?
- d) To what extent is the target group inclined to comply with regulatory decisions generally?
- e) How likely is it that third parties will identify non-compliance by the target group and how likely is it that they will cause the target group to suffer a penalty (e.g. by refusing to deal with them) as a result?

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<sup>22</sup> Including, in particular, costs related to a possible increase in the allocation of personnel attached to supervision and auditing costs.

<sup>23</sup> Naturally, the specific methodologies used to estimate the costs and benefits will depend on how comprehensively it is intended to develop RIA, and also on the sector of regulated entities. As with any other regulatory activity, any asymmetry of information between regulators and regulated entities warrants ongoing critical judgment regarding information that can be compiled from regulated entities. It is also highlighted that the certification and auditing of information provided by regulated entities is not free of costs and may involve delays in making regulatory decisions.

- f) How likely is it that non-compliance will be discovered through complaints?
- g) How likely is it that the target group will be inspected or audited by the authorities?
- h) How likely is it that non-compliance will be discovered in an inspection?
- i) To what extent will targeted inspections increase the chance of discovering non-compliance?
- j) How likely is it that a sanction will be imposed if non-compliance is detected?
- k) How severe is the sanction likely to be?

To understand and estimate the costs arising for the regulated as a result of a particular regulatory measure, it is common to look under the following categories (OECD, 2008a):

- a) Acquisition of new equipment needed to comply with regulations;
- b) Employing additional staff and external consultants to ensure implementation of regulatory measures;
- c) Alteration of the production process to bring it into line with regulatory requirements;
- d) Collecting and storing information that must be reported or retained under the regulation;
- e) Other increases in the costs of producing goods resulting from the considered regulatory measure.

ANACOM's regulatory activities contain a number of concrete examples where regulated entities report implementation costs associated with the execution of these measures.

As a concrete example of the costs that may be associated with a specific regulatory intervention, there is ANACOM's decision of 17 July 2004, which laid down the general principles and conditions governing access to and use of ducts and

infrastructure associated with the then PT Comunicações, S.A. (currently MEO) in the context of a reference offer for access to ducts<sup>24</sup>, as well as subsequent decisions which resulted in changes to the reference offer.

In this regard, the incumbent specified a significant amount of costs related particularly to infrastructure registry, mapping data acquisition, the implementation and management of computer systems, human resource management, operation and maintenance of infrastructure, and billing and collection.

Another example is ANACOM's decision of 17 February 2010, concerning amendments to the RUO (Reference Unbundling Offer)<sup>25</sup>, which entailed additional costs referenced by the incumbent operator, including those related to the improvement of RUO quality of service, such as costs of resizing work teams involved in maintenance and repair, and costs of developing support processes and information systems.

At retail level, it is also known that, historically, in terms of business processes related to price and quality of service conventions, the incumbents of the electronic communications sector and the postal sector have claimed increased costs associated with more demanding quality of service targets.

Since the impacts of regulatory decisions are often felt over a long period in time, it is necessary – insofar as it is possible to quantify such impacts in monetary terms - to calculate the net present value (NPV) of these costs, thereby accommodating the effects of inflation, uncertainty and inter-temporal preference for money<sup>26</sup> (OECD, 2008a).

Quantifying the benefits of a given regulatory decision may be as difficult as quantifying its associated costs, or more difficult. Nevertheless, with regard, for example, to wholesale markets (which currently encompasses the essential majority of electronic communications markets susceptible to ex-ante regulation according

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<sup>24</sup> [Offer for access to the PTC concessionaire ducts \(consultation report and decision\)](#).

<sup>25</sup> [Amendments to the RUO](#).

<sup>26</sup> Since assessment of the latter two aspects is particularly complex, it is considered that some relationship with the reference interest rates in the market may be accepted.



to the EC Recommendation on relevant markets<sup>27</sup>) and decisions focusing on wholesale prices, the aspects which may be analysed include:

- a) The effect of reduced wholesale prices in terms of reducing retail prices;
- b) The change in the volume of consumption of electronic communication services provided;
- c) The potential increase in the number of customers subscribing to electronic communications services;
- d) The impact, on different time horizons, on volumes of investment by electronic communications service providers;
- e) The competition effects on the electronic communications markets affected by the decision, especially where decisions involve the establishment of self-regulation or co-regulation solutions, require or encourage the publication of information (e.g., information on pricing, sales, costs or quantities produced), exempt some operators from compliance with obligations applicable to others, or increase the costs of switching provider (OECD, 2008a);
- f) Downstream effects in terms of productivity in the national economy.

When it is not possible to conclude a credible analysis in relation to the expected benefits stemming from certain regulatory options, generally the decision to be taken involves choosing the regulatory option estimated as more efficient for society in terms of costs (OECD, 2008a).

The OECD (2008a) also draws attention to the fact that certain regulatory measures may have a pernicious impact, which it is important to avoid, due to reduced competition or substitution effects on the consumption of certain products<sup>28</sup>.

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<sup>27</sup> Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

<sup>28</sup> The objections advanced by the OECD (2008a) are empirical rather than theoretical in nature, so that the substantive objections (regarding the "tout court" distortion of regulatory intervention) presented by the theorists of the Chicago School mentioned above are less relevant.

As regards the first aspect, the OECD notes that excessive regulation of certain markets may lead to a reduction in investment, to the extent that potential investors might doubt the profitability of the business.

Regarding the second aspect, the OECD offers the example of regulatory measures which have increased safety standards in civil aviation. These measures have resulted in a reduction in the number of deaths caused by aviation accidents, but on the other hand, have increased the costs of air travel. As a result, many people have opted to travel by car instead of by air, possibly increasing the number of road accidents and the total number of deaths overall<sup>29</sup>.

It should also be taken into account that it is often not possible to make a quantitative assessment of the impact of regulatory measures being proposed and it is therefore necessary to use qualitative information. For example, it may be extremely complex to estimate the monetary value of the human lives saved as a result of any regulatory decision that will improve access to emergency services. In such cases, the OECD (2008a) points out the utility of multi-criteria methods to support decisions (such as, for example, M-MACBETH<sup>30</sup> currently in use at ANACOM), to try to bring greater objectivity to the analysis.

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<sup>29</sup> The question is put whether, in the absence of regulatory intervention, the number of air accidents would not have grown as well, which could also result in more people opting to drive instead of fly.

<sup>30</sup> <http://www.m-macbeth.com/en/m-home.html>.

## 5. ADVANTAGES AND DISADVANTAGES OF RIA

Some of the advantages and disadvantages commonly associated with RIA are discussed below. Prior to the adoption of an RIA process - which presumably results in improved efficiency of regulation as a whole - it is nevertheless advisable, where possible, to quantitatively translate these advantages and disadvantages into benefits and costs resulting from the adoption of RIA.

An interesting exercise in this respect, as highlighted by the OECD (1997a), was carried out by Hahn, who estimated the current value related to the benefits and costs of 92 regulations published by the United States Government between 1990 and 1995. The present value of benefits was estimated at 990 billion US dollars<sup>31</sup> and the present value of costs was estimated at 450 billion US dollars<sup>32</sup>.

### 5.1 ADVANTAGES OF RIA

There are four commonly recognised key advantages associated with better regulation and RIA programmes.

One main advantage has to do with the fact that better regulation increases the credibility and legitimacy of the regulatory process. Moreover, in parallel, a positive impact is often had on the reputation of the regulated operators, with their initiatives given greater regulatory legitimacy (Radaelli *et al*, 2008; Mandelkern *et al*, 2001).

Secondly, in open economies, better regulation increases a country's competitiveness, including through increased foreign direct investment and by reducing incentives for certain high-value added activities to relocate abroad (Radaelli *et al*, 2008).

The fact that RIA contributes to minimising circumstances in which the costs of preparing and implementing regulatory measures are disproportionate may also be considered an advantage (Mandelkern *et al*, 2001).

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<sup>31</sup> Around 876 billion euros at the exchange rate on 17 September 2015.

<sup>32</sup> About 398 billion euros at the exchange rate on 17 September 2015.

A fourth advantage stems from the fact that RIA restores some responsibility to stakeholders, helping to ensure that regulation does not intervene excessively in the internal organisation of companies affected by the regulatory process and encouraging spontaneous initiative by these companies, enhancing their sense of responsibility and civic sense (Mandelkern *et al*, 2001).

As highlighted by the OECD (2002), the most important contribution of RIA to the quality of decisions does not stem from the precision of the specific estimates made in order to select the most suitable option, but rather from the act of analysing, questioning and understanding the impact of decisions on the real world and of examining the assumptions underlying these decisions.<sup>33</sup>

That is, to successfully establish an RIA process, it is useful, and perhaps imperative, to have an organisational culture which accommodates the querying and questioning of decisions taken.

Mandelkern *et al* (2001) even states that it is common for RIA implementation to encounter cultural resistance from staff who believe that they already know how to do their job and how to make the best decisions for the country or for their area of public policy. Radaelli and Francesco (2010) refer, in this context, to the need to provide direction and energy to systems that would otherwise seize up. As such, where staff view RIA as an unnecessary bureaucratic burden, they ultimately take a negative and merely formal approach towards it. This resistance can only be overcome with time and with senior management engagement.

