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Responsive Regulation: Achieving the Right Balance Between Persuasion and Penalisation

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Responsive Regulation: Achieving the Right Balance Between Persuasion and Penalisation

Abstract:

This paper not only considers the regulatory challenges faced by regulators, but also the potential of responsive regulation and particularly meta regulation to address these challenges. It explores developments which have necessitated a change from the traditional form of regulation, that is, command and control regulation to more responsive hybrids of regulation. Even though traditional regulation has its advantages, its inability to address the demands of changing business environments has resulted in the adoption of more flexible forms of regulation such as risk based regulation and responsive regulation. Whilst the potential of responsive regulation is considered, the complexities and challenges faced by the regulator in identifying and assessing risk, solutions aimed at countering problems of risk regulation, along with the problems arising from different perceptions of risk will be addressed only briefly.

Introduction

The challenges faced by regulators *inter alia* include the difficulties in addressing the problem of uncertainty generated by non prescriptive rules. Such uncertainty regarding the required level of minimum compliance could result in some companies going beyond what is actually required in complying with such rules.¹ A consequence of the uncertainties regarding what is required by the law and the strong incentive to ensure compliance, which includes increased penalties, is evidenced by the difficulty in distinguishing between “beyond compliance” and “over compliance”.² According to Gunningham and Johnstone, the encouragement given to organizations to go beyond strict legal requirements, constitutes an important benefit of more flexible and less prescriptive models of regulation.³ Gunningham also asserts that the unsatisfactory performance of both direct government regulation and market deregulation has compelled a review of present regulatory strategies, hence resulting in an experimentation with alternative mechanisms such as economic instruments, self-regulation, co regulation and a range of information based strategies.⁴ In his opinion, the design of a “third phase” of regulation, one which still involves government intervention, but selectively and in addition to a range of market and non market solutions, will be required in order to address the inefficiencies of traditional regulation, on one hand, and the flaws inherent in deregulation on the other hand.⁵

¹ See F Haines and D Gurney ‘Regulatory Compliance: The Problems and Possibilities in Generic Models of Regulation’ in ‘Regulation: Enforcement and Compliance’ R Johnstone and R Sarre (eds) (2004) Research and Public Policy Series No 57 at page 24

² *ibid* at page 24; also see BH Kobayashi ‘Antitrust, Agency and Amnesty: An Economic Analysis of the Antitrust Laws Against Corporations’ (2001) *George Washington Law Review* 69 (6) 715-744

³ N Gunningham and R Johnstone *Regulating Workplace Safety: Systems and Sanctions* 1999 Oxford: Oxford University Press at page 35

⁴ N Gunningham and P Grabosky *Smart Regulation: Designing Environmental Policy* (1998) Oxford : Clarendon Press at page 35

⁵ *ibid* at page 10

Interactions between states and markets

Legal regulation

The occurrence of interactions between states and markets does not take place in a vacuum.⁶ Such interactions determine the position assumed by legal regulation.⁷ The characterisation of different types of law has occurred on the basis of reference to their "location in space".⁸ Legal pluralism, which is generally perceived to be a prominent form in globalisation, refers to "geographical or metaphorical notions of space in its conception of law."⁹

A consideration of legal regulation as state-market interactions simply does not generate analytical questions which relate to the nature of these interactions, but also prescriptive questions, namely, the degree of state intervention and market ordering required for the facilitation of effective regulation.¹⁰

Changes in state-market relationships are reflected through: Gradually blurred lines between states and markets, which is attributed to the privatization of states and the dominance of markets by powerful corporate actors.¹¹ Further, in response to changing state-market relationships, modern forms of legal regulation have developed.¹²

The privilege of the inclusion of state-economy interactions in considering legal regulation derives from the definition of legal regulation, which can be defined as the regulation of economic activities.¹³

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.¹⁴ Decentring also refers to changes occurring within government and administration : the internal fragmentation of the tasks of policy formation and implementation.¹⁵ Self-regulation fits into this analysis because it is a form of 'decentred' regulation as it is not state regulation.¹⁶

