Better Regulation Task Force

Routes to Better Regulation

A guide to alternatives to classic regulation

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Foreword by Sir David Arculus and Eve Salomon

Driving the better regulation agenda forward is vital if the European Union (EU) is to increase competitiveness, employment and wealth creation. All parts of the EU – Commission, Parliament and Member States - need to regulate better if we are to compete successfully in an increasingly aggressive global market. With many other economies getting stronger, we in the EU need a lean regulatory system if we are to continue to thrive.

Better Regulation is about implementing policy in efficient and effective ways. There are many good reasons for regulating at EU level. Citizens, businesses and the environment need protecting, trade barriers need to be reduced and opportunities for growth created. However, all too often European regulatory action comes in the form of 'classic' prescriptive rules and regulations that stipulate both the objectives and how they should be achieved. This approach can stifle innovation and impose unnecessary burdens and costs. Although 'classic regulation' such as traditional Directives and Regulations can work well and is often necessary, it should not be the automatic choice and other approaches should be considered first.

This report examines a wide range of less prescriptive options or alternatives to classic regulation which can achieve policy objectives in less burdensome ways. For example, if those being regulated can devise their own ways of achieving an objective, they will find the most efficient way to do so. It is in their interest to meet targets while minimising bureaucracy and costs. Flexible, non-prescriptive regulation can also encourage businesses to innovate, as they are not restricted in how they can achieve regulatory targets.

We are pleased that the European Commission recognises the need to consider alternative ways of regulating. Their enhanced Impact Assessment Guidelines state that a variety of delivery options should be assessed at an early stage of policy development, an approach that we fully support. While the use of alternatives at EU level has been fairly limited so far, our research has identified several examples where a 'light-touch' regulatory approach has been applied successfully. There is clearly some good experience to build on and we have included case studies throughout this report to illustrate the variety of approaches that can and have been used and the lessons to be learned. We hope that this report will help support the Commission's work on alternatives by setting out clearly the factors that contribute to their success or failure.

We are not against classic regulation where it is the best approach and where it works, perhaps for example where the EU needs to establish measurable certainties across the 25 Member States. We also recognise the scope for integrating classic regulation and alternative tools in creative ways that combine the advantages of both approaches. Indeed, many of the case studies in this report rely on a judicious mix of classic regulation and alternatives.

Using alternatives instead of classic regulation has advantages for policy makers trying to address fast moving and complex issues. For example, alternatives are generally quicker to implement, especially where the organisations and businesses likely to be affected are involved

in their preparation and implementation. As we pointed out in our recent report "Get Connected", involving stakeholders in designing and delivering solutions builds their understanding and ownership of issues and improves the chances of a successful intervention, whether regulatory or non-regulatory.

Similarly, we pointed out in our report "Make it Simple, Make it Better" that the simplification of classic EU regulation can be a lengthy and difficult legislative and political process without an effective 'fast-track' mechanism. As alternatives tend to have less prescriptive detail written into statute, they are inherently more flexible and can be amended or simplified more easily in light of changing needs or circumstances. For example, the Commission has recently pledged to withdraw 68 pending legislative proposals for which the justification has changed or where impact assessments were not carried out. It has also announced a rolling programme of simplification, based on proposals for priority regulatory reform submitted by Member States. While these are welcome initiatives, we believe that more systematic consideration of alternatives and their wider use will improve the design, implementation and impact of legislation, reducing the future need for amendment and simplification.

In preparing this report, we have come across the view that classic regulation is the only safe type of regulation and that alternatives create unnecessary risk and uncertainty. However, one need only look at the high number of infraction cases to see that Member States and their businesses and citizens are currently struggling to cope with the volume and complexity of classic regulation they are required to implement. Classic regulation brings with it no guarantee of compliance and a greater use of alternatives could reduce burdens and improve outcomes. Further, if we could show that a range of less burdensome options had been considered and discounted for good reason during the decision making process, any resulting piece of classic regulation is likely to have more credibility with stakeholders and a greater chance of success.

We want this report to help promote the greater use of alternatives in EU law making where they can deliver better outcomes. We have therefore included alongside our findings and case studies a number of recommendations, addressed mainly to the Commission. We believe that implementing these recommendations would make a real difference to the EU regulatory landscape and we hope that the Commission will accept them. We are encouraged that the Commission, the Parliament and the Council have all made statements supporting the wider use of alternatives. We hope that they will find our work helpful and will use this report as a basis to take forward their work on promoting the use of alternatives as part of their ongoing commitment to better regulation for all.

Sir David Arculus
Chair

Eva Salomon
Sub-Group Chair

Executive Summary

The scope of this report

This report is the Better Regulation Task Force's (BRTF) third study on better regulation in the European Union (EU). Our earlier studies have looked at the simplification of European legislation[1] and how the EU consults with stakeholders[2].

This report examines the use of alternatives to classic regulation. Classic regulation (such as EU Regulations and traditional Directives) is often the most appropriate way to implement proposals and achieve policy objectives but it should not be the automatic choice. Alternatives can sometimes be quicker, more flexible, cheaper and more effective. Our starting point is that those developing policy should systematically compare all the delivery options (regulatory and non-regulatory) at an early stage and choose the most appropriate one that will successfully implement the policy in the most efficient and least burdensome way.

How we conducted our research

In researching this report, we talked to officials and stakeholders from the UK, Brussels and from a number of Member States. They are listed in Annex H. We found examples of where alternatives have been used in the EU and have included them throughout this report to illustrate our findings. We have also reviewed the factors which contribute to the success or failure of alternatives to help inform the development of future policy proposals and to identify situations that could favour the wider use of alternatives. We would like to thank all those who have contributed to our work.

Who the report is aimed at

Our discussions with Commission officials showed that, although there is increasing awareness that considering alternatives is a vital part of good policy-making, not enough is known about the range of options available and where they have been used. The Commission's revised Impact Assessment Guidelines[3] published in June 2005 go some way towards filling this gap. This report is intended to complement the new guidelines and we hope policy makers will use it as a guide when they are developing proposals.

The Parliament and the Council also have key roles in the design and implementation of EU policy. Together with the Commission, they have signed up to the Inter-Institutional Agreement on Better Law-Making[4], which recognises the need to use 'alternative regulation mechanisms' where appropriate. We hope this report will also help Parliamentarians and Member State officials to understand more about the use of alternatives and assist with their scrutiny of proposals.

[1] "Make it Simple – Make it Better", December 2004
[2] "Get Connected – effective engagement in the EU", September 2005
[3] SEC (2005) 791
[4] Inter-Institutional Agreement on Better Law-Making, Official Journal of the European Union December 2003, 2003/C 321/01

Definition of alternatives

We define alternatives to include a wide range of options that are less prescriptive than Regulations or traditional Directives (together known as 'classic regulation') that can be used to implement or deliver policy proposals. Usually when alternatives are discussed in the EU, the debate tends to focus on the use of co-regulation and self-regulation. While these are important, we feel that confining the debate to these two options is unduly restrictive. There is a broader range of alternatives that should be considered. For the purposes of this report, we have looked at flexible forms of legislation as well as non-legislative tools. The range of options we consider includes:

- taking no action
- providing information or guidance
- using market based instruments
- co-regulation
- self-regulation
- social partner agreements
- issuing recommendations
- using New Approach Directives and flexible Directives

Good practice for all delivery options

We have found that much of the criticism of alternatives, especially non-legislative options, comes from a lack of understanding. A badly designed or poorly implemented alternative will fail just as readily as a badly designed or poorly implemented regulation. All forms of intervention, from classic regulation to voluntary agreements, require that those responsible follow good regulatory practice and respect the Principles of Good Regulation devised by the BRTF. These Principles are Proportionality, Accountability, Consistency, Transparency and Targeting.
For example, good consultation is key to the effective delivery of policy goals however they are to be delivered. As we pointed out in our recent report "Get Connected"[5], consulting at the right time, in the right way and with the right people will ensure that a wide range of delivery options is considered. It will also result in better drafted instruments, more stakeholder buy-in and wider awareness of the new measures.

[5] "Get Connected – Effective Engagement in the EU", September 2005

Factors that affect the use of alternatives

By examining proposals that have been delivered by alternative means, we have been able to identify certain factors that influence whether or not the use of an alternative is likely to be successful. These factors are:

Risk
There are occasions, such as where there is a serious risk to people's health and safety, where classic regulation is usually the most appropriate choice in order to provide legal certainty and a clear means of legal redress. However, the level of intervention must be proportionate to the risk posed and the regulation carefully targeted. Introducing legislation as a knee-jerk reaction to a particular problem usually results in unnecessary, non risk-based requirements which don't work as expected. Objectives can often be achieved by using existing legislation or less burdensome options.

The policy area
Alternatives are often appropriate for complex or technical areas of policy where better results are achieved by involving experts closely in setting requirements. Such experts will have a greater understanding of their own market and can advise on the best means of achieving policy objectives. Our research has indicated that stakeholders are usually more involved in helping to develop alternatives than they are with the development of prescriptive legislation.

Market considerations
Markets that are fast-moving and innovative will benefit from the flexibility of alternatives. Alternatives also suit markets with only a small number of operators, as it is easier to reach a consensus on the requirements and easier to monitor compliance. Indeed, a smaller market often provides a degree of self-policing. However, care must be taken to involve all interested parties to avoid the creation of a cartel. It is also easier to monitor compliance if the majority of products or services stem from within the EU, or if the operators have a strong European base.

Monitoring
A robust and transparent monitoring regime is vital for an alternative to succeed. Objectives and deadlines must be well defined and realistic. Careful monitoring of progress against such objectives will create confidence and trust in the use of alternatives.

Stakeholder buy-in
The more stakeholders support the use of an alternative, the greater its chances of success. If some parties in a sector oppose the requirements, then problems can occur. If operators need to be coerced, then prescriptive legislation may be a better option, provided there is adequate enforcement.

Incentives
An alternative will be more successful if stakeholders are encouraged to support it and feel it is worthwhile to comply. The threat of EU legislation can sometimes be enough to prompt stakeholders into action. More positively, businesses can often attract good publicity and generate sales by acting on their own initiative to tackle problems, rather than waiting for EU intervention.

Sanctions
In cases where non-compliance may cause harm or even death and full compliance is critical, criminal sanctions may be needed to deter breaches. Such sanctions can only be provided by legislation and this may prevent the use of non-legislative alternatives, except in conjunction with legislative tools.
For less serious breaches, expulsion from trade bodies, fines, and negative publicity can act as sanctions, as these do not need legal underpinning.

Consumer interest
Consumer interest and pressure can be a key factor supporting the use of alternatives. Making information more readily available can influence consumers' buying behaviour in a particular direction, leading operators to take action voluntarily without the need for classic regulation.

Representative bodies
It is easier to negotiate and monitor an alternative if there is a strong trade association in place. A strong trade association can also help police the market, freeing up Commission time and resources.

Recommendations

Further action is necessary to promote the wider use of alternatives. Based on our research and consultation, we are making several recommendations that we believe will drive forward the use of alternatives. We hope that the EU institutions will accept and act on these recommendations over the next 12 months to demonstrate that they take their commitment to consider and use alternatives seriously. These recommendations should be read in the context of the analysis and case study evidence that is included in the main body of the report.

Recommendation 1

We recommend that officials use this report when developing policy as it will help them identify and compare a range of options for delivering their proposals. This report can also be referred to alongside the Commission's Impact Assessment Guidelines when drafting roadmaps and impact assessments.

The diverse nature of the Commission means that it is difficult to share knowledge and ideas about better regulation in general and the use of alternatives in particular.

Recommendation 2

In order to make optimal use of alternatives and other good regulatory practices, we recommend that all Directorate Generals set up a dedicated better regulation unit or at least appoint better regulation champions within policy units. These better regulation experts should share ideas and experience through forming a better regulation inter-service group or working group.

Recommendation 3

We recommend that the Secretariat General be given more specific responsibility and greater resources to co-ordinate delivery of the better regulation agenda across the Commission. This could include more direct involvement in training and acting as a centre for quality control of proposals and impact assessments, including the consideration and use of alternatives.

DG Environment formally recognises and encourages the use of voluntary agreements at EU level by supporting each agreement with a Commission Recommendation. This is good practice that could be more widely adopted in the Commission.

Recommendation 4

We recommend that the Secretariat General publicise more widely within the Commission the techniques used by DG Environment to promote the use of voluntary agreements.

To date, the use of New Approach Directives has been primarily limited to regulating products, but there is scope to use them more widely.

Recommendation 5

We recommend that the Commission explore whether greater use can be made of New Approach Directives and consider applying this type of Directive to a wider range of sectors.

At present there is no mechanism in place to inform the Council and Parliament of when alternatives have been used or of impending measures that will be delivered by alternative means.

Recommendation 6

a) Each year, using information provided by Directorate Generals, we recommend that the Secretariat General compile a list of policy measures that the Commission has taken forward by self or co-regulation. The list should include comments on the success or failure of the measures and should highlight best practice and lessons learned. Once established, this list should be extended to include other alternative measures (such as market based instruments) highlighted in this report.

b) We recommend that this list form part of the Commission's annual report on "Better Lawmaking" and that the information be communicated to the Council and Parliament.

c) We recommend that, in its Annual Work Programme, the Commission provide an indication of forthcoming proposals that will be taken forward by alternative means.

One concern about the use of alternatives is the lack of legal redress for consumers should operators not meet their commitments under self-regulatory regimes. A means of redress is provided for in the USA under the Federal Trade Commission Act, and in the EU advertising industry a similar legal backstop is provided by the Misleading Advertising Directive.

Recommendation 7

We recommend that the Commission investigate the US approach and the operation of the Misleading Advertising Directive and consider whether it might introduce similar backstop legislation to provide a means of legal redress for self-regulatory measures.

Businesses and other stakeholders often complain about the amount of legislation produced by the EU. They could be more active in identifying areas where introducing alternatives may avoid the need for prescriptive legislation.

