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WORKING PAPER

Keeping a watchful eye: Doctrines of accountability and transparency in the regulatory state by DR. MARTIN LODGE

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Keeping a Watchful Eye:
Doctrines of accountability and transparency in the regulatory state

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Abstract

One of the central features of the 'rise' of the regulatory state has been the shift of particular policy functions to non-majoritarian institutions. Issues of accountability and transparency have therefore moved to the foreground of regulatory debates, both in the applied and academic public policy literature. This paper argues that a narrow debate on parliamentary oversight is too limited and advocates a more diverse and complex approach towards accountability and transparency. It does so in three steps. First, the paper proposes a regulatory regime perspective that points to five essential dimensions of any regime that need to be transparent and held accountable. When linked to a basic toolbox of four tools, voice, choice, information and representation, and viewed through the lenses of three distinct administrative doctrines, a picture of considerable diversity emerges. Second, the paper briefly considers the comparative experience in network regulation in Britain, Germany and New Zealand, pointing to the differences and commonalities in the respective state's choices of policy instruments to advance accountability and transparency. Finally, the paper discusses certain trade-offs inherent in any choice of particular policy instrument, therefore highlighting the potential costs of introducing 'more' accountability into regulatory regimes.

[1] Dr. Lodge gave a Policy Institute seminar, based on this paper, on the 21st January 2003. Further details on The Policy Institute seminar series in public policy may be obtained from The Policy Institute website at www.policyinstitute.tcd.ie/events.html

Introduction

The perceived emergence of the so-called 'regulatory state' in Europe has renewed many of the old debates in public administration and related disciplines concerning transparency and accountability. This 'rise' of the regulatory state (Majone 1997) has been most noted in the context of the international privatisation bandwagon, in particular in the network industries (telecommunications, electricity, gas, water, and arguably, rail). However, the 'regulation' bandwagon has moved beyond the area of (formerly) state-owned enterprises; at least in the context of the UK, the 'bandwagon' seems to have also moved towards the regulation 'inside government' (Hood et al, 1999), with more and more functions witnessing the establishment of independent watchdogs (the latest incarnation being the announcement of a university access regulator).

Such changes to the institutional furniture of the state have refocused attention on debates concerning accountability and transparency. Diverse actors, ranging from multilateral donors (World Bank, International Monetary Fund, Inter-American Development Bank etc.) to so-called NGOs, such as Transparency International, are advocating 'accountability' and 'transparency' as part of 'good governance' programmes, while at the national level regulatory reforms throughout the 1980s and 1990s have attracted substantial criticism with regard to their 'democratic deficit'. Accountability and transparency involve a multiplicity of relationships, based on different types of power relationships; accountability and transparency requirements can be established coercively or through voluntary consent, and may receive different degrees of 'acceptance' by those held accountable. Therefore, questions of 'who is accountable to whom and for what' are more than just issue for abstract discussion about the value of parliamentary oversight, but go to the heard of power relationships within the regulatory space (see Scott 2000: 40-3).

This paper does not aim to reiterate well-known, if not worn-out debates concerning accountability and transparency in the regulatory state that must already have contributed considerably to global warming. This paper seeks to draw out a more complex picture of what 'accountability' and 'transparency' mean when it comes to regulation. It does so by introducing the more complex notion of 'regulatory regime' and illustrates the diversity of accountability and transparency instruments by drawing on three distinct administrative doctrines. This paper does not advocate a 'one best way' on how to fix accountability and transparency, it merely seeks to highlight that accountability and transparency raise fundamental issues concerning power and the distribution and legitimisation of the (ab)use of authority. By drawing on comparative examples of network regulation regimes, this paper further seeks to highlight the national diversity of instruments. Finally, this paper suggests that any advocacy of 'accountability' and 'transparency' should consider the potential trade-offs which inevitably occur in any regulatory instrument policy choice. First, however, the next section briefly illustrates why accountability and transparency remain pertinent issues for the analysis of the regulatory state.

Why talk about accountability and transparency <u>again</u>?

As already noted, accountability and transparency are well-trodden issues in the study of public administration. While accountability is usually associated with the obligation to account for regulatory (and any other type of) activities to another body

or person, transparency is associated with prescribed standards of making regulatory activities access- and assess-able. However, the two notions continue to attract substantial discussion, both in applied policy and in analytical debates.

Talk about 'better regulation' has been widespread since the 1990s, stressing in particular the importance of accountability and legitimacy of regulatory regimes. In its so-called 'regulatory reviews', the OECD similarly pays attention to issues of accountability and transparency; noting, in the case of Ireland, the necessity to strengthen parliamentary oversight and co-ordination mechanisms between regulatory and competition bodies. It also supported the introduction of 'regulatory impact assessments' and of more formal procedural devices in consultation (OECD 2001). In the Irish case, the OECD review followed the publication of the so-called 'Blue Book' on Governance and Accountability in the Regulatory Process that reflected on initial experiences with regulating utilities in the cases of telecommunications and electricity (Department of Public Enterprise 2000). Apart from these considerations (and responses, for example, parliamentary oversight over (tele)communications was strengthened in 2002 with the Communications Act), there were also policy developments that placed the basic tension regulatory independence and political accountability at the heart of the policy debate, for example, the direction by the telecommunications minister to establish 'flat rate access' to the Internet (Irish Times, 8 January 2003, p. 17) or earlier controversy about the formal and informal obligations of regulators to appear in front of parliamentary committees.

