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Burden Reduction: An Evaluation of Statutory Instruments in the UK Government's Regulatory Off-setting and Business Impact Target Initiatives 2010–2019

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This article analyses Statutory Instruments passed between 2010 and 2019 to evaluate the embeddedness of the UK Government's regulatory off-setting and business impact target initiatives. It begins by outlining the origins of those initiatives and their scope, technical details and compliance mechanisms. After describing the methodology for the analysis, it reports results, showing that a range of exclusions and exemptions limit the number of Statutory Instruments covered by the initiatives, that the intensity with which burden reduction is pursued declines over time and that the largest savings are incidental rather than being motivated by a desire to reduce burden.

Keywords: Better regulation, BIT, Burden reduction, Business impact target, Impact assessment; Regulatory off-setting

Convinced that the avoidable burden of regulation was hampering 'growth, innovation and social action' and that a better balance would encourage personal responsibility (Department of Trade and Industry, 2010), the Coalition Government announced in 2010 that it would 'cut red tape by introducing a "One In, One Out" rule whereby no new regulation would be brought in without other regulation being cut by a greater amount' (Department of Trade and Industry, 2010). As Section 1.1 explores, the policy behind that announcement was not entirely novel. In fact, it is possible to trace the origins of centralised assessment of the

compliance costs associated with regulation back to the Thatcher Government's desire to move away from central planning with its associated bureaucracy and subsequent Labour, Conservative and Coalition governments have all expressed a desire to reduce the burden from regulation.

The One IN, One OUT regime came into effect on 1 January 2011 (Department for Business, Innovation and Skills, 2015). Following an estimated £850m in reduced net costs to business,[1] the system was ratcheted up with effect from 1 January 2013 (House of Lords Hansard, 19 November 2012) to require departments to hit One IN, Two OUT targets, while meeting the One IN, One OUT expectations over the whole Parliament (Department for Business, Innovation and Skills, 2015). In 2016, a statutory target for impact reduction (the business impact target or BIT) was enshrined in s. 21 of the Small Business, Enterprise and Employment Act 2015, initially accompanied by an extension of the One IN, Two OUT scheme to One IN, Three OUT for regulatory provisions that had not been a manifesto commitment (Department for Business, Innovation and Skills, 2016, p. 8). The system was later extended to certain regulators by s. 14 of the Enterprise Act 2016.

The BIT was set at zero for the 2019 Parliament, with an interim target also set at zero, pending a review into how the assessment of regulatory impact met the Government's Manifesto commitment to 'strive to achieve the right regulatory balance between supporting excellent business practice and protecting workers, consumers and the environment' (House of Commons Hansard, 15 December 2020), though previously it had required savings of as much as £10bn over the life of a five-year Parliament.[2] The review concluded that the BIT should be replaced (HM Government, 2022). It is therefore timely to reflect on the systems in operation between 2010 and 2019, so that lessons for future attempts to incentivise burden reduction can be learnt.

As Section 1.2 notes, the Government published tallies of burden reduced at regular intervals during the period to 2019. Such quantitative statements make good policy headlines, but the numbers are based on forward-looking estimates that are not adjusted retrospectively when post-implementation reviews are conducted and changes to the methodology make comparisons over time less straightforward. However, the amount of burden purportedly reduced is not the only indicator of effectiveness and reviews based on impact assessments risk

[1]The figure was later adjusted. See Department for Business, Innovation and Skills (2013a, p. 4).

[2]The first BIT was for a saving of £10bn, with an interim target of £5bn (House of Commons Hansard, 3 March 2016). The BIT for the 2017 Parliament was set at saving £9bn with an interim target of saving £4.5bn (House of Commons Hansard, 20 June 2018).

missing the complete picture.[3] Instead, this article considers how well embedded the regulatory off-setting and BIT requirements were in the period to 2019. By analysing Statutory Instruments, it is possible to ascertain the proportion of legislation caught by the mechanisms and the efficacy of the compliance systems, which is equally vital as a measure of effectiveness.

The article begins by outlining the origins of the burden reduction mechanisms and their scope, technical details and compliance mechanisms. It then considers the methodology to be used for the analysis before reporting that the initiatives reach only a limited percentage of Statutory Instruments passed during the period, that the intensity with which burden reduction is pursued declines towards the end of the period and that the largest savings are incidental and not motivated by a desire to reduce burden.

1. Overview of the burden reduction mechanisms

1.1 A brief history

The formalised burden reduction mechanisms introduced by the Coalition Government built on previous policy initiatives. The Conservatives had come to power in 1979 aiming to encourage free enterprise and to reverse the 'remorseless flood of regulations and legislation' that 'shrivelled the impulse to expand and throttled enterprise' (Joseph, 2014). Following a multi-departmental 'scrutiny' by the Efficiency Unit[4] that considered the 'Burdens on Business' (Department of Trade and Industry, 1985), a centralised system of compliance cost assessment for regulatory measures was introduced in 1985 (HM Government, 1986), overseen by the newly established Enterprise and Deregulation Unit, and from the 1992 General Election onwards, the Conservatives and Liberal Democrats both included pledges in their General Election manifestoes to cut red tape and reduce the burden on business to encourage the economy to flourish. New Labour followed suit, introducing a similar commitment to small business in 1997 (Labour Party, 1997) and in 2005, the 'Less is More' report (Better Regulation Task Force, 2005) recommended the adoption of a system used in the Netherlands to ascertain the administrative costs from all obligations imposed by government departments and regulatory agencies under both national and European legislation (i.e. the cost of familiarisation, form filling and enforcement not directly applicable to the policy goal being pursued) and to secure a reduction in those costs by a net target amount. The report recommended a rolling programme of simplification and

[3]Others have considered the quality of impact assessments and their role in evidence-based policymaking. See, for example, Dunlop et al. (2012) and the studies cited therein.

