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Regulatory design and accountability

Contents

As major repositories of public power, the institutional design and accountability of regulatory agencies are important matters. The more so, it may be said, in this era of 'super-agencies'. A host of questions arises for the student of law and administration. Will the statutory framework provide sufficient guidance? Is the agency given the appropriate tools for the job? Are good governance values such as transparency properly reflected in the design? Individually and

collectively are the external lines of accountability up to the task? Or are they apt to confuse (or be confused)? We see immediately that, embedded though they now are as generally accepted statements of regulatory best practice, the better regulation principles do not exhaust the field.

'Public + private' as well as 'public vs private',[1] contemporary developments happening under the broad rubric of 'governance' give all this an additional twist. In what ways are self-regulatory organisations (SROs) appropriately harnessed in the public interest? How is the delegation and re-delegation of powers in a co-regulatory system properly organised? Alternatively, a problem exacerbated in the EU context,[2] how in this challenging landscape of overlapping functions and fluid networks can the consumer interest be properly vindicated and effective lines of accountability secured? We will see serious efforts being made to match the advance in agency powers with more open and protective procedures, but this should not be allowed to obscure the underlying potential with systems of governance for 'passing the buck'.

1. The agency model

(a) Risen tide

The rise of agencies in general, and regulatory agencies in particular, is a recurring theme in this book. Consider the position some forty years ago, when, in a comparative study, Schwartz and Wade[3] commented on the sharp distinction with administrative law in the US. The American federal system had long been agency-oriented, partly by reason of the New Deal (see p. 33 above). Instruments of government regulation such as the Interstate Commerce Commission (1887) and the Federal Power Commission (1930) were a chief battleground for law as an instrument of administrative policy and in defence of private rights, and, latterly, for law as a resource for wider, collective interests (interest representation).[4] In contrast, Schwartz and Wade observed, 'this kind of regulatory agency scarcely exists in Britain' and is 'difficult to compare with British institutions'. Perhaps this was an exaggeration, given the role of such bodies as the Monopolies Commission (1948) and the Independent Television Authority (1954), as well as a crop of agencies then on the horizon, including the Civil Aviation Authority (1972) and the Health and Safety Commission (1974).[5] Nonetheless, it conveyed an essential truth, that Britain did not have a strong tradition of using the agency model of government regulation.

[1] L. Salamon in Salamon (ed.), *The Tools of Government: A guide to the new governance* (Oxford University Press, 2002).

[2] J. Scott and D. Trubek, 'Mind the gap: Law and new approaches to governance in the European Union' (2002) 8 *ELJ* 1.

[3] B. Schwartz and H. Wade, *Legal Control of Government* (Clarendon Press, 1972).

[4] See for an excellent overview, G. Lawson, *Federal Administrative Law*, 3rd edn (West, 2004).

[5] T. Prosser, *Law and the Regulators* (Clarendon Press, 1997), Ch. 2; M. Moran, *The British Regulatory State* (Oxford University Press, 2003), Ch. 3.

One explanation lay in the dominant Westminster style of government. Premised on ministerial responsibility, and so on a simple principal-agent model or chain of delegation[6] from legislature to executive and hence civil servants, the centralist practices of parliamentarianism did not readily permit the development of independent regulatory agencies (IRAs).[7] In addition, agencies that combine powers treated as distinct in Dicey's 'balanced constitution' were considered constitutionally awkward or even monstrous.[8] Another explanation is of course the post-war preference for public ownership as distinct from the private sector-plus-regulator model. Schwartz and Wade believed that 'it would never be thought right' in Britain to devolve the control of major industries such as rail or power 'where decisions of the utmost political and economic importance have to be taken and for which responsibility to Parliament is indispensable'.[9]

Conversely, the explanations for the rise of the regulatory agency go beyond political fashions. Independence from, or an arm's-length relationship with, government is said to facilitate the continuity of, and flexibility or responsiveness in, policy formulation and implementation, and also a disinterested expertise. In addition, that is, to helping to deflect criticism or political responsibility and reducing government overload.[10] The specialist, multi-functional agency fits well the model of government regulation as sustained and focused control. Expressive of the demand for 'joined-up' regulatory activity, as well as for economies of scale, the new breed of super-agency reflects and reinforces these general elements, not least in complex and contested matters of risk regulation. And the push in this direction from Europe is ongoing.

Two parliamentary reports show just how far the UK administrative law system has travelled. In a wide-ranging study of regulatory accountability published in 2004, the Constitution Committee (CC) aimed to reconcile the values of independence and control. Post-privatisation there was however no rolling back the agencies. 'Traditional mechanisms of accountability may therefore have to be reinforced, or reviewed and adapted, where necessary, to the new arrangements.'[11] A 2007 review of economic regulators by the ad hoc Select Committee on Regulators (RC) assigned 'quasi-constitutional status' to what

[6] D. Kiewiet and M. McCubbins, *The Logic of Delegation* (University of Chicago Press, 1991); K. Strom, W. Muller and T. Bergman (eds.), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, 2003).

[7] The use of boards and commissions had declined in the nineteenth century as government expanded and Parliament demanded more direct ministerial control of state activity; see Ch. 2 above.

[8] R. Baldwin and C. McCrudden, *Regulation and Public Law* (Weidenfeld & Nicolson, 1987), Ch 1.

[9] Schwartz and Wade, *Legal Control of Government*, p. 41. C. Walker, 'Governance of the critical national infrastructure' [2008] *PL* 323, gives another perspective.

[10] See on the broad historical development, M. Everson, 'Independent agencies: Hierarchy beaters' (1995) 1 *ELJ* 180; and M. Thatcher, 'Regulation after delegation: Independent regulatory agencies in Europe' (2002) 9 *JEPP* 954.

[11] CC, *The Regulatory State: Ensuring its accountability,* HL 68 (2003/4), p. 6.

was now tellingly described as 'the regulatory estate'.[12] 'It was taken as read by the regulators, the regulated and the Government that the regulators are to be fully independent and that no undue influence should be put on them at any point.'[13]

While the independence of regulatory agencies from elected authority is commonly regarded as their chief virtue, not least in the markets, the agency model of regulatory governance itself implies sophisticated wiring systems. For reasons of coherence and control, those 'steering' must themselves be 'steered'. In the typically understated language of Whitehall: 'it is helpful for regulators to be given guidance by government on issues that are matters of public policy'.[14] Encompassing such matters as 'standards in public life' (see p. 54 above), but centred in particular on VFM audit (below), flanking techniques of bureaucratic regulation are much in evidence. There is independence, and there is independence.[15]

(b) Design kit

But if powerful regulatory agencies were here to stay, how should they be designed (and evaluated)? Spurred by the evident defects of the Ofdog model (see p. 249 above), the search for 'legitimacy' – as expressed in terms of the core values which agencies need to satisfy in order to merit and receive public approval[16] – became a leitmotif of UK administrative law in the 1990s. An important link was being made with regulatory effectiveness: 'many regulators operate without sufficient legitimacy to do their job with full confidence, weakening the regulatory environment and prompting agencies to operate defensively'.[17]

Baldwin has identified five main sources of agency legitimacy[18] (there is naturally considerable overlap with the various principles of 'good' and 'better' regulation propounded by successive governments[19]):

- *Legislative mandate*: agency action deserves support when authorised explicitly by the people's representatives in Parliament. The greater the agency discretion however, the less a statutory mandate can be used to justify actions and policies.

[12] See HL Deb., vol. 700, cols. 1224–50.
[13] RC, *UK Economic Regulators*, HL 189 (2006/7), p. 71.
[14] BERR, *Government Response to the Select Committee on Regulators* (2008), p. 4.
[15] See further, M. Thatcher, 'The third force? Independent agencies and elected politicians in Europe' (2005) 18 *Governance* 347.
[16] R. Baldwin, *Rules and Government* (Clarendon, 1995). Note also the pioneering study by J. Freedman, *Crisis and Legitimacy: The administrative process and American government* (Cambridge University Press, 1978).
[17] Constitutional Reform Centre, 'Regulatory agencies in the United Kingdom' (1991) 44 *Parl. Affairs* 504, 507.
[18] Baldwin, *Rules and Government*.
[19] As also with a well-known set of models of administrative justice devised by Mashaw: see p. 447 below.

- *Expertise*: traditional rationale for agency model and redolent of 'trust'; sits comfortably with wide agency discretion.[20] Much to the fore, and frequently contested, in the vital arena of risk regulation,[21] it finds tangible expression in judicial 'deference' to highly technical regulatory decisions (see p. 314 below).
- *Efficiency*: range of measures, including productive efficiency (agency costs), contribution to allocative efficiency (for example, by regulating for competition), and contribution to dynamic efficiency (for example, by encouraging product innovation). It is a standard 'better regulation' component in the choice of regulatory instruments by policy-makers and agency officials.
- *Due process*: expressive of the search in public law for a better quality of administrative justice. It places a premium on agencies adopting fair administrative procedures, maximising consistency and equality of treatment, transparency and participation of outside interests. (One might wish to add good governance values and respect for human rights.)
- *Accountability*: view of agency decisions being rendered more acceptable by effective means of scrutiny or 'answerability', which itself is 'a key discipline on regulators'.[22] It is given a very contemporary edge by the new regime of regulatory sanctions (see p. 265 above).

For the architects and controlling minds of agencies there are several key messages.[23] One is of an irreducible core of both legal and administrative elements. 'Strong claims across the board point to regulation that deserves support, generally weak claims indicate a low capacity to justify'. Performance under different headings may also be linked. A regulatory process perceived as unfair could well suffer low levels of co-operation, so impeding fulfilment of the mandate. While trade-offs are inevitable, appropriate weightings being 'the meat and drink' of regulatory debates, institutional designs scoring very poorly in a particular category are best avoided. 'What matters is the collective justificatory power'. Here *theta* values of due process and *sigma* values of efficiency and effectiveness (see p. 61 above) may come into conflict. Formal participation requirements are a rightful democratic attribute and necessary instrument for institutional learning; on the other hand they can be a recipe for delay and indecision (a factor which clearly influenced the Ofdog model).

The practical relevance is illustrated in the evidence to Parliament. Take the model of legislative mandate. This is the standard stuff of administrative law: to step outside the statutory terms of reference is illegitimate or, in the language

[20] See for the classic 'green light' defence of the expert agency, J. Landis, *The Administrative Process* (Yale University Press, 1938).

[21] E. Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007), Ch. 2.

[22] CC, *The Regulatory State*, p. 7.

[23] As elaborated in R. Baldwin and M. Cave, *Understanding Regulation* (Oxford University Press, 1999), Ch. 6.

of judicial review, ultra vires. A broad formulation is typical however, with objectives couched in general terms, pregnant perhaps with conflict. With a view to flexibility and responsiveness, rarely is an agency 'a mere transmission belt for implementing legislative directives in particular cases'.[24] So what constitutes an effective statutory remit?

> The regulators were unanimous in their belief that clarity was the most important quality . . . Clarity enabled regulators to readily understand their purpose, to focus their mind quickly on the work in hand . . . Clarity . . . brought other major benefits: increased legitimacy for the regulator; greater consistency in regulators' decision making; a greater likelihood of an internally well-organised, well-run regulator; greater opportunities to monitor regulatory performance successfully; increased ability for regulated industries and consumers to judge the legitimacy and appropriateness of regulatory policies and actions.[25]

Agencies, the Select Committee on Regulators concluded, are 'most likely to be effective when they are working towards limited and relatively narrowly defined duties and objectives'.[26] But we note the tensions. This is not the logic of New Labour's re-balancing of regulatory policy, with more emphasis on social and latterly environmental factors (see p. 236 above); similarly, the rise of the super-regulator is administrative law code for wide-ranging discretion. We see, too, why ministerial guidance is at such a premium. Varying the constitutional theme of hierarchy of legislative instruments, there also is a significant role for graded systems of primary legislative obligation in structuring agency discretion. DTI explained to the Constitution Committee that regulators operate 'under a hierarchy of statutory duties to achieve a range of public policy objectives . . . Some of these duties express matters which are to be achieved through the exercise of the regulators' functions, others identify issues or concerns which the regulator must take into account when exercising its functions . . . In some cases, though not all, one or more duties is identified as having primacy or precedence over other duties.'[27]

Ambiguities in the legislative mandate make it difficult to determine the effectiveness of an agency in realising its objectives. There are other general problems in measuring performance. Tasked for many years with a three-fold social project[28] (to work towards the elimination of racial discrimination, to promote equal opportunity, and to encourage good relations between people of different ethnic and racial backgrounds) the Commission for Racial Equality, a forerunner of CEHR, is a classic example. What would have happened in the absence of the regulator's efforts? How is the agency's performance to be separated from that of the regulated? And how does it relate to parallel statutory obligations lat-

[24] R. Stewart, 'The reformation of American administrative law' (1975) 88 *Harv. LR* 1667, 1675.
[25] RC, *UK Economic Regulators* , p. 23.
[26] *Ibid*., p. 24.
[27] Evidence to CC, *The Regulatory State*, p. 373.
[28] Under the auspices of the Race Relations Act 1976, s. 43.

terly imposed on most public authorities?[29] Market regulation presents similar difficulties, as when an agency is tasked with promoting sectoral efficiency.

We touch here on a long-standing dispute in law and economics over efficient action or results as a value independent of distributional considerations. Evidencing the more purist market ideology of the time, it was an article of faith that Ofdogs limit themselves as far as possible to the maximisation of economic efficiency.[30] The approach was also designed to shore up agency legitimacy: to help structure and confine discretion, and to ground decisions in technical expertise. Practical workings confirmed however that discretion and dispute were endemic: for example, an agency policy of consumer protection could be at variance with promotion of competition; a price control designed to curb the profitability of the dominant firm might reduce market entry. And should economic criteria enjoy such a dominant position? In view of the Utilities Act 2000 (see p. 253 above), and indeed of the HRA, the retort by Prosser was prescient. Public lawyers 'are concerned . . . to develop theories of non-arbitrary decision-making, which are not necessarily economic based but which involve other conceptions of legitimacy and rights . . . for example, through employment of Dworkin's concept of a right to equal respect and concern . . . The same values [of individual autonomy] used to justify market provision may also justify rights of access to the necessities of life through non-market mechanisms.'[31] Then again, after a period of New Labour, could it be that the Regulators' Committee heralds a swing back?

> It is . . . important that regulators' remits are not continuously expanded . . . When the original privatisation statutes were put in place, the regulators' duties were more focussed than they are now on their economic roles of regulating monopolies, promoting competition and setting prices. Determining which policy issues were for government and which for regulators was therefore relatively clear-cut. However, the later increase in the importance within the regulators' roles of other duties (particularly social and environmental duties) means that there is now a less clear distinction . . . Government should be careful not to offload political policy issues onto unelected regulators.[32]

The Committee's report itself serves to illustrate the slippery nature of 'efficiency'. Take agency costs – never popular. At one with the general picture painted by Hampton (see p. 234 above), those of the chief economic regulators have increased substantially in recent years, totalling almost £700m in 2006–7. The common explanation is more staff. Although minded to warn against 'regulatory creep', the Committee (advised by the NAO) could see no obvious

[29] Race Relations (Amendment) Act 2000 and now the Equality Act 2006. See for relevant 'baseline' research: CRE, *Towards Racial Equality* (2003).

[30] C. Foster, *Privatisation, Public Ownership and the Regulation of Natural Monopoly* (Blackwell, 1992).

[31] T. Prosser, 'Privatisation, regulation and public services' (1994) 1 *Juridical Review* 3, 17: drawing in turn on older legal principles associated with 'common callings' (see p. 344 below).

[32] RC, *UK Economic Regulators*, pp. 24–5.

scope for operational cost savings; the trend was largely attributable to the 'significant extensions in their remits'.[33]

The wider regulatory reform agenda has cast its spell. We saw the quest for economic efficiency exemplified in impact assessment and by the drive for 'simplification' in the wake of Arculus. With agencies having to adhere to better regulation principles their choice of particular instruments and methodologies has also been influenced. 'Regulators should commit to evaluating the impact of their work and monitoring the extent to which they are providing value for money . . . The principles of proportionality and targeting . . . both . . . address aspects of efficiency . . . We would encourage other regulators to consider risk-based regulation more explicitly, particularly as a means of using regulatory resources more efficiently'.[34]

Another piece in the jigsaw, rule design, is a particular concern of administrative law (see Chapter 5). Giving it a highly contemporary edge is the question whether a principles-based approach of the kind pioneered by FSA (see p. 274 above) should be adopted in market regulation more generally. Efficiency gains could be anticipated both in terms of agency resources and administrative burdens on operators; preventing 'loopholes' is also attractive. Looking at it through the lens of small and medium enterprise however, the Regulators' Committee was understandably cautious. Agencies should be sensitive to differential impacts; some operators may benefit from a more directive approach. 'The principles basis may make regulation less predictable and so increase regulatory uncertainty with the possible consequence of increasing the cost of capital . . . This concern applies with increasing force as one moves towards smaller regulated businesses which will not have the same lines of contact with the regulator as will the larger ones.'[35] Furthermore, the collapse of trust associated with the current global financial crisis clearly puts in issue the viability of this form of 'regulatory bargain'.

