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Regulating markets in the interest of consumers?

**On the changing regime of governance in
the financial service and communications sectors**

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Changing markets, changing demands on regulation

Regulatory regimes are changing in Western democratic states and elsewhere, for a variety of complex reasons concerning the shifting relations between the state and the market. These changes are driven by pressures to liberalize (or deregulate) markets, and so enable business to respond competitively to the growing complexity of markets in a globalized information society. In recent decades, with apparently ever greater frequency and severity, the imperative for such change has become publicly visible through a series of crises in the regulation of financial services, food safety, health care, environmental problems, and so forth¹, these being endemic in today's risk society.² Such crises have been interpreted as publicizing the failures of the traditional model of regulation, showing how it was not fit for purpose, unable to integrate or fairly balance the at-times competing demands of economic and consumer policy, nor able to develop a unified and principled regulatory approach across products or services (i.e. sector-wide) either nationally or internationally (i.e. across networks of regulators). Jessop argues that the dominance of institutions of the nation state is being supplanted by a dispersal of powers both in the direction of super-national bodies (such as Europe) and bodies within the state.³ This represents a shift away from social contract and towards an administration oriented towards coordination of markets and social policy, in acknowledgement of the trend towards the individualisation of risk (i.e. the increasing exposure of the individual to the consequences of their own risk-related decisions⁴).

The very complexity and dynamic nature of the market has repeatedly shown up the limitations of the previous piecemeal evolution of regulation as demanded *ad hoc* by specific sub-sectors, with market developments now outstripping the capacity of traditional, rule-book models of regulation to cope, let alone to anticipate, regulatory issues. For example, in the UK during the 1980s, a series of crises in the financial services market prompted an urgent call for regulatory reform. Notwithstanding the existence of a well-established group of regulators of the financial industry, they seemed to have failed to protect the consumer in relation to pensions, mortgages, and investments. Along with other regulatory failures, these crises threatened consumer confidence at a time when such confidence was critical to the Government's policy of shifting the welfare burden by making it the responsibility of individual consumers (or investors). The 'pensions crisis', in which individuals were persuaded, against their financial interest, to leave company pensions and invest in private pensions thereby losing out on employers' contributions, was a case in point, as was the 'endowment crisis', in which millions of consumers bought endowment mortgages in the 1980s and 1990s, after which it became clear that these products could not guarantee sufficient returns to pay off individuals' mortgages as claimed.

The various crises demanded a new approach to regulation, not only because of the widespread adverse publicity that accrued to both the industry and the regulators, but also because the problem revealed just how the markets were transformed, demanding a commensurate transformation in the regulators. In the case of both the pensions and endowment mortgage crises, each was associated with product innovations that swept rapidly through their respective sectors; each was for long term investments based on uncertain projections into the future; in both cases, it appeared that inducements given to employees to sell the new products had influenced the interaction at the point of sale; and last, consumers appeared to be acting against their own interests, taking on risks they ill-understood, insufficiently critical of the advice they were offered, far from 'financially-literate' consumers

exercising informed choice. Regulation should, it seemed evident, conduct proactive market analysis, monitor new products, set high standards for the quality and dissemination of consumer information and advice, monitor the long-term impacts of product choices on consumers, especially ‘vulnerable consumers’, and so forth – all in a manner that was beyond the scope and capacity of the legacy regulators.⁵

Thus, the new style of regulation represents a move away from the previous mixture of hierarchical, ‘command-and-control’, self-regulation and government departments that made up the previous regime.⁶ Its ‘softer’, more indirect approach claims to democratize power by dispersing and devolving the role of the State, demanding more accountable and transparent regulatory bodies, engaging civil society in the processes of governance and empowering the public by enhancing choice.⁷

Regulation must, it is argued, make strategic decisions for the whole market, taking into account the range of economic, technical and social policy trends, looking to the future, and balancing the needs of the market with those of consumers and the public. Such arguments suggest that the regulatory process is a partly a discursive one, with power exercised less through the enforcement of an authoritative legal process but instead through the negotiated application of standards of judgment that operate according to expertly manufactured processes of intelligence-gathering and decision-making.⁸ Indeed, regulatory bodies must develop a broad base of competencies which encompass not only a capacity to analyze dynamic markets but also the ability to develop partnership with firms and other stakeholders, defined widely as any body representing those who may be deemed to have, or who claim to have, some stake in the regulatory domain in question.

