

Regulatory Tools

Literature Review

Regulatory tools are explicit state interventions in PPP processes in pursuit of specific societal outcomes not achievable through normal market-based or incentive mechanisms (OECD, 2010). The tools and instruments available are diverse; legislation, licenses, circulars, permits, regulations, registrations, administrative guidelines, directives and codes of practice, which collectively shape a complex regulatory architecture for society to understand, use and abide by (Seik, 1996). Black (2008), however, suggests that regulation is far more expansive and encompassing than just laws and rules, forming part of wider governance and institutional processes within which policy and decision-making occurs. Yet the very complexity of globalised society and markets within which regulation now exists, brings with it attendant risks of regulatory systems failure (Freiberg, 2010).

Freiberg (2010: 24) presents a powerful taxonomy of regulatory tools within which we can start to understand and unpack the complex nature of regulatory environments. It is to this framework that attention now turns and where we complement the arguments with further literature.

Economic Regulation

Economic regulation requires market intervention to protect the public interest due to market failure (Stigler, 1971). Here, natural monopolies and external costs (environmental externalities) are the most prominent examples. In the UK context, regulatory agencies are established to address potential abuses; the creation of OFWAT and OFGEM, Environment Agency and Natural England as agencies with taxes, grant payments or tradeable permit schemes as potential response tools. There are, however, inherent risks of regulatory capture where powerful private interests influence these agencies as a way of enhancing profits (Peltzman, 1976).

Transactional Regulation

Freiberg (2010: 8) views this as the privatisation and contractualisation in the delivery of public policy. This forms a central plank of contemporary UK government policy enabling local communities to take over local services and assets under the localism banner e.g. Localism Act (2011) and Public Services Act (2012). However, transactional regulation does not require direct legislative authority and rests primarily on the general concepts of contract law. Agri-environment payments, for example, under the Rural Development Regulation, are implemented by the UK government within EU rules.

Authorization as Regulation

Authorization protects the public interest by the state authorising particular activities, premises or products through tools associated with licensing, permission, registration, certification, accreditation and litigation. For example, supply chain stewardship schemes certify that products of services meet published sets of standards. The Forest Stewardship Council (FSC) requires certification from sustainable and equitable forestry practices rights through to manufacture of finished forest-derived products; whilst in farming, the Organic Soil Association standard is well-known and independently verified (Everard, 2012).

Structural Regulation

Structural regulation involves limiting choice and influencing behaviour so that people act in accordance with the desired regulatory 'zoning' or face sanctions. The design of the built environment, through access routes and public space, directly influences peoples' behaviour; green belt zoning affects land use decisions whilst more subtle influences of urban design and behavioural responses are evident in Hamilton-Baillie and Jones' (2005) work on crime reduction and anti-social behaviour.

Informational Regulation

Information is an indirect regulatory tool enabling people to make improved decisions. For example, disclosure (e.g. fat content in food; surgeons mortality rates; school league tables) provide mechanisms to help people make informed choices. In the context of PPPPs, Impact Assessment (IA), Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) form part of the policy appraisal family of tools that seek to inform and support the development and implementation phases of legislation and PPPPs (Eftec, 2010). In effect, these tools provide a solid foundation on which to build more robust decisions. Despite these aims, there is significant evidence which suggests that these support tools have had a limited effect (IEMA, 2011); for example, issues of resources and time available with many decisions made outside SEA and IA frameworks (Sheate, 2012). There are also concerns that these tools are seen as hurdles to jump through rather than as useful, supporting processes (Eales and Sheate, 2011).

Legal Regulation

Legal regulation involves the use of 'standards' (emission, product controls, process and equipment standards), planning and building controls (building regulations). Standards ensure that minimum requirements are complied with as a means of regulating performance. Whilst this provides 'adequate' solutions, they are essentially limiting 'negative' aspects of an activity rather than promoting good practice. Furthermore, they can also restrict behaviour based on their primary function. For example, building regulations, with their focus on safety, have been criticised for a lack of emphasis on quality. The Passivhaus (2013) standard provides an interesting response to this.