Ireland was neither alone in discussing the appropriate means of holding 'regulation' accountable and transparent, nor was it alone in facing problems in dealing with the tension of 'independence' and 'accountability'. In Germany, telecommunications was, at the time of writing, undergoing a major review of its regulatory framework, partly as a result of changes in the European regulatory context, energy regulation was, given its associational character and accusation of cartelisation of the industry, contested and the regulation of railways had witnessed, in 2002, a slight strengthening of the investigatory powers of the (safety) regulator, the Eisenbahn Bundesamt. Among two 'benchmark' cases for public sector reform more generally, and regulatory reform more specifically, Britain and New Zealand, the regulation of network industries continued to attract considerable attention, in particular concerning issues relating to accountability and transparency of regulatory processes. While in Britain this was mainly in the context of railways and in various bodies reviewing network regulation in various aspects (such as the Better Regulation Task Force and National Audit Office reports and ongoing reviews by the Treasury and a select committee of the House of Lords), in New Zealand major reviews to electricity and telecommunications led to, in 2001, far more sectoral approaches towards regulation than the previous 'light handed' approach towards network regulation and its absence of sectoral regulatory agencies would suggest (a move that was later, in late 2002, repeated in gas).

Similarly in the legal and analytical literature on regulation, the issues of accountability and transparency continue to attract much attention. One particular and widely voiced concern has been with the impact of the rise and spread of non-majoritarian institutions for the quality of democracy and citizenship (standing side-by-side with criticisms of the doubtful legitimacy and accountability of self-regulatory systems (Moran 2002: 405)). Whereas in the age of the welfare state, citizenship was

seen to include rights to particular services, it is suggested that the age of the regulatory state has brought about a reduced conception of citizenship, limiting the rights of the individual to that of the contractual rights of a consumer. Furthermore, the spread of the non-majoritarian institutions was seen to constrain the ability of political representatives to hold the exercise of delegated powers accountable, raising fears that regulatory agencies were increasingly becoming 'headless branches of government'. Privatisation and regulatory reform were said to have lead to a reduction in 'input' opportunities for citizens, while not widening the 'choice' options of customers (Falconer and Ross 1999). Contrasting views pointed to potential substitutes for holding regulatory regimes to account - apart from the vertical measures, there was an increasing reliance also on horizontal mechanisms, such as controls being exercised by auditors, professional standard setters and courts (Scott 2000: 43; Stirton and Lodge 2001: 475). A further claim was that the rise of the regulatory state has witnessed a shift from input-to output related ways of legitimacy (Majone 1999), therefore a decline in 'input' (or traditional parliamentary means of holding regimes to account) was potentially compensated by improved system outputs.

Similarly the principal-agent approach, with its key concern of asymmetric information that allows for shirking and drifting by self-interested agents, has been concerned with issues of transparency and accountability (see McCubbins et al. 1987, Horn 1995, Epstein and O'Halloran 1999, Macey 1992, Levine and Forrester 1990). Shirking and drifting describes the self-interested move of actors beyond the zone of discretion intended by the enacting coalition's initial legislative bargain. The ability to 'drift' and 'shirk' originates in asymmetric information problems and occurs at the political, regulatory agency and the regulated agent level. Means to alleviate such problems include 'fire alarms' (by affected constituencies), 'police patrols' (as exercised by oversight bodies) and procedural 'deck stacking'. However, while the literature emerged in the concern of congressional oversight over agencies, it is not clear why and how these particular police patrols or fire alarms are legitimised and how they should operate or even be constituted. This paper attempts to develop a more differentiated picture, suggesting that when viewed through the lenses of different administrative doctrines very different understandings emerge as to what may be regarded as legitimate 'police patrol' or 'fire alarm'. The next section attempts to provide for such an account, suggesting not only that a mere focus on the political accountability of regulators to parliamentary oversight is far too narrow, but requires more attention to instruments that not only deal with the transparency on how regulatory decisions are being made, but also how information is being detected and standards are being set.

Regulatory regime, transparency toolbox and three administrative doctrines

Conventional understandings of accountability are concerned with the demands on an agent to report on certain activities and the ability to impose sanctions. Thus accountability is inherent to any system of control. This section seeks to explore a more complex understanding of accountability and transparency. First it sets out five dimensions on which a (basic) system of control requires to be held accountable and transparent. Second, it establishes a 'transparency toolbox' of four basic tools that provide different means through which to achieve accountability and transparency in regulation. Third, this toolbox is applied through the lenses of three administrative doctrines. When stretched across the five dimensions of accountability and

transparency in a regulatory regime, a picture of potential diversity emerges that seeks to encourage the debate to move towards more comprehensive discussions concerning accountability and transparency in the 'regulatory state'.

A regulatory regime as a system of control requires at minimum three central elements: detectors (for information gathering), effectors (for behaviour modification) and a standard-setting machinery (Hood 1983: 3-4). These three elements are essential in order to keep the control system within a preferred subset of all its possible states (Hood 1986: 112). The following is concerned not with these three elements as such, but with the way in which they raise issues of accountability and transparency. Across these three essential elements of any control systems, demands on accountability and transparency occur across five dimensions:

- The accountability and transparency of the decision-making process involved in the setting of rules and standards;
- The transparency of the rules to be followed;
- The accountability and transparency of the activities of regulated actors;
- The accountability and transparency of the activities of regulating actors;
- The accountability and transparency of so-called feedback processes.

Apart from focusing on where accountability and transparency are required, any discussion also requires an analysis of potential tools and instruments. Drawing on Hirschman's distinction of loyalty, exit and voice responses (Hirschman 1970), Table 1 introduces a 'transparency toolbox' of four basic mechanisms that potentially enhance transparency and accountability.

