Assuring Regulatory Transparency: A Critical Overview

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Abstract. The concept of transparency has very rapidly gained prominence in OECD countries. It is particularly associated with the rise of the governance agenda. Transparency is a core governance value, and the regulatory activities of government constitute one of the main contexts within which transparency must be assured. There is a strong public demand for greater transparency, which is substantially related to the rapid increase in number and influence of Non-Governmental Organisations or "civil society groups", as well as to increasingly well educated and diverse populations.

Transparency initiatives now form a major part of the regulatory policies of many OECD countries: in 2000, 20 of the 30 OECD Member countries had government-wide transparency policies.[5] Many OECD countries have now made substantial investments in improved regulatory transparency, and have reaped important gains in terms of regulatory quality, legitimacy and accountability.

However, despite these gains, the results have, in many cases, fallen short of expectations. As well, the implementation of transparency has itself lead to new stresses and problems within the regulatory process. Today I would like to consider why regulatory transparency is important and point to some of the main trends in terms of improving regulatory transparency. I would also like to look at some of the problems and issues that arise in implementing it and suggest means of minimising the problems and grappling with the issues.

5. See *The OECD Regulatory Capacities Database.* Cited in *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*. OECD, Paris, 2002 (Forthcoming).

Introduction: The concept of transparency & the major tools

The term transparency is itself largely non-transparent. This is probably a result of the fact that is means a wide range of – albeit related – things in different contexts, and is implemented via an extensive range of tools. One definition of transparency used in a new OECD publication[6] is *transparency is the capacity of regulated entities to identify, understand and express views on their obligations under the rule of law.*

From a regulatory perspective, transparency involves both the accessibility and intelligibility of laws on the one hand and the openness and consistency of the processes by which they are made, on the other. That is, it is about both the law-making process and the implementation and enforcement of the resulting laws. Each of these parts embraces several elements:

The *Accessibility and intelligibility* of regulation is determined by considerations including the total volume of legislation in effect, the use of plain language in drafting, the use of incorporated material, electronic access and codification. These are all elements affecting the citizen or business's right to know and understand their legal obligations. To take each of these in turn:

- The *Volume of legislation* affects transparency because it is a key determinant of whether affected parties can reasonably be expected to know and understand their compliance obligations. Too numerous or too detailed laws are non-transparent because those who must comply cannot navigate their way through the raft of legislation to determine which laws affect them and how. Thus, moves in many countries to contain regulatory inflation have important potential benefits for transparency. On the other hand, an issue that is little addressed so far is the need to deal with the increasing incorporation of detailed technical material in laws if transparency is to be improved.

- *Incorporated material* – that is, the adoption of standards, codes of practice and the like in regulation – tends to reduce transparency by increasing the volume of detailed, technical requirements. It also reduces the accessibility of the law, since such materials are often difficult and expensive to obtain and can change frequently. Controlling the use of this material is a major challenge for transparency, since many regulators have increasingly turned to it as a convenient means of addressing regulatory requirements.

- *Codification* of legislation enhances transparency by ensuring consistency between laws, simplifying and clarifying regulatory requirements and thus rendering them more easily understood.

- *Plain language drafting* enhances transparency by making the law more intelligible. It therefore enhances public confidence in the necessity and appropriateness of the law. Plain language policies are widespread, but effective implementation means persuading drafters to abandon conventional approaches to drafting, training them in "plain language" alternatives and meeting concerns that the use of plain language should not be at the expense of precision in meaning and practical enforceability.

6. Ibid.

– *Electronic access* to legislation enhances transparency by reducing the costs of access to the law and improving its availability – particularly in regional or rural contexts. This is often combined with central registers of law (including lower level rules) to allow easy searching. Registers of proposed new laws are also important to facilitate involvement in public consultation processes.

The *process elements* of regulatory transparency include clear procedural requirements (Administrative Procedure Acts), opportunities to be heard and appeal rights.

