

Regulating in the consumer interest



Fresh thinking



About us

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers and aims to give people a stronger voice.

We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.



What is Fresh thinking

Our Fresh Thinking series is designed to promote debate and spark ideas on policies that can benefit consumers. The pamphlets do not necessarily represent Consumer Focus policy positions.



Executive summary

In recent decades, Britain has been a leader in developing new regulatory models and approaches. But there is now a vibrant debate about where we go from here. Has the so-called ‘regulatory state’ grown too large? Which decisions should elected politicians take and which should be left to regulators? How can the quality of regulatory decision-making be improved?

Consumer Focus has a long-standing interest in these issues, reflected in our influential *Rating Regulators* report last year, in which we assessed six major economic and consumer-facing regulators.

Britain’s regulators have over the years delivered many important gains for consumers and good businesses alike. Effective regulation is critically important in protecting consumers from harm, ensuring fair access to essential services, stopping market abuses, establishing standards to enable competition, and removing barriers to entry. But we never forget that consumers ultimately pay the costs of regulation. Regulations can sometimes act as a barrier to innovation and it can be abused by existing players to prevent competition and choice.

Life is more complicated than government deciding and regulators executing, not least because means and ends are so inextricably linked. Governments and regulators each bring different merits.

For example, regulators tend to have a better record than government departments when it comes to transparency and engagement, while governments can make better value judgments and decisions about trade-offs and redistribution between different groups of people.

They are also better placed than sector-specific regulators to view the detriment faced by consumers in the round – those people who are fuel poor are also likely to experience water poverty.

Rather than getting caught up in what could be a sterile debate about the exact boundary between government and regulators, we aim here to set out what success would look like, establishing a new, more strategic and accountable approach to regulation. We make the case for:

- **Clarity over objectives and who does what**

Regulators should have a clear statutory basis, focused where appropriate on consumers. There must be clarity about how government and regulators plan to work together, and government should set the strategic framework in which they want regulators in each sector to operate. This might mean every government department publishing a strategic policy document for each regulated area within its remit. These would spell out the Government's vision and objectives for the sector in the forthcoming parliamentary term; what it intends to do to give effect to that vision; and what it expects the regulator to do, and how it intends to ensure coordination of these two parallel streams of work.

- **A more integrated way of undertaking policy work within and across economic sectors, which harnesses the expertise that each actor has to offer**

There needs to be active engagement between departments and regulators over the development and implementation of policy. This must extend across the regulatory state to ensure that policy-making is joined up and consistent between economic sectors. One approach might involve government departments commissioning a regulator to provide advice on a key policy issue. This would utilise both the regulator's technical knowledge and its skills with respect to engaging the public. There is also a pressing need to develop and share real insight into consumer and business behaviour. Alongside this there is scope for regulators to innovate and engage consumers and consumer bodies in creative and often less heavy-handed means of regulation, for example 'regulation by reputation' facilitated through the release of regulatory data to inform public decision-making.

- **Greater transparency and accountability for all actors in the process**

The accountability of regulators to the public could be improved by: a requirement for regulators with consumer-facing statutory objectives to include people with consumer expertise in their decision-making structures; rolling reviews of the major consumer-facing regulators by the National Audit Office; and enhance parliamentary scrutiny of the regulatory state as a whole.

As a first step, we suggest the Regulatory Reform select committee makes the issues covered in this pamphlet the subject of a future investigation.



Over a period of decades and successive governments, Britain has evolved a system of independent regulation which is much studied around the world. However, there is now vibrant debate about whether the ‘regulatory state’ has grown too big, with insufficient accountability, too many silos and not enough joined-up strategy. Alongside this, politicians from all parties grapple with how to make the good intentions of better regulation a reality. We are at a critical moment, as the regulatory landscape for the next decade starts to be shaped.



Our focus

Consumer Focus has a well-established interest in this important debate, building on the work of its predecessor bodies¹ and drawing on the expertise which it has in the energy and postal sectors in particular. Last year we published an influential analysis of the work of six key regulators, *Rating Regulators*. Our assessment framework is set out on pages 11-12.

We have a cross-economy remit and considerable generic and sector-specific expertise on regulatory structures, cultures and methods. We know that effective regulation can be extremely important in protecting consumers from harm, ensuring fair access to essential services, stopping market abuses, establishing standards to enable competition and removing barriers to entry.