The design-kit is valuable; it does not do however to be overly mechanical. Not only will Baldwin's varying logics of regulatory legitimation play differently in different contexts; ultimately, there is no way of avoiding the contested nature of the trade-offs between them. Different views of the state are reflected in, and reinforced by, this selection of values (see Chapters 1–2). Attention is here directed to a major advance on the Ofdog model, which sees due process and agency accountability taken much more seriously.

(c) A new model

An exercise of broad agency discretion fuels calls for transparency, allowing all information to be brought forward and the basis of regulatory policy to be clear.

[33] *Ibid*., p. 35.
[34] *Ibid*., pp. 36–8.
[35] *Ibid*., p. 39.

There is further a powerful demand for inclusive or participative procedures to ensure that all affected interests are allowed a 'voice', so underwriting the legitimacy of the agency's decisions. The concern of the Constitution Committee with scrutiny in the regulatory state itself speaks volumes. 'Accountability is a control mechanism which is an integral part of a regulatory framework . . . Effective regulation therefore requires effective accountability.'[36]

When setting up the Ofdogs, the Conservatives paid scant attention. Trotting out the traditional control of Parliament and courts, ministers rejected the American-style model of interest representation (see p. 170 above), seeing it as excessively rigid and adversarial.[37] Pointing up the absence of an Administrative Procedure Act, public law critics bewailed the 'startling difference' between the two national systems; the British understanding of due process was 'highly impoverished'.[38] As against pluralist values or ideas of deliberative democracy, the formal institutional framework reflected an old domestic style, so facilitating a closed, bipolar dialogue between regulators and regulated, devoid of hearings.

Individual D-Gs in fact built up some innovative procedures of their own, better to allow for inputs from competitors and user groups. As against the danger of fuzzy compromise between competing special interests, the advantages both in terms of administrative rationality and institutional legitimacy were evidently not lost on the regulators. OFTEL was the market leader in this exercise of agency procedural discretion inside a skeletal statutory framework (of course licensees still enjoyed a privileged position in the broader discussion):

> In principle, OFTEL will consult on all issues that have significant impact on consumers and operators. The only issues on which OFTEL would not consult are those which are of too little consequence to merit the expense . . . or of such a high level of commercial confidentiality that consultation would be damaging . . . The Director General's policy is to develop the maximum transparency in the consultation process – hence to include as full an exposition of his reasons as practicable.[39]
>
> The transparency of the regulatory process . . . is particularly important in telecoms where there is increasing competition in different segments of the market and where regulatory decisions can have different effects on different players. OFTEL needs to have a clear picture . . . It is vital therefore that proposals for change are fully aired and discussed with all the stakeholders in the industry.[40]

[36] CC, *The Regulatory State*, p. 7.

[37] J. Steltzer, 'Regulatory methods: A case for hands across the Atlantic?' in Veljanovski (ed.), *Regulators and the Market* (IEA, 1991).

[38] C. Graham and T. Prosser, *Privatising Public Enterprises* (Oxford University Press, 1991), pp. 239, 256. For a slightly different perspective, see A. McHarg, 'Separation of functions and regulatory agencies: Dispute resolution in the privatised utilities', in Harris and Partington (eds), *Administrative Justice in the 21st Century* (Hart Publishing, 1999).

[39] OFTEL, *Annual Report 1993* [1.12].

[40] NAO, *The Work of the Directors General*, HC 645 (1995/6), p. 64.

It was left to the incoming Blair government to declare a step-change in legislative practice, duly inaugurated in the Utilities Act 2000. 'We believe that the framework needs strengthening to improve accountability and achieve a right balance of interests between consumers and shareholders.'[41] The national trend has latterly been in favour of stronger process requirements, linking better regulation Hampton-style to broader constitutional developments in judicial review and freedom of information. Globalising forces in the market economy have also been influential, as evidenced by a highly developed rule-making schema for the FSA:

> When the Financial Services Authority proposes to make any rules, it must first publish a draft accompanied by a cost-benefit analysis and an explanation of the purpose of the proposed rules and must invite representations on them. When the rules are published the Authority must also publish a general account of the representations received and its response to them; differences must be justified by cost benefit analysis . . . In addition, the Authority is obliged to maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties, and to establish, and to consider representations by, a Practitioner Panel, and a Consumer Panel, to represent those interests.[42]

Concerns in the early years of privatisation about rough-and-ready agency procedures have dissipated (with the focus shifting to problems of network accountability: p. 306 below). It is today the accepted norm that public consultation precedes (and reasons-giving follows) a major regulatory decision. Of course the adequacy in a particular case may be open to dispute. The recent findings of the Regulators' Committee are eminently predictable:

> We have heard no evidence to suggest that regulators' consultation exercises are lacking in depth; indeed, quite the opposite . . . As well as being thorough, regulators' procedures were praised for being open . . . Witnesses from the regulated industries also praised the regulators' commitment to continual improvement of these processes. There is a recognition that communication between regulator and regulated has improved considerably in recent years . . . There is certainly a positive story to tell . . .
>
> But it would be wrong to overlook the more critical comments we have received . . . Some raised doubts over the extent to which regulators took seriously the responses . . . some were critical of time-scales imposed on consultations . . . some complained that the burden consultation exercises put on them was too great . . . some felt that, on occasion, certain regulators side-stepped the consultation process altogether when formulating policy . . .
>
> Industry needs reassurance that the time it invests in responding to consultation is time well spent and is meaningful in the decision-making process.[43]

[41] DTI, *A Fair Deal for Consumers: Modernising the framework for utility regulation*, Cm. 3898 (1998), p. 3. And see BRTF, *Economic Regulators* (2001).

[42] T. Prosser, 'The powers and accountability of agencies and regulators', in Feldman (ed.), *English Public Law* (Oxford University Press, 2004), p. 321.

[43] RC, *UK Economic Regulators*, p. 51–2.

Let us take stock. Conveying the sense of advances in agency powers being matched with more open and inclusive procedures, Prosser in 2004 spoke approvingly of a 'new regulatory model' emerging in the utilities.[44] Displaying by now familiar features, the template contrasts strongly with the original Ofdog model (see p. 249 above):

- regulatory commission
- clarification of key duties, with priority given to consumers and competition, and injection of social and environmental objectives
- enhanced enforcement powers ('wider' and 'deeper')
- heightened process requirements, including transparency
- strengthened consumer voice

We see how recent developments – better regulation 'mark II' – accentuates this. The institutional architecture of regulatory commissions is a *sine qua non* of the move, Hampton-style, to super-agencies. And the process requirements framed by LRRA (a miniature 'regulatory procedures act'), the super-consumer advocate established by CEARA, and the administrative penalties regime of RESA, must be factored in.

Looking at IRAs more generally, the model needs supplementing:

- Infusion of risk-oriented methodologies

For reasons discussed further in s. 3, the authors also would insist on another – quintessentially administrative law – bullet point:

- Expanded *ex post facto* forms of accountability ('answerability').

2. Regulatory development: A case study

How does the general regulatory development play out in individual agencies? The water regulator OFWAT makes a suitable case study. Leading two lives, first as an Ofdog, and latterly as a regulatory commission, the agency neatly illustrates the changed institutional template. Increasingly inclusive and transparent procedures also show the different phases of UK regulatory reform, with initial 'soft law' contributions from the D-G and then harder-edged requirements of 'better regulation'. Practical workings further serve to point up continuing pressures for change – the sense of regulatory development as a process, not an event. Enforcement had not been the agency's forte; officials, however, are acquiring a taste for Macrory-type administrative penalties. Even the lack of market competition, which has cast the water industry apart in the evolution of the utilities since privatisation, is being addressed.

OFWAT does water regulation; water regulation is not OFWAT. Usefully illustrating the complexities of regulatory governance and the multi-level context, the agency itself comprises part of a network featuring government

[44] Prosser, 'The powers and accountability of agencies and regulators', p. 318.

departments, other IRAs, and – increasingly prominent – EC actors. Division and interconnectedness of regulatory functions is a defining feature. As discussed in s. 3 of this chapter, administrative lawyers need to focus on the resulting problems of diffuse accountabilities.

The contemporary element of 'greening' in administrative law deserves special attention. Typically, we see this economic regulator starting out narrowly focused on price control, and then, expressive of New Labour's less concentrated form of market ideology, taking on a broader legislative mandate. Water management is today at the cutting edge of public policy; the agency must think 'sustainable development', but also deal with the fact of conflicting interests which casts a lengthening shadow over the exercise of regulatory choice:

> Water resources in England and Wales (especially in south east England) are threatened by below average rainfall in the short-term and climate change in the longer-term. The use of these resources is also facing increasingly tight regulation in order to meet ever-higher ecological requirements. Simultaneously, demand for water is increasing because of population growth, a decreasing average household size and growing use of water-intensive appliances.[45]

(a) Ofdog

When privatising the industry in the Water Act 1989, the Thatcher government recycled the model of vertical integration in the pre-existing 'professional bureaucratic complex'.[46] Ten regional water authorities, each covering a main river catchment area in England and Wales,[47] metamorphosed into ten regional companies, with the integrated utility functions of providing clean water, sewerage and sewage treatment. Some thirty surviving local companies, providing a quarter of the total water supply, were also brought inside the framework. While control of pollution and management of rivers became the responsibility of a National Rivers Authority (later gobbled up in the Environment Agency), the legislation dealt with economic regulation in standard Ofdog fashion through a sectoral framework with long-term licensing and price control operated by the DG for Water Services (OFWAT).

The DG's primary duties were to exercise powers 'in the manner that he considers is best calculated' to ensure (a) that the water and sewerage companies carried out their functions properly and (b) that the companies could finance this by securing a reasonable rate of return on their capital. The secondary

[45] Lords Science and Technology Committee, *Water Management*, HL 191 (2005/6), p. 3. And see M. de Villiers, *Water: The fate of our most precious resource* (Mariner, 2001).

[46] W. Maloney, 'Regulation in an episodic policy-making environment: The water industry in England and Wales' (2001) 79 *Pub. Admin.* 625. And see W. Maloney and J. Richardson, *Managing Policy Change in Britain: The politics of water* (Edinburgh University Press, 1995).

[47] Scottish legislation is distinct, culminating in the Water Services etc (Scotland) Act 2005.

duties included promoting economy and efficiency; facilitating competition; and safeguarding the interests of customers, especially vulnerable groups (for example, there should be 'no undue preference' in fixing charges). Other (tertiary) duties included having regard to particular environmental issues, such as conservation of flora and fauna.[48] Self-evidently, much depended on the D-G's regulatory philosophy. Under former Treasury official Sir Ian Byatt, D-G throughout the 1990s, a light-touch approach became the orthodoxy.[49] 'We regulate at arm's length wherever possible. We provide incentives to companies to operate efficiently. It is for the companies to decide how they manage their activities and meet their obligations.'[50] To operationalise matters, the D-G had four indispensable sources of in-house expertise: water engineers, economists, accountants (for complex calculations of cost of capital and asset base, etc), and regulatory lawyers (for drafting of licences and dealing with, for example, competition law disputes).

Faced with the classic monopoly conditions of a network industry, such as high transport costs of water, OFWAT had to make do with 'yardstick competition',[51] so using comparative efficiency measurement to inform an industry-wide system of price control that could scarcely be abandoned. Practical workings confirm the methodological difficulties both in terms of hydrological and demographic variation between regions [52] and the classic problem of asymmetry of information between regulator and regulated (below). The 'big business' element must be factored into the equation. With a supply area of 5,000 square miles, Thames Water has some 8 million water customers.[53]

The regulatory rule 'RPI+K' was adopted for the purpose of determining an annual average price cap, with a 'K factor' set for each company in the light of overall industry potential, and differential potential between operators, for efficiency gains. This has combined the need for continuing high levels of investment, especially given strengthening EU requirements (see p. 299 below), with the typical Ofdog incentivising element (see p. 250 above). 'We do not control profits or dividends. If companies exceed our efficiency assumptions they will be more profitable. Customers will benefit from these efficiencies at future price reviews. It is for the companies to decide whether to share these benefits with customers by charging less than their price limits allow between price

[48] See ss. 2–3 of the (consolidating) Water Industry Act 1991.

[49] Sir Ian Byatt, 'The water regulation regime in England and Wales' in Henry, Matheu and Jeunemaître (eds.), *Regulation of Network Utilities: The European experience* (Oxford University Press, 2005).

[50] OFWAT *Annual Report 2005-6*, p. 5.

[51] R. Baldwin and M. Cave, *Understanding Regulation: Theory, strategy and practice* (Oxford University Press, 1999), Ch. 18.

[52] D. Bailey, 'The emerging co-existence of regulation and competition in the water industry' (2002) 25 *World Competition* 127.

[53] OFWAT has generally opposed mergers in the industry precisely because of the need for benchmarking: see Competition Commission, *Water Merger References Guidelines* (2004).

reviews.'[54] The periodic reviews were set at five-yearly intervals, so affording the companies sufficient scope to improve efficiency and generate additional profits.[55] The initial determination in 1994 was very favourable to the industry: evidently, there was greater slack than the agency calculated. With water prices rising significantly, large-scale profit-taking was no source of popular legitimacy for OFWAT.[56] Further highlighting the importance of agency discretion, the 1999 periodic review wrought substantial change, with the demand for environmentally friendly investment programmes making inroads.[57]

'Learning by doing' is an apt description of OFWAT in the early years. Here, as elsewhere in the utility sector, the new breed of regulators had to experiment with complex modalities of econometrics and financial modelling in largely uncharted territory. 'Nobody knew what the cost of capital was . . . because nobody had borrowed for utilities in these markets.'[58] The closed, elite and informal practices familiarly associated with state corporatism lingered on. 'Detailed discussions were held with each company prior to publication of OFWAT's decisions: in almost every case the draft K factors distributed to the companies in 1994 were revised upwards.'[59] Departmental wrangling with the Treasury behind the scenes compounded matters: the ministerial guidance commonly conveyed mixed messages.[60] As Sir Ian conceded, a 'disinterested expertise' could only take the agency so far in the real world of regulatory politics:

> How do you do trade-offs? The customer of course wants water at a reasonable price, the customer wants clean drinking water and the customer wants a good environment, particularly on the beaches . . . At the [1999] review we thought that out of a bill of something like £230 the bill could have come down by as much as £60 for efficiency but £30 was ploughed back into higher quality. We thought that was broadly a reflection of the responses which we got from the various actors, trying to put them together in a judgmental rather than a systematic way.[61]

Increasingly however, the Ofdog took 'substantial steps with a view to improving . . . openness, consultation and clarity'.[62] Further illustrating the positive

[54] OFWAT, *Regulating the Companies: The role of the regulator* (2006), p. 2. And see J. Cubbin, 'Efficiency in the water industry' (2005) 13 *Utilities Policy* 289.

[55] The licensing system also allows for interim determinations if costs or revenues change materially. A cautious approach is implicit since this would otherwise blunt the incentive effect of the price-cap model.

[56] Commons Environmental Audit Committee, *Water: Periodic review 2004 and the environmental programme*, HC 416 (2003/4) puts this in historical perspective.

[57] See Commons Environmental Audit Committee, *Water Prices and the Environment*, HC 597(1999/2000).

[58] Sir Ian Byatt, Evidence to CC, HL 68 (2003/4), Q12

[59] Maloney, 'Regulation in an episodic policy-making environment', p. 639.

[60] See on this aspect, Commons Environmental Audit Committee, *Water: Periodic review* 2004.

[61] Evidence to CC, HL 68 (2003/4), Q 5.

