§ Law in Context

Law and Administration

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Regulation and governance

Contents

1. Essence

Regulation is of the essence of administrative law, constituting much of the interface between the state and the individual or 'legal persons'. To a greater or

lesser extent, and in a myriad of different ways, citizens, small business, large corporate and even multinational enterprise fall into its domain. As prime machinery of governance, regulation has epitomised the contemporary mixing in administrative law of public with private powers: 'steering not rowing'. The recent UK process of regulatory reform itself is an archetypal example of domestic administrative law development in a global context.

Regulation wears a distinctly 'green light' hue as one of the chief instruments for the achievement of policy objectives. Epitomised today in the rise of 'the regulatory state', its day-to-day workings are of the first importance in the functioning economy. As such, regulation is a hot topic of political debate: not least when some 'disaster' occurs as with the current credit crunch. The style and substance of regulation connects in turn with competing – shifting – views of the role of the state. According to a recent, highly influential, report to government:

> The world in which regulators operate continues to change, both with the pressure on business of a more competitive world, and the changing regulations that need to be enforced. As a society, we have increased expectations that regulations can and will protect consumers, businesses, workers and the environment, coupled with an increasing need to keep our businesses efficient and flexible to face new competitive challenges. Our regulatory system has the pivotal role in resolving the regular conflict between prosperity and protection.[1]

Tasked to consider the inspectorial and enforcement activities of public regulatory systems operating at UK level and in England and Wales, the same review highlights the scale of the activity:[2]

> Regulation in the review's scope is delivered through 63 national regulators, and 468 local authorities. Regulators at national level employ about 41,000 individuals, of whom about 12,000 work primarily on inspection and enforcement. There are just under 20,000 people working in local authority regulatory services of whom 5,500 work primarily on inspection and enforcement. National regulators in the review's remit carry out at least 600,000 inspections each year, and local authorities carry out approximately 2 ½ million. National regulators send out 2.6 million forms a year. Statistics are not collated for the number of forms sent out by local authorities . . . Regulatory bodies at national and local level . . . have a combined budget of around £4 billion.

Underpinning its central place in administrative law is regulation's great capacity for reinvention. A wide array of tools and techniques – and many different combinations of them – is on offer. Classic issues of rules and discretion

[1] P. Hampton, *Reducing Administrative Burdens: Effective inspection and enforcement* (HM Treasury, 2005) (hereafter, '*Hampton Review*'), p. 1.
[2] *Ibid*., pp. 11–12.

or compliance and sanction are given a very contemporary edge in the never-ending quest for properly responsive forms of regulation, as with impact assessment (see p. 152 above) and – with a view to 'structuring', 'confining' and 'checking' (see p. 200 above) – risk-based regulation ('RBR'). Indirect means of harnessing private endeavour in the public interest, for example official validation of self-regulatory systems ('meta-regulation') or the twinning of government and non-government agencies ('co-regulation'), have also been favoured. And whereas in earlier years regulation was the by-product of privatisation, today the tentacles of the regulatory state stretch increasingly far and wide: public power renascent.

All this brings issues of control and accountability sharply into focus: 'who regulates the regulators?' As we see in the next chapter, traditional 'red light' techniques of judicial review may be of little consequence in view of the highly dynamic and technically complex nature of the regulatory process. Since regulation may or may not be recognisably 'public' in character, difficulties also arise over the reach of supervision. In practice, a premium is placed on the use of audit-style techniques. The rise of regulatory agencies operating outside the hierarchical lines of ministerial control and responsibility reflects and reinforces the challenge to classic constitutional techniques in an age of governance; alternative means for directing their efforts are actively explored by ministers, as by codifying principles of regulatory policy and practice. How best to secure legitimacy in view of such competing values as independence and accountability, or due process and efficiency and effectiveness (see p. 285 below)? Meanwhile, complex regulatory networks are notoriously difficult to pin down – 'mind the gap'.

(a) Regulatory reform: Changing fashion

Characterised by 'a constant up-grading of instruments [and] the establishment of an array of regulatory policies, institutions and tools, many of them innovative and unprecedented,'[3] the UK has been a world leader in regulatory reform. While many shared strands naturally exist, not least the overarching EU connection, several main phases can be identified over the course of a generation, revealing different emphases in administrative law aims and methods and legislative and institutional development.

The Conservative 'blue rinse' is an obvious starting place. Together with privatisation, which focused attention on utility regulation, the chief mantra in this first phase was the deregulatory one of 'lifting the burden'.[4] Flanking themes were increased interest by government in techniques of self-regulation and a distinct preference for regulation by agency 'at arm's length'

[3] OECD, *Government Capacity to Assure High Quality Regulation: Regulatory reform in the United Kingdom* (2002), p. 6; and see M. Moran, *The British Regulatory State: High modernism and hyper-innovation* (Oxford University Press, 2004).

[4] DTI, *Lifting the Burden*, Cmnd 9571 (1985).

from ministers. Viewed in historical perspective, this amounted to change in, and challenge to, an old regulatory culture, not least because, in paradoxical fashion, privatisation led to a more legalistic – juridified – relationship between the state and the private sector as more explicit regulatory structures were established (a process of 're-regulation').[5] Contemporary observers noted how older, informal structures of regulation had been breaking down under the pressure of powerful economic, technological, and ideological forces.[6]

In the words of Tony Blair's fresh-faced minister in 1997:

> Some regulation is necessary for public and consumer protection, for example to ensure food safety, and to carry out the functions of Government. 'Deregulation' implies that regulation is not needed. In fact good regulation can benefit us all – it is only bad regulation that is a burden. That is why the Government's new regulatory policy will concentrate on ensuring that regulations are necessary, fair to all parties, properly costed, practical to enforce and straightforward to comply with.[7]

Following the lodestar of 'better regulation' in this next phase thus meant re-balancing the policy debate, which in turn implied a somewhat broader approach to matters of administrative law design and technique, as with regulatory impact assessment (see p. 152 above). A set of principles for regulatory reform,[8] which themselves reflect and reinforce the wider quest for 'good governance', were operationalised and particular interest taken in both harnessing and taming systems of self-regulation. Concern about regulatory agencies' own accountability was much to the fore, resulting in substantial institutional re-working and larger ('joined-up') structures. A regulatory doctrine of proportionality would feature prominently in a drive for greater regulatory 'responsiveness', with emphasis placed on risk-based methodologies (see p. 73 above).

One of the most radical programmes of regulatory reform anywhere in the world, a key element of keeping the economy strong; in this way was a third phase officially advertised: better regulation – 'mark II'.[9] Its hallmark as New Labour engaged in a third term in office was an attempt to re-work the day-to-day routines of regulation in a more 'targeted' fashion: in Gordon Brown's words, 'to deliver better regulatory outcomes while driving down the

[5] C. Veljanovski, *Selling the State* (Weidenfeld & Nicolson, 1987).

[6] J. Kay and J. Vickers, 'Regulatory reform: An appraisal' in Majone (ed.), *Deregulation or Re-regulation? Regulatory reform in Europe and the United States* (Pinter, 1990), p. 223. See further M. Moran and T. Prosser (eds.), *Privatisation and Regulatory Change in Europe* (Open University Press, 1994).

[7] Cabinet Office news release, 3 July 1997 (Chancellor of the Duchy of Lancaster, David Clark).

[8] Better Regulation Task Force (BRTF), *Principles of Good Regulation* (Cabinet Office, 2003).

[9] Department for Business Enterprise and Regulatory Reform (BERR), *Next Steps on Regulatory Reform* (2007).

cost to business of complying with regulation'.[10] A swing back in favour of deregulation would be grounded in another bout of institutional reform and in what rapidly emerged as the full-blooded discipline of 'risk-based regulation' ('RBR').[11] Designed to achieve large-scale reductions in the regulatory load on business, there would be a strong dose of audit technique.[12] A drive to raise compliance, not least by tackling those operators who persistently flout their regulatory responsibilities, has seen a major revamp of the sanctions 'tool-kit'.[13] Associated features include an accretion of ministerial order-making powers for steering the work of 'arm's length' regulators, a general legislative codification of better regulation principles, and a large-scale replacement of Dicey's 'ordinary courts' with regulators and tribunals. Aiming to promote consumer 'voice', ministers have also looked to consolidate.[14] Super-regulators would now be mirrored in a super consumer advocate.

Naturally, the rhetoric of 'better regulation' has not always matched the reality. Estimates have put the cost of regulation to the UK economy at 10–12 per cent of GDP (similar to the annual take in income tax). While much of this will be 'policy costs' directly attributable to the regulatory goal, 'thousands of small, sometimes invisible' administrative costs 'represent a huge cumulative burden':

> Within the £100 billion plus total are laws covering social, economic, political and technical issues such as minimum wage, maternity rights, environmental protection and consumer safety . . . People may rightly vote for cleaner air, longer holidays or safer travel. No one votes for red tape or excessive monitoring, inspection and form filling . . . Red tape costs . . . account . . . for . . . around 30% of total regulatory costs.[15]

In the twin contexts of an enlarged EU and – epitomised by China and India – of heightened global competition, the external pressures for further regulatory reform have appeared unrelenting. According to a 2006 report from the European Commission:

> British business has become more vocal in criticising the UK's regulatory burden. Puzzlingly, the best available evidence suggests that the UK's overall levels of regulation are actually relatively light, if not in some specific areas of regulation. Furthermore, the government pursues regulatory reform energetically. Nonetheless, summary data indicates that other countries, including many of the UK's EU partners, appear in recent years to have been

[10] Chancellor of the Exchequer Gordon Brown, *Budget 2005*. Although the developments are typically more muted, the agenda encompasses the public and third (voluntary) sectors.
[11] *Hampton Review*.
[12] BRTF, *Regulation – Less is More: Reducing burdens, improving outcomes* (2005) [hereafter, '*Arculus Review*'].
[13] R. Macrory, *Regulatory Justice: Making sanctions effective* (Cabinet Office, 2006) [hereafter, '*Macrory Review*'].
[14] DTI, *Consultation on Consumer Representation and Redress* (2006).
[15] Sir David Arculus, foreword to BRTF, *Annual Report 2004–5*.

> deregulating faster than the UK. The primary cause of British business criticism could reflect these signs that, in a globalising world, regulation in the UK is now not significantly lighter than in some other Member States, or in other developed economies. Whereas in earlier years, when the UK's regulatory burden was much lighter than in other countries, British business enjoyed the competitive advantage of lower regulatory compliance costs and, therefore, operating costs than their external competitors. Today, however, as regulatory regimes outside the UK have apparently gained ground on the UK, the competitive advantage may have shrunk. That, in turn, may be a factor behind the UK's recent inability to further close its productivity gap with other advanced countries.[16]

Today, amid the wreckage of a banking system, yet another phase of regulatory reform is signalled. Calls for 'more regulation' are all around; and understandably so, with the state suddenly playing the role of underwriter of last resort on an unprecedented scale. Whether this heralds the end of a neo-liberal era, or (as appears more likely) a series of pragmatic adjustments designed to produce 'a firmer grip on the tiller', remains to be seen of course. One important measure will be the degree of policy slop-over: the extent to which institutional responses in terms of the financial crisis are read across into other regulatory sectors. From the standpoint of the administrative lawyer, it would be strange indeed if the better regulation agenda, and the hitherto fashionable nostrums of risk-based regulation, escape unscathed. As illustrated in later sections, there has been a pervasive sense of complacency.

2. Classification, explanation and formulation

Regulation is a slippery concept. As seen in earlier chapters the term is sometimes used loosely to describe any form of behavioural control – effectively the main output function of government. It is often used in economics to describe all activity of the state, including nationalisation, taxation and subsidy, determining or altering the operation of markets. More manageably, according to Selznick,[17] regulation refers to sustained and focused control exercised by a public agency over activities that are socially valued. This well-known formulation betrays its roots in an age of government. It usefully delineates the central core of activity for administrative lawyers but, given the rise of complex and fragmented processes of regulation involving both state and non-state actors, needs supplementing.

There is far more to regulation than simply passing a law. The stress on 'sustained and focused control' points to the need for detailed knowledge and close and continuing involvement with the regulated activity. 'Full-blown' regulation involves 'a combination of three basic elements: rule formulation;

[16] J. Sheehy, 'Regulation in the UK: Is it getting too heavy?' (2006) 3(7) *ECFIN Country Focus* 1, 5.

[17] P. Selznick, 'Focusing organisational research on regulation' in Noll (ed.), *Regulatory Policy and the Social Sciences* (University of California Press, 1985).

monitoring and inspection; enforcement and sanctions'.[18] The idea of a continuous 'regulatory cycle' serves to highlight the strong sense of dynamics. Again, regulation is not only about preventing unwanted behaviours; much of it has a determinedly facilitative flavour, effectively enabling commerce on the basis of an orderly market framework.

Regulation is commonly associated with *public* control exercised over *private* business. An 'executive' model, in which public regulation is the direct responsibility of central or local government, may be contrasted with an 'agency' model. 'Self'-regulation' by the private sector, classically defined as 'an institutional arrangement whereby an organisation regulates the standards of behaviour of its members',[19] may appear at first sight to fall outside the subject matter of administrative law. Government however may in effect be delegating the regulatory function, or there may be subtle blends, such as self-regulation within a statutory framework, or full-grown hybrids of public and private control, which command our attention. Less familiar as a category is 'bureaucratic regulation' (of government bodies by other government bodies). Incorporating standard administrative law machinery – auditors, inspectors, ombudsmen, regulatory agencies – it finds a home in different chapters of this book.

(a) Competing theories

Regulation is an old battleground of ideas.[20] And if the great twentieth-century debate between state-centred welfare economics and neo-liberalism wore an increasingly dated air, recent regulatory perspectives are only properly understood by reference to it. Writing in the late 1990s, Gunningham and Grabosky made the point explicitly: 'the challenge for regulatory strategy is to transcend this ideological divide by finding ways to overcome the inefficiencies of traditional regulation on the one hand and the pitfalls of deregulation on the other. That is, to move beyond the market–state dichotomy'.[21]

As classically conceived, economic regulation involves 'governmental efforts to control firms' decisions about price, output, product quality, or production process'.[22] Full of meaning for administrative law 'green lighters',[23] this has

[18] C. Hood and C. Scott, 'Bureaucratic Regulation and New Public Management in the United Kingdom Mirror-Image Developments?' (1996) 23 JLS 321, 336.

[19] R. Baggott, 'Regulatory reform in Britain: The changing face of self-regulation' (1989) 67 *Pub. Admin*. 436.

