

## FIXING STANDARDS OF REVIEW OF REGULATORY DECISION-MAKING

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My enquiry this evening<sup>1</sup> is directed not towards the merits of demerits of regulation but, rather, towards consideration of whether our current standards of review of regulation (and by ‘review’ I mean and will use the term to include judicial review by and/or appeals to courts and tribunals) is fit for purpose or whether it is in need of restructuring and, if so, how.

I have not, so far, stated what I mean by ‘regulation’ and it is clear, is it not, that depending upon the breadth of narrowness of our definition, the appropriate standards of review may vary. But the appropriate standards of review may vary for other reasons such as the nature of the regulatory decision that is being made, the number of persons affected and even, as I shall suggest, the judicial forum in which the review process is conducted.

Despite what is, therefore, a potentially complicated subject-area I will narrow its scope by confining it to rules-based, commercial regulation. I want to state a few specific propositions and then seek to make them good. First, it is desirable that there should be standards of review for commercial regulators. Secondly, the relevant standards should be effective and easy to understand. Thirdly, these standards should be consistent and should not differ as between commercial regulators.

The notion that there ought to be standards of review over commercial regulators is unsurprising. In its 2004 Report, *The Regulatory State: Ensuring its Accountability*, the House of Lords Select Committee on the Constitution had this to say about the role of courts in supervising the exercise of regulatory power:

*‘Challenge constitutes the most powerful form of accountability. The courts may overturn the decision of a regulator. Public bodies are subject to judicial review. Decisions of certain regulators may also be challenged on the merits of the case.’*<sup>2</sup>

In what it called a ‘360’ degree view of accountability the Constitution Committee saw the courts and tribunals adjudicating on regulatory decision-making as an essential agent of accountability. On this analysis there were three aspects to regulatory accountability. The first was the duty to explain, the second was exposure to scrutiny and the last was the possibility of independent review through either the courts or other appeal mechanisms.<sup>3</sup>

It should be, and perhaps is, uncontroversial that regulatory review standards should be both effective and easy to understand. However, whether they are is quite another matter. In one of the early commercial regulatory cases (*R v. SFA, ex p. Panton*, unreported June 20 1994) Sir Thomas Bingham MR said of the SFA and the SROs:

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<sup>1</sup> This talk was delivered to the Constitutional and Administrative Law Bar Association on 5<sup>th</sup> July 2011.

<sup>2</sup> See paragraph 219.

<sup>3</sup> See Appendix 4.

*'... these bodies are amenable to judicial review but are, in anything other than very clear circumstances, to be left to get on with it.'*

Now I would respectfully question whether this is, as a review standard, either effective or (because of its generality) easy to understand. Nor, in the early days of commercial judicial review were other formulations of the appropriate standards of review against commercial regulatory bodies likely to prove effective in practice or to be easy to apply because of their lack of specificity. Indeed, at one time, it seemed as if none of the traditional grounds for review applied to commercial regulation.

If we take as our initial review yardstick, the three *CCSU* grounds of illegality, irrationality and procedural impropriety, in several cases the Courts have come close to excluding any of them as indicative of whether a commercial regulator has acted in a way that renders it amenable to judicial review.

This appears most clearly in the Court of Appeal ruling in *R v. Panel on Take-overs and Mergers, ex p. Guinness plc* [1990] 1 QB 146. There, Sir John Donaldson MR stated expressly that the *CCSU* grounds were of limited utility in reviewing the decisions of a self-regulating body such as the Panel.

He held that illegality was, generally, an inappropriate basis for review of a body which was both legislator and interpreter. Irrationality was as difficult to apply as it was for the Panel to judge what was or was not relevant. Similar problems arose with regard to procedural impropriety as the procedures were of the Panel's own devising. Even the application of conventional natural justice could cause problems as a determination of what was fair might depend on underlying value judgments as to, for example, appropriate timescales.

