



Regulation and Fairness

An Emerging Opportunity

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policy network paper



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Foreword

In this important contribution to the debate about the future of fairness and modern regulation, Shamit Sagar rightly points out that regulatory policy will always be integral to a centre-left governing strategy. Despite the catastrophic impact of the financial crisis which underlined the irrationality and instability of markets, there is little appetite on the part of voters for governments to effectively replace markets by nationalising the means of production and acting as the monopoly provider of key services and utilities. The consensus for a liberal market economy has broadly survived the financial crisis. What has been missing so far is a convincing account of how social democratic governments can tackle the injustices which markets create without damaging economic growth and living standards.

Some years ago, the economist John Kay advocated an approach to public policy based on 'disciplined pluralism' in markets and state provision. Kay's insight was essentially that any market or service thrives through the capacity for experimentation. In competitive markets, the profit motive provides the spur to take risks and do things differently. In public services, a degree of choice and diversity of supply encourages providers to innovate, take risks, and lever up performance.

The implication of Kay's analysis is that regulatory policy should seek to maximise the capacity for experimentation, breaking up monopolies and challenging unhealthy concentrations of market power; at the same time, regulation should seek to protect potentially vulnerable consumers and prevent catastrophic market failures. Instead of grand ideological prescriptions, centre-left parties should focus on remedying specific problems arising in product, capital and labour markets. Kay echoes Keynes' dictum in *The End of Laissez-Faire*: 'The important thing for governments is not to do things which individuals are doing already, and to do them a little better or a little worse; but to do things which at present are not done at all.'

This is the argument which Sagar addresses cogently in his paper. In the aftermath of the crisis, there is a widespread feeling that financial regulators were wholly ineffective in curbing the excesses of financial markets. Executive pay rose to absurd levels regardless of contribution without any adequate regulatory oversight. In utilities markets, consumers have grown increasingly frustrated at rising prices and the perceived decline in service standards. In key areas of public provision, sectors like health and social care have seen repeated examples of regulatory failure, more often causing harm to the most vulnerable.

Across the board, there is growing recognition of the costs imposed by inadequate regulation. Sagar highlights that many regulators have in the past adopted an overly cautious and passive approach, giving citizens and consumers the tools to gain information about markets, but offering few mechanisms of redress where wrongs have occurred. Regulators have to be much more mindful of how they can prevent failures from occurring at the outset, while tough penalties are more likely to prevent repeat offences.

In conclusion, regulation is not the only tool available to centre-left policy makers. The financial crisis has underlined the case for government activism in forging a dynamic industrial policy that rebalances the economy towards manufacturing sectors and under-performing regions. The state will always be required to play an active role in the provision and delivery of public services. Nonetheless, the historical legacy of social democracy is the capacity to tame markets in the public interest; regulatory levers are critical to that task. That is why an agenda of fairness through modern regulation remains crucial for a future-orientated centre-left governing strategy.

Patrick Diamond, senior research fellow, Policy Network

Executive summary

Modern regulation is at a crossroads. The criticisms of financial regulators after the 2008 financial crisis, the absence of checks and balances on grotesque press intrusion, and shortcomings in the regulation of other markets and public services, all point to the need to re-evaluate both rationales and operating models. Issues of fairness and equity are central to this re-evaluation, mainly so as to protect and support vulnerable citizens but also in order to rebalance relationships and recalibrate practices in complex markets and public services.

The default response to these crises has been to provide more and better information for users. This is predicated on the idea that enhanced navigational tools alone can deliver better outcomes, and reflects a narrow focus on immediate transactions and benefits. Another response has been to strengthen redress channels, allowing those who have received poor treatment, service or goods to have their 'wrongs' put 'right'. The redress model has been much improved in recent years with considerable ease-of-use facelifts that have benefited ordinary as well as vulnerable users. However, there have been few incentives to go beyond remedial regulation, and providers and firms with the poorest records have varied in the extent to which they have sought to prevent repeat failures.

A further option recognises these failings by requiring or incentivising regulators to identify the riskiest circumstances for users and for whole sectors. These systemic weak spots are often either structural or the result of asymmetries with providers. Regulators are then well positioned to utilise their powers and insights to create genuinely preventative regulation, particularly designed to appreciate the vulnerabilities of some users at the outset.

