Accountability and Transparency in Regulation: critiques, doctrines and instruments
Martin Lodge

The supposed rise of the regulatory state (Majone 1997), often associated with the international privatisation policies and ‘within government’ change (Hood et al. 1999), has led to a renewed emphasis on debates concerning accountability and transparency. Accountability and transparency have also become prominent features in the talk about ‘governance’, as promoted by diverse groups and organisations such as the World Bank, the International Monetary Fund and the OECD and so-called NGOs, for example by ‘Transparency International’. At the domestic level, the perception of limited accountability and transparency of regulatory regimes have been at the forefront of criticisms by the media, the wider public, business and so-called public interest groups. Far from implying a unified understanding of what constitutes accountability and transparency, universal endorsement by such a diversity of actors suggests that the appeal of these terms is primarily based on them meaning different things to different people. Questions of who is accountable and transparent, to whom and on what terms therefore represent crucial dimensions in any regulatory regime and therefore deserve critical analysis. Three, partly overlapping discussions make the study of accountability and transparency relationships in the regulatory state particularly pertinent.

First, one of the features of the ‘rise’ of the regulatory state at the end of the 20th century has been the re-arranging of governmental architectures, control mechanisms and relationships between actors. Apart from changing ownership structures in various service delivery domains, this shift has been associated with the creation of quasi-independent agencies, the supposed formalisation of relationships between actors as well as the increasing number of actors involved in the regulatory space (Loughlin and Scott 1997, Scott 2000). The ‘regulatory state’ is said to have led to a more complex ‘regulatory space’ (Scott 2001, 2000; Hancher and Moran 1989) of over- and under-lapping relationships across regulatory regimes, involving to a varying extent government departments, politicians, regulatory bodies, ‘target populations’, firms, shareholders and the wider public. Decision-making in areas involving politically sensitive trade-offs, for example between values of economic efficiency, social and environmental objectives as well as security of supply concerns, are seen to have been moved from majoritarian to non-majoritarian institutions (Baldwin and Cave 1999: 286, see also Berry 1979). Similarly, as was the case in 19th century British regulation, concern emerged whether regulatory developments were driven more by the self-interest of regulatory agencies than the intentions of politically accountable ‘law-givers’.

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2 For example, Baldwin, Scott and Hood suggest that an attempt by the imaginary Ada Smith to establish a pin-making plant encounters six regulatory regimes based on at least six different legal regimes from the point of establishing the company to the eventual marketing of products (Baldwin, Scott, and Hood 1998: 1).
Second, and related to the previous point, the move from the welfare state towards the regulatory state has widely been held to imply a change in the quality of citizenship, namely a move from a political conception of citizenship to that of an economic agency. Whereas in the ‘age’ of the welfare state citizenship was seen to include rights to particular services, it is suggested that the age of the regulatory state has brought about a reduced conception of citizenship, limited to that of the individual provided with the contractual rights of a consumer (Barron and Scott 1992; Stewart 1992). Partly as a reflection of these criticisms, there has been substantial advocacy for enhanced ‘openness’ of regulatory regimes, for example in risk regulation (see Hood, Rothstein and Baldwin 2001: 151-163). ‘Openness’ includes demands for greater ‘transparency’ of existing rules, more inclusive participation and more substantial obligations to justify and report on decisions taken.

Third, regulatory activities are said to differ from other government activities in terms of their ‘visibility’ (Horn 1995: 40). On the one hand, regulation allows governments to hide the true costs of their activities by imposing the costs of regulation on those parties affected by regulation. Thereby governments avoid the visibility of public budgets and the potential electoral backlash by anti-tax coalitions (in particular when the costs of regulation are targeted at diffuse or non-pivotal interests). On the other hand, regulation as a tool of government reduces information asymmetries as it imposes the cost of adjustment and implementation on regulated actors. This distribution of regulatory cost is said to facilitate informed participation by affected constituencies (although it assumes the ability to organise collective action by the affected parties). Furthermore, systems which allow for ‘revolving doors’ (the occurrence of transfer between public and private sector work) encourage a regulatory decision-making process ‘in front of an audience’: regulators seek to advance their future private-sector careers through competent (if arguably short-termist) rather than biased or captured regulation (Makkai and Braithwaite 1995).

This chapter aims to highlight the potential diversity of instruments through which regulation can be held accountable and transparent. While accountability is defined as the obligation to account for regulatory (or any other type of) activities to another body or person, transparency is associated with prescribed standards of making regulatory activities access- and assess-able. However, there is substantial diversity in the ways and levels in which regulatory regimes can be held to account and be made transparent. As systems of control, regulatory regimes require three central elements: standard-setting, behaviour-modification and information-gathering. Holding these three elements accountable and transparent is crucial for the functioning of any control system: without accountability and transparency, any non-arbitrary standard-setting or enforcement would be impossible. Nevertheless, how accountability and transparency are incorporated into regulatory regimes differs greatly in terms of who holds whom accountable for what type of activities and type of consequences. Moreover, there are particular trade-offs from advocating one set of instruments over others. The rest of this chapter explores these issues in three stages. The next section sets out five dimensions across which accountability and transparency apply to regulatory regimes and surveys two dominant accounts on accountability and transparency in regulation. The third section illustrates variety in accountability and transparency instruments by applying a simple ‘transparency toolbox’ across three administrative doctrines. Such a discussion also allows for some initial empirical analysis. The fourth section points to trade-offs when choosing particular regulatory
instruments over others. This chapter is therefore less concerned with establishing a Bob-the-Builder perspective of ‘can we fix it [accountability], yes, we can’, but rather to point to the diversity of potential instruments and their basis in particular administrative doctrines.