[20] A good introduction is M. Ricketts, 'Economic regulation: Principles, history and methods' in Crew and Parker (eds.), *International Handbook on Economic Regulation* (Edward Elgar, 2006); and see generally, R. Ekelund (ed.), *The Foundations of Regulatory Economics* (Edward Elgar, 1998).

[21] N. Gunningham and P. Grabosky, *Smart Regulation: Designing environmental policy* (Clarendon Press, 1998), p. 10. See generally B. Morgan and K. Yeung, *An Introduction to Law and Regulation* (Cambridge University Press, 2007).

[22] S. Breyer and R. Stewart, *Administrative Law and Regulatory Policy*, 3rd edn (Little Brown, 1992), p. 1.

[23] J. Landis, *The Administrative Process* (Yale University Press, 1938).

been the realm of public-interest theories of regulation predicated on 'market failure' – circumstances in which the interaction of market forces fails to generate allocative efficiency. Typical justifications are externalities, where price does not reflect costs imposed on society (environmental protection); difficulty with expressing consumer preference (food labelling); 'moral hazard', as with avoiding extravagant consumption of free services; and excessive competition and predatory pricing. Market disciplines being at a premium, the case is a compelling one for regulation of monopolies, as also of anti-competitive practices.[24] Even Prime Minister Thatcher took the point, in the case of the 'Ofdogs' (see p. 249 below).

Policies of redistribution, transferring wealth from the advantaged, have not been in vogue. Yet distributional concerns remain on the regulatory agenda, illustrated by universal service obligations imposed on major utilities companies.[25] Regulation is sometimes advocated as producing socially desirable results that are inefficient ('cross-subsidisation'). And there is of course a considerable history of government regulation designed to further social policy, as that big new feature on the administrative law landscape the Commission for Equality and Human Rights (see p. 200 above) reminds us.

Public-interest theory is comfortable theory, indicating the design and operation of regulation in the pursuit of collective goals. It became a subject of increased scepticism as economic and social regulation proliferated in the 1960s and 1970s in Western industrialised countries. The limits to centralised institutional capacity – in Hayek's words,[26] 'the fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order' – could not be wished away. Private-interest theories of regulation gained ground, the basic thesis being that 'interest groups demand more or less regulation according to the self-interest of their members and public officials supply more or less regulation according to what benefits their self-interest'.[27] Producers, benefiting from homogeneity of interest and low organisational costs, might override more general preferences or diffuse interests. According to Stigler,[28] 'regulation is acquired by the industry and is designed and operated primarily for its benefit' – the problem of 'regulatory capture'.

Concerns about the excessive burden of regulation filtered into Britain from

[24] For the resulting legal framework, see R. Whish, *Competition Law* (Butterworths, 6th edn, 2008); also, T. Prosser, *The Limitations of Competition Law: Markets and public services* (Oxford University Press, 2005).

[25] T. Prosser, *Law and the Regulators* (Clarendon Press, 1997); M. Feintuck, *The Public Interest in Regulation* (Oxford University Press, 2004).

[26] F. A. Hayek, *Law, Legislation and Liberty*, vol. 1 (Routledge, 1973,), p. 13.

[27] R. Pearce, S. Shapiro and P. Verkeuil, *Administrative Law and Process*, 2nd edn (Foundation Press, 1992), p. 17. See generally C. Sunstein, *After the Rights Revolution: Reconceiving the regulatory state* (Harvard University Press, 1990), Ch. 3.

[28] G. Stigler, 'The theory of economic regulation' (1971) 2 *Bell Journal of Economics* 1; and see the classic by M. Olson, *The Logic of Collective Action* (Oxford University Press, 1965).

the US, where matters were compounded by rule-bound or legalistic techniques of 'command and control' operated by sprawling federal agencies. The cure, explained Stewart, might be worse than the disease:

> The legal commands adopted by central agencies are necessarily crude, dysfunctional in many applications, and rapidly obsolescent . . . These dysfunctions not only overburden the regulated entities but also cause them to fail at their intended goal. Legal blueprints . . . inevitably fall short of postulated outcomes and produce unintended side effects when officials attempt to apply them to unforeseen or changed conditions . . . Centralisation of information and decision-making . . . is generally far more costly for the government to administer than alternatives that place greater reliance on market incentives. [29]

Ogus, drawing on this country's rich history of administrative law, showed a wider field of choice, classifying individual techniques of public regulation by the degree of state intervention.[30] At one end of his spectrum came information regulation (as audit methodology requires of public services (see Chapter 2)). At the opposite end, firms would be prohibited from undertaking an activity without obtaining 'prior approval' (licensing). In between, there was standard-setting, with compliance more or less closely prescribed and sanctioned across the full range of 'target', 'performance' and 'specification' standards. Other classic instruments in the armoury included competition rules and price caps.

By the 1990s, the search for a regulatory 'third way' was nonetheless accelerating. From the perspective of socio-legal theory, regulatory failure was not simply a problem of too much law. For Teubner, juridification 'signifies a process in which the interventionist social state produces a new type of law, regulatory law, [which] "coercively specifies conduct in order to achieve particular substantive ends"'.[31] It tends to be 'particularistic, purpose oriented and dependent on assistance from the social sciences'. Drawing on autopoiesis, the theory of self-generating and self-referring systems normatively closed but cognitively open, Teubner identified a 'regulatory trilemma':[32] regulatory law tends to be ignored, or to damage the life of the system being regulated, or to impair the integrity – premised on autonomy and generality – of the legal system. This brand of reflexive theory suggested constitutive approaches to self-regulation (designing processes and organisational structures to ensure that other, wider interests are taken into account in decisions).

[29] R. Stewart, 'Madison's nightmare' (1990) 57 *University of Chicago LR* 335, 343, 356. See further S. Breyer, *Regulation and its Reform* (Harvard University Press, 1982).

[30] See A. Ogus, *Regulation: Legal form and economic theory* (Clarendon Press, 1993).

[31] G. Teubner, 'Juridification: Concepts, aspects, limits, solutions' in Teubner (ed.), *Juridification of Social Spheres* (Walter de Gruyter, 1987). See also J. Black, 'Constitutionalising self-regulation' (1996) 59 *MLR* 24.

[32] G. Teubner, *Law as an autopoietic system* (Blackwell, 1993). See also N. Luhmann, *A Sociological Theory of Law* (Routledge, 1985).

(b) Responsive regulation

So influential has the concept been that no administrative law book could be complete today without reference to 'responsive regulation'. As expounded by Ayers and Braithwaite in the early 1990s,[33] it means designing regulatory frameworks which stimulate and respond to the pre-existing regulatory capacities of firms, keeping regulatory intervention to the minimum required to achieve the desired outcomes, while retaining the regulatory capacity to play a more forceful hand. Stress is laid on the need for creative combinations of techniques tailored to particular circumstances and especially on enforcement as involving a progression through different compliance-seeking tools:

> Central to our notion of responsiveness is the idea that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation . . . By credibly asserting a willingness to regulate more intrusively, responsive regulation can channel market place transactions to less intrusive and less centralised forms of government intervention. Escalating forms of responsive regulation can thereby retain many of the benefits of laissez-faire governance without abdicating government's responsibility to correct market failure . . . Regulatory agencies will be able to speak more softly when they are perceived as carrying big sticks. [34]

The 'responsive regulator' thinks in terms of a hierarchy of regulatory strategies: in model form, the face of a pyramid.

Appropriately defined as 'the bringing to bear' of regulatory requirements on those bodies or persons sought to be influenced or controlled,[35] a broad conception of enforcement is central to this approach. The model illuminates this, beginning with the least intrusive interventions at the base, moving towards the apex

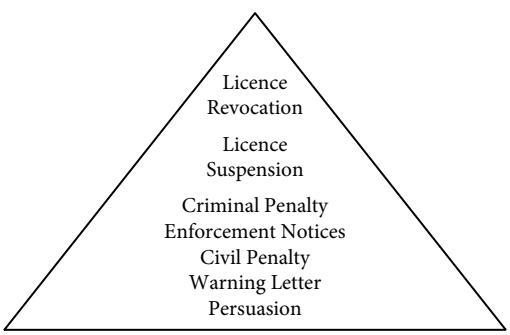

Fig 6.1 Model enforcement pyramid

[33] I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the deregulation debate* (Oxford University Press, 1992).

[34] *Ibid*., pp. 4, 6.

[35] R. Baldwin and M. Cave, *Understanding Regulation: Theory, strategy and practice* (Oxford University Press, 1999), p. 98.

through enforcement actions of increasing severity. The very shape of the pyramid highlights the tendency for most enforcement activity to be of a determinedly routine nature. 'Tit-for-tat': the model also suggests how agencies can seek to calibrate their actions, so that increasingly strict measures are applied to the recalcitrant and less interventionist ones adopted in the light of closer compliance.

The approach suggests a strong dose of 'restorative justice',[36] such that the offender is given an opportunity to put things right. An agency may play up proactive 'fire-watching' responses (greater investment by the firm in safety systems). The drastic remedies at the apex are appropriately characterised as a brooding presence, rarely called upon, and a powerful background influence ('regulation in the shadow of the law'. 'To reject punitive regulation is naïve; to be totally committed to it is to lead a Charge of the Light Brigade. The trick of successful regulation is to establish a synergy between punishment and persuasion.'[37]

Long and tall, short and squat – differently shaped pyramids can be used to model different regulatory regimes according to the available techniques and how these are operationalised.[38] Yet as Scott observes, in the world of fragmented interests and networks 'contemporary regulatory law is rarely within the control of a single regulatory unit with capacity to deploy law coherently for instrumental purposes'.[39] The influence of political, social and economic environments on regulatory enforcement styles is also well attested. In a leading study of environmental regulation, Hutter points up a broad range of factors – from close relationships with regulatees to low costs of inspection, and on through a low incidence of serious breaches to lack of media interest – as conducive to informal, collaborative, enforcement work.[40] Carefully 'calibrating' actions is not so simple even within a single agency.

(c) Regulation *à la mode*

Recent regulatory theory has consciously expanded on 'responsive regulation'. Acknowledging that in the real world of agency design and activity the significant and legitimate roles of other stakeholders are themselves critical factors, Gunningham and Grabosky introduced the concept of 'smart regulation':

> The central argument [is] that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better

[36] J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).
[37] Ayres and Braithwaite, *Responsive Regulation*, p. 25.
[38] B. Hutter, *Compliance: Regulation and environment* (Oxford University Press, 1997). There are close parallels with the idea of the 'complaints pyramid' discussed in Ch. 10.
[39] C. Scott, 'Regulation in the age of governance: The rise of the post-regulatory state', in Jordana and Levi-Faur (eds.), *The Politics of Regulation: Institutions and regulatory reforms for the age of governance* (Elgar, 2004) 158. See also, R. Baldwin and J. Black, 'Really responsive regulation' (2008) 71 *MLR* 59.
[40] B. Hutter, *The Reasonable Arm of the Law?* (Oxford University Press, 1998).

> regulation. Further, that this will allow the implementation of complementary combinations of instruments and participants tailored to meet the imperatives of specific environmental issues. By implication, this means a far more imaginative, flexible and pluralistic approach to environmental regulation than has so far been adopted in most jurisdictions.[41]

Their ideal type of a whole 'pyramid', with public agencies on the first face (government regulation), businesses on the second one (self-regulation), and 'surrogate' or 'quasi'-regulators (whether other businesses or NGOs) on the third face, usefully highlights the complex interactions taking place in the regulatory frameworks of governance. The 'smart regulator' thinks of blends of responses to mixes of problems:

> One might begin with a less intrusive instrument such as . . . education (i.e., using second parties), but then recruit another instrument if the first exhausts its responsive potential (e.g., third party audit or government mandated community right to know), and end up (where all else fails) with highly coercive instruments, such as government enforcement of command and control regulation . . . Ideally, one would use a combination of instruments in sequence to achieve a co-ordinated and gradual escalation up one or more faces of the pyramid from base to peak.[42]

Given the prominent role of NGOs and an especially wide choice of regulatory instruments (e.g. tradeable permits), environmental law and policy appears a natural home for smart regulation. But will the need for consultation requirements properly to empower third party 'surrogates' be assigned a high priority? (Refer back to Arnstein's 'ladder', see p. 173 above). The attractions of smart regulation may themselves be a weakness: 'co-ordinated. . . escalation' sounds like a leap of faith. And administrative lawyers beware: the determinedly fluid, multiparty approach poses major challenges in terms of accountability.

On show in, for example, financial regulation and – increasingly – regulation of the professions (see p. 323 below), the indirect technique of 'meta-regulation'[43] merits special attention. The contemporary blending of public and private powers is exemplified by the attempt of government regulators to exercise control through leverage of internal – commercial – control systems. Linked to principles of corporate governance, this approach calls for much care and ingenuity on the part of the agency as Parker explains:

> Regulators and rule-makers will themselves have to revise and improve their strategies constantly in light of the experience and evaluation of corporate self-regulation. [First], law and regulators must help *to connect the internal capacity for corporate self-regulation*

[41] Gunningham and Grabosky, *Smart Regulation*, p. 4.
[42] *Ibid*., p. 400.
[43] J. Braithwaite, 'Meta risk management and responsive regulation for tax system integrity' (2003) 25 *Law and Policy* 1; B. Morgan, 'The economisation of politics: Meta-regulation as a form of non-judicial legality' (2003) 12 *Social and Legal Studies* 489.

> *with internal commitment to self-regulate*, by motivating and facilitating moral or socially responsible reasoning within organisations . . . Secondly, law and regulators should hold corporate self-regulation accountable, and facilitate the potential for other institutions of society to hold it accountable, by *connecting the private justice of internal management systems to the public justice of legal accountability, regulatory co-ordination and action, public debate and dialogue . . .* The most important standards for corporate self-regulation processes allow regulators, the public and the law to judge the companies' own evaluations of their performance, and whether they have improved it on the basis of those evaluations – *meta-evaluation*.[44]

As deployed for public regulatory purposes of risk management, the strategy involves, in Power's words,[45] 'turning organisations inside out'. Self-evidently, however, such an approach can be fraught with difficulty, not least because of the problem of 'fit'. Rash is the meta-regulator who assumes that the design of firms' internal control systems echoes its own public interest objectives.

