

Centre for Information Policy Leadership Response to the UK Government’s Consultation on the Framework for Better Regulation

Centre for Information Policy Leadership

The Centre for Information Policy Leadership (CIPL) is a global privacy and data policy think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and more than 80 member companies which are leaders in technology, finance and other key sectors of the global economy. It has offices in Washington, London and Brussels.

CIPL’s mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL’s work facilitates constructive engagement between business leaders, privacy and security professionals, regulators and policymakers around the world¹. In recent times, CIPL has worked on a range of issues with the Department for Digital, Culture, Media & Sport (DCMS), the Information Commissioner’s Office, and UK-based academics. A former Information Commissioner, Richard Thomas CBE, is a global strategy adviser.

CIPL is widely associated with promoting the Accountability Framework² and the Risk-based Approach³ as substantive regulatory tools which create benefits for all – organisations using data, individuals, regulators, the economy and society at large. It has also given considerable attention to reviewing the effectiveness of Data Protection Authorities around the world and has put forward a range of proposals for improving the ways in which individuals are protected which do not impose undue burdens or stifle innovation or growth.

¹ For more information, please see CIPL’s website at <https://www.informationpolicycentre.com/>. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.

²https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_accountability_mapping_report_27_may_2020_v2.0.pdf. The Accountability Framework is reproduced in the Annex.

³ https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/white_paper_1-a_risk_based_approach_to_privacy_improving_effectiveness_in_practice.pdf

The Framework for Better Regulation⁴

CIPL welcomes the UK government’s initiative in launching this consultation which seeks to improve ways in which regulation works in practice⁵. The basic aims, and the five principles, are broadly consistent with the approaches that CIPL has promoted over the past 20 years. In particular, we agree that:

- high-quality regulation leads to better markets;
- emphasis is constantly needed on how regulation shapes and supports new technologies;
- proportionality requires the right balance between rules and non-regulatory options;
- the focus should be on “what works” to achieve the desired outcomes in the real world; and
- high UK standards and “robust regulatory diplomacy” have the potential to influence decisions across the world, especially where problems require a global approach.

CIPL is not well-placed to address all the 35 detailed questions which BEIS has set out in the consultation paper. Instead, we hope it is helpful for us to generalise from our research and policy experience with data protection and privacy. These address the “Role of Regulators”, but go wider than the ground covered by Questions 8-17 and may perhaps be best seen primarily as a response to **Question 35** (“Other matters ...to improve the UK regulatory framework”).

A Different Approach

CIPL has worked closely with Prof. Christopher Hodges (University of Oxford), the author of Law and Corporate Behaviour (2015) which sets out a comprehensive and evidence-based analysis of regulation, enforcement, compliance and ethics. His search for the most effective regulatory approach draws heavily upon how organisations respond to regulatory requirements in practice. His book examined numerous sectors and CIPL has worked with Prof. Hodges to apply his findings to data protection.

CIPL broadly agrees with the detailed response that he has submitted to this Better Regulation consultation⁶. In particular, we agree that there is a strong case for a genuinely fresh approach which concentrates on how regulation is applied, rather than the substance of the rules themselves. In this context, the key points to make can be simplified and summarised as follows:

- Most regulators have limited resources, a range of functions and tools at their disposal and considerable discretion as to which to use in particular situations. It is fundamentally important that published strategies should spell out the outcomes (results) they expect the regulated community to achieve or (usually easier) to avoid.
- Equally, they should make clear how they will prioritise and deploy their tools.
- The evidence indicates that (despite political and media assumptions) punishment and deterrence play a very limited role in influencing corporate behaviour.
- Most organisations – especially in competitive markets - seek to comply with regulatory requirements, whether for reputational, commercial, political or other reasons. The priority for

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005119/reforming-the-framework-for-better-regulation.pdf

⁵ CIPL will be responding separately in due course to the recently-announced DCMS consultation on “Data: A new direction”

⁶ C Hodges, *Response to Consultation: Reforming the Framework for Better Regulation*, 23 September 2021

regulators should therefore be on those functions which help organisations (especially SMEs) to “get it right” legally and ethically.

- This calls for genuine constructive engagement and considerable mutual trust and co-operation between a regulator and its regulated community, with maximum clarity about common purposes, objectives and outcomes, and maximum accountability to demonstrate that these are being sought and secured.
- At the same time, regulators need to segment the market, so that they can readily identify the minority who deliberately, wilfully, cavalierly or repeatedly ignore regulatory requirements and cause real detriment. “Hard” enforcement and actual or threatened sanctions can then be targeted on that minority which cannot be trusted.

“Regulating for Results”

In 2017, CIPL published a detailed discussion paper - “Regulating for Results”⁷ which elaborated this approach and set out ‘Principles for a Results-based Approach’. The thinking has been adopted by a number of Data Protection Authorities around the world, though so far to a lesser extent in continental Europe. In the UK, the Information Commissioner’s Office – widely seen as a world-leader – also has strategies which are consistent with our proposals and is especially praised for its pragmatic guidance for data controllers and processors.

With minor modification, the main principles we articulated in 2017 can be generalised for UK regulators as follows:

Principles for a Results-based Approach

- Regulators need to be independent, strategic, effective, co-ordinated and transparent.
- The goal should be to produce cost-effective outcomes, which effectively protect individuals in practice, promote responsible behaviour and facilitate prosperity and innovation.
- The top priority has to be securing protection in practice for relevant individuals.
- A regulator should be accountable for transparently spelling out the particular outcomes it is seeking and the priorities and approaches it will be adopting to achieve those outcomes in its regulatory work.
- The strategies of all regulators should be as co-ordinated, consistent and complementary as possible.
- Regulators should treat regulated organisations in a consistent manner – adopting similar approaches across and within sectors, irrespective of the type or geographical reach of the organisation.