Accountability and transparency and regulatory regimes
The ‘real world’ of public administration and regulation is characterised by multiple types of accountabilities, established and enforced in different ways and taking place across a number of diverse actors. For example, international firms are not only supposed to be accountable to government departments, regulatory and standard setting authorities and customers in their various national markets, but also to their (groups of) shareholders. Furthermore, accountability may not only be required legally, but also represent responses to demands on reputation and legitimacy. Similarly, regulatory and other standard-setting regimes have become increasingly internationalised in a number of policy domains. Thus, accountability and transparency involve a multiplicity of relationships, based on different types of power relationships (accountability and transparency requirements can be established coercively or through voluntary consent, and may receive different degrees of ‘acceptance’ by those held accountable). Therefore, questions of ‘who is accountable to whom and for what’ are said to have become increasingly pertinent (see Scott 2000: 40-3).

Conventional understandings of accountability are concerned with the demands on an agent to report on certain activities and the ability to impose sanctions. Thus accountability is inherent to any system of control. As already noted, a regulatory regime as a system of control requires at minimum three central elements: detectors (for information gathering), effectors (for behaviour modification) and a standard-setting machinery (Hood 1983: 3-4). These three elements are essential in order to keep the control system within a preferred subset of all its possible states (Hood 1986: 112). The following is concerned not with these three elements as such, but with the way in which they raise issues of accountability and transparency. Five dimensions can be distinguished:

- The accountability and transparency of the decision-making process involved in the setting of rules and standards
- The transparency of the rules to be followed
- The accountability and transparency of the activities of regulated actors
- The accountability and transparency of controls exercised on those operating within the set rules
- The accountability and transparency of so-called feedback processes.

Before returning to a discussion of the above five accountability and transparency dimensions of regulatory regimes, the rest of this section reviews the contribution of two central literatures on regulation to debates on accountability and transparency. The first represents arguments based on normative assumptions regarding liberal-representative democracy; the second is based on principal-agent analysis. It is suggested that the former literature’s focus is limited by its focus on political-representative instruments, while the latter requires not only to account for complexity of blurred agent-principal(s) roles, but also needs to explore the meaning of its proposed mechanisms.
Arguments based on the normative support for a mythical vision of liberal democracy place decision-making by elected representatives at the heart of their analysis. Thus, accountability is seen primarily from a vertical perspective; within government, between decision-makers and courts, between companies and regulators as well as between bureaucracies and parliament. The primary concern has traditionally been with the checking of bureaucratic power through elected representatives. This myth of ‘democratic government’ is maintained through the elected leader of a department that is held to account through formalised appearances in front of various parliamentary arenas. So-called ‘horizontal’ measures (such as control via auditors, professional standard-setters and courts) are also supplemented by vertical instruments (Scott 2000: 43, Stirton and Lodge 2001: 475).

The perceived rise of the regulatory state has been seen as a fundamental threat to the quality of liberal democracy; first, because of the perceived growing significance of non-majoritarian institutions; second, because of the perceived challenge to assumed ‘citizenship’ rights from the wider consequences of regulatory change, in particular in the area of public service provision (also Scott 2000: 54-9). The spread of non-majoritarian and formally ‘independent’ regulatory agencies across policy domains was seen to constrain the ability of political representatives to hold the exercise of delegated powers accountable, raising fears that regulatory bodies had become ‘headless branches of government’. More long-standing concerns with accountability and transparency have been directed at policy domains characterised by professional self-regulation, such as in the British case with its extensive self-regulation in medicine, law, advertising and financial markets. Such ‘private interest group’ government is seen to raise substantial questions of accountability to the political system and the wider public (Moran 2002: 405; Moran 2001: 282).

A second criticism links accountability and transparency to broader discussions on the relationship between state and citizen. It has been claimed that reducing voice accountability options through privatisation has not been accompanied by increased choice options. Accordingly, Falconer and Ross (1999) diagnose an overall decline in accountability standards of public services in the UK. In a more wide-ranging critique, Haque has suggested that regulatory and wider public sector reform have not only led to increased economic inequality and hardship, but also to a deterioration of standards of citizenship, given alleged greater selectivity with regards to the recipients of reformed ‘public’ services, reduced opportunities to exercise public scrutiny, the emergence of a politicised short-termist civil service and the increasing incentive to utilise ‘public’ office for private gain (Haque 2001: 71).

