

Consultation: Reforming the framework for better regulation

Summary

Which? welcomes this opportunity to respond to the Government's proposals for reforming the framework for better regulation. This is an opportune time to review the UK's approach and ensure that regulation is used effectively to benefit consumers, as well as working for responsible businesses and delivering wider societal benefits.

Our views on the key elements of the proposals (which we respond to in detail below) are as follows:

- **Common law approach** - The regulatory framework on the whole achieves an appropriate balance between principles-based and more prescriptive legislation and we do not think there is a need to fundamentally move away from the current approach. Allowing more flexibility to regulators in the way suggested risks undermining basic principles of the rule of law that public authorities should be accountable for their actions on the basis of pre-existing, clear and known laws.
- **Proportionality principle** - Legislation should always be used and designed appropriately to achieve the desired policy outcome and be proportionate. A precautionary principle is also essential to protect consumers as well as to ensure consumer confidence in innovation, particularly when dealing with emerging technologies where there may be scientific uncertainty.
- **Regulator's role in promoting innovation and competition** - We do not consider it necessary or appropriate to require all regulators to have a duty to consider competition and/or innovation as in some cases this would result in the regulator being too conflicted and unable to fulfil its public protection responsibilities effectively.
- **Accountability of regulators** - Wider accountability mechanisms for regulators should be considered and best practice promoted. This includes for example reviewing the make-up of their boards and how they operate, including the level of transparency they operate to.
- **Better regulation framework** - The Better Regulation framework should give much greater consideration to impacts on, and for consumers and the public, including consumer protection and wider consumer confidence, as well as the

environment. It must take a longer-term approach to assessing the costs, but also the benefits of regulation.

- **Reviewing the business impact target (BIT)** - The emphasis of the BIT has risked stifling policy development by making it too much of a counting exercise, rather than a fuller and more meaningful assessment of the range of available policy interventions, regulatory and otherwise, to achieve the desired outcome. Our strong preference is Option 4 (remove). There needs to be an effective way of assessing and reviewing the impact of regulatory measures, but these need to be part of a more holistic approach.
- **Regulatory off-setting (one in, x out)** - The one in, x out approach fails to recognise the wider impacts, whether positive or negative, that regulation can have for different interests over time. Rather than having crude targets that create false and meaningless incentives to try and find regulations that can be removed in order to allow regulation to be introduced, even when that regulation fulfils a crucial policy purpose, there should be a more in-depth analysis of the costs and savings that proposed regulation will lead to.

Introduction

Which? welcomes this opportunity to respond to the Government's proposals for reforming the framework for better regulation. This is an opportune time to review the UK's approach and ensure that regulation is used effectively to benefit consumers, as well as working for responsible businesses and delivering wider societal benefits.

We agree that having the right regulations in place is essential for the functioning of the economy as it helps ensure fair competition, consumer confidence and can create the right conditions for growth and innovation. Effective regulation will also be crucial for enabling the UK to achieve wider commitments that will benefit society and future generations, such as reaching net zero.

We have concerns that previous approaches to 'better' regulation have been largely focused on too simplistic deregulation and that measures such as the Business Impact Target (BIT) have focused narrowly on immediate-term costs to businesses, without considering the longer-term benefits both to businesses and broader society that well designed legislative measures can bring.

We therefore hope that as a result of this consultation a much more robust approach can be developed, which includes more rigorous and broader-based impact assessments, recognising the role that appropriate regulation can play to achieve policy goals as part of a wider toolbox of incentives and disincentives.

Ensuring effective regulators is an essential element of this. We welcome the consideration given to enhancing regulators' role in setting standards and enhancing their accountability,

but think that caution is needed in devolving too much responsibility away from transparent and democratic mechanisms for determining appropriate regulation.

Consultation questions

A common law approach to regulation

- 1. What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?**
- 2. Please provide an explanation for any answers given.**
- 3. Are there any areas of law where the Government should be cautious about adopting this approach?**
- 4. Please provide an explanation for any answers given.**

The Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) report proposed that more power and discretion could be delegated to UK regulatory bodies, removing many of the detailed rules in the existing statutory framework to make them less prescriptive (replacing them with outcomes to be achieved) and allowing the regulatory regime to be shaped more by case law.