This pamphlet examines these different conceptions of regulatory fairness to describe the terms of an emerging debate and the opportunities that this represents. On the left, the challenge of social democratic renewal is fundamentally dependent on a thorough and credible understanding of the capacity of existing regulatory architectures. Perceptive and nuanced regulation is in demand that is not naïve to the imbalances between users and providers in markets and public services, and the risks posed to the weak and vulnerable in particular. This implies a more thoughtful role for state involvement and oversight that equips regulatory agencies to be on the front foot in bearing down on exploitative behaviours. On the right, a smaller scope for the state even beyond fiscal consolidation nevertheless means that citizens, users and consumers face challenges that are not merely navigational. Enhanced competition and transparency are indeed suitable regulatory tools to help meet those challenges. But these will need to be augmented with an approach to fairness in regulation that spots early on the exposure of some to being exploited at worse or making poor choices at best.

A more expansive view of regulation and regulators, in other words, can have a role in enhancing the social participation of all, and this is a natural corollary of wider efforts to modernise markets and reform public services.

Introduction

Regulation is part of modern life—from roots that can be traced back over two centuries. Regulation since then has expanded across markets and public services and is now “a defining feature of modern society” (Brooker and Taylor, 2009). Regulatory agencies have been ubiquitous in their reach, scope and responsibilities, extending beyond markets and public services into a myriad of ethical, medical, social, personal, governance and constitutional matters.

What is the place of fairness in modern regulation? One answer is that it is to provide basic information and guidance to enable consumers and users to navigate choice and quality in modern markets and public services. This of course implies that the onus remains on users to self-manage their interests, however much regulators – and others such as consumer groups – can assist them at the margin.

Another response has gone further and suggested that unlocking unfairness depends on trying to isolate – and prevent – where the circumstances facing particular users are so bleak that they cannot be expected to make certain choices wisely. This implies something of a partnership between regulators and users. The difficulty in practice has been that regulators often remain slow and clunky in the way in which they overcome their bureaucratic hurdles to step in and assist in a timely and helpful way.

And others have asserted that fairness involves standing back and looking to see who has the upper hand in markets and public services – then focusing diligently on limiting the potential for one side to exploit the other. This implies that regulators remain on the front foot, sceptical about structural asymmetries and probing about the business models of providers. It also implies that their harness accumulated wisdom and judgement about where weaknesses are mostly likely to lie and to go beyond a reactive compliance approach to supervising firms and providers.

Fairness, of course, spans each of these definitions and affects the landscape of how markets and public services are structured and moderated. And the idea of fairness as even-handedness is increasingly a facet of a global debate about the functioning of market capitalism and how well regulators have been equipped—and performed—to deal with poor performance and wholesale failure. In some cases, major regulatory bodies have had to confront the criticism—sometimes from their own leaders such as Adair Turner, chairman of both the UK Financial Services Authority—that the intellectual models underpinning their own regulation of markets has been flawed.

Regulation and public policy boundaries frequently overlap generally and specifically in terms of where fairness fits. For instance, there is a long tradition of public policy interventions that set out to level the playing field for private and/or market transactions between individuals and also between individuals and institutions. Policies that are designed to deliver greater access to high attaining schools and universities illustrate this, based on the rationale that these scarce opportunities can be equalised with long-run benefits for social mobility. Regulators such the Office for Fair Access (in higher education) concentrate on gathering and directing key information about success and failure and holding providers to account through agreed targets on *inter alia* widening participation. Furthermore, public policy sometimes involves giving voice and representation to weak, unheard social groups. This has been commonplace in social policy (e.g. creating professional advocates for those unable to articulate their own interests effectively in social work and for child protection specifically), but also in relation to the public’s interaction with professional groups (e.g. patient advocacy and liaison (PALs) services in hospital clinics). Some of these tasks have been taken on by regulators to ensure that traditionally dominant voices are challenged in designing and delivering user services. For example, Consumer Panels and Councils of various complexions have been established *inter alia* by the Financial Services Authority (FSA), the Legal Services Board (LSB), the Water Services Regulation Authority

(Ofwat), the Office of Communications (Ofcom) and the Civil Aviation Authority (CAA), to pursue this core rebalancing task.