[4]Established in 1979 to consider the efficiency of the civil service and the elimination of waste in government.

even floated the idea of One IN, One OUT, but more as a description of desirable behaviour to encourage prioritisation and a change in culture than as a formalised system. The proposals were accepted by the Chancellor in the 2005 budget (HM Treasury, 2005) and the then Labour Government committed first to assessing the existing cost to business of 'administering regulations' and then to reducing administrative burdens on business by 25% by 2010, said to be worth £3.5bn annually to business (National Audit Office, 2008; Department for Business, Enterprise and Regulatory Reform, 2008). Regulatory budgets were also considered but were ultimately not pursued, with the Brown Government instead concentrating on short-term policies to help business cope with recession (House of Lords Hansard, 2 April 2009).

Meanwhile, the Conservatives in opposition were being advised by one of the authors of 'Less is More', David Arculus, who proposed a strengthened system of regulatory budgets (Arculus, 2009) and they committed to introducing a formal system of burden reduction if elected. Similarly, the Liberal Democrats promised to slash red tape, bureaucracy and regulation with no new regulation passed until a full assessment of its costs and necessity had been published (Liberal Democrats, 2005) and by the 2010 election were also pledging to work towards a One IN, One OUT policy (Liberal Democrats, 2010).

The One IN, One OUT policy announced by the Coalition Government in 2010 (HM Treasury, 2010) was therefore an extension of policies that had been circulating under previous governments, both Conservative and Labour, though as adopted it introduced some key differences. It included any new UK legislation that imposed a direct annual net cost on business or civil society organisations and, crucially, did not distinguish between administrative burdens and policy costs (HM Government, 2011). To fully comprehend its rationale, the policy must be viewed against the prevailing state of the economy. Following the financial crisis of 2007/2008, the final quarter of 2009 saw the country move out of a recession described as the deepest in terms of lost output since quarterly data was first published in the 1950s (House of Commons Library Research, n.d.), but the country's finances were still precarious. According to the 2015 budget, the Government inherited 'the largest deficit since the Second World War and rapidly rising debt' (HM Treasury, 2015). The Coalition Government's first budget referred to an 'unavoidable debt reduction plan' and proposed a 'new model of economic growth built on saving, investment and enterprise' (HM Treasury, 2010). Hence the One IN, One OUT system was seen as a way to 'make Government departments hesitate to regulate and more likely to consider non-regulatory ways of achieving their policy goals' (HM Government, 2011) because it was thought that the volume and complexity of regulation could damage the country's competitiveness (HM Treasury, 2010) and the government believed that business was the 'driver of economic growth and innovation' (HM Government, n.d.). It was therefore part of

a strategy to rebalance and re-energise the economy 'to make the UK the best place in Europe to start, finance and grow a business' (HM Treasury, 2011) by 'minimising the burden of form-filling and paperwork' to release productive time for businesses (Department of Trade and Industry, 2010). It aimed to incentivise consideration of alternatives to regulation and to 'bear down on regulatory cost' by removing redundant laws, changing government culture to deliver a positive outcome for business and civil society (Department of Trade and Industry, 2010).

Buoyed by the 'continuing increase in deregulatory measures', the system was ratcheted up to One IN, Two OUT with effect from 1 January 2013 to help businesses spend less time and money complying with government regulations 'when they should be developing and growing their companies' by 'tightening the screws across Whitehall' (HM Government, 2012) and removing the 'brake on aspiration' (HM Government Press Release, 2012, 19 November).

Cuts estimated to be worth £10bn between 2010 and 2015 (Javid, 2016, 3 March) motivated the Government to refine the system further. According to the Explanatory Notes to the Small Business Enterprise and Employment Act, the BIT was introduced to ensure the discipline around regulatory management had statutory backing. It was accompanied by an extension of the One IN, Two OUT scheme to One IN, Three OUT for regulatory provisions that had not been a manifesto commitment (Department of Business, Energy and Industrial Strategy, 2016). Introducing the legislation for its second reading, Vince Cable noted how it would 'support the Government's regulatory reform agenda, ensuring that ineffective, out of date and burdensome regulation does not hold back our businesses' (House of Commons Hansard, 16 July 2014).

