



Involving consumers in the development of regulatory policy

A UK Regulators Network Consumer Working Group discussion
paper by Martin Coppack, Francis Jackson and James Tallack

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This paper was drafted by Martin Coppack of the Financial Conduct Authority, Francis Jackson who at the time worked for FCA but has subsequently joined Ofgem, and James Tallack of the Civil Aviation Authority, as a contribution to a working group that was established by the Joint Regulators Group (now replaced by the UK Regulators Network). Other working group members have at various times included Ofgem, Office of Fair Trading (now the Competition and Markets Authority), Ofwat, Ofcom, the Office of Rail Regulation and Monitor. This paper is for discussion and does not necessarily reflect the views of these regulators, either individually or collectively.

We welcome reactions to this discussion paper – please email James.Tallack@caa.co.uk.

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Introduction and definitions

Many regulators have a role that is wholly or partly focused on protecting the interests of consumers. This is often laid down in statute, typically in a principal objective, although rarely does such legislation specify precisely how regulators should engage with those whom the regulation is meant to benefit or take account of their attitudes, experiences and behaviour.

The Legal Services Consumer Panel has suggested¹ that the broad spectrum of activity potentially covered by the term “consumer engagement” includes:

- Regulators providing information to the public about their work through their websites and publications i.e. the regulator enabling public accountability
- Helping consumers to use services more effectively, for example by providing people with advice about choosing service providers i.e. the regulator empowering consumers and helping the market work effectively. (This is the subject of a separate project in the first UKRN workplan.)
- Engaging consumers in developing policy, for instance by conducting research to find out people’s preferences.

To this, a fourth strand of consumer engagement could be added: the ongoing gathering of consumer-related intelligence that helps regulators monitor their sector for signs of consumer detriment. Intelligence drawn from this type of consumer engagement – examples include complaints data, ‘market tracker’ and satisfaction surveys, social media and letters from MPs – may not on its own always provide a basis for immediate policy action, but it is often used by regulators to help identify issues that might warrant deeper investigation.

This short discussion paper focuses on the third ‘dimension’ of consumer engagement, i.e. a process of effective dialogue between regulators and consumers that ensures that regulation, and the outcomes it delivers, are designed around consumers’ needs. However, except in cases of pure monopoly (where there may not be a market in any meaningful way – see following paragraph), it is strongly related to the second dimension – consumer engagement with the regulated market. This is a key concern in regulated markets like energy supply, telecoms and financial services where consumer outcomes are primarily determined by competition between regulated businesses and the regulator has a responsibility to ensure that consumers have the capability to drive competition by making informed and effective choices between those businesses. Engaging with consumers to understand whether they are getting the outcomes they want is therefore fundamental to the development of effective regulatory policy in ‘competitive’ regulated markets.

Equally, in sectors like rail, water and energy networks where choice for consumers is limited or non-existent, effective regulation is also dependent on regulators engaging with consumers to

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http://www.legalservicesconsumerpanel.org.uk/ourwork/ConsumerEngagement/documents/ConsumerEngagementWorkshop_16July2010.pdf

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understand what outcomes they want and whether they are getting them. This is so that regulated businesses can be directed towards delivering those outcomes through policy instruments such as price controls and service quality standards, which substitute for the price and product discovery process in markets where consumers have a choice of provider. In a 2011 paper, former UK electricity regulator Stephen Littlechild, quotes Ofwat in his description of the importance of this process:

In April 2011 Ofwat declared that “Customer engagement is essential to achieve the right outcomes at the right time and at the right price”. [Ofwat] explained at some length that “engagement means understanding what customers want and responding to that in plans and ongoing delivery”, that “good engagement with customers can legitimise the price setting process” by influencing companies’ plans, helping them to demonstrate that they have delivered value for money, ensuring that the price limits represent a price and service package that customers and society want and are willing to pay for, and much more.²

