WHO REGULATES THE REGULATORS?

Georgina Lawrence
PREFACE

The CRI is pleased to publish *Who Regulates the Regulators?* as CRI Occasional Paper 16. The author, Georgina Lawrence, was a Research Officer at the CRI at the time of writing, late in 2000. The work was made initially available for comment as an ‘interim report’, and put on the CRI web site. Georgina has updated the report for comments received, and gratefully acknowledges those comments. The amendments made, and the views expressed, remain, of course, the responsibility of the author.

The CRI would welcome continuing debate and comment on this Occasional Paper and the theme of regulatory control generally. The debate on the accountability and framework controls for the regulators is on-going and we hope that, ‘Who Regulates the Regulators?’ will make a contribution to that debate. The CRI is pleased to consider manuscripts for publication in this area, in order to promote that debate. These should be addressed to:

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1 INTRODUCTION

In November 2000, Utility Week, a news magazine focusing on utilities in the United Kingdom, opened their political page with the rhetorical question:

“Who regulates the regulators? The answer, of course, is nobody”.¹

This paper examines whether that answer is true. It looks at the powers and the duties of the regulators, their methods of operation, and the controls over them. It also examines the manner in which their decisions can be reviewed or revised by higher authorities. But beyond this issue, the paper also considers whether anyone could ever “regulate the regulators”.

It is a truth universally acknowledged that a problem in need of a solution must be considered by a person with the ability to exercise their discretion and make a decision. Even the most thorough set of guidelines cannot enable a decision-maker to ‘follow the list’ and ‘come to the obvious conclusion’. Any decision-maker must consider the particular facts of the case at hand, and exercise their own discretion or judgement to reach a decision. In order to regulate an industry, decisions must be taken. Regulators are empowered to act independently and to make important decisions, and so are given the ability to exercise their own discretion.

The regulated industries are regulated for many reasons. These include:
- to prevent abuses of monopoly power;
- to prevent anti-competitive behaviour and allow competition to flourish;
- to protect consumer interests;
- to protect environmental interests;
- to protect the interests of particular classes of consumers.

Today, in Britain, many ‘utility’ services are affected by regulation. This regulation is usually made the responsibility of a specific ‘regulator’, an individual or group responsible for the regulation of a discrete area. The regulator is usually appointed by government to hold office for a defined period of time. The regulator usually holds a role that is independent of government. The regulator is given powers to regulate their defined sphere. The regulator must exercise their power in accordance with their relevant statute, regulations and guidelines. The regulator is usually given a substantial amount of discretion in exercising their power.

This concentration of power in the hands of unelected and independent officials has caused some public concern and debate about the powers of the regulators. The media has contributed to this debate (with varying degrees of helpfulness). Media contributions have included articles such as one entitled: “They’re not great or even very good: It’s high time someone started regulating our bloated regulators”.² At the outset of this paper, however, it should be noted that the contribution of regulators,

¹ Regulators face scrutiny by MPs, 24 November 2000, p 15.
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particularly in the relation to economic regulation, have been largely judged favourable.

It would be fair to say that the role and powers of regulators have been debated ever since they were first conceived, and many academics have contributed to, and shaped the debate. This paper examines ‘who regulates the regulators?’, based on the position in the year 2000. It focuses mainly on the role of the rail regulator, the new gas and electricity markets authority (GEMA), the director general of water services and the director general of telecommunications. Obviously the sphere of regulation spreads far beyond these regulators, but these have been chosen as examples because they regulate areas which affect virtually everyone who lives in Britain, and because of the powerful nature of the industries they regulate.

Defining the role

Despite the important role played by regulators in Britain, their role has never been fully defined. There is no clear role in British constitutional law for a regulator, and their powers are derived from their specific enabling statutes, which list a few defined objectives, and provide limited guidance to the regulators about how they should regulate. Regulators do not operate under a common code, written or unwritten. There is no clear explanation of how and why this situation evolved. Regulators have been operating in British public life for a considerable period of time, with Tony Prosser noting that “it has been well documented that much regulation has ancient roots”. The current use of industry regulators can be dated to the 1980s, when the Conservative government commenced a series of privatisations of state owned utilities. These industries were typically divided into competitive units, or made open to competition and then privatised. Independent regulators were then created to control and regulate these privatised industries. Although the concept of regulation had existed for a long period in British public life, the new regulators were given unprecedented powers. Cosmo Graham has recently pointed out that the regulatory agencies established for the utilities after privatisation “represent, by themselves, a challenge to the traditional doctrine. They have no politically accountable head and have a substantial amount of autonomy in relation to developing and executing policies”.


4 Law and the regulators, op. cit, p 33.

The creation of the utility regulators over the 1980s and 1990s followed a period of academic and political debate about the role of the new regulators. Convention and norms of regulatory practice were only built up over time, meaning that the initial regulators had very little guidance. Some commentators have declared that the Littlechild Report (written by Professor Stephen Littlechild to consider the manner in which British Telecom should be regulated) provided the philosophy of good regulation which should guide the regulators.\(^6\) Professor Littlechild’s report famously declared that:

“Competition is indisputably the most effective means…of protecting customers against monopoly power. Regulation is essentially a means of preventing the worst excesses of monopoly: it is not a substitute for competition. It is a means of holding the fort until competition arrives”.\(^7\)

However, it is obvious that Littlechild’s focus was directed to economic regulation alone, and his statement disregards any considerations of regulation for social or environmental objectives.

The Littlechild view that regulation was merely a method of ‘holding the fort’ until competition arrived has not been fulfilled. Regulators have not been restricted to policing competitive markets, and, over recent years, have had their powers expanded to include duties such as protecting disadvantaged consumers and the fuel poor. The expansion of the powers of the regulators has not been without criticism, and has re-awakened the debate about what the role of the regulators should be, how they should operate, and how they should be controlled or regulated.

**Who are the regulators?**

The regulators are unelected and powerful public officials. The powers that they are given, and the manner in which they are controlled, will be discussed later in this paper. Government appoints all of the regulators, as the result of a decision-making process that is hidden from the public eye. This makes them analogous to quangos, although the regulators exercise far more power than the average quango. Each of the regulators is appointed by the relevant secretary of state, meaning that the question of who would make a good regulator, and what attributes the regulator should possess, are also considered privately. The personal qualities that are sought in regulators are not open to public debate, but one approach which can be discerned has been described as “the ‘good chaps’ approach, whereby a trustworthy person is appointed to the appropriate job”.\(^8\)

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\(^6\) Veljanovski C (ed) (1991), The Regulation Game, in Regulators and the Market: An assessment of the growth of regulation in the UK, Institute of Economic Affairs, London at p 20, “The criteria and philosophy underlying good regulation was spelt out in the Littlechild Report…”

\(^7\) Littlechild S (1983), Regulation of British Telecommunications’ Profitability, HMSO, London, paragraph 4.11.

The Utilities Act has moved to make regulation the responsibility of a group of people and has, for example, created the Gas and Electricity Markets Authority to take over the roles of the director generals’ of electricity and gas. While this does move away from the initial ‘personalised’ style of regulation that had been the subject of some criticism, every person within a group of regulators will, of course, each be exercising their personal and individual judgement when making their decision. The personal qualities that secretaries of state seek in their regulators will therefore still remain important, whether the regulator is to operate individually or as part of a larger group.

The regulators have tended so far to be predominantly white, middle aged and professional men. There has been one female regulator, Clare Spottiswoode, who was the director general of gas supply from 1993 to 1998. Prior to their appointment, the regulators have had careers with varying levels of connection with the concept of regulation, or with the industries they were given the power to regulate. Stephen Littlechild, the director general of electricity supply from 1990-1998, was, at the time of his appointment, an academic recognised as an expert on economic regulation, had advised on the regulatory regimes for the water industry and the telecommunications industry, and had been a member of the Monopolies and Mergers Commission for six years. John Swift QC, the rail regulator from 1993-1998, had been a competition barrister before his appointment. In contrast, Philip Fletcher, the current director general of water services, was appointed from his previous position as Receiver for the Metropolitan Police District, and had an extensive background in the Department of the Environment.

The regulators are selected by the government of the day, and are today appointed by the secretary of state following a selection process that follows the Nolan Procedures. The regulators are appointed for a fixed term (usually five years) and can only be removed from office on specified grounds, such as incapacity and misbehaviour. The regulators are eligible to be re-appointed at the end of their term, and this issue of potential re-appointment may (or may not) make a regulator who wishes to serve a second term more compliant to government objectives.

