REGULATORY HORIZONS COUNCIL

Reforming the framework for better regulation

Consultation Response

1 October 2021

Contents

Introduction

Who we are

The Regulatory Horizons Council (RHC) is an independent expert committee that identifies the implications of technological innovation, and provides government with impartial, expert advice on the regulatory reform required to support its rapid and safe introduction.

The RHC exists to promote regulatory change that is needed to ensure the UK gets best value from technological innovation. That value could be in terms of productivity and global competitiveness; it could be in terms of environmental sustainability or social inclusion. But no technological innovation will deliver value unless it is able to make the – often difficult – journey through from concept to start up and from start up to scale. Regulation plays a critical role in this journey and may even be the deciding factor in the success, or otherwise, of a particular innovation.

Regulation can impede innovation in many different ways. It may be designed and implemented in ways that suit existing technologies and established firms, but are inimical to disruptive technologies or business models. It can be hard for those who are not practised in and resourced for discussions with regulators and policymakers to navigate. It may simply be unclear, creating risk that undermines investment cases. It may create processes that take too long to implement, adding cost and slowing down the vital process of iteration, learning and refinement.

But the answer is not always as simple as 'deregulation'. Regulation often fulfils a need to address public concerns. Regulation helps to keep us safe, ensure we are not ripped off, protects and promotes healthy, competitive markets. If technological innovations are to deliver benefits, they must be taken up and trusted by society, and regulation plays a critical role in securing that trust.

So the answer must lie in getting the right regulatory frameworks. By doing this, we will enable innovation to happen *and* foster the trust that is needed for it to achieve maximum impact.

And we can do this. The UK has a long track record in leading edge thinking and best practice on regulation. We have dedicated, expert, passionate regulators who are already pushing the boundaries of regulatory technology to deliver benefits from innovation. We have a vibrant community of inventors, innovators and entrepreneurs with myriad ideas about new and better ways of doing things. We also have a wide variety of highly engaged and articulate civil society groups, providing clarity both on issues of potential concern and possible solutions.

By listening to, understanding, and working with others, the Regulatory Horizons Council hopes to achieve real impact by advocating regulatory approaches that will enable innovation to flourish and deliver value across our economy and society.

Published and upcoming reports - How they inform and relate to the consultation

The RHC has produced three reports with recommendations for government this year, on the regulation of: fusion energy; medical devices and genetic technologies. We are currently finalising a further 'deep dive' report on drones.

The RHC was also commissioned via the government's Innovation Strategy in July this year to look at whether there are a set of high-level guiding principles for regulation that may apply broadly to any sector of innovation. We refer to this project as the Pro-Innovation Regulatory Principles workstream and we plan to finish this in the coming months. This project has some significant areas of overlap with the consultation on reforming the framework for better regulation as well as focusing on some other issues. Where possible, we have therefore used initial findings from our project to inform our response – in addition to the experience and knowledge the Council already has, including from the above reports.

This consultation comes at a very important point for the UK and we welcome the opportunity to use our combined experience and knowledge to inform the discussion. Our response focuses mostly on the proposals that coincide strongly with our remit, where we consider the proposals could potentially have a significant impact on innovation.

Common Law Approach

Moving to a "common law" model of less codified regulation

Responses to the following consultation questions:

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.

Views of the Regulatory Horizons Council

The RHC thinks that many areas of law that could impact on innovation, particularly those that seek to address emerging technologies, could benefit from being less codified in primary legislation, but the RHC also cautions against a system that ends up relying on potentially slow and uncertain case law. For areas that could impact emerging technologies, it suggests that regulators and other policy-makers seek to use other tools where possible, such as standards.

In our discussions with those attempting to get ideas from concept to start up and from start up to scale, we have heard repeatedly about the importance of the *right regulation at the right time*. If we wish to encourage technological innovation it is important that regulation is agile and flexible, both enabling the development of new technologies and business models and responding to them in a timely way.

It is clear that the *form* of regulation is relevant here as well as the *substance*. Generally speaking, across most sectors, where an innovation is disruptive and path-breaking (and therefore potentially able to contribute to meeting today's important societal needs), there is unlikely to be a clear regulatory precedent for governing that technology. Alternatively, what looks like an obvious regulatory precedent may risk imposing inappropriate constraints that will prevent or delay future development of the technology (e.g. the decision to regulate stem cell therapies as if they were drugs)[1].

