

Re-engineering Regulation Project



Introductory Scoping Paper

Stephen Booth

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Lord Sedwill KCMG FRGS is the Chair of the Re-engineering Regulation Project. He is Chairman of the Atlantic Futures Forum and Chairman of the G7 Panel on Global Economic Resilience. He was Cabinet Secretary & Head of the Civil Service (2018-20), National Security Adviser (2017-20), Permanent Secretary at the Home Office (2013-17), and HM Ambassador and NATO Representative in Afghanistan (2009-11). Before that he had a diplomatic and security career serving in Egypt, Syria, Jordan, Cyprus and Pakistan. He was also CEO of UKvisas (2005-08).

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Sir John Armitt CBE is Chairman of the National Infrastructure Commission and National Express Group. He is also on the Board of the Berkeley Group and Expo 2020. He is a former Chair of the City & Guilds and he was Chairman of the Olympic Delivery Authority, the body which built the venues, facilities and infrastructure for the 2012 Olympic Games. He was Chairman of the Engineering and Physical Sciences Research Council from 2007 until 2012.

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Lord Bilimoria CBE DL is President of the CBI, the founder of Cobra Beer, Chairman of the Cobra Beer Partnership Limited, a Joint Venture with Molson Coors, and Chairman of Molson Coors Cobra India. He is the Founding Chairman of the UK India Business Council, a Deputy Lieutenant of Greater London, a former Chancellor of Thames Valley University (now the University of West London). In 2008, he was awarded the Pravasi Bharti Samman by the President of India. In July 2014, he was installed as the seventh Chancellor of the University of Birmingham, making him the first Indian-born Chancellor of a Russell Group University in Great Britain. He is an Honorary Fellow of Sidney Sussex College Cambridge and was Chair of the Advisory Board of the Judge Business School, Cambridge University from 2015-2020 and subsequently appointed as an Honorary Ambassador.

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Dame Patricia Hodgson DBE is Deputy Chair of Policy Exchange. She is a Member of the Science & Technological Facilities Research Council (UKRI) and the UK's AI Council. She was previously Chair of Ofcom, Principal of Newnham College, Cambridge, Non-Executive Director of The Competition Commission, a Member of the Higher Education Funding Council for England and chaired the Higher Education Regulation Review Group. In 2021 she chaired Policy Exchange's Reform of Government Commission. Patricia's executive career was in broadcasting. She was a main board director of the BBC and Chief Executive of the Independent Television Commission.

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Barnaby Lenon CBE, Professor and Dean of Education at University

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Barnaby Lenon CBE is Professor and Dean of Education at University of Buckingham. He previously taught at Eton for 12 years, was the deputy head of Highgate School, head of Trinity School Croydon and head of Harrow for 12 years. He then helped establish the London Academy of Excellence in East London, one of the most successful state sixth form Academies, where he was chairman of governors. He is chairman of the Independent Schools Council (ISC) and has been a governor of 23 state and independent schools and a board member of Ofqual.

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Sir Mark Rowley QPM retired from policing in 2018 and has since taken on new leadership challenges, with a continuing focus on secure and thriving communities, including on the Academic Advisory Panel of Policy Exchange's Liveable London Unit. From 2011, he was the Assistant Commissioner for Specialist Operations of the Metropolitan Police Service and National Lead for Counter Terrorism Policing (2014-18). He was previously Chief Constable of Surrey Police (2009-2011), and served as Acting Deputy Commissioner of the Metropolitan Police between February 2017 and April 2017.

William Salomon, Senior Partner of Hansa Capital Partners LLP.

William Salomon is a Director of Hansa Investment Company Limited, Trustee of Policy Exchange, Senior Partner of Hansa Capital Partners LLP, Deputy Chairman of Ocean Wilsons Holdings Limited and Director of its listed subsidiary, Wilson Sons Holdings Brazil S.A.. He was Chairman of Rea Brothers, a merchant bank, and responsible for developing Finsbury Asset Management and the Finsbury range of funds based on the concept of early recognition of key investment trends, such as life sciences and technology, and appointing specialist managers. He is President of the charity Young Enterprise.

Sir Paul Tucker, former Deputy Governor of Bank of England.

Sir Paul Tucker is a fellow at Harvard Kennedy School, and author of *Unelected Power* (Princeton University Press, 2018). Previously, he was Deputy Governor at the Bank of England, sitting on its monetary policy, financial stability, and prudential policy committees. He was a member of the steering committee of the G20 Financial Stability Board, chairing its Committee on the Resolution of Cross-Border Banks, and Basel's Committee on Market Infrastructure (as it is now known). Subsequently, he chaired the Systemic Risk Council from 2016 to mid-2021. His new book, *Global Discord*, is due out next year.

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Rt Hon Lord Udney-Lister Kt PC served as Senior Strategic Adviser to the Prime Minister from July 2019 to November 2020. Before this, he was Chairman of Homes England, Chief of Staff to the Mayor of London and Deputy Mayor for Policy and Planning at City Hall and Leader of Wandsworth Council. He also served as a Non-Executive Director at the Foreign & Commonwealth Office from April 2017 until July 2019.

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Mark Yallop is Chairman of the FICC Markets Standards Board, and a former external member of the Bank of England's Prudential Regulation Committee. He was UK Group CEO for UBS from 2013-14 and Group COO for ICAP plc from 2005 to 2011. He spent 20 years at Deutsche Bank from 1984-2004 where he was instrumental in building their investment banking business and served as Group COO from 2002-04. He has been a member of numerous financial services industry bodies.

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Introduction

Almost all commentary on regulation since the Brexit referendum has been about deregulation. Many favour a post-Brexit bonfire of controls and bureaucracy. Many have also contended for a long time that the UK's problems stem from its officials gold-plating EU rules. On the other side of the divide, trade unions, environmental groups and consumer lobbies have defended existing regulatory regimes against a lowering of standards and protections.

Is this highly polarised debate the right one to have? Is there not an argument for suggesting that the discussion which really needs to take place is about what kind of regulation currently exists in this country? Moreover, *what and who*, exactly, is being regulated? Is regulation fulfilling its intended purpose and what are the *unintended* consequences of regulation? How does the UK's regulatory system adapt to and adopt the rapid technological change that is underway? How should the UK respond to the growing international regulatory competition between the United States, China, and the European Union, and what are the opportunities of greater international regulatory cooperation?

About the project

Policy Exchange's *Re-engineering Regulation* project is approaching these questions from the perspective of a "Third Way". The objective is not to reduce regulatory protections but to reduce the administrative burden of regulatory compliance and make regulations and regulatory systems more efficient, more effective, and more user friendly for the organisations and individuals who must put them into practice.

The project will address the following overlapping issues:

1. The rise of the regulatory state and how to ensure accountability, transparency, and scrutiny
2. Lessons from previous attempts to achieve "Better Regulation"
3. Regulation of the public sector
4. Regulating post-Brexit
5. The challenge and opportunities of technological innovation
6. The international dimension of regulation

The project will undertake research and gather evidence through interviews, surveys and offer a public forum to raise issues and provide examples of how regulation can be improved across a variety of sectors: from small businesses, professional and financial services to the NHS, policing and teaching. We will make recommendations intended to improve how regulations are created, implemented, and reviewed so that all those involved in the process, especially those creating and enforcing regulations, are part of a system that is transparent, accountable, and dynamically self-cleansing.

The Re-engineering Project will build on previous Policy Exchange work, including the findings from the Policy Exchange Reform of Government Commission, *Government Reimagined*¹, and the Britain in the World Unit's recent report, *Post-Brexit freedoms and opportunities for the UK*².

Context

Regulation is difficult to define but – along with taxation and public spending – is increasingly one of the primary instruments by which the state interacts with and exerts authority over its citizens. It affects all areas of life, from business and the delivery of public services to the advancement of societal and environmental objectives. Regulation arises from legislation or, in the case of self-regulation, can be a substitute for it. Regulation is often necessary to provide an effective framework for business, consumers, the public sector, and wider society. Good regulation drives competition and innovation and too little regulation can lead to poor services, harm, or injury.

However, regulation inevitably imposes financial and other costs. Regulators must be funded by government or the sectors they regulate, but by far the biggest costs – economic or otherwise – are the obligations imposed on regulated entities to change their behaviour and to demonstrate compliance with the rules. Costs to businesses are ultimately passed on to consumers and unproductive red tape reduces the resources available to deliver public services. Poorly designed or implemented regulations can stifle competition, growth, and impose significant burdens on individual professionals in the private and public sector, negatively impacting wellbeing and job satisfaction. Therefore, the beneficiaries of an improved regulatory system would not just be businesses and wider society but the many professional workers and individuals in the private and public sector whose daily lives are negatively affected by poor implementation of regulation.