For the purpose of this paper – and indeed all of the Working Group’s work – “consumer” means “end user”. Focusing on end users is consistent with various pieces of consumer protection legislation.³ However, while such legislation tends only to cover individual or ‘household’ consumers, our definition also includes businesses of all sizes that use but do not provide the regulated service. In any public policy intervention in a market, there is a strong efficiency argument for focusing on the interests of those who ultimately pay for the products and services that the market in question provides. The end of any industry’s value chain is the point in the chain at which a socially useful outcome (i.e. real value for a real person) is created, such as being able to heat and power a home, invest, save or borrow money appropriately, or getting to a travel destination safely and on time.⁴

Why effective regulator-consumer engagement matters

‘Accountability’ is one of the Government’s six Principles for Economic Regulation. It stresses the importance of regulatory decisions being taken by bodies that have “the legitimacy, expertise and capability to arbitrate between the required trade-offs”.⁵ A 2011 Consumer Focus paper agreed that without expertise and strong regulatory skills regulators risk losing the confidence of both consumers and industry. However, the paper also pointed out that regulatory decisions will only be seen as legitimate if they are taken on the basis of effective input from all stakeholders.⁶ Effective engagement strategies are therefore essential for securing the ongoing commitment of consumer bodies to the formulation of legitimate regulatory decisions, and the approval from consumers more broadly of regulatory processes.

² <https://www.repository.cam.ac.uk/bitstream/handle/1810/242038/cwpe1142.pdf?sequence=1>

³ E.g. Directive 98/6/EC on consumer protection in the indication of product prices defines a “consumer” as “any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity”; similarly, the Unfair Commercial Practices Directive (2005/29/EC) gives the following definition: “‘consumer’ means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”.

⁴ While economic value can also be created earlier in the chain (i.e. whenever a part of the chain can sell for more than it bought for) this ‘value added’ depends entirely on delivering a real outcome at the end. If regulators focus on securing the interests of those at the end of the chain, they will drive a more efficient market by ensuring that all resources are directed towards the creation of socially useful outcomes.

⁵ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/p/11-795-principles-for-economic-regulation.pdf>

⁶ <http://www.consumerfocus.org.uk/files/2011/10/Regulated-industries-and-consumers.pdf>

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While Consumer Focus highlighted the importance of effective input from all stakeholders, one of its key concerns was the significant resources that regulated businesses invested – and continue to invest – in working with and influencing their respective regulators. This risked views from such businesses becoming the only effective external input to the decision making process, with the consequence that:

[I]nformation, intelligence and public debate would become one-sided, with insufficient challenge to the received wisdom shared by people on both sides of the regulatory relationship. Experience suggests that regulators and regulated businesses can sometimes frame issues in a similar way, with common views on what the key questions are, even if they may have different perspectives on the answers.⁷

If regulators do not fully understand the needs, wants and behaviour of the consumers on whose behalf they regulate, their work risks becoming disconnected from the real world. In an environment where many people share a similar professional background and mindset it is necessary to proactively engage with the full spectrum of consumers to avoid regulation becoming an academic and myopic activity.

As well as making regulation more accountable by ensuring that effective input on behalf of consumers leads to better quality (i.e. more balanced and evidence-based) judgements by regulators, consumer engagement supports more efficient and proportionate approaches to regulation. Increasingly, regulators are expected to align their activities to clearly-evidenced risks and ensure that they deploy their limited resources in the most efficient and effective way. This means focusing their activities on the most significant risks to consumers, and ensuring that regulatory scrutiny and burdens on the businesses they regulate are targeted appropriately and are proportionate to the risks they have identified.

Effective consumer engagement is therefore fundamental to embedding a risk-based approach to regulation. This is because it provides reliable and robust evidence of consumer needs and detriment that enables regulators:

- in the first instance, to clearly define objectives based on the outcomes that consumers need; and
- to systematically monitor the market thereafter for signs that risks to those objectives have materialised or are likely to materialise.

As Ofwat has pointed out, by making it clear how their decisions have been informed by their assessment of risks, regulators will also make their decisions more transparent to consumers, businesses and wider stakeholders. This will “promote understanding of the key risks and issues that [consumers] face, and foster a more mature, collaborative approach to addressing those risks and issues.”⁸ A more collaborative approach can also lead to earlier interventions being made on issues which consumer organisations are better positioned to detect at an early stage.