Regulation can create a pathway to meaningful competition and choice, as in the telecoms sector, safeguard access to essential services, such as water and energy, and ensure the safety of consumers and workers in sectors such as transport.

¹ See for example the National Consumer Council publications *Consumers and regulation*, *Reputation and regulation* and *Better regulation: the consumer contribution*

But we also know that consumers ultimately pay the costs of regulation. Regulation can sometimes act as a barrier to innovation and it can be abused by existing players to prevent competition and choice.

Our battle cry is therefore for the right regulation, properly enforced, but no more.

This pamphlet looks ahead to future relationships between the UK Government and the main consumer-facing regulators in areas of economic activity. It considers how next generation regulation can most effectively advance the consumer interest. We consider the appropriate dividing line between UK Government and regulators on social policy issues and sketch out what a more strategic and accountable approach to regulatory decision-making might look like.



The political context

The last 30 years have seen an unprecedented expansion of the regulatory state. Virtually all areas of our lives as citizens and consumers – from the air we breathe to the food we eat, from education to healthcare – are now touched by the work of regulators. The work of many of these organisations now includes a substantial policy-making dimension in addition to administrative/delivery functions.

Regulatory bodies' growth has continued, despite efforts in the wake of the Hampton report² to reduce both the amount of regulation and the overall number of regulators.

There has been a plethora of initiatives aimed at advancing the better regulation agenda and removing unnecessary bureaucracy, including 'one in one out' and a short-lived proposal for regulatory budgets.

² *Reducing administrative burdens: effective inspections and enforcement*, Philip Hampton, March 2005

Processes for cost-benefit analyses and then impact assessments have been refined, with a view to ensuring that decisions to intervene are fully justified.

These moves have been aided by a range of executive and advisory organisations such as the Better Regulation Executive, Better Regulation Taskforce, Better Regulation Commission and Risk and Regulation Advisory Council, as well as sector-specific bodies such as the Council for Healthcare Regulatory Excellence. The National Audit Office has taken an increasing interest in the performance of regulators, publishing a series of reports, and together with the Better Regulation Executive has undertaken 'Hampton Reviews' of a number of regulators. There is also now a House of Lords Committee on the Economic Regulators and a Select Committee on Regulatory Reform.

A number of economic and public services regulators have been merged, for example with Ofgas and Offer (the gas and energy regulators) becoming Ofgem, five broadcasting and telecommunications regulators becoming the communications regulator Ofcom and much more recently the Healthcare Commission and the Commission for Social Care Inspection coming together to form the Care Quality Commission. Some brand new regulators have been created too, particularly with regard to a range of professional services, from lawyers to pharmacists.

There has long been concern about 'red tape' and 'burdens on business', albeit in an increasingly tired and unproductive way. But a more substantial debate is now likely in the run up to the 2010 General Election, particularly on where the role of government stops and that of regulators begins.

In *Rating Regulators*³, Consumer Focus identified this issue as causing difficulty. Our stakeholder interviews highlighted confusion about the roles of these two actors with respect to two types of issues: ethical matters such as genetically modified (GM) food; and social policy considerations in areas such as digital inclusion and fuel poverty.

We believe it is important for this debate to be taken further – consumers may lose out if the responsibilities of government and regulators are not clearly articulated and resolved. If there is inaction, we may see a drift in the role of some regulators, with little transparency or legitimacy. Regulators may face increasing pressure from the media and lobby groups to intervene in place of political action, creating a democratic deficit. Alternatively, key decisions on major long-term issues, particularly those affecting future consumers such as energy and food, may fall into a gap between regulators and government, leaving key decisions unmade. There may also be inconsistency between regulators dealing with related issues, damaging the interests of both consumers and businesses. Government may seek to solve problems by loading costs on to consumers in a particular sector (eg the cost of renewables in the energy field), effectively imposing a stealth tax upon consumers.

If any of these scenarios unfolds, it is certain that public confidence in Government and regulators will be undermined.

This debate is of course particularly pressing because of the present and likely future pressures on public spending, which will create an imperative for more streamlined government in the broadest sense. Regulators will more than ever have to demonstrate that they are delivering their core role effectively and efficiently.

³ Consumer Focus, *Rating Regulators*, February 2009

Rating Regulators assessment framework

Consumer Focus developed an assessment framework in our report Rating Regulators, consisting of a set of twenty indicators which together form the essential building blocks of a consumer-focused regulator.

