

PCG Policy Briefing: Regulation

Introduction

PCG is the cross-sector trade association for freelance contractors and consultants in the UK. Its members are typically knowledge-based workers, supplying their services on a business basis to a succession of clients. For this reason, they may fall within a wide range of different regulations as they move between clients in different sectors. As the smallest of small businesses, it is vitally important for them that regulations is therefore clear, accessible and not unduly burdensome. It is PCG's position that the government has much work still to do in order to ensure that the regulatory landscape meets these criteria.

The Better Regulation agenda

The government's Better Regulation agenda has delivered much that is welcome. It clearly represents a more concerted effort to reduce regulatory difficulties than has been mounted before and constitutes a welcome tacit acknowledgement that some recent regulatory developments have not been sufficiently effective. The five principles of good regulation identified by the Better Regulation Task Force – proportionality, accountability, consistency, transparency and targeting - strike PCG as sound. The agenda is still at a fairly early stage, however, and it must be judged in coming years on the effectiveness of its delivery.

PCG welcomes many of the actions so far taken or proposed. The simplification of forms will be welcome for all small businesses. The shift to risk-based assessment and inspection holidays for businesses with good compliance records are also sensible ideas, as is the Better Regulation Portal via which members of the public can make suggestions for the reform of specific regulations.

There are some respects in which PCG feels there is scope for further work. The drive to measure the administrative burdens of regulation on business is extremely welcome and the reduction of these burdens is a good measure by which to gauge the success of the Better Regulation agenda. PCG has some concerns, however, at the effectiveness of the measurement exercise, which was conducted by a large consultancy firm which is not necessarily well-placed to understand the concerns of small businesses.

This cause for concern extends to government itself: in a governmental culture which measures success in terms of activity, and in particular legislation produced, are civil servants really able to "think small first"? A similar issue surrounds politicians: they tend to want change and reform; businesses want stability. The specific exercises undertaken so far are welcome, but a broader cultural shift must also ensue for the Better Regulation agenda to be completely fulfilled.

Compliance, Penalties and Redress

The Hampton report and other strands of the Better Regulation agenda have made much of the need for advice and information to be properly available to businesses. This is a welcome observation, but businesses also need certainty that they will not be penalised for following official advice. There have been instances in the past of official advice provided by government bodies turning out to be wrong and people who have followed it being prosecuted. PCG would like to see a binding undertaking that this cannot happen

in future: businesses who have acted in accordance with government guidance and recommendations should not be prosecuted for doing so, even if that guidance was not correct.

The recent activity in the Better Regulation agenda does not seem to have placed much emphasis on redress when, for instance, regulations have been incorrectly enforced. PCG members have repeatedly expressed concerns that they have experienced or witnessed regulations being wrongly implemented, at times by inspectors who do not possess appropriate expertise or experience. At other times, regulations have been drafted so badly that they have directly and seriously undermined businesses. In these instances, businesses should always have the right of appeal to a body independent of the original regulator.

PCG also feels that, where penalties could exceed a certain level comparable to criminal sanctions (for instance, £1,000 or a suspension of the right to trade which would amount to a loss of livelihood), regulatory bodies should be required to prove non-compliance beyond reasonable doubt.

Impact Assessment

The use of Regulatory Impact Assessments has become standard in legislative and regulatory proposals in recent years. While there remains some work to be done in making their use entirely consistent, this is on balance a very positive development. The assessment of the actual impact of regulations after their implementation has not, however, been nearly as impressive. PCG would like to see a full post-implementation impact assessment of all regulations and legislation to be made mandatory. This must include full consultation with all stakeholders and interested parties. It must also involve the establishment of appropriate systems to monitor the impact: at the moment, for instance, the Treasury is unable to measure the income generated by individual tax measures. This is clearly unacceptable, as it makes assessing their effectiveness impossible.

An increased use of sunset clauses in legislation will assist with this to an extent, although PCG accepts that they are not a panacea and risk clogging the system with constant renewals. Their increased use should therefore be encouraged, but within the bounds of common sense.

Although the UK's Presidency of the EU in 2005 was able to draw attention to issues of Better Regulation, there remains much work to be done in applying these principles to the EU's processes. In particular, its use of RIAs is totally inadequate. Proposed directives can change far more over the course of their development than is usually seen with legislation in the UK, to the extent that a measure's final form can bear little or no resemblance to the initial proposal. These measures can also take so long to be passed that the area they are attempting to influence might have changed considerably since the first proposal was made. Nevertheless, RIAs are carried out on initial proposals but not on measures at any later stage. This needs to be remedied, either by moving the RIA to a later stage in the process, or by allowing for at least two to be undertaken.

