

carr Regulators' Roundtable

Regulatory Confidence

Contemporary regulation literature has devoted significant attention to the concept of 'reputation', particularly the notion of having a reputation for competence in the eyes of diverse stakeholders (Carpenter 2010). Reputation is widely regarded as a crucial factor in explaining the varying degrees of autonomy enjoyed by different regulatory agencies.

To establish a reputation for competence, regulators need to project confidence. Debating regulatory confidence takes place in the context of well-rehearsed debates about the appropriate level of autonomy in decision-making. It addresses the balance between ensuring that agencies remain sufficiently distant from their political 'masters' on the one hand, and preventing 'over-confident' regulators from exceeding their mandates on the other. In the contemporary British regulatory landscape, questions about regulatory confidence are of paramount importance. These concerns encompass a range of issues, from the appropriate response to 'economic growth duties' to broader calls for 'reimagining' the equilibrium between 'risk' and 'opportunity'.

Confidence manifests itself in both external and internal dimensions. The external dimension pertains to projecting confidence in decision-making processes and earning the trust of relevant stakeholders. The internal dimension focuses on the integrity of decision-making processes and the confidence of decision-makers themselves in making sound choices. Furthermore, a nuanced perspective on regulatory confidence necessitates an examination of various interrelated aspects, including regulatory objectives, decision-making, and stakeholders.

Confidence in regulatory objectives

Regulators are confronted with sets of (often shifting) objectives. Some objectives are explicitly stated in legislation; others are conveyed through annual letters of expectations. Additionally, there may be the implicit understandings that characterise the 'bargain' between regulators and the broader political system. Consequently, comprehending these diverse and evolving objectives constitutes a fundamental requirement for regulators. This objective also aligns with the development of a 'core mission' for regulatory agencies (Wilson 1989). Such core missions may emerge from professional development and recruitment practices, as well as leadership decisions. In general, how to address decision-making in view of, often varied and changing, sets of objectives relates to questions of engaging with the core mission of the regulatory agency, understanding that some conflicts may relate to political choices rather than regulatory interpretation, and resources.

First, there is a challenge of being able to 'optimise' between different objectives. A shared commitment towards a 'core mission' may conflict with evolving expectations. For instance, even where the core mission is to minimise the risk of harm, the requirement to balance competing objectives may require the consideration of both risks and benefits, thereby leading to a reconsideration of the acceptable levels of risk. Furthermore, there are intergenerational effects; different groups within an organisation have grown accustomed to different methodologies and assumptions, leading to inconsistencies in understanding of objectives.

This conflict might be manageable as part of a learning process: the primary objective is to establish a broader purpose for the organisation that evolves towards an 'enabling regulator.' Such a regulatory regulator would seek to develop regulation collaboratively with key stakeholders, thereby establishing a shared agreement regarding desired outcomes. Such processes also need to deal with the institutional inheritance of regulatory agencies. Some agencies reflect particular circumstances and needs that reflect the time of their initial statutory origin. For example, the British regulators that were set up in the context of the various privatisations of network industries in the 1980s and 1990s were fundamentally about price regulation. Stretching their scope beyond questions of price and competition regulation has been challenging as any such initial organisational setting creates blind spots (being unable to see certain issues even from professional viewpoints) and Achilles' Heels (inviting certain regulatory vulnerabilities in view of chosen regulatory strategies); one example being the development of a more differentiated understanding of what a 'vulnerable consumer' is (see Lodge 2019). Initial statutory provisions, however, have made it difficult for regulators to adjust their focus.

Second, certain objectives are in tension and cannot be resolved by regulators themselves. Instead, such tensions reflect competing political objectives. Different ministers may hold alternative viewpoints regarding the weighting of different objectives and their potential trade-offs. Regulatory confidence, therefore, hinges on clarifying the ultimate responsibility for specific decisions. Some regulators may be willing to have such difficult conversations, potentially leading to their removal. Other regulators may not be so inclined. One may even suggest that the existence of alternative career paths invites regulatory confidence; those regulators with potential options in the world of consulting or in the industry may be more willing to speak 'truth to power' than those lacking alternative career paths.

