

Sunshine Regulation: Implemented Practices and Observable Impacts

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Sunshine Regulation: Implemented Practices and Observable Impacts

Introduction

Éric Brousseau | Scientific Director, Dauphine Gouvernance and Regulation Chair & Club of Regulators

To balance the relationship between supply and demand, incumbents and new players, operators and government, regulators can rely on the formal levers of power granted by the legislator – but also on the so called “soft law” tools. The latter are premised on the idea that potential misbehaviour on regulated markets are the result of asymmetries in information. The regulator might then provide the various stakeholders with information that would help rebalance the relationship between them.

The datafication of activities plays a strong part and boosts the capability of regulator to do precisely this. In a recent study, the Governance and Regulation Chair, made static and dynamic comparisons of OECD data, allowing to compare along four dimensions sectoral regulatory governance. These dimensions are:

- the independence from government
- the discretionary power of the regulatory authorities (which is inversely proportional to the formalisation of its formal authority)
- the variety and the reach of the tools enabling regulatory authorities to monitor market activities (pricing, licenses, etc.)
- and the transparency regime implemented by the regulator through collection, processing and provision of data to various stakeholders (users, operators, governments, etc.)

The two first dimensions describe the institutional arrangement framing the activity or the regulatory authority. The two last dimensions describe the levers in the hand of the regulator to fulfil its mission.

The review was conducted on 30 OECD countries in four industries: telecom, energy, rail and airports. We found:

- significant heterogeneity in institutional arrangements (i.e. independence and discretion) across countries, reflecting differing institutional structures in each country as well as varying degrees of maturity in regulatory processes;
- strong correlation between channels of actions (i.e., market regulations and transparency tools), highlighting a complementarity between soft law and hard law levers.
- a high degree of divergence between industries, in particular between telecom and airport.
- the dynamic analysis revealed smooth growth in the independence of regulatory authorities over time as well as relative stability in the scope of market tools, but a significant development in tools designed to foster transparency. In the past years, transparency practices appear to have been the major vector of development of the scope of action or regulators. Moreover their development resulted in converging practices across industries and countries.

1st Roundtable – Sunshine Regulation through data

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FRANCE

“Data-driven regulation: how to enable users to make informed choices and better shepherd the market?”

Pierre Dubreuil | Head of the Data-driven Regulation Unit, French Electronic Communications Regulatory Authority (ARCEP)

ARCEP is an independent administrative authority, responsible for regulating not only electronic communications, but also the postal and print media sectors. It operates on behalf of the State, but independent from any political power or economic stakeholders.

It considers itself as:

- a network architect, as it creates the conditions for a plural and de-centralised network organisation by defining regulatory rules that apply to all or some stakeholders;
- and a network guardian, enforcing the principles essential to guarantee users' ability to communicate.

The concept of Data-Driven Regulation first emerged in response to weaknesses revealed by a 2016 ARCEP-commissioned review, namely:

- disparities in the quality of services, in particular in mobile coverage;
- a lack of information on quality of service and coverage from the end-users' viewpoint, when these were considered decisive factors in the choice of an Internet service provider;
- consumer demand for a greater role in the regulatory process overall, with a view toward enabling competition, innovation and investment by operators and regulated players.

ARCEP initially responded by publishing precise maps on a dedicated website, so that users could see, at a glance, the ISP coverage at their home or workplace, and switch easily from one to another, comparing quality and identifying which was best-suited to their usage. It also conducted surveys on quality of service and published them on the same website.

To give consumers a greater voice in the regulatory process, an online platform was opened in October 2016, on which any user could report malfunctions encountered in the relationship with their fixed or mobile provider. Users thus became “mini-regulators” serving the common good. They became more empowered, while ARCEP was able to access real data on the market and network functioning.

To improve the quality of fixed internet services, ARCEP opted for a qualitative co-creation approach, bringing together measurement tools, Internet access providers, consumer associations and academia, to ensure that end-users would have the right level of information. This process is the perfect illustration of a new regulatory process involving the entire ecosystem.

