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Regulatory strategies

Ojo, Marianne
Center for European Law and Politics, University of Bremen

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ABSTRACT

Over the years, there has been a shift from a wide command-and-control style of supervision whereby the regulator imposes detailed rules with which regulators supervise to one which consists of risk based regulatory strategies. 'Enforced Self Regulation', a regulatory strategy whereby negotiation takes places between the State and the individual firms, lies between the command-and-control style of supervision and meta risk regulation in that firms are still required to regulate but according to their own models. It differs from the traditional command-and-control style of bank supervision in that firms and not the regulator, are required to regulate. It is similar to meta-risk regulation in that the individual firm's model is taken into consideration in regulating such firms.

Whilst the merits and disadvantages of the individual regulatory strategies are considered, this paper concludes that all regulatory strategies should take into consideration the importance of management responsibilities – both on individual and corporate levels.

3. Regulatory Strategies

3.1 Regulation of banks: Command and control regulatory strategies

Banking supervision is based on a licensing system which not only allows supervisors to identify the population to be supervised, but also to control entry into the banking system.[1] In order to qualify for and retain a banking licence, entities must observe certain prudential requirements. Capital adequacy constitutes one of the foundations of prudential supervision.[2] In most countries there are minimum capital requirements for the establishment of new banks and capital adequacy tests are a regular element in ongoing supervision.[3] In the consultative package "The New Basel Capital Accord" issued by the Basel Committee in January 2001, the Basel Committee proposes a capital adequacy framework based on three complementary pillars: minimum capital requirements, a supervisory review process and market discipline. Capital adequacy is a term used to describe the adequacy of a bank's aggregate capital in relation to the risks which arise from its assets, its off balance sheet transactions, its dealing operations and all other risks associated with its business.[4]
The aim is for a bank to have enough capital in relation to its risks to absorb the highest foreseeable amount of loss and still give allowance in which to realise assets, raise new capital or arrange for arranged disposition of its business.[5]
Statutory requirements govern the minimum amount of capital which a bank must have[6]. These have been established by UK and European legislation and from internationally agreed recommendations of the Basel Committee on Banking Supervision[7].

Safeguards which protect the banking system include measures such as the lender of last resort arrangements, deposit insurance, regulation and supervision and these may not be performed by one single entity. For instance, the central bank whilst performing lender of last resort functions, may not be responsible for regulatory and supervisory functions. Regulation and supervision are terms which are often used interchangeably even though these terms can be distinguished from one another. Regulation can be defined as the establishment of certain rules whilst supervision refers to the monitoring of those rules. According to the Oxford English dictionary, regulation is literally defined as a "rule prescribed for the management of some matter, or for the regulation of a conduct; a government precept or direction" whilst supervision is defined as "general management, direction or control, oversight, superintendence."[8]

Depending on the instructions given by the State, the bank regulator is responsible for the creation of secondary sources of law which include rules, standards and guidelines that originate from primary sources such as statute and therefore has the role of *de facto* law maker.[9] The regulatory process highlights the regulator's duties in ensuring that prescribed rules are continuously obeyed.[10] Once a bank is authorised, a regulator can assume his role of

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[1] ' The Relationship between Banking Supervisors and Banks' External Auditors' Jan 2002 para 29 page 8 see <http://www.bis.org/publ/bcbs87.pdf> (last visited 11 th July 2007)

[2] ' The Relationship between Banking Supervisors and Banks' External Auditors' Jan 2002 para 33 page 9 see <http://www.bis.org/publ/bcbs87.pdf> (last visited 11th July 2007)

[3] ibid

[4] J Hitchins, M Hogg and D Mallet, *Banking : A Regulatory Accounting and Auditing Guide* (Institute of Chartered Accountants 2001) 163

[5] ibid

[6] ibid

[7] ibid

[8] *Oxford English Dictionary*, see <http://www.http://dictionary.eod.com>

[9] M Shapiro, 'Administrative Discretion: The Next Stage', *Yale Law Journal*, vol. 92, 1487 (1983) 1510.

