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Gatekeepers and Non-State Intermediation in Regulatory Governance

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1. Introduction

A key theme in contemporary analysis of regulatory governance is that of the interdependencies which emerge within regulatory regimes. There are numerous instances where the dependency of state actors on others draws non-state actors into some aspect of making a regulatory regime work. We can think of regulatory regimes as comprising the capacity for making norms, for monitoring or feeding back information about compliance with the norms, and for realigning deviant behaviour (Hood, Rothstein and Baldwin 2001). In practice these components of a regulatory regime are typically widely diffused (Scott 2001). The question of how non-state actors are enrolled within regulatory regimes has

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become a central preoccupation with the recognition of the limited capacity of the state to act (Black 2003; Grabosky 1995).

An important concept developed to capture this dependency on non-state actors is that of the gatekeeper. A gatekeeper, in this sense, is a non-state actor who has the capacity (but not necessarily the incentive) to contribute to the control of the behaviour of others. The concept is deployed within regimes which are essentially public in character, but in which non-state actors play a key part. In this sense such regimes are conceptually distinct both from self-regulation (in which a regime originates from and is managed by an organization of non-state actors) and from non-state or private regulatory regimes (such as those which apply to standards). It might be argued that regimes involving gatekeepers constitute a form of co-regulation. Thus, for example, the European Internet Coregulation Network, recognises a conventional usage of the term to refer to 'regulated self-regulation' but advocates a wider conception to include other kinds of regimes in which interdependencies between state and non-state actors are central to its operation.[2]

Gatekeeping has a particular significance in regimes where state actors have limited capacity to act because of lack of legal authority, or poor information or resources. It is the comparative advantage of the gatekeeper with the resources relevant to regulation which is exploited within gatekeeping activities. One recent paper describes gatekeeper regimes as a solution in search of a problem, with the expectation that further use of this mechanism will be made by governments in future (Gilboy 1998: 139).

Arguments about the possibility of gatekeeping have largely been restricted to the imposition of duties on intermediaries in spheres of criminal jurisdiction, sometimes referred to as 'third party policing' (Anleu, Mazerolle and Presser 2000). Much emphasis has been placed on the particular capacities of professional advisers in preventing and detecting fraudulent business conduct

[2] See the EICN website at http://network.foruminternet.org/.

(Grabosky 1992). The aim of this paper is to offer a conception of non-state intermediation in regulatory governance which extends beyond the enforcement dimension to include the generation of norms and regulatory monitoring, recognising that the dependency of state actors on non-state actors may be in any one or more of these dimensions of regulation. We consider the variety of sources of capacity for gate-keepers to act. We then move on to consider the incentives non-state actors have to act as gate-keepers and how these may be manipulated. Finally we evaluate the conceptual and normative implications of extensive dependence on non-state actors for key parts of what remain in essence state regulatory regimes. This short paper is intended to form a preliminary step in devising an empirical project to further elucidate some of the conceptual and normative issues concerning gatekeeping regimes.

2. Gatekeeping

The significance of gate-keeping functions has received renewed emphasis in initiatives in a number of regulatory domains where state regulators have come up against the limits of their capacities to act. These diverse domains include attempts to control money laundering, illegal immigration, internet gaming and unauthorised absences of children from school and regimes to promote better corporate governance.

In Kraakman's work a gatekeeper is conceived of as an entity which sits in relationships both with a regulated unit and with a regulator, such that there is capacity for the gatekeeper to make an effective response to wrongdoing by the regulatee and some form of duty (reflected in the creation of some kind of liability for failure to act) to make that response owed to the regulator (Kraakman 1986: 54, fn3). Thus for Kraakman a gatekeeper is defined by a combination of capacity and duty. (Coffee 2001) argues for conceiving of gatekeepers as a sub-set of Kraakman's group, to comprise only those who trade on their position as reputational intermediaries, such that, though there may be legal duties, the engine which drives the gatekeeper is based on market position based on reputation. Within this conception, gatekeepers are likely to comprise those who engage in relatively transparent certification and verification activities under contract to the regulated actor. This approach to conceiving of gatekeepers seems unduly narrow in excluding those with the capacity to act who do not have a duty so to do, and in restricting the motivations for action to maintaining market position based on reputation.