In March 2018, the House of Commons Regulatory Reform Committee launched an enquiry into its effectiveness that concluded without reporting when Parliament was dissolved for the 2019 election (House of Commons Select Committee, 2018). Subsequent reviews recommended systems of formalised burden reduction be retained. The Penrose Report exhorted Government to 'make cutting red tape into an automatic burden-reduction process' (Penrose, 2021) and 'Reforming the Framework for Better Regulation' recommended a return to regulatory off-setting (Department for Business, Energy and Industrial Strategy, 2021). However, despite continued commitment to a target, the 'Benefits of Brexit' report rejected the reintroduction of a One IN, X OUT system as not being 'consistent with delivering world class regulation to support the economy in adapting to a new wave of technological revolution or achieving net zero' (HM Government, 2022) and, while the Government has indicated that it will be replaced, at least to measure progress towards its commitment to shave £1bn off the burden of regulation through adapting EU law (HM Government Press Release, 2022, 31 January), the Retained EU Law (Revocation and Reform) Bill currently before Parliament will revoke the BIT (Department for Business, Energy and Industrial Strategy Press

Release, 2022, 22 September). At the time of writing, the proposed scope, technical details and compliance systems for its replacement are yet to be announced, although the 'Benefits of Brexit' report refers to a more nuanced approach (HM Government, 2022). However, until the Bill is passed, the BIT remains in force.

So how did the formalised burden reduction mechanisms work in the period to 2019?

1.2 Scope

The One IN, One OUT and One IN, Two OUT regimes applied to all Whitehall departments and central government organisations as well as agencies forming part of central government and the initial scope included any new UK regulation that imposed a direct annual net cost on business or civil society organisations (which included charities, voluntary organisations and social enterprises).[5]

The definition of regulation for these purposes was:

> a rule or guidance with which failure to comply would result in the regulated entity or person coming into conflict with the law or being ineligible for continued funding, grants and other applied for schemes. This can be summarised as all measures with legal force imposed by central government and other schemes operated by central government.

Thus, it caught primary legislation, Statutory Instruments, codes of practice and self-regulation backed by statutory force, guidance issued under statutory powers and by-laws made by central government. In practice, however, the compliance systems only focused on soft law such as codes of practice, self-regulation and guidance if legislation was needed for their implementation. There were specific exclusions from the ambit of the system that varied over time but consistently included the implementation of EU measures unless gold-plated and tax and tax administration.

As implemented, the scope of the BIT in the period to the end of 2019 was broadly similar. The statutory mechanism requires the Secretary of State to publish a target 'in respect of the economic impact on business activities of qualifying regulatory provisions which come into force or cease to be in force during the relevant period' as well as an interim target for the first three years of the Parliament. The target covers central government departments and, now, certain regulators

[5]Unless otherwise indicated, descriptions for the regulatory off-setting system are taken from HM Government (2011) and Department for Business, Innovation and Skills (2015). Descriptions of the BIT system are taken from Department for Business, Energy and Industrial Strategy (2018) and Department for Business, Energy and Industrial Strategy (2020a).

but does not extend to regulatory provisions made in areas devolved to the Senedd Cymru, the Scottish Parliament or the Northern Ireland Assembly.[6]

Business activities are defined in s. 27(2) of the Small Business, Enterprise and Employment Act to include activities carried on by a voluntary or community body as well as by businesses, and pursuant to s. 22(3), a 'regulatory provision' is a 'statutory provision' (which includes a provision that has effect by virtue of the exercise of a function conferred on a Minister or relevant regulator) that:

> (a) imposes or amends requirements, restrictions or conditions, or sets or amends standards or gives or amends guidance, in relation to the activity, or
> (b) relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which relate to the activity.

The Act itself contains some exemptions from the scope of the target. Other exclusions hinge on whether the regulatory provision is a 'qualifying regulatory provision', which is determined by the Secretary of State and published simultaneously with the target and the methodology for the relevant period.[7] Again, measures deriving from the EU and tax measures were consistently amongst the exclusions in the period to 2019.

In the 2017–2019 Parliament, a *de Minimis* rule, a new concession to proportionality, was introduced to exclude measures with an impact of ± £5m (House of Commons Hansard, 20 June 2018). Change to the incorporation of EU law as a result of Brexit (including the amendment of any deficiencies) was also added to the exclusions.

1.3 Technical details

Calculations are based on the Equivalent Annual Net Cost to Business (EANCB), or, under the BIT, the Equivalent Annual Net Direct Cost to Business (EANDCB), and costs include administrative and policy costs. The details were refined throughout the period, making comparisons over time difficult. However, in general terms, under the regulatory off-setting regime, an IN resulted when a regulation's direct incremental economic cost to business or civil society exceeded its direct incremental economic benefit, scored when implemented. Conversely an OUT arose when the reverse occurred or when regulations were removed or recast. So, extending the health and safety regime to ships and hovercraft generated an IN

[6]Section 22(7) SBEEA.

[7]See s. 21(3) and s. 22(2) SBEEA.

of £0.1m (Impact Assessment DfT00084 associated with SI 2011/1771), whereas abolishing the need to display a paper tax disc in motor vehicles led to an OUT of £6.76m (Impact Assessment DfT00289 associated with SI 2014/2358). Under the BIT, the sum of the EANDCB over the first five years that the measure is in force is used to assess progress towards the target. Hence, requirements to report pay ratios and the gender pay gap resulted in an increased impact of £3.8m per year (Impact Assessment RPC-GEO-3023(4) associated with SI 2017/172), whereas changes to company filing requirements at Companies House reduced impact by £0.5m per year (Impact Assessment BIS017(v)-16-BE associated with SI 2016/599).

