

# ***REFGOV***

***Reflexive Governance in the Public Interest***

## ***Services of General Interest***

### **How Reflexive is the Governance of Regulation?**

By Colin Scott

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# How Reflexive is the Governance of Regulation?

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## 1. Introduction

A central concern in regulatory policy over the last quarter century has been to limit perceived tendencies towards burdensome and excessive regulation. The commitment to reduce regulatory burdens sits well with an ideological commitment to reducing the size of the state and the extent of intervention in the economy, particularly in the United States and the United Kingdom. In other countries the motivations for regulatory reform have been more closely linked to technocratic concerns with efficiency in public management, and have been partly inspired also by concerns with impediments to trade created by a perceived excess of regulation.

This paper is a small part of a larger project, funded by the European Union Sixth Framework Programme (FP6) which seeks to evaluate the extent to which governance over a wide range of activities exhibits characteristics of reflexivity and the effects associated with both the emergence and non-emergence of reflexive forms, both in reshaping the role of law within governance, and within the substantive fields of activity. Reflexive governance, as it is conceived within the project, involves the establishment of institutions and process which facilitate the actors within a domain for learning not only about policy options, but also about their own interests and preferences. Learning, within open and deliberative processes, might cause participants not only to conceive of better techniques or instruments but also, beyond

policy solutions, to reorder the way that the policy problems are conceived and prioritised (Radulova 2007: 368).

The paper assesses, in outline only, the experience in a number of jurisdictions against this potential for reflexivity and learning in regulatory reform processes. While there is evidence of learning in most jurisdictions, the OECD appears best geared towards putting reflexive processes at the heart of its activities. The European Commission, taking a lead role in EU Better Regulation policies, is well placed to emulate that example. It has been suggested that the Commission's stewardship of recent Better Regulation policies has sought to emulate the Open Method of Coordination (OMC), a governance mode involving elements of reflexivity and modelled on OECD policy processes (Schäfer 2006).

However OECD processes are limited in the extent of their reflexivity, arguably having limited scope for contextualised learning and application in respect both of interests and policy solutions (Radaelli 2007). This is particularly clearly seen in the orientation of the OECD Regulatory Reform programme to a single model of 'best practice'. The extent to which EU Better Regulation policies might provided for a stronger degree of contextualization could be seen as a key test for the commitment to a degree of reflexivity going beyond the OECD model from which OMC was adapted.

## **2. Reflexivity in Governance**

One narrative sees a series of transitions in governance within EU member states away from the welfare state model which was dominant in post-War Europe until at least the 1980s. Changing ideas, fiscal crisis, weak public sector performance, and the imperatives of the European Community single market programme were each factors which put the welfare state model under pressure. Within both academic and policy communities a regulatory state model appeared to offer a viable alternative (Majone and Everson 2001; Moran 2003). The regulatory state model involves a shift away from bureaucratic, informal and internal governance of policy programmes towards a greater emphasis on hierarchical controls external and more rule based

controls (Loughlin and Scott 1997). Whilst the reforms to the utilities sectors, involving the establishment of independent regulatory agencies to promote market liberalization have been the most visible examples of this shift, a more hidden revolution within the centre of national governments has perhaps been more significant in the elaboration of a regulatory state model, though the pattern has been far from uniform across the EU member states (Hood et al. 2004).

Simultaneous with the regulatory shift there has been a distinct trend towards more inclusive and consultative governance forms, which move both policy making and implementation away from the hierarchical model, back in the direction of mutuality or community. The Open Method of Communication (OMC), characterised by non-hierarchical relations between Community institutions and member state governments provides an example of this trend (Scott and Trubek 2002). Similarly 'stakeholder' governance models have received considerable emphasis in drawing in wider participation rights into somewhat more deliberative processes, particularly in respect of corporate governance and labour rights (Kelly, Kelly and Gamble 1997). OMC and stakeholder models are brought together in attempts to foster wider participation amongst civil society actors in OMC processes. An important debate about the extent of openness and the room for experimentalism, deliberation and learning within OMC processes is being conducted. Against the optimism as to the potential for a radical departure in governance heralded by the development of OMC (Zeitlin 2007) are important critiques which suggest that OMC fails to live up to the billing (Radulova 2007).

Earlier work within the FP6 project on Reflexive Governance has been critical both of OMC and stakeholder processes as being insufficiently reflexive (Deakin and Schutter 2005). My purpose in this paper is not to further elaborate the general critique of OMC, but rather to apply that general critique to processes of regulatory reform. What is rather clear within the context of regulation and regulatory reform is that an analysis which focuses on policy making is deficient if it does not also attempt to capture the nature of implementation processes.