Market rationality underpins on form of motivation for action amongst gatekeepers. Legal liability to act, a form of subjection to hierarchy constitutes a second. A third, and less often observed basis for action is motivated by the the desire to contribute to the well being of some form of community (Goodin 2003). The point here, here is that the existence of a legal duty to act does not capture all the circumstances in which someone with the capacity to act will do so. Furthermore, the fact of a legal duty to act does not mean that a gatekeeper will so act. Analysis of the role of audit firms in the string of corporate collapses in the United States in the early 2000s has focused unduly on questions of what may or may not have been within the legal duty of auditors and insufficiently on the mechanisms through which the duties which did exist were made binding on auditors.

Community incentives to act as gatekeeper are exemplified by Whistleblowing – the voluntary provision of information to the authorities about wrongdoing. This is an example of gatekeeper behaviour which would fall outside Kraakman's definition. Whistleblowing occurs in circumstances where the action may not even be permitted by law (as commonly happens with leaking of official information which may reveal governmental wrongdoing of some kind), and is often against the financial incentives of the whistleblower because of the financial loss which would result from detection and dismissal where the whistleblower is an employee.

Market incentives to act as a gatekeeper arise where the probity and credibility of a product or a service provider is tied in part to their capacity to market themselves. Some examples are discussed below.

How widely is the operation of regulatory regimes dependent upon the capacity and action of gatekeepers? There is a wide variety of regimes in which obligations are placed on non-state actors to support the operation of the regime. Money laundering regulations commonly require banks to make certain checks on the identity of those opening or holding accounts with them, and create wider obligations on banks, auditors and others to report to the police transactions with specified characteristics. It is common for laws to place obligations on airline carriers to check on the entitlement of passengers to secure entry to the country of destination (Gilboy 1997). In Australia the sale of pay-as-you-go mobile phone is permitted, notwithstanding the potential such devices have for anonymous communication within criminal enterprises, but creates an obligation on the retailer to collect information relating to the identify of the purchaser. In each of these case obligations to participate in the state regulatory regime are created.

The capacity to support state regulatory regimes goes wider than this, however. Compulsory liability in respect of employment and motor vehicles gives to insurance companies a critical role on occupational and road safety, yet the obligations (to take out insurance) are placed on employers and on drivers rather than on insurers. The expectations within such regimes are first that insurers will supply a choice of appropriate insurance products, and second that their *commercial* decision making on such issues as who to insure and on what terms and conditions, should act as a form of control over the safety-related conduct of the insured (Ericson, Doyle and Barry 2003: chapter 8).

3. Capacity

What is it that gives gatekeepers their capacity to act? In many instances one key component is likely to be the possession of information which is available to them, but is not routinely available to the state. Other key resources include legal authority (for example within a contractual setting), technical or organisational capacity to inhibit behaviour, and wealth.

Banks possess comprehensive information about the financial transactions of their clients, insofar as they are routed through the bank. Policies designed to inhibit or control money laundering make extensive use of the knowledge of banks and professionals concerning their clients' financial transactions, and target this knowledge by creating obligations to report to police certain kinds of suspicious transaction. They additionally exploit the hierarchical capacity of banks to demand verifying information from their clients (Financial Action Task Force on Money Laundering 2003). Legislation on corporate governance places particular obligations on non-executive directors and on auditors to detect and report irregularities in corporate reporting, exploiting the informational resources possessed by those actors.