In all iterations, some measures are classified as Zero Net Cost (ZNC). The detail behind this concept changed over time, but it includes measures with no quantified net cost or saving as well as measures where new obligations are imposed but the cost is offset by the anticipated savings. During the One IN, Two OUT period, it encompassed changes that were regulatory but where the benefits exceeded the cost. Thus, the Statutory Instrument introducing the 5p charge on carrier bags was originally assessed as ZNC because it was a regulatory measure even though businesses were predicted to benefit because the charge could cover administrative costs before any surplus was donated to charity and because fewer bags were needed (Impact Assessment DEFRA1809 associated with SI 2015/776). However, since SI 2015/776 came into force after the BIT became operational, it counted as a saving of £1,017m towards that target (Department of Business, Innovation and Skills, 2016).

1.4 Compliance

The system relies on impact assessments. During the period to 2019 a cabinet sub-Committee, the Reducing Regulation Committee, was charged with enforcement and its approval was needed before legislation was given policy clearance. Building on the role it had held since 2009, the Regulatory Policy Committee was tasked with validating all impact assessments prior to clearance by the Reducing Regulation Committee. That role was formalised when the Regulatory Policy Committee was appointed as the independent verification body for the BIT, with responsibility for validating contributions towards the target by analysing the underlying impact assessments to ascertain if they were 'fit-for-purpose'.[8]

Fast-track procedures introduced in August 2012 applied to measures that were deregulatory or that imposed gross annual costs to business of under £1m (Regulatory Policy Committee, 2012). Measures arising as a result of the Red Tape Challenge, a cross-government programme introduced in April 2011 to review

[8]Latterly, this included determining whether measures classed as non-qualifying regulatory provisions that exceeded the *de Minimis* threshold were appropriately excluded.

the existing stock of regulation that also exhorted the public to identify obsolete or excessively burdensome measures, automatically qualified for the fast-track procedure provided they met certain criteria. Other fast-track measures had to be triaged using a Regulatory Triage Assessment and, while measures revoking redundant regulations were allowed to proceed if they fell within the scope of the burden reduction mechanisms, an impact assessment was required to validate any OUT.

After the *de Minimis* threshold became effective, impact assessments for measures below ±£5m EANDCB could be self-certified by Departments based on a proportionate assessment of impact.[9] Such measures were subject to a 'call in' procedure, operated by the Better Regulation Executive as a 'critical friend'.

The compliance procedures also relied on transparency injected by the Statements of New Regulation, a six-monthly publication introduced from 1 January 2011 that reported progress under the regulatory off-setting regime, and the Government's annual report on progress towards the BIT, mandated under s. 23 of the Small Business, Enterprise and Employment Act.

2. Methodology

The research relies on codes applied to Statutory Instruments.[10] Basing the evaluation on legislation provides additional insight. Data in Government analyses of the system, for example, the Statements of New Regulation and BIT reports, are helpful, but since they rely on impact assessments as their organising factor, they mask the extent to which exclusions are relied upon and are unable to give a complete picture of the proportion of legislation caught. Coding by Statutory Instrument also retains links with the compliance systems.

The data are sourced from www.legislation.gov.uk, where legislation is listed in order of Statutory Instrument number, making it easier to work through completely and chronologically. Codes are assigned to each Statutory Instrument to note the year it is passed. The regulatory off-setting system became operational on 1 January 2011, but the 2010 year is coded to provide a comparison, with an 'Unclear' code used to denote the burden reduction status of measures likely to have been within the purview of the system as later implemented. 31 December 2019 is used as the end point because a ten-year period provides a sufficiently long timespan for measures from different sectors to be considered and because Brexit and Covid-19 introduce a disruption to the usual pattern in 2020.

[9]This system superseded the fast-track arrangements under One IN, Two OUT.

[10]The coding of Statutes was also considered but their length adds complexity and the accompanying information is typically less complete.

Measures are analysed when passed, irrespective of when or indeed whether they are commenced. This enables the research to run from SI 2010/1 to SI 2019/1520 without worrying about when or if all sections came into force. Since the mechanisms are forward looking and measure putative rather than actual burden, whether legislation is commenced is irrelevant to this analysis. Coding according to the impact associated with the measure when passed also reduces any potential mismatch between measures that are deemed to count for the tallies and measures that are excluded/ exempt or not in-scope. The approach means that the burden reduction status of some measures differs from their status in the relevant Statement of New Regulation or BIT report, for example, if the methodology changes between the passage of the legislation and the commencement date. However, it improves consistency for the purposes of this analysis.

First, some Statutory Instruments are excluded from further analysis. The remaining 9150 Statutory Instruments are referred to as 'Relevant SIs' throughout. Exclusions relate to provenance and purpose. Statutory Instruments emanating from Northern Ireland, Scotland, Wales and the Church of England are excluded, plus those with the following purposes:

> 'Air': Statutory Instruments relating to the closure (or reopening) of air space for events or emergencies. These are very specific and typically temporary in nature. For example, flights are restricted over the Cenotaph on Remembrance Sunday each year.[11]
> 'Brexit': Statutory Instruments relating to Brexit, typically to amend deficiencies arising from the UK's withdrawal from the EU. These were not a constant during the period and many merely modify previous Brexit-related measures to reflect the changing date of the UK's exit.
> 'C. Number': Statutory Instruments with a c. number that only commence legislative provisions. Sometimes commencement provisions are included with the substantive measures so it would introduce distortions to include commencement provisions in standalone instruments.
> 'Consequential': Statutory Instruments that only make minor consequential amendments or provide for transitional arrangements. Again, it would distort the analysis to include these when many such measures are included with the substantive legislation.
> 'Error': Statutory Instruments that only correct typographical or other drafting errors since their inclusion would risk duplication of the original measure.
> 'Roads': Statutory Instruments that temporarily close roads or impose speed restrictions. These are numerous at the beginning of the period

[11]See, for example, SI 2010/2349.

but, for most closures and restrictions, the function was transferred to Highways England in 2015. Given their temporary nature and since they are not uniformly present throughout the period, their inclusion would distort the analysis.