In the present chapter, we focus on two regulatory domains in the new governance, financial services and communications, showing how their new regulators in the UK (respectively, the Financial Service Authority – FSA, and the Office of Communications – Ofcom) exemplify the changing regulatory regime. We do so as part of a larger project entitled “Public Understanding of Regimes of Risk Regulation” that examines how consumers’ interests are represented within the new culture of regulation in these two sectors, as well as the ways in which consumers themselves understand their changing roles, rights and responsibilities as regards the management of risk. In this chapter, we ask how the FSA and Ofcom represent consumers’ interests. This raises further questions, such as how such an assessment can be made and whose assessment of the new regulators’ success (or otherwise) matters? Drawing on our interviews with a range of senior figures in the regulators, industry sectors, civil society and the public, we identify considerable tensions both within and among these stakeholder groups, with preliminary assessments varying across a broad spectrum from neo-liberal to pro-welfare, from left-wing to right-wing, from advocates of tradition to advocates of change.⁹

‘Consumer-facing’ regulators

Typifying the new ‘lighter touch’, ‘joined-up’, ‘public-facing’, risk-centred’ regulators emerging in various sectors under New Capitalism¹⁰, the new breed of regulator has also been termed a ‘super-regulator’, tending to replace several legacy regulators, centralizing regulation across their respective markets, aiming for a converged or unified approach where, previously, regulation was product specific and took a variety of forms. This approach to regulation is exemplified in the UK by The Financial Services Authority (FSA) and the Office of Communications (Ofcom). Not only do they combine the activities of the legacy regulators in their regulation of the conduct of business, but they attempt an expanded range of activities linking the regulators and the public, encompassing public education, public debate, consumer

representation, consumer awareness, other forms of public engagement and participation and a renewed discussion of “public values”, particularly those relevant to the welfare aspects of financial service provision and to the public service and universal service dimension of communications.

The Financial Services Authority (FSA) assumed its full powers and responsibilities in December 2001, having gained statutory status under the Financial Services and Markets Act, 2000.¹¹ It is the UK’s sole financial regulator, replacing the work of several bodies - the Building Societies Commission, the Friendly Societies Commission, the Investment Management Regulatory Organisation, the Personal Investment Authority, the Register of Friendly Societies, Securities and the Futures Authority. Similarly, in the communications sector, The Office of Communications (Ofcom) was given statutory status by the Communications Act 2003, assuming its statutory powers in December of that year and so replacing the Independent Television Commission, the Radio Authority, the Broadcasting Standards Commission, the Office of Telecommunications and the Radiocommunications Agency.¹² Both regulators are bound by statute, funded by a levy on industry, and charged with acting in the interests of citizens and consumers.¹³ Both markets have a legacy of engagement with consumer policy and with the welfare state settlement, and both retain public policy significance. In communications, the critical importance of access, public service content and universal service to policies of social inclusion, cultural identity and civic participation, means that Ofcom cannot only act as an economic regulator. In financial services, similarly, while the first duty of the FSA is to maintain market confidence, this is complemented by duties to educate and protect consumers, reflecting the underlying public policy context regarding the changing nature of welfare provision and the increasing reliance by the state on individual adoption of personal financial products.

As we shall see, the tension between economic and public policy concerns remains a continuing and difficult tension. Commenting on the FSA’s new role in 2000, Christine Farnish (the FSA’s Consumer Director) argued that the regulator should seek to limit the impact on consumers of risks arising from the management and control procedures of firms by requiring firms to manage and facilitate public understanding and consumer protection, but ‘without placing such an onerous burden on providers that innovation and competition are stifled’.¹⁴ Indeed, the manner of the new regulators’ engagement with consumer issues is very different from the traditional model. Their central missions are worth quoting in this respect. First, under the Financial Services and Markets Act 2000, the FSA has four statutory objectives, supported by a set of ‘principles of good regulation’:

1. Market confidence: maintaining confidence in the financial system;
2. Public awareness: promoting public understanding of the financial system;
3. Consumer protection: securing the appropriate degree of protection for consumers;
4. The reduction of financial crime: reducing the extent to which it is possible for a business to be used for a purpose connected with financial crime.

Three of these objectives are clearly directly focused on the consumer (and so, indirectly, is the fourth, crime reduction being essential not only for well-functioning markets but also for consumer confidence). The interests at stake for consumers are implicitly divided among consumer confidence, consumer awareness and consumer protection. A similarly prominent focus on the interests of consumers is evident in the principal duties of Ofcom. According to the Communications Act 2003:

¹³(1) It shall be the principal duty of Ofcom, in carrying out their functions;

to further the interests of citizens in relation to communications matters; and to further the interests of consumers in relevant markets, where appropriate by promoting competition'.

The six specific duties that elaborate the application of these principal duties tend to conceive consumers more broadly (including, significantly, business consumers), adding in the importance of market diversity and, as with the FSA, building in specific consumer protections.¹⁵

Similarities across the two regulators include the stress on 'literacy', surely a new policy for a new regulatory regime; particularly critical as the informational demands of these complex markets grows, along with the individualization of the risk to consumers.¹⁶ For the FSA, 'financial literacy' offers a framework for explicating the skill or competency that a complex financial sector demands of the individual consumer. It also shifts the role of the regulator from one of controlling the industry directly, protecting consumers and reducing risk, to one of ensuring that the industry adequately informs the consumer, so that through individual choices, consumers themselves are equipped to act responsibly and reduce risk. The parallel in the communications sector is clear: Section 11 of the Communications Act (2003) requires Ofcom to 'promote media literacy' among the UK population in order to empower consumers in making informed choices.¹⁷ The underlying purpose of the emphasis on literacy is less clearly stated, but would appear to be that of supporting economic competition by increasing consumer knowledge and awareness while also legitimating a reduction in regulatory interventions (especially, consumer protections) by making consumers more aware of the risks they face and the means of addressing them.