Embedding the Ecosystem Approach and Ecosystem Services into Regulation

There is significant interest in embedding the Ecosystem Approach into regulation. For example, the UK's Natural Environment White Paper, EU Biodiversity Strategy, the International Convention on Biological Diversity and the National Planning Policy Framework, represent a vanguard of efforts to increase consideration of these issues within governmental policies (Baker *et al.*, 2013). The adoption of ecosystem services focussing on benefits means that the environment can be incorporated positively into decision-making and this taxonomy helps improve the value component which has suffered under market failure conditions in decision-making (Baker *et al.*, 2013).

The recent review of the EIA Directive proposes the inclusion of ecosystem services in the topics EIA must consider - though only those derived from biodiversity (Annex IV (4)). This directness is one of the potential strengths of regulatory tools in this area, though as seen in the proposed amendment Directive (COM (2012) 628 final), in the inclusion of 'biodiversity and the ecosystem services it provides a potential concern if the definitions are inadequate or even simply wrong (for example ecosystem services are not only derived from biodiversity).

Baker *et al.* (2013) identify two factors leading to this interest in incorporating ecosystem services into regulatory tools:

- using ecosystem services presents a more complete, holistic and integrated consideration of the socio-ecological system;
- the ecosystem services concept is an effective framing of the environment in terms of communicating with and influencing stakeholders and decision-makers.

Crucially, these two factors address some of the weaknesses of in the regulatory arena. For example, the issues around unintended consequences and cumulative impact. This is not necessarily a simple process as highlighted in Sheate *et al.* (2012) but the integrated and systemic nature of the Ecosystem Approach does allow for the more effective consideration of indirect effects and a broader interpretation of the system under consideration.

Summary

Regulatory tools are increasingly used to balance agendas in pursuit of sustainability which poses a significant challenge (Baker *et al.*, 2013); in particular, the need to elevate the environmental interest into decision-making processes (Spash, 2008)¹. Here the family of Impact Assessments have formed the principal regulatory response, although their effectiveness has been questioned on their stated environmental efficacy (Söderman and Saarela, 2010) and by those who claim they are being used primarily to justify a particular policy decision that has already been made rather than as an informational decision support tool (Hertin, 2009).

However, when regulation is well-conceived and integrated within public policy, it provides certainty and clarity, addressing market failure and supporting long-term investment decisions which, in turn, can drive behaviour change where incentives alone are not sufficient (Ballatine and Devonald, 2006). Adams (2004) sees the regulatory tools environment as an attempt by the state to enhance the efficiency, equity and sustainability of market products and, in so doing, accords well with the core principles of the Ecosystem Approach.

There is, however, potential conflict between one set of regulatory tools trying to do one thing when another set of regulatory or incentive tools do another. For example, Adams *et al.* (in press) highlight significant regulatory scalar disconnects where policy at the local authority scale (enforcement action for demolition) contradicts with national government policy (exemplar for low impact development) in the case of a permaculture dwelling in open countryside at Brithdir Mawr Wales. Furthermore, Wakeford (2012) notes the many different, potentially conflicting and duplicating regulatory and fiscal incentives available to a tenant/landowner on various land use options.

In moving from these problems of regulation towards more positive actions OECD (2010) have identified key drivers for more effective regulatory governance. These include:

- a solid research and evidence base;
- strong institutional leadership and oversight;
- clear accountability and transparency between private and public responsibilities for regulation;
- effective consultation, communication, co-operation and co-ordination across all levels of government and beyond, including international and neighbourhood arenas.

These drivers are not assured within a regulatory environment. Regulation needs careful control and management, given the attendant risks of moving costs between scales of operation, sectors and groups and regulatory capture. The over-hasty adoption of inappropriate regulation could add unnecessary burdens, inhibit innovation and harm competitiveness. As Gibbons and Parker (2012) recognise, one must:

- not presume that regulation is the only answer to a problem;
- take time and effort to consider and provide robust analysis of all of the policy options, including 'do nothing';
- make sure there is substantive evidence to support the preferred policy option and ensure that it is properly referenced and sourced;
- produce reliable estimates of the costs and benefits and assess the risks, costs and benefits appropriately;
- assess non-monetary impacts thoroughly;
- explain and communicate results clearly.

¹ See also the Valuation tools literature review neat.ecosystemsknowledge.net