Table 1: Transparency Toolbox

VOICE Prevents lack of user consideration and responsiveness via redress and consultation mechanisms	REPRESENTATION Prevents dominance of large user/business groups via consumer groups & councils
CHOICE Prevents paternalism by allowing for consumer choice of nature, quality and quantity of good	INFORMATION Prevents 'lemon choices'

The 'transparency toolbox' distinguishes between tools that are either individually exercised or collectively provided (see Stirton and Lodge 2001: 478). Thus, information and representation are supposed to make regulation (and regulated service provision) transparent to users and citizens en masse, while voice and choice mechanisms are provided to the individual for their discretionary utilisation. It also distinguishes between input-oriented mechanisms, those aimed at enhancing the quality of the process of regulatory decision-making and regulated service provision and output-oriented mechanisms which facilitate the evaluation of provided regulation and regulated services. Choice seeks to enable user participation and redress, representation seeks to counter imbalances in collective action (for example through the enfranchisement of public interest groups in regulatory decision-making processes, Ayres and Braithwaite 1992), choice aims to enhance selection, while

information seeks to redress potential information asymmetries, thereby enhancing the quality of choice.

As such, the toolbox provides only little content as to 'how to fix' or enhance the accountability and transparency of regulatory regimes. Building on the analysis of doctrines in public management (see Hood and Jackson 1991: 9-19), three different ways on 'how to' design and discuss regulatory transparency can be distinguished, 'fiduciary trusteeship', 'consumer sovereignty' and 'empowered citizenship' (Hood 1998; Hood 1997). All three provide distinct understandings as to how accountability and transparency should be incorporated (by whom to whom) into a regulatory regime and with what type of instruments.

The fiduciary trusteeship doctrine has been particularly prominent in 'traditional' public administration (Hood 1986: 181-84). It resonates with those criticisms of the 'regulatory state' that are troubled by the blurring of the 'public'-'private' divide (for example, Haque 2001). Concerning the regulation of public service provision it is assumed that 'producers' know best, given high information costs with customers being a divided group and incapable of collective action, potentially willing to accept undesirable risks given lack of expertise. Such expertise is provided by public interested technocrats able to counter concentrated interests, to balance against public pressure for 'knee jerk responses' or to deal with issues of long-term, but low-level salience, such as nuclear energy refuse, medical treatments, the consumption of particular foodstuffs or even holiday locations. Accordingly, regulation should be exercised in an orderly, legally structured way that minimises the discretion of all parties to safeguard certainty in the regulatory process by reducing the potential for arbitrary (and discretionary) decision-making. Accountability is conducted via oversight and review by authoritative and responsible experts. In terms of transparency tools, this doctrine emphasises the importance of representation (through elected officials and specialist bodies) and of limited voice for individuals, through elected representatives. Put differently, regulatory activity is said to be accountable once it is suitably justified, at best in front of a knowing audience of experts or competent political representatives.

Arguments based on the fiduciary trusteeship doctrine warn against the risk of a downward drive of regulatory standards ('Delaware effect') once competition (or choice) between different standards is allowed, while direct citizen involvement is regarded as setting a dangerous precedent that downgrades the importance of expert decision-making and judgement, opening regulation up to ill-informed decisions and potentially leading to more widespread challenges to hierarchical authority, undermining authoritative activity due to hyper-accountability. However, it is questionable whether individuals require this kind of paternalism across all areas of regulation, and how far such a concept should be stretched in its application. While we may agree on the necessity of oversight by expertise in highly complex domains, we may be less willing to accept such paternalism when it comes to the monitoring and sanctioning of individual leisure pursuits or the mere choice of phone set designs. Furthermore, it is debatable whether the assumption of trust in experts and their judgement is not rather naïve, given experts' self-interest and biased understandings (such as 'groupthink' syndromes), pointing to further questions of the accountability of these bodies and the accountability and transparency of their selection mechanisms. Finally, it is doubtful whether a belief in 'authority' will provide straightforward

solutions when it comes to 'wicked issues' involving multi-dimensional problems in highly uncertain environments lacking any form of political and societal consensus. Instead such problem constellations seem to require strong participatory and inclusive processes across all five dimensions of the regulatory regime.

The consumer sovereignty doctrine, in contrast, regards citizens as the best judges of their own needs, who should be allowed to take their own decisions when it comes to choosing public services or in accepting risks. Therefore, individuals are regarded as capable of informed choice and their choices are sufficient to hold producers to account for the behaviour. Public authority over economic rents is to be minimised, as it is most likely to be abused by self-interested activities of those in authority. Thus, the significance of competition is emphasised, allowing the individual a maximum possible degree of voluntary choice on the extent and nature of consumption of any particular good (Hood 1986: 171-72), relying also on the self-interest of the providers of the regulated product to be accountable by providing information and being concerned about their reputation. Thus, providers find it in their interest to be accountable and transparent in their activities to increase their chances of survival.

This principle of competition and rivalness is not merely limited to the accountability and transparency of public services provision but applies to regulation more generally. Thus, rivalry may exist between competing regulatory standards and certificates (such as shipping classification and registration schemes). Furthermore, rivalness and diversity, which need not necessarily occur within one single policy domain, induce cross-organisational policy learning and 'discovery' processes. Furthermore, distrust in hierarchical decisions could potentially be minimised through competitive means of selection of regulators with distinctive policy packages. Accordingly, this doctrine emphasises the transparency tools of information and choice, the former in particular contributing to the quality of the latter.