Regulators also find themselves effectively speaking for the voiceless in overseeing market practices and the roll out of innovation and change. For instance, Ofcom has taken on the responsibility of safeguarding the interests of elderly consumers in relation to digital switchover programmes. Public policy has also taken a critical eye to unequal opportunity structures on lines of ethnicity, gender and disability, and this widening of scope has also spread to aspects of regulation. These are largely thematic public policy concerns and, as they have become embedded, their salience has spread to regulators (Ünay, 2011). Financial regulators, for instance, hold responsibility for ensuring the risk is suitably quantified, priced and communicated in health and travel insurance for gay and disabled consumers.

This pamphlet is concerned with the changing ideas of fairness and how these are applied to modern regulation. It especially focuses on the normative questions that have underpinned the development of modern regulation and the links to everyday examples. It argues that regulatory leadership is shifting to take a more expansive view of fairness. The pamphlet proceeds in two main parts. The first section deals with three dimensions of fairness as addressed by regulation and regulators. This also contextualises the wider question of how and why certain social objectives of regulation sit alongside traditional objectives centred on economic rationales. The second part turns to consider emerging challenges and discusses the priorities for understanding political and regulatory risk.

Three faces of fairness

Fairness as a concept has been applied to the world of regulation and regulatory policy in several different ways. These faces of the fairness agenda, so to speak, have varied and have often been inconsistent in terms of their meaning and their application to specific cases where regulators hold significant responsibilities to tackle harm and mischief.

The first dimension has been heavily couched in the language and values of social justice, such that regulation is frequently described as a primary means of taming the harsher features of modern markets. The public interest is commonly cited as a theoretical justification for the taming role (Feintuck, 2004; Majone, 2006). Regulators, in practice, have been reactive to consumer advocates who have pointed out why and how users are poorly served by certain market arrangements and practices (Vogel, 1981). And those advocates, in turn, have been motivated by principles and values that are thought to be in short supply generally, indirectly influenced by New Left critiques of capitalist democracy (Harris and Milkis, 1989). Fairness, thus, is the result of external pressure brought to bear especially when things go badly wrong for end users, and is replete with a shrill clash of values between markets and their putative tamers. For instance, Gordon Brown, a former UK Prime Minister, while still in office, spoke of 'unbridled free market dogma, which had been discredited by the financial crisis' (BBC, 2009).

The main criticism is that this has led to a static, consumerist outlook that focuses on giving users more basic tools alone and withdrawing thereafter. The relationship is essentially passive because it does not go beyond showing users how they might obtain better outcomes. Describing the challenge of environmental protection, Holdsworth and Steedman (2005) note that:

Consumer-facing policies have largely been limited to traditional information provision and awareness-raising. These policies have not had a transforming effect on mainstream society. Only now is it being recognised that preaching to people is a poor substitute for enlisting them as active partners. Once enlisted, people have been persuaded to make major changes in their lives.

The second face has evolved from this starting point to adopt a more workman-like, quasi-technocratic approach. Regulators have come to learn and accept that, in safeguarding consumers and users, there are some segments within society who are in greater need of protection than others. Regulatory priorities therefore need to be recalibrated to give weight to these needs (Feintuck, 2010). This is an enlightened perspective. Typically, a disaggregation of end user impacts frequently reveals significant capability gaps that prevent individuals from making suitable decisions for themselves (Saggar, 2010).

It is only fair to say that many regulatory agencies have shown resistance in principle to this argument, citing the need to retain independence and a belief in the rational self-correction of markets. And yet, in practice, in pursuing one-size-fits-all policies and practices, can result in highly uneven and largely predictable outcomes. For instance, publishing consumer alerts aimed at Polish temporary workers in English language media, unsurprisingly, tend to have poorer impacts than tailored messages using appropriate language and media outlets.

The result has been that greater attention has been paid to analysing market characteristics and behaviours, and greater care has been taken to design flexible policy interventions that are informed by knowledge about end users. The fairness agenda, thus, has been taken forward through the mechanics of operational policies that are sensitised to recognise granular variations in circumstances. Fairness equates to pragmatic awareness on this front and a willingness to take an iterative approach to policy design, implementation and feedback (Camerer, Issacharoff, Loewenstein, O'Donoghue and Rabin, 2003).

