Regulatory Policy Committee

RPC response to the Government consultation on Reforming the Framework for Better Regulation

September 2021

EXECUTIVE SUMMARY – as posted on rpc.blog.gov.uk

There is potential to improve the UK Better Regulation Framework

The existing Better Regulation Framework in the UK is highly regarded internationally, but we support the Government's aim to look for ways to improve it further. The UK's future approach should continue to be evidence-based and draw on the sound and tested analytical principles set out in the HM Treasury "Green Book".

Assessment of individual policy proposals

The fundamental role of the current Better Regulation Framework is to ensure that decisions on the best approach to achieving a particular policy objective are supported by robust, unbiased and relevant evidence and analysis, and that this assessment is transparent and open to challenge in Parliament and by stakeholders. This approach should remain the focus of a future framework.

The following points draw on our experience and would allow Better Regulation to be delivered even more effectively in the future:

- **Independent scrutiny** – we strongly believe that the process will be more robust if it includes an enhanced role for an independent scrutiny body (ISB) like the RPC. An ISB offers an expert, unbiased perspective to assure Ministers and external stakeholders that policy proposals and decisions are based on robust evidence and sound analysis.
- **Earlier scrutiny** – we support the consultation document's proposal that departments should give more serious consideration to non-regulatory options by focusing on this issue from the outset. Early independent scrutiny of evidence on the impacts of a range of regulatory and non-regulatory options would support this approach, help streamline the process, and ensure that regulation is introduced only where absolutely necessary. It would also allow the department to take account of the ISB's comments during the remainder of the policy development process to ensure that the final IA is fit for purpose.
- **Better evaluation** – similarly we support a robust process that ensures post-implementation review (PIR) as soon as appropriate following the coming into force of regulations, and that Ministers give a higher priority to taking account of and acting on the findings of the PIR. Independent scrutiny of monitoring and evaluation plans in impact assessments would help to ensure rigorous, useful and proportionate arrangements are in place to track the outcome of the regulations and to support evaluation of their effectiveness.
- **Wider impacts** – the consultation asks whether IAs should consider wider impacts of regulations on, for example: innovation, trade and investment, competition and the environment. The wider impacts that are relevant to a policy decision vary from measure to measure, therefore we believe that the BRF should ensure that the wider impacts that are relevant to the particular

regulatory proposal are considered in the IA associated with that proposal, rather than focusing on a pre-set list of impacts.

- **Streamlined IAs and scrutiny** – we support the desire to streamline the IA process. In fact, we think that streamlining can help to ensure that relevant evidence is available when needed to support decision making. The process should focus on the evidence appropriate at different decision points: the impacts of options at the pre-consultation stage, and the costs and benefits of the selected option and plans for monitoring and evaluation at the pre-implementation stage. This should lead to better PIRs that properly assess the effectiveness of the measure. Giving the ISB the ability to 'red rate' on the assessments produced at each of these stages would reinforce this process and reassure both ministers and external stakeholders.
- **Civil Society Organisations (CSOs)** – the current consultation does not expressly address the use of the BRF for evaluating regulatory impacts on CSOs. Because impacts on CSOs can differ significantly from those on business, we believe more consideration should be given to improving departments' analysis of the impacts on them, and that the BRF could be improved to better support them in doing so.

Tracking the cumulative impact of regulation and minimising unnecessary burdens

As well as assessing the impacts of individual regulatory proposals to ensure that they attain their specific objectives in the best way, a broader view of the cumulative impact of regulation is needed to ensure that the Government's more general objectives are consistently factored into proposals for new regulatory measures. One such general objective is the desire to reduce unnecessary regulatory burdens on business.

There have been a number of calls for an offsetting approach such as "One In, Two Out" (OITO) to replace the current business impact target (BIT) which has not been effective at controlling the regulatory burden on business. Our response highlights the following aspects of this approach:

- **Measuring business impacts** – we support the measurement of the incremental costs and benefits of regulation in order to identify and eliminate unnecessary or counterproductive regulatory burdens. We are in favour of doing so in a way that both builds on the current EANDCB (equivalent annual net direct cost to business) and recognises the uncertainty inherent in any *ex-ante* measure of impacts. Experience suggests a more comprehensive single measure (such as bNPV or NPSV) would be difficult to construct and risks creating perverse incentives. Unlike broader measures, EANDCB is sufficiently well-defined to be relatively easily and consistently measured across a wide range of policy areas.
- **Scorecard approach** – an alternative to using a single metric would be to use a scorecard approach. This would include the EANDCB alongside qualitative or quantitative assessments of other distinct and significant impacts, such as on the environment or trade. This would aid transparency of decision making

for measures that impose costs on business and CSOs, but generate significant wider societal benefits – as is likely to be the case for Net Zero.

- **One In, Two Out regulatory offsetting** – it is for the Government to decide whether it wants to set itself a target to reduce or minimise the impacts of its regulatory activity. Offsetting metrics like OITO can have a powerful and positive impact on government choices and force hard decisions to reduce the regulatory burden on business. However, any such mechanism should recognise that delivery of other Government commitments (such as Net Zero) is likely to necessitate action that increases costs on business. Any control mechanism needs to recognise and plan to deal with this conflict or it will not work – there will be pressure to introduce exemptions and exclusions that undermine its intent, specific ministers will focus on the objectives associated with their brief, or other urgent objectives will be prioritised and it will be ignored (as the BIT appears to have been in recent years).

Next steps

We believe that by taking account of our comments, the BRF can provide an improved process for robustly evaluating the costs, benefits and wider impacts of new regulations, support the development of better regulation and contribute to the delivery of wider government objectives. We look forward to hearing the Government's decisions on the issues raised in the consultation and to working with Ministers and others to implement them as effectively as possible.

WHAT IS THE REGULATORY POLICY COMMITTEE?

The RPC, the independent Better Regulation watchdog, is an independent body, sponsored by the Department for Business, Energy and Industrial Strategy (BEIS).

The committee is formed of independent experts from a range of backgrounds, including economics, private and voluntary sectors, business, the legal profession, and academia. Collectively, the RPC has experience and knowledge of employee, consumer and economic issues. Current committee members are:

- Stephen Gibson (Chair)
- Jonathan Cave
- Laura Cox
- Sheila Drew Smith OBE
- Jeremy Mayhew
- Professor Brian Morgan
- Andrew Williams-Fry

The committee is supported by a secretariat of civil servants formed of economists, policy advisers and operational researchers.

The committee scrutinises all new regulation from across government with impacts greater than +/-£5m. Given this experience, the committee has a unique viewpoint on the process and impact of the process of creating regulation. This response is provided to Government in order to help to improve the Better Regulation Framework process, so as to support Better Regulation in the future.

RESPONSE TO CONSULTATION QUESTIONS

This document sets out the response of the Regulatory Policy Committee (RPC) to the questions in the consultation on the Framework for Better Regulation. In developing our response, we have published a series of blog posts that cover key issues raised by the consultation – those posts should be considered part of our response.

Introduction

We are very pleased to have this opportunity to respond to the consultation on the Better Regulation Framework. While we believe that the UK Better Regulation system is already good and highly regarded internationally, it can undoubtedly be improved further. We hope that our input can help with that and ensure that the system becomes even more effective in future.

We strongly support the continuing need for independent scrutiny at a number of points in the process of developing new regulations. Properly deployed, independent scrutiny helps the government to make better policy decisions. If undertaken at key decision points, it can both reassure decision makers that they are not missing anything critical, and assist in demonstrating this transparently to interested stakeholders.

We offer our consultation response both in the content of the blog posts that we collectively agreed and in the responses to the specific questions in this consultation which are set out below.

We believe it is worth bearing in mind the key principles of Better Regulation that were established ten years ago that stated that Government should only regulate where the following criteria apply[1]:

1. It has been demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory or non-regulatory approaches;

2. Analysis of the costs and benefits demonstrate that the regulatory approach is superior by a clear margin to other approaches;

3. The regulation and enforcement framework can be implemented in a fashion which is demonstrably ***proportionate, consistent, accountable, transparent*** and ***targeted***; and

4. The proposal complies with a general presumption that regulation should only impose costs on business and social enterprises when a compelling case has been made.