However, as with fiduciary trusteeship, the applicability of the consumer sovereignty doctrine faces some challenges. It is questionable to what extent an individual should be able to choose risk-taking activities, as long as the question of 'acceptable' externalities (i.e. the imposition of costs on others due to individual behaviour) has remained unresolved. Furthermore, there are potentially certain domains where the demand for choice or the possibility of transparent 'controlled experiments' between different standards may be unacceptable to the wider public. A choice between a safe and an unsafe plane or ship may lead to discounts on price to the individual consumer of the plane's or the ship's services, but the consequences of a plane crash or major maritime spillage may impose higher costs on the wider public than the individual benefits arising from the existence of choice.[2]

The third doctrine builds on empowering citizens. It suggests that the two earlier doctrines either run the risk of concentrating power, thereby facilitating elitist regulatory decision-making processes or of disadvantaging certain individuals over others, given different capabilities to understand perceived complexities of market processes. Thus, this doctrine does not only advocate maximising input-oriented participation and placing a maximum of scrutiny on the regulatory process (for

[2] Ignoring here potential difficulties in coming to the appropriate assessment of ‘desirable‘ and ‘undesirable‘ side-effects (and of decision-making processes to come to an assessment).

example, rotating mandates of regulators), but regards such activity as having also transformative effects on the participating citizen (Bozeman 2002: 148).[3] Therefore, accountability and transparency mechanisms emphasise the importance of reducing social distance between those who regulate (and produce) and those affected by regulatory activity. This reduced social distance is directed at the involvement in the processes in particular, rather than an emphasis on enhancing the quality of choice to the individual.

In terms of the transparency toolbox, this doctrine emphasises the importance of voice, representation and information. Information is seen as important given inherent distrust of authority and elitist decision-making, which therefore requires a maximum of public scrutiny; this is linked to mechanisms of representation, where the contribution from a cross-section of constituencies may be linked to principles of rotation and the mandating of regulators. Similarly, voice is regarded as crucial in that it allows for the contribution of 'laypeople' to the regulatory decision-making which otherwise is reserved to experts and their particular biases. There are, as with the other doctrines, certain limitations as to the extent to which regulation can be made truly egalitarian. It seems to ignore the costs involved in participation (while also the predicted transformative impact may be questioned) and the potential occurrence (so often bemoaned by so-called experts) of 'irrational' decision-making by including too much 'publicness'. Similarly, there are limitations as to the extent to which authority can be distrusted (or rather the potential costs of such distrust), given the need to acquire some expertise to regulate particular activities, while mandating devices may cause considerable tensions given the incomplete nature of such mandating 'contracts' and the difficulty to establish universally acceptable decision-making procedures which may be regarded as leading to universally accepted outcomes.

Table 2: Transparency Toolbox across three doctrines

	Fiduciary Trusteeship	**Consumer Sovereignty**	**Citizen Empowerment**
Locus of Authority	Technocratic authority	Individual consumer	Participation in collective decision-making
Choice	Election of political representatives	Election of regulators/politicians/ choice of regulatory standards and in public services	Public discourse and choice on value conflicts
Voice	Public hearings, letters to authorities and political representatives	Complaint handling	Localised input and encouragement of value statements
Representation	Consumer councils	Competition among public interest groups	Direct citizen involvement, rotating mandates, peer group pressure
Information	White Papers, Annual Reports, government/regulator statements	Benchmarking, Financial transparency requirements,	Mandating of representatives, maximum scrutiny and exposure of rival views

[3] Participation in the production of the regulated activities is seen to reduce the need for control.

Table 2, besides summarising the above argument, suggests how the different doctrines locate authority differently. Certain instruments are being advocated by different perspectives with different justifications; thus, for example, the participation in elections is universally endorsed, however, while one doctrine regards it as an important measure of competition, the other regards it as legitimating the use of authority, while the third points to the importance of participation in its own right.

Having looked across the application of a very basic 'transparency toolbox' across three doctrines, indicating of what type of instruments would be advocated by particular worldviews in contrast to others, a similar exercise can be undertaken across all the five dimensions of a regulatory regime, as set out earlier. Table 3 provides an overview of instruments particularly emphasised by the various administrative doctrines, although it does not claim to be exhaustive.

Table 3: Accountability and transparency across regulatory regimes

	Fiduciary trusteeship	**Consumer sovereignty**	**Citizen empowerment**
Decision-making process involved in the setting of rules	Legislative and technocratic decision-making	Competition between sets of rules, individual choice	Inclusion, 'discourse' between contrasting worldviews
Transparency of the rules to be followed	Professional standards and legality	Contractual obligations, competition law	Publicness of access and procedural rules
Accountability and transparency of regulated activities	Oversight through supervision by experts, political competition for office, consumer representation duties	Competition and benchmarks, information revelation requirements, individual focus	Oversight through lay-participation, local production
Accountability and transparency of controls on regulated activities	Reporting duties and legalism	Competition between standards and agencies, Choice mechanism, information revelation, legal redress	Involvement, mandated supervision, public interest group involvement
Accountability and transparency of feedback processes	Reviews (royal commissions and task forces) by experts	Evolution of competitive orders, mutual adjustment through discovery processes	Immediate participation, including affected constituencies

Table 3 illustrates the key difference of advocated instruments across the five accountability and transparency dimensions of any regulatory regime. The first dimension, the accountability and transparency of the standard-setting process, points to the differences in conception as to appropriate locus of authority and to differences in terms of process. Similarly, across the three doctrines there are substantial variations in advocated instruments when it comes to the transparency of rules that are to be implemented, ranging from a reliance on professional standards, the existence of legal codes (including competition law) and those that involve access and participatory rights.