⁷ https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_final_draft_-_regulating_for_results_-_strategies_and_priorities_for_leadership_and_engagement_2_.pdf

- A regulator should adopt a risk-based approach to all its activities, basing priorities on conduct that creates the most harm to individuals or to democratic and social values.
- An approach of constructive engagement with the emphasis on leadership, information, advice, dialogue and support will be more effective than sole and excessive reliance upon deterrence and punishment.
- Open and constructive relationships, based on honest dialogue and mutual co-operation will improve overall compliance outcomes.
- Regulated organisations should be segmented and assessed in particular by reference to demonstrable good faith and due diligence in their efforts to comply.
- Organisations trying to behave responsibly and “get it right” should be encouraged to identify themselves, for example by transparently demonstrating their accountability, their compliance programmes, and relevant accountability frameworks.
- Punitive sanctions should be mainly targeted on non-compliant activity that is deliberate, wilful, seriously negligent, repeated or particularly serious.
- Though the need to deal with individual complaints can be an important component of protecting individuals, handling high volumes is very resource intensive and can impede wider strategic goals. Complaints should be tightly managed with clear criteria to determine the extent of investigation, also taking into account that complaints are a valuable source of intelligence.

“Organisational Accountability and Enforcement”

In October, CIPL will be publishing “Organisational Accountability and Enforcement”, a White Paper which develops our think further still. An embargoed copy is [attached](#).

This paper elaborates ways in which Data Protection Authorities (DPAs) can encourage and incentivise the accountability of organisations which they regulate. It reviews the extent to which DPAs around the world are adopting a more outcomes-based approach to regulatory oversight and including *ex ante* engagement and encouragement of best practices. Specifically, we wished to explore the extent to which organisations are given credit for good faith efforts to implement accountability. The paper included a detailed survey completed by 65 regulators around the world (41 DPAs and 24 non-DPAs)⁸. The recommendations which CIPL draws from the survey and from earlier policy work on the Accountability Principle are summarised on the first page.

Of particular note in the current context is the finding that there is a global trend towards an outcomes-based approach that emphasises engagement, guidance and encouragement of accountable practices. This leads to the particular recommendation that regulators should transparently give credit for recognised accountability measures as a mitigating factor in their enforcement decisions.

⁸ BEIS may find it worthwhile to examine the detailed findings of our survey, if only as bench-marking reference.

Specific Consultation Questions

Although this response makes general points rather than address all 35 consultation questions, CIPL wishes to respond to specific points covered by three of the BEIS questions:

Question 9: Should innovation be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?

As indicated above, CIPL attaches great weight to innovation and has consistently argued that regulatory requirements should not stifle innovation or growth. CIPL therefore supports the proposition that – in suitable terms – regulators should support innovation, or at least ensure that any threat to innovation is kept to the minimum.

There has to be some scepticism, however, that a statutory objective would be worthwhile. Indeed, it could be counter-productive by placing a further layer of legalistic bureaucracy on the shoulders of regulators which could lead to disruptive litigation and inhibit their attempts to engage constructively in the ways which we propose. Innovation must come from innovators in the regulated community and is unlikely to be stimulated by regulators whose primary goal should be helping organisations to “get it right” legally and ethically.

Instead, CIPL believes that there is a better case for suitable revision to the Regulators' Code which could steer regulators away from disproportionate interventions which could negatively impact on innovation. The Code (made under the Legislative and Regulatory Reform Act 2006) provides a clear, flexible and principles-based framework for how regulators should engage with those they regulate. It (and its predecessors) has been taken seriously by the ICO - as illustrated by the details it gives of its own compliance with the Code⁹. This has had a beneficial effect on its effectiveness and reputation. CIPL would therefore wish to see this flexibility retained and updated, rather than disrupted by new – and potentially competing – statutory requirements.

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

For reasons spelt out above and elaborated in our new White Paper, CIPL considers that regulators could and should give greater weight to encouraging and incentivising maximum demonstrable accountability on the part of those they regulate. This could cover accountability for adopting ethical business practices as well for compliance with regulatory requirements and securing intended outcomes.

Again, however, this would fit better within an updated Regulators' Code, rather than attempted via statute.

⁹ <https://ico.org.uk/media/about-the-ico/documents/1042177/compliance-with-regulators-code.pdf>

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Question 12: Which option would increase the number and impact of regulatory sandboxes?

CIPL is proud of its early elaboration and promotion of the Sandbox concept, which dates back to its 2017 paper on Regulating for Results. Our 2019 paper on Sandboxes¹⁰ spelt out the details of promising ways forward and argued that their use should be seen as a valuable feature of constructive engagement and innovative regulation. This led to a very worthwhile roundtable with the ICO whose successful Sandbox service has proved to be a global pioneer.

Sandboxes are a prime example of the need for trust and co-operation. A suitable addendum to the Regulators' Code would be the best way to increase their number and impact.

Further Discussion

If BEIS representatives would value any further discussion on any aspect of this response, please feel free to contact CIPL's President, Bojana Bellamy, who is based in London - BBellamy@hunton.com.

CIPL - September 2021

¹⁰https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_on_regulatory_sandboxes_in_data_protection_-_constructive_engagement_and_innovative_regulation_in_practice_8_march_2019_.pdf

ANNEX

CIPL's Accountability Framework



CIPL Accountability Framework – Universal Elements of Accountability