ICAEW
REPRESENTATION 94/21

REFORMING THE FRAMEWORK FOR BETTER REGULATION

Issued 1 October 2021

ICAEW welcomes the opportunity to comment on the Reforming the Framework for Better Regulation published by Department for Business, Energy & Industrial Strategy on 20 July 2021, a copy of which is available from this link.

Good regulation is an essential ingredient for a strong and vibrant economy and the good of wider society. We support the government's ambition for bold reform. If done well, reform could benefit many generations to come. Government should continue to engage stakeholders in ongoing dialogue to ensure that a new approach is widely accepted and will stand the test of time.

It is essential that:

- Parliament sets clear objectives for regulators focusing on desired outcomes
- Powers granted to regulators are well defined, and
- Parliament retains oversight to ensure that outcomes are being met.

Poor regulation ('red tape' or regulation that merely results in an ineffective 'tick box' approach) is counterproductive to government aims. We agree this should be avoided. Good regulation, on the other hand, can set a tone and culture of improvement and minimises adverse impacts, including on innovation and competition.

The *Regulators' Code*, which incorporate the *Principles of Good Regulation*, already sets out relevant principles. It requires regulators to support those they regulate to comply and grow, hear their views, communicate clearly and transparently with them and focus activities where risks are highest. This existing framework can help government achieve its objectives in the Ministerial Forward. But regulators need to be accountable for properly applying it.

The current consultation does not go far enough. More should be done to embed such principles into the UK's regulatory regime. We have two suggestions:

- Replace the *Better Regulation Framework* with a more holistic one. That, we suggest, would take the *Principles of Good Regulation* and the *Regulator's Code* as its starting point and reflect insights arising from this consultation and subsequent discussions.
- Establish a new independent body to assist Government and Parliament ensure that the desired regulatory approach is being followed in practice.

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KEY POINTS

Note – to help readers navigate this response, we selectively indicate where additional comment is contained under a specific question by noting the question concerned, eg, [QX].

Support for the reform initiative

1. Good regulation is vital for a vibrant economy serving society's needs and we support the government's objectives to ensure that the UK's regulatory regime is one of the best in the world. If the UK's model is sufficiently widely respected, it should help us be more influential on the world stage. That will be important given the impact non-UK regulation will inevitably have on the UK.
2. One of the objectives is to ease regulatory burdens. We support that objective, but regulation brings benefits as well as burdens and views will differ as to the relative merits of a heavily or lightly regulated society. Our response is intended to be neutral on that issue and is focused on steps that can be taken to ensure that whatever regulation we have is 'good regulation'.
3. In the interests of brevity we have not provided many concrete examples to support our comments, but we would be happy to provide more information if requested to do so.

Reform is needed

4. The concerns about our current regulatory regime have been well documented in the consultation document and elsewhere. They include: the sheer volume of law (particularly secondary legislation); the number of regulators (around 90 excluding local authorities, according to a recent National Audit Office (NAO)) report; complexity; and direct and indirect cost (a figure of £100 billion per year cost to business being cited by NAO in an earlier report). We do not seek to go over all the ground here or underestimate the value of good regulation, but we agree that reform is needed.
5. The consultation emphasises the burden of existing regulation (including inherited EU legislation), but our members often find that it is the frequency of change to regulation that is most disruptive (regulatory 'churn'). The risk that a process aimed at solving one problem (improving potentially poor regulation) would create another (increased churn) needs to be addressed. This issue, and many other concerns, would arise less frequently if the *Principles of Good Regulation* were better adhered to, particularly the principle of consistency which encompasses stability.
6. The *Better Regulation Framework* is not adequate for that purpose. It is designed to measure aspects of proportionality, but this is only one of the *Principles* and there are broader areas of concern around what is measured.

Considered approach required

7. Improvement is required, and it is important that changes are carefully considered. Our current system of regulation involves Parliamentary scrutiny, advice from civil servants and consultation with stakeholders. The UK remains one of the best countries in the world to do business and in which to live. There is scope to make things worse rather than better and the stakes are high.
8. We suggest government takes time to digest the results of this consultation, consult further and commission research including on lessons that might be learned from other countries and from academic commentary or research. This includes academic research that has identified regulatory capture and regulatory empire building as potential problems with regulatory processes. Measures to avoid such negative outcomes need to be carefully considered in every regulatory context.
9. Any approach will need to be widely accepted or it risks being reversed by future governments and much effort would be wasted. Building a consensus will be important and ongoing consultation or dialogue referred to above will be helpful in that respect.

Principles of Good Regulation [Q6-7]

10. We believe that the *Principles of Good Regulation* published by the Better Regulation Task Force (in 2003) are sound. They are:
    - **Proportionality** (eg. no sledgehammer to crack a nut, consider alternatives to regulation eg, doing nothing or education).
    - **Accountability** (eg. criteria for judging effectiveness and hold government to account).
    - **Consistency** (eg. ensure regulation is consistent and 'joined-up', provide for stability and certainty, enforce consistently).
    - **Transparency** (eg. identify objectives, ensure effective consultation with at least 12 weeks' notice, use clear and simple language, allow time for compliance).
    - **Targeting** (eg. focus on the problem with a goals based approach and minimise side effects, enforcement to be based on risk, systematic review and modify or eliminate if appropriate).

11. The difficulty, however, lies in how they are interpreted and implemented in practice, particularly in how proportionality (principle 1) applies. Regulators do not always adhere to them. To meet the UK's ambitions, an effective framework is needed to ensure accountability (principle 2) to these *Principles.*

12. These aspects of the *Principles* call for particular attention (see Q35):
    - approach on *enforcement*; supporting those regulated to comply and grow. Regulation that is not applied proportionately does not achieve this;
    - need for regulation to be *understandable* and *accessible* (transparency);
    - impact on *small business* (proportionality and targeting). Regulation should be adequate to do its intended job;
    - need for a more *joined up* approach (consistency). The Ministerial Forward stresses government objectives around growth and innovation, yet at present regulators sometimes obstruct these outcomes; and
    - *consultation timeframes*.

13. The *Framework for Better Regulation* focuses on proportionality with an emphasis on analysis of costs. This is not sufficient to promote compliance with the *Principles* as a whole. The BEIS *Regulators' Code* incorporates the *Principles* (as described in the relevant statute), and has its own emphases (eg, on consultation and transparency) which are generally helpful. However, we do not believe that it has been effective in ensuring that regulators adhere to the *Principles*.

A new Framework of Good Regulation [Q10, Q18-19, 24, 25]

14. We believe that the *Framework for Better Regulation* should be replaced by a new framework for good regulation. This would incorporate the *Principles of Good Regulation* and the *Regulator's Code* as appropriate to result in a single framework applicable to regulators and, to the extent appropriate, the legislative process.

15. It would also need to address any issues arising out of this consultation not already addressed in the current *Principles*, *Framework* or *Code* or where a different emphasis might be required (eg, problems of churn and applying a proportionate and consistent approach to sanctions). However, it is important that the principles within any new framework remain relatively short and easy to follow.

New independent body for good regulation [Q14-15, Q17, Q27]

16. Parliament will always have ultimate oversight and responsibility for the regulatory regime and regulators empowered by it. However, given the amount and complexity of regulation, it

needs support. It currently receives this through various processes outlined in the consultation document.