– *Standard procedural requirements*, which are often contained in legislation, ensure that the legislative process is understood and that opportunities to participate in the process are known. They also allow regulators to be challenged if the requirements have not been followed and stakeholders have not been given opportunities to challenge new proposals.

– *Appeal rights* are essential safeguards in the compliance and implementation stages of the regulatory process. Standardised, independent appeal processes ensure that regulation is applied fairly, avoiding arbitrary decision-making and minimising the scope for corruption. They also ensure that this application of regulation is itself transparent. Independent administrative appeals bodies within government administrations, as well as parliamentary mechanisms such as ombudsmen are increasingly used in OECD countries.

– *Consultation processes* are central to transparency, since they involve a dialogue between regulators and stakeholders during the development of new regulation. However, the tools of consultation vary widely, from narrowly constituted advisory groups or committees, to "notice and comment" procedures which give all members of the public the opportunity to participate, whether or not they have direct interests in the proposal.

Consultation tools

Among the tools of transparency, consultation occupies a pre-eminent position. Given this, it is important to recognise that consultation is not one tool, but rather constitutes a range of quite different tools which, to some extent, have different purposes. A basic distinction can be made between *active* and *passive* consultation.

The term *active consultation* can be given to tools like advisory groups and committees and, to some extent, to public hearings. The distinguishing feature is that this model of public consultation functions as a dialogue between regulators and stakeholders. Thus, the stakeholders are to some degree active participants in the regulatory process, rather than merely being consulted on their views.

The advisory group/committee model implies a selected, usually quite small, group of participants, chosen either for their expertise or because they have substantial direct interests in the proposed regulation. To a large extent, this limited participation is essential to the dialogue aspect of active consultation. However, public hearings represent an attempt to replicate this dynamic in a context of broader participation. They cannot guarantee all voices will be heard, but do allow a "real time" exchange of views and follow-up of questions.

Passive consultation, then, refers to the generally more widespread approach of receiving written comment from stakeholders in response to published regulatory information. Passive approaches are more likely to be open to the general public – *e.g.* notice and comment procedures. However, other variants exist, such as "circulation for comment", in which the information is targeted only at selected groups, who are invited to comment.

Selective forms of consultation arguably score less well in transparency terms than models that allow the broad public to participate. However, they can make other contributions to regulatory quality that make them indispensable. For example, more targeted tools that allow for a real dialogue, such as advisory committees, can be more effective in assisting regulators to narrow options and clarify major stake-holder views early in the process. They may also be better means of generating quantitative information for use in the RIA context.

Open processes, such as public hearings or "notice and comment" can ensure all voices are heard and that the opportunities to be consulted are widely known. They are also essential to ensure that consultation is not used as a means of regulatory "capture" whereby concentrated sectoral interests prevail over more diffuse, widespread ones. In particular, transparency allows stakeholders to challenge proposed laws and requires regulators to defend their proposals. This latter characteristic is a key reason that more open, public models of consultation are being used increasingly in most OECD countries – as citizens increasingly demand the right to scrutinise proposed regulation and question the pursuit of such sectional interests. Consultation can also be a key means of identifying additional alternatives and requires regulators to be able to respond to alternatives put forward.

Of course, open consultation processes also function as anti-corruption mechanisms as, arguably, corruption represents the extreme extent of "regulatory capture. This is true of transparency mechanisms overall, and a key reason for promoting them, in many contexts.

These complementary characteristics mean that the two forms of consultation are increasingly being used in combination in OECD countries, while there is good reason to believe that they are mutually reinforcing, in terms of effectiveness.

Transparency in the regulatory context – why is it important

Transparency is a governance value in itself, as well as an essential aspect of ensuring accountability and minimising corruption. It is a key demand of NGOs, who see it as an essential building block of civil society – that is, as a means of empowering citizens. The context in which the rise to prominence of the transparency has occurred is one of declining trust in governments. Transparency is a potentially powerful response to this decline in trust. It requires governments adhere to higher standards of conduct by ensuring that that conduct will be open to scrutiny. It also promotes trust by allowing stakeholders to *see and judge* the quality of government actions and decisions.

