

Reforming the Framework for Better Regulation

About the Advertising Association

1. The Advertising Association promotes the role and rights of responsible advertising and its value to people, society, businesses, and the economy. We bring together companies that advertise, their agencies, the media and relevant trade associations to seek consensus on the issues that affect them. We develop and communicate industry positions for politicians and opinion-formers, and publish industry research through advertising's think-tank, Credos, including the Advertising Pays series which has quantified the advertising industry's contribution to the economy, culture, jobs and society.
2. The membership of the Advertising Association is very broad and includes the associations representing industry sectors, such as the advertisers (through ISBA), the agencies and advertising production houses (through the IPA and APA), all the media (from broadcasters and publishers, cinema, radio, outdoor and digital), advertising intermediaries and technology providers (through IAB), market research (through MRS) and marketing services such as direct marketing (through the DMA) and promotions.

Executive summary

3. We welcome the opportunity to comment on the Better Regulation framework. Ensuring business confidence to invest in the UK should be a key objective if the Government wants to succeed with its ambitions for 'Global Britain', innovation and levelling up. This requires a stable regulatory environment and a predictable, light-touch and evidence-based approach to new regulation.
4. At the heart of any regulation or policy making should be the principle of proportionality. By this we mean regulation must meet the necessity test and be the least restrictive measure to achieve the desired policy outcome. The principle of proportionality also places a higher burden on policymakers to provide evidence to demonstrate those causal links.
5. In addition, we support the idea that regulators should be given a statutory duty to have regard to competition and innovation and these should continue to be reflected in impact assessments.
6. Instead of streamlining impact assessments, we would argue for improving the quality of the analysis and ensuring that the minimum standards of analysis are met or exceeded. For example, the analysis contained in the impact assessment considering the policy options for HFSS advertising restrictions fell well short of the standards expected as we discovered basic arithmetic errors. Moreover, strong evidence was lacking which gave the impression it was an exercise in post-rationalisation of the preferred policy choice. Also, impact assessments should be much more tightly integrated with post-implementation reviews and include the metrics and policy outcomes that will be used to measure if the policy was a success. This would, in effect, "close the loop" in the policy lifecycle.
7. Finally, earlier engagement with stakeholders can help inform the policymaking process and explore alternate options to statutory regulation. This would be a more effective way

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of reviewing regulation instead of relying on arbitrary targets. It would also reinforce the principle of proportionality.

Context about advertising

8. Advertising is important. It plays a crucial role in brand competition, drives product innovation and fuels economic growth. Many industries such as arts, sport and culture depend on it for their revenues and it also funds a diverse and pluralistic media enjoyed by consumers of all ages, including children and young people.
9. Advertising is a driver of economic growth and competition. We have estimated that every pound spent on advertising returns £6 to GDP through direct, indirect, induced and catalytic economic effects. Advertising spend will be over £23.5 billion in 2020, which we estimate, results in £141bn to GDP, supporting 1 million jobs across the UK.
10. According to Deloitte research carried out on behalf of the Advertising Association, the one million jobs supported by advertising can be broken down as follows:
 - 350,000 jobs in advertising and the in-house (brands) production of advertising.
 - 76,000 jobs in the media sectors supported by revenue from advertising.
 - 560,000 jobs supported by the advertising industry across the wider economy.
11. As reported in Advertising Pays: UK Advertising's Digital Revolution¹, advertising's contribution to the economy topped £138 billion in 2018 in the UK. Online advertising accounts for 57% of that amount and is predicted to grow to a 62% market share by 2020. The ad-tech sector, which provides digital tools and services for the advertising industry, comprises more than 300 UK-headquartered companies, with over £1bn invested in this sphere since 2013. This means the UK is now the largest online advertising market in Europe and third in the world behind the US and China.
12. Please contact Konrad Shek (konrad.shek@adassoc.org.uk) for further information on any of the points raised in this submission.