[1] Mittra, J., Tait, J., Mastroeni, M., Turner, M., Mountford, J., Bruce, K., (2015) Identifying Viable Regulatory and Innovation Pathways for Regenerative Medicine: A Case Study of Cultured Red Blood Cells, *New Biotechnology*, *32(1)*, 180-190 DOI: 10.1016/j.nbt.2014.07.008

Rather than anticipating future technology outcomes and devising regulations accordingly, it is preferable to govern their development using soft-law processes such as standards or guidelines to ensure safety to people and the environment until the eventual properties and uses of the technology have been clarified. The next steps would then be (a) to develop a hard-law based regulations or (b) to rely on a soft-law standards-based approach.

Having too much prescriptive detail set out in primary legislation, which is hard and time consuming to change, creates a risk that the regulatory framework will inevitably lag developments in the real world. This could both stymie innovation in the first place, and undermine trust in that innovation if it becomes apparent that harms need to be dealt with which were not immediately apparent.

It may be appropriate for parliament, in the form of legislation, to set out some broad duties and powers for regulators. This is important in giving regulators legitimacy and the 'big stick' they may from time to time find necessary to bring people to the table to get action. But there is a great deal of experience in the UK, for example, in respect of our economic regulators, of statute giving regulators broad duties and powers but considerable discretion on how they act in line with those, subject to the checks and balances of administrative law.

In our discussions we have heard many innovators express a desire for certainty and clarity about 'the rules'. This seems to us to represent an understandable desire to know what will be required of them, so that they can better build this into their development work – a desire not to be exposed to unnecessary risk during the undertaking of an already risky enterprise. But it should not be taken literally, as a desire for regulation to be codified and for clarity and certainty over agility. Better communication between regulators and innovators/stakeholders could lead to more anticipatory regulation that helps provide certainty and clarity.

A further theme we have encountered in our work is the importance of regulation that is designed and implemented in an accessible and inclusive way. This is important so as to guard against regulation being shaped unduly by incumbents to favour existing technologies and business models and ensure that framework is more open to change and enabling of disruptive innovation. This reinforces our view that enshrining the *detail* of regulatory frameworks in primary legislation is to be avoided. While the legislative process is open and democratic, engaging in it is time consuming and may confer an advantage on those organisations who are well resourced and experienced in doing so.

To be clear, however, we would not support a view that it is preferable to avoid setting out detailed regulatory frameworks in legislation *in order to rely more* on provision of clarity over time through case law. This would not provide the clarity and certainty about regulatory frameworks that innovators have told us is essential as they develop their ideas,

and crucially work to scale them on the basis of viable business models. Case law develops too slowly for this, and it may well be too difficult to extrapolate general principles from specific cases.

There are different options available that would strike a better balance. There is a wide variety of regulatory tools, developed and used by regulators as they exercise their discretion in line with their duties. These include licences, codes of practice, guidance, discussion papers and speeches. At one end of the spectrum they may be enforceable, towards the middle of the spectrum they may set clear expectations that would be relevant in any legal action, and at the other end of the spectrum they may simply put an issue on the agenda for debate.

It is also clear to us that there is an important role for standards in a proportionate and agile regulatory system. Standards are developed independently potentially including contributions from government or regulatory bodies, and adherence to them is generally voluntary, encouraged by industry peer pressures. There is a risk that standards may be 'captured' by those with the greatest interest in them, who are prepared to devote the time and effort needed to engage in the relevant groups involved in developing them. But they can also be better reflective of the reality of the technology and markets involved than more formal regulatory tools, and they can enable approaches to be tested and adopted in a more flexible, adaptive environment, which is more enabling of innovation.

Adopting a proportionality principle

Responses to the following consultation questions:

Question 5: Should a proportionality principle be mandated at the heart of all UK regulation?
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?
Question 7: If no, please explain alternative suggestions.

View of the Regulatory Horizons' Council

The RHC agrees that a proportionality principle should be a mandatory part of regulation, but it needs to be incorporated alongside other principles and considerations.

The RHC considers that regulation that enables the UK get best value from technological innovation should be proportionate. We note that proportionality is not a new principle in

application to regulation in the UK; it is one (the first) of the five principles of better regulation[2].

In particular, the RHC is concerned that regulation should be proportionate to risk. There are different dimensions to this, which are worth noting distinctly.