A number of jurisdictions have sought to harness gatekeepers in their efforts to control illegal internet gaming. In New York State banks and other financial intermediaries have been encouraged by enforcement officials to deploy their technical capacity to block transactions to support the prohibition. A particular attraction of dependence on gatekeepers in the internet domain is that a relatively small number of intermediaries have capacities to exert control over very large numbers of transactions (Mann and Belzey 2005) In Australia legislation obliges internet service providers (ISPs) to make available to its customers software which filters out illegal gaming sites. Whereas the New York regimes relies chiefly on the technical capacity of the banks, in Australia the main emphasis is on the contractual nexus between ISPs and their customers.

In other instances gatekeepers may be in a position to exercise hierarchical power over others, typically deriving from contract. A preliminary possibility prior to contracting is simply that a gatekeeper may refuse to contract for provision of services or goods. Kraakman uses the example of nightclubs which simply refuse entry to those who underage as a means of complying with and enforcing rules on underage drinking. Accordingly he labels this form of gatekeeping as ‘bouncer’ regimes (Kraakman 1986: 63). There are many examples of providers of goods who are expected to exercise discrimination in deciding who they will supply (Anleu, Mazerolle and Presser 2000: 70) (eg pharmaceutical products, weapons, alcohol, solvents, matches, tobacco).

Once the gatekeeper is prepared to enter into the contract then the other party is liable to be subject to conditions which may be continuing and which can form the basis for hierarchical control over the regulatee. Thus insurance companies can require their customers to take certain steps, such as maintaining vehicles in good condition, as a condition of insurance. They recognise that drivers who drive more face greater risk and offer reduced rates to driver who drive less (Ericson, Doyle and Barry 2003: 291).

A third dimension to gate-keeping power is wealth. Banks as credit card issuers are major controllers of the flow of funds to retailers. Retailers who refuse to comply with the requests of banks risk losing an important source of income and thus risk their viability. The principal resource of investors is wealth, such that theyhave the potential to shape behaviour, not just by reference to financial performance through investing decisions. Ethical investment policies are a deployment of this capacity to shape behaviour of businesses in particular directions. In the environmental regulation domain, the capacity of investors to shape decision making of firms has been identified as a possible future resource for making regulation more effective. An interesting aspect of this story is that government intervention is required in some instances to *permit* institutional investors to use their gatekeeping capacities for purposes of environmental regulation because gatekeeping implies a dilution of purposes of investment beyond the legally permitted objectives of maximising income from funds

(Richardson 2003). Thus, while the market may encourage some forms of gatekeeping, the ordinary law may inhibit it.

4. Incentives

The capacities to support regulatory regimes is widely dispersed amongst potential gate-keepers. What are the main incentives for non-state actors to use their capacities to support regulatory regimes? (Kraakman 1986: 61) distinguishes two basic types of incentives in his contrast between market and public gatekeeper, the former facing market incentives to act and the latter legal duties. There may be third possibility linked directly neither to market nor law, that is more in the nature of communitarian behaviour. Much whistleblowing activity is not legally required and often goes against the market incentives of the whistleblower (because of the threat to their continued employment). Whilst it is possible to conceive of the reasons for action in terms of incentive, another approach offers an analysis in terms of culture, and in particular the development and application of social and professional norms (Gilboy 1998: 136). My intention here is to think of incentives broadly, such that compliance with professional or community norms can be conceived of as a reason for action.

Voluntary action in support of the state which cuts across the interests of their clients will often be unattractive to market actors. Thus banks and internet service providers have, in general, vigorously resisted calls for voluntary provision of information to state enforcement authorities on the grounds that confidentiality is a key part of the product which is sold to their customers. One business is unlikely to act on its own where such action threatens its market position. Collective voluntary action is more feasible, particularly where a substantial segment of the market is involved and such self-regulatory activity maintains for the gate-keepers a degree of control over their resources and staves off the threat of more intrusive direct state control.