While writers in the legal tradition point to the problems for democratic legitimacy and therefore advocate tools to advance vertical accountability, for example for appointment and parliamentary committee hearing structures (Graham 1997), other literatures point to alternative sources of legitimisation of the ‘regulatory state’. For example, Romzek (2000) claims that rather than reducing accountability, public sector reforms have been mainly about (albeit potentially ‘mismatching’) changes in accountability modes. In contrast, Majone (1999) suggests that the shift towards the

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3 It is beyond the scope of this chapter to rehearse the criticisms of this conception of accountability in a liberal democracy.
‘regulatory state’ involved a move from input to output-based forms of legitimacy which not necessarily implies a reduction in legitimacy. Thus, input-oriented accountability applies to the mechanisms of policy choice, the choice (and its democratic quality) as to how to organise a particular policy domain and to delegate authority to an ‘independent’ agency, and how to choose standards on which the output of an agency is to be measured. In contrast, output-oriented legitimacy applies to the ‘delivering’ agency, focusing on policy outputs and outcomes, often associated with benchmarks and prescribed targets (such as inflation targets). Self-limiting measures, i.e. the distancing of policy areas from political decision-making, are justified by the long-term interest of political and economic stability which is seen to be put at risk if discretionary ‘openings’ for political expropriation exist or are perceived to exist. Such motivations have been prominent, for example, in the shift towards independent competition authorities and central banks in the post-Second World War period.

The principal-agent literature points to a wider understanding of accountability and transparency instruments given its concern with information asymmetries and incomplete contracting. Thus, a number of measures have been put forward to prevent ‘shirking’ or ‘drifting’ by the agent. At the same time, the principal-agent analysis, limited as it is in the light of the extensive number of relationships and interdependencies, points to at least three dimensions where an absence of accountability and transparency facilitates the possibilities for ‘drift’ as a consequence of limited control due to incomplete information (although, as already noted, regulation is arguably less affected by information asymmetries than other government policies). These involve agency drift by the regulated actor(s) through the evasion of control in the pursuit of self-interest action (potentially leading to ‘capture’ of the regulatory regime, Stigler 1971), bureaucratic drift by regulatory and bureaucratic authorities enforcing regulation through selective or biased attention, budget-and turf-maximisation strategies, and, finally, coalitional drift, where the governing coalitions seeks to move beyond the policy preferences established by the enacting coalition. In the face of an inherent self-interest to avoid control, a variety of devices have been explored to prevent such ‘drifting’, ranging from ‘police patrols’ (through monitoring committees and the like), ‘fire alarms’ (of constituencies affected by adverse regulatory decisions), self-revelatory mechanisms such as cross-sanctions, and through structural-procedural devices which direct the regulatory decision-making process towards particular outputs (such instruments include decision-making and appointment rules, legislative direction and the like). These instruments operating at the ex ante and ex post stages of regulation apply across all three levels of ‘drift’ (see McCubbins et al., 1987, Horn 1995, Epstein and O’Halloran 1999, Macey 1992, Levine and Forrest 1990).

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4 Such measures invite reverse effects, such as creative compliance, the setting of benchmarks which may be not challenging or create perverse incentives in terms of resource allocation.

5 Moran (2002: 403) criticises that self-limitation arguments fail to account for the danger of inducing policy stasis. However, this criticism does not account for the alternative (albeit not elected) means of reducing the risk of organisational closure, such as the existence of cross-organisational professional communities and the interaction between agency and review bodies, such as courts.

6 This discussion is biased towards holding the ‘hardwired’ bargain under control, it does not discuss the ways in which a ‘hardwired’ regime needs to be accountable in terms of responsiveness.
Nevertheless, in light of the five dimensions of regulatory regimes that involve transparency and accountability, both these literatures are limited. While the legal-political literature is mostly concerned with political measures of accountability and transparency, it pays little attention to other dimensions which may (or may not) offer alternative means to hold an actor accountable. Whether such alternatives are effective or not, will largely depend on the underlying incentive structure facing the particular actor supposedly to be held to account.

The principal-agent literature (and its ‘interpretive’ branch, Huber and Shipan 2000) raises two central questions. First, one needs to specify what is perceived to represent the appropriate locus of authority of decision-making and to understand what is meant when talking about ‘police patrols’ and ‘fire alarms’. These mechanisms require a justification as to what and who constitutes a legitimate ‘police patrol’ or ‘fire alarm’ and such definitions in themselves are most likely to cause disagreement, for example about the internal accountability of ‘fire alarms’, the extent of responsiveness by the standard-setting system to particular ‘fire alarms’ rather than others or the speed and representativeness of monitoring committees. Second, accountability and transparency mechanisms need to be applied across all five dimensions of regulatory relationships, as set out above. Most definitions stress the importance of decision-making to be made in a visible way and to be justified appropriately (Stirton and Lodge 2001: 474-7), thus ignoring the importance of ‘responsiveness’ and ‘detection’: the knowledge of what has been decided is not a particular extensive form of transparency. Additional dimensions are, for example, the ways in which standard-setting machineries respond to the information gathered through the detecting instruments, the ways in which detection is held accountable and the way in which the standard-setting is being held accountable. Holding ‘detectors’ to account seems particularly crucial as ‘failure’ has been widely associated with break-downs on the detection dimensions of control systems. Thus, the analysis needs to expand to account for the variety and multi-dimensionality of relationships within (even a stylised) regulatory regime. Furthermore, it needs to illustrate ‘how to’ establish appropriate mechanisms for the holding to account and transparent of particular actors. The next two sections seek to illustrate such an approach.