A further, important element of regulatory fairness has also been a pro-active stance in stimulating demand for regulatory protection and redress. Since the weakest players in certain markets are often unable to judge their own disadvantage (and losses or harm can be and remain invisible and/or intangible), it has fallen on the regulator to step into their shoes to highlight their detriment. Through creatively offering greater access to regulation and redress, regulators have discovered significant pools of previously unmet demand. For example, the Legal Complaints Service of the Law Society of England and Wales controversially staged a road-show event in the Rother Valley in northern England in 2007—highlighting and offering redress to the large numbers of former mineworkers whose industrial injury compensation claims had been exploited by their own appointed lawyers (House of Commons, 2007).

Many regulators have taken pride in such a best practice approach and have been keen to draw attention to whole swathes of vulnerable users who have directly benefitted. The high level principle behind this approach was signalled by the Hunt Report (2008) on the future of the Financial Ombudsman Service (FOS). Hunt resulted in a fresh approach to reaching vulnerable communities who traditionally are reluctant to take matters to statutory, independent redress bodies that are otherwise highly effective and patronised by educated, well-informed users.

This has largely become the orthodox position on how fairness is incorporated into regulatory best practice. Beyond the FOS, it is reflected in the Electoral Commission (EC) adopting creative outreach programmes to raise awareness of, and enrolment onto, the electoral register; it is at the heart of the Care Quality Commission (CQC) targeting particular groups and care homes in its inspection regime; and it is embodied in the Food Standards Agency (FoSA) focusing its health improvement initiatives on collaboration with selected voluntary organisations working in deprived neighbourhoods.

The third face of fairness in modern regulation centres on a more explicitly consumer-centric or user-centric approach that takes its cue from how users, markets and public services work in non-rational and non-intuitive ways. Based on this insight, regulation sets out to change the cultures of businesses and providers, as well as regulators themselves, such that the actual circumstances of individuals are fully

taken into account in shaping and distributing products and services. These circumstances shed light on consumer behaviours, some of which are influenced by personal psychology, group behaviour, herd instincts and even neurology (Cialdini and Goldstein, 2004; Caruso and Shafir, 2006; Gigerenzer, 2008).

This approach partly grows out of regulators previously adopting a more enlightened position towards vulnerable or at-risk constituencies, but it is different in that it can potentially be applied to all end users (BBC, 2011). The crux is that users cannot blithely be assumed to be following their own interests and may even unintentionally thwart the work of regulators who assume otherwise. It is thus reasonable to expect, *inter alia*, that firms do not set out to exploit product or circumstantial complexity; or that time-poor consumers are able to avoid an avalanche of confusion marketing; or that, since many users are already known to underestimate and therefore misallocate risk, to take at face value their declared appetite for risk. Indeed, users may even be irrational in the face of market dynamics, social pressures, ingrained habits, and assumptions that see the future solely through the prism of the past (NEF, 2005). And if such irrationality is evidentially commonplace, the response of regulators should be to factor this reality into their analysis and interventions at source. For this reason, the FSA, the outgoing UK financial watchdog, wrote to the Treasury Select Committee in 2011 proposing that its successor body be tasked to “promote fair, efficient and transparent markets in financial services” (FSA, 2011a).

There are several tributaries that have fed into this account of fairness. The most prominent has been the insight gained by leaders of regulatory bodies about the terrain in which they have operated in. They have noted that particular kinds of failure have recurred regularly over decades, suggesting that providers have learnt little from past experiences (Wheatley, 2012). Additionally, regulators have become more aware of, and influenced by, behavioural research findings that have pointed to the severe limits on the rationality of users due to a profusion of choice (Iyengar and Lepper, 2000; Schwartz, 2004). Indeed, some of this research has suggested that various unrealistic and factually skewed assumptions characterise consumers’ outlooks of themselves, making it hard to persuade consumers to take the first step to rebalance their relationships and transactions with providers (Rothman and Salovey, 1997).

A further influence has been that potential end users can be signposted, nudged and steered only so far by regulators before it is clear that effective regulation must involve keeping certain goods and services away from them. These products and services might be sufficiently harmful in such hands that, reluctantly, regulation cannot avoid blanket prohibition. Fairness, in this context, sees the role of regulation as a final, unimpeachable safeguard and its absence would result in many preventable and costly harms materialising.

This safeguard inevitably comes close to taking a highly paternalistic stance (to supporters) and the ubiquitous nanny state (to critics). But it is sustained by two key drivers: the first is that of repeat failure (among providers and users alike); the second is that vulnerability and exposure to harm is not fixed but in fact shifting as a result of a changing external environment and changing day to day circumstances.