There is something rather obviously reflexive about governments seeking to exert controls over their own regulatory practices. In Bronwen Morgan's major study of the Australian National Competition Policy, chiefly targeted at regulatory policies of the Australian states and territories, she explicitly labels the policy as being one of 'meta-regulation' – defined by Morgan to refer to processes of oversight of regulation (Morgan 2003). The term has been deployed in other regulatory contexts to more directly identify regimes in which the steering capacity of regulated targets is harnessed for regulatory purposes – a more reflexive conception meta-regulation as the steering of self-regulation (Parker 2002). Radaelli (2007: 195-6) adopts the former conception of meta-regulation in his analysis of the fit between better regulation policies and the Lisbon agenda of the EU. In this paper I suggest that the latter conception of meta-regulation, with its emphasis on reflexivity, and the stimulation of both control and learning capacities within targeted organisations, might be more fruitful, and in particular because it takes in policy making *and* implementation. Given general observation about weaknesses in the capacity of governments to regulate other parts of government hierarchically (Hood et al. 1999; Wilson and Rachal 1977) the deployment of alternative ways of thinking about steering at the implementation stage could be of particular value.

There is some evidence within national policies of learning from experience with different sectors so as to reshape the governance of regulation with new instruments, extend their scope and so on. The OECD has, perhaps, the most well developed reflexive processes, involving wide participation, benchmarking and learning among member state governments. The OECD practices exemplify a limited form of reflexive learning, making a virtue out of the necessity of using 'new governance' steering mechanisms, because of the absence of legal authority. This experience begs the question is the presence of legal authority a hindrance in developing reflexive governance structures? The developing EU policy on regulatory reform provides a good testing ground for this question. If the EU is to follow the OECD in developing a form of Open Method of Coordination in respect of regulatory reform, applied at both EU and national levels, a key challenge is to go beyond the limited reflexivity associated with OECD benchmarking, in particular the limited capacity within OECD

processes to recognise and adopt diverse, as opposed to convergent, best practice policy solutions, sensitive to particular institutional contexts within member states.

### **3. Governing Regulation**

Policies of regulatory reform have been taken up by national and supranational governmental bodies for varying reasons. Within the European Union, national regulatory policies risk impeding trade between member states. This risk generated a raft of regulatory policies at EU level geared towards positive integration, and a series of decisions of the European Court of Justice supporting negative integration through mutual recognition, where harmonising measures were not forthcoming (Barnard and Scott 2002). At the level of the EU doctrines of proportionality and subsidiarity have been developed, in part, to act as a constraint on further regulatory policy making and to provide the normative basis for a review of the appropriateness of existing instruments. The OECD has long had concerns with the development of better public management practices within its member states, but it lacks the authority to control member state practices through legal measures. Accordingly the OECD has sought to develop methods of collecting and sharing information about best practice in the oversight of regulation through benchmarking, peer review and related techniques. Attempts to measure and compare regulatory burdens across countries suggest that even within the EU the experience is highly variable, with significantly higher regulatory costs, broadly, in the Southern member states, and lower costs in the Northern member states (World Bank 2006).

Critiques of regulatory programmes in the United States in the 1970s suggested that inbuilt dynamics within public policy making would tend towards an excess of regulation, highlighting risks that regulation would serve the interests of regulated business or that imperfect market outcomes would be displaced by even more imperfect regulatory solutions (Stigler 1971). The policy response was to develop more or less systematic review of decisions to impose regulation, through a form of cost-benefit analysis. This scientific approach to measuring costs and benefits of regulation was underpinned by an ideological commitment to reducing the scope of government interventions. Commentators disagree on whether the impetus for

programmes of 'deregulation' in the 1970s came from changes which meant those previously protected by regulation now favoured deregulation (Peltzman 1976) or a fundamental shift in ideas (Dirthick and Quirk 1982).

There was an element of ideology also lying behind the UK government programmes developed in the 1980s, but in a rather different context . The UK government was concerned to reduce the role of the state in direct provision of public services and, in pursuit of this end, adopted policies of privatization, accompanied by the establishment of new regulatory regimes . The attack on 'regulatory burdens' was part of a package of measures targeted at reducing the scope of state intervention in the economy (Feigenbaum, Henig and Hamnett 1999). This initial deregulatory phase occurred, paradoxically, at a time when new and more extensive regulatory measures were being developed over the privatizing utilities sectors (Majone 1994).