Whistleblowing is a special class of often public-spirited voluntary action to supply information about wrong-doing. Some professionals, of course, are bound by codes which do not permit whistleblowing because of duties of confidence – for example doctors, lawyers, priests and journalists. In this case the existence of market incentives or imposition of legal duties may not be effective, for example because a journalist thinks it is right to protect sources even if this means going to prison. We can, of course, think of the media as providing a complete alternative mechanism for scrutinising and holding to account, so that publication of information may be an alternative or a supplement to regulatory action which targets particular conduct.

The main emphasis of Kraakman's seminal paper on gatekeepers is on the imposition of 'collateral liability' on those private parties 'who are able to disrupt misconduct by withholding their cooperation from wrongdoers.' (Kraakman 1986: 53) (See also (Gilboy 1998)'s analysis of 'third party liability systems'). This approach anticipates state actors identifying those who have the capacity to be gatekeepers and then imposing penalties for failure to fulfil this role. We have already discussed one key example with the recent history of attempts by the New York State government to prevent New York State residents from engaging in (illegal) internet gaming. The state's enforcement capacity in this domain is limited because the technology permits firms to offer internet gaming services from outside the United States. Since the service providers have no legal presence or assets in the United States it is very difficult to enforce the criminal law against them. The Attorney General's strategy for addressing this problem is to target those financial intermediaries who do have a presence in New York State, and who provide the means through which punters pay for internet gaming. Credit card issuers and internet payments firms have been targeted and investigated for aiding illegal internet gaming activity. In the face of aggressive investigations at least two such firms have given formal commitments to use their technology to block all transactions which are coded as internet gaming (Scott 2005). Intriguingly no formal action has been concluded against any payment intermediary and no authoritative determination has been made on the extent of any legal duties to block internet gaming.

Whereas Kraakman's analysis emphasises the legal duties which the state imposes on gatekeepers (often through criminal law) it is quite possible to envisage regimes in which the legal duty is owed as a matter of private law to some third party to the regulatory relationship. So, for example, in the case of auditors' duties to report wrongdoing within the companies which they audit, whilst the English courts have substantially rejected an argument that a duty of care is owed in negligence to third parties with an interest in taking over the audited firm, it is clear that legal duties are owed in contract and/or tort to the shareholders, in addition to the firm itself (*Caparo* v *Dickman*).

The creation of private law duties to incentivize prospective gatekeepers can also be achieved through legislation. In the UK issuers of credit cards who permit acceptance of their credit card for payment of goods and services in contracts between retailers and consumers are jointly and severally liable for misrepresentation and breach of contract by the retailer to the consumer where the value of the transaction exceeds £100 (Consumer Credit Act 1974 s.75). Thus, in this case obligations are created, but they are owed not to the state but to individual consumers. The impact of these obligations is (or ought to be) to encourage banks to vet those retailers who they permit to accept payments using their credit cards (Scott and Black 2000: 236). This mechanism could therefore act as a control over not only compliance with civil obligations in contract and misrepresentation but also create incentives to monitor for firms which trade while close to insolvency (since credit card issuers routinely pick up the bill for consumers when traders become insolvent if goods or services, such as furniture or airline seats, are not provided as a result).

There may be strong market incentives for some gatekeepers to take action against wrong doing by others (Kraakman 1986: 54) which may act in tandem with legal duties to act. Indeed the creation of legal duties on auditors and other reputational intermediaries is likely to constitutive of the market conception of conduct which enhances or detracts from reputation (Shearing 1993). We might distinguish here those who have direct financial incentives and less direct market incentives. Insurance companies provide a key example of gatekeepers with direct market incentives to detect and act on wrongdoing of those they insure. So, for example, we might rely on insurance companies to detect and act on insurance fraud to an extent that gives to public police a rather limited role (Ericson, Doyle and Barry 2003: chapter 9). It is important to note that insurance companies face (and require) no legal duty on them to act on insurance fraud. Looking at indirect market incentives we might imagine circumstances where company stock could be traded at a higher rate where the company's professional advisers (lawyers, accountants, auditors, etc) were each accorded a reputation for unimpeachable and rigorous conduct in their affairs. This in turn would permit the professional advisers to charge more for their service because of that reputation and the benefits it brings. In effect such firms are able to charge for being 'reputational intermediaries' (Kraakman 1986: 61 ,fn 21) and this brings with it what we might think of as market (as opposed to legal) duties to act. A major criticism of dependence on 'reputational intermediaries' in the corporate governance field has derived from anecdotal evidence that gatekeepers may be 'undermotivated to protect their reputations' when reputation is set against more tangible benefits in colluding in fraudulent conduct (Coffee 2001: 3).