[10] D Singh, ' *Banking Regulation of UK and US Financial Markets* Ashgate 2007 at 83 ; For instance, the

monitoring such bank's activities through on-site or off-site supervision and can also exercise enforcement measures in the event of the bank's non compliance. In addition to regulation and supervision, bank regulators and central banks can also undertake the important complementary function of surveillance.[11]
The contentious issue relating to the distinction between regulation and supervision centres on whether a regulator has implemented a rules or discretion based approach to carry out its statutory responsibilities.[12] Whilst regulation is intended to prescribe how management should make decisions, supervision provides for a degree of discretion and judgment to be exercised in the decision making process. Regulation and supervision can also be distinguished according to whether a business is an investment business or whether it is a banking business.[13] A range of conduct of business rules protects investors and these rules are not present in commercial banking except for the Banking Code which offers limited protection for the depositor.[14] The obligations owed to an investor and a depositor under the two forms of business are different.[15] For example, a bank has limited or no obligation to a depositor in explaining the reasons for decisions regarding the deposit, whereas in an investment business the obligation to investors is continuous so as to enable them judge the risks associated with the investment product bought.[16] Based on this, banking is usually governed with a supervision-based approach, allowing for a bank to be prudently run in terms of managing its assets and liabilities.[17]

Two general types of regulation and supervision are identified by Llewellyn:[18]

a) Prudential regulation, which focuses on the solvency and safety and soundness of financial institutions and,
b) Conduct of business regulation which focuses on how financial firms conduct business with their customers.

The case for prudential regulation and supervision of financial firms is that consumers are not well equipped to judge the safety and soundness of financial firms[19] whilst conduct of business regulation helps to ensure the setting up of rules and guidelines about the proper way in dealing with customers.[20]
Banks are regulated in different ways ranging from prudential techniques designed to prevent systemic crisis arising in the first place to protective techniques which are used once a crises arises. Under techniques designed to prevent a crisis from occurring are the use of capital and liquidity ratios. When a crisis has occurred, the use of the safety net of deposit insurance and rescues are measures adopted.

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system in the UK focusses on criminalising unauthorised activities and ensuring that safeguards such as specific fit and proper requirements for firms and persons are in place before they can carry out business within the market;ibid.

11 ibid

12 B Quinn, 'Rules v Discretion: The Case of Banking Supervision in the Light of the Debate on Monetary Policy', Special Paper 85, July 1996 Financial Markets Group, London School of Economics

13 D Singh, ' *Banking Regulation of UK and US Financial Markets* (2007) 84

14 ibid p 85

15 ibid

16 ibid

17 ibid

18 D Llewellyn, 'The Economic Rationale For Financial Regulation' (Financial Services Authority London Occasional Paper 1 April 1999) 10 - 11

19 ibid p 10

20 Ibid p 11

Over the years, there has been a shift from a wide command-and-control style of bank supervision to one whereby banks are still required to regulate capital, albeit according to their own models.

3.2 Meta – Risk Regulation: Risk based regulatory strategies

Different explanations have been given as to why risk has become central across regulatory and governmental circles and these explanations are partly influenced by different approaches as to what risk is.[21] One view in attempting to account for risk as a strategic organising principle in the public sector, attributes the specific needs of government.[22] Political scientists, however suggest that the adoption of the language and practices of risk reflects a deeper, more complex process, one of "political isomorphism".[23] According to this view, risk becomes accepted and embedded in one organisation or institution such that it acquires recognition within other organisations and institutions.[24] Other explanations, mainly from socio-cultural disciplines suggest that the importance of risk derives from issues related to control, accountability, responsibility and blame in late modern society.[25] Two well-known theoretical perspectives addressing these are termed "risk society" theory and "governmentality" theory.[26] These theoretical perspectives will be considered in greater depth under chapter five.

Regulation is often perceived as consisting of command and control strategies whereby the regulator imposes detailed rules with which the regulator monitors compliance.[27] However, meta-risk regulation is a type of regulatory strategy which draws firms into regulatory processes and attempts to both influence and make use of firms' internal risk management and control strategies.[28] As a result, supervision is not so much about the simple monitoring of firms' compliance with regulatory rules but more about evaluating and monitoring firms' awareness of the risks created by their business and of their internal controls.[29]

Meta risk regulation deals with the risk management of internal risk and being able to use the firms' own internal risk management systems to achieve regulatory objectives.[30] From this perspective, it therefore differs from risk-based regulation which is used by the UK's financial regulator, the Financial Services Authority (FSA) and which embraces external risks.[31] The Basel II Capital Accord provides an example of the operation of meta regulation in that bank capitalisation is not to be imposed externally by regulators but will be determined by a bank's

