Better Regulation:
Risks, Markets, Responsibility

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INTRODUCTION

The value of not regulating

A popular explanation for economic scandals, crises and suboptimal market outcomes is the lack of government regulation. This interpretation is intensively promoted by the promoters of a "bridled" market and by the communication departments of the respective administrations: only the supervision and control of the market economy by the bureaucratic state would ensure the integrity of economic actors. This would even apply to competition, which would allegedly be endangered without a dedicated authority.

Without doubt, market conditions are never perfect – they could only be so if the market players themselves were infallible, which, realistically, does not even apply to the Pope despite the spectacle, his white dress and the pomp of the Vatican. Also, the idea that all market participants are honest and always imbued with the best intentions cannot capture the infinite variety of millions of daily decisions in every corner of the world.

A legitimate question therefore is whether a regulator with preemptive market intervention can best "guarantee" the integrity of individual players and good results, "protect" consumers and investors, and "safeguard" society from crises. Experience shows that government regulation only works in fair weather. This is impressively illustrated by the financial crisis of 2008, which passed its tenth anniversary. Economist Véronique de Rugy calculated that U.S. federal spending on financial market and banking supervision increased tenfold from 190 million to 1.9 billion dollars between 1960 and 2000, adjusted for inflation. In 2008, it already amounted to 2.3 billion dollars. The financial markets were and remain among

the most regulated sectors of the economy. Obviously, this could not prevent the crisis.

A systematic crisis can only be caused by a deficient institutional framework – in this case by a failed central bank planned-economy policy and the aggressive political promotion of home ownership to insolvent households. It would therefore be quite appropriate to regard these financial crises – as earlier ones – as state failures, which, given the intrinsic inferiority of a planned economy, cannot come as a surprise. Socialism, whether universal or in small doses and sectoral, is the surest way into a crisis.

Nevertheless, the situation is not that hopeless. The market economy itself contains important regulating mechanisms – above all, free competition. Here, every market participant cares about his reputation and is critically observed and judged by his fellow human beings. What sounds like wishful thinking from a superficial, statist point of view is in fact the basis for the flourishing of a free global market economy that would hardly work without trust and the effort of every actor to earn and maintain a reputation.

It is also free competition that removes black sheep the fastest from the market. For example, U.S. fraudster Bernard Madoff had long been exposed by independent analysts, while the state regulator, the Securities and Exchange Commission, was regularly clearing him of any wrongdoing. In the meantime, the believers in regulation relied on the worthless stamp of the state and at the end were faced with a pile of junk. How would the affected capital market participants have acted in this and other cases if they had not weighed themselves safe thanks to state "supervision"?

Of course, rules on financial markets – as in other markets too – are necessary. Contracts and industry or company-specific standards and regulations fulfill this purpose in everyday economic life, just as their fulfillment and conflict

resolution are ensured by independent certifications, arbitral tribunals and trade associations. Business develops and implements viable and efficient solutions to disagreements.

Above all, market players do not prosper by selling dangerous or fraudulent products and services. Rather, it is the profit motive in free exchange that contributes to the integrity of the participants – beyond the existence of a moral culture. If this were not the case, a market economy based on a global division of labor would simply be an impossibility in view of the infinite diversity of individual interests. It is the self-interest of every business and every business person to uphold a reputation for quality, dependability, reliability, honesty and correctness. In a service-based society, this is often even more valuable than physical production factors. The value of a brand, the goodwill of a company or the name of a business person makes up a large part of the assets of a company or an entrepreneurial venture.

Conversely, a reputation damage means often a total loss, regardless of the residual financial and physical capital. Reputation is an important competitive advantage in a free market economy. Consumer trust in a pharmaceutical company, food manufacturer or distributor, or bank does not arise from regulatory checklists. It is built up by flawless products and services over years. The incentive to maintain a sound reputation in a competitive system is the most practical instrument for protecting consumers and investors against fraud, incompetence or negligence.

Against this background, government regulation has, above all, disadvantages: it drives away from reputation, in that every "regulated" company appears to be equally trustworthy; it creates the appearance of security and weakens the critical thinking of consumers and investors (as in the spectacular Madoff case); it reduces the value of reputation or goodwill; and it puts whole sectors or the whole economy

under general suspicion, although penal law would be sufficient to address criminal cases.

Government regulation replaces voluntary incentives with coercion and, as such, illustrates a profound misunderstanding of the nature and functioning of a market economy where integrity and trustworthiness are always rewarded very highly, especially in countries where the degree of economic freedom is highest.

Those who want to prevent the rule of law from overstepping its powers, must therefore demand regulatory restraint: Renouncing to legislate and regulate should often be the priority.

The present volume does not deny that there may also be an administrative ethos and a subsidiary role for universally enforced rules – but the necessary standards are best achieved by more effective means than by clumsy and coercive state institutions that never take responsibility for the consequences of their own policies, and use their inherent ineffectiveness as an excuse for ever-larger budgets and an ever-larger staff.

Pierre Bessard
Member of the Board of Trustees and
Director, Liberal Institute

I. THE FALSE PROMISES OF OVERREGULATION

Emotion as the root of overregulation

Alexandre de Senarclens

Politics is the art of the possible, it is thus the art of acting and delivering for citizens. But politics is also obviously the art of conveying a message and communicating. A politician cannot survive, namely be re-elected, if he does not give the impression of someone who acts for the good of the people. A politician merely acting behind the scenes, even if he is amazingly efficient and competent, stands no chance of being re-elected. A politician should also address the concerns expressed by the population. These concerns may be futile or of relative importance to the general well-being, but if it is perceived as a concern by the population, it becomes important and must be resolved as a consequence. Objectivity and responsibility are by far not the most important aspects for a politician.

Especially nowadays, what is important is the emotion a problem generates in the population. This phenomenon has been increased by television and has been multiplied by the Internet, social media, and videos recorded on smartphones. Seeing a bridge fall and cause many casualties does not have the same effect as reading about it in the *New York Times*.

Therefore, in the 21st century, a politician must, in order to survive, address the concerns of the population that are often dictated or amplified by emotions. When addressing them, he will show that he is taking action and that he is close to the citizens.

What does taking action mean in this context? What is the politician's typical answer?

Unfortunately, it usually means legislating in the form of a law passed by Parliament or in the form of a directive decided by the government. Thus, when a situation is deemed unacceptable by the population, it shall be rectified by a law in the hope that it does not happen again. The risk inherent to human activity is less and less tolerated. The state must therefore provide, plan, codify and enforce the laws and directives that it has issued, and therefore exercise control. The question of whether it is a good or needed regulation is not the primary concern of politicians.

As such, here are two examples from local politics where emotion and controversy have caused direct political reaction but not good and efficient regulation.

1. In the elections in Geneva in the spring of 2018, a new party attempted to enter Parliament. It appeared that this party had very substantial financial resources, significantly higher than other parties. There were many more ads in newspapers and on the street. It also appeared that part of the funding came from abroad. This generated controversy. The response was immediate. Even before the elections took place, a bill was introduced to limit the budget of each party's election campaigns and prohibit all donations from abroad. In this case, the party in question had a very poor score and did not enter Parliament. In this example, we did not give people enough time to make up their minds, to vote and potentially penalize this party. We did not trust their judgment. We were afraid that the population would be abused and we were paternalists. The outcome of a controversy arousing emotion is a legal response and therefore the state taking action. And this action, if this law were to pass, will require more control from the state and therefore more civil servants, more bureaucracy and, finally, higher taxes.

2. Another example: We have before the Geneva Parliament a bill to introduce anti-pollution stickers on motor vehicles (indicating the age and cleanliness of a vehicle) in order to prohibit the most polluting vehicles being driven in case of pollution peaks. We are all convinced that the pollution generated by cars is a real issue and that we must prevent it. But, as a matter of fact, in Geneva, it is shown that pollution peaks are increasingly rare and increasingly shorter (in number of days). We also have cars that are renewed quickly with vehicles that are less polluting, thanks to more efficient engines and also the arrival of hybrid and electric vehicles. Yet, instead of observing the significant improvement of air quality in recent years and taking notice of the fact that the automotive industry will continue to provide cleaner vehicles, the State of Geneva wants to introduce these stickers in case of pollution peaks. The government can already take simple measures, such as reducing the speed on the highway, or even ask for alternate-day travel (even/odd license plate). But no, that's not enough, the environment is a recognized issue that rightly attracts interest and emotion within the population, therefore the government is going to "act" and impose on all car owners to buy stickers. Again, this will generate bureaucracy with civil servants who will have to implement, manage and monitor this measure. In my view without any effect on the environment.

In these two examples, there is the same vicious circle: controversy and emotion are generated, the state and politicians feel obligated to take a stand, laws or directives are passed, resulting in more bureaucracy and less freedom. In the end, this means higher taxes and a larger administration.

What is the solution? There is no magic recipe. We must continue to educate the public and explain the consequences of this sterile phenomenon. We must pay attention to

these trends and never fall into the short-term trap. We should call for individual responsibility, try to explain to voters this vicious circle that will lead to more administration and higher taxes, but for sure not to a more efficient state or more efficient government. To sum up, better regulation is often no regulation.

The questionable track-record of the nanny state

Christopher Snowdon

The Nanny State Index (NSI) is a league table of the worst places in the European Union to eat, drink, smoke and vape. The initiative was launched in March 2016 and has led to high level discussions and debates about the effects of regulation on health outcomes. Since the first edition of the Index was published, there have been many regulatory changes, most of them for the worse. Of the 28 countries included, all but six of them have a higher score than they did two years ago.

Eleven countries now forbid the use of e-cigarettes wherever smoking is banned. After Finland and Luxembourg, Hungary and Poland joined the fold. As governments seek to raise money and protect their tobacco revenues, there is also a growing trend towards taxing e-cigarette fluid. Greece, Slovenia, Romania, Latvia and Hungary all introduced new taxes, and e-cigarette tax rates now range from 0.01 euro per ml in Latvia to 0.60 euro per ml in Portugal. Although some governments have been slow to recognize the health benefits of safer nicotine products, they have been quick to see their potential for raising revenue. The emergence of "heat-not-burn" technology, such as iQOS, has inspired Greece and Slovakia to approve new taxes that specifically target tobacco for "electronically heated" products.

The most significant change that took place was the introduction of the EU's Tobacco Products Directive (TPD) which came into effect in May of that year. This legislation is principally aimed at smokers, with a ban on packs of ten, mandatory graphic warnings and, from 2020, a ban on menthol cigarettes, but it also places a significant burden on

vapers. The TPD bans all e-cigarette fluids containing more than two per cent nicotine, restricts the sale of e-cigarette fluid to small, 10ml bottles, and bans e-cigarette advertising in printed media, online and on television and radio. As a result of the TPD, twelve countries that scored a perfect zero for nanny state regulation of e-cigarettes now have at least 16 points (out of 100).

The UK and France decided to gold-plate the TPD by becoming the first countries in the Northern hemisphere to ban branding on tobacco packaging ("plain" or "standardized" packaging). Hungary, Slovenia and Ireland look set to join them in the next few years and there have inevitably been calls to roll this policy out to food and alcohol.

It is not all bad news, however. Some governments used the TPD as an opportunity to liberalize their vaping laws. Countries that previously had a de jure or de facto ban on e-cigarette sales, including Finland, Denmark, Hungary and Belgium, now permit their sale under varying degrees of regulation.

There are a few flickers of liberalization in other areas as well. Finland discarded its tax on confectionery, chocolate and ice cream in January 2017 and the Finnish government is considering relaxing its highly restrictive alcohol laws by, for example, making it legal to buy a round of drinks and pay by credit card. In Slovakia, cyclists are now permitted to drink a pint of beer before using a cycle lane. Last year, the Czech Republic's finance minister pledged to halve VAT on draft beer (this has not yet happened) and, in Bulgaria, a proposed tax on fast food and energy drinks in Bulgaria was rejected thanks to the finance minister.

The most sensational piece of deregulation came in Sweden where the e-cigarette market went from complete illegality to laissez-faire by accident. After Sweden's Supreme Administrative Court ruled that e-cigarettes are not medical

devices and cannot be regulated as such, they fell into legal limbo where they remain at the time of writing. Unsurprisingly, there have been no reports of any health problems as a result of e-cigarettes being freely bought and sold. The Swedish government should bear this in mind when it finally gets around to regulating the vaping market.

Looking to the future, the prospects for lifestyle freedom generally look bleak. A number of countries are seeking to join Hungary, Finland and France in putting a "sin tax" on sugary drinks. Belgium has already done so. Ireland and the UK will join them next year. Latvia and Lithuania have set a precedent by banning the sale of energy drinks to people aged under 18. France banned free refills of fizzy drinks at the start of 2017. Sweden is set to regulate alcoholic ice cream. Greece has introduced a tax on wine for the first time.

The Czech Republic will soon introduce an indoor smoking ban, albeit with plenty of exemptions. Romania introduced a more severe smoking ban last year, leaving only Austria, Germany and Slovakia as the last truly smoker-friendly countries in the EU – and Austria has a ban planned for 2018. Cyprus is looking to both extend its ban to some outdoor places and include vaping in it. The governments of Scotland and Finland have set a deadline for making their countries "tobacco-free". Estonia and the Netherlands are seriously considering a retail display ban for tobacco.

There has been little in the way of nanny state regulation of alcohol since the last Index was published, but that looks set to change. Lithuania, Latvia and Estonia are all on the verge of introducing heavy temperance legislation, with the health minister of Estonia publicly stating that he wants to treat alcohol and tobacco in the same way, i.e. with draconian regulation. Minimum pricing for alcohol is tied up in the courts at the time of writing but, win or lose, the Scottish government will be able to introduce this regressive policy after

Brexit. Meanwhile, Ireland has tabled a temperance law that will introduce minimum pricing, extensive advertising restrictions and possibly even a retail display ban similar to that already in place for tobacco.

This rising tide of lifestyle regulation confirms C.S. Lewis's view that "those who torment us for our own good will torment us without end for they do so with the approval of their own conscience". The nanny state never sleeps. There is so much legislation and so many new proposals that it can be difficult to keep up, but that is what the Nanny State Index aims to do.

Does paternalistic regulation work?

Despite efforts by the EU to harmonize some legislation, the Nanny State Index reveals huge differences in the way governments choose to regulate their citizens' lifestyles. The most heavy-handed countries – Finland, the UK and Ireland – all have very high taxes on alcohol and tobacco, as well as severe smoking bans, but Finland has an almost impregnable lead at the top of the table thanks to its negative approach to e-cigarettes, its tax on soft drinks and its harsh temperance laws which include a near-total ban on alcohol advertising and a state-controlled alcohol monopoly.

At the other end of the table, countries such as the Czech Republic and Germany have modest taxes on alcohol and tobacco, do not try to control their citizens' diets, and treat vapers and smokers with respect. If you want to use the Nanny State Index as a travel guide, there are separate league tables for food, alcohol, tobacco and vaping, so you can pick your holiday according to your preferences.

Paternalistic lifestyle policies create a number of problems and costs. "Sin taxes" fall most heavily on the less well-off. High prices fuel the black market. Advertising bans re-

strict competition and stifle innovation. Smoking bans damage pubs and clubs. Excessive regulation creates excessive bureaucracy and drains police resources. Insofar as "public health" campaigners acknowledge these costs, they argue that they are more than offset by the benefit to health, but the data in this Index finds little evidence of this. As Figure 1 shows below, there is no correlation between Nanny State Index scores and life expectancy.

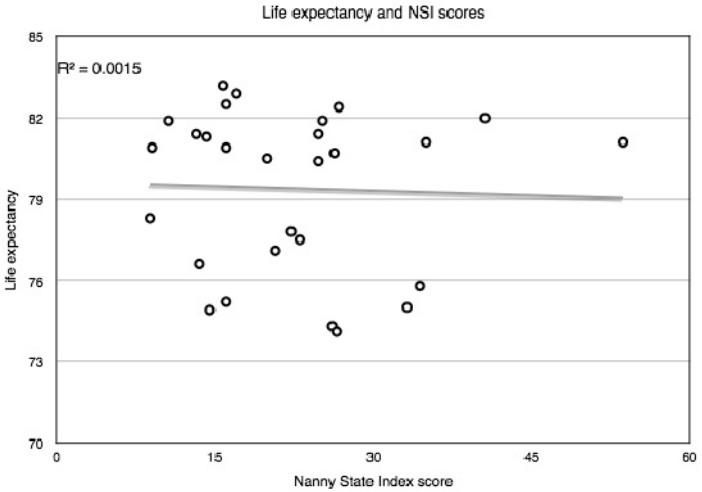

Figure 1: NSI scores and life expectancy

There is also no relationship between tobacco control scores and lower smoking rates, or between alcohol control scores and lower rates of alcohol consumption. Nor is there any relationship between alcohol control scores and rates of binge-drinking among men or women.