First, it is important that the burden of any regulation, in terms of what it restricts or prevents should be reasonable in the context of the benefit that regulation is seeking to achieve. The RHC sees a risk that, in assessing the proportionality of regulation, regulators or policy-makers could give greater weight to the apparent and tangible benefits and disbenefits of that regulation rather than those benefits and disbenefits that are less apparent and less tangible. Specifically, we are concerned that regulators could too easily be tempted to view as proportionate regulation the cost of which is reasonable in terms of the extent to which it addresses problems that *have occurred* in the past, while underweighting the disbenefits of that regulation in terms of preventing benefits that *may occur* in the future, for example as a result of innovation.

Second, it is important that regulators and policy-makers consider not only the proportionality of regulation but also the proportionality of *different types* of regulation, which should include all the tools in the regulatory tool-kit (and not only those available to the relevant regulator or policy-maker). For example, where an activity is likely to result in widespread, irreversible harm, to groups in society who may be unable to cope with such harm, there may be a case for more intrusive ex ante regulation restricting that activity; where an activity is likely to result in more limited, reversible harm to groups in society who would be able to cope with such harm, it may be more appropriate to put in place some ex post redress scheme.

We would also encourage regulators and policy-makers to look at less formal regulatory tools or self-regulatory tools, in particular in circumstances where it is desirable to enable innovation. Importantly, these tools can be more easily adapted to take account of learning over time, in relation to use cases, business cases, and potential concerns and benefits. Standards, which are developed and reviewed and applied by working groups, can be useful in this context. Similarly, guidance and codes of practice can also be useful in striking a balance between the need to provide clarity to business, which is important for investment, and the need for flexibility in the face of change.

[2] 2005 Better Regulation Task Force report principles: proportionality, accountability, consistency, transparency and targeting - https://www.regulation.org.uk/library/2005_less_is_more.pdf

The Role of Regulators

Regulators' role in promoting innovation and competition

Responses to the following consultation questions:

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?

View of the Regulatory Horizons' Council

The RHC thinks that both competition and innovation can be embedded in the decision making of regulators in other ways than those suggested, and that there are other factors to consider.

The RHC is firmly of the view that regulators have a massive impact on the ability of, and incentive for, firms to innovate and on the extent to which that innovation is taken up and delivers value. We have talked to many innovators and entrepreneurs and this view is uncontended. We believe that it is crucial that regulators appreciate and are mindful of the impact their work has on innovation.

We have considered carefully the question of whether regulators should *promote* innovation. It feels to us wrong to require regulators to undertake the *promotion* of innovation for its own sake. Regulators exist, on some level, to protect the public from harm or guard against some concern. This might be, for example, to protect the consumer from exploitation, to safeguard competition, to ensure the safety of people and the environment of products or services, or to protect privacy. A duty to promote innovation, positioned at the same level in the hierarchy of duties as the regulator's *raison d'etre* may not therefore be appropriate. However, bearing in mind the principle of proportionality, some requirement on regulators to be mindful of their impact on innovation feels

necessary. To be clear, we would not welcome a requirement on regulators to *promote* innovation *at all costs*. Indeed, in our view, this would risk the creation of best value from technological innovation because it would create the risk that public trust and confidence in technological innovation would be undermined, as the public developed a view that regulation could not be relied upon to understand and protect their interests. However, we would argue that regulators – in achieving the aims for which they were established – should strive to create an environment that is supportive of innovation.

We understand and are sympathetic to the argument that regulators should therefore have a statutory duty in relation to innovation, but one which is either subordinate to the primary aims of the regulator or else expressed in way that enables the regulator to balance it against its other duties. Regulators are famously 'creatures of statute'. Regulators' statutory duties comprise their guiding lights, flowing through their every decision, representing powerful standards by which they are held to account and providing the basis, should it prove necessary, for litigation. The inclusion of a statutory duty on regulators in respect of innovation would therefore be a powerful thing. Indeed, the process of parliament enacting such a change to regulators' statutory duties would send a powerful signal to them about a *change* in their direction that society, expessed by means of its democratically-elected representatives wished to see.