Recurrent “wars” on red tape, “bonfires” of quangos and pledges to roll back the “nanny” state illustrate that there is a constant tension between governments’ impulse to regulate and an acknowledgement that regulation places costs on organisations and limits the freedom of individuals and their capacity to exercise judgment. Over the last two decades, successive governments have adopted an evolving programme of regulatory reform under the banner of “Better Regulation” but there are growing question marks against whether the current approach has reached the limits of its

1. <https://policyexchange.org.uk/wp-content/uploads/Government-Reimagined.pdf>

2. <https://policyexchange.org.uk/wp-content/uploads/Post-Brexit-freedoms-and-opportunities-for-the-UK.pdf>

effectiveness or provides the transparency and accountability it is designed to. The current government has placed important aspects of the UK's Better Regulation regime under review.

Hitherto, the debate has largely focused on the burdens imposed on the private sector – and their necessity or otherwise. There is, however, a real case for suggesting that far greater scrutiny should be applied to the burdens on the public sector – which can, for example, take frontline staff away from patient care, policing or the blackboard.

Meanwhile, there are many factors that are changing the UK regulatory landscape, which call for a modernising regulatory agenda. Brexit has seen large swathes of regulatory power returned to the UK, offering the choice to diverge from EU rules in the future and raising questions about how these powers should be wielded by government, parliament and arms-length or independent regulators. Rapid technological change – the “fourth industrial revolution” – is bringing the challenge of how or if to regulate new sectors and products, as well as presenting the opportunity to harness data and technology to improve existing regulatory systems. Equally, outside the EU, the UK is now an independent voice in the world of international “regulatory diplomacy”, where the US, China, and EU are increasingly in competition in setting new standards, particularly in emerging technologies. The data-driven economy and ability for digital technology to span jurisdictions means that international regulatory cooperation is of increasing importance to policymakers.

The following sections of this paper provide a survey of these issues and the questions they pose, which the project will seek to address in future work. This paper provides a historical and theoretical overview, but the future work of the project will seek to address how regulation works in practice, using case studies and short reports looking at particular issues or sectors.

1. The rise of the “regulatory state” – ensuring accountability, transparency, and scrutiny

“Rules matter: they are needed for the rule of law, for the protection of human rights, for democracy, and for social and commercial life. However, rules are always and unavoidably incomplete and indeterminate. . .

. . . Deficiencies in the way institutions and individuals act therefore cannot be remedied just by setting additional requirements, for example by providing more law, more regulation and more accountability; indeed doing so can be counterproductive.

. . . The ways in which rules and standards are embedded and lived in institutional life also demand cultures that can discipline and shape the interpretation and enactment of rules and standards, and provide the means for participants to judge one another’s claims and proposals, and their trustworthiness. Trustworthy cultures that permit, shape and foster good judgement and thereby support the identification of plausible ways of judging situations and feasible proposals for action are required if law and regulation are to work well.”

Baroness O’Neill of Belgrave³

The rise of the “regulatory state”

Regulation is not a new phenomenon. However, towards the end of the 20th Century, profound changes to the organisation of government, the economy and society have resulted in a deeply entrenched and complex regulatory system, described by the academic Michael Moran as the “regulatory state”.⁴

The emergence of the regulatory state is partly a function of the privatisation of the utilities and nationalised industries. These sectors are now subject to the independent, sector-specific ‘economic regulators’ (Ofwat, Ofcom, Ofgem, the Civil Aviation Authority, the Office of Rail and Road, and the Payment Systems Regulator).⁵ These economic regulators typically control prices in markets where ‘natural monopolies’ exist, in order to promote efficiency and fairness for consumers, while providing stability and predictability to enable long-term investment in these vital network industries. These regulators exist in parallel with the Competition and Markets Authority (CMA), which is not an economic regulator but has overall responsibility for the UK’s competition regime.

3. O’Neill, O. (2017), *Accountable Institutions, Trustworthy Cultures*, T.M.C. Asser lecture; https://www.asser.nl/upload/documents/20181119T160555-O'Neill-00_print.pdf

4. Moran, M., (2001), *The Rise of the Regulatory State in Britain*, in *Parliamentary Affairs*, 54, pp19-34.

5. There are also economic regulators where responsibility for some industries has been devolved, in Northern Ireland and Scotland, such as the Northern Ireland Authority for Utility Regulation and Water Industry Commission for Scotland.

Meanwhile, traditionally self-regulated professions, such as accountancy and the financial markets, have come under the oversight of specialised bodies, often with statutory authority, such as the Financial Conduct Authority (FCA).⁶

These developments have coincided with an increase in ‘social’ or cross-cutting regulation. Rather than trying to rectify a particular market failure, which has tended to be addressed by sector-specific regulation and specialised regulators, social regulation is typically applied across the entire economy and is designed to protect the whole population from discrimination and risks. Examples include regulation of health and safety at work, food safety, and environmental protection. This area of regulation has been particularly influenced, although not solely, by the UK’s membership of the EU.

Another development is increased regulation of the public sector and government itself. The public sector is not only subject to the same cross-cutting regulation as the private and voluntary sectors, a growing number of dedicated regulatory bodies and inspectorates oversee the performance of the public sector and the delivery of public services. This has been accompanied by an increasing use of indicators, targets and audits intended to improve standards and provide accountability. Arguably, this makes the public sector more highly regulated than any other.

Throughout this period, government and parliament have increasingly delegated regulatory powers to independent or arms-length bodies, which raises important questions of democratic accountability and legitimacy. There are currently over 90 regulatory bodies in the UK, excluding local authorities. Between them, these regulators had a total expenditure of around £5bn.⁷ Local authorities also play an important role in the regulatory framework by granting licences, conducting inspections, and taking enforcement action.

As might be expected, most regulators regulate businesses but, as the table below illustrates, many also regulate different types of organisations in the voluntary sector, providers of public services and/or individual professionals.

6. Although it has competition and consumer protection functions, the FCA is not classed as an ‘economic regulator’.

7. NAO (2020), *Regulation overview 2019*; <https://www.nao.org.uk/wp-content/uploads/2020/03/Overview-Regulation-2019.pdf>

Who is regulated? (selected regulatory bodies)				
Regulator	Businesses	Not for Profit	Public Service providers	Individuals - Professionals
Care Quality Commission	Y	Y	Y	
Education and Skills Funding Agency	Y	Y	Y	
Environment Agency	Y			
Financial Conduct Authority	Y			Y
Financial Reporting Council	Y			Y
General Medical Council				Y
Health and Safety Executive	Y	Y	Y	Y
Information Commissioner's Office	Y	Y	Y	Y
Insolvency Service	Y			Y
Legal Services Board	Y	Y		Y
Medicines and Healthcare Products Regulatory Agency	Y	Y	Y	Y
Ofqual	Y	Y		
Ofsted			Y	
Pensions Regulator	Y	Y	Y	Y
Security Industry Authority	Y			Y

Adapted from Cabinet Office (2017), Regulatory Futures Review

Clearly, the regulatory state is not a monolith. And, for those advocating or designing reform, it is useful to distinguish between different regulatory functions and regulatory actors.

First, broadly defined, some regulations are fundamentally necessary for any particular type of society to function. In a society such as the UK's case, this includes contract law, some laws of negligence, systems for market stability, competition law, and so on. These building blocks set the overarching framework for the economy and wider society. Other regulations, however, might be considered as choices that reflect the political preferences of the moment. So, while the right level of consumer protection might be the subject of fierce political argument, the principle that contracts should be honoured would not.

Second, there is a huge spectrum of different kinds of regulatory agency, with different functions, and with different degrees of insulation from/closeness to government and day-to-day politics.⁸

In practice, these differences are not always clear-cut but they are useful conceptually because they enable distinctions to be made between reforms that are:

8. See Tucker, P., (2018), *Unelected Power: the quest for legitimacy in central banking and the regulatory state*, Princeton University Press, pp72-90:

- Intended, or likely, to fundamentally alter the underlying systems of the economy and society, such as the decision to privatise industries;
- Intended to change the way that decisions about how the regulatory choices of the moment are made and implemented, such as the use of cost-benefit analysis or the degree of regulator discretion versus legislative prescription;
- And reforms that are intended address either of the above directly but are intended to improve accountability or the efficiency of the regulatory state in general, such as the role of parliament, how regulators are appointed, and so on.

Ensuring effective accountability, transparency, and scrutiny throughout the system

Effective systems of accountability, transparency, and scrutiny are an integral part of the overall design and functioning of the regulatory system. As a 2004 report by the House of Lords Select Committee on the Constitution, *The regulatory state: ensuring its accountability*, argued, “accountability is a control mechanism through which effective regulation is maintained (and endorsed), and failing or ineffective regulation is identified and exposed, and thereby subject to remedy and improvement.”⁹

Accountability, transparency, and scrutiny need to be applied to the various roles that government, parliament and regulators play in designing and operating within the system, which can be summarised as follows:

- Government and parliament are ultimately responsible for whether regulation is needed, and overall design of a good regulatory framework and incorporating it into law, including what powers to delegate to arms-length or independent regulatory bodies.
- Responsibility for developing individual regulations rests with individual departments, and parliament enacts or amends primary legislation and scrutinises secondary legislation.
- Where designated to do so, arms-length or independent regulatory bodies implement and enforce regulation, operating within the powers defined by ministers and parliament or within a framework of statutory objectives approved by parliament. This can include capping prices; issuing licenses, guidance, and rules; monitoring compliance; and imposing sanctions.
- Government is responsible for monitoring and improving regulatory performance within this framework and is accountable to parliament for this. (Successive governments’ efforts to implement “Better Regulation” policies, designed to ensure law making and regulatory enforcement is cost-effective and proportionate, is examined below in **Section 2** of this paper).