Indeed, the only relationship we can find between life expectancy and any other variable is economic prosperity. The statistically significant association between life expectancy and gross national income suggests that health campaigners would do better to pursue economic growth than make

doomed attempts to control the personal behaviour of the public through coercion.

The criteria

The Nanny State Index consists of three main categories: alcohol, nicotine and diet. Each of the three categories is weighted equally at 33.3 per cent. Nicotine is subdivided into tobacco and e-cigarettes, each with an equal weighting, i.e. 16.7 per cent overall.

Each category has a number of different criteria. Points are scored for each criterion, which are combined to reach the final score. The Nanny State Index is only concerned with policies that have an adverse impact on consumers. These policies are given different weights to reflect the extent to which consumers are negatively affected, from relatively minor inconveniences to heavy taxes to outright prohibitions. Countries with higher scores are less free and countries with lower scores are freer.

Paternalistic policies typically reduce the individual's quality of life in one or more of the following ways:

- raising prices (through taxation or retail monopolies)
- stigmatizing consumers
- restricting choice
- inconveniencing consumers
- limiting information (with advertising bans)
- reducing product quality

The Index includes any policy designed to deter consumption of legal products which imposes one or more of these costs on consumers. The criteria for each category and

their weightings are shown for alcohol, e-cigarettes, food and soft drinks, and tobacco.

All data reflect the legal status in March 2017 to the best of our knowledge. We do not make adjustments for how the law is enforced. Some countries may not police their regulations effectively – in fact, we know that they do not – but this is unquantifiable. We are interested only in what the law says, not whether it is easy to flout the law in practice. Nor do we include legislation that is pending. In some instances, we have included commentary about laws that have been proposed or rejected. These are included to provide additional information – they do not affect the scores.

Methodology

Alcohol

The alcohol category includes taxation (50%), advertising restrictions (20%) and other (30%).

Taxation is divided into three categories of alcohol duty: beer, wine and spirits. Each has equal weighting. The data come from the European Commission (wine and spirits) and the British Beer and Pub Association (beer). Tax rates are adjusted for purchasing power. The country with the highest rate of tax scores 100. The other countries' scores are based on their tax rate as a percentage of the highest taxing country. Calculations are made for each of the three types of drink, leaving a score out of 300 which is converted into a score out of 50.

Advertising is divided into three categories: TV/radio advertising, outdoor advertising and sponsorship. These are subdivided into two further categories: wine/spirits and beer (wine and spirits tend to be subject to the same advertising restrictions). Each of the six resulting subcategories is given a score out of 10, with 10 representing a full ban and 0 repre-

senting no significant restrictions. This leaves a score out of 60 which is converted to a score out of 20.

Other is made up of the following four subcategories with a total value of 30 points:

Retail monopoly. Some countries have a state-owned monopoly on alcohol retail, thereby restricting competition, reducing availability and raising prices. Monopoly = 5 points. No monopoly = 0 points.

Statutory closing time in the on-trade. Some countries force bars and restaurants to stop serving alcohol and/or close at a certain time of night. These countries score 10 points, those which allow the proprietor to decide when to close receive 0 points.

Zero or near-zero drunk driving limit. Most EU countries have a drunk driving limit of 0.05% blood alcohol concentration. Others, including the UK, have a higher limit of 0.08%. In some countries, however, the limit is set so low as to be more of temperance measure than a road safety measure. A limit of 0.02% or lower is well below the range at which driving becomes dangerous and has the effect of discouraging people from consuming alcohol if they are driving the following morning. Countries which set the limit at 0.02% or lower are given 5 points in the index.

Ban on promotions. Some countries restrict or ban the use of sales promotions such as happy hour or two-for-one deals. No restrictions = 0 points. Partial restrictions: up to 9 points. Full ban: 10 points.

E-cigarettes

The e-cigarette category includes product bans (up to 40 points), advertising restrictions (up to 10 points), taxes (10 points) and vaping bans (up to 40 points) with a total of 100 points available.

Product bans. Up to 40 points are given for bans on certain types of e-cigarettes and/or fluids. Full prohibition or the regulation of e-cigarettes as medical products would give 40 points, but e-cigarettes are now legal in all EU countries subject to different degrees of regulation. The EU has set limits on tank sizes, fluid strength, bottle size and several other product features, meaning that all TPD-compliant countries score at least 10 points. Further points are awarded for bans on flavours (up to 5 points), refillable e-cigarettes (5 points), cross-border sales (5 points), domestic mail order sales (2 points).

Advertising. Points are awarded according to the size and scope of advertising restrictions. All countries must ban most forms of e-cigarette advertising to comply with the EU's Tobacco Products Directive and therefore score at least 6 points. Further points are awarded for bans on purely domestic e-cigarette advertising.

Tax. Countries which place a specific tax on e-cigarettes (in addition to standard sales tax) score up to 10 points. Points are awarded according to the size of the tax as a proportion of the highest tax, with the country with the highest tax scoring 10.

Vaping ban. Up to 40 points are awarded for bans and restrictions on e-cigarette use (vaping) in public places. In countries where vaping is classed as smoking for the purpose of smoking bans, the score from the smoking ban subcategory in the tobacco index is used.

Food and soft drinks

This category is made up of five categories with a total score of 100.

Taxation. This includes any taxes (in excess of normal sales tax) placed on food products, soft drinks or specific in-

gredients. Scores are given according to the number of products taxed and the size of the tax. Up to 10 points for soft drinks and up to 25 points for food = maximum of 35 points.

Advertising restrictions. Up to 25 points are awarded according to the scope and severity of advertising restrictions.

Energy drinks. Some countries regulate caffeinated cold drinks ('energy drinks') more severely than traditional, caffeinated hot drinks. Restrictions on advertising these drinks are included in 'advertising restrictions' above but a further five points are awarded for a total ban on the sale of energy drinks to people aged under 18 years.

Vending machines. Up to 10 points are awarded for bans on food vending machines and/or bans on certain food/drink products being sold from vending machines. Scores depend on the scope of the ban (e.g. schools, hospitals) and the number products affected.

Mandatory Limits. Up to 25 points are awarded for state-sanctioned limits on how ingredients can be used in food. Note: some countries have 'voluntary agreements' with industry with regards to levels of salt, fat and sugar. As these are not statutory, we do not include them as part of the Index, despite the fact that these 'voluntary' agreements are frequently backed up with the threat of legislation.

Tobacco

The tobacco category includes taxation (30%), advertising (10%), smoking ban (30%) and other (30%).

Taxation. Calculated in a similar way to alcohol taxation (see above). Tax rates are taken from the European Commission and adjusted for purchasing power. The highest taxing country scores 100. Other countries are scored as a percentage of the highest tax.

Advertising. Scored out of 10. A total ban scores 10 points, a total ban except at point of sale scores 9 points. If other advertising is permitted, a lower score is awarded, but all TPD-compliant countries score at least 6 points.

Smoking ban. Divided into five subcategories, each scoring up to 10 points. These are: bar, restaurant, workplace, cars and outdoors. Points are awarded according to the size and scope of the ban with the final score out of 50 adjusted to make it a score out of 30.

Other. Divided into five subcategories: plain packaging (10 points), retail display ban (10 points), oral tobacco ('snus') prohibition (5 points) and vending machine ban (5 points).

The full rankings and the analysis of the complete ineffectiveness of nanny state regulations as regards life expectancy, smoking rates and alcohol consumption can be found online at http://nannystateindex.org/.

Insights from Parkinson's law

Pierre Bessard

The dynamics of administrative growth are often intuitive, but they are rarely scientifically investigated. Since research in the social sciences largely depends from the administration and is tax financed at state universities, the state apparatus is rarely questioned critically, even though it represents one of the greatest threats to economic prosperity and personal freedoms in a society.

The British economist and historian Cyril Northcote Parkinson (1909-1993) took on the task in his classic *Parkinson's Law* (1958) with a great deal of humor and, at the same time, empirically founded – and this in a post-war period in which the belief in government and bureaucracy was particularly pronounced. According to Parkinson, the conventional assumptions about the nature and functions of the administrative state were deceptive and at best confusing. Standard works on administration do not read like scientific works, but like novels, "mixed with literature on ape-men and space ships"; they are simply too far removed from reality.

Parkinson's law corrects the usual misconceptions by primarily describing and examining the growing pyramid of the administration, the mass of civil servants, and government cabinets. It also deals with their incompetence, which starts with the hiring process. It further puts into perspective the quality of political decision-making processes – both in legislative parliaments and in government finance committees.

Time, personnel and workload

The most important insight from Parkinson's law is that there is no actual connection in administrations between the work to be done and the time needed to do it. Similarly, in office environments there is no connection between the amount of work to be done and the number of employees who are determined to do it. The reason is that work can basically be extended at will to fill the available time. This applies all the more to office work, which can gain in importance and complexity the more time one is allowed to spend on it. According to Parkinson, the lack of real activity does not necessarily have to manifest itself in conspicuous idleness or distractions such as reading newspapers or playing solitaire games on the computer screen.

On the contrary, idleness often unnecessarily increases the workload in an inflationary way for even the smallest tasks, while the hard-working person literally "has the most free time". Parkinson illustrates this fact with an observation from everyday life:

An old lady without a profession spends her whole day writing and sending a single postcard to her niece in Oberammergau. One hour passes by in search of the postcard, another hour in search of the glasses, half an hour until the address is found. Then follow five quarters of an hour dedicated to the composition of the text, twenty minutes for the important decision as to whether or not to take an umbrella on the way to the letterbox at the next corner. In short, a job that does not take a busy man more than three minutes in total can leave in other people the feeling of total exhaustion after a day's work full of doubts, fear and effort.

The state administration is particularly vulnerable to the limitless elasticity of work, because there is no market discipline, i.e. the benchmark of profitability and the signals

of freely set prices. It is therefore a fundamental law that state bureaus always and everywhere work highly inefficiently and wastefully if no systematic correctives are used to "shake the tree every day". This is all the more the case because the tax revenues of the state increase automatically and without necessity as a result of growing economic productivity, higher economic growth and rising population numbers, which enables constantly larger budgets and workforces. From this point of view, it is not exaggerated to view state authorities to some extent as intrinsic resource-wasting machines, whether at international, central, regional or local level.

It would also be a misconception to think that the constantly growing number of civil servants reflects a real workload. The number of civil servants is growing regardless of whether the work increases, decreases or disappears altogether. It is well known that bureaucracies never die. They keep inventing new alibi jobs, even long after their mission has been fulfilled or even become completely obsolete.

Politicians and taxpayers should therefore be aware of this law of bureaucratic growth. It is defined by two causal driving forces that can serve as guidelines: (1) every civil servant or employee wishes to increase the number of his subordinates, but not the number of his rivals, (2) civil servants or employees create work for each other.

Unproductive administrative growth

How should this be understood? The first driving force is that an official always prefers the employment of two subordinates when the workload is supposedly increasing: if he involves a colleague as an equal, he creates a rival in the bureaucratic hierarchy; if he only employs one subordinate, the same problem arises; with two employees, on the other hand, he creates a competition among subordinates, which keeps them under control and poses no threat to them. The official

also strengthens his own position by having the majority of subordinates signal a certain importance and complexity (which in all likelihood is only imagined). The more subordinates he has, the greater his chances of ascending the bureaucratic hierarchy become.

The next step will then be for one of the subordinates himself to demand helpers, who in turn will be needed in the plural. In order not to risk hostility in the office, the second subordinate must also get several auxiliaries. In this example, seven people will soon do what one person did before. The seven officials not only deal with the same matters through an endless back and forth (driving force no. 2), but also with office politics and problems that would hardly exist without the office (vacation and absence management, work sharing, supervision, etc.). All of them therefore tend to be overbusy and certainly not idle. Over time, the growth of any public administration apparatus is massive due to excessive tax revenues and excessive budgets, as can be observed in any advanced country.

Parkinson's studies indicate an average annual growth rate of 5.75 percent for civil servants. On a mathematical basis, the workforce is expected to develop according to the following formula:

$$x = \frac{2k^m + p}{n}$$

In this formula, x is the number of new employees "to be hired" from year to year; k is the number of employees seeking promotion by hiring new subordinates; p is the difference between the age at which they were hired and the age

at which they will retire; m is the number of working hours per person used to produce internal office memoranda.

In order to define the growth rate as a percentage, x is multiplied by 100 and divided by n, the headcount of the previous year. This rate is empirically between 5.17 and 6.56 percent, regardless of the variations in the workload. The weakness of this finding is its scientific nature, because different rules apply in politics. Never before has an authority proposed to reimburse the taxpayer for "too much money" due to rising tax revenues and to keep its budget stable or even to reduce it. Everything that is levied is usually spent. In addition, budgets are always set at a disproportionately high level, so that in the case of a mere reduction of expenditure growth, all the talk is about "saving", "empty coffers" or "tightening the belt".

State administrations are therefore not only growing constantly and unnecessarily, but are also mastering the art of glossing over their harmful growth with flowery formulations. The assertion that this creates more "jobs" is just as unserious. In fact, unproductive jobs are created at the expense of the productive economy, which has to bear the tax burden. Therefore, administrative growth should rightly be seen as a wealth-minimization program. Due to the resilience and infinite productivity of the market economy, this decline in prosperity is only relative: the economy grows more slowly, but it continues to create added value.

Why is it nevertheless so difficult to question and possibly dismantle bloated administrations, even though they harm taxpayers? The unproductive administrative jobs that are usually remunerated above-average are reality, are tangible and are seen. On the other hand, the productive jobs in the economy that were not created due to a needlessly high tax burden remain invisible. The soundness of Parkinson's law therefore requires us to see through the superficiality of the

usual state propaganda and to think analytically and more sophisticatedly.

The advantage of small government cabinets

Another lesson of Parkinson's law pertains to the number of government members. In many cases, such positions convey power and prestige without any other benefit. According to Parkinson's experience, the optimal government cabinet number is five members: The cabinet is thus capable of working together and can ensure sufficient complementarity between finance, domestic policy, foreign policy, defense and justice. A five-member cabinet can also be assembled quickly and work confidentially.

However, it is unusual for government members to be limited to five. This was, for example, the original number of members for the (almost perfectly liberal) government of the United States of America until it was increased to seven in 1840. Switzerland adopted the same number in its federal constitution eight years later and, thanks to a more cautious policy and greater institutional stability, it has remained so to this day. In the U.S., the number of members of the central government has now risen to 17. In Switzerland, there have recently been regular attempts by the administration or individual parliamentarians to increase the Federal Council to nine members, but this has never convinced a parliamentary majority. The federal administration would thereby expect new offices and additional expenditure. The statist parliamentarians who demand the same hope for more paid commission work and meetings, and possibly a complete professionalization of the legislative process.

The typical false justification for an extension of the size of government cabinets is the alleged need for further specialization in view of the alleged increase in complexity. Yet often the feeling of increasing complexity lies in the in-

competence of government members. This cannot simply be compensated for by further administration, as shown by the experience of talented former foreign ministers in the most difficult times. Moreover, perceived complexity increases with the dissipation of the state in terms of tasks due to excessive tax revenues, which inflates the administration with additional offices and makes governance much more intricate (or superficial).

From a purely technical point of view, a body that is too large works considerably less efficiently. It is a basic rule that more than three chatty members make a government unfit for work because egocentric showing off displaces objectivity. With the "ideal" number of five members, two make policy, two provide information and another government member deals with financial issues. This corresponds to a reasonable division of labor. An increase to seven or nine members does not bring any advantage here – not to mention the inflationary government bodies of 20 or more members, as can be found in Germany or France, for example. Such large governments are the final stage of inefficiency. Larger governments usually no longer fulfil their function at all: decisions are made beforehand by a few members. The official government meetings are staged symbolically for ceremonial or medial purposes.

The real reason for the expansion of government bodies has indeed nothing to do with governance, but traditionally serves to appease and integrate various interest groups, parties and opposition forces. This is somewhat explicit in Switzerland with its unwritten "magic formula", in which the largest parties, language regions and the sexes are to be adequately represented. In several cantons, however, the number of government members has been successfully reduced from 7 to 5, as in the canton of Lucerne by means of a popular initiative in 2002. Elsewhere, this was achieved through a reform of the state governance. In the meantime, 13 of 26 cantons or

half-cantons are governed by bodies of five, including Aargau, Jura, Lucerne and Ticino.