The MR concluded that the court should *'review the Panel's acts and omissions more in the round than might otherwise be the case'* and (in something, it might be thought, of a circular formulation) consider *'whether something had gone wrong of a nature which required the intervention of the court.'*

What was happening *sub silentio* (and sometimes not so silently) was that the Courts were treating standards of regulatory review as something of a *'restricted area.'* This was, indeed, the very phrase used by Sir Thomas Bingham MR when giving a lecture to ALBA in 1991 (subsequently reprinted in *Public Law*)<sup>4</sup> entitled *'Should Public Law remedies be discretionary?'* Sir Thomas Bingham singled out a particular ground for a discretionary refusal of relief in judicial review proceedings as *'restricted areas'*, that is areas in which the courts are loathe to intervene (an example being national security). One specific restricted area was, on this analysis, at least an aspect of commercial regulation, namely *'the growing willingness of commercial opponents to pursue their policies by other means, namely by litigation.'*<sup>5</sup>

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<sup>4</sup> [1991] PL 64,

<sup>5</sup> However, it is probably fair to accept that in a clear case of illegality, irrationality or unfairness the Court will interfere and would always have interfered. even in commercial regulation cases: see for example the successful challenges in (amongst other cases) *R v National Lottery Commission, ex p. Camelot* 2000 All ER (D) 1205

Yet even as the courts were disavowing a wish to interfere with commercial regulation except in the clearest cases, there was a hint of something more rigorous to come. In *R v. The Institute of Chartered Accountants in England & Wales, ex p. Brindle* (December 21, 1993, unrep) Sir Thomas Bingham had this to say in the context of regulatory review:

*‘... I would expect the developing case law to define with greater precision the grounds upon which the court will exercise its discretion to refuse relief, but for the moment perhaps the courts have got the balance right.’*

Well, whether or not in the mid 1990s the courts had just about got the balance right (and I have my doubts about that) such a generalised standard of review could not survive a number of important developments since then some affecting, as they affected so much else in domestic public law, commercial regulation.

There were three main developments. Let me state them and then return to each of them briefly in order to outline their overall effect and also their interrelationship.

The first development was the incorporation in substance in October 2000 of the European Convention on Human Rights into domestic law via the Human Rights Act 1998. The second development was the increasing amount of legislation giving effect to European Directives and implementing the philosophy of appeals being made on the merits of regulatory decisions and with those appeals being heard by independent tribunals. The third main development was the issue of regulatory reform with the creation of a new type of regulator and with the standard of regulation itself often becoming the story and leading to discrete standards of regulatory review being enacted rather than, as in the past, incrementally developed under the common law by way of judicial review.

Nor can this last development be viewed entirely separately from the creation of the new tribunal system under the Tribunals Courts and Enforcement Act 2007 under which a new and more flexible form of tribunal justice is emerging that is not necessarily as hands-off as traditional judicial review and with a lexicon that makes judicial review to the High Court from its decisions extremely difficult in practice. Some commercial regulators are subject to the jurisdiction and, hence, to the more stringent review standards of this relatively new and expanding system of justice.

I will telescope the most significant effect of the Human Rights Act by mentioning two particular aspects that affected commercial regulatory decision-making from that point on.

Following the coming into force of the 1998 Act regulators had immediately to address the effect of regulatory sanctions in terms of the process leading up to the imposition of such sanctions. Were proceedings before the regulator henceforth to be treated as essentially ‘criminal’ in nature with all the safeguards provided by Article 6 ECHR including, most importantly, the requirement of an oral hearing? Also, following the enactment of the Human Rights Act and its emphasis on safeguarding widely-defined property rights under Article 1

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(manifest unfairness), *Stagecoach v Competition Commission* [2010] CAT 14 (irrationality). *BAA v. Competition Commission* [2010] EWCA Civ 1097 (bias). Was successful at first instance but was overturned on appeal. Moreover, clear illegality has always put a commercial regulator ‘in the frame’.

Protocol 1, were regulatory decisions that had the effect of either expropriating or controlling such property necessarily to be regarded as proportionate under the ECHR?