9. House of Lords Select Committee on the Constitution (2004), *The regulatory state: ensuring its accountability*, p21.

The role and status of regulators

The role and status of arms-length regulators has not developed systematically. The *Regulatory Futures Review*, undertaken by the Cabinet Office in 2017, noted that “in some cases regulatory activities have been combined with non-regulatory activities” and that the combination of functions delegated to regulators “is often a product of history and convenience as much as logic”.¹⁰

Meanwhile, the administrative status of various regulatory bodies, which have been established as different types of arms-length bodies, is often inconsistent. For example, the National Audit Office (NAO) noted in 2016 that, “the Gambling Commission (DCMS) and the Environment Agency (DEFRA) are executive NDPBs [non-departmental public bodies]; the Veterinary Medicines Directorate (DEFRA) is an executive agency; Ofwat and the Competition and Markets Authority are non-ministerial departments; and Ofcom is a statutory corporation.”¹¹ Similarly, in 2014, the House of Commons Public Accounts Committee noted that:

“The Care Quality Commission (CQC) and Ofsted are both inspectorates. The CQC inspects health and social care services in England, and Ofsted performs a parallel role inspecting children’s services. However the CQC is an NDPB, and Ofsted is a non-ministerial department. The reasons for this difference are not clear. It is also not clear to what extent each is intended to be under the influence of the minister in order to support government policy, or independent of ministerial influence in order that its regulatory functions are not seen as subject to political influence.”¹²

In 2021, Policy Exchange’s Reform of Government Commission concluded that the complexity of the public bodies landscape, which includes regulators and other bodies, “results in a poor public understanding of the role that public bodies play and their relationship to elected politicians” and the focus of reform should be on transparency and accountability.¹³

Regulating the regulators

Arms-length and/or independent regulatory bodies can provide important skills, expertise, and their distance or formal independence from day-to-day politics can allow them to focus on the long-term public interest. For example, the independence of economic regulators is cited as an important factor in providing the certainty to attract private finance to regulated sectors.

However, regulators wield significant power. There is a natural tendency for organisations to seek to cement and increase their power. Groupthink can cause internal rules and behaviour to become resistant to change, innovation or outside views. Equally, there is constant pressure on regulators to introduce further conditions or guidance, particularly after specific or isolated incidents of wrongdoing by industry, which can lead to “regulatory creep”. For example, the *Regulatory Futures Review* highlighted a case of regulatory creep within Ofgem:

10. Cabinet Office (2017), *Regulatory Futures Review*, p17

11. NAO, (2016), *Departments’ oversight of arm’s-length bodies: a comparative study*, p22; <https://www.nao.org.uk/wp-content/uploads/2016/05/Departments-oversight-of-arms-length-bodies-a-comparative-study.pdf>

12. House of Commons Public Accounts Committee (4 November 2014), *Who’s accountable? Relationships between Government and arm’s-length bodies*; <https://publications.parliament.uk/pa/cm201415/cmselect/cm-pubadm/110/11005.htm>

13. Policy Exchange (2021), *Government Reimagined*; <https://policyexchange.org.uk/wp-content/uploads/Government-Reimagined.pdf>

“When energy supply licences were first introduced more than 10 years ago each supplier licence was approximately 160 pages long. A review to get rid of unnecessary and verbose conditions led to a shorter licence of approximately 60 pages. But now the licence is approximately 500 pages long! Approximately 200 of these pages were introduced by Ofgem in response to specific incidents of wrongdoing within the industry such as mis-selling and unauthorised doorstep sales.”¹⁴

It is therefore important that regulators should be accountable to three constituencies: ministers and parliament, regulated entities, and the public.

Ministers and parliament. Regulators are responsible for delivering policy objectives set by government. Therefore, government cannot and should not fully abdicate responsibility for the performance of regulated sectors, even where regulators are independent. In most cases, government has a role in making appointments to regulators’ boards, and sometimes issues guidance which signals government’s priorities and view of how legislation should be interpreted.

Accountability and transparency in the relationship between government and regulators is essential but needs to be weighed against the value of independence. Parliament, particularly via select committees, can also play an important role in providing scrutiny, not only of the regulators themselves but also governments’ relationships with them.

This is particularly important when regulators are set multiple objectives, which inherently require political trade-offs to be made. An NAO report into the operation of Ofwat, Ofgem, Ofcom and the FCA noted that:

“Our recent report on vulnerable consumers found that some measures to promote a competitive market, which reduces prices for consumers who switch to the best deals, can conflict with objectives to protect those in vulnerable circumstances who are less likely to switch and therefore benefit from cheaper prices. It concluded that regulators and government need to be clearer about their respective responsibilities. There are areas where government formally provides direction or strategic steer, for example, introducing legislation requiring regulators to introduce price caps or universal service obligations. However, regulators report that determining how to manage many of these trade-offs remains challenging.”¹⁵

Such difficulties in reconciling competing objectives raises issues of political accountability, particularly if the regulator is formally independent. In 2018, former Deputy Bank of England Governor Paul Tucker argued that, “it is vital that an independent agency is set a clear objective that can be monitored.”¹⁶ He noted that the objectives of the FCA, an independent regulator funded entirely by the firms it regulates, “are ranked equally and vague”. He added:

“...what typically happens is that a securities regulator, or market regulator, will embark on a particular policy and nobody will say anything. Then something will go wrong and the regulator will be told that they weighed their

14. Cabinet Office (2017), *Regulatory Futures Review*, p31

15. NAO (2019), *Regulating to protect consumers in utilities, communications and financial services markets*, p8; <https://www.nao.org.uk/wp-content/uploads/2019/03/Regulating-to-protect-consumers-in-utilities-communications-and-financial-service-markets.pdf>

16. Tucker, P. (12 June 2018), lecture on *Unelected Power: The Quest for Legitimacy in Central Banking & the Regulatory State*; http://paultucker.me/wp-content/uploads/2018/07/Paul-Tucker-Transcript-Unelected-Power_FINAL.pdf

objectives incorrectly: they should have been putting more weight on investor protection relative to promoting market efficiency; more weight on promoting the City relative to investor protection; or whatever. That is fine, it seems to me, as long as you have an agent that is not completely independent, such as one that has to come back every year for its money and so is obliged to be sensitive to the shifting currents of parliamentary opinion about where they should direct their effort.”

Regulated entities. It is important that regulated entities have access to formal mechanisms of appeal against regulatory decisions or enforcement actions, to ensure that regulators make proper use of their coercive power. In the UK, rights to appeal are routinely included in the legislative framework, such as the right to appeal to a court or tribunal. However, these complaints systems are not always effective. For instance, businesses are not always aware of the mechanisms open to them and formal proceedings can be costly, particularly for smaller firms.

Fundamentally, particularly with regard to smaller companies, there is a power imbalance between regulators and those they regulate. Research on why regulated entities may be reluctant to engage with regulators is limited, but interviews and surveys suggest reasons include fears of retribution for raising issues with regulators. This can be compounded because, due to the complexity of rules, regulated parties are concerned they are guilty of some degree of unintentional non-compliance even if it is not the matter at hand.¹⁷ On the other hand, there is also a risk of regulatory capture, since large multinationals or semi-monopoly firms providing a service the public want and need, such as the technology platforms or network infrastructure companies, can be more powerful than the regulator and are likely to have greater influence over regulatory guidance or codes of conduct than smaller firms, which are less likely to be consulted.

Accountability is not just about rights of appeal when something has gone wrong, it should occur at the level of routine interaction. There should be avenues and systems to ensure that regulated entities can make informal complaints or provide feedback on the regulatory framework without fear of retribution. Representative trade bodies can provide a useful convening and intermediary function between regulated entities and their regulator. A 2020 Confederation of British Industry report recently recommended that business be given a greater role in informing the regulatory system:

“Regulators should increase the level of consultation with business, including cohesive engagement with multiple regulators on cross-cutting issues and setting out a minimum standard of consultation ahead of any major regulatory change. Regulators should maintain a clear right of appeal, including clear dispute resolution mechanisms, and opportunities for businesses to raise concerns over the regulatory framework.”¹⁸

Regulators could benefit from engaging more actively in informal conversations with regulated entities, particularly smaller firms, which

17. Russel, G. and Hodges, C. (2019), *Regulatory delivery*, Bloomsbury Professional, p117

18. CBI (2020), *Reimagining regulation: creating a framework for the future*.

might not have the time or know-how to approach the regulator themselves. Such active and “off the record” intelligence gathering could provide useful input from industry, or the public sector frontline, about deficiencies in the current system, and alert regulators to examples of potential wrongdoing.