In other countries, the size of the government has taken quite different proportions. In France there is now a need for representatives from every conceivable communitarian group and for every concern in government, however insignificant they may be. In the fifth republic, for example, there were up to 49 members of government. This number, however, has been increased or decreased over time, from 26 in the first government in 1959 to 20 under the former conservative government, and to 29 under the current government. There is also no stability of the ministries in France, but these are arbitrarily created, depending on political interests. In Germany the number of cabinet members also fluctuates: since the foundation of the current federal republic in 1949 between 13 (today) and 22 (in 1965 and 1966).

The law of triviality

Although governments and administrations naturally also decide on important matters, another finding of Parkinson's law states that the time spent on an item on the agenda is inversely proportional to their importance or financial costs. This is the case until the sum is considered too small and the discussion participants lose interest. For the largest and smallest sums of money, between 2 and 4.5 minutes are usually used. The reason for this fact is that at most one member of the government can understand the consequences of really important decisions, whether they are foreseen or not. However, the discussions in the cabinet can hardly be constantly started anew. It is better to remain silent if one understands something of the matter, so that everyone can save face and move forward with the agenda.

Parkinson illustrates this situation with an example: on the one hand, there is the decision to build a nuclear reac-

tor for 1 billion dollars, and on the other, there is the decision to build a bicycle shelter for the employees of the main offices for 171,500 dollars. While a few minutes are used for the reactor, the nature and application of which hardly anyone understands, and the background of round costs of 1 billion dollars remains completely unclear, a saving of 2 190 dollars on the bicycle shelter will be debated for 45 minutes. The question will be whether it should be made of aluminum or galvanized metal, or whether it is even necessary. Other topics can be discussed even more heatedly, such as the drinks to be served at meetings, because every member knows something about coffee. For such a purpose, further clarifications and reports will be required and the decision postponed to the next meeting.

This explains why decisions on large projects tend to lead to bad results, high deficits or serious negative consequences. Governments invariably go wrong on budgets and predictions of impacts. Just think of events such as national exhibitions, Olympic games or, more specifically, the completely misguided assumptions made by the Swiss government regarding the current health insurance act or the new rail link through the Alps (NEAT). This is also the reason for the superiority of market-economy and civil-society solutions, where economic calculation can act as a corrective, unlike the situation in government administrations.

Are excessive rules and regulations opening a new "road to serfdom"?

Patricia Commun

After the financial crisis 2008 some German banks, like IKB, the famous Mittelstand's bank, got rescued by the German government. As a consequence of these state-financed banks emergency programs[1], policymakers and regulators have since tightened banking regulations, with most lenders agreeing that there was a need for it.

However, the compliance system that tightens banks' activities nowadays should also be seen as a logical continuation of a long tradition of state interventionism in our mixed-economy systems, with a clear mistrust of free markets. Seen in this light, the excess of rules and regulations banks and international companies are now faced with, can be considered as a continuation of the "road to serfdom" described by Hayek in 1944 in his seminal critics of the planned economy.

German banks are now supposed to rapidly integrate lots of new European and German regulations including: a

[1] Germany had no rescue program to be compared with the Keynesian stimulus package of the American Recovery and Reinvestment Act (ARRA) of 2009 which cost more than 830 billion dollars to the American taxpayer. The German government concentrated its efforts on rescuing banks. Within a short time, lawmakers in Germany adopted new legislation to stabilize financial markets via generous state guarantees and shots in the arm for many banks. The German banks rescue package cost proportionately about as much as the ARRA stimulus package as it reached 60 billion euros. Moreover, the zero interest rate policy of the European Central Bank cost the Europeans and especially the Germans who are traditionally good savers hundreds of millions of euros.

new anti-money-laundering act; a new European credit transfer regulation; a new German tax avoidance act; a new German fiscal code (§154); a new regulation in the German banking act (§24cKWG); a new audit report directive; a new transparency index and, last but not least, new European data protection principles.[2]

Rules and regulations tend to be issued by governments who want to align the operators' interests with their own. This is the case here as the list of bank regulations quoted above mainly refers to monitoring and controlling the financial flows in governments' fiscal interest. Today, however, this alignment with the government's interest goes one step further in terms of actively supporting governments' actions to control financial flows and to report suspected bribery. For instance, German banks are from now on supposed to forward electronically all suspicions of bribery to the Financial Intelligence at the General Customs Direction.[3]

At the same time, fear of and resistance to international competition is expressed in an increasing number of countries which make use of rules and regulations that constitute non-tariff barriers to protect their regional or national markets.[4]

These are often also supported by local operators craving for protection from foreign rivals, and who are therefore willing to accept this straightjacket of rules and regulations as a means to an end.

Rules and regulations thus become protectionist weapons in the common interest of national companies and

[2] "Compliance 2018. Quo Vadis" in *Die Bank* Nr. 3, 2018, p. 8-11.

[3] According to the Anti Bribery Corruption Compliance Program Guidance of June 2017.

[4] The recent "local content" requirements for US automotive companies introduced under the Trump administration's USMCA replacement of NAFTA, are a recent and blatant example.

governments. As a further example, "*South African businesses are required to meet a host of regulations if they wish to do business with government or any of its parastatals. Non-compliance across your enterprise and business network could result in exclusion from the tendering process and supplier database. In addition, companies that place value on corporate compliance may avoid doing business with you as they would want to ensure that they meet their own regulatory obligations*."[5]

Rules and regulations are also edited for the sake of consumers who want protection from market power when competition appears to be ineffective. For instance, the food industry in Europe is bound by multiple rules and regulations edited by the European Community under pressure from consumer lobbies.

More recently, new regulations about sustainability have been issued by "civil society", especially NGOs urging companies to integrate environmental problems in their strategy. Companies that want to operate globally could suffer reputational damage if they do not observe environmental sustainability regulations. More and more companies are becoming aware of the tremendous costs that can be caused by the non-observance of sustainability rules.

Last but not least, rules and regulations can be issued to improve predictability of financial markets in the alleged interest of all economic and governmental agents. Many rules and regulations were issued after 2008 in the finance industry to avoid systemic risk.

As evidenced in these few examples, rules and regulations depict a profound mistrust towards the free market economy. Today, the rules and regulations system reaches deep within organizations, as the economic agents actively integrate regulations, not only in their communication, but

[5] Lexis Nexis, June 2017 (https://www.lexisnexis.co.za/)

also in all their business processes. They are left with the burden of proof that they are following all the new rules and regulations that constantly get imposed upon them. This the so-called "compliance" pressure.

Not only banks but almost all international companies in manufacturing, transportation and retail are now concerned by regulatory compliance.

As non-observance of the so-called compliance rules might have either dramatic financial, reputational or even legal consequences for every single bank or international company, compliance risks should be taken seriously and the introduction of compliance processes along the supply chain represents therefore a tremendous financial burden for companies.

Meanwhile many new jobs in advisory and controlling are born out of this compliance system: chief compliance officers become increasingly important, educational trainings and certifications are booming. A compliance index has been created, corporate governance systems have been developed, integrating quantitative analysis of compliance culture in different departments, etc.

The compliance systems place a burden of additional costs on operators, thus undermining their competitiveness. However, private and public economic agents look more and more intertwined, perfectly integrated in the mixed-economy system.

Even if many companies complain about this excess of compliance rules today, they look as if they hardly have any alternative. Why did private agents end up willingly inflicting upon themselves such a straightjacket of rules?

Excessive rules and regulations, together with a profound mistrust of the free market economy lead to an illiberal society

Looking back upon German and European history of the 20th century and using Hayek's analysis of a planned economy in "The Road to Serfdom", helps us better understand what is going on with the current "compliance system".

Throughout the 20th century, an overdose of rules and regulations, linked with nationalism and protectionism, paved the way for dictatorships and wars.

There were two main reasons why public and private agents craved for rules and regulations, as they still do today.

The first reason was the general blame of major economic crises on liberalism and globalization. The second one was the rejection of international elites linked with a profound mistrust in international experts.

In Germany after World War I, the military defeat and the unfortunate peace negotiations were blamed on the Weimar Republic and its political liberalism. The economic crisis was then blamed on "laissez faire" and therefore on economic liberalism. "Liberalism then has the distinction of being the doctrine most hated by Hitler"[6]. Hate of liberalism also meant rejection of free exchange and mistrust of international companies. Once in power, Hitler logically went on to undermine free exchange, replacing it by protectionism and a system of bilateral trade contracts. He established a command economy and a dictatorship which also focused on destroying the Jews, considered as the most dangerous representatives of the international financial elite. Eliminating this international elite was one of the main goals of Hitler's national-socialism. National-socialist economic policy was then based on a protectionist command economy run by the industrial federa-

[6] Hayek, *The Road to Serfdom*, 1944, p. 81.

tions. The German companies and their federations fully adapted to the new constraints and organized themselves the government-imposed command economy, whereby the federations administered and distributed the limited imported raw materials to the different industries. The federations also introduced the "Führerprinzip" according to which authoritative coordination systems tightly bound the companies to their federations that had to execute the four-year, war-orientated economic plan. The faithful cooperation of industries with the new national-socialist power might thus look as a stricter version of an old compliance system.

Today, even if we are far away from such extreme political situations, there are disturbing parallels, e.g. a systematic blame of the last economic crisis on liberalism and on financial institutions and a growing rejection of economic, mostly international elites and experts. The explosion of compliance rules and norms must be also seen as the most recent expression of national protectionism and mistrust towards globalization and free exchange. The voluntary cooperation with fiscal authorities is also part of a new faithful collaboration between political and economic power.

Freedom does not mean freedom from arbitrary power any more but freedom from necessity

After World War II, Western Germany eventually stayed under control of a command economy, welcomed by the UK and the US governors, and which was supposed to tackle the problem of scarcity and to avoid social disorders that might lead to dictatorship again. Only the famine in winter 1946-1947, which cost the lives of hundreds of thousands, convinced the US that this command economy might lead to the starvation of the whole Western German population after all. Moreover, the arguments of German liberals in the newspapers, as well as in the Western German Economic Council,

convinced the US to stop the total price controls system. Partly thanks to Eastern Germany experiencing communism, Western Germany became then the only European country that was offered the chance to experiment a liberalization of its economy and (at least limited) liberalism (the so-called "ordo-liberalism") which also sought to reintegrate social concerns into a free-market economy framework.

In all other European countries, central planning used to be the dominant idea after World War II.

> *"The new freedom promised was no more freedom from coercion (freedom from the arbitrary power of other men) but freedom from necessity… Before man could be truly free, the ˝despotism of physical want had to be broken, the ˝restraints of the economic system relaxed."*[7]

In Germany a new form of liberalism (under the name of social market economy) could hence gain the support of the population only by promising wealth for everybody.[8] Freedom therefore became increasingly a synonym for generalized access to wealth.

German-speaking liberals and among them Friedrich Hayek, agreed upon the fact that legal systems and institutions had to be redesigned both to preserve competition and to make it operate as beneficially as possible. Indeed, the destruction of competition had been made responsible for arising dictatorships in Europe in the first half of the 20th century. Liberals considered that "*in no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other. Even the most essential prerequisite of its proper functioning, the prevention of fraud and deception (including exploitation of ignorance) provides a great and by*

[7] Hayek, *The Road to Serfdom*, p. 77.

[8] Ludwig Erhard, Western Germany's minister of the economy published *Wohlstand für alle* (Prosperity for all) in 1957.

no means yet fully accomplished object of legislative activity."[9] However, Hayek considered central planning as the worst enemy for an effective competitive system.

Compliance systems endanger free market economies, just as central planning used to do it in older times

The impressive number and complexity of rules and regulations that bind economic agents today might be a sign that, again, free-market competition is under attack.

As complex and rapidly evolving national and international compliance systems are now arising in the US and in Europe, they may represent the new danger for free market economies, in a way similar to that of central planning at the time when Friedrich Hayek first published his famous book "Road to Serfdom".

Indeed, one could label the huge mobilization of financial and personal resources in favor of compliance a "misdirection of resources" to borrow Hayek's words.

Moreover, on a broader civilizational level, the growing importance of compliance rules and systems might be even more worrying since, as mentioned by Hayek "*up to the present the growth of civilization has been accompanied by a steady diminution of the sphere in which individual actions are bound by fixed rules… The rules of which our common moral code consists have progressively become fewer and more general in character. From the primitive man, who was bound by an elaborate ritual in almost every one of his daily activities, who was limited by innumerable taboos, and who scarcely conceived of doing things in a way different from his fellows, morals have more and more tended to become merely limits circumscribing the sphere within which the individual could behave as he liked.*"[10]

[9] Hayek, op. cit., p. 88.
[10] Ibid., p. 101.

Today, compliance systems tend to embed economic agents in a very tight nexus of rules and behaviors that can be more and more controlled or eventually replaced by automatized technological processes (themselves designed to be compliant).

Hayek already noted that innovation arises thanks to the frustration of specialists revolting against the existing order.[11] Today, more and more tightly defined work processes and constraints on the freedom of economic agents, lead to frustrations, which in turn themselves become powerful incentives to develop technological innovations that make it possible to delegate these controls to software and automatic devices (and soon artificial intelligence). Thus, a widespread culture of control might produce more and more dehumanization at the workplace.

Could conceivably all compliance control activities be replaced by automatic devices in the future? It should be noted that in this respect, the problem is not technology, robotization, nor artificial intelligence, but rather the dehumanization produced by such a generalized culture of total control in the society and in companies.

Increasingly, human resources experts now appeal to a new moral code of conduct in companies and warn that companies should better cultivate interpersonal relationships and again focus on valuing personal responsibility.[12]

Compliance capitalism instead of planned capitalism

We previously wondered why companies accepted self-inflicted straightjackets of rules. One assumption could be

[11] Ibid., p. 98.

[12] See e.g. Yves Morieux: https://www.bcg.com/capabilities/smart-simplicity/six-simple-rules-overcoming-complexity.aspx

that companies might be trying to realize what bankrupt governments are no longer able to achieve on their own.

More and more rules and regulations arise as capitalism is given the task to realize "the old dreams of social justice, greater equality and security which were the dreams of socialism".[13] These old human dreams could not be realized by socialism, as socialist systems dramatically failed throughout the 20th century. Nowadays, it is our democratic systems that continue to chase the promise that they could realize these old human dreams. However, governments and public agencies in western democracies are now increasingly running out of (other people's) money and therefore do not have any longer the human, financial or technical resources to realize the socialist dream.

From this perspective, it looks like they may be desperately trying to delegate to large international companies[14] their purported goal to bring prosperity, respect, tolerance and security all over the world. International groups now look as the long arm of governments that make them co-responsible for safety, consumer security and other goals (including a broadly socialist agenda of equality and social justice) in civil society.

Economic agents are nowadays requested by rules and regulations to complete what are essentially governmental tasks under control of public and non- governmental agencies, for instance a drive towards social and environmental sustainability.[15] Social sustainability means taking responsibility for long term employability and respect of employees all

[13] Hayek, op. cit., p. 83.

[14] Especially German companies like Bayer or TUI cultivate this wonderful image of social sustainability.

[15] German groups have committed to keep transparency on their social policies and are checked by non-governmental organizations in this respect.

over the world under control of NGOs, and ensuring "inclusive growth".

An unintended consequence may also be, as economic agents pretend to provide security and justice by establishing the foundation for long-term growth, that there is less and less acceptance for downturns and crises. Their dramatization can also be explained by the high social expectations private agents are supposed to be providing to society at large.

All in all, compliance rules become so invasive that they might become a substitute for regulation by the price mechanism and competitive processes. What paves the road to serfdom today may not be "centrally-planned capitalism" any longer, but potentially "compliance capitalism".

II. PERSPECTIVES ON DEFICIENT REGULATION

Inside the UN bureaucracy

David Chikvaidze

Rules and regulations are, of course, not inherently bad, or bureaucratic. When a group of people works together, we need rules and regulations to make sure everyone knows what each contributes and so that all can benefit from the shared good generated. Regulation and accountability go together to ensure people do not abuse the system. This applies universally.

The need for regulation and accountability also applied when Member States established the United Nations. In its more than 70 years, the UN has been subject to both external and internal regulation, side by side, a sort of "double jeopardy".