In appointing a regulator, the government must balance the need for a regulator to be familiar with the issues with the desire for an outsider or a ‘new broom’ to take over as regulator and inject some fresh ideas into the industry. Governments must also consider the risk of regulatory ‘capture’, whereby an inexperienced regulator can end up being controlled by, and supporting the interests of, a powerful regulated company operating within the industry. This public scrutiny and media attention focused on the work of the regulators limits the pool of potential regulators to those who do not fear possible adverse media scrutiny and attention.

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9. See for example: CBI (1996), Regulating the Regulators. A CBI Discussion Paper, p 18, where one of the proposals for change is given as “replacement of individual regulators by panels. This would provide a stronger sense that regulatory decisions result from a process of deliberation rather than the personal decisions of a single powerful individual”.


11. The Nolan Procedures are those outlined in the Nolan Committee’s First Report of the Committee on Standards in Public Life (May 1995), which state that appointments should be made on the basis of merit, equal opportunity etc.
New Labour reforms

The current Labour government has contributed to the debate about the role and operation of the regulators, and has, to date, primarily focused on the powerful utility regulators. The Better Regulation Task Force, an independent body supported by the Cabinet Office’s Regulatory Impact Unit, was established in 1997 to advise the government on regulatory issues. The Labour government also developed the debate about the role of regulators by publishing a green paper on the role and structure of utility regulation, entitled ‘A Fair Deal for Consumers’. After a period of consultation, this was followed by a white paper, and eventually some of the issues discussed found their way into the Utilities Act 2000 (which was extensively restructured during its passage through Parliament).

The green paper represented an attempt to provide a rationale for regulation, and to try and define what the Labour government felt that the role of the regulator should be. The government was committed to retaining the role of the utility regulators, but stated that these regulators should operate within a defined framework, and have clear objectives. The green paper said:

“We need to set a proper framework for regulation, in which the roles of government and of regulators are clear. The role of government is to determine the objectives for utility regulation, and to create a framework which ensures regulation is consistent with these objectives. The role of regulators…is to fulfill their duties within the framework set by government”.

The green paper also explicitly stated the government’s view that regulators had a wider brief than to merely enforce competition, and re-emphasised the regulator’s duty to act as a champion of the consumer and of the environment. This duty to act in the interests of the consumer and the environment of course already existed, as the acts that created the regulators gave them duties to protect these interests.

“Effective regulation should therefore ensure that the consumer comes first. It should do this by providing proper incentives to innovate and improve efficiency; driving competition to promote choice and value for money wherever possible; protecting consumers where competition is an insufficiently effective discipline; and ensuring that these industries contribute to a better environment and quality of life…”.

The green paper attempted to clearly spell out the full range of the responsibilities placed upon regulators, and to stimulate public debate about whether these

12 For more information on the operation of the Better Regulation Task Force, see the webpage, www.cabinet-office.gov.uk/regulation.
15 Op cit, page 3, paragraph 1.9.
16 Ibid, page 2, paragraph 1.2.
responsibilities were rightfully the prerogative of the regulators. The responses to this green paper showed that there was a great deal of public and political interest in the issues surrounding what a regulator’s role should be. The government received over 250 written responses to its green paper, and the debates surrounding the issue of how the utilities should be regulated greatly delayed the passage of the Utilities Act 2000, which was not passed until 28 July 2000. The debate and delays resulted in the act becoming a ‘compromise’ act, and the final act only covered the electricity and gas industries, not the telecommunications and water industries as was originally intended.

Issues to consider

The primary consideration in examining the role played by the regulators is what powers and duties the current regulators have been given, and what discretion they are allowed in exercising their powers. When considering the discretionary powers given to the regulators, consideration must also be given to how the regulator’s decisions can be overturned and scrutinised by a higher authority.

Any decision made by a regulator will be subject to various constraints. These can include finances, staffing and conventions. Regulators can also be constrained by media scrutiny, because their significant decisions (such as pricing reviews) are inevitably faced with extensive media scrutiny, and public comments are made and reported about the wisdom of the regulator’s decision. This could cause some regulators to tailor their decisions to secure more favorable coverage.

This paper examines the constraints upon the powers of the regulators, which include:

- the statutory framework that sets out the duties of the regulators;
- the Ombudsman;
- Parliamentary Committees;
- the Courts;
- the Competition Commission;
- the Secretaries of State.

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17 White Paper, op. cit p5.
2 POWERS AND DUTIES OF THE REGULATORS

The acts that create the regulators give them duties, which are obligations to do certain things. These duties are expressed as being mandatory, in that the regulators must carry out the duty. The mandatory nature of these duties is shown by the use of the words ‘must’ and ‘shall’ (which are usually, but not always, interpreted as implying a mandatory obligation). Some duties allow the regulator discretion in deciding how they can best be met. These duties are often expressed by the use of words such as ‘have regard’, and ‘take account’. These phrases often mean that the duties should be considered by the regulator but that the duties do not necessarily need to be fulfilled.

The discussion on the duties of the regulators which follows encompasses the terms ‘primary duties’ and ‘secondary duties’. This wording is not used in the acts themselves, and may require some explanation. The Utilities Act expressly uses the term ‘principal objective’ to emphasise those duties which must be considered first and which are the most important. The remaining objectives imposed upon GEMA in the Utilities Act are described as ones which should be carried out in the manner which is regarded as being best calculated to ‘further the principal objective’, or ones to which GEMA should ‘have regard’ while carrying out the principal objective.

Other acts just tend to say that the regulator has certain duties. After this first list of duties, subsequent duties are expressed as being needed to be carried out ‘subject to’ to the first list of duties, or ‘without prejudice to’ the first list of duties. It is obvious that the duties which are carried out ‘subject to’ or ‘to further the principal objective’, are duties which are subject to the other duties listed. It is therefore helpful to label the first duties given to the regulators (and which are clearly given to GEMA as the ‘principal objective’) as the ‘primary duties’, and to label the other duties given to the regulators, which are subject to these ‘primary duties’, as the ‘secondary duties’.

Obviously the secondary duties given to the regulators may conflict not only with each other, but with the primary duty. The primary duty can be described as ‘the most important duty’. It is, of course, questionable how much influence the different prioritising of duties has on the regulator’s decisions in practice. The manner in which the acts make one duty subject to another may be clear, but whether practical decision-making can actually follow such procedural steps, or does so, is difficult to assess. It is suggested that the creating of secondary duties in the acts reflect the government’s desire to signal to certain groups (such as the fuel poor and those in rural areas) that the regulators will specifically consider their interests.

18 Utilities Act 2000, section 9 (gas) and section 13 (electricity).
19 See the Water Act 1989, section 7(3), Telecommunications Act 1984, section 3 (2).
20 Railways Act 1993, section 4 (2).
21 These terms have been used by many academics, see for example, Cosmo Graham, Regulating Public Utilities: A Constitutional Approach, op. cited 28.
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The regulators cannot exercise their duties without being given the powers to do so. The duties that are imposed on the regulators therefore can only be exercised through the powers given to the regulators. For example, the director general of telecommunications is given the duty to ‘encourage major users of telecommunication services whose places of business are outside the United Kingdom to establish places of business in the United Kingdom’.22 One obvious way to do this might be to offer tax concessions to these businesses. However, as the director general does not have powers regarding taxation, he is unable to take such a step. Instead, he must do all he can to fulfill this duty (subject of course to his primary duties) within the powers that he has.

The regulators are also given specified duties because if they were given powers but no duties, they would be able to exercise their powers to achieve any end they desired. The duties given to the regulator fetter the regulator’s ability to exercise their powers, and ensure that the use of their powers are directed to specific, statutorily defined outcomes.

Powers of the regulators

The power of the regulators rests in their ability to make certain decisions that affect an industry. However, it must be noted that, to a great extent, the regulators are playing with a hand that has already been dealt. The regulators do not get to establish the structure of the industries they regulate, or to construct the licences which are granted to regulated service providers. The regulators are merely able to shape (within the limits of their duties and powers) the manner in which the industry operates and its impact upon consumers and the environment.

Control of the industry is further fettered by the constraints on the regulator’s ability to change the terms of the licences that control the industry participants. Regulators do, however, have the power to monitor the operation of their industries, and, if they perceive public interests are being adversely affected by a particular situation, can agitate for an amendment to a service provider’s licence to address the situation. This can involve negotiating with the licence holder for a change by consent, or referring and presenting the matter to the Competition Commission.