It must also be taken into account that RIA is essentially a participatory process and should be integrated with public consultation processes<sup>34</sup>, so that stakeholders and those affected by regulatory decisions can contribute to improving the information available and correct erroneous assumptions and analysis (OECD, 2008a).

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<sup>33</sup> In any case, among developing and transition countries at least, only a small minority are able to achieve effective estimates of a quantitative nature (Kirkpatrick and Zhang, 2004).

<sup>34</sup> Intervention already required, under the law, in the development of the administrative procedure.

## 5.2 DISADVANTAGES OF RIA

According to Radaelli *et al* (2008), one disappointing feature of empirical literature is that it tends to focus almost exclusively on variables which are endogenous to RIA programmes, neglecting independent variables such as the characteristics of the political systems, administrative traditions and the power of pressure groups, which have an important role to play.

It is in this context that these authors (see also Radaelli and Francesco (2010)) - in line, for example, with economists associated with the "School of Virginia" ("School of Public Choice"), such as Buchanan and Tullock (1975) - present an alternative, less constructive explanation to justify implementation of an RIA process.

According to this line of thought, the groups with the most interest in adopting and implementing RIA would be well-organised pressure groups that seek to obtain advantages in the demand and supply of regulatory measures. In particular, these groups would be best placed to take advantage of the complexity of the administrative procedures (McCubbins, Noll and Weingast, 1987)<sup>35</sup>.

In particular, RIA would offer these pressure groups a prime instrument which they could use to oversee the decision-making process of regulatory agencies during the process on a case-by-case basis. That is, RIA provides a further tool to ensure political control of regulatory agencies, to be added to the traditional oversight instruments on an ex-ante basis (such as the budget of regulatory agencies) or on an ex-post basis (e.g., judicial review of decisions).

For Radaelli and Francesco (2010), political control through RIA could be classed within the relationship known in economic science as "principal-agent", where the "principal" (the State) seeks to control the "agent" (the regulator) in order to ensure that the regulator fulfils the public service mission assigned to it.

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<sup>35</sup> *"The traditional study of administrative law (...), views administrative procedures as means of assuring fairness and legitimacy in decisions by administrators. Its foundations are constitutional and common law principles of nondelegation, separation of powers, due process, and other procedures that protect against autocratic and capricious decisions by government officials. A major puzzle that emerges from this view is why administrative law is as complex as it is, and especially why legislation often specifies administrative procedures that go beyond the requirements for assuring conformity with these principles. Among these puzzles are the differences among regulatory agencies in procedures for policy decisions, enforcement and judicial review".*

Another feature of RIA, according to some authors (e.g., Croley and McCubbins) is that, while appearing on the surface to be open and neutral, it facilitates "rent seeking" activities.

In particular, this is because RIA can bring significant delays to the regulatory process, enabling better organised pressure groups to exercise their influence in order to further delay or influence the regulatory process to their advantage.

According to McCubbins, Noll and Weingast (1987), there is a good example of this how this happens from the 1980s, when the FCC was hampered by the preferences of North American politicians in pursuing the regulation of cable television distribution networks. According to these authors, in order to satisfy this "client" policy, the FCC, in the first place would put a very broad interpretation on the laws that allow it to regulate AM radio, to also regulate FM radio, terrestrial broadcasting, satellite broadcasting and cable television. Secondly, to confirm its jurisdiction over the regulation of cable television distribution, the FCC argued in court (*USA vs. Southwestern Cable*), that the uncontrolled development of cable television could interfere with the regulator's television broadcasting policies. After confirming its jurisdiction, the main entities interested in the FCC's decision-making process could then influence the development of FCC regulatory policy regarding cable TV distribution.

In parallel, and more recently, it is known that the ability of the FCC to intervene in the field of Internet regulation has been questioned, including in the courts, by different market players.

To avoid situations of regulator "capture" or of diminished effectiveness of implementation, it is useful to have a mechanism to review better regulation and RIA initiatives on an ex-post basis. Ex-post review is also one of the key OECD (2009) recommendations for Portugal, with the suggestion that Tribunal de Contas (Court of Auditors) might be given a role in this field.

Another measure that can help reduce delays in regulatory decision-making and minimise capture opportunities stems from the implementation of two different types of approach to RIA (OECD 2008b). "Lighter" analysis, requiring fewer resources and

which could be completed more expeditiously, would apply to less complex decisions or to decisions with limited market impact, likely comprising the majority of decisions. For example, such "simplified" RIA processes are carried out by the governments of South Korea, the United States and Canada, up to a threshold, respectively, of about 8 million euros<sup>36</sup>, 88 million euros<sup>37</sup> and 34 million euros<sup>38</sup>. Meanwhile, a more comprehensive RIA process could be applied to very complex regulatory decisions and to decisions with a very large impact on the market.

## 6. CASE STUDIES

In order to determine the state of play in the implementation of RIA among European NRAs, in June 2011 and subsequently in June 2015, ANACOM sent out questionnaires through the BEREC contact network (CN). In response to the first initiative, in addition to the data collected to illustrate ANACOM's position, answers were received from the NRAs of Germany, Austria, Denmark, Slovakia, Spain, France, Netherlands, Hungary, Ireland, Malta, Poland, Portugal, Romania, United Kingdom and Switzerland. In 2015, responses were received from the NRAs of Germany, Belgium, Cyprus, Croatia, Denmark, Slovakia, Spain, Greece, Netherlands, Ireland, Italy, Poland, Czech Republic, United Kingdom, Romania, Serbia, Sweden and Turkey.

Among the NRAs responding in 2015, only AGCOM, ComReg, Ofcom and PTS<sup>39</sup> reported that they had formally implemented an RIA programme. In 2011, only Ofcom and ComReg reported having implemented an RIA programme.

Nevertheless, ACM (Autoriteit Consument & Markt - NRA of The Netherlands) reported that it was legally bound to estimate the costs of regulation and the costs of compliance with the regulation (in terms of consumer benefit and welfare gains)

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<sup>36</sup> 10 billion South Korean Won, at the indicative exchange rate of the European Central Bank (ECB) on 17 September 2015.

<sup>37</sup> 100 million US dollars, at the indicative exchange rate of the ECB on 17 September 2015.

<sup>38</sup> 50 million Canadian dollars, at the indicative exchange rate of the ECB on 17 September 2015.

<sup>39</sup> Although PTS did not respond directly to the question of the questionnaire, it is possible to draw this conclusion based on a logical interpretation of what is referred to in its comments.

in the context of a proportionality test. However, in 2012, with the lifting of the obligation, ACM discontinued impact assessments of market analysis decisions.

BNetzA (Bundesnetzagentur - NRA of Germany), in its decision-making process, currently considers the advantages and disadvantages associated with each decision, examining the expected impacts and their consequences. This goal is achieved (as well as, for example, through the completion of studies), through public consultations, hearings and publications. Furthermore, close contact is maintained with stakeholders, in order to monitor the outcome of regulatory decisions on an ex-post basis.

In 2011, NMHH (Nemzeti Média - És Hírközlési Hatóság - NRA of Hungary) reported that, despite not having implemented an RIA programme, it monitored and examined the impact of market analysis decisions on a continuous basis, and, where necessary, introduced required corrections.

The NRA of Spain (currently CNMC - Comisión Nacional de los Mercados y la Competencia) reported in 2011 that it was considering the adoption of RIA programmes. However, discussion of RIA is not considered in the Spanish Regulator's activities plan for 2015.

On the other hand, UKE (Urząd Komunikacji Elektronicznej - NRA of Poland) explicitly stated in 2015, as it had in 2011, that it is was not considering future adoption of RIA programmes because it deemed them unnecessary, taking the view that ex-ante regulation is already based on the nature of the problem identified and is proportional and justified in accordance with the regulatory objectives set out under the EU regulatory framework.

Meanwhile, OCECPR (Office of Electronic Communications & Postal Regulations - NRA of Cyprus) and ANCOM (Autoritatea Națională pentru Administrare și Reglementare în Comunicații - NRA of Romania) both reported in 2015 that they were considering formal application of an RIA scheme. In the case of ANCOM, the process seems to be at a more advanced stage, in that there is already an outline for RIA implementation.



A presentation is made below of the case studies that are deemed most relevant to an examination of regulatory impact analysis, i.e. the EC, Ofcom and ComReg.

Meanwhile, outside of Europe, the case of the United States and the FCC has less application to the national reality, given the particularities of the political system and the legislative and administrative framework, despite being one of the most experienced countries and NRAs in the empirical application of RIA methodologies. In particular, since the United States is a democracy with a strong presidential set-up, government mainly uses RIA as a mechanism (in a framework that is similar to what is known in economic literature as "principal-agent") to control the activity of federal agencies, ensuring that the activities of these agencies ("agents") remain in line with the objectives of government policy ("principal"). Moreover, in the United States, since federal regulatory agencies prosecute tasks that can often be confused with the exercise of executive power and since their governing bodies are unelected, RIA is seen as a way of enhancing the credibility of these agencies among the general public (ITU, 2014; EC, 2011r).

