

European Civil
Justice Systems

Ethical Business Regulation

Growing Empirical Evidence

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Policy Brief

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The Foundation for Law, Justice and Society

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The Foundation for Law, Justice and Society

Regulation, Regulators, and the Crisis of Law and Government

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.



Executive Summary

- This policy brief outlines the concept of Ethical Business Regulation (EBR), and records some current examples and empirical evidence of where it is applied. The concept is based on existing evidence on why people observe or break rules, on how culture can support continuous performance and innovation, and commercial success. The objective is to build on this evidence to enhance business performance in compliance with the values of society, and hence to boost economic growth.
- EBR facilitates effective relationships between businesses and regulators so as to achieve common ends more effectively and efficiently. EBR therefore supports co-regulatory arrangements, which produce benefits desired by all, whilst reducing costs.
- EBR is based on the findings of behavioural science. The same science has been applied as 'nudge' and by regulators seeking to influence consumers' choices. EBR applies the science to support relationships between businesses and regulators.
- The scientific findings show that people will voluntarily observe a rule where the rule is made fairly, applied and enforced fairly, and its substance is fair. The focus on fairness links to Polanyi's prescription of re-embedding economic activity into its social context.
- The civil aviation industry has shown that voluntary reporting needs an open (no blame) culture.
- Those businesses that have adopted fair and open cultures based on doing the right thing and speaking up (Ethical Business Practice) find that it leads to commercial success.
- EBR is based on individual businesses that choose to adopt an ethical culture, and hence deserve to be treated with respect by responsive regulators. Ongoing arrangements can be agreed, such as the Primary Authority Scheme.
- This approach already exists in some sectors or is becoming more prevalent, notably in civil aviation, pharmaceuticals and medical devices, water, energy, food standards, gambling, and equality and human rights. Evidence of the approach is now being compiled, and various pilot studies being undertaken.

Ethical Business Regulation

Growing Empirical Evidence

What is ethical business regulation?

The essence of ethical business regulation (EBR) is: to do the right thing, and speak up in sharing all relevant information in open relationships, so as constantly to learn and improve. This follows from the idea that a stable and healthy contemporary society should encourage and support its people to do the right thing in all aspects of life — home, work, social, and public life.

This model can be applied to (a) how organizations operate internally, so as to maximize their achievements and performance, and (b) the relationships between organizations and their external stakeholders, such as regulators, customers, suppliers, investors. It applies equally to public or private organizations.

Organizations that demonstrate that they can be trusted on a consistent basis deserve the increased trust that their behaviour generates. Reputation will increase in response to success, but people often respond to problems by asking, 'Who's to blame?', rather than taking care to find out what the real cause of the problem is, hence what the real solution is, and then taking steps to reduce the risk that the problem recurs.

It's industry's risk, not the regulator's. It starts with us, doing our business.

How an organization responds to bad news or adverse events is critical: this is true of both commercial and public bodies. But trust should play a critical role here. The public (media, reputational, and regulatory) response to how the organization has responded is itself critical. Responding to people who are trying to do the right thing by blaming or punishing them is not

fair and will both destroy trust and hamper improvement. But how do we know who is trying to do the right thing? Should we not be encouraging people to do the right thing, and remove barriers to achieving that constant state of affairs?

How do we know what the 'right thing' is? By reaching a decision through open, fair, informed engagement in discussion. This does not mean that everyone will necessarily agree with the decision, but if it can be seen to be fair and to have been reached through a fair process of involvement then acceptance will be supported. States and organizations have processes to set laws or rules. The processes by which those rules are made and applied, as well as the substance of the rules, need to be demonstrably *fair*. The process of fair, open, informed discussion is critical. In the context of regulation, making the rules is only the start; the process of engagement has to be continued on a constant basis. So the relationship between regulator/enforcer and commercial business will be critical.