**Transparency toolbox and doctrinal choices**

How then can a regulatory regime be held accountable and be made transparent? This section seeks to illustrate the different bases on which to promote instruments enhancing accountability and transparency that allow the discussion to move beyond stale accounts of political-legal interpretations of what accountability constitutes. Drawing on Hirschman’s distinction of loyalty, exit and voice responses (Hirschman 1970), this section introduces a ‘transparency toolbox’ of four basic mechanisms that potentially enhance transparency and accountability. However, the tools of a 2x2 box provide little support as to ‘how to’ address accountability and transparency in regulation. Such content is provided by administrative doctrines that put forward particular principles or ideas what should be done in administration in the light of particular policy problems (see Hood and Jackson 1991: 9-19). This section first sets out a so-called transparency toolbox (see Stirton and Lodge 2001: 478) before moving to a discussion of the different doctrines which provide different ways in which to apply these tools to facilitate the accounting for regulation, these also suggest the ways in which actors are held accountable by others actors.
Table 1: Transparency Toolbox

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<th>Individually exercised</th>
<th>Collectively provided</th>
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<tr>
<td>Input – oriented</td>
<td>Voice</td>
<td>Representation</td>
</tr>
<tr>
<td>Output – oriented</td>
<td>Choice</td>
<td>Information</td>
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The ‘transparency toolbox’ as illustrated in Table 1, is based on two key dimensions. First, it distinguishes between tools that are either individually exercised or collectively provided. Thus, information and representation are supposed to make regulation (and regulated service provision) transparent to users and citizens en masse, while voice and choice mechanisms are provided to the individual for their discretionary utilisation. Second, it distinguishes between input-oriented mechanisms, those aimed at enhancing the quality of the process of regulatory decision-making and regulated service provision and output-oriented mechanisms which facilitate the evaluation of provided regulation and regulated services. Choice seeks to enable user participation and redress, representation seeks to counter imbalances in collective action (for example through the enfranchisement of public interest groups in regulatory decision-making processes, Ayres and Braithwaite 1992), choice aims to enhance selection, while information seeks to redress potential information asymmetries, thereby enhancing the quality of choice.

As such, the toolbox provides only little content as to ‘how to fix’ or enhance the accountability and transparency of regulatory regimes. Building on the analysis of doctrines in public management, three different ways on ‘how to’ design and discuss regulatory transparency can be distinguished, ‘fiduciary trusteeship’, ‘consumer sovereignty’ and ‘empowered citizenship’ (Hood 1998; Hood 1997). All three provide distinct understandings as to how accountability should be designed (in particular by who to whom) into a regulatory regime and with what type of instruments.7

The fiduciary trusteeship doctrine has been particularly prominent in ‘traditional’ public administration (Hood 1986: 181-84). It resonates with those criticisms of the ‘regulatory state’ that are troubled by the blurring of the ‘public’-‘private’ divide (for example, Haque 2001). Concerning the regulation of public service provision it is assumed that ‘producers’ know best, given high information costs with customers being a divided group and incapable of collective action, potentially willing to accept undesirable risks given lack of expertise. Such expertise is provided by public interested technocrats able to counter concentrated interests, to balance against public pressure for ‘knee jerk responses’ or to deal with issues of long-term, but low-level salience, such as nuclear energy refuse, medical treatments, the consumption of particular foodstuffs or even holiday locations. Accordingly, regulation should be exercised in an orderly, legally structured way that minimises the discretion of all parties to safeguard certainty in the regulatory process by reducing the potential for arbitrary (and discretionary) decision-making. Accountability is conducted via oversight and review by authoritative and responsible experts. In terms of

7 Thus the analysis is linked to cultural theory. It however does not deal with fatalism or ‘contrived randomness’ as a mode of control. A fatalist would rely on ‘told you so’ reporting and unannounced and unpredictable instruments.
transparency tools, this doctrine emphasises the importance of representation (through elected officials and specialist bodies) and of limited voice for individuals, through elected representatives. Put differently, regulatory activity is said to be accountable once it is suitably justified, at best in front of a knowing audience of experts or competent political representatives.

