

Policy Tools, including Regulation

You have identified a problem or opportunity, gained relevant experience, and identified all the necessary facts and opinions. What tools are at your disposal to enable you to implement Ministers' policy decisions?

Put shortly, the Government can do one or more of four things if it wishes to change behaviour:-

- it can exhort;
- it can tax;
- it can spend - which also implies taxing or borrowing; or
- it can legislate and regulate.

Exhortation (leaflets, advertising, speeches etc.) can sometimes be enough on its own, but you often have to move to one of the next three if you really want to have an impact. But then you will find that Ministers have a strong aversion to raising taxes or spending money (which are two sides of the same coin), so they prefer you to offer new legislation or regulations- until they realise that this route too can lead to huge resentment amongst those who are to be regulated, and can also have a large impact on the economy.

It is therefore absolutely vital that you avoid the trap of choosing the route which looks superficially attractive and carry out a professional job of analysing the options. Clearly written, helpful advice can be found in the *Better Regulation Guide* published by the Cabinet Office, and this will in particular help you prepare a draft *Regulatory Impact Assessment* summarising the costs and benefits of proposed legislation, if that route begins to look the better one. The most important thing is to prepare and consult on an early draft before you and your Ministers get too committed to a course of action which contains hidden pitfalls.

Much the same advice applies if you are negotiating in Brussels. Again, the Cabinet Office offer guidance (*The Guide to Better European Regulation*) and either you or the Commission should prepare a *fiche d'impact*:- the Euro version of a Regulatory Impact Assessment.

Transposition

You will have choices, too, when it comes to transposing European Directives into UK law. The process can be fraught with difficulty, and legal advice should be obtained as soon as you begin to think about transposition, which should in turn be very early in the negotiation process.

You need to reconcile a number of possible tensions. One source of tension is the desire, of those who are to be regulated, for regulatory certainty. Small firms in particular do not want to have to go to court to resolve ambiguities or to find out how the law applies to unusual circumstances. So even if the Directive itself is not very detailed (and they often are) you end up drafting to cope with every eventuality,

whereupon everyone complains about the length and complexity of your proposal. It is truly a no-win situation.

Another tension arises when you try to define the businesses, employees and activities that are within the scope of the UK regulation. EU legislators often kindly leave such decisions, within limits, to national governments, but this can be a poisoned chalice. If you spread your net too wide then you will again be accused of over-regulating and “gold-plating” the Directive. But if you err on the side of exempting things which you could have caught, you are then likely to face legal challenge from the Commission or from someone who might have benefited from a wider interpretation.

There is therefore often no risk-free route to implementation and you must offer Ministers a range of strategies and help them choose the right one in all the circumstances. You should in particular not necessarily recommend the option which is legally watertight. It can often be wise to take a small risk of legal challenge in return for coming up with a solution which makes sense within our economy and society, even if it is not the route chosen by other member states.

Unwanted Consequences

It is also important, whether you are imposing taxes, spending money, drafting domestic legislation or transposing European legislation, that you take care to avoid unwanted consequences, and (if regulations are necessary) to regulate in such a way as to encourage compliance and deter evasion. Let’s look first at unwanted consequences.

The key point to remember is that it can be very difficult to identify such consequences - and this is one of the main reasons why genuinely open-minded consultation is so important. It might help if I list the sort of unwanted consequence that can occur:

- a risk-free food chain might raise costs (to the detriment of the poor), restrict imports (to the detriment of the third world) or sacrifice taste and texture for the monotonous security of the can.
- attempts to reduce sports injuries might well generate poor health as a result of reduced physical activity,
- expensive railway safety might increase fares and charges and so divert traffic to more dangerous urban roads,
- attempts to create risk-free child-care might reduce the availability of such care,
- the risk to a child living with inadequate parents needs to be balanced against the risk of the damage that would arise from enforced separation,
- UK-only regulation might, if it were to increase the price of UK goods, lead to cheap unregulated goods coming in from abroad.

It is also important to remember that you are dealing with a dynamic situation, not a static laboratory experiment. For instance, because we each seek to arrive at our personal balance between cost and benefit, we will intuitively adjust our behaviour to avoid, or mitigate the effect of, an increased risk, and vice versa for a reduced risk. The observed effect of an increased or reduced risk is therefore often unpredictable. This particularly applies where (as in the case of road safety) most of us have

intuitively established the level of risk with which we feel comfortable. To take a simple example, if a winding road is to be straightened or widened, you would not assume that drivers (or the NHS) would pocket the value of all the increased safety. Instead, most drivers would speed up - accepting some of the risk for themselves, and transferring some of the risk to pedestrians etc.

Another aspect of the same phenomenon is that the public or business community will usually adjust their behaviour to cope with an unwelcome development, or simply just get used to it. This is why environmental groups, for instance, are so keen to stop certain developments before they become established as precedents. Their response may seem to be out of proportion to the harm done by the proposed development but it might make a great deal of sense in the wider scheme of things. Do not therefore underestimate or patronise such lobby groups.

Indeed, once a policy decision has been implemented, it can be very difficult to tell whether it was correct, and it also becomes very difficult to get back to where you began. Who knows, for instance, whether it was right to give planning permission to certain large developments? But any attempt to knock them down would cause an uproar, from those who live in, work in or supply them, or from those who have simply grown fond of them (e.g. the Battersea Power Station). And I sometimes wonder what would have happened if our predecessors had known for certain that motor vehicles would end up causing one million deaths a year around the world. So don't get too upset when a Minister takes an apparently illogical decision. The great British public will probably find a way of adjusting to the decision, if not actually circumventing it.

Compliance

It is also vital that compliance and enforcement issues are considered before any decisions are made about the scope and nature of any regulations. The legislation can be well-meant, but it will quickly fall into disrepute if it has to be policed in an obtrusive way, or if the cost of its enforcement is out of proportion to its benefit. Regulations should always be transparent, targeted, consistent, and in proportion to the risk, and the regulator must be publicly accountable.

Compliance is often best assured by providing incentives to encourage those causing the risk to change their behaviour. Where possible, therefore, the cost or impact of the regulation should fall upon the person causing the risk, not the person suffering it. If that is not possible then any numerical targets (e.g. for local enforcement bodies) should be concerned with reductions in the occurrence in the risk (e.g. fewer outbreaks of food poisoning) rather than increases in enforcement action (e.g. numbers of prosecutions). And don't make it obligatory for small firms to keep papers for 40 years - and, yes, such a regulation did recently exist.

Watch out, by the way, for the implications for middle class journalists. For instance, when designing policies affecting employees, think carefully about their impact on au pairs. Or when changing education policy, how will it affect Montessori schools? You attack the freedom of the press at your peril!

Finally, make sure that your solution can be implemented by those who have not been immersed in the issue in the way that you have been. Don't design systems which are subtle, clever, difficult, and don't plan staff numbers and implementation timetables on the basis that all involved will be geniuses. Also, make sure that your solution is understood by those at whom it is aimed. Research can help, of course. The DTI, investigating ineffective product warnings, found that many young people could not define the word "fatal". A new warning "solvent abuse can kill suddenly" has been substituted.