Differences in emphasis or approach are also significant. The notion of citizens, as distinguished from consumers in the Communications Act, arose from and serves to perpetuate a tension possibly unique to the communications sector, for communications (especially, objective news, public service broadcasting, and universal service in telecommunications) are widely held to serve key citizen as well as market functions. These terms are, by contrast, generally aligned in the financial services sector (indeed, the term 'citizen' is rarely used). Moreover, in the communications sector, consumer interests are far less controversial than in relation to financial services. Although views among stakeholders differ, the risks at stake seem less urgent than in financial services - losing out on one's phone bill is less catastrophic than losing out on one's pension. Consequently, consumer concerns in the communication sector face two interesting challenges: one is to identify the 'vulnerable' or disadvantaged subset of consumers to whom phone bills, in practice, do make a real difference; the other is to find a way of charting the long-term cultural and political consequence of a changing communications environment (for example, the implications for informed citizens of a diversifying and globalizing range of news channels, not all as tightly regulated as hitherto). Intriguingly, Ofcom has attempted to position both of these issues as citizen rather than consumer issues, taking advantage of the apparent absence of crisis associated with them, and thereby seemingly sidestepping the welfare-oriented agenda (protecting vulnerable consumers) and also permitting a deferral of policy development (citizen issues are longer-term, less urgent, than consumer issues¹⁸).

The impetus for change in these two sectors also varied. While a series of crises fed into the formation of the new regulator in the case of the financial sector, resulting in a strong emphasis on risk assessment and consumer detriment, technological change proved a key driver in the communications sector. Converging information and communications technologies (and particularly the rapid diffusion of the internet

in the late 1990s) seemed to demand a converged regulator. Only a powerful sector-wide regulator, integrating broadcasting, telecommunications and spectrum management, could, it was argued on all sides, flexibly respond to new market challenges while being ‘future proofed’ against changes that could otherwise destabilise or impede technological innovation and market expansion.

Significantly, the FSA, the earliest of the new breed of regulator, served as a model for Ofcom, resulting in many similarities between the two organisations. Many informal connections exist between these regulators, including the not infrequent movement of personnel from employment in one regulator to employment in the other – and this occurs also between the regulator and its stakeholders (in industry, and in civil society). Especially pertinent here, both regulators include a ‘semi-detached’ Consumer Panel which, Ofcom puts it, is charged with advising on the consumer interest, including noting publicly where the regulator itself fails to adequately represent the consumer interest, thus acting as a ‘critical friend’ to Ofcom ‘at full arm’s length’. Similarly, advertising itself as ‘an independent voice for the consumers of financial services’, the FSA Consumer Panel describes itself on its website as working ‘to ensure that the FSA regulates the financial services industry in the UK in the interests of consumers’. They continue,

‘We advise and monitor the FSA on all its policies and activities from an independent consumer point of view. We also review and comment on wider developments in financial services if we feel that consumers are losing out’.¹⁹

The links between the two panels, and their difference from the legacy regulators, was made explicit in our interview with Colette Bowe, Chairman of Ofcom’s Consumer Panel, when she observed that,

“The purpose of such bodies is not to adopt an adversarial model, *vis a vis* the regulator, which has quite often been the case. It’s to adopt an advisory and sort of strategic warning kind of role. Which is a different animal altogether”.²⁰

Potential benefits for the consumer

Notwithstanding the various differences in these two sectors, in their legacy from previous regulation, and in their organisation, both FSA and Ofcom have an unprecedented capacity to act in the consumer’s interest in the knowledge based economy. Each has the resources to conduct detailed and sophisticated market analysis to determine the potential impacts of market developments on consumers and to monitor the potential vulnerability of consumers. Each has right to obtain information from firms about the performance of products and about their customer relations. And as we have seen, each has a Consumer Panel monitoring their delivery of regulation in the consumer’s interest, providing a route for the expression of an independent voice for consumer representatives and a means of making the regulator accountable to those consumer representatives.²¹ The new regulators are entitled to demand information from regulated firms (for example, on the performance of products or on the level of consumer complaints) so that the regulator can develop a pre-competitive analysis of market conditions, product innovation and consequences for consumers to inform policy development. These analyses are, in turn, to be used to guide the supervision of firms, to set regulatory priorities and to provide generic advice to firms and consumers. The expectation is that this will enable the regulators to respond to potential crises, to sustain flexible relations with firms, and to enable firms to develop consumer policy – all a strong contrast with the traditional emphasis on developing a regulatory rule book backed up with the threat of enforcement to regulate the conduct of business.

In his recent work, Habermas has shifted his view on the public sphere, arguing that public spheres surrounding administrative institutions reflect the complex interdeterminacies between the administration and civil society, with the former offering a carefully structured institutional discourse and the latter acting to distil and express public opinion.²² Thus he suggests that multiple public spheres emerge from the interaction between the institutions of governance, civil society, commerce and the public. On this view, the new regulators represent not so much a compromise between state and economy as an institutional public sphere in their own right, one that combines the highly technical risk analysis of markets with an engagement with the plurality of voices in the public sphere in order to integrate economic regulation, consumer representation and a voice for the citizen.