Within these limitations, regulators have the power to take certain decisions as they arise. The most important of these decisions are those surrounding price controls. Each of the regulators are given the power to economically regulate their industries by setting price controls limiting the amount that can be charged for certain services. These controls impact hugely upon the economic fortunes of the service providers, as well as affecting the prices paid by consumers for essential services. Each price review is carried out by the regulators in the face of extensive media coverage, and the results of a review also can have a large impact upon the stock market.

Another area in which the regulators have powers is that of licence enforcement. If a regulator is of the opinion that a service provider has breached a condition of their

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22 Telecommunications Act 1984, section 3(2)(e).
licence, the regulator is placed under a statutory duty to impose an order upon the licence holder to prevent the contravention of the licence condition. The regulator therefore has the power to decide whether or not a licence condition has been breached (although the secretary of state also has the power to impose orders if they feel that a licence condition has been breached, the regulator will, in practice, be relied upon to make the decision). If the regulator does decide that a condition has been breached, then the regulator is legally required to take steps to enforce the licence condition. The regulator also has the power to decide what order should be made to enforce the licence conditions, and obviously this decision can have a huge impact on the fortunes of the licence holder. The Utilities Act 2000 goes even further, and gives GEMA discretionary powers to impose a financial penalty upon licence holders who contravene the conditions of their licence.23

The regulators also have extensive powers concerning anti-competitive conduct. Under the powers granted to them by the terms of the Competition Act 1998, they have extensive rights to investigate anti-competitive conduct that infringes the act, and to enforce the terms of the act by imposing orders or financial penalties.

There are also a series of lesser powers that the regulators can exercise, such as offering advice and assistance to consumers and interest groups, and publishing information about the operation of the industry.

It must be acknowledged that the powers the regulators do have are limited, in that the regulators cannot shape or control the industry except through the avenues specifically granted to them, of which price control is undoubtedly the strongest tool. However, even when setting price controls the regulator is limited by the structure which the industry already operates in, and the need for regulated service providers to make a return on capital at least equal to their cost of capital. Each time the regulators do exercise their powers they must also balance their conflicting set of duties, which further restricts their powers. These duties are discussed in detail below.

Duties of the regulators

The duties of the regulators widen their areas of interest to some extent by allowing them to intervene in their industry on behalf of certain groups, such as consumers, or in the interests of special causes, such as the environment. However, the duties also restrict the regulators’ power, because they ensure that the regulators’ work is carried out, and decisions made in line with certain criteria. The scope and nature of the regulators’ duties has become controversial of late as some regulators have faced criticism that they have not fulfilled their duties, even when situations arose that placed them under a statutory obligation to do so. There is also inherent conflict between some of the duties of the regulators. The duties placed upon the regulators mean that they must act to protect certain interests and act to achieve certain ends. They have some discretion in deciding how these interests and ends may best be protected and achieved, and in how they may be balanced, but it would be wrong to

23 Utilities Act 2000, section 59 (electricity) and section 95 (gas).
say that the regulators have completely unfettered discretionary powers. However, as was noted above, it is also difficult to say that the duties given to the regulators are entirely prescriptive. Even with the problem of conflicting duties set aside, some of the duties are so general in nature, and are so far removed from the regulator’s powers, that it is difficult to see how they can actually influence the activities followed and decisions made by the regulator.

The duties of each of the regulators considered in this paper are set out below:

**The Rail Regulator**

The rail regulator’s powers and duties are primarily laid out in the Railways Act 1993. The Transport Act which was passed on 30 November 2000 has however altered some of the powers of the rail regulator. The rail regulator is placed under duties which include:

- to protect the interests of the users of railway services;
- to promote efficiency and economy on the part of persons providing railway services;
- The Transport Act placed the regulator under a duty to promote competition ‘only for the benefit of the users of railway services’;
- to promote through ticketing;
- to impose minimum performance requirements upon operators;
- to enable persons providing railway services to plan the future of their business with assurance;\(^{24}\)
- the Transport Act placed the regulator under a duty to facilitate the furtherance by the Strategic Rail Authority of any strategies which it has formulated;
- the Transport Act also places the regulator under a duty to contribute to the development of an integrated system of transport for passengers and goods;
- The Transport Act further places the rail regulator under a duty to contribute to the development of sustainable development.\(^{25}\)

Besides these more primary duties, the regulator is also placed under ‘secondary’ duties which must be considered by the regulator while he carries out his primary duties. These include:

- to have regard to the effect that railway services have on the environment;
- to take into account the need to protect all persons from the dangers arising from the operation of railways, taking into account any advice given by the Health and Safety Executive;
- to act in a manner that will not render it unduly difficult for persons holding network licences to finance any activities;
- to have regard to the financial position of the franchising director (of the Office of Passenger Rail Franchising).\(^{26}\)

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\(^{24}\) Railways Act 1993, section 4.

\(^{25}\) Transport Act 2000 section 199.

\(^{26}\) Railways Act 1993, section 4.
The Transport Act also places the regulator under a duty to carry out his functions taking account of general guidance from the secretary of state about railway services or other matters relating to railways.\textsuperscript{27} The regulator had been under such a duty in the past, but the duty had expired in 1996.

If the rail regulator is satisfied that a railway operator is breaching a licence condition, or the terms of an agreement, or another condition, the regulator must make a provisional or final order to ensure compliance with the condition. The rail regulator must follow certain procedural steps in making such an order.\textsuperscript{28}

\textit{The Director General of Water Services}

The Water Act 1989 sets out the duties of the director general of water services. The ‘primary’ duties set out in the Water Act include:

- to ensure that the functions of water and sewerage undertakers are properly carried out;
- to ensure that companies holding appointments as water or sewerage operators are able to finance carrying out their functions, in particular by securing reasonable returns on capital.\textsuperscript{29}

The following objectives must be carried out subject to the objectives described above

- to ensure that the interests of every customer or potential customer of water or sewerage undertakers are protected with regard to the undertaker’s charges. In particular, the director must protect the interests of rural customers and potential customers. The director must also take into account the interests of those customers who are disabled or of pensionable age;
- to ensure that the interests of such customers are also protected regarding the terms upon which the undertakers provide services;
- to ensure that the interests of such customers are protected regarding any benefits which could be secured when undertakers dispose of any interests in their protected land;
- to promote efficiency and economy on the part of companies carrying out the functions of water or sewerage undertakers;
- to facilitate competition between those appointed as water or sewerage undertakers;\textsuperscript{30}
- to carry out functions with regard to the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological features of special interest;
- to carry out functions with regard to the desirability of protecting objects of archaeological, historical or architectural interest;
- to carry out functions with regard to the effect upon the beauty or amenity of any area;

\textsuperscript{27} Transport Act 2000, section 199.
\textsuperscript{28} Railways Act 1993, section 55.
\textsuperscript{29} Water Act 1989, section 7.
\textsuperscript{30} Water Act 1989, section 7.
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- to carry out functions with regard to the desirability of preserving public access to places of natural beauty;
- to carry out functions with regard to the desirability of maintaining public access to objects of architectural, historical or archaeological interest;
- to carry out functions to ensure that water, and land associated with water is made available for recreational purposes;
- to take account of the needs of the chronically sick and disabled.\(^{31}\)

It should be noted that the prioritisation of the objectives in the water industry are currently the subject of some controversy and the matter has not been definitively resolved by the courts.

The director general is also obliged to obey any directions given by the secretary of state relating to the exercise of power concerning any company owned by the Crown.

If the director general of water supply is satisfied that a company holding an appointment is contravening the conditions of the appointment, the director must make a final or provisional order to ensure that the company complied with the terms of their appointment. The director general must follow certain prescribed procedural steps in making such an order.\(^{32}\)

**The Gas and Electricity Markets Authority**

The Gas and Electricity Markets Authority (GEMA) was created by the Utilities Act 2000. The Utilities Act abolished the offices of the director general of gas supply and the director general of electricity supply and transferred their functions to GEMA.