The term 'co-regulation' is increasingly used to describe public/private partnerships with the specific purpose of 'sustained and focused control'.[46] In Britain, as demonstrated by OFCOM (see p. 330 below), it has come to be associated with one particular model, the sub-delegation of powers by a public agency to a self-regulatory organisation (SRO). Typically, the statutory agency retains backstop powers in case the scheme proves not to work but also to assist the self-regulator in dealing with 'rogue' members of the scheme – the proverbial 'big stick in the cupboard'.[47] For its part, responsible for the day-to-day activity, the SRO must work in partnership with, but subject to control over remit and periodic review by, the agency. Bartle and Vass see on offer:

> a new regulatory paradigm . . . involving a form of regulatory 'subsidiarity', whereby the detailed implementation and achievement of regulatory outcomes can be delegated ('downwards') to industry and private sector agreements . . .
>
> Developing regulation within a co-regulatory framework is an example of how the practice of regulation evolves to achieve better cost-effective outcomes, but is dependent, if public confidence is to be secured and maintained, on good regulatory governance . . . Accountability of both the regulators and the regulated, through transparency of process and reporting, is the essential mechanism required. [48]

[44] C. Parker, *The Open Corporation: Self-regulation and democracy* (Cambridge University Press, 2002), p. 246. See also, C. Coglianese and D. Lazer, 'Management based regulation: Prescribing private management to achieve public goals' (2003) 37 *Law and Society Review* 691.

[45] M. Power, *The Risk Management of Everything: Rethinking the politics of uncertainty* (Demos, 2004).

[46] The European Commission is much enamoured with the concept: *Better Lawmaking* COM (2003) 770. See further, F. Cafaggi, 'New modes of regulation in Europe: Critical rethinking of the recent European paths', in Cafaggi (ed.), *Reframing Self-regulation in European Private Law* (Kluwer, 2006).

[47] D. Currie (Chairman of OFCOM), speech to the Advertising Association, 19 May 2003.

[48] I. Bartle, and P. Vass, *Self-Regulation and the Regulatory State* (CRI, 2005), pp. 4, 40.

A mix of self-regulatory flexibility and responsiveness with government regulation's hard edge has obvious attractions, but equally the high dependency on meta-regulation – by one partner of another – makes it vulnerable. Efficient and effective workings of the 'essential mechanism' of accountability can scarcely be assumed in a split system.

Conceptually speaking, there is clear overlap with the expansive category of 'self-regulation' traditional in the professions. Today, it is increasingly diluted by a rising tide of external involvement, publicly appointed lay members, formal complaints systems (see Chapter 10) and statutory reporting requirements. This has culminated in a new species of agency, the sector-specific 'meso-regulator' targeted on the professions (see p. 327 below). A separate tier of meta-regulation is inserted, with the aim of closer 'steering' of traditionally autonomous bodies, e.g. the relationship of the Legal Services Board and Bar Council.[49] As well as sucking up some of the powers, the meso-regulator thus sits above the professional self-regulation, exercising leverage. Infused, like co-regulation more generally, with ideas of 'smart' regulation, the model offers a form of agency-based 'sustained and focused control' militating against 'capture'. Once again, however, it raises concerns about complexity and duplication, and possible infighting: where does the buck stop?

'Pure' self-regulation is the more notable by its absence:

> Self-regulation has for all intents and purposes become 'embedded' within the regulatory state . . . The traditional view of self-regulation as an activity remote or removed from the interests of the regulatory state is an anachronism . . . Where self-regulation operates, it operates with the sanction, or support or threat of the regulatory state. The modern regulatory state has become all pervading in the ambit of its attentions, and self-regulation has now to be seen in this context – simply as one of the 'instruments' available to the regulatory state.[50]

Harnessing or enrolling non-state actors in complex systems of 'collaborative governance' is another way of characterising the development – state power in a velvet glove. Central government is left with the problem of squaring the desire for authoritative action with its reliance on other bodies to deliver on its policies. The tools used to try to steer decentralised regulation produce, and are produced by, a 'thickening at the centre'.[51]

All this highlights the scale of the challenge to standard conceptions of government and of formal law as discussed in earlier chapters. Aman underscores the theme:

> The cumulative effect of various market approaches to regulation, regulatory structures and procedures is to introduce a new mix of private and public power . . . The overall context

[49] See Part 2 of the Legal Services Act 2007; also DCA, *The Future of Legal Services: Putting consumers first*, Cm. 6679 (2005).

[50] Bartle and Vass, *Self-Regulation and the Regulatory State*, pp. 3–4.

[51] J. Black, 'Tensions in the regulatory state' [2007] *PL* 58, 63.

> of globalisation frames these developments. The emphasis on global competition and economic growth coupled with the general weakness of any individual single state in the face of globalisation processes encourages more negotiation on the part of the state as well as regulatory approaches more sympathetic to the cost-conscious demands of multi-national businesses and government as well.[52]

Let us examine the several phases of UK regulatory reform against this backdrop.

3. Blue-rinsed regulation

'There should always be a presumption *against* regulation unless it is strictly necessary . . . The temptation to over-regulate must be restricted.' So said Prime Minister Major in emphasising the high priority given by the Conservatives to lifting the burden on business.[53] A Deregulation Unit was tasked to co-ordinate initiatives across Whitehall and the work gained impetus from the Deregulation and Contracting Out Act 1994 (see p. 172 above). Compliance Cost Assessment (CCA) was introduced,[54] an appraisal technique designed to generate information on the total compliance costs for business sectors and individual firms, and also the effect on national competitiveness. Notably, this attempt at more 'rational' regulation – which prefigures the increasingly broad process of impact assessment under New Labour (see p. 152 above) – was shot through with discretionary judgement. Preparing a CCA would, in the words of the Government manual, 'largely involve making *assumptions* about the consequences of regulation and producing *estimates* as to the extent of the impact on business'.[55] Anticipating the current drive for more flexibility at ground-floor level, there was also talk of 'ensuring compliance rather than over-zealous enforcement'. This was the message of an enforcement code tellingly entitled *Working with Business*. Typical of the time, Citizen's Charter principles – information and advice 'in plain language', 'courteous and efficient service', accessible complaint procedures – featured prominently.[56]

Prevailing ideas of 'good' regulation were spelt out in guidance to officials engaged in the basic administrative law task of rule-formulation.[57] The first theme, proportionality, geared with the developing evaluation process. 'Think

[52] A. Aman, 'Administrative law for a new century', in Taggart (ed.), *The Province of Administrative Law* (Hart, 1997), 117.

[53] DTI, *Thinking About Regulating: A guide to good regulation*, (1994), foreword. The policy development can be followed through a series of White Papers: *Lifting the Burden* (see n 4 above); *Better Business Not Barriers*, Cmnd 9794 (1986); *Releasing Enterprise* Cm. 512 (1988); also DTI, *Deregulation: Cutting red tape* (1994).

[54] Deregulation Initiative, *Checking the Cost of Regulation: A Guide to compliance cost assessment*, (1996).

[55] *Ibid*., p. 8.

[56] DTI, *Thinking About Regulating*, pp. 10–12; DTI and Citizen's Charter Unit, *Working With Business: A code for enforcement agencies* (1996).

[57] *Ibid*.

small first', the second theme, reflected the concern that 'over-regulation harms small businesses most'. A special 'litmus test' for small business was developed, to test impact. 'Go for goal-based regulations' was the third theme; provisions 'should specify the goal and allow businesses to decide how to achieve this goal'. In the event, a wedge of detailed prescriptive rules in areas such as health and safety and consumer protection was abandoned in favour of broader target standards.[58]

The manual naturally included a checklist.[59]

Good regulation – ten points to think about

1. Identify the issue . . . Keep the regulation in proportion to the problem.
2. Keep it simple . . . Go for goal-based regulation.
3. Provide flexibility for the future . . . Set the objective rather than the detailed way of making sure the regulation is kept to.
4. Keep it short.
5. Try to anticipate the effects on competition or trade . . . Try to find ways of regulating which cause the least market disruption . . .
6. Minimise costs of compliance . . . Think small first.
7. Integrate with previous regulations.
8. Make sure the regulation can be effectively managed and enforced . . . If [it] cannot be enforced fairly at a reasonable cost, think again.
9. Make sure that the regulation will work and that you will know if it does not . . . Consider how you will monitor the results, costs and any side-effects or changes in behaviour . . .
10. Allow enough time . . . for . . . consulting people inside and outside government.

The obvious danger was sub-optimal control. Allied to the presumption against regulation was a stress in evaluation on costs over benefits. Similarly, in the absence of American-style rule-making procedure (see p. 170 above), consultation exercises were concentrated on the regulated industries, rather than groups representing consumers.[60] While other EU states were also pursuing deregulatory policies, the UK under the Conservatives was 'notable for the ideological vigour of its commitment'.[61] All this serves to highlight the political dimension in regulatory strategy and design.

[58] The process is traceable to the Health and Safety at Work Act 1974: see for a comparative study, R. Baldwin and T. Daintith (eds.), *Harmonisation and Hazard* (Graham & Trotman, 1992).

[59] DTI, *Thinking About Regulating*, pp. 20–1.

[60] *Ibid*., pp. 13–15; Ogus, *Regulation*, Ch. 16.

[61] T. Daintith, 'European Community law and the redistribution of regulatory power in the United Kingdom' (1995) 1 *ELJ* 134, 137. For a retrospective, see C. Scott and M. Lodge, 'Administrative simplification in the United Kingdom', in OECD, *From Red Tape to Smart Tape* (2003).

(a) 'Ofdogs'

The so-called 'Ofdogs', which emerged as a necessary by-product of the Conservatives' large-scale privatisation of the utilities, demonstrate a major shift in UK administrative law in favour of the agency model of public regulation. Bodies such as OFTEL (the Office of Telecommunications, 1984), OFGAS (the Office of Gas Supply, 1986) and OFFER (the Office of Electricity Regulation, 1989) came to litter the regulatory landscape. Predictably, given the scale and complexity of the privatisation process, a steep learning curve for government and agencies alike, diversity in powers and performance was a common trait. There were, however, standard components in what became known for a brief historical moment as regulation 'UK style':[62]

- a *single, independent* regulatory agency, headed by a director-general (D-G), for each industry
- within a general regulatory framework provided by the privatisation statute, practical operations predicated on a system of *licensing*
- control of the dominant firm via a *price-cap formula*, intended to incentivise greater efficiency
- the D-Gs as part of a regulatory *network*, the competition authorities included
- latterly, emphasis on *quality* regulation as part of the economic regulation.

As a compact agency, a non-ministerial government department operating at arm's length from, though subject to the patronage of, the minister, the Ofdog model typified fragmentation of the traditional government framework. There was a strong sense of personalisation associated too with vesting of the powers in the D-G, making these watchdogs peculiarly vulnerable to criticisms of excessive discretion and lack of accountability.[63] Ofdogs possessed substantial licensing powers, control being exercised both on entry to the industries and through modification and enforcement of the terms and conditions. By so structuring and confining the discretion of individual operators, and especially the privatised firms like British Telecom that initially faced little competition, the D-Gs were able to engage in 'structural regulation' (the way in which the market is organised) as well as 'conduct regulation' (behaviour within a market). Expressing the dominant concern with regulatory failure, the D-G of Electricity Supply considered that regulation was 'a means of "holding the fort" until competition arrives'.[64] The D-G of OFTEL spoke of competition as 'a regulatory weapon; by allowing interconnection on favourable terms, 'a regulator does not need to wait, hoping that it will occur, but

[62] C. Veljanovski, 'The regulation game' in Veljanovski (ed.), *Regulators and the Market* (IEA, 1991); also, M. Armstrong, S. Cowan and J. Vickers, *Regulatory Reform: Regulation of economic activity* (MIT Press, 1994).

[63] C. Graham, *Is There A Crisis in Regulatory Accountability?* (CRI, 1995).

[64] S. Littlechild, *Regulation of British Telecommunications Profitability* (HMSO, 1983) [4.11].

can take active steps to encourage it'.[65] Detailed licence provision came to look 'cumbersome and inappropriate' as structural regulation for competition began to bear fruit.[66]

Adopted across a wide range of industries, the licence rule 'Retail Price Index (RPI) – X' for limiting the profits and prices of the dominant firm was described by contemporaries as 'the most distinctive feature of monopoly regulation in Britain'.[67] This meant the now privatised utility company could raise prices for a defined 'basket' of its wares by no more than the rate of retail price inflation minus X per cent, with 'X' representing a regulatory judgement of its cost-efficiency potential – a major ongoing exercise of agency discretion. This incentivising approach duly illustrated the propensity for juridification. Originally trumpeted as a straightforward means of economic regulation,[68] RPI–X was the focus of progressive rule development; the emergence of a hierarchy or subspecies of rules structuring and confining commercial discretion more closely. Otherwise, an operator like BT was free to change individual prices, affecting different classes of consumer, provided the average was met.[69]

Regulation 'UK style' also demonstrates the important role in governance of regulatory 'tiers' and 'webs'. An industry-plus-agency model view of arrangements is too simplistic; the interconnectedness of split regulatory functions between institutions was an essential feature.[70] Ministers retained significant powers, e.g. on market entry and payment of subsidies. Behind the D-Gs stood the competition authorities, in the shape of the Monopolies and Mergers Commission and the Office of Fair Trading (OFT). Their potential involvement constituted both regulation 'in the shadow of regulation' (leverage on the dominant firm in e.g. a licence renegotiation) and a measure of so-called 'network accountability' (the D-G having to justify his policy to other regulatory actors).[71] Reference to the MMC also served as a check on the D-G's exercise of discretion.[72]

There were changing attitudes to 'quality regulation', broadly defined to include customer service issues and standards of supply.[73] In line with the

[65] As in telecommunications: see B. Carsberg, 'Office of Telecommunications: Competition and the Duopoly Review: in Veljanovski (ed.), *Regulators and the Market*, p. 100.

[66] Hansard Society and European Policy Forum, *Regulation of Privatised Utilities* (1996), p. 9.

[67] R. Rees and J. Vickers, 'RPI – X price-cap regulation' in Bishop, Kay and Mayer (eds.), *The Regulatory Challenge* (Oxford University Press, 1995), p. 358. 'CPI-X regulation' (Customer Prices Index – X) is a later formulation.

[68] In contrast to American 'rate of return' regulation: see D. Helm, 'British utility regulation theory, practice and reform' (1994) 10 *Oxford Rev. of Economic Policy* 17.

[69] See further, C. Hall, C. Hood and C. Scott, *Telecommunications Regulation: Culture, chaos and interdependence inside the regulatory process* (Routledge, 2000).

[70] B. Hogwood, 'Developments in regulatory agencies in Britain' (1990) 56 *International Rev. of Administrative Sciences* 595.

[71] C. Scott, 'Accountability in the regulatory state' (2000) 27 *JLS* 28.

[72] S. Lipworth, 'Utility regulation and the Monopolies and Mergers Commission, retrospect and prospect' in Borrie and Beesley (eds.), *Major Issues in Regulation* (IEA, 1993).

