CARR Regulators' Forum

Transboundary Regulation

How regulators deal with cross-jurisdictional issues links to a number of different empirical aspects. It relates to relationships at the European Union-level, the interaction with other European regulatory bodies, the relationships within a devolved UK and the relationships between regulatory bodies and local authorities. Key questions for trans-boundary regulation are therefore the definition of responsibilities and how over- and underlaps can be avoided, how and under what conditions information is exchanged, and how consistency is ensured.

How do regulators keep informed about experiences in other jurisdictions?
Regulators experienced trans-boundary regulation in multiple and diverse ways. For some, this was a well-structured process in which different levels operated via committees to deal with issues, ranging from the local level with engagement with police and fire services as well as other stakeholders, to the international level with procedures for ensuring that responsibilities were allocated and understood. Such inter-organisational processes relied on memorandums of understanding (MoUs) among multiple countries. Other regulators had to deal with varied jurisdictions, and some umbrella regulators also regulated members with different jurisdictional scope. Regulators in devolved areas also had different objectives which could be interpreted as some form of natural experiment.

In the international domain, particular regulatory working groups existed to deal with particular issues where regulatory attention had been found to be lacking. Where experiences were drawn from also varied across regulators. Some regulators looked to other EU member states and English-speaking countries with some regulators having the objective to 'promote best practice' by drawing on international experiences. Some regulators therefore had established units to observe international developments.

Elsewhere, developments in the international context were seen as potential options for the UK and therefore there was always an interest in knowing about the latest thinking and trying to learn from the emerging (unintended) consequences. In some areas, US regulation was particularly prominent, partly because it differed in approach to the UK approach. In other areas, institutional variety among national systems was seen as vast. However, this did not mean that there was not an interest in the UK approach towards inspection. There was an issue about whether national standards were the kind of standards that organisations aspired to, or whether these organisations were not in an international competition, and therefore wanted to benchmark themselves on some criteria which allowed for international comparison. In other areas, an internationally mobile workforce raised issues about understanding national qualifications and standards.

Transboundary regulation also reflected on trying to influence international or EU-level regulation. In some cases, more emphasis was placed on actual negotiating. There was a need to ensure that the regulatory approaches taken elsewhere would broadly 'fit' with the UK risk-based approach. One could also learn a lot during meetings with other member states, especially in terms of transposition and what one could bring into one's own processes. The EU institutions were playing a broker role in putting people in touch, and a lot was learnt from personal conversations. In other areas, the relationship to the EU was characterised more by trying to join up the different initiatives and committees. It was really important to be setting the agenda, to chair working groups, and to ensure that one was 'holding the pen'. In other areas, working with national regulators also meant that one could set the agenda and could provide an early warning system for potential themes that might become current on the European Commission agenda in the near future.

There were also areas where international arenas offered oversight over national approaches. These activities could be more or less helpful. They could point to some areas that had not been emphasised before and could therefore be used to question one's approach. At other times though, the underlying assumptions about the regulated population might be so different that it was not always easy to establish commonality of approaches. This also happened in cases where problems were seen as expressing particular national approaches rather than others.

Finally, there were also differences between regulators that were directly dealing with EU provisions and those regulators that dealt with EU provisions more indirectly, namely where departments were in charge of actual transposition. Here one had to consider deviations from the EU provisions, which were often accused of 'gold plating'. In some cases, this 'gold plating' reflected a desire for higher standards. In other cases, transposition was about 'carpentry', namely how to incorporate the regulatory requirements within an existing framework without imposing unnecessary costs on business. Any initiative that went beyond the minimum of the EU provisions had to be justified. The more general problem was that these initiatives could have an impact in terms of stifling originality and creativity. National regulators may have considered and developed superior approaches, but the EU was somewhat slower in their adoption.

How do regulators respond to 'externalities' arising from diverse regulatory approaches?
The approaches of other jurisdictions' approaches could have an impact on the viability of regulatory approaches, for example in the area of financial sanctions. The principle of extra-territoriality in terms of sanctions had in some cases led to some businesses exiting broad categories of customer relationships – a process known as derisking- because, they say, of fear of legal or regulatory enforcement. This might lead to legitimate customers being denied access to services. Such national differences might also inhibit some joint working.

In other areas, there were also some unintended consequences. Having lower registration fees than other jurisdictions could lead to considerable extra-work, without being able to raise the fees to reflect workload. More generally, the problem of 'venue shopping' was one in which businesses could profit from choosing their regulator, and there might also be unintended consequences from incentivising regulators to 'attract' businesses for revenue-raising purposes. In some international cases, it was possible to raise standards elsewhere, and therefore to increase the price of regulated activities, therefore reducing the problem of businesses moving to other jurisdictions. A similar concern emerged in the context of the EU's mutual recognition principle, where regulators had to acquire knowledge as to the quality of the different training systems.

Regulatory decisions could also encroach on other aspects of a regulated activity, for example, a regulatory decision on quality could have implications for the financial viability of a business. There were non-UK examples of such an impact. There were also wider issues regarding accountability structures and as to who should be held responsible for wrong-doing in individual institutions when one was dealing with large chain operators. Elsewhere it was found that the main tool for having an impact was to affect business-to-business relationships. Other examples of potential encroachment could include demands for written documentation. The publication of such documents might lead to unintended mobilisation effects and impact on broader funding decisions.

However, issues of regulatory arbitrage could also develop in different ways. In those areas where regulators had the same objective, but one regulator had more 'teeth' to undertake action, then the other regulator might be very enthusiastic in encouraging that regulator to pursue actions that were in their mutual interest, even if the underlying concerns were somewhat different.

How do regulators handle demands for flexibility versus demands for a regulatory consistency?
There was always more of a demand for 'consistency' rather than for 'flexibility'. There was also an understanding that, for example, local authorities would inspect in different ways. One way to manage this was to have a strong link to local authorities, by organising workshops, providing them with regulatory tools and guidance. The current 'primary authority' initiative in the UK was in principle a good idea as it reflected on different degrees of regulatory expertise. However, the current patterns still required further investigation. Elsewhere, too, the issue was how to ensure that there was not a 'race to the bottom'. It was important to take away the incentive to 'race' by driving down standards in order to attract business. This could be done, for example, by setting the standards that were supposed to be achieved. In general, there was a fine line between being flexible and establishing a framework that avoided such perverse incentives.

At the same time, such frameworks could only provide guidance in some cases. Then it was important to highlight that maintaining standards, and therefore the law, was a central regulatory objective.

A related trans-boundary aspect was the potential multitude of regulatory objectives and regimes that affected business. There might be competing risks, and businesses were put in a position to highlight some aspects more than others, or were, in their own mindset, emphasising one type of risk more than others; for example, seeing a particular risk mostly in terms of health and safety of the workforce and not also as a safety risk to the general population. Fines could lead to behaviour distortions in this respect. Elsewhere, co-operation among regulators always had to consider somewhat different objectives.

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