The third face thus represents accumulated wisdom among regulatory practitioners. It also reflects changed conceptual thinking about fairness itself and how it is reflected in decisions that affect users as a whole. By pro-actively standing in the shoes of users, it becomes possible to see that confidence in navigating choice in markets and in public services is highly dependent on surrounding factors, only some of which users and regulators are able to directly control. These dependencies might include opportunity and capacity to examine choices dispassionately. But it will also be contingent on motivation, and this specifically is shaped by users’ sense of how well their past actions successfully served their own interests (Hsee and Tsai, 2007). Where they sense these have not been well served, users have enormous emotional and personal incentives to lose motivation and, where motivation is retained, it is truncated to permit only partial examination of choices (Kahneman, 2002 and 2003).

Notions of fairness can get terribly lost in this soup. But the essential point is that fairness gets eroded not because users fail necessarily to understand or act on their own interests, but, rather, because regulators naively assume that the opposite is always the case.

The pre-launch of the new Financial Conduct Authority (FCA) echoes the debate around the third face of fairness. There is, to start with, little fanfare that resembles a traditional portrayal of the regulator as the tamer-in-chief of uncontrolled and irresponsible market capitalism. There is, instead, a clear expectation that the new body (assisted by the platform established by the Conduct Business Unit of its predecessor) will set out to look at how products and services are understood by consumers; that it will also seek to keep an eye on weak or vulnerable categories of consumers who lack basic capabilities to comprehend and navigate choice; and that it will make no prior assumptions about consumers being in the driving seat when facing firms. But more than that, the Product Intervention powers that the new watchdog will hold are designed to keep consumers out of contact with known or likely toxic products and services.

These choices are effectively taken out of consumers' hands by a regulator acting as a guardian of the public interest. The potential application of these much broader powers and remits can be seen in a range of related and unrelated sectors including utilities, railways, telecommunications, state education, food safety, miscarriages of justice, pharmaceuticals, care homes, and so on.

Regulatory reform: trends, challenges and priorities

While the fairness agenda has been built and extended on various pillars (social justice, navigational efficiency and market failure), it is increasingly shaped by experiences and intelligence gathered in regulated sectors. The common themes centre on the capabilities of users, the impacts of market reforms (including the changing dynamics of commercial businesses models and public service delivery reforms), the judgement of harmfulness in a predictive and preventable manner, and the need to identify and utilise proportionate interventions.

User capability

To start with capability, helping consumers in a world of intense information access and potential overload seems daunting (BRE/NCC, 2007). In part, it is because of scarcity of time and unfamiliarity, many of which are developing at a pace, which makes it hard for users to keep track. It is also due to structural imbalances between producer groups and users, typically in expert knowledge and status (Fullenkamp and Sharma, 2011).

Some illustrations can be identified to show current and emerging trends that have implications for creating greater fairness:

- **The professions.** The traditional professions of law, medicine, accountancy, and so on, have developed little by way of transparency of information for users. Publishing data about high performers (i.e. standards of consumer/client care greatly in excess of the norm) and low performers (i.e. adjudicated complaints upheld against individual professionals or firms) has considerable potential to shake things up. Consumers might be warned off very poor performers for instance, and they might be attracted to top performers, in ways that are analogous to Ofsted specifying similar outcomes for schools and their potential users. Ofsted has announced consultation on its intention to scrap the category of "satisfactory" in favour of "requires improvement" in its unannounced school inspection programme, arguing that past practice may be misleading (Wilshaw, 2012).

That said, it is striking to note that few professional trade associations have championed proposals to distinguish professional leaders from laggards, and this remains a major prize for both regulators and professional bodies. The Legal Ombudsman has begun to publish details of the complaints it upholds and has been heavily criticised by professional bodies who fear that these data will paint a misleading picture (LeO, 2011). The crucial point is that greater fairness is embodied in the principle of reducing or even removing the asymmetry between lay users and professional experts.

- **New redress/advocacy mechanisms.** The model of static regulators who step in to help consumers to 'right' various 'wrongs' has been challenged as being too reactive. There is arguably room for new players seeking to support consumers and doing so through advocacy and simplification of complex data. These players will have a vested interest in encouraging a more complaint-oriented public and in framing certain firms and industries in increasingly negative and confrontational terms. This can be a potentially regressive development if those with such a vested interest simply want to 'right' each and every 'wrong', regardless of context.

