Redefining the boundaries of the regulatory state

Bruno Queiroz Cunha highlights the importance of interdependence in regulation

Boundaries are at the heart of two of the most central problems in regulation: the problem of 'commitment' and the problem of 'politicization'. In the former case, boundaries are supposed to prevent regulators from becoming too exposed to the effects of political, social or economic instability; in the case of the latter, boundaries are supposed to prevent political executives from interfering in the day-to-day decision-making of these agencies. The mantra of 'independence' has been used to create a myth of technocratic and modern decision-making that is far removed from the days of informal bargaining between (often state-owned) regulated industries and election-seeking politicians.

Discourses about the importance of 'independence' resonated with the diagnosed problems of state-industry relationships in various jurisdictions as well. However, the continued insistence on 'independence' runs the risk of becoming self-defeating. Enthusiasts of regulatory 'independence' seem so keen on maintaining boundaries, seeing any engagement with political and industry processes as an example of impending doom that will inevitably lead to a return to what, for them, represents outdated, cosy informal network-based policy approaches.

Independence is, in the eyes of these formal independence enthusiasts, primarily about separation from politics. Whether it relates to removing the dead hand of the finance ministry from the agency's budget or about dealing with political interests, the view is that 'regulators play a key role in ensuring that projects are attractive for investors, yet they play only a limited role in guiding policy formulation' (OECD, 2017: 1). This reference to the age old 'politics-administration' dichotomy resonates with those who see regulation and bureaucracy as technocratic solutions to be separated from the political machinations.

However, increasingly, evidence suggests that such a view of independence is hardly supportive of developing regulatory capacity. As regulatory regimes and their underlying understandings mature, there comes an acknowledgment that regulation and, therefore, regulators do play a central part in setting the policy framework, that they need to engage pro-actively with politics and with industry instead of sitting behind formal statutory boundaries.

Indeed, there is plenty of empirical evidence that active engagement enhances rather than reduces the autonomy of regulators. Regulatory agencies in a number of national and sectoral contexts had to go through periods of criticism, industry fiasco and collapse, and budgetary restraint. Those that navigated these periods pro-actively – in co-operation with regulatees and in dialogue with political principals – succeeded in developing their reputation and therefore also their autonomy, even though, formally, one might say that their independence was threatened by 'undue influence'.

So what does active boundary management look like? One is a clear understanding of the ways in which agencies can shape agendas and formulate policies in their spheres of influence: 'few students of regulation would deny that agencies, in their area of competence, are important participants in the agenda-setting process' (Majone, 2006; similarly Ossege, 2016). Examples exist of how regulators enhance their reputation by actively engaging with their national political executives. One case in point is the Norwegian oil regulator, the Norwegian Petroleum Directorate (NPD), that regards itself as an 'advisor' and 'knowledge broker'. Active engagement enhances state effectiveness and regulatory capacity as the regulator gains better knowledge of the industry it is overseeing and accepts sharing it upwards and sideways. In the UK, Ofgem, the energy regulator, has also sought to enhance its autonomy by seeking to create a more flexible way of operating, including sharing information and being more open about dealing with different stakeholders, including government.

The same applies to transition contexts. Parrado and Salvador (2011) have highlighted in some political systems regulators are much better resourced than ministerial departments and therefore influence their policy sector considerably. Parrado and Salvador's work in this area applies especially to Latin America. In cases where mutual suspicions run high, regulators are afraid of dealing with ministries, and ministries want to flex their superior muscle to regulators. Nevertheless, what is needed in these circumstances is not a rigid regulatory mandate, but one that encourages regulators to assume broader functions and to contribute with their expertise to decision-making.

Of course, advocates of more fluid boundaries in the regulatory state will be accused of inviting capture and political control, and adding uncertainty. Yet, after over a quarter of a century of experience with regulatory agencies, such criticisms run somewhat hollow. We do know more about boundary lines and where such lines need to be drawn so as to preserve an agency's reputation. However, that does not mean that regulators can hide behind their understanding of

formal statutory provisions. In other words, regulators should see themselves through the lens of 'complementarity' not 'independence' (see for instance Svara, 2001). In doing so, they need to become part of policy formulation processes, to develop relationships with their industry that is both advisory and supervisory, and they need to understand that engaging with stakeholders does not imply reputation or legitimacy losses. There is no other way for regulators – they need 'to get their hands dirty' if they want to regulate successfully.

However, such a view of complementarity does require an elected government that does grant regulators this legitimate space; it also requires stakeholders to engage with regulators rather than regard them as inconvenient actors that can be sidelined through exclusive political access or drawn-out judicial review channels.