'Wider': SIs that reflect the UK's role in the wider world, either by extending the reach of legislative provisions to the Channel Islands, the Isle of Man or the overseas territories or by effecting constitutional change or making specific appointments in overseas territories.

Next, codes are assigned to Relevant SIs according to burden reduction status (i.e. 'IN', 'OUT', 'ZNC', 'Excluded', '*de Minimis*', 'Not In-scope' or 'Unclear'). Codes are initially ascribed according to unequivocal statements in the accompanying paperwork if analysis of the legislation itself indicate that such statements clearly conform to the applicable rules. Notwithstanding the absence of an express indication of status, some Relevant SIs are then assigned codes by following the rules and comparing the categorisation of other similar instruments, for example, measures clearly deriving from the EU that are not gold-plated are categorised as 'Excluded'. The quality of the impact assessments varies. Accordingly, they are used as a guide supported by analysis of the legislation itself and an application of the relevant rules. In cases of doubt, an 'Unclear' code is used. For legislation with more than one relevant impact assessment, the impact is aggregated and the code represents overall impact.

The Explanatory Memorandum accompanying most Statutory Instruments provides additional information. It typically states whether an impact assessment has been prepared, and it routinely comments on whether a measure is in-scope of the burden reduction mechanisms or why it is exempt and whether the instrument is part of the Red Tape Challenge. Caution needs to be exercised but the Courts have taken the view that, although not definitive since not endorsed by Parliament, such documents can aid interpretation (*Westminster City Council* v. *National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956).

Thus, information from the Explanatory Memorandum, together with any accessible impact assessments or equivalent documents filed on www.legislation.gov.uk allows codes to be applied to identify Relevant SIs with an impact assessment ('IA'), those without ('No IA'), those with Tax Information and Impact Notes ('TIIN')[12] and those where impact assessments are stated to be completed in the Explanatory Memorandum but are missing from the website ('Missing'). Codes also note where a broad impact assessment is relied on ('Broad'), where the Explanatory Memorandum indicates that the impact is below the threshold for

[12]The Treasury equivalent of an impact assessment. See House of Commons Hansard (15 March 2001). See also HM Treasury and HMRC (2010).

producing an impact assessment ('Below'), where a Regulatory Triage Assessment or some other estimation of impact that falls short of a full impact assessment is conducted ('RTA') or where an Assessment of Regulator Impact ('ARI')[13] is completed.

Similarly, codes note the stated rationale for the policy to identify whether the legislation is motivated by burden reduction. Codes indicate if a measure is a Red Tape Challenge measure ('RTC') or made as a Legislative Reform Order ('LRO'). In each case, a desire for burden reduction is likely to have been present. Legislative Reform Orders made under s. 1 of the Legislative and Regulatory Reform Act 2006 are predicated on burden reduction and the rationale for the Red Tape Challenge was to identify burdensome measures. Codes also pick up where, even though not a Legislative Reform Order or part of the Red Tape Challenge, burden reduction is clearly stated to be behind the policy change in the accompanying paperwork ('Burden'). For example, the impact assessment associated with SI 2011/883 explains how the changes permitted electronic solutions to relieve administrative burden. Otherwise, the Relevant SI is coded to show that any resulting burden reduction is merely incidental ('Incidental') or that the paperwork shows a mixed or unclear motivation ('Mixed/ Unclear').

The data is categorical and typically nominal when coded. Appropriate tests therefore involve using the mode as the measure of central tendency, considering the range and constructing contingency tables.

3. Analysis

Table 1 shows how many Relevant SIs correspond with each burden reduction status in each year. The first observation is that surprisingly few Relevant SIs fall within the scope of the regulatory off-setting or BIT systems (i.e. are coded 'Excluded', 'IN', 'OUT', 'ZNC' or '*de Minimis*' (55.58% of Relevant SIs are coded 'Not In-scope'). Some that are 'Not In-scope' are routine measures relating to the business of Government, such as those that designate bodies for inclusion in Government accounts. Some, while less routine, relate to reorganisation of Government or state resources, be they changes to the machinery of Government or to the funding or governance of specific schools and hospitals. Others pertain to individuals rather than businesses or the third sector. They may be burdensome, but they fall outside the scope of the burden reduction mechanisms.

Relatedly, many Relevant SIs rely on exclusions or exemptions (i.e. are coded as 'Excluded') (25.81% of Relevant SIs). These, prima facie, have an impact or fall within the definition of a regulatory provision for the BIT (and, latterly, exceed the

[13]This system was introduced in late 2012 to capture changes in policy, process or practice by a regulator. It supposedly only related to non-statutory proposals but nonetheless some are associated with Relevant SIs. For more information, see Department for Business, Innovation and Skills (2013b).