Recommendation 8

We recommend that the Commission invite Member States, sectoral formations of the Council, committees of the European Parliament, trade associations and lobby groups to review its Annual Work Programme and to submit proposals for alternatives where prescriptive legislation is thought to be unnecessary.

Recommendation 9

We recommend that the Commission extend the "Your Voice[6]" website to include an ongoing platform for stakeholders to submit proposals for simplification, where simplification could be achieved by implementing the policy through more flexible or non-legislative measures. This channel should be well publicised.

The Council and the Parliament have made a commitment to consider the scope for using alternatives when they scrutinise legislative proposals brought forward by the Commission.

Recommendation 10

When setting its annual Work Programme we recommend that the Commission include proposals for classic regulation only where the relevant impact assessment contains an analysis of at least one alternative tool (where appropriate) and the do nothing option, unless the need to legislate is set down in the Treaties.

Recommendation 11

When considering Commission proposals, we recommend that the Parliament and Council review the impact assessments and in particular the extent to which alternatives have been considered. Where they believe that an alternative tool might be a better approach to delivery, they should return the proposal to the Commission for further development, or ask for a detailed analysis of alternatives.

We have been advised that the Council and Parliament are concerned that the wider use of non-legislative alternatives might threaten or undermine their roles in the law-making process. We believe on the contrary that the Council and Parliament should play a key role in promoting the use of alternatives to classic regulation and review how they work in practice.

Recommendation 12

a) We recommend that all relevant Parliamentary committees consider reviewing the implementation of self and co-regulatory measures.

b) We recommend that Commissioners regularly report on forthcoming proposals at sectoral formations of the Council to provide an opportunity for Council to consider the most appropriate mechanisms for implementation.

[6] The platform that allows EU citizens to view consultations and to share experiences and views: http://europa.eu.int/yourvoice/index_en.htm

1 Setting the scene

1.1 The reasons for intervention

There are perfectly good reasons why intervention by governments or at EU level is necessary. Intervention upholds safety standards for citizens and protection for the environment. It protects workers' rights and provides consumers with a right of redress should they be dissatisfied with the goods and services they purchase.

Intervention is necessary at EU level when the objectives of the Treaties cannot be met by Member States acting alone or when a collective EU-action adds value. The Commission has identified three types of situation where intervention at the EU level may be required[7]:

- A discrepancy between the goals of the EU and an existing situation, usually in areas such as upholding citizens' rights and consumer protection, preventing discrimination, protecting the environment, promoting competitiveness and the sustainable development of economic activities and growth.

- Where the outcome of market forces does not meet society's needs. This could be dealing with pollution, where market prices do not reflect the real costs to society, where these is insufficient supply of public goods, where competition is weak or missing, where markets are incomplete or where a lack of information is affecting the market.

- Where there is regulatory failure, including poorly-defined legal frameworks, unintended consequences resulting from previous actions or failures with implementation or enforcement.

Intervention at EU level may also be required to break down trade barriers to help create the single European market as well as to ensure that the EU meets its international obligations, for example in the financial sector or with global environmental measures.

Where EU level intervention is required, the Commission is responsible for drafting and putting forward proposals, although it often receives requests for intervention from other bodies, such as the European Parliament or Council, Member States or economic operators. Sometimes there is pressure to introduce prescriptive EU legislation, such as Regulations or traditional Directives (from here on we refer to these as 'classic regulation'). While classic regulation is often the best approach, it should not be the automatic choice. Other forms of intervention can sometimes achieve the desired policy objectives more effectively and at lower cost.

Any form of intervention can distort a market and a thorough analysis of the problems and how to solve them is needed before any action is taken. Intervention should always be kept to a minimum, so as to avoid any knock-on effects or unintended consequences. This is known as the proportionality principle, as set out in the European Treaties.

1.2 Why regulate?

The concept of 'no action' is discussed in more detail elsewhere in this report. Where it has been decided that some sort of intervention is necessary at EU level, there can be advantages in using classic regulation, whether a Directive or an EU Regulation. For example, circumstances where there is a serious risk to life or security and defence issues require absolute certainty. There is no room for any ambiguity in the rules covering areas such as these, which can be a result of using flexible provisions or because of badly drafted legislation.

[7] European Commission Impact Assessment Guidelines SEC (2005) 791- Annex (section 2).

Where requirements are clearly stated in legislation, it is easier for those affected to know what is expected of them. For example, without contract law not many transactions would take place. Regulation also helps to provide consistency, in that everyone has to abide by similar rules and organisations cannot choose to opt-in or out.

Classic regulation can also protect operators. If they follow legal requirements, they cannot then be held liable if their prescribed actions trouble others. Not all alternatives to classic regulation can provide this level of protection.

Sometimes, classic regulation might be the only way to get a market to respond in the required way. Alternative tools will often work only with the support of the operators in that market. Properly enforced classic regulation can force operators to act even if they are reluctant to comply.

Example: The Commission has encouraged airlines to prepare voluntary commitments to improve their quality of service. These commitments include pledges on assistance during delays and meeting the needs of disabled passengers.

However, more recently, the Commission was unable to reach an agreement with airlines to develop similar commitments regarding compensation and assistance for passengers when flights are delayed or cancelled. As the Commission felt it was important for passengers to be protected against these eventualities, it made proposals for classic regulation. A Regulation[8] came into force in February 2005 to give rights to passengers, which sets out the circumstances for redress and levels of compensation.

Another advantage of classic regulation is that compliance rates can be better, probably because it has a higher profile. Traditionally, more publicity and focus is given to formal legal provisions than to alternatives, which are often implemented through unconventional channels. It is also easier to get hold of legislative documents, for example on dedicated websites, while it can be more difficult to find documents on alternatives.

Finally, good quality, well drafted legislation with a good enforcement regime provides security for markets, consumers and citizens, together with a clear legal means of redress if the law is broken. Much of the classic regulation introduced by the EU is designed to provide protection for its citizens and to give access to a clear means of redress.

Example: An EU-wide single standard was agreed in 1987 when freeing up the radio spectrum for wider use. Mobile telephone operators had no choice but to use Global Systems for Mobile (GSM) technology and the adoption of a single system allowed easy roaming between countries. It also provided economies of scale, which reduced prices and allowed more people to have access to mobile phones. This can be contrasted with the more flexible US market where operators used whichever technology they like, leading to problems with an incompatible patchwork of technologies. In this instance regulation worked well.

However, the Commission is now considering a different approach to auctioning off a further portion of the radio spectrum, known as the “3G expansion band”. This was originally intended to provide extra capacity for 3G mobile networks, but the EU may now take a more “technology neutral” approach and allow operators who buy chunks of the spectrum to use it for 3G or other technologies. Market forces will then determine which technology comes to the forefront. The regulatory approach 1987 helped harmonise the market and avoided the problems encountered in the United States. Now that technology has advanced, the thinking is that a more flexible approach could help make the market more competitive and allow scope for the technology to advance further.

[8] Regulation (EC) No.261/2004

1.3 Why consider alternatives?

Classic regulation is not the only option available when intervention is necessary. There are other, more flexible forms of legislation, as well as a range of non-legislative tools. These other policy options, which from here on we refer to as 'alternatives', are shown in more detail in Chapter 2. While some believe that alternatives are limited to self-regulation and co-regulation, it is important to note that in this report we use the term to cover a much wider range of delivery options, all of which are more flexible than classic regulation.

Alternatives bring their own benefits. They can provide more flexibility and can be quicker to implement than classic regulation. For example, there are several voluntary agreements in place for environmental matters that took around two years to negotiate and implement rather than the six years it might have taken via the legislative route.

Our study into the simplification of European legislation[9] showed that it is difficult and time-consuming to amend classic EU regulation, although the use of comitology[10] can shorten the process. Non-legislative alternatives can be amended more quickly and regularly, provided there is agreement between parties. As some markets experience rapid cultural, economic or technological change, it is important that the rules governing them can be amended quickly and easily.

From **case study 2** (Annex B): In the UK, the Advertising Standards Authority (ASA) works through co-regulation. This has helped it to respond to changes in technology and advertising practices and to change its remit to cover advertising on the internet and by text message, e-mail and other electronic media. The co-regulatory regime also enables the ASA to respond efficiently to cultural changes. For example, something unacceptable in the past may not now raise much concern and it would be difficult to have to continually adapt classic regulation to move with the times.

From **case study 4** (Annex D): The European New Car Assessment Programme (Euro NCAP) has been able to evolve with developing technology relatively easily and quickly. The original 3-star rating system has been extended to 4 and then to 5-stars to reflect the introduction of features like airbags and separate ratings introduced for child and pedestrian protection. This system has encouraged manufacturers to develop technology to improve safety and to compete with each other to raise standards.

In some markets, inflexibility can stifle innovation. Classic regulation can take responsibility away from players in the market whereas alternatives can provide the scope for fresh ideas to be adopted, as organisations are encouraged to develop their own ways of meeting requirements.

Example: The Eco-Design of Energy Using Products Directive (currently under development) aims to improve the environmental impact of electrical and electronic devices or heating equipment. The Directive will be drafted to allow Member States to use self-regulation, so that operators have scope to achieve the objectives set out in the Directive in their own way, which should encourage innovation.

9 "Make it Simple – Make it Better", December 2004

10 Comitology is a process whereby the Commission is given the power to adopt legislation by procedures involving committees of Member State representatives who can exercise some degree of control over the powers delegated to the Commission.

Being open to the use of alternatives can help the EU institutions reach a consensus with organisations that operate in the market. Several organisations have told us that they feel more involved and can make a more constructive input where alternatives are being actively considered. This is important, as we know that involving stakeholders fully in policy design and implementation greatly increases the chances that a particular intervention will be successful. Stakeholders are likely to know more about their markets than governments or regulators. Using more flexible tools to implement policy objectives can get them more involved in the process and tap into their expertise, which is likely to result in a more practical, realistic and achievable outcome.

Of course, good consultation is also necessary when using classic regulation. The Commission's Consultation Code of Practice[11] and Impact Assessment Guidelines[12] stress the need for active engagement with stakeholders. Legislation which is forced through against opposition from those affected is less likely to succeed, as organisations look for loopholes that they can exploit to avoid compliance.

From **case study 3** (Annex C): The voluntary agreement on CO2 emissions from cars set realistic targets to reduce these emissions to a timetable agreed by the car manufacturers. The voluntary approach enabled stakeholders to discuss constructively with the Commission the level of ambition that could be achieved without disproportionate cost.

Classic regulation often becomes complex in the search for consistency in compliance and this can lead to provisions that are difficult and expensive to enforce. By contrast, alternatives can encourage markets to police themselves. For example, the voluntary agreement on energy consumption of TVs/VCRs includes an independent body to monitor progress on compliance and to report regularly to the Commission.

Finally and perhaps most importantly, we should remember that alternatives can often be cheaper to implement and to administer. They can be the most economically efficient method to achieve policy objectives and so maximise cost-efficiency within the EU. Implementation costs are likely to be less where they are borne by the sector itself, as self-regulated businesses have an interest in keeping costs down. Using alternatives means governments can avoid the often lengthy procedures of getting legislation onto the statute book and so deliver policy objectives more quickly. Self-regulation saves governments at least some of the costs of implementation, monitoring and enforcement.

From **case study 2** (Annex B): The advertising industry is self-policing in several Member States. Self-Regulatory Organisations (SROs) handle all complaints, if necessary with a mechanism for referring controversial complaints to government bodies. This saves governments the time, effort and expense of looking into every complaint, since they can rely on the SROs to monitor and enforce the market on their behalf.

11 COM (2002) 704
12 SEC (2005) 791

1.4 Good policy making

In Chapter 3 we set out some common factors that can influence the use of alternatives, based on our analysis of how the EU has used alternatives to date. The use of alternatives is not yet well developed at EU level and consequently we have limited evidence of their effectiveness. As some of the main alternative measures currently in place (such as the car CO2 voluntary agreement) run their course, it will become easier to identify lessons that can help in the development of future proposals.

In the meantime, even though there is high level commitment to expand the use of alternatives, we have found some reluctance amongst officials and MEPs to consider flexible, non-legislative options. This could be due to a lack of knowledge of alternatives or a belief that alternatives are less reliable than classic regulation. However, many of the perceived problems with alternatives can apply equally to classic regulation. If a policy proposal is badly designed or poorly implemented and enforced it is not going to work, whether it is classic regulation or an alternative. Good policy making is essential in both cases.

A common criticism of alternatives is that they do not provide the legal certainty of classic regulation. However, Regulations and traditional Directives do not always provide certainty. Frequently there are problems and delays in transposing classic regulation and implementing it fully in all Member States. One need only look at the number of infraction cases brought forward over recent years to realise that classic regulation carries with it no guarantee of compliance or that the expected results will be achieved. Nor is classic regulation immune from problems of interpretation and inadequate enforcement. In contrast, an alternative developed with the active support of the market can often provide greater reassurance that the expected results will be delivered.

Example: There are changes being proposed to the Television Without Frontiers Directive[13] to cover internet regulation. Although there is scope for using alternatives, it appears that certain outcomes, such as the regulation of advertising and a right of reply, will be prescribed in the Directive itself. This could create an imbalance such that website operators within the EU will be regulated but those based outside the EU will not be subject to the same rules. This is notwithstanding that website operators, unlike television broadcasters, are always global in their reach. Some fear that, as a result, European businesses may well move to non-European bases to circumvent the requirements.

Another criticism made of alternatives is that they are not always transparent. Stakeholders can be unaware of their existence and therefore do not comply. Evidently this can also apply to classic regulation that is over complex or inadequately publicised. Relevant stakeholders need to be identified and informed of any forthcoming changes to the regulatory landscape. Good policy making will involve stakeholders in the development of proposals. Good consultation is essential for success, regardless of the delivery option chosen.

Example: There is a plethora of classic regulation on waste. Many Member States have had problems in implementing waste legislation and stakeholders complain that there is too much legislation for them to understand it fully. There are suggestions that many small businesses are unaware of some of the requirements and therefore do not comply.