The public and intended beneficiaries of regulation. Regulators must also be transparent and engage with the public. Stakeholder organisations, such as consumer groups or social and environmental NGOs, can provide a useful representation of public concerns.

Questions for the project to address

- Are the current mechanisms in government and parliament for holding the various actors in the regulatory system to account adequate?
- How does the different administrative status of different regulators impact on their accountability to Ministers, Parliament, regulated entities and the public?
- What is the suitable criteria by which to judge if regulators should be independent? And should regulators with multiple objectives be afforded the same level of political independence as those with fewer, simpler objectives?
- How can the experience of those that are regulated and those they serve, acting as a ‘devil’s advocate’, be better used to help simplify and streamline individual regulations and improve the wider regulatory system?
- How can better engagement by regulators with regulated entities improve outcomes for all parties involved: regulators (increased compliance), regulated entities (reducing the burden of compliance) and the public/consumers (help to spur innovation in a given sector)?
- How effective are consumer bodies and what consumer or complaints structures work best?

2. The pursuit of “Better Regulation”

The UK is widely considered to be a world leader in good regulatory practice.¹⁹ Over the last two decades, successive governments have adopted an evolving programme of regulatory reform and developed various policymaking tools, such as cost-benefit analysis, under the banner of “Better Regulation”. These tools are designed to provide transparency and accountability for regulation and reduce the overall burden of regulation. However, there are growing question marks against whether the current approach has reached the limits of its effectiveness or provides the transparency and accountability it is designed to. The current government has placed important aspects of the UK’s Better Regulation policy under review.

From deregulation to Better Regulation

The Thatcherite rhetoric of deregulation in the 1980s gave way to that of “Better Regulation” with the Blair Government of 1997, which identified reform of the regulatory system as a key priority. It developed new institutions such as the Better Regulation Task Force (BRTF), a Regulatory Impact Unit (RIU) in the Cabinet Office, and Regulatory Reform Ministers were appointed in each department of state. Meanwhile, Impact Assessments (IAs), designed to estimate and quantify the costs and benefits of regulatory proposals, were established as a key tool in the policy making process.

In 2005, two foundational reports of Better Regulation policy were published, the BRTF’s *Less is More*²⁰ and the Hampton Review.²¹ The key recommendations of *Less is More* were that government should measure and set targets to reduce the administrative costs of regulation on business and the voluntary sector, adopt a ‘one in, one out’ approach to limit growth of regulation, and implement a programme across all government departments and independent regulators to simplify existing regulations. The BRTF established five principles of good regulation: Proportionality, Accountability, Consistency, Transparency and Targeting.

The Hampton Review focussed on the implementation and enforcement of regulation and set out a series of principles which it recommended all regulators adopt. These principles urged regulators to become more risk-based in their inspection and information requirements, focus greater effort on improving advice and guidance to help businesses which want to comply, and to deal more effectively with persistent offenders.

19. OECD (2018), *Regulatory Policy Outlook 2018*

20. Better Regulation Task Force (2005), *Regulation - Less is More: Reducing Burdens, Improving Outcomes*.

21. Hampton, P., (2005), *Reducing administrative burdens: effective inspection and enforcement*.

The principles identified by the BRTF and the Hampton Review were enacted in the Legislative and Regulatory Reform Act 2006 and continue to inform the present Better Regulation Framework²², which provides guidance for policy development, and the Regulators’ Code²³, which focusses on “regulatory delivery”, setting out how regulators should engage with those they regulate.

Successive institutional changes saw the Better Regulation Executive (BRE), which effectively replaced both the RIU and the BRTF, established as the strategic driver of Better Regulation policy across government. In 2009, the Regulatory Policy Committee (RPC) was established, comprising of economists, senior business people and civil society representatives, with a remit to provide independent expert scrutiny of the IAs accompanying regulatory proposals.

In 2010, the Conservative-led Coalition Government further developed the quantitative approach to regulatory reform and placed a greater emphasis on reducing regulatory costs. It introduced the ‘one-in, one-out’ (later one-in, two-out) initiative. Under this approach, for each £1 of costs introduced by new regulation, £1 (and later £2) of regulatory costs had to be removed from other changes. The Government claimed it had delivered savings to business worth £10 billion under this approach, although the NAO later noted that the expected reduction in costs “were achieved through only 10 regulatory decisions”.²⁴

In addition, the 2011 Red Tape Challenge launched a two-year public consultation designed to crowdsource the views from businesses, organisations and the public on which regulations should be improved, kept, or scrapped. The NAO’s review noted that:

“The Red Tape Challenge helped the government to understand better the regulations that are currently in force. But many departments have only a partial understanding of the total costs and benefits to business of the regulations for which they and regulators are responsible and of the scope for reductions.”²⁵

From 2015, the Conservative Government had a more explicit deregulatory agenda, introducing the Business Impact Target (BIT) of a further £10 billion reduction of regulatory costs on business for the period 2015–2020. This was to be delivered through regulatory budgets for departments, which take account of the impact of changes in policy and practice by the regulators which they sponsor. In 2016, Theresa May’s government briefly introduced a ‘one-in, three-out’ rule²⁶, but the Conservative Party manifesto for the 2017 General Election reverted to a ‘one-in, two-out’ policy.²⁷

22. BEIS (March 2020); https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf

23. Department for Business, Innovation and Skills (2014); https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913510/14-705-regulators-code.pdf

24. NAO (2016), *The Business Impact Target: cutting the cost of regulation*, p4; <https://www.nao.org.uk/report/the-business-impact-target-cutting-the-cost-of-regulation/>

25. NAO (2016), *The Business Impact Target: cutting the cost of regulation*, p22;

26. Department for Business Innovation and Skills press release (3 March 2016), *Government going further to cut red tape by £10 billion*; <https://www.gov.uk/government/news/government-going-further-to-cut-red-tape-by-10-billion>

27. The Conservative Party (2017), *FORWARD, TOGETHER: Our Plan for a Stronger Britain and a Prosperous Future*, p15.

Key institutions and their role in the current system

Each department has a **Better Regulation Unit (BRU)**, which oversees that department's processes for better regulation and advises on how to comply with the requirements of the **Better Regulation Framework**.

The **Better Regulation Executive (BRE)** is a unit within the Department for Business, Energy and Industrial Strategy. It leads across Government on Better Regulation policy and is responsible for embedding it in policymaking. This includes issuing guidance on how to operate the Better Regulation Framework, monitoring the **Business Impact Target** and publishing an annual report, and providing advice and support to BRUs.

The **Regulatory Policy Committee (RPC)** is the Government's independent advisory body set up to provide scrutiny of **Impact Assessments**, the evidence, and analysis supporting regulatory changes, affecting the economy, businesses, civil society, and the voluntary sector. The RPC does not review IAs for proposals that regulate only individuals or public bodies.

The **National Audit Office (NAO)** conducts audits and reviews of regulators, examining the way they regulate and the consequences of their regulatory actions.

Source: *Better Regulation Framework and Regulatory Policy Committee*²⁸

Better Regulation policy under review

The overall effectiveness of the quantitative approach to controlling and reducing regulatory costs on the private sector is unclear. The NAO's 2016 report, *The Business Impact Target – cutting the cost of regulation*, found that the BRE and the BIT's regulatory budgeting process had made some progress in raising the profile, across government, of regulatory costs imposed on businesses, but also pointed to significant shortcomings (see box below).²⁹

The Business Perceptions Survey, periodically conducted on behalf of government, suggests the proportion of businesses that viewed regulation as an obstacle to success fell from 59% in 2010 to 37% in 2020.³⁰ However, surveys of smaller business suggest regulation continues to be a major burden. In 2017, research by the Federation of Small Businesses showed that two-thirds of small businesses believe that the burden on regulation outweighs its benefits.³¹

28. BEIS (2020), *Better Regulation Framework*; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916918/better-regulation-guidance.pdf; Regulatory Policy Committee; <https://www.gov.uk/government/organisations/regulatory-policy-committee/about#what-we-do>

29. NAO (2016), *The Business Impact Target: cutting the cost of regulation*; <https://www.nao.org.uk/report/the-business-impact-target-cutting-the-cost-of-regulation/>

30. BEIS (2020), *Business perceptions survey 2020*, p21; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944356/business-perceptions-survey-2020-report.pdf

31. Federation of Small Businesses (2017), *Regulation returned: what small businesses want from Brexit*; <https://www.fsb.org.uk/resources-page/regulation-returned---what-small-firms-want-from-brexit-pdf.html>

Shortcomings of the Business Impact Target (BIT)

In 2016, the NAO pointed to significant limitations with the BIT, which underpins the quantitative approach to controlling regulation:

- Many departments had only a partial understanding of how the existing ‘stock’ of regulations for which they and regulators they are responsible for affects businesses, and of where burdens could most easily be reduced: “This means the government cannot know how ambitious its target for reducing regulatory costs is”.
- Due to various exemptions, which included the cost of EU regulation, the target does not and is not designed to reflect all administrative and regulatory costs to business. This meant that £8.3 billion of expected costs imposed on business in the relevant period were not included in the scope of the Target and greatly exceeded the £0.9 billion that were. “...we consider that this approach leaves the government open to claims of ‘cherry-picking’ the measures that it includes.”
- Businesses and departments often do not understand the target’s measure of regulatory costs or the complex rules that determine which costs and benefits count towards it: “The measure draws a distinction between direct and indirect impacts that has only partial grounding in business experience or economic principles.”
- Lack of evaluation meant that the government could not know the real impact of its efforts on business and was unable to learn lessons from previous interventions. The NAO noted that, of the 83 in-scope regulatory decisions made by departments in 2011, only two reviews were completed and independently assessed, while a further five were scheduled: “Departments frequently fail to plan for evaluation when making regulatory decisions.”