This culture of mutual engagement, respect, learning, and constant improvement is based on social trust — trust between people, and in how people act within their organizations and systems. Trust is based on evidence. Hence, the sources of reliable evidence that will indicate whether trust should or should not be placed should be maximized. The question is where we get evidence of that trust? Trust is a state of mind that is developed from all the diverse available evidence. Trust is essential in relation to future reliance, but it is difficult to measure the likelihood of future compliance or performance, and how that might be affected by unavoidable risks. Risk assessment is based on data; this data comes from relationships, especially open relationships. If one is to build trust,

one should provide verifiable evidence of past behaviour and of internal culture, from multiple sources.

The social contract of trust is broken where information is not openly shared. Traditional conceptions of 'responsibility' and 'accountability' rely on authoritarian structures, naming, shaming, convicting, and punishing. Within a social context, however, the meaning of 'responsibility' and 'accountability' is *social* — it is to one's family, friends, colleagues, and customers, rather than vertically to those in authority. If trust is to be maximized, social accountability is the critical mechanism. Strong social accountability can replace traditional mechanisms of legal responsibility and punishment.

People should be encouraged to share information on how to improve business behaviour. This may lead to better ways of doing things (innovation, improvement in performance) or learning from mistakes or adverse events (avoidance of repetition, risk-reduction, and improvement in performance). When determining the appropriate response to such events, we should differentiate those actions taken with integrity from those that are deliberately anti-social.

Deterrent sanctions do not affect future behaviour. The brain can be affected by being reminded that something should not be done, especially if it perceives that the risk of being identified (and embarrassed) is high. So a valid regulatory strategy can be to affect the perception that the risk of being caught is high. But if the risk is in fact low, that strategy will fail. It is not a strategy that will be effective in many situations, for example, because it is impossible or too costly to guarantee that every wrong act will be identified, and such an approach engenders a culture of constant suspicion and control through fear, which is unacceptable in a contemporary society. Some people are motivated by making money illegally in the belief that they will not be caught. But this does not mean that they will be prevented by the risk of punishment or increased punishment.

If people or organizations do *not* behave ethically, or fail to engage in a sequence of ethical actions in

response to an adverse event, people expect to see proportionate responses as a matter of maintaining their belief in a fair society. Further, society is justified in responding to wilful, deliberate, or grossly negligent wrongdoing or repeated unethical behaviour by protecting itself through traditional punitive means. Hence, an enforcement toolbox that contains a wide range of powers is required (for public authorities and for commercial authorities). But response to unethical actions must be proportionate, and this requires coordinated balance between public, professional, commercial, and social sanctions to prevent multiple responses accumulating into injustice. This means that sophisticated coordination is needed between sanctions imposed on persons and organizations, and responses imposed by different authorities — without obscuring the fact that it is *social* responses, such as ostracism or public reputational effects, that are sometimes the most powerful. For serious offences, withdrawal of the right to trade is required.

An approach based entirely on ensuring compliance will fail, as it does not give sufficient emphasis to improvement and risk. It also erodes trust, since it sends a message that those subject to regulation are being unduly monitored, measured, observed, and judged. Adopting a deterrent approach simply by imposing increasingly serious penalties in the belief that future behaviour will be in compliance with the rules does not work, and destroys any existing relationship, as well as the opportunity to build future relationships. Policymakers in criminal enforcement have long known that 'deterrence doesn't work' and have switched to finding ways of affecting character traits — particularly a person's willingness to break social norms, and their levels of empathy and self-control.¹

Much misconduct is perpetrated by good people doing the wrong thing for a variety of reasons. Dan Ariely shows that people can cheat, and still feel good about themselves (called the 'fudge factor'). How much they can cheat and still feel good about themselves depends on various things. When people can rationalize bad behaviour, they may cheat or misbehave. But whilst we need controls for rogues, it is culturally destructive to treat the majority as if they are criminals.

The ideal sequence of reactions to adverse events is:

1. To identify an issue as quickly as possible.
2. To identify the root cause of the problem.
3. To share information on the problem and to discuss and agree the appropriate response.
4. To implement the right response, and share that information.
5. To apologize for harm caused, and repair it or provide redress.
6. To monitor the situation and see if changes need to be made in the initial response.