For example, talking of the directory enquiries market, Allan Williams notes that Oftel, Ofcom's legacy telecommunications regulator, 'was a crap regulator because they didn't understand what consumers actually wanted, what the actual problems in the market were and they didn't understand that you couldn't just make competition work through increasing choice at the supply side.'²³ Indeed, as Claire Milne, a freelance consumer spokesperson comments, 'another difference between Ofcom and Oftel, of course, is that Ofcom is explicitly tasked with putting consumer interest first which Oftel never was.'²⁴ Further, this consumer interest could be recognised in its diversity because of the very size and resources of the super-regulator. As Ofcom's Director for Nations (Wales) observes, 'one of the things that Ofcom did when it was established was to attempt to deliver a solution that took more note of the national varieties within the United Kingdom than the legacy regulators had'.²⁵

Both Ofcom and the FSA put considerable effort into a sustained engagement with diverse voices reflecting different interests, as managed by establishing a complex network of relations of mutual dependency among a wide range of stakeholders - firms, industry representatives, the political sphere, consumer representatives, and the public. Insofar as the regulators thus mediate between the state, commerce, and civil society, they have had to develop clear principles of action that may also benefit the consumer. These include a commitment to transparency in regulatory practice, as evident through the public provision of meeting minutes, regulatory processes and outcomes, research reports, and so forth – available through leaflets, publications, the website, road shows and other forms of publicity. Particularly interesting is their wide use of consultative and advisory processes that tie stakeholders across many spheres into the regulatory process. Being relatively independent from state, commerce and civil society, this depoliticises the regulatory process in some respects. By being highly visible and by making their processes transparent and accessible, regulation has become more salient on the public agenda; it has also become in certain ways more accountable. At the same time, these changes render regulatory power both diffuse and so more complex, complicating claims for accountability and transparency. In short, through their structure and practice, the activities of the new regulators lend themselves to an analysis in terms of the criteria – the ideals and the challenges - of the public sphere.

So, these regulators are expected to devote their main efforts to supporting competitive markets and active consumers. Since it is broadly assumed that the market will provide for the consumer/citizen, the new model of governance can, it is hoped, replace previous forms of regulation that constrained market activity. Yet there remain legitimate public concerns regarding the balance between market competition and public policy, our particular concern focusing on the competence of consumers, the consequences for consumers, and expression of consumer interests within the regulatory process.

Doubts from the market liberals

According to the neo-liberal emphasis on deregulation, the state should provide a legal framework for economic activity by establishing rules of contract that protect property rights while limiting regulatory intervention to identifying and correcting obvious cases of market failure arising from monopoly, information asymmetries or externalities that cannot be corrected by market mechanisms.²⁶ Yet the new regulators were designed to anticipate economic, social and political changes (or crises) affecting the markets, enhance consumer literacy and engagement, and act in an accountable and transparent manner. Not surprisingly, this model has received considerable criticism from both industry and from the political opposition to the Government, where between 1997 and 2000, the Conservative Party argued strongly that the regulators had too much power (acting as both judge and jury).

These criticisms were articulated in *Leviathan at Large*²⁷ published by the Centre for Policy Studies as a distillation of the concerns of the industry and of the Opposition's Financial Services and Markets Bill team (which included some high profile Conservative MPs as well as advisors from the financial services industry). Opening with a reminder that London is the world's most successful financial market, the pamphlet took this as evidence that little was wrong with the existing regulatory regime, though some difficulties were acknowledged. Indeed, it was argued that regulation may put this very success at risk; hence the move to establish a super-regulator was viewed with considerable concern, precisely questioning any public sphere-type claims to openness, transparency and consultation:

‘The FSA will be the most powerful, and one of the least accountable, institutions created in the United Kingdom since the War. It will be, in many respects, legislator, investigator, prosecutor, judge, jury and executioner.’²⁸

Thus the pamphlet asked many pointed questions whose answers remain unclear even several years later: why vest so much power in the combined role of Chairman and Chief Executive and why so few non-executive directors on the FSA board? If the regulator is accountable to the Treasury, to whom is the Treasury accountable as regards its relationship with the regulator? How independent of the regulator would the Practitioners' Panel really be? How could the regulator play both the role of advisor to firms and enforcer of sanctions, especially if the firms in question had followed the advice offered?

The authors' warnings that strengthening regulation would result in a loss of jobs and business as well as higher costs for consumers echo the right wing attack on the welfare state during the 1970s and 80s, the most extreme formulation being that any attempt by government to influence markets will be less efficient than allowing the market to regulate itself. Thus the authors anticipated a disastrous state of affairs in which public calls for the regulator to intervene will result in draconian action against firms that get into difficulties (or get their customers into difficulties), thus exacerbating rather than reducing crises, generating a loss of confidence in the market, and damaging both economic prosperity and the interests of consumers. Consequently, *Leviathan at Large* included many suggestions regarding how to limit the power of the FSA – for example, one test proposed is that a regulation that increases business is a ‘good’ regulation and a regulation that tends to reduce business is a ‘bad’ regulation, even though it was acknowledged that some consumers would lose out.