[13] Directive 89/552/EEC

A further criticism of alternative, non-legislative tools is that they lack a means of legal redress. This is not true in the case of co-regulation, New Approach Directives and 'flexible Directives', which do provide a suitable legal underpinning. Other non-legislative options can involve other sanctions for non-compliance, such as expulsion from trade associations and 'naming and shaming'. As these can sometimes be effective, these options should not be entirely ruled out on this basis.

Our conclusion is that good policy-making skills and respect for the Five Principles of Good Regulation[14] are essential to the success of all types of proposal, regulatory or non-regulatory. Suspicion of alternatives can often be based on a lack of information and experience. Good policy making requires that all possible delivery options are explored and evaluated and the most appropriate one chosen on the basis of the evidence in the impact assessment.

1.5 EU endorsement for using alternatives

Over recent years there has been an increasing focus on better regulation, as the EU strives to make legislation as fair and efficient as possible. Better regulation has economic benefits that can improve the day to day lives of citizens, by making sure rules and requirements are proportionate, consistent and easy to understand and achieve their objectives without imposing disproportionate costs.

There are several EU better regulation initiatives that highlight the need to promote the wider use of alternatives. The context is the **Lisbon Agenda** of 2000, when the European Council set new objectives for the EU to become, within a decade:

> *"the most competitive and dynamic knowledge-based economy in the world, capable of sustainable growth with more and better jobs and greater social cohesion".*[15]

Better regulation has an important part to play in improving competitiveness and the economic conditions in which businesses operate. Many of the following initiatives stem from the need to achieve the Lisbon goals.

The Commission's Action Plan

In June 2002 the Commission adopted the Action Plan "Simplifying and Improving the Regulatory Environment"[16] in accordance with the mandate issued by the European Council at Lisbon. This Action Plan discusses the use of alternatives to legislation (including co-regulation, self-regulation, voluntary sectoral agreements, open co-ordination method, financial interventions and information campaigns). The Commission says in this document that:

> *"appropriate use can be made of alternatives to legislation without undermining the provisions of the Treaty or prerogatives of the legislator".*

The document goes on to state that it is preferable not to make a legislative proposal where self-regulatory agreements already exist or can be used to achieve the relevant objectives.

The Inter-Institutional Agreement on Better Law-Making

In December 2003 the Commission, Council and Parliament signed this agreement[17] which recalls the Community's obligation to legislate only where it is necessary. Of particular relevance is that the agreement recognises the need to use 'alternative regulation mechanisms' where appropriate.

[14] See Annex F
[15] A copy of the Lisbon agenda can be found at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm
[16] COM (2002) 278
[17] Inter-Institutional Agreement on Better Law-Making, Official Journal of the European Union, 31.12.2003, 2003/C 321/01

The Six Presidency Initiative

In January 2004 the governments of Ireland, the Netherlands, Luxembourg and the UK signed the Four Presidency Initiative on 'Advancing Regulatory Reform in Europe', during their terms as president of the Council in 2004 and 2005. In December 2004, the governments of Austria and Finland also signed, ensuring that the better regulation momentum will be maintained during their presidencies in 2006[18]. In the Six Presidency Initiative, the signatories called for further action to:

> *"ensure that non-legislative options, including the 'do nothing' option, get stronger consideration at EU level. The decision to proceed with legislation should never be taken as a given in impact assessment. In order to allow a consideration of non-regulatory and less burdensome alternatives by the Council, equal weight must be given in all Commission impact assessments to the relevant costs and benefits of no action, of the proposed route of action and, where legislation is proposed, to the possibility of at least one further non-legislative approach."*

Commission Better Regulation Communication 2005

In March 2005, the Commission produced a Communication entitled 'Better Regulation for Growth and Jobs in the EU'[19]. This document proposes actions to create a better regulatory environment, including:

> *"….a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered."*

Commission Impact Assessment Guidelines

In June 2005 the Commission published its updated Impact Assessment Guidelines[20]. They state that, once the policy objectives have been defined, careful thought needs to be given to which delivery mechanisms are most likely to achieve these objectives. The Commission advises that:

> *"Considering alternative policy options will force you to think 'out of the box'. Identifying and screening a wide palette of options also offers greater transparency. It is a way to inform policy-makers and stakeholders why some options have been discarded at an early stage."*

The guidelines go on to state that an extensive list of alternative options should be drawn up and analysed and also provide a list of alternative mechanisms for officials to consider.

[18] Advancing regulatory reform in Europe, A joint statement of the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies of the European Union, 7 December 2004
http://www.hm-treasury.gov.uk/media/95A/52/6presidencies.pdf
[19] COM (2005) 97
[20] SEC (2005) 791

1.6 Putting words into action

These initiatives show that there is high level support across the EU for better regulation and for the wider use of alternatives. The European Parliament, the Council and the Commission all recognise the benefits that more flexible approaches to legislation can bring and that there is scope to make wider use of alternatives. Given this level of agreement, we would like to see a more systematic and structured consideration of alternatives as proposals are developed to ensure that the most appropriate option for delivery is chosen.

The impact assessment process lies at the heart of this exercise and we fully support the approach to alternatives set out in the Commission's new guidelines.

Public confidence in the EU is low and the Union is often criticised for producing too much legislation or legislation that is unnecessary or over complex. It would help regain the confidence of the public and businesses were the EU to subject all future proposals for intervention to a meticulous analysis of delivery options. Following the Impact Assessment Guidelines, Commission officials need to avoid any automatic impulse to legislate and instead weigh-up all the options, choosing the one that looks most likely to achieve the desired result at minimum costs and avoiding unintended consequences. Such a rigorous process of considering alternatives can help prove legislation is necessary and improve both the effectiveness and the image of classic regulation.

2 The types of delivery tool available

Several different options are available to deliver policy objectives. The aim should be to find the option that best achieves the objectives while minimising costs and burdens. Apart from Regulations or traditional Directives, there are the less prescriptive regulatory tools, such as 'flexible Directives' and New Approach Directives, as well as non-legislative tools such as self-regulation or the provision of information. Discussion on alternatives is often limited to non-regulatory tools. In this report, in talking about alternatives, we include flexible regulatory instruments as well as non-legislative methods.

As many of these options as possible should be considered at an early stage in policy development, even though some might appear unsuitable. It is important to keep an open mind to avoid dismissing possible options too early in the process. While some options will need to be rejected because of legal requirements or the characteristics of particular markets, justifying why they have been discounted will strengthen the overall analysis and help build the case for the preferred tool.

Sometimes a mixture of tools works best. Classic regulation may be needed to set up the legal framework for a more flexible approach, as with the emissions trading scheme. A 'flexible Directive' might be needed to define policy objectives, leaving Member States with the flexibility to decide how to deliver the objective and to what timeframe. Indeed, a study by the OECD into environmental policy[21] concluded that voluntary agreements can be most effective when used alongside legislation.

It is important to note that measures that transpose EU Directives into national legal systems must be legally binding. Member States cannot rely on voluntary agreements to transpose EU Directives unless the Directive itself explicitly provides for this possibility[22].

As enough is known about traditional Directives and Regulations, this section only deals with the types of alternative tool available. It is not a definitive list. The tools we describe can be considered for most policy areas, but there may be other sector specific tools that can also be used. Officials will have a better understanding of approaches which might be particularly suited to their area of work.

In all cases, officials should consult stakeholders on the range of possible delivery options to see whether there is a preference for a particular option. Stakeholders may also suggest new approaches that the officials have not considered. It is essential to choose the most effective and efficient option for delivering policy objectives and good stakeholder consultation helps identify the best option.

2.1 No action

Before looking at *what* needs to be done, consideration should first be given to *whether anything* needs to be done and, if so, by whom. The principles of subsidiarity and proportionality are important at EU level and are enshrined in the Treaties. They limit the scope of action by the EU to those things that are necessary and effective and are designed to ensure that the simplest possible method of implementation is chosen.

Subsidiarity is the principle whereby the EU does not take action, except in those areas which fall within its exclusive competence, unless such action is more effective than action taken at national, regional or local level. Action should be left to Member States whenever possible. Officials should consider whether action is already being taken at Member State level and, if so,

21 "Voluntary Approaches for Environmental Policy – an Assessment" OECD 1999, ISBN 92-64-17131-2

22 Examples of this practice can be found in Directive 2000/53/EC Article 10(3) and Directive 2002/96/EC Article 17(3).

whether a better solution would be to spread existing best practice rather than introduce new EU regulation.

The principle of proportionality sets out how the EU should exercise its powers. Any action should be as simple as possible to minimise the financial or administrative burdens on governments, economic operators and citizens. So, in some cases, the appropriate choice might be to take no action at EU level. Any action that is taken should be implemented in the lightest possible fashion.

The option to 'do nothing' can frequently be overlooked when intervention is being considered. The Commission's Impact Assessment Guidelines state that the option of 'no action' should always be included in the range of delivery options for consideration, except where the Treaties require that EU action be taken. In this way, the effects of intervention can be compared with the effects of maintaining the status quo. The European Policy Forum (EPF)'s 2005 analysis of impact assessments (IAs)[23] suggests that the 'do nothing' option is not given enough thought. However, it may be that decisions to take no action are taken well before IAs are published. Recently, the Commission has reassessed the backlog of legislative proposals and decided that no action is required for several, such as proposals to regulate the package sizes for coffee[24]. This is a welcome development.

Any intervention can create additional burdens for bodies operating in the sector concerned, so careful thought is always necessary before deciding whether and how best to intervene. In some cases, 'no action' can mean no new requirements or regulations but, instead, taking non-regulatory steps like clarifying the existing law, improving its enforcement or highlighting requirements already in place which are not being respected.

Events can sometimes lead to the hasty introduction of regulation, sometimes prompted by particular stakeholders and the media. This often results in poorly thought through legislation that does not meet its objectives and is later found to be unnecessary.

Example: There were a number of significant electricity supply interruptions around the world during the late summer of 2003, including in North East America and Eastern Canada, parts of London, eastern Denmark and Southern Sweden. Almost all of Italy was blacked out for nearly 24 hours in late September. The Commission reacted swiftly by announcing in December 2003 a proposal for new regulation which was, among other things, intended to prevent future blackouts. In this case, it has been suggested that the Commission did not thoroughly consider the option of 'no action'. The problem may have been better dealt with by individual Member States or by an amendment to the existing EU Electricity Directive, which already contained provisions about the security and supply of electricity.

Using existing legislation

If there is no sector specific (or vertical) legislation already in place to achieve policy objectives, new provisions may be required. However, it may be that the desired outcomes can be achieved by using existing general (or horizontal) legislation, which can avoid the need for new provisions.

[23] "The Itch to Regulate: Confirmation Bias and the European Commission's New System of Impact Assessment" European Policy Forum 2005, ISBN 1-903850-17-7
[24] COM (2005) 462

Example: There are over 40 legislative texts in force relating to food labelling, including a horizontal Directive (2000/13/EC) and a range of vertical Directives relating to individual products. Having such an array of legislation can be counter-productive. Consumers get confused by too much information and businesses find it difficult to comply with so many different provisions. Some of the requirements in the vertical Directives could have been delivered via existing provisions or amendments to the horizontal Directive. The Commission has acknowledged this and intends to simplify food labelling legislation following a review and consultation exercise.

The Commission can publish interpretative communications to clarify existing provisions and so avoid the need for new laws. Using existing law also brings longer term legislative benefits by reducing the rate of growth of the EU legislation and the future need to simplify and consolidate it. Following an invitation by the Dutch and Irish Presidencies to identify priority areas for simplification the Council selected 144 proposals, which were then narrowed down to 15 priority areas[25]. The Commission recently conducted a similar exercise to identify areas of legislation that could be simplified[26]. If greater use is made of existing legislation rather than implementing new Directives and Regulations, there would be less need to simplify and rationalise so many areas of legislation, which takes up considerable time and resources.

The Better Regulation Task Force's report on simplification[27] recommends that any proposal for new legislation should include a holistic review of all relevant legislation applying to the activities to be regulated and an explanation of how any new proposal fits with the existing regulatory regime. Analysing the 'no action' option in detail is part of such a holistic review and would reduce the need for simplification plans in the future.

Open method of co-ordination

The Commission has identified in their Impact Assessment Guidelines that the 'open method of co-ordination' can help achieve policy objectives without the need for legislative action. For example, Member States can co-operate by sharing best practice, peer reviews or agreeing common targets. It cites the European Employment Strategy as an example of where this method is being used successfully.

No action - yet

We have come across several examples of an approach to policy making that can be described as 'no action – yet'. Officials take a 'wait and see' approach before deciding whether to intervene. A date can be set to review the issue and the decision on whether to take action delayed until then, allowing time to assess how a situation has changed and whether intervention is necessary.

[25] See Press Release 14687/04 (Presse 323)
[26] Communication COM (2005) 535 outlines the Commission strategy for the simplification of the regulatory environment, and includes a list of areas for simplification identified following consultation with stakeholders and Member States.
[27] "Make it Simple – Make it Better", December 2004

Example: In October 2004, the Commission issued Recommendations on director's remuneration and the role of independent directors, as part of a drive to promote best practice in corporate governance. They decided not to legislate so that Member States could take account of national corporate governance traditions and practices when implementing changes.

The Commission invited Member States to report back by mid 2006 on what they are doing to promote the application of these Recommendations. The Commission will then assess whether the desired result has been achieved or whether further measures are needed to achieve the objectives.

2.2 Providing information or guidance

Providing information or guidance can be a relatively inexpensive and effective method of influencing people's behaviour. Information can be provided by the EU itself or it can demand that industry or other bodies provide information to their customers. Such information can include publicity campaigns, training, guidance or rating systems. This option can be used independently to influence behaviour although campaigns are often combined with other legislative and non-legislative options, so that stakeholders know what is expected of them.

Example: As part of an effort to improve road safety and reduce drink driving, the Commission has supported awareness campaigns in several Member States to encourage party-goers to designate one non-drinking driver. The campaigns were deemed successful due to the take-up of the idea by motorists and the support offered by the alcoholic drinks industry.