## **6.1 EUROPEAN COMMISSION**

In 2002, the EC (2002) published its Communication on Impact Assessment as a tool to improve the quality and coherence of the policy development process, noting that this is not a substitute for political decision. In the Communication, it was defined that the process of impact assessment will be implemented for the EC's major initiatives, i.e. those which are presented in the Annual Policy Strategy or in its Work Programme.

The document established two stages of impact assessment: preliminary impact assessment and extensive impact assessment. Preliminary impact assessment should be used to identify the assessment objectives, the main policy options available (taking into account considerations of proportionality and subsidiarity, with the latter seen by the EC as the main driver of the process) and a description of the steps already undertaken and foreseen. Extensive impact assessment is performed in cases where a preliminary assessment suggests that the EC's proposal will result

in: (a) substantial economic, environmental and social impacts or (b) major policy reform in one or several sectors.

Based on the analysis of the main options available, a choice of policy instruments is identified for implementation, including prescriptive regulatory actions, co-regulation, market-based instruments, financial interventions, promotion of voluntary agreements or self-regulation, information, networking or co-ordination activities, and framework directives.

In 2005, the Interinstitutional Common Approach to Impact Assessment was published<sup>40</sup>, as agreed between the European Parliament, the Council and the EC, following the Interinstitutional Agreement on better law-making of 2003<sup>41</sup>. The three institutions agreed to follow this common approach, which they considered should, in an integrated manner, provide an assessment of the impact of proposed initiatives on a social level<sup>42</sup>, economic level<sup>43</sup> and environmental level<sup>44</sup>, identifying in parallel the respective costs, and short and long term benefits. According to this common approach the impact of proposed initiatives must be assessed in a rigorous and extensive manner, based on information that is accurate, objective and complete. Also according to the same document, the assessment must be transparent and proportionate, focusing on the goals indicated in the proposals put forward.

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<sup>40</sup><http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0259+0+DOC+XML+V0//EN>.

<sup>41</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2003.321.01.0001.01.ENG&toc=OJ:C:2003:321:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2003.321.01.0001.01.ENG&toc=OJ:C:2003:321:TOC) .

<sup>42</sup> According to the EC (2004), assessment of social impact should include Impact on employment and labour market access; Impact on job quality; impact on social inclusion; impact on equality of treatment and opportunities; impact on social rights and standards; impact on consumer rights; impact on governance and participation; impact on public health and safety; impacts on access to social protection, health and educational goods and services.

<sup>43</sup> According to the EC (2004), assessment of economic impact should consider the impact on competitiveness, markets, trade and investment flows; impact on direct and indirect costs imposed on businesses; impact on the administrative requirements imposed on businesses; impact on innovation and research; impact on specific regions, sectors or workers; impact on third countries and international relations; impact on public authorities; impact on the macroeconomic environment.

<sup>44</sup> According to the EC (2004), assessment of environmental impact should consider Impact on air quality; impact on water quality and resources; impact on soil quality or resources; impact on the climate; impact on biodiversity, flora, fauna and landscapes; impact on land use; impact on water production or recycling; impact on environmental risks; impact on mobility and the use of energy; impact on the environmental consequences of business activities.

The Impact Assessment Board (IAB)<sup>45</sup>, set up in 2006 (following a decision of the EC President), provided a quality control and support function for EC impact assessment. In particular, the IAB, comprising high-level experts appointed by the EC President, prepared published opinions with a view to improving RIA. For this purpose, it typically met on a fortnightly basis, receiving preliminary impact assessments from the Commission a good time in advance<sup>46</sup>.

The IAB annual report referring to 2010 (2011a) states that the EC has continued to make progress towards an evidence-informed approach, while recognising that much more work is needed in this area and also to make improvements to the consultation process between EC services.

The IAB was able to offer advice to EC services in their own preparation of preliminary impact assessments. Nevertheless, where the IAB had serious doubts about the quality of impact assessments conducted by the EC's services and/or their compatibility with the Commission Impact Assessment Guidelines (EC, 2011b), it presented a set of specific recommendations, and the service was asked to re-present the impact assessment, taking these recommendations into account. The proportion of impact assessments that are changed and re-submitted to the IAB in accordance with this procedure is typically high, representing 40% of all EC impact assessments in 2014 (2015)<sup>47</sup>.

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<sup>45</sup> [http://ec.europa.eu/governance/impact/iab/iab\\_en.htm](http://ec.europa.eu/governance/impact/iab/iab_en.htm).

<sup>46</sup> According to the IAB (2011a), in 2010, more than 90% of the impact assessments presented to it were submitted at least three weeks in advance.

<sup>47</sup> However, the IAB draws attention to the fact that such a high percentage is not necessarily reflected in poor quality final versions of impact assessments, given that the drafts are significantly changed. In addition, the IAB's standards have been raised, particularly since 2009.

**Figure 3 impact assessments evaluated and opinions issued by the IAB**

	2007	2008	2009	2010	2011	2012	2013	2014
Number of impact assessments evaluated	102	135	79	66	104	97	97	25
Number of opinions formulated	112	182	106	83	138	144	142	35
Resubmission rate	9%	33%	34%	42%	36%	47%	41%	40%

Source: EC (2014)

In its 2010 annual report, the IAB highlights the key role that culture change, staff training<sup>48</sup> and stakeholder consultation plays in the successful adoption of appropriate impact assessment procedures. In its 2011 annual report, the IAB also calls on EC services to make further efforts to present genuinely alternative options in RIA, and to better justify the proportionality of these different alternatives based on more detailed information.

In December 2012, the EC announced its intention to strengthen its approach to Smart Regulation in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of regions - COM (2012) 746 Final<sup>49</sup>. Specifically, this will involve an intensification of efforts to eliminate regulatory burden and, in parallel, to reinforce the instruments of regulation and continue to apply them in all its relevant activities. In addition, the EC also intends to develop efforts in the implementation and administration of RIA methodologies, working in close cooperation with other European institutions and

<sup>48</sup> In 2010, using external trainers, the EC carried out 17 training sessions on impact assessment (basic level) for a set of 200 people. The EC Secretariat-General gave a further 25 advanced sessions with 325 participants and 10 service-specific training sessions for over 100 people. An unquantified set of training sessions were also carried out by EC staff specialising in impact assessment.

<sup>49</sup>

[http://www.fd.uc.pt/~stavares/FDUC/Arquivo\\_2012\\_2013\\_Energia/Entradas/2013/3/24\\_From\\_Better\\_to\\_Smart\\_\(economic\)\\_Regulation\\_files/smart\\_regulation\\_2.pdf](http://www.fd.uc.pt/~stavares/FDUC/Arquivo_2012_2013_Energia/Entradas/2013/3/24_From_Better_to_Smart_(economic)_Regulation_files/smart_regulation_2.pdf).

with Member States. In this context, the EC has brought together all ongoing initiatives in the Regulatory Fitness and Performance Programme (REFIT) seeking a reduction in the regulatory burden while ensuring that the EU's legislative construct remains fit for this purpose.

Meanwhile, on 01 July 2015, the IAB was replaced by the Regulatory Scrutiny Board (RSB) to provide a central quality control and support function for the EC in RIA<sup>50</sup>. The RSB offers its opinion with respect to the preliminary versions of RIA performed by EC services, and a positive opinion is needed from the Board for an examined initiative to advance. After the proposals have been approved by the EC, both the RIA and the RSB opinion are posted on the EC website.<sup>51</sup>

Another very important component for the success of impact assessment are roadmaps. Corresponding in essence to a preliminary impact assessment, these roadmaps are formulated at an early stage of the decision process; briefly, they include:

- a) The context and definition of the problem to be resolved;
- b) The main problems that the initiative in question will address;
- c) Details of who will be affected by the decision;
- d) The basis for justification of EU action;
- e) The objectives of the initiative;
- f) Identification of the main potential regulatory options;
- g) An initial assessment of the expected impact in terms costs and benefits;
- h) An indication of the information already available and of information to be collected in support of the decision and to carry out the impact assessment;
- i) An indication of whether or not there will be a need to refer to external entities and experts.

These roadmaps are publicly available on the EC website<sup>52</sup>, with several of interest to the electronic communications sector, including: on collective spectrum use (EC,

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<sup>50</sup> The RSB is chaired at Director General level and consists of three high-level Commission officials and three external experts (all working full-time).

<sup>51</sup> [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/cia\\_2015\\_en.htm](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2015_en.htm)

<sup>52</sup> [http://ec.europa.eu/governance/impact/planned\\_ia/planned\\_ia\\_en.htm](http://ec.europa.eu/governance/impact/planned_ia/planned_ia_en.htm).

2011c); on a follow-up to the "active and assisted living" programme (EC, 2013b); on measures to reduce the costs of broadband infrastructure deployment (EC, 2013c); on the accessibility of websites of public bodies (EC, 2012b); on access to and preservation of scientific information (EC, 2012c); on universal service (EC, 2011d); on international roaming (EC, 2011e); on costing methodologies for access products (EC, 2011f); on applicable remedies in the context of functional separation (EC, 2011g); on personal data breach notifications (EC, 2011h); on Europe-wide numbering range for business services (EC, 2011i); on the preparation of the World Radio-communications Conference (EC, 2011j); on Web accessibility (EC, 2011k); on network and information security (EC 2011l); on critical information infrastructure protection (EC, 2011m); on electronic identification, authentication and signature (EC, 2012d, 2011m); and on citizen privacy and trust in new services (EC, 2011o).