External regulation

The UN was created by its Member States, now 193 countries with different systems as a blueprint. Member States seek to influence each other and the UN. One way of doing this is to ensure that the Organization is dependent on Member States through the creation of rules; this in turn leads to overregulation, making it difficult for the UN to be flexible and agile in today's global environment.

An excellent case in point is micromanagement by Member States, especially via budget and regulations. For example, some Member States limit or withhold funding in order to influence UN activities and policy, including reform efforts. Furthermore, the Secretariat-General cannot move even a junior professional post from one position to another within the same division without going through an arcane

Member State-created machinery, culminating in the General Assembly's Fifth Committee, which deals with administrative and budgetary matters.

The UN often finds itself in a situation where it has received a mandate from the Member States through one Committee, but then struggles to obtain the funding for that mandate through the Fifth Committee.

Past reform debates have highlighted differences that exist among some Member States, particularly developing and developed countries.

- Developed countries, which account for the majority of assessed contributions to the UN's regular budget, have tended to focus on the UN's role in maintaining international peace and security and the overall efficiency of the organization, and sought greater flexibility and authority for the Secretariat-General to implement reforms, specifically those related to oversight and human resources.

- Developing countries, on the other hand, which constitute the largest voting bloc in the UN, tend to focus on development-related policies. In the past they have generally objected to reforms that would enhance the power of the Secretary-General and decrease the power of the General Assembly and its Fifth Committee. Some developing countries express concern that reform initiatives might drain resources from development programs.

To illustrate the resulting "logjam" of mandates, let me recall the Outcome Document of the 2005 World Summit. It called for a systematic review of all UN mandates five years or older, due to concerns that existing mandates might be duplicative, no longer relevant, or require unnecessary reporting requirements. Member States started reviewing 9,000

mandates in 2006. To date, not a single mandate has been discarded.

Internal regulation

In order to ensure a level playing field for all staff, the UN Secretariat, as any large bureaucracy, has strict rules and processes in place, e.g. for recruitment, procurement, etc. These can be complex and cumbersome, sometimes disproportionately so with regards to what one is trying to achieve. Our reality is that it can take months to employ someone or procure an item or service.

At a UN Reform event in September 2017, the Secretary-General said "Someone out to undermine the UN could not have come up with a better way to do it than by imposing some of the rules we have created ourselves. I even sometimes ask myself whether there was a conspiracy to make our rules exactly what they need to be for us not to be effective."

The UN and its staff are eager to be transparent and avoid abuse and misuse.

The extent of external and internal regulation at the UN is stark when compared to, say, a company, where a Board gives guidance and instructions to the CEO, who is then left to generally implement as she or he sees fit. At least, that is our perception of the private sector in the UN.

Next steps: The UN Secretary-General's reform agenda

Soon after taking office in January 2017, Secretary-General António Guterres announced his intention to introduce reforms of the way the UN works and how it delivers its mandate. He found that the UN is affected by slow, unresponsive service delivery; fragmentation in management structures; micro-management by governing bodies; a trust deficit with Member States and with staff; inadequate resourcing and

ineffective implementation of mandates; and a lack of transparency and accountability.

The Secretary-General has proposed a set of ambitious, mutually reinforcing reforms to make the UN fit for the 21st century – focused more on people and less on process, more on delivery and less on bureaucracy.

One major element of the reform agenda (in addition to repositioning the UN development system and peace and security architecture reform), is UN management reform. Management reform is crucial and will impact the other reform initiatives. The UN Secretariat has a highly centralized management system that was developed decades ago. The Secretary-General's proposed management reforms aim to simplify procedures and decentralize decisions, with greater transparency, efficiency and accountability; bring decision-making closer to the people we serve; empower and trust managers; reform burdensome and costly budgetary and administrative procedures; reduce fragmentation; and eliminate duplicative structures. The Secretary-General can undertake some reforms on his own (e.g. gender parity in senior leadership positions), but many others depend on the Member States.

In July 2017, the Secretary-General explained to UN staff that his management reforms were based on the concept of two contracts:

1. A contract between the Secretariat-General, department managers and structures in the field, resulting in delegation of authority to the field, with a condition of transparency and accountability, in order for resource management decisions to be taken more quickly.
2. A contract with UN Member States where the Secretariat-General asks States for more freedom with some rules (e.g. transfer of resources between pillars, region-

al diversity, transparency and accountability measures) in return for a more efficient and streamlined delivery.

The Secretary-General has proposed a new management paradigm that would empower managers to determine how best to use their resources to implement the UN's mandate, as well as streamlining and simplifying policy frameworks. The General Assembly has welcomed the Secretary-General's commitment to improving the ability of the UN to deliver on its mandates through management reform. We have yet to see if this will translate into Member State support for the actual reforms.

The European commission's suboptimal approach to regulation in the high technology sector

Shanker Singham

The European Union's approach to competition law and enforcement demonstrates an attitude in the high-tech and media sector, that – due to its anti-competitive and interventionist measures – will harm innovation in this critical sector.

The divergence of EU and US antitrust agencies' approach to competition law implementation and enforcement are most apparent in measures towards the conduct of high-tech firms, where the EU's legalistic approach created a chilling environment for innovation in the sector.

The new media economy operates differently from other industries when it comes to regulation. The marginal costs of technological giants mean that their interactions are distinct from other industries where governments try to prevent cartels from occurring.

As result of the dramatic increase in the importance of delivering relevant content, the understanding of locality has changed. Accordingly, shared interest has become the predominant feature in markets these days, and physical or geographic locality in turn has become of less determinative of a market.

The relation between high-tech firms and antitrust policy depend upon numerous factors, all are inextricably related to firms and end-consumers, interacting in a market with increasing intervention.

The European Commission's approach

We are concerned that the direction of travel of EU competition enforcement in the high-tech and media sectors is progressively more and more anti-competitive and interventionist and will harm innovation in this critical sector on a global basis.

The EU is a major regulatory power, and its actions are copied by other jurisdictions. It is possible that interventionist policies in the EU will lead to a race to the bottom where new and emerging high-tech firms will increasingly pull their competitive punches assuming that all jurisdictions will follow the EU's lead. This could have a huge impact on global innovation.

It is therefore useful to look at how these issues have been and are handled by the other major antitrust power, the United States and whether we can learn anything from different approaches to antitrust enforcement in this area.

Differences between the EU and US approaches

The EC and the US antitrust agencies have diverged considerably in a number of areas of competition law implementation and enforcement. This divergence is particularly great in their approaches to the conduct of high-tech firms.

There have been a number of recent cases, where the European Commission has applied its competition law to the very large tech giants from the US. Starting with the Microsoft case in 2007, and moving through Intel, and now Google, and the state aids cases against Apple and Amazon, the Commission has imposed fines or some sort of sanction on the marquee US tech giants. Meanwhile the reaction of the FTC and DOJ in the US has been much more muted. These cases are exposing fault lines between the US and EU approaches, and

between an economics-based approach and a more legalistic one.

With respect to cartels, US and EU law have become broadly more aligned, and procedures, though by no means the same have been drawn closer. It is in the area of single firm conduct that we see some major differences. The EC has a much lower market share threshold than the US above which a firm could be in dangerous territory.

In the US, market share must be quite high (typically seventy per cent or more) before it can possibly be considered to have power over price or a dangerous probability of doing so, but even here, the firm must then do something illegal (i.e. abuse that market power). What the firm does must then be judged on the anti-competitive effect, not, crucially on the intent of the firm.

In the EU, this threshold is much lower, and is compounded by the use of other doctrines such as the collective dominance doctrine, where a small number of firms (2 or 3) can have collective dominance if their market share is combined and exceeds sixty or so per cent. This approach to competition policy has a chilling effect on innovation particularly in the high-tech sector. Under EU law, abuse is also required for there to be an infringement, but the EU has typically had a more interventionist approach, finding abuse of dominant position much more readily based on doctrines like the duty to deal.

A comparative analysis of US antitrust and EU competition law

While antitrust enforcement is a legal process, as in all economic lawmaking, the law must express real economic forces. Competition law has evolved considerably in both of the major antitrust jurisdictions, the EU and the US in the last centu-

ry, and it is worth recapping how and why these trends have occurred, in order to understand the present-day differences.

In the US, in the early days of competition enforcement, immediately after the passage of the Sherman Act (the US antitrust law), enforcement was focused on breaking up the big trusts, such as Rockefeller's Standard Oil. But, as enforcement evolved, the US adopted a much more legalistic and less economic approach. European competition law arose out of a fear that firms would cartelize European markets and damage the goal of a market integration in Europe.

In the 1960s and 1970s, US antitrust law was used in profoundly anti-competitive ways to help small businesses, holding that small fragmented markets were a public good in and of themselves. US antitrust enforcement diverged quite considerably from the economic goal of promoting consumer welfare. For example, in the Alcoa decision, Judge Learned Hand stated that preserving a social landscape of a multitude of smaller players was one of the goals of antitrust, at whatever cost.

In the Brown Shoe case, fragmentation of a market by the courts was seen as an end in itself, favouring the smaller producer against larger rivals. The US supreme court stated that the antitrust laws were designed to "protect small, viable locally-owned businesses" even where this "resulted in higher costs." This was eventually recognized by economists like Harold Demsetz who note in a series of papers in the 1960s and early 1970s that we have no theory that suggests that a fragmented market was an intrinsic good, advocating broad regulatory policies that maximized consumer welfare.

Gradually the tide in the US turned towards a much stronger economic underpinning. This economic underpinning has provided the intellectual foundations for the approach of the US antitrust authorities to high tech firms and those operating in the new media economy.

Competition law in the European Union

In the EU, competition law from its inception has been at least as much about promoting EU market integration as it has been about spurring competition. While US antitrust law has, in recent times, been focused on the limited goal of consumer welfare with respect to private behaviour, EU law has always had more objectives, tied to the European project itself.

These differences have manifested themselves in a number of ways, for example, US law is much more tolerant of vertical restraints on competition, such as exclusive distribution arrangements. EU law is much less tolerant of these arrangements because of concerns that distributors would operate against the wider goals of market integration.

The EU competition enforcement system has been more rules-based and legally formalistic than the US one. Since 1995, the EU went through a series of reforms, not unlike the evolution of US antitrust law. In 2001, Mario Monti became the first EU Competition Commissioner to declare that consumer welfare was not only "a" goal of competition policy but "the" goal. So there has been much more convergence between EU and US law between 1995 to 2005.

However recently we have seen some significant differences in particular with respect to cases involving high tech companies and those operating in the new media economy.

The New Media Economy (NME)

Downward pressure on the costs of transmitting information is transforming the relative costs of transmitting information and producing content. Consumers now are more concerned with the content of the ideas themselves than the means of transmission.

The new media economy has radically altered the manner in which media and high technology firms compete with each other. Many firms now compete with each other across multiple platforms. Consumers also more pro-actively seek out information across channels, rather than being passive receivers of it as they have been in the past. This has also changed the market dynamics. There is a convergence between telecommunications, broadcasting, audio-visual and related services.

The EU accepted this reality back in 1997 in its Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. The EU accepted that the regulatory approach adopted could negatively impact these developments and leave EU citizens "in the slow lane of the information superhighway". It also noted that a pro-competitive regulatory policy was necessary to ensure that this sector could deliver benefits. An overly intrusive antitrust policy will have the same effect as an anti-competitive regulatory framework.

Convergence and the NME have combined to radically change the way consumers process information. As we noted above, these developments have resulted in a framework where content is far more important to consumers than the manner of transmission. This has fundamentally altered what is local and what is free.

As content becomes more significant, the definition of locality has changed. Now locality is not bound by transmission. Communities are bound together by interest in content regardless of their geographic locality.

Definition of free

When public service broadcasters had to compete with others for the limited commodity of spectrum, government interven-

tion was needed to preserve spectrum, and regulation was necessary to ensure pluralism, diversity, independence and cultural offerings that it was assumed the free market would not provide.

Public broadcasting was heavily subsidized in order to enable it to compete with private broadcasters. As the market has expanded to encompass other platforms for receiving content, and the need to support public broadcasting has diminished, the need for public subsidy and other regulatory barriers is lessened.

Ensuring vigorous inter-platform competition

In the NME world of declining marginal cost to zero, ensuring vigorous inter-platform competition will be very important. The industries in this area must seek as wide a market as possible, in order to compete with other platforms. There is an important dimension related to intellectual property protection here. Weakening of intellectual property protection will actually damage inter-platform competition because it will erode the ability of these platforms to actually compete with each other.

High tech firms and antitrust policy

There are a number of contexts which are important to consider that are unique to high tech firms and that determine the best antitrust approach to them.

First, the marginal cost curve of high-tech sectors is decidedly different from that for more basic goods. The U-shaped marginal costs curve of a basic good has been replaced by a marginal cost curve which is declining to zero. The reduction in the marginal cost means firms in this sector

are under considerable pressure to rapidly build as large an installed base as they can.

Second, market power is much less durable than it is for less high-tech products. This is a sector where a whole technology can become obsolete more or less overnight. Given this, legalistic and formalistic approaches to market share as a proxy for power over price may not hold good.

Third, and related, it is much easier for potential entrants to break into these markets. The barriers to entry are relatively low – new companies that become global giants start on university students' laptops for example.

Fourth, market definition is changing. Increasingly, across geographies and products, markets are expanding. The traditional approach to market definition is to apply the classic SSNIP test (Small but Significant Non-Transitory Increase in Price) – the test asks will consumers switch if there is a small but significant, not transitory increase in price? If they do, then these products are included within the product market definition. If they do not, you keep expanding what is included in the hypothetical product market definition. In the new media economy, where different platforms compete for users, the relevant market can contain a print-based newspaper company, a search engine, or a website.

All of these can compete together in the same market place. A principal complaint of the sector is that regulators apply far too strict definitions of product markets (based on historic views of what constituted a relevant product market) that unduly narrow the markets in which firms compete. Clearly, market share declines dramatically as the relevant product market expands.

Fifth, network industries have powerful, positive feedback loops. This is because the development of new

products and the development of new consumers who buy that new product are mutually reinforcing.

Sixth, often tech markets are two sided rather than one sided. A two-sided market occurs when a particular firm or technology is serving different types of consumers. Credit card markets are an example of two-sided markets. The credit card service involves two different types of consumers – the merchants that must accept the credit card, and the end consumer who wishes to use the credit card to buy things from the merchant. In two sided markets, often one offering is free (or heavily subsidized), because the goal of the firm is to increase installed base, and revenue is made in some other way related to the size of the installed base (such as advertising). This makes market shares both harder to calculate but less useful as an indication of power over price.

Any antitrust enforcement in the high-tech space needs to take full account of the key factors that are set out above.

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III. WAYS TO BETTER REGULATION

Regulatory risks and possible solutions – a Swiss perspective

Nicolas Wallart

Businesses often complain about too much or too detailed regulation (overregulation). Although Switzerland regularly ranks as one of the world's most competitive and innovative economies, some indicators tend to point to more problematic directions. For example, the number of pages of federal legislation in force, arising from both national and international law, continues to steadily increase over time. From a cumulated 54 000 pages in 2004, it reached 69 000 pages in 2015.

Good measures of regulation are scarce, as regulation is notoriously difficult to apprehend. Available indicators at the national level include the monitoring of the bureaucracy by the SECO, which indicates that administrative burdens are high or rather high for 54% of businesses responding. The cost of regulation has been evaluated at 10 billion francs a year by the Federal Council or 1.7% of GDP. This number shows that regulation is a relevant macroeconomic dimension, especially considering the fact that it pertains only to direct costs for businesses, and was estimated in only 12 areas.

International indicators also point to a diverse picture: Switzerland ranks 38th out of 190 countries in the Ease of Doing Business indicator prepared by the World Bank (2018), and 6th out of 137 countries on the burden of government regulation in the World Economic Forum's Competitiveness Index (2017).

The risk of inadequate regulation

Comparably to overregulation, inadequate regulation leads to counterproductive effects that can even be worse than the issue it is supposed to address. It may not fix the problem at hand, it may lead to high regulatory costs in the form of compliance costs or market distortions, it may harm competition. Regulation can be subject to regulatory capture by interest groups. It may excessively burden small and medium businesses, lead to unintended consequences or pose obstacles to trade. Regulation can also be too formalistic and not responsive to changing circumstances.

A good regulatory system has to address these issues in an effective way.

Some ways to improve regulation

Regulatory policy needs to tackle two dimensions: the stock (i.e. existing regulations), and the flow (new or revised regulations).