Clearly, the many detailed concerns of both this pamphlet and many other commentaries expressed during passage of the Act and the early years of the regulator reflect a strong distrust of both the purposes and the design of the new regulatory regime. The emergent picture was of a too-powerful body driven by strident voices representing the consumer interest, as amplified by the press, able to set its own agenda, unaccountable in its processes, and insufficiently open to scrutiny. The outcome would surely be, warned the neo-liberal critics, a bureaucratic regulator which over-regulates the market, neglecting competition and the profitability of firms:

‘With the Bill as it stands, the industry remains uncomfortably dependent on a broad-minded reinterpretation of the existing Bill to strike that balance and make those difficult judgements and trade-offs. The pressures on the FSA will always be to slip towards excessive regulation’.²⁹

Doubts from civil society

Given the concerns expressed by the conservative opposition and the industry about the structures, practices and powers of the new regulators, one might suppose that civil society bodies would welcome the new regulators as likely benefactors of consumers’ interests. However, matters have not proved so straightforward. The power of the super-regulator worries them just as it worries the market liberalisers. Mick McAteer, senior policy advisor at Which? (the Consumers’ Association), notes that:

I should say that what we didn’t campaign for was the creation of a regulator which included retail regulation and wholesale regulations in the same organisational structure. We would’ve preferred what they call the twin peaks approach you know have a dedicated consumer protection agency looking after retail issues and then having a wholesale and markets regulator separate from that.³⁰

The new regulator also challenges the core activities of civil society organisations. Bodies such as the National Consumers’ Association have traditionally campaigned for consumers’ rights, complementing this with independent advice to consumers on products and services. It seems that the new regulators pose both opportunities and dangers in relation to these activities. For example, the new regulators have a major responsibility, together with substantial resources, to provide impartial consumer advice, thus obviating the need, perhaps, for that hitherto provided by consumer organisations. At the same time, the research and awareness activities undertaken by the regulators are so well resourced that to provide an alternative, possibly competing, service for consumers exceeds the capacity of civil society organisations.

As Jocelyn Hay, Chair of the Voice of the Listener and Viewer, comments regarding research on consumer judgements of broadcasting content, ‘We don’t have the resources to do the research that is necessary in order to make it objective’. ³¹ Allan Williams adds, ‘it’s a capacity issue, you know, that there are lots of issues that we can deal with as a consumer organization and we try and prioritise...’³² As he goes onto explain, the Consumers’ Association recently decided that, while it remains their priority to address financial issues, critically monitoring the FSA’s activities, they have decided communications are sufficiently well monitored by Ofcom’s Consumer Panel, and so they have withdrawn from this domain.

Observing such trends, Freedman argues that the very notion of ‘evidence-based policy’ serves to exclude those voices that lack the capacity to produce competing

high quality evidence.³³ Jonathan Hardy, from the Campaign for Press and Broadcasting Freedom, adds that a debate held in terms of research evidence is one that has already narrowed the range of possible contributions:

'...an underlying concern is that the sort of survey and research data (...) which seeks to identify consumer attitudes is not the same as a mechanism to empower discussions around citizenship which would involve identifying and making political decisions about regulation and regulatory governance'.³⁴

One may also ask, how much public consultation is enough? Don Redding of Public Voice tells us that,

'We suggested that they [should] have a research project to identify, define and build consensus around what were citizens' issues in communications across the whole view of the sectors [...] but] they came back and said, "we don't want to, we've got so many people we have to consult with already, we've got so much apparatus in terms of the Content Board, the panels on disabled and elderly people, the nations and regions representation etc. and the Consumer Panel that we feel we're well enough in touch".³⁵

John Beyer of MediaWatch UK reads this as complacency on the regulator's part, arguing instead for the importance of '...views that are expressed to Ofcom, not just in focus groups, not just in consultations, but from the general public, which they should canvas... But they don't do that, because it creates too much work for them'.³⁶ A picture emerges from these critics of a debate subtly framed by the regulator to further its own interests, despite its explicit claims to openness.

The regulator offers two responses – one, that it conducts far more consultation than ever before, its doors being generally open. Unfortunately, it suggests, the public does not always respond - Julie Myers explains: 'It's very hard to get consumer people to come to an event'.³⁷ Second, and more contentiously, the regulator is itself critical of those voices striving to be heard. Julie Myers continues, 'the regulator always has to be asking itself, 'alright, so we've got some consumer groups at an event, but how far do they actually represent the interests of the generality of consumers, and how much do they actually just represent, you know, particular groups of consumers?' The Director of External Relations is yet more sceptical, asking rhetorically, 'Do we get better advice from self-appointed, um (...) probably issue-driven, (...) non-representative groups?'³⁸ Their stress on market research is, in part, due to its statistical claims to representativeness of the entire population, not just its more vocal or partisan elements.