Among the more extensive impact assessments produced by the EC with relevance to the sector, the following assessments can be highlighted: on the review of the EU regulatory framework (EC, 2007) and, more recently, on the revision of the regulation on mobile roaming<sup>53</sup> (EC, 2011p) or with regard to the proposal for a Regulation laying down measures concerning the European single market for electronic communications (EC, 2013d).

## **6.2 UNITED KINGDOM - Ofcom**

The RIA practices implemented in the United Kingdom are examined below - firstly at government level and, secondly, as by Ofcom.

The United Kingdom has a specialist group focused on improving regulation - the Better Regulation Executive (BRE), which operates as part of the British Department for Business, Innovation and Skills<sup>54</sup>. The Better Regulation Executive works with

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<sup>53</sup> Regulation (EC) no. 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile communications networks within the Community, as amended by Regulation (EC) no. 544/2009.

<sup>54</sup> BIS is the government department responsible for promoting the basic conditions which make the British economy successful. Its mission includes creating conditions for business success, promoting innovation, science, entrepreneurship and giving everyone tools and opportunities to be successful in a global and open economy.

departments and regulatory bodies to improve the production of regulatory measures, promoting, in particular, the simplification, modernisation and improvement of implementation and dissemination processes.

BRE considers that any regulation should follow five essential principles to ensure regulatory effectiveness and efficiency:

- a) Transparency - its objectives and effects must be clear;
- b) Accountability - it must be possible to assign its authorship and implementation to one or more entities;
- c) Proportionality - it must respond, sparingly, to the problem it seeks to solve;
- d) Consistency - it must be consistent with national objectives and requirements and with other existing regulation;
- e) Focus - it should be clear who the regulation applies to and which individuals are affected by the regulation's impact.

According to the rules issued by BRE, emphasis should be placed on transparency of regulation for users, on removing all unnecessary costs of regulation and avoiding any potential negative impacts. As such, the goal is that regulation is only implemented when market failures are evident or when there are problems of social fairness. In practice, it is intended that regulation is implemented only when it contributes to providing a net benefit to society.

In this regard, the BRE states that the problem that gives rise to the regulation is generally an easily identifiable issue. As a rule, the direct costs of regulation are also clear. However, the chain of impacts caused by regulation can be very difficult to gauge (benefit and costs).

According to a survey carried out by the BRE, one of the issues associated with regulation is the perception (not always positive) of those being regulated and of society itself. Therefore, one of the objectives of the BRE is that regulation is subjected to a suitably disseminated process in order to expand its benefits.

According to the BRE (2011), improvement of the regulatory process and regulation has the following advantages:

- a) Giving consumers the information they need without burdening them with unnecessary and intricate details;
- b) Ensuring that the information provided is effective in helping consumers, in particular clarifying difficulties in the decision-making process;
- c) Simplifying consumer protection mechanisms;
- d) Reducing the burdens and bureaucracy faced by citizens, institutions and businesses;
- e) Simplifying the work of civil servants;
- f) Improve the service provided by public sector staff;
- g) Improving the quality and image of regulation in society;
- h) Improving the focus of regulatory intervention;
- i) Increasing the benefits of regulation for society as a whole.

To achieve these benefits, the BRE (2011) states in particular that the role of regulation should be simple to understand and to fulfil, complementing not complicating the way society works and keeping the United Kingdom competitive.

To achieve these objectives, the British government should:

- a) Establish concrete measures to simplify and improve existing legislation;
- b) Clearly communicate the obligations of citizens and organisations;
- c) Calculate the impact of new regulatory measures;
- d) Work in conjunction with the EU to improve European guidelines;
- e) Improve the legislative approval process, including by making it more expedient.

It can be concluded from some case studies presented by BRE (BIS, 2009a) that quality regulation is associated with:

- a) Reduced legislative complexity;
- b) Clarity of objectives;
- c) Commitment to the study and resolution of presented issues;
- d) Clear accountability of agencies and other entities involved in achieving results, including a proper system of rewards and punishments;



- e) Planning of actions with regard to implementation, monitoring and possible review;
- f) Proper management of the change process inherent to regulation.

With this perspective, in May 2009, the British Government conducted surveys to assess receptivity to regulation, and concluded that between 70% to 85% of the population accepts that the benefits of regulation outweigh the costs involved.

The main regulatory benefits cited by consumers, in addition to the effective implementation of laws and support of business competitiveness (BIS, 2009b), include those related to:

- a) Ensuring that regulation is effective in bringing benefits;
- b) Introduction of specific estimates and verification measures in the regulatory package;
- c) Creation of standards for products, services and buildings, establishing, for example, quality and safety standards;
- d) Elimination of cartels;
- e) Environmental Protection;
- f) Health and safety;
- g) Social fairness.

In terms of potential benefits, note is made of those related to increased competition, encouraging innovation, improving the investment climate, the existence of clear professional rules, corporate accountability, environmental sustainability, greater long-term socio-economic and environmental sustainability and the improvement of social conditions in general.

In 2009 BIS (2009a) issued a code of good practice for regulation (issued via the BRE), which included case studies to illustrate the application of each rule. Briefly, the rules set out in this code stipulate that regulation should be:

- a) Based on a good understanding of users and their needs;
- b) Designed with input from users and their representative bodies;
- c) Organised around the business processes involved and helping those involved understand how the law applies to their day-to-day work,

- d) Written in concise language and without using jargon which makes it difficult for the targeted public to understand.
- e) Clear with regard to the circumstances and users to which it applies;
- f) Published and applied in a timely manner;
- g) Widely published and available for consultation whenever needed, including over the Internet;
- h) Revised and improved whenever necessary.

The BRE's code of good practices follows "*Hampton Implementation Review*", which presents a set of principles for good and effective regulation (BRE, 2008), grouped into six major areas:

- a) Design of regulations: (i) Regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all stakeholders should be consulted; (ii) When new policies are being developed, consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden on businesses and regulators;
- b) Advice and guidance for businesses - Regulators should provide advice easily and cheaply;
- c) Data requests - Regulated businesses should not have to give unnecessary information or the same piece of information more than once;
- d) Inspections - No inspection should take place without reason;
- e) Sanctions - Businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions, while regulators must be: (i) transparent in their determination and application of sanctions; (ii) avoid providing an incentive, of any kind, to not respect regulation; (iii) monitor the application of sanctions and of the effect of applied sanctions;
- f) Focus on results - Regulators should: (i) measure the effects of regulation and not just the products that result from the regulatory process; (ii) remain accountable for the effectiveness and efficiency of their activities; (iii) maintain an independent attitude at all times.

Accomplishment of the *Hampton Principles* will be reflected on three levels:

- a) Risk-based regulation – i.e., the regulators and the regulatory system as a whole should use risk measurement mechanisms and direct efforts where they are most needed;
- b) Transparency and accountability - that is, regulators should: (i) be accountable for the efficiency and effectiveness of their activities; (ii) disseminate their action policy; (iii) account for their activities before stakeholders, the Government and Parliament; (iv) implement regulatory measures in a transparent manner;
- c) Economic progress - regulators should recognise that their activity is intended to encourage progress and that they should intervene only when there is a clear case for protection.

Regulatory practice in the United Kingdom with respect to electronic communications and, more recently, postal services, is exercised by Ofcom. On 18 February 2011, Ofcom published the document "*Principles for economic regulation*" (Ofcom, 2011a), in which it presents its agreement with the BIS guidelines.

Ofcom notes that the electronic communications sector, in line with other regulated sectors, involves high sunk costs (which can ward off interest from potential investors), so that good regulation should promote both market efficiency and stability. This goal assumes that the effects of regulation are considered in terms of consumers and service providers/operators over the short and long term. In this regard, it is stressed that it is necessary to maintain an attractive and stable climate that attracts and fosters investment. These provisions also mean that existing regulation should be up for review whenever necessary, and any regulatory instruments that may have become superfluous should be withdrawn.

The NRA of the United Kingdom agrees that the electronic communications sector brings together technologies and markets which are evolving at a rapid pace. This dynamism cannot be disregarded, and Ofcom stresses the need to balance a climate of stability with a certain regulatory flexibility; this can be achieved through the following actions:

- a) Establishing defined basic principles that guide the activity of the regulator;
- b) Avoiding unnecessary intervention and interventions whose regulatory impact is not well specified;
- c) Focusing regulatory intervention on solving well-defined problems;
- d) Giving priority to the most important intervention in order to avoid wasting resources or conflicts of interest;
- e) Supporting intervention with instruments that allow proper dissemination to the public and oversee the costs and benefits which result;
- f) Ensuring consistency over time in matters related to sunk costs.

Ofcom encourages self-regulation and supports interested businesses in drawing up codes of conduct or in the conclusion of agreements to improve the functioning of the sector. Regulation is seen as an instrument that should be used only when self-regulation fails or where a company has a strong incentive not to comply with the code of conduct or market functioning agreements.