The principal objective of GEMA in carrying out its functions in relation to the gas industry and the electricity industry is to:

- protect the interests of consumers in relation to gas conveyed through pipes, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas through pipes;\(^{33}\)
- protect the interests of consumers in relation to electricity conveyed by distribution systems, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity.\(^{34}\)

In fulfilling this principal objective with regard to the gas industry, GEMA must have regard to:

- the need to secure, so far as it is economical, all reasonable demands in Great Britain for gas conveyed through pipes;

\(^{31}\) Water Act 1989, section 8.  
\(^{32}\) Water Act 1989, section 20.  
\(^{34}\) Utilities Act 2000, section 13.
the need to ensure that licence holders are able to finance the activities that they are obliged to carry out by reason of the Gas Act 1996 or the Utilities Act.\(^\text{35}\)

In fulfilling the principle objective with regard to the electricity industry, GEMA must have regard to:

- the need to secure that all reasonable demands for electricity are met;
- the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by the Electricity Act 1989 or the Utilities Act 2000.\(^\text{36}\)

When considering these needs, for both industries, GEMA must also have regard to the interests of:

- individuals who are disabled or chronically sick;
- individuals of pensionable age;
- individuals with low incomes;
- individuals residing in rural areas.\(^\text{37}\)

Subject to GEMA’s obligations listed above, GEMA must also carry out its functions in relation to the gas industry in the manner which it thinks will best:

- promote efficiency and economy on the part of persons authorised by licences or exemptions to carry on any activity;
- allow the efficient use of gas conveyed through pipes;
- protect the public from the dangers of gas conveyed through pipes or from the use of this gas;
- secure a diverse and viable long-term gas supply.\(^\text{38}\)

GEMA must also, while carrying out its functions in relation to the gas industry, have regard to the effect on the environment caused by activities connected with the conveyance of gas through pipes.\(^\text{39}\)

While carrying out its functions in relation to the electricity industry, subject to the relevant obligations listed above, GEMA must also act in the manner which it thinks will best:

- promote efficiency and economy on the part of persons authorised by licences or exemptions to transmit, distribute or supply electricity and the efficient use of electricity conveyed by the distribution systems;
- protect the public from dangers arising from the generation, transmission, distribution or supply of electricity;
- secure a diverse and viable long-term energy supply.\(^\text{40}\)


\(^{38}\) Ibid.

\(^{39}\) Ibid.

\(^{40}\) Ibid.
WHO REGULATES THE REGULATORS?

While carrying out its functions in relation to the electricity industry, GEMA must also have regard to the effect on the environment caused by activities connected with the generation, transmission, distribution or supply of electricity.\textsuperscript{41}

GEMA is also obliged, in carrying out its duties in relation to both industries, to take account of any guidance issued by the secretary of state about how GEMA is to contribute to certain social or environmental policies.\textsuperscript{42}

If GEMA is satisfied that a licence holder is contravening the terms of their licence, GEMA must issue a provisional or final order to ensure compliance with this condition. GEMA must follow certain procedural steps in imposing such an order.\textsuperscript{43}

\textbf{The Director General of Telecommunications}

The regulator of the telecommunications industry is the director general of telecommunications, whose powers are outlined in the Telecommunications Act 1984. This act states that the primary duty of the director general is to carry out his functions in the manner which he considers is best calculated to:

- secure, as far is reasonable, the provision throughout the United Kingdom of telecommunication services to satisfy reasonable demand. These services include, in particular: emergency services, public call box services, directory information services, maritime services and services in rural areas;
- ensure that persons who provide telecommunications services are able to finance their activities.\textsuperscript{44}

Subject to these duties, the director general must exercise power in the manner which he feels is best calculated to:

- promote the interests of consumers in the United Kingdom in respect of the prices charged for, and the quality and variety of telecommunications service and apparatus;
- to maintain and promote effective competition between persons engaged in commercial activities connected with telecommunications in the United Kingdom;
- to promote efficiency and economy on the part of these persons;
- to promote the development of new techniques, and research into new techniques by these persons;
- to encourage major users of telecommunication services whose place of business are outside the United Kingdom to establish places of business in the United Kingdom;

\textsuperscript{40} Utilities Act 2000 section 13.  
\textsuperscript{41} Ibid.  
\textsuperscript{42} Utilities Act 2000 sections 10 and 14.  
\textsuperscript{43} Utilities Act 2000 section 60 (electricity) and the Electricity Act 1989 section 25, and Utilities Act 2000 section 96 (gas) and Gas Act 1986 section 28.  
\textsuperscript{44} Telecommunications Act 1984, section 3.
to promote the provision of international transit services by people providing telecommunication services in the United Kingdom;

• to enable persons providing telecommunications services in the United Kingdom to compete effectively in the provision of such services outside the United Kingdom;

• to enable persons producing telecommunications apparatus in the United Kingdom to compete effectively in the supply of such apparatus both inside and outside the United Kingdom.\(^{45}\)

The secretary of state may issue general directions to the director general indicating considerations to which the director general should have particular regard in determining whether to exercise his functions.\(^{46}\)

Where the director general of telecommunications is satisfied that a licence holder is contravening or has contravened and is likely to contravene again the conditions of their licence, the director general is obliged to make a provisional or final order to secure compliance with the licence condition. The director general must follow a number of procedural steps in making such an order.\(^{47}\)

**Duty to obey guidance given by the Secretary of State**

As was noted above, the Utilities Act 2000 gives the secretary of state a novel obligation to:

> “from time to time issue guidance about the making by the Authority [GEMA] of a contribution towards the attainment of any social or environmental policies set out or referred to in the guidance”.\(^{48}\)

GEMA is then required, in carrying out its functions to have regard to this guidance.\(^{49}\)

The imposition of this duty upon GEMA obviously limits GEMA’s powers to exercise discretion in decision-making. The ability of the secretary of state to issue such guidance about the attainment of social or environmental policies reflects the intention expressed in the government’s white paper on utility regulation to achieve a “regulatory framework which properly reflects the government’s social and environmental objectives”.\(^{50}\)

The government stated in the white paper that the proposal to introduce this duty:

> “has been widely welcomed including by consumers, business, regulators and special interest groups on the grounds firstly, that it will help to ensure that the utility sectors make an appropriate contribution to wider social and economic goals; secondly that it will make clear

\(^{45}\) Telecommunications Act 1984, section 3.

\(^{46}\) Telecommunications Act 1984, section 47.

\(^{47}\) Telecommunications ACT 1984, section 16.

\(^{48}\) Utilities Act 2000 section 10.

\(^{49}\) Ibid.

\(^{50}\) Department of Trade and Industry, A Fair Deal for Consumers: Modernising the framework for utility regulation, the response to consultation, July 1998, p 6 paragraph 11.
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that responsibility for setting objectives in these areas rests with
government, not regulators; and thirdly, that it will improve the
transparency and predictability of regulation”. 51

The intention of the government is therefore clearly to limit the discretion affor ded to
the regulators, although it will be interesting to see in practice how precisely worded
and prescriptive such guidance can be, and what effect it can, and will, have on the
decisions made by GEMA.

The imposition of a duty on regulators to obey guidance issued by the secretary of
state is not completely new, as the rail regulator had been placed under an obligation
(which expired in 1996) to carry out his functions while taking account of guidance
issued by the secretary of state. 52 The Transport Act, as was noted above, has re-
instated such a duty. 53 The director general of telecommunications has always been
under a similar duty to have regard to any general directions issued by the secretary of
state while determining whether to exercise his functions. 54 The secretary of state
may also issue guidance to the director general of water services to which the director
general must have regard, but these can only be “with respect to the exercise in
relation to any company which is wholly owned by the Crown of any powers
conferred on the director by or under Part II of this act”. 55

Common duties of the regulators

The lists of the regulators’ duties given above shows the similarities and the
differences between their respective duties. A comparative summary of the
regulator’s duties shows that several duties are common between the regulators.
These are:

• to protect consumers;
• to ensure (or act to assist) that providers of utility services can finance their
  activities;
• to promote efficiency and economy on the part of providers, as well as being
  under a varied duty;
• to promote or facilitate competition;
• to protect the environment;
• to enforce licence conditions breached by licence holders.

It can be seen that not all of these interests can always co-exist fully. The interests of
consumers may well run counter to the interests of the environment, while utility
service providers may argue that full competition will prevent them from being able
to finance their activities. The regulator is therefore expected to balance these
competing interests. The imposition of guidance by the secretary of state is another

51 Ibid p7 paragraph 12.
53 Transport Act 2000 section 199.
54 Telecommunications Act 1984, section 47.
method which attempts to guide the regulator’s discretion in balancing competing interests. The acts provide a limited amount of guidance to the regulators, in an attempt to guide the regulator’s discretion, by ranking some of their duties as primary duties, which means that they must be considered first, and as the most important criteria.
WHO REGULATES THE REGULATORS?
3 THE ABILITY OF THE REGULATORS TO EXERCISE DISCRETION

As was noted above, the acts which create the regulators and give them their powers and duties allow the regulators to exercise a large amount of discretion in making their decisions. But this is not the only way in which the regulators are given a large amount of discretionary power. The failure of the relevant acts to set procedural requirements for the day to day operation of the regulatory offices also means that the regulators are given a high level of autonomy and discretion in the exercise of their powers. The general duties of the regulators, which were discussed above, are supplemented by more specific task-based duties, such as the duty to keep their industry under review, to investigate complaints, to advise their secretary of state when requested to do so, and to prepare and present an annual report. Yet the regulators are only provided with their general duties (such as the duty ‘to protect consumers’) and their task-based duties (such as the duty ‘to investigate complaints’). They are, however, given only minimal ‘procedural duties’ which prescribe how their role and functions are to be carried out.