We believe that these principles remain sound and any new Better Regulation Framework should continue to seek to apply them particularly a focus on alternatives to regulation to achieve policy objectives which is a strong theme of the consultation.

[1] Adapted from NAO (2014), *Using alternatives to regulation to achieve policy objectives*.

1. A “common law approach” to regulation

We agree that we should take this opportunity to consider how we can adapt our approach to regulation to both take advantage of freedoms from EU exit and to use regulation as force for good in rebuilding the economy, encouraging innovation and enhancing UK trading position.

It is not for the RPC to offer a view on the policy approach to be taken or whether a shift to a common law approach would help deliver that. We note that the common law approach has many potential advantages and is a highly successful, well-recognised approach to resolving issues that arise in UK society. However, we believe some important issues should be considered in light of the current proposals.

First, this raises the question of whether all areas of regulation should be included within the scope of common law decisions. This approach may in effect substitute the judgement of regulators with the judgement of courts, which may have less experience in particular areas of regulation. It may be desirable to consider ring-fencing some areas of regulation (for example relating to safety or consumer protection) where the government wishes to ensure that specific stipulated controls are in place. This would help reduce the risk that intended protections may be eliminated or eroded by court decisions. Also, regulation of different business sectors varies widely in its complexity and detail. It may be beneficial to consider whether the common law approach is appropriate for all areas of regulation.

Second, relying more heavily on common law decisions to create and interpret regulation may result in an increase in litigation, resulting in increased costs for both businesses and the UK courts. It may be beneficial to consider having specific courts specialising in some areas of regulation, or business regulation generally, especially for complex areas of regulation. Other countries have found that introducing business-focused courts has improved speed and efficiency of litigation in business matters.

Finally, this would be a significant change, and business organisations often argue that stability of approach is important to support effective business planning and help raise investment. Any such change may, therefore, be worth piloting in certain areas of regulation first.

Common law approach

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

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

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

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

Adopting a proportionality principle

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

Proportionality is one of the fundamental principles of Better Regulation. As such, we support the proposal in the consultation for an approach based on risk assessment and delivering the right outcomes as a key component of the UK Better Regulation framework.

The assessment of risk is an important part of the appraisal of regulatory proposals. As noted in the consultation document, the precautionary principle can be applied to inform the final decision when there are known harmful risks from action or inaction but there is a lack of scientific evidence relating to their likelihood and severity, leading to a "better safe than sorry" approach. While it is for departments and regulators to decide when and how to apply the precautionary principle, the RPC can offer guidance on its application and in particular on how best to present within impact assessments supporting evidence on the extent and likelihood of harmful effects, their irreversibility and levels of certainty.

In many cases, applying the precautionary principle militates against decisions that *may* lead to irreversible harmful effects, for example extinction of species even where the risk is very low or impossible to quantify. However, a strict interpretation of the principle may encourage excessive regulation or stifle some beneficial regulation that encourages the adoption of new technologies, products and processes. We would argue that a proportionate approach to the types, severity, reversibility and likelihood of risks/harms under consideration could provide a better balance between regulation to promote innovation and growth, and safeguarding against the most harmful and irreversible outcomes.

Earlier independent scrutiny of regulatory proposals would provide a mechanism to check that the approach to proportionality was being applied at an early stage of policy development through assessment of the level and types of risk involved and the outcomes to be delivered through regulatory or non-regulatory options.

More generally we would encourage consideration of the extent to which proposals for a new system meet the other important principles of Better Regulation (set out above). While these underpinned the design of the current Better Regulation system, it can be easy to lose sight of them. We believe it remains important to ensure that any new system remains aligned with them.

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?

As mentioned in answer to Question 5, we believe that proportionality is a fundamental part of Better Regulation and that independent scrutiny can check the

approach to proportionality used in policy making. In answer to this question, we would like to point to two aspects of proportionality in the policy making process that independent scrutiny supports and we think should be retained.

As an example, the current scrutiny process already supports proportionality in the proposed approach to regulation in the form of the small and micro business assessment (SaMBA) required in IAs. This is specifically designed to ensure that consideration is given to whether small and micro businesses (SMBs) could be exempt from the proposed regulatory change without giving up a large part of the intended benefits; if not, whether there any disproportionate costs on SMBs where mitigation measures should be considered (for example extended transition periods). We believe that an explicit consideration of the proportionality of application to small businesses should be retained in any future framework.

The RPC is already able to 'red rate' on whether the analysis supporting the SaMBA is sufficient. We would support a process that continues to encourage departments to consider the impacts on SMBs of regulation to determine whether there is a case for exemption or mitigation of impacts.

Separate from a proportionate approach to the design and enforcement of regulations, proportionality should also be applied to the process for scrutiny of regulatory proposals. Under the current framework, the administrative exemption for *de minimis* measures means that the RPC is not required to validate the impacts where the equivalent annual net direct cost to business is less than +/-£5m. This has greatly streamlined the process and reduced the number of cases scrutinised by the RPC to some 20% of the previous level, allowing scrutiny to focus on the most significant measures (as measured by EANDCB). We also apply a proportional approach to the IAs that do fall under our scrutiny to ensure that the appropriate level of resources is invested in gathering and analysing evidence on the impacts of a policy – this is set out in our proportionality guidance.

The proportionality principle could be extended: we can already call-in measures where the evidence supporting the *de minimis* assumption may warrant scrutiny. But there are other measures, meeting the de minimis criterion, with significant impacts that are not well-captured by EANDCB, such as those involving significant transfers that would 'net out' and those with significant indirect and wider. Such decisions may require greater analysis compared to proposals whose impacts are more direct, obvious and easy to quantify in EANDCB terms or extensions/amendments to existing regulations.

Question 7: If no, please explain alternative suggestions.

2. The role of regulators

The focus of RPC's independent scrutiny is on the impact assessments supporting regulatory proposals from departments. However, we are required to validate the estimated EANDCB from regulators of their qualifying regulatory provisions for the BIT.

We see less of the work of regulators in delivering our current role than the regulatory activity of departments. As a result, we do not consider ourselves to be in a position to comment on the overall policy approach to the relationship between departments and their regulators.

Businesses and civil society organisations (CSOs) ultimately may not particularly care where any given regulation originated. Any system that seeks to consider the overall burdens placed on business and CSOs therefore should cover both departments and regulators. We would encourage consistency of approach between departments and regulators in terms of what impacts (including competition and innovation) are to be included and how they are captured (either as part of a formal metric, or described within a 'wider impacts' analysis section of impact assessments). Depending on the approach adopted, this might extend to requiring proposals from regulators to be subject to the same scrutiny as those from departments.

It is also worth considering the implications of any move towards greater regulator discretion as regards scrutiny and accountability. Proposals from regulators can have significant impacts on business and it is important that any process that attempts to measure or control such impacts includes these in its scope. The current model leaves significant areas of regulation out of scope from RPC scrutiny and a future model might bring more of these into scope.

Regulators' role in promoting innovation & competition

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)

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
c. Creating reporting requirements for regulators
d. Other (please explain)

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

Delegating discretion to regulators to achieve regulatory objectives

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?

Regulatory sandboxes

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

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

Accountability of regulators

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

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

Improving the way businesses are regulated

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

The RPC aims to bring an independent analytical perspective to decision making. We encourage both departments and regulators to use a range of techniques (including surveys) to build a robust evidence base for their proposals. This helps to ensure that the impacts on those affected by regulatory change, as well as any unintended consequences, are identified and factored into the design of proposals.

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?

3. Revising the process and requirements of Better Regulation

We welcome the opportunity that this consultation provides to explore ways to improve the Better Regulation Framework in the UK which has many positive features and is highly regarded internationally.