For new or revised regulations

- **Interministerial consultation**: Depending on the regulatory project, it is important to exchange views between all ministerial departments (federal offices) in order to improve the quality and the policy coherence. This can be done several times during the development of a regulatory proposal.
- **Public consultation**: The Federal Chancellery prepares in coordination with the ministerial departments a list of open consultations. Regulatory proposals are submitted to all interested parties: cantons, political parties, associations and interested stakeholders. It is also published on the internet. After an

evaluation of the responses, the results are published in a consultation report.

- **Impact Assessment (RIA)**: The regulatory impact assessment is an instrument to examine the economic consequences of federal legislative projects. Proposed regulations at the federal level are critically evaluated as to their necessity and impact. This applies to the federal laws as well as ordinances by the Federal Council. If more than 10,000 business firms are affected by a regulatory project and an increase of their administrative costs is likely, a quantitative estimation of the regulatory costs has to be carried out in the context of an RIA.

  There are basically two different kinds of RIA: In case of limited effects on the economy or on business firms, a simple RIA of limited scope is appropriate. In case of larger effects on the economy or business firms, a more extensive RIA is necessary, and an external evaluation mandate may be considered. According to the principles laid out by the Federal Council, the economic effects are to be evaluated and presented according to the following five evaluation parameters: (1) necessity and appropriateness of government action, (2) effects on the different societal groups, (3) effects on the economy as a whole, (4) alternative solutions, and (5) effective implementation. In order to be effective, RIA have to be transparent and of high quality.

- **SME Forum**: This extraparliamentary commission is mostly composed of business entrepreneurs who give their opinion on proposed federal laws and ordinances from the point of view of small- and medium-sized enterprises. It evaluates the implementation of the projected measures, in particular the administrative

burdens, the costs arising from the measures, and the limitations posed to entrepreneurial freedom. In many cases, the opinions can improve the regulatory proposal.

For existing regulations

- **Regular scrutiny of existing regulations**: It is important that existing regulations are regularly scrutinized in order to detect potential for improvement and reduce unnecessary administrative burdens. The Federal Council publishes on a regular basis reports on the reduction of administrative burdens, including a selection of new actions.
- **Reports and action plans**: The Federal council takes continuous action to improve and adapt existing regulations to changing conditions. This can be done in specific economic sectors, like the recently opened consultation on the reform of the electricity market. It may also consider transversal issues and other priority areas. For example, some countries have introduced a regulatory brake according to the principle of "one in, one out". The Federal Council is evaluating such instruments more closely.

  A recent example is the digital test: The SECO has carried out a survey by mandate of the Federal Council to examine where legislation relevant to the economy could needlessly hinder digitalization or be made redundant by digital developments. Based on the responses of business associations and other stakeholders to the survey, the Federal Council decided to examine in more detail measures to reduce hurdles in the case of legal formal requirements. The aim is to lower hurdles for digital business models and

improve the regulatory framework for the digital economy.

- **Sunset, review and evaluation clauses**: Article 170 of the federal Constitution has systematized the examination of federal regulations and policies for their effectiveness. Today, more than 100 different laws and ordinances contain an evaluation clause, which compels the federal administration to evaluate the effectiveness of measures and regulations. Sunset clauses can also be combined with an evaluation: in this case the regulation will be eliminated unless the result of the evaluation is positive. Evaluation and review clauses are especially useful when the impact of a regulation is uncertain or the market conditions are evolving rapidly.

The positive role of the consultation process in the Swiss experience

Cécile Rivière

According to the 2018 Global CEO Survey conducted by PwC the burden of regulation remains the main concern of companies worldwide. This also applies for Switzerland. Already in 2013, the Federal administration estimated the direct regulatory costs in the most important economic sectors at around 10 billion francs per year, other figures even exceed this estimate. Although mere estimates of the administrative burden can be made, comparisons with countries competing with Switzerland as a business location show that the regulatory burden in Switzerland increases. On one hand, Switzerland ranks extremely well in terms of innovation and competitiveness indexes from various institutions, but on the other hand, it modestly ranks 33rd in the World Bank's "Ease of Doing Business" index for 2018. Our country seems therefore to face challenges when it comes to overcome the burden of regulation.

Several reasons lead to this. The private sector regularly blames the so-called "Swiss finish" for an overly high burden of regulation. Often, with the aim to improve regulation, the lawmaker introduces additional requirements to regional or international standards.

Regulation is a complex and dynamic beast. The private sector must comply with norms produced by international, regional and national regulators. This is of particular importance for an exporting economy like Switzerland, deeply integrated in the global value chains. Already at national level, companies face communal, cantonal and federal regulations. Moreover, the citizens' direct rights to influence the

law-making process, i.e. the popular initiative and the referendum, lead to the fact that the Swiss people can directly request the introduction of or alternatively reject a regulation. This fragmented landscape can result in inconsistencies – over- and underlaps – in terms of regulation.

Yet, if one examines the principles defining "better regulation" at the international level – "evidence and a transparent process, which involves citizens and stakeholders (for example, businesses, public administrations and researchers) throughout"[1] – these best practices, internationally promoted, bear similarities with the processes implemented by the Swiss Federal authorities. One could therefore come to the conclusion that even though laudable, the Swiss approach is not sufficiently developed to reduce the administrative burden on businesses and unlock added value.

One must, however, acknowledge the good practices prevailing in Switzerland. The country benefits from a well-functioning and established dialogue between regulated and regulators. Each draft-legislation enters into a consultation process in which the stakeholders are invited to participate. Even though this process extends the law-making process it is useful to identify potential pitfalls and to suggest alternatives. Active participation of the stakeholders enables the developments of expertise and enhances the regulators' reputation. In Switzerland, stakeholders are eager to bring forward their positions because the political system grants them the necessary space. Thus, to a certain extent, Switzerland can be considered a very good laboratory for better regulation. One of the findings is that better regulation is still regulation and that each interested party, be it regulators or those subject to regulation, must have to manage their own expectations.

[1] Definition given by the European Commission: https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en

Other solutions and positive trends could be more consistently applied to prevent regulation from seriously harming innovation. Regulation should in particular be principle-based and technology-neutral. Common sense should prevail upon ideology. Besides, whenever possible, the use of soft law instruments should be preferred. Switzerland has a strong tradition of soft laws and self-regulatory approaches. The private sector is thus encouraged to organize itself and develop relevant standards. Soft law is often seen as "fake" law but it is not. It creates benchmarks and incentivizes companies, investors and consumers. A good example is corporate social responsibility: to address complex and global challenges related to human rights and sustainability, recognized international standards create incentives and establish a level playing field where national regulation could be detrimental.

In Switzerland, one can observe a growing call for differentiated regulation, within a same branch, according to the size or the risk-structure of the actors. In the banking industry for example, the actors now stress the fact that smaller and specialized banks should not be as heavily regulated as the systemic universal banks. This risked-based approach could prevail upon a "one size fits all" approach. Besides, there is a clear need to establish a shared regulatory culture and a common regulatory language between regulators and regulated, especially for the high-tech industry or when addressing new actors such as FinTech companies.

Last but not least, within the companies, measures could be taken to avoid preventing innovation from inside. Indeed, to eliminate all risk of failure within the organization, some companies add an extra layer of regulation or compliance requirements.

It must be reminded that the principles of good regulation focus on the origins of the law or on its implementation. Such principles tend to increase legitimacy and acceptance.

However, it is often forgotten that rules also can become obsolete. While measures to curb the creation of new regulation are needed, attention should also be paid on their elimination. To get rid of unnecessary regulation, however, proves to be a very difficult task, even though in the current period of technological change it is of outmost importance. Unnecessary or outdated regulations hinder innovation and the development of new markets. As Charles Montesquieu wrote in *L'Esprit des Lois* in 1748: "Les lois inutiles affaiblissent les lois nécessaires"[2], i.e. those laws that are useless weaken the necessary ones.

The Swiss federal authorities have become aware of the problem and have started to take action in this area, supported by Parliament. As an example, the State Secretariat for Economic Affairs (SECO) was given a mandate by the Federal Council a few months ago to conduct an investigation to identify those elements of the legislation that are relevant from the point of view of current economic policy, those that hinder digitization and those that have become redundant as a result of the digital shift. The SECO report was published at the end of August. Hopefully, it is followed by action. It should also be ensured that the cantons would be consistent and take their own steps in a similar direction.

To summarize the above, one can conclude that in the fight against overregulation, good intentions are not enough. Each institutional level must contribute and act consistently. It should never be forgotten that good regulation should aim at building trust among all stakeholders. Too often, we see "preventive" laws that result in a negative vision of the private sector, hence fueling the addressee's suspicion.

[2] *L'Esprit des Lois*, Charles de Montesquieu, Livre XXIX, chap. XVI

Making risk regulation fit for purpose

Lorenzo Allio

Modern government must take account of and contribute to shaping the 21st century world. Economies and societies are characterized by faster interactions between various actors across several levels of governance. Regulators are called upon to tackle increasingly complex and multi-faceted challenges. Whereas in the past problems have tended to be tackled singularly as definite entities, today societies recognize the presence of, and expect solutions to, risks that range from the systemic and the "macro" dimensions, to the individual and the "micro".

Public opinion influences the salience of policy issues. Citizens have higher expectations of the capacity of governments to solve problems, but at the same time, and paradoxically, they lack confidence in public institutions and decision-making. Objective and calm assessment of facts has, moreover, become more difficult because of pervasive relativism and distrust in expertise.

In response to this contemporary context, governments have embarked on a series of structural reforms of the public sector. Since more than two decades now, Better Regulation strategies have been, in most OECD countries, a part of such endeavours.

Generally speaking, the Better Regulation agenda in OECD countries seeks to guarantee high levels of protection to human health and the environment along with high economic performance for sustainable development and prosper-

ity. If we consider what the agenda has delivered, we observe that the glass is half full and half empty.

On the one, positive hand, not only has Better Regulation been progressively institutionalized, with more structured allocations of roles and responsibilities and the establishment of standing forms of regulatory oversight. Many regulatory management tools such as public consultation, regulatory impact analysis and ex post evaluation have also become standard practice. While good regulatory principles and practices are relatively well deployed in most parts of the executive, they have been increasingly embraced also by legislative assemblies. Importantly, attention is being given to ensuring that the methodologies and the procedural arrangements underpinning the tools are coherently interlinked.

In many instances, on the other, less positive hand, the potential of the Better Regulation agenda has however remained untapped. If we limit the horizon to Europe, we must acknowledge that we do not live in "the most competitive, knowledge-based economy in the world", as the so-called "Lisbon Agenda" of the European Union had committed to achieve by 2010. Almost 10 years after that deadline has passed, not only have European economies not outperformed other trading blocks, but the divide in terms of growth and innovation compared to the US, China and Japan has actually not reduced.

Multiple influences and non-regulatory reasons certainly help explain such under-performance. From a risk regulatory perspective, and with particular regard to public risk management decisions, this paper highlights the following contributing factors:

- the need to "get risk regulation right";

- the importance of "getting it right with risk regulation"; and
- the opportunity to embrace also "Better Administration".

The remaining of the paper shortly expands on each of those three points.

Getting risk regulation right

Several inputs contribute to shaping public risk management, and science is one of them. The role of science in decision-making varies in type and depth. At the stage of horizon-scanning and foresight, scientific insights are elements of the policy formulation process. When it comes to developing legislative interventions, deliberations should be informed by scientific evidence. When it comes to implementing legislation, however, "getting risk regulation right" primarily means basing decisions on the best available evidence.

Translated in practice, this implies that regulators set and systematically enforce consistent standards for scientific excellence, whenever they procure, process, validate and use scientific expertise.

It is also imperative that they ensure scientific impartiality. Controlling for and managing conflict of interests is key to ensure independence, both in terms of financial relationships and of biases arising from ideologies, core values and believes. "How" scientific findings are generated is more important than "who" has generated them. In this context, transparency is the pre-condition to apply the "scientific method", submitting research to clearly defined protocols and Systematic Peer Review and replicability tests.

In Europe, the risk governance system of the European Commission and of some European countries presents

pockets of very good practices in this respect. However, horizontal policies for risk analysis throughout the regulatory process are lacking in most jurisdictions, and minimum scientific quality standards are still not established.

Getting it right with risk regulation

"Getting it right with risk regulation" means minimizing regulatory failure, unintended consequences, or disproportionate regulatory impacts while protecting against harm.

For long time, the focus of Better Regulation strategies in European countries and in parts of the business community has been to identify and eliminate administrative burdens. "Fighting red tape" has dominated not only the narrative of reforms but has also prompted institutional changes – for instance the creation of oversight bodies also at arm's length of government.

While this has triggered momentum and certainly addressed important elements of the regulatory reform agenda, including the need for simplifying administrative procedures and streamlining licensing processes, it might have potentially diverted resources from investigating more "complex" impacts generated by regulatory interventions – namely those that fundamentally affect innovation.

In modern economies, innovation is the single most important driver to enhance productivity and inclusive economic growth, and the principal means of achieving societal (prosperity) and environmental goals (sustainability). Innovation flourishes when societies create conditions in which investors and entrepreneurs are encouraged to take risks and hence create new sources of wealth and work. Today, around 85% of all R&D expenditure involves industry directly or indirectly, and safety research, much of it in response to man-

datory requirements, is almost entirely funded by the private sector.

The Better Regulation "new frontier" in this respect hence includes developing a more thorough understanding both of the incentives that the private sector has to invest in innovation, and of the impacts that regulatory decisions have on such incentives. Better Regulators are in other words called upon to master dynamics that potentially distort private R&D investment allocation decisions, such as capitalized development costs (time to market); so-called "defensive R&D"; stigmatization; and erosion of intellectual property assets.

Risk managers should also become more aware of the importance of designing regulation better, notably by ensuring policy and regulatory coherence; accounting for risk-risk trade-offs and other unintended consequences; and by developing risk-benefit analyses. Acknowledging the limitations of pure hazard-based approaches (instead of grounding interventions on risk assessments) is also important, especially when such approaches are driven by the unrealistic goal of achieving a "zero-risk" or "toxic-free" environment and they impose the a priori phasing out and substitution of hazardous substances.

Expanding Better Regulation to embrace also "Better Administration"

The third pillar of an upgraded risk regulation reform refers to the overarching scope of application of good regulatory principles, management tools and due process standards.

In all major OECD countries and also at the level of the EU, implementation of risk management laws takes place primarily through the actions of centralized institutions and decision-making mechanisms that form part of an "administrative state". Such technical, implementation decisions involve rule-making or adjudications. They encompass issues

such as general product safety, food safety, pharmaceuticals, chemicals, environmental protection, public health, occupational health and safety, and consumer protection.

Typically, administrative decisions are taken in contexts and through procedures that have emerged without any formal strategy or plan, often as a result of a piecemeal approach, reflecting different and separate policy objectives and older approaches designed to resolve different problems. Yet, they significantly affect the opportunities and freedoms of citizens and businesses, and thus the ultimate success of the underlying social and economic policy.

To manage such dynamics, not everywhere are typical safeguards at play. At the EU level, for instance, the Better Regulation strategy has not been crafted to cover centralized and administrative implementation processes. Likewise, judicial review by the EU courts has not created a framework of procedural standards to match the growth in the power of the administrative state.

Action is needed to reform the governance of the administrative state in Europe. The principles and tools deployed to ensure high quality regulation should be applied to administrative decisions, too. At the EU level, this could be achieved also through the introduction of an EU Law of Administrative Procedures, which would set binding due process standards for, among other, meaningful public participation, public record and access to information. Expanding the scope of Better Regulation to embrace also "Better Administration" would significantly increase transparency, accountability, proportionality and predictability of risk management measures. And contribute to making risk regulation fitter for purpose.

The potential of regulatory simplification

Daniel Trnka

Programmes focusing on fighting bureaucracy, cutting red tape, reducing administrative burdens or administrative simplification are on the top of the list of priorities of most governments of developed and also developing countries around the world. To use one of the most recent examples, the President of the United States of America Donald Trump cut a symbolic piece of red tape during an event at the White House on 14th December 2017 promoting its administration's efforts to decrease the amount of federal regulations.

The economic crisis which started 10 years ago contributed to further underscore the importance of administrative simplification. Simplification helps to free resources that are being spent on compliance and enables them to be invested in jobs and support economic recovery and growth. Therefore, administrative simplification became one of the important tools on how to overcome the crisis and re-boost growth.