However, we are also sympathetic to arguments that regulators' statutory duties should be changed only rarely, and that a profusion of statutory duties in effect leaves regulators without any guidance. Given this, we think that government could use the tool of 'strategic policy statements' or 'remit letters' to provide clear guidance to regulators about the strategic goals those regulators should deliver. Such tools should be used to set strategic objectives at a high level, rather than to direct regulators in respect of their day to day decision-making. But they are powerful nonetheless. And regulators can be held to account to delivering against them by their sponsoring department and by select committees. Indeed, where regulators are required to 'act in accordance with' or 'have regard to' these statements or letters they may also provide the basis for litigation.

We understand that not all regulators have strategic policy statements or remit letters. But there may still be advantage in there being some vehicle by which a government can be clear to regulators about those things it considers to be important. The Regulators' Code provides a means by which government can be clear to regulators about such things. And we would welcome a requirement on regulators in the code to consider the impact of their activities on innovation.

We further note that, in our discussions with regulators and regulated firms, we observe a marked tendency for regulators to be held to account for fixing the problems of the past rather than enabling and encouraging a steps towards a brighter future. In our discussions with regulators, we have found them to be attracted by the idea of opening up possibilities for a better world, but struggling to prioritise their resources on future-facing work. This

effect seems to us compounded by the fact that much of the agenda is set for regulators by the incumbents they regulate, and the issues and interests of these incumbents may well not reflect those of more disruptive firms. This leads us to recommend that, if the government is keen for regulators to focus on enabling and encouraging innovation, they provide dedicated, ring-fenced, funding for regulators to this end.

As a final point, we note that this question seeks views on the role of regulators in promoting *innovation and competition.* Competition can certainly enable and incentivise innovation. Competitive markets enable transactions to take place between different players. In competitive markets, barriers to entry – and therefore to disruptive innovation – are low and firms have an incentive to take advantage of these circumstances to innovate to win and retain customers. In competitive sectors, a duty on regulators to promote competition is common, and it can help to create conditions that are favourable to innovation. However, in some regulated sectors, competition may not be economically viable, or government policy may not favour competition. In such sectors, for example water, it is still important that regulators are mindful of their impact on innovation. It may not be helpful, therefore, for the government always and everywhere to conflate competition and innovation; if innovation is what the government wishes to encourage, it should be explicit on this point.

Delegating discretion to regulators to achieve regulatory objectives

Response to the following consultation question:

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?

View of the Regulatory Horizons' Council

The RHC agrees the Government should 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.

As noted above, the RHC considers that, in order to be proportionate to risk and to adapt to change, regulators need to use the right regulatory tool for the job. It is therefore important both that regulators are given the discretion to choose the right tool from the tool kit and that the tool kit is appropriately wide. Parliament (and government through strategic policy statements and remit letters) should be clear about what it wishes

regulators to achieve and then regulators should be given wide discretion in how they achieve those goals. In order to maintain their legitimacy, it is also important that appropriate checks and balances are in place to ensure that regulators are held to account for how they exercise that discretion – through a combination of administrative law, parliamentary accountability, and levels of transparency that enable them to be held to account by civil society.

We have also set out our view that some elements within the regulatory tool kit, notably standards, guidance and codes of practice, provide important tools for regulators to strike an appropriate balance between the need for certainty to enable investment and commercialisation and the flexibility needed to adapt to change and learning.

We very much support the desire to integrate more agile approaches into regulatory policy and decision-making. The sort of tools described above – guidance, codes, and standards – help to enable agile approaches, as they are more flexible and open to adaptation. But agile regulation is more than the use of these tools. Agile regulation requires an agile mindset. An agile regulator is *constantly in touch* with the markets it operates in, aware of new developments and eager to understand what they mean and how they work. It also means they can anticipate public responses to new developments, if these are likely to be sensitive, because it engages in dialogue with all stakeholders. An agile regulator adapts quickly to new developments, moving quickly to implement solutions that are 'good enough', putting them out into the market, and building into their processes feedback loops that enable them to capture information on what is working well and what is not, and to adapt their regulation.

The RHC believes that agile approaches are helpful in creating an environment that is supportive of innovation. But they may be challenging for regulators. They are inimical to 'expert culture' in which the regulator feels held to account for knowing and implementing the 'right answer', and they require an openness to doing things that will not work first time, but simply reveal information and create the opportunity to learn and improve. The increasing use of regulatory 'sandboxes' is commendable as a step towards greater use of agile regulatory approaches. These sandboxes provide helpful test environments, in which innovators can test new technology and business models on a small scale, enabling themselves to learn how to adapt their innovation to regulation and enabling regulators to learn how best to regulate those innovations. But we have heard from various innovators that the small-scale testing afforded by sandboxes does not provide the right environment to test new business models, which often require scale. We therefore welcome the move from some regulators, notably the FCA, to develop 'scaleboxes' that will enable this to happen. We also see scope for the use of digital twins to enable new technologies and business models to be tested and appropriate regulatory interventions to be designed, before being implemented in the real world.