5. Normative Implications

Gatekeepers are likely to be an increasingly important aspect of the way policy makers think about regulatory capacity as the limits to direct and hierarchical regulation become clearer in a wider array of domains. An initial question raised by this claim is to what extent gatekeepers should be conceived of as adjuncts to public regulatory regimes, and to what an extent an alternative conceptualization based on interdependency (rather than primacy of state institutions of and motivations for regulation) is necessary. The capacity of gatekeepers to carry out some regulatory functions with greater effectiveness than state institutions raises the question whether such non-state actors might also be better placed to determine more basic issues such as the nature and intensity of regulation which is appropriate. To regard gatekeepers merely as the neutral technology of state regulatory efforts negates the capacity for instrumental and moral activity in both market and community settings. It is for this reason that it is important to emphasise the extent to which market and community incentives to act as gatekeeper exist alongside but distinct from legal duties to act. Similarly it is right to insist that gatekeeper duties, where they are framed in legal terms, are not owed only to the state and that there may be settings where the legal accountability of gatekeepers to third parties might be expected to be more effective in promoting effective gatekeeper activity than accountability to state actors.

The enrolment of non-state actors within public regulatory regimes raises questions about the appropriate limits to such gatekeeping activity. To what extent should we expect non-state actors to engage in activities which may cut across their commercial interests in order to support public regulatory activity? A key issue here concerns the appropriateness of imposing liability on gatekeepers arising from the illegal conduct of others. A particular question relating to the liability of auditors in corporate governance settings is whether it is justifiable to impose strict liability for accounting irregularities which they fail to detect and which are the primary responsibility of the audited firm.

A second issue concerns the appropriate limits to such enrolment, either in terms of what is effective or what is legitimate. The element of compulsion in regimes where third parties face legal liability for failure to act in response to wrongdoing of others raises important questions as the limits of the state’s coercive capacity. The significance of compulsion is magnified by the realisation that, in contrast with the contracting out of regulatory functions, little or no payment is made by the state for gatekeeper activities (Gilboy 1998: 140). This is not to say that there are not pay-offs. Gatekeeper organisations may derive commercial or other benefits from cooperative behaviour with and by government regulatory authorities. Gilboy's study of the relationship between airlines and immigration authorities in the United States highlights a number of 'favors' which immigration inspectors can grant to airlines which affect commercial interests (Gilboy 1997: 522-525).

A third normative issue relates to the standing of non-state actors as participants in public regimes. The accountability structures for non-state actors are different from those of public regulators. To what extent should banks, airlines or ISPs be liable for decisions which adversely affect their customers where such decisions are erroneous? What should happen when such firms interpret their obligations too extensively and in such a way that customer interests are damaged. How do we cope with the tendency to promote systematic discrimination that is inherent within markets for risk-based products such as insurance?

A fourth issue concerns the effects of delegation of regulatory functions to gatekeepers where such delegation effectively permits the state to evade controls over its own activities. A prime example is offered by the immigration domain, where non-state gatekeepers may be able to evade controls over breaches of human rights norms which would apply more systematically to state immigration authorities (Guiradon and Lahav 2000). So, for example, airlines are able to turn away asylum seekers who lack appropriate documentation for entry to their destination country, in circumstances where a state might have treaty obligations to properly consider the case for granting asylum.