Our response

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

13. Not answered.

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

14. Not answered.

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

15. The Government should be cautious about using this approach for GDPR.

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

16. UK companies have invested significant time and resources in becoming GDPR compliant. GDPR prompted companies to make significant changes and it has led to heightened engagement and understanding of the rights and responsibilities¹.
17. The EU remains a key market for UK advertising and correspondingly the free flow of personal data between the UK and the EU/EEA is crucial. We regard regulatory alignment an important component to maintain that free flow of data. Given that the EU only recently granted a data adequacy decision to the UK, we would not want any policy decision to jeopardise this.

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

18. Yes.

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?

19. See response to Question 7.

Question 7: If no, please explain alternative suggestions.

20. The proportionality principle should be assessed using two criteria: necessity and the least restrictive measure to achieve the desired outcome.
21. To establish necessity, we need to prove that there is a causal connection between the regulation being proposed and the policy outcome that is being pursued. In other words, there is no alternative to regulation and the measures are relevant or pertinent. This also places an obligation to provide evidence to prove this link.
22. The least restrictive measure is concerned with the existence of a relationship of proportionality between the restrictions being introduced, on the one hand, and, on the other, the objective pursued and its actual attainment. In doing so, it becomes necessary to judge the disadvantage created compared to the advantage of pursuing the desired outcome. We think this provides a good balance between societal interests, an individual's rights and freedoms, as well the freedom to trade. This least restrictive measure also has implications for international trade and free trade agreements, especially when exercising the sovereign right to pursue legitimate public policy objectives that would conflict with trade liberalising rules. In this instance, the UK would also be obliged to seek the least restrictive measure.

Question 8: Should competition be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?

23. We would favour option b. "Embedded into statutory objectives". This requirement could be embedded via a statutory duty to have regard to competition. However, it would require coordination with the CMA, as the lead regulator for competition.

¹ <https://ico.org.uk/media/about-the-ico/documents/2614992/gdpr-one-year-on-20190530.pdf>

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

24. We would favour option b. "Embedded into statutory objectives". This requirement could be embedded via a statutory duty to have regard to and to promote innovation.

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

25. Supplementary duties for regulators should include a requirement to have a statutory duty to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and any other principles that represent best regulatory practice.
26. We would also draw attention to Ofcom which, under the Communications Act 2003, has a duty placed on it to have regard to the desirability of promoting and facilitating the development and use of effective forms of self-regulation. It was on this basis and the powers granted under the Deregulation and Contracting Out Act 1994 that Ofcom established a co-regulatory partnership with the Advertising Standards Authority (ASA) in 2004. In practice, this means that the ASA is responsible on a day-to-day basis for regulating the content and programme scheduling of broadcast ads. The self- and co-regulatory system for advertising is held in high regard as a model for an alternative form of regulation. This system maintains high levels of compliance, high standards and is entirely funded by industry. The key advantage of this system is that is flexible and more responsive than statutory legislation.

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?

27. In principle, we agree with the concept of agile regulation as it could be said that traditional methods of regulation are not keeping pace with technological advancements and are not responsive enough to deal with crises. However, this is caveated by the fact that agile regulation may not be appropriate for all sectors and its usefulness depends on the prevailing circumstances.
28. Implementing agile regulation does require some caution for the following reasons:
- There is a high potential for scope creep.
 - There is a need to maintain procedural fairness.
 - Often the effects of policy decisions are not known until some years after implementation.
 - It is important to maintain coherence across regulators. Could agile regulation lead to different regulators taking different approaches or operating at different speeds? And will it lead to regulatory fragmentation?
 - The cost to regulators in terms of developing expertise and tools to monitor market developments should not be under-estimated. In addition, companies may be burdened with more requests for information to inform these policy decisions.
29. Finally, if the Government was minded to delegate greater flexibility to implement agile regulation it is important that the necessary checks and balances are put in place in order to:

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- 1) avoid facilitating the introduction of unnecessary, unreasonable, or disproportionate regulation; and
- 2) prevent the avoidance of proper scrutiny.

Question 12: Which of these options, if any, do you think would increase the number and impact of regulatory sandboxes?