The current government has placed the BIT under review, including within a July 2021 consultation on “Reforming the Better Regulation Framework”.³² Lord Callanan, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy made a statement to Parliament in December 2020, on the BIT, which noted:

“The Manifesto undertook that Government ‘will strive to achieve the right regulatory balance between supporting excellent business practice and protecting workers, consumers and the environment’. The Government does not believe that the current methods of assessing regulatory impacts allow for this. Therefore, the Government will consult with business to ensure the impact of regulation is reflected more effectively, so as to continue to provide necessary protections without placing unnecessary burdens on business.”

The current government has therefore set a “holding” BIT target of zero, in contrast to previous targets, which have sought to reduce the net burden on business.³³

32. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005119/reforming-the-framework-for-better-regulation.pdf

33. <https://www.gov.uk/government/publications/better-regulation-annual-report-2019-to-2020/better-regulation-governments-annual-report-2019-to-2020-accessible-version>

Enforcement and implementation are just as important as rulemaking

The Hampton Principles recognised that day-to-day implementation and enforcement, or regulatory delivery, can be just as important as the rulemaking process itself. Ultimately, regulation is only effective if it is complied with. Equally, how regulation is implemented is also an important element of the overall level of regulatory burden. For example, the OECD's 2018 Regulatory Policy Outlook quoted a British businessperson as saying:

*“As a small retailer I have to comply with thousands of regulations across a dozen themes. Scrapping two or three burdensome regulations here and there is great, but it does not make a great difference to me. What makes a difference is the attitude of inspectors. Being able to sleep at night because I know I have got it right and don't fear an inspector knocking on the door”.*³⁴

This is linked to an important distinction in regulatory approaches between rules-based regulation and outcome-based regulation, which generates different types of relationships between regulators and those they regulate. Generally, the rules-based approach is seen as: more precise, and therefore potentially more certain for regulated entities; more effective in constraining regulatory discretion; and better at ensuring that the regulator is ultimately accountable for the outcomes of the regulatory system. Rules-based regulation is particularly prevalent in areas which have been heavily influenced by inherited EU regulation, such as food safety standards.

In contrast, the outcomes-based approach is seen to be more flexible; encourage experimentation and alternative approaches to compliance; encourage regulated entities to take more responsibility and think through consequences of actions; be more adaptive to changes in the environment and market; and to allow the regulator to tailor its approach to enforcement. Broadly, there has been a move to focusing on what high-level outcomes regulated entities are required to achieve rather than on punishing failure to comply with detailed rules. Nevertheless, the *Regulatory Futures Review* noted that, “While outcome-based regulation is a long accepted regulatory principle, many regulators face a constant battle to resist pressures to increase regulatory prescription.”³⁵

Outcomes-based regulation does come with drawbacks. For example, uncertainty can give rise to over- or under-compliance, particularly among smaller firms, which can be influenced by the growing “compliance industry” of third-party consultants. Larger businesses are more likely to have significant numbers of compliance personnel who can liaise with and influence the regulator in providing or clarifying guidance – although the need for large compliance teams could itself be a sign of regulatory inefficiency.

Ultimately, it is likely that a balance or hybrid of the two approaches will be appropriate, depending on the circumstances.³⁶ For example, rules-

34. OECD (2018), *Regulatory Policy Outlook 2018*, p106.

35. Cabinet Office (2017), *Regulatory Futures Review*, p2.

36. BEIS (May 2018), *Goals-based and rules-based approaches to regulation*, BEIS research paper number 8, p49; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714185/regulation-goals-rules-based-approaches.pdf

based regulation is likely to be more appropriate in setting clear minimum standards where uncertainty needs to be reduced to a minimum, such as basic health or environmental standards, whereas outcomes-based regulation is often used to pursue government objectives within whole markets, such as the drive to upgrade the UK’s broadband networks.³⁷

Questions for the project to address

- How have machinery of government changes affected the priority attached to Better Regulation policy across government?
- How can Parliament best hold the Government to account with respect to the effectiveness of its Better Regulation policy and the wider regulatory reform agenda?
- Have approaches such as ‘one-in, two-out’ reached their limits? How can quantitative Better Regulation policies, such as the Business Impact Target, be harnessed more effectively to provide accountability and transparency to Parliament and the public?
- To what extent are quantitative methods of regulatory measurement open to manipulation and/or a substitute for politically difficult simplifications or changes to regulation?
- Does the current approach to Better Regulation provide the right balance between a focus on the policymaking process and day-to-day regulatory delivery?
- What is the correct balance between rules- and outcome-based regulation? Do the distinctions sometime get confused? Which contexts are better suited to either approach? What can be done to reduce the burden of overcompliance and risks of undercompliance with outcomes-based regulation?

37. See Ofcom (18 March 2021), *Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26*; https://www.ofcom.org.uk/_data/assets/pdf_file/0022/216085/wftmr-state-ment-volume-1-overview.pdf

3. Public sector regulation

Debates over regulation tend to largely focus on the burdens imposed on the private sector. Not only is the public sector subject to many of the regulations affecting private businesses, it is also often affected by its own specific forms of regulation, either by government departments or by specialist bodies such as the various quality inspectorates.

Regulation – including guidance, inspection, and reporting – is central to the delivery of effective public services, provides accountability for public funds, and protection for citizens. However, both as a result of regulation, and due to internal management practices, public sector workers often complain that the delivery of public services is hampered by high levels of unnecessary bureaucracy and regulatory complexity – which can, for example, take frontline staff away from patient care, policing or the blackboard and negatively impact wellbeing, job satisfaction and stunt innovation.

For example, a 2019 survey, conducted by the National Education Union, found that two fifths of respondents (40%) predicted they would no longer be working in education by 2024, and almost one fifth of all respondents to the survey (18%) expected to be gone within two years. When asked why they would be leaving, workload (62%) and the accountability regime (40%) were the main reasons given.³⁸ Equally, an NHS Providers survey of NHS trusts and foundation trusts in 2019 concluded that:

“While there are promising indications of improvement in some areas, in other respects providers’ experiences have worsened over the last year. This year, fewer respondents said that the overall regulatory framework of the NHS is working well than in previous years, and there has been no increase in the proportion of trusts who believe the regulatory framework offers value for money.”³⁹

Meanwhile, the coronavirus pandemic has highlighted the strengths and weaknesses of existing regulatory systems, particularly in the public sector. Governments across the world, including in the UK, have had to rewrite or bypass existing rules to ensure their citizens can benefit from innovative treatments and help their economies and public services adapt to the disruption caused by the pandemic.⁴⁰ Although an exceptional crisis, it is important government learns from the experience.

38. NEU (16 April 2019), *The state of education: workload*; <https://neu.org.uk/press-releases/state-education-workload>

39. NHS Providers (2019), *Regulation survey 2019*; <https://nhsproviders.org/regulation-survey-2019/key-points>

40. OECD (30 September 2020), *Regulatory quality and COVID-19: The use of regulatory management tools in a time of crisis*; <https://www.oecd.org/coronavirus/policy-responses/regulatory-quality-and-covid-19-the-use-of-regulatory-management-tools-in-a-time-of-crisis-b876d5dc/>; Professional Standards Authority for Health and Social Care (April 2021), *LEARNING FROM COVID-19: A case-study review of the initial crisis response of 10 UK health and social care professional regulators in 2020*; https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/learning-from-covid-19-a-case-study-review-of-the-initial-crisis-response-of-professional-regulators.pdf?sfvrsn=c6ad4920_6; Jones, L. (1 February 2021), *How the Coronavirus Pandemic Has Exposed Britain's Failed 'Regulatory State'*; <https://www.qmul.ac.uk/mei/news-and-opinion/items/how-the-coronavirus-pandemic-has-exposed-britains-failed-regulatory-state--dr-lee-jones.html>;

A 'blind spot' in the Better Regulation agenda?