We have argued previously that it would be beneficial for independent scrutiny of regulatory/non-regulatory options to take place earlier in the process than at present. We believe that it is possible to design a process which focuses consideration on the key evidence needed at different points in the process and that independent scrutiny of aspects of this evidence can assist decision makers in government and in Parliament.

Before a proposal goes out to consultation, we believe the focus should be on ensuring rigorous consideration is given to the problem government is seeking to address and consideration of a comprehensive range of options, including whether the policy objectives can be met through a range of alternatives to regulation. External scrutiny could reinforce the rigour of any early "gateway" focused on these issues both by assuring decision makers of the evidence supporting different options and by demonstrating transparency to stakeholders.

Regulatory measures that are subsequently worked up and require Parliamentary approval should continue to be accompanied by an impact assessment. At this stage it should focus on an estimate of the impacts (costs and benefits as well as any wider impacts as discussed below) in accordance with the metric(s) chosen by government and on the quality of the plans for monitoring and evaluation. Again, independent scrutiny can bring a valuable external perspective to assure the evidence and reassure stakeholders.

By separating the aspects of regulatory policy making currently scrutinised prior to implementation – to a model in which policy options are considered earlier and the impacts of the final proposal are considered prior to Parliamentary consideration and implementation, our proposition would reduce the amount of work conducted by policy makers and the RPC – particularly at the time-critical final proposal stage. We believe that by assessing different aspects of an IA at different and more appropriate stages, we can secure greater benefits from scrutiny.

We also agree with the proposal in the consultation document that more should be done to ensure that, after a measure has been in force for some time, there should be a robust post implementation review of how it is operating in practice. Again, as at present, this should be submitted for independent scrutiny to ensure that ministerial decisions relating to whether the measure should be retained, amended or replaced are based on a sound evidence base.

A revised process focused on key evidence at different stages would streamline impact assessments and could be delivered in a way which is both less burdensome for departments and also provides better transparency.

An early regulatory gateway

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

As we argued in a recent blog post, there is a strong case for independent scrutiny of all impact assessments ahead of consultation. Earlier scrutiny allows gaps in the evidence and analysis to be addressed as part of the consultation which helps inform the final policy decision and enable policy-makers and ministers to make better and more effective regulation. It is at this early point, therefore, that independent scrutiny can add the most value to ministers and departments, as well as to stakeholders who are most impacted by the proposals.

We are supportive of the early gateway proposals to ensure that at the early stages of policy development a robust case is made for why regulation is the best option to tackle an identified problem, compared to a range of non-regulatory alternatives and, if a non-regulatory option is not appropriate, to support the choice between different regulatory alternatives.

A more effective process to ensure that non-regulatory options are properly considered alongside the more "instinctive" regulatory options could reduce the amount of regulation and the overall regulatory burden as well as help the streamline the regulatory development process. Independent scrutiny of the supporting evidence of likely costs and benefits of different options would be critical to ensuring that all options are considered properly.

This process must recognise that non-regulatory options can be difficult to formulate as they require actions of third-parties and so this approach would need to be supported by appropriate help to departments.

Under the current framework, departments only submit pre-consultation stage impact assessments to the RPC on a voluntary basis – therefore we only see about 40% of IAs at this stage. Within these, we identify significant weaknesses in the rationale and consideration of options in around 22% of submissions. While mandatory final stage impact assessments submitted to us often contain some limited discussion of non-regulatory alternatives, by this stage it is generally too late in the political process to pursue these as serious policy alternatives.

A requirement for earlier IAs with a particular focus on the rationale and options, including proportionate evidence of the impacts of the different options, would allow for earlier independent scrutiny focused on these aspects of the IA – which would reduce the overall work involved in the policy development and scrutiny process, as non-regulatory approaches would not need to have a final IA and even for policies still taken forward via regulations, these aspects of the IA would not need to be considered again before implementation. The rigour of a process that needs independent confirmation that different options have been adequately considered would provide a stronger incentive to ensure non-regulatory alternatives are developed, assessed and tested with stakeholders and third parties.

The process should allow the scrutiny body to offer an opinion on the fitness for purpose of the analysis supporting the various regulatory and non-regulatory options to reassure decision makers that they are making their selection on robust evidence.

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

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

We would encourage the early gateway process to be used as way of ensuring that as wide a range of alternatives to regulation are considered, including the use of standards which can create a platform on which market forces can deliver better outcomes.

As with other non-regulatory solutions, successful development and adoption of standards has the advantage of being pro-competitive and, through strong industry engagement, can be updated and amended as necessary. However, the strength of engagement with industry means that standards can take time to consult on and develop and policy makers need to allow time for them to be implemented before considering traditional command and control regulation.

Streamlining regulatory impact assessments

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

We acknowledge that analytical resources available to departments are necessarily limited and there is a need to prioritise analysis on the most important and impactful regulatory measures. However, we believe that it would be a mistake to pursue excessive streamlining of the policy development process in a way that leads to far greater costs later on (through poor policy choices that are not based on robust evidence and analysis or do not consider regulatory or non-regulatory alternatives). We believe that (as discussed above in answer to question 18 above) some key changes can help to streamline the process, while still ensuring that sufficient information on impacts for regulatory measures are captured.

While the proportionality of analysis is always a matter of judgement to be determined on a case-by-case basis, the RPC has published guidance on the level of analysis that is likely to be appropriate according to the expected size of the impacts as well as a range of other considerations including the number of businesses/consumers affected, how radical, novel or contentious the measure is, and the risk of meeting objectives.

Under the current framework, the application of the *de minimis* threshold, where departments and regulators are able to self-certify measures as having annual net costs +/-£5m without the need for validation from the RPC, has been successful in streamlining the system and enabling resources to focus on the measures with the largest impacts – it has reduced the number of cases submitted to the RPC to

around 20% of the previous level. We would support the continuation of a similar threshold exemption for the smallest measures under a revised framework. Depending on the metric chosen, consideration should be given to whether this should continue to be a net threshold or should somehow factor in gross impacts (to avoid measures with large costs and large benefits that cancel out being exempt from scrutiny).

For measures above *de minimis*, in general, the RPC has recommended the following broad thresholds for considering the level of impact and proportionality of supporting analysis for both impact assessments and PIRs:

- High impact (EANDCB >£50m)
- Medium impact (EANDCB >£10m but <£50m)
- Low impact (EANDCB >£5m but <£10m)

We believe that the analysis should provide proportionate evidence necessary to support the decisions required at each stage of the policy development cycle. In our recent blog post on independent scrutiny we outlined three key stages:

- **Scrutiny in advance of consultation** – an early or 'inception stage' impact assessment could support the proposed gateway process. This would focus on evidencing the problem to be addressed, the rationale for government intervention, and, through a statement of expected outcomes against objectives (the 'success criteria in paragraph 3.3.7), whether regulation is the most appropriate policy intervention compared against a range of alternatives to regulation. This stage would help to challenge the view that a regulatory approach is the default policy response to a problem and would bring forward consideration of issues that are already included in IAs to a more appropriate point in the decision making process.