Despite different names, the focus of these programmes is on reviewing and simplifying the stock of existing laws and regulations. The main goal is to remove unnecessary costs imposed on regulated subjects by government regulations that can hamper the economic competition and innovation. The approaches governments are using differ. Some countries have launched projects on measuring administrative burdens, some are using methods such as 'one-in, one-out' or 'one-in, two-out' to compensate new administrative costs by reducing these costs elsewhere.

In many cases, these programmes have not been as successful as originally expected, at least in terms of the perception by businesses and citizens. Even in countries where administrative burden reduction efforts delivered significant results according to the government, businesses expressed little enthusiasm.

This article, based on the extensive work of the OECD in the field of regulatory policy and governance and its publications, summarizes the main trends and developments in the area of administrative simplification in recent years and provides some ideas and recommendations for future policy directions.

Main trends

The OECD data show that virtually all OECD jurisdictions had some programmes aiming at reducing regulatory burdens in 2017.

Focus on administrative burdens

In 2000's, projects focusing on administrative simplification and reducing administrative burdens in particular were booming especially, but not exclusively, in the EU countries. The Standard Cost Model (SCM) was used to quantify administrative burdens and identify potential opportunities for their reduction. One of the major factors that contributed to the rapid spread in use of this approach was the initiative of the European Commission which launched in January 2007 the *Action Programme on reducing administrative burden in the EU* by 25% by 2012.

The Standard Cost Model developed in 1990s by the Dutch government has been by now used in one way or the other by a majority of OECD countries. Other simplification tools and processes (e.g. codification and consolidation, crea-

tion of one-stop shops) have been in the shadow of administrative burden reduction efforts and sometime present only ad hoc endeavours that are not, or poorly coordinated with mainstream efforts.

Problems of perception

Despite high expectations among civil servants and politicians, the perception of programmes on measuring and reducing administrative burdens by those who should mainly benefit from such programmes, i.e. businesses and/or citizens varied, to say the least. Even in countries where programmes of administrative burden reduction delivered significant results, at least on paper, businesses expressed little enthusiasm about the results.

In the Netherlands for example, the government met its goal to reduce administrative burdens on businesses by 25% already in 2007 and successfully repeated the programme with the same reduction goal in 2007-10. Despite these achievements, businesses were frustrated at what it considered to be slow progress and the failure to tackle issues that really matter from its perspective.

Reasons for this negative perception by regulatees may be the following:

- The absolute burden reduction may seem impressive when related to the whole society or the business sector in a given country. However, when expressed in terms of individual company/citizen, they may not represent such significant savings.
- There may be a delay in the visibility of results of removing administrative burdens to the stakeholders.
- Some countries or agencies may focus on easily removable red tape, for example regulations that are obsolete

and/or not actually complied with. Getting rid of these regulations does not bring any actual relief for the regulated subjects.

- Governments do not take into account the perception of regulations by regulated subjects. Sometimes those regulations perceived by regulated subjects as most irritating may not be those that are the most burdensome concerning the result of a quantitative measurement and vice versa.
- Communication with stakeholders may have been neglected in some cases. The results of simplification projects, such as the reduction of administrative burdens by 25%, may be attractive for the media but may be too abstract for individual citizens or entrepreneurs in terms of their own benefits.

Widening and broadening of administrative simplification

In reaction to this, many countries have broadened and widened their programmes, taking into accounts wider categories of costs, besides only the administrative ones (such as other direct compliance costs, irritants, indirect costs for the economy), and also concentrating not solely on businesses but including also the costs of regulation on citizens and the public sector.

Businesses have been the primary focus of administrative simplification efforts. The perception of citizens on how successful governments are in their fight against bureaucracy is nevertheless heavily influenced by their personal experience. Thus, citizens' perception of administrative simplification programmes may be influenced by the fact that those who benefit from the most significant savings will be large companies.

Another issue is related to the relatively narrow definition of administrative burdens. Naturally, the administrative simplification projects focus mostly on one part of regulatory costs – administrative costs. These costs, especially those connected with filling in questionnaires, are usually seen as the most irritating, connected with the "bureaucracy" in the negative sense of the word. Fighting against these costs may be appealing for politicians. It is sometimes not easy to see the purpose of expenditures on compliance with information obligations. While the substantive compliance costs are usually justified by the protection of basic values such as environmental protection or consumers' rights, justifying information obligations is more difficult.

Aiming at reducing administrative costs may be supposed to be a "safe bet". Surprisingly enough, it has not always been the case. For example, the Swedish Board of Industry and Commerce for Better Regulation (NNR) estimated that "for all companies, administrative costs were below 30%" of all regulatory costs. NNR complains that "compared with financial and material regulatory costs, administrative costs of regulations are only a small portion of companies' regulatory costs and therefore the reduction of such costs is of minor importance for businesses."[1]

One category of regulatory costs is different: irritation costs. These costs are not objective and therefore difficult, if not impossible, to quantify. Irritation costs can be defined as the costs that are subjectively felt by the regulated subject as annoyance caused to him by not being able to see and understand the *raison d'être* of the obligation or not being able to conform to the objectives of a given regulation. The subjective perception of how burdensome a given regulation is may differ from the results of quantitative measurements. In fact, the findings of the EU baseline measurement of administra-

[1] NNR Regulation Indicator 2008, NNR, Stockholm.

tive costs imply that "[t]he degree to which an information obligation is perceived by business as irritating (irritation factor) is very often uncorrelated to the administrative burdens imposed".[2]

Regulatory offsetting

To further increase the 'visibility' of regulatory costs and increase the pressure on all parts of the administration to reduce these costs, one of the approaches that has been gaining ground in the last five years is offsetting new regulations by reducing the existing ones.

The United Kingdom was the first OECD country formalizing such approach as an official government policy in 2011 with introducing the "One-In, One-Out" policy (later 'upgraded' to "One-In, Two-Out" and even, though unofficially, the "One-In, Three-Out"). Other OECD countries, such as Canada, Spain or Germany followed in 2012, 2013 and 2015 respectively. Canada was the first country to actually legislate regulatory offsetting. More recently, Korea, USA or Mexico introduced their versions of regulatory offsetting. Such an approach has been recently introduced also in France. In the meantime, the approach was implemented and later abandoned in Australia.

Regulatory offsetting has its roots in setting net quantitative targets for reducing administrative (or later compliance/regulatory) costs. The benefit of adopting some rules to cap regulatory costs is that these rules require regulators to optimize across regulatory choices. It imposes a discipline on regulators, which, presumably, involves that regulators and legislators choose more efficient and effective regulation and

[2] Communication from the European Commission to the Council and the European Parliament – Action programme for Reducing Administrative Burdens in the EU, COM (2009) 544 final, Brussels 2009.

discard other regulation in order to meet a cost cap (or a cap on incremental costs). This optimization argument is frequently presented in terms of an analogy with public budgeting disciplines: it is argued that increasingly sophisticated public budgeting tools have been developed over many decades in order to enhance the transparency and accountability of governments for their taxing and spending behaviours.

There are significant differences among regulatory offsetting programmes in the above-mentioned countries. These relate to the scope of implementation, scope of offsetting, institutional and co-ordination mechanisms involved in the implementation, etc. While some countries (Canada) offset only administrative costs, other ones measure direct compliance costs or (USA) even indirect costs. Significant exemptions also exist in some countries. While in the UK, Germany and Spain, regulations implementing the EU legislation are excluded from the offsetting obligation, in the USA only "significant regulatory actions" (those with an impact above 100 Million USD, with some exceptions) must be offset.

There are obvious risks connected with regulatory offsetting, such as too much focus only on regulatory costs and danger that regulations which might be costly but still beneficial for the society will be abolished, just to mention the main ones. Despite this criticism and initial distrust among some scholars, civil society organizations as well as some regulatory policy practitioners, the regulatory offsetting programmes have been gaining ground among OECD countries. Governments in countries studied by the OECD mostly use regulatory offsetting as a 'communication tool', with the aim to stress the importance of shining more light on regulatory costs stemming from new regulations. However, offsetting is always used as a complement to standardized mechanisms for regulatory impact assessment and analyzing both regulatory costs and benefits.

Recommendations for future directions

Based on the experience of OECD member countries, lessons and policy recommendations that should be considered when designing, undertaking and evaluating administrative simplification programmes can be drawn.

Quantification complemented by qualitative methods

Governments should quantify regulatory burdens and set quantitative targets for their reduction. However, quantification should be used cautiously with the efficiency in mind. Qualitative methods, especially those assessing the irritation costs, should complement the quantitative ones, to better target the efforts.

Methods, such as the SCM represent a methodology that is relatively understandable and easy to implement. The numbers are easier to present to the media and wider public. Experience of countries that have measured their administrative burdens shows that the process of measurement may be costly, especially when the full baseline measurement is conducted (all existing regulation is measured) and when external private companies are contracted for the measurement phase.

The results in the countries that conducted a full baseline measurement also prompt that the Pareto principle can be applied on administrative burdens – 20% of regulations usually cause 80% of the overall administrative burden.

Some countries have decided to use more qualitative techniques, either as a complement to the existing quantitative ones or to replace them. Qualitative techniques do not try to express regulatory costs in measurable terms but rather work with information that may be subjective and is not quantifiable, but still may represent useful input for the sim-

plification effort. A sub-set of qualitative techniques are the perception studies.

Better co-operation with stakeholders

In connection with using more qualitative methods, better communication and co-operation with stakeholders is necessary. This is a condition to ensure the acceptability of the measures to the widest possible audience and to allocate scarce resources to the highest-burden areas.

Not to waste resources on measuring costs of insignificant regulations, it is important to focus only on priority areas which are highly burdensome and/or irritating for stakeholders. The best way to identify these areas is usually in co-operation with regulated subjects, mostly businesses which know the real-life impacts of regulations the best.

Another important issue is selecting and announcing simplification measures. On the one hand, presenting a long list of measures carries the risk of depleting the programme and diverting the focus away from the key measures. On the other hand, it is difficult to launch an extensive simplification programme with just a single flagship measure. The co-productive approach in particular involves having the necessity to take into consideration the multiple issues raised by businesses.

Experience from Belgium reveals the importance of combining far-reaching measures and other seemingly less significant measures designed to put an end to day-to-day irritations that can build up. Moreover, experience from the Netherlands shows the constant need to prune the legislative arsenal insofar as, even when it looks as if certain laws are no longer applied, they always have the potential to prevent the launch of a new business. Swedish experience shows that, over time and with the proper levels of stakeholder involve-

ment, simplification programmes can gain in refinement and precision. Swedish businesses examined the 400 measures initially put forward by the government and selected the 40 they considered most substantial.

Better integration

Administrative simplification should be integrated and coordinated with other activities in the area of regulatory policy and governance. It is very important to integrate *ex post* simplification with *ex ante* assessment of regulations. Because ICTs are major tools to simplify administration, government policies on e-government and administrative simplification should also be closely integrated.

When simplification efforts are not coordinated properly, synergistic effect of various approaches may not be used fully. Resources can also be wasted on parallel projects such as the codification of legislative documents that are at the same time considered to be amended as part of the administrative burden reduction programme. The institutional structure can be one of the main factors supporting or hampering better co-ordination of administrative simplification efforts.

A further step of integration is the co-ordination of administrative simplification with other policies and instruments dealing with regulatory quality. The most important example is integrating *ex post* simplification with *ex ante* assessment of regulation - regulatory impact assessment (RIA). Significant tension can arise from contradictory trends. Efforts to simplify the regulatory stock will never get off the ground unless parallel measures are taken to reduce legislative inflation. When it comes to tackling the regulatory burden, the first step is to shut off supply before starting to absorb any excess.

This requires a genuine shift in administrative culture towards risk-based management, and a global vision of the regulatory burden that is not confined to the substance of regulations but which also takes into consideration how they are applied and the care taken by the administration in fulfilling its role. On the one hand, there is a demand for the reduction of unnecessary administrative burdens. On the other hand, new regulations are being adopted for different reasons: as a requirement from inter- and supranational institutions; as a request at the national level for high security and safety standards; at a political level where new regulation is sometimes used as a benchmark to show that "something is being done". Part of the answer to this challenge lies in ensuring that the impact assessment of new regulation is further strengthened with a focus on *ex ante* assessment of administrative burden.

Process re-engineering, using ICT as well as the creation of electronic one-stop shops show that there is more integration among administrative simplification and e-government: ICTs are increasingly used to ease the administrative burden on citizens, businesses and public authorities. The Dutch Interior Ministry estimates that 40% of burden reductions for citizens are ICT related.

On the other hand, there is less evidence of closer integration of these areas at an institutional level and at a policy development level. Often, policies in these two areas are developed separately and therefore cannot fully exploit the potential synergic effect.

Institutional structures

Institutional infrastructure: independent control oversight bodies can help promote objective feedback on the government's performance in terms of its efforts to reduce regulatory burdens, help depoliticize the use of the law and raise public

awareness on these issues. Transparency and stakeholder involvement are of vital importance here, and subnational levels must also be involved.

Efficient institutional structures for co-ordination and monitoring of administrative simplification projects are essential. These structures should reflect the top-level political support and the whole-of-government approach (inter-ministerial committees, working groups). The trend to create or to strengthen the role of advisory bodies in the area of administrative simplification is also visible. These advisory bodies usually have a significant level of independence and external stakeholders such as businesses are represented in these bodies.

Evaluation

Administrative simplification efforts should be evaluated for their "value-for-money". An evaluation strategy should be developed before launching the project. The *ex post* evaluation exercise needs to look beyond the achievement of the target set by policymakers and analyses the real outcome of the programme in terms of social welfare and industry competitiveness. In addition to the soundness of the methodological choices adopted during the measurement, the evaluation should ensure that the reduction measures adopted: do not create additional sources of cost for businesses, while reducing burdens; do not increase costs for other agents, such as consumers or public authorities and do not eliminate even greater benefits generated by the regulation that has been eliminated/simplified.

Focus on regulatory delivery

A certain number of simplification programmes have come unstuck as a result of the negative perception of their impact by businesses. One of the possible reasons for this perception

is that the programmes did not address the aspect that is most visible to users, i.e. implementation and enforcement. This visible aspect is embodied by the inspector and the impression that he or she has the power to shut down a business from one day to the next due to non-compliance with a regulation that the user should have known about.

The objective is not regulation per se, but to achieve better results for society. This requires the development of risk-based management and the creation of favourable conditions for genuinely improving living conditions by giving citizens the possibility to have a real influence on regulatory decisions, and by encouraging officials in public bodies to undertake a strategic rethink of their mandate.

In the United Kingdom, this resulted in a three-page code for regulators that was developed in liaison with the regulators themselves. The code places the removal of unnecessary regulatory burdens and the ability to challenge regulators at the heart of the shift in culture.

Experience from the Netherlands shows that it is possible to have a less punitive approach to inspections and to reward model performance with, for example, a two-year exemption from inspection when permitted by the business's track record. A unified inspection process was also introduced in the Netherlands (despite initial resistance) to address fragmentation issues.

Conclusions

Administrative simplification is likely to remain among the most important government agendas in the following years. The perception of the beneficiaries – businesses and citizens – might still not be so positive and the public will keep complaining about the high level of government bureaucracy and too much red tape. This does not mean however, that the

efforts to simplify administration should be condemned and abandoned.

Administrative simplification projects must be adjusted, widened and broadened, better targeted, quantitative tools must be complemented by qualitative ones. Their effects on economic growth, creating jobs, enabling innovations, etc. must be clearly shown to persuade the decision makers and the stakeholders on their usefulness. Governments should also, through perception surveys, regularly assess the perception of regulations among business and citizens and set improving this perception as one of the goals of regulatory reform.

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OUTLOOK

Why the best form of regulation is competition

Anthony Evans

We need regulation, but the common way in which regulation is applied can backfire. I believe that a major problem with how we engage in regulation is an insufficient appreciation for how markets – even those which are not perfectly competitive - function.

In this article I want to cover three main points. Firstly, the relationship between regulators and the market. Secondly, what sort of consumer protection is necessary. And thirdly, which institutional mechanisms are best at improving the flow of knowledge. The bottom line is that a genuinely competitive market process is the best way of regulating industry, and we should encourage regulators to uphold such a market.

The relationship between regulator and the market

The trend in banking regulation (even prior to the latest financial crisis of 2008) has been that banks try to find loopholes in new legislation, and this prompts further revisions. The result of this cycle is ever greater complexity. This is a problem because it means that we do not know how regulations will be gamed, but we do know that if firms adopt similar strategies this will increase systemic risk.