A more enlightened approach would be to prioritise whole classes of cases where disadvantaged or unsophisticated consumers have lost out. Claims management firms and sectoral consumer redress bodies could be required to identify and put such cases first, perhaps devoting additional resources to doing so. Fairness principles are salient because redress would be treated not in strict, absolutist terms but rather relative to the position of the user's capabilities and the provider's obligations to them. Tellingly, FOS, FSA and OFT have publicly called for a new Coordination Committee to scan for potential mass claims and for the prioritising of claims handling in this manner (FSA, 2010).

- **Understanding vulnerability.** On vulnerable consumers, economic regulators and competition authorities have come under pressure to raise their game in respect of particular groups or sections of society being left behind in making efficient and informed use of modern markets. For instance, functionally illiterate or innumerate individuals can be isolated with reasonable accuracy as a first step to assessing how well they can navigate choices and signposts. Typically, they might not be expected to understand or follow basic information about hospitality infection or mortality rates, school inspection reports describing value added educational outcomes, low cost airline advertising of core and add-on services, legal advice regarding success odds and fees, credit card firms' marketing of introductory benefits, and so on.

Market and public services reforms

Structural reforms in markets and in public services are of relevance in considering fairness questions, both broad and narrow. In de-regulating telecommunications and utilities in earlier decades, a major rationale was to create opportunities for consumers to influence firms' behaviour, typically through awareness of service standards and use of price comparison. Several regulators have further strengthened the position of vulnerable groups of consumers by requiring firms to disaggregate information about user patterns and also through universal access agreements. In public services, if anything, the shift has been starker, supplying users with performance data for the first time (Audit Commission, 2006). The Chief Inspector of Schools recently commented that:

Our education system is much better because of greater accountability in the system. Those who think we haven't made progress need to remember what it was like before Ofsted. I certainly do. In the seventies and eighties, when I worked in places like Peckham, Bermondsey, Hackney and West Ham, whole generations of children and young people were failed. Ofsted challenged the educational establishment to do better. It needs to continue doing so and raise the bar to address significant failures. (Wilshaw, 2012: 2)

Taking a more expansive view of fairness involves two key elements. The first, naturally, centres on challenging providers to self-examine their accessibility and forms of accountability to demonstrate performance in relation to traditionally hard-to-reach users. For instance, where the FSA has sought to

prioritise low income consumers who have been affected by Payment Protection Insurance (PPI) mis-selling, it remains to be seen whether or how far this strategy delivers positive outcomes for the target group. And, where many local secondary education economies have been transformed by the roll out of Academies and Free Schools, Ofsted has an on-going role in pinpointing take up among the lowest attaining social groups.

This touches on the second element, namely regulatory authorities taking a pro-active stance in building their knowledge and understanding of priority groups and scenarios. This reflects the regulatory style of an agency as much as anything, and also on the manner of interaction that it promotes with its regulated community. Outreach activities are one example, displaying a cultural disposition on the part of a regulator to learn more about vulnerable or under-represented parts of its constituency, and can generate valuable insights into how particular people and communities live their lives, and the mix of influences that lie behind their often inconsistent choices or indeed perceived lack of choices.

The main point to capture is the degree to which regulatory interventions and tools are designed to chime with existing relationships and norms in the circumstantial lives of users. The use of mystery shopping as a tool is a good example. Such a technique is widely cited to shed fresh light on poor frontline standards. But its use as a flexible regulatory tool is rare and not obviously connected to other methods to identify mischief.

This is a general lesson from social policy quarters and also feedback from implementation of otherwise intelligent regulation policy. If one size does not fit all, there is a tendency to incorporate greater discretion into delivery models. Thus, adaptation can be used to deal with a wider set of circumstances. Such discretion is attractive at one level but not at another. This is because, unknowingly, regulators may be creating a recipe for frontline staff to put off or discourage particular groups of users, however unwittingly.

Complaints handling illustrates this well. Those contacting regulators and redress bodies for guidance on how to complain will most likely be put off by being told that they must complain formally in writing. They will be further disheartened to learn that they have short deadlines to do so. Their morale will probably dip yet further if they are met with a bureaucratic, aloof tone that infers the would-be complainant has an ulterior motive and/or cannot judge whether they have a complaint to begin with. On all fronts, giving frontline regulator staff discretion to grasp the circumstances of users can be counter-productive unless accompanied by a suitable cultural empathy for such users.