In sum, it is time to move away from stale debates about independence. They do not reflect the real world of regulation, and thereby run the risk of impeding actual regulatory capacity building. It is time to reconsider redrawing the boundaries of the regulatory state.

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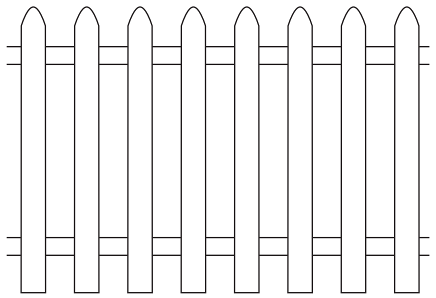

Competition policy in troubled times?

Martin Lodge argues that competition as a policy objective requires renewed consideration

Over the past three decades, the primacy of competition and market-based ideas has been at the heart of public policy. More recently, this unquestioned status of competition has been shaken. For some, the c-word evokes images of a misplaced trust in market-type mechanisms. Whether it is questions over private finance initiatives, incomprehensible contractual arrangements, highly diffused responsibility (avoidance), or the emergence of new technological giants, the world of competition and regulation is widely seen as requiring a different approach. For others, the c-word's successful dominance is under threat, putting major achievements in policy since the 1970s at risk. Accordingly, great apprehension is being expressed about the potential dangers lurking outside the competition policy community.

What can explain this change in policy mood? It is, after all, certainly the case that sophisticated and embedded transnational competition policy-mechanisms and communities exist. Processes of reasoning and appeal bear witness to its well established status.

However, once we start looking more closely at competition policy as a technology and as an overall policy programme, certain strains appear that indicate why the c-word may indeed be living in troubled times. Leaving Brexit-related questions aside, one question is what competition as a set of instruments actually intends to achieve. The institutional case-by-case approach shaping UK policy could be accused of lacking an overall 'philosophy'. Highlighting that competition policy seeks to enhance 'consumer welfare' might be an appealing economic concept, but it is not clear what the moral purpose of 'consumer welfare' is. Going back to ordo-liberal roots might offer some support. Accordingly, competition policy was about market fairness: to protect individuals from economic and political power concentrations so as to enable them to flourish socially and economically. It is not clear whether contemporary competition policy visualizes such a moral purpose, especially when 'fairness' is regarded as an inappropriate policy objective and needs to be 're-translated' into concerns about 'vulnerable consumers' so as to attract the attention of competition watchdogs.

Similarly, there are also questions about the role of institutions in competition policy. For some, strong and authoritative institutions are critical for policing markets, whereas others are less interested in state-based institutions overseeing markets.

Markets are also changing, requiring readjustment in understandings of vertical and horizontal mergers. Debates are ongoing whether competition law and policy has the appropriate tools (and interest) to deal with the rise of digital platforms and vertically integrated companies whose concentrated market power is difficult to assess in orthodox ways. The same applies to questions as to whether competition policy has taken the eye off the ball in view of debates regarding growing market concentration and industry profitability. These issues are disputed. However, they feed into much wider debates about the lack of responsiveness in both political and economic systems to the experience of the median citizen. It is arguably this wider dissatisfaction with the lack of responsiveness of political and economic systems that is fuelling the discontent with the c-word.

Focusing on competition policy as a programme highlights many of the sources of discontent. It suggests that the c-word spread widely without much reflection about the prerequisites of marketization and its limits. The health system in England with its emphasis on market-based mechanisms offers a case in point. Designed to incentivize organizations to compete against each other in (assumed) times of plenty, these supposedly market-type mechanisms fit poorly in times of resource constraint and capacity stretch and stand in the way of collaboration. Even in imagined times of plenty, demands for local autonomy and entrepreneurial 'innovation' would clash with principles of central government-based regulation and control. More fundamentally, competition-based mechanisms are largely seen as increasing transaction costs to the benefit of rent-seeking consultancies without actually incurring risks to private providers. The need to sustain services means that failure does not (and arguably cannot) mean 'exit'; leaving the taxpayer as ultimate lender of last resort. Similarly, there are also questions as to whether markets deliver – in view of declining service quality and lack of responsiveness to consumer needs. The idea of price 'comparison' also becomes increasingly problematic as algorithms maximize 'bespoke' differentiation and obfuscation. If the experience of the 'market' is inherently poor, competition policy enthusiasts cannot then side-step such criticism by pointing to 'competition' and 'consumer choice' while turning up their noses at (for them) sub-optimal ('irrational') consumer choices.

Furthermore, there are also signs of the over-extended application of the c-word. Public services are allegedly run as a 'market' where consumers are supposed to reign sovereign