The responsive approach (to regulation) proposed by Ayres and Braithwaite involves a process whereby regulators proceed with compliance based strategies and then resort to more punitive "deterrents" when the desired level of compliance is not achieved.¹⁷ In their opinion, this is a more preferable option to the positions supported either by those who believe that "gentle persuasion works in securing business compliance with the law"¹⁸ and those who only consider that corporations would only comply with the law where tough sanctions were applied. Greater regulatory challenges, in their

⁶ B Lange 'Regulatory Spaces and Interactions: An Introduction' Sage Publications (2003)12 (4) 413

⁷ ibid

⁸ ibid at page 414

⁹ ibid

¹⁰ ibid at 416

¹¹ See B Lange 'Regulatory Spaces and Interactions: An Introduction' Sage Publications (2003) 12 (4) 413

¹² ibid

¹³ See S Picciotto 'Introduction: Reconceptualizing Regulation in the Era of Globalization' in D Campbell and S Picciotto (eds) 'New Directions in Regulatory Theory', special issue of the *Journal of Law and Society* 29(1) 1-11

¹⁴ J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post – Regulatory' World (2001) in M. Freeman (ed.) 103

¹⁵ Ibid p 104

¹⁶ Ibid p 113

¹⁷ I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1995) Oxford: Social Legal Studies at page 101

¹⁸ ibid at page 20

view, were to be found, not at the apex of the pyramid of regulatory strategies, nor at the base of the pyramid, but at the intermediate levels of the pyramid of regulatory strategies.¹⁹ Such intermediate sections, thus, were in greatest need of regulatory innovation.

With the responsive approach, it is assumed that regulation would always commence at the base of the pyramid. 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.²⁰ In the Enforced Self-regulation Model, each firm is required to propose its own regulatory standards in order to avoid harder (and less tailored) standards imposed by the state.²¹ This individual firm is “enforced” in two senses:²²

First the firm is required by the State to do the self-regulation. Second, the privately written rules can be publicly enforced. Governments are advised to resort to “command regulation with non-discretionary punishment” only after having considered, firstly, the provision of solutions which are self regulatory to industries, and where the relevant goals were not achieved under this option, the subsequent adoption of a more rigorous approach of “command regulation with discretionary punishment” through enforced self regulation.²³ As a result of the susceptibility of states to capture and corrupt related activities in business, it is of immense importance for third parties, non government organisations particularly, to be directly involved in the oversight of regulatory enforcement.²⁴ As well as this function of acting as a safeguard against the capture of state regulators, non government organisations can also directly regulate businesses themselves through schemes which they oversee.²⁵ Responsive regulation considers the role of non government organisations as regulators to be so fundamentally important, in the same way that businesses play a vital role as regulators – as well as regulatees.²⁶

Although the ‘pyramid of regulatory strategies’ is directed at individual regulated firms, a parallel approach is applied by Ayres and Braithwaite to entire industries.²⁷

Enforced self regulation was not only proposed as a means of striking a balance between the advocates of “gentle persuasion” works best and those who favor tougher measures, but also considered to be of greatest need at the intermediate levels of the pyramid of regulatory strategies²⁸. In striking this balance between compliance and enforcement measures, Ayres and Braithwaite contribute to resolving regulatory difficulties faced by regulators, of when best to apply either compliance or punitive measures, and in situations where the use of excessive punitive deterrent measures could conceal harsh treatment of less significant regulatees. According to Baldwin and Black, Ayres and Braithwaite acknowledge the possible difficulties of moving down the regulatory pyramid since relationships between regulators and regulatees, which are foundations for less punitive strategies, could be influenced through the application of overly punitive sanctions.²⁹ Furthermore, ‘voluntary’ compliance

¹⁹ *ibid* at page 101. A range of certified punitive strategies exist at the apex of the pyramid whilst experience of the successes and failures of the free market and of self regulation (aimed at protecting consumers) can be found at the base of the pyramid, *ibid*

²⁰ *ibid* p 101

²¹ *ibid*

²² I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1995) Oxford: Social Legal Studies at page 101

²³ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 5

²⁴ See J Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006) *World Development* Volume 34 No 5 at page 888

²⁵ *ibid*; also see Ayres and Braithwaite, *Responsive Regulation*, chapter 3.