[73] J. Bowdery, *Quality Regulation and the Regulated Industries* (CRI, 1994).

strong market ideology prevailing in the early 1980s, no direct provision was made for this in the early privatisation schemes of telecommunications and gas. Yet RPI–X could in such conditions have perverse effects, the incentive for the dominant firm to reduce costs providing a corresponding incentive to reduce quality.[74] The problem was tackled in typically incremental fashion. Individual regulators such as OFTEL took action to shore up standards by negotiation and informal agreement. Later privatisation statutes, on electricity and water, created specific powers to establish performance standards binding on the licence-holders. Eventually, embodying the philosophy of John Major's Citizen's Charter programme, the Competition and Service (Utilities) Act 1992 brought such quality regulation powers up to the level of the strongest. In hindsight, this more consumerist 'feel' heralded the next phase of UK regulatory reform under New Labour. The pendulum was swinging.

4. 'Better regulation'

'The job of government is to get the balance right, providing proper protection and making sure that the impact on those being regulated is proportionate'.[75] In so seeking to re-orient policy away from deregulation, the incoming Labour administration gave 'better regulation' a determinedly consensual flavour. 'Politicians differ about the appropriate level of intervention, but all governments should ensure that regulations are necessary, fair, effective, affordable and enjoy a broad degree of public confidence.'[76] The agenda was a huge one, reaching into most aspects of government activity. A Regulatory Impact Unit was created in the Cabinet Office to help drive it, together with the 'Better Regulation Task Force', an independent advisory body composed largely of business people and charged with 'challenging' departments. The '"thickening" of the centre' soon included a 'better-regulation minister' for each department, a Whitehall network of 'better-regulation units' and, showing the role for bureaucratic regulation, a designated Cabinet committee (the 'Panel for Regulatory Accountability') to vet departmental plans. Replacing the Conservatives' Deregulation and Contracting Out Act 1994, the Regulatory Reform Act 2001 provided the essential legislative framework (see p. 168 above).

First promulgated by the BRTF in 1997, a five-fold set of regulatory principles rapidly became the orthodoxy, being mainstreamed in the policy process through the detailed template of regulatory impact assessment (see p. 152 above). As an archetypal piece of 'soft' law designed to influence the hard legal product, relevant Cabinet Office guidance shows the parallels with legal precept, as well as the twin policy elements of continuity and change:

[74] See National Consumer Council, *In the Absence of Competition* (HMSO, 1989).
[75] BRTF, *Principles of Good Regulation*, 3rd edn (Cabinet Office, 2003), p. 1.
[76] *Ibid*.

Principles of Good Regulation

The principles are a useful toolkit for assessing and improving the quality of regulation. Use them to inform and shape your consultation, particularly in the planning stages:

- Proportionality
  Policy solutions should be appropriate for the perceived problem or risk: you don't need a sledgehammer to crack a nut!
- Accountability
  Regulators/policy officials must be able to justify the decisions they make and should expect to be open to public scrutiny.
- Consistency
  Government rules and standards must be joined up and implemented fairly and consistently.
- Transparency
  Regulations should be open, simple and user friendly. Policy objectives, including the need for regulation, should be clearly defined and effectively communicated to all stakeholders.
- Targeting
  Regulation should be focused on the problem. You should aim to minimise side effects and ensure that no unintended consequences will result from the regulation being implemented.

Once you have drafted your policy proposal and policy options, check that it complies with all of the five principles. If you have planned and carried out your consultation well, it should meet these criteria anyway. [77]

The stress on 'targeting' would smooth the path of risk-based methodologies on the administrative law frontline. 'Enforcers should focus primarily on those whose activities give rise to the most serious risks'. 'Consistency' would be assigned wide currency as an administrative value. 'Regulators should . . . work together in a "joined-up" way . . . new regulations should take account of other existing or proposed regulations . . . regulation should be predictable in order to give stability and certainty . . . enforcement agencies should apply regulations consistently across the country'.[78] Better to combat the over-zealous interpretation of rules and guidance – 'regulatory creep'[79] – an additional premium would be placed on transparency.

A push for hybrid and indirect strategies shows the influence of contemporary regulatory theory:

> The level of risk involved in any activity should determine the level of protection necessary. However. . . no solution will eradicate risk, and we have found no evidence that indicates

[77] Cabinet Office, *Principles of Good Regulation* (1998), p. 1.
[78] *Ibid*., p. 4–5.
[79] BRTF, *Avoiding Regulatory Creep* (2004).

> that state regulation is necessarily more effective than alternative arrangements at reducing risk. There will always be cases of people breaking laws and failing to meet mandatory requirements. And sometimes, the out-of-touch nature of regulations will encourage a climate of evading the rules. In contrast, rules that have been developed closely with, or indeed by, those whose behaviour is to be controlled might be more readily complied with. The rules should be targeted to ensure that they require the minimum standards necessary to deliver adequate protection. A common feature of all effective systems, however, is the potential for the imposition of real sanctions. [80]

In seeking so to reconcile an expansive role for the regulatory state with 'light-touch' regulation based on securing operator-led solutions, the task force had effectively incorporated self-regulation as part of better regulation. The state should not only let industry and commerce 'row', but also do more 'steering'.

(a) Changing institutional geography

With concerns about regulatory accountability a main driver, substantial changes in the institutional geography were in train. Time was called on the individualised 'Ofdogs', the preference now being for the standard regulatory structure of a commission or board with collective responsibility for decisions. The benchmark is Part 1 of the Utilities Act 2000, which replaced OFGAS and OFFER with GEMA, the Gas and Electricity Markets Authority; similar reworkings soon included the OFT, OFCOM, and the Office of Rail Regulation (ORR).[81] The Act also represented a golden opportunity to demonstrate New Labour's commitment to a more rounded approach to regulation. A primary duty to protect the interest of consumers, ministerial powers to intervene to help disadvantaged groups, and provision for the furtherance of environmental objectives, mark the changed philosophy.[82]

The rise of the 'super-' or 'mega-' regulator reflects and reinforces broader trends in agencification (see Chapter 2). Take the Financial Services Authority (FSA), which became the single regulator for the industry in 2001, finally combining the responsibilities of nine separate bodies. One of the first integrated financial regulators in the world, it thus substituted for an old model of institutional regulation, in which different sets of financial institutions (insurance, securities, etc) had their own regulatory bodies, a 'thematic' or 'functional' model defined holistically in terms of engagement in commercial financial activity. Behind this lay the Financial Services and Markets Act 2000 which, in

[80] BRTF, *Alternatives to State Regulation* (2000), p. 26; also BRTF, *Imaginative Thinking for Better Regulation* (2003).

[81] See respectively, Enterprise Act 2002, Communications Act 2003, and Railways and Transport Safety Act 2003.

[82] Utilities Act 2000, Parts 2–4; P. Leyland, 'UK utility regulation in an age of governance' in Bamforth and Leyland (eds.), *Public Law in a Multi-layered Constitution* (Hart Publishing, 2003).

sweeping away the pre-existing mix of statutory regulation and self-regulation, afforded the FSA major new enforcement powers (see p. 263 below). As the agency's first policy director confirms, concerns about coherence, consistency and targeting featured prominently in the choice of institutional design:

> With the growth in the number of multiple-function firms, the need for communication, coordination, cooperation and consistency across specialist regulatory bodies [has] become increasingly acute and increasingly difficult to manage efficiently . . . A single regulator can take advantage of a single set of central support services . . . introduce a unified statistical reporting system for regulated firms . . . operate a single database for the authorisation of firms . . . avoid unnecessary duplication or underlap across multiple specialised regulators, introduce a consolidated set of rules and guidance . . . offer a single point of contact to both regulated firms and to consumers.
>
> In addition to pure scale economies, a single regulator ought to be more efficient in the allocation of regulatory resources across both regulated firms and types of regulated activities. One crucial element of this is the development of a single system of risk-based supervision under which regulatory resources are devoted to those firms and those areas of business which pose the greatest risk when judged against the objectives of protecting consumers, maintaining market confidence . . . and reducing financial crime . . . A single regulator ought to be best placed to resolve efficiently and effectively the conflicts which inevitably emerge between the different objectives of regulation. This is because a single management structure should be better able to identify, to decide upon and to implement a collectively agreed resolution . . . A single regulator ought to be able to avoid the unjustifiable differences in supervisory approaches and the competitive inequalities imposed on regulated firms through inconsistent rules which have arisen across multiple specialist regulators. [83]

OFCOM, the Office of Communications, is another big beast in the administrative law jungle. Launched in 2003 in place of five regulatory bodies, its origins lie in the dynamics of convergence in the sector. As such, the agency is a leading illustration of regulatory structures and processes being driven by technological change. According to the White Paper:

> The current system for media and communications regulation is a reflection of the way communications developed in the twentieth century, with different content and distribution channels. We need a regulatory body with the vision to see across these converging industries, to understand the complex dynamics of competition in both content and the communications networks which carry services. It should not demand the same regulation for each medium, but must see across the whole sector and help build a coherent system . . . It will be essential for the regulator to have delegated powers to act independently in response to fast-changing circumstances. [84]

[83] C. Briault, *The Rationale for a Single National Financial Services Regulator* (FSA, 1999), pp. 15, 18, 20–2. See further on the practical experience, G. Walker, 'Financial Services Authority' in Walker and Blair (eds.), *Financial Services Law* (Oxford University Press, 2006).

[84] DTI, *A New Future for Communications*, Cm. 5010 (2000), pp. 11, 77. See also NAO, *The Creation of OFCOM: Wider lessons for public sector mergers of regulatory agencies*, HC 1175 (2005/6).

OFCOM may be likened to a giant spider – at the centre of a more or less finely woven regulatory 'web'. Highlighting the place in 'better regulation' for mixes of public and private power, the agency must 'have regard to . . . the desirability of promoting and facilitating the development and use of effective forms of self-regulation'.[85] This has grounded the policy of co-regulation, taken in the White Paper to mean:

> situations in which the regulator would be actively involved in securing that an acceptable and effective solution is achieved. The regulator may for example set objectives which are to be achieved, or provide support for the sanctions available, while still leaving space for self-regulatory initiatives by industry, taking due account of the interests and views of other stakeholders, to meet the objectives in the most efficient way. The regulator will in any case have scope to impose more formal regulation if the response of industry is ineffective or not forthcoming in a sufficiently timely manner.[86]

5. Better regulation – mark II

The most recent period of UK regulatory reform has seen the focus widen beyond government departments to include regulatory agencies, inspectorates and local authorities.[87] Yet more bureaucracy 'to improve the productivity of the UK economy by removing unnecessary regulation . . . or reducing the costs associated with complying':[88] the reader will appreciate the irony. Created in 2007, the Department for Business, Enterprise and Regulatory Reform is 'to help ensure business success in an increasingly competitive world'. Successor to the Regulatory Impact Unit, the Better Regulation Executive has concentrated on fostering risk-based approaches; the BRTF meanwhile has metamorphosed into, first, a beefed-up Better Regulation Commission, and thence, underscoring the broad policy orientation, the Risk and Regulation Advisory Council.[89] Moving on from the Regulatory Reform Act 2001, there are two successive legislative flagships: the Legislative and Regulatory Reform Act (LRRA) 2006, and the Regulatory Enforcement and Sanctions Act (RESA) 2008. Principles have been laid on principles and placed on a statutory footing, and bureaucratic regulation has abounded, in a fresh attempt to embed the 'best practice' of better regulation.

(a) Hampton

Three independent reviews commissioned by ministers, of which the Hampton review, *Reducing Administrative Burdens: Effective inspection and enforcement*,

[85] Communications Act 2003, s. 3(4).
[86] DTI, *A New Future for Communications*, p. 83.
[87] A theme elaborated by BERR, *Next Steps on Regulatory Reform*.
[88] NAO, *Regulatory Reform in the UK* (2008), p. 2.
[89] BRC, *Public Risk: The next frontier for better regulation* (2008).

is the best known, established new policy. Given a typically ad hoc and piecemeal development over many years, the basic finding that 'the system as a whole is uncoordinated and good practice is not uniform' was eminently predictable. Hampton homed in on risk-based regulation:

> Risk assessment – though widely recognised as fundamental to effectiveness – is not implemented as thoroughly and comprehensively as it should be. Risk assessment should be comprehensive, and should be the basis for all regulators' enforcement programmes. Proper analysis of risk directs regulators' efforts at areas where it is much needed, and should enable them to reduce the administrative burden of regulation, while maintaining or even improving regulatory outcomes. [90]

Glossing over the limitations of RBR methodology (see p. 275 below), Hampton was thus concerned both to widen and deepen its already very considerable application, not least at the local level. This would involve a major deregulatory push in the form of adjustment to the means of enforcement and greater stress on the facilitative – pro-enterprise – role of regulators.

Hampton elaborated a series of principles for regulatory enforcement:

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most.
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.
- All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted.
- No inspection should take place without a reason.
- Businesses should not have to give unnecessary information, nor give the same piece of information twice.
- The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions.
- Regulators should provide authoritative, accessible advice easily and cheaply.
- When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed.
- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work.
- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.[91]

[90] *Hampton Review*. And see BRC, *Risk, Responsibility, Regulation: Whose risk is it anyway?* (2006).

[91] *Hampton Review*, p. 43.

Chancellor of the Exchequer Gordon Brown spoke of a new era of trust (which today, in light of the happenings in the financial sector, appears remote!):

> In the old regulatory model – which started in Victorian times – the implicit regulatory principle has been 100% inspection of premises, procedures and practices irrespective of known risks or past results. The theory has been to inspect every one continuously, demand information whole-scale, and require forms to be filled in at all times, the only barrier to the blanket approach being lack of resources. The new model we propose is quite different. In a risk based approach there is no inspection without justification, no form filling without justification, and no information requirements without justification. Not just a light touch but a limited touch. Instead of routine regulation attempting to cover all, we adopt a risk based approach which targets only the necessary few.
>
> A risk based approach helps move us a million miles away from the old assumption – the assumption since the first legislation of Victorian times – that business, unregulated, will invariably act irresponsibly. The better view is that businesses want to act responsibly. Reputation with customers and investors is more important to behaviour than regulation, and transparency – backed up by the light touch – can be more effective than the heavy hand. So a new trust between business and government is possible, founded on the responsible company, the engaged employee, the educated consumer – and government concentrating its energies on dealing not with every trader but with the rogue trader, the bad trader who should not be allowed to undercut the good.[92]

A further round of institutional reform was part of the logic:

> Some of the problems identified . . . are rooted in, or exacerbated by, the complicated structure of regulation in the UK . . . There are many small regulators at national level – of the 63 regulators covered by the review, 31 had fewer than 100 staff, and 12 had fewer than 20. Small regulators, although focused, are less able to join up their work, and are less aware of the cumulative burdens on businesses. It is more difficult and more expensive to have a comprehensive risk assessment system if data is split across several regulators with similar areas of responsibility. In such circumstances, a holistic view of business risk becomes difficult, if not impossible.[93]

We dealt earlier with the Legislative and Regulatory Reform Act as a discreditable attempt by ministers to undermine Parliament's constitutional prerogatives (see p. 168 above). But this should not obscure its important role in promoting compliance with the principles of better regulation. As well as removing or reducing burdens (see further below), Part I permits the minister by order to create or abolish regulatory bodies and transfer functions, amend the constitutions of statutory regulatory bodies and modify the way in which regulatory functions are exercised, under this broad rubric.[94]

[92] HM Treasury, *Chancellor launches Better Regulation Action Plan*, press release 24 May 2005.
[93] *Hampton Review*, p. 6.
[94] LRRA, s. 2.