Procedural duties

Some of the procedural duties imposed upon GEMA can be examined as an example. GEMA is under a duty to publish a ‘forward work programme’ before each financial year, containing a description of the non-routine projects (and the objectives of such projects) that GEMA plans to undertake in the upcoming year. This forward work programme must be published as a draft initially, and must allow representations to be made concerning its proposals, and consider any such representations. A further procedural duty is imposed upon GEMA in relation to its powers to amend the standard conditions of electricity licences. The Utilities Act contains procedures which GEMA must follow if it does wish to amend these standard conditions. GEMA must give notice of its intentions to make such changes in a prescribed form, and allow for representations to made, and consider these representations. If the secretary of state, as a result of considering this notice, directs GEMA not to make any modifications to the standard conditions, GEMA is obliged to comply with this direction.

Each of the regulators has only a minimal number of procedural duties imposed, leaving them relatively free to decide themselves how to operate and how to make regulatory decisions. Parliament could, of course, impose specific procedural requirements which mandated that certain procedures must be followed by the regulators if it so desired.

57 Utilities Act 2000, section 33.
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Criticism of regulatory discretion

One criticism of the concentration of power in the hands of the regulators centres on the fact that regulators are unelected and undemocratic, and are only distantly connected to government. David Souter, for example has noted that regulators have enormous decision-making power, and that most of a regulator’s decisions are made:

“with good intentions, but what they do will not have been subject to democratic scrutiny and accountability, nor will it necessarily be coherent with what other regulators are doing in other sectors or with the implications of government policy in areas where that is being more fully exercised”.  

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The Better Regulation Taskforce, in their ‘Response to the government’s Green Paper on Utility Regulation’, noted such criticism, stating that:

“There is a strong view that in the current model of regulation the role of the regulator has been too dependent on the personality of individuals, not transparent enough in its consultation and decision-making process, and not accountable enough to instill public confidence in its work”.  

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Placing important regulatory decisions in the hands of independent regulators was of course a deliberate decision of the democratically elected and politically accountable government, which was only too aware of the perils of accountability. Cosmo Graham has persuasively argued that:

“at least one part of the reason for such an arrangement seems to have been a desire on the part of government to avoid accountability or responsibility for regulatory decisions relating to the industries. This was in part related to a wish to avoid repeating the worst mistakes of the structure adopted for nationalised industries for a variety of short-term motives. There are, of course, more positive reasons for adopting such a structure”.  

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The discretion which has been afforded to British regulators can also be seen as one of their strengths. C D Foster, in his book, ‘Privatization, Public Ownership and the Regulation of Natural Monopoly’, argues in defence of the independent regulatory system. Foster suggests that regulatory discretion is one reason why regulators can operate successfully. His book lists some of the ‘positive reasons’ for bestowing discretion upon the regulators.  

61 Foster states that:

“[t]o be effective, history suggests, regulators need ample discretion, that is, power to act in the way they see fit………… In Britain, their discretion to determine right or wrong within the scope of their powers is almost absolute…..History suggests the reason for this development. It shows how both Parliament and Congress [in the USA] often failed to be consistent in developing regulatory policies. It shows how both were prevented from achieving consistency by the pressure of vested interests. And it shows that more important even than that pressure from vested interests in preventing consistency was the changing composition of committees in Parliament and Congress”.  

The fact that regulators are so independent also means that decisions can be obtained which are relatively consistent because they are untouched by political or popular concerns. Allowing considerable discretion to be exercised by these independent regulators means that there can be relative consistency about the decisions made whilst a particular regulator is in office. The creation of GEMA, a group of people acting as regulator, should only slightly dim this effect, and not obliterate it. Appeal courts, which are similarly made up of a group of individual decision-makers, are renowned for having a certain ‘feel’ and ‘leaning’ to their decisions as long as the same individuals are part of the group. When the members of the group change, obviously so does the nature of the decisions made, but this change also occurs when a solo regulator is replaced by their successor.

The ability of independent regulators to exercise discretion and make decisions free from political or popular pressures may or may not be viewed as a public benefit. Yet the regulatory certainty which results from such a stance is nearly always cited as something that is desired by consumers and regulated businesses alike. The discretion vested in the regulators can be seen as one of the key factors allowing such certainty. It must also be noted that allowing regulators to exercise discretion and leaving them unfettered by political or external accountability has the disadvantage that each of the individual regulators or regulatory offices may take a different approach to a national problem. This inability to apply a national approach to regulatory problems means that national issues may well be addressed in a piecemeal and inconsistent way by the regulators.

It must also be noted that regulatory discretion is always fettered by the need to be ‘reasonable’. This requirement is discussed more fully below, in the section of the paper dealing with judicial review. Decisions of regulators may potentially be subject to judicial review if the decision is found to be so unreasonable that no reasonable person could come to it. This obligation is present as a common law requirement, and so is applicable regardless of the wording of the particular statute.

‘Personality’ and the regulator

One of the factors which arises as a sub-issue of the question of regulatory discretion revolves around the ‘personality’ factor of the regulators. As the regulators are given wide discretionary powers, a change in the office holder may result in a change in

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62 Ibid, 268.
regulatory policy. As was noted above, this may even occur to a lesser extent when an individual in a regulatory group, such as GEMA, is replaced. The ability of a change in regulator to affect regulatory policy is clearly accepted today. Sir Ian Byatt was replaced a director general of water by Philip Fletcher on 1 August 2000, and changes to many aspects of Ofwat policy were confidently expected to follow. The magazine Utility Week noted on 22 September 2000, that “Philip Fletcher indicated that he may be more open than his predecessor to mergers. He also hinted that he would be more active in developing competition”.  

The relatively recent change in office holders of the rail regulator also forced a change in regulatory policy. When Tom Winsor became rail regulator in July 1999, the Office of the Rail Regulator was in the midst of preparing for the periodic review of access charges. Tom Winsor announced that with regard to this periodic review that he did “not regard anything done so far as binding me in my future decisions”.  

Of course, these changes in regulatory policy may also be due to circumstance or may also be due to other events, and we cannot observe what the passage of time and change in circumstances may have done to alter the initial regulator’s policy.

The fact that a change in regulator can alter the policy of a regulatory office is often cited as a criticism of the discretion afforded to regulators. It is almost impossible to see how the current system could lead to any other result, and the ability of a new regulator to alter regulatory policy can therefore be seen as an inevitable result of the current discretion afforded to the regulators. This can be viewed as a positive asset of the current system because a new approach by a new regulator may solve a long-running problem or as an inherent disadvantage because a new regulator may fail to comprehend why an approach taken by a predecessor was correct and may take a new approach.

**Voluntary moves towards procedural uniformity**

Even though the regulators have been granted a large amount of discretion in their duties and in their procedural rules, it is noticeable that despite this, or perhaps perversely because of it, the regulators have tended to adopt fairly uniform procedural methods.

**Consultation procedures**

A remarkable evolution in the procedures followed by the regulators has been the increased use of consultation in decision-making. The Public Accounts Committee published a report in 1997 on ‘The Work of the Directors General of Telecommunications, Gas Supply, Water Services and Electricity Supply’. The committee said that they:

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63 Ofwat hints at softer line on mergers, 5.  
“welcome[d] the emphasis given by the directors general to
consultation. We recommend that the directors general ensure that
when they consider significant decisions, they do all they can to
consult in advance on the issues that they must consider…”.

All of the regulatory offices discussed in this paper have voluntarily moved to adopt
the use of the consultation process, although to a different extent. Oftel has been
praised for having “taken the lead in consultation procedures”, and all of the
regulators had, by the late 1990s, adopted their own use of the consultation process.

The increased use of an open consultation process in decision-making, and the giving
of detailed reasons for decisions, has become an accepted feature of the regulatory
landscape. A visit to the web-sites of the regulatory offices discussed in this paper
reveals that all of them contain details about current consultation processes, as well as
listing reasons for regulatory decisions made following a period of consultation. It is
notable that the regulators have adopted these procedural methods without being
required to do so by legislation, although the threat of legislative intervention may of
course have been a significant factor in causing this approach to be adopted. As was
noted above, the government’s desire to require regulators to follow a standard
procedure for consultations was not fulfilled in the Utilities Act, and so GEMA (or
any of the other regulators discussed in this paper) are not statutorily required to use
consultation procedures.