Table 1. Burden reduction status, showing number of Relevant SIs in each category in each year

Year	Not In-scope	In-scope					Unclear	Total
		Excluded	IN	OUT	ZNC	*De Minimis*		
2010	622	248	0	0	0	0	209	**1079**
2011	543	285	16	41	24	0	76	**985**
2012	606	236	29	49	18	0	116	**1054**
2013	604	311	15	44	37	0	89	**1100**
2014	688	301	25	48	28	0	123	**1212**
2015	613	286	30	44	27	0	130	**1130**
2016	387	179	17	28	18	0	71	**700**
2017	410	183	20	21	2	27	48	**711**
2018	391	204	13	8	0	87	39	**742**
2019	222	129	7	1	0	53	25	**437**
Total	**5,086**	**2,362**	**171**	**284**	**154**	**167**	**926**	**9150**

de Minimis threshold), but they are not counted towards the tally. The percentage of 'Excluded' instruments in each year remains relatively flat over time at between 22.39% (2012) and 29.52% (2019) of Relevant SIs. Breakdowns showing the reasons for exclusion/ exemption highlight how most relate to the implementation of EU measures or are concerned with tax. Other reasons for exclusion/ exemption are less frequently stated in the paperwork and many Relevant SIs remain coded as 'Unclear' because the basis for exclusion/ exemption could not be ascertained. This corroborates a potential flaw in the system at least in the early years of burden reduction: if a policymaker concludes that a measure is excluded/ exempt, that obviates the need for validation by the Regulatory Policy Committee, meaning that the opinion as to its burden reduction status is never challenged.

Of course, there may also be genuine confusion as to the burden reduction status of a particular measure. The system is complex, as the number of instruments coded as 'Unclear' highlights (10.12% of Relevant SIs are coded 'Unclear'). Leaving aside 2010, which has a disproportionate number of 'Unclear' codes since the regulatory off-setting system was not yet fully operational, the data show a reduction in Relevant SIs coded as 'Unclear' in the years after 2016 (between 11.5% and 7.72% of Relevant SIs are coded 'Unclear' in the years 2011–2016, whereas the range is 6.75%–5.28% for 2017–2019). This is likely to be attributable to the introduction of the *de Minimis* system and suggests that, if a convincing case for the quantified impact being below the threshold could be made, policymakers find it more straightforward to assign a policy to that category than to fit the policy within an exclusion, which if not convincingly applied results in an 'Unclear' code.

The potential for avoidance of the system from exploiting the self-certification of exclusion/ exemption or reliance on *de Minimis* rules is supported by an

analysis of impact assessments. Table 2 records the presence and/or type of any accompanying assessment of impact. Unsurprisingly, a significant number of Relevant SIs that are outside the scope of the regulatory off-setting or BIT systems do not have an impact assessment or equivalent (4385 of 5086 or 86.22%). More interestingly, 1147 Relevant SIs that are 'Excluded' out of 2362 (or 48.56%) have no impact assessment or equivalent, showing how this category can be applied without engaging with the system. The same point can be made about the 61 Relevant SIs that have been coded as '*de Minimis*' and have no impact assessment or Regulatory Triage Assessment, taken together with the 44 Relevant SIs deemed to be below the threshold for assessing impact. Even some Relevant SIs coded as 'IN', 'OUT' and 'ZNC' have no impact assessment, but the numbers are small. The data also show that some Relevant SIs with an impact assessment are still coded as 'Unclear' (166 Relevant SIs), again highlighting imperfections with the system, though the vast majority that remain in that category have a missing impact assessment, have no impact assessment or rely on a broad impact assessment, and the 'Unclear' category includes 209 SIs from 2010 that would have been caught by the system had it been fully operational.

The data indicate a change over time in the completion of impact assessments. As Figure 1 shows, the number of Relevant SIs with a completed impact assessment in each year declines over time (blue bars). As the regulatory off-setting system grows more stringent, reliance on broad impact assessments increases (red bars), with a peak between 2013 and 2015 corresponding to the period when the One IN, Two OUT system was in force. Once the *de Minimis* system is introduced in 2017, the reliance on broad impact assessments diminishes and instead the numbers of Relevant SIs with Regulatory Triage Assessments dramatically increases

Table 2. Impact assessments and burden reduction status, showing number of Relevant SIs in each category

	Not In-scope	In-scope					Unclear	Total
		Excluded	IN	OUT	ZNC	De Minimis		
No IA	4,385	1,147	15	13	14	61	403	6038
IA	192	514	140	235	120	20	166	1387
Missing	23	76	9	16	7	6	103	240
Broad	368	123	6	14	12	10	235	768
TIIN	47	430	0	0	0	0	4	481
Threshold	57	34	0	1	0	44	5	141
RTA	14	37	1	5	1	26	10	94
ARI	0	1	0	0	0	0	0	1
Total	**5086**	**2362**	**171**	**284**	**154**	**167**	**926**	**9150**

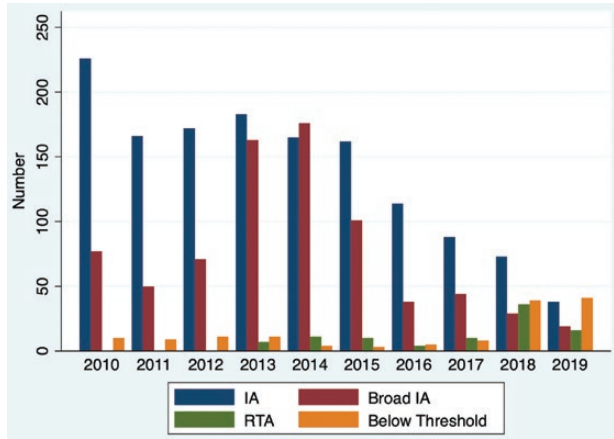

Figure 1. Impact assessments ('IA', 'Below Threshold', 'RTA' and 'Broad IA' only).