The (third dimension of) choice of instruments to advance the accountability and transparency of regulated actors and activities, seeks to avoid 'capture' or 'creative compliance'. Potential answers to such incentives range from the creation of oversight bodies, to a concern with the incentive structures and information revelation requirements to a mixture of lay-participation in oversight, to participation in the running of the regulated activities and other participatory means. The fourth dimension concerns the accountability and transparency of the regulator, with the primary emphasis being to avoid goal displacement through bureaucratic self-interest. While according to the 'fiduciary trusteeship' doctrine, such behaviour is to be controlled through reporting, legal duties and technocratic oversight, the 'consumer sovereignty' doctrine suggests instruments of choice, such as election to regulatory offices and regulatory standards as ways to control regulatory activities. 'Citizen empowerment'-based instruments on contrast stress the importance of heterogeneous participation, encouraging the public discourse of competing values of regulation, for holding the 'effecting' capacity of regulatory regimes to account.

Finally, the 'feedback' side of the regulatory regime requires to be hold to account and transparent in order to allow for the unbiased updating of regulatory standards and activities. The first doctrine advocates the importance of expert driven reviews, the alternative doctrines point to the importance of maintaining variety and diversity in order to encourage learning and mutual adjustment processes, while more egalitarian doctrines stress the importance of participatory discourse and value-based reviews.

Comparing national network regulation regimes

This section explores how different regulatory regimes in three countries, Britain, Germany and New Zealand, have developed accountability and transparency mechanisms. Britain and New Zealand are widely seen as benchmark cases for public sector reform, in the case of regulatory reform the two countries adopted very contrasting styles with Britain establishing regulatory agencies, while New Zealand opted for 'light handed' regulatory regimes relying on ex post competition policy. Germany is shaped by a more heterogeneous institutional 'landscape', having established in telecommunications (and postal services) a regulatory authority, in electricity and gas, the regime is based on an associational governance agreement between major interest groups and ex post control by the federal cartel office, while in railways, regulatory activity is shared between the cartel office and a more technical-legal supervisory agency. This section first briefly illustrates the three states' reforms, with particular attention to the way in which accountability and transparency have been incorporated into the respective regulatory regimes. For reasons of space, this treatment will mainly illustrate key tendencies rather than discuss in great detail the three states' regulatory regimes for their network industries.

Britain

The regulatory reform process in Britain can be characterised by four key elements that became increasingly prominent.[4] First, the usage of RPI-X that aimed to avoid the juridification effects of US-style rate of return regulation. Second, the creation of quasi-independent formal regulatory agencies. Third, an increasing tendency to apply

[4] Telecommunications privatisation took place in 1984; gas, in 1986, water in 1989, electricity in 1989/90 and railways in 1993 (for railways, see Lodge 2002).

and prefer structural separation to regulatory policy to induce market-'like' conditions in the regulated industries. Initially, the significance of universal service and the finance-ability of services had been dominant in the privatisation legislation. However, dissatisfaction with the performance of the regulated monopolies increased the advocacy in favour of structural policy options. Fourth, there was an increasing emphasis in the quality of services provided. Starting with action by the telecommunications regulator, Oftel, on the publication of performance achievements backed by the threat of financial sanctions, the 1992 Competition and Services (Utilities) Act extended and to some extent standardised consumer regulation across all the utility sectors, including the promotion, prescription, publication and enforcement of performance standards, and the provision of complaint and dispute handling procedures. These themes were carried forward in the 2000 Utilities Act, which mainly applied to the energy domains (after water and telecommunications had been taken out of the Bill following lobbying and departmental turf-fights). The 2000 Act also to some extent reduced the extent of formal 'independence' of the sectoral regulators, introducing the possibility of ministerial guidance in areas of social and environmental regulation.

The extent of choice was increased gradually with growing structural liberalisation. The regulatory authorities were said to take a strong interest in facilitating network access for new entrants, and with decreasing market power of the incumbents, the authorities moved away from operating as pro-active liberalising authorities towards becoming competition watchdogs (partly facilitated by the changes in the 1998 Competition Act which created concurrency with the Office of Fair Trading). The 1992 Competition and Services (Utilities) Act advanced individual voice by making consumer complaint provisions part of the licence requirements. Furthermore, information was enhanced by the required publication of disconnection rates, late and deferred payment procedures and services standards and targets. Moreover, the status of voice and representation was supposed to be advanced by the Labour government's plans to give consumer councils the explicit task of dealing with and monitoring consumer complaints. Moreover, criticism of the decision-making within the regulatory agencies led to increased procedural openness, especially in the cases of Oftel and Ofwat (Prosser 1997). All regulatory agencies started to increase their activities concerning information in the shadow of Labour's initial interest in major reform to its utility regulators. Direct price information was launched by Oftel as an industry-driven initiative in November 1999, but www.phonebills.org.uk remained largely ineffective, given limited participation and outdated information. Ofgem similarly started providing Internet-based information on price and services (non-interactive), the latter was also offered in the telecommunications domain by www.cpi.org.uk, again as part of an Oftel initiative. It was claimed that the role of Oftel was to encourage rather than provide the provision of information. Energywatch provided a similar, although more extensive service for energy price and service comparison.[5] Representation mechanisms initially reflected the diverse patterns originating in the era of nationalised industries. The consumer representative role of the economic regulators was mainly of secondary importance (see Hall, Scott and Hood 2000: 188-92 for Oftel). Nevertheless, the 2000 Utilities Act established the recognition of consumer interests as a primary objective for regulators, with 'energywatch' obtaining advanced information-gathering powers. However, the notion

[5]. http://www.energywatch.org.uk/supplier_information/comparisons_of_price/index.asp)

of 'representation' received increasingly less favour among officials and subsequently ministers. Thus, in the further development of communications regulation, civil servants convinced ministers to adopt a mode of consumer representation developed under the regime of the Financial Services Authority in the late 1990s, which involved a consumer and practitioner panel, and a regulatory decisions committee (which took major regulatory decisions) which was made up of practitioner and public interest representatives.