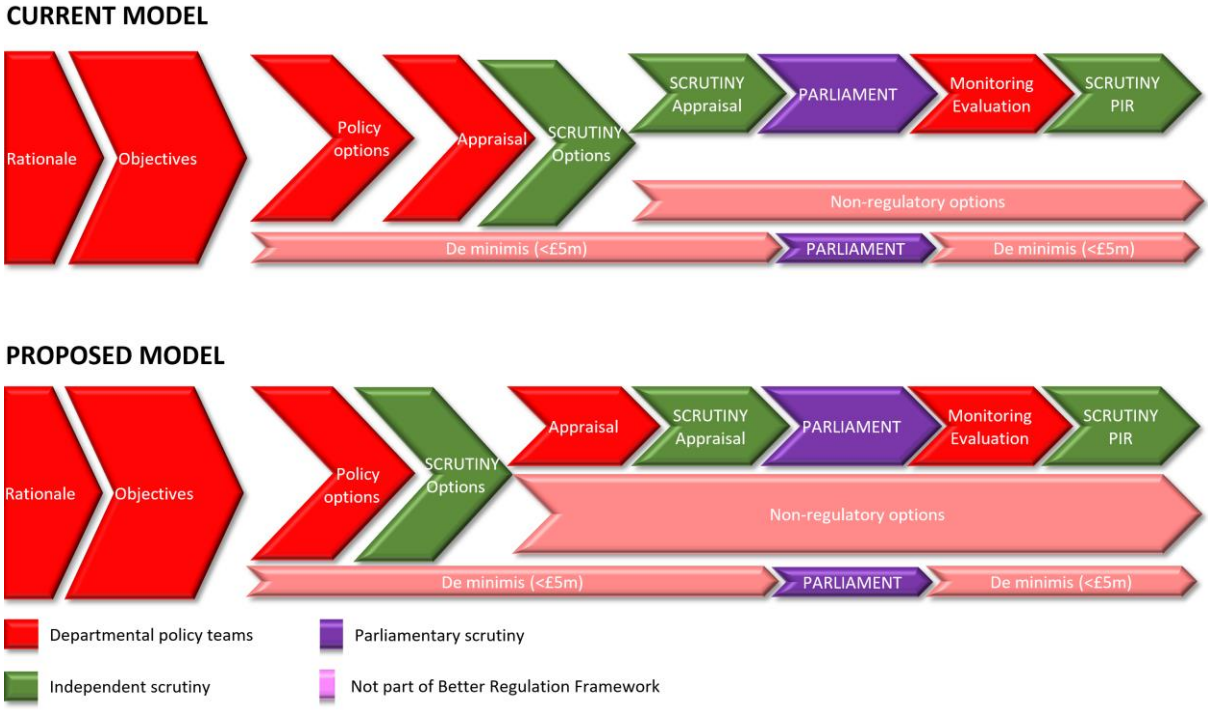
  Importantly, **this requires no additional work by policy makers or the RPC**. The work proposed for this stage is currently conducted at the Final Stage. However, we believe the benefits for better policy making are realised if this work is conducted at this earlier stage.

- **Final stage scrutiny before parliamentary approval** – we believe that our current responsibility for verifying the estimates of costs in final stage impact assessments, and the ability to red-rate as not fit for purpose, should be retained. This stage would also include a full cost-benefit analysis to provide transparency over whether the benefits of the selected option outweigh the costs. Currently we can comment on, but not red rate, the plans to monitor and evaluate the impact of a regulation after it has been implemented. In 2021, 22% of monitoring and evaluation plans within final stage impact assessments were assessed as "weak" or "very weak" (i.e. the analysis was not sufficiently robust to address the issue and it provided inadequate support for decision-making on this aspect of the assessment). Well-developed

monitoring and evaluation plans that identify what data will be collected and when are important for ensuring effective deliver of a post implementation review (PIR) that will make recommendations relating to future changes to regulatory measures.

- **Scrutiny post-implementation** – it is crucial that the impacts of regulation are evaluated after they have been implemented and consideration given to whether they should be retained, amended or removed. We would support an increased focus on the timely completion of comprehensive PIRs to support ministerial decision-making.

The diagram below shows the various stages of scrutiny under the current and our proposed model. Earlier scrutiny of regulatory options removes the need for appraisal of options that might be achieved by non-regulatory approaches and allows more policies to be taken forward through a non-regulatory route.



By focusing the evidence and analysis on what is necessary for decision making at these three key stages we believe the process could be streamlined without sacrificing the quality of supporting analysis or the value of independent challenge or imposing a delay in the policy making process. Further, streamlining should be delivered by focusing on the key evidence at different stages in this way and on reducing the number of proposals for regulation by better identification of alternatives in more cases, rather than by reducing the amount of evidence considered on any given case.

As part of focusing on the analysis that matters most at each stage of the process, we strongly support targeted consideration of wider impacts as described in paragraph 3.3.9 to be included where they are relevant to the proposal and would welcome the opportunity to 'red-rate' on them as part of our independent scrutiny role. In a recent blog post, we set out the importance of being able to scrutinise impacts including trade, competition, innovation and the environment where they are relevant to the proposal, but any approach needs to be proportionate and avoid becoming a 'tick box' exercise where departments are expected to present analysis against a large number of wider impacts. We discuss further our views on wider impacts in response to question 24.

Any new process would require new templates and guidance. This should be produced to ensure that departmental analysts focus their work on the evidence needed at each stage and are not incentivised to include unnecessary additional material in the belief that it strengthens their case. This would both help to streamline the process from the perspective of the analysts (who have to produce less material) and would make the resulting IAs more impactful for those that use them to support decision making (by making them more focussed on the important information).

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

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

We support a greater focus in the process on ensuring effective monitoring and evaluation plans are developed as regulations are introduced by allowing an independent scrutiny body to red-rate on this part of the IA and greater rigour in post implementation review of whether they had the desired effect and assessments of impact were accurate which then fed through more effectively into ministerial decisions about whether to retain, revise or remove the regulations.

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

We think that there is value in a process that encourages analysts to consider all significant impacts relevant to the Governments priorities of innovation, trade and investment, competition and the environment or other relevant issues, in assessing the costs and benefits of a proposal. These vary from policy area to policy area. We discuss this in our blog post on wider impacts where we argue that wider impacts should be considered within impact assessments and balanced against direct impacts on business.

The current approach to impact assessments encourages departments to focus on quantification of direct business impacts for verification by the IVB and inclusion in the business impact target. This can take the focus away from robust consideration of the wider impacts, such as competition effects, innovation, trade and the environment. While these are often included within the impact assessment, the level of quantification of these impacts varies and, at both consultation and final stage. Wider impacts have been “weak” or “very weak” in 23% of impact assessments submitted for scrutiny (that is, the analysis is not sufficiently robust to address the issue, and it provides inadequate support for decision-making on these aspects of the assessment).

We believe that the analysis should focus on those impacts, whether direct or indirect, which are most relevant to the regulatory proposal in question. For example, where a proposal is designed to generate environmental costs/benefits as a key objective or as a likely consequence of the measure, the impact assessment should provide an assessment of those costs/benefits. However, if it is reasonable to assume the same proposal is not expected to have any impacts on competition within markets (or only very modest second order effects), it is not proportionate or insightful to provide a robust analysis and departments should be able to state ‘de minimis’ for such impacts, or that the proposal would ‘do no harm’ to competition.

While the RPC can currently comment on the wider impacts, it cannot red-rate on this. In order to ensure that the quality of the department’s assessment of the wider impacts is sufficient to support decision-making on this aspect of the assessment, the scrutiny body should have the ability to red-rate this aspect of the IA where it is both relevant and significant to the proposal and not fit for purpose.

There is a separate question of whether and how many of these impacts might be factored into any metric or scorecard to be used for the purpose of comparing the impacts of different regulatory proposals or for assessing delivery against a target or a control measure (such as “one in two out”). Here there is a need for consistency across measures. The greater the number of issues that any metric attempts to cover, the less individual focus each will receive and the more likely it is that the system will either become burdensome or that each issue will receive more cursory consideration. It will therefore be important to decide which of the impacts that might be included are the highest priority. We discuss this further in our response to questions 21 and 29 where we argue that direct business impacts (EANDCB) should be retained as the core metric and used for any regulatory control mechanism that the government may wish to adopt, but a range of wider impacts should be considered as part of an overall scorecard of impacts to inform decision-making.

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)

Elements of all of these options.

As in our response to Q24, we believe that analysis for a given proposal should focus on the impacts which are of most importance and relevance to that regulatory proposal rather than mandating a list of potential impacts to be considered in every case. However, where they are relevant and significant to the policy then we think that it would support better policy making if they were properly considered in the IA and were subject to independent scrutiny to ensure that they were fit for purpose.