This approach is very 'light-touch'. It provides consumers with the information they require to enable them to make an informed decision. Even when there are risks involved, people may still want to make up their own minds whether the risks are acceptable and how they wish to respond, rather than having legislation telling them what to do.

Sometimes this light-touch approach changes consumer behaviour which, in turn, can influence the market and the products or services provided.

From **case study 4** (Annex D): The European new car assessment programme (Euro NCAP) scheme publishes results of crash tests on cars with the safety standards used set higher than those in current EU legislation. Consumers have shown a preference for safer vehicles and this has led to manufacturers improving safety standards.

In order for information campaigns to be effective, it is vital that the information reaches the right people. Careful research is needed to target the message to the intended audience. A simple example is that providing information on websites is not going to work if a large proportion of the target audience does not have internet access. Similarly, language barriers can also present problems in reaching people who do not use the language of the country they are resident in as their first language.

Not everyone will need the same amount of information, as there will be varying degrees of knowledge throughout the market. For example, small businesses may have less knowledge and fewer legal resources than larger organisations and some consumers may be more aware than others. A 'one size fits all' information campaign may not be successful while varying the approach will push the cost up. Information can quickly become out of date so it is important to check that stakeholders are regularly updated with the latest details.

2.3 Market based instruments

Market based instruments (MBIs) seek to influence the behaviour of a market by using either positive or negative incentives. The potential of MBIs at EU level is restricted given that, for example, taxation measures must be agreed unanimously in Council. When they are used, they tend to be combined with some form of legislation in order to provide a means of redress. Sometimes, flexible EU level legislation allows and encourages MBIs to be implemented at Member State level, recognising that Member States are in a good position to decide what works in their markets.

Trading schemes

These schemes set limits to what can be produced and then allow market players to negotiate and trade with each other to increase or decrease their allocation. They are very flexible and cost effective but can be complicated to set up.

From **case study 1** (Annex A): The carbon emissions trading scheme is the first time this approach has been used by the EU. Operators are allocated rights to emit carbon dioxide up to a certain limit and can buy permits to emit more if required. Conversely, if operators emit less carbon than their allocation, they can sell some of their permits. This acts as an incentive for them to cut their emissions and the overall effect is to reduce emissions in the most cost effective manner.

It is too early to know how well the emissions trading scheme is working. Stakeholders have told us that the system is quite complex and that registering for the scheme is bureaucratic. Industry has been involved in detailed discussions with the EU and there have been disputes over allocations and disparities in how the scheme has been implemented in different Member States. Nevertheless, all the organisations we consulted said they found the scheme workable and preferred it to the other options that had been considered, such as prescriptive legislation or a form of energy tax.

If a trading system can operate in a market as complicated and diverse as the CO2 emissions market, then similar schemes should be considered elsewhere. Indeed, some operators in the aviation industry have requested that the scheme be extended to their sector.

Competition policy

Sometimes a government can intervene in a market in order to encourage competition, which in turn leads to reduced costs, more consumer choice and operators being forced to improve their performance. The Commission has a specific Directorate General (DG Competition) to look at potentially uncompetitive practices and to make recommendations to help encourage effective competition.

It may be possible to achieve policy objectives by opening up a market (for example by reducing market entry requirements) and encouraging competition. DG Competition can advise and will also assess alternative proposals (such as self-regulation) so that a closed shop is not created.

Example: The Commission examined the professional services industry in 2004[28]. They identified examples of price fixing, advertising bans and entry requirements that were restricting competition. They made several recommendations to Member States on action to open up professional services to greater competition. The Commission reported on progress in September 2005 and found mixed results[29]. It has called on further action by most Member States and will continue to monitor progress.

Fiscal measures

Altering the financial rewards or penalties for operating in a market can encourage particular types of behaviour. For example, taxes can be used to modify behaviour or ensure that users pay the social price for their consumption.

Example: The 2003 Directive on the taxation of energy products and electricity[30] sets out the minimum rates of taxation applicable to electricity and to energy products when used as motor or heating fuels. The aim is to improve the operation of the internal market by reducing distortions of competition between mineral oils and other energy products. It encourages more efficient use of energy so as to reduce dependence on imported energy products and limit greenhouse gas emissions. To help protect the environment, it authorises Member States to grant tax advantages to businesses that take specific measures to reduce their emissions.

Given the limitations at EU level on the use of taxes as an instrument of policy, the approach is more common at Member State level.

Example: Finland, together with many other Member States, has implemented the revised Packaging Waste Directive[31] through a system of packaging taxes (or product charges) along with a deposit system for items such as cans and bottles. Customers are encouraged to return items for recycling by receiving a small refund when they return them to the point of sale or to 'deposit pools'.

Subsidies are direct payments to encourage a certain type of behaviour and government subsidies to businesses are tightly regulated by EU State Aid rules. The main argument for using subsidies is that the decision to act is still left to market members. However, they are often criticised for distorting the behaviour of the market itself, encouraging inefficiency and for being uncompetitive.

28 COM (2004) 83
29 COM (2005) 405
30 Directive 2003/96/EC
31 Directive 2004/12/EC amended Directive 94/62/EC.

2.4 Co-regulation

The Inter-Institutional Agreement on Better Law-Making describes co-regulation as:

> *"….the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)".*

There is often some cross over between co-regulation and self-regulation, as the Commission is sometimes quite closely involved in self-regulation. For clarity, we shall use the distinction that co-regulation involves some sort of legal underpinning and can therefore be described as self-regulation with a legislative back-stop.

An important advantage of co-regulation is that it provides a degree of certainty due to the back-stop legal provisions whilst also encouraging innovation by allowing a flexible approach to implementation. The legislation can set out the objective and relevant deadlines, together with the conditions for monitoring and enforcement, without specifying in detail the means to achieve the objective.

Example: There are several voluntary agreements in place for the white goods market, covering things like fridge freezers and washing machines, to ensure that the least energy efficient goods are eventually taken out of production. The agreements are underpinned by legislation setting out requirements for the labelling of the goods and the efficiency categories that goods may fall into (category 'A' being the most efficient).

At present, the most efficient products tend to cost the most. Consumers therefore have a choice between buying a less efficient product at a lower price or a more expensive but more efficient model. Feedback suggests that, at present, customers are evenly split when making this choice, but as technology changes and the price differential reduces, it is hoped that sales of the more efficient products will increase.

Manufacturers are told to attain a certain level of efficiency, but it is not prescribed how to achieve this. They will therefore always strive to find the most cost effective way of doing so. This arrangement encourages the manufacturers to produce energy efficient products as cheaply as possible.

By avoiding detailed prescription of how objectives should be achieved, co-regulation and gives stakeholders an active role and encourages them to assume responsibility for delivering results. Co-regulatory initiatives are more likely to be successful as those being regulated have scope to use their experience to design and implement their own solutions.

Example: Television companies in France introduced programme ratings via an industry initiative as their response to the requirement to protect minors in the Television Without Frontiers Directive[32].

[32] Directive 89/552/EEC

2.5 Self-regulation

The Inter-Institutional Agreement on Better Law-Making defines self-regulation as:

> *"…the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)".*

Self-regulation requires markets to regulate their own activities, without the requirements or agreements being underpinned by legislation. EU involvement is usually limited to encouraging or facilitating the process, perhaps with the threat of legislation should it not be successful.

Self-regulation usually involves voluntary agreements, codes of practice and codes of conduct, such as those made by the European, Korean and Japanese automotive industries to reduce CO2 emissions from their cars.

From **case study 5** (Annex E): An example of self-regulation is the voluntary agreement to reduce energy consumption of TVs and VCRs in standby mode, implemented by the European Association of Consumer Electronics Manufacturers (EACEM). Targets to reduce energy consumption have been set by EACEM and an independent consultant reports annually on progress.

Self-regulation obviously raises issues about how to ensure implementation and consistency across Member States. However, similar concerns arise with many legislative and non-legislative provisions at EU level. It is always going to be difficult to engage the whole EU market without the active support of European-wide trade organisations. Self-regulation also raises concerns about how people who suffer as a result of any regulatory failure can seek legal redress.

As with co-regulation, self-regulation can create barriers to trade. Self-regulation at Member State level can restrict markets and sometimes result in the need for classic regulation to free up these markets. It is important to remember to maintain competition when a self-regulatory scheme is being considered.

2.6 Social partner agreements

The European social partners include organisations representing the interests of management and labour (employers' organisations and trade unions) at European level. They are UNICE[33]/UEAPME[34] for the employers, ETUC[35] for employees and CEEP[36] for enterprises with public participation. They are key players in developing EU policy and under Article 138 of the Amsterdam Treaty, must be consulted before the Commission submits proposals in the social field in the areas covered by Article 137.

They may also negotiate agreements that are then incorporated into European law. Previous agreements between the social partners on parental leave, part-time working and fixed-time working have been implemented by EU Directives. More recently, agreements have been reached on teleworking and work-related stress, which are to be implemented by the social partners themselves in accordance with national procedures and practices.

33 Union of Industrial and Employers' Confederations of Europe

34 Union Europeene de l'artisanat et des petites et moyennes enterprises

35 European Trade Union Confederation

36 Centre européen des entreprises à participation publique et des entreprises d'intérêt économique général

Examples: The social partner agreement on teleworking is the first such agreement to be voluntary and not delivered by legislation. Employers are expected to implement the provisions without them being prescribed in legislation. It was signed in July 2002 and Member States had until July 2005 to implement the agreement. It will be reviewed in July 2006 and the social partners may then take further action if they deem it necessary.

Teleworking means using IT to carry out work at home that would usually be done on the employer's premises. The agreement aims to give EU teleworkers more security while maintaining business flexibility. It covers issues such as employment conditions, data protection, privacy, training and health and safety.

An agreement on parental leave led to the Parental Leave Directive[37]. It gives men and women workers the right to up to three months leave on the birth or adoption of a child. When the agreement was made, the decision was taken to use a legislative option rather than a voluntary agreement so that workers would have a means of legal redress should their employers not comply.

Social partner agreements give the partners an opportunity to try to reach agreement without the need for legislation. If legislation is necessary, the partners can negotiate its content and they are trusted to reach the most practical solution. If the partners decide on a non-legislative route, the Commission suspends the legislative procedure.

It is too early to gauge the success of the teleworking and stress agreements, but not too early to learn lessons from them. For example, after the teleworking proposal had been agreed, it was realised that it could usefully have included provisions for an annual update to track progress. Such a provision was subsequently inserted into the stress agreement to ensure the social dialogue committee produces an annual assessment of progress.

Social partner agreements allow decisions to be taken by those most closely affected, on the basis that they are likely to be best placed to determine what measures are needed and the level of intervention required to deliver a particular social policy. However, detractors argue that the system is exclusive and needs a wider range of views to be represented. Some Member States (such as the UK and Ireland) do not have a social partners model and in these circumstances, negotiations and implementation may sometimes prove difficult.

2.7 Recommendations

Recommendations are official instruments produced by the Commission or Council that do not have legal force but set out suggested courses of action. They are commonly used by the Commission to encourage action in a particular sector and can be used as part of self-regulatory schemes, such as the agreement on CO2 emissions from cars[38].

Issuing a Recommendation can signal that the EU thinks action should be taken in an area and is often a warning to industry that it needs to act or face the likelihood of future legislation. For example, in 2001 the Council produced a Recommendation[39] on the drinking of alcohol by young people, which included suggested strategies for Member States to tackle this problem. In this case, the recommendation emerged even though serious consideration had earlier been given to issuing legislation.

37 Directive (96/34/EC)
38 Recommendations 1999/125/EC, 2000/303/EC and 2000/304/EC.
39 2001/458/EC

2.8 New Approach Directives

New Approach Directives set out essential requirements which must be met in order for products covered by the Directives to be marketed in the EU. The Directives allow manufacturers to comply (and to demonstrate that they comply) in any manner they choose, including by means of compliance with voluntary, harmonised standards. "CE" markings are then used to show this 'presumption of conformity'.

New Approach Directives are generally agreed to have successfully combined voluntary stakeholder initiatives with regulation. They are more flexible than traditional Directives and have been used to regulate relatively homogenous product groups in areas requiring technical harmonisation, such as pressure vessels and medical devices.

> Example: The Simple Pressure Vessels Directive[40] removes technical barriers to trade by harmonising the laws of Member States covering the design, manufacture and conformity assessment of pressure vessels to make certain that only safe vessels are put on the market. All vessels in scope have to meet essential safety requirements, be checked and have safety clearance by an approved body and bear CE markings to confirm this.

However, New Approach Directives are not without criticism. The monitoring and enforcement of the Toys Safety Directive[41] have been criticised because of cases of non-compliance, where toys are either not CE marked or are fraudulently marked. This could perhaps be because there is a large number of manufacturers based outside of the EU, making enforcement difficult. The Construction Products Directive[42] has also been criticised, in this case for trying to do too much and being too complicated. It has been identified as a candidate for simplification.

We have also been told that these Directives could potentially favour large businesses over small businesses. Large organisations are said to have greater influence over the setting of standards and use this to their advantage. As is the case with all legislation, policy makers need to guard against this by ensuring that they consult properly with a range of interested parties and do not favour certain sectors of the market.

2.9 Flexible Directives

Traditional Directives often try to spell out exactly what the policy objectives are and how to achieve them. As a result, they can be over-prescriptive and inflexible, creating complex requirements that are difficult to comply with. However, Directives can be more flexible by creating an overall framework that clearly sets out the objectives, then leaving open the means of achieving them. This gives Member States and operators the flexibility to implement provisions in ways suited to their markets and avoids the rigidity of a 'one size fits all' approach.

40 Directive 87/404/EEC
41 Directive 88/378/EEC, amended by Directive 93/68/EEC
42 Directive 93/68/EEC

Example: The 1989 Television Without Frontiers Directive[43] aims to ensure the free movement of broadcasting services within the internal market while at the same time preserving certain public interest objectives such as cultural diversity, the right to reply, consumer protection and the protection of minors. It is implemented by a range of regulatory and co-regulatory measures in different Member States. For example, to comply with the duty to protect minors, the Netherlands and France use co-regulatory rating systems implemented by the broadcasters. Other Member States, like the UK, instruct an industry regulator to apply specific requirements.