Examples of moves towards EBR

If the above approach to maximizing the beneficial outcomes of human activity is correct, the question then becomes one of how to apply the approach in the context of regulation, i.e. to the cultures of both public regulatory or enforcement bodies and commercial entities. This policy brief contributes to such a roadmap. In simple terms, it seeks to identify a vision of the culture required by both sides, individually and in the way that they engage each other and outside actors, and to encourage movement towards that vision. A series of examples can be identified from different sectors of the UK which demonstrate significant moves in this direction.

UK regulatory policy

The development of the concept of Better Regulation in the UK has revealed some interesting issues. Better Regulation is about 'doing more with less', i.e. being more effective in establishing compliance with society's rules so as to support a fair and level playing field, whilst minimizing the cost for both public and commercial operators. This has led to theories in which the number of rules is reduced, rules and control systems are simplified, and control systems are coordinated—namely businesses' compliance and management systems; regulators' approval, inspection, surveillance and enforcement systems; and market reputational systems. An important step in this process was the requirement that regulators should support business growth.

Another major step was the requirement that regulators should publish their enforcement policies and strategies. Analysis of those published policies

reveals a wide range of approaches amongst the regulatory community, not just to enforcement but to regulation generally. At one extreme, some authorities adhered to traditional approaches of deterrence, in which imposition of fines on businesses would theoretically lead to rational cost-benefit conclusions that businesses would in future do the right thing. There turns out to be only limited empirical evidence to support that theoretical approach, although 'hard' enforcement may be the only way to respond to committed criminals whose intention is simply to profit from illegal activity. At the other extreme, some authorities adopt an approach toward businesses whose activities are essentially legal of improving levels of compliance and reducing risk by advice, encouragement, and support, only rarely using a 'big stick' approach.

It may be surprising to realize how few UK authorities currently base their enforcement activities on the more punitive 'hard' enforcement approach, and how many authorities adopt the soft approach as standard. Indeed, the trend is clearly from 'hard' to 'soft'. This direction of travel is related to the evolution in the functions of authorities that were initially created as 'economic regulators' to monitor competition and prices in markets (where economic analysis is the core skill), later to be asked to assess broader issues of market behaviour and to ensure the good treatment of consumers (where an understanding of behavioural science is critical).

Trust is increasingly regarded as critical by many regulators² and by companies,³ and has become about more than merely stopping people and businesses from engaging in bad behaviour, now to include helping people to act ethically.

The Primary Authority Scheme

The Primary Authority Scheme (PA) has created a *relationship* between regulators and businesses. Its original aim was to coordinate the responses of the 400-plus Local Authority enforcement functions across the country and to ensure that they took positions that were consistent. But in addition, importantly, businesses could obtain advice on which they could rely on and what they have to do to comply (assured advice), compliance with which would not trigger enforcement action.

Arrangements are overseen by the Regulatory Delivery division of the Department for Business, Energy and Industrial Strategy, which approves PA agreements and their terms, and resolves conflicts in approach. Since neither expertise nor the ability to exert beneficial influence on businesses rests with public authorities, PA has been extended to allow certain approved private bodies, such as trade associations, to deliver assured advice. PA is currently being extended beyond the Local Authority community to include some national regulators.

The coordinated approach of PA has been hugely successful in delivering assured advice to support consistent good practice. For trusted businesses, it reduces the need for inspections or enforcement action, and instead supports communication within an established relationship so as to identify and swiftly resolve issues as they arise. It has spread quickly, and now involves 10,000 businesses, 90% of which are small. The Regulatory Delivery division has discovered that most of the benefits of PA for a business derive from the ability to talk to a regulator (paying for the consultancy time). There has only been one dispute to resolve in eight years, significantly fewer than previously.

Some success stories from PA are:⁴

- At a Northamptonshire local authority, savings to businesses in 2014–15 were estimated to be £80,000, with improvements in business compliance and satisfaction.
- Imperial Cars' partnership with Portsmouth City Council reduced complaints to Trading Standards by half and increased turnover by £27 million.
- Savings for a care home group (HC-One) of £1 million as a result of agreeing single best practice that was applied consistently across its multiple homes in different geographical areas across the country.