²⁶ *ibid*

²⁷ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 5

²⁸ Ayres and Braithwaite, *Responsive Regulation* at page 101

²⁹ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 6

at the base of the pyramid could be rendered extremely difficult as a result of constant threat of punitive measures at the top.³⁰

Further criticisms directed at the pyramid approach, in addition to the above mentioned criticism, can be classified into three groups, namely, “the policy” or “conceptual”, “the practical” and “the constitutional”.³¹ Legal problems which exist in applying a responsive approach may arise from the fact some legislatures may have stipulated deterrence procedures which may leave little scope for the enforcement agency in adopting such an approach.³² Furthermore, responsive regulation would be difficult to implement in corrupt societies since it encourages situations whereby discretion is given to bureaucrats who may exploit such discretion for purposes aimed at promoting their own interests.³³

The incentive structures which exist within a firm become very crucial in issues involving voluntary or involuntary compliance. Whilst it has been observed by some³⁴ that good regulatory practice should focus on outcomes of regulatory objectives, rather than compliance with prescriptive rules, the concern relating to whether compliance is ‘voluntary’ or ‘involuntary’ appears to be of irrelevance as long as compliance is ultimately achieved. Nevertheless, compliance is vital, hence the need for direct monitoring by the State or government.

Three fundamental elements exist in implementing responsive regulation.³⁵ The first of these consists of disapproval which is systematic, fairly directed and explained in its entirety. The second element combines such disapproval with a respect for regulatees, whilst the third consists of increased intensification of regulatory response in situations where the regulator has tried considerably, but without success, to meet those standards which are required.

Advantages of Traditional Regulation

Although command and control regulation has been criticized for its rigidity, such rigidity having contributed to economic inefficiency, Latin suggests that this approach has advantages.³⁶ Furthermore, these advantages extend beyond those advantages identified with more tailored and flexible instruments.³⁷

-”decreased information collection and evaluation costs, greater consistency and predictability of results, greater accessibility of decisions to public scrutiny and participation, increased likelihood that regulations will withstand judicial review, reduced opportunities for manipulative behavior by agencies in response to political or bureaucratic pressures, reduced opportunities for obstructive behavior by regulated parties, and decreased likelihood of social dislocation and “forum shopping”

³⁰ *ibid*

³¹ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 6 and for further criticisms, see *ibid*.

³² *ibid* at page 9

³³ See J Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006) *World Development* Volume 34 No 5 at page 896

³⁴ See F Haines and D Gurney ‘Regulatory Compliance: The Problems and Possibilities in Generic Models of Regulation’ in ‘Regulation: Enforcement and Compliance’ R Johnstone and R Sarre (eds) (2004) *Research and Public Policy Series No 57* at page 19; P May and R Burby ‘Making Sense Out of Regulatory Enforcement’ *Law and Policy* 20 (2) 157-182, J Black ‘Rules and Regulators’ *Journal of Law and Society* 26 (2) 215-239 (1997) Oxford: Clarendon Press

³⁵ See R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 6, and also J Braithwaite, *Responsive Regulation and Restorative Justice* (2002) Oxford: Oxford University Press

³⁶ N Gunningham and P Grabosky *Smart Regulation: Designing Environmental Policy* (1998) Oxford: Clarendon Press at page 42

³⁷ *ibid*; also see H Latin ‘Ideal versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine Tuning” Reforms’ (1985) 37 *Stanford Law Review* at page 1271

resulting from competitive disadvantages between geographical regions or between firms in regulated industries”.-³⁸

The ability to define the expected behavior of regulatees with immense clarity, constitutes the major strength of command and control regulation.³⁹ Not only does this enable breaches of the legal standard and legal enforcement to be identified in a relatively straight forward manner, it defines limits of regulators’ operations which enables the firms to have a clearer understanding of their regulatory obligations.⁴⁰