The Directive is being revised to cover television-style broadcasts over the internet. The intention is to take a tiered approach, with some provisions being prescribed in the Directive and others taken forward by co-regulation. However, there are concerns that even this approach may be too regulatory, stifling innovation in the broadband content industry and setting down provisions that will be impossible to enforce in practice.

Critics of flexible Directives say they can undermine the single market. It can be difficult to measure and compare levels of implementation if Member States take different approaches. However, this need not be a disadvantage, as it allows scope to compare the different approaches and to try out new ideas. Sharing experience can lead in the end to the most appropriate solution being adopted more widely. Individual Member States may anyway require different approaches and prescribing a single means to achieve objectives can have a detrimental effect on the EU market.

Example: The revised Packaging Waste Directive[44] is intended to reduce waste and increase the amount of packaging material that is recycled. The Directive is flexible and allows Member States to introduce their own methods of reaching the targets. Several Member States have introduced a system which incorporates taxes and deposits.

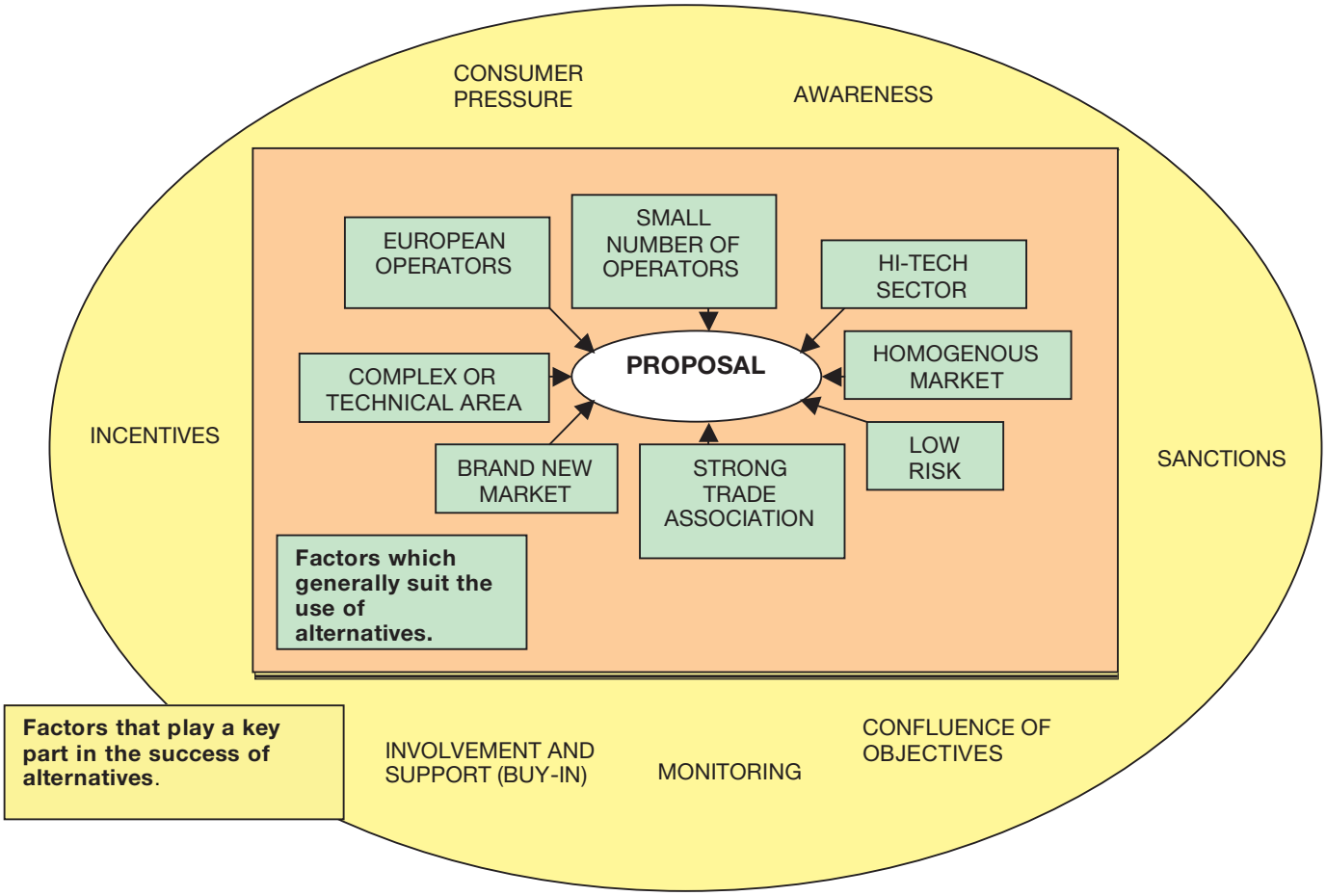
The UK is the only Member State to have introduced a trading scheme. The scheme works by requiring relevant businesses of a certain size to recover and recycle a given volume of packaging, known as an "obligation". These obligated companies are required to pay for a certain proportion of the UK's total obligations to recycle packaging. They make payments by buying recovery notes from recyclers and the notes act as proof to the regulator that recycling has occurred. A market is created where these notes are traded.

We are pleased to note that the Commission is encouraging the use of more flexible methods of implementation in its Directives. The Impact Assessment Guidelines[45] refer officials to the commitment made in its 2002 Action Plan[46], that the content of a Directive should be limited to the essential aspects of legislation. The guidelines state:

> *"…directives should, as far as possible, be general in nature and cover the objectives, periods of validity and essential aspects of legislation, while technicalities and details should be a matter of executive measures or be left to Member States."*

43 Directive 89/552/EEC
44 Directive 2004/12/EC amended Directive 94/62/EC
45 SEC (2005) 791
46 "Simplifying and improving the regulatory environment" COM (2002) 278

3 Factors that can influence the use of alternatives



We have reviewed EU experience to date with different kinds of delivery options and have identified some important factors that seem to influence the suitability of alternatives. Although different policy areas have their own characteristics, some general principles do apply and are reviewed in the next section. In all cases, a high quality impact assessment should be prepared, setting out the advantages and disadvantages of different delivery options and providing a justification for the preferred way forward.

3.1 Risk

When deciding on the appropriate option for intervention, it is important to consider the risks posed by the current situation and to choose a level of intervention that is proportionate to the risk. This requires a balanced, rational evaluation of the situation and the avoidance of knee-jerk reactions to particular events or pressures.

The EU has a responsibility to protect its citizens and their environment but it also recognises that risk cannot be completely eliminated or controlled. The key is to achieve a balance between the seriousness and impact of the problem that the intervention is hoping to address and the positive and negative impacts that the intervention might cause. There are some situations where the potential for damage is so great or where people's health and safety is under such serious threat that classic regulation may be required to put in place necessary levels of protection and to provide clear routes to redress. In such circumstances, alternatives not may be able to provide the level of certainty required. However, it is important to remember that classic regulation is only as good as its enforcement. Even the best legislation will not serve its purpose if steps are not taken to ensure compliance.

Example: There are various EU requirements in place concerning the transport of dangerous goods. For very dangerous goods, such as nuclear waste and toxic chemicals, the requirements are very stringent. The rules are more relaxed for those goods perceived to be less of a threat.

3.2 The policy area

Alternatives may work best in complex policy areas which demand a high level of expertise and where it is necessary for EU officials and parliamentarians to co-operate closely with the experts who work in the field to achieve policy goals. Devising and monitoring provisions in such complex policy areas requires a great deal of data collection and analysis. Operators in these markets may already have a lot of the relevant information to hand or will probably find it easier to collect than officials.

From **case study 1** (Annex A): Controlling CO2 emissions is a complex problem that involves several sectors, such as the utility companies and the chemical industry. It is generally agreed that the flexible alternative of the emissions trading scheme is more likely to succeed in this context than an approach based on prescriptive legislation.

Of course, the Commission also engages stakeholders and consults expert groups when drafting classic regulation. However, businesses have told us that they feel more involved in the process when invited to devise alternatives than they do when they are consulted on classic regulation.

Complex policy areas can often be best managed by using options which encourage the involvement of stakeholders and which provide them with some flexibility. Suitable options would include New Approach Directives, co-regulation, self-regulation or a combination of legislation and market based instruments.

Example: Many of the New Approach Directives, such as for simple pressure vessels and implantable medical devices, cover extremely complex and detailed policy areas. The European standards bodies work closely with the relevant industries on technical specifications and to devise appropriate standards. Operators are allowed a wide choice of how to meet their obligations.

3.3 Market considerations

The type of market that is operating and the members of that market can influence the suitability and success of alternative tools.

High-tech sectors

Alternatives tend to be particularly well suited to high-tech sectors which can evolve and change rapidly and where classic regulation can be too inflexible to work effectively. It can take years to implement or amend classic legislation whereas alternative tools can be introduced, amended or updated in a much shorter time. For example, the voluntary agreement to reduce CO2 emissions from cars took around 4 years to implement while similar pieces of classic legislation can take on average 6-7 years.

This is important because innovation and technological advancement can be stifled by inflexible or unresponsive regulatory regimes. As future technological change is difficult to predict, it is risky to put long-term targets or requirements into a classic regulation. Using an alternative that is easier to adapt and update makes it easier to keep the regulatory framework in line with market developments.

Markets that are constantly changing and developing would benefit from the flexibility provided by New Approach Directives, co-regulation, self-regulation or a combination of legislation and alternative tools. This is the case for energy efficiency requirements for white goods, which are contained in a mixture of Directives and voluntary agreements.

New markets

It has been suggested to us that completely new markets might also be suited to the use of alternatives, to provide the flexibility needed to keep up with changing demand and the evolving market.

> Example: High definition TV allows signals to be broadcast with a much higher resolution than with traditional formats. Industry has agreed minimum, voluntary standards for high definition TV receivers that identify the types of compliant receivers available. As the market is new there is uncertainty over the preferred format for storing images and technological advances could change the scope of compliant devices. The self-regulatory system in place allows for the standards to be changed as the market evolves.

Small number of operators

Markets that involve a small number of manufacturers or suppliers can be especially suited to the use of alternatives, particularly self-regulation or co-regulation. These markets are easier to identify, organise and monitor, and it can also be easier to reach consensus. In these circumstances, any failing by one company has implications for the entire industry, so there is usually scope for some degree of self-policing. This makes it less likely that an unscrupulous organisation will purposefully ignore an agreement in an attempt to gain an unfair advantage.

One criticism of self or co-regulatory measures in this type of market is that they make tacit collusion and anti-competitive agreements more likely. Outsiders may inadvertently (or deliberately) be prevented from participating in that market and small businesses can be

overlooked when the agreements are negotiated. To reduce this risk, a robust impact assessment should be prepared, setting out in a transparent way what is being proposed and how the operation of the agreement will be monitored. DG Competition should also be contacted for their advice.

From **case study 5** (Annex E): The voluntary agreement on energy consumption by TVs/VCRs is a relevant example. There are relatively few manufacturers, all of whom have signed up to the agreement and have set realistic targets to improve the energy consumption of their products.

This can be contrasted with the market for digital TV set-top boxes, where there are many manufacturers. Attempts to agree a voluntary code for energy consumption were unsuccessful as several manufacturers did not comply and sold cheaper, less efficient products and so gained a market advantage. Consequently, the energy efficiency of these products has deteriorated, as manufacturers continue to produce cheaper, less efficient devices.

Although markets with a small number of operators are suited to the use of alternatives, this does not rule out their relevance to more fragmented markets. For example, proposals for the revised Food Hygiene Directive[47] have deliberately been left flexible because of the large number of small businesses involved. Given the diverse range of businesses and food substances covered by the Directive, it would be impossible to prescribe in detail how to achieve the objectives that the Directive seeks to achieve. Instead, it was much more practical to set the objectives in the Directive and then leave operators to find the most suitable way to achieve them.

The geography of the market

The suitability of alternatives can depend on the proportion of products in the relevant market sector that is manufactured in the EU. It is obviously more difficult to monitor the market if a large part of the production is being imported into the EU. In such circumstances, there is less chance of an alternative tool being successful.

Example: The New Approach Directive on toy safety has faced enforcement problems as, amongst other things, the majority of products is imported from the Far East, making it more difficult to be sure that standards are being met.

It is easier to monitor the market when manufacturers have an effective representation in Europe, even if their main bases are outside the EU. For example, the Japanese and Korean car manufacturers' associations both deal regularly with the Commission on the car CO2 emissions voluntary agreement. The European Association of Consumer Electronics Manufacturers (EACEM), which is responsible for the voluntary agreement to reduce TV/VCR power consumption, includes member firms from Asia.

[47] Directive 93/43/EEC

Example: The European Association for the Domestic Appliances Industry represents 95% of the market for some appliances, which makes it feasible to consider voluntary agreements for these manufacturers and appliances. Voluntary agreements are less likely when many of the manufacturers are based outside Europe (e.g. vacuum cleaners and hair dryers).

Although it is hard to generalise, as each proposal for intervention needs to be analysed separately, it appears that classic regulation may be more suited to markets where a large proportion of goods or services are imported from outside Europe. Conversely, a market where the majority of products or services originate from Europe could make it more likely that more flexible options will succeed.

Homogeneity

The more homogeneity in the market and between Member States, the easier it is for alternatives to work. Businesses can then develop a uniform approach and do not need to adapt their products and strategies to several different markets, which can prove costly and inefficient.

Example: The market for white electrical goods is similar throughout the EU and the various voluntary agreements with the manufacturers on energy efficiency have proved successful, with less efficient products being taken out of production as more efficient products are developed.

3.4 Monitoring

Our research has clearly shown that, for an alternative to work, it needs a robust monitoring regime. Alternatives can be more easily used and are more likely to succeed where a good surveillance system already exists or can be easily introduced. It is essential to have well defined, realistic objectives and deadlines to measure against.