[62] Hansard Society and European Policy Forum, *Report of the Commission on the Regulation of Privatised Utilities* (1996), p. 56.

exercise of procedural discretion in a permissive statutory framework, the D-G was especially keen to shore up regulatory legitimacy in the markets:

> It is essential that we approach our tasks in a transparent way, designed to minimise unnecessary regulatory uncertainty . . . We hold workshops to describe and discuss our policy approaches and meet the companies and others to discuss issues . . . We try to ensure that the basis of regulation is fully understood by the companies themselves and their own investors, bondholders and other lenders. This helps to hold down the cost to them of raising finance and thereby, through the system of incentive-based price cap regulation, the cost of customers' bills. As examples, we now publish our forecasts of companies' regulatory capital values and the financial model we use to set price limits.[63]

With no serious prospect of 'exit', and with only basic statutory provision in the form of regional 'customer service committees' (CSCs) appointed by the D-G to investigate complaints and make representations to the companies,[64] the exercise of consumer voice became a pressing issue. Individual complaints could be dealt with in standard pyramidal fashion – internal review by the companies, possible further review by a CSC, and evaluation by OFWAT of those few cases raising significant regulatory issues – but what of collective interest representation by a dedicated consumers' champion? An agency-sponsored development was typically incremental. Regular rounds of meetings with CSCs led on to an 'OFWAT National Customers Council' composed of CSC chairmen which, in order 'to achieve a higher public profile' and 'clearer separation from OFWAT', was later armed with a memorandum of understanding and re-launched as 'WaterVoice'. Yet by definition such soft law arrangements could only go so far. 'The DG . . . appoints the staff . . . Watervoice is funded by the DG who is responsible as Accounting Officer for its expenditure . . . OFWAT provides WaterVoice with advice, information and briefing.'[65] The case for a statutory body was further underlined when WaterVoice indicated some blemishes on OFWAT's generally 'satisfactory' record:

> The technical content, complexity and length of OFWAT consultation documents are not conducive to effective public consultation and participation in the debate, thereby limiting input to those with special knowledge . . . OFWAT does publish its conclusions following public consultation but we believe that as a matter of good practice OFWAT should always include sufficient analysis and explanation of decisions so that respondents can see to what extent their individual views have been influential.[66]

Showing the increased importance in the national administrative law system of 'anti-trust', the Competition Act 1998 introduced a whole new dimension

[63] OFWAT, *Memorandum of Evidence* to *CC*, HL 68 (2003/4), p. 3.
[64] Water Industry Act 1991, ss 28–9.
[65] WaterVoice, *Memorandum of Evidence* to *CC*, HL 68 (2003/4), pp. 1–2.
[66] *Ibid*., pp. 3–4.

to the regulation. This was all the more significant for OFWAT because of the fact of regional monopolies. As a utility regulator, the agency now had concurrent competition law powers with OFT in the sector.[67] The whole process of considering allegations of market abuse by a dominant firm, imposing interim measures, carrying out investigations, and imposing financial penalties, itself means substantial agency discretion:

> When we receive a [competition] complaint we consider carefully, amongst other things: the consumer harm involved; the complainant's views; the benefits of setting a precedent for the market; the size of the market; and our resource constraints. We cannot investigate a complaint under the CA98 unless we have reasonable grounds for suspecting an infringement . . . We are unlikely to consider complaints unless they are supported by substantive evidence and information, although we do take account of the resources available to the complainant . . . OFWAT has discretion to decide on the most appropriate powers to use . . . It may not always be appropriate to investigate a complaint under the CA98. For example, we may be developing policy that will address the issues raised by the complainant.[68]

Matched with a right of appeal to the Competition Appeal Tribunal (see p. 321 below), this major accretion of powers has proved a mixed blessing. Big business repeat players, typically deploying City commercial and public-law specialists, make the most formidable adversaries. As the agency laments: 'we have spent a lot of time and resources defending appeals to CAT'.[69]

(b) Benchmark

Set in 2004, the current price control covers the period 2005–10. The exhaustive periodic review process preceding it shows quite how far the Ofdog model had evolved. Placing more emphasis on sustainable development and on the affordability of water for low-income families,[70] the ministerial guidance was itself the subject of a public/private deliberative cycle: initial statement, draft business plans from the companies, summary report by OFWAT and advices from other agencies in the network, principal statement.[71] OFWAT's own two-year timetable comprised: (a) consultation on and elaboration of agency methodology, (b) agency consideration of draft and final business plans, (c) setting of and consultation on draft determinations, and (d) setting of final determinations. An independent review group set up by OFWAT judged it 'about right'. In contrast to the Department (which was considered 'more

[67] Competition Act 1998 s. 54 and Sch. 10; and see Enterprise Act 2002.
[68] OFWAT, *Report on Competition Complaints* (2006), pp. 3–4; and see DTI and Treasury, *Concurrent Competition Powers in Sectoral Regulation* (2006).
[69] OFWAT, *Annual Report 2005–6*, p. 23.
[70] See also Water Industry Act 1999 (prohibiting disconnection of domestic users for non-payment).
[71] DEFRA, *Principal Guidance to the DG of Water Services* (2004).

opaque'),[72] there was 'a high level of satisfaction' with the agency's conduct of the process, with 'even the most critical parties' considering it a further 'major improvement':

> [The process] was seen as more transparent, with OFWAT being prepared to listen to representations in, for the most part, an open-minded way; to explain how it had modified its approach in responses to consultation papers; and provide feedback on . . . submissions made by individual companies. The overall process was thought to have been well planned and managed, with . . . delay in the issue of Ministerial Guidance as the only blip in the timetable . . . Virtually all respondents respected the role of the Director-General personally in the price setting process, and commended his independence and integrity.[73]

Of course substance may colour views of procedure:

> Consumer orientated organisations believed OFWAT should have given more weight to customer interests, and the WaterVoice committees felt that communications with them deteriorated sharply after the Draft Determinations. The Environment Agency and other environmental groups felt that OFWAT treated environmental improvements as optional investments – rather than integral parts of company investment programmes – and made them subject to disproportionate scrutiny while, at the same time, exaggerating the contribution of the environmental programme to bill increases. They were also concerned over what they see as the tendency of companies to bid up costs for environmental schemes through gaming. For their part, the water companies considered that whilst OFWAT was generally open and transparent in relation to the methodologies it deployed, this was not the case at the end in relation to the way OFWAT dealt with issues of efficiency and capital maintenance . . .
>
> Despite these differences, we found no one advocating radical change to the processes adopted by OFWAT . . . or in OFWAT's approach or behaviour. The process is seen as being now essentially on the right lines.[74]

The detail of the resulting price control shows the huge importance of this regulatory regime. Whereas for 2000–5 the K factor had been assigned a negative average value (-1.5 per cent), OFWAT now determined an average annual increase in the price cap before inflation of 4.3 per cent.[75] As well as reflecting increased operating costs, this was to enable a £17 billion capital investment programme, including £8.5 billion for repairs to an ageing infrastructure and – largely to comply with EU requirements – £ 5.5 billion on quality and environmental improvements. The increased price limit was both substantially lower

[72] Water UK, *Future Regulation of the Water Industry: Simpler, smarter, better* (2006), p. 13.
[73] OFWAT, Independent Steering Group, *Report into the Conduct of the 2004 Periodic Review* (2005), p. 4.
[74] *Ibid*., p. 6.
[75] OFWAT, *Future Water and Sewerage Charges 2005-2010: Final determinations* (2004). With expected average annual household bills in 2009-10 of £297 (excluding inflation).

than that originally requested by the companies (6.2 per cent), and, following representations from the 'green' lobby, significantly higher than those suggested in the agency's draft determination (3.1 per cent). As for the incentivising element, what OFWAT termed 'demanding but achievable' challenges, such as operating cost efficiencies of some 1.3 per cent each year, assumed that 'all the companies, especially the less efficient, will improve further and faster than the economy as a whole'. Major variation in tariffs between companies by reason of different revenue requirements and revenue base was an inevitable outcome.[76]

The aftermath points up issues of 'grievance' and channels of redress (see Chapter 10). As agency officials are grimly aware, there never will be universal satisfaction, least of all among individual consumers. 'The level of the price limits meant that we saw a significant increase in the numbers and complexity of complaints about bills.'[77] The extent to which this individual expression of 'voice' was futile was not explained. The companies were seemingly content, or at least chose not to unsettle the markets. None requested a re-determination by the Competition Commission, as under the Ofdog template they were entitled to do.

(c) New model agency

'The Ofdog is dead: long live OFWAT!' The acronym is retained but the D-G's powers are no more, having been transferred to a regulatory commission through a typical piece of New Labour amending legislation, the Water Act 2003.[78] To support the increased range of work, the 'Water Services Regulation Authority' boasts sub-directorates of regulatory finance and competition, network regulation, and consumer protection, as well as operations, corporate affairs and legal services.

The revamped legislative mandate[79] includes as a primary duty: 'to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services'. Both objective and means clearly fit Prosser's 'new regulatory model'. A key message is that OFWAT should think long-term:[80] 'consumers' is defined to mean all users of water, current and future. This is underwritten by a secondary duty 'to contribute to the achievement of sustainable development'. There is a further link to the wide-ranging requirements of the EC Water Framework Directive,[81] which speaks of 'common principles . . . to promote sustainable water use'.

[76] With expected average increases in household bills ranging from 7% (Anglian) to 25% (South West, Southern, and Wessex).

[77] OFWAT, *Annual Report 2005-06*, p. 3.

[78] Implementation sensibly took place after completion of the 2004 periodic review

[79] Water Act 2003, s. 39.

[80] See for the policy development, DEFRA, *Directing the Flow: Priorities for future water policy* (2002).

[81] Directive 2000/60/EC; now supplemented by the Groundwater Directive 2006/118/EC.

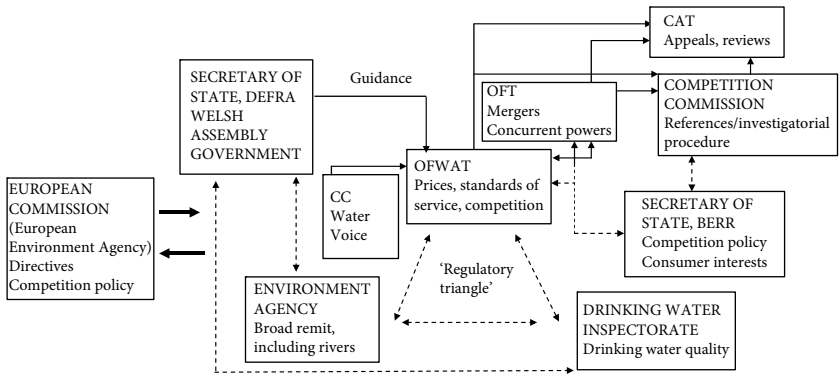

Fig 7.1 Water, water everywhere: Simplified map of a regulatory network

Figure 7.1 illustrates the broader networking context. Better to hold the system together, the Act demonstrates a particular technique of regulatory governance: legal duties to co-operate, underpinned by inter-organisational requirements to make pseudo-contractual MoUs.[82]

Take standards for (a) drinking water and (b) discharge of used water back into the environment. As set out in regulations, these are the responsibility of ministers, with advice from the Drinking Water Inspectorate (DWI), an arm's-length body established at the time of privatisation, and the EA, respectively. The European connection features strongly: drinking water for example must be 'wholesome' at the time of supply, this being defined by quality standards largely derived from a 1998 Directive.[83] DWI and EA do separate monitoring and enforcement under the European Commission's more or less watchful eye.[84] OFWAT must be in the loop precisely because 'environmental and quality regulation is incorporated as a constraint into economic regulation'.[85] Or, as the ministerial guidance patiently explains,[86] since the companies must maintain such standards, the agency when setting the price cap has to allow them the financial wherewithal. No wonder then that working relations with the Secretary of State and the Welsh Assembly government[87] as relevant political authorities, and with DWI and EA in an expert triangular network, are officially described as 'close'.[88] Conversely, we see how accountability is blurred. Informed of increased prices, the irate

[82] Water Act 2003, ss. 35, 52. See further, 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).

[83] Drinking Water Directive, 98/83/EC.

[84] See for the potential of infringement proceedings, Case C-278/01 *Commission v Spain* [2003] ECR I-14141.

[85] CC, HL 68 (2003/4), p. 17.

[86] DEFRA, *Social and Environmental Guidance to OFWAT* (2008).

[87] The Government of Wales Act 2006 carefully ties Wales into an integrated England and Wales water-resources system: ss. 101, 114, 152.

[88] OFWAT, *Regulating the Companies*, p. 5.

customer asks: 'Who is responsible?' The answer, conveniently, is 'everybody' and 'nobody'.

A Guaranteed Standards Scheme (originally part of the Citizen's Charter programme, p. 247 above) shows ministers acting in concert with OFWAT. Commonly sanctioned by an automatic compensation payment, these minimum service requirements on, for example, water pressure, maintenance of supply and both making and keeping appointments, have recently been extended. OFWAT's contribution is to monitor compliance ('league tables'), determine unresolved disputes, and recommend changes to the rules as determined by the minister in statutory instrument.[89]

We note too the important place for interest representation. The 2003 Act substituted for customer service committees and WaterVoice a separate statutory body, the Consumer Council for Water. A national body with a regional presence, CCW has broad-ranging powers to make representations, as well as handle complaints, and also a power to mount its own investigations.[90] More particularly, it can acquire and review information about consumer matters and the views of consumers (regular tracking surveys), provide advice and information to consumers and public authorities, and publish statistical information about complaints (company comparisons). While given broad rein as a consumer advocate, the watchdog is not unleashed however; powers to obtain and publish information from the industry are tightly restricted.[91] Note too the sectoral dimension. CCW is a prime candidate for takeover by the new super-consumer advocate.[92]

The Act is a repository of better regulation. Not only must OFWAT have regard to the 'big five' principles of transparency, accountability, proportionality, consistency and targeting[93] but the agency also has enhanced enforcement powers: Macrory-style administrative fines.[94] These are applicable in a wide range of circumstances – contravention of statutory requirement, breach of licence condition, failure to meet minimum performance standard. Any such penalty must be of an amount 'reasonable in all the circumstances of the case', up to a maximum of 10 per cent of annual turnover.

(d) Continuing dynamics

With the price control established, monitoring activity centres on four main topics: levels of service; security of supply and efficient usage; financial performance and expenditure; and unit costs and relative efficiency. Buttressed

[89] Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI No. 594.

[90] Water Act 2003, ss. 43, 46–7. And see CCW, *Forward Work Programme 2008–09 to 2010–11*.

[91] Water Act 2003, ss. 43–4.

[92] CEARA, s. 31 makes express provision.

[93] Water Act 2003, s. 39.

[94] Subject of course to a right of appeal: Water Act 2003, ss. 48–9.

by reports from other agencies in the network, OFWAT's main source of data is each company's annual regulatory return. As well as extolling the virtues of effective corporate governance (internal controls), the agency has tried hard to mitigate the problem of asymmetry of information. A variant on meta-regulation, independent expert 'reporters' are placed inside the companies, tasked with examining, and then advising OFWAT on, the accuracy and completeness of regulatory information.[95] An informal European network of agencies allows yardstick competition based on international comparisons.[96]

A recent burst of enforcement action is significant. The first example concerns water leakage – an emotive topic. The 2004 periodic review factored in a £3 billion investment by the companies designed to achieve levels of loss a third lower than the recorded peak in the mid-1990s; annual leakage targets for each company were duly incorporated in the determination.[97] Substantial and repeated failure by Thames Water to comply put the company in breach of its statutory duty to ensure a secure and efficient water supply,[98] triggering the exercise of formal enforcement powers. To enhance credibility, OFWAT is seen moving sharply up the 'enforcement pyramid': from increasingly frequent reporting requirements and detailed investigation of company performance to a voluntary binding undertaking extracted in lieu of an enforcement order.[99] A major precedent for UK regulatory practice post-RESA, this is very much in the mould of the 'Macrory penalty principles'. The maximum administrative fine possible was £66 million: instead the company agreed an extra £150 million investment from its own resources and tougher medium-term targets[100] – 'restorative justice'.

The second example bears directly on the functioning – and limitations – of the regulation. Several companies have recently been fined by OFWAT for misreporting. The largest penalty – £36 million – was against Severn Trent for providing false information about its customer-service performance and using the figures to justify increases in household bills.[101] Using criminal law as back-up, OFWAT had meanwhile referred to the Serious Fraud Office further allegations against the company of faked data on water leakage; Severn Trent eventually pleaded guilty to two charges of fraud and was fined £2 million. The fact that the affair only came to light through the exertions of a company 'whistleblower' speaks volumes about the continuing regulatory difficulty of asymmetry of information.

[95] OFWAT, *Reporters' Protocol* (2003).

[96] OFWAT, *International Comparison of Water and Sewerage Service* (2008); and see International Water Association, *Competition and Economic Regulation in Water: The future of the European water industry* (2006).

[97] See OFWAT, *Security of Supply, Leakage and Water Efficiency 2005–06 report*.

[98] Water Industry Act 1991, s. 37.

[99] Water Industry Act 1993, ss. 18–19.

[100] OFWAT, *Security of Supply*, App. 5.

[101] OFWAT, *Final Determination*, 2 July 2008. The company also apologised to its customers and reduced bills.