Data-driven regulation is first and foremost a rational approach, built on real-world problems. It creates the ability to make the end-user more accountable, increases regulator capacity for analysis and makes information available to users and civil society. Rather than dictating user behaviours, the regulator harnesses the power of information to understand the market and shed light on how to operate, steer the market in the right direction and better protect consumers and their rights.

The implementation of a data-driven regulation is a real commitment for institutions, both in budget and implementation. For its specially-created team of 10 data scientists, ARCEP created a dedicated infrastructure, with servers, databases, etc., and the internalisation of new skills such as data hosting, lead infrastructures, data analysis, etc. To publicise and share this approach, eight French regulators have jointly published a paper on it, reflecting their shared understanding of the topic. At the OECD, the concept also has an important impact on the workstream on shaping the future of regulators. Other parallel sectors in France are starting to implement an approach to regulation for a sustainable digital sector. An environmental observatory will be launched in 2022, including the first indicators on this key project for the future.

Various comparison tools have also emerged, following the general principle of data-driven regulation, in areas as different as grocery foods to online media. ARCEP's tool set is aimed at enabling citizens and authorities to better understand and plan connectivity deployment in their regions; improve the regulator's ability to take action in a supervisory capacity using data from public dashboards.

In the last four years, investments in data-driven regulation have grown by 40%, more than 100 000 alerts have been received from end-users and businesses on the platform, resulting in regulatory action.

ARCEP deems that regulating on the basis of data is much more than a matter of transparency. Likewise, it is not merely "soft law" or deregulation; its aim is truly to regulate players effectively, as is now more and more the case. It is a powerful regulatory tool, based on a mandatory decision that rests upon regulated players.

MEXICO

“Experiences of IFT with the Telecommunications Information Databank (BIT)”

Pedro Javier Terrazas Briones | General Coordinator of Strategic Planning, Federal Institute of Telecommunications

The Telecommunications Information Databank is considered a crucial tool that paves the way for the IFT to become a fifth-generation regulator in telecommunications.

It came about as the culmination of a series of regulatory landmarks, most notably: the 2013 Federal Telecommunications Law and the 2014 Organisation Act, both of which stated the need for indicators on telecommunications and broadcasting, and an integrated databank; and, in 2020, the guidelines for the integration of a statistical companion, which stated that the amount of information received will depend on the level of commercial activity of each operator and defined telecom services, a.k.a., the role of proportionality.

It was informed by a wealth of sources:

- 700 telecom indicators received directly from supply-side players, the core of the information telecommunications databank;
- and on the demand side, the main consumption habits and trends of telecom users as captured through large-scale surveys, in particular the ICT Annual Survey on Internet Use.

The Information Databank compiles data from five main services: pay TV, fixed and mobile Internet access and fixed and mobile telephony.

It is presented as 120 open format tables, with nearly 700 indicators that can be downloaded in a single click. It also includes a section in which the user can access the main information on the mobile and fixed market, and compare it with Mexico’s main market indicators for a quick and complete context analysis of the telecom industry.

Major progress has been achieved in this field over the last eight years, from the creation of the strategic planning coordination unit to the release of databank website, in its successive versions. From 40 information tables at the start, it has grown to more than 100 and nearly 700 telecommunications and broadcasting indicators.

One of the main objectives of this information databank was to strengthen the IFT’s regulatory analysis, a goal now accomplished through the product portfolio, containing anything from statistical reports and yearbooks to the calculation of probabilities of ICT use according to income and level of allocation, among other variables. Moreover, the databank contains telecom forecasts as well. The entirety of this information and product range can be accessed through the databank website.

As a result, taking all this information into account, the telecommunications information databank aims to improve this design of proven policies for the benefit of the entire population and the decision-making process of the various public and private players involved. This is accomplished through two factors: proportionality, i.e., taking into account the operators’ commercial size on an annual or quarterly basis; an investment of nearly 3% of the annual budget on data capabilities.

This information and product set enables the IFT to build better regulatory analysis, which in turn creates a more transparent data integration process paving the way for regulatory innovation. Better data capabilities enhance the regulatory innovation process: in the 2000 Handbook on the Collection of Administrative Data on Telecommunications, the International Telecommunications Union recognised the databank as a comprehensive and modular telecommunications and broadcasting databank, based on business intelligence logic. Telecommunications is one of the three most data-driven industries in the world, along with the Cloud services and the financial sector. It is one of the tasks of the IFT to share this power of information to maximise the benefits for the market.