The indicators represent our thinking on the characteristics and qualities that regulators should develop in order to effectively promote the interests of consumers.

Legal framework

- statutory objectives and duties enable the regulator to adequately promote the interests of all consumers
- responsibilities between different actors are clearly defined, without gaps or overlaps
- structures are sensitive to devolved contexts
- the right tools for the job

Culture and accountability

- translates statutory objectives into consumer-focused priorities and values
- embeds a consumer focus across all levels of the organisation
- transparent about its activities
- accessible to the general public, including disabled users
- works effectively in a devolved setting

Rating
Regulators
assessment
framework

State of readiness

- identifies likely sources of consumer detriment, both now and in the future, which shapes work priorities
- uses effective mechanisms to understand the consumer perspective and translate this insight into sound decisions
- works effectively with others, including with consumer organisations
- influences the wider regulatory agenda

State of action

- empowers consumers to help achieve regulatory outcomes
- has effective incentives to encourage compliance with its rules
- chooses the appropriate regulatory approach in the circumstances, and intervenes in a timely fashion when needed
- gives priority to, and intervenes effectively on behalf of, consumers who are vulnerable
- uses enforcement tools when necessary to protect consumers

Impact and learning

- defines and measures its impact on consumers in terms of outcomes
- evaluates its work and embeds learning



Regulators' expanding reach

The model of independent regulators in areas of economic activity – the primary focus of this paper – emerged following the privatisation of utilities in the 1980s. Many of these regulators were intended to have a relatively brief life, 'holding the fort' until competition arrived; and one intended effect of the change of ownership and creation of independent regulation was to de-politicise issues, allowing companies and regulators to take tough decisions.

Their initial focus was on ensuring that consumers did not suffer from providers abusing a dominant market position, with some having a particular duty relating to the protection of vulnerable consumers. However, they have since assumed a wider range of responsibilities and the complexity and multi-dimensional nature of regulatory decision-making today is striking.

For example, there has been growth in duties relating to vulnerable consumers, and recent legislation now also gives regulators duties to take account of sustainable consumption considerations. This latter development has prompted a major restructure at Ofgem with the creation of a new business unit – Ofgem E-Serve – to focus on administering environmental programmes and the delivery of sustainability projects.

The social and environmental guidance issued by government to the energy, postal services and water regulators to put these responsibilities into operation is worded in a general language that apparently gives them wide discretion to act. Far from restricting themselves to issues of competition and price, independent regulators are now expected to consider the impacts of their actions on economic, social and environmental well-being.

Yet, so far as we know, only Ofcom has an explicit duty to further the interests of citizens as well as consumers. In our *Rating Regulators* study, this was welcomed both by the regulator and its stakeholders, on the grounds that it does not restrict Ofcom only to work on markets issues. The Communications Act foresees conflicts between the citizen and consumer interests, which it addresses by requiring Ofcom to *'publish a statement setting out (a) the nature of the conflict; (b) the manner in which they have decided to resolve it; and (c) the reasons for their decision to resolve it in that manner'*.

Independent regulators have therefore grown in size and scope as well as number. Indeed, Tony Blair once remarked that *'it seems to be part of the DNA of regulatory bodies that they acquire their own interests and begin to grow'*⁴.

⁴ Speech on compensation culture at University College London, 26 May 2005

There is probably some truth in this, although it is also worth noting that the trend to outsource operations from Whitehall has been a deliberate government strategy. One perspective on this trend is that government has increasingly recognised the need for independent regulators to make decisions free from ministerial interference. A less generous view might be that government has been all too happy to let others handle some hot potatoes. But certainly politicians of all parties have a tendency to call for more regulation whenever an incident occurs.

Facing calls to get tough over bankers' bonuses, Hector Sants, Chief Executive of the Financial Services Authority, felt the need to complain that *'to suggest the FSA should be acting outside its mandate given it by parliament is totally unreasonable and in my view is just people passing the buck'*⁵.

It must also be acknowledged that many regulators have not embraced prospects of a wider role with enthusiasm. Of the six regulators examined in our Rating Regulators study, we found that only Ofgem had developed an overarching strategy – its Social Action Plan – to co-ordinate its approach to meeting the needs of vulnerable consumers. Ofwat was adamant that it is not their role to set prices based on affordability, despite pressure from parliamentarians and consumer groups to do so.

