

Regulators' Forum

Codes of conduct

Codes of conduct fulfil many purposes – they are therefore central to many regulatory domains. This meeting of the Regulators' Forum considered the different rationales for a code of conduct, the basis on which codes could be established, and how and when codes could be reviewed and updated.

Codes of conduct (also known as codes of practice or codes of standards) fulfil many purposes - for the regulated, the regulator and for others such as government and the general public. Fundamentally they are about public confidence and public protection. Any definition needs to recognize and reflect that they are in some way or another about the exercise of power. For example, if the exercise of professional power over individuals is involved, then codes of conduct are supposed to offer protection from abuses of professional discretion and, in doing so, advance public confidence in that profession. Furthermore, a code of conduct can give a field of practice a sense of identity – there are clearly benefits to exercising 'entry control' to distinguish one's activities from others. Codes are therefore a tool to build confidence and legitimacy. Finally, codes of practice can affect both individuals and organisations. A workable definition of a code of conduct might therefore be 'sets of professional and ethical principles and values which determine what kind of behaviours are considered ethical and 'right' in a given set of circumstances'.

In addition, statutory codes can be distinguished from those that are voluntary. Usually, statute does not specify what the code should look like, but merely requires the existence of a code.

One strong motivation for the creation of a voluntary code might be the profession's desire to avoid statutory regulation. A code can make a profession feel and be presented as being more 'presentable'. When looking at self-regulatory arrangements, it is also worth exploring governance arrangements. Voluntary membership-based organisations will always face problems in enforcing codes as there is always be threat of member 'exit' from the self-regulatory scheme and thus the requirements of the code. This threat of exit and regulatory arbitrage depends on the extent to which the code has resource implications and relates directly to questions about the degree to which a code could build on public confidence. The drafting of a code, statutory or self-regulatory, may involve pre-consultative exercises including the use of focus groups and formal consultation.

There are a number of ways in which the provisions of a code might be articulated. One is to identify minimum requirements. There is a tendency that such codes will become highly prescriptive, which will subsequently encourage box-ticking exercises. Others seek to set the bar at improving the profession. These are forward-looking documents. Again, the critical point is to deal with the question of sanctions. Naming and shaming is often not enough when there is evidence of poor governance. Others speak about the importance of the code becoming part of the DNA of individual and organisational conduct. As such, therefore, one can assume that almost all codes

will have a number of key elements, namely to 'act with integrity and competence, to promote trust in one's profession, demonstrate respect towards others, and act responsibly'. These principles appear to be near-universal to all codes, regardless of whether they were of a statutory or voluntary in nature. One wants people to be open in owning up to their mistakes. In some domains, a code operates usefully in the background. This is particularly useful when inspection frequency has to be low.

A principle-based approach is frequently now advocated, but even so usually needs to have some prescriptive components. There will always be tension between discretion and prescription. One question is whether it is about the level of maturity of regulators and of the profession – a more mature field might be ready for greater principle-based approaches. There are also variations as to how much a code is supposed to shape conduct – in the area of psychology, it is said that no code can replace professional and ethical judgement. How much one wants to allow for discretion usually becomes evident in discussions about the code and whether such codes should include the word 'must' or 'should' when defining desirable standards of behaviour.

Compliance with a code of conduct was seen as being primarily about reputational risks. One could therefore possibly distinguish between different needs in a code. The more prescriptive parts could be seen as a 'safety net' for the general public as they set out the minimum standards required while the principle-based codes rely on the application and understanding of guidance. Such questions also relate closely to differences in the size and overall composition of the sector itself. Some are professionally educated. Other aspects involve the degree of competence of the clients and the general understanding of what the role of the regulator is supposed to be. This could then also lead to conflicts when certain professions experience conflicts between organisational/employment-related obligations and demands arising from the code.

A wider debate is whether codes can advance the maturing of a sector and promote innovation. This question was fundamentally about access to the sector. Too much prescription could prevent a maturing in the sector or stand in the way of innovation and competition.

Updating a code can be costly. Review exercises can be conducted on a regular basis or they can be reactive or proactive. Such exercises can be extensive, especially when a review is conducted after a significant period of time. They usually include workshops and pre-consultative exercises regarding both the content and the scope of a code. On the one hand, if the code is not being reviewed on a regular basis, there will always be criticism about the relevance of at least some of its provisions; if one reviews the code more frequently this risks undermining the central significance of the code to the profession. To reduce the cost of such exercises, some regulators have moved towards more informal practices involving ad hoc consultations and short information letters of up to 12 pages. Such activities and documents have no legal status, but reflect adjustments as to how to interpret codes. They may not be directly enforceable, but it is possible to make them stick through other means. They appear popular with the regulated profession. For example, non-compliance might be seen as an aggravating factor when considering enforcement action. Such guidance notes are usually treated as a 'legal burden', and also have a cost element. If the guidance material is less detailed it is inevitable that companies will be in need of more bespoke advice. This is particularly the case when the target population is highly diverse.

One common problem relates to how professional codes of conduct seek to handle 'conflicts of interests'. Guidance is often insufficient and is also problematic when dealing with small professional communities where conflicts regularly arise. It is essential that the code should

encourage reflection on how individuals and organisations confront, for example, conflicts of interests.

International codes play a role in the development of codes. However, these codes often contain principles that have been defined at the level of high universal ethical principles and as such be relatively meaningless. Codes can, however, be very important for some international sectors, but their enforcement is highly localised. On their own, international codes are unlikely to change much. They require detailed knowledge and the presence of a credible sanction threat. There are also issues when international codes are more lax than national ones and where the industry is unwilling to compromise quality. In other sectors, while international codes can be seen as highly useful, universal and consistent enforcement prove to be problematic. This, in turn, gives rise to additional (local) codes.

Finally, there was also the question as to whether regulators should be advertising the existence of codes more and should be required to report on their operationalisation. Most regulators did not engage that extensively in such activity. It was widely agreed that greater publicity would potentially enhance public legitimacy.

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