In Which?'s view, our regulatory framework on the whole achieves an appropriate balance between principles-based and more prescriptive legislation. We do not think that there is a need to fundamentally move away from the current approach, which is already tailored to the needs of particular sectors and desired outcomes.

Which? works across a broad range of regulatory regimes and works closely with different government departments and regulators. In some sectors, such as financial services, there has been a steady shift towards a more principles-based, outcomes-focused regime which we have supported. However in other sectors, particularly those where there may be a large number of small operators, such as the food industry, where a lot of technical expertise may be required to interpret the principles into on the ground realities, it is more appropriate to have more specific requirements within regulation. This does not preclude the need for regulators to still provide specific guidance or to supplement legislative requirements with more specific technical rules, for example establishing safety limits.

We also have concerns that an over-reliance on case law would be counterproductive as this is likely to place greater burdens on businesses through the inherent uncertainty it could create. It would also place a greater reliance on the courts which could increase costs for all involved. For consumers in particular the civil courts system is increasingly difficult and expensive to access and effective alternative forms of dispute resolution are only available in

some sectors. We also do not think that such a 'case by case' approach is appropriate when determining what is an appropriate level of consumer or public protection.

Adopting a proportionality principle

- 5. Should a proportionality principle be mandated at the heart of all UK legislation?**
- 6. Should a proportionality principle be designed to 1) ensure that regulations are proportionate with the level of risk being addressed and 2) focus on reaching the right outcome?**
- 7. If no, please explain alternative suggestions.**

Legislation should always be used and designed appropriately to achieve the desired policy outcome. It should therefore be proportionate. We do not accept that further overarching legislative measures are required to achieve this as a 'proportionality' approach is already well-embedded in the impact assessment, wider policy development and parliamentary scrutiny processes in the UK. A good example is the current draft Online Safety Bill, which has carefully considered proportionality issues throughout.

The consultation document, however, suggests that the proportionality principle could be used to replace or bolster references in current legislation to the precautionary principle. We do not see the two as juxtaposed.

The UK has a long history of taking important measures to protect public health for example on a precautionary basis and important lessons were in particular learned following the Bovine Spongiform Encephalopathy (BSE) crisis. A precautionary approach is important to protect consumers as well as to ensure consumer confidence in innovation, particularly when dealing with emerging technologies where there may be scientific or ethical uncertainty.

Current regulatory standards may fall within a framework that is underpinned by the precautionary principle – whether for assuring meat safety or appropriate chemical regulation to protect the environment as well as public safety. The UK is now in a position to determine how standards are developed within these frameworks, based on its own risk analysis regimes.

It would be a mistake to assume that it is the frameworks themselves that should be substantially changed – or to move away from the importance of the precautionary principle, particularly in light of the impact from machine learning, Artificial Intelligence (AI) and in the future quantum computing. The focus should instead be on sharing best practice to promote robust scientific risk assessment and clear ethical decision making and ensure that risk management decisions are made in an inclusive and transparent way that adequately reflects the level of scientific or ethical uncertainty and public acceptability of the risk, taking into account the potential risks and benefits. The balance may differ depending on the

nature of the sector or products concerned, for example, foods compared to medicines where a greater level of risk may be tolerated, relative to the benefits.

Regulators' role in promoting innovation and competition

- 8. Should competition be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?**
- 9. Should innovation be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?**
- 10. Are there any other factors that should be embedded into framework conditions for regulators?**
- 11. Should the Government delegate greater flexibility to regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules, rather than legislation?**

Which? works with a range of regulators; some of which have specific duties in relation to promoting competition (such as the Competition and Markets Authority and Ofcom) and others, such as the Food Standards Agency or Office of Product Safety and Standards which do not because their role is about public safety and protection.

We have concerns that some existing regulators can be too slow to respond to protect consumers because their duties are too ambiguous. Regulators need to be evidence-based and proportionate in their approach, but we do not consider it necessary or appropriate to require all regulators to have a duty to consider competition and/or innovation. In some cases this would result in the regulator being too conflicted and unable to fulfil its responsibilities effectively. Innovation should not be an objective in its own right, but a means to achieving wider policy objectives relevant to the regulator.