⁵ The Guardian, Mandelson considers legal action to tackle City bonuses, 14 August 2009

It is also worth noting that at least some regulatory statutes include various powers for Ministers to influence regulators' priorities and decision-making, as well as in some instances to determine standard licence conditions for regulated businesses. There has already been some movement towards more shared policymaking by government and regulators in sectors such as energy, and existing statutes may provide an opportunity for Ministers to shape the work of regulators further.



The value of independent regulators

There are good reasons why some areas of public policy are delivered at arm's length from government through independent regulators. Few would argue that decisions about freedom of information or MPs' expenses should not be taken independently of politicians. However, there are reasons both of principle and practicality why independent regulators can add value to the decision-making process. Potential benefits include:

- Freedom from political interference, bolstering confidence among the public and the regulated that decisions will be made objectively and based on available evidence
- Placing decision-making in a regulatory board, which is immune to short-term political pressures, facilitates more consistency of decision-making and decisions that are taken with a longer-term view. In fact, regulatory boards are a relatively recent development, having replaced a model based on individual champions, some of whom were for a time almost household names. The more stable regulatory framework that regulatory boards produce encourages market entry and new investment

- The concentration of expertise in one place, both of market knowledge and skills, promotes better quality decisions and relieves the burden of busy government departments that have a wide portfolio of issues and changing priorities to manage
- Making decision-making more transparent – experience suggests that regulators tend to consult more openly and widely than government
- Making decision-making more evidence-based – our *Rating Regulators* study found that regulators have increased their investment in consumer engagement to inform decision-making, improving the quality and legitimacy of decisions

Indeed, the prevailing direction of travel in recent years has been to enhance regulatory independence including through the emergence of boards as the dominant governance model. At the same time, this trend has been balanced by a series of measures designed to improve regulatory accountability. These steps include: the role of agencies such as the Better Regulation Executive and National Audit Office; enhanced parliamentary scrutiny including confirmation hearings; and statutory requirements with respect to openness, for example an obligation to consult on and publish strategic plans.



The limitations of independent regulators

But there are also good reasons of principle and practicality why a policy-making role for regulators on some issues should be limited.

Decisions about equity and social justice are essentially value-laden judgements that should reflect the wishes of the public as expressed through the democratic process. It is likely that people expect such questions of principle to be answered by individuals who they can hold directly to account. Unlike politicians, the public cannot hire or fire regulators.

Moreover, social policy issues involve trade-offs – between rich and poor, or current and future consumers – that may run counter to the natural mindset of economic regulators set up primarily to promote competition. Competition often benefits consumers, including those who are vulnerable, but in *Rating Regulators* we found that regulators had a misplaced confidence in the ability of market mechanisms to change company behaviour. This weakness most severely affects consumers in a position of vulnerability who are less able to fend for themselves and who the market has little incentive to provide for. Similarly, the impetus to give economic regulators a sustainability objective arose from the concerns of some that they were excessively focused on the development of competitive markets and lower price⁶.

⁶ Ian Bartle and Peter Vass, *Economic regulators and sustainable development – promoting good governance*, Centre for the Study of Regulated Industries, 2006

On a more practical level, regulators have a limited range of tools at their disposal with which to provide for more equity within a market. Only government has access to fiscal tools that can redistribute wealth. Further, regulation is organised in individual economic sectors, yet issues of affordability arise across markets. Those people who are fuel poor are also likely to experience water poverty. Ideally approaches should be underpinned by a common set of principles covering all sectors, with joined-up solutions.

Take social tariffs as an example, which market participants lack the incentive to provide on their own initiative. As an economic regulator trying to encourage competition, the natural policy response is towards cost-based pricing, but social tariffs are a move in the opposite direction. Regulators should not be deciding who pays more and who pays less, as this is a public policy issue. Social tariffs depend on where you see the problem in society; it is up to government to recognise where there is a disadvantage. But moves to implement and administer the tariffs should be taken by the regulator because it has the industry expertise and can enforce rules through its toolkit of incentives and sanctions.