The structure of the industry is again in issue. Following the well-trodden path, OFWAT has begun to take market competition seriously.[102] While naturally pointing up the achievements since privatisation – £70 billion of capital investment by 2010, better standards of service, increased environmental and drinking water compliance, greater efficiency[103] – the agency concedes comparatively low levels of innovation in the sector. Together with ministers, it is currently looking at ways to disaggregate contestable markets such as retail services from natural monopoly activities. The pre-existing methodology serves for 2010–15,[104] but a single price cap for each company thereafter looks unlikely:

> Our strategy is to take some key steps to open markets . . . and to enable competition to prove itself. New steps can be taken as our knowledge increases. As markets are opened, we will look for opportunities to withdraw regulation where competitive pressures provide sufficient protection for consumers. But until this happens, or where competition cannot provide this protection, we will continue to regulate in a manner that robustly challenges monopoly service providers.[105]

Reviewing the regulatory system in 2005, the Lords Science and Technology Committee was highly critical: 'OFWAT currently focuses too narrowly on keeping water prices down and insufficiently on security of supply in terms of long-term planning, network renewal and the promotion of efficiency.' The Committee highlighted the particular difficulty of achieving the kind of integrated policy approaches required for sustainable development, urging joint initiatives: 'we have seen insufficient evidence to convince us that the potential consequences of climate change are being adequately factored'.[106]

The 'greening' of the regulation has suddenly gathered pace. Designed to frame the agency's policy-making in the 2009 periodic review and thereafter, recent ministerial guidance is notably firm. OFWAT is 'expected to consider . . . environmental outcomes in their broadest sense' and 'to draw on its unique perspective, skill and experience to maximise its contribution to sustainable development'.[107] This signals a raft of regulatory initiatives on, for example, water conservation, sustainable abstraction levels, and the industry's carbon footprint. Happily, the agency sees 'no conflict' between sustainable

[102] OFWAT, *Review of Competition in the Water and Sewage Industries* (2008). There has been much prodding, especially by CAT (below) and also the Select Committee on Regulators.

[103] OFWAT, *International Comparison*. See also I. Byatt, T. Balance and S. Reid, 'Regulation of water and sewerage services' in Crew and Parker (eds.), *International Handbook on Economic Regulation* (Edward Elgar, 2006).

[104] See OFWAT, *Setting Price Limits for 2010–15: Framework and approach* (2008).

[105] OFWAT, *Review of Competition*, p. 4. And see DEFRA, *Future Water: The government's water strategy for England* (2008).

[106] Lords Science and Technology Committee, *Water Management*, pp. 39, 109.

[107] DEFRA, *Social and Environmental Guidance* [2.4]; drawing on the major policy document, DEFRA, *Future Water*.

development and its other legal duties: 'sustainable development should inform our work and "permeate" through it'.[108]

But there will be hard choices, not least in view of economic recession (and the difficulty of borrowing in the markets). Risk methodologies already feature prominently:

> The industry has already developed accepted approaches to assessing risk in some areas. For example, water resource plans include technical assessments of required allowances for 'headroom' and 'outage' in handling risk to the supply/demand balance . . . Reducing risk often also carries costs, and these tend to increase exponentially as risk diminishes. For example, it would be prohibitively expensive to attempt to remove all risk of hosepipe bans during dry years . . . In assessing the approach to handling risk, we support a realistic approach that builds on empirical understanding of likelihood, consequences, and the costs associated with interventions to address risk. We do not support removing the risk altogether, as costs will outweigh the likely benefits.[109]

OFWAT's vision is of good corporate governance: 'a sector made up of sustainable organisations, taking account of their economic, social and environmental impacts, acting to address the key sustainable development challenges ahead, and delivering high quality, good value and safe services to customers'.[110] Let us see.

3. Accountability matters

(a) Multiple accountabilities

How, in its *ex post facto* sense (see p. 46 above), might regulatory accountability be analysed? In addressing the three basic questions of 'who is accountable, to whom and for what', the Constitution Committee[111] adopted a '360º view'. The model (see Fig 7.2) ranges across state, business and civil society as befits an age of governance.

The model serves in classic 'law in context' fashion to remind administrative lawyers that traditional accountability mechanisms are part, but only part, of a bigger picture of multiple accountabilities. The Committee went on to highlight the importance and diversity of the various channels:

> Regulators carrying out public functions wield considerable powers and must accept that these powers carry responsibilities, including the duty to explain to all interested parties, whether they are parliamentary select committees, Ministers, regulated companies,

[108] OFWAT, *Contributing to Sustainable Development* (2006), p. 6. See also OFWAT, *Sustainable Development Action Plan* (2007) *Preparing for the Future: OFWAT's climate change policy statement* (2008) *and Water Today, Water Tomorrow: OFWAT and sustainability* (2009).

[109] *Ibid*., p. 12. And see *OFWAT's Strategy: Taking a forward look* (2008).

[110] OFWAT, *Setting Price Limits for 2010–15*, p. 2.

[111] CC, *The Regulatory State*, p. 20.

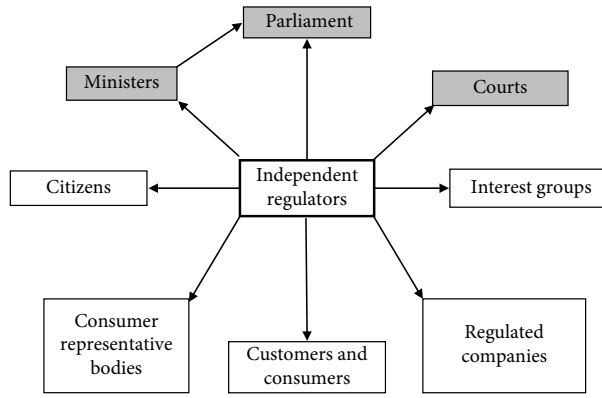

Fig 7.2 360° view of multiple accountabilities

> consumers or citizens. We recognise that this duty is likely to be exercised in different ways, and to different extents, for the different interested parties. It will depend on statutory and formal requirements, good practice, and an understanding of the information needs of each party . . . Equally, the rights of the various interested parties to expose the regulator to scrutiny will vary. Parliamentary select committees have a right to summon regulators to appear before them; this is a right not normally available to the individual citizen.[112]

A spatial form of classification is illustrated. As well as 'upward' accountability to constitutionally superior state institutions, there is the role of 'downward' accountability to consumers and citizens and of course to operators (note how, following Hampton, this is buttressed by the 'hard law' principle that regulators themselves take accountability seriously: p. 258 above):

> We draw a distinction between regulators exercising a duty to explain – extending to all the bodies identified in [the model] – and being required to respond to demands made by those who gave them their powers. Citizens, consumer bodies and regulated bodies lack the power to summon regulators to justify their actions. We have reflected this distinction in [the model]. The shaded boxes comprise the bodies that exercise power directly in relation to the regulators. These are the bodies that are responsible for scrutiny and formal review . . . Parliament is at the apex in that it passes the law creating the regulatory bodies and is the body responsible for calling Government to account.[113]

The potentially corrosive effect on regulatory effectiveness of competing pulls and/or excessive burdens of justification is indicated. Accountable to a plethora of different forums, all of which apply a different set of criteria, the regulator is faced with *the problem of many eyes*.[114] Even so, the model is deceptively

[112] *Ibid*., p. 19.
[113] CC, *The Regulatory State*, p. 20.
[114] M. Bovens, 'Analysing and assessing accountability: A conceptual framework' (2007) 13 *ELJ* 447, 172; and see J. Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' (2008) 2 *Regulation and Governance* 137.

simple. 'Horizontal' accountability to other public bodies, as with bureaucratic regulation and pre-eminently audit, is a glaring omission. Perhaps too, this parliamentary committee needs reminding of the European Union. Where is the Commission?

The true challenge for accountability presented by interconnected and overlapping functions of regulatory networks is glossed over. As our own simplified model of water regulation illustrates, regulatory 'spaces' are far more cluttered than the 360° view implies, centred as it is on the accountability of individual regulators. That there is no thoroughgoing solution for this *problem of many hands*[115] is shown by the best attempt at providing one. Convinced of the potential for harnessing 'dense networks of accountability within which public power is exercised . . . for the purpose of achieving effective accountability or control', Scott suggests two alternative models. In his 'interdependence' model, actors who are 'dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy' form a mutual accountability network. As shown above with OFWAT, 'each of the principal actors has constantly to account for at least some of its actions within the [regulatory] space, as a precondition to action.'[116] This autonomous self-responsibility may be a substitute for the formal accountability to public law institutions eroded by network governance or (as Scott suggests) may be supplemented by formal accountability to public law institutions. In his second 'redundancy' model, 'overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them'.[117] Scott describes this as a 'belt-and-braces' model of accountability, in which two or more independent mechanisms, each capable of working on its own, are deployed to ensure the system does not fail. Exploiting 'redundancy' – ratcheting up the pressure to explain and justify by invoking multiple accountability machineries – is what clever campaigners do.

Scott's strategy of reinforcing network checks and balances shows some useful potentials.[118] As discussed in the next section, it is of the essence of 'steering' that the presence of state agents in a regulatory network can operate as a control device to limit opportunistic behaviour by private parties and ensure respect for the public interest. And in policy domains with a strong EU dimension, the supervisory powers vested in the Commission may help to shore up and fill gaps created by network governance or left by decreased accountability at national level. A set of multi-level governance arrangements as sophisticated as the European Competition Network (see p. 278 above)

[115] D. Thompson, 'Moral responsibility of public officials: The problem of many hands' (1980) 74 A*m. Pol. Sci. Rev.* 905.

[116] C. Scott, 'Accountability in the regulatory state' (2000) 27 *JLS* 38.

[117] *Ibid.*, p. 52

[118] See also S. Wilks and B. Doern, 'Accountability and multi-level governance in UK regulation' in Vass (ed.), *Regulatory Review 2006–07* (CRI, 2007).

shows how mutual accountability can be given tangible expression in never-ending rounds of meetings and formal and informal reviews; the design militates against (national) agency 'capture'. The joint accountability of the Network is harder to secure.[119] Leaving aside the chance of 'simultaneous failure' of accountability systems (for example, for lack of information),[120] the redundancy model is problematic. Gaps may be left. 'Redundancy' itself implies a significant element of inefficiency. 'Mutual accountability networks' tend to be more concerned with policy input and long-term relationships than retrospective evaluation, rendering accountability difficult. With participants rendered complicit in decisions, there is a risk of degeneration into a complacent 'old boy network' – the accountability function blunted by mutual interest – and there are obvious problems of transparency. The lines of responsibility and accountability are apt to be blurred, presenting fresh opportunities for passing the buck. It is therefore questionable whether a mutual accountability network can be shored up so as to add the requisite element of legitimacy to the accountability process.[121]

As we said of ministerial responsibility, few would wish to venture a vessel as flimsy as internal network checks and balances. The rise of regulatory governance itself suggests strengthening the capacities of classical, external, techniques of political and legal accountability. One notable feature is the increased blending of audit technique with parliamentary scrutiny in a form of hard-edged and free-flowing techno-political accountability.[122] Efforts are also made to thicken regulatory accountability through core administrative law methods, as part of 'the transforming of judicial review' (see Chapter 3), and especially by an application of high-class tribunal technique in key economic sectors. Let us look at this more closely.

(b) Audit and political accountability

Audit is much to the fore with regulatory governance.[123] Grounded in budgets and resource allocation, but capable of application across the full range of agency practices of rule formulation and implementation and enforcement, the broad and flexible rubric of VFM gives this historic forum of accountability a very contemporary appeal. Control via ministers being a hollow hope, MPs can seek to reclaim lost ground by piggybacking on the technical investigations

[119] See further, C. Harlow and R. Rawlings, 'Promoting accountability in multi-level governance: A network approach' (2007) 13 *ELJ* 542.

[120] Scott, 'Accountability in the regulatory state', p. 60.

[121] As regulation moves increasingly outside the state, these accountability problems become more serious. See C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

[122] In Ch. 13 we will see the Parliamentary Ombudsman also playing an increasingly prominent role in regulatory accountability.

[123] See for a self-assessment, E. Humpherson, 'The National Audit Office's audit programme in perspective' in Vass (ed.), *Regulatory Review 2006–07* (CRI, 2007).

and evidence of the NAO, which now has extended jurisdiction over NDPBs. This allows for NAO reports to be followed up in hearings by the PAC (see p. 59 above).[124]

Matters are complicated however because the NAO wears two hats. As the better-regulation agenda expanded so this arch-bureaucratic regulator began to play an increasingly active role as policy guardian and advocate. This is the stuff of reports on the conduct of impact assessment (see p. 152 above); on progress with reduction of administrative burdens (see p. 261 above); and of 'Hampton implementation reviews' (see p. 266 above). Recent events point up the twin dangers of overstretch and complacent acceptance of the network 'view'. Tasked by the Treasury with a major review of the FSA,[125] the NAO produced a highly laudatory report: the ARROW system of RBR was 'rigorous' in application; 'rich in process', the agency could now think about 'streamlining'.[126] Little hard evidence was produced to substantiate these claims. As the failure of Northern Rock and the FSA's own highly critical review (see p. 276 above) soon confirmed, it was a flabby piece of work.

The NAO could usefully concentrate on expanding the support given to a select group of select committees. A summary of Parliament's capacities by the Hansard Society[127] shows why this particular instrument of political accountability is at a premium:

Specific powers:

- vote appropriations to pay for the industry regulatory bodies
- overturn relevant ministerial decisions in the form of Orders (for example, RROS).

General scrutiny powers:

- oral and written answers and statements on regulatory bodies' activities
- formal submission of regulatory bodies' annual reports
- debates in Westminster Hall on regulatory bodies' work (generally poor attendance)
- answerability of regulatory bodies to the PAC via the NAO
- select committee work: formal evidence from regulatory bodies (and stakeholders) in the course of investigations; private briefings by regulators; frequent appearances by agency chief executives.

Starting from a low base, select committees' contribution thickened with New Labour in office. As well as numerous ad hoc inquiries into regulatory matters occasioning public concern, particular committees have shown themselves

[124] Government Resources and Accounts Act 2000 (Rights of Access by Comptroller and Auditor General) Order, SI No. 1325; Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2003, SI No. 1326.

[125] Under s. 12 of the Financial Services and Markets Act 2000.

[126] NAO, *The Financial Services Authority*, HC 500 (2006/7), p. 4.

[127] Hansard Society, *Parliament at the Apex: Parliamentary scrutiny and regulatory bodies* (2003).

important repeat players, most obviously the Commons Trade and Industry (now Business and Enterprise) Committee.[128] Adding to the mix are the Commons' Regulatory Reform Committee, the Lords' Delegated Powers and Regulatory Reform Committee and Merits of Statutory Instruments Committee (see Chapter 4). The very fact of inquiries into regulatory accountability, and into the role of the economic regulators, by Lords committees (see p. 284 above) is significant. Nor should the added value of scrutiny by the devolved parliaments and assemblies in the more intimate conditions of small-country governance be overlooked.[129] Economic regulation is commonly constructed UK-wide, but bold is the agency which, operating locally, steadfastly ignores the views or moral suasion of, for example, the Scottish Parliament. All this represents a valuable counter-weight to the rise of non-majoritarian regulatory institutions epitomised in the 'super-agency' and underscores the importance of not being subsumed in some intricate 'mutual accountability network'. The particular value in fields dominated by experts of an unruly element of political accountability should not be underestimated. Uncomfortable lines of questioning cannot always be brushed aside; later, for example, we see MPs prick a cosy consensus on co-regulation.

Nevertheless, overall contribution is necessarily modest. Problems reflect, or are epitomised in, the experience of the many regulatory contexts of EU multi-level governance. The subjects are so technical that reports are prone to gather dust, far from the public view. Committee resources and expertise are, on the other hand, limited. Better to match the 'rule of networks' (see p. 277 above) – and so maximise the accountability potential inside the national system – there is a pressing need at Westminster to expand links with other Member States' parliaments, as well as with the European Parliament.[130]

Undue fragmentation of the scrutiny arrangements is a recipe, as the Constitution Committee has pointed out,[131] for decidedly mixed results. Where, in the form of a dedicated committee able to absorb, probe and disseminate the lessons of experience across the piece, is the machinery to ensure that regulators collectively are accountable to Parliament? The Constitution Committee outlined its preferred model:

> The functions . . . should include the right to be consulted over any proposal to confer statutory powers on a new regulator, or to add to those of an existing regulator, in good time for its comments to be taken into account during pre-legislative scrutiny. Other functions should include:

[128] See e.g. Commons Trade and Industry Committee, *Fuel Prices*, HC 279 (2004/5), and *Security of Gas Supply*, HC 632 (2005/6).

[129] R. Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (University of Wales Press, 2004), Ch. 11.

[130] See K. Auel and A. Benz (eds), *The Europeanisation of Parliamentary Democracy* (*J. of Legislative Studies* special issue, 2005).

[131] CC, *The Regulatory State*, Ch. 10. And see P. Norton, 'Select Committees and the accountability of the regulatory state' in Vass (ed.), *Regulatory Review 2006–07* (CRI, 2007).

- Having regard to such issues as potential duplication or overlap of regulatory activities, and the clarity of hierarchies of objectives
- Identifying and promoting good practice in its role as the parliamentary counterpart of the lead Government department and the Regulatory Impact Unit of the Cabinet Office
- Examining whether regulation is guided by . . . the BRTF principles
- Satisfying itself that appointment processes for regulators conform to Nolan principles
- Monitoring the regularity and scope of RIAs produced by Government and by IRAs
- Focusing on annual reports of regulatory bodies with a view to maintaining the consistency and co-ordination of parliamentary scrutiny.[132]

To which the authors would add:

- Examining the complex entanglements of the regulatory state or opaque networks.