Addressing the Deficiencies of Traditional Regulation

“Responsive regulation is distinguished (from other strategies of market governance) both in what triggers a regulatory response and what the regulatory response will be”.⁴¹ 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.⁴² According to Baldwin and Black⁴³, in order to be “really responsive”, regulators are required to be responsive - not only to the level of compliance of the regulatee, but also to the frameworks within the firms – both operating and cognitive, to the environment which encompasses the regulatory regime, which is broader and institutional, to the different ways whereby regulatory tools and strategies operate, to the performance of the regime and ultimately, to changes which exist within each of the mentioned elements. Regulation, it is argued, is responsive when it knows its regulatees and its environments, when it is capable of coherently organizing different and new regulatory modes of reasoning, when it is sensitive to performance and when it recognizes what its changing challenges are.⁴⁴ Baldwin and Black’s opinion of what is really responsive would have to take into consideration the growing impact of risk.⁴⁵

Gunningham advances the argument that the deployment of a range of regulatory actors to implement combinations of “policy instruments”, which are tailored to individual goals and circumstances, will generate more effective and efficient policy outcomes and that this approach should reduce the regulatory burden on government, thereby liberating scarce resources for apportionment to those areas which are in greatest need of government intervention.⁴⁶ Greater focus is also placed on the ability of second and third parties - be it business, commercial or non commercial third parties- to act as quasi regulators who would complement or act as substitutes for government regulation in particular situations.⁴⁷ Proposals are advanced whereby a set of principles and policy prescriptions can be designed to achieve a “regulatory mix”.⁴⁸

Self regulation and Co regulation

The exercise of control by a group of firms or individuals, over its membership and their behaviour can be considered as self-regulation.⁴⁹ Variables of self regulation consist of the governmental nature

³⁸ ibid

³⁹ N Gunningham and P Grabosky *Smart Regulation: Designing Environmental Policy* (1998) Oxford : Clarendon Press at page 42

⁴⁰ ibid at page 41

⁴¹ Ayres and Braithwaite, *Responsive Regulation* p 4

⁴² ibid

⁴³ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at pages 3 and 4

⁴⁴ ibid

⁴⁵ See M Ojo ‘The Growing Importance of Risk in Regulation’ Munich Personal Archive (2009) < <http://mpra.ub.uni-muenchen.de/13723/>>

⁴⁶ N Gunningham and P Grabosky *Smart Regulation: Designing Environmental Policy* (1998) Oxford : Clarendon Press at page 15

⁴⁷ ibid

⁴⁸ See ibid at page 19

⁴⁹ See R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford

of self-regulation, the level of involvement of self regulators and the extent of the binding legal force which is connected to self-regulatory rules.⁵⁰ Claims in favour of self regulation or the incorporation of components of self regulation into governmental regulation are based on arguments related to expertise and efficiency.⁵¹

“Coregulation, as distinct from enforced self-regulation, is usually taken to mean industry-association self-regulation with some oversight and/or ratification by government.”⁵² It is distinguished from enforced self regulation in that with enforced self regulation, negotiations which are aimed at establishing regulations that are tailor made to each firm, take place between the state and individual firms.⁵³

Meta Regulation

Why Meta Regulatory Strategies Could Be the Most Responsive Forms of Regulation

Regulation may be regarded as a response to risk⁵⁴ and the control of risks can be considered to be the main concern of regulation.⁵⁵ “The regulatory state is becoming a risk management state”⁵⁶. Ulrich Beck argues that whilst the standard way of risk regulation in modern societies was well suited for such societies, it is not responsive enough to our “post modern” societies.⁵⁷ Risk is, as a result, inefficiently controlled at too high a cost.⁵⁸ Recent years have witnessed growing acceptance of the fact that the efficiency of regulation will be enhanced where a collaboration with private control systems exists.⁵⁹ By utilising activities which relate to private internal control systems for purposes

University Press at page 125

⁵⁰ *ibid* at pages 125 and 126

⁵¹ *ibid* at page 126; In relation to expertise, it is usually advanced that self-regulatory bodies possess greater expertise than is the case with independent regulation. Efficiency is also a ground put forward by proponents of self regulation in that self regulation emphasizes the ability of self regulation to generate controls in an efficient manner – since there is greater accessibility to those being controlled. Furthermore, self regulators are able to acquire information at lower costs, incur low monitoring and enforcement costs and can easily adapt their regimes to changing industrial conditions; *ibid* at page 127.