The Food Standards Agency was for example set up as an independent non-ministerial government department with an unambiguous remit to protect public health and consumer interests in relation to food because of concerns that public safety had not been given sufficient priority, leading to a number of food scares which had severe implications for consumers as well as the food industry and UK-trade with the rest of the world.

The CMA has previously raised concerns that its statutory duty places too much emphasis on promoting competition relative to wider consumer protection. Its former chairman highlighted that its statutory duty to "promote competition, both within and outside the United Kingdom, for the benefit of consumers" means that it does not have a primary duty directly to protect consumers and that this constrains the CMA from acting to protect consumers' interests.

Rather than a heavy-handed approach of placing new duties or guidance on regulators to consider competition and innovation and potentially undermining or confusing their primary focus, we consider that broader-based guidance that highlights best practice in terms of stakeholder engagement and robust regulatory impact assessments to ensure that regulation is evidence-based, reflects the practical realities of the market, considers unintended consequences and is focused in its ultimate outcome is more appropriate.

Regulators do need to be agile and responsive to new developments and we agree that principles of agile regulation should be promoted. It may be appropriate to delegate greater responsibility to regulators in certain circumstances and with appropriate safeguards. We have for example seen a number of issues in relation to digital markets where regulators

have not had effective tools to respond. But care is needed to ensure that this does not reduce the level of transparency and consultation - and that there is still effective Parliamentary scrutiny over the nature of regulations and appropriateness and nature of interventions, particularly when dealing with new technologies that may raise a range of societal issues, both in terms of safety, security and wider ethics. These issues may also go beyond the remit of individual regulators.

Regulatory sandboxes

12. Which of these options, if any, do you think would increase the number and impact of regulatory sandboxes?

- a) Legislating to give regulators the same powers, subject to safeguarding duties**
- b) Regulators given a legal duty**
- c) Presumption of sandboxing for businesses**

13. Are there alternative options the Government should be considering to increase the number and impact of regulatory sandboxes?

As set out in the consultation document, regulatory sandboxes encourage innovation by allowing innovators to trial new products, services or business models in a real-world environment under regulator supervision. As highlighted, some regulators, such as the Financial Conduct Authority, already have experience of using them.

Regulatory sandboxes can clearly be a useful tool in helping to ensure the appropriate regulatory approach to innovation in some sectors. We do however have real concerns that therefore adopting an approach where legislation would be introduced to give all regulators the same powers to disapply rules, even if subject to safeguards, would be disproportionate. Similarly, requiring regulators to consider regulatory sandboxes as part of a legal duty to consider innovation is unnecessary in our view, although best practice in this area should be highlighted and encouraged.

We strongly disagree that a presumption of sandboxing should be created by providing a route for any business to seek an exemption from a regulation by providing a sufficiently strong case that it is testing innovation. This should only be determined on a case by case basis, taking into account the wider implications, including for consumer protection and wider confidence. There should be strict criteria for regulatory sandboxes, including that the product or service would not otherwise be developed, and that the business assumes the risk of compensating consumers who may be negatively affected.

Accountability of regulators

14. If greater flexibility is delegated to regulators, do you agree that they should be more directly accountable to Government and Parliament?

15. If you agree, what is the best way to achieve this accountability? If you disagree please explain why.

As set out above, we do not consider that it is necessarily appropriate as a matter of course to delegate greater responsibility to regulators for establishing rules and guidance, although this may be appropriate in some circumstances. Parliamentary accountability is important, but there are already mechanisms to ensure that this is the case through the sponsoring government department as well as through select committee scrutiny of regulators. It is appropriate to review whether this could work more effectively but we do not consider that

it is necessary to make any fundamental change in terms of establishing a specific scrutiny committee for regulators.

We do think that wider accountability mechanisms for regulators should be considered and best practice promoted. This includes for example reviewing the make-up of their boards and how they operate, including the level of transparency they operate to. The Food Standards Agency and Food Standards Scotland for example web-stream many of their board meetings so that the deliberations that lead to their decisions on how to regulate (or advise Ministers on how to regulate) can be scrutinised.

Deep dives of individual regulators

16. Should regulators be invited to survey those they regulate regarding options for regulatory reform and changes to the regulator's approach?