Public policy decisions are those that:

- involve a high degree of judgement and as such can be controversial – eg the planting of GM crops or embryo transfer
- address trade-offs between competing interests in society – eg social tariffs
- shape the bigger picture and help set future strategic frameworks – eg building nuclear power stations to ensure long-term energy security

However, it would be too simplistic to describe the balance of responsibilities on policymaking as simply the role of government to decide and that of regulators to execute. Means and ends are inextricably linked, so that the way in which regulators choose to implement policy can change the policy itself, and vice versa.

Instead, it might be more useful to set out what success would look like – not just in terms of creating greater clarity of roles but establishing a new, more strategic and accountable approach to regulation. These factors can be summarised under three headings, which are explored further below:

- Clarity over objectives and who does what
- A more integrated way of doing policy within and across economic sectors, which harnesses the expertise that government and regulators each have to offer
- Greater transparency and accountability for all actors in the process



Clarity over objectives and relationships

Clarity over roles must start with parliament giving regulators a clear statutory basis. This should include straightforward regulatory objectives, so that regulators have a sense of purpose. There should also be clarity over policy criteria, ie what regulators should 'have regards to' in carrying out their work. The statutes should provide for the ability to amend this legal framework where circumstances change.

Where the role of the regulator is essentially about either protecting consumers or promoting their interests, this should be captured in legislation in a clear and unambiguous way.

It should take priority over objectives such as promoting competition, which are a means rather than an end – competition often benefits consumers, which is why it is important, but it is not an objective in its own right.

We welcome the Government's proposals⁷ to amend the duties of the Civil Aviation Authority, for example, so that they are focused on the interests of current and future passengers and freight users. The current situation, in which airlines, not passengers, are seen as the customers of airports, has been a recipe for regulatory failure and resulted in falling standards.

As noted above, regulatory statutes tend to give ministers powers of direction over regulators. These powers could be used to re-position the dividing line between government and regulator.

Underneath the statutes, it is important to have clarity over the medium and long-term outcomes that departments and regulators are working towards, in order to fulfil the statutory objectives. This requires government and regulators to engage at a strategic level, rather than simply on individual issues.

This could mean every government department publishing a strategic policy document for each regulated area within its remit. This document could spell out the Government's vision and objectives for the sector in the forthcoming parliamentary term; what it intends to do to give effect to that vision; what it expects the regulator to do; and how it intends to ensure coordination of these two parallel streams of work. This would draw the Government out to say what it wants to achieve and provide an accountability framework against which the regulator's performance can be assessed.

⁷ *Reforming the framework for the economic regulation of airports: Decision Document*, Department for Transport, December 2009

There should also be clarity as to how the day-to-day relationship between departments and regulators operates in practice. This might take the form of a 'regulatory contract' between government and regulators, outlining who is doing what and what resources each will have to ensure that this work is done as efficiently and effectively as possible.

Each of these documents should be in the public domain. Select committees could question representatives from each actor to assure themselves that the work is allocated and coordinated appropriately.



An integrated policy-making approach

The balancing of responsibilities between regulators and ministers needs to be done in a rational manner that facilitates the best decision-making. If there is to be any rebalancing towards government departments, this will come at a price. More civil servants will have to be employed and ministers will need to give more attention to regulation.

There needs to be active engagement between departments and regulators over the development and implementation of policy. At the same time it is essential that the independence of regulators is preserved. Further, people do not divide up their lives in the same way as government divides policies affecting consumers between departments. Therefore an integrated approach should extend across the regulatory state to ensure that policy-making is joined up and consistent between economic sectors.

One approach might involve government departments commissioning a regulator to provide advice on a policy issue involving the characteristics outlined above.

This would utilise both the regulator's technical knowledge and its skills with respect to engaging the public. The regulatory contract would make clear the respective roles of the different actors in this process including that decision-making responsibility rests with ministers. Such a model could achieve a situation where decisions are made with full knowledge of the economic, social and environmental implications, but where the regulator focuses on its core functions and retains demonstrable independence.

It is striking how little sharing of information, experience and expertise there seems to be between the regulators. Too often, regulators still seem to assume that the challenges they face are unique to their sector. Alongside this, there is a serious lack of insight into consumer and business behaviour and how this might be affected by different forms of regulatory intervention. Regulation is essentially predicated on the notion that if the regulator does x, businesses will do y and/or consumers will do z. But the regulatory knowledge base in this respect is at best poorly articulated and at worst almost non-existent.