As well as contributing to higher quality policy outcomes, there are other benefits to the end consumer from successful engagement. A good relationship with the regulator will assist consumer organisations, in particular, to better understand the fundamentals of the regulated market and as a result to be more effective in their provision of advice to consumers and their advocacy with respect to other organisations (e.g. central government, industry).

⁷ <http://www.consumerfocus.org.uk/files/2011/10/Regulated-industries-and-consumers.pdf>

⁸ http://www.ofwat.gov.uk/regulating/compliance/pap_pos1203regcomp.pdf

Principles of effective consumer engagement

Based on a rapid literature review and the key features of the approaches described in the following section, we have identified four core principles that regulators should consider when designing and reviewing their consumer engagement strategies.

Tailored

- Give clear and realistic timeframes for input and be prepared to be flexible
- Avoid lengthy and convoluted consultation and briefing documents that use technical jargon and are not written in plain and clear language appropriate for the audience
- Investigate and use a range of research approaches
- Do not overburden consumer organisations with undue demands on what are often limited resources – relationship managers can assess the reasonableness of requests for engagement and moderate them accordingly

Inclusive

- Identify all consumer cohorts (e.g. older consumers, consumers in vulnerable circumstances, consumers in different geographical regions) that are relevant to a regulatory decision
- Reject assumptions about ‘average’ or ‘mainstream’ consumers, which can lead to inappropriate one-size-fits-all policies
- Work to build consumers’ and consumer bodies’ capacity to engage productively with the regulator

Transparent

- Identify and communicate the role of consumers in the engagement process and objective of the process
- Be clear on how input will be used to influence decisions in order to manage expectations
- Credibly and openly report input from consumer engagement, including positive and negative experiences/outcomes and tensions in consumer views and show how this input has been reconciled and reflected in regulatory decisions
- Publish findings from engagement in a timely manner and create further opportunities to share expertise and information, for example by making raw data from regulatory processes available for scrutiny by consumer groups and the public, where possible

Developing

- Establish indicators to measure the success of engagement strategies and activities, with a view to seeking ongoing improvement
- Periodically review engagement strategies and processes
- Regularly consult on effectiveness of engagement strategies with consumer bodies
- Benchmark against other regulators and public bodies, and learn from them, by sharing experiences (good and bad) and research findings through forums like the UKRN

How can regulators engage effectively with consumers?

Regulators have a long history of engaging indirectly with consumers through representative bodies, such as statutory (e.g. Consumer Futures, now part of Citizens Advice) and independent (e.g. Which?) consumer organisations. In some sectors the regulator may also have a panel or advisory committee of independent consumer policy experts, from which it can seek advice on consumer

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issues. Such ‘consumer panels’ may be established through statute, such as in financial services, telecoms and legal services, or set up voluntarily, as in the case of the Civil Aviation Authority’s (CAA’s) Consumer Panel and Office of Rail Regulation (ORR’s) expert panel.

Engagement with consumer bodies and consumer panels is an important but, on its own, partial form of consumer engagement and there is increasing recognition of the need to supplement it with other strategies to involve consumers in regulatory decision-making. In this section we also consider two other strategies: direct engagement between regulators and individual consumers; and the role of regulators in facilitating effective dialogue between consumers and regulated businesses.

Engagement with consumer representatives (consumer groups)

The consumer’s voice is often at its most powerful and coherent when it is expressed via organisations whose function (or part function) is to represent the consumer’s interests. These groups have considered policy positions, usually based on an established set of principles, that represent the interests of their stakeholders in a way that those stakeholders independently could not.

In this ‘indirect’ form of consumer engagement, consumer organisations represent the interests of consumers to regulators. Consumer organisations often approach this using a set of stable principles to guide their views and collection and interpretation of evidence (e.g. the eight consumer principles used by Consumers International and its members such as Which?)⁹. These organisations can take a diverse range of forms: charities and private companies, statutory and non-statutory organisations, special interest groups and general consumer advocates. Unsurprisingly, given the diversity of the sector, the appropriate form of engagement with the regulator may vary considerably according to the organisation; nonetheless they are sufficiently similar in nature for it to be possible to develop high level strategies for dealing with this group of stakeholders, as outlined below.

