**BEIS Consultation on Reforming the Framework for Better Regulation**

**Comments from the BRC (British Retail Consortium)**

**October 2021**

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**BRC Response**

**The BRC**

The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

The BRC has for many years tried to engage in the better regulation agenda through all its phases so we welcome the opportunity to revisit some of the options. We do regret that the consultation has been over the summer period with regulatory changes to pandemic legislation in the background and alongside many other consultations from BEIS and DCMS.

The first suggestion we would have for better regulation is that the Government should adopt a self-denying ordinance not to present stakeholders who have far fewer resources than the Government with consultations to which they want serious responses over the summer period unless absolutely necessary. The European Commission used to adopt a similar technique. It leads to less member input and less considered responses.

As noted the BRC has been committed to the better regulation agenda and indeed over the years has submitted various ideas including a paper on the problems with Government sponsored self regulation and a paper almost 20 years ago suggesting the value of introducing effective Impact Assessments. Sometimes we have wondered whether the Government as a whole is as committed as the BRE and indeed whether BEIS is the appropriate Department to house the BRE rather than the Cabinet Office with its cross Government oversight. In addition it would be useful if the Government made an announcement when a programme ends rather than just leaving it to fade away.

We agree with the Government that the regulatory system should be smart, proportionate and consider the needs of business – to which we would add other stakeholders including civil society and consumers. We also agree that regulatory activities should be carried out in a way that is transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

We strongly support the view that alternatives to regulation should be considered alongside regulation but also believe that regulation can sometimes offer the best option to ensure everyone is playing by the same rules.

***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.***

The BRC is uncertain what is meant by a common law approach. We had thought it might mean an approach whereby everything was permitted except that which is specifically banned. However, on a roundtable with BRE it emerged that this might mean that the courts would fill in the detail based on cases ie case law would be the foundation of the more detailed regulatory system.

Neither of these approaches would be supported – neither would provide the degree of certainty that businesses require and both would be subject to unpredictable changes

On the other hand a less codified approach is possible with principled legislation can work – though it is noticeable that elsewhere in BEIS the Competition and Consumer Consultation is suggesting the opposite – the addition of more codified rules to aspects that are today government by principles on the grounds this would make it clearer that the practices are unacceptable.

I refer to the addition of specific banned practices to supplement the general prohibitions of the UCPD as transposed into UK law. In fact the issue of the desirability of moving to a less codified approach can best be examined by reference to specific case – with an analysis of the advantages and disadvantages in the specific case – rather than a theoretical approach.

The UCPD provides a good example. During its passage there was a strong push by business to persuade the then Business Department to oppose the measure which established some principles of Unfair Practices together with a blacklist of absolutely unfair practices. UK – and indeed EU retailers – were unhappy that they would not be able to refer to what they could and could not do. Initially the Government agreed but then it relented. One result was the demise of the Prices Code which was definitive about what a business was allowed to do to be replaced after much agonizing by advice which was not definitive but which Trading Standards Officers often seemed to think was – and on occasion also the CMA. It was replaced by Guidance from the OFT/CMA on what practices they would examine closely with a view to enforcement action.

After the passage of time, businesses grew to like or at least accept the more principled approach which they believed provided an opportunity for interpretation – and indeed to oppose the addition of practices to the banned list.

Some of this may have derived from the lack of enforcement which resulted. Enforcers have been reluctant to bring forward cases when the requirements were vague – in turn leaving a void of legal interpretation by the Courts. It should be noted that there has probably also been little enforcement of the banned practice list either.

At the same time, consumers have been less certain of their rights too, which might be seen as a disadvantage of this type of legislation where citizens need to have some understanding if it is to be helpful.

Our conclusion is that the value of moving to principled legislation depends on businesses understanding how to move from the prescriptive to the principled approach; a recognition by enforcers that it allows businesses a myriad of ways to comply and innovate; can lead to a lack of enforcement of even the principles at a local level; can be subverted by a regulator giving its strong hint of how it should be applied; and can lead to citizens and smaller businesses being unaware of their rights.

It may well be more appropriate where regulation is not enforced locally or where it is directed at non citizen/consumer facing businesses, and probably a policy area that is not in the limelight and subject to knee-jerk political responses to sudden but passing crises.

Clearly, the question arises of whether and how the detail should be filled in. We do not believe the courts taking several years if ever a case is brought is satisfactory for businesses, though it might be a way forward for legislation designed to nudge people in a particular social or economic direction. Using less energy or eating less bad food spring to mind provided there is no desire to impose specific actions.