Arguments based on the fiduciary trusteeship doctrine warn against the risk of a downward drive of regulatory standards (‘Delaware effect’) once competition (or choice) between different standards is allowed, while direct citizen involvement is regarded as setting a dangerous precedent that downgrades the importance of expert decision-making and judgement, opening regulation up to ill-informed decisions and potentially leading to more widespread challenges to hierarchical authority, undermining authoritative activity due to hyper-accountability. However, it is questionable whether individuals require this kind of paternalism across all areas of regulation, and how far such a concept should be stretched in its application. While we may agree on the necessity of oversight by expertise in highly complex domains, we may be less willing to accept such paternalism when it comes to the monitoring and sanctioning of individual leisure pursuits or the mere choice of phone set designs. Furthermore, it is debatable whether the assumption of trust in experts and their judgement is not rather naïve, given experts’ self-interest and biased understandings (such as ‘groupthink’ syndromes), pointing to further questions of the accountability of these bodies and the accountability and transparency of their selection mechanisms.\(^8\) Finally, it is doubtful whether a belief in ‘authority’ will provide straightforward solutions when it comes to ‘wicked issues’ involving multi-dimensional problems in highly uncertain environments lacking any form of political and societal consensus. Instead such problem constellations seem to require strong participatory and inclusive processes across all five dimensions of the regulatory regime.

The consumer sovereignty doctrine, in contrast, regards citizens as the best judges of their own needs, who should be allowed to take their own decisions when it comes to choosing public services or in accepting risks. Therefore, individuals are regarded as capable of informed choice and their choices are sufficient to hold producers to account for the behaviour. Public authority over economic rents is to be minimised, as it is most likely to be abused by self-interested activities of those in authority. Thus, the significance of competition is emphasised, allowing the individual a maximum possible degree of voluntary choice on the extent and nature of consumption of any particular good (Hood 1986: 171-72), relying also on the self-interest of the providers of the regulated product to be accountable by providing information and being concerned about their reputation. Thus, providers find it in their interest to be accountable and transparent in their activities to increase their chances of survival.

This principle of competition and rivalness is not merely limited to the accountability and transparency of public services provision but applies to regulation more generally. Thus, rivalry may exist between competing regulatory standards and certificates (such as shipping classification and registration schemes). Furthermore, rivalry and diversity, which need not necessarily occur within one single policy domain, induce

\(^8\) Let alone the accountability of so-called ‘total institutions’, such as prisons, which, by nature, lack day-to-day transparency in their operating procedures.
cross-organisational policy learning and ‘discovery’ processes. Furthermore, distrust in hierarchical decisions could potentially be minimised through competitive means of selection of regulators with distinctive policy packages. Accordingly, this doctrine emphasises the transparency tools of information and choice, the former in particular contributing to the quality of the latter.

However, as with fiduciary trusteeship, the applicability of the consumer sovereignty doctrine faces some challenges. It is questionable to what extent an individual should be able to choose risk-taking activities, as long as the question of ‘acceptable’ externalities (i.e. the imposition of costs on others due to individual behaviour) has remained unresolved. Furthermore, there are potentially certain domains where the demand for choice or the possibility of transparent ‘controlled experiments’ between different standards may be unacceptable to the wider public. A choice between a safe and an unsafe plane or ship may lead to discounts on price to the individual consumer of the plane’s or the ship’s services, but the consequences of a plane crash or major maritime spillage may impose higher costs on the wider public than the individual benefits arising from the existence of choice.9

The third doctrine builds on empowering citizens. It suggests that the two earlier doctrines either run the risk of concentrating power, thereby facilitating elitist regulatory decision-making processes or of disadvantaging certain individuals over others, given different capabilities to understand perceived complexities of market processes. Thus, this doctrine does not only advocate maximising input-oriented participation and placing a maximum of scrutiny on the regulatory process (for example, rotating mandates of regulators), but regards such activity as having also transformative effects on the participating citizen (Bozemian 2002: 148).10 Therefore, accountability and transparency mechanisms emphasise the importance of reducing social distance between those who regulate (and produce) and those affected by regulatory activity. This reduced social distance is directed at the involvement in the processes in particular, rather than an emphasis on enhancing the quality of choice to the individual.

In terms of the transparency toolbox, this doctrine emphasises the importance of voice, representation and information. Information is seen as important given inherent distrust of authority and elitist decision-making, which therefore requires a maximum of public scrutiny; this is linked to mechanisms of representation, where the contribution from a cross-section of constituencies may be linked to principles of rotation and the mandating of regulators. Similarly, voice is regarded as crucial in that it allows for the contribution of ‘laypeople’ to the regulatory decision-making which otherwise is reserved to experts and their particular biases. There are, as with the other doctrines, certain limitations as to the extent to which regulation can be made truly egalitarian. It seems to ignore the costs involved in participation (while also the predicted transformative impact may be questioned) and the potential occurrence (so often bemoaned by so-called experts) of ‘irrational’ decision-making by including too much publicness. Similarly, there are limitations as to the extent to which authority can be distrusted (or rather the potential costs of such distrust), given the need to

9 Ignoring here potential difficulties in coming to the appropriate assessment of ‘desirable’ and ‘undesirable’ side-effects (and of decision-making processes to come to an assessment).

10 Arguably, the key argument would be that participation in the production of the regulated activities would reduce the need for control.
acquire some expertise to regulate particular activities, while mandating devices may cause considerable tensions given the incomplete nature of such mandating ‘contracts’ and the difficulty to establish universally acceptable decision-making procedures which may be regarded as leading to universally accepted outcomes.