There are two stories we can tell about the implementation of policies on the governance of regulation. The first is a largely technocratic story about the implementation of tools of regulatory impact analysis (RIA) or cost benefit analysis (CBA) over government rule making, particularly as it affects businesses. The basic principles of the technique involve the measurement of both narrow compliance costs and broader economic and social costs associated with particular measures, and an attempt to balance these against measures of benefits of positive impact. Notwithstanding the technocratic gloss associated with processes such as CBA and RIA there is rather obviously something problematic, from a methodological point of view, in attempting to measure costs and benefits associated with measures which have not yet been adopted. This is particularly the case because of the tendency of behavioural responses to regulation to generate unintended and even counterproductive effects (Grabosky 1995; Sieber 1981).

The processes associated with the production of new rules are accompanied by processes for investigating and measuring impact as a means of testing whether the proposed measure is justified or not. Will the measure do more good than harm? is the basic question. Even the rather less common attempts to scrutinise existing rules in cost-benefit or impact terms are methodologically problematic, given the necessity

of using counterfactual assessments of what would happen in the absence of the measures. Reforms to energy, and in particular, telecommunications operation and regulation are beset with problems of assessing their impact because, while data on such matters as price, quality of performance, penetration (for phone lines) may be reasonably robust, sorting out the causes of change, in the face of changing technological, market, organisational and regulatory conditions is difficult.

In the face of challenging epistemological questions such as what counts as costs and benefits? How are they to be quantified? How is impact to be measured? Governments concerned to implement the techniques have tended to focus on the question of costs, especially to businesses, and been rather less scientific about benefits. The early UK regime suffered particular criticism for its over-emphasis on compliance costs faced by businesses (Froud, Boden and Ogus 1998).

An alternative narrative about regulatory reform might suggest that the 'science' is not so important and that what matters more is the commitment to reflect on the nature and necessity of regulatory rules and policies. This way of thinking is reflected in official guidance in the UK which asks those responsible for policy making to consider as a first option doing nothing as being the least worst response to a particular problem. The next level up is stimulation of or dependence on self-regulation. We then pass through less intrusive (such as education, information, using the market, financial incentives, self-regulation) to more intrusive forms of governmental regulation to be adopted, in each case, only if measures further down the scale are inappropriate (Better Regulation Task Force 1998; Better Regulation Task Force 2000). This strategy bears resemblance to the pyramid of regulatory technique developed by Ayres and Braithwaite as part of their recipe for 'responsive regulation' (Ayres and Braithwaite 1992). Whereas the better regulation strategy is premised on acting in the least intrusive way possible to achieve the objectives, the responsive regulation approach explicitly deploys the threat of more intrusive regulation to incentivize firms to make the lower level strategies effective.

The commitment to better regulation, then, is about reflecting not only on the need for regulation, but also on the appropriate instruments and intensity to achieve the aims



involved. Such reflection might lead to innovative ways of regulating or thinking about regulation. Structures of regulatory reform which are capable of delivering on the capacity for reflection are likely to involve a wide range of stakeholders in sharing information about how regimes do or might operate, and perhaps also a role for researchers in assessing the effectiveness and impact of regimes.

There are a number of variables which comprise the policy elements of regulatory reform strategies. Most obviously there are the tools used and their scope of application. A further element is the extent and nature of consultation with stakeholders. An important innovation in the UK was the establishment of the Better Regulation Task Force (subsequently renamed the Better Regulation Commission) comprising business people and others to investigate and report on regulatory burdens across a wide range of sectors, distinct from the day-to-day scrutiny of new regulatory proposals within Departments and overseen by the Cabinet Office. When UK policy on deregulation (as it was then called) commenced in the 1980s the main emphasis of the tools was on the measurement of compliance costs associated with regulation, with the scope extending only to regulation of business (Froud, Boden and Ogus 1998). The tool-kit was progressively expanded through the development of regulatory impact analysis to set wider costs against benefits, though frustration at the inexact nature of calculations has led to retrenchment in recent years. Much of the attempt to control government departments was pursued through soft law instruments, though legislation has been needed to provide, for example, for the controversial powers to reform of primary legislation by statutory instrument (Deregulation and Contracting Out Act 1994 s.1).

Subsequent statutory measures (Regulatory Reform Act 2001 and the Legislative and Regulatory Reform Act 2006) extend the scope of the legislative regime to target enforcement practice, recognising that problems of regulatory burden may lie not in the rules themselves but rather in how they are policed. In respect of enforcement a soft law instrument, the Enforcement Concordat, will effectively be displaced by legislative principles and the power to issue statutory codes of practice for regulators. An important change of emphasis in the steering of regulatory enforcement practices

under the 2006 Act is a shift towards risk-based enforcement, not properly reflected in the Enforcement Concordat.