The question of representativeness is indeed critical: for an institution in the public sphere, which voices should be included, how should they be weighed? And for a civil society body in the public sphere, the questions are equally critical: how can it participate on equal terms with other competing voices; how can it sustain the capacity to develop an influential critique without relying on the provision of resources (finance, connections, expertise) that may compromise its perceived, and actual, independence? After all, the complexity of risks that potential impact on consumers is such that, to provide an independent expertise, civil society bodies must encompass considerable and diverse specialisms, including economic analysis, risk assessment, technical knowledge, market analysis, and consumer understanding. For example, the complex investment risks often 'hidden' in the underlying investment vehicles for financial service products place a strain on the principle of *caveat emptor* - consumers could not reasonably be expected to understand the long-term consequences of many financial service products; but this also places a strain on the capacity of consumer groups to identify and draw attention to such risks.

The regulators themselves recognise that power brings resources and vice versa. Richard Hooper, Chair of Ofcom's Content Board, pointed out that, especially by comparison with the legacy regulators, Ofcom has very considerable power which, he is convinced, is used to improve the quality of regulation. Talking of the scale of the super-regulator, he says,

'I think people say that's both a strength and a weakness, I think when the arguments were going on in the late 90s, people said no politician would ever give Ofcom the amount of power it's got but they were wrong, they did... I think one of the striking differences for me between Ofcom and the predecessors is that this is really seriously evidence based. I mean people are staggered by the amount of research we do and the amount of evidence we bring to the market'.³⁹

The introduction of a new regulator has, therefore, implications for the activities of civil society bodies in the regulated domain, and their roles are changing in consequence. For Habermas⁴⁰, their key role in the new regulatory regime is not so much awareness-raising, nor provision of public information to consumers, nor yet the conduct of independent research, but rather the galvanising of public opinion so as to bring consumers' views to the attention of policy makers, firms and regulators. Undoubtedly, the new regulators have become, indeed have made themselves into, a significant site – hitherto unprecedented - for consumer representation and deliberation among stakeholders. Both Ofcom and FSA provide a range of formal and informal opportunities for such engagement – through consultation responses, committee membership, public meetings, research presentations, working group activities, and so forth. Yet paradoxically, the more open the regulator, the greater the problems of capacity for consumer representatives: many civil society workers are unpaid, or working with very limited budgets, and the regulator holds so many meetings and consultations that it easily exhausts the capacity of civil society organisations, particularly by comparison with the far larger resources of the industry to represent the market perspective in the same fora. Hence the civil society bodies are stretched, face tough decisions about their priorities, and worry about their funding base, while the regulator is frustrated at the difficulty in obtaining sufficient representation from a diversity of stakeholders, and disappointed that few put themselves forward for committees and other negotiating fora.

So, from the civil society perspective, the stakes are too high for effective participation in the deliberative process. But insofar as they fail to act as they would wish, they fear that they leave the arena to those whose commercial interests put the consumer interest at risk. They claim that the new regulators have given priority to market regulation over the development of consumer policy, framing consumer interests largely in terms of the choice agenda, listening more to the industry than to the ordinary person. To be sure, these consumer interests are investigated, and addressed, through various forms of consumer representation encompassing an impressive research enterprise as well as many public consultations, as noted above. However, though broadly positive about the FSA's consumer panel, Mick McAteer, Senior Policy Advisor to Which? points to a crucial distinction when he claims that consumer representation is a lesser phenomenon than the task of representing the consumer interest:

'... it's very easy to have consumer representation by creating panels. And you know that's very different to actually representing the consumer interest, the whole way through what we would call the regulatory supply chain. You know just as firms have a supply chain so does regulatory policy where the

policy's actually made way upstream before it even gets to the stage of consultation or discussion you know'.⁴¹

The consequence, as civil society bodies observe, is that the regulator sets the agenda on key policy issues, so that when consumer representatives enter the process they can at best act as critics of an established agenda, for they have very limited power to shape that agenda or the broad direction of policy. As Mick McAteer comments:

'But by the time you see the consultation document then that policy's framework has been well established and the agenda has been set. That goes back right through the FSA itself onto the treasury and onto European level so you know it's interesting to trace'.⁴²

Conclusions: tensions at the heart of the regulators

'Well, it's what I would call second generation regulation actually... You know, in the eighties, we were all able to very quickly ...delineate what the role of an economic regulator was... We moved on with financial regulators into seeing how, in a highly competitive market place, there was a role for economic regulators in...mandating information into the market place, to make the market work better. What I'm talking about now is kind of second generation regulation, which is about having...a strongly articulated view about certain things that we want to happen...It goes beyond, 'well we never want people to be ripped off'. It goes into, 'Yep, well, we want people to have a secure old age'.⁴³

This 'second generation regulation', as the Chairman of Ofcom's Consumer Panel explains above, has clear ambitions to meet the needs of consumers not only negatively, avoiding detriment, but also positively, in accordance with social values once understood primarily within the framework of the welfare state. In so doing, the new regulators are anticipating future trends internationally as well as nationally. As Kip Meek, Ofcom's Senior Partner for Competition and Content points out,

'there's a new regulatory framework which is providing us with new directives that, you know, impose a particular way of regulating across Europe, and we were the first country to ...pick up on that and integrate that into our national law and actually deal with the process of market reviews associated with it'.⁴⁴