Regulators retain some discretion even when they use the consultation process for
making decisions and give reasons for their decisions. If a consultation paper is issued
to invite public contributions on a certain topic, the regulator, as the person who
formulates the questions and issues which are consulted upon, remains the power to
shape the nature and level of the debate. The regulator even retains a far more basic
power, that is, to decide whether the results of the consultation process will be used to
shape the regulator’s decisions making, or whether the consultation process will be
for ‘show’ only, and the decision made without recourse to the results of the
consultation. When David Edmonds, the director general of telecommunications,
appeared before the select committee on trade and industry on 7 December 1999, he
openly acknowledged that not all consultations serve their publicly intended role. The
committee asked:

“Obviously you cannot prejudge what will come out of the
consultation document that you have said you will produce, but have
you got any timescales for a total unbundling [of the local loop].
(Mr Edmonds) No I have not. Some consultations are more genuine
than others. This is a very genuine consultation”.

The validity and genuine nature of a consultation process are not the only issues that
cause concern. Obviously a consultation paper cannot seek imput on every aspect of

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66 Ibid, paragraph 106.
68 Trade and Industry Select Committee - The Office of Telecommunications, Evidence taken 7
December 1999, Question 60, Printed 25 January 2000, HC 93-I.
the issue at hand. The need for the regulators to be selective about what issues are included for consultation can result in controversy.

Ofwat issued two consultation papers relating to the proposed restructuring of the Kelda Group, a proposal which would have seen the creation of a ‘community owned mutual’, which would have held the assets of the regulated water company Yorkshire Water. The Consumers’ Association responded to the consultation with a number of criticisms of the consultation papers themselves. They noted that:

“Although the paper relates specifically to one company, the implications of any decision taken by Ofwat in this case are likely to affect the whole of the water sector. …[The Consumers’ Association] is extremely concerned by the tight deadline for responding to this vital paper…. [The Consumers’ Association] is also disappointed by the lack of a wider debate about new ownership structures in the industry. The separate consultation that was released on this in June …also failed to look at all the options for reform. For example, it did not examine the option of mutualising the whole of a company rather than just its monopoly activities. Nor did it separate out arguments for restructuring of the industry from those relating to changes in ownership. A rushed decision without a careful analysis of the options is unlikely to be in the best interests of consumers”.

The criticisms of Ofwat’s consultation process may be unfair due to the unusual time pressures surrounding the Kelda proposal, as well as the potentially huge effect that the Kelda proposal could have on the structure of the water industry. However, the criticisms of the Consumers’ Association do illustrate the fact that regulators can shape the consultation process, and the nature of comments received, by limiting response times and by restricting the consultation paper to the coverage of specific, discreet issues. While the issue of timing could be addressed by legislation or agreement between the regulators to ensure that minimum consultation periods are used, the question of how to ensure that consultation papers address salient issues of wider public concern does not have such a clear answer. It is hard to see even how the government’s white paper plans for the regulators to develop and comply with a code of practice relating to consultations could ensure that the core issues (if these could be objectively defined) were those that were fully opened to public comment.

The ability of a regulator to shape a consultation process extends beyond the issues covered to the manner in which the questions concerning these issues are framed. As many market research organisations have found, the manner in which a question is

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69 Ofwat, New ownership structures in the water industry: A consultation paper issued by the director general of water services, 6 June 2000. This paper was issued in response to general discussion emanating from a number of companies about re-structuring. It sought comments by 23 June 2000. On 14 June 2000 the Kelda group announced their plans for restructure and Ofwat issued a second consultation paper, which incorporated the first, titled The proposed restructuring of the Kelda group: A consultation paper by the director general of water services, 20 June 2000. Comments were sought by 17 July 2000.

70 Consumers’ Association, Ofwat consultation on the proposed restructuring of the Kelda group, Consumers’ Association response, July 2000, 1.
framed, and the order in which it is presented, can shape the answers provided. Yet it would be impossible to establish a code that prescribed exactly what issues should be consulted upon, what dimensions of that issue should be examined, and how the questions concerning these matters should be framed. It would further be impossible to prescribe precisely how the regulator should incorporate the comment received from the consultation process into his or her decision-making process. This means that even regulators who do consult widely before making a decision still retain power and control over their decisions, and the input into their decisions. The nature of the consultation and decision-making process must therefore be acknowledged as one of the many sources of regulatory power and discretion.

**Giving reasons for decisions**

Another procedural area which has not traditionally been covered by legislation but which has been developed by the regulators, is the giving of reasons for decisions. The Public Accounts Committee, in their report mentioned above, also stated that:

> “the directors general need to strive to ensure that the quality of decisions is as good as it can be and that the reasons for decisions are clear to those affected by them”.

Oftel has for a long time published detailed reasons for their regulatory decisions, and the other regulatory offices have again followed suit to a varying extent.

The government’s white paper on utility reform (which was limited to considerations of the gas, electricity, telecommunications and water sectors) indicated that the new Labour government believed that the system of self-motivated consultation and information provisions concerning policy and decisions was not adequate. The white paper stated that:

> “The government confirms that it intends that each regulator will be placed under a statutory duty to consult on, publish and follow a code of practice governing their consultation and decision-making process” (Conclusion 7.3).

and that:

> “The government confirms that it intends to introduce a duty on the regulators to publish reasons for key decisions” (Conclusion 7.4).

The government’s plans for reforms for utility regulation were encompassed in the utilities bill, which, as was noted above, was radically altered during its passage through parliament. The final utilities act only encompassed the electricity and gas industries. The government’s desire to require each regulator to follow a code of practice governing their consultation and decision-making process was not reflected

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71 Op cit, paragraph 105.
in the final act. The utilities act does however require GEMA to publish its reasons for most of its significant decisions, being mainly those concerning licence determinations and licence enforcement.\textsuperscript{73}

\textsuperscript{73} Utilities Act 2000, sections 42 and 87.
4 CHECKS ON THE REGULATORS’ POWERS

The question of ‘who regulates the regulators?’ must examine which external bodies or individuals have the power to reconsider the decisions made by the regulators. It must be noted at the outset that there is no single body or institution to which regulators are accountable. Regulators are not directly accountable to a particular minister or directly to government or parliament itself. There is no ‘regulator’s regulatory body’ in existence. There are, however, some bodies which can oversee and possibly overturn decisions made by the regulators. These include parliamentary committees, the ombudsman, the Competition Commission, and the courts through the process of judicial review. The ability of each of these institutions to oversee the regulator’s activities will be discussed below.

A further obvious check on the power of the regulators that should be noted at the outset is funding. Funding levels can be dependent upon government goodwill. A lack of funding limits the power of the regulators by restricting their ability to adequately monitor their industries, and can limit their ability to obtain expert legal or technical advice, or to thoroughly investigate a controversial statement or stance by a regulated service provider. The National Audit Office is able (as it is for all public bodies) to investigate whether a regulatory office is properly spending its money and providing the government with an adequate level of service. Thus both questions of the amount of funding and how it is spent act as controls over the regulators.

Parliamentary committees

There are two types of parliamentary committees that have influence over regulators - departmental select committees and the Committee of Public Accounts. The Committee of Public Accounts is supported by the National Audit Office and concerns itself with expenditure, including the expenditure of the regulatory offices. Departmental select committees operate on the general basis that each department of state should have one committee. The primary departmental select committees able to question the decisions taken, and the role played by, the regulators in 2000 were therefore the Trade and Industry Select Committee (which had Oftel and GEMA within its sphere), and the Environment, Transport and Regional Affairs Select Committee (which had Ofwat and the ORR within its influence). Reorganisation of government departments now means that Ofwat is the responsibility of the Department of the Environment, Food and Rural Affairs (DEFRA), and ORR is the responsibility of the Department of Transport. There is however no specific parliamentary committee devoted to regulators, although some commentators have called for one to be established.\textsuperscript{74} The parliamentary committees are made up of members of parliament, and the party affiliations of the committee members reflects the party proportions of the House.