This is unfinished business. 'The question of who regulates the regulators has not been answered and will not go away. There is a need for a wider, and continuing, review.'[133] Recently the Commons has taken the lead. Exploiting a broadly worded mandate, the Regulatory Reform Committee has moved on from scrutinising draft orders to conduct a general inquiry into the design and impact of the regulatory reform agenda. Attesting the role for creative forms of techno-political accountability, we find the NAO helping to work up the Committee's work programme.[134] Engagement with stakeholders, from business and trade union representatives to the National Consumer Council, and with an array of government and academic experts, further illustrates the special value of select committees' inquisitorial technique. The end result is a promising beginning:

> We have recommended regular parliamentary scrutiny of the BRE through annual reporting to Parliament. We believe that the BRE should . . . focus more on setting clearly defined and prioritised targets and then measuring against them – both for itself and for Departments and (where relevant) Agencies. The BRE should itself scrutinise the robustness of reporting in programmes such as the Administrative Burdens Reduction Programme. We have also suggested that Government Departments provide information on progress in burdens reduction in their Annual Reports. That information would then be available for scrutiny by the relevant Departmental Select Committee.[135]

(c) Judicial supervision (I): Standards

Regulation raises some classic issues of legal accountability. How far can the 'ordinary courts' reasonably go in scrutinising the decisions of expert

[132] *Ibid.* [201].
[133] RC, *UK Economic Regulators* [1.29]. This ad hoc committee was only a temporary expedient.
[134] NAO, *Regulatory Reform in the UK* (2008), p. 2.
[135] Regulatory Reform Committee, *Getting Results: The better regulation executive and the impact of the regulatory reform agenda*, HC 474 (2007/8), p. 3.

repeat-players in the many complex areas of market regulation? What is the role of procedural review in promoting transparency, etc., in powerful non-majoritarian bodies? How in the shaping of jurisdiction should the courts respond to the 'public + private' equation of governance?

In addressing the key question of intensity of review, we start from the idea that judicial review of expert regulatory bodies is traditionally in de Smith's famous phrase 'sporadic and peripheral'. With exceptions,[136] a deferential attitude to regulatory autonomy, with agencies granted considerable latitude in matters of judgement, long characterised the case law.[137] The general trend of juridification in the regulatory process, as exemplified by the Regulators' Compliance Code, together with the broader transformation of judicial review (see Chapter 3), suggests a less permissive view.[138] Recent procedural-fairness cases illustrate this. A circumspect approach to substantive review still prevails however; an experienced practitioner notes, 'advancing irrationality challenges in a regulatory context is notoriously tough'.[139] As Ogus reminds us, considerations of relative institutional competence loom large here:

> Regulatory rule-making often [involves] the 'polycentric problem': issues cannot be resolved independently and sequentially; they are, rather, interdependent and a choice from one set of alternatives has implications for preferences within other sets of alternatives. The decision-maker must take into account the whole network before she can reach a single decision. The adversarial setting of the judicial process does not lend itself to grappling with this problem, not the least because judicial intervention is generally sought after the rules have been promulgated.[140]

In breeding the Ofdogs, the Thatcher government showed little appetite for judicial review. The determinedly subjective and permissive language of the privatisation statutes locked up together with a continued use of informal techniques of regulatory bargaining and the technical complexity of much of the subject matter to reduce its potency. A decade of operations saw only a handful of cases. In the event,[141], far from the so-called 'hard look' doctrine of judicial examination of the basis of regulatory decisions once fashionable in America,[142] the judges stressed the breadth of the statutory discretion, declining to become involved in detailed questions of fact.

[136] As in *Laker Airways v Department of Trade* [1977] QB 643 and, with a chilling effect on formal investigations for social regulatory purposes, *Hillingdon LBC v Commission for Racial Equality* [1982] AC 779.

[137] See generally J. Black, P. Muchlinski and P. Walker (eds.), *Commercial Regulation and Judicial Review* (Hart Publishing, 1998).

[138] See e.g. R. Macrory, 'Environmental public law and judicial review' (2008) 13 *Judicial Review* 115.

[139] T. de la Mare, 'Regulatory judicial review: The impact of competition Law' (ALBA lecture, 2007), p. 4.

[140] A. Ogus, *Regulation: Legal form and economic theory* (Clarendon Press, 1994), p. 117.

[141] As in *R v Director-General of Gas Supply, ex p. Smith* (31 July 1989, unreported); *R v Director-General of Telecommunications, ex p. Let's Talk (UK) Ltd* (6 April 1992, unreported).

[142] *Vermont Yankee Nuclear Power Corpn v NRDC* 435 US 519 (1978); but see n. 146 below.

A City regulation case from the same period, *Ex p. Panton*,[143] is a striking example of light-touch review. At issue were disciplinary decisions of the Securities and Futures Authority, one of the statutorily empowered SROs later replaced by the FSA.

> *Sir Thomas Bingham MR:* The clear intention is that bodies established under the Act should be the regulatory bodies and it is not the function of the court in anything other than a clear case to second-guess their decisions or, as it were, to look over their shoulder . . . These bodies are amenable to judicial review but are in anything, other than in very clear circumstances, to be left to get on with it. It is for them to decide on facts whether it is or it is not appropriate to proceed against a member as not being a fit and proper person. It is essentially a matter for their judgment as to the extent to which a complaint is investigated.

It is noteworthy also that the Monopolies and Mergers Commission did not lose a single judicial review case during the long years of Conservative rule despite regular challenges.[144] The closest squeak came in the *South Yorkshire Transport* case.[145] The issue was whether, as the MMC had determined, a particular merger came within the meaning of the statutory phrase 'a substantial part of the United Kingdom', so empowering an investigation. In a benchmark ruling echoing the later American approach,[146] the House of Lords made clear that while as a 'jurisdictional fact' the matter was susceptible to review, it did not entail a 'hard-edged' question yielding one correct answer:

> *Lord Mustill:* This clear-cut approach cannot be applied to every case, for the criterion itself may be so imprecise that different decision-makers, each acting rationally, might reach different conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: the present is such a case. Even after eliminating inappropriate senses of 'substantial' one is still left with a meaning broad enough to call for the exercise of judgement rather than exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the Commission arrived was well within the permissible field of judgement.

A greater use of litigation already appeared likely as New Labour came to power in 1997. For Scott, seeking to explain a small stream of utility cases:

[143] *R v Securities and Futures Authority, ex p. Panton* (20 June 1994, unreported). The earlier *Datafin* case (see p. 316 below) had effectively established that the SFA was subject to judicial review.

[144] See *R v Monopolies and Mergers Commission, ex p. Argyll Group plc* [1986] 1WLR 763; also, *R v Monopolies and Mergers Commission, ex p. Stagecoach Holdings plc*, The Times 23 July 1996. And see J. Swift, *Judicial Control of Competition Decisions in the UK and EU* (Competition Commission, 2004).

[145] *South Yorkshire Transport v Monopolies and Mergers Commission* [1993] 1 WLR 23.

[146] The famous '*Chevron* doctrine', whereby the statute is construed in accordance with the specific intention of Congress where evident, and, where not, the agencies are allowed reasonably to exercise judgement discretion: *Chevron USA Inc v NRDC* 467 US 837 (1984).

> Liberalisation has had the effect of multiplying the number of players participating in each sector (both regulatory and commercial) and tended to threaten the consensual, bureaucratic models of provision and regulation which carried over from the era of public ownership. Increasingly these more numerous players are seeking to test their rights and obligations against the legal frameworks of each sector . . .
>
> The key instances of litigation have occurred under circumstances where restrictions that had hitherto applied have been lifted or have been in the process of being lifted. Thus we have seen dominant incumbent firms seeking to improve the regulatory conditions as they face competition . . . a dominant incumbent challenging the UK implementation of EC liberalisation measures . . . new entrants seeking to improve the conditions of entry . . . and a pressure group challenging the relaxation of minimum service levels.[147]

In *Scottish Power*,[148] the refusal of the Director-General of Electricity Supply to reopen a consensual modification of the company's licence in light of the MMC's recommendation of more favourable terms for another company was quashed for *Wednesbury* unreasonableness. Since the D-G had put forward no 'preventing reason', he could scarcely complain at this use of judicial review as an agent for rationality in the regulatory process.

Judicial insistence on transparency and dialogue in regulation sits comfortably with the all-pervasive principles of better regulation. This kind of procedural review came to prominence in *Interbrew*,[149] a first defeat for the Competition Commission (the more powerful successor to the MMC). The company contested the minister's decision to accept the Commission's recommendation[150] that it be required to divest itself of a recently acquired UK brewing business. The Commission's failure to raise with Interbrew the remedy it was considering was held to amount to procedural unfairness:

> *Moses J:* There can be no doubt but that the Commission owed a duty of fairness in conducting its investigation as to the merger. The content of the duty will vary from case to case but generally it will require the decision maker to identify in advance areas which are causing him concern in reaching the decision in question . . . I accept that the Commission was under no obligation to undertake a two-stage procedure revealing firstly its provisional views as to the consequences of a duopoly and, at the second stage, inviting comments upon a proposed remedy. I also accept that the Commission was under time restraints . . . But that, in my judgment, would not have prevented the issue being raised in a way which would have given Interbrew a fair opportunity to deal with it.

147 C. Scott, 'The juridification of relations in the UK utilities sector' in Black, Muchlinski and Walker, *Commercial Regulation and Judicial Review*, pp. 20, 56.

148 *R v Director-General of Electricity Supply, ex p. Scottish Power plc* (3 February 1997, unreported). For other contemporary examples see *Mercury Communications Ltd v Director-General of Telecommunications* [1996] 1 WLR 48 and *Save Our Railways* (see p. 405 below).

149 *Interbrew SA v Competition Commission* [2001] EWHC Admin 367.

150 Today it is the agency and not the minister that has the prime decision-making responsibility in monopolies and mergers: Enterprise Act 2002.

Legal accountability works to promote, and is itself promoted by, the increased amount of information and explanation available from the regulators. The courts, in other words, play a composite role, constituting machinery for accountability but contributing also to public accountability by, for example, buttressing reasoned decision-making (see Chapter 14). Indicative perhaps of future developments, the *Eisai* case[151] shows the outlines of what Shapiro has called 'synoptic dialogue':[152] the regulator is being asked to supply evidence to show that the decision-making process, and ultimately the decision, is fair and rational. The dispute centred on the economic model used by NICE (see p. 123 above) to appraise the clinical benefits and cost-effectiveness of new medicines for NHS purposes. Wishing to have the whole matter re-opened, a pharmaceuticals company aggrieved by restrictive guidance on the availability of its products complained that the full workings of the methodology had not been disclosed in the public consultation. Protestations by the agency that this was a recipe for more technical wrangling and delay failed to move the court.

> *Richards LJ:* Procedural fairness does require release of the fully executable version of the model. It is true that there is already a remarkable degree of disclosure and of transparency in the consultation process; but that cuts both ways, because it also serves to underline the nature and importance of the exercise being carried out. The refusal to release the [workings] stands out as the one exception to the principle of openness and transparency that NICE has acknowledged as appropriate in this context. It does place consultees (or at least a sub-set of them, since it is mainly the pharmaceutical companies which are likely to be affected by this in practice) at a significant disadvantage in challenging the reliability of the model. In that respect it limits their ability to make an intelligent response on something that is central to the appraisal process.

The judicial resolve to avoid substantive matters of economic regulation has nonetheless held firm despite regular testing. The *GNER* case[153] centred on the rail regulator's policy of differential charging, whereby franchise holders, but not their competitors, had to pay substantial fixed track charges on the basis of greater operational costs. Dismissing a complaint of unlawful discrimination, Sullivan J held fast to the principle of no second-guessing:

> Ascertaining the cost that is directly incurred as a result of operating any particular train service is a complex and difficult task, and the answer to the question: 'what is that cost?' will be very much a matter of expert judgment. In a nutshell, the Office of the Rail Regulator considers that the variable track access charge, although imperfect, is the best answer that can be provided

[151] *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438.
[152] M. Shapiro, 'The giving reasons requirement' (1992) *University of Chicago Legal Forum* 179, 183; and see p. 103 above.
[153] *R (Great North Eastern Railway Ltd) v Rail Regulator* [2006] EWHC 1942. Other cogent examples are *R (London and Continental Stations & Property Ltd.) v Rail Regulator* [2003] EWHC 2607 and *R (Centro) v Transport Secretary* [2007] EWHC 2729.

> on the information presently available . . . Given the ORR's expertise in this highly technical field the Court would be very slow indeed to impugn the ORR's view . . . It is in any event no part of the Court's function to substitute its own view on matters of economic judgment: the question is not whether the ORR's approach to this issue makes good sense in terms of transport economics, but whether it is compliant with the [relevant] Regulations . . .
>
> Where the statutory framework confers such a large measure of discretion upon the Regulator it would not be appropriate to focus solely upon the wording of the Act and to ignore the very detailed policies which are applied by the ORR . . . When these policies and practices are considered it is clear that the market conditions under which franchised operators and open access operators are able to seek access to the railway infrastructure are, in practice, very different indeed.

Regulatory lawyers have naturally been interested to explore Convention rights. Since economic regulation necessarily impinges on 'civil rights and obligations' the procedural requirements of Art. 6 feature prominently and have driven an expansion of statutory appeal rights as part of the 'new regulatory model'. The right to peaceful enjoyment of possessions in Art. 1 of the First Protocol is also in play: deprivation of possessions must be 'in the public interest' and 'subject to conditions provided by law'. We see how the substantive and procedural constraints on the Macrory-style use of financial penalties are neatly tailored to promote compliance, especially via the proportionality principle, so exploiting the very extensive margin of appreciation for acting in the public interest customarily allowed under this Article.[154]

In *Marcic v Thames Water Utilities Ltd*,[155] the Court of Appeal and House of Lords clashed over the judicial role. M's property had suffered repeated flooding from sewerage systems operated by TW, which made his house virtually unsaleable; only major drainage works could resolve the problem. The Court of Appeal awarded damages under the HRA for a breach of Art. 1 of Protocol 1 and Art. 8, as well as in the tort of nuisance. TW had failed to demonstrate that its scheme of priorities struck a fair balance between the competing interests of M and other customers. But how did this square with a regulatory system predicated on OFWAT's power to make an enforcement order?[156] Implicit in 'sustained and focused control' is that public regulation of statutory undertakings constrains free-ranging private law rights of action; the graded responses of the 'enforcement pyramid' must have room to operate. Insisting that the regulation must be considered in the round, the House of Lords refused to allow M to side-step OFWAT (to which he had in fact never complained).

> *Lord Nicholls:* The claim based on the Human Rights Act 1998 raises a broader issue: is the statutory scheme as a whole, of which this enforcement procedure is part,

[154] *Lithgow v UK* (1986) 8 EHRR 329; *R (SRM Global Master Fund) v HM Treasury* [2009] EWHC 227.

[155] [2002] EWCA Civ 64; [2003] UKHL 66.

[156] The case pre-dates the agency's power to impose financial penalties. An enforcement order would have generated individual rights to damages.

> Convention-compliant? In the present case the interests Parliament had to balance included, on the one hand, the interests of customers of a company whose properties are prone to sewer flooding and, on the other hand, all the other customers of the company whose properties are drained through the company's sewers. The interests of the first group conflict with the interests of the company's customers as a whole in that only a minority of customers suffer sewer flooding but the company's customers as a whole meet the cost of building more sewers. As already noted, the balance struck by the statutory scheme is to impose a general drainage obligation on a sewerage undertaker but to entrust enforcement of this obligation to an independent regulator who has regard to all the different interests involved. Decisions of the Director are of course subject to an appropriately penetrating degree of judicial review by the courts. In principle this scheme seems to me to strike a reasonable balance. Parliament acted well within its bounds as policy maker . . . The malfunctioning of the statutory scheme on this occasion does not cast doubt on its overall fairness as a scheme.

Lord Hoffman explained that in complex matters of economic regulation the courts should proceed cautiously, including in human rights cases. (Linked themes are the circumspect approach in resources cases (see Chapter 16) and an evident concern to keep the lid on HRA damages claims (see Chapter 17)):

> When one is dealing with the capital expenditure of a statutory undertaking providing public utilities on a large scale . . . the matter is no longer confined to the parties to the action. If one customer is given a certain level of services, everyone in the same circumstances should receive the same level of services. So the effect of a decision about what it would be reasonable to expect a sewerage undertaker to do for the plaintiff is extrapolated across the country. This in turn raises questions of public interest. Capital expenditure on new sewers has to be financed; interest must be paid on borrowings and privatised undertakers must earn a reasonable return. This expenditure can be met only by charges paid by consumers. Is it in the public interest that they should have to pay more? And does expenditure on the particular improvements with which the plaintiff is concerned represent the best order of priorities? These are decisions which courts are not equipped to make in ordinary litigation. It is therefore not surprising that for more than a century the question of whether more or better sewers should be constructed has been entrusted by Parliament to administrators rather than judges.