Hampton had set in train a mass cull of separate agencies, with the landscape of administrative law becoming home to an expanded breed of 'super-regulators'.[95] Take the Health and Safety Executive (HSE). It is now merged with its erstwhile twin, the Health and Safety Commission, so integrating an array of informational, advisory and lobbying functions.[96] To the not inconsiderable remit of the safety of workers and the public in workplaces are added some very particular regulatory responsibilities, e.g. those of the Adventure Activities Licensing Authority. How long – echoing concerns about the new CEHR (see p. 70 above) – before serious complaints are generated of an unwieldy and/or insufficiently specialist agency?

Hampton also triggered substantial rationalisation of the regulatory activities of local government in the important domains of trading standards and environmental protection. At the heart of this is the rapid emergence of the 'Local Better Regulation Office', first as a government-owned company, and now on a statutory footing with powers to issue guidance to local authorities (with a backstop power to direct compliance).[97] Subject in turn to ministerial powers of direction, guidance and review,[98] LBRO is clearly intended to be a significant player in the close regulatory web or network being spun. LBRO's remit is to:

- get local authorities to adopt risk-based enforcement and reduce the number of business inspections and information requests
- manage up the quality of local enforcement services
- give local authorities a smaller and agreed list of priority areas for enforcement,[99] instead of the long and unprioritised list they get at present
- better co-ordinate local enforcers so that (i) business receives consistent advice on compliance and (ii) multi-size business gets a clear home or lead authority, instead of regulation by multiple authorities. [100]

(b) 'Regulatory Procedures Act'

Breaking new ground in our administrative law system, LRRA Part 2 contains important provisions on the exercise of regulatory functions. Earlier 'soft law' statements of better regulation are given a harder edge across the piece:

> Any person exercising a regulatory function . . . must have regard to the [following] principles: (a) regulatory activities should be carried out in a way which is transparent,

[95] HM Treasury, *Implementing Hampton: From enforcement to compliance* (2006).
[96] See Legislative Reform (Health and Safety Executive) Order 2008, SI No. 960.
[97] RESA, ss. 6–7.
[98] RESA, ss. 15–17.
[99] See the *Rogers Review of National Enforcement Priorities for Local Authority Regulatory Services* (Cabinet Office, 2007).
[100] HM Treasury, *Implementing Hampton*, p. 48. Hampton had envisaged a yet more powerful Consumer Trading Standards Agency.

> accountable, proportionate and consistent; (b) regulatory activities should be targeted only at cases in which action is needed . . .
>
> In this Act 'regulatory function' means –
>
> (a) a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or
> (b) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity.[101]

Supplementing this is ministerial power to make a statutory code – tertiary legislation – to which, when 'determining any general policy or principles' or 'setting standards or giving guidance generally', a regulator must also have regard.[102] The framework governs most statutory regulators, including many 'super-agencies';[103] so too, a long list of 'executive' regulatory functions exercised by ministers or by local authorities in England and Wales.[104] As an authoritative distillation of 'best practice', the end product may be likened to a miniature 'Regulatory Procedures Act'. Presented as 'a central part of the Government's better regulation agenda', the Regulators' Compliance Code enshrines Hampton's recommendations about enforcement activity:[105]

- *Economic progress* – regulators to consider the impact of their regulatory interventions on economic progress and to keep their activities under review with a view to minimising burdens, especially for small business.
- *Risk assessment* – to precede and inform all aspects of approaches to regulatory activity. Risk methodologies to be regularly reviewed and updated.
- *Advice and guidance* – regulators to provide general information, advice and guidance to make it easier for regulated entities to understand and meet their obligations.
- *Inspections* – to be justified and targeted on the basis of risk assessment.
- *Information requirements* – regulators to balance the need for information with the burdens this entails for operators. Regulatory data to be shared where this is practicable, beneficial and cost effective.
- *Compliance and enforcement action* – regulators to incentivise and reward good levels of compliance, for example by lighter reporting requirements. Sanctions policies to be consistent with 'Macrory penalties principles' (see p. 263 below).

[101] LRRA, ss. 21, 32.

[102] LRRA, s. 22. So replacing a voluntary code, *Enforcement Concordat: Good practice guide for England and Wales* (1998), which had in turn replaced the Conservatives' one: DTI and Citizen's Charter Unit, *Working with Business*.

[103] In some areas of economic regulation, there is a sector-specific version: see e.g. Communications Act 2003, s. 3 (OFCOM).

[104] Legislative and Regulatory Reform (Regulatory Functions) Order 2007, SI No. 3544. Devolution allows Scotland, Wales and Northern Ireland to go their own way: LRRA, s. 24.

[105] BERR, *Regulators' Compliance Code* (2007).

- *Accountability and process* – regulators to ensure effective consultation and feedback opportunities and to provide effective and timely complaints procedures.

This is a milestone in the ongoing juridification of UK regulatory policy and practice. As so often with tertiary legislation the precise legal effects are hard to pin down however. In principle, judicial review is a possibility (failure to give specific obligations due weight). Any decision to depart from the Code would need to be carefully reasoned and based on material evidence. Then again, the framework operates subject to any other legal requirement affecting the exercise of a regulatory function (including of course EC obligations). While the inspector should operate in accordance with general policy or guidance, the Code does not apply directly to enforcement activity in individual cases.

(c) Arculus

Appearing in tandem with Hampton, the Arculus review *Regulation: Less is more* had as its chief target the administrative costs of regulation to business. It recommended a massive dose of audit-style technique: burdens should be measured[106] and, through a system of departmental simplification plans, reduction targets agreed, across Whitehall.

By 'simplification' Arculus in fact meant a wide range of administrative law actions, which businesses as 'stakeholders' should be actively encouraged to suggest:[107]

- *Deregulation* – removing regulations from the statute book, leading to greater liberalisation of previously regulated regimes
- *Consolidation* – bringing together different regulations into more manageable form and restating the law more clearly
- *Rationalisation* – using 'horizontal' legislation [such as a general duty not to trade unfairly] to replace a variety of sector-specific 'vertical' regulations and resolving overlapping or inconsistent regulations
- *Administrative burden reductions* – making forms simpler or clearer, increasing the intervals between information requests, sharing data etc.

This presented an ongoing challenge to government since with a view to promoting change in the regulatory culture Arculus demanded that departments identify offsetting measures when introducing new administrative burdens. The inherently crude approach of 'one in, one out' was championed as an:

> easily understood description of the way we want people who are involved in putting administrative burdens on others to think and to behave. It is about prioritising, about

[106] According to a rough and ready model of 'standard cost' borrowed from the Netherlands: *Arculus Review*, pp. 12, 19–23.

[107] HM Treasury, *Simplification Plans* (2006), p. 5.

> putting the more important things ahead of the less important, and accepting that, if we try to do everything, we know that either we ourselves or those around us will not be able to cope. Regulatory bodies need to work out which are the most important regulations, which we can do without and which ones can be removed from the regulatory basket. If ministers do want new laws they will need to . . . drop other proposals – thus *stemming the flow*, or repeal existing laws – thus *reducing the stock*.[108]

Arculus spoke of achieving 'an outstanding return on investment for the UK – potentially a greater than 1% increase in GDP'.[109] Rules and regulations being such a major output function of (New Labour) government, one is entitled to be sceptical. A strong start has been made however. The measurement exercise having identified annual administrative costs from regulation of £13.4 billion, departments committed to the challenging target of a 25 per cent net reduction by 2010. By early 2008, some twenty separate simplification plans were up and running, containing hundreds of detailed proposals.[110] And 'audit of audit', the NAO has been specifically tasked with evaluating their delivery.[111] How different is all this from 'good regulation' Conservative style? The pendulum had swung back.

Take the HSE, which 'deals with many areas of the economy where strong regulation and enforcement are key to public confidence'.[112] Illustrating how the different policy strands are interwoven, a 'Sensible Risk Management' initiative, designed as the name suggests to encourage a more proportionate approach to assessing and managing risk in the work-place, is centre-stage in the agency's simplification plan. As well as 'forms projects' designed to reduce agency-inspired paperwork, flanking developments include such determinedly practical measures as a simplified process for checking building contractors' competence, rationalising the guidance on control of hazardous substances to make it more accessible, and re-targeting inspection of heavy industrial equipment. Perhaps hopefully, agency officials believe that 'none of the changes will result in a reduction in worker or public safety';[113] if so, it is a remarkable indictment of previous regulatory practice.

Woe betide the 'arm's length' agency that does not toe the line. Should restructuring under the LRRA seem a little drastic then ministers are empowered under Part 4 of RESA to require regulators to review the burdens they impose, reduce any that are 'unnecessary' (disproportionate), and report

[108] *Arculus Review*, p. 6. Revamping an over-loaded impact assessment system was part of the package.
[109] *Ibid*., p. 3.
[110] BERR, *Delivering Simplification Plans: A summary* (2008). See further, Regulatory Reform Committee, *Getting Results: The Better Regulation Executive and the impact of the regulatory reform agenda*, HC 474 (2007/8).
[111] NAO, *Reducing the Cost of Complying with Regulations,* HC 615 (2006/7).
[112] HSE, *Simplification Plan 2006: Executive summary.*
[113] *Ibid.*

annually on progress.[114] From a legal standpoint, this is one step on from the generalised taking-account requirements of the Regulators' Compliance Code. The guidance duly warns of judicial review if an agency's review 'is of insufficient detail'.[115]

(d) Macrory

Tasked with ensuring that, as Hampton recommended, sanctions are 'consistent and appropriate for a risk based approach to regulation',[116] the Macrory review, *Regulatory Justice: Making sanctions effective*, focused on classic compliance issues. Ministers quickly embraced the central recommendation of a more flexible and transparent set of regulatory sanctions designed to 'reduce the burden on legitimate business by dealing effectively with the rogues and reducing the need for inspection'.[117]

Macrory confirmed the fact of a highly fragmented set of arrangements heavily reliant on criminal prosecution should operators prove unwilling or unable to follow advice and comply with legal obligations.[118] Largely centred on the magistrates' courts, and, commonly, offences of strict liability [119] punctuated from time to time by high-profile prosecutions (as in the notoriously difficult matter of 'corporate manslaughter'[120]), this constituted a blunt instrument:

> Criminal sanctions currently are often an insufficient deterrent to the 'truly' criminal or rogue operators, since the financial sanctions imposed in some criminal cases are not considered to be a sufficient deterrent or punishment . . . In instances where there has been no intent or wilfulness relating to regulatory non-compliance a criminal prosecution may be a disproportionate response . . . Criminal sanctions are costly and time-consuming for both businesses and regulators. In many instances, although non-compliance has occurred, the cost or expense of bringing criminal proceedings deters regulators from using their limited resources to take action. This creates what has come to be known as a *compliance deficit*.
>
> Criminal convictions for regulatory non-compliance have lost their stigma, as in some industries being prosecuted is regarded as part of the business cycle. This may be because

[114] The duties apply automatically to the big economic regulators like OFCOM and OFWAT. See further, Select Committee on Regulators, *UK Economic Regulators* HL 189 (2006/7), Ch. 7.

[115] BERR, *Guide to the Regulatory and Enforcement Bill* (2007) 51.

[116] *Macrory Review*, p. 4.

[117] Cabinet Office press release, 28 November 2006. So following in the footsteps of other common law countries: see C. Abbott, 'The regulatory enforcement of pollution control laws: The Australian experience', (2005) 17 *JEL* 161.

[118] K. Hawkins, *Environment and Enforcement: Regulation and the social definition of pollution* (Oxford University Press, 1984); D. Vogel, *National Styles of Regulation: Environmental policy in Great Britain and the United States* (Cornell, 1986).

[119] See A. Simester, *Appraising Strict Liability* (Oxford University Press, 2005).

[120] But see the Corporate Manslaughter and Corporate Homicide Act 2007. The Act lifts Crown immunity to prosecution.

> both strict liability offences committed by legitimate business and the deliberate flouting of the law by rogues is prosecuted in the same manner with little differentiation between these two types of offender . . .
>
> Since the focus of criminal proceedings is on the offence and the offender, the wider impact of the offence on the victim may not be fully explored. There has been a limited evolution of the rights and needs of victims in the area of regulatory non-compliance.[121]

An expansive sanctions 'tool kit' that includes administrative fines and other non-criminal penalties was identified as the way forward, coupled with careful targeting and general use of variable and fixed monetary administrative penalties (MAPs).[122] As well as greater flexibility in the design of statutory notices, traditionally geared towards criminal sanctions, a role in cases of serious breach for enforceable undertakings was recognised. Voluntary but legally binding agreements of this kind provide a means for taking industry considerations and resources into account and for redress to affected parties.[123] Fitting with emergent EU requirements centred on environmental protection,[124] the use of criminal procedure could then be refined and sharpened.[125] Regulators could be expected to opt for prosecution over civil sanctions in 'top-end' offences such as cartels (the OFT), deliberate or reckless industrial pollution, and corporate killing (the HSE). MAPs would typically occupy the middle ground, with statutory notices clustered round minor or technical breaches.

The concepts of 'responsive' and 'smart' regulation thus gained tangible expression. A capacity to move up and down the hierarchy (or 'enforcement pyramid') of sanctioning options is implicit, underscoring flexibility. Subsequently incorporated in the Regulators' Compliance Code, the 'Macrory penalties principles' deal with structuring sanctions. Paralleling a move in the general criminal law, they are designed to open up such possibilities as restorative justice. Sanctions should:

- aim to change the behaviour of the offender (perhaps involving 'culture change within an organisation or a change in the production or manufacturing process')
- aim to eliminate any financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and the regulatory issue ('the regulator should have the ability to use its

[121] *Macrory Review,* pp. 15–16. See also A. Ogus, 'Better regulation-better enforcement' in Weatherill (ed.), *Better Regulation* (Hart, 2007).