A trend has also emerged of MEPs arranging for the impact of measures to be assessed by the European Parliament at a fixed time after implementation. It would be useful if this were to be made mandatory for all directives and a similar requirement placed on the Commission regarding regulations.

Administrative Burden

When asked to identify the regulations that cause them the most difficulty, businesses can often struggle to provide an answer. It is the case that, while some individual regulations are very problematic indeed, the chief problem is the sheer burden of regulation. The exercises in 2005-6 to measure administrative burdens acknowledge this problem, but it bears repeating. It may be the case that an individual regulation involves completing a simple form that should take half an hour, but a handful of these simple requirements can, together, eat into a business's time quite considerably. This is particularly true of freelance contractors and consultants, who have to deal with the administrative burden of regulations on their own.

While efforts have been undertaken to measure the administrative burden of regulation, PCG agrees with Sir David Arculus's comment, in the final report of the Better Regulation Task Force that policy costs, which make up 70% of all costs, must also be measured and reduced. This will allow us to question not only how regulations are implemented as they are, but also why and whether they are justified.

Another symptom of the sheer volume of regulations is a query often asked by freelance contractors whose clients are in a range of sectors: "How do I know what I need to know?" PCG suggests that all regulations should be made available via a central portal, perhaps at an address such as www.regulation.gov.uk. This portal would simply have to provide links to each department's regulations and explanatory material. If regulations do not show up when a set of reasonable search criteria are entered, businesses should not be penalised for failing to comply.

A further issue associated with the burden of regulation is so-called "gold plating" of EU directives. The government is consistently adamant that it does not add unnecessarily to EU directives but, rather, it implements them thoroughly and does no more. PCG is willing to believe this, but observes that most other EU member states implement directives rather more lightly. The explanation for this may be that their lawyers and civil servants are less risk-averse and are willing to implement directives less stringently. They clearly suffer no recriminations from the EU for this and PCG urges the government to apply a little more common sense in its implementation efforts.

Regulatory Reform Orders

PCG acknowledges that the new regulatory reform orders created by the Legislative and Regulatory Reform Act of 2005 are without doubt an extremely powerful tool for correcting poor regulations. PCG raised concerns, however, during the consultation on the draft Bill and feels that these concerns remain. RROs are constitutionally innovative, almost to the point of being revolutionary, and the safeguards attached to them are of questionable merit.

Ministers have pledged not to use RROs to introduce controversial reforms and to allow parliamentary scrutiny committees an effective right of veto over any measure. PCG accepts that these undertakings have been made in good faith and feels confident that they will be respected by the ministers that made them. They are not enshrined in statute, however, and there is nothing to prevent future governments from using these extremely powerful orders to by-pass Parliament and overrule its will.

PCG would like to see the Act amended to include a sunset clause. PCG also calls for the parliamentary scrutiny committees to be given a statutory right to veto a proposed RRO if even a minority of, say, a third or even a quarter objects of their members; as RROs are intended purely for uncontroversial measures, this should present no problems to the government.

PCG is also concerned that the ready availability of RROs will remove an incentive for the government to get it right first time. Government should not, ideally, be producing any regulations in need of reform. The very creation of RROs indicates that the government lacks confidence in its own ability to produce effective regulations: it would be preferable for this inadequacy to be remedied as a first priority.

Summary of PCG policy suggestions

- A binding undertaking that businesses and individuals cannot be prosecuted or penalised for acting in accordance with official advice or guidance from the government or one of its agencies.
- Businesses should always have a right of appeal against a regulatory penalty to a body independent of the regulatory body.
- Where penalties could exceed a certain level (for instance, £1,000 or a suspension of the right to trade which would amount to a loss of livelihood), regulatory bodies should be required to prove non-compliance beyond reasonable doubt.
- Mandatory post-implementation impact assessment of all legislation and regulations at UK and EU level.
- RIAs to be carried out on EU proposals at a later stage, either instead of or in addition to the current practice of initial assessments.
- Policy costs of regulation to be measured as well as administrative costs.
- A central portal, via which all regulations are visible, to be established.
- The government should implement EU regulations more in line with the practice of other member states.
- The Legislative and Regulatory Reform Act should be amended to include a sunset clause.
- A statutory power should be granted to parliamentary scrutiny committees to reject proposed RROs if even a specified minority of members objects.
- The government should address the deficiencies in its formulation of regulations that make RROs desirable in the first place.