Example: In 2003, the Commission introduced a road safety action plan which contained a range of legislative and non-legislative measures designed to halve the number of road deaths within the EU by 2010. A system was introduced to monitor the success of the measures and a review of progress is to be published in 2006. The Commission is then expected to legislate in those areas where the alternatives have not succeeded and will look to utilise best practice in other areas.

This approach can be contrasted with the Commission's Recommendation on alcohol and adolescents, which included suggestions as to how Member States might tackle the issues raised. The Recommendation stated that a review would take place in July 2005 to see whether the suggestions had been taken on board. However, there were no clearly defined objectives against which to measure success and there has been no monitoring of whether or how the Recommendation has changed behaviour. Subsequently, although the industry has followed the suggestions in the Recommendation, there has been a lack of action by some Member States and it could be argued that some areas of alcohol misuse identified by the Commission, such as binge drinking, are getting worse.

Although monitoring is required for all kinds of regulation, it is especially important for alternatives as a defence against detractors and to create confidence in their use. The pressure to legislate is often so great that it is important to gather and use evidence to show how policy objectives can be achieved through the intelligent and imaginative use of alternatives.

> From **case study 3** (Annex C): There is ongoing pressure for more prescriptive legislation to reduce CO2 emissions from cars but so far the Commission's monitoring shows that the industry is on course to meet the agreed targets and that the voluntary agreement should continue.

It may be preferable to have the monitoring undertaken or at least audited by an independent body, in order to maintain trust and transparency and so the industry cannot be accused of 'cooking the books'. An example of this is the annual report on the voluntary agreement to reduce TV/VCR energy consumption, which is submitted to the Commission by an independent consultant.

3.5 Buy-in

All stakeholders need to 'buy-in' to an alternative if it is to succeed. All the case studies that we describe in the annexes to this report share the same critical characteristic that they are supported by the majority of operators that are affected by them.

> Example: The Commission Recommendation on adolescents and alcohol is largely supported by the alcoholic drinks industry, which has been taking steps to tackle alcohol misuse amongst young people based on the measures suggested in the Recommendation. However, there is apparently a lack of action by some Member States and by the Commission itself to promote the Recommendation and to monitor progress. As a consequence, the measure may not be achieving the policy objectives. All parties have actively to support a measure for it to succeed.

Buy-in from stakeholders will depend on the aim of the policy and how it is likely to affect them. For example, businesses are more likely to support a proposal if they believe it could protect their market from unfair competition and may fight against a proposal to open up the markets they operate in.

Where the Commission and stakeholders share an interest in achieving a proposed objective, an alternative is more likely to succeed. For example, the Directorate General responsible for health and consumer affairs (DG SANCO) has created a forum where stakeholders can consider what voluntary actions they could take to reverse the rise in obesity. All sides appear keen to address the issue and this makes it more likely that a successful voluntary agreement can be developed.

Sometimes, however, the industry needs to be prompted into action or persuaded to give their support to a proposed alternative measure. Operators are unlikely to respond positively unless they recognise and agree that there is a problem that needs to be addressed. In some cases, the Commission may have to make clear to the industry that legislation is likely before they will support or investigate an alternative. However, this needs careful handling as industry is unlikely to respond positively or to help find innovative solutions in the face of what it may see as threats. However, if operators do not respond to prompts from the Commission and refuse to find their own ways to address a problem, then classic regulation may be required to coerce them into action.

Buy-in from other sectors

Getting buy-in from other sectors can encourage stakeholders in the target sector to act. As an example, insurers would be well placed to put additional pressure on vehicle manufacturers to improve safety standards by offering lower premiums for safer models.

From **case study 2** (Annex E): The media has an important role to play in the self-regulation of advertising. The system only works because the media is ready to refuse to carry adverts that self-regulatory bodies deem inappropriate. Without this co-operation, advertisers may ignore instructions from the regulator and successfully place harmful or misleading adverts.

Example: Cable and satellite TV distributors have requested that manufacturers follow a code of conduct for the production of digital TV boxes, to ensure that the boxes they deliver to their customers are as energy efficient as possible. In contrast, there is no external pressure influencing the production of 'freeview' digital boxes, which are purchased directly by the consumer. As a result, the freeview boxes are increasingly less energy efficient, as manufacturers focus on keeping the price down in a highly competitive market.

3.6 Incentives

Stakeholders often need some kind of incentive to encourage them to support an alternative.

From **case study 1** (Annex A): The emissions trading scheme allows operators who emit less carbon than their allocation to sell their excess permits. This gives them the incentive of being able to profit from the system.

The threat of prescriptive legislation should an alternative scheme not succeed is a commonly used incentive in the case studies we have examined. Businesses often prefer to be given the opportunity and flexibility to find their own ways to achieve objectives and hence avoid prescriptive legislation. The Commission stated in its 2002 Action Plan[48] that self-regulatory measures could be underpinned by a recommendation that legislation be introduced if self-regulation proved ineffective and this is true of several environmental voluntary agreements. However, industry's commitment to make an alternative work may reduce as the threat of legislation diminishes, which means that a good monitoring system is essential to encourage continued buy-in.

While stakeholders should be closely involved in developing all types of legislation, they have told us that they are usually more involved with alternative proposals than with classic regulation. This gives them a greater chance to influence the rules, which is itself a good incentive for them to get involved and to offer support.

An obvious incentive for businesses to co-operate and comply is a potential increase in sales. All organisations like good publicity and the potential increase in revenue that can result. For example, car manufacturers publicise the good safety ratings that they receive from the European New Car Assessment Programme (Euro NCAP) in an effort in increase sales.

[48] "Simplifying and Improving the Regulatory Environment" COM (2002) 278

Examples: We have encountered the concept of 'naming and praising' in our research. Peugeot cars now publicise their performance against CO2 emissions targets on their website. They obviously believe that their performance in surpassing voluntary targets and subsequently helping the environment is worth publicising. It is doubtful that meeting legislative requirements would be deemed worthy of publicity, as they would only be achieving what is required of them.

There have been other instances of 'naming and praising'. In connection with the energy efficiency voluntary agreements, the Danish government has set up a website which tells consumers where they can find the most energy efficient white goods at the cheapest price. Sales have improved for those suppliers listed.

3.7 Sanctions

Alternatives can include sanctions for non-compliance, such as removing certification for breaching codes of conduct. However, where non-compliance can have serious consequences, such as with fraud or activities likely to cause death or serious harm, heavier penalties including criminal sanctions will be needed. These can only be provided by legislation. 'Flexible Directives', New Approach Directives and co-regulation provide the necessary legal underpinning and can therefore impose sanctions.

Non-compliance with other alternative tools can result in reprimands, bad publicity or expulsion from trade associations. These need to carry with them some degree of commercial disadvantage for the organisation concerned if they are to be effective. However, the negative effects of bad publicity should not be underestimated. Operators do not want to be seen to be breaking rules, whether statutory or non-legislative, as this can have a harmful effect on their reputation and affect their sales. Similarly, most reputable organisations want to keep on good terms with governments, if only to avoid the possibility of future sanctions.

From **case study 2** (Annex B): In the UK, sales of SmithKilne's Ribena Toothkind reportedly dropped by 15% (wiping £18 million off their annual turnover) after the Advertising Standards Authority (ASA) rejected their claim that it was kind to teeth. Similarly, when the ASA ordered the withdrawal of the Tetley tea marketing campaign claiming that the product's anti-oxidants could help keep you healthy, it was estimated to have cost Tetley £15 million.

3.8 Consumer interest

Consumer interest and pressure can help promote the use of alternatives. We were told that one reason for the failure of a proposed voluntary agreement to provide compensation for airline passengers was that passengers do not have a strong collective voice and so cannot force the airlines to act. The Commission found it necessary to legislate instead.

From **case study 4** (Annex D): Consumer interest has played a big part in driving up safety standards of cars. Safety standards are an important consideration when cars are purchased. A good score under the Euro NCAP scheme can increase sales, so manufacturers will strive to get a good as score as possible to benefit commercially.

Of course, consumers cannot make informed choices about what they buy – and hence influence the market – unless they have good information available about the products on offer and the companies that make them. Transparency is important and consumers need to be made aware of any alternative tools or voluntary standards in operation and how they are relevant to their purchase.

3.9 The role of representative bodies

Negotiating alternatives to regulation such as voluntary agreements is easier where the organisations affected have a trade association to represent them, especially if this is a Europe-wide association. Difficulties are bound to arise if there is no body that has the influence and authority to develop an agreement on behalf of a whole industry.

> From **case study 3** (Annex C): The fact that car manufacturers are organised into only three main associations (representing European, Japanese and Korean operators) made it easier for the Commission to engage with them on the voluntary agreement on car CO2 emissions.

A strong trade or regulatory body can also provide a degree of self-policing of the market, reporting regularly or as necessary to government or the responsible independent regulator. For example, most Member States have Self Regulatory Organisations to monitor the content of advertising and to deal with complaints. Some of these bodies can refer contentious cases to the government if they are unable to resolve the issue internally.

4 Recommendations to facilitate the use of alternatives

The EU is committed to the better use of alternatives. The Inter-Institutional Agreement on Better Law-Making[49] calls for the use of "alternative regulatory mechanisms where appropriate." Similarly, the Commission's revised Impact Assessment Guidelines[50] of March 2005 underline the need for policy officials to consider the full range of delivery options available.

These are welcome steps, but the reality is that the number of alternative approaches to delivering policy is still tiny in comparison with the large amount of legislation that the Commission produces every year. More is clearly needed to encourage the use of alternatives. We hope that the following recommendations will make a difference and facilitate the use of a broader range of delivery options. Addressing these recommendations over the next 12 months would prove that the EU institutions take their commitments to the use of alternatives seriously.

4.1 Using this report

Our research indicates that there are certain factors which influence the suitability of alternatives for delivering policy. We have also identified a number of examples where alternatives have been implemented. Our work could help officials think more widely about what delivery option to choose.

Recommendation 1

We recommend that officials use this report when developing policy as it will help them identify and compare a range of options for delivering their proposals. This report can also be referred to alongside the Commission's Impact Assessment Guidelines when drafting roadmaps and impact assessments.

In line with the Commission Impact Assessment Guidelines, we believe that a wide range of options for delivery should be assessed when developing new proposals. Likewise, reviewing current regulatory initiatives might also reveal cases where less prescriptive and less burdensome approaches may be better suited to achieving policy objectives.

For example, stakeholders have expressed concerns to us over the current review of the Television Without Frontiers (TVWF) Directive and the proposal to introduce prescriptive requirements to regulate new media services with audio-visual content, such as the internet. This is an area where there is general agreement that steps need be taken to oversee the content of services that fall outside traditional broadcast regulation and we understand that the industry is keen and ready to tackle the problem. As stakeholder buy-in is a key factor for the success of an alternative and the Commission is committed to regulating by the lightest means possible, we believe that this is an area where a less prescriptive approach could be introduced. In particular, we believe options for self-regulation of the internet should be considered at EU and Member State level under the revised TVWF Directive.

[49] Inter-Institutional Agreement on Better Law-Making, Official Journal of the European Union (31.12.2003), 2003/C 321/01
[50] SEC (2005) 791

4.2 Sharing best practice

Each Directorate General (DG) within the Commission has its own way of organising its work on better regulation. All those we have spoken to have a central contact point for impact assessments but not all have dedicated central support specifically for better regulation. While some variation may be necessary to reflect the different policy areas that each DG manages and to avoid a 'one size fits all' approach, wholly different approaches between DGs can create problems with consistency and the flow of information. Delivering better regulation requires dedicated resources within each DG and a network to connect them. A loose network has existed since 2002, but details of good practice still fail to reach every DG.

DG Environment (DG ENV) is an example of good practice, as it has designated officials to deal specifically with voluntary agreements and market based instruments. Similarly, DG Health and Consumer Protection (DG SANCO) has developed a promising new approach to assessing the options for delivering new proposals and their likely impact by using scoping papers at an early stage in their internal deliberations. We think other DGs could learn from these experiences.

Recommendation 2

In order to make optimal use of alternatives and other good regulatory practices, we recommend that all Directorate Generals set up a dedicated better regulation unit or at least appoint better regulation champions within policy units. These better regulation experts should share ideas and experience through forming a better regulation inter-service group or working group.

There needs to be a consistent and coherent approach to better regulation across the Commission, including more guidance and support on how to choose the most appropriate instrument for policy implementation. The Secretariat General, as the Commission's central co-ordinating body, is best placed to develop such an approach. Indeed, the Secretariat General has already demonstrated its willingness and capacity to provide this kind of co-ordination by developing and disseminating the recent high-quality Impact Assessment Guidelines.

Recommendation 3

We recommend that the Secretariat General be given more specific responsibility and greater resources to co-ordinate delivery of the better regulation agenda across the Commission. This could include more direct involvement in training and acting as a centre for quality control of proposals and impact assessments, including the consideration and use of alternatives.

4.3 Voluntary agreements

Experience in using voluntary agreements varies across the Commission. DG ENV encourages their use wherever possible and has an impressive track record in negotiating and implementing them.

One potential problem with using voluntary agreements at EU level is that the European Court of Justice (ECJ) has taken the view that measures which transpose European Directives into national law must be legally binding. Some of the Commission DGs cite this as a reason to avoid considering the use of voluntary agreements. DG ENV, however, has adopted a policy that, where they believe that a voluntary agreement is a viable delivery option at Member State level, they include wording to this effect in the Directive.

For voluntary agreements at EU level, DG ENV issues a Recommendation in parallel to reinforce the validity of the agreement and provide formal support. For example, this approach has been used to recognise more formally the agreements between European, Japanese and Korean car manufacturers to reduce CO2 emissions. Unfortunately, we have not found any evidence of other DGs actively seeking to promote the use of voluntary agreements in these kinds of ways.

Recommendation 4

We recommend that the Secretariat General publicise more widely within the Commission the techniques used by DG Environment to promote the use of voluntary agreements.