Third, a further challenge relates to the resourcefulness of regulators to be able to fulfil different objectives. Such challenges relate to a range of circumstances. One relates to a lack of resources to fulfil one's regulatory objectives. A second concern relates to the imposition of regulatory objectives and functions without much consideration of where such functions should sit and how they should be implemented. A third concern relates to multi-regime regulators; namely how to ensure organisational attention and resourcing according to regulatory objectives where these objectives might not reflect the dominant concern of any one agency, or where agencies are not equipped to 'control' a risk on their own. Such variations in attention may also reflect the varying resourcefulness of different constituencies, such as the regulated industry or other affected groups. For example, regulators may be particularly responsive to the 'easy to measure' phenomena linked to well-organised regulatory constituencies - at the expense of less well-represented interests. As a result, those functions that deal with potentially much higher risk (in terms of impact and probability), but that lack interest group backing and are difficult to measure, become secondary. Adding regulatory functions and objectives together might appear straightforward as a way of signalling 'consolidation', but may fly in the face of an alternative requirement, namely focused oversight over very specific activities.

Confidence in regulatory decision-making

As regulatory outcomes are frequently barely visible, defining what makes for a 'good' regulatory decision is particularly challenging. Decision-making involves negotiated outcomes that are difficult to place in 'performance metrics'. Equally, decisions may only become visible when associated with some perception of failure and scandal. Frequently, therefore, what makes for a 'good' decision in the world of public policy and regulation is based on informal views and rarely responds to nicely designed guidance material or 'better regulation principles'. In settings where 'good' is difficult to assign, one can distinguish between (i) confidence that regulatory decision-

making is robust and valid and (ii) that regulatory decisions at all levels of an organisation are taken confidently (instead of, for example, pushing all decisions upwards so as to avoid blame and responsibility).

The central challenge for confidence in regulatory decision-making is information asymmetry, especially in highly dispersed settings where both information and authority are distributed across different regulators and regulatees. The risk-producing regulated parties might be well-intentioned, but may nevertheless fail to address critical issues. One regulatory strategy to address such concerns is to focus on critical control or assurance points. An additional critical organisational strategy is to conduct internal audits. Many of the issues that are placed on the risk register may, in practice, not be engaged with across the organisation or may only be applied in highly inconsistent ways. At the most basic level, regulatory leadership needs to ensure that forms are completed and filed in broadly consistent ways across an organisation.

While all regulators are seeking to be 'risk-informed', the reality is that all organisations have fluid risk appetites. Having no risk appetite might lead to 'gold plating' to ensure safety, but conflicts with other objectives, such as 'growth'. One needs to conduct international and national peer review to challenge oneself. One needed to check on the impact of guidance on the industry and it was important to have, before the issuing of guidance, a conversation with the relevant stakeholders. Such a conversation should welcome innovation and experimentation. However, it is particularly difficult to have such conversations in highly fragmented settings.

Furthermore, within any regulator, it is likely that there are plenty of levels of risk appetites across different issues. Rather than looking at them individually, it is important to reflect on potential tensions and also not to revert to treat all issues on the basis of a 'low risk appetite' alone; for example, the benefits of a new IT systems might be associated with a high risk appetite, but the fears regarding cyber-security may invite a very low risk appetite.

To encourage conversations about risk appetite within regulators, experimental techniques such as sandboxes might 'shake up' existing dominant 'old hat practices'. Such experimental techniques and their outcomes need to be communicated carefully across the organisation. Introducing such techniques, however, was challenging in view of the inherently cautious professional outlook that most people recruited to regulators shared.