30. We support option b) requiring regulators to consider regulatory sandboxes as part of any legal duty to consider innovation. However, not all sectors may benefit from regulatory sandboxes and therefore the Government should not be advocating them just for the sake of it. Regulators should be considering feasibility, demand, potential outcomes, and collateral effects.
31. Whilst innovation-friendly policies can help regulatory sandboxes, the reverse is not necessarily true. In other words, regulatory sandboxes are not the pathway to innovation. In fact, it is regulation that fails to keep up with the times, creating uncertainty, that is a barrier to innovation. Regulation needs to be flexible and have clear guidelines. Regulators should be willing to provide guidance when uncertainty arises. Sandbox experiments should be used to design lasting policies that increases societal, economic and consumer welfare, instead of giving temporary relief to a small number of market participants.

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

32. See response to question 12.

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

33. Yes. If greater flexibility delegated to regulators leads to greater discretionary powers, then it logically follows that they should be more directly accountable to Government and Parliament to ensure that there are democratic checks and balances. But there should also be a role for the courts to ensure that there is a route to appeal and cases can be judged on full merits.

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

34. The accountability could be achieved by statutory reporting to Government and Parliament. In addition, powers could be given to the Secretary of State to provide guidance or direction to the regulator. Moreover, substantive new rules, such as codes of conduct, or revision thereof should be laid before Parliament.
35. In addition to this there should be an appeals process which includes a broad spectrum of appropriate mechanisms to ensure that standards of procedural fairness are maintained.

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

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36. Yes. This would encourage stakeholder participation in the regulatory process. Where recommendations have merit, regulators should be encouraged to act on them. Otherwise, the process would quickly lose legitimacy and participants will lose interest.

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?

37. Yes, we would agree with implementing deep dives of individual regulators to ensure that their processes remain fit for purpose, are effective and deliver value for money. To that end, we think there is an obvious role for the National Audit Office (NAO) to conduct this work and come up with recommendations. It already publishes the Performance Measurement by Regulators report, the last report dated November 2016, reviewing regulators in general, as well as good practice guidance on the principles of effective regulation, published in May 2021.

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

38. Yes, for the following reasons below.
- Early scrutiny of policy proposals will encourage the evaluation of other viable alternatives. When policy proposals are consulted on during the latter stage of the policy development lifecycle, often there is resistance to consider other alternatives given the political capital and resources spent to get the proposal thus far. This inevitably leads to phenomena such as the sunk cost fallacy, whereby continued investment is justified because of the resources already invested.
 - Early scrutiny of policy proposals means greater stakeholder participation which also has the effect of increasing the legitimacy of policy decisions or regulatory actions where those genuinely take stakeholder contributions into account.
 - Early scrutiny gives businesses more time to provide the necessary information and data that is often used to inform policy decisions. Moreover, it gives regulators and policy makers more time understand the impact of the policy proposals on business models.
 - Early scrutiny ensures that new policy or regulation is coherent and delivers on the objectives of previously announced Government strategies or plans.

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

39. N/A.

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

40. Yes. This would follow the proportionality principle of least restrictive measures. This should mean in principle that a full spectrum of policy tools is considered to address policy problems, inc. self-regulation or standards. This approach also requires early involvement from stakeholders to assess the feasibility of alternative solutions.

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

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41. No. It is felt that impact assessments (IA) are being used to offer post-rationalisation of policy decisions as opposed to an objective assessment of the policy options. Streamlining the process suggests spending less time on analysis which we would counsel against. Rather than streamlining the process, our recommendation is that the focus must be on ensuring that impact assessments are based on the accurate interpretation of accurate evidence.