[122] So building on major sector-specific developments, e.g. the Financial Services and Markets Act 2000 which affords the FSA a wide range of administrative, civil and criminal sanctioning powers, including MAPs. The Health and Safety Offences Act 2008 is in similar vein.

[123] C. Parker, 'Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings' (2004) 67 *MLR* 209.

[124] See Cases C-176/03 *Commission v Council* [2005] ECR 1-7879 and C-440/05 *Commission v Council* [2007] ECRI–9097; and, latterly, Commission, Directive 2008/99/EC on the Protection of the Environment through Criminal Law.

[125] See further R. Baldwin, 'The new punitive regulation' (2004) 67 *MLR* 351.

discretion and, if appropriate, base its decision on what sort of sanction would help bring the firm into compliance')
- be proportionate to the nature of the offence and the harm caused
- aim to restore the harm caused by regulatory non-compliance (such that 'business offenders take responsibility for their actions and its consequences')
- aim to deter future non-compliance ('firms should never think that non-compliance will be ignored or that they will "get away with it"').[126]

A more flexible sanctioning toolkit demands additional safeguards, most obviously to protect business from heavy-handed implementation. Assuming agency compliance with the Hampton principles of enforcement as a basic requirement, Macrory prescribed a seven-fold operating framework.[127] Regulators should:

- publish an enforcement policy
- measure outcomes ('impact') not just outputs (numbers of agency interventions)
- justify their choice of enforcement actions year on year to stakeholders, ministers and Parliament
- follow up their enforcement actions where appropriate
- enforce in a transparent manner (e.g. disclosing when and against whom action has been taken)
- be transparent in the way in which they apply and determine administrative penalties
- avoid perverse incentives that might influence the choice of sanctioning approach (e.g. internal 'targets' for different types of enforcement action or correlation with salary bonuses).

This too is taken up in the statutory code. Take accountability, where further emphasis is laid on the regulator's responsibility to render itself responsible:

> Regulators should ensure that clear reasons for any formal enforcement action are given to the person or entity against whom any enforcement action is being taken . . . Complaints and relevant appeals procedures for redress should also be explained . . .
>
> Regulators should provide effective and timely complaints procedures . . . that are easily accessible to regulated entities and other interested parties. They should publicise their complaints procedures, with details of the process and likely timescale for resolution. Complaints procedures should include a final stage to an independent, external person.

Creating a specialist regulatory tribunal, whereby MAPs would be made compliant with the institutional-procedural requirements of Art. 6, was the obvious

[126] *Macrory Review*, pp. 30–1. And see K. Yeung, *Securing Compliance* (Hart Publishing, 2004).
[127] *Ibid.*, pp. 32–3.

next step.[128] This fits both with a trend in economic regulation, where new life is breathed into the tribunal technique (see p. 321 below), and, in the form here of a 'General Regulatory Chamber', with the general move to a unified tribunal system able to accommodate new specialisms (see Chapter 11).

(e) New dispensation

Reworking Macrory's ideas, Part 3 of RESA provides for four broad categories of civil sanctions, which will now be available to regulators of all shapes and sizes:[129]

- fixed monetary penalty, with the amount of the relevant penalty prescribed in statutory instrument
- imposition of 'discretionary requirements', which include (a) variable monetary penalty, (b) 'compliance notice', requiring the operator to take specified steps to ensure that the offence does not continue or recur, and (c) 'restoration notice', requiring specified steps to restore the position, so far as possible, to what it would have been had the offence not been committed
- stop notice to prohibit the carrying on of a particular activity until the operator takes specified steps to come back into compliance, coupled with a duty to pay compensation in prescribed cases
- enforcement undertaking.

To levy a fine or impose other discretionary requirements the regulator must be 'satisfied beyond reasonable doubt' that the person has committed the particular regulatory offence; stop orders on the other hand require that the regulator 'reasonably believes that the activity . . . presents a serious risk of causing serious harm', and enforcement undertakings 'reasonable grounds to suspect' that the offence has been committed. Official estimates suggest that 30,000–40,000 prosecutions each year could metamorphose into civil sanctions. With rights of appeal both on liability and sanction, the General Regulatory Chamber may expect to be busy.

By choosing not to prosecute, regulators would be 'effectively ousting the jurisdiction of the ordinary courts'.[130] Invoking Dicey, the Lords' Constitutional Committee thus bewailed the looming 'transfer, on an unprecedented scale, of responsibilities for deciding guilt and imposing financial sanctions . . . away from independent and impartial judges to officials'. However, much like the famous Donoughmore Committee (see p. 36 above), this very contemporary articulation of 'red light' concerns was ill fated. Able to deploy in the politi-

[128] *Macrory Review*, pp. 53–6.

[129] RESA ss. 39–50 and Schs. 5–7. Echoing the compliance code, a regulator must publish detailed guidance on its enforcement and sanctions policies and be prepared to 'name and shame': RESA ss. 63–5.

[130] CC, *Regulatory Enforcement and Sanctions Bill,* HL 16 (2007/8), p. 3.

cal arena the twin facts of tribunal appeal and judicial review, ministers were well placed to see off this fundamentalist challenge to the onrush of regulatory power.

Ministerial tentacles are everywhere in what may be likened to a licensing system. Regulators are not automatically awarded the new powers. Rather, it is a matter of discretion to make rules by statutory instrument.[131] In order to be eligible, the minister must be satisfied that a regulator is in compliance with – of course – the five general principles of better regulation. This is the realm of 'Hampton implementation reviews' involving the NAO. The minister may also give directions suspending and revoking suspensions of regulators' powers to apply the sanctions in relation to particular offences (e.g. when the minister is satisfied that the agency has regularly failed to abide by Hampton principles of enforcement in that context).[132] Looking forwards, a patchwork of rules and regulations could result, a re-fragmented framework in which civil sanctions are available from time to time. 'The arrangements . . . risk being too complex and inaccessible to conform to one of the most basic facets of the rule of law, namely that the laws ought to be reasonably certain and accessible', warned the Constitution Committee.[133]

Whereas Macrory was concerned to increase public confidence, not least by establishing a more transparent system, much was heard in the legislative debates of the dangers of an adversarial 'ticket-writing culture' and of the regulatory focus shifting from 'catching the rogues' onto legitimate business.[134] Significant concessions were extracted under the banners of procedural fairness and protection from abuse of power. Thus procedures for levying fixed as well as variable monetary penalties must include a 'notice of intent' stage, so allowing the person to make written representations before the final decision is made; a monetary penalty cannot exceed the maximum fine for a summary offence. Importantly however, the Government resisted calls[135] for caps on variable monetary penalties for the more serious offences. The policy of being able to capture the benefit gained from non-compliance – a 'big stick in the cupboard' – would otherwise have been compromised.

(f) Consumer voice: Super-advocate

Regulatory arrangements designed for an age of international capital inevitably raise the question: who, amid the cacophony of voices, is actually heard? Echoing the general move in administrative law beyond individual protection to issues of collective access (see Chapter 4), the 2006 DTI *Consultation*

[131] Via affirmative resolution procedure: RESA ss. 36, 62. 'Ministers' for these purposes includes Welsh ministers.
[132] RESA ss. 66–8.
[133] CC, *Regulatory Enforcement and Sanctions Bill*, p. 2.
[134] See e.g. HL Deb., vol. 701, cols. 8–40 (third reading).
[135] CC, *Regulatory Enforcement and Sanctions Bill*, p. 4.

on Consumer Representation and Redress carefully emphasised the range of modalities:

> There are different forms of representation that consumers require. They value contact that can provide helpful information and advice. They may have complaints that need resolution or redress. And they need their interests to be promoted in the formulation and implementation of the policy framework within which everything happens. [136]

Conservative privatisation cast a long shadow. As explained further in Chapter 7, disparate consumer bodies had been created following the sector-specific model of the Ofdogs to whom they were largely subservient. Despite best efforts in policy development and advocacy, the National Consumer Council, set up as a company in 1975 and largely funded by the Government, was never able to make good the deficiency.[137] As part of the quest for a more rounded approach to economic regulation, fresh-faced New Labour had in turn focused on separating consumer representation from the regulatory offices so as to 'encourage more open debate on regulatory decisions and raise the profile of consumers within the regulatory process'.[138] As DTI made clear, the resulting hotchpotch of independent consumer councils, each with its own dedicated staff and resources, defined functions and rights to information, was no longer considered fit for purpose:

> The fragmented nature of consumer representation in the UK means that there is not a single, coherent, voice for the consumer which can reflect priorities across the different markets, or which can speak with expertise and authority for all consumers in discussion with companies, with Government, or in Europe. Consolidation. . . into a single, coherent, body would bring a number of specific benefits, including the critical mass to engage effectively. . . and the benefit of being able to draw on experience and expertise from a number of sectors. The new structure should also allow a reduction in the overall cost of consumer representation. [139]

This dovetailed with Hampton's view of an institutional geography of super-regulators. In this way 'manipulation' and 'therapy' or relegation to the bottom rungs of Arnstein's 'ladder of participation' (see p. 173 above) would be avoided, or so the argument went:

> The new 'Consumer Voice' would bring together specific duties and powers held by the existing sectoral consumer bodies with the National Consumer Council's remit as a

[136] DTI *Consultation on Consumer Representation and Redress* (2006) [2.4]. And see M. Harker, L. Mathieu and C. Price, 'Regulation and Consumer Representation' in Crew and Parker (eds.), *International Handbook on Economic Regulation.*

[137] See NCC, *In the Absence of Competition* (HMSO, 1989).

[138] DTI, *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*, Cm. 3898 (1998), p. 16.

[139] DTI, *Consultation on Consumer Representation and Redress* [2.19].

> wide-ranging single, independent, consumer champion, creating a powerful body, able to target resources appropriately to tackle consumer detriment wherever and whenever it emerges.
>
> The main functions of Consumer Voice would be to represent consumers in all markets, and provide information and advice on the consumer perspective to business, to Government, and to sectoral regulators. Consumer Voice would undertake cross-sectoral research proactively to identify key consumer issues, and play a key role in formulation of public policy both in the UK and in Europe . . . Sectoral duties that Consumer Voice would need to take on would include input into price reviews or other proposals that would have a major impact on consumers. The arrangements to establish Consumer Voice would take account of the need to retain sectoral expertise.[140]

The legal base is Part 1 of CEARA, the Consumers, Estate Agents and Redress Act 2007. In providing for three core elements, (a) representative function, (b) information function, and (c) research function, the Act speaks generously of the 'consumer' and of 'consumer matters', so ensuring a broad and flexible jurisdiction.[141] Subsequently given the title 'Consumer Focus', the new body has a regional presence in the different parts of the UK.[142] In determining priorities, it is required to proceed in transparent and consultative fashion through forward work programmes.[143] Illustrating the need for different actors to work constructively together, 'co-operation arrangements' must be entered into, including with the Office of Fair Trading, which continues to take the lead on consumer protection. The watchdog has powers to demand information from regulators and from operators but these are hedged round by ministerial restriction and cumbrous procedures.[144]

Some sectoral arrangements such as the gas and electricity and postal sectors fit better together than others; other bodies such as OFCOM's 'consumer panel', essentially concerned with policy advice, have been left intact.[145] But given the basic prescription of cohesion, empowerment and simplification, the new super-advocate can be expected to grow; there are many little-known consumer bodies that could easily be incorporated in a 'one-stop shop'.[146] Whether the consolidation comes at the expense of loss of focus – too many diverse topics for the 'super-advocate' properly to handle – remains to be seen.

[140] *Ibid*. [2.10] [2.12].

[141] 'Consumer' means 'a person who purchases, uses or receives . . . goods or services which are supplied in the course of a business': CEARA, s. 2.

[142] CEARA, s. 1 and Sch. 1. See further, Consumer Focus, Work Programme to March 2010 (2008).

[143] CEARA, s.10. Back-up powers include the power to investigate 'any matter which appears to the Council to be, or to be related to, a problem which affects or may affect consumers generally or consumers of a particular description'.

[144] CEARA, ss. 19, 23–8.

[145] See for details, DTI, *Summary of Responses and Government Response to Consultation on Consumer Representation and Redress* (2006).

[146] Examples are the Air Transport Users' Council and the Rail Passengers' Council.

Better complaints and redress systems are part of the package. Effectively standardising 'best practice', CEARA further empowers regulators to prescribe complaints-handling standards and the minister to insist that operators join an industry scheme such as an ombudsman.[147] 'Consumer Direct', a government-created telephone and on-line advice service, has been extended to cover enquiries and simple complaints in those sectors covered by the new super-advocate.[148] From the perspective of administrative law, this all illustrates the holistic idea of individual and collective 'voice', and more particularly the 'improvement' role of grievances, an aspect on which we focus in Chapter 10. 'Complaints data flowing back to Consumer [Focus] from Consumer Direct and the ombudsman [systems] will be a key input to the advocacy work.'[149]

6. Risk-based regulation

In earlier chapters we have emphasised the place of RBR as the dominant regulatory policy in recent years. It is then important to examine the way in which RBR operates in practice, with a view to assessing its place in administrative law. An appropriate angle of approach is in terms of rules and discretion, with RBR as a method of supposedly rational reasoning which structures and confines the agency's exercise of power. The determinedly mathematical style further attests the broad influence of audit technique.

Encapsulating the better regulation principle of 'targeting', RBR means (i) setting regulatory standards on the basis of assessment of risks of a given sector or activity; and (ii) assessing the risks that individual operators pose to an agency's goals and ordering regulatory activities accordingly. The methodology covers a wide spectrum of approaches: from an entire risk-based perspective or framework of regulatory governance to, at a minimum, the piecemeal use of technical risk-based tools commonly grounded in cost–benefit analysis.[150] Further illustrating how IT transforms the structures and use of public power, as with 'screen-level' and even 'system-level' bureaucracy (see p. 197 above), it is characterised by 'a move away from informal qualitatively based standard setting towards a more calculative and formalised approach'.[151] Imagine trying to construct and apply the targeting technologies described below using an old-fashioned card index!

The Environment Agency is a leader in the field, the more so in the light

[147] CEARA, ss. 42, 46–50. Otelo, the first established ombudsman for electronic communications, provided a model.

[148] See DTI *Consultation on Consumer Representation and Redress*, Ch. 5.