The NRA of the United Kingdom (Ofcom, 2005a) points out that the option of not intervening should always be considered seriously: "Sometimes the fact that a market is working imperfectly is used to justify taking action. But no market ever works perfectly, while the effects of regulation and its unintended consequences, may be worse than the effects of the imperfect market". Ofcom (2008b) distinguishes four types of attitude to regulation:

- a) No regulation - In markets where regulation is not necessary, businesses are empowered to develop and deliver an adequate and technologically advanced product to consumers without any external intervention. In turn, consumers are empowered to take full advantage of the products and services offered and to avoid any harm associated with the products.
- b) Self-regulation - These are markets where the industry collectively applies measures which benefit consumers and/or market functioning without direct oversight from the regulator.
- c) Co-regulation - Characteristic of markets in which the regulatory scheme is agreed between a regulatory authority and the industry, with the responsibility

of applying corrective measures split between the regulator and the regulated;

- d) Statutory regulation - In these markets, the objectives and rules are defined by legislation and imposed by the regulator, and may even affect the business processes of regulated parties. Compliance with the imposed obligations is enforced by public authorities.

According to Ofcom, regulation should be progressive and based on incentives for organisations and consumers (Ofcom, 2008b; BIS, 2009b). Therefore, when encountering a problem, a means of resolution is sought which works in line with natural market mechanisms. If this is not possible, Ofcom contacts those involved and explores the possibilities of self-regulation or co-regulation. The regulator intervenes only where no other solutions are possible, formulating and applying statutory legislation. There is no formula for the regulation and each case is examined on its own basis. The impact of intervention is always weighed to ensure that the net benefit is positive and to facilitate further evaluation and oversight of the regulatory action. The mandatory performance of regulatory impact assessments is enshrined in Ofcom's Statutes (part 1, section 7 of the Communications Act, relating to the duties and functions of Ofcom<sup>55</sup>).

The structure of the regulatory impact documents must contain the following elements:

- a) Detail of the problem that the regulation seeks to resolve;
- b) Option or options for the regulation, always favouring simpler and cooperative regulation;
- c) Analysis of each regulatory option, detailing the various costs and benefits involved. Whenever possible the impact of each action will be detailed for each of the entities involved in the regulatory process. The analysis of these options, and their costs and benefits, also requires calculation of the main associated risks;

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<sup>55</sup> See <http://www.legislation.gov.uk/ukpga/2003/21/section/7>.

- d) Timetable for the regulatory process and for the period over which the costs and benefits are incurred, as well as for regulatory action oversight mechanisms;
- e) List of entities involved or to be involved in resolving the problem;
- f) Proposal / document on the public consultation carried out on the problem to be resolved and proposals for suggested action.

After the public consultation phase, a document is published which, in addition to a description of the problem and the expected impact of the regulation, includes responses to the public consultation and identifies proposals for concrete actions, including dissemination, with regard to each of the entities involved in regulatory action.

After implementation of regulatory action, its impact will be evaluated according to a defined schedule. This assessment must entail a review of the currency of the assumptions underlying application of the regulatory action and verification of whether the proposed objectives have been achieved.

Accordingly, the six phases defined for the implementation of RIA are accomplished, in line with the stages defined by BIS:

- a) Step 1 - Define the issue to be considered and identify the citizen or consumer interest;
- b) Stage 2 - Define the policy objective;
- c) Stage 3 - Identify the options;
- d) Stage 4 - Identify the impacts of each option on different types of stakeholders;
- e) Stage 5 - Identify the impacts of each option on competition;
- f) Stage 6 - Compare the impacts of the various options and choose the best regulatory action.

The options taken by Ofcom should, whenever possible, be assessed based on quantitative estimates, while, as a minimum, costs and benefits should be described qualitatively (Ofcom, 2005a). Where it is possible to quantify costs and benefits, the

discount rate recommended by the British Treasury will be used (unless there are specific reasons to do otherwise) to work out the net present value of the options under analysis.

The Guidelines of Ofcom (2005a) indicate the need to consider the risks associated with the possibility that an option is not fully implemented or implemented with delay, i.e., in RIA, Ofcom should consider possible effects of delays, due to difficulties in executing the measures or due to unforeseeable effects.

In the same document, Ofcom recommends evaluating the risk of non-compliance. That is, Ofcom should make an assessment of costs involved if regulated undertakings fail to act according to Ofcom's decisions, which is one of the possibilities to be considered in the analysis. Moreover, according to information provided by Ofcom (in reply to the ANACOM questionnaire mentioned above), one of the biggest challenges faced by the British NRA in the context of RIA is the fact that stakeholders contest the methodology and assumptions adopted as part of the RIA.

Furthermore, Ofcom is required to assess the impact of regulatory measures on its structure, operations and costs, and also complete the same analysis with regard to other public agencies affected by regulatory measures (Ofcom, 2005a).

While Ofcom's activity is not directly related to environmental measures, the possible costs and/or benefits that regulatory action might bring to the environment are referred to in the regulatory impact assessment forms used by Ofcom and should be properly considered.

Although, for the sake of fairness, Ofcom accepts the application of similar measures to similar problems (Ofcom, 2005b), it is aware that problems should be analysed on a case-by-case basis and that proposed solutions may vary, particularly given that the positions of the various service providers and market conditions are subject to rapid change.

In the context of the regulatory actions undertaken by Ofcom and discussions with stakeholders, the following documents are made public, in relevant media, in paper form and on Ofcom's website:

- a) Public or limited consultation documents;
- b) Work of specific committees and discussion groups;
- c) Annual Communications Market Report;
- d) Annual report into the consumer experience;
- e) Codes of good practice for the various services/markets;
- f) Procedures for sanctioning regulated entities;
- g) Licences/authorisations issued;
- h) Annual Report on the activity Ofcom;
- i) Ofcom Annual Report and Accounts;
- j) Documents which could indicate possible links of interest on the part of Ofcom's management.

Ofcom's procedures are overseen by Parliament, and the regulatory impact of their performance is reviewed periodically by the relevant parliamentary committees.

In the document "Principles for Economic Regulation" (Ofcom, 2011a), Ofcom is assumed as an organisation of excellence due to its expertise. Even so, cooperation between the various entities with regulatory responsibilities, whether part of the government or independent regulatory authorities, is deemed essential. The convergence of objectives and policy is seen as one of the basic pillars of better regulation, and the flow of information is crucial to ensure consistency of action, disclosure and subsequent monitoring of results.

Ofcom seeks an ongoing reduction in regulation costs in order to maximise the net benefit of regulatory actions without compromising impartiality or professionalism. To this end, the rules governing the review of the regulatory impact of its measures are subject to a continuous process of improvement.

In this context, although Ofcom has not adopted different RIA processes according to the complexity of the decision to be taken, in practice RIA for more complex decisions are undertaken to a much greater level of detail.

As an example of a more complex RIA, in its reply to ANACOM's 2011 questionnaire circulated through BEREC, Ofcom indicates "Ofcom's Pay TV statement" saying



that the entire decision itself constitutes an impact assessment even while incorporating a separate section specifically on the impact assessment (section 11)<sup>56</sup>.

An examination of the summary of this Ofcom document is in line with the information which it provided in response to ANACOM's questionnaires, highlighting the diversity and complexity of the material covered, with natural reflexes in the impact assessment - which resulted in particular in three decisions:

- a) To require Sky to make Sky Sports 1 and 2 available to other operators at prices set by Ofcom.
- b) To approve requests from two operators seeking to offer their own subscription television channels over Sky's digital terrestrial television platform, but subsequent to the entry into force of a wholesale offer for Sky Sports 1 and Sky Sports 2;
- c) To consult the *Competition Commission* on a proposed decision referring to two closely related markets (market for the sale of premium content rights and market of premium content services).

As an example of a less complex RIA, and in response to ANACOM's same questionnaire of 2011, Ofcom points to the ongoing pricing review with regards to points of traffic handover on leased lines, saying that the whole consultation document (55 pages) constitutes an impact assessment<sup>57</sup>. It is a significantly briefer document than the previously mentioned "Ofcom's Pay TV Statement" with a range of data and considerations on the impact of operating and capital costs as regards traffic handover points.

There are also other examples of RIA performed by Ofcom, which appear to contain a high level of detail:

- a) The document on the regulation of retail markets (Ofcom, 2005b), in which, along with a detailed description of the possible options for action, particularly

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<sup>56</sup> See [http://stakeholders.ofcom.org.uk/consultations/third\\_paytv/statement/](http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/).

<sup>57</sup> See <http://stakeholders.ofcom.org.uk/consultations/revision-points-handover-pricing/>

with regard to actions in respect of operators with significant market power, RIA is systematised together with the facts that have been weighed in the decision-making process;

- b) An RIA on mobile markets (Ofcom, 2008a) led to a public consultation that was held between August and November 2008. This represents a post-regulation analysis, assessing how consumer needs are being served by the British mobile market, while at the same time seeking to envisage the future needs of the mobile market and anticipate new requirements for regulatory intervention;
- c) An RIA, this time following forms standardised by BRE, is presented in a document in which, directive by directive, Ofcom (2011b) examines the EU's September 2010 review of the applicable regulatory framework for electronic communications. For each case, an analysis is made of the benefits and costs for consumers and service providers stemming from the transposition and non-implementation options of each directive. Briefly, the RIA also refers to the existence of future oversight actions over the decision. Each analysis is validated and signed by the responsible member of the government.