⁵² P Grabosky and J Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies*, (1986) Oxford University Press, Melbourne at page 83

⁵³ See also I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1995) Oxford: Social Legal Studies at page 101 and R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press at pages 125-127

⁵⁴ 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

⁵⁵ R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press at page 138

⁵⁶ M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page 23 and also see B Fischhoff, SR Watson and C Hope ‘Defining Risk’ *Policy Sciences* 17 (1984)

⁵⁷ See U Beck, *Risk Society: Towards a New Modernity* (1992) London: Sage Publications and also M Lassagne and B Munier, ‘The Move Towards Risk-Based Regulation and Its Impact on Operational and Strategic Management’ see <<http://www.cireq.umontreal.ca/activites/050930/papers/munier.pdf>> (last visited 17th March 2009) According to Ulrich Beck and other sociologists’ considerations of the “risk society”, nature does not play a role in generating risks in the sense that risks are no longer the consequence of external or uncontrollable factors such as “force majeure” but are generated through man made decisions. Cultural theorists however, argue that attitudes to risk differ according to cultural preferences. See R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press at page 141. Also see M Douglas *Risk and Blame* (1992) London

⁵⁸ It can be observed from daily occurrence that more attention should be devoted to recent evolution toward risk based regulation, examples of which can be found in recent European and partly Western-rule setting as illustrated by the Basel II agreement on the regulation of risks in banking and the European Commission White Paper on how to regulate risk in the chemical industry. For more information on this, see M Lassagne and B Munier, ‘The Move Towards Risk-Based Regulation and Its Impact on Operational and Strategic Management’ <<http://www.cireq.umontreal.ca/activites/050930/papers/munier.pdf>> (last visited 17th March 2009)

⁵⁹ M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page

which are of public regulatory nature, regulators are not only able to relieve themselves of the cumbersome work which derives from rule making, but are also able to concentrate on the oversight of the functioning and design of local systems.⁶⁰ ‘Enforced self regulation’, ‘regulated self-regulation’ and ‘meta regulation’ are various forms which a responsive model may assume and such a model assigns a central role to internal control systems.⁶¹ Basel II bank regulation reforms constitute an example of meta regulation.

Meta regulation is referred to as the regulation of self regulation⁶² whilst meta risk management implies the risk management of risk management. Traditionally risk management, to a large extent, has focused on complying with current rules.⁶³ It has great potential especially in situations where risks are volatile and where the regulator is not in a position to comprehend such risks.⁶⁴ However maximum realisation of such potential can only occur only where such risks are within the control of an enterprise where the regulator holds an influential position.⁶⁵

As mentioned previously, over the years, there has been a trend towards greater regulation of business management processes and strategies of regulated firms through regulatory tools which address the role of senior managements of firms and directly regulate individuals within firms.⁶⁶ According to Fiona Haynes, meta regulation “with its collaborative approach to rule generation”, could controversially be considered to be the approach with greatest evolution when considered in relation to other approaches such as co-regulation, enforced self regulation and process or management-based regulation.⁶⁷ Meta regulation is a method which is capable of managing “self regulatory capacity” within those sites being regulated whilst exercising governmental discretion in stipulating the goals and levels of risk reduction to be achieved in regulation.⁶⁸ Processes and procedures for risk management are developed, not only by key stake holders, but also by personnel within these organisations.⁶⁹ This takes place whilst ensuring that “pro-compliance motivational postures” are generated within the site being regulated such that the goal of the regulator, that is, risk reduction, is achieved.⁷⁰ The success of the implementation of meta regulation is based on the regulator and regulated organisation’s understanding of risk priorities in the same manner.⁷¹ Meta regulation is advantageous particularly where there are complex causes of harm, which also require constant monitoring.⁷²