Table 2, besides summarising the above argument, suggests how the different doctrines locate authority differently. Certain instruments are being advocated by different perspectives with different justifications; thus, for example, the participation in elections is universally endorsed, however, while one doctrine regards it as an important measure of competition, the other regards it as legitimating the use of authority, while the third points to the importance of participation in its own right.

Table 2: Transparency Toolbox across three doctrines

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<th>Fiduciary Trusteeship</th>
<th>Consumer Sovereignty</th>
<th>Citizen Empowerment</th>
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<tr>
<td><strong>Locus of Authority</strong></td>
<td>Technocratic authority</td>
<td>Individual consumer</td>
<td>Participation in collective decision-making</td>
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<tr>
<td><strong>Choice</strong></td>
<td>Election of political representatives</td>
<td>Election of regulators/politicians/choice of regulatory standards and in public services</td>
<td>Public discourse and choice on value conflicts</td>
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<tr>
<td><strong>Voice</strong></td>
<td>Public hearings, letters to authorities and political representatives</td>
<td>Complaint handling</td>
<td>Localised input and encouragement of value statements</td>
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<td><strong>Representation</strong></td>
<td>Consumer councils</td>
<td>Competition among public interest groups</td>
<td>Direct citizen involvement, rotating mandates, peer group pressure</td>
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<tr>
<td><strong>Information</strong></td>
<td>White Papers, Annual Reports, government/regulator statements</td>
<td>Benchmarking, Financial transparency requirements,</td>
<td>Mandating of representatives, maximum scrutiny and exposure of rival views</td>
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Having looked across the application of a very basic ‘transparency toolbox’ across three doctrines, indicating of what type of instruments would be advocated by particular worldviews in contrast to others, a similar exercise can be undertaken across all the five dimensions of a regulatory regime, as set out earlier. Table 3 provides an overview of instruments particularly emphasised by the various administrative doctrines, although it does not claim to be exhaustive.
Table 3 illustrates the key difference of advocated instruments across the five accountability and transparency dimensions of any regulatory regime. The first dimension, the accountability and transparency of the standard-setting process points to the differences in conception as to appropriate locus of authority, and to differences in terms of process. Similarly, across the three doctrines there are substantial variations in advocated instruments when it comes to the transparency of rules that are to be implemented, ranging from a reliance on professional standards, the existence of legal codes (including competition law) and those that involve access and participatory rights.

The (third dimension of) choice of instruments to advance the accountability and transparency of regulated actors and activities, seeks to avoid ‘capture’ or ‘creative compliance’. Potential answers to such incentives range from the creation of oversight bodies, to a concern with the incentive structures and information revelation requirements to a mixture of lay-participation in oversight, to participation in the running of the regulated activities and other participatory means. The fourth dimension concerns the accountability and transparency of the regulator, with the primary emphasis being to avoid goal displacement through bureaucratic self-interest. While according to the ‘fiduciary trusteeship’ doctrine, such behaviour is to be controlled through reporting, legal duties and technocratic oversight, the ‘consumer sovereignty’ doctrine suggests instruments of choice, such as election to regulatory offices and regulatory standards as ways to control regulatory activities. ‘Citizen empowerment’-based instruments on contrast stress the importance of heterogeneous participation, encouraging the public discourse of competing values of regulation, for holding the ‘effecting’ capacity of regulatory regimes to account.

Finally, the ‘feedback’ side of the regulatory regime requires to be held to account and transparent in order to allow for the unbiased updating of regulatory standards and activities. While the first doctrine advocates the importance of expert driven

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<th>Table 3: Accountability and transparency across regulatory regimes</th>
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<tr>
<td><strong>Decision-making process involved in the setting of rules</strong></td>
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<tr>
<td>Legislative and technocratic decision-making</td>
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<tr>
<td><strong>Transparency of the rules to be followed</strong></td>
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<tr>
<td>Oversight through supervision by experts, political competition for office, consumer representation duties</td>
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<tr>
<td><strong>Accountability and transparency of regulated activities</strong></td>
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<tr>
<td>Reviews (royal commissions and task forces) by experts</td>
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<td><strong>Accountability and transparency of feedback processes</strong></td>
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Finally, the ‘feedback’ side of the regulatory regime requires to be held to account and transparent in order to allow for the unbiased updating of regulatory standards and activities. While the first doctrine advocates the importance of expert driven
reviews, the alternative doctrines point to the importance of maintaining variety and
diversity in order to encourage learning and mutual adjustment processes, while more
egalitarian doctrines stress the importance of participatory discourse and value-based
reviews.