Jessop⁴⁵ argues that the drivers of regulator change include the 'de-nationalization of the state' in which there is a:

'Hollowing out of the national state apparatus with old and new state capacities being reorganized territorially and functionally on substantial, national, super-national, and trans-local levels. State power moves upwards, downwards, and sideways as state managers on different territorial scales try to enhance their respective operational autonomies and strategic capacities'.⁴⁶

Linking these changes to the new economic role of the state in the 'globalizing, knowledge driven economy', Jessop⁴⁷ notes the increased focus on the role of the state in the administration of many aspects of everyday life and of the conduct of business, as well as the coordination of economic policy at the super-national level. Strategic interventions thus occur on a variety of scales rather than through the

executive control of a national agency. This ‘de-statisation of the political system’ he suggests is reflected in the ‘shift from government to governance’.

If the new consumer-facing dimension of the new regulatory regime is genuinely to benefit consumers, then these partnerships must function in such a way as to ensure this. Undoubtedly, the diversity of stakeholders in both markets investigated here are, indeed, galvanised to represent their various interests, enter the institutional public sphere established by the regulators, and deliberate in public on the unfolding series of policy issues. Yet, as we have already noted, notwithstanding the cautious welcome initially bestowed, particularly by those organisations who had participated in the public debate over the formation and design of the new regulators, there is considerable scepticism expressed on all sides from those same stakeholders. As both industry and civil society bodies observe, some key dilemmas lie at the heart of the new regulatory regime. These include the question of how to represent the diverse interests of consumers (or, indeed, citizens⁴⁸); that of how to bear the burden of regulation; that of the independence of regulators and, in consequence, whether encompassing both economic and consumer responsibilities within a single organisation can fairly balance the interests of both market and public; and last, the question of the accountability or openness of the new regulators.

We have argued that the formation of the new UK regulators of financial services and communications represents a response to growing economic and social complexity in their respective markets. The aim is to develop the capacity for the responsive regulation of firms in the new economy while also addressing the interests of the public, as expressed through a range of civil society bodies, public debates, and market research. As we have shown, the consequence is a tension between the principle of conglomeration, standardization and simplification as embodied in the notion of the single, converged regulator adopting principled (risk-based) regulation and the diverse relations of engagement and accountability which link the regulator to government, civil society, firms and the public. Although these dual functions of developing market intelligence and guiding firms on the one hand and engaging with representatives of publics and public policy on the other hand are reflected in the multiple statutory obligations placed on the regulators, in practice they raise difficult questions regarding the ways in which the regulator prioritises and integrates its work across these different functions.

Thus, the complexities arising from the knowledge-based economy intensify the technical requirements on the regulator (to understand a dynamic and global market, to deploy a range of marketing strategies, and to ensure innovative product development) while simultaneously creating new challenges in consumer policy (precisely because the consumer is exposed to this highly complex and changing market place in the context of long run policy changes that devolve greater responsibility to the literacy and competence of consumers). The former considerations encourage the development of policies designed to work behind the scenes, ‘over the heads’ of consumers while the latter challenges require policies that engage the citizen/consumer both to enhance their competence and to attain their consent.⁴⁹ These dilemmas are intensified by the operating principles of accountability and transparency with which the new regulators practice. Much of the regulators’ work is focused on gathering market intelligence, risk analysis and writing codes for the conduct of business (economic regulation). Yet, much of their transparency relates to their handling of public policy issues and their responsibilities for consumer protection and education (consumer policy). Within the microcosm of the new regulators, therefore, is a tension that lies at the heart of questions of rationalization and democratisation in the new governance.

Our analysis has demonstrated how these dilemmas are reflected in regulatory practice as well as in the diverse concerns of stakeholders representing the industry and the consumer. Following Cohen and Arato⁵⁰, we suggest that questions of the democratisation of civil society as illustrated by the public-facing activities of the regulators reveal the major dimensions of debate in contemporary political theory, most evident in debates between advocates of the free market and defenders of the welfare state. Put simply, should regulation reflect elite or participatory theories of democracy? Should the focus be on the rights of the consumer or the interests of the citizen? Cohen and Arato argue that these debates make assumptions about the relation between governance, civil society and the public sphere. The changes in governance discussed by Jessop⁵¹ and Habermas⁵² involve a dispersal of power and so open up a potential role for civil society in representing the views of the public. Indeed, the role of civil society has been pivotal in debates over the potential for the formation of a political public sphere, for civil society could, it is argued, provide a context for the formation of public opinion with a legitimate claim to influence the political process. Habermas' early formulation of the theory of the public sphere suggested that social institutions were inimical to unconstrained public deliberation because of their tendency to rationalise and control the process of public opinion. However, in his later thinking on the public sphere, Habermas⁵³ now acknowledges the need for administrative/institutional involvement in order to establish the conditions of possibility for public deliberation. He suggests two important revisions to public sphere theory: that administrative institutions establish and maintain complex relations with a diversity of representatives of civil society and the public; and that the administrative sphere might, through these complex relations, work to establish a public engagement and deliberation focused on their legitimate sphere of interest.