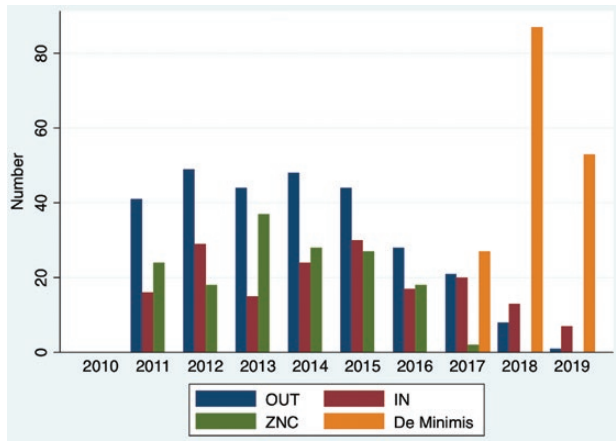

Figure 2. Relevant SIs ('IN', 'OUT', 'ZNC' and 'de Minimis' only).

(green bars) and many more Relevant SIs are deemed to be below the threshold for requiring an impact assessment or equivalent by those completing the paperwork (yellow bars), highlighting how the possibility of relying on *de Minimis* status reduces the extent to which routine assessment of impact is embedded.

The suggestion from the analysis of impact assessments that the intensity of application of the system waned over time is supported by the data on the burden reduction status of Relevant SIs more generally. Figure 2 shows how measures coded 'IN', 'OUT', 'ZNC' and '*de Minimis*' are spread over time. The data show how the number of Relevant SIs coded 'OUT' and 'ZNC' declines over time, with only 0.35% of Relevant SIs associated with an OUT being passed in 2019. By contrast, 16.90% of Relevant SIs associated with an OUT are passed in 2014 and 17.25%

in 2012. This says nothing of the value of burden shaved off, but it does imply a marked decline in the proportion of legislation generating OUTs over time. One can only speculate as to why this should be. It could be that significant OUTs have already been achieved and/or because policymakers were incentivised to adopt less burdensome practices *ab initio*; it could be that the rise in framework legislation means that changes in impact from revisions to the detail of regimes in revised guidance or codes of practice are missed[14]; or it could be that attempts to make the system more proportionate via the *de Minimis* system means that the cumulative value of smaller burden reductions is lost and the rigour of the system is diluted. The fact that 6.45% of Relevant SIs qualified as *de Minimis* during 2016–2019 implies the latter is a factor in the reduction.

The waning intensity is underlined once again if Relevant SIs coded as 'OUT' are considered in isolation. Figure 3 shows the split if codes are applied to indicate motivation for the measure. The green segment, indicating Relevant SIs driven by a desire for burden reduction, shrinks down to zero in later years, and there is equally a marked decrease in the number of Legislative Reform Orders (blue segment) and Red Tape Challenge-inspired measures (red segment). Similarly, when the figures attributable to the burden saved are analysed, it is notable that the biggest reductions are absent from this group. The largest amount saved is £23.94m, associated with SI 2013/2667 that changes the requirements for drivers of Heavy Goods Vehicles and Public Service Vehicles to undertake periodic training to hold a Driver Certificate of Professional Competence. Four other Statutory

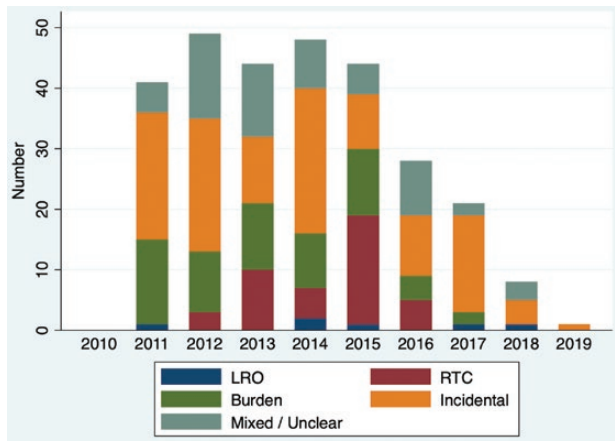

Figure 3. Relevant SIs ('OUT' only), split by policy motivation.

[14]Although technically falling within the scope of the system if backed by statutory force or issued under statutory powers, the role of the RRC in relation to such measures is diminished if they do not require statutory approval, and hence the compliance mechanisms are laxer.