Civil aviation

Safety in civil aviation is critical: it is essential that planes do not crash. Crashes are catastrophic for all those on board, and for those on whom the debris falls, and the reduced confidence affects business. Pilots do, of course, have 'skin in the game', so are motivated to maintain safety. The success record in

civil aviation is outstandingly high when compared with many other forms of transport or other activities such as healthcare. Airline members of the International Air Transport Association (IATA) moved 3.6 billion people in 2015 and lost about 400—a miniscule percentage.

The regulatory system includes requirements for control systems, approval of operations and key people, and reporting of critical information so that it can be expertly reviewed and key points fed back into practice as swiftly as possible. But the issue that is regarded as critical for aviation safety is a *just culture* for all individuals involved, whether they are regulators, air traffic controllers, pilots, corporate management, or people who close cargo doors. The terminology has also changed from a 'no blame' culture to an 'open' and 'just' culture, as the former was regarded as too simplistic.

A critical change in the approach occurred when it was realized that imposition of sanctions for not reporting information produced the result that no information was reported, since people feared they might be criticized for doing so. It has also been recognized that the just culture has to apply *everywhere*: if it is not seen to be followed in *all* of the regulatory, professional accreditation, commercial, and social spheres, it will not be sustained. Further, the concept of 'compliance' has been replaced by focus on *performance*: the approach is constantly to improve how people and the system are performing in a risk-based world.

The Civil Aviation Authority regards itself as around the middle of a ten-year journey to support change in processes and systems. The CAA developed the previous compliance-based approach, rather than throwing it away. It found that a rules-based system is backward-looking and inculcates a culture in which members look for ways to circumvent the rules, whereas a principles-based approach aims to be forward-looking and to encourage people to take responsibility for the culture within their own organization. The critical component is to *build relationships* — with a view to change the regulator–operator relationship from the parent–child model to one between responsible parties who have reason to trust each other.

Responding to events by blaming individuals or organizations will neither improve performance nor support trust relationships. The best airlines regard it as a matter of honour to raise potential issues with responsible regulators swiftly — but also to implement solutions without waiting to be told. The risk lies first with the business, which must address it directly. In this system, it is the regulator's job to challenge, including challenging institutional complacency (the 'we've always done it this way' response). Discussions between regulator and business that reveal disagreement are seen as a sign of success in raising and addressing issues. The CAA regards it as essential to talk to airlines about their culture and key personnel. Complacency and turning a blind eye are behaviours to identify and address. It finds that recording concerns expressed in minutes of meetings, which companies have later to confront and may be questioned on, has a significant effect on addressing differences of opinion.

One of the current challenges is that, whilst some national authorities adopt a just culture approach, some others across the world remain in punitive, blaming, and deterrent mode. The latter is a serious threat to effectiveness and performance. Some authorities want to fine pilots and organizations: if they do that, pilot reporting goes down, and the airline's ability to know what its own organization is doing is harmed.

Full transparency is needed between operators, intermediaries, and regulators, and yet, perhaps counterintuitively, public confidence can be adversely affected if too much quantitative data is published. Public confidence can be maintained through transparency of qualitative, but not always quantitative, data.

Some further examples

The Food Standards Agency (FSA) published the following five principles that form the core of discussions with stakeholders in 2016:⁵

1. Businesses are responsible for producing food that is safe and what it says it is, and should be able to demonstrate that they do so. Consumers have a right to information to help them make informed choices about the food they buy; businesses have a

responsibility to be transparent and honest in their provision of that information.

2. FSA and regulatory partners' decisions should be tailored, proportionate, and based on a clear picture of UK food businesses.
3. The regulator should take into account all available sources of information.
4. Businesses doing the right thing for consumers should be recognized; action will be taken against those that do not.
5. Businesses should meet the costs of regulation, which should be no more than they need to be.