The Databank is swiftly moving towards having a fully-electronic process for the delivery of information in which operators can validate and upload information into a single platform, rather than the ongoing manual process used up to the present. The new 4.0 version of the website is set to be released shortly. It will contain, in addition to the current core data on telecom services, a wide range of indicators on broadcasting services and sectors so as to balance out its array of information.

Debate

Eric Brousseau

Pierre, you highlighted the breadth of the stakeholder panel shaping the regulatory landscape, which includes INRIA, a French research agency for Computer Science, and the MLAB in the United States. What type of relationship do you have with these organisations?

Pierre Dubreuil

The MLAB, part of Google, is dedicated to measuring the speed of mobile networks. In this co-construction approach, the aim was to have an entire ecosystem working on a problem statement which we had been unable to tackle ourselves. In fixed networks, ARCEP long published a national-level report on speeds using data from its own internal laboratory measurement system.

Unfortunately, it became so well-known to players that they could tweak their performance to appear more effective than they actually were. The power of Google's private-sector tools were thus brought in and shaped with the assistance of academics, to make the data as representative of reality as possible. In exchange, ARCEP shares its approaches to mobile crowdsourcing, best practices and general views.

A Participant

What does your cooperation with other regulatory authorities entail?

Pierre Dubreuil

The level of interaction varies according to the regulator and the respective problematics involved. ARCEP has published a common paper on data-driven regulation, and more-recently a paper on how to design a sustainable digital world through regulation. It works in particular with the French CSA, given the many links that exist between the two, not only on frequency, but also on platforms, etc. Convinced of the essential contribution of data-driven regulation, ARCEP is always willing to and interested in showing the work it has carried out and angles it has taken.

Eric Brousseau

Mexico is now recognised world-wide for its very active data-sharing practices. Your strategy appears to be aimed at developing fine-grained databases that are made available to all. What are the limits to this approach? How do you deal with issues such as privacy or sensitive business information?

Pedro Javier Terrazas Briones

When dealing with information deemed sensitive by an organisation or country, in the present or future, the IFT makes it clear that it will publish them only in aggregate fashion, for instance, at the level of a given market. One of the main risks and challenges encountered lies in the companies' methods for finding information. We aim to build one integrated system. In Mexico, a number of companies do not have such an integrated system: income, sales, manufacturing, etc. are each managed separately. The IFT is working to help companies build a unified system through the provisions and guidance it issues.

2nd Roundtable – Soft law tools

SWITZERLAND

“Sunshine Regulation in the Electricity Sector in Switzerland: A Status update”

Barbara Wyss | Head of Prices and Tariffs Section, Federal Electricity Commission (ELCOM)

Switzerland, in contrast to other regulatory environments, operates a system of Cost+ for grid tariffs, as opposed to an incentive-based system. The most important features are:

- the definition of total-chargeable costs, defined as the actual operating costs plus depreciation and interests on the regulatory asset-base;
- the consideration for the country’s considerable demographic and geographical diversity. More than 630 DSOs operate in Switzerland, 230-250 of which are very small. Two of them serve over 350 000 billed recipients on their own, while many serve less than 1 000.

As Switzerland’s independent regulatory authority in the electricity sector, ELCOM is well-empowered to pronounce rulings. It can also examine costs and tariffs and correct them. It is required to deliver long-term data, on tariffs, costs, services, etc., which it has been collecting since 2009.

The Sunshine concept is part of the overall regulatory concept of ELCOM. Not having an incentive-based regulatory system, it has no broadly applicable manner to address efficiency issues. The Sunshine Regulation, as a multi-dimensional regulatory approach, helps in this respect: it compares the distribution of grid operators based on several indicators and publishes these, with results, by DSO.

It is important that the indicators keep simple and comprehensible, so that:

- they can be easily verified by DSOs, local councils or customers;
- grid operators can identify optimisation potential, thanks to individual benchmarks provided to them free of charge.

For the time being, only a limited amount of indicators are collected, covering three areas:

- quality;
- costs and tariffs;
- and compliance.