As a final point, the RHC notes that the essence of agile regulation is an emphasis on learning and adaptation. We therefore consider that it is important for regulators to 'short circuit' the feedback loop between regulatory action, collection of evidence as to the impact of that action in the market, and adaptation of regulation on the basis of that evidence. Collaboration between regulators and sharing of learning across regulators is crucially important in achieving this. If every regulator has to try something *itself,* collect evidence *itself* about what is working and what is not, and then *itself adapt,* that feedback loop will inevitably be longer and less efficient than if regulators learn from each other. Government should therefore consider what steps could be taken to enable, encourage and potentially require collaboration across regulators, as a counterbalance to regulators' focus on how to achieve their own statutory duties through the exercise of their own powers within their own remit.

Regulatory sandboxes

Responses to the following consultation questions:

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?

View of the Regulatory Horizons' Council

The RHC thinks there are alternative options the Government should be considering, but as alternatives to regulatory sandboxes rather than necessarily to increase the number and impact of regulatory sandboxes.

The RHC is supportive of any attempt by regulators, in pursuit of their duties, to create environments that are supportive of innovation. In our discussions with innovators and disrupters, we have heard a great deal of support for the use of sandboxes by regulators, which are seen as providing testbeds for new and different ways of doing things that both assist the innovators and enable the regulators to regulate more efficiently and effectively.

While sandboxes have been a success, however, they are not a panacea. We have heard concerns from some that the bar to gain access to sandboxes is set too high – a firm must be doing something that has genuinely not been done before, rather than perhaps doing something that has been done before but adapting it to a different context. We have also

heard concerns that participation in a sandbox can provide the participating firms with a competitive advantage, getting a head start in knowledge of an adaptation to a newly-emerging regulatory landscape, in a way that makes it hard for others to compete when the product or service is launched at scale. Further, it is clear that some innovators are keen to see greater use of testbeds at scale, so-called 'scaleboxes', that enable them to test scale-based business models as well as technological innovations. In our view, these 'scaleboxes' would be very helpful in enabling regulation to deliver best value from technological innovation, which does require viable business models as well as technologies.

We are also aware of the costs associated with participation in sandboxes and scaleboxes. These costs could create barriers to entry for innovators, which are unhelpful. We would therefore advocate an openness to the use by regulators of 'digital twins', artificial environments that enable new products and services to be tested in a virtual world, before being tested in reality, potentially providing a more accessible, lower cost test environment. We fully recognise that the development of digital twins and the capability within regulators to make use of them may be costly at the outset. There could therefore be a case for collaboration between regulators to enable these approaches to be developed efficiently.

In line with our view that regulatory collaboration to share learning is critical for the creation of a regulatory environment that is supportive of innovation, we would strongly advocate for any evaluation and lessons learned from the use of sandboxes, scaleboxes and digital twins to be shared across regulators.

As a final point, we would urge regulators and policy-makers to avoid 'not invented here' syndrome. In our work we have become aware of technological innovations that have been deployed in other countries, some way ahead of their deployment in the UK. UK regulators should take advantage of being a 'fast follower' in some areas, extracting all the available learning from developments in other countries, so that UK can move more quickly and more efficiently to an appropriate regulatory environment.

Accountability of regulators

Responses to the following consultation questions:

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?

View of the Regulatory Horizons' Council

The RHC thinks that regulators can already be held sufficiently accountable to Government and Parliament through the use of existing mechanisms, including remit letters and strategic policy statements. However, these mechanisms could be used more often if they enable greater flexibility to be delegated.

As noted above, the RHC believes that flexibility and agility is key for a regulatory environment that supports innovation, that discretion on the part of regulators is a critical enabler of such flexibility and agility, and that accountability is essential if regulators are to exercise this discretion while maintaining their legitimacy.