In its response to the 2015 version of ANACOM's survey, Ofcom stated that between 2014 and 2015, as part of its activity, it had carried out 24 RIA processes, including, impact assessments on the prices charged by the wholesale arm of BT (Openreach), relevant markets, portability, pricing, spectrum management and changes to license conditions.

Finally, Ofcom highlights (again according to the results of this questionnaire) staff training and the existence of a central body at governmental level supporting RIA implementation as key factors of success in relation to implementation of RIA.

### 6.3 IRELAND - ComReg

The entity responsible for providing regulation of the communications sector in Ireland is ComReg. According to an Irish Government directive, stemming from Section 13 of the Communications Regulation Act<sup>58</sup> of 2002, ComReg is required to carry out RIA before deciding to impose regulatory obligations.

As explained in the document "*Guidelines on ComReg's Approach to Regulatory Impact Assessment*" (ComReg, 2007ab), RIA must follow best European and international practice, in accordance with the measures stipulated by the Irish government to improve regulation.

The standardisation of ComReg's practices gave rise to a public consultation launched in December 2006, whose findings were published on 10 August 2007.

According to the document on ComReg's Guidelines (2007ab), RIA has three objectives:

- a) Establish whether regulation is actually necessary;
- b) Identify the impacts (positive and/or negative) of the measures to be implemented;
- c) Identify whether there are alternative regulatory measures.

The gain from applying or withdrawing regulatory measures should be assessed according to an RIA; this assessment is simpler when the issues are less complex and more elaborate when ComReg is studying problems with greater potential impact on stakeholders.

On the other hand, *ComReg's guidelines* (2007ab) state that it is preferable to perform the RIA as close to the beginning of the regulatory process as possible (i.e. as soon as any decision comes under consideration), so that all impacts are taken into account and that it is possible to cancel the full assessment process and subsequent regulatory implementation while the costs involved remain very low.

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<sup>58</sup> See <http://www.irishstatutebook.ie/2002/en/act/pub/0020/index.html>

In its regulatory impact assessment, ComReg (2007ab) undertakes to apply the principles and values of necessity, effectiveness, proportionality, transparency, accountability, consistency, impartiality, integrity and professionalism.

ComReg (2007ab) defines five steps in designing an RIA:

- a) Describe the issue and identify the objectives of regulatory activity;
- b) Identify and describe the regulatory options;
- c) Determine the impacts on stakeholders;
- d) Determine the impacts on competition;
- e) Assess the various regulatory options and choose the most appropriate.

All of ComReg's regulatory decisions should take into account the costs and benefits associated with each regulatory option. In cases where ComReg considers it necessary, and insofar as this is possible, the net associated benefits are calculated for each regulatory option. As recommended by the EC, ComReg mentions the possibility of using multi-criteria decision tools in assessing regulatory options (ComReg 2007ab).

In the document that provides the framework for *ComReg's guidelines* for RIA processes (ComReg, 2007ab), ComReg warns that estimating the costs associated with regulatory impact is often easier than estimating the associated benefits, especially as benefits tend to accrue across the economy as a whole.

ComReg also stresses the involvement of stakeholders throughout the RIA process, from their consultation and collaboration in the development of first approaches to the regulatory issue to their collaboration in the process of implementing and monitoring regulatory measures; ComReg considers this involvement as a key success factor when undertaking RIA.

The presented principles RIA are put into operation in detail using, for example, illustrative generic tables in the document "*Revised RIA Guidelines - How to conduct a Regulatory Impact Analysis*" (Department of Taoiseach, 2009).

It is important to emphasise that performance of RIA is not always mandatory. ComReg (2007ab) states that these assessments should be performed wherever there is relevant impact on the market, consumers or any stakeholder. It is also

stressed that not all circumstances are appropriate for conducting an RIA. ComReg evaluates and determines when RIA is required, taking into account the principles of reasonableness and proportionality. It may also be necessary to forgo performance of an RIA in situations where regulation has to be produced and applied urgently.

If ComReg determines, at the beginning of the RIA process, that the potential decision involves a low level of costs and imposition, it draws up a simplified analysis. Where, on the contrary, it is expected that a given regulatory action may impose significant obligations on one or more stakeholders, then a more detailed RIA should be performed.

As an example of a less detailed RIA, ComReg (2011c) indicated (in their responses to ANACOM's questionnaires of 2011 and 2015) the RIA presented in a document proposing changes to a code of practice for value-added services, in which various measures were presented to promote transparency and consumer protection. Because Ireland's NRA recognises that it is very difficult to make quantitative estimates concerning the evolution of consumer benefits, the RIA focuses more on qualitative assessments, without prejudice to the use of survey data.

It should be noted that, previously, ComReg (2010b) sought to define the limits of its intervention in the regulation of value-added services, and to this end listed and analysed three forms of action. For each option, the corresponding expected impact was detailed for industry, consumers and society in general. At the end of the analysis, the results were compiled and presented, and the option chosen according to the better regulation criteria by which ComReg is guided.

As an example of a more detailed RIA, ComReg (2011d) indicated (in its reply to ANACOM's 2011 questionnaire) the RIA presented in a document on the analysis of the wholesale broadband access market ("market 5"). This document contains an extensive and detailed discussion on the impact of the different obligations imposed on this market in terms of competition and consumers while noting the responses given by stakeholders to the public consultation held on the matter.

It should be noted that, previously, on 29 June 2011, a document was published on the introduction of key performance indicators for regulated markets (ComReg, 2011a). According to ComReg, RIA was used to ensure the transparency of the obligations imposed on operators and providers, particularly on those that have significant market power. Obligations are imposed in the following markets:

- a) Retail narrowband access
- b) Terminating segments of wholesale leased lines
- c) Wholesale infrastructure access
- d) Wholesale broadband access.

In the RIA on the introduction of key performance indicators for regulated markets, ComReg considered three possible courses of action (ComReg, 2011a):

- a) Maintain current policy without changing operator/provider requests;
- b) Impose specific performance targets which must be met by Eircom;
- c) Impose key performance indicators which were the subject of consultation and agreed with the operators/providers.

The assessment document sets out the reasons which led ComReg to decide upon the regulatory option c) above as the best way of accomplishing the proposed objectives of ensuring consumer services and guaranteeing regulation transparency. This analysis shows the effect of the measures proposed on the various stakeholders, from Eircom (incumbent operator in Ireland) to consumers.

Meanwhile, in terms of market analysis, in response to the second edition of the questionnaire circulated in 2015, ComReg indicated, as an example, the RIA conducted in respect of the analysis of the market of access to the public telephone network at a fixed location for residential and non-residential customers.

In line with the document referred to in the previous example, on 22 March 2011 ComReg (2011b) published an analysis of the transparency obligation and access obligation in the market for wholesale terminating segments of leased lines and, on 21 November 2012, an analysis of mobile and fixed termination rates. In both these analyses, as in previous ones, the regulatory impacts of the measures to be implemented were identified, together with the impacts on the various stakeholders,

with special attention given to the expected effect on the operator with significant market power and on consumers.

In the postal sector, note is made of the RIA on the liberalisation of the postal sector published in June 2010 by the Department of Communications, Energy and Natural Resources (2010). In this RIA, the aspects analysed include ComReg's powers in the implementation and oversight of the postal sector, the necessary authorisations to exercise the postal activity, the regulatory obligations associated with the provision of postal services, the designation of a universal service provider, the financial instruments which seek to ensure service universality, permitted pricing policies and access to service delivery infrastructure.

A point to note is the explicit reference, among the group of stakeholders, to citizens with disabilities and most vulnerable groups. This group is given particular focus in the discussions on the universal postal service.

The conclusions of this document point to the drafting of a new package of legislation on the postal sector (in conjunction with the implementation of the Postal Directive), while updating regulatory instruments (e.g. authorisations) which, with new legislation, may be rendered obsolete.

It should be noted that a value for the net benefit is not explained at the end of the analysis in any of these cases. However, the potential costs and benefits of each regulatory option are always identified, and a decision taken accordingly.

## 7. THE PRACTICE OF ANACOM IN THE CONTEXT OF RIA

In general, the legislative framework governing the operations of independent administrative authorities in Portugal already contains rules which require those taking measures to carry out assessments.

In this regard, see, for example:

- a) The management principles laid down in the *Lei-Quadro das Entidades Reguladoras* (Framework Law on Regulatory Entities - Law no. 67/2013 of 28 August)<sup>59</sup> and incorporated into the Statutes of ANACOM (approved by Decree-Law no. 39/2015 of 16 March - see article 7, paragraph 1);
- b) The provisions of Article 99 of the *Código de Procedimento Administrativo* (Administrative Proceeding Code - adopted by Decree-Law no. 4/2015 of 7 January) which, as regards the procedures to be followed in preparing regulations, sets out that regulations are approved based on a draft, accompanied by a Statement of Reasons, which should include a balance of the costs and benefits of the planned measures;
- c) The provisions of article 8 of the LCE - *Lei das Comunicações Eletrónicas* (Electronic Communications Law)<sup>60</sup> set out that where the NRA, in the exercise of the powers set forth in this law, intends to take measures which

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<sup>59</sup> In particular, under paragraph 1 of article 4 of this Framework Law, Regulatory Entities are required to observe the following management principles:

- a) Exercise activities in accordance with high quality standards;
- b) Guarantee economic efficiency with respect to their management and in solutions adopted in their activities;
- c) Management by properly determined and quantified objectives and periodic evaluation based on the results;
- d) Transparency in performance through public discussion of draft documents containing regulations and through the public release of documentation with relevance to their activities and operations with impact on consumers and regulated undertakings, including on the cost of their activity for the regulated sector;
- e) Respect for the principles of prior allocation and scheduling of expenditure which underlie the assumption of commitments and late payments in public entities.