This pattern suggested that there was at one level a shift towards an increased emphasis on consumer standards and, in the immediate period after 1997, increased representation via consumer councils. However, the same pattern suggested an increased move towards 'light' versions of consumer representation that resembled closely those transparency mechanisms advocated by the administrative doctrine of consumer sovereignty. Furthermore, despite the presence of instruments of representation and voice, the provision of information emphasised less the 'effecting' kind of influencing consumer behaviour, but stressed the importance of 'detecting' consumer behaviour by regulatory agencies, in particularly to accommodate social concern and political criticism of the conduct of the regulatory agencies vis-à-vis consumers.

Germany

Public sector reform in Germany emerged as a major theme in public policy in the early- to mid-1990s in the context of unification and the European single market. The 'privatisation' of the former public monopolies in railways, telecommunications and postal services, the large-scale sale of municipal water providers and the liberalisation of energy markets suggested that Germany was 'catching up' in terms of the public sector reform 'bandwagon'.

In telecommunications, the liberalisation and privatisation of 'Deutsche Telekom' evolved over three stages, starting in 1989 with the corporatisation and separation of telecommunications, postal and banking activities, leading, in 1995 to the creation of joint stock companies and full liberalisation in 1998 and the sale of shares. Uniquely in the German administrative landscape, a regulatory office for telecommunications and postal services (RegTP) was established which marked the entry of the term 'regulation' into German public administration (despite the traditional existence of supervisory bodies in other policy domains). The railway operator, Deutsche Bahn, was established as a publicly-owned private law undertaking in 1994 with internally divided business sectors for freight, regional and long- and short-distance passenger services and infrastructure. The responsibility for procuring regional services was transferred to sub-national governments, the Länder, which used competitive tendering procedures for the allocation of services. No economic regulator was established, the 'Eisenbahn Bundesamt' supervised technical-legal aspects, while the Federal Cartel Office was responsible for disputes concerning network access. In electricity, ex post regulation was exercised by the Federal Cartel Office within the framework of the German competition law. Infrastructure charges and interconnection were regulated by a corporatist arrangement of business associations.

Germany witnessed a rapid development of choice in electricity and telecommunications, in the latter case facilitated by the asymmetric regulation imposed on the incumbent and the high 'starting technological conditions', while in

the former case the early expansion was rapidly moderated by increasing industry concentration and high access charges. In railways, the main choice was 'competition for the market' in local services, although the first rival railway services on the railway network emerged during 2002 (usually however replacing services withdrawn by the incumbent). In terms of voice, the regulatory arrangements across all network industries did not provide for any specific standards beyond those prescribed in EU provisions. The telecommunications regulator was active in consumer advice and reported, superficially, on the (increasing) number of submitted complaints in its annual reports. It was not involved in 'detecting' consumer behaviour. Comparative information on price, unlike service quality, was widely available from private sources for electricity and telecommunications. Compensation payments for failure in railway services were only introduced in the context of European Commission-led initiatives. In terms of representation, there were no specific bodies representing network industry consumers. Furthermore, the government's intention to review towards telecommunications regulation in 2003 concerned mainly adjustments to EU provisions and changing market conditions (and to a lesser extent possibly also 'technological convergence'). There were hardly any comments about the absence of 'transparency' of the regulatory regime or demands for enhanced consumer representation.

New Zealand

In terms of regulatory reform, New Zealand took a very different path to the two European examples. First, its initial reforms did not involve privatisation, but a corporatisation of state-owned enterprises (in 1986, telecommunications were sold in 1990), the application of structural separation and the rejection of establishing sectoral regulators. This so-called 'light-handed' model of regulation placed great stress on financial transparency and accountability and was widely praised for its reliance on general competition law.[6] By 2003, following continuous criticism of the absence of real competition, poor oversight and reporting practices, network regulation had moved to some extent to a more sectoral-type regulation, albeit in the form of sectoral 'governance' (electricity and gas) or in terms of a telecommunications commissioners situated at the Commerce Commission.

For example, in electricity, distribution was traditionally provided by a mixture of departments within local government and local electricity power board, which purchased electricity from the country-wide grid of the Ministry of Energy. The latter was also responsible for the generation of electricity and power advice. Structural reform in terms of a vertical separation of transmission from generation was initiated in 1988. In 1994, 'Transpower', was established as independent state-owned enterprise for the transmission network. From 1993, competition for sales to small retail consumers was introduced and further structural reform was introduced by the splitting off (and sale) of 'Contact Energy' (including 30 per cent of generation assets). In 1996, following considerable debate, the government announced the split of the state corporation into three state-owned and competing enterprises with the full separation of line and energy businesses and the creation of a convenient consumer switching system. In the light of a change in government in 2000, outrage over prolonged power outages in Auckland, and dissatisfaction with the extent of

[6] Thus, key issues such as interconnection, line charges, metering and other financial and technical details for facilitating direct access and competition were not regulated.

competition in both electricity and telecommunications, the government launched two major enquiries into the respective policy domains. This led, in telecommunications, to the creation of a domain-specific Commissioner, based at the Commerce Commission (with considerable responsibilities for negotiating so-called regulated serves and dealing with social obligations). In electricity, legislative change established a sectoral 'Electricity Governance Board' (EGB) that was to implement objectives set by the government. The government was also equipped with powers of intervention in case of dissatisfaction with the EGB's performance as well as with the power to impose price controls.