So, suddenly, commercial regulators had to consider entirely new questions and concern themselves with how the Courts would react to them. Taking Article 6 ECHR - were their processes now required to embrace an oral hearing because of the possibility that they would be treated, because of the potential sanctions available, as being criminal under the ECHR. The privilege against self-incrimination is also an integral aspect of criminal proceedings under Article 6. Could answers to compulsory questions be admitted as evidence in regulatory proceedings or was that, too, contrary to Article 6?

The latter was the very issue in *R v. SFA, ex p. Fleurose* [2001] EWCA Civ 2015. There the Court of Appeal was faced with the argument that evidence of answers to compulsory questions ought not to have been admitted before the Disciplinary Appeals Tribunal of the SFA because such proceedings were *criminal* under the ECHR. In the event the Court rejected the argument holding that the relevant proceedings were not 'criminal' and that only the more limited right of a fair trial in the determination of civil rights and obligations was engaged.

Article 6 issues of different kinds continue to surface in commercial regulatory judicial reviews. A recent example occurred in *R (Stagecoach) v. Secretary of State for Transport* [2010] Civ 223 Admin. There, the argument was that the determination of schemes of compensation for concessionary travel was made by interested 'authorities' and, hence, not by an independent and impartial tribunal as required by Article 6. The argument was rejected on the basis that Article 6 does not accord a right to have administrative decisions even those affecting civil rights and obligations taken by an independent and impartial tribunal; rather the right is to have disputes as to those rights so determined.

For present purposes, though, the detail of the new types of arguments being raised post enactment of the HRA does not matter. What matters is that they were now capable of being advanced and that they greatly complicated the notion articulated less than a decade earlier that I have already mentioned namely that commercial regulators should simply be left by the courts to get on with it.

As far as the second development – that of increasing EU law relevance to commercial regulation - is concerned, this overlaps heavily with the ECHR especially as ECHR fundamental rights are, for practical purposes, also part of EU law and when the EU accedes to the ECHR will become directly enforceable as a matter of EU law.

Where the proliferation of EU law into the arena of commercial regulation has had special resonance is, of course, in the fields of competition law, state aid, and the free movement Treaty rights. This has triggered something of a practitioner growth area. A recent analysis of High Court judicial review of commercial regulation cases between November 2009 and

December 2010 demonstrated that nearly three quarters of the cases involved consideration and/or application of EU law.<sup>6</sup>

It is beyond the scope of this short survey to deal in any detail with the review jurisdiction over the various commercial regulators now increasingly affected by EU law and I do not need to for the key points I seek to make.

Many but by no means all regulatory decisions so affected are within the statutory remit of the Competition Appeal Tribunal ('CAT') and the issues arising out of the CAT jurisdiction are a useful exemplary model on which to make the basic point that although review standards of commercial regulation are increasingly specific, the rationale for many of the jurisdictional standards that apply is often hard to understand.

Where the CAT possesses jurisdiction it may (depending upon the particular statutory provision involved) possess a statutory review jurisdiction (similar to common law judicial review)<sup>7</sup> or a statutory appeal jurisdiction (where it engages in the factual merits of a case).<sup>8</sup> To complicate matters, there is a hybrid 'appeal' jurisdiction under s. 192 of the Communications Act 2003. I say 'hybrid' because although described as an appeal it is not a full appeal on the merits but, rather, an enhanced standard of review with the factual merits being taken into account as mandated by the EU Communications Framework Directive (see: *T Mobile & Telefonica v. Ofcom* [2008] EWCA Civ 1373).

The different rationales underpinning the different bases of review are less than clear. This is further complicated by the fact that there is a complicated (and unreasoned) interplay between challenges that engage the review jurisdiction of the CAT and judicial review in the High Court; indeed, there may be situations in which there is a parallel jurisdiction.