The Financial Times journalist Tim Harford has used the example of the VW emissions scandal.[1] The regulator had predictable tests and firms' behaviour was focused on trying to pass those tests, losing sight of the underlying problem that

[1] Harford, T., (2016) Messy, Riverhead.

testing was supposed to solve. Harford suggests that a better method is "randomly times tests of arbitrarily chosen areas" – in other words, an exam. If students don't know what will be on the test, the optimal strategy is to revise everything and cover all bases.

In his 2012 Jackson Hole speech, Andy Haldane (now Chief Economist at the Bank of England) argued that regulators should focus on heuristics (i.e. rules of thumb) rather than complex regulatory mechanisms.[2] He said, "you do not fight fire with fire, you do not fight complexity with complexity". We need to break out of that cycle, but using exams as the underlying metaphor is wrong.

In an exam the instructor will have knowledge of the content, and the student is tested against that. In the case of a dispute, the instructor is "right". When applied to the banking system this implies that the regulatory agencies have knowledge of the risks, and banks are trying to circumvent them. But in a dispute, how do we know who is right? It should not be treated as a game between an omniscient presence and a nefarious subordinate. And to the extent that regulation is focused on consumer protection, it is not actually necessary.

What sort of consumer protection is necessary?

There is a wide rationale for consumer protection, but it is important to recognize the ways in which a competitive market process – grounded in the rule of law – can provide this. For example, consumers demand protection from fraud or extortion. But reputational mechanisms (such as customer testimonials or branding) place restrictions on what companies can get away with. In addition, we have the courts to

[2] See Haldane, A., (2012) "The Dog and the Frisbee" Federal Reserve Bank of Kansas City's 366th economic policy symposium.

protect customers from the threat of physical force. Indeed, it is important to emphasize that the legal system rests on the protection of private property rights, and regulatory agencies that have the authority to confiscate or compulsorily reallocate resources actually undermine this.

A common reason for consumer protection is the fact that the general public do not have perfect information, and their state of ignorance may be exploited. However, a whole industry of solutions exists to mitigate these information asymmetries, through things such as third-party certification, warranties, and free trials or samples. Market imperfection is an inefficiency, and any inefficiency is a profit opportunity.

Even extreme situations such as worker exploitation can be pursued through a competitive market, where the freedom of contract ensures that people only enter contracts they deem beneficial.

Not only is competition able to address some of these concerns, it does so without introducing new problems that are associated with regulation. These include:

- *The dynamic of intervention*. Once one regulation is adopted there can be a call for additional ones to correct unforeseen issues. For example, excessive safety standards may lead to a false sense of security and to an increase in accidents due to additional risk-taking. This leads to demands for further safety regulations, which result in even more accidents (for the same reasons). The end result is an arms race of safety standards and a cycle of complexity.
- *Rent-seeking*. The recent Congressional hearings on Facebook made it clear that legislators had no understanding of a social media company's underlying business model. Although they claimed that they were in the public interest, and protecting consumers against

invasions to their data privacy, it is in fact the government that does most to threaten privacy. Rather, the main purpose of the hearings was to find an angle to extract rents from a profitable company. Governments do not protect the public from extortion; extortion is precisely what they do – through taxation and excessive regulation!

- *Excessive quality standards*. When regulator invoke minimum quality standards these tend to popular, because few people want quality to be low. However, it is possible to have unnecessary high quality. Excessive minimum standards may lead to shortages and overpriced products, for example in the housing sector.
- *Unintended consequences*. Excessive regulation may lead to the formation of black markets, to increased costs of living harming low-income households, and encourage unregulated alternatives that are less safe. By limiting supply, driving up costs, and restricting competition and choice, regulations end up reducing quality and hurting the consumers they allege to protect.

Which institutional mechanisms do improve the flow of knowledge?

Instead of viewing regulation as a game between the regulators and the banks, the focus should be on the knowledge flows between the banks and the market as a whole. This occurs in a situation where:

- we do not know who will encounter relevant information,
- we do not know what information is pertinent,
- we do not know what behaviour is consistent with the desired risk profile of customers.

Consequently, there are two options. The first option is central planning. This is a hierarchical system where knowledge is supposed to flow up to the decision makers. Unfortunately, this introduces moral hazard because losses are collectivized. The second option is a decentralized system, i.e. a market. In markets decision rights flow down to whoever has the information, and the profit-and-loss system is used to guide behaviour. In concrete terms this means that excessive risk-taking (as judged by the market, not the bureaucrats) is penalized through bankruptcy, investors are rewarded for their attention to long-term profitability, and firms are free to experiment with different business models, which introduces choice for consumers, and thus reduces systemic risk.

Competitive markets are fast – in 2007 Mattel recalled several Chinese-made toys. Before regulators had even decided what sort of action might be appropriate, $2.75 billion had been wiped from the market value. The market was very quick to penalize the company.

Although most forms of regulation can be performed by a competitive market process, it is important to make two caveats. The first is to clarify exactly what is meant by a "competitive" market. The second is to establish the appropriate jurisdiction of the regulatory authority.

Regulatory authorities traditionally followed textbook theory by defining competition as the degree of market concentration. In this view the more concentrated a market is, the less competitive it is, and the greater the rationale for intervention. However, an alternative view is to define a competitive market purely on whether it is contestable – in other words whether new entrants face arbitrary hurdles. Since these hurdles tend to be enforced by governments their main role is to reduce these entry *barriers*. From a competition perspective such barriers harm consumers because they block profitable ventures. By contrast *costs* of entry reflect real re-

source scarcity and determine whether a venture is profitable in the first place. Costs of entry such as economies of scale, network effects and brand loyalty are not indicators of an anti-competitive situation. Indeed, if a monopoly is based on superior efficiency (i.e. it operates at lower average costs than any potential rival) then this tends to be beneficial to consumers. And even if one argues that the monopoly in question impinges consumers, they do not tend to last over time. Competition authorities are always fretting about the perceived market dominance of particular large companies, but it is telling that the particular company in question changes over time.[3]

The second key caveat concerns the appropriate jurisdiction of the regulatory authority. There are some situations, such as the presence of externalities, that make it prohibitively costly to resolve them using market mechanisms. In which case some form of regulatory authority would be necessary. However, these may not coincide with the jurisdiction of a national regulatory authority. For example, instances of noise pollution on a university campus are best regulated through the local housing association. Instances of carbon dioxide emissions may be best regulated at an international level.

This article has not intended to be "anti-regulation". On the contrary, regulation is critical. However, I am making the case that the best form of *most* regulation is through competition and the market process, rather than the state. Ultimately regulation is too important to be left to the government.

[3] A tweet by Jerry Neumann makes this point well: In the 1960s, without government intervention no one would ever beat General Motors, in the 1970s IBM, in the 1980s Microsoft, in the 1990s GE, in the 2000s Walmart, in the 2010s Amazon. [https://twitter.com/ganeumann/status/1038528256436260869]

The case for strong limits on the precautionary principle

Cécile Philippe

A risk is a probability or threat of damage, injury, loss or any other negative occurrence that may be avoided through preemptive action. It is a hazard caused by oneself or by others. In some cases, it is the consequence of collective action. In economics, one refers to negative externalities.

Societies have been dealing with risk for centuries. Accumulation of knowledge, education, savings, pooling of resources, insurance are ways to deal with uncertainty. Through time people have built and learned to rely on institutions that help them navigate through uncertainty and risk created by themselves and by others.

Responsibility

The best way to deal with risk at the individual level, is to make sure that every single individual supports not only the positive consequences of his or her actions but also the negative ones. The optimal structure is when a person is penalized, long-term, from an action. This is another way to say that one should be responsible of one's actions and it works best when property rights are well defined and a judiciary system can make you pay for it.

Insurance

The technique of insurance is another way to deal with the financial consequences of a risk that has materialized. It does not ban or prevent the occurrence of a harmful event – like

robbery or fire for instance – but it protects the person insured against it through the elimination of its financial consequence.

The contract between the insurer and the insured person must create incentives that promote cautious behaviour from the insured party. Such behaviours reduce the scale and possibility of occurrence of the risk. The insurer's interest is to have his client take the necessary precautions in order to avoid the multiplication of damages. It is a matter of keeping his business running. For example, quite frequently an insurer may ask his client to have a reinforced door, an alarm, or a fire extinguisher before he agrees to insure him. The same goes for insurance against risks the client may cause for others. Thus, private insurance promotes prevention, self-discipline and a reduction in risk taking. It must be allowed to do it, which is often not the case due to ideology-driven government regulation.

Reputation

The reputation of a company can also be an important way to reduce the risks it might be willing to take, as it could jeopardize its business.

Why a precautionary principle?

The precautionary principle is still relatively new in our societies, as it goes back to the 1970s and materialized for the first time in 1992. It has been introduced because it was argued that some risks could not be managed in a decentralized way but needed some regulatory intervention. For instance, Nicholas Nassim Taleb – an expert on risk – does not discard the principle as such, as he believes it can apply to some situations.

Taleb is known for his analysis of systemic risks. In his books, *The Black Swan*, *Antifragile*, *Skin in the game*, he ap-

pears as a defender of the precautionary principle but only in those cases where a cost-benefit analysis is impossible, because the nature of the activity itself endangers something, which jeopardizes life on earth.

To him, individual bankruptcy is not as big a deal as a collective collapse. And of course, ecocide, the irreversible destruction of the environment, is the big issue to worry about. As he explains, the death of one individual is never the worst-case scenario unless it correlates to the death of others, that is, it is a systemic risk.

Therefore, one should look for systemic risks that can threaten humanity or ecosystems and, in those cases, one should apply the precautionary principle.

What is the dilemma with the precautionary principle?

The precautionary principle says that when a product or an action might create serious or irreversible harm, lack of scientific certainty should not preclude public preventive action. It justifies the intervention of public authorities in order to regulate or ban the product or the activity.

Easily said, not easily done, because the precautionary principle gives enormous power to public authorities that will have to decide between two alternatives involving two kinds of errors:

- On the one hand, policy makers may err by failing to adopt measures to address a health or environmental damage that is going to happen in the future.
- On the other hand, policy makers may adopt regulatory measures to control a health or environmental risk that will never materialize.

There is an asymmetry between the two alternatives because no one will ever know the victims of a technology

that has never been allowed to develop whereas an accident caused by a lack of precaution will be known.

Another difficulty with the precautionary principle is that it puts a very powerful tool in the hand of politicians who are very much influenced by interest groups.

James Buchanan, who won a Nobel prize in economics in 1986, explains how interest groups hijack political debates and capture politicians, winning huge benefits in the form of favourable regulations (cf. biofuels). They are willing to devote enormous lobbying effort and large amounts of money to get to their ends, given the windfalls.

Of course, ordinary taxpayers ultimately have to pay for these benefits. But a favour worth millions, even billions, of dollars to an interest group may cost only a few dollars to each individual taxpayer. Why would anyone make the effort to understand, let alone oppose, complex government policies? It's just not worth it. As public choice theory explains, "rational ignorance" is a much better default mode.

This dynamic, of "concentrated benefits versus dispersed costs," explains why we have so many bad policies that are not in the public's interest, why it is so difficult to reform such policies, and why government keeps growing: The number of groups a politician can pander to in order to buy votes is endless. The precautionary principle makes manipulation possible at an even greater level.

Public opinion is also pushing towards a broader use of the precautionary principle. It is a fact that people have today a more extensive definition of what is a risk. We live in very complex societies and it makes people more anxious than ever. There is a societal demand for more precaution. It makes the use of the precautionary principle even more tempting.

Since its early days, the precautionary principle has become ubiquitous. While its initially stated goal was to allow for policy decisions regardless of prevailing scientific uncertainty, such uncertainty has become the main justification for public intervention. It is a sort of universal catch-all for policies aimed at banning any product at all, even if there exists a scientific near-consensus regarding its harmlessness under actual conditions of use. One emblematic example is that of electromagnetic waves. The precautionary principle is often presented as a safeguard against introducing new technologies, such as nanotechnologies. The stated goal is that they should not be approved until their safety is fully proven. In actual fact, application of the precautionary principle often ends up targeting various products that have been on the market for decades, with no problems found, even if they are references in their respective industries (see the examples of DDT and Bisphenol A).

Finally, application of the precautionary principle by political authorities has run amok in cases where environmental risk is non-existent. The precautionary approach thus aims, for example, at common consumer products such as e-cigarettes, juices enriched with vitamin C, energy drinks, etc.

The case for having strong limits

If one agrees that there might be room for application of the precautionary principle, it becomes obvious that it should be limited to cases where there is:

- A degree of certainty of the risks at stake;
- The extent of the damages is huge;
- The reversibility of the damages given what we already know and what could be the improvements already in progress is impossible.

That defines systemic risks. However, as we have already mentioned, the precautionary principle is already applied to many more cases than those and it can have dire consequences.

- It generates legal uncertainty for businesses.
- It undermines the rule of law.
- It harms economic activity.
- It is a serious obstacle to technological innovation and scientific progress.
- Because it disregards the benefits of targeted products, it increases overall risk rather than reducing it (drug approval, etc.).
- The precautionary principle may also require companies to turn to less effective substitutes with real economic, health and environmental risks that may prove "worse than the disease". (ban on glyphosate, e-cigarettes, bisphenol A etc.)

The question is thus to find ways to create an environment where the precautionary principle is not called for in situations where it is not needed because other institutions can deal with it.

Ideally, public decisions should be informed by independent scientists. The focus should be on trying to find ways to create an environment where research can be conducted according to the scientific method.

Finally, we should leave the black and white logic of a ban versus an authorization in favour of guarantees from the stakeholders, such as setting aside provisions, financing more research, etc. It would better promote responsibility instead of banning lines of products or activities because they are deemed risky.

Consumer protection in the 21th century

Julian Morris

How do we know whether an apple we buy is safe to eat, whether the kilo of butter on sale is really a kilo, whether our cell phone will blow up in our hand (or send all our data to the government), or whether a taxi driver will overcharge us (or worse)? Concerns such as these have driven the creation of consumer protection laws. But with the emergence of new ways of sharing information and rating suppliers, do we still need these laws?

A long history of intervention

Consumer protection laws are nothing new. The Babylonian code of Hammurabi, written in about 1760 BC, set prices for various goods and services, ranging from an operation performed by a doctor to the rent on a ship. It also set "prices" for various harms, including theft and injuries (for example, rule number 196 states that "if a man puts out the eye of another man, his eye shall be put out").

Roman emperors introduced various regulations seeking to standardize weights and measures. And these regulations, in various guises, were replicated by medieval monarchs and local governments. Some of these laws established very specific requirements. In England, the Assisa panis et cervisia of 1266 regulated the price, quality and amount of bread and ale that could be sold.[1] Likewise, in Bavaria, the

[1] Alan Ross, "The Assize of Bread," *The Economic History Review*, Vol. 9 (2), 1956, pp. 332-342.

Reinheitsgebot of 1516 specified that only hops, barley and water may be used to produce beer.

While notionally justified on the grounds that they protected consumers, these laws often had very nearly the opposite effect – reducing output and undermining innovation. By limiting profitability of bakers and brewers, the Assisia had the effect of reducing the incentives to produce bread and beer. Although local authorities sought to adjust the amount of bread sold at a particular price to account for changes in the price of wheat, thereby maintaining the profitability of bakers, spikes in those prices led to shortages of bread.

Until 1987, when the European Court of Justice ruled that it violated the principle of the free movement of goods,[2] the Reinheitsgebot had been amended only once in nearly 500 years.[3] Following the ECJ decision, imported beers not compliant with the Reinheitsgebot, could be sold in Germany, but German producers are still largely bound by the law. In 1993, Germany amended the Reinheitsgebot, leading to the adoption of modern craft beer techniques—but with few exceptions those beers still cannot be called beer.[4] As a recent article notes, "until the arrival of craft beers, the most recent innovation in German brewing was the advent of the very successful Pilsner in the 19th century."[5]

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[2] *Commission v Germany* (1987), Case 178/84.

[3] The amendment permitted the use of yeast, the presence of which had been unknown in 1516 (though other exceptions were made, including the grant, to one producer, to use wheat). Stephen R. Holle and Manfred Schaumberger, "The Reinheitsgebot - One Country's Interpretation of Quality Beer," *Brewing Techniques*, Vol. 7 (1), 1999.

[4] Kate Connolly, "Medieval beer purity law has Germany's craft brewers over a barrel", *The Guardian*, 18 April 2016.

[5] Esme Nicholson, "Germany's Beer Purity Law Is 500 Years Old. Is It Past Its Sell-By Date?", NPR, 29 April 2016.