Engagement can be initiated from both directions: consumer organisations may actively lobby the regulator on certain issues and the regulator can solicit input from stakeholders on a given issue (e.g. consultation on a new policy). Engagement can be of value at all stages of the policy-making process: during developing and scoping, as part of formal consultation and post-implementation to evaluate outcomes.

As mentioned above, the diversity of consumer organisations is both a strength and a challenge. It provides a depth and range of informed opinion and evidence, which is a rich resource that regulators can leverage to inform their policy-making. Given how different the consumer landscape is from the markets and businesses that regulators oversee, it may be beneficial for them to have dedicated staff with specialist expertise in this area. Their role is principally to build and manage the regulator’s long-term relationships with consumer organisations, ensuring that they are treated as respected stakeholders on a par with industry. In reality, because consumer organisations typically have far fewer resources than regulated industries, there is often a need to capacity build to amplify their voice within the regulatory decision-making process. For example the FCA has a dedicated Partnerships team that manages the relationships with consumer organisations. This team contains a technical specialist in consumer engagement as well as dedicated resource. This helps to ensure that engagement activities are effective and efficient for resource-stretched consumer groups. The team

⁹ Access; choice; consumer influence and representation; information and education; quality; redress; safety; value for money.

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acts as a single point of contact for external organisations and for internal colleagues wishing to engage with them (see Annex).

Such a function may also develop the following methods of engagement:

Working groups/roundtables

An ad hoc group of consumer bodies can be formed around specific issues or topics, such as policy consultations. It may involve a more restricted number of participants than the regulator's full network of contacts. They would likely be organisations chosen on the grounds of their knowledge of and interest in the topic under question and their capacity to actively participate to both parties advantage. To note, roundtables are often favoured by regulators as an efficient way for them to gain access to viewpoints, however, this can be very resource-intensive for consumer bodies.

Membership-based group of consumer bodies

There are many organisations that are likely to have, at some point in time, an interest in the work of a particular regulator. It would not be realistic, however, to maintain a close relationship with all of them, all of the time: many may struggle for resources and be likely to have no more than a transient interest in the sector. A possible solution is for the regulator to form a core group of its key consumer stakeholders. The purpose is to establish and maintain productive and trusting relationships with a core set of organisations which are active in the relevant policy area.

Giving certain groups a certain status as partners (whilst still remaining open to others) can help to establish a stronger mutual commitment to working together. For example, the FCA has developed a Consumer Network which holds six-monthly meetings for information exchange with and between the members. In between these meetings the FCA tailors engagement appropriately – taking into account the subject matter, individual consumer group interests and each consumer group's resource constraints. (See Annex.)

Data sharing

In addition to the informal data- and information-sharing that is likely to form a key part of a regulator's interaction with its consumer body stakeholders, there is also the option of developing more formal data-sharing agreements with some organisations. These agreements create an environment where issues can be discussed openly and data can be shared confidentially. They allow both organisations to have sight of information earlier and intervene faster.

Consumer secondments

Another possible engagement strategy for regulators to explore is that of seconding staff to consumer organisations (and potentially vice versa). This can serve to deepen the relationship over time, by swapping first-hand knowledge of the two worlds of consumer representation and regulation, with their very different constraints, priorities and mind-sets.

Moreover, the additional resource provided by a secondee (especially if seconded for free or on favourable terms for the receiving consumer organisation) can give a much-needed capacity boost to organisations whose budgets for policy work are often severely constrained. A better quality policy contribution is evidently of benefit to both organisations.