According to the former electricity regulator and architect of price controls, Professor Stephen Littlechild, *'regulatory analyses tend to rely heavily on hypothetical conjectures about how the market would work under different types of control, and what a competitive market would look like, rather than upon evidence of how it actually does work'*⁸.

⁸ *Regulation, over-regulation and deregulation*, Centre for the Study of Regulation Industries, University of Bath, Occasional Lecture no 22, 24 November 2008

There is a pressing need to develop and share real insight into consumer and business behaviour.

Ironically a similar lack of such insight is responsible for the fact that so many initiatives intended to reduce the amount of regulation have failed. Government knows little about what really drives civil servants' regulatory behaviour, and so policies such as 'one in one out' and regulatory budgets are little more than stabs in the dark.

Just as there is a National School for Government, which recognises that senior public servants across government need to learn and develop their skills just like any other profession, there is perhaps a need for some kind of national school of regulation. The Florence School of Regulation has been established by the European University Institute⁹, but there is a pressing need closer to home for a concerted programme to encourage regulatory excellence and train tomorrow's regulators – not so we can have more regulation, but rather to make the regulation which is needed more effective. The various initiatives established to enable regulators to talk to one another are important but not sufficient.

Understanding consumers and businesses also creates the basis for innovation by regulators. Too often government and regulators prefer new regulation to the effective enforcement of existing rules, with a surprising reluctance among some regulators to use their current powers. But there is scope for regulators to innovate and engage consumers and consumer bodies in creative and often less heavy-handed means of regulation, for example 'regulation by reputation', facilitated through the release of regulatory data to inform public decision-making.

⁹ http://www.florence-school.eu/en/FSR_HOME

An integrated policy-making approach should also include proper consumer input. This should start with a transparent and inclusive policy development process involving the full range of stakeholders. Obtaining the views of the public through consumer engagement techniques is also critical, and a number of regulators, from the Food Standards Agency to Ofgem, have an increasingly credible record in this respect, with a growing use of deliberative approaches. These can be relatively costly, but for major regulators in particular they represent an important investment.

However, there is also a case to give consumer bodies a special role in policy development to counterbalance the better resourced efforts of providers. One example is the idea of negotiated regulatory settlements. For example, there have been calls to allow Consumer Council for Water take a formal role in negotiations with the water companies and Ofwat on price controls. Professor Stephen Littlechild has suggested that settlements would '*allow different approaches, more innovation and better evidence on the merits of each approach*'¹⁰. And the Government has proposed that when Passenger Focus takes on responsibility for air travel, it should be able to appeal price control decisions to the Competition Commission, a power previously granted only to airport operators¹¹.

¹⁰ Professor Stephen Littlechild, *Let Ofwat and CCWater negotiate the regulatory settlement*, Utility Week, 14 November 2008

¹¹ *Reforming the framework for the economic regulation of airports: Decision Document*, Department for Transport, December 2009

Consumer involvement can sometimes feel threatening to regulators, but ultimately it will improve the quality of decision-making. One of the benefits that consumers and those representing their interests provide is that they are not regulatory insiders.

Arguably one of the lessons of the financial crisis is that all too often regulators, and those they are regulating, frame issues in a similar way. They may have different answers, but these tend to be the same questions. Consumers are sometimes able to ask different, harder questions because they are able to step back and challenge accepted wisdom.



Transparency and accountability

Transparency is vital in ensuring public trust in the decision-making process and for allowing an informed assessment of regulatory performance. In our *Rating Regulators* study, we found a reasonably good level of transparency both about decision-making and performance, although there were some inconsistencies that were not obviously explained by sectoral differences. There is an opportunity to learn from good practice, for example we found the Food Standards Agency demonstrated a high level of transparency by, among other things, holding open board meetings and publishing board papers in advance.

Regulators now have well established mechanisms for consulting on policy decisions and communicating outcomes. In our experience this is generally a more open and inclusive process than is typically found in government departments. If policy-making responsibility is transferred to Whitehall, it is important that these transparency disciplines also follow – many departments have much to learn in order to internalise the true meaning of effective consultation.

Regulators discharge important duties, they spend large budgets and have powers to make rules and impose sanctions. It is important that the public knows, through the scrutiny of parliament and others, if these organisations are working effectively and achieving value for money.