17. There is already a case for existing processes to be improved, but this will become even more important if Parliament decides to delegate more to regulators (ie, increase their regulatory making or enforcement powers).
18. We believe government should establish a new independent body to promote good regulation in the public interest. This could help Parliament hold regulators to account, help regulators preserve their independence where relevant, and help ensure that government bills meet the *Principles of Good Regulation*. This would be a significant reform and the body would need to be adequately resourced to perform what would be an important function.
19. It might also help promote a learning cycle to inform reviews of whether regulations and regulators remain relevant and fit-for-purpose, in their current form or at all (as referred to in the NAO paper on the principles of effective regulation published this year).
20. This new body could make a difference by questioning front-line regulators regarding the process of oversight regulation over them. It could assess whether the degree of oversight and requirements imposed on front-line regulators (bearing in mind cost of requirements are ultimately passed down through regulatory fees and firm fees to the consumer) are necessary, proportionate and in the public interest. The body could be empowered to make thematic reviews across regulation (and multiple layers of regulation) in targeted sectors to identify common areas where better adherence to the principles could apply across a number of sectors.
21. The public frequently insist that 'something must be done' in response to every misfortune, and it can be challenging for Parliament (or regulators) to explain why simply making new regulation forbidding that thing might not be the best answer, particularly as it is the one thing most obviously in their power to do relatively easily. The body might perform a particularly useful role in helping government and regulators achieve, and justify taking, a proportionate approach as being in the public interest.

Potential to give increased regulatory powers to regulators [Q1-4]

22. We agree that there could be scope to reduce the amount of secondary legislation made through giving increased regulatory powers to relevant regulators. But a stronger framework for accountability must be in place first.
23. Considerable caution is required. There will need to be clear policy as to what should be covered by legislation and what might be covered by regulation. Powers and responsibilities of regulators must be appropriately framed and focused on desired outcomes. Mechanisms for Parliamentary oversight or control are needed. It is essential that regulators comply with the *Principles of Good Regulation.* Otherwise there is a real risk here that delegation simply exacerbates the very problem government seeks to address.
24. We are not currently able to suggest any general policy that could apply in these respects. Given the variety of regulators and activities covered by them, the approach may need to be determined according to the objectives of any given statute/policy and the suitability of the relevant regulator.

Other key points

25. In our view, the current processes for assessment of regulation eg, impact assessments, business impact targets and post implementation reviews need to be broadly reconsidered and potentially replaced. [Q21-29]
26. We do not support One in X out approach and believe that there are better alternatives. [Q30-34]
27. We agree that regulation should be applied in a way that allows innovation and competition to flourish where possible; we think some caution is required in how such a concept might be expressed in terms of regulatory duties. [Q8-9]

28. We believe that regulators should use all tools at their disposal (eg, guidance, sandboxes, surveys, standards) to ensure that they adhere to the *Principles of Good Regulation* and other objectives (eg, to facilitate growth) on a continuous basis, but we doubt that an approach that might suit one would necessarily suit all. [Q11-16, 21]
29. Aspects of international regulatory matters and their impact on the UK merit further consideration. [Q35]
30. Government will need to assess the cost of increasing delegation to regulators, their value for money and how they would be funded. [Q35]
31. The *Principles of Good Regulation* and potentially aspects of any new framework for good regulation should apply also to HMRC and tax legislation. [Q35]
32. We are not clear why government believes that digitalisation will lead to better regulation, although we can see scope for it to make compliance easier in some cases. [Q35]

ANSWERS TO SPECIFIC QUESTIONS

4.2. The common law approach to regulation

Question 1: What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?

33. We could suggest specific secondary legislation that we think would benefit from reform, but reform needs to start with a stronger accountability framework for delegation first. Without this we are not currently in a position to suggest whole areas of law that would benefit from this approach. A proper exercise is needed to put in place a robust framework for regulatory accountability. Then each piece of secondary legislation can be considered to determine whether it might better be replaced with regulation.

Question 2: Please provide an explanation for any answers given.

34. The paper refers to a 'common law' approach, but the related questions focus on delegation to regulators. The two concepts should not be confused.
35. We agree that the sheer volume of secondary legislation (which is unlikely to have undergone detailed parliamentary scrutiny) does give cause for concern in the context of the *Principles of Good Regulation* and that there may be scope for it to be replaced with regulation made by regulators under powers given to them by statute so long as, critically, they can be held to account. We do not believe that the issue is confined to EU law.
36. Increased use of regulators can have advantages. In principle, it allows for a more nuanced approach, greater flexibility and consideration of long-term interests (beyond a single parliament). Regulators should naturally engage with their stakeholders in a way that simply is not feasible in the context of legislation.
37. However, there are reasons to be cautious (outlined under Q3) and different tiers and types of regulator also need to be considered (see under Q14).
38. The most significant areas of retained EU law from an ICAEW regulatory perspective are those relating to audit and anti-money laundering. The strength of these at the moment is that they have the merit of securing equivalency and adequacy not just from EU member states but also internationally from arrangements the EU has had with international regulatory bodies. Any relaxing of those rules could place the cross-recognition in jeopardy and inhibit rather than benefit commerce in these specific areas.
39. Common law (that is, law arising from court cases) does play an important part in our regulatory regime. For instance, some laws are not enforced by a regulator, but give direct rights to those intended to benefit from them which they can enforce in courts (including tribunals).
40. The courts are independent of the parties in dispute, both sides get a fair hearing and our courts have an excellent reputation for providing well-reasoned outcomes that avoid judging with the benefit of hindsight and take account of the factual circumstances pertaining at the

relevant time. They can shine a light on poor regulation when any regulatory shortcoming is scrutinised as part of the process.

41. We have seen the effective roll out of regulatory themes through common law. The evolution of the concept of 'due regard' for diversity under section 149 of the Equality Act has proved to be balanced and proportionate and secured change be it over a long period of time, aided by timely court judgements that have gradually tightened up. This has consequently secured changes in behaviour though regulator, service provider and consumer at a consistent pace.
42. However, this has been achieved without a regulatory body being directly involved to secure that change. In contrast we have found similar loosely defined obligations in law that then have to be taken forward by regulatory bodies to be extrapolated into considerable detailed requirements through regulation and guidelines.
43. However, courts are not a substitute for good regulation, indeed if regulation were perfect there might be fewer disputes about regulation for them to resolve. Courts are also capacity constrained and litigation is expensive (potentially impacting those who can least afford it most). The judiciary should be consulted before even tentative plans are made to increase their role.
44. We agree that a proliferation of unnecessary criminal offences should be avoided, but this is not in itself a reason to devolve power to regulators. The *Principles of Good Regulation* demand that sanctions apply for breaches in a proportionate way, and this should apply to regulators and civil sanctions too, a topic that is not covered in detail in the consultation, but which will require attention and which we comment on further under Q35.

Question 3: Are there any areas of law where the Government should be cautious about adopting this approach?

45. Yes, see Q4.

Question 4: Please provide an explanation for any answers given.

46. There are many reasons why Government should be cautious about introducing a general policy to grant wider regulatory making powers to regulators.
47. The process would not of itself result in 'better regulation'. It would be essential that the regulator is a 'good' one, including adhering to the *Principles of Good Regulation*. As noted in our Key Points, we do not believe that current mechanisms to monitor and assess regulators' adherence to the *Principles* are sufficiently robust to give confidence that this would currently be the case.
48. The EU Commission is sometimes portrayed as a regulation generating machine whose staff depend upon promoting the idea of ever more regulation with little (or distant) democratic control. If UK regulators are to be given increased powers, it will be essential for Parliament to demonstrate that it is exercising meaningful control over them and that they do not create regulation for regulation's sake or become too distant from democratic accountability.
49. The sheer number of regulators and their variety means that it may not be appropriate to apply the same approach on delegation in a uniform way (although we believe that the *Principles of Good Regulation* apply universally, in relation to the public sector as well the private sector). For instance, some have narrower remits than others, some concern matters or life or death while others do not. Some are, effectively, government departments while others have their own legal personality and may be managed by individuals who are independent of government. The large number of regulators (including regulators of regulators) brings related challenges of managing risk of overlaps, duplication or inconsistency in regulation (see also our comments on 'joined up' regulation under Q35).
50. The cost impact of increasing the role of regulators would need to be assessed and related issues, including funding of the regulator, considered. It is not necessarily the case that direct or indirect costs of enforcement etc would be reduced in the hands of a regulator. (See further comments on funding under Q35).

