

# Taskforce on Innovation, growth and regulatory Reform

## Submission by Sir Mark Boleat

Contact: Tel: 07803 377343; email: mark.boleat@btinternet.com

### Introduction

1. The Task Force's terms of reference include regulatory reform. This short submission addresses the key issues of the nature of the regulatory burden and the accountability of regulators.
2. My qualifications for commenting on these issues include having chaired regulatory bodies, established a regulatory regime (for claims management companies), chaired regulated companies, membership of the Regulatory Policy Committee and author of an influential paper on regulation – [An Agenda for better Regulation](#).

### Summary

3. The key issues are -
  - The regulatory burden largely stems from a variety of unofficial forms of regulation, not subject to any political oversight. These include guidance, which is often interpreted as being mandatory, information requests and policies and practice on inspection and enforcement activity.
  - Regulators have huge scope in deciding what to do and how to do it. They are tempted to go after easy targets rather than real problems.
  - There is little effective accountability of regulators.
  - Regulation is subject to an impact assessment regime overseen by a Regulatory Policy Committee. But it covers only a small fraction of regulation and the regime it uses is not fit for purpose because it bears no relation to the way that regulation is developed.
  - There is little enthusiasm among established businesses for deregulation partly because regulation can provide an effective barrier to entry.
  - A priority for Government should be to develop a strategy to reduce the regulatory burden caused by misuse of guidance and information requests, and a concentration of inspection and enforcement activity on process rather than substance. This must include the introduction of a robust regime for the accountability of regulators, embracing comprehensive audits of their effectiveness.

### The nature of the regulatory burden

4. Over the years, if not decades, there have been a number of initiatives aimed at reducing regulation but so far the record is unblemished by any success. They are because they have failed to understand the nature of regulation, from which it automatically follows that any action is unlikely to be successful.
5. In the early stages of the Brexit debate there was much talk of "reducing red tape from Brussels". This has been toned down, recognising that the vast majority of regulation is home-grown, and indeed there is now obvious additional regulatory costs resulting from being outside of the European single market. However, that should not disguise the fact that membership of the European Union contributed, albeit indirectly, to a significant increase in regulation. This is largely because it gave ample opportunity for the gold plating of regulations, and generally it accelerated the process of regulatory creep. Regulators and officials sometimes argued, without justification, that EU requirements meant that there was no alternative to what they were proposing, thereby stifling proper debate and scrutiny.

6. It follows that Brexit should offer an opportunity to address the regulatory issue – and there is an expectation that this will happen. It would certainly be welcome to compensate for the added regulation caused by the departure from the Single Market.

7. So what are the real regulatory problems? Generally they are not the result of the wording of legislation and regulations, scrutinised, albeit often not effectively, by Parliament. Rather, they stem from a variety of unofficial forms of regulation, not subject to any political oversight. These include guidance, which is often interpreted as being mandatory, information requests and policies and practice on inspection and enforcement activity, particularly for those businesses subject to a specific regulatory regime and regulator.

8. A good example of regulation by guidance relates to the right to work in the UK. The law provides that an employer may be liable to a civil penalty if they employ someone who does not have the right to work in the UK. However, employers have an “excuse” if they conduct appropriate checks. But the Home Office Guidance effectively requires such checks: “You should conduct a right to work check **before** you employ a person” and “ You must obtain **original** documents” and “You must keep a record of every document you have checked”. There is a general belief that such checks are a legal requirement and employers may face an inspection of such documents – much easier than inspecting whether illegal workers are being employed.

9. The issue of enforcement and inspection regimes raises an equally important issue of the huge scope that regulators have to decide what to do and how to do it. It is sadly the case that many regulators – and police forces – are tempted to go after easy targets rather than real problems. A good example of this is the way that HMRC enforces minimum wage legislation. There is an annual ritual of big companies being named and shamed for non-compliance. They are easy targets for HMRC because the minimum wage regulations are very complex and difficult to comply with, and big companies have immaculate records that can be inspected. By contrast, businesses that completely flout the regulations and have minimal records are generally left alone. Another example is the refusal of regulators and policy-makers to address sectors where there is substantial malpractice, such as estate agency and car servicing, instead preferring to concentrate on easier issues such as bank accounts.

10. Within regulatory bodies the chief executive has huge power in deciding policy and practice. It is quite common for a change at the top of a regulatory body to be accompanied by significant changes which can have a material effect on individual businesses and whole sectors. There is little effective accountability and often no meaningful checks and balances within regulators. Boards of regulatory bodies often do not have the right balance of experience and expertise, partly because of political interference and bureaucratic delays in the appointments process and partly because there is a poor risk/reward balance for those willing to put their names forward.

### **Regulation of regulators**

11. So what about the regulation of regulators? Ministers and officials have limited power and generally choose not to intervene if a regulator is not functioning effectively – unless there are political consequences. Other than the Treasury Committee, select committees take little interest in regulators and an appearance before a Select Committee is no grounds for concern.

12. Technically, regulation is subject to an impact assessment regime overseen by a Regulatory Policy Committee. But it covers only a small fraction of regulation. Financial services are largely exempt as are most regulators. Also regulators, like regulated institutions, get round regulation by using the informal methods. Even where it does apply the regime is not fit for purpose because it bears no relation to the way that regulation is developed. Primary legislation now generally does

little more than provide for regulations to be made so an impact assessment at that stage is often meaningless. And the regulations (which may or may not be subject to an impact assessment) may simply set out a framework for making rules – for which there is no impact assessment. Options are required. This is generally inappropriate and simply leads to three options: do nothing (not on because something must be done); an over-the-top option (rejected because OTT) and the preferred option. A correct approach would be to require an impact assessment of the final decision with a commentary and analysis, where appropriate, of options that were considered and rejected. This would fit in with how policy is made – or should be made.

### **Why established businesses do not want deregulation**

13. There is little enthusiasm among established businesses for deregulation. There are good and bad reasons for this. The good reason is that much of the cost of regulation is a one-off implementation cost, which is not recovered if the regulation is repealed. To take a simple example, the unnecessary legal requirement for no-smoking signs in buildings and even vehicles resulted in some initial implementation costs, none of which will be recovered if the regulation is repealed. Indeed there will be a limited cost for those businesses that decide to remove the signs. The bad reason is that for established businesses regulation can provide an effective barrier to entry. Those businesses that have borne the cost of implementing regulations have no wish to see potential competitors having an easier ride.

### **What should the Government do**

14. So what should Government do? There is no need for a “big bang” approach, which would simply lead to the ritual complaints about lowering of standards. Rather, there should be a low-key, but high impact, approach, which would -

- Identify the true nature of the regulatory burden, largely by talking to trusted trade associations, companies and experts to understand fully those regulations and parts of the regulatory process that need to be reformed.
- Reform the impact assessment regime to align it with the way that policy is actually developed.
- Identify some “quick wins” in respect of laws and regulations which would not be politically controversial. One example would be to end the requirement on the Post Office to deliver to each address six days a week – a real example of deregulation enabled by Brexit. A major quick win for new businesses would be reform of anti- money-laundering requirements, which are effective in making it very difficult for new businesses to open bank accounts and arguably ineffective in preventing money laundering.
- Develop a strategy to reduce the regulatory burden caused by misuse of guidance and information requests, and a concentration of inspection and enforcement activity on process rather than substance. This must include the introduction of a robust regime for the accountability of regulators, embracing comprehensive audits of their effectiveness.