<sup>60</sup> Law no. 5/2004 of 10 February, rectified by the Declaration of Rectification no. 32-A / 2004 of 10 April. Amended by Decree-Law no. 176/2007 of 8 May (Articles 104, 113, 114 and 116); by Law no. 35/2008 of 28 July (addendum of Article 121A); by Decree-Law no. 123/2009 of 21 May (revocation of paragraphs 5 to 7 of article 19 and paragraphs 5 to 7 of article 26); by Decree-Law no. 258/2009 of 25 September (articles 13 and 116); by Law no. 46/2011 of 24 June (articles 13 and 116); by Law no. 51/2011 of 13 September (with republication); by Law no. 10/2013 of 28 January (articles 39, 52, 94 and 113 and addendum of article 52A); by Law 42/2013 of 3 July (articles 45 and 113); by Decree-Law no. 35/2014 of 7 March (repeal of Article 124); by Law no. 82-B / 2014 of 31 December (article 106); by Law no. 82-B/2014 of 31 December (article 106); by Law no. 127/2015 of 3 September (article 106).



have a significant impact on the relevant market, it shall publish the respective draft of said measure and give interested parties opportunity to comment on it, for which purpose a fixed period, of not less than 20 days (paragraph 1), shall be provided, and for said purpose, the NRA shall publish the adopted consultation procedures.

- d) The stipulations of article 9 of Lei Postal (Postal Law)<sup>61</sup> state that where, in the exercise of competences provided for in this law, ANACOM intends to adopt any measure with a significant impact on the market, it shall publicise the respective draft decision and grant the possibility of assessing the matter to whoever wishes to do so, for at least 20 days (paragraph 1), whereas, in situations of duly substantiated urgency, ANACOM is entitled to decide not to carry out the public consultation provided for in the preceding paragraph or to grant a shorter time-limit;
- e) The rules set out in articles 100 (hearing of stakeholders) and 101 (public consultation) of the *Código de Procedimento Administrativo* (Administrative Proceeding Code).

The market analyses prepared by ANACOM are conducted in a manner similar to an RIA programme. In particular, a balance is made of the costs and benefits of the regulatory option and of the various alternative options, stakeholders are heard, and monitoring and oversight measures are applied. When undertaking market analysis, ANACOM is already required to act in accordance with the regulatory objectives laid down in article 5 of the LCE, and likewise according to the principles in the LCE (for example, article 55) and in the Administrative Proceeding Code (even where an RIA is not implemented).

Therefore, as noted by the OECD (2008b), in certain cases where regulation is required in accordance with international standards, it is fitting to forgo application of a detailed RIA.

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<sup>61</sup> Law no. 17/2012 of 26 April, amended by Decree-Law no. 160/2013 of 19 November (articles 13, 14 and 35; addendum of article 14A and repeal of paragraph 2 of article 14); by Law no. no. 16/2014 of 4 April (Articles 21, 24, 37, 38, 39 and 54).

*In casu*, the existence of a European and national legal and regulatory framework which sets out certain catalogues of obligations that may be imposed on operators with significant market power in a number of relevant markets susceptible to ex-ante regulation and the need for a certain level of harmonisation (in relation to the obligations that may be imposed) at European level contribute to a framework which somewhat restricts the flexibility available to the NRA. In theory, it might be assumed that these constraints would reduce the use of very detailed RIA. Nevertheless, it can still be considered, in each individual case, to what extent it would be useful, timely and appropriate to estimate the costs and benefits associated with the application of a particular regulatory measure in the context of market analysis.

In this context, note should be made of the interpretation that the process of imposing obligations resulting from the market analysis usually developed by ANACOM already incorporates the stages of an RIA process, namely:

- a) Definition of policy objectives - corresponding to the objectives of ANACOM's activity as defined in applicable legislation and in ANACOM's Statutes;
- b) Identification of regulatory options - set out in the national and Community legal and regulatory framework, with an objective of achieving harmonisation at EU level, promoted in particular by BEREC;
- c) Assessment of costs and benefits - as a rule ANACOM's decision-making already makes a balance (albeit qualitatively) of the costs and benefits of the various options available in each case;
- d) Consultation - conducting consultation and prior hearing procedures stems from applicable legislation and ANACOM regulations;
- e) Design of implementation, oversight and supervision mechanisms - these mechanisms, as well as being set out under the laws in force, can also be specified in regulatory decisions.

In addition to the example given above on the process of imposing obligations, it can be recognised that the decisions taken by ANACOM in other areas often undergo the phases typically associated with RIA, albeit implicitly.

With regard to spectrum management, decision-making processes are based on the guidelines set out in report 125 of the ECC (Electronic Communications Committee) of CEPT, which recommend that Decisions, Recommendations or sets of principles or plans of action with significant impact on the market or the general public take RIA into account. Accordingly, these guidelines - more than any systematic practice - are already considered in the activities carried out in the context of the CEPT and EU and which seek coordination of spectrum policy and to promote harmonisation in the use of frequencies, whereas implementation naturally falls to the administrations in accordance with the national regulatory framework.

It should be emphasised that in Portugal, account is taken on a case-by-case basis of the impact of measures to be taken (e.g. limitation of rights of use of frequencies or procedures for allocation of rights), and public consultations are carried out as necessary in line with the provisions of the LCE; this in addition to the fact that national legislation - as applicable to each service and more generic legislation applicable transversally to all activities undertaken by ANACOM (such as the Administrative Proceeding Code) - leads in the same direction.

Specifically, in the context of spectrum management, consideration is given to the following stages, which - given the transversal application of RIA - are very similar to the steps presented in the context of market analysis:

- a) Identification of the consultation objective: Consultation and prior hearing procedures conducted in accordance with the law and applicable ANACOM regulations. With regard to spectrum management, this is usually related to the assignment/availability of spectrum bands and allocation/amendment/revocation of rights/licences to use spectrum. For these purposes, as a rule, these normally involve the limitation of rights of use of frequencies or selection procedures for the allocation of rights under the terms of the LCE.
- b) Description of the proposal or plan of action taking the objectives into account: As a rule, this entails the development/amendment of the National Table of Frequency Allocations (NTFA);

- c) Identification and description of the regulatory and/or technical options: considered in decision making at CEPT/EU level;
- d) Impact assessments (e.g. technical impacts) on existing spectrum users: considered in decision-making at CEPT/EU level and in the context of consultation and prior hearing procedures defined in the LCE;
- e) Monitoring and periodic assessment: considered pursuant to the LCE, in particular as regards the requirement to keep the NTFA updated.

The other measures with significant impact on the market take the general guidelines of RIA broadly into account in their preparation. In any case, recognising the importance of continuing to improve assessment of the impact of regulatory measures it has adopted on the market, ANACOM submitted<sup>62</sup> the strategic guidelines for the 2015-2017 Multi-Annual Activities Plan to public consultation<sup>63</sup>. This plan refers to the intention to carry out a study on RIA in 2015, focusing on a comparative analysis of the approaches taken by different NRAs as regards RIA programmes. In the context of the consultation, comments were received from 11 undertakings, two of which - G9SA - Telecomunicações (currently G9 Telecom S.A.) and then PT Portugal SGPS, S.A. (PT) - commented on RIA.

G9SA essentially confirmed the usefulness of conducting impact assessments of the regulatory measures adopted by ANACOM.

PT also agreed on the usefulness of an RIA study, expressing their interest in the use of methods which make it possible to gauge, *a priori*, the costs and benefits of the measures under assessment in order to minimise the impact of regulatory risk. In PT's opinion, the development of a structured process to assess the regulatory impact and the cultural change necessary to systematise this practice should also be considered as strategic priorities. Finally, PT also made suggestions as to the formulation and timings of implementing a systematic RIA process in ANACOM.

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<sup>62</sup> Under the previous Statutes, which did not at that time specify this obligation.

<sup>63</sup> See at ["Relatório da consulta pública relativa às orientações estratégicas para o plano plurianual de atividade"](#).

Following this public consultation, under the strategic priority related to promoting open and competitive markets and performance of line of action "2.7 Assess the impact of adopted regulatory measures", ANACOM included the development of a study on RIA in its Multi-Annual Activities Plan 2015-2017, with a focus on a comparative analysis of the approaches taken by different NRAs towards RIA programmes.