In terms of transparency, the initial emphasis of reforms rested on the notion of consumer sovereignty. The importance of choice in facilitating competition (in electricity fully established since 1999) was one important element. In contrast, voice options did not figure prominently in the initial regimes, apart from general consumer rights as provided in the 1986 Fair Trading Act. However, one major criticism of the New Zealand model was the absence of any coherent way in which service providers dealt with complaints. This eventually led to the creation of the Electricity Complaints Commission (in October 2001). Prior to the major changes to regulation in the early 2000s, the main emphasis of policy adjustment (in response to criticisms of reporting practices and public outcry over the 1998 Auckland power failure) had been to rely on increased information, both for financial-regulatory as well as consumer-oriented purposes. Throughout the 1990s, disclosure rules were increased over time in their robustness and detail, although not in terms of scope.[7] A direct tool for consumer information was provided by the Consumer Institute's so-called 'Consumer PowerSwitch' which offered an online and interactive comparison between electricity providers (www.powerswitch.org.nz). In terms of representation, no particular organisations existed, apart from broad responsibilities of the Ministry of Consumer Affairs (which was particularly concerned with the utilisation of the provisions by low income consumers, inhabitants of the Pacific Islands and the Maori) and the overall consumer watchdog, the Consumers' Institute. The Ministry also published highly critical reports on the practice of electricity suppliers to provide 'good contracts' in terms of metering arrangements, rights of consultation, liability questions and disconnection procedures.
While Table 3 only aims to highlight certain features of the regulatory regimes in very broad-brush terms, it illustrates a number of important issues. In terms of comparative analysis, there are two broad patterns. On the one hand, there is continued national diversity. Transparency and accountability mechanisms are over time added to existing regulatory arrangements, therefore reinforcing existing policy choices and paths. On the other hand, there are also some indications of 'equivalent' policy change. All states have witnessed (at different speeds) an increase in consumer choice. However, all states have also witnessed an increase in accompanying measures, less in terms of establishing representation, but more so in terms of adding information and individual voice (especially complaint) tools to their regulatory regimes.

[7] Particular criticism was targeted at the reporting practices and more general behaviour of the transmission companies.

Table 3: Overview of national transparency mechanisms

Mechanism	Britain	Germany	New Zealand
Voice	Increasing emphasis on complaint handling **high**	Limited regulatory information service **Low**	Increasing demand on companies to proved for voice mechanisms **low**
Representation	Consumer councils, towards diverse representation within regulatory bodies **high/med.**	No representation beyond regulatory authority **Low**	Consumer Institute, Ministry of Consumer Affairs, large users, Telecommunications Commissioner **Low-medium**
Choice	Increasing emphasis on choice. Shift of agencies towards competition **high**	Enhanced choice in telecoms, hurdles in electricity **High-medium**	Liberalisation and online switching in electricity, limited exercise in choice **medium**
Information	Price, service comparison provided/delegated by regulators **medium**	Numerous private price comparisons **High**	Online pricing comparison in electricity, standardisation of switching provisions over time, financial transparency **medium**

On a more applied public policy level, such an analysis also raises important questions. Why, for example, do we witness substantial price comparison, supplied in the media, in Germany, while in Britain there was hardly any price comparison apart from some additions to regulatory websites in the early 2000s? Why was unified billing possible in Germany from 1 January 1998, but not in the UK (or Ireland for that matter, see Irish Times, 11 January 2003, p. 17)? Why has the shift in terms of voice options towards increasing consumer complaint provisions been most noticeable in Britain and, more recently, in New Zealand, but less in Germany? Why did consumer councils play a significant role, possibly more in terms of institutional arrangement than in policy significance terms, in Britain, but less so in Germany or New Zealand? Such questions, which cannot be dismissed on the grounds of national distinctiveness and policy inheritance, are not meant to encourage the unreflective copying of other regime's provisions to provide for accountability and transparency, but seek to highlight the diversity of ways in which different states and sectors have approached these issues and to encourage some reflection about the appropriateness of particular provisions rather than others. At the same time, when linked to the previous discussion of the various doctrines in which regulatory regimes can be held accountable and transparent, it also raises further questions. For example, do policy domains that are characterised by low information costs for consumers witnessing the use of instruments as promoted by the consumer sovereignty doctrine? Such an approach therefore advocates far less a 'one size fits all' approach towards applying instruments of accountability and transparency, but a far more contingency-based approach that reflects the 'cost profiles' of the various policy domains for the choosing consumer-citizen.

Trading-off transparency and accountability

Choosing appropriate regulation is therefore neither a question of demanding 'more' nor a question of 'one size fits all'. Furthermore, any discussion needs to take the potential side-effects into account: the regulatory road to 'policy hell' is often paved by good intentions. This section illustrates crucial trade-offs across a number of central issues in holding regulatory regimes accountable and transparent. Such debates point to the limitations of claims (by any of the three doctrines under discussion) advocating 'more' transparency. Without claiming to be exhaustive, three central themes are discussed in this section, pointing to particular trade-offs in the consequences of effecting accountability, in the setting of standards, and in the degree of responsiveness to public pressure.