Regulators are already accountable to parliament for the exercise of the powers conferred on them by parliament through statute in pursuit of the duties also conferred on them by parliament through statute. This accountability is powerful, and keenly felt by regulators, through various parliamentary committees. Where regulators are in receipt of strategic policy statements or remit letters from government, they are further held to account for the effect given to these priorities as set by government. Such instruments provide a usefully transparent, appropriately high-level, means by which government can communicate its priorities to regulators, by convention once each parliament. We can see advantages in their more widespread use, especially if they gave government more confidence to enable flexibility and discretion on the part of regulators. We can also see scope for policy-driven strategic policy statements to provide a focus for (and indeed require) regulatory collaboration in pursuit of key policy goals, for example net zero. However, care must be taken to ensure that government is not seen as undermining the expertise and long term focus of regulators, since this could undermine trust in the regime overall. In particular, any perception of political 'interference' and short termism would undermine investment that was dependent on regulation in any way.

The RHC notes that the accountability of regulators beyond parliament and government also matters for their legitimacy. If regulators are not trusted by the public to act in their interests, if they are not trusted by those they regulate to be objective and impartial, trust and confidence in the regulatory system will be undermined. If this were to occur, regulation would be less able to create the conditions that would see technological innovation deliver best value for the UK. This is because, in order to deliver value, technological innovation needs to be trusted, and because regulation plays a key role in engendering that trust. The wider accountability of regulators to their stakeholders is therefore critical. In this context, the RHC notes the importance of public engagement by regulators. Regulators should endeavour to create a genuine connection with all of the communities their regulation affects, to listen to these diverse voices and balance them appropriately and transparently in their decision making. It is easy for regulators and policy makers to craft consultation documents, publish them, receive responses and consider that they have engaged with their stakeholders. But in reality, they will only have

engaged with those who are aware of them, motivated to respond to the conversation they have created, and resourced to respond. These may well be those with vested interests, perhaps in maintaining the status quo, they may be less likely to include disrupters or those whose interests are not directly relevant to questions of regulation. In order to achieve genuine accountability, and achieve an environment that is supportive of innovation, the RHC recommends that regulators and policy maker pay attention to best practice in transparency and public engagement. Further work is needed by regulators, working together, to understand the various tools that exist for public engagement, including use of social media, deliberative democracy and citizens' juries, and to share learning on what works best, in which circumstances.

Improving the way businesses are regulated

Responses to the following consultation questions:

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

View of the Regulatory Horizons' Council

The RHC would not completely agree with these questions in the form they are suggested.

The RHC agrees in principle with the question that it is important for regulators to understand the impact of their regulation on those who are affected by it. However, it is our strong view that the focus of the Regulators' Code on the need for regulators to engage with *those they regulate* is not helpful. It seems to us that there is already a risk that regulators will be captured by incumbents or the existing regulated firms, simply because they have a relationship with these firms, they will understand their products, services and business models, and because those firms will be aware of the regulator, well-able and well-incentivised to engage in debate with it. Thinking about our mission to ensure that regulation enables the UK to get best value from technological innovation, it feels important to us that regulators should also engage with potential disrupters, new entrants with new technologies and new business models, in order to ensure that they understand and even anticipate future developments and are regulated so as to enable and encourage innovation. We have heard repeatedly from innovators that they find it hard to engage with regulators who may not understand why they are relevant, what technology they are using or how their business models work. Similarly, it feels important to us that regulators should engage with the public, whose interests they protect and

promote. We have already noted the difficulties for regulators in achieving genuine, deep public engagement that goes beyond well-informed, well-resourced interest groups, but it remains important for regulators to do this, in an ongoing fashion, so that they can properly understand and respond to public concerns and maintain their legitimacy. In our view, there is a strong case for the Regulators' Code to be revised to reflect this.

Capturing innovation in Impact Assessments

Responses to the following consultation questions:

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
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)

View of the Regulatory Horizons' Council

All of the suggested impacts could have benefits of being captured via impact assessments, which could also tie back to strategic policy statements or similar.

The RHC considers that impact assessments have an important role to play in the creation of a regulatory environment that is supportive of innovation. The Green Book provides a wide-ranging and versatile framework for impact assessments. However, we have noted above our view that too much weight is placed by regulators and policy makers on the benefit of regulation in avoiding apparent and tangible disbenefits, with insufficient weight placed on the cost of less apparent and tangible benefits foregone as a result of regulation, which may include innovation that did not happen or did not achieve take up.