As noted above, recent governments' efforts to promote Better Regulation have been largely a business-driven exercise. There were, however, early efforts to address the issue of public sector regulation under a broad Better Regulation approach. For example, in 2000, the BRTF published *Red Tape Affecting Head Teachers*⁴¹ and, in 2002, *Higher Education: Easing the Burden*.⁴² In 2007, the Government introduced a public sector strategy *Cutting Bureaucracy for Our Public Services*, seeking to deliver "a tangible and permanent reduction in unnecessary Government bureaucracy", including reducing the number of data requests from central government.

However, the evidence suggests that these initiatives have not had the same prominence within government as those undertaken for the private sector. An NAO review of the government's 2007 strategy noted that, "Departments told us the target for reducing bureaucracy in the public sector lacked and still lacks the priority" given to the private sector. It added that this was reflected in "staff responsibilities within the Better Regulation Executive" and "the limited scope of the initial baseline exercise and subsequent monitoring arrangements in comparison to the private and third sector Administrative Burdens Reduction Programme."⁴³

In 2007, the BRE was transferred from the Cabinet Office to the newly named Department for Business, Enterprise and Regulatory Reform. Although it retained its responsibility for overall strategy, including regulation of the public sector, a 2010 OECD survey of UK Better Regulation policy noted that the move "reinforced the perception of a strong link between Better Regulation and the business community, even if the BRE work extends beyond this." The BRE currently sits in the latest iteration of the business department, the Department for Business, Energy and Industrial Strategy (BEIS). In 2018, the OECD again remarked on the strong focus on business, suggesting the UK "may benefit from extending the focus of its current regulatory policy agenda on business on other elements important for inclusive growth."⁴⁴

There have been various subsequent reviews into regulation in the public sector.⁴⁵ However, there is no high-profile forum for advocating reform and exploring regulation across the whole of the public sector, or the same degree of cross-government attention and oversight that applies to the private sector. Therefore, much of the work on public sector regulation remains in silos or is sub-sector based.

Equally, within the main areas of public services – health, policing and education – regulation and regulators have more often been subject to government policy objectives shifting and changing, than has been the case in the private sector. The 2017 Regulatory Futures Review noted that: "in the UK, public services have been subject to frequent change as government sees it as being more its responsibility to secure improvements in public services than it does in the private sector where its aim is more (though not entirely) directed towards compliance."

41. Better Regulation Task Force (2000), *Red Tape Affecting Head Teachers*

42. Better Regulation Task Force (2001), *Higher Education: Easing the Burden*

43. NAO (2009), *Reducing bureaucracy for public sector frontline staff*, p23

44. OECD (2018), *Regulatory Policy Outlook 2018*, p238.

45. See for instance the independent reducing bureaucracy in policing advocate Jan Berry's report *Reducing bureaucracy in policing* (2010) and Department for Health and Social Care (2020), *Busting bureaucracy: empowering frontline staff by reducing excess bureaucracy in the health and care system in England*; <https://www.gov.uk/government/consultations/reducing-bureaucracy-in-the-health-and-social-care-system-call-for-evidence/outcome/busting-bureaucracy-empowering-frontline-staff-by-reducing-excess-bureaucracy-in-the-health-and-care-system-in-england>

Accountability or “intelligent accountability”?

The desire for accountability in the delivery of public services is both understandable and legitimate.

For example, inspections and reporting can have a critical role to play in highlighting examples of good and bad performance and variations in public service. However, the question is whether the methods employed are effective, efficient, and proportionate. The philosopher Baroness O’Neill argued in her 2005 critique of public sector regulation, *A View from ‘Near Abroad’*, that the quest for accountability can often result in over-centralised, top-down management:

“The distinction between management and accountability has been increasingly blurred for those working in the public sector. The blurring is particularly evident in the big public sector institutions such as the NHS, schools and universities. All are assured that they must manage themselves, and that they are not managed from, but are rather accountable to, Whitehall. Yet the ways in which funding is provided, in which targets are set, in which information is required, in which performance is measured and monitored in abstraction from primary tasks, and sanctions are organised, often converge with and become indistinguishable from management from afar.”⁴⁶

O’Neill does not argue that accountability is undesirable or unnecessary but that many modern methods of seeking accountability damage rather than repair trust. Rather, O’Neill has stressed the need for “intelligent accountability”:

“Intelligent accountability, I suspect, requires more attention to good governance and fewer fantasies about total control. Good governance is possible only if institutions are allowed some margin for self-governance of a form appropriate to their particular tasks, within a framework of financial and other reporting. Such reporting, I believe, is not improved by being wholly standardised or relentlessly detailed, and since much that has to be accounted for is not easily measured it cannot be boiled down to a set of stock performance indicators.”⁴⁷

In the late 1980s, reform of the English school system established that the autonomy granted to governing bodies and headteachers was to be held in check by a highly developed centralised framework holding schools accountable for school performance, subjecting them to national prescription in several areas (the National Curriculum was introduced) and making them responsive to, and reliant on, parental choice. These top-down initiatives and targets had the worthy intention of improving performance and evidence suggested they had a positive effect.⁴⁸ However, they received growing accusation and criticism of micro-management by government.⁴⁹

In 2012, former head of Ofsted Christine Gilbert argued that the role of inspections, performance tables and targets in providing school accountability “has been a key driver for reform and few would argue for a return to a self-defining and self-regulating professionalism”. However, she noted that “accountability is not just the preserve of government,

46. O’Neill, O. (2005), ‘A View from “Near Abroad”’ in *Changing Times: Leading Perspectives on the Civil Service in the 21st Century* and its enduring values, ed. and pub. Civil Service Commissioners

47. O’Neill, O. (2002), *Reith Lectures: a question of trust - Lecture 3: called to account*; http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/20020417_reith.pdf

48. NAO (2006), *Improving poorly performing schools in England*

49. See Gilbert, C. (2012), *Towards a self-improving system: the role of school accountability*; and NAHT (2018), *Improving school accountability*, report of the NAHT Accountability Commission

its agencies and Ofsted” and that, “it is time to re-balance the current framework by giving greater emphasis to school-led accountability that is rooted in moral purpose and professionalism.” Successive reforms to the Ofsted inspection regime have sought to reduce the burden of inspection and, in 2019, following a consultation with the profession, the government said it was further simplifying the accountability framework. It said, “we understand that the wider context in which headteachers operate can create pressure that leads to excessive workload that distracts teachers from teaching.”⁵⁰

Questions for the project to address

- How to ensure that the impact of regulation on the public sector receives the same level of attention across government as private sector regulation?
- How might initiatives to reform regulation in the private sector inform efforts to improve public sector regulation?
- How should transparency and scrutiny mechanisms be designed to ensure that Parliament and the electorate can systematically monitor the impact of regulation on the public sector (notwithstanding its faults, the Business Impact Target is, in part, designed to enable this for the private sector)?
- How can frontline public sector professionals’ experience better inform government and policymakers whether regulation and accountability mechanisms are proportionate, and how they can be improved?
- How can decentralisation and policies designed to empower localism, such as Police and Crime Commissioners, enable professionals in the public sector to take greater personal and collective responsibility for improving outcomes and embracing innovation?

50. Department for Education (2019), *Identifying schools for support: Government consultation response*; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916644/Identifying_Schools_for_Support_government_response.pdf

4. Regulating post-Brexit

Withdrawal from the EU is resulting in changes to the regulatory landscape. With the important exception of the limitations set by the terms of the Northern Ireland Protocol, Brexit has seen large swathes of regulatory power returned to the UK, offering the choice to diverge from EU rules in the future and raising questions about how these powers should be wielded by government, parliament and arms-length or independent regulators.