During the nineteenth century, advances in science and industry dramatically improved the accuracy of measurement, leading to better, more reliable standards, as well as better means of detecting potentially harmful additives. At the same time, industrialization and urbanization resulted in a proliferation of mass-produced processed foods, many of which contained "adulterants" of various kinds, which reduced the quality of the food and some of which were harmful.

Following a series of studies by Dr Arthur Hassall on instances of adulteration, published in the Lancet in the early 1850s,[6] Parliament launched a Select Committee on the issue in 1855. Between 1860 and 1875, Parliament passed a series of acts intended to address the problem of food adulteration,[7] culminating in the Sale of Food and Drugs Act of 1875. These acts established strict rules prohibiting the use of "injurious ingredients" in food and drugs, required local governments to appoint analysts to sample food and drugs for sale in their jurisdictions, and empowered those same governments to prosecute merchants violating the act.[8]

The Safe Food and Drug Act was the first comprehensive legislation of its kind and arguably was a foundational moment in the establishment of the regulatory state. Other legislatures followed suit with similar laws, including the U.S. Pure Food and Drug Act of 1906. And in Britain and elsewhere, the model of establishing strict rules and empowering agencies to enforce them became pervasive.

While these laws were typically enacted on the premise that they would protect consumers, like the Assisia and the Reinheitsgebot they have often had the unintended effect

[6] Hassall, A.H. *Food and Its Adulterations*, London: Longmans, 1855.
[7] Neil Coley, "The Fight Against Food Adulteration," *Education in Chemistry*, 1 March 2005.
[8] http://www.legislation.gov.uk/ukpga/1875/63/enacted

of limiting supply and undermining incentives to innovate that would benefit those same consumers. One of the most blatant examples of this was Britain's so-called "Red Flag Act" of 1865, which limited the speed of self-propelled vehicles to 4mph in the countryside and 2 mph in towns—and required that a person walk in front of each vehicle carrying a red flag. Far from protecting consumers, the Act had the effect of denying consumers access to a desirable technology. It also likely held up the development of automobiles in the UK until 1896, when the speed limit was raised to 12 mph and the red flag requirement rescinded.

But these public laws were not the only, or even the main means by which consumers were protected. Since Roman times, consumers in Western countries have been protected by laws of contract that impose liability on sellers for fraud, misrepresentation, and passing off. Over time, courts imputed terms into contracts pertaining to the quality of products sold, such as requirements that the products be "of merchantable quality" and "fit for purpose."

In addition, companies have strong incentives to avoid harming their consumers in order to ensure repeat custom and avoid reputational damage. A notable instance of this is Crosse and Blackwell, a prominent food processor in the UK, which was identified in one of Dr Hasselll's Lancet articles of purveying pickles adulterated with copper sulphate. Thomas Blackwell declared during the Parliamentary inquiry that, following the Lancet report, the company had immediately eliminated adulterants from its foods.[9] The company also put in place a system of farm to factory quality con-

[9] Peter Atkins, "Vinegar and Sugar: the Early History of Factory-made Jams, Pickles and Sauces in Britain," in Oddy, D.J. (Ed.), *The Food Industries of Europe in the Nineteenth and Twentieth Centuries.* Farnham: Ashgate, 2013.

trol, sourcing ingredients directly from farmers.[10] By the mid-1860s, Crosse and Blackwell had become one of the largest food companies in the world and continues to be a significant brand today, suggesting that the firm's actions had the desired reputational effect.

The problems of the top-down approach

In spite of the incentives of firms to ensure their products meet high standards in order to avoid liability and reputational damage, governments continued to expand the regulatory state throughout the 20th century. In addition to a plethora of product regulations, entire industries have been subject to regulation and systems of occupational licensing were established for professions ranging from medicine and law to hairdressing.

Economists have long recognized the problems inherent in top-down government regulation. In a seminal 1959 study, Ronald Coase noted that the Federal Communications Commission was not the most efficient or effective allocator of radio spectrum. Coase argued that it would be better to establish property rights in spectrum and allow market transactions to determine allocations. Yet, nearly 50 years later, spectrum continues to be controlled by the FCC.

A key reason for the persistence of such regulations is the power of interest groups who benefit directly or indirectly from them. In the *Theory of Economic Regulation*, George Stigler argued that even when regulations are intended to promote the public interest, they tend to be captured by those who are being regulated and thereby serve as a barrier to entry, to the benefit of the regulated firms and individuals—but at a great cost to society. But this insight is hardly new. In *The Wealth of Nations*, Adam Smith noted that "people of the same trade

[10] Ibid.

seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

Aside from benefiting the companies and individuals subject to them, regulations may also benefit more ideological interest groups—leading to a form of tacit collusion between regulated firms and those interest groups. Bruce Yandle explained the phenomenon in his essay on Bootleggers and Baptists, noting that Baptist ministers call for prohibitions on the sale of alcohol on Sundays at least in part because they want people to go to their churches, so they will fill the collection plates; meanwhile, bootleggers benefit from restrictions on the sale of alcohol on Sunday because they get to be the only suppliers of alcohol on those days.[11] Such tacit collusion is pervasive. For example, during the 1990s, environmental and consumer advocacy groups in Europe raised concerns over—and called for bans on—genetically modified crops, in spite of the many benefits of those technologies for consumers and the environment (and a lack of evidence of harm);[12] meanwhile, producers of so-called "organic" food benefitted from the scare stories by emphasizing that their foods did not contain GMOs.[13]

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[11] Bruce Yandle, "Bootleggers and Baptists-The Education of a Regulatory Economist," *Regulation*, May-June 1983, Vol. 7 (3), pp. 12-16.

[12] GMOs can enable increased productivity using fewer agrochemicals, increasing output and lowering the cost of foods—and reducing the amount of land required to grow crops. Meanwhile, there is no evidence that consumption of such crops poses harms of a different kind or scale to those presented by conventionally-bred crops. (For a review of the evidence see: National Academy of Sciences, Genetically Engineered Crops: Experiences and Prospects, Washington, DC: National Academies Press, 2016.)

[13] Robert Paarlberg, "A dubious success: The NGO campaign against GMOS," *GM Crops Food*. 2014, Vol. 5 (3), pp. 223–228.

While regulatory capture explains the persistence of many regulations in the face of overwhelming evidence that there are better alternatives, it also suggests that there may be a way out. In the past two decades, innovative ways of enabling consumers to make better informed purchases have emerged that are generally superior to top-down regulations.

Alternatives to traditional regulation

Websites and apps offer a variety of means for consumers to access information pertaining to the quality of goods and services on offer. Thumbtack, a marketplace for services (everything from appliance installation to wedding planners) undertakes background checks on all its providers and enables users to rate the quality of services. Ebay enables buyers to rate sellers. Amazon enables buyers to rate both products and vendors. To varying degrees these sites also enable buyers to provide more granular feedback on the products and services they purchase, enabling consumers better to match their preferences with those whose tastes and views are more relevant to them.

There are many websites that enable either expert or user-shared evaluations of products and services, offer price comparisons, and enable users to purchase those goods, either directly or indirectly. These include Tripadvisor (mainly focused on accommodation and experiences), Yelp (various services), OpenTable (restaurants), Expedia and Booking (flights, cars, accommodation), and of course Google (practically everything).[14]

[14] This list is very far from exhaustive. For a range of other popular sites see: https://www.oberlo.com/blog/25-best-price-comparison-websites -- or just search on Google, Yahoo!, Bing, or – if you are concerned about sharing data—DuckDuckGo.

So effective are the systems created by online platforms as sources of information for consumers about the quality of products and services that in a 2015 survey conducted by the Pew Foundation, 40 percent of U.S. adults said they always use them when making a purchase for the first time and an additional 42 percent said they sometimes use them.[15] Among those aged 18-29, the proportions were higher: 54 percent said "always," and 43 percent "sometimes"—only 3 percent said they never used such sites.

Social media (Facebook, Twitter, etc.) also increasingly offers a means for consumers to share information about products. Indeed, online forums have become powerful means by which consumers share information not only about features of products, but also means of altering them, sometimes resulting in manufacturers developing new products to meet consumers' felt needs. One site is devoted to "hacking" Ikea products, for example.

Perhaps the most significant instance of this was the role played by online forums such as https://www.e-cigarette-forum.com/, through which e-cigarette users share information about devices and how to improve them. Innovations shared on these sites led to the development of better products by manufacturers, resulting in the plethora of devices and e-liquids now available. Since e-cigarettes are estimated to be considerably less harmful than combustible cigarettes (at least 95 percent less harmful according to UK government agency Public Health England), this has generated enormous benefits to those millions of smokers who had been unable or unwilling to quit but have switched to e-cigarettes. Meanwhile, the e-cigarette revolution has emboldened cigarette manufacturers to develop less harmful alternatives to their own products.

[15] http://www.pewinternet.org/2016/12/19/online-reviews/

Another set of internet-based technologies has gone further in usurping the role of regulation. Ridesharing apps, such as Uber and Lyft, enable an effective means for riders and drivers to coordinate with one another, provide price transparency, and enable riders and drivers to rate one another. When a driver picks up a rider, both parties know with whom they are dealing, the driver knows where the rider is going (and is guided to the destination by a GPS-based mapping system), and the rider typically knows how much the trip will cost. Payment is taken through the app, providing protection for both driver and rider –and if a driver takes an inappropriate route, there are systems to dispute excessive charges (which from personal experience seem to be highly effective). In addition, drivers whose ratings fall below a specified level are kicked off the system. As a result, these services are far more effective at ensuring that riders are protected from being ripped off than the regulatory systems governing conventional taxi services. Moreover, trip wait times and costs are generally lower for rideshare services than for taxis.[16] Perhaps ironically, the popularity of ridesharing services has put pressure on taxi companies to improve the quality and lower the cost of their services—showing that competition is a far more effective driver of quality than regulation.[17]

Like ridesharing apps, home-sharing apps and websites such as Airbnb, Homeway, and Flipkey enable users to coordinate (in the case of these sites, for short-term stays in rooms or whole properties), make payment, and rate one an-

[16] A 2014 survey found wait times significantly lower for rideshare services: https://www.its.dot.gov/itspac/dec2014/ridesourcing whitepaper_nov2014.pdf. A comparison of costs of using Uber vs. Taxis at various airports found that Uber was significantly less expensive in most locations: https://www.smartertravel.com/airport-uber-versus-taxi/.

[17] https://www.ftc.gov/system/files/documents/public_comments/2015/06/01912-96334.pdf

other. A recent study shows that these services have increased the supply of accommodation, putting pressure on hotels to keep prices in check.[18]

Of course, "the Internet" is hardly an inviolable source of knowledge and objectivity! There is much nonsense and disinformation available on the interwebs. Indeed, misinformation about technologies such as GMOs,[19] vaccines,[20] e-cigarettes,[21] and even bread,[22] are spread virally on websites and social media. And many product "reviews" are posted by companies seeking to promote their own products. But the existence of biased and inaccurate information merely suggests the need for systems that enable consumers to separate the wheat from the chaff. Moreover, counterintuitively, the presence of some inaccurate information may actually improve users' ability to make good decisions (at least with regard to estimates of the size of effects, which is subject to cognitive biases).[23] The operators of platforms are aware of these problems and are evolving mechanisms to address them, such as prioritizing reviews by verified purchasers, reviewers of multiple products, and other means.

In many respects, and in spite of their imperfections, the information and assurances consumers are able to obtain through these internet-based systems is far superior to the

[18] Chiara Farronato and Andrey Fradkin, "The Welfare Effects of Peer Entry in the Accommodation Market: The Case of Airbnb," NBER Working Paper 24361, February 2018.
[19] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4642419/
[20] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6122668/
[21] https://www.theguardian.com/science/sifting-the-evidence/2017/dec/29/e-cigarettes-vaping-safer-than-smoking
[22] https://www.newyorker.com/magazine/2014/11/03/grain
[23] Bertrand Jayles et al., "How social information can improve estimation accuracy in human groups," PNAS, Vol. 114 (47), pp. 12620-12625, 2017. http://www.pnas.org/content/114/47/12620

information and quality checks required by government-imposed regulations. The Pew survey found that 46 percent of respondents felt that consumer reviews on websites and apps make them feel confident about their purchases, compared with 26 percent for "government regulation"; meanwhile 41 percent said such reviews make companies accountable to their customers, against 30 percent for government regulation; and 41 percent said consumer reviews helped ensure the safety of products and services, against 33 percent for government regulation.[24]

Returning to the questions I asked in the opening paragraph, then, the answer is that when it comes to purchasing products and services, considerably more people value the information and assurances provided by online services than value government regulation. Indeed, it is not unreasonable to conclude that these services are increasingly usurping the role of government regulations.

But companies who have been protected from competition by regulation have, unsurprisingly, sought protection from the purveyors of goods and services that threaten their markets. Most obviously, taxi companies and medallion owners have lobbied fiercely to require ridesharing services to comply with taxi regulations—or ban them altogether. Likewise, hotel operators have sought to impose restrictions on the operation of home-sharing services.

The push by these vested interests should be resisted. One way to do this would be for government agencies charged with promoting competition and the free movement of goods to use their powers to counter the actions of governments to impose anti-competitive regulation – as the European Commission did when French brewers challenged the Reinheitsgebot.

[24] http://www.pewinternet.org/2016/12/19/online-reviews/

Competition and consumer protection authorities should recognize the benefits that have come from such services—promoting both competition and consumer welfare. Instead of regulating those services, as some demand, they should be liberated to innovate better ways to enable consumers to access information, goods, and services.

When taxi companies in Philadelphia sued Uber, alleging that it had engaged in anticompetitive behavior, in violation of the Sherman Act, the judge dismissed the complaint and the Third Circuit Court of Appeal affirmed the dismissal, noting that, far from diminishing competition, the company's entry into the market for the provision of on-demand rides promoted competition and consumer welfare.[25]

In other jurisdictions, however, individuals offering ridesharing services have been forced to obtain licenses; in some places, such services have been banned altogether. Given the superiority of app-based systems for ensuring the safety and efficacy of ridesharing services, bans are clearly harmful and licensing requirements are redundant. Worse, by imposing costs on those offering ridesharing services, mandatory licensing reduces supply and raise prices; in many cases, these costs make it uneconomic for people to offer such services.

For example, the New York Taxi and Limousine Commission requires all operators of ridesharing services to obtain a T&LC license and associated insurance, which comes at an annual cost of some $3,000.[26] For people who might otherwise offer ridesharing for only a few hours a week (for ex-

[25] Philadelphia Taxi Association, Inc. v. Uber Technologies Inc, No. 17-1871 (3d Cir. 2018). https://law.justia.com/cases/federal/appellate-courts/ca3/17-1871/17-1871-2018-03-27.html

[26] Personal conversations with several Uber and Lyft drivers. See also: https://nypost.com/2015/07/12/700-uber-drivers-to-be-fired-under-new-bill/

ample, at peak times or during a commute), it is not worth the cost and hassle to obtain such a license. Likewise, for people who offer ridesharing services in neighboring states (New Jersey and Connecticut) and who pick people up in those states but don't have a T&LC license, it means they cannot offer return rides. Such licenses unarguably reduce competition and harm consumer welfare – and ought to be challenged as violations of antitrust.

Meanwhile, many governments have imposed restrictions on the sale of electronic cigarettes. These restrictions were sought by a classic "bootlegger-Baptist" coalition: the "bootleggers" are cigarette and pharmaceutical manufacturers, who benefit from continued sales of their products, while the "Baptists" are so-called public health groups, who claim that cigarette smokers should "quit or die" and that new products will result in a new generation of nicotine addicts.[27] The predicable result has been to reduce the availability, choice and cost of e-cigarettes in markets subject to such restrictions, to the detriment of those who would otherwise use these products as an alternative to more harmful smoking. Since these regulations unambiguously hinder competition and harm consumer welfare they are, it would seem, anti-competitive and could be subject to a challenge from competition authorities.

This is not to advocate for the elimination of all government-imposed consumer protection regulation, but rather to advocate for scaling back such regulation so that it focuses narrowly on well-recognized harms that are not adequately addressed by private alternatives, including those provided through internet-based services – and to ensure that when

[27] Jonathan H. Adler, Roger E. Meiners, Andrew P. Morriss, and Bruce Yandle, "Baptists, Bootleggers & Electronic Cigarettes," *Yale Journal on Regulation*, Vol. 33, 2016, pp. 313-361.

regulation is imposed, the benefits of such regulation unambiguously outweigh the cost it imposes on society.

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