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

42. As a first step there should be an explicit requirement for Government to set out specifically what it expects the regulation or policy to achieve, in measurable terms (and for that itself to be part of the consultation process, as well as the IA), and then a commitment to assess effectiveness against those measures. IAs should also refer to relevant Government strategies or plans, for example the Plan for Digital Regulation, with justification of how the regulatory action helps deliver on the strategy or plan's objective.
43. Additionally, we would recommend IAs and ex-post evaluations/PIR to be more tightly integrated. This would mean that IAs need to be forward-thinking about the measures that would be used in an ex-post evaluation to measure policy outcomes and success.
44. Whilst Cost-Benefit Analysis (CBA) can be useful for decision-making i.e., more efficient allocation of resources. it can be subject to bias and its accuracy is heavily reliant on the estimates and the assumptions being made. Hence CBA should not be viewed as a standalone tool and not solely what determines policy decisions. Moreover, if the CBA is utilised properly it should factor in full economic cost and benefits, in other words it should factor in other non-financial costs such as societal costs etc.
45. There are also some procedural and structural issues that should be addressed, namely,
- Ensuring the quality and integrity of the impact assessment. As an example, the original IA used to justify the recent HFSS advertising ban contained basic arithmetic errors. According to research we commissioned, the central estimate of the reduction in calorie consumption and the associated benefits was around 5% of the figures quoted in that IA. This would suggest a larger role for the Regulatory Policy Committee (RPC) to quality-assure the IAs being published.
 - Civil service churn often means that the officials in charge of designing the policy are often not the ones who are seeing the policy implementation to completion. It also means that lessons learned during the policy lifecycle are not properly absorbed by the system.

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

46. IAs tend to have a cursory regard for the “do nothing option”, as opposed to treating it as a serious policy option. This may be due to policymakers feeling compelled to do something. However, for CBA this is an important consideration. The policy option chosen should be significantly better than the “do nothing option”. If this is not the case then the “do nothing option” should be a viable policy option.

Question 24: What impacts should be captured in the Better Regulation framework? Select all which apply:

47. All the above: a. Innovation, b. Trade and Investment, c. Competition and d. Environment

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Question 25: How can these objectives be embedded into the Better Regulation Framework?

48. We think that this could be implemented via a. A requirement to consider these impacts, and b. Ensuring regulatory impacts continue to feature in impact assessments.

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?

49. Fundamentally, the Government's approach should be flexible. PIRs should be completed when the regulation has been fully implemented and has been operational for a period of time. Often the effects of regulation may only surface years after implementation and this would lean towards a 5-year review period.
50. That said, for regulation that has high risk or significant economic impact there may be merit in implementing 2-year review PIRs. In addition, there could be a "process failure" PIR with the intention of intervening where policy/regulation was made in haste or did not complete the necessary detailed IA so that the regulation/policy can be re-assessed before it has been in place too long.
51. The PIR process can be strengthened via ex ante IA or project evaluation that has a properly defined policy problem and an intervention with clear objective. These objectives should ideally directly link to measurable performance indicators that would determine whether the regulation or policy had the desired effect. Depending on the complexity of the regulation, the PIR may require detailed planning to get the necessary inputs for analysis.

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

52. See Question 26.

Question 28: Which of the options described in paragraph 3.4.10 would ensure a robust and effective framework for scrutinising regulatory proposals?

53. We would prefer b. Option 2. An independent body to continue to provide a scrutiny function which would operate independently from the Government. We think that the RPC already does a good job but would require an increase in resources.

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?

54. We would prefer option b. Change

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

55. We note that the One-in, X-out approach has been gaining interest among developed countries to limit the costs of regulatory compliance. However, this approach seems to

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be somewhat arbitrary to focus purely on costs as opposed to the principle of proportionality (necessity and the least restrictive measure).

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

56. Not answered.

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

57. One of the key critiques of One-in, X-out regulatory offsetting includes a concern that this approach will lead to too much focus only on regulatory costs and a disregard of regulations which might be costly but still beneficial.

58. There is also a concern that if there is a need to regulate a government department may be constrained if it cannot find the necessary regulatory offset.

59. The OECD believes that there are many methodological and implementation issues that need to be resolved before adopting a one-in, x-out approach as part of a government's regulatory policy. Key suggestions for countries introducing regulatory offsetting include i) ensuring a solid methodology for calculating regulatory costs; ii) linking the responsibility for finding offsets to the "owners" of regulation; iii) setting up quality oversight mechanisms; iv) securing strong political commitment and support and v) implementing regulatory offsetting as a complement to other regulatory management tools.

Question 33: How important do you think it is to baseline regulatory burdens in the UK?

60. We think option b. Somewhat important to baseline regulatory burdens. The key benefit of baselining regulatory burdens is to conduct comparative analysis to determine the overall international competitiveness for the UK for business and investment.

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

61. Not answered.

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

62. Not answered.

Advertising Association
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