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[21] J Gray and J Hamilton *Implementing Financial Regulation* (2006) 5
[22] Ibid p 5
[23] ibid
[24] Ibid
[25] Ibid p 5; also see M Douglas, *Risk and Blame: Essays in Cultural Theory* (1992) Routledge
[26] see U Beck, *Risk Society: Towards a New Modernity* (1992) London: Sage Publications ; also see C Hood, H Rothstein and R Baldwin *The Government of Risk: Understanding Risk* (2001) Oxford University Press; see T Bennett 'Culture and Governmentality' in C McCarthy and J Packer (eds) *Foucault, Cultural Studies and Governmentality* 2003) State University of New York Press at page 47; M Dean, *Governmentality. Power and Rule in Modern Society* (1999) London/Thousand Oaks/New Delhi: Sage 1999

[27] J Gray and J Hamilton, *Implementing Financial Regulation : Theory and Practice* (2006) 36
[28] ibid
[29] ibid
[30] ibid p 37
[31] Risk based supervision by the UK's financial regulator, the FSA, considers three sources of risk (the external environment, consumer/industry wide risks and regulated institutions) and therefore embraces external risks whereas with meta regulation, no external risk considerations are involved.

own internal risk management models provided these models are considered by regulators to be adequate.[32] One major advantage of meta-risk regulation is that it should enable the FSA exploit the expertise of the industry in an age when the complexity and volatility of modern risk calls into question the ability of financial regulators to stay one step ahead.[33] A disadvantage lies with its use of mathematical models.[34] In addition, whilst Basel II builds in a second pillar of a supervisory review process which requires regulators to ensure the soundness of banks' internal risk rating processes, it has been suggested that there is scope for bank "gaming and manipulation" of ratings as regulators at best, have information that is not as much as that of banks whilst banks have access to private risk-relevant information that can be excluded from the rating system presented to regulators.[35] Other dangers with meta-risk regulation involve meta-risk management seeking to leverage off firms' own systems and expertise in aid of reducing risks to the FSA's objectives rather than directly imposing detailed requirements on firms as to the design of their internal risk assessment and management strategies.[36]

The following section introduces the concept of 'Enforced Self Regulation'. According to this concept and contrasting with the command-and-control style of supervision, firms are still required to regulate but according to their own models. Having just discussed meta regulation, 'Enforced Self Regulation', a similar concept in that the individual firm's model is taken into consideration in regulating such firms, is introduced with a brief discussion on self-regulation.

3.3 State Regulation or Self – Regulation ?

"Decentring regulation" is used to express the notion that governments should not and do not have a monopoly on regulation and that regulation is now being carried out by other actors namely: large organisations, collective associations, professions, technical committees etc without government's involvement or even formal approval.[37] Decentring also refers to changes occurring within government and administration : the internal fragmentation of the tasks of policy formation and implementation.[38] Self-regulation fits into this analysis because it is a form of 'decentred' regulation as it is not state regulation.[39]

"Responsive regulation is distinguished (from other strategies of market governance) both in what triggers a regulatory response and what the regulatory response will be".[40] Ayres and Braithwaite also propose that regulation be responsive to industry structure – since different structures will be conducive to different degrees and forms of regulation.

The Enforced Self-Regulation Model is a form of responsive regulation whereby negotiation occurs between the State and the individual firms to establish regulations that are particularized to each firm.[41] In the Enforced Self-regulation Model, each firm is required to

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[32] ibid
[33] ibid
[34] Ibid p 38
[35] Ibid p 39
[36] ibid
[37] J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post – Regulatory' World (2001) in M. Freeman (ed) 103
[38] Ibid p 104
[39] Ibid p 113
[40] Ayres and Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford Union Press 1992)p 4
[41] Ibid p 101

propose its own regulatory standards in order to avoid harder (and less tailored) standards imposed by the State.[42] This individual firm is “enforced” in two senses :[43]