Transparency is also an important regulatory quality tool in a range of other senses. It minimises the risks of regulatory failure in several ways.

Transparency and regulatory quality

Consultation, a major transparency element, is a cost-effective means of *gathering data* – which supports Regulatory Impact Analysis, a key regulatory quality tool based on objectively weighing the benefits and costs of different policy options in a comparative context.

Regulatory Impact Analysis (RIA) can itself be considered a transparency mechanism. RIA is often regarded primarily as a means of favouring rational (including benefit/cost based) decision-making over other possible models. However, it is also potentially a mechanism for laying bare to stakeholders the nature of the regulatory decisions made and the criteria used. It fulfils this function if it is combined with public consultation – that is, if the results of RIA are made public and used as a vehicle for consultation. Providing information is a fundamental way of making consultation effective and meaningful, particularly in the case of the general public and less well resourced interlocutors.

Transparency – through consultation, plain language drafting, improved accessibility of the law and other initiatives – improves the *legitimacy* of regulation. It thereby helps promote compliance and, as a consequence, regulatory effectiveness.

Transparency also reveals likely *compliance stresses*, by highlighting where proposed regulation lacks acceptability (that is, where it conflicts with widely held public attitudes as to what constitutes reasonable behaviour), or where it lacks perceived proportionality (that is, where the proposed regulation is not regarded by the public or stakeholders as a reasonable response to the identified problem).

Trends in transparency initiatives

Recent OECD work indicates a number of clear trends in terms of Member countries' initiatives toward improved transparency. The most important are:

- ***Adoption of more public and more extensive consultation processes***. As I've mentioned, many countries are opening their consultative processes, adding new consultation tools that are open to the public to longstanding "corporatist" or selective processes. Consultation is also being begun earlier, increasing its potential to affect the final shape of regulation.

- ***Providing better information to support consultation***. The use of RIA has expanded rapidly and many countries have combined RIA with consultation to develop a consultation process based on better information flows and, as a result, a deeper and more effective dialogue.

- ***Increased use of Administrative Procedures Acts***. Countries are increasingly using legislation to both standardise their regulation-making and regulatory implementation and enforcement functions and to make these processes transparent.

- ***Increased use of independent appeals processes.*** As part of this move toward more standardised and open administrative procedures, avenues of appeal against enforcement decisions are becoming more widely available and increasingly involve independent bodies, rather than being made by the regulator themselves.

- ***Increasing importance of international trade rules in promoting transparency requirements***. One of the most important trends is that international trade agreements are mandating a wide range of transparency standards as means of enhancing international competition and market access. This is tending to drive substantial convergence in transparency standards and tools. The WTO and GATS agreements are major examples.

- ***Electronic access to legislation and related documentation***. Governments have grasped many of the opportunities provided by Information Technology to make laws more accessible, as well as providing access to related materials. This represents a major enhancement of technology which is continuing to develop at a rapid rate.

Challenges for transparency initiatives

While substantial progress is being made on regulatory transparency issues, a number of broader regulatory trends pose substantial new problems and risk undermining the gains being made. Some of the more important problems that have been recognised in many OECD countries are:

- ***The role of "regulatory inflation"*** in undermining effective transparency. While many countries have recognised and sought to deal with the regulatory inflation issue, success has often been limited, and growing bodies of regulation remain a major concern.

- ***The increasing use of "incorporated instruments",*** including detailed, technical standards in regulation is a major contributor to regulatory inflation, and poses additional problems in terms of lack of accessibility and in undermining "plain language" initiatives. On the other hand, the use of international standards in place of locally derived equivalents can enhance transparency by improving consistency and accessibility for foreign competitors;

- ***The increasing use of "quasi-regulatory" instruments***, of uncertain status, poses particular problems for transparency by creating uncertainty as to what compliance obligations exist.