On the basis of these considerations, Habermas⁵⁴ proposes four criteria for judging whether political and administrative institutions support deliberation. We can use these to establish a normative evaluation of the new regulators. First, the regulators should carry out coordinating functions efficiently but always recognising the different viewpoints at stake and so creating equal conditions for influences on decision-making. At the same time, the regulator must acknowledge that the systems it must deal with will be focused on bargaining and coordination, and so cannot be expected to combine this with the task of social integration. Second, one must recognise the dual mode of operation of these regulatory responsibilities in terms of effectiveness and legitimacy. Relationships with commerce and civil society have different implications for regulation: on the one hand, recognition of the limits of coordination (so that partnerships are needed); on the other hand, to have an open dialogue within a vibrant public sphere. Third, the regulator should give equal recognition to the deficits precisely arising from effectiveness and legitimisation. Thus, it should recognise that steering deficits (effectiveness) and legitimisation deficits are equally important, that each can undermine the other, and that there is a potential combination of both deficits resulting in a vicious circle of negativity and scepticism. Fourth, the regulator must engage in public debate concerning issues of effectiveness and legitimisation, communicating its activities regarding these issues to both commerce and civil society.

These principles aim to recognise the limits of political/administrative institutions in complex societies while also providing a normative account which takes advantage of the complex interdependencies of the information society to argue for the inevitability and desirability of deliberation in governance and regulation. We have arrived at these normative principles through a consideration of the viewpoints of diverse stakeholder interests in the fields of financial service and communications regulation. It remains to be seen how the regulators respond to these challenges of integrating economic regulation with public engagement and deliberation.

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¹¹ See www.fsa.org.uk

¹² Uncomfortably, however, other communication regulators (e.g. the BBFC, the PCC, the BBC, ICSTIS) continue to exist side by side with Ofcom and, most notably, internet content is excluded. See www.ofcom.org.uk

¹³ Lunt, et al, *Risk and Regulation in Financial Services and Communications*.

¹⁴ C. Farnish, FSA Speech: Getting a Fair Deal for Consumers, paragraph 2.

¹⁵ Ofcom's specific duties fall into six areas:

Ensuring the optimal use of the electro-magnetic spectrum

Ensuring that a wide range of electronic communications services - including high speed data services - is available throughout the UK

Ensuring a wide range of TV and radio services of high quality and wide appeal

Maintaining plurality in the provision of broadcasting

Applying adequate protection for audiences against offensive or harmful material

Applying adequate protection for audiences against unfairness or the infringement of privacy.

¹⁶ One can witness a similar trend in other regulatory domains – as in the recent notions of health literacy, environmental literacy, political literacy, information literacy, and many others.

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¹⁹ For FSA Consumer Panel, see <http://www.fs-cp.org.uk/>. For Ofcom Consumer Panel, see <http://www.ofcomconsumerpanel.org.uk/>

²⁰ Date of interview, 28/09/05. All interviews quoted here were conducted ‘on the record’ by the authors as part of the “Public Understanding of Regimes of Risk Regulation” project. Interviewees are identified and quoted with permission.

²¹ To balance this, the industry also has strong representation (e.g. through the FSA’s Practitioners’ Panel).

²² Habermas, *Between Facts and Norms*.

²³ Interview with Allan Williams, Senior Policy Advisor, Consumers’ Association (Which?), 04/03/05.

²⁴ Interview with Claire Milne, freelance consumer spokesperson, 20/04/04.

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³⁰ Interview with Mick McAteer, 25/02/05.

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³⁴ Interview with Campaign for Press and Broadcasting Freedom (Pat Holland, Jonathan Hardy and Gary Herman), 21/07/05.

³⁵ Interview with Don Redding, Public Voice, 09/05/05.

³⁶ Interview with Allan Williams, op cit.

³⁷ Interview with Julie Myers, Policy Manager, Ofcom Consumer Panel, 28/06/05.

³⁸ Interview with Tony Stoller, Director of External Relations, Ofcom, 10/08/05.

³⁹ Interview, 20/06/05.

⁴⁰ Habermas, *Between Facts and Norms*.

⁴¹ Interview with Mick McAteer, op cit.

⁴² Interview with Mick McAteer, op cit.

⁴³ Interview with Colette Bowe, Chairman, Ofcom Consumer Panel, 28/09/05.

⁴⁴ Interview, 20/07/05.

⁴⁵ Jessop, *The Future of the Capitalist State*.

⁴⁶ Jessop, ‘The State and the Contradictions of the Knowledge-Driven Economy’, p.10.

⁴⁷ Jessop, ‘The State and the Contradictions of the Knowledge-Driven Economy’.

⁴⁸ Livingstone, ‘Citizens and Consumers: Discursive Debates during and after the Communications Act 2003’.

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⁵¹ Jessop, 'The State and the Contradictions of the Knowledge-Driven Economy'.

⁵² Habermas, *Between Facts and Norms*.

⁵³ Habermas, *Between Facts and Norms*.

⁵⁴ Habermas, *Between Facts and Norms*.