

Consumer engagement in regulation

What does good practice look like?

Trisha McAuley

The role of regulators

Regulators need to make accountability real by delivering outcomes for the people they serve. However, you cannot deliver an outcome focused approach if you do not know what the people you serve think, need and want. Moves, therefore, by regulators over the last few years to increase and enhance the involvement of consumers in regulatory processes are very welcome, as is the recognition that consumers are not just the prime beneficiaries of regulation but are co-producers. Having said that, it remains somewhat disappointing that, here in the 21st century, consumer engagement in regulation is still seen, largely, as being innovative and that conversations such as this are still necessary.

I have deliberately used the word ‘consumer’ here instead of ‘customer’, as the latter implies an existing, transactional relationship. But effective engagement needs to go beyond existing customers and identify all those affected by regulatory and policy decisions. It needs to reach out to consumers who cannot access the market but would like to, and indeed, need to. It needs to consider the critical trade-offs that will have to be made in meeting the needs of current and future consumers.

The regulators have employed different mechanisms and structures to engage with consumers and there have been clear reasons for those differences in terms of the purpose and the scope of the task. For that reason, not one approach is any better or worse than another. I do believe that more needs to be done jointly, and strategically, by regulators to bring together and highlight best practice in consumer engagement across regulated industries and markets in the UK. Sometimes I see regulators criticising each other and sometimes I see consumer engagement being viewed as some sort of competition between regulators – that does nothing for public trust or consumer confidence.

Regulators have a key role to play in driving consumer engagement processes in markets. But, no matter what consumer engagement structures they have, longer term change will not happen unless they can ensure they have put in place the right organisational culture and commitment. Without this, consumer engagement will be an add-on only, when it should actually be embedded throughout the regulatory business. It needs to be integral to any corporate strategy and at the heart of policy and delivery. It needs Board level leadership and commitment. It needs clarity of purpose. That purpose should be for consumer engagement to have a genuine and visible impact on policy. It recognises consumers as experts with the insight and expertise which can help policies to respond better to need.

While there are many excellent examples of consumer engagement in regulation I would suggest that more needs to be done to mainstream the consumer perspective into regulatory strategy and delivery and in the regulatory values and systems that support it.

It is important to understand and accept that high quality engagement improves the quality of decision making, and builds trust with the public. Engagement means genuinely influencing decision making. Do not engage if you cannot guarantee that the contribution of consumers or their representatives will make a difference. Regulators need to be clear about what they mean by engagement and understand the spectrum of participation and the differences between informing, consulting, involving, collaborating and empowering.

Clarity of purpose is critical and regulators need to engage at the very earliest stage of policy development – long before a price control review starts, not after they have already determined its shape and structure. We need consumer involvement in the design of consumer engagement structures. The regulator cannot act in isolation. This needs real partnership with consumer bodies and their active involvement upstream to co-design the best possible form of engagement going forward. It needs stakeholder buy-in and trust. Regulators need to listen and build consensus.

The regulator should know and demonstrate the impact of consumer engagement on its decision making processes. And commit to transparency when it rejects or fails to act on advice from the consumer group, and give clear reasons why. Regulators need to keep thinking about the future as appropriate models of consumer engagement that will always change. Agile regulation looks to alternative regulatory business models to reflect evolving consumer experience and need.

Consumer engagement – institutional arrangements

There are two key inter-related aims – improve regulatory outcomes and increase public legitimacy. The growth of interest in how citizens can participate is a direct response to a perceived lack of accountability. It is therefore critical that accountability is followed through in the institutional arrangements and delivered, and seen to be delivered, in practice. What are the elements that make up legitimacy and accountability?

A publicly available governance document is critical. The parameters of the task in hand should be defined at the start, and agreed by all parties. Lack of clarity runs the risk of mission creep, causing confusion, altering outcomes and doing nothing to manage public expectation or consumer confidence. There needs to be an agreed purpose, direction of travel and business plan.

Consumer interest representatives need to have actual involvement in regulatory decision making. They need to truly be seen as equal participants along with other interested parties and be involved at the same, and earliest stage of the decision making processes. They need equal access to decision makers.

Be honest about the actual involvement of customers/consumers and honest about their representativeness. A consumer interest representative is not the same as a representative consumer. A customer engagement group cannot possibly represent all consumers. So it, and the regulator need to need to be honest about these limitations – honesty where customers are not involved and have not agreed or made decisions. Do not over-claim that customers are engaged when they have not been.

Consumers, rather than stakeholders, should be round the table. They are not the same thing. And there should be no vested organisational or personal interests.

Resources to do the job properly goes without saying – a shoestring operation will have no credibility and no authority.