However, problems exist in establishing the cause of regulatory responsibility – be it individual or organisational. *Legal and General Assurance Society v FSA (Financial Services Authority)* highlighted how the more holistic focus which meta regulation has on systemic failures on the part of

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⁶⁰ *ibid*

⁶¹ *ibid*; Also see E Rosa, ‘Meta Theoretical Foundations For Post Normal Risk’ *Journal of Risk Research* 1 (1998)

⁶² See the penultimate chapter of Christine Parker’s book, C Parker *The Open Corporation: Effective Self-Regulation and Democracy*. 2002 Cambridge: Cambridge University Press

⁶³ M Lassagne and B Munier, ‘The Move Towards Risk-Based Regulation and Its Impact on Operational and Strategic Management’ see <http://www.cireq.umontreal.ca/activites/050930/papers/munier.pdf> (last visited 17th March 2009)

⁶⁴ J Braithwaite, *Meta Risk Management and Responsive Governance Paper to Risk Regulation, Accountability and Development Conference*, University of Manchester, 26-27 June 2003 at page 1

⁶⁵ *ibid*

⁶⁶ J Gray and J Hamilton, *Implementing Financial Regulation* (John Wiley and Sons Ltd 2006 at page 2

⁶⁷ F Haines, ‘Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster’, *Law and Social Inquiry* (2009) 39 (forthcoming) at page 3

⁶⁸ *ibid* at page 1

⁶⁹ *ibid* at page 3; Also see C Parker *The Open Corporation: Effective Self-Regulation and Democracy*. 2002 Cambridge: Cambridge University Press

⁷⁰ *ibid*

⁷¹ F Haines, ‘Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster’, *Law and Social Inquiry* (2009) 39 (forthcoming) at page 17

⁷² *ibid* at page 1

firms, rather than their specific acts or omissions, is starting to influence the ways of approaching issues of causation in the framework of regulatory responsibility.

The increasing popularity of internal control systems has been an express feature of risk management.⁷³ Primary or real risks⁷⁴ are translated by internal control systems into systems risks such as early warning mechanisms and compliance violation alerts.⁷⁵ As a result, many risks are capable of being and are being “operationalised” as organisational processes of control.⁷⁶ Such transformation is a pre requisite for the feasibility of risk based regulation – which will be discussed in the final section of this article.⁷⁷

Good Regulatory Policy and Successful Regulatory Design

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.⁷⁸ 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.

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.⁷⁹ Direct government monitoring would still be necessary for firms too small too afford their own compliance groups.⁸⁰ State involvement would not stop at monitoring as violations of the privately written and publicly ratified rules would be punishable by law .⁸¹

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.⁸²

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.⁸³ According to Rose – Ackerman (1988)⁸⁴, 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.

⁷³ M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page 24

⁷⁴ Primary risks, for example financial loss are distinguished from secondary risk (reputational risk) see *ibid* at page 32

⁷⁵ *ibid* at page 24

⁷⁶ *ibid*

⁷⁷ *ibid*

⁷⁸ Ayres and Braithwaite, *Responsive Regulation* p 103

⁷⁹ I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford Union Press 1992) 129

⁸⁰ *Ibid* p 106

⁸¹ *ibid*

⁸² C Hadjiemmanuil, 'Institutional Structure of Financial Regulation: A Trend Towards Megaregulators, United Kingdom: Full Consolidation as a Response to the Inefficiencies of Fragmentation' p 109

⁸³ I Ayres and J Braithwaite, *Responsive Regulation : Transcending the Deregulation Debate* (Oxford Union Press 1992) 3

⁸⁴ *Ibid* at p 3

Ayres and Braithwaite also argue⁸⁵ 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 in designing a good regulatory policy. Ayres and Braithwaite⁸⁶ 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 invocation.