51. Where new regulation is required in an area not already covered by a regulator, Parliament would need to decide whether to create a new regulator for the purpose or extend the remit of an existing one (or regulate through legislation).
52. In increasing powers of regulators, it will be important to Parliament, and to the public, that there is good accountability of the regulator to Parliament. That is not only for obvious constitutional reasons. It is also because it is easy to set regulatory high-level goals or principles that seem fair and unobjectionable, but are much harder to apply in concrete terms to business or individuals. Parliament should not be left disconnected from some of the difficult questions that might arise in practice and it is essential that there are mechanisms to overcome any practical difficulties in a timely way.
53. Parliament should consider whether regulators they intend to empower have appropriate controls to ensure their independence, eg, regarding disclosure of potential conflicts of interest and lobbying etc.
54. It is important that all regulation is easily accessed, and legislation and regulation can be read as a coherent whole. Where different regulators publish their own materials on their own websites it can be difficult to find through links to legislation etc. We comment further on the importance of accessibility of law and regulation under Q35 below.

Question 5: Should a proportionality principle be mandated at the heart of all UK regulation?

55. Yes, but all the *Principles of Good Regulation* should be applied by government and regulators, not only the principle of proportionality. It is not clear whether, or how, this should be 'mandated' in the sense of a legally binding obligation, but we do believe that adherence should be an objective against which government legislation introduced into Parliament and regulation should be assessed and that robust mechanisms to address shortcomings are required.
56. The need for review of secondary legislation may be most pressing in the case of EU retained law which incorporates the EU's 'precautionary' principle' (reverse burden of proof on business to show absence of danger before they are allowed to do something), but we do not see that the exercise should be limited to such cases.
57. Proportionality itself is highly important. In our own experience with our members, we often feel uncomfortable with the application of rules that we are required to apply to them without regard to their size or size and risk profile. In particular we do not feel the area of proportionality of risk, which is a key driver of regulation in the first place, is being given sufficient prominence. Where regulators apply a blanket or one size fits all approach, they risk unnecessarily inhibiting economic activity (including innovation and competition). The impact is particularly felt in small businesses on which we comment further under Q35.
58. Proportionality should apply both when rules are being devised and when it comes to enforcing them (see further regarding enforcement under Q35).
59. The consultation highlights the perceived shortcomings of secondary legislation which is typically not subject to the same sort of Parliamentary scrutiny as primary legislation (statute). However, other legislation also does not always pass the test of 'good' regulation and in some cases statutory provisions are so intertwined with the secondary legislation that it would be unproductive to review one and not the other.
60. In our view, the *Principles of Good Regulation* should apply whenever legislation or secondary legislation is brought forward regardless of whether or not it has been designated as 'regulatory', although how the *Principles* are applied may vary in some cases. This includes tax legislation (see Q35).

Question 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?

61. Yes, broadly speaking.

62. The principle of proportionality includes the qualities noted in the consultation paper:

> '(1) Risk: ensuring the design, appraisal and implementation of regulations, including their cost, is proportionate with the level of risk being addressed.
>
> (2) Reaching the right outcome: regulation should be based on outcomes rather than assessing mechanistic 'tick-box' compliance with rules. Remediation and penalties where a bad outcome (such as a harmful data breach) occurs should be proportionate to the harm caused as well as the size and ability to pay of the business involved'

63. There are, however, numerous challenges defining the 'right outcome' and weighing up different elements of risk, including what is taken into account and what is not. For instance, reducing road deaths and pollution might be met by banning cars and some might think this proportionate (for avoidance of doubt, we do not). Regulators may also be charged with potentially conflicting objectives, for instance ones designed to increase competition or reduce cost and others to improve quality.

64. It is not only 'right outcomes' that should be assessed, but all outcomes so that the advantages of regulation can be weighed against any disadvantages.

65. It will be important for the desired outcomes to be identified when regulation or legislation is first considered so that these assessments can later be made.

66. The proportionality principle should not be taken to mean that breaches of rules should not be breaches at all unless they have resulted in a bad outcome. A breach is a breach. The proportionality in such cases applies in considering whether any action should be taken in respect of the breach and if so the proportionality of the sanction.

Question 7: If no, please explain alternative suggestions.

67. Not applicable.

4.3. The role of regulators

Question 8: Should competition be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?

- ***a. Embedded into existing guidance***
- ***b. Embedded into statutory objectives***
- ***c. Creating reporting requirements for regulators***
- ***d. Other (please explain)***

68. Answer – a or d. Whether or not to make competition an objective will depend upon the nature of the regulation and the regulator's mandate.

69. We believe that in most cases business will naturally seek to innovate and compete as this leads to profit and other forms of success.

70. The risk that business might seek to profit from anti-competitive practices is mainly addressed through competition law (eg, prohibition on cartels, abuse of dominant positions and merger control). If other regulators are to be given additional powers or responsibilities in this area, it is important that they are appropriately skilled in competition matters, that conflicts are avoided and that potential overlaps in powers of enforcement are managed.

71. Regulation on the one hand and innovation and competition, on the other, can conflict, and conflicting objectives cause problems. Thus, in our view regulators should not have positive objectives in these areas but should avoid regulation that needlessly constrains innovation and, subject to one proviso, competition. The proviso is that some fields of regulation will indeed require a positive objective for competition. As to innovation, we find it difficult to foresee any regulator as being the midwife of innovation. Moreover, there are cases where regulation is having to catch up with innovations that pose risks. This illustrates that regulation sometimes has a necessary attribute of controlling innovation. Competition, however, can sometimes be an objective in its own right, and regulation in the energy sector is an example. It also illustrates that it can conflict with other objectives or needs and that the

right but difficult balance needs to be struck by a regulator. For the generality of regulators, however, not needlessly constraining competition is as far as the objectives need go.

72. There are a lot of factors beyond competition and innovation that regulators need to consider including the wider social advantages and disadvantage of the regulation. One of the challenges for them will be to ensure they have the skills (and powers/duties) to look at these wider benefits or disadvantages in this context. Competition and innovation are relevant, but a balance is required. The issues may also be more relevant to some regulators than others. The current state of the energy supply sector illustrates how competition can conflict with other public-interest objectives or needs.
73. Where regulators are given powers or duties to 'promote' competition or innovation, there is a risk that they will make rules saying 'how' business should compete or innovate. This could be counterproductive in terms of meeting the underlying objectives. Views no doubt differ on the degree to which regulation can or ought to displace markets, but markets are complex and regulatory alternatives are rarely simple.
74. Where it appears that regulation is, or might, disproportionately impede competition or innovation, there should be mechanisms to review and potentially amend them. These could include regulatory sandboxes (see further Q13 below) or various alternatives including review of the regulations.
75. Regulators need themselves to keep up with developments in relevant markets so that they are in a position to adapt to new products or services that those they regulate may wish to provide.
76. In 2013 the Competition & Markets Authority in its review of the Audit Market made 7 recommendations, 6 of which were incorporated into statute law, and one was not (namely a recommendation to the FRC that it include competition in its objectives), as noted in the Kingman Review in December 2018. If government wishes competition to be a key element of policy going forward it will need to be sure that regulators do not override this with their own agenda or policies and this may therefore need some statutory underpinning in relevant cases.
77. The current lack of a censure mechanism for failing to achieve good regulation objectives has inhibited the effectiveness of the current framework for better regulation and if competition is to be included as a specific objective, it is important that a mechanism is included for that purpose (again, we suggest that this should be a new independent body referred to above).

Question 9: Should innovation be embedded into existing guidance for regulators or embedded into regulators ' statutory objectives?