Absolute independence is critical – be honest about that! The regulator needs to let go – can it really do that? We need to see honesty about those tensions.

It is the role of consumer advocacy to be partisan whereas regulators will have to balance a range of different interests and evaluate the costs against the benefits of any regulatory decision. The approach to consumer engagement needs to be, and seen to be, truly independent of the regulator. Is it perceived to be independent by *consumers*?

There needs to be clear, unbiased management of the process. The regulator needs to build the capacity of, and provide support to, the consumer representative body. But it must do so without compromising the independence of the consumer engagement and input. It is critical to get that balance right. The approach to consumer engagement should also be truly independent of and separate from the regulated business(es). Do consumers see it that way? How do you know?

The consumer engagement group needs to work in partnerships with the regulator and the industry but it cannot and should not get too close. It has a role to offset regulatory capture and therefore it is critical that it too does not become captured. Regulators therefore need to be clear and honest that that consumer interest representatives have not been ‘captured’ by the regulator themselves or the regulated business/industry. They need to show how they have worked to avoid that capture. For example, who provides market and regulatory information to a consumer group? How is that information framed? Distinguish, and be clear, about what is information, what is advice, what is guidance and what is direction – and be very clear and honest about what is appropriate and what is not appropriate, what is biased or one-sided and what is truly independent information.

The same principle applies to direct engagement between the parties involved. Behind the scenes, discreet conversations, often over lengthy periods, based on individual or small group relationships can run the same risks regarding capture. Structured corporate support is essential as opposed to reliance on personal knowledge and behind the scenes conversations that lack transparency when difficult decisions have to be made.

Looking outwards is critical for the consumer engagement body. Stakeholder buy-in is important as is engagement, listening and working with consumer organisations, learning from their expertise on good practice, and avoiding duplication.

Accessibility and visibility are essential. A consumer engagement structure will only be credible if it operates on the basis of a robust, independent research evidence base.

But it also needs to listen to consumers. Legitimacy is derived from meaningful engagement with its constituency and from a strong research evidence base. Consumers are not homogenous. Regulators and consumer interest representatives should know who their consumers are and the diversity of that base. And have a clear plan for finding them and for what they will do if they are hard to reach. Be very aware that those who are the most likely to participate are not always representative. You need to engage with those least likely to participate in the market – usually the most vulnerable who could benefit the most.

Is the public informed about its work? Consumers need to know who is acting on their behalf and what they are doing. Consumer groups need to make themselves accountable to consumers. Transparency is vital in ensuring public trust in decision making. The wider public needs to see what is going on and how decisions are being made. Consumers need to know what is being done in their name – this impacts on the trust agenda. If it is not present in consumer engagement structures then that trust is even harder to win. The reputational challenge to consumer bodies is much bigger.

Coming to negotiated settlements – I am wholly in favour of any means to increase and enhance consumer involvement but we need to be honest about what is being delivered. Is it going to be different from the traditional regulator/company interface – or just a different form of negotiation, trade-off or compromise – it's still a negotiation rather than a clear informed, stand-alone consumer position. Is it a downward negotiation or a consumer-driven decision?

And consumer engagement does not stop once the business plan or price control have been agreed. The aim should be for it to be embedded in the culture of the regulated business, bringing about long term consumer-centric culture change – so you don't have to start all over again at the next price control review. They should accept and recognise that empowering consumers brings benefits to the business and therefore that it is neither an onerous burden nor an expensive add-on.

The consumer engagement groups needs to be able to define and measure its impact on consumers in terms of outcomes.

Has it addressed real market failures?

Has it increased regulatory accountability – and seen to be doing so?

It should ensure that its work is evaluated independently.

Expertise and support

As above, consumer interest representatives need equal access to information from the regulator and the regulated in a form they can use. All steps need to be taken to avoid decision making bias or capture. Any third party advisor needs to be independent of the regulator.

Members need to possess the ability to analyse and make sense of complex information and then be seen to be asking the difficult questions and challenging accepted wisdom. They need to be consumer interest experts. They need to be able and equipped to identify likely sources of consumer detriment now and in the future, to be confident that they are effectively exploring the needs of existing and future consumers and discussing robustly the short and long term trade-offs that will need to be made as a result. They need to have strong powers of analysis and a track record in applying sound judgement and making robust decisions.

Trisha McAuley OBE, is a consumer and public interest expert. She was Senior Director for Scotland of Consumers Futures (previously Consumer Focus). She is non-executive director of, amongst others, the Scottish Environment Protection Agency, Northern Ireland Water, and NHS Greater Glasgow and Clyde. She is also public interest member of the Institute of Chartered Accountants Scotland Discipline Board and a member of the Ofgem Gas Network Innovation Competition Expert Panel.