Nor do we believe that regulators should be free to decide the detailed implications which are not subject to Parliamentary scrutiny let alone stakeholder comment. Often they may have their own academic agenda which is impractical and it makes them legislator, enforcer, judge and jury – an unsatisfactory approach proposed for the CMA in the current BEIS consultation.

There is no particular reason to believe that regulators would be particularly open to innovation and change in the interests of business – though the ICO has certainly tried hard with its sandboxes and business friendly guidance (of necessity within the requirements permitted).

Code schemes are an option – but their success depends on widespread acceptance of the Code and the Code sponsor being respected across both those who helped to draft the Code and those who did not – and the Code actually being enforced. This might work in the case of a large number of small businesses – but not where large businesses that have more recognition than the Code sponsor are involved – at least if the Code contains any really serious non PR elements. In any event Codes can easily be used to prevent innovation by new entrants by failing to recognise the validity of different ways of doing things. They can only be used as a useful co-operative approach by those who sign up and are trusted reputable businesses if they sit alongside regulation for those who do not – with the promised advantage for the signatories that they will escape public enforcement if they follow the Code and that detailed regulation will be developed in a co-operative manner to meet outcomes and that enforcement will bear in mind that they are businesses that wish to comply.

The one type of Code that can be enforced is one where the Code owner cab effectively prevent those businesses that are subject to it from continuing to trade in the way they wish. The ASA Codes are a case in point. They require an acceptance of the ethos behind the code but can give rise to frustration if there is a perception that they fail to recognise changes in technology and what should be allowed and seek to determine the current social mores.

There was a period where Government consistently proposed what we called Government sponsored voluntary regulation to achieve objectives. This was then outside the IA system and the one in one out system that made it popular with Ministers and Departments. Basically it was rather capricious in that a Minister would expect a Code to be developed rapidly to meet a particular political problem and would then complain if it was not observed or was troo wishy washy.

Reporting requirements and education can be added to the armoury – both having waxed and waned in popularity and neither being fully effective once the immediate political or media concern had been overcome or faded away.

The best approach has been the development and widespread acceptance of the Primary Authority system. This has enabled businesses to understand alongside enforcers the requirements of legislation and adapt their procedures to ensure they are meeting those requirements – be the legislation prescriptive or principled – and enabling them to receive assured advice which, if followed, means they will not be prosecuted. This system does allow innovation and a reduction in unnecessary enforcement at the local level. In our view it should be adopted by Regulators at the national level – especially if they are given administrative enforcement and fining powers. They could act to provide assured advice – but would be subject to oversight to ensure they were not being overly prescriptive or conservative int heir approach.

We believe that such a system is more likely to survive Parliamentary scrutiny than what might be seen as a regulatory free for all of some of the other options – or the usurping of the Parliamentary role of scrutiny of subordinate legislation where it could be handed over to regulators to draft and implement in their own right.

***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.***

The BRC can support a proportionality principle as the starting point for any proposed regulation or legislation – with a requirement or expectation that a departure from it needs to be justified in the context of the proposal.

Risk based, targeted regulation and enforcement allows innovation and it allows business adaptability in how regulation is implemented in any given business depending on the risk involved. It means that a low risk business does not need to implement a myriad of rules that will never be needed and it means enforcers can target any activity they need to undertake.

The value of a risk based approach was demonstrated some years ago by some pilots for local authorities to undertake inspections in a joined up way. Thus depending on the assessment of risk of a business fire safety or trading standards or health would take the lead for any given business and assess the business across the board. The upshot was a reduction in enforcement visits and the discovery with the resources released of a whole range of businesses that had previously fallen beneath the radar but which could be very non compliant in general.

Risk based enforcement and risk based regulation go together. Risk based enforcement is very difficult on the basis of legislation based on the precautionary principle which tends to lead to a tick box exercise. The GDPR is in many ways based on the precautionary principle with a high cost to business to ensure the boxes are ticked. It could be based far more on a risk based approach with assessments of likely harm rather than any potential harm. Fortunately almost alone among EU regulators the ICO has wherever possible adopted a risk based approach regardless allowing businesses to do more for themselves in determining what they need to do compared with businesses in the EU.

Such an approach is vital if new technologies such as AI are to be allowed to flourish and businesses are to be allowed to innovate. There is always a danger that the technology might be regulated in its own right rather than how people use the technology. The proposals for an ex ante competition regime purely for large digital companies could lead in that direction if regulators are more concerned to restrict their activities due to public concerns than they are to enable then to succeed within a principled framework.