The right information and analysis of impacts should be transparently presented in impact assessments to stakeholders and key decision makers. We would consider it to be part of good regulatory policy making for both policy makers and analysts to identify the appropriate set of impacts and undertake a proportionate analysis for inclusion in the impact assessment to aid final decision making. This could be supported with best-practice case studies and methodology guidance documents similar to those currently provided by the RPC.

If it is concluded that a consistent metric or suite of metrics is required to track the cumulative impact of regulatory proposals or to allow a control mechanism to operate, then this will need to be done using consistent criteria. But care should be taken not to allow the focus in IAs to be too much on the metric or metrics chosen for this purpose at the expense of significant impacts of the proposal in question that are not included in the metric/target/control.

4. Scrutiny of regulatory proposals

Our experience over the past ten years shows that independent external challenge can improve the rigour with which possible impacts are considered and encourage better decision making within government and provide Parliament with robust evidence. We believe that both the improvements in analysis that we suggest to department in response to the IAs that they submit, and the improvements that they make prior to submission in the knowledge that their IA will be subject to independent scrutiny, have helped to improve the UK policy making process and led to better regulatory decisions.

As set out in section 3, we believe proposals should be subject to scrutiny at post implementation review stage, focusing on whether the regulation is operating as intended and whether it should be retained, revised, extended or removed. This also gives an opportunity to feedback lessons learned from the implementation of this measure into future policy measures.

Assessing the impacts of regulation - Post Implementation Review

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?

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

We believe that government should consider the lessons learnt from the creation of regulation. PIRs are important for looking back at a regulation to assess whether the intended objectives were achieved as a result of the regulation and if there were any other impacts or unintended consequences – we discuss this in our blog post on PIRs. A good PIR will help inform decisions on whether the regulation should be retained, amended or removed. At present this is not working as effectively as it might - between 2016 and 2018, 72% of PIRs were completed on time (typically within five years) with the figure falling to below 40% in the last two years.

We would support proposals to encourage more effective PIRs and ones that require ministers to act on the findings, for example to “sunset” a regulation where recommended or conduct a policy review of the regulatory landscape in an area.

We believe that, as in the current system, PIRs should continue to be subject to independent scrutiny by the same body that reviews impact assessments (including, critically, the plans for monitoring and evaluation) to ensure that they are properly carried out using robust evidence and analysis. The scrutiny body should produce opinions that confirm that the evaluation has been done well and that the evidence gathered supports the recommendation for action in the PIR.

The development of new regulatory proposals should be consistent with an “evaluate first” principle – so that the effectiveness of existing regulations is properly considered before new regulation are proposed in any given policy area. The quality of the final PIR produced and the commitment to the new process adopted is more

important than the timing of when the PIR is completed, which as we argue below, should vary for different measures depending on when impacts are likely to be felt.

It is important to recognise that the timing of expected costs and benefits will differ for each regulation. In some cases, the impacts may arise in the short term and a PIR conducted two years after the measure came into effect would be able to provide an estimate of the actual costs and benefits. However, other proposals may not generate impacts for several years either by design or the time needed for businesses to adjust and respond to new regulatory requirements. In these cases, a two-year PIR would offer very limited evidence of impact and be restricted to a process evaluation relating to how the regulations have been implemented.

We would therefore support a process where the most appropriate time-period for a PIR is proposed in the monitoring and evaluation plans that should be developed prior to the introduction of any legislation (in the final IA) – although a default time-period of 2 years could be used in the absence of other factors extending the period.

These monitoring and evaluation plans should be embedded into the impact assessment that is produced final stage, with the independent scrutiny body having the ability to red rate the plans. This should help ensure that M&E arrangements, including data collection and the expected timings of the costs and benefits, are considered as the regulation is brought in and can inform a decision on the most appropriate time to undertake the PIR.

It is essential, however, that the process developed for PIRs is robust and includes consequence if PIRs are to be taken more seriously than at present and genuinely feed into subsequent decisions about whether the regulation should be revised, retained or removed. This might involve a political mechanism to ensure that the relevant minister has either taken forward the recommendations in the PIR or explained why it is not appropriate to do so.

The scrutiny function in the Better Regulation Framework

Question 28: Which of these options would ensure a robust and effective framework for scrutinising regulatory proposals?

a. Option 1
b. Option 2
c. Option 3
d. Other (please explain)

Option 1) Scrutiny undertaken internally as part of government processes. *This could take the form of a cross-governmental group of ministers, supported appropriately by the civil service.*

- ***Option 2) An independent body*** *could continue to provide a scrutiny function which would operate independently from the Government. They could provide scrutiny of regulatory proposals and their impacts to government departments directly.*
- ***Option 3) Government scrutiny with independent expert advice.*** *This could take the form of a cross-governmental group of ministers as in option 1, but with an external body providing expert input and advice, or scrutiny could be provided by a joint committee of ministers and experts from industry and academia.*

We strongly support the ongoing existence of an independent scrutiny body (option 2), building on the experience of the RPC over the past ten years. During this time, we have developed close relationships with policy makers, analysts, parliamentarians and business stakeholders who value the independent advice, training and technical guidance we offer.

Independent scrutiny is seen as the best practice approach to Better Regulation internationally with the UK system being held in high regard by other international regulatory bodies, it is also strongly supported by the business representative groups that we regularly engage with. We discuss the value of independent scrutiny in our blog post.

We see three key ways in which independent scrutiny adds value to the framework:

- It brings an **independent analytical perspective** to the decision-making process. The pressures that government faces can result in a tendency to focus on the issues that matter to those making the decision and lose sight of the impacts on those affected by them – including unintended consequences. Independent expert input can help to ensure that these impacts are properly factored in and that the evidence and analysis underpinning the proposals are robust;

- It delivers **accountability** and **transparency** to external stakeholders. It strikes a balance between offering confidential input and publishing opinions and other material that are used by ministers in finalising proposals, and Parliament in its democratic scrutiny role; and

- It facilitates the **sharing of best practice** across government. The RPC works alongside the government analytical community to provide training, best-practice case studies and support and to ensure that previous lessons are fed back into the system.

We believe that independent external scrutiny has a number of advantages over other approaches to assurance. While regulatory proposals could be scrutinised within government departments or ministers, independent scrutiny brings fresh perspectives and expertise based on a wide range of experience from the outside world that helps to counter “group-think”. By looking across the full range of policy proposals from departments, an independent scrutiny body will also be well-placed to become a centre of excellence for regulatory policy development by enabling cross-cutting themes and common methodological issues to be identified leading to greater consistency of approach.

Since 2017, we have issued opinions on 146 consultation stage impact assessments, 228 final stage impact assessments and 54 PIRs. The introduction of the de minimis threshold was very effective in reducing the number of EANDCB submissions from regulators for measures with low impact, enabling independent scrutiny to focus on the most significant proposals for the business impact target. In contrast, the number of PIRs, which are important for understanding how well

existing regulations have been implemented and for shaping the design of future regulatory proposals, has been relatively low.

Number of RPC opinions issued by type and year, 2017 to 2021

	Consultation stage	Final stage	EANDCB validation	Post Implementation Review
2017	33	58	366	25
2018	27	49	26	8
2019	33	45	11	3
2020	21	40	6	10
2021*	32	36	0	8
Total	146	228	409	54

* Opinions issued 1st Jan to 29 September 2021

The independent scrutiny provided by the RPC has enhanced the accuracy and credibility of the current business impact target and before that, the operation of OIOO/OITO. Where we identify issues that may lead to an impact assessment being red-rated either for the EANDCB or SaMBA, we typically issue an Initial Review Notice (IRN) describing our concerns and encouraging departments to resubmit the impact assessment. Since 2017, between 20% and 25% of submissions received an IRN each year (with a peak of 38% in 2020).