(d) Judicial supervision (II): Reach

The proliferation of indirect forms of governance raised the question of amenability to judicial review. In the 1980s 'the Datafin project'[157] entailed the assertion of jurisdiction in cases stated to involve 'public power'. But how far could this sensibly go? With one eye on the caseload, how should the courts

[157] So dubbed by M. Aronson, 'A public lawyer's responses to privatisation and outsourcing' in Taggart (ed.) *The Province of Administrative Law* (Hart Publishing, 1997).

deal with a mass of self-regulatory organisations (SROs) more or less, or not at all, connected with the state (see p. 326 below)? Simply to abstain might offend against the historical role of judicial review, protection of individuals from abuse of power; this was an argument raised by a range of applicants scrambling to gain entry into judicial review procedure.[158] Alternatively, was there not a need to adjust judicial review jurisdiction to meet the twin realities of SROs being 'steered' by, and exercising powers on behalf of, government? It is important to keep in mind however that judicial review is only one form of judicial supervision. Not before time, the courts have begun to mix and match 'public' and 'private' law doctrines better to reflect the subtle mixes of 'public' and 'private' power.

The *GCHQ* case had expanded the reach of common law principles of judicial review (see p. 107 above): but what then? Three broad positions were possible:[159]

1. Judicial review should operate to keep statutory and prerogative bodies under supervision, it being geared towards, and confined to, the exercise of explicitly governmental and legal powers.
2. Judicial review should apply to any exercise of regulatory power actually delegated by the state. This fits with the move to indirect forms of administration, and encompasses some, but importantly not all, forms of self-regulation.
3. Judicial review should extend to the exercise of monopoly power over an important sector of national life. This conveys a different sense of publicness to (2), being premised not on a connection with the state but on the amount of power exercisable.

The leading case of *R v Panel of Take-overs and Mergers, ex p. Datafin plc*[160] shows the judges moving beyond (1) to (2), and even flirting with (3). A non-statutory SRO, the Panel devised and operated the relevant City Code. It had no direct statutory, prerogative or common law powers, nor was it in contractual relationship with the financial market or with individual dealers, but it clearly was a major actor in the regulatory network. Supported by statutory powers which presupposed its existence, and boasting a City-wide membership which included nominees of the Bank of England, its decisions could result in the imposition of sanctions. When the Panel rejected Datafin's complaint of breach of the Code by a rival bidder, the Court of Appeal held it susceptible to judicial review:

[158] For diverse reasons: no other cause of action; special relevance of tests of legality, fairness and irrationality; and superior public law remedies (quashing orders). Employment cases were much to the fore, see e.g. *R v East Berkshire Health Authority, ex p. Walsh* [1985] QB 152.

[159] A fourth position, that judicial review should regulate all forms of power, public or private, exercised by the state or otherwise, was never seriously on the agenda.

[160] [1987] QB 815. See D. Pannick, `Who is subject to judicial review and in respect of what?' [1992] *PL* 1

> *Lord Donaldson MR:* In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly, the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction . . . The Panel . . . is without doubt performing a public duty and an important one . . . In this context I should be very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted.

Since a public element could be found in most walks of life, the reasoning was potentially explosive. Whereas previously, in establishing the limits of the supervisory jurisdiction, the courts had looked at the *source* of a body's power, the judges had now encompassed in the test the *nature* of the power being exercised.

But matters were not so simple. From the viewpoint of the regulator, 'the decisive interest' of the case lay in 'the guidelines . . . indicating that the jurisdiction would be sparingly exercised'.[161] Not only had Lord Donaldson spoken of the 'considerable latitude' owed to a SRO interpreting its own rules; he had further asserted the court's discretionary power to limit public law remedies (see Chapter 16). Intervention should be by declaration and should be 'historic rather than contemporaneous' in order to sustain orderly markets. The reasoning in *Datafin* was a poor solution: discouraging to litigants, it conjured the shadow but denied the substance of judicial review.

In asserting jurisdiction, the court had failed to provide appropriate guidance, sparking a predictable welter of litigation, and complex and contradictory case law. Subsequent cases focused on the need to find 'not merely a public but potentially a governmental interest'[162] in the regulation (an approach akin to position (2)). Requiring of the judges 'a greater perspicacity and insight into governmental intentions than most politicians and civil servants would claim',[163] a court might ask whether 'the Government would have assumed the powers being exercised "but for" self-regulation?' Alternatively, it might ask whether the body had been 'integrated' in a system of regulation approved or defined by government, such as co-regulation.[164] This both fitted the facts of *Datafin* and marked a substantial limitation on the scope of the project but, as would later be candidly admitted, it was as often as not 'a matter of feel'.[165] The Bar Council, the Advertising Standards Authority, the Press Complaints Commssion (see p. 462 below), and a not-for-profit company regulating

[161] Lord Alexander, ' Judicial review and City regulators' (1989) 52 *MLR* 640, 644.

[162] *R v Chief Rabbi of the United Hebrew Congregations, ex p. Wachmann* [1992] 1 WLR 1036 (Simon Brown J).

[163] R. Cranston, 'Reviewing judicial review' in Richardson and Genn (eds.), *Administrative Law and Government Action* (Clarendon Press, 1994), p. 48.

[164] *R v Chief Rabbi of the United Hebrew Congregations, ex p. Wachmann.*

[165] *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599 (Scott Baker LJ).

farmers' markets have all been held amenable to the jurisdiction; the contrary list is a bewildering array of bodies ranging from the Football Association to Lloyds of London, the Labour Party and the Chief Rabbi.[166] As Aronson explained,[167] the root of the difficulty lay in the project's binary logic. The public/private dichotomy it assumed did not match the social reality – made ever more apparent as regulatory reform progressed – of mixed power with both public and private elements.

Datafin left an unresolved tension between recognition of institutional power as a reason for subjecting a body to review and exemption of bodies with a contractual source of power. It had previously been held in *Law v National Greyhound Racing Club Ltd*[168] that the NGRC was not the kind of body covered by judicial review, its licensing powers being derived from contract. In effect, the club had been treated as a 'domestic tribunal'. Post-*Datafin*, the key question was whether the contract 'exception' should be disapplied in a type (3) monopoly situation. Matters came to a head in *R v Jockey Club Disciplinary Committee, ex p. Aga Khan*.[169] The Jockey Club never had been drawn into a co-regulatory partnership with government; its great powers of organisation and control of all aspects of horse racing were exercised through its rulebook, which constituted a contract for those in the industry. One of his horses having failed a dope test and been disqualified, the applicant sought judicial review. This attempt further to extend the frontiers of the jurisdiction signally failed however.

> *Sir Thomas Bingham MR*: Those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country . . . But this does not . . . alter the fact . . . that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights . . . It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.[170]

Not all public lawyers were dismayed. Aronson urged the need to broaden horizons: 'the way in which the state has restructured itself . . . will even raise questions as to whether the best way of handling an issue might not be an adaptation of private law doctrines'.[171] Some tools lay close to hand. Lord Denning

[166] See Lord Woolf, J. Jowell and A. Le Sueur, *de Smith's Judicial Review*, 6th edn (Sweet & Maxwell, 2007), Ch. 3.

[167] Aronson, 'A public lawyer's responses to privatisation and outsourcing'; and see J. Black, 'Constitutionalising self-regulation' (1996) 59 *MLR* 24.

[168] [1983] 1 WLR 1302.

[169] [1993] 1 WLR 909.

[170] The decision would later be reaffirmed for the purpose of the current procedural rules, introduced in 2000: *R (Mullins) v Jockey Club* [2005] EWHC 2197. And see below, Ch. 15.

[171] Aronson, 'A public lawyer's responses to privatisation and outsourcing', p. 70. See also, D. Oliver, 'Common values in public and private law and the public/private divide' [1997] *PL* 467.

had conjured a supervisory jurisdiction that was neither contractual nor grounded in judicial review in the context of restraint of trade. Such was *Nagle v Fielden*,[172] in which the Jockey Club's refusal to license a female racehorse trainer was held challengeable as contrary to public policy. Previously overshadowed by *Datafin*, this parallel common law control was ripe for reinvigoration. Alternatively, where the court could find – or construct – a contractual nexus in the self-regulation, implied terms could be used to impose good governance values.[173] The *Bradley* case[174] in 2004 shows the potentials. A five-year ban imposed by the Appeal Board of the Jockey Club struck at B's livelihood; the Club could be said to have promised that it would give effect to a *lawful* decision of the Board. Effectively bridging the public/private 'divide', Stephen Richards J held that both features generated a supervisory function, 'very similar to that of a court on judicial review':

> Given the difficulties that sometimes arise in drawing the precise boundary . . . I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so forth . . . The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim.

The court should still show deference; it was the secondary decision-maker in the sense familiar from *Huang*. As Lord Phillips observed on appeal, 'professional and trade regulatory and disciplinary bodies are usually better placed than is the court to evaluate the significance of breaches of the rules or standards of behaviour governing the professions or trades to which they relate'. The ban was upheld, so serious were the findings of corrupt practice.

The HRA gives all this an extra twist. Specifying a modified 'public functions' test, s. 6 of the Act reflects the broad impetus – and limitations – of the *Datafin* project. As we see in the next chapter, a line of cases, some involving SROs, but mostly concerning the contractualisation of public services,[175] take a cautious approach to amenability to Convention rights.

[172] [1966] 2QB 663.

[173] As sign-posted by a string of trade union disciplinary cases, e.g. *Lee v Showmen's Guild* [1952] QB 329 and *Edwards v SOGAT* [1971] Ch 354; and see Ch. 8 below.

[174] *Bradley v Jockey Club* [2004] EWHC 2164; [2005] EWCA Civ 1056. See also *Mullins v McFarlane* [2006] EWHC 986. An independent Horseracing Regulatory Authority is now in place.

[175] The leading authority being *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Others* [2007] UKHL 27. For cases involving SROs, see *R (Beer) v Hampshire Farmers Markets Ltd* [2004] 1 WLR 233 and *R (Mullins) v Jockey Club* [2005] EWHC 2197.

(e) Thickening legal accountability: High-class tribunals

The trend in economic regulation today is a closer form of legal 'answerability' with statutory appeals and reviews by high-powered tribunals substituted for judicial review. Reflecting and reinforcing the increased role for competition law in market regulation, the Competition Appeal Tribunal (CAT) is the prime example.[176] Adjudicating on decisions of the Competition Commission, the OFT, and sectoral agencies like OFCOM, CAT fits neatly into Prosser's 'new regulatory model'. The logic of CAT – effectively a specialist regulatory court – is creative tension or less 'deference'. A leading practitioner notes the crude equation: 'review of experts by generalists – wide margin of appreciation; review of experts by other experts (potentially even 'more expert experts') – narrow margin'.[177] Possible non-compliance with Art. 6 ECHR, stemming from the limitations of judicial review (see further Chapter 14), is also avoided.

CAT's great strength is its cross-disciplinary nature: a panel of legal chairmen and a panel of members with backgrounds in business and accountancy, regulation and economics. Specially tailored rules of procedure render it better equipped for 'hard look' review than the Administrative Court; complex factual issues and technical evaluations are well catered for:

> The Tribunal will pay close attention to the probative value of documentary evidence. Where there are essential evidential issues that cannot be satisfactorily resolved without cross-examination, the Tribunal may permit the oral examination of witnesses. As regards expert evidence, the Tribunal will expect the parties to make every effort to narrow the points at issue, and to reach agreement where possible.[178]

In fact CAT has a split jurisdiction.[179] First it deals with appeals on the merits, the strong version of legal 'answerability'. Although the Court of Appeal may step in occasionally to clip its claws,[180] CAT can thus range much more freely than does the ordinary judicial watchdog. Indicative of the 'hard look' approach, the Tribunal has elaborated its own checklist. The regulator's decision is tested to see whether it 'is incorrect or, at the least, insufficient, from the point of view of (i) the reasons given; (ii) the facts and analysis relied on; (iii) the law applied; (iv) the investigation undertaken; or (v) the procedure followed'.[181] Point (ii) speaks volumes.

[176] Closely followed by the Financial Services and Markets Tribunal, which deals with disciplinary decisions and proceedings taken for market abuse.
[177] de la Mare, 'Regulatory judicial review', p. 6.
[178] CAT, *Guide to Proceedings* (2007), p. 13.
[179] Competition Act 1998; Enterprise Act 2002.
[180] As when CAT, claiming a supervisory role, sought to impose on the regulator a timetable for re-investigation: *OFCOM v Floe Telecom Ltd* [2006] EWCA Civ 768.
[181] *Freeserve v Director General of Telecommunications* [2003] CAT 5.

In *Albion*,[182] a CAT case concerning (the lack of) competition in the water industry, the first market entrant since privatisation struck a deal to supply a large industrial user. The incumbent supplier responded in classic monopolistic style by imposing hefty charges for use of its pipes. OFWAT rejected Albion's complaint of abuse of dominant position. Strongly rebuking the regulator, CAT pressed the need for more 'regulating for competition':

> The effect of [OFWAT's] decision is to render uneconomic Albion's proposal to supply Shotton Paper . . . The consequent removal of choice for the customer and the potential elimination of the [market entrant] are matters which the Tribunal views with serious concern . . . Irrespective of the justification in principle for a policy designed to enable incumbents to recover their sunk and common costs and fund investment . . . the particular application . . . maintains a retail price which is not shown to be cost-based and which the evidence strongly suggests to be excessive.

Second, in certain cases concerning mergers and market investigations a different balance has been struck, with CAT statutorily enjoined 'to apply the same principles as would be applied by a court on an application for judicial review'. Predictably since legal principles are generally malleable (see Chapter 5), and judicial review principles particularly so (see Chapter 3), this requirement has been a recipe for conflict between CAT and both regulators and judges. Question: where (as effectively with *GNER*) the Administrative Court would choose 'super-*Wednesbury*' (see p. 314 above), is it open to CAT to use 'ordinary *Wednesbury*' or even 'anxious scrutiny' as the standard of review?

A 2004 merger case, *IBA Health Ltd*,[183] shows the jostling for position. In upholding a complaint against the OFT, CAT ventured to suggest that because it was an expert body there was no direct read-over of the restrictive case law on judicial review. The Court of Appeal was naturally more conservative. 'If and in so far as CAT did not apply the ordinary principles of judicial review as would be applied by a court . . . then they failed to observe the mandatory requirements'. Even so, the judges allowed that some stretching was permitted. 'CAT was right to observe that its approach should reflect the "specific context" in which it had been created as a specialist tribunal.' Giving substance to the idea of a 'synoptic dialogue', CAT duly exploited the opportunity in *UniChem*.[184] 'The Tribunal has jurisdiction, acting in a supervisory rather than appellate capacity, to determine whether the OFT's conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account, and that material

[182] *Albion Water Ltd v Water Services Regulation Authority* [2006] CAT 23. See further *Dwr Cymru v Albion Water Ltd* [2008] EWCA Civ 536.

[183] *Office of Fair Trading v IBA Health Ltd* [2004] 4 All ER 1103.

[184] *UniChem v Office of Fair Trading* [2005] CompAR 907, where CAT also drew on the leading ECJ authority of Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987. See also *Tesco plc v Competition Commission* [2009] CAT 6.

facts have not been omitted.' The message is clear: for securing effective legal accountability, cutting-edge market regulation demands technically superior forms of adjudication. Given New Labour's predilection for handing decisions of major economic significance to super-regulators, this type of close scrutiny has added value. 'If the CAT does not control, it may be argued that these agencies are in a real sense uncontrollable.'[185]

4. Breaking the mould

Public power exercised through indirect means is still public power and public lawyers in an age of governance must engage with the forms, functions and activities of hybridised systems ranged across a continuum from self-regulation to highly developed species of meta-, meso-, and co-regulation.[186] We started with the metaphor of government steering not rowing: a light hand on the tiller. Now we see that under New Labour the steering has increased in many sectors.

(a) Self-regulation in issue

Britain was once described as 'something of a haven for self-regulation'.[187] Prevalent in major parts of industry, in the City of London and in the professions, this reflected and reinforced the attributes of co-operation, informality and discretion, the high degree of trust associated with an elite or 'club' style of government. The second half of the twentieth century saw a decline; the more so, once a distinctive regulatory reform agenda took hold in the 1980s. While self-regulatory organisations (SROs) continued to play a vital role across broad swathes of the functioning economy, such arrangements came increasingly to be, in Moran's words, 'institutionalised, codified and juridified'.[188] The regulatory culture was being transformed on the back of efforts to redefine self-regulation 'to encompass the public interest, the interests of users as well as practitioners'.[189]

The Financial Services Act 1986, the classic example from the Thatcher years, constitutes the 'halfway house' between a pre-existing network of self-governing bodies expressing 'group' values, and the current structures of super-agency and RBR. At the heart of the scheme lay a blend of statutory and self-regulation: a more elaborate and hierarchical system of rules and procedures than hitherto.[190] The state was becoming 'a more pervasive presence

[185] B. Kennelly, 'Judicial review and the Competition Appeal Tribunal' (2006) 11 *Judicial Review* 160, 163.