This interplay and the practical difficulties it creates has been well analysed by Dinah Rose QC and Tom Richards in a recent article in the *Judicial Review Journal*.<sup>9</sup> As they point out in a sub-section partly headed '*Headaches for Regulators*':

*'The complexity surrounding the scope of the CAT's jurisdiction has the potential to produce extraordinary and unsatisfactory results. It may very well be the case that the different decisions within a composite overall decision are mutually interdependent – and yet the legislation appears to require that they be considered by different judicial bodies. In addition, the procedures for the CAT and High Court differ significantly ... Moreover, while the CAT may be tasked with determining part of the challenge on the merits, the High Court on a judicial review claim traditionally treats the merits as forbidden territory and will ordinarily restrict itself to limited grounds for judicial review. Different parts of the same composite decision may thus be determined not only by different judicial bodies by reference to divergent standards of review.'*<sup>10</sup>

The effect of EU law on commercial regulation is not merely to create new jurisdictional bases for review but is also substantive. It is here that one sees best the combined effect of EU and ECHR law on the fixing of review standards for commercial regulatory decisions.

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<sup>6</sup> See Aidan Robertson QC '*Developments in Commercial Regulation and Judicial Review 2010*' [2011] JR 94, 98

<sup>7</sup> See, eg, s. 120 Enterprise Act 2002 (merger decisions), s. 179 *ibid* (market investigation decisions).

<sup>8</sup> See, eg: ss. 46-47 of the Competition Act 1998.

<sup>9</sup> *Appeal and Review in the Competition Appeal Tribunal and High Court* [2010] JR 201.

<sup>10</sup> See fn 8 at paragraph 31.

EU law has a number of substantive doctrines that are, to say the least, unfamiliar to domestic law and I suspect, if the truth be told, to many commercial regulators. There are, for example, the twin EU principles of effectiveness and equivalence, as well as the general principles of EU law including non-retroactivity and most notably the better known principle of proportionality. The concept of proportionality is, of course, also present in the Strasbourg case-law and it is, perhaps, in the marriage of proportionality for both ECHR and EU purposes but the general exclusion of that principle as a ground for common law judicial review that one can see why, added to the procedural and jurisdictional complexities I have already drawn your attention to, some of the standards of review in respect of commercial regulation as developed in the case law increase the difficulty of predicting the outcome of a regulatory challenge.

Nowadays one often sees ECHR and EU arguments run in tandem in challenges to regulatory decisions. Think, for example, of the challenge to the automatic fines on truckers coming into the country with clandestine entrants concealed in the backs of their lorries (see *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158). The challenge succeeded under A1P1 and also (at least at first instance)<sup>11</sup> on the free movement of goods and services.

There are many other examples of EU and HRA arguments being run together<sup>12</sup> but a very recent instance is the unsuccessful vending machine challenge (*R (Sinclair Collis) v. Secretary of State for Health* [2011] EWCA Civ 437) and I would like to spend a moment or two looking at that. The challenge was directed to the prohibition of the sale of tobacco from vending machines under the Health Act 2009 and associated regulations.

Put simply, the case included arguments under A1P1 ECHR and arguments under Article 34 TEU (free movement of goods). For their success these arguments necessarily relied upon being able to establish that the statutory ban lacked proportionality.

I have time only to draw upon the essential features of the case which matter for present purposes. The important aspect for my purposes is that the Court of Appeal (which by a majority of 2-1 dismissed the appeal from the ruling of the President of the CA who had dismissed Sinclair Collis' challenge) disagreed (amongst other things) as to: (i) the burden of proof in establishing proportionality, (ii) whether or not the test in an EU case for proportionality was that a measure had to be '*manifestly inappropriate*' or whether the relevant threshold was the standard proportionality test, (iii) whether in failing to consider a less restrictive alternative (if there was such a failure – on which the Court further disagreed) this was sufficient to render the measure disproportionate or whether this was solely a matter for the Court.

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<sup>11</sup> The ECHR challenge survived the Court of Appeal but the EU challenge did not.