We are not convinced that a proportionality principle is a matter of either ensuring regulations are proportionate with the level of risk OR focusing on the right outcomes. In many areas there should be an element of both. The right outcomes may be a reasonable overall measure for determining what is proportionate with the level of risk. For example, the outcome required could be safety of people’s personal data or securing their privacy and legislation could require businesses to embed that outcome in the design of their systems (one thinks here of security by design in the IoT area) and in turn it could be determined that the regulations below this to secure the outcome could be proportionate to risk by having a three tier approach with the businesses presenting the most risk required to present a more rigorous design to their systems than those that present very little risk.

***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?***

We are always suspicious of statements such as that in 3.2.1 that regulators should be given duties to promote competition and innovation. The role of regulators is to provide the context and enforcement approach that enable competition and innovation to thrive – not to actively promote it.

Giving regulators a duty to promote these desired outcomes can lead to excessive interference and be a burden on business when they are asked to report. The BEISS consultation on Competition and Consumer Protection proposes that the CMA should report on the state of competition- and with it comes a proposal to require businesses to provide the evidence for the report on pain of a fine.

In our view regulators should be expected to enable innovation and growth and competition as appropriate to their overall remit which should be updated from time to time. Their annual report can indicate how they have sought to achieve it.

The problem with embedding it is that nobody ever really checks – it is there and it is assumed they are doing it much like the Regulators Code which is often considered as an afterthought , if at all. The lack of attention to it seems to be confirmed by the question earlier in the consultation about a risk based approach – this already appears in the Code as a requirement so if observed and actually used it would appear that the question should be redundant.

***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?***

No.

The BRC does not believe that Regulators should replace elected representatives and also Peers in interpreting regulation through decisions (which tend to be made in relation to specific circumstances without necessarily reflecting their impact); guidance (which can reflect a Regulator’s prejudice and wish for what the law ought to be or allow and go beyond what was intended); or rules (which should be determined by Parliament and Government after discussion with stakeholders which may include regulators).

As we have suggested, regulators could adopt a Primary Authority type approach at the national level in order to allow innovation by individual businesses through the provision of assured advice that what they intend to do is in accordance with the law be it principled or specific – but that is different from setting rules that interpret principled legislation across the board for everyone on the basis of preventing bad behaviour by rogues that may then inhibit some innovation. Such an approach can also accommodate the desire to adapt to new technologies as it involves working with individual companies – and enables a regulator to adopt a light touch approach to enforcement of any particular rule in a specific way in certain cases. Both these are presented in the paper as desirable outcomes of giving regulators more power to set the rules. We believe this PA type system would be a preferable approach.

To allow this would require a culture to be embedded in a Regulator that has an approach to those it regulates of a co-operative approach to working with reputable businesses that generally can be trusted to work towards achieving the outcomes desired.

It would also require that all the safeguards that have been built into Government legislation should be applied to regulators – including Impact assessments; justifications for new rules; consultations with stakeholders etc.

***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?***

Regulatory sandboxes can be a useful tool – but they need to be made more widely available to be fair to all businesses. In turn that requires more resources for regulators to help businesses within the sandbox, to assess the results and to enable more businesses to participate. The ICO scheme, for example, is reported to be very useful but limited in its scope due to resource requirements.

None of the above would be effective in the way intended without these extra resources.

***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?***

The proposal smacks of giving power on the one hand and taking it away with the other.

We are not convinced that making regulators more directly accountable to Government and Parliament would help real scrutiny.

We are well aware that there is little Parliamentary time to review Annual reports and little detailed scrutiny as a result. Even where there is it can only be at a high level.

More accountability to Government and Parliament removes the value of a regulator standing a bit above the day to day fray and all the risks of expecting/requiring them to act on the issue of the moment.

We realise that Secondary legislation is also seldom properly scrutinized and may be even less so now that there could be so much more that does not go through on the nod as required by EU law. However, we believe it is better than the two Houses have an opportunity to revise their procedures to improve this scrutiny of proposals from a Department than try to oversee an arms length regulator or to remove the arms length.

Having said that, the question is in the conditional. If greater flexibility is delegated…. If it were to be, then there would certainly need to be a system of accountability and scrutiny on a regular basis with new rules that they implement being sent for examination and a capacity for stakeholders affected to complain.