The first theme concerns the potential consequences of who is being held accountable to whom. As accountability and transparency are crucial for holding the regulatory regime in a desired subset of possible outcomes and outputs, it can be questioned whether certain measures of holding to account and transparent may not invite undesired side-effects. For example, when things are seen to go wrong, one of the central claims is that someone has to be seen to have been responsible for the misconduct or the particular undesired outcome (to prevent the so-called 'many hands' problem, see Bovens 1998).[8] However, it is debatable how 'transparent' such holding to account is supposed to be and what type of sanctions are associated with the possible finding of misconduct. Open systems arguably encourage behaviour to reduce all forms of risk exposure or even more unaccountable task evasion, which then is even more difficult to detect, let alone to correct. Such avoidance behaviour may be further facilitated in cases of strong sanctions. A fear of sanctions encourages the narrow-minded 'going by the book', the potential export of regulated activities to other territories with less 'tough' regulatory regimes and the potential crowding out of desirable activities given high regulatory compliance costs. One related issue concerns 'who' should be held to account when things 'go wrong'. An emphasis of finding the person 'in charge' may very well identify a particular culprit of a particular wrongdoing, but it is most unlikely to address the question whether such behaviour was induced by dysfunctional wider systems. Most studies of 'failure' have pointed to the importance of dysfunctional organisations rather than individual wilful wrong-doing.

The second theme points to problems of setting standards and how these are being held to account. The fiduciary trusteeship doctrine implies a relatively certain state of affairs – experts are assumed to be able to come to some form of quantitative analysis as to what standards are likely to offer greater benefits than costs or what type of risks are deemed irrelevant or insignificant. Such an account can be challenged on two related points. First, the need to quantify scenarios is often seen as already restricting empirical complexity, thereby potentially fitting a solution to the 'wrong problem'. Second, in so-called 'wicked issues', standard-setting by experts may generate even more distrust and contestation, given inherent value and technocratic conflicts and lack of any form of direction and consensus. An alternative version, advocated in particular by the 'citizen empowerment' worldview is to generate open contests between the different views via encouraging discourse. However, such processes may

[8] A view stressed, for example, by Bentham and often made in debates whether to allow for presidential or board-type regulatory bodies.

deepen existing conflict cleavages, may require longer time periods than is feasible for regulatory responses and it may generate conditions such as increasing elite cartelisation or opinion fragmentation.

A third theme points to the level of responsiveness of regimes to external pressure. While many claim that regulatory regimes should be open to the preferences of the 'public', it is not always clear what the 'public' constitutes and what type of assessment of 'public opinion' should be utilised. Furthermore, the degree to which regulatory regimes should be resilient to outbreaks of public demands for regulatory activities (following, for example, fatal bites by dogs considered as 'dangerous') is contested in the literature (Breyer 1993). It is also a well-established truth that institutions do not respond in a weathervane, but in biased ways to external pressures; in the dangerous dogs case, for example, it is notable that, in cross-national perspective, the regulatory activities are usually are not directed at 'middle class' dog breeds and types, despite their prominence in incident statistics (Lodge and Hood 2002). Moreover, claims to accountability and transparency are likely to encourage a trend towards increasing juridification and potential gridlock: if all activities are to be held accountable and transparent and are linked to a high-complaint culture, then regulatory activities are bound to become increasingly rigid.

Such questions suggest that asking for 'more' accountability and transparency, or more generally, 'openness' does not only involve questions of selecting administrative doctrine and instruments, it also points to certain limitations and consequences of particular instruments and techniques. Accountability and transparency are therefore not goals in themselves, their purpose is to maintain a system in a certain range of desired states. Furthermore, whatever doctrine is advocated in the promotion of accountability and transparency is likely to invite particular trade-offs and tensions, leading to continuous challenges to the existing regimes.

Conclusion

As noted at the outset, it is very difficult to deny that transparency and accountability are essential 'good'. This paper has attempted to suggest that accountability and transparency are not goals in themselves, their sole purpose is to keep a system of control within a certain range of desired states. To keep a system of control 'under control' requires a more refined view than the basic debates about parliamentary oversight over supposedly independent regulatory agencies would suggest. Thus, this paper has advocated the adoption of a regulatory regime approach that points to accountability and transparency along at least five dimensions. When approached with a basic toolbox of four instruments and the different understanding of potential worldviews as to what constitutes 'appropriate' regulation, a more complex picture as to accountability and transparency emerges that goes beyond the concerns of parliamentary oversight over regulatory activities. Moreover, any analysis and discussion of accountability and transparency needs to consider not only the standard-setting dimensions, but pay equal consideration to issues occurring on the effecting and the detecting modes of any regulatory regime.

The empirical section too has suggested that there national policy responses to questions of accountability and transparency have varied, raising the question why particular mechanisms have not been transplanted. In particular, the comparison did not suggest that there were clear differences between sectors where there were low

information costs for consumers (thus arguably justifying instruments promoted by the consumer sovereignty doctrine). However, at the same time, there was a clear tendency over time towards emphasising instruments that promoted information and voice that accompanied the increased reliance on choice and competition. The formal existence of choice without any accompanying instruments that facilitate actual choice does not facilitate consumer choice.

In conclusion, if war is too important to be left to the generals, then regulation is too important to be left to the regulators and (poorly resourced) parliamentary oversight committees. Talking about accountability and transparency has for too long been concerned with long-established questions about parliamentary oversight and the consequences of oversight and ministerial direction on the goal of regulatory independence. The obligation to be accountable and transparent is fundamental to any power relationship within any regulatory regime and therefore is important to public debate. However, to come to an informed discussion, it is important to widen this debate, both analytically and empirically, rather than remain continuously rehearsing narrow views that only in most limited ways add to the ways in which public services can be made transparent and accountable to the final consumer of the product, the citizen.

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