- ***a. Embedded into existing guidance***
- ***b. Embedded into statutory objectives Reforming the Framework for Better Regulation***
- ***c. Creating reporting requirements for regulators***
- ***d. Other (please explain)***

78. Answer - a or d. See also those of our answers to Q8 that apply to both innovation and competition. We would, however, emphasise that good regulation and good regulators should not stand in the way of innovation unless required to meet other proper objectives and regulators should keep up with innovations in the sectors they regulate and adapt their regulation as necessary for the purpose.

Question 10: Are there any other factors that should be embedded into framework conditions for regulators?

79. Yes. We believe that the *Principles of Good Regulation* as a whole should be embedded. They should be reviewed and updated if necessary (as a result of this consultation exercise

or otherwise). As noted in our Key Points above, we believe that these *Principles*, along with the *Regulators' Code* would form a good basis for a new framework for good regulation.

80. Such a framework should also address other matters arising out of this consultation.

Question 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?

81. Yes. We believe that regulators should have flexibility, indeed it is necessary if they are to adhere to the *Principles of Good Regulation*. However, to the regulated, the distinctions between these sorts of approaches may be a fine one. Nothing is a substitute for a well written self-contained rule.

82. Where regulators make 'decisions' with binding force, this is akin to regulation. It may be helpful to provide illustrations of how rules might apply in various circumstances through decisions, in which case they should be published and easy to find in any context where they might be relevant (eg, alongside the applicable rules).

83. Where regulation requires 'guidance' in order to be understood, there is an argument that it has failed at the first hurdle (ie, being sufficiently simple and clear). Where guidance is given statutory force (eg, Companies Act guidance on persons with significant control), we find it hard to distinguish from regulation. Even where guidance is stated to be 'advisory' or the like (as opposed to mandatory), the distinction may seem to be a fine one, particularly if judged with hindsight and, for instance, in connection with a negligence claim.

84. Those, such as ICAEW, who provide guidance in an effort to help explain how regulation (other than their own) may apply in particular circumstances face the same difficulties as anyone else if the law is ambiguous, contradictory or unclear. They cannot change the law or 'take a view' (at least, not without some risk to themselves).

85. In May 2018 BEIS published a research paper *Goals based and rules-based approaches to regulation*. In chapter 6 it addressed potential responses of the regulated community to these two different approaches. The behavioural aspects noted in that chapter in respect of regulated persons appear to us to be relevant here in making the assessment of regulatory bodies, particularly in the context of the skills base of those being asked to interpret the goals. There are considerable ranges of skills across the large number of regulatory bodies in the UK and some of them would be well placed to achieve the right balance, but others may fall significantly short resulting in extremes of excess or inadequate rule making.

Question 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

86. Answer – b, because they wouldn't have a choice. But we do not see that increasing the number of sandboxes in itself should be a general objective; sandboxes should be a tool for use in appropriate circumstances. See Q8 above.

87. ICAEW has found limited use for sandboxes as a regulator at this time. Accountancy regulations are generally framed at a high level to allow scope for innovation without the need for dispensation. Where firms have concerns about regulatory infringement, they are able to discuss these with our advisory unit which can support them in exploring new ideas and methodologies whilst keeping within the necessary outcomes. In the case of statutory regulation we have less discretion and would in most cases need to refer to the relevant oversight body to allow the relaxation of their rules. The Legal Services Board have indicated that they are open to innovative sandboxes, but we have not availed ourselves of that option to date, and have had no similar assurances from other oversight bodies.

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

88. Yes, see our answer to Q8 regarding innovation (and competition).

89. 'Sandbox' is not a defined term for general legal purposes. In part it appears to describe mechanisms to help new entrants navigate existing rules or to reduce the fear of regulated persons that they might be sanctioned by the regulator for innovating in ways not anticipated by the rules. If the *Principles of Good Regulation* were being applied, however, such mechanisms might not be required; the rules would not be so complex as to deter new entrants and a regulator could be relied upon to enforce proportionately (and the rules would keep up with, or at least, not deter innovation). A sandbox may also provide temporary dispensations from a regulator's rules for new developments, accompanied by closer supervision. This could raise issues of fairness, eg, if participation is not open to all relevant businesses.

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

90. Yes - See also Key Points above regarding a possible new independent body to assist Parliament.

91. As noted earlier, the regulatory landscape includes a considerable number of regulators, each with an independent role but some degree of accountability to Parliament or ministerial departments. ICAEW however as a regulator has its accountability driven for the most part through oversight regulators in the statutory roles it carries out for the government. Thus for corporate and local audit the FRC are the oversight body, for financial services and consumer credit the FCA, for anti-money laundering OPBAS, for insolvency the IS and for legal services the LSB. Each of these bodies in turn then reports into relevant government departments, which include BEIS, the Treasury, the Department for Communities and Local Government and the Ministry of Justice.

92. We have found that each of these 9 stakeholders and even their sub-departments have varying views on what exactly their obligations are under the *Principles of Good Regulation*. This causes ICAEW as a regulator considerable difficulty in trying to manage regulatory functions that are cross-cutting particularly where conflicting views are taken by these bodies. In addition, as a voluntary regulator of accountancy, we have direct obligations to the Better Regulation Executive in how we structure and apply our own regulations for that non-reserved activity.

93. As the oversight bodies are set up for the most part to ensure that the front-line regulators under their remit are effectively meeting the expectations of Parliament, compliance with the *Principles of Good Regulation* should be an inherent part of that supervisory assessment not only in those they supervise but in the way they conduct themselves.

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

94. As noted in our introductory comments, we suggest that Government should consider establishing an independent body to ensure that relevant regulators adhere to the *Principles of Good Regulation* (and help government to do so). The body should be involved early in the pre-legislative process and have a wider remit than existing bodies have individually and be resourced accordingly.

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

95. Yes, in the sense that regulators should consult those they regulate, but this is not the only way.

96. The *Regulators' Code* calls for in scope regulators to provide simple and straightforward ways to engage with those they regulate and hear their views. But regulators should also

hear from those who are intended to benefit from the regulation or might be affected (eg, indirectly).

97. The *Principles of Good Regulation* require the risk of unintended consequences to be assessed. This may require a regulator to consult widely, eg, seek views of the public, and to liaise with other regulators.
98. Regulators should also be required to give due weight to the views of the stakeholders, although a balance needs to be struck.
99. There are a variety of ways in which regulators might seek to obtain views of their stakeholders. For instance, they might have committees or panels (eg, consumer panels). These might provide more valuable insights than surveys.
100. Surveys can be very useful, but only in appropriate circumstances. They can be expensive to design and implement and can be designed to produce outcomes that those producing them wish to achieve or lack the transparency necessary for them to be relied upon. Those surveyed may be reluctant to respond unless confident of anonymity. Respondents are self-selecting and some go unheard, possibly even the majority (the silent majority). Surveys are not typically the best route for considering potentially complex/nuanced issues.

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

101. No – this is not something that should be prescribed as such. This is only one of the potential tools available to monitor effectiveness of regulators and would be highly intrusive and potentially costly.
102. We believe that anyone having a reasonable interest in the matter, including those regulated by a regulator, should be able to report concerns to an independent body as outlined above.
103. Deep dives for a number of regulatory bodies are effectively undertaken by oversight bodies they report into through the inspection arrangements of those overseers. These can result in recommendations that require further rules, resource and expense. The remit for these inspections could be positioned at an outcome level rather than output, and perhaps a review of the oversight bodies themselves may aid the approach in this area.

4.4. Revising the process and requirements of better regulation

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

104. Yes. The *Principles of Good Regulation* should be considered at the earliest opportunity. The proportionality principle requires alternatives to regulation to be considered, so this principle (at least) should always be considered as early as possible and before any decision is taken to regulate.

Question 19: If no, what would you suggest instead?