17. Should there be independent deep dives of individual regulators to understand where change could be introduced to improve processes for the regulated businesses?

There are already a range of mechanisms to review how regulators perform, including through the National Audit Office, the Public Accounts Committee and Cabinet Office reviews. These are important and should be built upon. It is however essential that any reviews or 'deep dives' consider how the regulators are delivering for all of their stakeholders, including consumers. Surveys and deep dives should not only seek to understand the perspectives of those they regulate, but also those who they regulate to protect.

Revising the process and requirements of better regulation

18. Do you think that the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?

19. If no, what would you suggest instead?

Early scrutiny of proposals is important in order to ensure that alternatives to regulation have been considered, but also that the proposed regulation is appropriately targeted. Care is needed to avoid an overly bureaucratic scrutiny process that holds up policy development. But more should be done to encourage regulators and government departments to consult a wide range of stakeholders early in the policy-making process so that their views can be taken into account.

20. Should the consideration of standards as an alternative or complement to regulation be embedded into this early scrutiny process?

Standards have an important role to play in supporting regulation and can work where technical detail needs to be worked through with stakeholder input in order to agree appropriate guidance to support compliance. Standards can also have a useful role in helping to provide an initial framework for appropriate measures that need to be taken while a more comprehensive regulatory framework is under development. Standards-setting is however a lengthy process that relies on the voluntary participation of business and wider public interest representatives. There is also a risk of relying on a 'common denominator' approach to regulation that could be detrimental to some of the more responsive, leading or innovative businesses within a particular sector and to consumers interests. The process would also be less accessible to consumer and other public interest groups who are

currently able to rely on regulators, within the confines of their statutory duties, to consult on and reflect a range of stakeholder views.

21. Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?

22. If now, what would you suggest instead?

23. Are there any other changes you would suggest to improve impact assessments?

The consultation document seeks views on whether there should be a process for shorter and less bureaucratic impact assessments focused more narrowly on the essential elements of cost-benefit analysis. It is proposed that the discursive elements could be replaced by success criteria, a short statement of expected outcomes from the regulation for it to be deemed successful at achieving the stated purpose and a concrete evaluation plan setting out how these outcomes will be measured over time.

A focus on clear success criteria, and their evaluation, would be welcome. There is also scope to ensure that impact assessments address key issues. However we consider that a much greater priority for this review of the better regulation framework should be to ensure that impact assessments take into account the full range of impacts including in relation to consumer and wider societal impacts – and that more robust methodology should be developed and shared to ensure that this assessment, which may often be qualitative, is conducted thoroughly and given sufficient consideration.

24. What impacts should be captured in the Better Regulation framework?

a) Innovation b) Trade and investment c) Competition d) Environment

25. How can these objectives be embedded into the Better Regulation framework? Can this be achieved via: a) a requirement to consider these impacts b) Ensuring regulatory impacts continue to feature in impact assessments c) Encouragement and guidance to consider these impacts, but outside of IAs d) Other? (please explain)

The Better Regulation framework should give much greater consideration to impacts on, and for consumers and the public, including consumer protection and wider consumer confidence. As well as considering the environment, which is essential, the framework should also consider health implications. It must take a longer-term approach to assessing the costs, but also the benefits of regulation.

Scrutiny of regulatory proposals

26. The current system requires a mandatory post implementation review (PIR) to be completed after 5 years. Do you think an earlier mandated review point, after 2 years, would encourage more effective review practices?

27. If no, what would you suggest instead?

28. Which of [these] options would ensure a robust and effective framework for scrutinising regulatory proposals?

Post implementation reviews are essential to ensure that regulatory interventions are delivering the intended outcomes and to understand any unintended consequences. These should be part of regulator and policy maker's regulatory approaches and should ensure that lessons are learned and acted upon. It is also important that these reviews are shared across government departments and regulators in order to help make improvements. The

frequency of these reviews should reflect the nature of the regulation, the likely implementation period and the expected timeframe for impact, rather than setting a time limit that would apply in all cases and which, if too short a timescale, could create unnecessary bureaucracy for both regulators and the stakeholders they will need to rely on for input – and if too long, would prevent important lessons being learned and improvements from being made.