Ofgem, originally created as an economic regulator, broadened its approach and introduced Standards of Conduct in 2014. This broadening raised the challenge of how to enforce the standards it was responsible for. It has started to engage in dialogue with operators in a Challenge Panel, which is making progress, and is pursuing an initiative on Future Retail Regulation that aligns closely with ethical retail principles, outcomes, and conduct. The opportunity for dialogue has been welcomed by some companies. Northern Gas Networks, for example, used to be a status-oriented organization, but created a customer-focused and safety-focused organization. It found that internal culture developed quickly, from one in which individuals expected to be told what to do to one in which trust was established, based on honesty, transparency, and authenticity. Like various other companies,⁶ it found that a rigid hierarchical structure prevents trust among employees. Workers who dig up roads love the idea that their most important corporate value is *love!*

Borealis reframed its approach to ethics during a time when the company was undergoing a 'step change in safety', which involves a similar culture change, and not as a result of any external stimulus. Senior management arrived at the view that ethics was each employee's responsibility. The new policy was based on underpinning strong values, and the company created ethics ambassadors throughout the organization (regular employees with other jobs who took on an additional ethical role) to be involved in the process of creating, training, and sustaining the new culture. Various tools can be used

to measure culture, to enable organizations to see what values are operating in an organization, and to measure culture risk by assessing 'limiting' values. Over time, changes and trends emerge.

Earlier in 2016, the chemicals company Johnson Matthey put in place a Code of Ethics entitled 'Doing the Right Thing'. It is based on two simple principles: 'do the right thing' and 'speak up'. The document illustrates applications of those two principles in various different business situations. Whilst the document is similar to many other corporate statements on mission, compliance, or ethics, its introduction was a result of extensive discussions by groups of staff in the company and across the world. A recent evaluation has shown that the approach is engendering internal enthusiasm and genuine ownership by employees all round the world.

The UK Bribery Act 2010 specifies that a company that has 'adequate procedures' designed to prevent persons associated with it from undertaking bribery to benefit the company has a defence to a charge against it.⁷ Recent international statements such as that by the OECD have emphasized the role of corporate boards in fostering 'a relationship of confidence and mutual trust between enterprises and the societies in which they operate',⁸ and of business integrity.⁹ The UK Financial Reporting Council has expanded the role of boards by noting the need to establish the culture, values, and ethics of the company, and to set the correct 'tone from the top' in ensuring that 'good standards of behaviour permeate throughout all levels of the organization'.¹⁰ The Institute of Business Ethics has also noted

three main drivers of bad behaviour: corporate stress which led people to take short cuts, excessive focus on short term financial targets which might itself become a source of stress, and a ready tolerance of small breaches of the rules which allowed misdemeanour to become incremental. ... The conclusion that culture matters is a problematic one for regulators because it involves a qualitative approach. They cannot force companies to have a 'good' culture because they cannot define exactly what that means and measure compliance on an objective basis.¹¹

Consumer Ombudsmen are now providing not just dispute resolution of fair outcomes in individual

cases, but are able to perform a powerful regulatory role in feeding back data on issues and trends that need to be addressed. Their relationships with companies, based on clear evidence from data, have developed such that they are now able to exert soft moral authority not just on specific behaviours (mis-selling, unfair trading) but also on corporate culture generally.

Extending EBR

There are a number of outcomes that support adoption of EBR. For government, the major considerations are:

- An economic policy based on both reducing burdens on business but also improving outcomes.
- An active search for shared outcomes, growth, and innovation.
- A growing realization of the drawbacks of enforcement based on economic or individual deterrence rather than on behavioural science.

For business, the advantages are:

- To achieve increased performance in terms of compliance and risk-reduction, since this supports profitability and innovation. There are many examples in which it costs money when people behave unethically.
- To improve relationships with some enforcers, since an open relationship is more productive in terms of achieving desired outcomes than an adversarial one.
- To address a lack of consistency between different enforcers now that some widely different approaches have become apparent. Inconsistency of approach applies not just within countries but also between states. The different culture of regulators raises challenges and costs for businesses.
- To reduce uninformed political influence on balanced and fair regulatory decisions. This is seen as a real problem in responding in a logical way to reduce risk, especially in crisis response, since it distracts from the real issues to be addressed. The over-reaction of asking 'who's to blame?' leads to a witch-hunt, and imposition of excessive and irrelevant extra regulatory burdens.