Such toolbox approach offers one way to approach accountability and transparency in
regulation from a different perspective to the traditional concerns of empirical
accountability of particular institutional arrangements. It also provides a basis for
legal analysis in at least two ways. One way is to assess whether the empirical world
of regulation conforms to ways in which costs and benefits from exercising choice in
various policy domain are distributed. Thus, the costs to the individual to exercise
choice have to be weighted against the costs of being restrained by collectively-
binding decisions. Thus, domains characterised with low information costs could be
predicted to rely on instruments based on the consumer sovereignty doctrine. A
second way is to utilise the toolbox to assess, in a comprehensive way, the existing
instruments that are supposed to advance the accountability and transparency of
particular regulatory regimes or to compare national regulatory regimes, enquiring
whether there is cross-national or cross-sectoral diversity or trends towards increasing
commonality or even convergence. Comparative assessments have pointed to the
diversity of ways in which national regulatory regimes attempt to hold the provision
of public services accountable, ranging, for example, from the New Zealand
experience with its absence of sectoral regulatory bodies and its emphasis on financial
transparency and attempts to facilitate choice, to the United Kingdom which apart
from a formal emphasis on choice, has placed, since the age of public ownership, a
strong (although largely ineffective) emphasis on representation through Consumer
Councils, to the German regime that apart from fostering choice, relied strongly on
private comparative information (Lodge 2001). Across regulatory regimes for
network industries in Western Europe, there has been an increasing shift not only
towards choice through market liberalisation, but also a growth of accompanying
transparency mechanisms, in particular voice (complaints) and information, although
with substantial variations across states and domains. Table 4 provides a limited
overview for four European states as an example of such a comparative approach.
<table>
<thead>
<tr>
<th>Mechanism</th>
<th>Britain</th>
<th>Ireland</th>
<th>Germany</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voice</td>
<td>Increasing emphasis on complaint handling</td>
<td>Formalisation of complaint handling</td>
<td>Limited regulatory information service</td>
<td>Not part of licence requirement – uneven compliance to regulator</td>
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<td></td>
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<tr>
<td>Representation</td>
<td>Consumer councils, towards diverse representation within regulatory bodies</td>
<td>Consideration of industry-ombudsman,</td>
<td>No representation beyond regulatory authority</td>
<td>Involvement of regulator and consumer associations</td>
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<tr>
<td>Choice</td>
<td>Increasing emphasis on choice. Shift of agencies towards competition</td>
<td>Late-comer – choice in telecoms most prominent –</td>
<td>Enhanced choice in telecoms; hurdles in electricity</td>
<td>Widespread liberalisation</td>
</tr>
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<td></td>
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<tr>
<td>Information</td>
<td>Price, service comparison provided/delegated by regulators</td>
<td>Limited – under consideration –</td>
<td>Numerous private price comparisons</td>
<td>Private price comparison</td>
</tr>
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<td></td>
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</tr>
</tbody>
</table>

(Based on Lodge 2002: 61)

Similarly, in Commonwealth Caribbean countries (Lodge and Stirton 2001), despite a more limited move towards choice, there has been an increasing awareness that political representatives does not necessarily provide a complete transparency and accountability regime, therefore leading to more individualised measures, such as complaint-procedures, more in-depth detection measures and increased consumer representation functions by regulatory bodies. Such an empirical picture, although limited, does not point to an overall decline of accountability and transparency as a consequence of the shift towards the ‘regulatory state’ per se – whether and how effective these mechanisms are, especially in contrast to those instruments employed in the age of the ‘positive’ state, is a different question requiring further research.

The toolbox of regulatory transparency points to the potential variety in which regulation can be held to account. It points to the diversity of instruments associated with ‘fire alarms’, ‘oversight’ and procedural devices characteristics. Such a discussion does not only offer one way to discuss different ways to organise accountability and transparency, it also offers one way to investigate regulatory regimes empirically, moving beyond stale debates concerning parliamentary accountability and towards a more complex understanding of regime characteristics and dynamics. The next section points to particular trade-offs that are associated with particular instrument choices that are fundamental to any debate concerning accountability and transparency in regulation. It nevertheless suggests that rather than debating the deteriorating impact of ‘marketisation’ of particular activities on the quality of ‘citizenship’, the extent to which accountability and transparency are provided through instruments informed by distinct doctrinal choices offers a more useful way to explore analytical and empirical difference.
Trading-off transparency and accountability

Having illustrated the variety of instruments available across administrative doctrines, this section illustrates crucial trade-offs across a number of central issues in holding regulatory regimes accountable and transparent. Such debates point to the limitations of claims (by any of the three doctrines under discussion) advocating ‘more’ transparency. Without claiming to be exhaustive, three central themes are discussed in this section, pointing to particular trade-offs in the consequences of effecting accountability, in the setting of standards, and in the degree of responsiveness to public pressure.