105. Not applicable.

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

106. No, not in a prescribed way. The alternatives to legislation include standards and other approaches (eg, guidance referred to in Q11, or codes of practice). In each case it is important that the *Principles of Good Regulation* apply. That would require regulators to consider proportionality.
107. In general, if adoption of standards is mandated (or even if voluntary, where compliance is effectively required in practice), they are practically the same as rules or regulations, albeit that powers to sanction may differ between regulators and standard setters.

108. Standards (or guidance) may seek to encourage 'best practice' rather than setting minimum standards that must be met by all. It is important that standard setters make the distinction clear and are aware that assessing 'best practice' requires expertise and that seeking to bring about uniformity in practices may in certain circumstances inhibit innovation and increase costs.

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

109. No, because we believe that more than 'streamlining' is required. We agree that impact assessments of some kind are required and that costs and quantifiable benefits should be included in relevant cases. Post implementation reviews should also seek to assess the impacts.
110. However, there are a number of concerns about the current Impact Assessment process (some of which are noted in the consultation):
    - IAs often come too late when policy has already been set
    - Evidence of costs v benefits is sometimes practically impossible to assess (and cost assessment is not necessarily always needed)
    - The £5 million threshold can be gamed and the amount is arbitrary
    - Different departments have different priorities and AIs are not always 'joined up'
    - They are complicated and time consuming
    - Cost assessment is often poor
    - Possible unintended consequences/externalities are often not considered, even when they might reasonably be foreseen.

111. Care is also required in not placing too great expectations on the assessment. Excess requirements can result in costly but weakly substantiated exercises. The results can be very subjective, as can be the conclusions drawn from them. Impacts can vary across supplier, consumer, regulator and markets, and the focus of any one regulator may mean differing priorities are applied towards these stakeholders in weighing up the cost/benefit.
112. If streamlining of impact means that the analysis is elevated from detailed evaluations to high level 'due regard' viewpoints, we believe that a better and more efficient outcome can be achieved. In most instances we suspect the result would be the same as that of the more detailed process.
113. The Small and Micro Business Assessment (SMBA) adds to complication and may sometimes obscure the principle that regulation should only be introduced if necessary. It is not clear that the SMBA has insulated small businesses from increasing volumes of regulation.
114. We believe that qualitative aspects should also be assessed (and the benefits of regulation are often more easily articulated in qualitative than monetary terms). The limitations of a qualitative approach will need to be accepted and it is important that it does not become a costly exercise.
115. Relevant regulators should generally be subject to similar disciplines and this will require a 'joined up' approach to be effective (see also Q35 on this subject).

Question 22: If no, what would you suggest instead?

116. See answer to Q21 above.

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

117. Yes. See Q21 above.

Question 24: What impacts should be captured in the Better Regulation framework? Select all which apply:

- ***a. Innovation***
- ***b. Trade and Investment***
- ***c. Competition***
- ***d. Environment***

118. A, b, c and d, in the sense that they can all be important. However, we are not convinced that the list of impacts should be prescriptive. Those involved should consider all relevant factors in making regulation. This is one of the challenges of the approach. It is self-evident that regulations concerning, say, trade, will focus on that but the relevant regulator should also be cognisant of other matters.
119. Sustainability (more than just the environment) should probably always be a consideration, but other matters such as health and safety, employment, privacy, crime and security (the list is endless) will also need to be considered as appropriate.
120. The four headings, with perhaps the exception of competition, are likely to be outside the natural remit and understanding of some regulatory bodies. Expertise would have to be secured in house or outsourced in order to make such assessments were they a detailed requirement. This would add to cost of regulation and in its initial stages not necessarily add value. Having 'due regard' may be a better starting point for such competence to build over time.

Question 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)***

121. Answer – see final concluding comments on this question. We agree that there should be a process for post-implementation review and believe that the suggested independent body could have a role in this. But there are challenges in making this effective. As with IAs, it may be difficult to assess the impact/effectiveness of legislation objectively. The sheer volume of existing regulation makes it difficult to do a comprehensive review, whilst limiting to legislation that specifically provides for review will inevitably mean that there are gaps in the process.
122. Reviews should take place at appropriate intervals depending on the nature of the legislation in question (and not necessarily tied to parliamentary terms, although review after 5 years seems a reasonable period in general). We agree that consideration should be given early on as to how effectiveness will be measured in future and that one of the main objectives should be to gain insights and learn lessons to be applied in future regulatory initiatives.
123. Following the comments in the preceding question we would tend towards route (a) supported by an element of (c) which can build competence and understanding of these areas over a period of time.

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

124. No, because this depends on what is intended to be reviewed and also the actions that might be possible on the back of that review. The PIR is focused around different elements of legislation, and how the government policy has been achieved through the mechanisms provided under that legislation. The outcomes from those reviews and the legislative needs to address them and therefore the remedies may take time to work through and achieve change.

125. The impacts of new rules/legislation both in terms of adverse impact and benefits are difficult to identify within a period of 2 years. Typically it can take a year for organisations and the regulators to get familiar with those rules and a further year to build a methodology around them. The impacts themselves are not like to emerge till after this period. We would therefore tend to support the retention of the 5-year period.
126. However, as we have identified above, some regulatory issues lie not with the legislation but with those charged to interpret and expedite it. We have referred in Q17 above to reviews of the regulatory bodies themselves, and these reviews might be developed to consider the *Principles of Good Regulation* as part of the review remit and their application to all relevant regulatory bodies.

Question 27: If no, what would you suggest instead?

127. We believe that review should be done by an independent body having wide powers to monitor implementation and success of good regulation initiatives on a continuous basis. It should have duties to identify and help deal with shortcomings in regulation, perhaps with power to refer to Parliament for remedy through a fast-track system.
128. We refer to a 'new body' but this is not intended to preclude the possibility that an existing body could be adapted to serve the purpose. Any such body would need to interact with other relevant bodies and the various relationships involved would require careful consideration.
129. This suggestion should not be taken as a criticism of any existing bodies, each of which can only perform the role that is assigned to it. As noted in our opening remarks, the UK is a good place in which to do business and we do have mechanisms for regulatory oversight already, including the Better Regulation Executive, the Regulatory Policy Committee and the National Audit Office. The Civil Service also does a huge amount of work in considering policy proposals and how they might be implemented and does consult on them, typically providing a good deal of background information and outlining different perspectives. The Law Commission is empowered to explore ways in which law might be improved and consults widely before making recommendations. ICAEW has actively engaged in many of these initiatives and related working groups over many years and we do not underestimate the efforts government and others take to create a good regulatory framework for UK business and wider society.
130. In our view, some of the current processes (Impact Assessments and reviews etc) need to be substantially changed or replaced, rather than tweaked. A more holistic approach is needed that ensures the *Principles of Good Regulation* are considered as early in the process as possible (ideally before a policy decision is taken in case the policy might give rise to significant concerns regarding implementation). Any legislative proposal should be supported by an explanation of the expected outcomes and measures of its success should include assessment of the outcomes achieved.
131. Regulators should be assessed by reference to their adherence to the proposed new framework for good regulation (as well as to other relevant measures such as achieving desired outcomes). This should include the principle of proportionality including proportionate enforcement.
132. We believe that the body referred to above should monitor these processes and have power to influence the regulatory making process, for instance the body might make recommendations to Parliament to take action.
133. There are challenges in holding regulators to account. Parliament will always have the power to abolish one regulator and create a new one in its place, but this is a blunt instrument; Parliament could require the regulator to amend its rules, but this may increase regulatory churn and would not of itself improve the regulator. Public criticism of a regulator might undermine its authority. Despite the challenges, if regulators are to be given more power, they must be subject to disciplines that apply in other walks of life.
134. The proposed body should be independent of government because it would be a tool for helping Parliament to assess government's record on better regulation.