New regulators are being established, such as the Office for Environmental Protection, which will commence work in January 2022 and will investigate and uphold compliance with environmental law by the government and other public bodies.⁵¹ Equally, the CMA has gained greater powers over the competition regime, and the UK-EU trade deal mandates the establishment of an independent enforcement body for subsidies and state aid. A government consultation leaves open whether this should all fall under the CMA or be split between different bodies.⁵²

Divergence from EU rules

In March 2021, Policy Exchange’s *Post-Brexit freedoms and opportunities for the UK*, identified a range of regulatory freedoms – including in the areas of finance, health, energy, and the environment – which could enable regulatory approaches to be tailored to its national strengths and priorities, and empower the UK to seek first-mover advantage in new sectors and technologies.⁵³ Meanwhile, Policy Exchange’s *The City and UK Financial Services* set out eight principles for the UK’s future regulatory approach to financial services and identified the Markets in Financial Instruments Directive (MiFID II) and Solvency II as EU-derived regulations that warrant immediate review.⁵⁴

In some cases, the UK may want to achieve a different policy objective to the EU. For example, the government’s proposed Animal Welfare (Kept Animals) Bill would raise animal welfare standards regarding the export of live animals. EU rules previously prevented any changes to these journeys, but the government is now free to pursue plans which would see a ban on the export of live animals for slaughter and fattening.⁵⁵

In others, the UK might want to pursue the same regulatory objectives but in a way that differs from the EU’s approach. The NAO has previously highlighted the difference in regulatory philosophies, noting that, “EU legislation can be more prescriptive and rules-based than the UK risk and outcome-based approach.”⁵⁶ This is particularly relevant in areas where much of the regulation has recently been determined at the EU-level, such

51. <https://www.gov.uk/government/news/first-new-board-members-of-office-for-environmental-protection>

52. BEIS (March 2021), *Subsidy control: Designing a new approach for the UK*; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957958/subsidy-control-consultation-document.pdf

53. Policy Exchange (March 2021), *Post-Brexit freedoms and opportunities for the UK*; <https://policyexchange.org.uk/wp-content/uploads/Post-Brexit-freedoms-and-opportunities-for-the-UK.pdf>

54. Policy Exchange (May 2021), *The City and UK Financial Services: a strategy paper*; <https://policyexchange.org.uk/wp-content/uploads/The-City-and-UK-Financial-Services.pdf>

55. Defra press release (8 June 2021), *Government launches second Animal Welfare Bill to protect pets, livestock and wild animals*, <https://www.gov.uk/government/news/government-launches-second-animal-welfare-bill-to-protect-pets-livestock-and-wild-animals>

56. NAO (2015), *A short guide to regulation*; <https://www.nao.org.uk/wp-content/uploads/2015/08/Regulation-short-guide.pdf>

as food safety regulation and inspection.⁵⁷ For example, a 2008 review of the Food Standard Agency’s (FSA) implementation of the Hampton Principles concluded that the FSA was constrained by EU legislation on food hygiene issues, but that it should continue to push for changes which allowed the UK to adopt a more risk-based and principles-based approach.⁵⁸ The UK can now apply such an approach to the stock of EU-derived rules, which might also offer opportunities to be more specific about the risks that regulation is seeking to mitigate.

Regulatory divergence from EU regulation is likely to occur both actively and passively. Future EU and UK regulation will now develop independently, particularly in new fields such as emerging technologies. Meanwhile, the current government has announced several initiatives designed to capitalise on the UK’s new regulatory freedom and actively diverge from EU policies and regulation.

In February 2021, the current government commissioned the Taskforce on Innovation Growth and Regulatory Reform (TIGRR) to “scope out and propose options for how the UK can take advantage of our newfound regulatory freedoms”.⁵⁹ TIGRR reported in June 2021⁶⁰ and the government subsequently launched a new consultation, “Reforming the framework for better regulation”, drawing on TIGRR’s work, which contained options on reforming the role of regulators and the wider Better Regulation policy toolkit. This included reviewing the metrics for assessing the costs and benefits of regulation, improving checks on new proposals to regulate, more rigorous post-implementation review, an audit of the stock of existing regulation, and revisiting the concept of ‘one in X out’.⁶¹

It was also announced that the Chancellor of the Exchequer Rishi Sunak would chair a new Better Regulation Committee at the heart of the government, “to drive an ambitious regulatory reform agenda” and ensure the UK’s regulatory framework is updated to enable innovation.⁶² Meanwhile, a new Brexit Opportunities Unit was established within the Cabinet Office to develop and take forward proposals for regulatory reform and opportunities to diverge from the EU.⁶³

In September 2021, Cabinet Office Minister Lord Frost announced the government’s initial response to the TIGRR report’s proposals. This included a review of retained EU law, including a new Commission through which “the public will be able to identify additional opportunities for cutting or reforming red tape and bureaucracy”, and a package of individual regulatory reforms.⁶⁴

Policy Exchange⁶⁵ has previously argued that several broad principles should inform an assessment of EU-derived regulation, including:

- the extent to which the original EU directive and evolution of EU case law is congruent and convenient for UK legal, business and employment institutions, traditions and practices;
- to what extent does it cohere with common law principles as opposed to a European Roman civil law tradition in terms of matters such as burdens of proof and proportionality;

57. BEIS (May 2018), *Goals-based and rules-based approaches to regulation*, BEIS research paper number 8, p53; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714185/regulation-goals-rules-based-approaches.pdf

58. Better Regulation Executive and National Audit Office (March 2008), *Effective inspection and enforcement: implementing the Hampton vision in the Food Standards Agency*, p16; https://www.nao.org.uk/wp-content/uploads/2008/03/Food_SA_Hampton_report.pdf

59. <https://www.gov.uk/government/publications/taskforce-on-innovation-growth-and-regulatory-reform/taskforce-on-innovation-growth-and-regulatory-reform-tigr-terms-of-reference>

60. Taskforce on Growth, Innovation and Regulatory Reform (16 June 2021), *Taskforce on Growth, Innovation and Regulatory Reform Independent report*; <https://www.gov.uk/government/publications/taskforce-on-innovation-growth-and-regulatory-reform-independent-report>

61. BEIS (22 July 2021), *Reforming the framework for better regulation*; <https://www.gov.uk/government/consultations/reforming-the-framework-for-better-regulation>

62. HM Treasury (3 March 2021), *Build Back Better: our plan for growth*; <https://www.gov.uk/government/publications/build-back-better-our-plan-for-growth/build-back-better-our-plan-for-growth-html>

63. <https://committees.parliament.uk/oralevidence/2184/html/>

64. Cabinet Office (16 September 2021), *Government launches plans to capitalise on new Brexit freedoms*; <https://www.gov.uk/government/news/government-launches-plans-to-capitalise-on-new-brexit-freedoms>; The full list of proposed regulatory reforms is available here; <https://www.gov.uk/government/publications/brexit-opportunities-regulatory-reforms>

65. Policy Exchange (March 2021), *Post-Brexit freedoms and opportunities for the UK*; <https://policyexchange.org.uk/wp-content/uploads/Post-Brexit-freedoms-and-opportunities-for-the-UK.pdf>

- the extent that evolving EU Court of Justice legal jurisprudence such as the concept of indirect discrimination interacts with wider UK legislation in unexpected, awkward or unduly costly ways;
- examining long standing regulation to ensure that it is needed and is appropriately and effectively framed for contemporary circumstances;
- and to examine regulation to ensure that it has not evolved into a form of rules that raise costs and effectively protect incumbent producers from domestic and foreign competition and the contest and challenge of new market entrants.

Government and parliament will also need to consider how much power returned from Brussels to delegate to regulators. For example, in March 2021, Chief Executive of the Prudential Regulation Authority Sam Woods argued that the operation and reform of EU-inherited regulation of the insurance sector should be placed in the hands of the regulator rather than laid in detailed parliamentary statute. The latter approach is typically the case under EU regulations, which can make it more difficult for regulators to adjust them on a day-to-day basis.⁶⁶ However, Woods acknowledged that increasing the power of the regulator in this way would raise new issues of accountability and scrutiny, which was previously conducted at the EU level:

“I can see the point that some in Parliament have been making that if we do more rule-making, and with European Parliamentary scrutiny of rule-making no longer present, then we might be expected to do more to support Parliament in probing technical regulatory issues. Whatever Parliament decides on this, we look forward to engaging fully.”

Divergence from EU rules could have an impact on UK-EU trade and this will need to be weighed against the wider impact on non-EU trade relationships and the UK’s own policy priorities.

66. Speech by Sam Woods to the Association of British Insurers (16 March 2021); <https://www.bankofengland.co.uk/speech/2021/march/sam-woods-association-of-british-insurers-executives-neds-and-chairs-net-work-webinar>

Questions for the project to address

- How should government systemically and strategically review and reform the stock of EU-derived regulation in a way that maximises benefits?
- How should individual departments and the whole of government evaluate the case for divergence from EU regulation, including the impact on trade with the EU and non-EU partners?
- How should the UK's Better Regulation framework be applied to the review and reform of EU-derived regulation, including the weight given to competition and the economy, on the one hand, and regulatory stability, on the other?
- What systems of scrutiny should be applied to judgments about how much power returned from Brussels should be delegated to regulators?
- How to ensure parliamentary scrutiny is organised and resourced to provide adequate oversight of larger volumes of technical regulation, which was previously agreed at the EU-level?

5. The challenge and opportunity of technological innovation

Governments across the world are grappling with the challenges and the opportunities of the “Fourth Industrial Revolution”, which is seeing the emergence of new technologies – such as artificial intelligence, gene editing and advanced robotics – that are blurring the lines between the physical, digital, and biological worlds.⁶⁷ Meanwhile, new technologies also offer opportunities to improve regulatory systems and reduce the burden of compliance.