Also in the context of the public consultation on the strategic guidelines for ANACOM's 2016-2018 Multi-Annual Activities Plan<sup>64</sup>, MEO - Serviços de Comunicações e Multimédia, S.A. (MEO) reiterated the comments made on the previous plan and advocated the importance of RIA, considering that it should be given the status of a new strategic priority. In the subsequent report, ANACOM reported that it had decided not to make RIA a strategic priority, which is not to say that ANACOM does not recognise the importance of the issue, and indeed some of ANACOM's major regulatory decisions entail this assessment. Reference is made, as an example, to the study completed for ANACOM by Indera (2015) on competition and regulatory issues in the mobile telephone service market, which can be found on ANACOM's website. In this study, an analysis was made of how a reduction in voice call termination rates on individual mobile networks impacts the market, competition and consumers. In summary, ANACOM concluded that *"since there is no a single methodology that serves to assess the impact of all measures, it is considered that RIA should be performed on a case-by-case basis, focusing on matters that are identified as relevant for this purpose"*.

In this context, and in view of what has been set out in the previous chapters of this document, it is considered that in ANACOM's context, efforts to improve implementation of RIA methodologies, if RIA is adopted more systematically, should focus on areas related to training, information and enforcement.

In fact, an important requisite for successful implementation of RIA methodologies is **general training** for the staff of any NRA whose activity is relevant in this context,

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<sup>64</sup> In the meantime, this consultation was made mandatory as a result of amendments to ANACOM's Statutes.

covering the theory and practice of RIA, and in particular the management of tools and instruments necessary for its implementation.

In addition to training on aspects of a more technical and procedural nature, it is also important to ensure training focused on the philosophy and general principles of RIA. This is what happens, for example, in Ireland, where the government provides staff with a range of two-day courses to contextualise RIA in a wider political context (OECD 2008b).

At the same time, shortcomings in training can be overcome, as suggested by the OECD (2008b), by sharing experiences with those who conduct RIA in line with international best practice. In the electronic communications sector, this role could be played by groups such as BEREC and REGULATEL - Fórum Latino-Americano de Autoridades Reguladoras de Telecomunicações (Latin-American Forum of Telecommunications Regulatory Authorities), which already play an important role in sharing best regulatory practices in various technical areas.

Another imperative, according to the OECD (2008b), is training in analysis and quantitative methods, as well as training in interviewing techniques, conducting surveys and focus groups.

This, of course, is notwithstanding the analysis, performed by staff who prepare the grounds for decisions, of all available relevant information, such as, for example, statistical data from public sources (e.g. INE (Statistics Portugal), EUROSTAT, OECD, World Bank, etc.), or the possible use of external consultants. The OECD (2008a) also points out that even a good review of academic literature can be very valuable in obtaining information about the performance of different regulatory options.

It should be taken into account that there is a perception that the evolution of the quality of RIA undertaken by a given entity is not linear but tends to follow a U-shaped curve (Jacobs, 2006). Initially, RIA is conducted by staff with high levels of training and competence. In a second phase, with more generalised use of RIA, the number of staff who perform RIA (including some less highly skilled) increases, and in parallel, there is a tendency to neglect investment in training, resulting in a decline

in the average quality of RIA. Finally, in a third phase, accumulated experience and a new focus on training may bring about a new improvement in the quality of RIA.

Given that, even in OECD countries, an insufficiency of input data is considered as one of the most important weaknesses in undertaking RIA properly, it is equally essential to focus on the **compilation of the information necessary for analysis** and the correct use of information obtained through public consultation, while ensuring that this doesn't result in a disproportionate burden for the consulted parties.

Another key factor in enabling assessment of the impact of a given regulatory measure is analysis of **the likelihood of whether or not regulated entities will comply with the proposed regulatory measures**. In fact, it is increasingly necessary to systematise whether there is a reasonable likelihood that regulated undertaking will attempt to "dodge" fulfilment of a certain regulatory measure proposed by the NRA. If so, it is necessary to estimate the inspection/supervision costs associated with enforcing compliance with this regulatory decision. If these costs are excessive and outweigh the corresponding benefits, the model of regulatory intervention should probably be rethought, both in order to promote compliance with the proposed measures from the outset, and in order to reduce the overall costs of subsequent enforcement.

## 8. CONCLUSIONS

RIA is a process with multiple benefits in terms of achieving better regulation, particularly in terms of contributing to a regulatory process with enhanced accountability and credibility; it also brings benefits in terms of increasing investment and productivity at sector and national level - one of the most important challenges facing the State in the current economic climate.

However, despite its evident advantages, RIA also entails important additional implications and costs for the organisation, particularly in terms of requiring highly qualified human and material resources for its proper implementation; in terms of research costs, compilation and processing of indispensable information; the additional time associated with the performance of analysis; increased risk of undue control of the regulatory process by well-organised pressure groups; as well as costs related to a possible increase in litigation as a result of greater transparency about the assumptions and methodologies underlying impact assessment (even while greater transparency can also contribute to enhancing the robustness of the decision itself).

For effective implementation of RIA, in a national context that is relatively pioneering and also noting that only a small number of NRAs claim to have implemented a formal and systematic RIA, strong support of top management is necessary in order to minimise the adverse impact of the factors and forces which oppose change. As such, from the outset, senior management should thoroughly evaluate all factors and elements in play, anticipating the consequences of the approach to be followed.

If RIA is to be implemented effectively, it is also essential to have a participatory organisational culture in which the questioning of decisions taken sits well.

It may also be useful to articulate the measures that may eventually be adopted by ANACOM in the context of RIA and the general framework defined by the government, as referenced by the OECD (2009a).

Finally, it is appropriate to highlight the ten key elements that, according to the OECD (2008b, 1997a), are central to the successful implementation of RIA:

- a) Maximise political commitment to RIA;



- b) Carefully allocate responsibilities in relation to the RIA programme;
- c) Train regulators, particularly in areas related to policy, legislation, economy and communication;
- d) Use a consistent but flexible analytical method;
- e) Develop and implement data collection strategies;
- f) Target RIA efforts;
- g) Integrate RIA into the policy-making process, as early as possible;
- h) Communicate the results;
- i) Involve the public extensively;
- j) Apply RIA to existing as well as new regulation.

Naturally, the accomplishment of these key elements by a given regulator should take into account the specific conditions of their environment, the provisions of their strategic activity planning and available resources. This is not a task that can be performed analytically in abstract, but a task that can be developed - with inclusive participation, directly and as a team effort – in an ongoing and iterative dialogue between the various operational areas of a given organisation in a phase of further implementation.

It will also be for ANACOM's better qualified operational areas to discern the specific advantages and implications that may arise as a consequence of any further implementation of RIA procedures and to identify, in this context, pilot areas appropriate for such possible implementation.

Taking into account the experiences recounted in the previous chapter, the assessment is made that, at ANACOM, regulatory decisions on market analysis, spectrum management decisions and other decisions that have impact on the market, as well as the procedures followed in public consultations and prior stakeholder hearings, already follow the principles of RIA in a certain manner. In any case, ANACOM will continue to monitor best European and international practice with regard to RIA-related processes and methodologies and, where relevant, seek to adapt them to its own analysis and decision-making.

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## **LIST OF ACRONYMS**

ACM – Autoriteit Consument & Markt.

AMA – Agência para a Modernização Administrativa (Agency for the Public Services Reform).

ANACOM – Autoridade Nacional de Comunicações.

ANCOM – Autoritatea Națională pentru Administrare și Reglementare în Comunicații.

ARCTEL – Associação de Reguladores de Comunicações e Telecomunicações da Comunidade dos Países de Língua Portuguesa (Association of Communications and Telecommunications Regulators of the Community of Portuguese Language Countries).

NRA – National Regulatory Authority.

BEREC – Body of European Regulators for Electronic Communications.

BIS – Department for Business Innovation and Skills (United Kingdom).

BNetzA – Bundesnetzagentur.

BRE – Better Regulation Executive (United Kingdom).

CEJUR – Centro Jurídico da Presidência do Conselho de Ministros (Legal Centre for the Presidency of the Council of Ministers).

CEPT - European Conference of Postal and Telecommunications Administration.

CNMC – Comisión Nacional de los Mercados y la Competencia (National Markets and Competition Commission).

ComReg – Commission for Communications Regulation (NR, Ireland).

EC – European Commission.

ECC – Electronic Communications Committee.

EMERG – Euro-Mediterranean Regulators Group.

EU –European Union.

FCC – Federal Communications Commission.

FCT – Fundação para a Ciência e Tecnologia (Foundation for Science and Technology).

IAB – Impact Assessment Board.

INE – Instituto Nacional de Estatística (Statistics Portugal).

NMHH – Nemzeti Média – és Hírközlési Hatóság.

OCECPR – Office of Electronic Communications & Postal Regulations.

OECD – Organisation for Economic Co-operation and Development.

Ofcom – The Office of Communications.

NTFA –National Table of Frequency Allocations.

PTS – Post- och telestyrelsen.

REGULATEL – Fórum Latino-americano de Autoridades Reguladoras de Telecomunicações (Latin American Forum of Telecommunications Regulators).

RIA – Regulatory Impact Assessment.

RSB – Regulatory Scrutiny Board.

RUO – Reference Unbundling Offer.

UKE – Urząd Komunikacji Elektronicznej.

UMIC – Agência Para a Sociedade do Conhecimento (Knowledge Society Agency).