By searching pro-actively for harder-to-reach users, regulators can begin to ascertain how far the problems brought to light by complaints help to identify recurring or systemic problems, either among provider practices or market structures, or both. This information can give them reason to consider whether they should act on their own initiative to review the position of users in a similar position, as well as those who have not yet complained.

Re-opening files of clients who have not complained or have not been known to complain is a big lever held by regulators. The greatest barriers to dissatisfaction being registered may stem from consumers' own psychological outlook that dismisses or diminishes the idea that redress can be obtained in a timely and cost effective way. Much modern regulation aims to create a partnership with users based on the principle of empowerment (Minogue, 2001). But this can be a deficit of the mind, more than of tangible circumstances, and is something that is clearly beyond the scope of regulators to tackle directly or alone.

Predictive and preventative

Finally, the fairness agenda can be viewed through the prism of a predictive foundation and, therefore, a potential to prevent detriment. This is a substantial advancement in principle. It means that fairness

is best served when regulatory practice is designed to foresee certain harms to users—typically, large-scale mis-selling of financial services or mass household utility contracts, sectors acutely associated with recurring regulatory doors being shut after numerous horses have bolted.

The default position of regulators in such scenarios in the past has been to address findings from complaint-driven systems that made no presumptions about the potential impacts of such faulty or inappropriate goods and services on users. Certainly, regulators had little interest in whether, in design terms, suitable products and services would be sold to the right people and at an appropriate time and manner. The fault was thought to lie further downstream in distributional channels and models.

There are a number of reasons why such a default mode is no longer reliable, one of which has been the spectacle of large-scale mis-selling and the significant redress costs (invariably under-estimated) these have entailed. Another is that regulators have been willing to examine incisive behavioural models to understand better the reasons why products and services are successfully sold or taken up, sometimes so unsuspectingly that it calls into question whether a market transaction remains the most suitable model to describe user behaviour (OFT, 2008; Burton, 1997). Some of these reasons have to do with:

- the impenetrable way in which key performance for users information is couched;
- the unwillingness of users to challenge, let alone abandon, choices they have already made;
- many users, faced with an information overload, default and seek assurances from those dubbed as experts (Ariely, 2008).

Significantly, such understanding of user limitations has been identified as a priority for improvements in business and management education (Currie, Knights and Starkey, 2010). The results of doing so will take time and affect the cultural outlook of a future generation of private and public sector senior management.

The crux is that regulators should take a closer interest in product design, testing and distributional channels. In the words of the Chief Executive-designate of the forthcoming Financial Conduct Authority: “When we start to hear of problems with a product, we will go in much earlier than in the past.”

The FCA is likely to be armed with certain Product Intervention powers—that will give it the ability to ban new product launches on the basis of likely or anticipated (but not actual) harmful user impacts. This is coupled with new Early Warning Notice powers alongside powers to pre-approve the delivery stage of simple products (TSC, 2011a and 2011b).

Proportionate and timely intervention

This represents nothing less than a small revolution in regulatory powers and thinking that, if successful, are designed to negate the need for expensive and time-consuming enforcement and redress. The upshot is a highly prevention-oriented tool backed up by an appetite to link fresh understanding of users to uncharted products and services. The admission of past failure strikes a powerful note (Turner, 2011: 3):

In the past the FSA's regulatory approach was based on the assumption that effective consumer protection would be achieved provided sales processes were fair and product feature disclosure was transparent. But this approach has not been effective in preventing waves of severe customer detriment.

To be sure, the power to ban products already exists so the issue really hangs on whether it can be applied further upstream at the design and testing stage. In practice, a preventative approach is widely covered by regulators in receipt of sophisticated intelligence about existing interactions between providers and users. Many will keep this intelligence under review so as to spot new classes of products

and/or changes in user circumstances that can lead to greater demand for particular products and services.

But can regulators go further and take a more predictive approach that sees hidden risks from certain constellations of provider and user characteristics? Some have sought to do so by developing consumer risk outlook models and tools that monitor factors such as interest rates, housing markets, unemployment, credit availability, social trends, public attitudes, media consumption and even niche marketing that can feed into the appeal of certain types of products. These horizon scanning methods are often routinely used to inform operational and resource allocation matters for regulators as executive bodies. Nevertheless, the advantage lies in the capability to examine regulatory risk and to prioritise in such a manner as to be able to step in quickly and early (CAB, 2011).