[186] J. Freeman, 'Private parties, public function and the real democracy problem in the new administrative law' in Dyzenhaus (ed.), *Recrafting the Rule of Law* (Hart Publishing, 1999).

[187] R. Baggott, ' Regulatory reform in Britain: The changing face of self-regulation' (1989) 67 *Pub. Admin.* 436, 438.

[188] M. Moran, *The British Regulatory State: High modernism and hyper-innovation* (Oxford University Press, 2003), p. 69.

[189] A. Page, `Self-regulation: The constitutional dimension' (1986) 49 *MLR* 141, 164.

[190] L. Gower, '"Big bang" and City regulation' (1988) 51 *MLR* 1.

than ever in financial markets'[191] but the Act was nonetheless a compromise and one which New Labour was ultimately unwilling to tolerate. Catching the public mood, the National Consumer Council[192] was also busy with a shopping list of reforms – public appointments, procedures for consultation and rule-making and complaint mechanisms. The theme was one of 'regulated autonomy',[193] with the delegation of state authority implied by self-regulation needing to be matched by an injection of good governance values. The BRTF later took up the baton under New Labour, reading across into self-regulation its five-fold principles of better regulation.[194]

Countervailing trends can be seen at work. On the one hand – the spread of state tentacles – there is more taming of self-regulation. On the other hand, embedding self-regulation in the regulatory state points up additional possibilities for SROs alongside, or as an alternative to, government agencies. Given the problems of overload associated with direct forms of state intervention, as also the ideological attraction of more private autonomy, policy-makers may prefer to hazard the route of making self-interested, collective action contribute to the achievement of public-policy objectives.[195] The danger with self-regulation is that regulatory capture is there from the outset[196]; the lack of legitimacy cannot be wished away.

Collective self-regulatory systems come in all shapes and sizes.[197] The degree of monopoly power and the relevance of the regulation for third parties are key variables. Does the SRO regulate all the suppliers in a market, including non-members? If so, it is a prime candidate for harnessing. Legal status and degree of formality are important design choices. The body may or may not have been specially created for the purpose. It may or may not have statutory powers. It may be merely an unincorporated association, be constituted under a (private) Act of Parliament, or, as is more commonly the case, be a company limited by guarantee (so having a basic constitutional structure in the form of the company memorandum and articles). And is there in effect a 'mini legal system': a well-established and generally recognised set of practice rules as with doctors and lawyers? The rules themselves may have binding force, sanctioned perhaps by a disciplinary tribunal,[198] or they may be more or less voluntary ('soft law'). Different approaches to access and consumer voice are again of interest. Are

[191] M. Moran, 'Thatcherism and financial regulation' (1988) 59 *Pol. Q.* 20, 26.

[192] National Consumer Council, *Self-Regulation* (1986) and *Models of self-regulation* (2000).

[193] P. Birkinshaw, N. Lewis and I. Harden, *Government by Moonlight: The hybrid parts of the state* (Routledge, 1990); C. Graham, 'Self-regulation' in Richardson and Genn (eds.), *Administrative Law and Government Action*.

[194] BRTF, *Self Regulation* (1999).

[195] See the pioneering work of W. Streeck and P. Schmitter (eds.), *Private Interest Government* (Sage, 1985).

[196] J. Kay, 'The forms of regulation' in Goodhart and Seldon (eds.), *Financial Regulation – Or Over-Regulation* (IEA, 1988), p. 34.

[197] A. Ogus, 'Rethinking self-regulation' (1995) 15 *OJLS* 97; I. Bartle and P. Vass, *Self-Regulation and the Regulatory State* (CRI, 2005).

[198] B. Harris, *Disciplinary and Regulatory Proceedings*, 4th edn (Jordan, 2006) is the leading text.

there formal processes of consultation with designated 'stakeholders' such as consumer groups? Is there a more flexible mix of formal and informal discussions with interested parties amounting to a regulatory negotiation?[199] And what, ultimately, is the input from government across the broad regulatory cycle of rule formulation, monitoring and inspection, enforcement and sanctions, for example under the banner of 'better regulation'?

Picking up on ideas of 'decentred regulation' or 'regulation in many rooms', BRTF's analysis highlights themes of flexibility and responsiveness, and of cost-effectiveness and expertise:[200]

- Self-regulatory rules are by definition developed by those directly involved in the industry or profession and so can be said to best reflect the issues and needs of the particular sector.
- It can be quicker to achieve self-regulation than statutory regulation.
- Self-regulation can generate a sense of ownership within the profession or industry and so is more likely to secure a high level of compliance.
- It can harness common interest in maintaining the reputation of those involved in the activity.
- It can be easily adapted or updated to reflect changing circumstances or industry developments.
- In some areas, especially the professions, it may be disproportionately expensive or difficult for government to acquire the specialist knowledge necessary to regulate effectively.
- Self-regulation can provide a quicker and cheaper means of redress.
- It can harness the close relationship between the industry/profession and its clients.

To which we might add:

- Self-regulation is cheap, because the regulated bear the burden of the costs of regulation.

The dangers are conveniently summarised by BRTF in terms of coverage and – as envisaged by private interest theories of regulation in terms of 'rent-seeking' – of conflicts of interest:[201]

- All those who trade in the profession or sector will not necessarily operate within the self-regulatory rules.
- It may be difficult to ensure that consumers appreciate the implications of trading with those who operate outside the rules.
- Consumers may not be aware of who or what is covered.
- There is a danger of self interest being put ahead of the public interest and

[199] As discussed in the agency context in the US: see J. Freeman and L. Langbein, 'Regulatory negotiation and the legitimacy benefit' (2000) 9 *New York University Environmental Law J.* 60.
[200] BRTF, *Self Regulation*, p. 4.
[201] *Ibid.*, p. 5.

self-regulation may lead to anti-competitive behaviour, especially in terms of restricting market entry beyond the restrictions required to protect consumers.
- The organisations involved in enforcement may not be open and transparent about their processes and outcomes.
- There may be a general lack of public confidence in the ability of or the incentives for a self-regulatory body to provide effective consumer protection, and to impose appropriate sanctions when rules are broken.

To which we would add:

- There is the problem of accountability and control through the acquisition of power by bodies not answerable in the conventional way through the political process and the diffusion of government responsibility.

(b) Harnessing: Policy options

The scope for creative blends of self-regulation and government regulation – forms of 'responsive regulation' whereby different combinations of techniques are identified and applied in a myriad of contexts – is demonstrated. We see how the concept of self-regulation is both sufficiently flexible to accommodate a considerable degree of official involvement and shades naturally into ideas of 'partnership' and 'co-regulation'. The broad policy options can be viewed as a continuum:

(i) pure self-regulation
(ii) tacitly supported self-regulation
(iii) coerced self-regulation
(iv) sanctioned self-regulation/formally identifiable elements of meta-regulation
(v) mandated self-regulation/ substantial elements of meso-regulation
(vi) fully-fledged co-regulation.

As an ideal type, category (i) conveys the classical idea of voluntary arrangements, of bottom-up control in the functioning economy where the collective group, industry or profession desires self-regulation and takes the initiative. Whereas, at a minimum, the regulatory state exhibits 'a passive interest' liable to be engaged should some major 'shock' afflict the legitimacy of a self-regulatory system.[202] Government relying on the body's regulatory functions, as reflected in a decision for the time being not to take legal powers: such is (ii), self-regulation with the tacit support of state actors. As illustrated by the Press Complaints Commission (below, p. 462), category (iii) denotes the not unfamiliar scenario of the SRO formulating and applying a system of controls in response to threats – real or perceived – that otherwise government regula-

[202] Bartle and Vass, *Self-Regulation and the Regulatory State* , p. 3.

tion will be forthcoming. Subsequently of course the SRO may gain acceptance, such that reliance for effective workings on 'the shadow of the state' diminishes.

In (iv), state actors are seen playing a more active role, such that ideas of meta-regulation come to the fore. Formulated by the SRO, requirements are subjected to official approval: private ordering bears the stamp of public interest. The design and workings of trade association codes of practice are a prime example of this; statutory regulators would simply be overwhelmed otherwise.[203] Category (v), in which the SRO is required to establish and apply norms within a prescribed framework, is often termed statutory self-regulation. Very familiar in the professions, this harnessing or enrolment of non-state actors in what increasingly looks like 'collaborative governance' is epitomised today by sector-specific meso-regulation. The paradigm being that of 'partnership working', category (vi) shows the mixing of public with private power taken to new heights in formally established twin regulatory arrangements. This may be coupled as in (v) with strong elements of meta-regulation.

Better to convey the flavour, we have chosen some examples for closer inspection. First comes fundamental reform of professional self-regulation in health and social care. Currently being implemented in the name of patient protection, it exemplifies the continuing advance of the regulatory state. Meso-regulation is centre-stage. OFCOM-inspired co-regulation is the second illustration, or rather two versions of it. Critically related to the effectiveness of meta-regulation in underpinning the joint arrangements, the good and the ugly of this fashionable technique are on offer. In addition, in Chapter 10 on complaint systems we examine the Press Complaints Commission. Highly self-regulatory in terms of content, its workings show both the many advantages of voluntary systems and an ongoing struggle for legitimacy.

(c) Meso-regulation: Health- and social-care professionals

The 2007 White Paper *Trust, Assurance and Safety: The regulation of health professionals in the 21st century*[204] effectively challenged a bastion of self-regulation. The prompt was the long-running public inquiry into events involving mass murderer Harold Shipman, highlighting concerns that in matters of regulation the culture of the medical profession was too focused on doctors' interests.[205] Itself part of a larger package of reforms, which includes a new super-regulator (the Care Quality Commission) to oversee health and social-care provision in England generally,[206] the resulting statutory provision

[203] See e.g. FSA, *Confirmation of Industry Guidance* (2006).
[204] Cm. 7013 (2007).
[205] Dame Janet Smith, *Fifth Report of the Shipman Inquiry: Safeguarding patients* (2001); DoH *Learning from Tragedy: Keeping patients safe*, Cm. 7014 (2007).
[206] See Health and Social Care Act 2008, Part I.

takes the modern trend of increased legislative intervention in the regulatory affairs of the professions to new heights.

The case for reform was grounded in the present-day realities of clinical practice. Here as elsewhere, public trust is at a premium in view of less deference and greater technical complexity:

> There is emerging and growing public pressure for the relationship between the health professional and the patient to be an open, honest and active partnership, and a declining public willingness to accept passively and unquestioningly the clinical judgements that are made for them. The system that regulates health professionals, in its governance and its ability to provide objective assurance, needs to respond to these pressures, which will increase as the global economy and the open information society gather pace.
>
> As the technical ability to intervene effectively continues to accelerate, patient and public expectations of health professionals are rising proportionately and the work of health professionals is becoming more complex and specialised. Accordingly, the scope for human error increases, putting growing pressures on health professionals who strive to fulfil their fundamental ambitions and instincts to deliver clinical excellence. Our system of regulation needs to adapt and respond to those pressures.[207]

The policy development further illustrates the influence of better regulation principles across the piece, as with targeting and proportionality. Ministers also recognised the role of due process and accountability as vital sources of regulatory legitimacy. Testifying to the high standards of most health professionals, the White Paper said:

> We need a system . . . that is better able to identify people early on who are struggling . . . so that they have a fair chance to improve . . . and a system that is better able to detect and act against those very rare malicious individuals who risk undermining public and professional confidence.
>
> Sustaining confidence also means patients need to be assured that, when there are problems with health professionals, their concerns will be listened to and acted upon and that they will receive timely explanations . . . Professional regulation is about fairness to both sides of the partnership between patients and professionals. To command the confidence of both, it must also be *seen to be fair*, both to patients and to health professionals.[208]

Although nostrums of RBR infused the policy development, the Government's chief medical officer had to concede that 'there are real challenges in constructing a rigorous, comprehensive and robust assessment that can put accurate costings on the risks and benefits that need to be weighed carefully in an ideal analysis of professional regulation'. This was something of an understatement:

[207] *Trust, Assurance and Safety*, Cm. 7013 (2007), p. 16
[208] *Ibid*., p. 2.

> Empirical information on the prevalence of death, injury, disability and mental distress caused by inadequate professional competence or malicious, discourteous or abusive conduct is not available. Even if it were, it would be difficult to cost. What price do we put on the benefits of patients' peace of mind and public confidence? How do we cost lives scarred by grief in families who have lost those they love? Can we measure the frustration and anxiety of health professionals enmeshed unnecessarily in national professional regulatory procedures? How do we measure the costs of a sense of having been unjustly treated? We are more dependent than we would wish to be on using judgement.[209]

The detailed provision in Part II of the Health and Social Care Act 2008 shows how the tentacles of the regulatory state spread in different ways. Take the demand for 'fire-watching' at the ground-floor level, where the role of private providers outside the NHS must be factored into the equation. The Act empowers a system of 'responsible officers' to help identify and handle cases of poor professional performance in organisations employing or contracting with doctors.[210] Putting in issue the very concept of professionally led regulation, the policy of 'assuring independence' sees – as a minimum requirement – parity of lay members with professional representatives on the relevant SROs, which include the General Medical Council, the Nursing and Midwifery Council, and the General Social Care Council. As for 'fire-fighting' in the form of fitness-to-practise cases, investigation and prosecution of doctors is separated from adjudication, better to allay concerns about the dominance of private practitioner interest. The hitherto imperious GMC retains basic functions such as registration but has otherwise lost out to a new corporate body, publicly appointed: the Office of the Health Professions Adjudicator.[211] The rules on enforcement are also stiffened: the civil, rather than criminal, standard of proof now applies across the sector.

A beefed-up system of meso-regulation fits the New Labour penchant for rationalisation. The drive was on for greater coherence and consistency in the face of diverse legal frameworks that, profession by profession, had been built up and amended over many years.[212] Officially described as a 'statutory overarching body', the Council for the Regulation of Health Care Professionals had been established in 2003 to promote best practice and the interests of patients and the public in the activities of the SROs.[213] Tasked with monitoring and reporting on their performance, investigating complaints against them, and providing government with advice, CRHB enjoyed a form of legal privileged access, given standing to refer fitness-to-practise decisions to the High Court on grounds such as undue lenience. The 2007 White Paper looked to add a more strategic approach centred on common protocols for local investigations

[209] *Ibid.*, pp. 19–20
[210] HSCA, ss. 119–20.
[211] HSCA, ss. 98–110.
[212] *Trust, Assurance and Safety*, p. 23.
[213] NHS Reform and Health Care Professions Act 2002.

by the SROs.[214] Formally re-launched as the Council for Healthcare Regulatory Excellence (CHRE), the agency must regularly state how far, in its opinion, each SRO 'has complied with any duty imposed on it to promote the health, safety and well-being of patients and members of the public'. It must also learn lessons from complaints by 'investigating particular cases with a view to making general reports on the performance by the regulatory body of its functions or making general recommendations to the regulatory body affecting future cases'.[215]

Given the size and diversity of the sector, let alone the challenge involved in altering professional mindsets, these arrangements will provide a sharp test of meso-regulation. Will CHRE have sufficient resources to exercise real leverage or will it find itself squeezed? Or will the agency veer towards the hands-on, with the clear potential for duplication and infighting? Or will it pursue a more 'sweethearting' relationship, leaving itself vulnerable to criticisms of capture? Coupled with specific duties to inform and consult the public, the answers will in part be dictated by the use of new ministerial powers of direction 'as to the manner in which the Council exercises its functions' and 'to require the Council to investigate and report on a particular matter'. The outline of one of Scott's 'accountability networks' is visible, with the various actors or tiers of regulation put in continuing dialogue – interdependency. The statutory agency could however easily find itself piggy-in-the middle.

(d) Co-regulatory empire: OFCOM

For the designers of OFCOM, co-regulation was an alluring prospect. OFCOM would be able to stand back from regulation or reduce regulatory burdens where it could see effective self-regulation, allowing the super-agency to concentrate its resources in those areas where co- or self-regulation was not a practical proposition.[216] Flexible self-regulatory norms fitted the highly dynamic nature of the sector: 'we are moving away from a traditional model where the regulator opines intermittently on the importance of particular things, and the industry reacts, to one where we are actually working with the industry in an iterative process'.[217]

In benign conditions these potentials may be realised. Take broadcast advertising, the lifeblood of most commercially financed television and radio. Here OFCOM could enrol two organisations experienced in operating and adjudicating industry codes and well versed in upholding the basic principles of 'legal, decent, honest and truthful' advertising: CAP, the Committee of

[214] *Trust, Assurance and Safety*, p. 9.
[215] HSCA, s. 115.
[216] OFCOM, *The Future Regulation of Broadcast Advertising* (2003), p. 8.
[217] EUC, *Television Without Frontiers,* HL 27 (2006/7), Q. 125; and see M. Feintuck and M. Varney, *Media Regulation: Public interest and the law*, 2nd edn (Edinburgh University Press, 2006).