[149] *Ibid.* [2.16].

[150] C. Hood, H. Rothstein and R. Baldwin, *The Government of Risk: Understanding risk regulation regimes* (Oxford University Press, 2004); E. Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, 2007).

[151] B. Hutter, *The Attractions of Risk-based Regulation* (Centre for Risk and Regulation, 2005), p. 3.

of burgeoning EU requirements.[152] The risk-based format is part of a self-consciously 'modern approach' to regulation.[153] At the heart of this is 'Operator and Pollution Risk Appraisal' (OPRA), a screening methodology for profiling businesses which graphically illustrates the multiple factors and enumerations associated with the basic formula: *risk* = *impact* x *probability*. Take the hazards of industrial pollution:

> First, we look at the environmental risk of the specific processes. This includes the following:
>
> - what hazardous substances are stored?
> - what hazardous substances could be emitted?
> - how frequent is the process and how complicated is it?
> - how is the hazard controlled at source?
> - how are environmental emissions reduced?
> - how sensitive is the local environment to pollution?
> - are emissions likely to cause annoyance, such as a smell?
>
> We give each of these attributes a score from 1 (low hazard) to 5 (high hazard). We then add these together to give a total Pollution Hazard Appraisal (PHA) score. [A] map shows these scores for each process divided into bands – Band A for lowest pollution hazards and Band E for highest pollution hazards.
>
> Then, we look at the operator and their ability to manage the environmental risks of the processes they are engaged in. We look at the following attributes:
>
> - recording and use of information
> - knowledge and implementation of authorisation requirement
> - plant maintenance
> - management and training
> - process operation
> - incidents, complaints and non-compliance events
> - recognised environmental management systems.
>
> We give all of these attributes a score from 1 (low performance) to 5 (high performance) which we then add together to get the Operator Performance Appraisal (OPA). The datasets show Band A for the best operator, down to Band E for the worst operator.[154]

The methodology has increasingly informed the day-to-day enforcement work. The EA regularly founds requests for new plans and adaptations on poor scores for specific items, while sharply limiting the use of inspection post-Hampton.[155] There is however 'a certain level of imprecision . . . We try to be objective but

[152] The ECJ has itself elaborated a broad ranging 'precautionary principle': Case T-70/99 *Alpharma v Council* [2002] ELR II-3475; Case T-13/99 *Pfizer* [2002] ECR II-3305.
[153] EA, *Delivering for the Environment* (2005).
[154] EA, *Pollution hazards* (*IPC OPRA*) (2007), p. 1.
[155] HM Treasury, *Implementing Hampton*, pp. 18–19.

our officers do have to use judgement to apply scores.'[156] The agency has had to introduce a system of regional checks, with a view to ensuring that scores are applied accurately and consistently. Goodin, urging the inevitability of some discretions (see p. 209 above), could have predicted this.

The HSE has long experience of risk-based decision-making. For a national regulator comprising a staff of several thousand, and charged with ensuring compliance in literally hundreds of thousands of workplaces, it could scarcely be otherwise. HSE pioneered a more systematic approach, so detailing the scientific basis and criteria by which it would decide upon the degree and form of regulatory control across myriad sectors.[157] Here as elsewhere, however, public perceptions of risks and what is desirable to contain them are not always reconcilable with the technical 'expert'-driven modelling used in RBR.[158] HSE is well aware that the methodology is contestable:

> It may be [not] be possible to derive a quantifiable physical reality that most people will agree represents the 'true' risk from a hazard . . . The concept of risk is strongly shaped by human minds and cultures. Though it may include the prospect of physical harm, it may include other factors as well, such as ethical and social considerations, and even a degree of trust in the ability of those creating the risk (or in the regulator) in ensuring that adequate prevention and protective measures are in place for controlling the risks . . . Human judgment and values . . . determine which factors should be defined in terms of risk and action made subject to analysis . . .
>
> Even using all available data and best science and technology, many risk assessments cannot be undertaken without making a number of assumptions such as the relative values of risks and benefits or even the scope of the study. Parties who do not share the judgmental values implicit in those assumptions may well see the outcome of the exercise as invalid, illegitimate or even not pertinent to the problem. [159]

(a) 'ARROW'

As a targeting technology ARROW – the elaborate 'Advanced Risk Response Operating Framework' of the Financial Services Authority – has taken RBR to new heights. In modelling the system, the designers naturally began with the statutory objectives assigned the new agency: market confidence, public understanding, consumer protection and reduction of financial crime.[160] However in light of such a broad mandate, considered difficult to operationalise,[161] they focused on how, why and in what circumstances these might *not* be achieved.

[156] EA, *More about OPRA Scores* (2007), p. 1.
[157] HSE, *Reducing Risk, Protecting People* (2001).
[158] As notoriously with food technologies: M. Lee, *EU Regulation of GMOs* (Edward Elgar, 2008).
[159] HSC, *A Strategy for Work Place Health and Safety in Great Britain to 2020 and Beyond* (2004), p. 11.
[160] Financial Services and Markets Act 2000, s. 2.
[161] C. Sergeant, 'Risk-based regulation in the Financial Services Authority' (2002) 10 *J. of Financial Regulation and Compliance* 329.

'Risks to objectives' (RTOs), e.g. financial failure or market abuse, were duly classified as arising from three main sources: external environment, consumer and industry wide developments and the individual institutions themselves. As well as 'watch lists' of particular firms, senior agency officials now felt sufficiently confident to embark on 'risk maps':

> We started out with an impact analysis, and that involved trying to identify measures to show what would be the size of the impact on the FSA's ability to deliver its objectives if a particular risk materialised. We then drew on supervisors' judgements and their existing knowledge of particular sectors and institutions . . . We allocated institutions to four impact bands – high, medium one, medium two and low . . . In cases like banks and building societies, we were looking at total assets and liabilities . . . In other cases, like credit unions, we looked at the number of members as perhaps the best measure . . . Of the 9,000 firms we currently supervise . . . roughly 80% by number of institutions are low impact, roughly 15% are medium two, roughly 4% are medium one and less than 1% is high impact. [Conversely] on market share, the high impact [firms] account for roughly 65% of the total market share, medium one roughly 24%, medium two 8%, and low impact . . . just over 3% . . .
>
> The next stage was to assess the likelihood or probability . . . Particular kinds of risk – credit risk, market risk, operational systems and control risk – involved building up a risk profile of each institution . . . Some of those aspects are quite easy to quantify, questions like financial strength; others of course are much more qualitative and require informed judgement by the regulator – judgement of the quality of management for example. We have also . . . tried to take account of the effect of external environmental factors . . . Problems from one institution in a particular country or a region can quickly spill over into other institutions in that region that have a UK presence . . .
>
> Assessments for high and medium impact firms show that it is only 0.5% of these firms [that are] rated both high impact and high probability – that is probably just as well from a regulator's point of view . . . [162]

It was assumed that the thoroughness of the probability assessment would be driven by the firm's impact rating. Whereas those designated 'low' impact might have little individual supervision, 'high' and 'middling' impact firms should expect visits of varying frequency to review operating and control systems ('meta-regulation'). FSA supervisors should in turn be generating tailored sets of 'risk-mitigation programmes' for firms to adopt: a determinedly contemporary form of 'fire-watching' underwritten by reporting requirements and ultimately enforcement action. Best practice requires the process to be highly dynamic however, such that material changes of circumstance are closely monitored and individual risk assessments adapted accordingly. In particular, 'vertical' (firm-based) supervision needs to be supplemented by

[162] M. Foot, 'Our new approach to risk-based regulation' (FSA, 2000), pp. 2–3. See also, FSA, *A New Regulator for the New Millennium* (2000).

thematic or 'horizontal' analysis of market developments, as under the broad rubric of 'external environment'.[163]

In structuring the exercise of regulatory power, ARROW confines it. Because only the risks to the FSA's own objectives are factored, those relating e.g. to shareholder value typically fall under the radar. 'It is not our role to restrict appropriate risk taking by authorised firms.'[164] A self-assessment lays bare the regulatory philosophy that has prevailed hitherto:

> Given the many possible events that could have a negative effect on the financial markets and our limited resources, our risk-based approach is based on a clear statement of the realistic aims and limits of regulation. In other words, we accept that we can never entirely eliminate risks to the statutory objectives we have been set by Parliament – our 'non-zero failure' approach. And although the idea that regulation should seek to eliminate all failures may look superficially appealing, in practice this would impose prohibitive costs on the industry and consumers . . . We regularly review the amount of risk we are prepared to accept and focus our resources on the risks that matter most. By doing so, we believe we can make the greatest overall difference in the UK financial services market, without stifling competitiveness.[165]

'Regulatory competition' (especially with the American securities markets) has been a main driver. 'Delivering a lighter regulatory touch for those firms that pose less risk to our statutory objectives, [ARROW] has been one of our principal methods of delivering regulation in an efficient and economic way'.[166] As such, it is intimately bound up with FSA experiments in 'principles-based' regulation: the replacement of detailed rules with short, high-level, requirements – e.g. 'a firm must conduct its business with integrity' – and accompanying guidance.'[167] An approach, that is, which assumes a high degree of trust.

Following a lengthy review, the FSA concluded that ARROW needed fine-tuning. Launched in 2006, 'ARROW II' aimed at:

- Better communication with firms concerning our assessment of them;
- Greater efficiency and effectiveness on our management of risk, and sharing and making better use of the knowledge we have;
- Greater proportionality and consistency in response to risks, applying our resources where they will make the most difference;
- Improved skills and supervisory knowledge of our staff;
- A major overhaul to our risk model, allowing better comparison of risks in different areas so we can more reliably devote our resources to the areas of greatest risk. [168]

[163] FSA, *The Firm Risk Assessment Framework* (2006) Chs. 3–4 ('ARROW II').
[164] Foot, 'Our new approach to risk-based regulation', p. 1.
[165] 'ARROW II', p. 7.
[166] 'ARROW II', p. 5.
[167] FSA, *Principles-based Regulation: Focusing on the outcomes that matter* (2007); C. Ford, 'New governance, compliance, and principles-based securities regulation' (2008) 45 *American Business Law Review* 1.
[168] 'ARROW II', p. 6.

(b) Balance sheet

RBR has a range of attractions, not least for the super-regulator. The more mathematical bent gives such agencies a common language, allows for comparison across different parts ('to which sectors should we direct resources?'), and constitutes a means for hierarchical control of junior officers' discretion. As such, this rapidly developing methodology not only echoes the administrative law themes of 'structuring' and 'confining' discretion with rules introduced by Davis (see Chapter 5), but has increasingly operated on a scale and with an intensity he could never have envisaged.

RBR links with other indirect strategies, so helping to frame the mixing of public with private powers typical of 'governance'. Chiefly, it unlocks the potentials of 'meta-regulation'. As the basis on which much in the 'risk maps' is constructed, and monitoring functions performed, gaining leverage through firms' own systems of governance is an article of faith. Agency resources are conserved and the primary responsibility for ensuring appropriate standards is vested where it is thought to belong. In the form of 'responsive regulation', RBR admits of carrots as well as sticks, with suitably conscientious operators earning more autonomy – less supervision – over time.[169] The methodology also allows opportunities for 'co-regulation' with trade associations and professional bodies in the context of a more principles-based approach.[170]

Agencies may also favour RBR as a useful source of legitimacy. The FSA for example has made much of the apparent objectivity and transparency of ARROW: 'From the point of view of those we regulate, our interventions in the marketplace can be justified in terms of the level of risk to our statutory objectives and consequent harm that would otherwise be present.'[171] This however begs the question: 'who decides which "failures" are acceptable and which are not?' Contentious decisions are 'masked in the technical structure of the risk-based framework'. For proper accountability, the regulators themselves 'need to be "turned inside out"'.[172]

Much depends on the regulator's own appetite for risk. While commonly presented as 'light-touch', RBR can prove burdensome for operators by reason of a voracious appetite for data. The calculations themselves may be daunting, not least because of the difficulty of comparing incommensurables in such (contested) fields as health and safety. There is, too, an inherent problem of equity. Things that look rational to the regulator may seem different from the standpoint of individuals who suffer in consequence, as when it turns out

[169] See e.g. 'ARROW II', p. 27. This approach is also prevalent in the public sector, as in the case of 'foundation hospitals': see, M. Goddard and R. Mannion, 'Decentralising the NHS: Rhetoric, reality and paradox' (2006) *J. of Health Organisation and Management* 67.

[170] See e.g. FSA, *Confirmation of Industry Guidance* (2006).

[171] 'ARROW II', p. 7.

[172] J. Black, 'The Emergence of risk-based regulation and the new public risk management in the United Kingdom' (2005) *PL* 512, 547–8.

that small operator 'low impact' firms commonly serve poorer sections of the community. Viewed from the perspective of judicial review, the principles of equality and consistency or non-discrimination cast a shadow.

The risk is that risk-based tools 'will be too literally and slavishly believed in'.[173] Not only is the technical complexity of 'risk maps' apt to obscure the underlying process of reducing structures and activities to numbers. Such apparently rational systems can also gloss over systemic risk or the big picture. The enterprise in fact has a paradoxical flavour. By dealing with uncertainty on the basis that the exercise of public power can be effectively ordered and managed by means of algorithm, RBR runs the risk of hobbling the responsiveness of the agency. 'If the safest thing to do is to follow the framework, the safest thing to do is not to respond to any circumstances or events which are not anticipated by that framework.' [174] In the case of the FSA, such elements have now been brutally exposed by a seizing-up of the financial markets and a sudden economic recession. Future historians will surely remark on how an era of transnational financial speculation – all too easily off the official radar screen – helped constitute the conditions of mass regulatory failure at domestic level.

(c) Disaster

2007 witnessed a harbinger of bad economic climes: the first major run on a British bank since the mid-nineteenth century. An aggressive player in the mortgage-lending market, Northern Rock had fallen victim to the worldwide credit crunch, so being driven – in very public fashion – to seek emergency funding from the Bank of England. Faced with thousands of depositors queuing to withdraw their savings, ministers eventually passed the Banking (Special Provisions) Act 2008, which allowed for nationalisation. While the bank's executives obviously bore primary responsibility for a reckless business strategy (borrowing 'short' and lending 'long'), the City of London's much-vaunted regulatory structure had hardly distinguished itself. According to the Treasury Select Committee, the establishment of a 'tripartite framework', with the Treasury, the Bank of England, and the FSA each having discrete responsibilities for the maintenance of the financial system, had resulted in a lack of leadership and coherent view. And while ARROW sounded well, the FSA had 'systematically failed in its duty as a regulator to ensure Northern Rock would not pose such a systemic risk'.[175] The FSA's own audit confirmed a catalogue of error: no detailed financial analysis; lengthened periods between risk assessments; no risk mitigation programmes failure to re-assess as market conditions worsened and so on. The affair had effectively highlighted the fact that RBR methodology is only as good as the personnel:

[173] Hutter, *The Attractions of Risk-based Regulation*, p. 13.
[174] Black, 'The emergence of risk-based regulation', p. 543.
[175] Treasury Select Committee, *The Run on the Rock*, HC 56 (2006/7), p. 34, and *Financial Stability and Transparency*, HC 371 (2007/8). A permanent statutory regime for dealing with failing banks is now provided by the Banking Act 2009.