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Engagement with consumer representatives (consumer groups)

Pros	Cons
Consumer organisations often have developed and coherent policy stances which inform their advocacy	Consumer organisations have limited policy resources compared with the public and private sectors so a sophisticated approach to engagement needs to be developed to ensure a mutually beneficial relationship develops and is maintained over time. The default position of calling consumer groups in for roundtables is resource intensive for such bodies.
They will often, depending on resource, proactively engage with the regulator on issues of importance to them	To maximise the value of the relationship the regulator is likely to need to commit resource to it e.g. specialist relationship management staff and free resource such as secondees.
They may be able to provide the regulator with access to large datasets about their client base	Any data provided is likely to be skewed to the organisation's client base rather than representing the population as a whole
External groups often conduct their own research, at no cost to the regulator	
They can be used as a conduit to access end consumers for the purposes of market research	

Consumer panels and advisory committees

An increasingly common feature of regulatory decision making is the involvement of a standing 'consumer panel'. Such panels typically consist of a small group of between eight and twelve independent consumer experts that advises the regulator on the development of policy that directly affects consumers.

Some consumer panels were set up at the same time as the regulator they 'face', such as the Financial Services Consumer Panel (FCA), the Communications Consumer Panel (Ofcom) and the Legal Services Consumer Panel (Legal Services Board), and their functions and funding are enshrined within the institutional arrangements created for these new regulatory bodies. Other panels – such as the Food Standards Agency's, the CAA's and ORR's – have been set up voluntarily by regulators who see them as adding value to their decision making processes.

Although some panels have an external profile and voice, the primary purpose of a panel is not normally to publicly campaign or lobby the regulator for action in particular areas (although a panel may initiate research and encourage a particular policy direction when it sees fit, or challenge the regulator's existing policies or proposals¹⁰). Instead, a panel provides expert advice to the regulator stemming from the collective expertise of its members and, perhaps most critically, is in a position to give input from an early stage in the policy development process due to its alignment with the policy development processes of its regulator.

¹⁰ This work may go beyond influencing a panel's regulator, such as directly addressing firms, consumers and central government. For example, the Communications Consumer Panel (for Ofcom) regularly publishes research and reports aiming to influence service providers' behaviour. Similarly the Financial Services Consumer Panel publishes research and policy papers with a wider audience than the just the FCA in mind.

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Some panels have more formalised relationships with their regulator than others. For example, the Legal Services Board can make formal requests for advice from the Legal Services Consumer Panel, whereas the CAA's Consumer Panel operates more as a confidential sounding board, with much of its advice provided through informal discussions and debate involving CAA staff.

A particular advantage that panels may offer is their stability and dependability. The expertise of panels can be developed over time, allowing them to become involved in complex technical challenges, such as setting price controls. For example, Ofgem's Consumer Challenge Group panel is constituted for the purposes of a price control review. During this process the panel meets with industry stakeholders and formally presents its views to the regulator.

Alternatively, a panel may effectively provide the regulator's Board with assurance on a key theme – the Food Standards Agency for example established an Advisory Committee on Consumer Engagement, which reported annually to the Board on how well the regulator was taking account of consumer perspectives. Panels also provide an opportunity for the regulator to draw on the cross-sectoral experience of members.

Such arrangements are likely to be supported by confidentiality arrangements between regulators and their panels, which are often not in place with external organisations, allowing the sharing of early policy thinking and/or market sensitive information.

There are, however, limitations to the consumer panel model. One criticism is that the nature of panel work tends to attract certain types (described as a “middle class professional early retiree looking to make a public service contribution” in one paper¹¹), meaning that panels may have difficulty in representing the diversity of consumer interests. Another challenge is keeping panels motivated and engaged when their work is often focused on the early stages of policy development where outputs are less tangible and it is therefore difficult to monitor whether their views have been taken into account.

Consumer panels and advisory committees

Pros

Provide independent and expert advice

Can often be relied upon for early engagement at a given date – tend to have a fixed schedule of meetings

Repeated interactions with regulator's staff and policy making process enables members to develop deep understanding of complex sector-specific issues

It may be possible to share more sensitive data with panels than with external groups

Cons

There may be difficulties in recruiting for a non-remunerated panel

A panel will require secretariat resource

There is a risk of members 'going native' after many years of working with the same regulator

It can be a challenge to recruit a panel that is truly representative in its make-up of the population at large and the consumer issues it faces