While further indicators could be identified, simplicity is the guiding principle.

As geography has some impact on the cost and structure of the grid, the DSOs are grouped on the basis of settlement density: urban, suburban, rural, mountainous and touristic, the latter type having quite a special energy consumption profile.

Switzerland has no legal basis for the publication of all the individual network operator results, yet. However, since 2000, provisions have allowed for tariffs to be published, such that customers can compare them by region, type and product. Parliamentary debate continues, in order to resolve the outstanding privacy issues on the way to full publication of results within two to three years.

After six rounds of Sunshine regulation, noteworthy effects have been observed:

- stable costs and, more importantly limited tariff increases;
- major efforts on the part of grid operators to produce high-quality data, significantly improved;
- the increasing use of data analysis to understand user behaviours.

Looking ahead, reporting on the regulation's impacts should probably follow the same model as that on tariffs, which regularly give rise to newspaper coverage and contribute to public information. It is important not only that Sunshine be seen as part of the overall regulatory framework, but also that the regulator make good use of various regulatory possibilities available to it, relying not only on Sunshine.

HUNGARY

“Soft law tools in the Hungarian water regulation”

Gábor Kisvárdai | Head of the Secretariat of the Vice President for public services; also Member of the Secretariat, WAREG (Network of European Water Regulators), Energy and Public Utility Regulatory Authority

As the Hungarian regulator is relatively new to operations in the water sector, with nine years of operation behind it, it is still becoming familiar with the reach and potential impact of its powers. Through its participation in WAREG, it has observed that, when the independence of regulators is challenged by any stakeholder the response tends to be the implementation of soft law cases.

Hungary is a country of 10 million, one quarter of which lives in the capital city or suburban areas. It spans 9 300 square metres, administered by 3 000 local government structures. Through a large-scale reform of the water sector, still in progress, the nation's 400 water companies have been condensed into 40. In this first phase of its operations, the regulator has not had adequate time to deal with publications and transparency, all of its energy and time being taken up by the licensing and reshaping processes.

Six Ministries have powers relating to water services in Hungary. As to the regulator, while holding powers connected to other national agencies, including water protection, licensing, water health, etc., it has been independent by law since 2013, and thus has its own budget. Its sole responsibility with regard to water regulation is the publication of an annual report to the Parliament. It also regulates electricity, natural gas, drinking water, waste water and the solid waste market.

In Hungary, the average water price per household amounts to approximately €1, compared to €3.5 per cubic metre at the European level. It is hoped that soft law tools will be effective in bringing this figure up. In addition to the “hard powers” granted to it by law (recommendations on tariffs to the Ministry of Innovation, a decree issued by the regulator's President).

In 2019, the regulator realised that the reporting requirements it placed on operators, consumers and local governments were too burdensome and, in fact, resulted in 40% extraneous data. It thus streamlined its demands, while also working to demonstrate to each user population, through two-way communication and study, why it needed each item. Today, new software is being developed with the interest groups of service providers, to make a smooth data collection process for the future. Before this, when service providers were found to be in non-compliance, they were met with high fines. This policy has since ceased, being deemed inefficient; instead, the regulator seeks to find out the reasons for the non-compliance and work with the faulty party to develop solutions.

The regulator also works proactively, seeking the opinion of stakeholders on what they would like to see in its publications. Close contacts are maintained with the service providers, governed by a memorandum of understanding signed with the interest group of service providers, and including mutual attendance at conferences. In the future a shared access to a large-scale database, funded by the European Union will be granted to service providers and other stakeholders of the sector. The regulator consistently publishes recommendations and guidelines taken into consideration new court decisions with other stakeholders, and legal interpretations of enactments.

The use of soft law tools in the last two to three years has shown:

- the importance of striking a balance between official and unofficial soft law tools;
- the necessity of soft law in the face of emerging technologies;
- the greater value of soft law if transformed into hard law.

Debate

Eric Brousseau

In both these cases, information-gathering and the publication process appear oriented toward the traditional activity of regulators: price, tariffs, quality of service, etc. How is the growing range of official or unofficial objectives, in particular environmental, assigned to regulators affecting this?