> More management time should be spent on assessing and engaging with internal supervisory judgements and decisions, as well as on assessing and challenging firms in particular areas . . . One of the themes emerging . . . has been the apparent ease with which individual members of staff have been able not to comply with established processes (for example recording key meetings, document filing, updating the FSA's database).[176]

Some fine-tuning was suggested, in the form of a supervisory enhancement programme aimed at securing more rigorous use of the existing framework. ARROW, despite the bad miss, remains in place. Yet fuelling the demand for heightened supervision, the problems appear deep-rooted. In light of the subsequent turmoil across the financial markets, a more thoroughgoing agency response has been called for as part of a package of (international) institutional and market reforms. More intrusive and more systemic, the talk now is of 'a major shift' in the FSA's supervisory approach with:

- increased resources devoted to high impact firms and especially large complex banks
- focus on business models, strategies, risks and outcomes, rather than primarily on systems and processes
- development of capabilities in macro-prudential analysis
- focus on technical skills as well as probity of approved persons
- increased analysis of sectors and comparative analysis of firm performance
- investment in specialist prudential skills
- more intensive information requirements on key risks (e.g. liquidity)
- major intensification of bank balance sheet analysis and oversight of accounting judgements
- focus on remuneration policies.[177]

Time will tell.

7. The EU (and global) connection

The scale of regulatory policy-making at Community level is today enormous, ranging from environmental protection to competition law, and consumer product safety to the regulation of banking and financial services. Reasons are not difficult to find. As highlighted in the drive to the Single Market in the 1980s,[178] the profusion of national regulatory regimes has long been recognised as a barrier to Member State trade. Also, Community regulation is a relatively inexpensive instrument of governance for the institutions, which enhances their power and status.[179]

[176] FSA, *Supervision of Northern Rock* (2008), p. 8. And see FSA, *Financial Stability and Depositor Protection* (2008), p. 8

[177] FSA, *The Turner Review: A regulatory response to the global banking crisis* (March, 2009), p. 8.

[178] Commission, *White Paper on Completing the Internal Market*, COM (85), p. 310.

[179] G. Majone, *Regulating Europe* (Routledge, 1996).

The early preference for harmonisation or integrated regulation proved cumbersome, and discouraging of innovation by producers. The so-called 'new approach' was to restrict harmonisation to minimum essential requirements and leave the task of either filling in the details or fixing standards above minimum requirements to the Member States or the Comitology.[180] Post-enlargement, the emphasis has shifted to the principle of subsidiarity, whereby regulation within the EU should be pursued at the lowest level consistent with effectiveness, and 'soft law' techniques of governance such as OMC (see Chapter 5).[181] The Commission has also in the last few years embraced the idea of 'better regulation'.[182] Today, much is heard in Brussels of 'impact assessment' and 'regulatory simplification'.[183]

All this has a profound impact on regulation in the domestic administrative law system. Whether at UK or regional level, government departments, local government and independent agencies have a positive role to play, by virtue of the many shared and indirect elements in the administration of Community law. At the same time, the capacity of domestic regulators and legislators to dictate a regulatory strategy may be closely affected; it has to be remembered that the Commission may take action against Member State infringements of Community law (TEC Arts. 226, 228). The emphasis has been on erosion of national regulatory jurisdictions but there are other more subtle implications for domestic regulatory practice. As the Davidson review showed (see p. 184 above), 'over-implementation' is all too easy. The obligation on the UK government to demonstrate effective compliance with, and enforcement of, Community norms leads inevitably to juridification,[184] centralisation and oversight of local regulatory power – in the context of devolution a potential source of friction.[185] A key UK policy aim in recent years has been the export of 'better regulation' to Brussels.[186] Given the scale of inter-penetration of regulatory law and practice, what otherwise would be the point of a radical national reform agenda?

(a) Rule of networks

Featuring diverse and fluid forms of collaboration and co-ordination across the multi-level system, as also a broad range of actors (ministers and officials,

[180] Premised on the principle of 'mutual recognition', established in the famous *Cassis de Dijon* case: Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[181] Commission, *White Paper on European Governance*, COM (2001) 428.

[182] Commission, *Better Regulation for Growth and Jobs in the European Union*, COM (2005) 97, and *A strategic review of Better Regulation in the European Union*, COM (2006), 689.

[183] Commission, *Action Plan for Reducing Administrative Burdens in the European Union*, COM (2007), 23. See further, Weatherill (ed.), *Better Regulation*.

[184] T. Daintith, 'European Community law and the redistribution of regulatory power in the United Kingdom' (1995) 1 *ELJ* 134.

[185] As evidenced by the collaborative provisions of the *Concordat on Co-ordination of European Union Policy Issues*, Cm. 5240 (2001).

[186] See e.g. the joint statement by the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies, *Advancing regulatory reform in Europe* (2004). For the EU policy development from a UK perspective, see EUC, *Regulation in the EU*, HL 33 (2005/6).

committees and agencies, and public and private bodies and groupings), European regulatory development exemplifies the growth of network governance.[187] This too has important ramifications for national administrative law. Reducing the decision-making burden by co-operating on supervisory approaches and standards with specialist foreign counterparts has obvious attractions, especially with risk-oriented regulatory regimes.

The OFT is part of the 'European Competition Network', a decentralised and multi-level system in which enforcement of EC competition law is a shared responsibility of the Commission and national agencies. Provision for the exchange of confidential information and re-allocation of cases with a cross-border dimension is at the heart of this.[188] Relevant 'soft law' developments promoting consistency include detailed Commission guidelines, a pan-European system of liaison officers and a plethora of working groups for establishing best practice.[189] The OFT thus wears two hats, being part of the domestic administrative law system while becoming increasingly integrated in the EU administration.[190]

We have also seen the rise of 'the European agency'[191] to which national sectoral counterparts will be 'networked' in. We can see this especially with the Food Standards Agency, set up like its European counterpart – the European Food Standards Agency – in the wake of the BSE crisis ('mad cow disease').[192] The national agency's website is replete with contributions to, and opinions emanating from, the scientific advisory work of EFSA. The pace of development is well illustrated by the Civil Aviation Authority's 2006 annual review:

> Aviation regulation in Europe has been changing at almost every level and there is little that the CAA does that is not affected in some way. A few examples make the point: our consumer responsibilities bring us into contact with European rules on denied boarding, cancellations and delays; our airspace responsibilities immerse us in the Single European Sky (SES); our economic work is involving us in Europe-wide discussions on topics such as slot allocation and airspace charging; and our safety responsibilities bring us into close contact with the European Aviation Safety Agency (EASA). EASA is the body which started operations

[187] H. Hofman and A. Turk (eds.), *EU Administrative Governance* (Edward Elgar, 2006); D. Curtin and M. Egeberg (eds), *Towards a New Executive Order in Europe?* (West European Politics special issue, 2008).

[188] Regulation 1/2003 on the implementation of the rules on competition laid down in Arts. 81–2 of the Treaty.

[189] I. Maher, *The Rule of Law and Agency: The case of competition policy* (Chatham House, 2006).

[190] See further, E. O'Neill and E. Scaife, *UK Competition Procedure: The modernised regime* (Oxford University Press, 2007).

[191] D. Gerardin, R. Munoz and N. Petit (eds.), *Regulation through Agencies in the EU: A new paradigm of European governance* (Edward Elgar, 2006). Confusingly however, these bodies are not 'regulatory agencies' as that term is commonly understood in the Anglo-American tradition, being more or less strictly confined to making individualised decisions, to advisory functions and exercising influence, and to information and co-ordination. See further, P. Craig, *EU Administrative Law* (Oxford University Press, 2006), Ch. 5.

[192] Food Standards Act 1999.

> in September 2003 and which is now responsible for aircraft certification and maintenance regulation across Europe. There are plans to add operations and licensing to those responsibilities shortly. [193] All EU Member States and their National Aviation Authorities (NAAs) are committed to the EASA system. For safety regulation this is undeniably the way of the future and promises significant benefits, provided EASA's supporting systems and regulatory framework are fully fit for purpose to realise those benefits, and sound working relationships are fostered between EASA and NAAs throughout Europe. For the CAA, it is crucial that EASA develops the ability to assist us and the British aviation industry in delivery of the Government's key safety policy objective, which is to maintain the UK's present high safety standards, identify possible threats and seek appropriate improvements.[194]

European regulatory harmonisation is facilitated through a bewildering array of formal and informal 'horizontal' networks of national bodies. Some are situated at the heart of the functioning economy, e.g. 'European Regulators Groups' for electricity and gas and for telecommunications, and the 'Committee of European Securities Regulators' (CESR). These influence policy agendas and cannot be lightly dismissed as talking shops.[195] From the standpoint of national administrative law, a growing trend (whereby domestic routines of enforcement become more Europeanised) is very significant. This is illustrated by the creation in 2005 of the Community Fisheries Control Agency, a response to the problem of dwindling stocks and of unscrupulous local practice that Commission infringement action has been unable to halt.[196] While the domestic authorities (for English and Welsh waters, the Marine and Fisheries Agency) remain responsible for securing compliance, CFCA is given powers to coordinate control and inspection activities and the deployment of Member State resources against illegal fishing.

(b) Going global

With the increased exercise of regulatory authority by international or transnational institutions across many fields,[197] national authorities must also master the art of standard-setting on the global stage, not least with a view to enabling national regulatory policies and practices. Examples are all around. Though today much of its policy-making effort is driven by European initiatives, the Financial Services Authority engages with a range of international

[193] Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Authority.
[194] CAA, *Annual Review 2006*, pp. 3–4.
[195] D. Coen and M. Thatcher, *After Delegation: The evolution of European networks of regulatory agencies* (CEPR, 2006).
[196] Regulation 768/2005 establishing a Community Fisheries Control Agency. And see e.g. Case C-304/02 *Commission v France* [2005] I-6263.
[197] J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge University Press, 2000); A-M Slaughter, *A New World Order* (Princeton, 2004).

bodies.[198] Looking forwards, international co-operation and co-ordination in this regulatory sphere will no doubt increase in the wake of the world-wide credit crunch.[199] Or take the CAA, which has 'playing a full part in international aviation organisations in support of the UK's needs' in its mission statement. For a self-styled world leader in the sector, how could it be otherwise? Top of the list is the International Civil Aviation Organisation;[200] national regulation is moulded in its image.

Demonstrating a very wide range of lobbying, negotiating and general networking activity, the case of the Food Standards Agency suffices to underscore the theme:

> With the diverse range of foods from around the globe available to people in the UK and with free trade and markets within the European Union, the Agency aims to ensure that imported foods meet the required UK standards, in order to protect the safety and interests of the consumer. As a result the Agency is playing an increasingly important role internationally, representing the UK Government on joint international bodies and making food safety information available to other countries and organisations. Developing relations with international organisations plays an equally important role, and the Agency has an interest in the work of several international organisations . . . The most significant fora in which other countries participate and the FSA has a varied interest are:
>
> - Codex Alimentarius Commission
> - World Health Organisation (WHO)
> - Food and Agriculture Organisation of the United Nations (FAO)
> - World Trade Organisation (WTO)
> - World Organisation for Animal Health (OIE)
>
> In particular, the FSA negotiates on behalf of the UK Government in the joint FAO/WHO body, Codex Alimentarius Commission, which was created to develop food standards, guidelines and related texts such as codes of practice. By active involvement in meetings and contributing to the EU's input to Codex, the Agency aims to influence the standards set for food traded globally and for better consumer involvement in the development of standards.[201]

8. Conclusion

British regulatory practice has come a long way in a short time, taking on much greater prominence. This reflects in part the transformation in state forms, and in part changes in regulatory style and culture (the processes of formalisation and juridification described in earlier chapters). Illuminating the political dimension of administrative law – so often downplayed – the path

[198] Especially the Basel Committee on Banking Supervision.
[199] See now the communiqué from the G20 Summit in London in 2009.
[200] (Chicago) Convention on International Civil Aviation (9th edn, 2006).
[201] Food Standards Agency, *How we work: International ordering* (2008).

of UK regulatory reform is characterised by mood-swings. The fashion for 'deregulation' inevitably raised concerns about sub-optimal control; attempts at 're-balancing' under the more generous rubric of better regulation have recently led to a conscious effort at 'de-burdening'. European and global forces of marketisation have created a strong lobbying role for domestic agencies in supranational regulatory networks.

State actors have also been experimenting with an array of regulatory tools and techniques. A classic administrative law device like licensing is given fresh twists; anti-trust powers are more widely disseminated among agencies; the new empire of risk-based regulation colonises more and more areas of economic and social life; the future belongs, or so it seems, to 'regulatory justice'. The endless official statements of regulatory principle sound well but there is a real risk of 'over-juridification': regulators being hamstrung by too many rules and too much codification. The process of regulation is itself increasingly regulated. In the name of 'better regulation' bureaucratic regulation is piled on bureaucratic regulation and central control is reasserted through a plethora of directions and guidance.

The most recent phase of UK regulatory reform shows the administrative law landscape changing dramatically. An elite group of super-regulators has emerged as a great power in the land. Officially justified in terms of efficiency and effectiveness, let us hope they do not come to resemble lumbering elephants. Reflecting and reinforcing ideas of 'responsive regulation' and 'collaborative governance', creative blends of government and self-regulation are also much to the fore. Modish techniques of meta-, meso-, and co-regulation show major vulnerabilities however. As with RBR, regulators may be blinded.

Complex mixes of public with private power have been engendered. First came the strong move away from the explicitly 'public' – privatisation coupled with private law. With an eye to good governance values, concerns were raised about the ability of administrative law to reach out and encompass the new modalities (see p. 94 above). Increased 'harnessing' of private power has followed, with self-regulatory systems themselves being hollowed out in the service of the regulatory state. All this presents us with another set of challenges in terms of institutional design and accountability. Today, far from a general retreat of public power, regulatory governance casts a lengthening shadow.