¹¹ Franceys, Richard W.A. and Gerlach, Esther, (2011), Consumer involvement in water services regulation, *Utilities Policy*, 19, issue 2, p. 61-70. Available at: http://econpapers.repec.org/article/eeejuipol/v_3a19_3ay_3a2011_3ai_3a2_3ap_3a61-70.htm

Direct consumer engagement

Direct consumer engagement allows the regulator to access a different form of intelligence from that provided by consumer organisations. Consumer organisations, especially if acting as advocates with developed policy positions, inevitably act as a 'filter' of any consumer data or information, if only because of the particular nature of their own client groups. When used with this understanding, however, their intelligence can nonetheless be of great value and a low cost resource for the regulator to draw on. However, at times it is necessary for the regulator to be able to source the information itself. This direct control enables it to extract the precise information it requires, for example, in answer to a specific question of policy or for a research piece on a given product or service. There are various ways of conducting such engagement.

Whatever approach regulators adopt, however, they need to bear in mind that there is often a distinction between what people say about their preferences, and what their actions reveal. For this reason, some regulators have started to use techniques from behavioural and experimental economics to improve their understanding of consumers' behaviour, which in turn has helped them to design more effective policies.

In its work on price partitioning, for example, the OFT used behavioural insights to examine the risk of consumer detriment arising from different pricing practices. This work is helping it to determine how to apply the Consumer Protection from Unfair Trading Regulations 2008, which prohibit misleading advertising. Similarly, an FCA study tested customer reaction to different ways in which financial companies might write to customers to offer redress for mis-sold payment protection insurance. The FCA regularly uses this research to inform its discussions with firms implementing redress schemes.

Research

The commissioning of quantitative and qualitative research through market research agencies provides the regulator with a way of obtaining a robust evidence base to inform its work. It can be used for a variety of purposes, from diagnosing the issues that consumers are facing within a particular market, through to developing and testing the efficacy of potential regulatory intervention or remedies.

The use of external agencies enables the regulator to use the best resource and research methodology for a particular research objective and allows the research to be conducted by an independent and objective third party, enabling consumers to be forthcoming and open in their opinions and experiences. The process of recruiting research subjects undertaken by agencies enables them to tailor the recruitment to ensure that it is representative of a chosen market, location or consumer segment. Some research approaches can enable regulators to hear at first hand about consumer experience from a diverse range of consumer segments that they would not otherwise have direct contact with. The use of market research agencies also enables regulators to benefit from their depth of experience and insight of working with other clients and sectors.

Many bigger regulators have dedicated market/consumer research teams which manage all market research projects commissioned and undertaken by the organisation. Such staff bring specialist expertise in their field to ensure that the regulator gets maximum value for money from externally commissioned research and that that the latter delivers the business requirements.

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Standing panel of consumers

An alternative to sourcing different consumers afresh for each piece of research is to establish a standing panel which can be repeatedly used to explore consumer perspectives on different issues. This has the methodological advantage of consistency in the survey population. And for qualitative research the iterative interaction with the regulator may allow the panel members to become more conversant and engaged with the issues at stake.

For example, Ofgem runs its 'Consumer First' panel. This is a standing panel of 80-100 real consumers in 4-5 locations around Great Britain, recruited to take part in several sessions over the course of a year, who can be sounded out to explore emerging thinking and to inform policymaking.

Direct consumer engagement

Pros	Cons
Enables the regulator to retain direct control over the conditions of engagement	Market research is costly to commission
Can source representative consumer samples for market research, including poorly represented groups	Contracts with research agencies require close management
Can be tailored to answer specific questions which may not have been addressed elsewhere or in the public domain	Sourcing non-mainstream consumers for research can be a challenge
Use of agencies enables the regulator to leverage their expertise	
If designed appropriately, engagement can reveal and take account of consumers' behavioural biases.	

Facilitated approaches

Some experts have advocated a role for regulators as a 'facilitator' of engagement between consumers and regulated businesses (typically monopoly service providers) in negotiations over prices and/or service quality. The aim of this approach – sometimes referred to as 'co-regulation' and related to the increasingly powerful public policy agenda around localism and decentralisation – is to reduce the regulator's role to that of a backstop dispute resolution mechanism. Here, the regulator only becomes determinative if agreement cannot be reached through dialogue between consumers and businesses (or if an agreed settlement is inconsistent with the regulator's legal obligations).