As a direct result of this verification element of our scrutiny process, the final EANDCB estimates that appear in the Government's annual BIT report often differ from those initially submitted by departments. For example, in the most recent BIT report, RPC scrutiny led to an overall adjustment of £232 million in magnitude relative to the estimates submitted by departments.

A stronger emphasis on PIRs in the process (see above) would allow the expected costs to business in the final IA to be compared with the actual costs that businesses have experienced post-introduction which could then feed into the BIT (or its successor approach).

From our engagement with stakeholders in business, CSOs and Parliament, we know that they value greatly the assurance that independent scrutiny gives them on the evidence used by government in developing regulatory proposals. The publication of IAs and independent opinions on their fitness for purpose can help the government reassure its stakeholders of the robustness of their proposals.

Among our many stakeholders, the business groups and the TUC maintain their key support for the RPC, championing our role, in particular our efforts to work with those government departments that produce new regulation, to transparently improve the quality of Regulatory Impact Assessments. Our stakeholders believe that it is vital that any regulatory changes, which impacts British business, are justified and rational providing, through our scrutiny, a confidence that regulation is grounded in a strong evidence base. Therefore, they wish to see the RPC or equivalent independent body continuing to be at the heart of the Better Regulation framework going forward.

We discuss elsewhere in our response the stages at which independent scrutiny should feature in a new Better Regulation process. In summary, we believe that it can add significant value at three stages: pre-consultation consideration of options; final stage consideration of estimates of impacts and of monitoring and evaluation plans; and validation of the findings of post-implementation reviews.

5. Measuring the impact of regulation

Decisions on what metrics or indicators are necessary should follow decisions on the purpose of the framework. Keeping track of the impacts of regulation on business will require retention of a metric. But this might usefully be supplemented by other metrics/indicators for other priorities, such as impact on the environment or on trade so that the benefits of a policy can be weighed up against the costs.

We believe it is important that a focus on the impacts of regulation on business is retained and that the current EANDCB metric, focused on direct business costs is an appropriate metric for the Better Regulation framework. It has the advantage of being sufficiently tightly defined to be easily measurable and linked to a clear objective to minimise the burdens placed on business, subject to achieving the societal benefits from regulatory change.

From its use over the last ten years, the metric is well known to policy makers, analysts and stakeholders and the RPC has built up significant case history of calculating EANDCB across a very broad range of policy areas. Although there have been challenges in applying EANDCB in some cases, we believe alternative approaches, such as the inclusion of indirect business impacts and other wider impacts, would lead to less consistency of approach and more spurious estimates of impact that would damage the credibility of the metric. An important aspect of any metric used is that it is regularly and transparently published in a way that promotes discussion and explanation of the results.

Depending on what the government priorities are, it might be appropriate to adopt a “scorecard” approach which allows a measure of business impact to be considered alongside measures or indicators of wider impacts such as on trade, competitiveness or the environment. While we recognise that not all of these impacts can be measured quantitatively or consistently across all regulatory proposals, we believe there is a case for independent scrutiny of the quality of analysis supporting the scorecard to inform decision making. However, the inclusion of too many such policy objectives in a scorecard would risk diluting the focus on specific objectives and making the process both difficult to use and more burdensome.

Question 29: Which of the four options presented 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)

In ANNEX A

It is for Government to set the overall objective(s) for what it wants to achieve through the Better Regulation framework and how such a metric would be used (for

example in delivering a “OIXO” type control) to incentivise delivery against the objective. We discuss the purpose and options for a metric in our blog post.

We note that the metric has been subject to several Government reviews and also examined by the NAO in its 2016 review of the business impact target (BIT). The NAO acknowledged that “constructing a sound metric for regulation is difficult” but observed there were weaknesses in the current EANDCB approach relating to:

- the distinction between direct and indirect leading to only partial coverage of the impacts in some cases (e.g. when there are significant consumer benefits);
- the use of a single metric not differentiating between different types of burden (e.g. administrative vs policy costs); and
- failure to consider the interactions across regulations and the cumulative burden.

We agree, but would argue that the setting of too many objectives related to policy priorities and accompanying metrics to track progress against each risks, weakens the overall coherence of the framework and will make it harder to deliver.

In setting a metric(s) for the framework, we believe that three principles should be followed:

- **Accountability** – it is important that Government, departments and regulators are accountable for the choices they make over regulatory reform and are able to transparently present the impact to Parliament and stakeholders;

- **Measurability** – for a metric to operate efficiently and consistently across a wide range of policy areas it should be easy to measure and clearly understood; and

- **Commitment** – there needs to be strong buy-in across departments for the mechanism by which the metric is expected to incentivise performance against the target or objectives with regular and transparent reporting of progress.

While the decision for which metric should support the Better Regulation framework rests with government, we offer some thoughts below on the options presented in the consultation document based on our experience over the last ten years of scrutinising the estimates of business impacts presented in impact assessments.

Existing EANDCB metric

The key metric that the RPC is currently required to validate for final stage impact assessments accompanying qualifying regulatory provisions is the equivalent annual net direct cost to business (EANDCB). This metric is used within the BIT and was also the chosen metric for the operation of the previous OIOO/OITO initiatives.

We believe that any metric(s) chosen by government to inform the effective operation of the Better Regulation framework should be linked to a clear statement of

purpose and be commonly understood, to ensure a consistent approach across sectors, policy areas and time. EANDCB focuses on the immediate and unavoidable impacts that regulatory change imposes on business and CSOs.

Businesses and CSOs are often the most directly impacted by the change through administrative costs to comply with the regulation (for example new reporting systems or familiarisation) and ongoing costs (for example having to produce goods/services that conform to new standards). Both the BIT and previous OIOO/OITO focus on reducing the annual costs to business as their objective. Therefore, a metric like EANDCB would appear to be a suitable metric if the framework retains a focus on measuring the immediate impact on business of regulatory change.

As noted in the consultation, and based on the RPC's experience of scrutinising EANDCB estimates, the strict interpretation of the metric can generate some outcomes that appear counterintuitive or perverse. These often occur when the regulation imposes costs on those businesses that must comply with the change, but the benefits to other businesses and/or consumers, who are the intended beneficiaries of the policy, do not score because they arise as a result of market adjustments or behavioural change. Previous examples of this have included regulatory proposals to reduce metal theft, which imposed direct costs on scrap metal dealers that were more than offset by the societal benefits from the impact of reduced theft. More recently, Defra's proposal for a deposit return scheme on beverage containers is expected to be costly to businesses (and so result in a high EANDCB) but generate substantial environmental benefits.

Our experience over the last ten years is that such 'perverse' outcomes, where the strict interpretation of EANDCB appears to operate against the policy intent, are relatively rare and can, where necessary, be appropriately explained in the relevant IA. We have built up a significant case history of how the RPC has interpreted the application of EANDCB for challenging cases, which we believe provides a strong base to build on for the future framework and metric, rather than starting with a new metric.

One disadvantage of EANDCB as a central metric is that, when aggregated across regulatory proposals to give an estimate of the total business burden, there is a risk of it being interpreted too precisely. We know there is significant uncertainty over estimates of the cost to business and impact assessments should ideally present a range to reflect this uncertainty. However, the historic need for a single estimate to inform a BIT target based on EANDCB means that the range of uncertainty and error is lost in the aggregated figure which gives rise to spurious accuracy in the final figure. Certainly, when quoted in relation to individual policy measures the potential range should be clear, and when considering an appropriate target or offsetting approach the level of uncertainty should be taken into account.

Previous government reviews of the metric have considered whether indirect business impacts (or only a subset of them) could be included within the metric. As we advised in 2017, since many costs imposed on business from regulatory change may ultimately be 'passed through' to others in the economy (consumers, other businesses, employees), the inclusion of indirect impacts may lead to very small impacts on business.

Alternatively, there would appear to be scope to allow some indirect impacts to be included within the EANDCB where these impacts are a clear objective and intention of the policy. However, in order to prevent 'gaming' through the inclusion of speculative indirect impacts, careful consideration would need to be given to the boundary of what indirect impacts could be included if EANDCB were adjusted in this way.