Regulating new technologies: supporting innovation and managing new risks

In this fast-moving era, regulation can struggle to keep pace with innovation, hindering the introduction of new products or ways of working, while leaving consumers and citizens with outdated protections. For example, the growth of the “gig” economy has led to calls for changes to labour market regulation and the future of work looks set for further change due to the impact of the Covid-19 pandemic.⁶⁸

Equally, there is a growing challenge of coordination across sectors and between regulators as new technologies straddle sectors traditionally regulated under separate regimes. Currently only 29% of British businesses believe that the government’s approach to regulation supports them in bringing new products and services to market.⁶⁹ Current and previous governments have taken steps to ensure the regulatory environment is conducive to innovation, such as establishing the Regulatory Horizons Council⁷⁰ and the Regulators’ Pioneer Fund.⁷¹ The Treasury’s recent plan for growth highlighted that an agile, flexible approach to regulation is crucial if the UK is to seize the potential of new technologies, products and services.⁷²

Brexit creates a unique opportunity for the UK to set out its own vision for the regulatory framework for emerging technologies across a range of sectors. For example, a recent report by the Regulatory Horizons Council on the development of nuclear fusion energy has called for a new regulatory approach to the technology, which differs from that applied to traditional nuclear fission. It notes that, since it is impossible for fusion to cause a nuclear accident and it does not create any long-lived radioactive nuclear waste:

67. BEIS (11 June 2019), *Regulation for the Fourth Industrial Revolution*; <https://www.gov.uk/government/publications/regulation-for-the-fourth-industrial-revolution/regulation-for-the-fourth-industrial-revolution>

68. Gyimah, S. (2 December 2019), *The gig economy needs a creative touch to regulation, not a knee-jerk ban*, in City AM; <https://www.cityam.com/the-gig-economy-needs-a-creative-touch-to-regulation-not-a-knee-jerk-ban/>

69. BEIS (2020), *Business Perceptions Survey 2020*, p42; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720434/Business_Perception_Survey_2018.pdf

70. <https://www.gov.uk/government/groups/regulatory-horizons-council-rhc>

71. <https://www.gov.uk/government/publications/apply-for-the-regulators-pioneer-fund/regulators-pioneer-fund-competition-brief>

72. HM Treasury (3 March 2021), *Build Back Better: our plan for growth*; <https://www.gov.uk/government/publications/build-back-better-our-plan-for-growth/build-back-better-our-plan-for-growth-html>

“Fusion must not be regulated in the same way as nuclear fission. It would lead to unnecessary burdens, substantial cost increases and could also deter innovation by reducing flexibility in design. It has been suggested by some fusion stakeholders that this has been experienced with the ITER fusion project in France, which has taken a nuclear fission approach to regulation. Adopting a fission approach is likely to severely undermine private sector fusion development and would send the public a disproportionate indication of the actual risk fusion in fact poses.”⁷³

Meanwhile, in 2015, the FCA developed the concept of a “regulatory sandbox”, which has provided a regulatory “safe space” in which eligible firms are able to carry out limited tests on innovative products while being exempt from certain regulatory requirements. A Deloitte report argued that the sandbox “has shown that regulators can play an active and positive role in encouraging innovation by giving unique business models ‘permission to play’ in a highly competitive financial services sector.”⁷⁴

Harnessing technology and data to improve the regulatory system

New technologies, such as automation and data science, also offer opportunities to improve how the regulatory system functions and help regulated entities comply with regulation. For example, greater data sharing could ensure that regulated entities do not have to provide the same information more than once, forming a “Tell us once” principle between the regulated and regulators.⁷⁵ The Rural Payments Agency, has used a type of supervised machine learning to develop a crop map of England based on satellite images and image classification methods to better assess rural payments and avoid fraud.⁷⁶ Within the financial services sector, in particular, private sector firms are developing regulation technology (RegTech) to help regulated firms meet their regulatory obligations.

However, the extent to which different regulators are currently adopting and developing such technologies is unclear. A recent report by the City of London Corporation identified the “reluctance of regulators” as a barrier to the greater adoption of RegTech solutions. It added, “addressing this barrier will require regulators to make RegTech a much more visible and frequent topic of discussion during their interactions with regulated firms, cementing its place on the regulatory agenda.”⁷⁷

There are also concerns that implementation of the wider regulatory framework for data protection and privacy may hinder effective cooperation between regulators and across public services. For example, the Regulatory Futures Review noted that the Data Protection Act (DPA) is “commonly cited as a reason why data cannot be shared” between regulators: “There is confusion as to the exemptions under the DPA and when these apply. This confusion is often perceived by regulators as either genuine misunderstanding or an excuse not to share data.”⁷⁸

73. Regulatory Horizons Council (31 May 2021), *Report on fusion energy*, p10; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990445/rhc-fusion-report.pdf

74. Deloitte (2018), *A journey through the FCA regulatory sandbox: the benefits, challenges, and next steps*; <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fca-regulatory-sandbox-project-innovate-finance-journey.pdf>

75. Cabinet Office (2017), *Regulatory Futures Review*, p52

76. BEIS (2020), *The use of emerging technologies for regulation*, BEIS Research Paper Number 2020/041; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926585/emerging-technologies-for-regulation.pdf

77. City of London and RT associates (April 2021), *2021: a critical year for RegTech*, p49; <https://www.theglobalcity.uk/PositiveWebsite/media/Research-reports/2021-A-Critical-Year-for-RegTech-final.pdf>

78. Cabinet Office (2017), *Regulatory Futures Review*, p54

Questions for the project to address

- How to embed an innovation-friendly culture across government and independent regulators?
- How to monitor and evaluate government and regulators' efforts to promote innovation through regulation?
- What can the UK learn from the regulatory approaches of other countries, such as the United States, Japan, and South Korea, which have historically been global leaders in promoting innovation?
- How to identify and promote the adoption of new technologies that would reduce the burden of regulatory compliance in the private and public sector?

6. The international dimension of regulation

The UK is now an independent voice in the world of international “regulatory diplomacy”, where the EU, the US and China are increasingly in competition in setting new standards, particularly in emerging technologies.⁷⁹ The Government’s Integrated Review of Security, Defence, Development and Foreign Policy highlighted the long-term strategic importance of influencing “the rules, norms and standards governing technology and the digital economy.”⁸⁰

The UK is a global regulatory leader in several fields – such as fintech, life sciences, and nuclear fusion. As Policy Exchange’s Indo-Pacific Commission argued, the UK should engage in “regulatory diplomacy” to encourage the setting of shared standards in areas of strategic importance to the UK.⁸¹ It should also work with allies and within multilateral forums to bridge regulatory differences between the two major Western regulatory superpowers: the US and the EU.

Meanwhile, the shift to a service-driven economy and ability for digital technology to span jurisdictions means that international regulatory cooperation is of increasing importance to policymakers and in securing market access for UK exports. Outside the EU, the UK can no longer directly influence the design of EU regulation. However, the UK is seeking to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – a trade agreement between 11 countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) – and has been invited to start the formal accession process by the existing members. Membership of platform agreements such as the CPTPP and the Digital Economy Partnership Agreement between Singapore, Chile, and New Zealand provide important opportunities to promote long-term policy objectives, such as encouraging better trade practices on intellectual property discipline, digital trade, and trade in services, which are shaped by international and domestic regulation.

Nevertheless, while modern and comprehensive free trade agreements typically include chapters on services liberalisation, the day-to-day interests of UK services exporters are generally influenced by local regulation and regulatory practice in target markets.⁸² Given the importance of services to the UK’s export mix, regulatory diplomacy and encouraging dialogue between regulators is increasingly important and could reap benefits sooner than traditional trade negotiations, which can take several years. The UK’s “fintech bridge” agreements with countries including Australia,

79. The Foreign, Commonwealth and Development Office has recently set up a government-wide initiative on Regulatory Diplomacy. Its objective is “to create a coherent approach to influencing standards development and regulation internationally, in line with UK priorities – involving government, regulators, standards bodies and industry.” <https://www.gov.uk/government/publications/international-regulatory-cooperation-for-a-global-britain-government-response-to-an-oecd-review/international-regulatory-cooperation-for-a-global-britain-government-response-to-the-oecd-review-of-international-regulatory-cooperation-of-the-uk-h>

80. Cabinet Office (16 March 2021), *Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy*; <https://www.gov.uk/government/publications/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy>

81. Policy Exchange (2020), *A Very British Tilt: Towards a new UK strategy in the Indo-Pacific Region*; <https://policyexchange.org.uk/wp-content/uploads/A-Very-British-Tilt.pdf>

82. Global Counsel (9 September 2016), *The future of UK trade policy: the case for regulatory diplomacy*; <https://www.global-counsel.com/insights/report/future-uk-trade-policy-case-regulatory-diplomacy>

Singapore, and South Korea, are a noteworthy illustration of how regulatory diplomacy can offer compliments to traditional trade policy and free trade agreements.

Questions for the project to address

- How can and should the UK utilise new trading relationships and platforms, such as its planned accession to the CPTPP, to promote long-term regulatory objectives?
- How to ensure a whole of government approach to promoting UK regulatory diplomacy internationally?
- How to ensure regulatory diplomacy is given priority alongside wider trade policy in bilateral economic relationships to support British firms in these markets?



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