The first theme concerns the potential consequences of who is being held accountable to whom. As accountability and transparency are crucial for holding the regulatory regime in a desired subset of possible outcomes and outputs, it can be questioned whether certain measures of holding to account and transparent may not invite undesired side-effects. For example, when things are seen to go wrong, one of the central claims is that someone has to be seen to have been responsible for the misconduct or the particular undesired outcome (to prevent the so-called ‘many hands’ problem, see Bovens 1998).\(^{11}\) One further crucial question concerns how ‘transparent’ such holding to account is supposed to be and what type of sanctions are associated with the possible finding of misconduct. Open systems arguably encourage behaviour to reduce all forms of risk exposure or even more unaccountable task evasion, which then is even more difficult to detect, let alone to correct. Such avoidance behaviour may be further facilitated in cases of strong sanctions. Progress is said to require trial and error processes within an ‘open’ environment to allow for improvement, debate and learning. A fear of sanctions will encourage the narrow-minded ‘going by the book’, the potential export of regulated activities to other territories with less ‘tough’ regulatory regimes and the potential crowding out of desirable activities given high regulatory compliance costs. The related issue concerns ‘who’ should be held to account when things ‘go wrong’. An emphasis of finding the person ‘in charge’ may very well identify a particular culprit of a particular wrongdoing, but it is most unlikely to address the question whether such behaviour was induced by dysfunctional wider systems. Most studies of ‘failure’ have pointed to the importance of dysfunctional organisations rather than individual wilful wrongdoing. The move towards holding larger systems to account, such as firms, has been seen in the emergence of ‘corporate manslaughter’ jurisprudence and legislation (which in itself may invite unanticipated side-effects).

The second concern points to problems of setting standards and how these are being held to account. The fiduciary trusteeship doctrine implies a relatively certain state of affairs – experts are assumed to be able to come to some form of quantitative analysis as to what standards are likely to offer greater benefits than costs or what type of risks are deemed irrelevant or insignificant. Such an account can be challenged on two related points. First, the need to quantify scenarios is often seen as already restricting empirical complexity, thereby potentially fitting a solution to the ‘wrong problem’. Second, in so-called ‘wicked issues’, standard-setting by experts may generate even more distrust and contestation, given inherent value and technocratic conflicts and lack of any form of direction and consensus. An alternative version, advocated in

\(^{11}\) A view stressed, for example, by Bentham and often made in debates whether to allow for presidential or board-type regulatory bodies.
particular by the ‘citizen empowerment’ worldview is to generate open contests between the different views via encouraging discourse. However, such processes may deepen existing conflict cleavages, may require longer time periods than is feasible for regulatory responses and it may generate conditions such as increasing elite cartelisation or opinion fragmentation.

A third concern points to the level of responsiveness of regimes to external pressure. While many claim that regulatory regimes should be open to the preferences of the ‘public’, it is not always clear what the ‘public’ constitutes and what type of assessment of ‘public opinion’ should be utilised. Furthermore, the degree to which regulatory regimes should be resilient to outbreaks of public demands for regulatory activities (following, for example, fatal bites by dogs considered as ‘dangerous’) is contested in the literature (Breyer 1993). A further concern is the biased ways in which institutions respond to demands for regulatory activity, in the dangerous dogs case, for example, it is notable that, in cross-national perspective, the regulatory activities are usually are not directed at ‘middle class’ dog breeds and types, despite their prominence in incident statistics (Lodge and Hood 2002). Moreover, claims to accountability and transparency are likely to encourage a trend towards increasing juridification and potential gridlock: if all activities are to be held accountable and transparent and are linked to a high-complaint culture, then regulatory activities are bound to become increasingly rigid.

Such questions suggest that asking for ‘more’ accountability and transparency, or more generally, openness does not only involve questions of selecting administrative doctrine and instruments, it also points to certain limitations and consequences of particular instruments and techniques. Accountability and transparency are therefore not goals in themselves, their purpose is to maintain a system in a certain range of desired states. Furthermore, whatever doctrine is advocated in the promotion of accountability and transparency is likely to invite particular trade-offs and tensions, leading to continuous challenges to the existing regimes.

**Conclusion**

Discussing accountability and transparency in regulatory regimes reflects on many well-established debates in public administration. However, the perceived rise of the regulatory state is seen to have led to a renewed concern with questions of how to hold particular activities to account in a transparent way. The traditional literature is too limited in its concern with pointing to particular hardwiring mechanisms or with its focus on legal-political accountability. Instead, any thorough discussion of accountability and transparency of regulatory regimes needs to go beyond such debates, pointing to different administrative doctrines and to the numerous dimensions of regulatory regimes which require to be held to account and be transparent in order to remain in a sub-set of desired outcomes.

Regulatory regimes are associated with five dimensions of accountability and transparency. Any analytical and empirical analysis of accountability and transparency should seek to adopt such a multi-dimensional perspective rather than on relying on dated conceptions of accountability to parliament. By pointing to three administrative doctrines, this chapter has suggested that debates about who is accountable to whom and in what ways are not merely a discussion about different institutional furniture arrangements and degrees of delegation. Instead, it reflects on
fundamentally different conceptions as to ‘how to’ hold activities transparent and accountable. This chapter has also pointed to the trade-offs inherent in the different ways in which regulation can be held to account and be made transparent.

Accountability and transparency are therefore not just a ‘good thing’ of which we should just have ‘more’ – the way in which such instruments are designed into a regulatory regime fundamentally affects the way in which power is allocated and negotiated in any regulatory regime and it leads to potential intended and unintended consequences that are associated with particular costs and benefits.
Bibliography
Falconer and Ross (1999)