Barbara Wyss

In Switzerland, the Electricity Commission is not actually in charge of environmental matters, which are under the helm of the Federal Office for the Environment and – concerning the renewables – the Federal Office of Energy. These bodies collect according information and may share information between them. This will be soon done via a dedicated web platform, which is currently set up technically as a e government project.

Gábor Kisvárdai

In Hungary, the regulator is broadly empowered to collect any type of data. There are few provisions as to the institutions with which it may or should interact for this purpose. Consequently, at the start, it collected in excess, whereas at present, it aims to be as efficient as possible and secure the minimum amount of data necessary.

A Participant

How can the regulator be held accountable internally and externally? Can the annual report serve this purpose?

Gábor Kisvárdai

According to law, it is enough that the regulator publish its report and that its president deliver it to Parliament. As this may not be sufficient for reality, it is working to enhance its accountability to both consumers and service providers by publishing and engaging with them. It is also striving to enable greater depth in transparency.

Barbara Wyss

In addition to the effective array of instruments at its disposal, the Swiss regulator publishes reports for Parliament, but also for the media, and is looking forward to the possibility of making even more data public.

3rd Roundtable – International experiences of coordination/experiments

EUROPEAN UNION

“Sunshine Regulation tools at EU and national levels in the energy sector”

Jean-Laurent Lastelle | Vice President; also Commissioner at the French Energy Regulator (CRE), Council of European Energy Regulators (CEER)

The world of energy and of energy regulation is in the midst of a crisis, with excessive energy prices reigning and structurally-crucial decisions to be made on the energy mix. To respond to this situation, a revamped range of regulatory instruments and collective support and training tools are needed. The Sunshine Regulation can help in this respect, as demonstrated by the experiences of both the CEER and the CRE.

The Sunshine Regulation can be defined as a soft law tool, encompassing recommendations, guidelines, benchmarking or nudges encouraging changes in practice on market. As ambitious as it may seem in an environment accustomed to traditional power, this move away from political confines and into greater independence, inspired by the world of public regulation, is crucial. The decisions, deliberations, votes, negotiations, hearings, obligations and sanctions used up to the present day are no longer the sole solution.

France, which was home to philosopher Michel Foucault, understands that power is not only about laws, police and judges, but also the manifold influences that structure of range of individuals' possibilities. In the context of the Sunshine Regulation, some of the tools envisioned could be deployed more easily at the supranational than the national level, being implemented more through cooperation than through regulation.

At the European level, CEER works to organise and promote consumer participation in the market, and foster the evolution of the role of operators and sharing of best practices beyond European borders. The Agency for the Cooperation of Regulators (ACR), meanwhile, works to deepen the internal market, through:

- the finalisation and implementation of network codes;
- improvement of planning capacities within the framework of ten-year plans;
- the establishment of the European wholesale market;
- and support for the development of the trans-European infrastructure.

The CEER and ACR also have common undertakings, including:

- monitoring the European energy market,
- discussions on the future of the internal energy market, i.e., the bridge to 2025, with the very fashionable notion of flexibility for the future,
- and a contribution to the European debate on European energy policy.

The CEER is composed of 39 national energy regulatory authorities from across the European Union and other countries. It supports its members in their responsibilities, sharing experiences and developing regulatory capacity and best practices, through working groups, events, an in-house training academy and papers.

The national regulators develop common position papers, including advice, papers and forwarding recommendations to improve the electricity and gas markets for the benefit of consumers and businesses. Together, they promote a harmonised regulatory environment and the consistent publication of existing European regulation, with the key objective of facilitating the creation of a single, competitive, efficient and sustainable internal market in Europe in the consumers' interest, with a wide range of energy regulatory issues, wholesale and internal market, consumer issues, distribution networks, smart grids, flexibility, sustainability and national cooperation.

The CEER is responsible for studying the application of European law in each Member State, in an effort to harmonise it. Yet there are no tools to benchmark the soft tools implemented in the very-present cooperation that exists. In particular, within the traditional regulatory framework, no progress could have been made on information comparison tools, providers of last resort, complex data and smart meters – all crucial catalysts to the profound transformations in the balance.