Advertising Practice, and ASA, the Advertising Standards Authority. This had the advantage of creating a 'one-stop shop' for advertising-content standards at a time of much convergence in the sector, while avoiding accusations of regulatory creep.

OFCOM's code-making and complaints-handling functions were delegated by statutory order[218] to two new limited companies sharing in the mixed industry and lay membership of CAP and ASA: the Broadcast Committee of Advertising Practice and the Advertising Standards Authority (Broadcast). There was the necessary caveat of the agency retaining its power to carry out any statutory function or duty ('no fettering'). To detail the respective roles, responsibilities and functions of the co-regulatory parties, 'soft law' in the form of a 'pseudo-contractual' MOU was used.[219] Agency officials had also to devise criteria for delegation. Ranging beyond better regulation principles, these provide a useful template for testing co-regulatory systems:[220]

- beneficial to consumers
- clear division of responsibilities between co-regulatory body and OFCOM
- accessible to members of the public
- independence from interference by interested parties
- adequate funding and staff
- achieve and maintain near-universal participation
- have effective and credible sanctions available
- auditing and review by OFCOM
- public accountability
- consistency with similar regulation
- independent appeals mechanism.

ASA and CAP were naturally keen to emphasise the notion of 'regulatory subsidiarity' in the form of partnership working:

> Co-regulation can only be truly effective where each partner . . . has full confidence in the role to be performed by the other . . . OFCOM's . . . role in such a partnership [should be] as an enabler and evaluator for co-regulation and not [to] second guess the decisions of the contractor . . . OFCOM should therefore have, as a default, a 'hands-off' posture towards the day-today operation of its co-regulatory partners. Indeed, these partners will only be useful if their independence is respected and any right for OFCOM routinely to interfere with the functions and procedures of its partners would be likely to undermine their authority. There would also be double jeopardy for those whose actions were to be regulated. This could mean, for example, leaving an adjudicatory body largely to determine – within the context

[218] Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, SI. No 1975.

[219] *Memorandum of Understanding between OFCOM, ASA (B), BCAP and BASBOF* (*MoU*) (2004). BASBOF (the Broadcast Advertising Standards Board of Finance) would deal with the industry levy.

[220] OFCOM, *Consultation on Criteria for Transferring Functions to Co-regulatory Bodies* (2003).

> of OFCOM's statutory obligations – the standards appropriate for its sector, and to judge upon these free from pressure by OFCOM. This is not, however, to suggest that OFCOM have no input in the setting of acceptable standards. With OFCOM retaining statutory responsibility – and therefore Parliamentary accountability – for those contracted out functions, it should routinely maintain constructive communications with its partners on all areas of mutual concern. Equally, should public policy develop on issues dealt with by a particular co-regulatory relationship, these might legitimately and formally be raised by OFCOM with the body to whom it had contracted out any of its functions.[221]

The MoU explains the complex relationship further:

> OFCOM retains all its legal powers stemming from the Act, and is therefore ultimately able to make Code changes. It will however not normally seek to do so, as OFCOM recognises that BCAP is the 'self' in self-regulation and in the spirit of the desire by all parties to ensure that the new system is a success, undertakes to use this power only in exceptional circumstances. This allows for the fact that there may be occasions when . . . OFCOM has to insist that a rule(s) should be amended or introduced and BCAP is unwilling to do so . . . This may include the introduction of a prohibition on certain categories of product/service.[222]

It being made a condition of their licences that operators ensure compliance both with the BCAP codes and with ASA (B) directions, enforcement was the crux of the matter:

> ASA(B) will communicate its decisions clearly and promptly to all parties in response to a complaint/challenge . . . Decisions in relation to upheld complaints/challenges may instruct the advertiser and broadcaster to change the advertisement prior to further broadcast, instruct the broadcaster to restrict transmission as directed, or instruct the broadcaster to cease broadcasting the advertisement altogether . . .
>
> If, in the opinion of the Director General of ASA(B), a broadcaster fails to comply fully and promptly with a decision of ASA(B) . . .demonstrates a repeated disregard for decisions of ASA(B) or . . . commits one or more code breaches of sufficient seriousness to warrant in ASA(B)'s opinion a statutory sanction, the DG shall . . . refer the matter to OFCOM for OFCOM to consider further action. OFCOM undertakes to consider any such referrals promptly and to impose any such proportionate sanctions as it deems appropriate in the circumstances in support of ASA(B), taking into account any representations from the broadcaster(s) concerned. Such sanctions may include a formal reprimand, a fine, a warning about possible revocation of the broadcaster's licence or, ultimately, the actual termination of the licence.[223]

Considerable effort is needed to work the machinery effectively. The MoU details multiple liaison arrangements; it also specifies 'no surprises' – the two

[221] ASA and CAP, *Joint response to OFCOM Consultation on Criteria for Transferring Functions to Co-regulatory Bodies* (2004), pp. 3–4.
[222] *MoU*, pp. 6–8.
[223] *Ibid*., pp. 13–14.

watchdogs should bark in unison. A strong dose of meta-regulation of the SROs – reporting to and monitoring by OFCOM across a range of performance indicators – is part of the prescription.

The design epitomises contemporary trends in regulatory governance. A determinedly mixed system of state and non-state supervision sets OFCOM at the centre of a regulatory web: sustained and focused control is premised on close collaboration. The model has so far functioned tolerably well. The standards of ASA (B) adjudication are underpinned by the work of an independent reviewer; another specialist body, the Broadcast Advertising Clearance Centre, performs the important 'fire-watching' role of pre-transmission examination and clearance of advertisements. Consumer representation on a BCAP advisory committee allows for external involvement in the code-making.[224] OFCOM meanwhile has been freer to focus on major issues of public concern.[225] With 'levels of mutual confidence and trust between practitioners, the self-regulatory authority and the statutory regulator that are arguably unparalleled elsewhere in Europe',[226] the agency has agreed the system to at least 2014.[227]

(e) Co-regulatory failure

Elsewhere in OFCOM's co-regulatory empire, trouble had been brewing. Regulation of one of the fastest growing areas, telecom premium rate services (PRS) and specifically 'participation TV', saw the agency authorised to approve the self-regulatory code of an 'enforcement authority', while again retaining powers to impose licence conditions and levy sanctions.[228] In practice, this meant ICSTIS (the Independent Committee for the Supervision of Standards of Telephone Information Services), a part-time industry body already dealing with the matter. The MoU duly provided: 'ICSTIS will have the role of administering and enforcing the Code, subject to the need to refer cases to OFCOM when network operators have failed to comply with an ICSTIS Direction.'[229] With few detailed reporting requirements, meta-regulation of the SRO was noticeably thin however. Much was being taken on trust.

Enter investigative journalists, who uncovered instances of callers to TV quizzes and competitions being tricked. This prompted ICSTIS, clearly not the most proactive of regulators, to introduce such basic measures as 'publication of complete, accurate, and easily understood rules' for interactive TV.[230] But

[224] See for details, ASA, *Annual Reports*.

[225] See e.g. OFCOM, *Final Statement on the Television Advertising of Food and Drink Products to Children* (February 2007).

[226] OFCOM chief executive Ed Richards, speech to ISBA, March 2007.

[227] A policy that sits comfortably with developing EU requirements: see M. Burri-Nenova, 'The new Audiovisual Media Services Directive' (2007) 44 CML Rev. 1689.

[228] Communications Act 2003, ss. 120–4.

[229] *Memorandum of Understanding between OFCOM and ICSTIS* (2005), p. 1.

[230] ICSTIS, press release 8 March 2007; and see *Statement of Expectations for Call TV Quiz Services* (2006).

where was OFCOM, the agency with statutory responsibility for consumer protection? Actively engaged in the co-regulatory process, or so the Select Committee was told:

> Since the advent of such services, OFCOM and ICSTIS have worked closely together to ensure that they minimize confusion when telling consumers who to complain to, as well as maximizing their enforcement efforts and certainty for broadcasters and premium rate service providers about regulatory requirements and compliance. OFCOM and ICSTIS produced detailed new rules and guidance in 2006 as a result of viewer concern, the regulators' own monitoring and the rise in the number of Call TV quiz shows on television platforms. These new rules and guidance were aimed at ensuring best practice in the industry and providing appropriate consumer protection. As a result of OFCOM guidance and ICSTIS' rules, there were significant changes in the way Call TV quiz shows operated and the way they broadcast – with increased transparency for the viewer . . . Nevertheless, neither regulator is complacent. Both OFCOM and ICSTIS are keeping this area under review and are planning separate consultations. [231]

Understandably, the MPs were not convinced:

> Confusion has arisen from the involvement of both OFCOM and ICSTIS in regulation, a split which is confusing for the public and which complicates the procedure for dealing with complaints. A single regulator, in our view OFCOM, should take the lead and give direction; and that single body should take responsibility for registering all complaints and forwarding them as necessary.[232]

The Select Committee's report served as a valuable 'tin-opener', calling into question the production standards used in participation TV, involving some of the country's most popular shows. The super-agency had to fall back on classical techniques of government regulation, launching a whole series of formal investigations, which 'raised serious concerns for OFCOM about the scale of compliance failure in this area, and the impact on trust between broadcasters and viewers.' The resulting industry-wide review revealed a can of worms. At the heart of the problem lay 'the absence of systems designed to require, ensure and audit compliance. In the absence of such systems individual mistakes, whether the result of technical failure, misjudgement, negligence or deliberate deceit, too often went unnoticed or unreported and sometimes ignored.'[233]

Much of the difficulty lay in the complex contractual relationships between broadcasters, production companies and service providers, leading 'to lack of clarity about who was responsible to whom and for what, and to lack of due

[231] Commons Culture, Media and Sport Committee, *Call TV quiz shows*, HC 72, (2006/7), Evidence, p. 49.

[232] *Ibid.*, p. 3.

[233] OFCOM, *Report of the Ayres Inquiry into Television Broadcasters' Use of Premium Rate Telephone Services in Programmes* (2007), pp. 1–2.

diligence'[234] in the industry. But this was compounded on the regulatory side, which was quintessentially soft-touch. Co-regulation itself operated to blunt the effective exercise of public power:

> Failures of compliance could have continued on such a scale, and gone largely undetected, only if successive regulatory regimes had been less than fully effective . . . While ICSTIS is able to bar a service provider for periods . . . it has never done so in the case of a broadcast use of PRS. ICSTIS can impose fines of up to £250k for each offence, but the usual figure has been a fraction of that sum. [OFCOM's] Broadcasting Code requires broadcasters to observe the ICSTIS Code, so a breach of one is technically a breach of the other. But the risk of double jeopardy, or of OFCOM judging a broadcaster while, on the same facts, ICSTIS judges its service provider, has meant that most cases of alleged non-compliance associated with PRS in broadcasting have in the past been handled by ICSTIS alone . . . Many of the stakeholders I spoke to called for more clarity between ICSTIS and OFCOM . . . Memorably, one major service provider said he thought ICSTIS were convinced that the industry would resist tougher regulation: 'we wouldn't,' he said, 'we would welcome it but just want them to get on with it'.[235]

The aftermath points up the role – and limitations – of financial penalties as a regulatory sanction. As well as reputational damage, the formal investigations eventually resulted in millions of pounds' worth of fines including against all four main terrestrial broadcasters. The largest, a £6 million penalty levied on ITV for 'institutionalised failure', was reduced in view of an £8 million compensation fund set up by the company. PRS had however delivered very large profits and, with OFCOM restricted to fining 5 per cent of turnover, the Macrory penalty principle of eliminating 'any financial gain or benefit from non-compliance' was hardly respected.

Restoring credibility meant re-visiting the regulatory design. The imposition of a prior-approval system was a major dent in OFCOM's light-touch philosophy. Re-launched as 'PhonepayPlus' with a viewers' online advice and complaints service, the SRO announced that it would not hesitate to revoke a permission for breach of the conditions of a level playing field. A new 'compliance code panel', functionally separate and with equal numbers of lawyers and lay members, further illustrates the theme of regulated autonomy.[236] Revamping the broadcasters' licences to pinpoint their own ultimate responsibility for the programmes was another very necessary regulatory step in light of the fog engendered by complex contractual chains.[237]

New governance arrangements were made by formal framework agreement. As against the co-regulatory paradigm of partnership working, regulatory responsibility has been taken back and agency accountability sharpened. The SRO is reduced to little more than a satellite:[238]

[234] *Ibid*., p. 4.
[235] *Ibid*., pp. 4–5.
[236] PhonepayPlus, *The PhonepayPlus Sanctions Guide* (2008).
[237] OFCOM, *Participation TV: Protecting viewers and consumers* (2008).
[238] OFCOM/ PhonepayPlus, *Framework Agreement* (2008), pp. 1–2.

- OFCOM recognises PhonepayPlus as its agency, designated to deliver the day-to-day regulation of the market, by approving the PhonepayPlus Code of Practice. Regulatory strategy, scope and policy are developed in dialogue with PhonepayPlus, but final decisions will rest with OFCOM.
- OFCOM and PhonepayPlus will agree medium term and annual objectives, strategies and related funding arrangements. Final decisions on these matters rest with OFCOM but will be informed by recommendations from the PhonepayPlus Board based on their knowledge of the sector and relevant trends.
- OFCOM will provide one member on the appointment or re-appointment panels of members of the PhonepayPlus Board and the Chief Executive. All appointments and re-appointments shall be subject to approval by OFCOM.
- PhonepayPlus will propose and agree with OFCOM performance measures and efficiency targets for [its] activities. These should at minimum cover complaint handling, the processing of serious cases that require adjudication, the operation of the Contact Centre and supporting web and Interactive Voice Response (IVR) services, the compliance support activity, and operation of the prior permission (licensing) arrangements.

The affair serves as a warning. There is a pervasive sense at the beginning of agency officials believing their own co-regulatory propaganda; key items in the organisational template were not read across. With cutting-edge enterprise offering substantial commercial rewards and ample scope for nefarious practice, and co-regulatory design weighted towards the self-regulatory aspect, conditions were ripe for regulatory failure – ineffectiveness – at the expense of consumers. Distancing the Government regulator from the coalface raises question marks over the credibility of sanctions, not least when the SRO appears insufficiently attuned to different business models and/or lacks the resources to keep pace. The chain of delegated authority was unnaturally extended and diffuse. The affair highlights the frailty of regulator-on-regulator checks in the 'mutual accountability network', suggesting weaknesses in Scott's model. A real injection of political accountability was required to right matters.

5. Conclusion

Going back some twenty years, the institutional design of 'blue-rinsed' regulation exhibited serious deficiencies. Calculations of economic efficiency were emphasised by the Ofdogs, but the twin facts of agency discretion and competing interests could not be discounted. Failures of due process, transparency and accountability put in issue the legitimacy of agency action. Prosser's 'new regulatory model' bears testimony to a raft of changes in the intervening period centred on, but not confined to, the chief economic regulators. There is a pervasive sense of agency empowerment: wider ends (extensive legislative

mandates), greater means (elaborate tools and techniques of enforcement), larger capacities (commission and expert staff). Credit where credit is due: much has also been done in recent years to clean up agency practice. Closed, bilateral approaches have largely given way to open, multilateral processes and consultation, even collective consumer 'voice'. At first internally driven as in the case of OFWAT, this development found proper recognition in statute and today is buttressed through the codification of 'good governance' obligations. British independent regulators have come of age.

External lines of accountability have also strengthened, if from a very low base. Experience confirms the strong role for audit techniques in 'regulating the regulators' – the more so when managerial and political accountability are combined through the select committee system. While reasserting the independence of regulators, the committees themselves have effectively framed the case for transparency and answerability; how better to rebut assertions of agency capture? The contributions of legal accountability are typically varied. Recent cases show the utility of regulatory judicial review on the procedural side; inflexible legal modes of classification are avoided in the aftermath of 'the Datafin project'; codification of better regulation principles inevitably means more opportunities for formal legal challenge. Yet questions of institutional competence loom large in this frequently technical and highly complex field. Courts, though still nominally in control, could see themselves sidelined by high-powered tribunals, an important feature of the fast-changing administrative law landscape. In substantive matters, CAT is not so easily bamboozled!

The problems of network accountability are more intractable. Taking water management as an example, we saw how complex webs of regulatory governance blur institutional responsibilities. Matters are naturally compounded in the EU context; opaque networks of public and private actors stretch across the different layers of governance. Another major factor is central government seeking to enhance its steering capacity, whereby agencies are not only empowered but also subjected to a glut of legislative rules and bureaucratic regulation (see Chapter 6). Building internal network checks and balances is a necessary but insufficient response. Democratic oversight – a dose of externality – is at a premium in these conditions.

Self-regulation poses in acute form the difficulty of securing the public interest. Equally, it is an integral part of light-touch thinking. It therefore presents government with both a challenge and an opportunity. Ideas of meta- and co-regulation are made more explicit in this age of governance (hybridisation). If carefully designed and operated, these types of indirect administration have considerable appeal. This however is a big 'if'. We sense that more bracing climes are starting to expose the shallowness of some of these regulatory fashions.