There is evidence that EBR can offer significant potential advantages if it were adopted more widely. The Scottish Government has indicated its intention to include EBR as a consistent core policy in delivering its political goal of a fair Scotland.¹² Interest has been indicated by UNCTAD,¹³ the European Commission,¹⁴ and regulators from Singapore to Ontario. Various regulators and businesses have indicated support for progress in this direction through evidence gathering on outputs, arrangements, costs and benefits, in formal arrangement or case studies. Academic support will be provided from the Centre for Socio-Legal Studies at the University of Oxford.

The analysis will also seek to support the development of evidence relating to trust. This will involve broad principles, rather than a 'one size fits all' approach, recognizing that different situations and stages of development are relevant. A 'standardized' approach would also lead to a tick-box compliance approach to culture, which is precisely what has been shown is necessary to avoid. The objective will be to find a way to balance conflicting needs: regulators and society want to know who to trust, and companies must be involved in a genuine attempt to express their best ethical culture. Developing evidence that would support granting trust comes from a wide variety of sources. A key question is: Where does expertise lie? An initial list of actions for businesses, regulators, and governments that would support the spread of EBR is listed below. That list is intentionally generalized, so it can be applied in differing specific contexts. Making EBR work starts with a state of mind.

Implementing EBR arrangements

This section suggests what next steps businesses and regulators should take in seeking to establish EBR arrangements. It draws on suggestions made in an Annex to the Report *Striking the Balance* issued in September 2016 by the Committee on Standards in Public Life. The various points listed there formed a matrix of recommended actions by Government, regulators/enforcers, and businesses. The Report agreed that suitable amendments should be made to the Regulators' Code. The focus of this section is to draw on that list so as to assist specific actions by regulators and businesses in implementing EBR arrangements.

Establishing a pilot approach

A central component of EBR is the relationship of trust between a business and a regulator. It is suggested that the evidence that will be necessary to establish ongoing trust may differ depending on the particular sector, type and size of business, and stage of development of both individual businesses and regulators. Hence, approaches will both differ and develop. In this situation, moving forward by means of some pilot studies may prove helpful for learning and evidence, as well as support change.

Two stages arise: first, the initial stage of initiation of a relationship and agreement of the parameters and mode of operation and, second, operating the relationship.

The essential step of initiation has to come from business. It is an individual business that will produce sufficient evidence that it can be trusted. Various suggestions on evidence are made below. However, the regulator is not merely passive in this initiation stage. It should decide and make clear (through discussion) its views on what evidence will be needed, and it should make changes so that incentives exist for businesses to adopt an ethical approach and barriers that would prevent this are removed.

Once the relationship of adequate initial trust has been established, an ongoing day-to-day relationship must be maintained. This essentially involves each party communicating with each other (and others) on an honest, open basis. The relationship moves from one of making rules to dealing with the practice of supporting constantly improved performance and risk-reduction. On the part of business, evidence to support trust must be constantly produced. This will be demonstrated largely through actions, responses, and outcomes. Equally, on the regulator's side, it is necessary to adopt a culture that distinguishes between an authoritarian approach to some businesses and a supportive approach to those who deserve trust. Possible challenges in adopting this flexibility should not be underestimated; neither should the depth of cultural change necessary to shift attitudes from those of an all-powerful regulator, dealing with complex economic issues, for instance, to a mode of talking to, listening to, and helping businesses to achieve these goals.

In some sectors, it may be helpful to work within a Protocol agreement, perhaps something like the Primary Authority model, which is extended to include an agreement to operate on the basis of EBR and listing some essential evidence (e.g. metrics) that will be produced to support ongoing trust. In some sectors that are subject to a high level of regulation, a great deal of granularity may already exist in relation to processes, certifications, audits, required information, communication challenges, metrics and so on, with the result that not much may need to be added — save an understanding that the relationship will involve trust and openness on both sides.