By their nature, indirect business impacts are also likely to be more difficult to monetise which creates difficulties for validation of EANDCB estimates. Seeking to include indirect impacts would be likely to skew the assessment, since they would reflect what is measurable, rather than what should be included conceptually to provide the best assessment of business impact. It would also be difficult to be consistent across policy measures, given the 'breadth' of indirect impacts considered for some measures.

Administrative and policy costs

The consultation document considers adjusting the EANDCB metric to only include administrative costs rather than policy costs, on the basis that it may incentivise policy makers to minimise the administrative burden placed on business in meeting the intended policy objectives. We are sceptical of the value of this proposal. An understanding of the total costs is necessary to inform decision-making and businesses are likely to be most concerned about total regulatory burdens rather than worrying about whether they are administrative or policy costs.

Another problem with this approach is that it requires a further definition to be developed to separate administrative costs from policy costs, which may not always be clear. In addition, and as noted in the consultation document, administrative costs only account for a very small proportion of total business costs (£43m out of a total of £1,120m) which risks the EANDCB metric appearing very partial in nature.

Movement to a net present social value metric

For the 'change' option presented in the consultation document, it is argued that a NPSV measure should be used. This captures a wider range of benefits such as environmental, trade and productivity. It is worth noting that impact assessments already include a NPSV measure alongside the EANDCB, to capture the overall objective that regulatory change should lead to a benefit to society in NPSV terms, but in doing so, may impose a cost on business.

Our experience is that the NPSV calculated within impact assessments is often incomplete because some impacts are difficult or impossible to monetise (for example departments have struggled to monetise impacts on consumer protection, corporate governance, or 'levelling up'). This can make it difficult or impossible to compare NPSVs across impact assessments on a consistent basis, unlike EANDCB, which is more narrowly defined in terms of its scope and therefore easier to calculate in a comparable way across proposals.

Another disadvantage of a single NPSV metric is that it masks significant cost and/or benefits through offsetting the impacts. For example, a regulatory proposal may generate a large NPSV through the delivery of environmental benefits, offset by

negative impacts on competition or innovation that are not immediately obvious from the headline NPSV. The scorecard approach described below provides one way to provide greater richness of transparency over the composition of impacts and allow different objectives to be weighed up.

Scorecard approach

The consultation notes an alternative approach to the EANDCB metric would be to develop a scorecard approach that captures a range of impacts (or direction of travel) that each regulatory proposal would have on different government objectives: e.g. environment, innovation etc.

We believe there would be value in developing a scorecard to capture the expected impacts of regulatory proposals against a small number of key government objectives. The current EANDCB could form part of the scorecard to cover the impacts on business, but we see merit in a scorecard presenting an assessment of other impacts related to government's chosen priorities.

As noted above in the consideration of NPSV, one of the weakest parts of existing impact assessments is the quantification of wider benefits, where data limitations often make robust analysis challenging. As a result, it is unlikely that such a scorecard could be completed in full across all regulatory proposals. However, we see significant value in providing an assessment of what quantitative and/or qualitative analysis of impact has been undertaken against each element of the scorecard. The fact that a given proposal has limited or uncertain impacts in a particular area is valuable in itself.

A scorecard approach would provide greater transparency and confidence that the impact of regulatory proposals against key objectives has been considered as thoroughly as possible, with a mix of quantitative and qualitative approaches, to aid decision making. For example, the completed scorecard could be used to illustrate how a regulatory proposal may impose £10 million of annual cost on business but generate a range of environmental, levelling-up or innovation costs or benefits (which may or may not be quantified in the overall NPSV) to enable ministers to understand the trade-offs against key objectives and make informed choices.

An external scrutiny body like the RPC would be well-positioned to be able to provide an overall 'fit for purpose' rating of the scorecard. This would be based on whether the quantification of impacts in the scorecard or, at the very least, the description of impacts, is sufficiently proportionate and robust to be used as a tool to inform decision making.

In creating a scorecard, we would caution against the selection of too many objectives to assess the impacts of regulatory proposals, as this risks weakening the overall coherence of the government's regulatory programme and limits the ability of the scorecard to be a useful tool to inform decision making. We note that not all (indeed potentially only the EANDCB) elements of a scorecard would feed into the BIT/OIXO regime discussed in the section below.

Summary

Overall, we believe that the current EANDCB metric is the most appropriate choice for capturing the business impacts of regulation. It has the advantage of being well known to departments and easy to measure consistently across regulatory proposals enabling cumulative totals to be presented if desired.

An alternative approach would be the introduction of a scorecard that sets out the best assessment of impact against a narrowly defined set of government objectives of which business impacts (using EANDCB) would be one.

This approach would set out transparently the range of impacts and any associated trade-offs across key objectives and serve as a tool to inform final decisions. The information included in such a scorecard and the analysis underpinning it could be rated as fit for purpose or not fit for purpose by an independent scrutiny body.

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

It is a strategic policy decision for Government whether to use targets or offset mechanisms, such as a OIXO approach. There are a range of potential advantages and disadvantages to different approaches and we set some of these out in our responses below.

The current Business Impact Target (BIT) has not worked well given the lack of commitment from the Government to reduce the impact of regulations on business to meet the target. For the 2017-2019 Parliament, the Government set a target of a £9bn *reduction* in direct business costs over the full length of the Parliament. Although that Parliament was cut short, the final position was an *increase* in costs of £7.8bn. For the current Parliament, Government has set a holding target of £0, but in the first year costs to business increased by £5.7bn (excluding some very significant costs from temporary measures introduced in response to Covid-19). Missing the target also appears to have had little reaction from ministers on decisions related to regulation.

OIXO can provide a highly visible target that creates an incentive for Government to control the flow of regulation and bear down on unnecessary burdens. However, we note that some major government policy objectives (such as achieving Net Zero) which involve significant increases in costs to business will require a significant effort to reduce burdens in other areas to meet an overall reduction in burdens. This may lead to some perverse incentives where decisions on which regulatory changes to make become more determined by meeting the OIXO rule rather than what may be most coherent for businesses/CSO within the sectors being regulated.

In designing a new approach to OIXO (or any alternative control), careful consideration needs to be given to the choice and measurement of the metric if it is to be applied consistently across all policy areas and provide an incentive mechanism to meet the intended objective.

Consideration should also be given to the reporting period of the target (annual or over a parliament) and how offsetting would operate (department level or cross-government) to ensure distortions are not created in the timing of when regulatory change occurs and the overall coherence of government's regulatory programme.

If the Government were to decide to reintroduce a regulatory offsetting mechanism like OIXO, we believe that EANDCB should continue to be used as the underlying calculation, providing transparency over the burdens being introduced on business.

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

It is for Government to decide whether the reintroduction of an OIXO approach is the most appropriate way to meet the policy objectives it sets for the Better Regulation framework.

As we discuss in a recent RPC blog, a OIXO or other regulatory budget offset mechanism has the potential to incentivise decisions that bear down on the burdens to business of regulation by requiring the removal of existing costs to offset or 'pay for' new regulatory burdens to be introduced.

While offset mechanisms can provide value through revealing the total burden of regulation added, and allowing Ministers to plan to reduce impact across a period of time, careful consideration needs to be given to situations where a strict interpretation of an OIXO control mechanism risks impeding the delivery of other key government policy priorities. There are likely to be situations where an objective to reduce regulatory burdens for business conflicts with other policy objectives that aim to deliver wider societal benefits. For example, the reduction of greenhouse emissions necessary to achieve net zero by 2050 is a key government priority that is very likely to increase regulatory burdens on business. If the Government wants to reduce the regulatory burden on business, then it will need to find significant additional measures to reduce burdens given the plan to increase burdens to meet net zero objectives.