4.4 New Approach Directives

New Approach Directives provide operators with scope to meet essential requirements set out in them via flexible and innovative measures, and allow compliance to be demonstrated by adhering to voluntary standards.

Although New Approach Directives have been in operation for some 20 years, they have so far not been widely used. DG Enterprise has most experience of using New Approach Directives and with the exception of conformity assessment, which is an integral part of the New Approach system itself, their use has been restricted to products. They have not yet been used in a service sector. We believe that there is scope to apply the 'New Approach' to other sectors, such as services or environmental protection, so that operators in these fields are required to meet standards that give a presumption of conformity to a New Approach Directive.

Recommendation 5

We recommend that the Commission explores whether greater use can be made of New Approach Directives and should give consideration to applying this type of Directive to a wider range of sectors.

4.5 Publicising the use of alternatives

During our research, we found that knowledge of alternatives and how they were being used was not well publicised within individual DGs or across the Commission more widely. Similarly, there is no mechanism in place to inform the Council and Parliament when alternatives have been used or are being considered. There is an obvious need to disseminate information and to share best practice and experience, as this would promote the wider consideration and use of alternatives.

The European Economic and Social Committee (EESC) has set up the PRISM 2 website[51] as a guide to and catalogue of self and co-regulatory measures. While this may become a forum to share best practice, it is still in its infancy and there is no formal mechanism for individual DGs to enter details of measures that they have used or come across.

One promising idea is that the Commission intends to create an inventory of self-regulatory and co-regulatory schemes in operation to enable their use to be monitored. However, as we emphasise elsewhere in this report, there are several other alternative tools that can be utilised and DGs would benefit from more information about the wide range of proposals that could be delivered by both non-regulatory and flexible legislative methods.

We think it would be useful for the Commission to compile information on the full range of alternatives in use and include details in its annual report on "Better Lawmaking". This would highlight the progress being made in the use of alternatives and could also set out good practice and identify lessons learned.

Recommendation 6

a) Each year, using information provided by DGs, we recommend that the Secretariat General compile a list of policy measures that the Commission has taken forward by self or co-regulation. The list should include comments on the success or failure of the measures and should highlight best practice and lessons learned. Once established, this list should be extended to include other alternative measures (such as market based instruments) highlighted in this report.

b) We recommend that this list form part of the Commission's annual report on "Better Lawmaking" and that the information be communicated to the Council and Parliament.

c) We recommend that, in its Annual Work Programme, the Commission provide an indication of forthcoming proposals that will be taken forward by alternative means.

4.6 Consumer redress

One difficulty with non-legislative alternatives is the potential lack of effective sanctions, especially when compared with the clearly defined penalties that usually arise for non-compliance with classic legislation. Some self-regulatory or voluntary schemes involve sanctions such as the threat of legislation, expulsion from a trade body or risk to reputation, but these may not provide a sufficient guarantee of compliance. Further concerns arise where voluntary or self-regulatory schemes do not include a clear means of consumer redress. This is often used as an argument against the use of non-legislative alternatives in the EU.

The US government has addressed this problem through its Federal Trade Commission Act, which places a legal duty on all businesses to meet their public promises. The offence of failure to meet a public promise provides consumers with a legal means of redress, even under self-regulatory regimes. It therefore provides an important legal backstop to self-regulation, in effect making self-regulation into a type of co-regulation and providing legal certainty without removing the benefits of self-regulation. The Misleading Advertising Directive[52] includes this kind of legal backstop, although in most Member States the mechanisms for regulating advertising are undertaken by industry bodies under self-regulation.

[51] http://www.esc.eu.int/smo/prism/index.asp
[52] Directive 97/55/EC

Recommendation 7

We recommend that the Commission investigate the US approach and the operation of the Misleading Advertising Directive and consider whether it might introduce similar backstop legislation to provide a means of legal redress for self-regulatory measures.

4.7 Stakeholder involvement

Businesses and others often complain about the amount of regulation they have to comply with and request governments and the EU to legislate less or in a lighter-touch way. We believe that all those being regulated should play a role in reducing the need for prescriptive legislation by helping to identify opportunities for the use of alternatives and committing themselves to making them work. The Council and the European Parliament also have a role to play in reducing legislative burdens and promoting the use of alternatives.

Recommendation 8

We recommend that the Commission invite Member States, sectoral formations of the Council, committees of the European Parliament, trade associations and lobby groups to review its Annual Work Programme and to submit proposals for alternatives where prescriptive legislation is thought to be unnecessary.

There are also opportunities for industry and other stakeholders to inform Commission thinking on the future direction of policy proposals. For example, DG Enterprise conducts regular horizontal screenings of their future plans to understand the potential impacts on SMEs.

The Commission has set up a consultation exercise on the "Your Voice" website[53] as a means for stakeholders to send it proposals for simplification. This consultation only runs until December 2005. We believe that it should be made permanent and extended to allow stakeholders to put forward suggestions for the use of alternatives.

Recommendation 9

We recommend that the Commission extend the "Your Voice" website to include an ongoing platform for stakeholders to submit proposals for simplification, where simplification could be achieved by implementing the policy through more flexible or non-legislative measures. This channel should be well publicised.

4.8 The roles of the institutions

The Commission has the right of initiative in the legislative process and proposes the legislation on which the Parliament and Council decide. As such, much of the responsibility for considering the full range of implementation tools and, where possible, promoting the greater use of alternatives, rests with Commission officials.

[53] The platform that allows EU citizens to view consultations and to share experiences and views: http://europa.eu.int/yourvoice/index_en.htm

Commissioner Verheugen has made some encouraging comments supporting the use of alternatives. In his speech at the UK Presidency Better Regulation Conference held in Edinburgh on 23 September 2005, he said:

> *"We should strive for the most cost-efficient and lightest form of legislation. If voluntary agreements or self-regulation is possible, we should aim for it."*

Putting this into practice requires that Commission officials are given the information and support they need to consider the wider use of alternatives and to understand the implications. An alternative will not always be appropriate. However, in every case officials need to consider the full range of delivery options and select the one that is likely to work best - this means the option most likely to deliver the desired outcome while minimising unnecessary costs and unintended consequences. This should be done in the impact assessment.

Recommendation 10

When setting its annual Work Programme we recommend that the Commission include proposals for classic regulation only where the relevant impact assessment contains an analysis of at least one alternative tool (where appropriate) and the do nothing option, unless the need to legislate is set down in the Treaties.

Most of the recommendations we have made in this section would be for the Commission to take forward. However, the Council and the Parliament have also made commitments in the Inter-Institutional Agreement[54] to support the use of alternatives. One of their most important roles is to scrutinise legislative proposals put forward by the Commission to ensure they are necessary and fit for purpose. This provides them with a good opportunity to press for a more systematic consideration and use of alternatives.

Recommendation 11

When considering Commission proposals, we recommend that the Parliament and Council review the impact assessments and in particular the extent to which alternatives have been considered. Where they believe that an alternative tool might be a better approach to delivery, they should return the proposal to the Commission for further development, or ask for a detailed analysis of alternatives.

We have been told that, regardless of the commitments made in the Inter-Institutional Agreement, the Parliament and the Council might be reluctant to promote the use of alternatives, as they believe it could undermine their legislative roles. However, if Parliament and Council are more involved in the early consideration of alternatives and in the monitoring of their effectiveness, they will safeguard their roles and be in a better position to judge the capacity of alternatives to meet policy objectives.

We believe that all the institutions should be more involved in ensuring that the full range of implementation tools is considered and the most appropriate measure chosen. For example, Commission Thematic Strategies and Green Papers could be used to foster discussions of the most appropriate means of dealing with policy proposals at Council and in Parliamentary

[54] Inter-Institutional Agreement on Better Law-Making, Official Journal of the European Union (31.12.2003), 2003/C 321/01

committees. The Environmental Committee of the European Parliament already has sessions where it looks at the implementation of EU environmental legislation. This is good practice that could usefully be extended so that the Committee also looks at the implementation of self and co-regulatory measures.

Similar arguments would apply to the Council, where the most suitable forum to introduce a similar procedure is likely to be in sectoral formations.

Recommendation 12

a) We recommend that all relevant Parliamentary committees consider reviewing the implementation of self and co-regulatory measures.

b) We recommend that Commissioners regularly report on forthcoming proposals at sectoral formations of the Council to provide an opportunity for Council to consider the most appropriate mechanisms for implementation.

5 Conclusions

The Task Force has found while researching this study that the use of alternatives at EU level is more widespread than most observers imagine. However, attitudes and levels of knowledge do vary across the different Directorate Generals within the Commission and amongst Parliamentarians and Member States.

We hope that this report will raise awareness of alternatives, the range of delivery options available and examples of where they have been used at EU level. By examining a range of case studies, we have been able to identify factors that can influence the use of alternatives. We hope that officials will find this report a practical aid to help them think about how the use of alternatives to classic regulation can help them in their work.

We have acknowledged throughout this report that classic regulation is often necessary. However, our research has shown that classic regulation is often chosen automatically as the means of delivering policy objectives and that other routes are frequently overlooked. If the EU is to regulate better, the most efficient and effective means of achieving policy objectives should always be chosen. We fully support the recommendation in the Commission's new Impact Assessment Guidelines that a range of delivery options is considered for every new proposal and we hope that our work will help Commission officials and others to put this into practice.

During the year that we have been working on this study, the EU's better regulation agenda has moved forward. Several important projects have been initiated, such as the withdrawal of unnecessary proposals from the legislative programme and simplification of some existing legislation. We believe that our recommendations, if implemented, will facilitate the wider use of alternatives, which will help push this agenda on and continue to improve the regulatory landscape.

We hope that the European Commission will welcome this report as a useful contribution to the drive for better regulation in Europe. We also hope that the Commission will accept our recommendations and put in place the necessary measures to secure the wider use of alternatives in the EU and build a flexible, responsive regulatory system that works by winning the support of all those it seeks to help and protect.

Annex A
CASE STUDY 1: EMISSIONS TRADING SCHEME

Under the EU Emissions Trading Scheme, Member States must each submit a National Allocation Plan to the Commission for clearance, determining the total amount of CO2 allowances for specified energy-intensive industries. The plans are based on each county's commitments under the Kyoto protocol. If companies want to emit more than their allowance they must buy emission 'allowances' in the market, whereas companies that produce less than their allowance can sell their rights.

Companies must keep track of their emissions and produce a report each year for verification by a third party. For every tonne of emissions not covered by an allowance, companies must pay 40 Euros between 2005 and 2007 and 100 Euros thereafter. They also have to surrender a compensating amount of allowance in the subsequent year. Member States must allocate allowances, operate the national registry of allowances, collect verified emissions data, make sure a sufficient number of allowances are surrendered by each company, and report back to the Commission annually. The Commission operates the European hub of the registry system and has to prepare an annual report on the basis of Member State reports for presentation to the European Parliament and the European Council.

The scheme (and therefore the market for emissions) was created by the Emissions Trading Directive 2003/87/EC which sets out the essentials but not the detail.

As it has only been in operation since January 2005 it is too early to comment on the effectiveness of the scheme, but there are some clear advantages to the chosen approach. For example it guarantees the desired environmental outcome in a way that other instruments, such as charges, do not. It also gives companies the flexibility to meet targets in the most cost effective way and according to their own strategy, by either reducing emissions or by buying allowances. This flexibility encourages innovation and investment in new technologies.

All of the organisations we discussed the scheme with said they found it preferable to other options that had been considered, such as some sort of emissions tax.

On the downside, the scheme has been criticised for being overcomplicated and excessively bureaucratic. It has been difficult for Member States to predict 'appropriate' levels and some companies have had to pay consultants to handle everything. There are also competitiveness related concerns as different Member States have signed up to different targets and less liberalised markets are said to have an advantage over free markets. In particular, the scheme is said to put European companies at a competitive disadvantage to non-constrained economies such as the US and China, although pursuing innovative solutions to reduce CO2 emissions now might prove commercially advantageous in the future.

Another problem the Commission needs to resolve sooner rather than later is the fact there is no plan post 2012. Industry needs long term certainty to justify and recoup the often considerable environmentally-friendly investment.

However, the review of the scheme will hopefully address these problems, and it is likely that at least some of the same issues would have existed if other approaches had been applied.

Suitability factors

The controversial and complex nature of the problem, combined with the great numbers of disparate sectors and companies involved - 12,000 installations across 25 Member States including combustion plants, oil refineries, coke ovens, iron and steel plants – meant that a flexible approach with close stakeholder involvement was necessary. However the lack of wholesale buy-in from consumers and industry (amongst other factors) meant that voluntary and educational approaches were not suitable.

A market based instrument, underpinned by legislation to lay down the essentials and ensure compliance, suited the nature of the problem. National governments approved, encouraged by the international pressure to comply with their Kyoto targets, and industry was largely satisfied because of the flexibility involved. It also helped that the US had trialled a similar trading scheme for sulphur (albeit on a smaller scale) which seemed to be working well, and from which confidence could be gained and lessons learnt.

Prescriptive legislation would have been difficult to design, less flexible, would have taken longer to introduce when the Kyoto deadline was fast approaching and would have no guarantee of success.

A tax based scheme would not have been as appropriate, as reaching the necessary unanimous agreement would have been difficult.

Annex B
CASE STUDY 2: NON-BROADCAST ADVERTISING

Europe generally

Advertising self-regulation exists in various forms in most Member States but as there is also relevant legislation, we have classified this as a co-regulatory approach. In some countries, such as Germany and Austria, advertising is subject to detailed legislation and there is only minimal scope for self-regulation. In others, for example the Netherlands and the UK, there is little detailed legislation and advertising content is largely controlled by self-regulatory organisations (SROs) – as permitted by the Misleading Advertising Directive.