A particular context in reviewing one's confidence in decision-making is provided by traumatic events. For some, such a traumatic event represents a 'wake up call' and an opportunity to 'put things right'. In other areas, responding to traumatic events is potentially highly problematic as it might involve leadership changes, concerns with loss of regulatory knowledge and institutional memory, as well as the questioning of particular regulatory technologies. Traumatic events can therefore lead to a confidence loss by the regulated sector. More generally, the more salient and contested the issues surrounding the regulated sector (as may be reflected in political attention or social media commentary), the more difficult it is to confidently do one's work as one is not in control of the wider environment.

While risk registers do provide a basis for conversation, it is also important to consider whether there are any inherent blind spots. In other words, have actual incidents been foreseen in regulators' risk registers? One has to be therefore aware of the potential limitations of any risk register. Blind spots may not just lead to the failure to spot particular risks, but also explain the lack of engagement with the management of particular risks (as associated with the literature on the 'normalisation of deviance'; Vaughan 2005). Organisational and sectoral cultures might emphasise certain issues rather than others. There might also be a bias towards making all risks appear 'amber', therefore not allowing for any differentiation.

Indeed, the fixation with certain performance indicators may incubate certain catastrophic risks. It is therefore important to focus across risk in one organisational context, but also bear in mind that such risk-based frameworks are focused on individual entities. It is important to keep the impact on the wider system in mind.

Confidence in relationship with key audiences

Having a reputation for competence by the relevant audiences is said to be a critical resource for being able to exercise regulatory authority in autonomous ways. How to establish who the relevant audiences are remains a challenge. Apart from the challenge of balancing input from the hard-to-detect and dispersed regulatory constituencies with those views of highly concentrated and well-resourced stakeholders, there is also the challenge of being responsive not just to those voices that may seem 'acceptable' (to the regulator and/or the wider political environment), but also those that might challenge existing viewpoints.

The latter challenge is particularly prominent in those industries where there is a tradition of a 'revolving door' (e.g., recruitment to regulators from industry and from regulators to industry, which might, in some cases, be associated with shared disciplinary or professional viewpoints). Essential here is the transparency and accessibility of regulatory language to enable a conversation across different parties. Such demands, however, might conflict with legal concerns. Related, the concern with legal risks need to be managed carefully. One way of doing so is to draw on standards of legal risks (for example, <https://www.gov.uk/government/publications/guidance-attorney-generals-guidance-on-legal-risk>). The key to legal risk is a shared understanding as to whether a regulatory organisation is willing 'to lose the appeal'. The legal risk should not be defined as the potential of a legal appeal, but as the potential (negative and positive) consequences of losing a legal appeal.

The former challenge of identifying rival sources of information is particularly prominent where competing interests are not present - receiving information from rival parties is a good way of reducing information asymmetries. The appeals process might also be seen as biased towards some interests rather than others. Similarly, for regulators operating across different regional geographies there is also the challenge to remain consistent across regions, especially in cases where there was particularly strong interest group mobilisation in one region rather than in others.

Regulatory confidence

Being confident implies a willingness to be transparent, such as about the processes involving the creation and maintenance of risk registers. The challenge for confident regulatory decision-making is also related to the consequences of a particular regulatory judgement. A regulatory judgement can have catastrophic consequences not just on an individual entity, but may have cascading effects. In particular, doing 'the right thing' might place considerable pressure in other parts of the regulated system (the problem of 'multi-organisational sub-optimisation', Hood 1976). Seeking to be responsive in such a context inevitably is also an issue of resourcing (across the system).

In conclusion, debates about 'regulatory confidence' are closely tied with wider concerns about 'regulatory excellence' (Coglianese 2017). At the same time, it also offers scope for a more focused discussion, namely about the confidence in regulatory technologies - the quality of information detection, the suitability of standards, and the capacity to modify behaviours. These technologies need to be responsive to the regulated environment while fulfilling a core mission. Furthermore, it is about the ways in which to install confidence inside an organisation by encouraging open conversations about risk appetite, but also outside in the ways individuals engage in consistent,

yet responsive, ways with their stakeholders. Regulatory confidence is about the courage to confront regulation with a degree of humility.

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