First the firm is required by the State to do the self-regulation. Second, the privately written rules can be publicly enforced. The proportion of self-regulation and rule-making by the firms permitted by the State is crucial and could lead to promoting or avoiding regulatory capture. Where more self-regulation is allowed than should be the case, then regulatory capture is likely to occur. This situation would not allow for sufficient accountability to the public and would be promoting private interests over public interests. Having delegated more responsibility and control than necessary to the firms, the State would not be monitoring and enforcing rules as effectively as it should. The system in the UK accountancy profession is more of a self-regulatory process – even though there is a mixture of state and self regulation. Self-regulation is not sufficiently enforced by the State as it should be. Therefore there is likelihood for abuse by the regulated. In reported cases, there has been lack of transparency within several accountancy organisations such as the Association of Chartered Certified Accountants[44]. In the UK High Court case of *AGIP (Africa) Limited v Jackson & Others (1990)1 Ch. 265,* the lack of accountability by regulators and the Institute of Chartered Accountants in England and Wales was highlighted.[45] The lack of authority of the Institute of Chartered Accountants in England and Wales (ICAEW) to examine files of accountants and to obtain evidence from non-UK sources was also illustrated.[46]

Enforced Self Regulation envisions that in particular situations, it will be more efficacious for the regulated firms to take on some or all of the legislative, executive and judicial regulatory functions.[47] Ayres and Braithwaite however stress that whatever particular regulatory functions should be “sub contracted” to the regulated firms would be dependent on the industry’s structure and historical performance and that delegation of legislative functions need not imply delegation of executive functions.
As mentioned earlier, the issue of monitoring is crucial in the model of Enforced Self-Regulation. In achieving the right mix of regulatory strategies, the right reallocation of regulatory resources would be important.[48] Direct government monitoring would still be necessary for firms too small too afford their own compliance groups.[49] State involvement would not stop at monitoring as violations of the privately written and publicly ratified rules would be punishable by law .[50]

Ayres and Braithwaite demonstrate that Enforced Self-Regulation might produce simple specific rules that would make possible both more efficient, comparable accounting and easier conviction of violators.[51] Exploring the strengths and weaknesses of the Enforced Self-Regulation Model would help to achieve an effective mix of state and self-regulation. The strengths of the Enforced Self-Regulation Model include the following:[52]

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[42] ibid
[43] ibid
[44] P Sikka, 'Policing Knowledge by Invoking the Law: Critical Accounting and the Politics of dissemination' p 11
[45] Ibid p 10
[46] ibid
[47] Ayres and Braithwaite, *Responsive Regulation: : Transcending the Deregulation Debate* p 103
[48] ibid at page 129
[49] Ibid p 106
[50] ibid
[51] C Hadjiemmanuil, 'Institutional Structure of Financial Regulation: A Trend Towards Mega regulators, United Kingdom: Full Consolidation as a Response to the Inefficiencies of Fragmentation' p 109
[52] ibid pp 110-116

i) Rules would be tailored to match the company.
ii) Rules would adjust more quickly to changing business environments.
iii) Regulatory innovation would be fostered.
iv) Rules would be more comprehensive in their coverage.
v) Companies would be more committed to rules they wrote.
vi) The confusion and costs that flow from having two rule books (the government's and the company's) would be reduced.
vii) Businesses would bear more of the costs of their own regulation.
viii) More offenders would be caught more often.
ix) Offenders who were caught would be disciplined in a larger proportion of cases than under the traditional government regulation.
x) It would be easier for prosecutors to obtain convictions.
xi) Compliance would become the path of the least corporate resistance.

Weaknesses of the Enforced Self-Regulation Model include :[53]

i) Regulatory agencies would bear costs of approving a vastly increased number of rules each year.
ii) State monitoring would sometimes be more efficient than private monitoring.
iii) Cooption of the regulatory process by business would be worsened.
iv) Companies would bear increased costs in delay and paperwork from getting new company rules approved.
v) Western jurisprudence might not be able to accommodate privately written rules being accorded the status of publicly enforced laws.
vi) Particularistic laws might weaken the moral force of laws that should be universal.
vii) The Model would encourage the trend to "Industrial Absolutism".
viii) Companies would write their rules in ways that would assist them to evade the spirit of the law.
ix) Companies cannot command compliance as effectively as government.
x) The independence of the compliance group could never be fully guaranteed.

Having considered the above, points (ii), (v), (viii) and (ix) of the weaknesses of the Enforced Self-Regulation Model would help decide what proportion of responsibilities should be delegated to the State. These weaknesses could be reduced through entrusting the State with more responsibilities. Enforced Self-Regulation should be a process where both the State and individual firms collaborate with sufficient mechanisms to ensure that self-regulation is enforced effectively. Entrusting the firm with too much control over rules it is able to write and insufficient monitoring by the State would obviously would not produce an effective outcome. More state based rules would ensure better compliance by firms in many cases and this would also reduce costs regulatory agencies bear in approving rules, reduce delay and paper work from getting new company rules approved and ensure greater independence of the compliance group (through greater involvement of state in the monitoring process). Courts have a very important role in the enforcement process and also in helping to achieve and implement responsive regulatory designs.