- ***Increasing regulation at supra-national levels***, especially by the use of international treaties and international standards bodies, poses several challenges for transparency, including ensuring that real consultation opportunities exist and providing adequate access to standards;

- ***Increasing use of alternatives to traditional regulation*** has in many cases led to transparency concerns, as the process of developing and implementing the alternative has often had little public input. Less widely used regulatory alternatives do not have clearly defined procedures and safeguards to ensure minimum transparency standards. This is a critical area in the further promotion of the use of alternatives – procedural safeguards to ensure adequate transparency standards must be built in.

- "***Emergency" regulatory processes***. In some countries, a response to improved regulatory processes has been for regulators to increasingly make use of "emergency" procedures designed to allow the regulatory process to be responsive in cases of extreme urgency.

Problems with transparency

In addition to these specific issues, transparency requirements, considered in general terms, throw up a number of problems or trade-offs that must be managed as part of the design and implementation of transparent regulatory processes. The following set of issues indicates the potential for tensions between transparency and other aspects of regulatory quality.

1. Transparency Vs urgency

First, regulators frequently perceive a stark trade-off between transparency and urgency. I've just mentioned the tendency for regulators to abuse emergency procedures to circumvent regulatory processes that are seen as too cumbersome. Transparent, consultative regulatory processes are often perceived to be slower and to reduce regulatory responsiveness, particularly to politically charged problems. Resistance to transparency measures within administrations may often largely be a result of this perception.

The perception is often reality – especially where consultative processes are *ad hoc* in nature and poorly planned. For example, starting consultation too late in the process can mean either repeating or revising regulatory development already undertaken or else limiting government responsiveness and undermining the purpose of consultation.

Thus, rationally designed consultative processes that are properly integrated with the policy process are needed. As I mentioned earlier, the tools of consultation are many and varied. The OECD's work on consultation shows that the different tools are often most effective when used in combination. That is, different tools can and should be used at different stages of the law-making process to achieve different goals. Thus, for example, a public notice and comment phase might be more effective and able to be completed more quickly if it has been preceded by active consultation with major interests at an earlier stage in the development of the proposed law.

2. Transparency and consultation fatigue

Despite a massive investment by governments in increased transparency, in particular through the rapid expansion of consultation, there is evidence of widespread public dissatisfaction with the results. This suggests strongly that improving transparency is not simply a matter of increasing the quantity of transparency initiatives, but is rather dependent on the quality of the initiatives taken.

A particular issue is "consultation fatigue", where groups and individuals have been found to withdraw from participating in consultative programmes over time. Addressing this issue is crucial to safeguarding consultation's role in enhancing regulatory quality and transparency in the longer term. Achieving this requires attention to a range of factors, including:

- *The need to organise consultation efficiently.* Better organisation of consultation can minimise separate requests for information and inputs by combining related issues and rationalising the number of consultation stages. As well, the burden of responding to consultation requests can be reduced by providing information to assist stakeholders in understanding the key issues and formulating their response. Providing adequate timelines can enable peak groups and less well resourced organisations, in particular, the opportunity to participate effectively.
- *Ensuring responsiveness* – Demonstrating responsiveness to the information and opinions received is fundamental to avoiding consultation fatigue. Stakeholders must see clear benefits from their participation through improvements in the acceptability of the regulation to them and, more generally, acknowledgement that their input has been weighed seriously. Thus, regulators must both be responsive and "be seen to be responsive". Being seen to be responsive can involve, *e.g.* communicating what influence consultation comments have had or, crucially, why they have not been taken up in particular cases. Achieving true responsiveness is likely to be more feasible if consultation is commenced relatively early in the legislative process, before there is a high degree of commitment or "lock in" to a particular option – or even to the decision to act rather than not act.