Gunningham and Sinclair⁸⁷ propose two vital components of a successful regulatory design namely, regulatory design principles⁸⁸ and instrument mixes.⁸⁹ Regulatory processes are classified into four namely:⁹⁰ Identification of the desired policy goal(s) and tradeoffs necessary to achieve it, identification of the unique characteristics of problem being addressed, identification of the range of potential regulatory participants and policy instruments and identification of opportunities for consultation and public participation.

Regulatory principles are classified into five namely:⁹¹ Prefer policy mixes incorporating a broader range of instruments and institutions, prefer less interventionist measures which include the principle of low interventionism, ascending a dynamic instrument pyramid to the level required to achieve policy goals – including building in regulatory responsiveness, empowering participants which are best placed to act as quasi regulators – including the application of the principle of empowerment and maximizing opportunities for win-win outcomes – including the consideration of whether firms will voluntarily go beyond compliance. Instrument mixes⁹² are broadly classified into those which involve inherently complementary activities⁹³, inherently counter productive instrument combinations, sequencing instrument combinations⁹⁴, combinations where outcome will be context specific and multi instrument mixes.

Responsive regulation v risk based regulation

Theoretically, regulatory regimes can become more responsive to the self-organisation of regulatees regardless of whether such regulates are banks or local government service providers.⁹⁵ Risk based regulation, in Power's view, is considered to be a blue print for the "risk management state".⁹⁶

In comparison to responsive regulation, risk based regulation is relatively new.⁹⁷ A risk based approach to regulation, particularly enforcement, was recommended by the Hampton Review in March

⁸⁵ Ibid at p 3

⁸⁶ Ibid at p 101

⁸⁷ See concluding chapter 'Designing Environmental Policy' by N Cunningham and D Sinclair in N Gunningham and P Grabosky *Smart Regulation: Designing Environmental Policy* (1998) Oxford : Clarendon Press

⁸⁸ ibid at pages 387-419

⁸⁹ ibid at pages 422- 448

⁹⁰ see ibid at pages 378-385

⁹¹ supra note 88

⁹² supra note 89

⁹³ These include voluntarism and command and control regulation, self-regulation and command and control, command and control regulation (or self regulation) and supply side incentives, command and control (or self regulation) and broad based economic instruments (which target different aspects of a common problem), liability rules and command and control (or self regulation)

⁹⁴ These include self regulation and sequential command and control, self regulation and sequential broad based economic instruments

⁹⁵ M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page 21

⁹⁶ ibid

⁹⁷ See H Rothstein, M Huber and G Gaskell, ' A Theory of Risk Colonisation' (2006) 35 (1) *Economy and Society* at page 91

2005.⁹⁸ In the aftermath of the Hampton Review, ‘risk based’ regulation has been implemented primarily through inspection and enforcement procedures which are derived through an examination of risks posed by a regulated person or firm to a regulatory agency’s objectives.⁹⁹

Risk based regulation has been adopted by several regulatory agencies as a means of organising resource allocation, managing limited resources and concentrating those resources where they are needed most - for example, in cases involving banks with weak internal controls.¹⁰⁰ Such an approach is strategic and goal oriented at the same time.¹⁰¹ The link between risk and strategy is vital in advertising new regulatory approaches and risk management, and would also improve communication between the regulator and the regulated.¹⁰²

Responsive regulation is distinguished from risk based regulation since the latter focuses on analysis and targeting rather than a “process of responsive escalation”¹⁰³. Whilst the framework of risk based approaches not only enables regulators to relate enforcement-related activities to the achievement of objectives, but also allows for the targeting of resources in such a way which prioritises the highest risks, the main controversial issue surrounding risk based regulation relates to inspection.