135. It should also be independent of any regulators within its ambit. Some regulators are powerful and may not welcome criticism of their rules (or conduct) by those they regulate; the regulated may be reticent to raise concerns about their regulator's performance with the regulator itself (even where there is a right to appeal against a decision or sanction of a regulator).
136. Those impacted by relevant legislation or regulations should be able to refer concerns to the independent body. The process should include the publication of reports so that it forms part of the democratic process. Issues of confidentiality etc would need to be considered.
137. The body would need to be well resourced and given appropriate profile within the public sector hierarchy if it is to be effective.

Question 28: Which of the options described in paragraph 3.4.10 would ensure a robust and effective framework for scrutinising regulatory proposals?

a. Option 1

b. Option 2

c. Option 3

d. Other (please explain)

138. Option 3, but see comments below. For ease of reference, we copy the options below:

> Option 1: ADJUST Minor changes to the current metric, such as including indirect costs and benefits, splitting policy and admin costs, using an updated 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 the Requires changes to legislation. Reforming the Framework for Better Regulation 35 Brief description of option Pros Cons 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 a simple scoreboard type approach.

139. There needs to be a step back here before addressing this question. The paper outlines the current governance and methodology, but the question effectively only addresses the governance. The current scrutiny process is limited to certain criteria and actors, and therefore unless large sums of money are involved (£5m+) and there are individuals with the vires and know-how to launch a challenge, there is very little scrutiny applied across a lot of regulation in the UK.
140. The current RPC set-up has a role on determining macro-economic decision making, but for regulators closer to the coal face with micro-economic factors, this is not accessible. As noted above, the relationship between any independent body charged with promoting good regulation and the RPC (or other bodies) will require consideration..
141. We believe that replacement is required, but assessment of good regulation should not depend upon government priorities at any given time. We believe that the process should be under control of an independent body accountable to Parliament as referred to above.
142. We believe that the process should be strengthened and agree that lessons learned should be applied on a continuous basis from one parliament to the next.
143. Models also need to capture non-business consequences. For example, we have received feedback from members that the sheer stress of complying with additional legislation may cause individuals either to close their business or not start in the first place. Workload stress caused by legislation is a reportedly a significant disincentive for people to start in business. However, the socio- economic impacts of these knock-on effects of legislation are hardly ever considered although the ramifications upon the public can be significant.

4.6. Measuring the impact of regulation

Question 29: Which of the four options presented under paragraph 3.5.4 would be better to achieve the objective of striking a balance between economic growth and public protections?

- ***a. Adjust***
- ***b. Change***
- ***c. Replace***
- ***d. Remove***
- ***e. Other (please explain)***

144. Answer – b. We believe that change is required. There needs to be some way of measuring impact. It should assess the success of the regulation in achieving its objectives (which should be identified before the legislation is proposed). Some kind of scorecard approach is likely to be required, albeit using more qualitative criteria than is currently the case (see also Q21 above). Whatever, we believe that an independent body should make the assessment and that body should help determine what is assessed and how.
145. By definition, a BIT focuses on business, but as noted in the consultation (and above) there are wider impacts to be considered. We do not think that BIT is a good metric to use. The standard costing method for impact assessment within HMRC is no better. The key observation that we have picked up from the analysis of the options and their pros and cons is that the NPV is not a complete metric. There are variable factors that need to be taken into account in setting regulation, including behavioural responses, where monetisation is not possible.
146. We believe that producing the BIT score is a near futile exercise; the outcomes are likely to be meaningless to average citizen and the score does not seem to be used by political parties in democratic process (eg, no requirement to include in manifestos). It does not, therefore, hold anyone to account for making poor regulation or reward them for better regulation.
    - Reports are made by government (so it is marking its own homework)
    - The timescale by reference to life of a parliament is arbitrary – good regulation needs to be embedded in our culture, across party lines
    - We share concerns noted in the consultation (the process does not cover devolved government, or non-legislative measures, various exemptions weaken it including £5 million de-minimis)
    - The direct cost method of calculating BIT is too narrow etc (as noted by National Audit Office)
    - Measuring what is easily measurable (direct costs and benefits) is of limited value but attributing more subjective values of costs or benefits (eg, to society) is inexact
    - If a report is of little value, the frequency scarcely matters.

4.7. Regulatory offsetting: One-in, X-out

Question 30: Should the One-in, X-out approach be reintroduced in the UK?

147. No. We do not think One -in, X-out (OIXO) is the best way forward.
148. If regulation is not needed, it should be withdrawn; if it is needed, then it is needed. There is no logical need to wait for a trade-off.
149. Also, our limited experience of the process did not instil confidence. It was time consuming (need to consider, consult etc), the drafting of legislation was sometimes tortuous, and the process seems capable of being gamed or producing more complex regulation (so defeating the object).
150. OIXO only works if all impacts can be monetised. But even then it does not always work, since social impact can outweigh cost considerations.

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

151. The advantage of the approach is that it did require regulators to go back and evaluate historic regulation to see if it was still relevant or could be better positioned in the light of subsequent development.

152. There are other ways this might be achieved. For instance it would be helpful to have a permanent and well publicised route for anyone to raise concerns about unnecessary or poor regulation so that concerns can be assessed at any time and steps taken to address them if appropriate. The new body we suggest could play a role in this. Sunset clauses area also designed to ensure that legislation is reviewed periodically (see also Q35 on sunset clauses). If all legislation were to be reviewed as seems to be proposed [Q33], it would be possible to identify legislation that merits further review. While this would be a major exercise, it might be worth doing every 20 years or so, and each review could build on the work of the previous one; we would be laying a foundation for good regulation for future generations.

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

153. See Q31 above.

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

a. Very important

b. Somewhat important

c. Somewhat unimportant

d. Not very important

154. Answer – a, in the sense that we agree that reform should be implemented as widely as practical.

155. A very extensive review of legislation will be needed if we are to get rid of dead wood and identify areas of poor regulation that should be replaced (eg, by regulations made by regulators rather than Parliament) or amended (to make simpler etc).

156. If this could be done in two years, that would be a spectacular achievement and well worth doing. Each piece of legislation could be marked against defined criteria, including for adherence to the *Principles of Good Regulation* with a recommendation as to next steps to improve it. Even if it took twice as long, this could be a worthwhile endeavour.

157. That said, we struggle to see how the cumulative impact of legislation could be costed/assessed in a meaningful way (though we have not looked at the exercises done elsewhere). Also, some industries like nuclear power, medicine or aviation are necessarily heavily regulated, but are potentially more valuable to the economy than less regulated spheres – the 'value' may be even harder to assess than the cost.

Question 34: How best can One-in, X-out be delivered?

158. As we do not support this approach, we do not believe that it should be delivered.

4.8. Further comments

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

International considerations

159. The paper refers to aspects of international regulatory co-operation (paragraph 1.8) and the Forward refers to a Sovereign approach. We believe that international considerations are important, including in relation to the following three areas.

Learning from experience

160. We believe that a more extensive review of the regulatory approach in selected jurisdictions would be useful so that we can benefit from lessons learned elsewhere (good or bad). This means that government should establish a process for documenting regulatory successes and failures in the rest of the world, and we suggest especially in Europe, US, Australia and Canada.

161. Our own experience of participating in the EU should be considered not only in terms critical of the EU but also whether there are useful things we can learn about ourselves from the experience or any positive aspects of the EU approach. For instance, were we sufficiently robust in arguing against regulation for regulation's sake and were the frequent suggestions that the UK gold plated EU regulation justified? If we are going to assess success of legislation or regulation on the basis of outcomes, do the desired outcomes need to be stated in legislation/regulation (along the lines of preambles to EU regulation) or does this increase scope for regulatory dispute?

Influencing global regulatory initiatives

162. The UK will continue to participate in various international initiatives so it may ultimately need to incorporate rules or principles into law that are not entirely of its own making. It is therefore important that it seeks to promulgate the *Principles of Good Regulation* in every relevant forum and retains power to implement in an appropriate way.