We can see merit in the inclusion in regulatory impact assessments of some assessment of impact on policy objectives, which could tie back to the strategic policy statements or remit letters received by the regulator from government. This could, for example, enable the regulator to give particular weight to priorities such as net zero carbon, trade and investment or innovation, as set out in the relevant statement or letter. This in turn could help to facilitate the accountability of the regulator in respect of the statement or letter. But, as we have noted, it would be critically important to avoid any suggestion of political interference that would undermine the ability of regulators to deliver value as a result of their expertise and ability to take a long term view, which could ultimately undermine the credibility of the regulatory regime itself.

Other proposals

Regulatory offsetting: One-In, X-Out

Responses to the following consultation questions:

Question 30: Should the One-in, X-out approach be reintroduced in the UK?
Question 31: What do you think are the advantages of this approach?
Question 32: What do you think are the disadvantages of this approach?
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
Question 34: How best can One-in, X-out be delivered?

View of the Regulatory Horizons' Council

The RHC does not support the use of 'one in x out' approaches. In our view the UK will get best value from technological innovation when we have the *right* regulatory regime, rather than as a result of any drive towards deregulation for the sake of it, as exemplified by 'one in x out'. We strongly support anything that enables and encourages regulators to be mindful of their impact on innovation, understand the impact of their regulation on those beyond the incumbent regulated firms, and to ensure that their approach represents a proportionate response to risk, which is agile and able to adapt over time. The establishment of arbitrary rules like 'one in x out' feels to us inimical to such approaches.

We do understand, however, the value in prompting regulators to consider the value of forebearing from regulation, while perhaps maintaining a 'watching brief', rather than rushing to intervene. We also understand the value in prompting regulators to consider when to remove regulation, for example where it has ceased to be needed or to be effective. But we consider there are better means of achieving this than a crude 'one in x out' approach. Regulators could be asked explicitly, in their strategic policy statements or remit letters for example, to consider and report on what they have done to forebear and remove regulation. More attention could be paid in impact assessments to the development of 'do nothing' options, which can be rather cursory and apparently developed to be dismissed.

An early regulatory gateway to increase alternatives to legislation

Responses to the following consultation questions:

Question 18: Do you think that the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?
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?
Question 21: Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?
Question 22: If no, what would you suggest instead?

View of the Regulatory Horizons' Council

The RHC considers that there is merit in applying some earlier stage scrutiny to regulators' decision making on whether and how to intervene. The consideration of standards should also be embedded early in the regulatory process. However, the RHC also thinks that late stage scrutiny can have some value in allowing enough information on impacts to be captured.

There does appear to us to be a risk that regulatory impact assessments are done at a late stage in the decision-making process, at a time when it may be practically (or reputationally?) difficult for a regulator to take a different route, taking account of what it learned through the impact assessment. Late stage regulatory impact assessments do have value, not least because they require regulators to be explicit about what they expect their intervention to achieve and to cost, which provides a useful basis for ex post evaluation. But early stage scrutiny sessions, that prompt regulators to set out how they assess the costs (risks) and benefits of different possible courses of action (including forebearance), would have greater value in terms of improving decision-making in respect of specific interventions, but also because it would help to develop and embed the discipline of regulatory 'optioneering'. Similarly, early stage scrutiny could also test how the regulator had taken account of any learning from post implementation reviews, helping to embed an adaptive mindset and approach within regulators. Such scrutiny could perhaps build on the existing impact assessments undertaken by the Regulatory Policy Committee.

There may also be scope for such a scrutiny body to help regulators develop best practice in relation to assessing the costs and benefits of different courses of action. In part, this builds on our earlier point about the importance of regulators taking a broad approach to

costs and benefits, taking account not only of those that are apparent and tangible. But it also recognises the difficulty of decision-making in the face of uncertainty. Regulators do not have perfect knowledge of how those they regulate will respond to their regulation, nor do they have perfect knowledge about the context in which those responses will take place. Futures techniques and scenario planning can be useful ways to improve the robustness of decision-making in uncertainty. But expertise and experience in applying them is not widespread among regulators, so more could be done to help regulators to share this, and learn from examples of their use by other regulators.

Scrutiny of regulatory proposals: Post Implementation Review

Responses to the following consultation questions:

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?

View of the Regulatory Horizons' Council

The RHC does not think that an earlier mandated review point is necessarily the correct approach.