The European Advertising Standards Alliance (EASA) promotes self-regulation and the sharing of best practice, and co-ordinates cross-border complaints. EASA can also issue 'Ad Alerts' to all European SROs instructing certain advertisements not to be published. Membership is broad including representatives from SROs, advertisers and the media. While there is no EU-wide code, all national codes are based on the central premise that adverts must be legal, decent, honest and truthful, prepared with a due sense of social responsibility, and with respect for the principles of fair competition.

EASA has worked hard to encourage all Member States to raise their standards and make sure consumers are fully protected across the single market. Progress has been made, for example in Spain where the SRO was re-branded and restructured, with its effectiveness now acknowledged at both national and EU level. Anticipating the EU enlargement EASA has also been active for several years in accession countries.

The Commission has been exerting pressure on SROs over the last 5 years, saying that self-regulation must be 'reformed' if it is to be accepted as a viable complement to classic regulation. In response EASA announced plans to create SROs in four Member States and launch at least three national consumer awareness campaigns (amongst other things) by 2006.

Alternatives are commonly criticised for allowing too much diversity between Member States but, in the case of advertising, the objective is to protect consumers, rather that to unify how this is achieved. Besides, the varied approaches and different codes reflect the different cultural, legal and commercial traditions in each country.

The UK approach

Delegating most of the responsibility for advertising to SROs is not the only way forward but it can work as well - if not better – than a largely prescriptive European or national regulatory approach, as demonstrated in the UK.

Representatives of advertisers, agencies, media owners and other industry groups jointly write and enforce the UK's code, which lays down the general rules for advertisers to follow alongside specific rules for certain areas such as advertising to children and the advertisement of alcohol.

The Advertising Standards Authority (ASA) is the SRO responsible for administering the advertising code. It is funded by the industry but the levy is collected by an independent body (the Advertising Standards Board of Finance) in order to prevent money being able to influence decision making. Decisions about complaints are taken by the Council, most members of which are from outside the industry. The Office of Fair Trading is the statutory regulator that provides legislative backstop powers where necessary.

The ASA is well known and widely used – it handled around 14,000 complaints about 11,000 adverts in 2004 alone. It takes the ASA an average of 27 days to resolve complaints in the UK and the service is free to consumers.

The Code is well enforced with the ASA able to apply a range of sanctions such as requiring media owners to refuse space for non-compliant adverts, withdrawal of direct mail discounts, a requirement to pre-clear future campaigns, plus the 'name and shame' effect from publishing its decisions. The latter can greatly damage a company's brand. For example sales of SmithKline's Ribena Toothkind reportedly dropped by 15% - wiping £18 million off their annual turnover – after the ASA rejected their claim that it was "kind to teeth". The ASA can also order advertisements to be withdrawn, for example, the Tetley Tea campaign which claimed that the product's anti-oxidants could help keep people healthy. The withdrawal reportedly cost £15 million and Tetley's contract with its ad agency was terminated soon after. The ASA rarely has to resort to referring cases to the OFT to impose fines.

It helps that the industry is involved with and fully supports the system, as it means they will be more willing to co-operate voluntarily than if the system had been imposed on them. Self-policing exists as competitors will report those advertisers who publish misleading claims. This is encouraged by the fact the behaviour of a few companies can have a detrimental effect on the entire industry.

Last but not least the code is easy to update and can respond swiftly to changes in society and technology. Something that may have been considered completely unacceptable 10 or so years ago may now be acceptable. The ASA has recently expanded its responsibilities to monitor advertising on the internet, by text message, electronic kiosks and computer games. It would have been a far more complex and lengthy procedure to amend legislation to cope with such changes. This flexible approach also makes it easier to deal with the detailed content of individual adverts and complaints in a way that the law could not.

Suitability factors

Several factors clearly influence the suitability of this flexible approach for advertising. First and foremost there is widespread buy-in as all parties are united by a common cause. Consumers do not want to be misled or offended by adverts, businesses need consumers to believe adverts for them to be effective and the media want the highly lucrative advertising industry to flourish.

The highly organised nature of the sector, at national and EU level helps, and the threat of legislation by the Commission helps to keep the industry on its toes.

Flexible regulation suits the cultural, legal and commercial diversity among Member States. It would be difficult to legislate appropriately at EU level in a more prescriptive way as the complex and fast changing nature of the sector requires an adaptable response.

Annex C

CASE STUDY 3: VOLUNTARY AGREEMENT ON CO2 EMISSIONS FROM CARS

The car manufacturing industry agreed voluntarily (albeit encouraged by the Commission) to reduce Carbon Dioxide (CO2) emissions emitted by passenger cars.

The European Automobile Manufacturers Association (ACEA) agreed to improve the average efficiency of its vehicles to 140 grams of CO2 emitted per kilometre by 2008, which represents a 25 per cent reduction on 1995 levels (186g CO2/km). It is an overall geographic target rather than one that has to be met by each Member State or manufacturer individually. An innovative solution is necessary (e.g. diesel direct injection systems) – the target cannot be met by increased sales of diesel cars or smaller cars alone.

One year later, mirror agreements were concluded with the Associations representing Korean and Japanese car manufacturers (KAMA and JAMA respectively) but with a deadline postponed accordingly to 2009. This prevented Asian manufacturers from having an unfair competitive advantage over EU manufacturers.

All three agreements were recognised by Commission Recommendations to signal support of the initiative and to encourage industry to act, or face possible legislative action. A decision by the European Parliament and Council lays down the monitoring provisions to be followed.

The agreement is not without criticism - the European Parliament said at the time that it had 'very little faith in voluntary agreements' and has been pushing for legislation ever since. Besides, while the Community target as agreed by the European Parliament and Council is 120g CO2/km, the car industry only agreed to commit to delivering 140g CO2/km. The industry argues that the Community target is not achievable with or without legislation.

The chosen approach has some clear advantages: it is technologically neutral and allows the industry to be flexible, for example by applying greater savings to some segments of the vehicle fleet than others. It also allows the industry to be innovative. The long lead time (with obligatory interim targets) was necessary as technology takes a long time to develop with different manufacturers at different stages of production and development. And it should not be forgotten that car makers have significantly reduced emissions already – at last count (in 2003) by 12%.

It would have been difficult to design prescriptive legislation to allow for differences in sizes and weights of cars. It could also have had unintended consequences. For example a federal mandate in the US requiring the average fuel economy of vehicles to be reduced is claimed to have caused manufacturers to reduce the weight of vehicles, which has been blamed for the increased number of traffic fatalities.

The monitoring and reporting requirements are particularly commendable with Member States (not just manufacturers) having to provide the necessary data for monitoring purposes and a progress report published annually by the Commission. This is something we have noted is often lacking. The interim targets set (although not additional commitments) enable the Commission to judge progress. Without this data it is unlikely that the voluntary approach would have been agreed by the co-legislators (the European Parliament and Council).

Suitability factors

A voluntary agreement was feasible as the market and the key players were easily identifiable and there was a limited number of manufacturers all belonging to one of three associations. The high tech nature of the market made a flexible approach more appropriate than prescriptive legislation. Compliance is encouraged by the fact that manufacturers do not wish to be at a competitive disadvantage and so tend to keep a watchful eye on each other.

The real and ongoing threat of legislation encourages industry to buy-in. There is however less consumer pressure than is ideal, with purchasing decisions for cars generally based on factors such as power and safety rather than environmental friendliness.

Annex D

CASE STUDY 4: EURO NCAP TESTING & INFORMATION PROVISIONS

Established in 1997, the European New Car Assessment Programme (Euro NCAP) is an independent organisation backed by five European Governments, European motoring, insurance and consumer organisations, and the Commission. All new cars sold in Member States must meet certain legal minimum safety standards, whereas Euro NCAP is more concerned with best practice and so test over and above these requirements.

The best-selling variants of new cars released into the European market are tested in accordance with harmonised protocols under conditions representative of different types of crash. Manufacturers can ask for their vehicles to be tested, and frequently do, but in these circumstances must pay all the costs. The test results are then published by Euro NCAP and others including consumer bodies and motoring publications, to inform consumers and encourage improvement. Manufacturers also commonly publicise good scores in their marketing literature.

Euro NCAP regularly discusses technical details with a range of stakeholders and its funding comes from multiple sources (rather than just the industry) so consumers and manufacturers alike can be assured that the tests and the results are realistic, accurate and objective.

The scheme has helped dramatically to improve car safety standards and has clear advantages to amending the legislation. First and foremost the Euro NCAP tests have been able to evolve with developing technology relatively easily and quickly. For example the original 3-star rating system was extended to 4-stars and then 5-stars to account for the introduction of features like airbags, and ratings are now shown for child and pedestrian protection as well. Changing legislation would have been more complicated and would have taken far longer. The approach also provides continuing incentives for industry to improve which legislation does not.

Suitability factors

As all Member States are faced with the same road safety problems and as strong safety records sell cars, independent testing and information provision proved to be an appropriate response. Consumers have fully backed the scheme by using the ratings to influence their buying decisions. Manufacturers in effect have little choice but to incorporate additional safety features when designing new cars as those with the best standards are rewarded by improved sales, and vice versa.

By contrast the additional pedestrian safety rating introduced by Euro NCAP has proved less successful than the passenger and child protection ratings - perhaps because consumers did not sufficiently buy-in to the idea (thus pressurising industry to improve standards) as they are more concerned about the safety of themselves and their passengers than that of pedestrians.

The market is highly organised and easily identifiable with only a few key players involved, which makes a flexible approach more feasible. The product is also a relatively homogenous one, so test results can be used throughout Europe without the need for each car to be tested up to 25 times. And last but not least, the technology in cars changes at such a pace that it would have been difficult for prescriptive legislation to keep up – as mentioned earlier.

Annex E

CASE STUDY 5: VOLUNTARY AGREEMENT FOR STAND-BY CONSUMPTION OF TVs AND VCRs

Switching a television (TV) or video cassette recorder (VCR) off using only the remote control (without disconnecting it from the mains or using the main on/off button) merely switches it to stand-by mode where it continues to use electrical power. The combined power use of the millions of TVs and VCRs in Europe while in standby mode was wasting a significant amount of energy, which could be substantially reduced by changes to the design of TVs and VCRs.

In 1997 the European Association of Consumer Electronics Manufacturers (EACEM), which represents the main TV and VCR manufacturers in Europe, produced (in consultation with the Commission) a voluntary agreement to reduce by a set amount the energy products consume when in stand-by mode. All participating manufacturers also agreed to do more to inform consumers about energy saving possibilities.

16 of the EACEM's members signed up to the agreement, accounting for about 64% in volume of the market for TVs and VCRs in Europe. To preserve the confidentiality of the parties, and to avoid anti-competitive exchanges of information, the scheme is administered by an external consultant.

The initiative was well received by the Commission and Member States which had been considering proposing legislation to deal with the problem at the time. Their support was encouraged by the fact that the mandatory standards which had been introduced for old appliances followed a very protracted process. However, the continuing overhanging threat of legislation provided an incentive for manufacturers to stick to the agreement.

Particularly interesting is the fact EACEM presented the draft agreement to DG Competition first to make sure it did not contravene competition rules and restrict the introduction of new products – a potential pitfall of voluntary agreements and self-regulation.

In 2000 a similar agreement was concluded for audio equipment and in 2003 a new agreement was reached for TVs and DVDs.

Suitability factors

A voluntary agreement was well suited as there were relatively few manufacturers, most of which belonged to EACEM. The homogenous nature of the products involved and the fact there was an EU wide supply chain also helped.

Last but not least, the market is a dynamic one which would have meant that the test procedures needed to introduce regulation would almost certainly have been obsolete by the time it came into force.

Annex F
About the Better Regulation Task Force

Membership

The Better Regulation Task Force was set up in 1997 to give the UK government independent advice on how to regulate better. We aim to improve legislative outcomes and, at the same time, to reduce unnecessary burdens on citizens, business and the public sector. The Task Force is non-political. Our members are appointed by the Minister for the Cabinet Office for their individual skills and qualities and for their knowledge of the regulatory environment. They do not represent any particular interest group or constituency. Members come from a wide variety of backgrounds - small and large business, the charitable and voluntary sectors, trade unions, consumer groups, enforcement bodies and the professions. The Chair of the Task Force is Sir David Arculus.

Principles of good regulation

The Task Force has developed five principles of good regulation. They underpin our recommendations to improve the use of alternatives to classic regulation in the EU.

Proportionality – Regulators should only intervene where necessary and should choose the delivery option which will achieve the desired results while minimising costs and burdens.

Accountability – Regulators need to account for their decisions, including the chosen option for delivery and its subsequent impact.

Consistency – All types of intervention from regulations to voluntary agreements need to be joined up and implemented to a consistent standard.

Transparency – Regulators need to ensure that those being regulated understand the process and are invited to suggest alternative delivery options, where appropriate.

Targeting – All types of intervention from regulations to voluntary agreements need to be focused on the problem and avoid burdensome side effects.

Members of the Task Force

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A Register of Members' Interests has been drawn up and is on the Task Force website: ww.brtf.gov.uk or is available on request.

Annex G
Sub-group members

Eve Salomon (chair of sub-group) is a freelance legal and policy consultant, specialising in broadcasting-related matters both domestically and internationally. She is also a member of the Gambling Commission and a Commissioner for the Press Complaints Commission.

Jean Coussins is Chief Executive of The Portman Group, a not-for-profit organisation which promotes sensible drinking and responsible drinks marketing. She is a Council member of the Advertising Standards Authority and also serves on the Scottish Ministerial Advisory Committee on Alcohol Problems and the Alcohol Education & Research Council.

Simon Murphy is Chief Executive of Birmingham Forward which promotes the professional, financial and business service sectors in the city of Birmingham. He is also a Non-Executive Director of iSOFT Group plc (European board), a Director of Capital Ventures Management Ltd, Non-Executive Chair of Sandwell Local Improvement Finance Trust Company and Director of Birmingham Professional DiverCity. Simon is a former MEP with considerable European experience.

Ian Peters is Director of External Affairs and Marketing at the EEF, the manufacturers' organisation. He was previously Deputy Director General of the British Chambers of Commerce and Deputy Director and Head of SME Policy at the CBI.

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Annex H
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