- *Empowering stakeholders* – In some policy areas, many important stakeholders are poorly resourced and limited in their ability to organise and present their viewpoints. There may be circumstances in which assisting stakeholders to develop capacities to engage effectively in consultation is appropriate. At the most basic, this can mean no more than providing more time for responses to be received and better information on the nature and reasons for the regulatory proposal.

3. "Formal" Vs "Real" transparency.

Closely related to the issue of consultation fatigue is the question of ensuring that opportunities to be informed of, and participate in regulatory activity are "real". That is, what problems must be faced to ensure citizens and groups are able effectively to take advantage of participation opportunities. Failure to deal with this issue means that the transparency achieved is "formal" rather than "real" in nature and is likely to be a prime contributor to consultation fatigue.

As I noted in relation to consultation fatigue, the timelines within which input is sought and ensuring adequate information provision standards are key factors. The degree of responsiveness to inputs received is also important. This can mean targeting the use of consultation mechanisms to situations in which there are real and substantial policy choices to be made and a willingness at the political level to be responsive to inputs in shaping the policy outcome.

Another issue in rendering transparency "real" rather than formal relates to the impact of Information Technology: The proliferation of information sources via Web sites and other means can mean that scanning for and finding relevant material becomes all but impossible. Thus, enhancing transparency can mean helping participants find their way through this maze of information sources. Many OECD Governments are now paying considerable attention to developing sophisticated web "portals" to guide citizens and businesses to the relevant services and/or information sources provided by Governments at both national and sub-national levels. Integration of these different information sources is a key theme.

4. Predictability Vs flexibility

Predictable regulation-making processes have the benefit of increasing the potential for stakeholder involvement, while also enhancing levels of trust. Thus, as I have mentioned, they are important transparency elements. The use of legislation to standardise and make predictable various elements of the legislation-making process is increasing in OECD countries, increasingly supplanting processes based on tradition or custom, or on policy-makers' discretion.

For example, in relation to consultation, several countries have legislated detailed requirements in pursuit of this predictability and to create a high level of assurance that the requirements are followed in practice.

However, such highly prescriptive approaches may undercut flexibility, militating against regulators' freedom to use the best means available to deal with specific issues or circumstances. The OECD has recommended that flexibility be provided within a framework of minimum standards set out in legislation or other instruments. Thus, where some important stakeholders may be difficult to reach, specific measures may be required to actively seek and ensure their input.

On the other hand, departures from standard practices may be required where there would otherwise be opportunities for strategic behaviour, or where regulatory urgency demands it. Thus, flexibility may need to include the possibility of truncating the minimum standard approaches in certain cases.

5. Transparency Vs confidentiality

Transparency is clearly at odds with confidentiality – but regulators must routinely deal with confidential information. The increasing use of a range of public/private partnerships by governments in seeking to achieve public goals effectively and efficiently means that these issues of intellectual property rights and commercial confidentiality increasingly loom large.

The application of "Freedom of Information" legislation and principles to the State's commercial dealings has already become a major area of controversy – yet there have been few systematic approaches to balancing these requirements.

6. Consultation/concertation Vs the democratic obligation to govern for all.

A potential danger, particularly where consultation becomes concertation (that is, when non-governmental groups actively *participate* in decision-making, rather than simply being consulted), is that governments' responsibility to govern for all can be compromised by their desire/imperative to be seen to be responsive to consulted interests.

No matter how open is consultation, more organised interests with larger stakes in particular decisions will tend to predominate, meaning there is a real potential for tension between these groups – and their views – and the government responsibility to guard the general interest.