The RHC strongly supports approaches by regulators that value learning, and enable regulation to adapt over time taking account of what has worked and what has not, as well as changing circumstances. We agree that post implementation reviews have an important role to play here. In the same way that it is important for regulators deciding whether and how intervention should take account of benefits that may be forgone as a result of their interventions, it is important for any post implementation review to look at the potentially beneficial things that *have not* happened as a result of regulation as well as those things that have happened. We appreciate that this may be difficult to observe, and that it may also be difficult to attribute causation. However, it feels to us important that regulators should include this question in their post implementation reviews, and design those reviews to provide insight on this. This could be done, for example, through the use of open questions in interviews with firms in (and around) the regulated market, asking them broadly about how the regulatory intervention had figured in their decision making, rather than targeting the review only at those firms who obviously took action as a result of the intervention. This could help to draw out those who, for example, decided not to pursue an innovation, or could not make it commericially viable, because of the regulatory regime.

The RHC can see merit in also adopting broader approaches that seek feedback on the impact of regulation. We are aware that Komet (The Committee for Technological Innovation and Ethics[3] – set up by the Swedish Government) has created and publicised an inbox, to enable anyone to alert them to aspects of regulation that they consider to be stifling innovation. Komet gathers this intelligence, looks at the issues and can recommend changes, with a view to unlocking innovation. This kind of wider information gathering, feels to us a useful complement to more formal post implementation reviews, because it empowers anyone to raise an issue, rather than only those with whom the regulator has sought to engage on a specific set of questions. Appropriately resourced and supported, this is something the RHC could take on.

Scrutiny function in the Better Regulation Framework

Response to the following consultation question:

Question 28: Which of the options described in paragraph 3.4.10 would ensure a robust and effective framework for scrutinising regulatory proposals?
a. Option 1
b. Option 2
c. Option 3
d. Other (please explain)

View of the Regulatory Horizons' Council

The RHC would prefer to see a scrutiny function that was independent of government and one that drew on appropriate expertise. We consider that independence from government would be important to ensure confidence in the scrutiny process. Without such independence there is a risk that the scrutiny process would be considered to weigh impacts differently according to the priorities and philosophy of the government of the day. This would undermine its credibility and the ability of the scrutiny body to establish a set of assessments over time that provided a credible guide to best practice in the assessment of regulatory interventions. It will be important for any scrutiny body to have appropriate expertise, so that it becomes authoritative in establishing best practice that regulators look to build into their own decision-making. The RHC notes that the conduct of cost-benefit analysis is, on one level, a technical discipline that can objectively be done more or less well, and that it will be important for it to be done well, whatever judgement calls are then applied.

[3] https://www.kometinfo.se/

Measuring the impact of regulation: reviewing the Business Impact Target

Response to the following consultation question:

Question 29: Which of the four options presented under paragraph 3.5.4 would be better to achieve the objective of striking a balance between economic growth and public protections?
a. Adjust
b. Change
c. Replace
d. Remove
e. Other (please explain)

View of the Regulatory Horizons' Council

The RHC are wary of the perverse incentives that are associated with a Business Impact Target requirement and would suggest that PIRs alongside informal review mechanisms, early stage scrutiny and widening the scope of impact assessments form a reasonable package that collectively captures the complex and nuanced implications of regulatory changes compared to a central BIT requirement. From the options suggested, the RHC therefore would suggest removing the BIT.

As with 'one in x out', the RHC is concerned that any attempt to reduce regulatory judgement to a 'tick box' exercise or a formula, will inevitably lead to a loss of valuable nuance. In our view a regulatory environment that is supportive of innovation will be one that is genuinely proportionate to risk. The assessment of proportionality to risk will involve the exercise of judgement in conditions of uncertainty, which will require regulators to appreciate and reflect on complexity and nuance, rather than conforming to arbitrary decision trees.

We appreciate that attemping to measure the impact of regulation does not *necessarily* result in the setting of targets. Indeed, we can see some merit in regulators undertaking a thought process designed that examines the different potential effects of a regulatory intervention in a rigorous way, hence our support for impact assessments, early stage scrutiny and post implementation reviews. But moving beyond that to create a 'system of metrics', 'scorecards' or 'targets' seems to us to create a risk of perverse incentives that would militate precisely against the sort of agile, risk-responsive, adaptive regulation that is needed to create an environment that is supportive of innovation.