The interdependency of state and non-state actors within regulatory regimes tends to undermine conceptions of regulation which retain a sharp distinction between the public and the private, and, consequently to cause us to question not only a reliance on state actors for regulation, but also reliance on mechanisms of evaluation and accountability which focus exclusively on the conduct of state actors. One approach to addressing this question would be to extend mechanisms of regulatory evaluation and accountability to encompass gatekeepers and this might be appropriate in cases where non-state actors take on legal duties which cause them to act on behalf of public regulatory authorities (Freeman 2003).

However, we need to recognise that the emergence of market and community-based structures for various activities may be a product of weaknesses or limited capacity of public governance structures, such that non-market or market mechanisms distinct from state structures take hold (Heimer 2002: 139). Where the motivation to action is based on market or community incentives it might be better to look to the distinctive institutional structures of markets and communities for evaluation and accountability. The market might be expected to impose a form of discipline on auditors, insurance companies and banks where they fail to carry out gatekeeping activities which, as a matter of commercial good sense, they should be doing (Anleu, Mazerolle and Presser 2000: 79). Similarly where community motivations are at play, for example in respect of employees or NGOs with special information, we might expect the mechanisms of community governance to impose a form of control. The way these mechanisms play out require investigation in empirical settings. In the corporate governance domain the suggestion is that the market incentives for auditors and others to turn a blind eye to irregularities are insufficiently counter-balanced by a commercial need to maintain reputations for probity and effectiveness in audit (Coffee 2001). The challenge is to work out how to realign the interests of gatekeepers with those of investors (Coffee 2002).

A third and hybrid approach is to recognise that interdependence between state and non-state actors is itself liable to generate multiple and overlapping accountability structures with elements of redundancy. In their study of international business regulation (Braithwaite and Drahos 2000: 618) refer to the generation of a ‘web of controls’ over governmental and non-governmental regulators. Assuring appropriate accountability over gatekeepers is a precondition for placing greater dependence on them by requiring third party certification in regulatory regimes in which state capacity for monitoring and enforcement is limited (Braithwaite and Drahos 2000: 619).

6. Conclusions

In many domains gatekeeper activities of some kind are an important part of regulatory regimes, though not to the exclusion of state activities. Making good on the potential of gatekeeper activities requires some degree of reconceptualization of the nature of regulatory activity, a better understanding of capacities and motives for action, and some re-thinking of normative accounts of regulatory effectiveness and legitimacy which tended to privilege the role of state actors within regulatory settings. It requires also more extended and systematic empirical study of gatekeeping regimes.

A critical analysis might lead us to question first the assumption that gatekeeper regimes only emerge as a result of intentional state activity, and cause us to reduce the emphasis on legal liability as the main incentive for acting as a gatekeeper. The role of contracts in creating liability for gatekeepers is of central importance because it does not infer state activity beyond the state role of underpinning contracts through providing the normative framework and, in the last instance, the institutions for upholding contractual agreements. A wide range of regimes invoke contracts to involve third parties in regulation. These include certification regimes for seaworthiness of ships (Furger 1997) , issuing of credit rating checks for firms seeking capital from banks and investors (Kerwer 2005), and certification of compliance with standards (Collins 1997). In each case a regulatory function is being performed with the potential to contribute to public welfare (and not just the interests of the parties involved) but without substantial state involvement. On this analysis it would be possible to offer an extended conception of gatekeeper regimes in which the state was not a key actor, but in which liability remained the key incentive for acting. Certainly the normative issues for such private regulators are just as pressing as they are for gatekeepers as they are conventionally conceived (Kerwer 2005). Indeed, the absence of public involvement in such regimes may make such regimes more worrisome.

Conversely, as we have seen, there are regimes where the state is centrally involved, but the motives for action are not premised on legal liability, but rather on market incentives. Activities of insurance companies provide a key example (Anleu, Mazerolle and Presser 2000), whilst a range of financial intermediaries face weak liability-based incentives (because of problems of detection and enforcement) and (market) reputational interests may be of greater importance.

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