Having a plan to take account of these potential trade-offs between operating OIXO and delivering government priorities is essential if the regulatory framework is not to fail. The framework must continue to focus attention on keeping business burdens to a minimum but at the same time allow Ministers to justify the introduction of new burdens to attain other policy objectives. Without acknowledgement and transparency of such trade-offs, the framework risks certain policy areas being exempted which would lead to business burdens not being reported and the target undermined.

In practice, the framework could make explicit provision for Ministers to introduce regulatory measures that are costly to business if they can provide assurance to stakeholders that the costs are justified by the long-term benefits of the policy, which may derive from indirect business benefits or societal gains presented as part of a 'scorecard', neither of which are captured by the EANDCB metric.

We would argue that such an approach to the Better Regulation framework is as much about transparency as control. Ministers should be able to demonstrate that they are taking a fully evidence-based approach to making decisions on regulation, that they welcome independent challenge as part of that process and that any new costs introduced are the minimum necessary and justified by the benefits of the regulation.

At its simplest, this might mean tracking the burdens on business using a metric developed from the current EANDCB and publishing cumulative accounts, ideally split by policy area or department. This would allow stakeholders to see what was happening and help ministers to justify decisions taken in pursuit of the policies they were elected to deliver. Any control mechanism which government might introduce should include and build on this principle.

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

We believe that there are a number of advantages from the reintroduction of an OIXO approach. These advantages tend to relate to the macro impact of government on the economy. It:

- Sets out an overall ambition and commitment to bearing down on regulatory burdens by requiring the removal of existing burdens to offset or 'pay for' any new costs to be introduced;
- Allows transparency about the total additional burden on business across a period of time, as well as the delivery of this objective;
- Develops progressively greater understanding of the cumulative impact of regulations; and
- Decentralises of responsibility for regulatory efficiency and efficacy by requiring individual departments or regulators to have to consider how they might trade off their different regulatory objectives.

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

Reintroduction of an OIXO approach also brings with it some potential disadvantages, which broadly relate to the detailed practice challenges in creating a metric without perverse outcomes:

- In some cases, the strict operation of OIXO may lead to perverse outcomes. As noted on p39 of the consultation, a measure to reduce gambling harms in society intentionally imposed a cost on business by restricting their profit. The size of this IN more than offset the total value of the savings made as part of the Red Tape Challenge initiative. We believe that the 'scorecard' approach discussed in the consultation and in our response to question 29 would be a valuable tool in such cases as it will show where there may be trade-offs between direct costs to business and a range of wider benefits and how the final decision is based on weighing up multiple objectives;
- Where achieving government objectives like net zero are likely to impose substantial costs on business, it may be challenging for departments to find enough savings from the existing statute to offset the INs;
- Potential constraints on ministerial decision making and the overall coherence of the stock of regulation in a policy area may happen if decisions on INs and OUTs are determined more by the need to meet OIXO accounting than in setting the most appropriate regulation (e.g. regulations that are much needed and beneficial to society risk being removed simply to find savings for business to meet the target); and
- There is an increased tendency to create ad hoc exemptions to OIXO where specific measures are likely to generate large INs that may otherwise have a perceived distortionary impact on the account (as has occurred for regulations related to the Grenfell disaster).

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

The consultation document notes that unlike some other countries, the UK has never baselined the full costs of the stock of regulations. We agree that such an exercise would have significant value particularly in terms of being more aligned to the way business perceives regulation and providing greater flexibility to target the OIXO approach.

As noted in our response to question 27, we are in favour of the adoption of an 'evaluate first' principle to the development of new regulatory proposals. This involves building up a more complete picture of the existing regulatory stock and its effectiveness through evaluations and PIRs, before bringing forward new regulatory proposals. A comprehensive evidence base of existing regulatory baselines and effective policy making could also be deployed more efficiently across impact assessments by reducing the burden of bespoke evidence gathering for each proposal.

The task of baselining should be undertaken on a departmental basis if offsets are to be linked to measures in ways that do not cross departmental lines, and a cross-government basis otherwise. The baseline should be updated for each regulatory budget period to reflect regulatory and regulatory actions, using the metrics employed in the OIXO programme.

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

There are a number of factors that need to be considered when designing an offset mechanism, such as OIXO.

Metric

The metric needs to drive the desired behaviours and incentives to meet a clear Government objective. The metric should consider the relevant unit used to measure 'INs' and 'OUTs'. Options include:

- **Number of regulations** (i.e. X regulations taken off the statute book for every one introduced) - This takes no account of the magnitude of the regulatory burdens and may lead to multiple small deregulatory measures being created to justify the introduction of a new regulation with a potentially significant impact. While using the number of regulations can be accounted for more easily than calculating the total impact offset, without offsetting the actual impact on business, such a metric may not meet the objective of reducing the overall impact on business;

- **'On paper' restrictions** (i.e. number of words or constraining rules per regulation, complexity of language) - This tries to approximate the cost felt by

businesses using a metric related to administrative burdens or a simple count of requirements, but takes no account of interactions among regulations, subsequent guidance and implementation, or the magnitude of such burdens. It is related to the inclusion of familiarisation costs among the administrative costs captured in the current EANDCB metric. However, there may not be a consistent relationship between the quantity of administrative burden and the overall impact on business. Again, while it may be simpler to consider the administrative burdens, a metric based on such a calculation is not designed to incentivise the reduction in the overall burden on business; and

- **Costs (including EANDCB, BNPV, NPSV)** - In contrast with the other candidates, directly measuring the costs within an offset mechanism avoids the skewed incentive to act to reduce anything other than the burden on business. However, we note that there is a trade-off between comprehensiveness of the calculation and potential analytical simplicity and practicality of the other candidates.

None of these metrics are perfect and fully reflect the impacts of instituting or removing measures. We also note that a *net* metric suppresses information about burden transfers – if for example the new measure and removal of the offsetting measure both transfer burdens from large to small businesses. However, in order to maintain the incentive on the reduction of burdens on business, we argue that **EANDCB should be retained as the primary metric for any approach to burden control like BIT or OIXO**.

***Ex ante* or *ex post* calculation of impacts**

As with the current business impact target, the chosen metric might calculate the impact on business using the *ex-ante* estimates of impact from the original IAs, or the *ex-post* calculations of their actual impacts (as captured in the post implementation review (PIR) or another evaluation).

The *ex-ante* approach may be preferred on the grounds of simplicity, but it would also include the sunk implementation costs that would not be recouped if the regulation was removed. In contrast, we believe that the *ex-post* approach is more aligned with Better Regulation principles because it would include actual data that could be contrasted with the ex ante estimates to reveal burdensome and unnecessary or obsolete regulations.

Timing

Any OIXO or offset mechanism would apply over a fixed period of time (e.g. a single year or the five-year life of a Parliament). While a fixed regulatory budget period requires greater forward planning, it may also lead to suboptimal sequencing of regulatory proposals (e.g. it may incentivise larger INs to be introduced earlier in the period or hold back OUTs until later in the period when there is greater clarity over what offsetting is required for the final account).

Linkage

In many past OIXO programmes, regulatory 'INs' and 'OUTs' have been calculated on a whole-of-government basis, rather than restricting the matching of 'INs' and 'OUTs' within a department. While there may be logic and a sense of fairness in reducing the regulatory burden in the same sector of the economy as the increase in burden from the new regulation, we note that if the Government is able to select the 'OUTs' between departments, it is able to find the areas with most opportunities for burden reduction, which may or may not come from the same area of the economy.

7. Further comments

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

The current framework applies to impacts on civil society organisations (CSOs – charities, unions and others) as well as to businesses. However, as we observed in one of our blog posts, all too often we simply use the term 'business'. As a result, everyone involved – departments, the RPC and other stakeholders – tends to focus on business impacts and do not give adequate consideration to the different issues that face CSOs.

We believe that it is important that a revised Better Regulation Framework should continue to include impacts on CSOs alongside those on business and that we should both use terminology that recognises this and be more rigorous in ensuring that impacts on this important group of stakeholders are taken properly into account in the process.

Regulatory Policy Committee

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