Within this context, governments will sometimes need to make judgements as to the standing, or degree of "representativeness" or " legitimacy", in relation to consulted groups. Questions can arise as to whether they are democratic themselves and, if not, what weight should be given to their views. It can also be difficult to determine how large is the group they represent This is particularly an issue with "peak" groups, which bring together numerous organisations with related interests]

7. Independent review of regulatory decisions

Another example of the tension between openness and the need to develop trust in regulatory processes, on the one hand, and the need for governments to retain responsibility for governing for all is the recent rise of proposals for independent review of regulatory decisions.[7]

This has arisen particularly in relation to complex, technically-based regulatory choices, where a key benefit sought from independent review is to provide expert verification of the decisions by supposedly disinterested parties: *i.e.* there is an element of safeguarding against the possibility of capture. These proposals appear to spring from the diminution of trust in governments that I have mentioned earlier. But how does this notion fit with that of the responsibility of governments to make policy choices? Clearly, if this mechanism is to be used, the role of such review panels needs to be carefully defined and understood if there is not to be conflict.

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7. See, for example, Transparency: Toward a global regulatory standard. AgBiotech Bulletin Volume 9, issue3, April 2001.

8. Different models of consultation have different transparency implications.

If the expansions in consultation being seen in many countries include greater use of more focused and less open models of consultation, the result can arguably be a reduction in accountability – and perhaps transparency, due to certain favoured groups being given greater access to the regulatory process.

Thus, where "focussed" models of consultation are used (*e.g.* advisory groups or boards), the issue of transparency safeguards arises within the consultative context itself. Groups that are "outside" the circle must remain informed and be confident that focussed consultation is not "captured". This issue is recognised, for example, in the recent European Commission document "Toward a Reinforced Culture of Consultation".[8] Thus, the co-ordination of different consultation models (open and focussed) may be required to maintain the necessary openness, while allowing the goals of a focussed model of consultation to be attained as well.

9. Transparency requirements as a regulatory alternative[9]

Another dimension of the transparency concept is the use of regulation to mandate transparency in the behaviour of private actors. These mandated disclosure requirements are a long-established tool of "light-handed" regulation and are increasingly being used. This tool is based on creating public pressure for improved practices by increasing awareness of (positive and negative) performance by the target entities. An early example of this approach was the formulation of greatly enhanced market disclosure rules in the wake of the depression of the 1930s. Food labelling and eco-labelling requirements are other, more recent, examples.

Recent failures of these mechanisms – in particular in relation to some spectacular corporate collapses – have raised questions as to the effectiveness of the notion of "legislating for transparency" as a regulatory tool. However, the issue needs to be seen in terms of a number of regulatory governance issues. First, to what extent are the mandated disclosure requirements enforceable? As with any regulatory tool, it is only where there is a high level of confidence that compliance can be attained do disclosure requirements constitute an appropriate tool.

Secondly, the nature and extent of the requirements must evolve over time, as do the problems they are designed to solve. Just as corporate disclosure requirements have evolved in the past to remove exemptions for particular sectors and include various accounting standards, so newly mooted rules for auditing arrangements are being evolved to address current inadequacies. This simply reflects the fact that regulatory quality is necessarily a dynamic concept.

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8. *Towards a reinforced culture of consultation and dialogue: Proposal for general principles and minimum standards for consultation of interested parties by the Commission.* Communication from the Commission. European Commission, Brussels, July 2002.

9. See, for example, *Clarifying Transparency* Graham, M & Weil, D. Financial Times, April 23, 2002.

Conclusion

Transparency measures are never costless, and in some cases can represent substantial uses of resources. Thus, as with any other area of government policy, a benefit/cost based assessment is needed in relation to transparency proposals.

This means that good practice in relation to transparency is not simply about having "enough" transparency – in some quantitative sense – but rather about the quality of the different elements of regulatory transparency, including the extent to which they are integrated with each other, and the regulatory process more broadly, and are consistent with, and mutually supportive of each other.

Transparency initiatives can conflict with other regulatory quality values and the potential for these conflicts must be recognised in order to ensure that they are managed as effectively as possible and a conscious process of balancing these goals and achieving appropriate trade-offs is undertaken.