163. It will be easier for us to do this if our own regulatory regime has been proven to be successful; it is possible that an independent body created for the purpose of promoting good regulation along the lines we suggest could become a respected voice on the international stage. Good use will need to be made of the mechanisms for regulatory cooperation established in economic cooperation agreements – including the UK-EU Trade and Cooperation Agreement. We have yet to see how this will operate. Having a robust domestic framework for regulatory accountability could strengthen the UK's hand in these fora.

Trade and equivalence

164. As regards international trade, 'equivalence' provisions on regulation will require careful consideration, eg, if our trading partners have what we consider to be poor regulation (whether over-regulation or under-regulation).

165. Businesses may be impacted by a variety of foreign rules and regulation and it can be difficult to keep on top of them all. There will inevitably be differences between approaches and, in some cases, conflicts that make compliance with all of them difficult. Government and regulators should consider how they might best assist business in this respect.

Enforcement

166. The *Principles of Good Regulation* require those responsible to consider how the regulations will be enforced and breaches sanctioned, but:

- it is not always sufficiently clear what body, if any, is responsible for enforcement;
- some regulations appear rarely, if ever, to have had sanctions applied;
- it is not clear that a consistent approach on sanctions is applied across all legislation/regulation.

167. We would welcome more information on the relationship between regulation and enforcement, particularly to identify laws and regulations that have never been enforced.

168. Legal challenges to sanctions imposed by regulators can be time consuming and expensive for all involved and regulators may produce long and prescriptive rules to minimise the risk of challenge. Government might consider whether making regulatory appeals easier could help address this.

169. Lack of enforcement (or lack of a body responsible for enforcement) may be indicative of unnecessary regulation or flawed regulation (eg, drafting makes enforcement outcomes uncertain). Any argument that an unenforced law has succeeded because it has deterred the relevant activity would need to be substantiated.

170. We note that:

> 'The Government remains committed to avoiding the proliferation of unnecessary criminal offences and making greater use of civil sanctions for regulatory enforcement, in line with the Macrory principles of regulatory enforcement.'

We would like to see independent assessment of whether this commitment has been met.

171. The Macrory recommendations include the following, all of which we believe should be taken into account when legislation or regulation is proposed (or reviewed):

- Be proportionate to the nature of the offence and harm caused
- Measure outcomes not just outputs
- Enforce in a transparent manner; and
- Justify choice of enforcement actions to stakeholders, Ministers and Parliament.

But this is not how regulators always operate in practice and fear of disproportionate enforcement may result in disproportionate effort being required to comply with regulation including regulation that does not adhere to the principle of transparency (eg, is not clearly drafted). This can be at the expense of effort that might otherwise be directed towards more productive endeavour.

172. Some regulators that have extensive power to make regulations (albeit within limits set by Parliament), are required to implement those regulations and are responsible for enforcing them. Parliament should maintain oversight so that the legitimate interests of those being regulated (as well as those intended to benefit from the regulation) are safeguarded. Rights of appeal to judicial bodies should also be provided where appropriate, in the interests of natural justice.

173. In general, regulators' rule-making function should be separate from their function to inspect those they regulate and their enforcement role, at least operationally. Rule-makers may not have an objective view of their rules in the way that, say, a court might. The regulated may be nervous, too, of disagreeing with a dual rule-making and enforcing body when replying to rule-making consultations; an open and honest consultation may not result.

174. Public interest may dictate that the enforcement side of the regulatory process is very public. It acts as means of deterrent, but also assures the public that poor compliance will be addressed. The approach though has to be balanced. The regulator has a responsibility under the *Principles of Good Regulation* to educate as best as possible the regulated community, and the consumers it serves, as to the reasoning for the regulations and the best ways to meet them. Enforcement then is a back up to reinforce those messages. We believe that regulators should seek to be improvement regulators of this kind.

175. However, where there are serious public ramifications from a breach, the tendency is for the regulator under government pressure to step up the enforcement messages as these are more immediate and create the better headlines to assuage public opinion. This concentration on enforcement, in our view is generally counter-productive to outcomes sought under the original rules and moves towards prescription. It is easier to legally enforce against a set of fixed outputs rather than a theoretical outcome such as public interest.

176. The prescription and the legal consequences - not just of cost but of business reputation, serve to inhibit innovation, reduce competition as would be suppliers exit the market or encounter increasing barriers to entering it, and prevent an open and immediate discussion on causation and remedy. The work undertaken by the International Network for the Delivery of Regulation, sponsored by BEIS in 2017, indicates that best practice is moving towards a collaborative and ethical basis for regulation rather than one operating under strict enforcement measures, drawing in particular on experiences in the aircraft industry where failures are more openly discussed and addressed. We believe that government should take the opportunity arising from this consultation exercise to leverage more of the findings of that working group and develop the *Principles of Good Regulation* around them.

Understandable and accessible regulation (transparency)

177. Drafting regulation presents many challenges. Regulations often concern technical and complex matters. Restrictions that are broadly drawn may be unduly restrictive so detail is often required. However, we believe that drafting is frequently more complex than it should be.

178. The drafting guidance of the Office of Parliamentary Counsel suggests drafters should:

> '1.1.1 Take readers by the hand and lead them through the story you have to tell. Imagine that you are trying to explain something orally to interested listeners. Where would you start? What will they want to know first?
>
> 1.1.2 It may help to give readers an overview of the whole story at the outset, so that they can understand each part in the light of the whole. Readers are more likely to understand something if they know why you are telling them.'

179. We agree with this, and believe that, in essence, it should be universally applied. We are not convinced that parliamentary drafting should be adopted generally, but regulation should always be well written. It should be possible to provide short and simple guidance to regulators on this subject.

180. The way in which legislation is published can be problematic. For instance, the government provided site does not show up-to-date consolidated texts and links to secondary legislation are cumbersome. It does not appear to include in readily accessible form EU Regulations (as opposed to Directives) that remain part of UK retained EU law.

181. We fully endorse proposals mentioned in the consultation that might address this, ie, make it easier to find the laws that bind us, but believe it is symptomatic of wider issues, eg, constant change and inherent complexity (one law referring to another etc).

182. If regulators are to be given a larger role in the regulatory regime, this may exacerbate the difficulties unless the process is carefully controlled and managed, eg, so that there are clear links between any legislation and the regulation made under it by regulators.

Small businesses (proportionality, targeting)

183. Our members who work in or support small businesses frequently tell us that the burdens of regulation impact small businesses disproportionately. Owners or senior executives often have to do the compliance work themselves - they do not have 'compliance departments' to support them - and costs of professional advice weigh heavily. Areas cited to us in this context include data protection, consumer protection and aspects of employment law. In some areas of law, it can be difficult for small businesses to find reliable publicly available guidance to help with compliance.

184. We believe that similar considerations apply to professional services firms in law and accountancy.

185. Government policies to put small business first and minimise regulatory burdens on them do not appear to have worked. The implications of this are potentially far reaching because small businesses may become less able to compete with the larger ones and pressure for small businesses to merge may grow (increasing the number of large businesses at the expense of diversity). While this is not necessarily a bad thing in itself, it does not seem right that it should be driven by the need to achieve economies of scale in regulatory compliance and a reduction in the number of participants in any part of the economy may reduce competition.

186. Excluding small businesses from aspects of some regulation may be a partial answer, but it can add to complication in the regulatory framework as different 'size' thresholds proliferate. If 'big business' needs to have compliance departments to understand and apply UK regulation, that is itself a problem which simply excluding small businesses does not address.

187. In the context of professional services, disproportionate regulation can drive those supplying the market outside the scope of that regulation through exiting regulated membership bodies (that afford consumer redress across a wide range of activities) or exiting the market

altogether, notably where the activity is reserved. Conversely those considering entering the market are dissuaded from doing so and the combination of both is to shrink the market and dilute competition. By way of illustration in audit the number of firms regulated by ICAEW has reduced in the ten years since 2010 by 35% to 2561, and the number of sole practitioners offering those services by 50% to 929.