Instruments are associated with savings of over £10m. By contrast, among Statutory Instruments where the paperwork suggests the burden reduction is incidental, 14 are associated with savings greater than £10m and some make a significant contribution to the tally, for example, changing the Regulated Activities Order to narrow the definition of investment advice to ensure firms have the confidence to deliver guidance services to support consumers generates a saving of £415.14m (Impact Assessment (unnumbered) associated with SI 2017/500). Similarly, changes to the Energy Company Obligation targets saved £604m (Impact Assessment (unnumbered) associated with SI 2014/3231). Of Relevant SIs with a mixed or unclear rationale, eight were associated with reductions in burden of over £10m, and again some make substantial reductions, including a saving of £512.5m by simplifying automatic enrolment for workplace pensions (Impact Assessment DWP 201611 associated with SI 2016/719).

4. Conclusion

Using legislation as the ordering factor reveals the true extent of the system. When considered in the context of the Government's entire legislative agenda, few Statutory Instruments are caught by the regulatory off-setting and BIT initiatives, many that rely on an exclusion/exemption to avoid their effects, and, latterly, many that previously would have fallen within the purview of the tallies rely on the *de Minimis* provisions to escape their constraints. Others are too difficult to categorise, showing how the complexity of the system hinders its effective operation.

Exclusions/exemptions from the mechanisms are manifold and yet the basis for exclusion/exemption is rarely explicitly stated in any accompanying paperwork, leading to the potential for policymakers to exploit ambiguities to self-certify that measures fall outside the scope of the tally system. Despite the long menu of possibilities, the exclusion/ exemption relied on are predominantly for tax measures or measures emanating from the EU. Brexit will, of course, change that and were the burden reduction mechanisms to continue in their current form, the proportion of legislation able to rely on the EU exclusion would recede. The effective exclusion of measures below the *de Minimis* threshold is more problematic though.

The data show that the intensity with which the burden reduction mechanisms are applied wanes over time, with a marked decrease in the percentage of Relevant SIs generating OUTs once the BIT and *de Minimis* exclusion come into force. This is matched by a decrease in the value of the OUTs reported by the Government in the BIT reports—the burden of regulation increased during the 2017–2019 Parliament (Department for Business, Energy and Industrial Strategy, 2020b)—but also by a reduction in the percentage of measures that count for the tallies at all, irrespective of whether coded 'IN', 'OUT' or 'ZNC'. Analysis of impact assessments associated with Relevant SIs shows how engagement with that key

aspect of the compliance system equally diminishes over time. The data show first an increasing reliance on broad impact assessments prepared for a policy as a whole and then an increasing amount of legislation categorised as having an impact below the relevant threshold, possibly encouraged by the introduction of the *de Minimis* exception. Similarly, data looking at the motivation for legislation among Relevant SIs coded as 'OUT' show a decline in burden reduction as a driver towards the end of the period.

The inescapable conclusion is that the system did not operate effectively in the period 2010–2019. The *de Minimis* rule, which relies on the self-certification that the best guess at forward-looking impact falls below an arbitrary threshold, latterly allows for the rigours of the system to be avoided, but even before that possibility the plethora of exclusions and exemptions, and the possibility of banking extremely large OUTs by delaying policy measures (e.g. Impact Assessment DWP201611 associated with SI 2016/719) or introducing compensation elements (e.g. Impact Assessment DEFRA1809 associated with SI 2015/776), prevents the rules acting as a real constraint on the imposition of regulatory measures by policy officials.

The system could be improved: validated impact assessments could be required for all measures, including those falling within the '*de Minimis*' and 'Excluded' categories; a statement as to the basis for exclusion from the burden reduction mechanisms could be required to be included in the Explanatory Memorandum; the number of exclusions could be whittled down; and retrospective tallies of actual impact saved could be introduced. But each of those would come with a cost, not only in terms of time and resources but also in terms of the broader ramifications. Retrospective tallies would require increased information provision by the regulated, which would increase the burden. Abolishing the *de Minimis* provisions would increase the burden of the system itself on policymakers and the initial rationale for the exemption/ exclusion would need to be revisited before changes were made. A tightening of the system would also increase the risk that policy initiatives were skewed by a desire for burden reduction. The Government has itself acknowledged that the system 'limits the way in which legislation can be scrutinised' (Explanatory Notes accompanying the Retained EU Law (Revocation and Reform) Bill). If the system were made to work more effectively, these risks would need to be confronted.

Alternatively, the Government could reflect on whether a tally of burden reduction is a useful adjunct to policymaking. If regulation is necessary, the most effective measures may not be the least burdensome and a focus on the administrative and policy costs of regulation may distort the broader analysis. Andrews (2007) applauds the use of impact assessment as a 'high level approximation to show where the balance of interest lies' but warns that figures in impact assessments 'must not purport to be accurate when accuracy is not achievable'. Official

bodies have questioned whether the focus on EANCB/EANDCB strikes the right balance between direct and indirect costs/benefits and whether wider societal impacts are appropriately captured (National Audit Office, 2016; House of Commons Committee of Public Accounts, 2016; Regulatory Policy Committee, 2017). This research suggests that loopholes, exclusions/exemptions and latterly the *de Minimis* system may enable policymakers to avoid the strictures of the system, which renders the tally of burden reduction less meaningful. Perhaps it is time to move away from the burden of regulation as a measure of its efficacy.

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Conflict of interest

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