Measuring the impact of regulation: reviewing the BIT

29. Which of the four options presented would be better to achieve the objective of striking a balance between economic growth and public protections?

Proportionate and targeted regulation is in the interests of both businesses and consumers. The cost of unnecessary regulation harms consumers who will ultimately bear the costs as well as businesses. However, Which? is concerned that the emphasis of the BIT has risked stifling policy development by making it too much of a counting exercise, rather than a fuller and more meaningful assessment of the range of available policy interventions, regulatory and otherwise, to achieve the desired outcome.

All measures that fall within the BIT have been assessed from the perspective that any contribution to the Target is undesirable. This is reinforced by the 'one in; x out rule' that also starts from the assumption that regulation is always to be avoided, rather than encouraging consideration of the most appropriate use of regulatory and other measures.

Four options for the measurement of the impact of regulation are proposed in the consultation:

- Option 1 – adjust (minor changes to the current metric, including indirect costs and benefits, splitting policy and admin costs, using an updated equivalent annual net direct cost to business (EANDCB) or business net present value (bNPV) to measure impacts
- Option 2 – change (include wider costs and benefits such as those which can be measured using NPV and HMT green book methodology. This could include environmental, trade, productivity etc)
- Option 3 – replace (introduce a totally new system to measure a wide range of government priorities, including those which are difficult to monetise in cost-benefit analysis. This could include additional, hard to measure considerations, such as competition, wellbeing and innovation. The metric for this option would be a scorecard or simple scoreboard type approach).
- Option 4 – remove (Have a central regulation strategy, but remove the BIT requirement, most likely in conjunction with a strengthening of the post implementation review (PIR) processes, and addressing the impacts based on data collected post implementation – Policy Success Metrics.

Our strong preference, because of the limitations and narrow focus of the BIT that we have outlined, is Option 4 (remove). There needs to be an effective way of assessing and

reviewing the impact of regulatory measures, but these need to be part of a more holistic approach that considers the full intentions and impacts of regulatory interventions.

Regulatory off-setting: One in, X out

30. Should the One in, x out approach be reintroduced in the UK?

31. What do you think are the advantages of this approach?

32. What do you think are the disadvantages of this approach?

33. How important do you think it is to baseline regulatory burdens in the UK?

34. How best can one in, x out be delivered?

The one in, x out approach of regulatory off-setting is over-simplistic and fails to recognise the wider impacts, whether positive or negative, that regulation can have for different interests over time. We do not think that it has contributed to a more robust approach to use of regulations or led to a more sophisticated understanding of when regulation is or is not appropriate.

Rather than having crude targets that create false and meaningless incentives to try and find regulations that can be removed in order to allow regulation to be introduced, even when that regulation fulfils a crucial policy purpose, there should be a more in-depth analysis of the costs and savings that proposed regulation will lead to.

The government's focus on net zero is a good illustration of why this approach is not fit for purpose. In some sectors the government will need to use regulation to drive particular business or consumer behaviours towards lower carbon impacts. This is essential in order to achieve the government's international commitments and more importantly, for the health of the planet and for the security of future generations. Legislating should not be conditional on finding twice as many other regulations to remove, because the regulations available to 'throw out' may also be serving an important purpose.

35. Are there any other matters not mentioned above you would suggest the Government does to improve the UK regulatory framework?

We would like to highlight three additional aspects:

- (i) **Public engagement** – the government should consider how there can be more effective public engagement and deliberation on the appropriateness and effectiveness of regulation and share best practice for where that has been done well.
- (ii) **Effective enforcement** – the framework for better regulation should reflect the importance of effective enforcement of regulation. Which? is feeding into the BEIS consultation on reform of competition and consumer policy which considers many aspects of this.
- (iii) **Regulation across borders** – many policy challenges that are on the government's agenda, from tackling climate change to regulation of online harms cross national boundaries. This means that the intent of national regulatory measures can be limited. The approach to better regulation should therefore also



consider how cross-border cooperation can be enhanced on the development of regulation, establishment of international standards and effective enforcement.

**Which?
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Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions. We're not influenced by third parties – we never take advertising and we buy all the products that we test.