It ought to be an outcome of the establishment of trust that costs are saved on both sides as a result of increased clarity of the responsibilities of all actors and their proactive commitment to initiating appropriate actions as they arise. This may result in greater integration and efficiency within a tiered co-regulatory structure. But it should in any event result in swifter and more thoughtful reactions to new information and events as they arise. Recording this efficiency through case studies will be helpful.

Actions by business

The essential objective for a business that wishes to adopt Ethical Business Practice (EBP) is to undertake an assessment of its internal values, facilitated by an outside expert, and arrive at a clear agreed statement of the company's values, with the full support of the board and CEO. However, any official statement, although essential, is far from sufficient. The crucial element is to *create* the cohesive internal culture that demonstrates by people's actions that they live and apply those values in all their decisions and actions.

This needs the full support of the entire workforce, the assent of stakeholders, and systems that will demonstrate whether or not it has comprehensive adoption. It may take time to achieve comprehensive adherence and adoption of the right structures and practices. Best practice discussions and support will be necessary. Particular actions, as listed in the Annex to the Committee on Standards in Public Life (CSPL) Report, might include:

1. Detailed consultation with all staff on what the firm stands for, what its core values are, what is expected of employees, and how to improve the culture, assessing what practices should be affirmed or should change.
2. A culture that encourages employees to speak up and does not tolerate retaliation for doing so in good faith.
3. Clear public statements of adherence to EBP, similar to the Partnering Against Corruption Initiative (CEO signs personally) or the UN Global Compact.
4. Incentivization and support of EBP throughout the business structure, performance management, and operational culture, plus removal of impediments to its achievement. Careful consideration of what incentives are used, so that they do not inadvertently cause problems.
5. Adopting policies on commercial activities and remuneration that are seen to be fair by internal and external stakeholders.
6. Enlisting well-respected employees to be ethics ambassadors in addition to their usual responsibilities.
7. Periodic auditing of the extent to which EBP is demonstrated in practice. Developing some metrics for this.
8. Obtaining external feedback from customers and stakeholders, for example, by joining an Ombudsman scheme.
9. Structures and a demonstrated commitment to a 'no blame' culture, including questioning and feedback from staff and stakeholders to identify how mistakes occur, where practice might be improved, and providing suggestions for improvement and innovation (a learning culture). This would maintain accountability of individuals.
10. Decision-making models and other structures for checking business decisions against wider ethical principles and expectations of all stakeholders.
11. Performance management that takes into account consideration of how results are achieved as well as what is achieved.

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12. Means for demonstrating the extent to which EBP exists, and therefore that trust can be placed in the organization, including that feedback, appropriate response, and improvements are made.

In evaluating the totality of actions taken by an individual business, the 'regulatory' burden should be proportionate to the size and risk of the business.

Actions by regulatory and enforcement bodies

There are three key issues for regulatory and enforcement bodies. First, are they themselves willing and capable of trusting businesses? This depends on where they are in their internal journey and culture. Second, on what basis would they trust a business? What evidence would be necessary? Third, how would they respond if a problem were to arise that involved a trusted business?

Specific actions as listed in the Annex to the CSPL's Report are:

1. Regulatory and enforcement authorities should review their objectives and enforcement strategies and policies to enable individual businesses to engage the entire regulatory community on an EBP Protocol.
 2. Businesses should be able to individually commit to an EBP Protocol with all regulatory authorities, including their stakeholders, that is 'recognized' by an external body such as under the Primary Authority Scheme, and that includes agreement on which regulatory control activities and systems will be performed by which tier, and the evidence that will demonstrate their ongoing adherence to ethical commerce.
 3. EBP Protocols should cover joint:
 - a) Commitment to supporting ethical behaviour.
 - b) Commitment to work collaboratively.
 - c) Details on how outputs are to be delivered and monitored.
 - d) Means of visible compliance.
 - e) Means of monitoring performance, including facility for receiving and demonstrating response to complaints.
 - f) Protocols on approach to identification of problems, and means of agreement of holistic responses to addressing problems.
 - g) Commitment to identifying causes of unethical behaviour and implementing means of supporting rectification and redress.
4. Demonstrable achievement of EBP should be encouraged and rewarded by regulators. Hence, Enforcement Policies and Sentencing Guidelines should be revised and specify an appropriate collaborative response to those who demonstrably observe EBP Protocols.
 5. The response to adverse events should, where proportionate, focus on identifying the cause of the problem, identifying an effective means of reducing the risk of reoccurrence, making demonstrably fair remedial and redress measures, and finally considering what marking or sanctioning should apply.
 6. In imposing sanctions, the behaviour of individuals and the systems and controls of an organization should be considered separately, and in context. Thus, individuals' actions may be seen to be either a mistake or criminal, viewed in the context of what the organization has done to support individuals to operate in a compliant way.
 7. The approach to enforcement strategy should:
 - a) Set out the circumstances in which powers will or will not be considered for use.
 - b) Be based on principles of predictability, fairness, proportionality, reducing risk, and encouraging improved performance.
 - c) Investigate the causes of serious or potentially systemic non-compliance, so that potential options for reducing the risk of reoccurrence of non-compliance, whether by an infringer or others, can be decided upon, and implemented.

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- d) Evaluate the impact on victims, so that risk-based remedial action can be identified and taken.
 - e) Encourage those businesses and individuals who have demonstrated their trustworthiness to continue to operate in a fair, 'no blame' environment.
 - f) Recognize that individuals are the root cause of both good and bad behaviour, whilst the behaviour of individuals and groups can be influenced by external factors such as incentives, group culture, level of support, education, reminders, etc.
 - g) Support a virtuous business ethic.
 - h) Give fair incentives to infringers to avoid, reduce, acknowledge, redress, and mitigate the harm they cause.
 - i) Recognize that problems will occur, irrespective of blame, and that most people in most businesses wish to do the right thing most of the time, and hence support them.
 - j) Distinguish those wrongdoers whose motivations and actions are ethically unacceptable, to be sanctioned proportionately.
 - k) Evaluate the moral seriousness of the motivation, actions, and outcomes of actors who have broken the rules, and impose proportionate sanctions appropriately.

This Policy Brief summarizes research by the author and invaluable comments made by a large number of individuals, none of whom should necessarily be taken to agree with the contents of this account, other than with its general position. This brief does not represent the policy of any government or official or private body. Individuals who were involved in a roundtable discussion at Oxford in July 2016 (although not all were able to attend) were:

Graham Russell, Director of Regulatory Delivery, Department for Business Energy and Industrial Strategy

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Omar Qureshi, Partner, CMS Cameron McKenna

Notes

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- ⁶ F. Laloux, *Reinventing Organizations: A Guide to Creating Organizations Inspired by the next Stage of Human Consciousness* (Brussels: Nelson Parker, 2014).
- ⁷ Bribery Act 2010, s 7(2).
- ⁸ *OECD Guidelines for Multinational Enterprises 2011 edition, principle 7*.
- ⁹ *Corporate Governance and Business Integrity. A Stocktaking of Corporate Practices* (OECD, 2015).
- ¹⁰ *Final Draft: The UK Corporate Governance Code* (FRC, April 2016), para 4.
- ¹¹ *Report of a senior practitioners' workshop on identifying indicators of corporate culture* (International Corporate Governance Network, IBE, Institute of Chartered Secretaries and Administrators, held on 17 December 2015).
- ¹² *Report of the Working Group on Consumer and Competition Policy for Scotland: Scottish Government response* (Scottish Government, March 2016).
- ¹³ *Draft Manual on Consumer Protection* (UNCTAD, 2016), ch 6.
- ¹⁴ *Opportunity now: Europe's mission to innovate* (European Commission, 2016), p. 40.



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The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

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