The relevance of a regulator's statutory duties also needs to be kept under review. If the lines of responsibility between regulators and departments are to be redrawn, it is vital that the effectiveness of these new arrangements are properly scrutinised. As we note above, there is already considerable scrutiny of regulators and this has increased over recent years. However, the following measures could further improve the accountability of regulators to the public:

- A requirement for regulators with consumer-facing statutory objectives to include people with consumer expertise in their decision-making structures. While board members should not represent specific causes, this measure should help ensure that the regulator is in tune with consumer needs. This idea is already a feature of legislation creating regulators in the food and legal services sectors, while the Conservative Party has proposed that the new financial services regulator it would set up should have two consumer experts on the board

- Rolling reviews of the major consumer-facing regulators by the National Audit Office (NAO). The NAO currently reviews aspects of regulatory performance on an ad hoc basis, which may then be investigated by the Public Accounts Committee (PAC). A regular programme of reviews, followed up by the PAC or relevant select committee, would assess the effectiveness of the regulator in fulfilling its statutory duties and identify the key issues arising in the regulated sector
- Enhance parliamentary scrutiny of the regulatory state as a whole. A report by the House of Lords Select Committee on the Constitution concluded that parliament lacked the means to engage in consistent scrutiny of the regulatory state and look holistically at what regulators do¹². Since then the House of Commons Regulatory Reform Committee has been given wider powers to examine matters related to regulatory reform. It may be too early to tell if this Committee is able to provide sufficient scrutiny of the regulatory state as a whole. However, we suggest that the issues covered in this pamphlet would be a useful topic for it to consider at an early stage

¹² House of Lords Select Committee on the Constitution, The Regulatory State: Ensuring its Accountability, 6th Report of Session 2003-4, May 2004

The way forward



The regulatory state has expanded both in volume and breadth. While economic regulators were set up with a narrow role to promote competition, they are now expected to consider the economic, social and environmental implications of their decisions. It is important that decisions affecting citizens and consumers are informed by all these factors – it is simply not possible to separate off the economic regulation of water companies from decisions about environmental issues, for example. But there is understandable concern that finely balanced judgements which have social or ethical consequences are currently being determined by unelected officials working at regulators.

However, the greater danger is that uncertainty about the respective roles of government and regulators means these decisions are not taken at all. This particularly impacts vulnerable consumers who have most to gain from social policy interventions.

Consumer Focus would welcome an open debate about who should do what. Whatever the outcome, going forward three things will define success: clarity over roles and responsibilities; a more integrated policy-making approach that utilises the skills that different actors bring to the table and encourages joined-up solutions; and improved transparency and accountability.

As a starting point, this pamphlet makes a number of concrete suggestions as to how these success criteria can be achieved in practice:

- Each regulator should have clear statutory objectives unambiguously focused on the consumer interest
- There needs to be clarity over the medium and long-term outcomes that departments and regulators are working towards, in order to fulfil the statutory objectives. This might mean every government department publishing a strategic policy document for each regulated area within its remit. This would spell out the Government's vision and objectives for the sector in the forthcoming parliamentary term; what it intends to do to give effect to that vision; what it expects the regulator to do; and how it intends to ensure co-ordination of these two parallel streams of work. This would draw the Government out to say what it wants to achieve and provide an accountability framework against which the regulator's performance can be assessed
- A regulatory contract between government departments and regulators should set out how their day-to-day relationship should work in practice, and what resources each will have to deliver on their responsibilities
- Government departments could commission a regulator to provide advice on issues exhibiting agreed policy characteristics. Final decision-making responsibility on these issues would lie with ministers

- A formal role for designated consumer bodies in certain decision-making processes, such as regulatory settlements and price control appeals, should be explored
- Regulators with consumer-facing statutory objectives should be required to include people with consumer expertise in their decision-making structures
- The NAO should conduct rolling reviews of major consumer-facing regulators
- There is a pressing need closer to home for a concerted programme to encourage regulatory excellence and train tomorrow's regulators – not so we can have more regulation, but rather to make the regulation which is needed more effective
- Regulators should build and share expertise and insight into consumer and business behaviour and innovate using techniques such as regulation by reputation
- Government and regulators should aim to enforce existing regulation before creating new rules
- There should be enhanced parliamentary scrutiny of the regulatory state as a whole. As a first step, we suggest the Regulatory Reform select committee makes the issues covered in this pamphlet the subject of a future investigation

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