\textsuperscript{74} See for example, Hain P (1995), Regulating for the Common Good, in British Utility Regulation: Principles, experience and reform, Dieter Helm ed, Oxera, Oxford, p 38.
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The power of the committees rests in their ability to investigate, report and make recommendations which are laid before parliament. The committees have the power to send for persons, papers and records to appear before them. They may not compel members of parliament to appear, but most chose to appear voluntarily. They cannot change regulatory policy, nor can they direct the regulator, or the relevant minister to take a certain course of action. The committees work primarily through the use of publicity and recommendations, and they can publish the text of their inquiries, and any recommendations made as a result of these inquiries. The committees can be quite adversarial when questioning a regulator, and although the only sanction which can be imposed is adverse publicity for the regulator, many regulators admit to being nervous of appearing before a committee. The committees, even though they cannot force change, do play an important role by facing the regulators with areas of public concern, and getting them to answer these concerns on the record.

Besides being a forum for the venting of public concerns, and presenting the opportunity for some potentially embarrassing comments to be made on the public record, the committees can also try to get the regulators who appear before them to promise to the committee that they will do certain tasks. When David Edmonds, the director general of Oftel, appeared before the Trade and Industry Select Committee, some members of the committee were anxious about who would bear the costs associated with the re-numbering programme. The committee noted that some charities, like Medic-Alert, were faced with what were seen as unfair costs as a result of the numbers change. Some of the committee members expressed the view that the telecommunications industry was morally obliged to make charitable contributions to cover these costs. Edmonds said in response to this:

“I can but make your views immediately available to the telecommunications companies, and I will of course”.

The committees do not have the power to direct the regulators or to oversee their decisions, but that they can operate using the more subtle influences of pressure and publicity to try and shape the actions of the regulators. This power to influence is certainly not an ability to ‘regulate the regulators’, but does provide a subtle, ‘good chaps’ level of control and influence; even if only to make the thought ‘what would the committee say?’ cross through the mind of a regulator when they make a decision.

The Parliamentary Ombudsman

The Parliamentary Ombudsman for England (whose official title is the Parliamentary Commissioner for Administration) is another individual who can, to a limited extent,
oversee the work of the regulators.\textsuperscript{77} The role of the ombudsman is to investigate complaints and possible injustices of government departments and other public bodies. The ombudsman can only investigate complaints that have been referred to him by a member of parliament.\textsuperscript{78} The ombudsman focuses on complaints concerning maladministration that have caused an injustice. If the ombudsman investigates a complaint, he may produce a report which makes recommendations for change. This report will be made to parliament, and not to the government. The ombudsman has no power to enforce the recommendations made is his report, but many of the recommendations which have been made in past reports have been acted upon by the body which provoked the complaint.\textsuperscript{79}

The regulatory offices are all public bodies which can be the subject of an investigation by the ombudsman, and so the ombudsman does operate as a higher authority which can review the work of the regulators. The ombudsman has received complaints about the regulatory offices, and has investigated a minority of this small number of complaints. However, much like the parliamentary committees, the ombudsman relies primarily on influence and possible adverse publicity to affect change, and cannot directly force a change to regulatory practice or to a decision of a regulator. The ombudsman is therefore also unable to directly ‘regulate the regulators,’ but operates as a secondary reviewing force which can recommend changes to regulatory procedure and past decisions. The ombudsman, much like the parliamentary committees, therefore relies upon publicity and the thought ‘what would the ombudsman say?’ to indirectly influence the regulators.

**Judicial review**

As is the case with most public bodies, decisions of the regulators are open to judicial review, whereby an applicant with sufficient standing (such as a customer or a business aggrieved by a regulatory decision) applies to the high court for leave for judicial review of the regulator’s decision. The main grounds for judicial review to be granted are that:

- the decision maker acted outside the scope of their powers;
- the decision maker did not follow the procedures which they were obliged to follow;
- the decision maker breached natural justice, or acted unfairly;
- the decision maker acted unreasonably;
- the decision maker made an error of fact or of law.

\textsuperscript{77} The Parliamentary Ombudsman also holds the separate posts of the Scottish Parliamentary Commissioner for Administration, and the Welsh Administration Ombudsman.

\textsuperscript{78} In his role as the English and Scottish Ombudsman he can only investigate complaints that have been referred to him by a MP, but in his role as the Welsh Ombudsman he can investigate complaints directly made to him by members of the public.

\textsuperscript{79} For further information about the work of the ombudsman, and of investigations that have been carried out in the past, see the ombudsman’s webpage at [www.ombudsman.org.uk/](http://www.ombudsman.org.uk/).
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If leave for judicial review is granted, the high court will review the decision. Judicial review does not allow the court to review the merits of the decision itself, instead, the court can only review the merits of the manner in which the decision was made. If the high court does decide that the application for judicial review was successfully made out, the court cannot supplant the regulator’s initial decision. Instead, the court can make only take advantage of other orders such as setting aside the initial decision, and/or asking the regulator to reconsider the matter, compelling the regulator to perform a unperformed duty and complementary orders for compensation etc.

Tony Prosser, in his comprehensive text, ‘Law and the Regulators’, notes that initial judicial reviews of the regulators and their offices “suggested that the courts would be most reluctant to second-guess regulatory bodies on substantive issues”. He says however, that “there is some evidence that this may be changing”.

It is, however, difficult to ascertain any definite trends in cases involving judicial review of regulatory decisions because these cases occur relatively infrequently, although, as Cosmo Graham notes, “it appears to be happening more frequently”. Judicial review does operate as a method to ‘regulate the regulators’, but, like all litigation-based controls, it must operate in piece-meal fashion, and may take a long time to evolve a comprehensive set of case law that can guide the regulators. The sporadic cases which have been brought can, to date, still be distinguished from each other on their particular facts.

When considering the impact of judicial review on regulators, regard must be had to the fact that regulatory review can only occur after a regulatory decision has been made, and the fact that such review will necessarily be lengthy and have an uncertain result. All regulators would be aware of the possibility of judicial review, and would presumably tailor their decision-making procedures and the decisions made, so as to avoid the prospect of successful judicial review.

Statute authorised legal appeals against decisions of regulators

The central acts which establish the regulated industries all explicitly give regulated licence holders aggrieved by a provisional or final order made by the regulators (to enforce a licence condition) the right to appeal the regulator’s decision to the high court. If the court finds that the decision was not within their power, or that the regulator had not complied with the necessary procedural requirements (grounds which are basically the same as those accepted for judicial review cases), the court may quash the order. This power is in addition to the power of judicial review which is automatically given to such regulated licence holders (although applicants for judicial review are generally supposed to have exhausted their accessible

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81 Ibid, also p 53.
83 Telecommunications Act 1984, section 18, Water Act 1989, section 22, Railways Act section 49, Utilities Act 2000, section 59 (electricity), and section 95 (gas).
alternative methods of appeal and redress). The problems mentioned above in relation to judicial review obviously apply equally to appeals under these statutes, and these appeals have therefore also been limited in practice.

The Competition Commission

Each of the companies operating in the regulated sphere does so as under a licence granted by the secretary of state. These licences place obligations upon the companies, and define their powers. The licence is therefore the key document for the operation of the regulated companies. The amendment of licences is therefore of crucial importance to the regulated companies and industries as a whole. Most licence terms can be amended, and there is normally a procedure established by legislation which outlines how licences can be changed. The secretary of state, in most instances, retains some power to amend licences, but the relevant regulators are also given powers to change licence conditions.

All of the regulators discussed in this paper are given the power to amend a licence condition if the licence holder consents to the modification, providing that various notice provisions are met. The regulators are also given more limited powers to amend licence conditions where the licence holder does not agree to the amendment. For the regulators to make a disputed amendment, they must involve the Competition Commission. (the Competition Commission was before 1 March 2000 known as the Monopolies and Mergers Commission). The Competition Commission has two ‘branches’. One of these is the ‘judicial’ branch, whereby the Commission acts as an appeals tribunal with an equivalent status to the high court, for appeals against decisions made by the director general of fair trading, or one of the regulators, in relation to the Competition Act. The other branch is the ‘reporting’ branch which investigates and provides reports on the activities of monopolies and on certain proposed mergers. This ‘reporting’ branch also investigates matters concerning modifications to licences that are referred to it by the regulators.

**Power of Competition Commission to authorise licence amendments**

The regulators are all given the power to make a reference to the Competition Commission to decide whether there would be a public interest detriment if a proposed licence amendment was not made. In simplified terms, if the Competition

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84 See for the rail regulator, section 12 of the Railways Act 1993, for GEMA, section 34 and 82 of the Utilities Act 2000, for the director general of water services, section 15 of the Water Act 1989, and for the director general of telecommunications, section 12 of the Telecommunications Act 1984.