As to scope the UK Cabinet Office took steps in the late 1990s to extend the scope of a form of Regulatory Impact Assessment to public sector bodies, inviting its Better Regulation Task Force to consider regulatory burdens on police officers and Schools, and commissioning research on regulatory burdens on higher education institutions. Subsequently the voluntary sector has been included within the scope of the programme. The UK Programme, in its systematic elements, remains less comprehensive than others. The Australian National Competition Policy, for example is marked by its claim of universal coverage at both national and state and territory level, and by a concern to scrutinise not only legal instruments but also self-regulatory and soft law instruments (Radaelli 2004).

OECD initiatives in the area of regulatory reform originated in the mid-1990s, shaped in part by experience in the UK and US. Two key soft law instruments underpin the programme. The *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* was produced by the Public Management Committee on Regulatory Management and Reform, a network of national regulatory officials, in 1995 and followed by an extensive evaluation of regulatory reform efforts in the member states in 1997 (OECD 1997a; OECD 1997b). Sustainable economic development is said to be the main goal of the policy. The *Guiding Principles for Regulatory Quality and Performance* were published in 2005. These documents provide principles and benchmarks, largely sourced from best practice in the member states against which surveillance is undertaken in country reports. Country reports are produced against an OECD template, but in a process in which the chief informant is the member state itself. Country reports are subject to peer review from the member states collectively.

A criticism levelled at OECD decision making structures is that they assume convergence by the member states on a single best practice model developed through investigation of best practice within the member states. This implies a form of reflexive governance which is limited, to the extent that it substantially rules out

member states learning things about their national contexts which might suggest that alternative practices might be better suited to a particular country, for example because of existing institutional structures or cultures. Policymakers within member states may favour best practice discourse precisely because it simplifies what it is to be done (Radaelli 2004: 726-7).

Within the EU there have been many false starts in the implementation of policies of regulatory reform. The Simplification of Legislation regarding the Internal Market (SLIM) programme, adopted in the mid-1990s, provides an example of a rather narrow programme with limited effects (Radaelli 1999). The adoption of the Lisbon Agenda in 2000 included a commitment to take further steps on 'better regulation'. The current better regulation initiative was originally sketched out in the report of the Mandelkern group to the European Commission in 2001. The Mandelkern report, whilst it placed tools of Regulatory Impact Analysis at the heart of its recommendations, emphasised also the role of transparent consultation processes on new measures and the importance of the activities of national parliaments. A key part of the plan was the development and use of better regulation networks within the Commission and beyond. The commitment to Better Regulation in the EU was renewed as part of the Lisbon strategy in 2005 (Radaelli 2007)

The features of the Better Regulation programme include development of best practice criteria and soft surveillance by the network of Directors of Better Regulation (DBR) from the member state governments at their six-monthly meetings (Radaelli 2007: 196). However there is little evidence of a move beyond the assumptions within the OECD model that member states, and indeed the Community legislative institutions themselves, should converge on a single best practice model. A more reflexive learning model might be more open to diverse solutions, adapted to peculiar national (and supranational) institutional contexts

#### **4. Empirical Work**

While some hypotheses can be developed from documentary sources, the question 'how reflexive is the governance of regulation?' involves a mixture of judgement as to

the key indicators of reflexivity and empirical analysis of practices within the various governance regimes. One hypothesis is that the capacity for reflexivity is in inverse proportion to the legal basis for action Empirical work undertaken by (Radulova 2007) is suggestive of a framework for research which could be adapted to better regulation. Who participates and who is excluded within the policy process? How open is the process to learning not only at the level of instruments and techniques, but also change in the way the policy problem (in this case of excessive regulation) is perceived? What evidence is there of broad participation and openness to learning making a difference in terms both of style of decision making and outcomes. The next stage of research will involve the pursuit of these questions with key actors within regulatory reform processes in two innovative jurisdictions – UK and Australia – and two supranational systems – those of the EU and the OECD.

## **5. Conclusions**

The introduction of more reflexive forms of governance over regulation (and over other activities) might appear risky to policy makers. A commitment to reflexive governance moves government away from directing the nature and implementation of policy instruments to a learning role shared with others. In the context of the meta-regulation of regulation this might entail a shift away from rule-based and ‘best practice’ and ‘tool-kit’ approaches to better regulation, such as regulatory impact analysis, towards more diffuse and smarter forms of regulation, which not only mix instruments, but also public and private actors (Baldwin 2005).

What are the potential pay-offs from adoption of the more reflexive mode? Whilst the empirical evidence is yet to be provided, we may hypothesise that more innovative and responsive policies may emerge. More appropriate and proportionate solutions to policy problems for which the solution might have been regulation could be found. To the extent that getting jobs done brings legitimacy to governments we should expect government to benefit. Aside from the outputs-based legitimacy, the greater transparency and consultation (and ‘beyond consultation’) associated with reflexive

governance has the potential to support strong inputs- or process-based legitimacy  
(Radaelli 2007: 200)

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