This level of innovation begs another question: how preventatively-minded might other regulators become in the future? In many cases, it would require regulators taking a closer interest in providers' internal development of products and services. This would mean a revised scope for providers to be accountable to regulators sufficiently early during the product or service life cycle. This is obviously highly relevant where market reform is designed to foster new business and business models.

One obvious and timely example can be seen in the reforms in legal services markets through the creation of new Alternative Business Structures (ABSs). The nature of products and services created through this dynamic are likely to be very different from those associated with traditional providers, suggesting there is a clear rationale for regulators to probe early on the potential for hidden user detriment. Previously, the Utilities Act 2000 re-cast Ofgem's statutory duties to include consideration of low income consumers and disabled consumers among other groups, added security of supply as a consideration, and instituted a system of social and environmental guidance from the government (Graham, 2009). Indeed, this remit was further extended by requiring Ofgem to contribute to the achievement of sustainable development in 2004.

In the case of regulators of public services and constitutional matters, there are further hurdles. For example:

- The Independent Police Complaints Authority might wish to probe the way in which constabularies adopt operational policing and crime detection models. These may give the IPCC—and now directly elected Police and Crime Commissioners (PCCs)—some purchase in shaping policing priorities so that vulnerable citizens' needs are more explicitly considered.
- The successors to the Serious Organised Crime Agency (SOCA) may turn to look at how particular categories of serious crime affect vulnerable groups.
- The Electoral Commission (EC) has already adopted something of a preventative stance in publicly criticising a government initiative to move to a system of direct individual electoral registration that is not accompanied by suitable safeguards, and similarly pointed to the harmful consequences of rolling out large scale postal ballots.
- Finally, the Independent Parliamentary Standards Authority (IPSA) may wish to examine the affects of current 'pay-and-rations' proposals on the future breadth and diversity of recruitment of politicians and public servants.

Conclusion

Public debate following the 2008 global financial crisis has intensified to the point where two broad schools of opinion have emerged. The first of these argues that forms of protected capitalism have always been with us—that is, the absence, of full, unbridled market forces has sheltered the perpetrators of an assortment of reckless behaviour from their consequences. The latter takes a more unapologetic line by stressing that few, if any, credible alternatives to market capitalism have been advanced. Despite the rather stark contrasts in these analyses of how modern capitalist economies have worked, there is a unifying theme, namely that modern capitalist political economy unavoidably has to be sensitised to the effects of systemic failure, wanton greed and the needs of those too vulnerable to navigate market economies and public services. This has been described as the challenge of “compensating for capitalism”, with a “focus on the fundamental aspects of the production process and its negative externalities” (Eisner, 2000: 119).

The debate ultimately pivots on the question of a shared understanding of fairness and how best to thwart the drivers of unfairness. In terms of the operation of global markets in finance, for instance, the unfair outcomes range from the gross moral offence created by private enterprises being bailed out by taxpayers through to successive chapters of mis-selling to unsuspecting consumers and conspiracies to manipulate interest rates.

Elsewhere, economic recession and austerity have meant that probing questions face governments, corporations and their leaders about responsible stewardship of the economy and the harsh impacts felt by some but not all. Fairness-type questions, furthermore, are echoed in the design and delivery of public services, the reputation of political and electoral processes, the safeguards put in place to support consumers in complex and vulnerable settings such as technology-led changes in healthcare and in telecommunications, and in policing trade-offs in ethical, personal and family matters.

This pamphlet has put forward a fresh perspective on regulatory reform that addresses questions of fairness in holistic manner. In particular, it argues that an expansive view of fairness can lead to a more active and interventionist style of leadership of regulatory agencies. The significance of the argument is twofold: first, it demonstrates a dissatisfaction and uncertainty about extant approaches to delivering greater fairness in the regulation of markets and public services; and second, it throws light on an innovative, new approach that is informed by the complexities facing users.

Specifically, the more expansive vision outlined here provides a powerful tool to tackle any complacency regarding capitalism's most harmful consequences. Any reluctance to tame capitalism might be forcefully countered by a regulatory vision in which fairness is incorporated into the market capitalist model itself and into the support and empowerment of consumers and users. These are the hallmarks of an emerging debate about the future of modern regulation.

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