<sup>12</sup> Of the many cases see the unsuccessful challenge against the DEA (*R (BT and Another) v BIS* [2011] EWHC 1021 (Admin) (to be discussed by Tom de la Mare, the (ultimately) successful challenge to the legality of NHS waiting list (*Yvonne Watts v UK*) and the unsuccessful challenge to the hunting ban (*R v Countryside Alliance and Others v. A-G and Another*). Another case where EU and ECHR arguments are being run in tandem is the pending POSD ban challenge in the Administrative Court currently due to be heard in October 2011.

It is not my intention to seek to unravel these important differences of view. What matters is that they exist and that for a litigant seeking to advance a proportionality challenge to commercial regulatory decisions they are as yet, at least in the context in which they were advanced in that case, unresolved.

From the early days of commercial review where there were few, if any, clear review standards we have, perhaps, moved to a different problem. The specificity with which commercial review standards are now sought to be infused comes up against the treacherous rocks of blandness, imprecision and inaccuracy. Between them they threaten to crush the best efforts to reach a clear, effective and consistent methodology.

Does anyone in this room really (hand on heart) know the answers to one or more of these questions: Is EU proportionality the same as ECHR proportionality and if not where are the differences? What is the relevant level of intensity of review as between different tiers of decision-maker? Who bears the burden of proof in a proportionality case? Is a breach of transparency curable by subsequent action following the issuing of proceedings (like a failure to give adequate and intelligible reasons)? Is accountability a regulatory principle that is capable in practice of being reviewed? Ditto for the regulatory principle that requires only effective action to be taken? Are the so-called regulatory principles (like a statutory target duty) merely an aspiration rather than a hard-edged duty to be complied with by commercial regulators?

Mention of regulatory principles brings me to the last main development affecting standards of review of commercial regulation. This is the creation of new types of regulator and also, perhaps as a result, with the direct regulation of regulators themselves sometimes by other regulators. Designed, presumably, to address the age-old question '*quis custodiet ipsos custodiet*' or (in the post-Woolf era) '*who regulates the regulators*'? a notable feature of recent years has been the development of meta-principles for regulators, the breach of which may give rise to judicial review or taint a decision so as to afford a basis for statutory review or appeal depending upon the relevant jurisdiction.

That there are new breeds of regulators since about the turn of the 21<sup>st</sup> century cannot, sensibly, be doubted. The growth of the so-called regulatory state has, at least in part, been characterised by the establishment of commercial regulators with a degree of independence from central government (including enhanced regulatory powers with greatly increased powers of investigation and enforcement encompassing the imposition of financial and other sanctions) but also with a number of 'good governance' obligations that are specified in statutes and/or in codes of practice.. Such regulators include the Financial Services Authority, the Pensions Regulator, the Gambling Commission. Enhanced regulatory powers have also been conferred on commercial regulators such as the Ofgem and Ofcom.

At the same time there has been the growth of what Julia Black terms '*meta-regulators*'<sup>13</sup> that is to say the creation of a governmental body to oversee self-regulation. Further (to quote Julia Black):

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<sup>13</sup> See Julia Black '*Tensions in the Regulatory State*' [2007] PL 58.

*'The rise of the meta-regulatory agency is also being accompanied by a "thickening at the centre": an expansion and enhancement of the role of the core executive, notably the Treasury and the Cabinet Office, in monitoring and attempting to direct the activities of regulators to whom it nonetheless wants to give a reasonable degree of operational autonomy.'*

The present 'map' of commercial regulation consists, then, of a variety of different players in which both self-regulation and governmental regulation are often merged to produce hybrid regulatory regimes with a variety of actors.

Where centralised models of supervisory control exist, (the most recent example being the Legislative and Regulatory Reform Act 2006 and its Compliance Code with its five regulatory principles)<sup>14</sup> there is a level of aspiration that may give rise to closer involvement between the review courts and the internal organisational processes and organisational structure of regulatory bodies especially with regard to investigation and enforcement.