Furthermore, risk based regulation is an embodiment of the idea that regulatory failures are possible – in contrast with the concept of zero tolerance.¹⁰⁴ Whilst some events can be classified as being of “zero-tolerance” nature, such an event as that of the fall of Equitable Life, which could be considered as ‘tolerable’ from the perspective of a systemic financial risk, in fact, generated life changing catastrophic consequences for many.¹⁰⁵

Other problems which relate to risk based regulation derive from the fact that “drivers of action” are short term random and irrational considerations, focus is not necessarily given to the most important risks, there is likelihood that risk based systems will tend to neglect lower levels of risk, which may aggregate to risks which are of immense and dangerous proportions.¹⁰⁶

Conclusion

The focus on internal controls and increasingly greater focus on risk management can be attributed to an increasingly volatile financial environment and the emergence of complex financial products (for example, derivatives). Whilst such factors necessitate the need for risk management, several consequences emanate from an excessive operation of risk management, namely¹⁰⁷: Reliance on internal controls may increase risk if it leads to an undermining of the knowledge of risk in other areas; despite the benefits of risk management, concerns are generated due to the fact that secondary

⁹⁸ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 12

⁹⁹ *ibid*

¹⁰⁰ M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page 21

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at page 12

¹⁰⁴ See M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page 22

¹⁰⁵ *ibid*

¹⁰⁶ R Baldwin and J Black, ‘Really Responsive Regulation’ LSE Law, Society and Economy Working Papers 15/2007 at pages 13-14

¹⁰⁷ see M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at page 50- 58; “Soft management systems” which are able to address uncertainties need to be designed and a balance should be struck between the role of calculative methods and other softer forms such as images and normative.

risk management has become an accepted “organisational common sense”¹⁰⁸ - reflecting the society’s loss in faith in its professions and public organisations.¹⁰⁹ According to Baldwin and Cave, the first regulatory challenge faced by regulators consists in the identification of risks that need to be reduced – not only on the basis of priority, but also in a way which would be approved by the public.¹¹⁰ Secondly, regulators are confronted with the challenge of managing and regulating risks in a way which is both effective and acceptable.¹¹¹ Furthermore, the design of institutions and techniques for managing risk, the choice of the appropriate regulatory technique, issues relating to whether risk management or regulation should be “blame oriented” and the contentious topic of reliance by risk managers on qualitative risk evaluations in contrast to more quantitative methods of assessments constitute additional challenges.¹¹²

In spite of the above mentioned consequences and challenges, the ability of responsive regulation to address with greater efficiency, a complex¹¹³ factor such as risk, its flexibility and responsiveness to regulatees and its environment among other advantages, make it a more desirable regulatory tool than traditional regulation or risk based regulation. Whilst direct monitoring by the State would be required, the involvement of third parties such as non government organisations would also be crucial to ensuring that a situation, whereby the State could be captured, is avoided. Furthermore the possibilities available in achieving the right “regulatory mix” make it a promising regulatory tool. Even though the contested nature of risk contributes to the difficulty of relying on risk as a regulatory tool, its presence and ever growing significance cannot be ignored – hence the need for a form of regulation which is able to manage risk more effectively and which would best suit an evolving regulatory environment.

¹⁰⁸ See also D Marquand, *The Decline of the Public* Cambridge: Polity Press 2004

¹⁰⁹ The close association between organizational governance and risk management exacerbates this position. Furthermore, Power argues that to move beyond such “risk management driven privatization of the public sphere”, a new idea of risk which incorporates types of leadership at state, regulatory and corporate levels, and which is able to develop a language of risk, understood by the public and which expressly allows for the possibility of failure without this being understood as a way of “passing the buck”, will be required, see M Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty* 2004 Demos at pages 57 and 58

¹¹⁰ R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press at pages 142 and 143

¹¹¹ *ibid* at 143

¹¹² *ibid* at 144

¹¹³ According to Baldwin and Cave, risk regulators encounter problems with the search for legitimation as a result of differences between the lay and experts’ perceptions of risk. For additional information on what could be done to improve the effect of legitimating arguments and solutions advanced to counter problems of risk regulation, see R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) Oxford University Press at pages 145 –149. For problems with defining and assessing risk, see page 138 *ibid*