Joined up government (consistency principle)

188. Government policy and resulting laws do not always appear to be 'joined up' (a measure introduced in one area may not anticipate impacts in other areas) and government often does not seem to be good at anticipating the consequences of its legislation. The Ministerial Forward to the consultation stresses the need for regulation to support growth and innovation, but sometimes regulation actively obstructs this. Proper accountability to a robust good regulation framework could help counter this.
189. Regulatory consultations often invite comment about unintended consequences, but it is not clear that concerns that raised have always been adequately considered (see below on consultation timeframes regarding consultation processes).
190. Regulators have (or should have) defined areas of responsibility. If their powers are increased, there is a risk that the law becomes more siloed, so that the impact of regulation in one area does not properly take account of impacts in others. Their respective areas of responsibility may also overlap. Regulators should be responsible for considering overall governmental policy and the public interest more generally and ensure that their actions do not conflict with those. This will require better liaison between regulators and between regulators and central government.
191. We note that this consultation does not cover Financial Services where a review is ongoing. That review should not pre-empt the outcomes of this wider review. *The Better Regulation Framework* excludes taxation (which has its own framework). We believe that initiatives to improve law and regulation should be coordinated. The message is diluted if various government departments (and regulators) seek to plough their own furrow.

Consultation timeframes (transparency principle)

192. A minimum 12-week consultation period should generally apply to public consultations, but this is frequently disregarded without satisfactory reason or explanation. There is some irony in the fact that this consultation too allows less than 12 weeks during (as is often the case) a holiday season.
193. Periods longer than 12 weeks can be helpful, particularly where views of organisations that reflect views of their members or other stakeholders are valued, as it will take time for those organisations to gather and consider those views (in effect, reducing the work that government would otherwise have to do). Where there is no obvious urgency for immediate legislation, the wider and more considered the view that government can collect, the better any resulting legislation is likely to be.
194. The fact that Parliament operates to its own somewhat esoteric timetable is not a good reason to impose short deadlines on business and the wider public who are providing their help and expertise on a voluntary basis.
195. We understand that government can also criticised for being slow to bring about changes in law that are widely perceived to be necessary or seeking to use the opportunity to have their say on a matter that affects them. In addition to formal consultations, we support initiatives that foster ongoing consultation and co-operation in working groups or bodies who share an objective helping government apply the *Principles of Good Regulation*. There have been many of these and ICAEW is a willing participant. They can help government act quickly when necessary and also help ensure that stakeholders are involved in a timely way.

Sunset clauses

196. Sunset clauses can be useful in certain circumstances, eg, where the regulation is, in effect, experimental or potential impacts are too difficult to assess or quantify. More generally, they

are a mechanism to ensure that relevant legislation is reviewed (without the need for a One in X out process) and could be applied more generally as part of a process to ensure continuous legislative review.

197. If they are to be widely used, it will be necessary to monitor how often the sun is allowed to set, or whether there is a tendency for government to maintain the status quo by extending the life of the legislation.

198. We do not believe use of sunset clauses to reserve right to introduce secondary legislation by a certain fixed time in the future is generally conducive to better regulation. It may encourage regulators to propose legislation simply because if they do not, the convenient opportunity will be lost (exposing them to potential public criticism). It also means that the secondary legislation will need to be made within the parameters set by the primary legislation, but Parliament will not have considered all the matters that might be pertinent (because it plans to kick the can down the road). Parliament can always legislate and does not need to reserve a right to do so in future.

Funding regulators and value for money

199. As Parliament is, rightly, concerned about the cost of regulation, it is essential that government consider the potential cost impact of increasing powers of regulators to make regulation. It is not necessarily the case that this will be a more cost-effective route (eg, than relying upon courts or government resource that might otherwise be involved).

200. It is important that regulators are sufficiently well funded to recruit and retain staff with appropriate levels of competence and experience. Such skills enable them to arrive at judgements and conclusions which ensure that *Principles of Good Regulation* are applied and resonate with the commercial and human behavioural aspects of the area under regulation. In particular, the skills involve asking people engaged in a particular industry with several years' experience to change their approach or behaviour to meet a regulatory outcome. This involves developed interpersonal skills and requires individuals carrying our regulatory roles to have a good insight into the industry and human behaviour. If a regulator is unable to attract these sorts of individual, there may be a risk that it will tend towards regulation by output (a tick box approach) rather than regulation by outcomes, because this may be a an easier, less demanding, approach. This in turn impedes both innovation and competition.

201. A commercial rate needs to be paid to these individuals, eg, in order to recruit them out of industry or other similar roles and this can be expensive and not linked to rates that might apply in, for instance, the civil service.

202. Parliament will also need to monitor and control the costs of regulators and assess whether they provide good value for money. In assessing whether a regulator is providing value for money, various aspects of its performance need to be assessed. This may be difficult to measure using only pre-set criteria and the views of all impacted, including the regulated, should be taken into account. It is not clear to us that the processes currently in place are sufficiently robust for this purpose and it may be that the independent body we propose could have a role to play here.

203. One measure that a regulator has been successful in making clear and effective regulation might be that the need for its activity reduces over time, so that there should be no assumption that the cost of any given regulator should remain the same or increase, potentially the opposite.

204. It is important for Parliament, which is ultimately responsible for the system of regulation, to be provided with the total costs of regulation including not only public funds voted as 'supply' but also those raised under levy powers that it has granted. Such levy funding will ultimately be passed on to the consumers of the regulated product or service, a fact that should not be overlooked.

Tax legislation and HMRC

205. We note that HMRC is not intended to be covered by the better regulation initiatives (and is not a regulator). However, we believe it should also apply the *Principles of Good Regulation*, not least because our tax code is over-long and complicated and needs improvement as the current process have not worked well.
206. Application of the *Principles* to HMRC would need to take account of its unique role and we do not under-estimate the time and care that would be required to cater for that, but it is difficult to see why it should be exempt from generally applicable good practice, eg, avoiding unintended consequences and making clear rules that intended users can easily understand.

Regulation and Digitalisation

207. We are not convinced that digitalisation projects will serve the purposes outlined in the paper (eg, para 1.9 of the consultation document) of ultimately eliminating bureaucracy and reducing the burden of regulation.
208. Making tax digital, for example, has added to the burdens of business. The digitalisation programme does not of itself change the regulations (which in the case of tax rules are hugely over-complex).
209. We understand the attractions to government of regulators 'opening up data to facilitate business innovation' (para1.11). However, this is a complex issue where interests of various stakeholders need to be considered. As a general principle, regulators are given data for relevant regulatory purposes, not to sell or otherwise share for some undefined purpose. Where underlying data belongs to individuals or businesses it should not be viewed by government or regulators as something that they can share without controls (eg, informed consent). We note that government has recently launched a consultation on reform of data protection law.
210. All UK primary and secondary legislation (and case judgments) should be available in easily readable form and, ideally, linked to relevant guidance to make a coherent whole. The current government provided on-line sites are a start, but we believe they need refinement and that more resource should be applied to this if necessary.
211. The Open Regulation Platform (para 1.10) may help, but it would not be able to overcome any inherent failings in the legislation or provide definitive guidance on any aspect of law which is capable of different interpretations or apply the law to every possible circumstance.

Constitutional issues

212. The consultation does not invite comments on the UK's constitution, and we do not comment in detail or make any suggestions for change. However, such matters might arise in a holistic review of our regulatory regime. For instance, one alternative to devolving more power to regulators would be for Parliament to exercise a greater level of scrutiny of secondary legislation than it currently does. Unless the volume of secondary legislation could be materially reduced this would not be practicable under current Parliamentary practices, but it is reasonable to ask whether current practices could be changed.

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