Choosing between state and self regulation is not that simple and there are various arguments for and against using either state or self-regulation. Pigon's 1938 statement on regulation views monopoly power, externalities and informational asymmetries as creating a

53 Ibid pp 120-125

"constructive role" for the government to help offset market failures and encourage social welfare.[54] This view is known as the helping hand view of government.[55] Those who do not agree with this view argue that governments do not frequently implement regulations to deal with market failures and this theory, known as the grabbing-hand theory also predicts that governments focussing more on strengthening private sector control of financial institutions namely banks, are more likely to promote development within these institutions than governments taking a more hands-on approach to regulation.[56]

3.4 Good Regulatory Policy

As it is difficult to choose between state regulation and self regulation and seeing that both have their merits, a combination of both would not be such a bad idea. The blurring distinction between banking, securities business and insurance and their global nature make it more difficult now for any regulator to fully comprehend such businesses – especially when such a regulator is external based.[57] Regulation can also assume many forms. Private regulation is sometimes used interchangeably with deregulation, free market or self-regulation whilst public regulation is used interchangeably with state and government regulation. However private regulation does not necessarily have to be self-regulatory as a set of rules could be followed by a private owned firm. State regulation in many cases involves external based regulatory procedures whilst self regulation attaches more weight to internal managerial control. For this reason, and due to the nature and complexity of financial conglomerates, there are merits to be considered from self-regulation.

Good regulatory policy could therefore be said to constitute an acceptance of the inevitability of some sort of symbiosis between state regulation and self regulation.[58] According to Rose – Ackerman (1988)[59], good regulatory policy should be a combination of self – regulation and state regulation. Issue relates to what proportion of self-regulation or state regulation should make up a good regulatory policy. This is of vital importance as proper delegation of a certain percentage of responsibilities to the state and individual institutions would reduce many of the disadvantages of the Enforced Self Regulation Model.

Ayres and Braithwaite also argue[60] that good policy analysis is not about choosing between the free market and government regulation nor deciding what the law should prescribe. They suggest that an understanding of private regulation, its interdependence with state regulation is required to achieve the mix of private and public regulation.

Achieving the right mix of private and public regulation is one of the greatest challenges encountered in designing a good regulatory policy. Ayres and Braithwaite[61] contend that there is no such thing as an optimal regulatory strategy and that there are just different strategies that have a mix of strengths and weaknesses. They go on to say that the appropriateness of a particular strategy depends on the legal, constitutional and cultural context and history of its

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[54] See JR Barth, G Caprio Jr, R Levine, 'Bank Regulation and Supervision: What Works Best?' pp 1-2

[55] ibid

[56] Ibid p 2

[57] See CAE Goodhart, *The Emerging Framework of Financial Regulation* (The Financial Markets Group of the London School of Economics 1998) 95-96

[58] I Ayres and J Braithwaite, *Responsive Regulation : Transcending the Deregulation Debate* (Oxford Union Press 1992) 3

[59] Ibid at p 3

[60] Ibid at p 3

[61] Ibid at p 101

invocation. Regulatory strategies should take into consideration the importance of management responsibilities, both individual and corporate. The quality of the FSA's staff has been named as one of the crucial elements to its success. Apart from management failures which contributed to the controversy surrounding Equitable Life[62], its risk-based system of supervision (as opposed to a rule-based system), requires a light touch.[63] This involves mutual agreement as to what risks are being run and trusting top management rather than prescribing strict and rigid ratios and for this reason, requires skilled staff.[64] The FSA has taken a huge step in the direction of greater consideration of the importance of management responsibilities through its anticipation of a principles based system of regulation.

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[62] Equitable Life, a British life insurer firm was allowed by the FSA to write new business even though it had too few resources to guarantee future payments. For more on this, see "The Financial Services Authority : Too big for its suits?" *The Economist* November 15th 2001 <http://www.economist.com/displaystory.cfm?story_id=866271>

[63] "The Financial Services Authority : Too big for its suits?" *The Economist* November 15th 2001 <http://www.economist.com/displaystory.cfm?story_id=866271>

[64] ibid