Dr. Darryl Biggar, an expert in Australian Competition Law, has claimed that such approaches offer "the potential for better regulatory outcomes, swifter, less litigious regulatory processes, more constructive relationships, and a clearer role for the regulator". This is on the basis that consumers and regulated businesses "know their own needs, desires, and constraints better than the regulator; they have local knowledge of their environment and can negotiate or tailor arrangements which suit them".¹²

Similarly, Stephen Littlechild has argued that facilitated approaches in the US energy sector – known as 'negotiated settlements' – have reduced regulatory burdens substantially:

¹² <http://bit.ly/1dabTfp>

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*Utilities are encouraged to discuss their proposals with market participants. The aim is to understand the products and investment programmes required by customers, and the costs of delivering the required goods and services, with a view to agreeing prices instead of requiring an expensive, time-consuming and uncertain regulatory procedure. The regulator stands by to determine the outcome if the parties fail to agree, and this is a factor that encourages rational discussion and agreement [...] With negotiated settlements, the regulatory burden is generally lower. The outcomes more closely reflect the needs of customers themselves. The scope for innovation is greater because there is no longer the same pressure for regulatory uniformity from one utility to another. Settlements would allow different approaches to be tried.*¹³

However, a number of objections have been raised to delegating primary responsibility for regulatory decisions to regulated businesses and consumers. Some of these were set out by Ofgem in a 2009 working paper, which considered a negotiated settlement approach for its RPI-X@20 review¹⁴ but ultimately rejected it. Ofgem cited concerns about insufficient alignment between the interests of businesses, consumer groups and other parties that would be involved in the negotiations and the interests of final consumers. Ofgem said it was particularly unclear how the interests of future consumers would be represented, and that it had concerns about consumer representatives' ability to "develop a sufficiently full understanding of the diversity of consumer needs and interests to represent the entire consumer view accurately to make trade-offs between, what may be, competing views from different groups of customers". Ofgem was also concerned about consumer representatives' "access to resources, the current levels of expertise of all but a very small number of individual consumer representatives and their appetite to engage in this way".¹⁵

Similarly, the limitations of the CAA's constructive engagement process (see box) have been identified by experts. A key concern highlighted by former BAA executive Mike Toms is that "while the process brought airlines and airports closer, it provides no vehicle for the interests of passengers to be taken into account [and therefore requires the CAA] to "have a method for developing a backstop view of whether any deal is in the best interests of the consumer".¹⁶ That the potential exists in certain circumstances for airlines to reach agreements with airports that may not be to the benefit of their passengers is also a key conclusion of a recent report commissioned by the Department for Transport.¹⁷

Facilitating effective engagement between consumers and regulated businesses with a view to delegating major regulatory decisions clearly requires the participation of effective consumer representatives. These groups must have the resources and expertise to understand complex issues¹⁸, to make trade-offs between competing views from different groups of today's consumers

¹³ <https://www.repository.cam.ac.uk/bitstream/handle/1810/242038/cwpe1142.pdf?sequence=1>

¹⁴ RPI-X@20 was a detailed review of energy network regulation, which resulted in Ofgem's new RIIO regulatory framework.

¹⁵ <https://www.ofgem.gov.uk/ofgem-publications/52006/role-consumers-working-paperfinal.pdf>

¹⁶ <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Airport-regulation.pdf?ext=.pdf>

¹⁷ "The overall fiduciary duty for airlines to maximise the future stream of their profits overrides passengers' price, quality and convenience preferences and means that there can be no automatic presumption that in all circumstances airlines' and passengers' interests will be aligned." The report identifies that interests are unlikely to be aligned in the following circumstances: if airlines have market power; if developments that may increase the degree of competition are being contemplated; if the airport in question is subject to economic regulation (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3196/airline-and-passenger-interests.pdf).

¹⁸ One criticism of consumer organisations is that they "rarely put efficient pricing high on their list of priorities, evidently partly for [misplaced] fear that the result will be higher prices for scarce services" (<http://www.airlineinfo.com/ostpdf31/906.pdf>, footnote 4).