***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?***

We are somewhat sceptical of the effectiveness of either proposal. To be effective there would need to be a consequence of a poor survey result. Likewise the deep dive would need to lead to real consequences for a regulator found to be wanting. We are well aware of well argued NAO reports that lie on a dusty shelf for years without the Government acting on their deep dive suggestions.

***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?***

The BRC notes this suggestion is very similar to the Inception Impact Assessments introduced by a previous EU Commission. We proposed the adoption of such assessments in previous proposals in the UK for better regulation and supported them in the EU.

We agree they should analyse whether the supposed problem really is a problem; if it is. whether its resolution can best be achieved by education; voluntary self-regulation; government sponsored voluntary regulation; a reporting requirement; principled legislation; or prescriptive regulation – and the potential costs and benefits of each. The key though id the assessment of the approach at this stage as much as the cost.

The real problem is enforcement. Far too often such Impact Assessments were either not genuine – the decision to regulate had already been made or there was no real attempt to do them at all.

We sometimes feel the same is true of Impact Assessments in the UK – and fear the same would be true of Inception Impact Assessments under whatever name.

There is little value in going to all the trouble of producing assessments – or consultations – and then ignoring the outcome. That simply takes up the time of civil servants and stakeholders.

The proposal has value – but it needs to be enforced so that nothing can proceed without such an assessment being produced. We suspect that is a tall order.

***Question 20: Should the consideration of standards as an alternative or complement to***

***regulation be embedded into this early scrutiny process?***

Standards can be useful for implementing detailed requirements relating to products and the like. However we do not believe they are an acceptable alternative to wider regulatory requirements.

They are developed by a small group of interested parties who may or may not be open minded about ensuring those not involved are not prejudiced; who may have a motive – hidden or open – of designing the standard to exclude innovators and innovation; and who do not have to consult widely and take on board the results of a consultation; and who may be reluctant to adapt the standard to changing needs. They then expect the standard to be followed by all players and if necessary either a regulator or a standards body can audit against the standard without due process or enforce on the basis of professional diligence requirements.

While standards can be embedded in the Assessment process – we do not believe they have a useful role to play in generalized legislation if they are to be applied other than as a sort of Code for those willing to sign up -in which case something else may be needed anyway for others.

***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?***

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

***assessments?***

The key is the suggestion that wider impacts should be assessed – not least in the Inception Assessment – we agree that these should include competition, innovation, environment and other relevant issues depending on the policy area.

In many ways they are even ore important than the cost which is often impossible to really calculate.

***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***

The impacts would probably need to include both standard Impacts and other related to the specific proposal.

Impacts on consumers; prices; business formation and adaptability; digitalization; the court system; enforcers capacity to enforce might, for example, be relevant in certain circumstances.

***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)***

We would suggest a requirement to consider some core impacts and a requirement to consider the impact on affected stakeholders in any given proposal.

***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?***

A new policy requires time to bed down and for stakeholders to assess its impact and whether it achieves the outcomes desired. We are of the view that a 2 year time frame is too short for a proper assessment and runs the danger of tying up resources of both civil servants and stakeholders in endless reviews.

Whatever time frame is adopted, the PIR is pointless if it is ignored. At the very least a critical PIR should result in a Minister having to answer to a debate in a Parliamentary Select Committee.

***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***)

An independent body that is well resourced should undertake an assessment which is reported to a group of Ministers or the Cabinet Office as in Option 3. We believe that independence of the process is necessary and that there needs to be a cross cutting Department with authority to act on a Report.

***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)***

We are inclined to replace or remove in line with the diagram – but more information about the likely impact is necessary.

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

***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?***

***4.8. Further comments***

***Question 35: Are there any other matters not mentioned above you would suggest the***

***Government does to improve the UK regulatory framework?***

We remain unconvinced of the value of any offsetting requirement. Experience suggests that Departments would offset new proposals with out of date regulation that was not enforced. And business found that new regulation in one area with an impact on a set of businesses was offset against regulation in another area with an impact on an entirely different set of businesses. From the business perspective it was pointless as an exercise.

More than that whole tranches of new legislation or policy change were omitted from the calculation.

In any event, if a policy is worthwhile it should be implemented regardless of any false offsetting – it should be implemented on its merits.

Likewise legislation that is outdated should be removed – but not on the basis of a red tape challenge. We are still waiting for the proposed promised action to codify the age restricted sales requirements from the very first red tape challenge to actually happen probably a decade later so we have a rather poor impression of such approaches.