85 The Competition Act 1998 gives all of the regulators discussed in this paper powers shared with the director general of fair trading to enforce the provisions of the Act. The Competition Act prohibits agreements which may prevent, restrict or distort competition and affect trade in the United Kingdom, as well as prohibiting the abuse of a dominant position in a market in the United Kingdom. The director general of fair trading and the regulators are given extensive powers to investigate suspected breaches of the Act, and to impose penalties for breaches of the Act. The Competition Commission can hear appeals from parties aggrieved by decisions made in this respect.

86 The director general of water services can make such a referral under section 16 of the Water Act 1989, The rail regulator under section 13 of the Railways Act 1993, GEMA under sections 36 and 83
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Commission makes such a decision, the licence will then be amended. The consent of the holder of the licence is irrelevant to such a change, as the approval of the Competition Commission empowers the regulators (or the Competition Commission itself in some cases) to make the change regardless of whether the licence holder has consented. It should be noted that the power of the Commission was increased relative to the regulators because the regulator must now inform the Commission if he or she proposes a different licence amendment to the original one and to the one proposed as an alternative by the Commission. It is then for the Commission to agree to the different licence change.

The Competition Commission (and its predecessor, the Monopolies and Mergers Commission) has been asked by several regulators to hold inquiries into whether a situation is adverse to the public interest, and able to be prevented by an amendment to a licence. The former director general of gas supply referred three such issues, and the director general of telecommunications has referred four.\(^87\)\(^88\) The director general of electricity supply has referred one issue, while the rail regulator has not to date, made any railway licence modifications.\(^89\) The director general of water services has only made references to the Competition Commission concerning price determination references, which are discussed below. The Competition Commission has therefore had a limited number of references made to it. This does not diminish the Competition Commission’s powerful ability to oversee the activity of the regulators concerning licence amendments, but merely indicates that, to date, its power has been based on the possibility of action, and does not in any way mean that the Competition Commission will not exercise its powers in this regard more fully in the future.

**Power of the Competition Commission to hear appeals concerning periodic reviews**

The Competition Commission has additional powers to oversee decisions made by the director general of water services and the rail regulator in respect of periodic reviews. The Water Industry Act 1991 gives the Competition Commission the power to hear disputes concerning decisions made by the director general of water services about the charges which water and sewerage undertakers can impose for their services. The Utilities Act 2000, and the director general of telecommunications under section 13 of the Telecommunications Act 1984.

\(^87\) The director general of gas supply made two licence modification referrals in 1992 (which related to the transportation and storage of gas by British Gas, and the level at which British Gas fixed the tariffs for the supply of gas). These referrals resulted in the Commission publishing the report British Gas plc. In 1996 the Director made a further referral on the transportation and storage of gas, which resulted in the Commission’s 1998 report BG PLC. See the Competition Commission webpage, at www.competition-commission.org.uk for further details.

\(^88\) The director general of telecommunications made a licence modification referral concerning BT’s chatline and message services, leading to the 1989 report, Chatline and Message Services. A further referral was made concerning BT’s provision of number portability, leading to the 1995 report Telephone Number Portability. In 1998 two further referrals were made concerning charges for mobile phone calls, resulting in the reports Cellnet and Vodafone and British Telecommunications plc.

\(^89\) The director general of electricity supply referred to the Competition Commission in 1994 the question of whether the charges Scottish HydroElectric plc imposed could be restricted. The Competition Commission published a report on the issues, Scottish HydroElectric plc in 1995.
charges which can be imposed by water and sewerage undertakers are adjusted by reference to the retail price index, but also by reference to an ‘adjustment factor’ or ‘K factor’ which is determined by the director general. If a regulated company disputes the director general’s determination, then the director general must refer the matter to the Competition Commission, who are empowered to set the size of the ‘K factor’ themselves. The decision of the Competition Commission is binding upon the director general and the relevant company. There have been four such references made to the Competition Commission.

The Transport Act also gives the Competition Commission power to review decisions made by the rail regulator during a review of access charges. Access charges are the amounts paid by rail operators for access to rail facilities, and are set according to levels determined by the rail regulator. If a company objects to the regulator’s decision, the regulator may review the decision (there is no limit on the number of times this re-consideration can occur) or may refer the matter to the Competition Commission. The Competition Commission will then investigate the matter, and publish their own report. The rail regulator must then make such changes to his initial decision as ‘appear to him requisite’ to implement the commission’s recommendations. If the Competition Commission disagrees with the changes proposed by the rail regulator, they may override them and directly change the regulator’s decision themselves.

The ability of the regulators to determine the charges which regulated companies can impose is one of their strongest powers, and represents their clearest ability to directly affect the fortunes of the regulated companies and the industries they work in. The ability of the Competition Commission to directly oversee the decisions made by the regulators, and to supplant these decisions, transfers some of the regulator’s powers upwards to the Competition Commission, and represents a true ability to regulate the regulators. Although the Competition Commission does not have this power with respect to all of the regulators who have been examined in this paper, the inclusion of these power in the new Transport Act indicates a willingness by Labour to extend the Competition Commission’s power in this regard.

The secretaries of state

The various secretaries of state also have substantial powers over their regulators. Each of the acts that created the structure of the newly regulated industries carefully reserved some powers for the relevant secretary of state. The most important power

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90 See the Competition Commission’s webpage, [www.competition-commission.org.uk/water.htm](http://www.competition-commission.org.uk/water.htm) under the heading Water Price Determination References.
91 The first two references were made in 1994, and the Competition Commission published the reports South West Water Services Ltd and Portsmouth Water plc in 1995. The second of the four references were made in 2000.
92 See the Transport Act 2000, Schedule 24.
93 Transport Act 2000, Schedule 24, section 12.
over the regulators that is held by the each secretary of state is the power to appoint each regulator and to remove them on the grounds of incapacity or misbehaviour.\textsuperscript{95} The secretaries of state have various powers to give directions and or guidance to the regulators, and these powers have been discussed previously in this paper. Their powers are not only limited to anticipatory powers which affect the regulators before the regulators can make their decisions (such as the power to give guidance to the regulators), but also extend to the ability to oversee and even overturn decisions after they have been made by the regulators.

The power of the secretaries to override decisions that have already been made by the regulators shows an ability to regulate the regulators. The clearest example of this power is the secretaries’ ability to overturn decisions made by the regulators about licence modifications. Part of the licence modification provisions for all regulators, for modifications following the agreement of the licence holders, require the regulators to provide notice to persons including the secretary of state, of any proposed licence modifications. In the case of the director general of telecommunications, the director general of water services, and GEMA, if the secretary of state does not agree to any modification proposed by the regulator, the secretary of state has the power to direct the regulator not to make any such modification.\textsuperscript{96}

With respect to decisions by the regulators about licence modifications following reference to the Competition Commission, the secretaries of state covering the rail, electricity and telecommunications industry have been given the power to direct the Competition Commission not to consider the matter referred by the regulator.\textsuperscript{97} The director general of telecommunications can also be directed by the secretary of state not to make any modifications to a licence following the Competition Commission’s report, although this power (which entails over-riding the decisions of the Competition Commission as well) is only able to be exercised when it appears necessary in the interests of national security or for relationships with a foreign government.\textsuperscript{98}

\textsuperscript{95} Telecommunications Act 1984 section 1, Railways Act 1993, section 1, Water Act 1989, section 5, Utilities Act, Schedule 1.

\textsuperscript{96} Telecommunications Act 1984 section 12, Water Act 1989, section 15, Utilities Act 2000, section 35 (for electricity licences), and the Gas Act 1986, section 23 (for gas licences). The secretary of state does not have this power with regard to the rail regulator.

\textsuperscript{97} Railways Act 1993 section 13, Telecommunications Act 1984 section 13 (which provides that such an order can only be given if it appears necessary in the interests of national security or for relations with a foreign government), Electricity Act 1989, section 12.

\textsuperscript{98} Telecommunications Act 1984, section 15.
5 CONCLUSION

The statement ‘who regulates the regulators? The answer of course is nobody’, is partly correct in that there is no comprehensive regulator of the regulators. Yet as this paper has described, the regulators are subject to several distinct controls. Some of the controls affect the regulators whilst they work, such as the provisions of their acts, and the guidance given to them by their secretary of state. Other controls have affect after the regulators have made their decisions, and are an external control over the regulators, such as the control provided by courts and the secretary of state.

Any person or body making decisions about the operation of the regulated industries will have to exercise discretion and balance competing interests. A decision-maker must be able to exercise discretion, and to carefully consider the merits of each case. If decision-makers are given overly prescriptive instructions about how exactly they are to do their job, they cannot adapt and face challenges with ingenuity. Real discretion is needed for powerful decision-makers, and the challenge is to provide an appropriate level of control over those decision-makers.
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