The aim of the national-level regulator is not only to guarantee reliable and affordable access for users, but to ensure that the products to which they have access are the best possible. Consequently, as delicate and daunting as the task may be, it must also foster innovation including through soft regulation tools. The French CRE aims to do so, in particular through biannual reporting on the performance of energy sector players, including non-traditional criteria such as non-discrimination, flexibility, transparency and the preservation of commercially-sensitive information. In a similar spirit, it has issued guidelines in particular on the principle of non-confusion in operator names and between suppliers.

INTERNATIONAL OVERVIEW

“Behavioural Insights global feedback”

James Drummond | Policy Analyst – Regulatory Policy Division, Public Governance Directorate, OECD

Regulation can be defined as an endeavour to bring about changes in behaviour. The field of behavioural insights (BI) offers tools and methods for regulatory policy makers to take a different approach to regulation that can include softer approaches. Through experimentation and observation of human behaviour, BI provide policy makers with a different perspective on the regulatory problem and potential solutions. It does so via an inductive approach that considers real life barriers and biases and applies them to regulatory problem.

When the UK Tax Authority sought to better understand the phenomenon of non-payment of taxes, it found, through behavioural data, that only 4% of non-payers actually did so intentionally. The remaining 96% were in need of support, information, encouragement or advice. Similar findings of innocent non-compliance have emerged in multiple areas, from observance of health instructions to debt repayment.

In a study on individuals not changing telephone plan when obviously more advantageous ones were available, some of the main behavioural barriers were found to be fear of regret and choice overload, which lead to people staying with the less optimal plan. Consequently, traditional “soft” regulatory approaches to require more information may intensify the problem. Thus, it is not only a matter of informing the individual, but doing so with the right details, at the right time and in the appropriate format that helps to break through these barriers and support better decision making. BI can also offer different ways to analyse a regulatory problem, such as the use of pre-selected options. Traditional policy analysis would not view this as an issue – people will de-select a choice they do not want. However, the UK Financial Conduct Authority found that pre-selecting insurance for purchases such as airline tickets resulted in 20% of consumers keeping the insurance even though they did not need it, resulting in overspending. This motivated changes to regulations to ban pre-ticked boxes in certain areas. This has also been used for good by pre-selecting pension schemes that resulted in people saving more for retirement, such as the famous “Save More Tomorrow” programme pioneered by Richard Thaler and Schlomo Benartzi in the United States.

Governments and regulators, too, are human – they are affected by biases and barriers just as much as individuals in society. BI should also be used to improve the regulatory policy making process, including the institutions and tools, to improve all regulatory outcomes – not just those that are “behaviourally informed”.

Debate

Eric Brousseau

Regulators and advisory boards, which tend to be highly skilled and informed, seem less in need of behavioural insights than policy decision-makers.

James Drummond

Behavioural analysis should arguably be mainstreamed symmetrically for both regulatory policy making and to regulatory policy outcomes.

Jean-Laurent Lastelle

The regulator, having no commercial interests to defend, can be relied upon to encourage better decisions.

Conclusion

Anna Pietikainen | Senior Policy Advisor, Public Governance and Regulatory Policy, OECD

If information is power, then the collection of information can effectively serve multiple purposes: tackling market failures, informing regulatory decision-making, facilitating decision-making by consumers, but also empowering those same consumers to enter a dynamic of co-creation and providing data to the regulator on quality of services.

Beyond this horizon, there exists another important community of stakeholders: government and public administration, which can use information to build and monitor policy goals.

The risk of regulatory tyranny can be mitigated by proportionality, balancing the purpose sought and the burden placed on industry. As data collection, processing and sharing are one of the key functions of an economic regulator, they must be the focus of a very deliberate institutional strategy, backed by adequate resources and skills.

There is also a need for a mix of hard and soft approaches with regard to data collection, processes and sharing, to be crafted based on context and culture. Soft approaches may be favoured for the flexibility that they bring. Whatever the approach chosen, regulators must be transparent in their choice and disclose their work, in line with the principle of ethical operation.

In a regulatory regime, the “sun” should indeed shine on every player, with data sharing not only across a sector, but also on regulators themselves. This observation will be one of the items of discussion at the upcoming meeting of the OECD Network of Economic Regulators later this week.



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