The Code of Practice must be taken into account by any relevant person (i) when determining any general policy or principles by reference to which the function is exercised; and (ii) when setting standards or giving guidance generally in relation to the exercise of the regulatory functions. The purpose of the Code is to *'promote efficient and effective approaches to regulatory inspection and enforcement which improve regulatory outcomes without imposing unnecessary burdens on business...and other regulated entities.'*

The statutory duty to have regard to the Code means that the regulator must take into account its provisions and give them due weight in developing policies or principles or in setting standards or giving guidance. That said, a regulator will not be bound to follow a provision of the Code if it properly concludes that the provision is either not relevant or is outweighed by another relevant consideration. Nor does the Compliance Code apply to all commercial regulators.<sup>15</sup>

Drawing these various elements together, it seems to me that in order to fix appropriate standards of review for what is a dynamic and fast-moving area of the law, there needs to be a return to simplicity. Not, I should add, the simplicity of an empty-box structure with no relevant standards of review at all (letting commercial regulators get on with it) but, rather, (starting with jurisdiction) simplicity of jurisdictions and forums for deciding regulatory cases. It may well be sensible to retain pure questions of statutory interpretation and other hard-edged questions of law for judicial review in the High Court (or suitably staffed nominated Administrative Court judge tribunal who could also address merits where necessary) and to leave pure merits reviews to less exalted specialist tribunals. I can see neither rhyme nor reason, though, for having a hybrid type of appeal or for the present mix of overlapping jurisdictions. Nor can I see any sense in resurrecting the old forms of action by laying jurisdictional traps for whether cases are properly started in the High Court of Tribunal.

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<sup>14</sup> That is: transparency, accountability, proportionality, consistency and targeting only at cases where action is needed. See also similar statutory obligations in (eg) s. 3(3)(a) Communications Act 2003 where the duty is to have regard to such obligations.

<sup>15</sup> See s. 24(5) of the 2006 Act.

Secondly, retaining a distinction between merits and review jurisdiction makes sense. But there needs to be a rationale for drawing these distinctions in each category of case.

Thirdly, there is a need, also, for a readily comprehensible series of substantive principles for differentiating between the scope of a court or tribunal enquiry in: (a) an appeal scenario, (b) a review scenario where proportionality is relevant and (c) if applicable a scenario where neither appeal nor proportionality is relevant. Debates on the intensity of review should, if such distinctions were sufficiently carefully drawn, disappear.<sup>16</sup> I also think that the relevant principles should be concrete and not merely aspirational or at least that if the principle is merely an aspiration it ought not to constitute a relevant review standard.

Fourthly, given the status of the statutory Compliance Code and the combined obligations now subsisting under EU and ECHR law, there is no sensible reason for excluding proportionality as a common standard of review of all commercial regulatory decisions even if proportionality is not yet (curiously) known to our domestic non-HRA law. We do, however, need to know exactly what we mean by proportionality and to devise a schema that can be applied consistently across the board. Again, this will hopefully remove the scope for sterile disputes about the intensity of review.

Fifthly, notwithstanding the current case-law suggesting that it is the Court rather than the regulator that determines proportionality, a challenge by way of review should succeed where the regulator has misunderstood either an essential aspect of jurisdiction or a legally material factor. Such a principle should be added in statutory form if the principle does not exist where HRA challenges are brought.

Sixthly, the old case-law on amenability to judicial review should be revisited in the context of commercial regulation to allow all modern regulators to fall within its ambit. The narrow search for the exercise of a public function bears no sensible relationship with the complexity of modern commercial regulation and the variety of players.

Finally, to such extent as is possible the differences between EU and ECHR law should be reduced by a domestic standard of review that includes the strongest legal protections in both systems.

None of this will be easy. In terms of review standards for commercial regulation we are a long way from the *laissez-faire* review of the mid 1990s. But the complicated development of commercial regulation has brought new difficulties in its wake. We have not yet solved these difficulties but we are, I believe, on the way. I hope that it is not a case of *plus ça change plus c'est la même chose*.

Somehow, I do not think it is.

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<sup>16</sup> For a case in which those arguing for greater intensity of review might be thought to have been angels dancing on the head of a pin, see: *BSkyB v. Competition Commission* [2010] EWCA Civ 2.

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