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(while also taking the needs of tomorrow's consumers into account), and to engage in what are commonly lengthy and challenging negotiations.

If regulators are not confident that consumer representatives can satisfy all of these criteria they must find other ways to ensure that all significantly affected interests are represented in negotiations. Ofgem's Consumer Challenge Group (see box) is one example of how a regulator could encourage regulated businesses to engage effectively with consumers. Another example comes from the Australian Energy Regulator, which has published extensive guidance on how it expects energy networks to engage with consumers in developing regulatory proposals.¹⁹

It is also difficult to see how securing the interests of future consumers could be achieved under facilitated approaches to decision making. As another expert on regulation, Dr. Chris Decker, has observed: "There may be an acceptable bargain between current consumers and [regulated firms], but [this may] not be in the best interests of future consumers/citizens." As an example, Dr. Decker points to how utilities and consumers in Florida and Canada negotiated settlements that deferred certain costs onto future consumers and suggests that there may be a role for regulators to "represent" the views of such consumers.

Examples: Facilitated approaches in the UK

Compared to other countries, particularly the USA and Australia, facilitated approaches are less common among UK regulators. However, there is some evidence that things are starting to move in this direction.

In response to dissatisfaction with previous price control processes at regulated airports, since 2004 the CAA has pursued a process called "constructive engagement". Under constructive engagement, the CAA invites the airports and airlines to come to agreements in a limited number of areas, including traffic forecasts, quality of service requirements, and investment programmes. However, the CAA retains responsibility for operating costs, cost of capital and the final price control. It also ensures that the interests of passengers and future airlines are safeguarded, and retains final responsibility for decisions.

For its current price control, Ofwat has shifted the focus of regulation in its sector away from regulating inputs (how much money water companies need to spend) and outputs (what they will deliver for the necessary investment) and towards outcomes (what consumers and society want from water companies). A key feature of Ofwat's outcomes-based approach is that only a handful of industry-wide outcomes will be set centrally, with the remainder being company-specific. These company-specific outcomes will reflect the priorities of each company and its customers and will be determined through the company's consumer research and engagement with its Customer Challenge Group²⁰.

¹⁹ <http://www.aer.gov.au/sites/default/files/AER%20-%20Consumer%20engagement%20guideline%20for%20network%20service%20providers%20-%20November%202013.pdf>

²⁰ Customer Challenge Groups are independently chaired and consist of a cross-section of customers or their representatives. The Groups have a key role in scrutinising company business plans (see: http://www.ofwat.gov.uk/pricereview/pr14/customer/prs_201305ccg).

Effective consumer and wider stakeholder engagement is a core component of Ofgem's new RIIO²¹ model for the regulation of energy networks. Under RIIO network companies are required to take into account the needs and views of their stakeholders in order to develop well-justified business plans. Each network company is required to develop and publish a detailed plan which demonstrates how they will deliver in the interests of both existing and future consumers. Proportionate treatment in terms of the level of regulatory scrutiny and fast-tracking of price control proposals provide strong incentives for companies to submit high quality plans based on effective engagement with stakeholders. Ofgem's Consumer Challenge Group of consumer and environmental experts provides independent scrutiny of companies' business plans, focusing on whether company stakeholder engagement had been tailored and meaningful, how far it had shaped their business plans and whether the plans provided evidence for adopting, or equally not taking forward, particular proposals from stakeholders.

Conclusions

This paper has set out the reasons why effective consumer engagement is fundamental to the development of effective and efficient regulatory policy in line with the objectives given to regulators to promote the interests of consumers. It has also given an indication of the different forms that effective engagement may take. It is clear that regulators should develop a 'mixed methodology' approach to consumer engagement that capitalises on the benefits offered by indirect, direct, consumer panel-based and facilitated forms of engagement, while ensuring that the weaknesses of each of these forms of engagement do not distort the decision making process.

It is also evident that sharing ideas and practice is beneficial for regulators and that, for those employed within regulators to continually develop their skills, an ongoing dialogue is essential. To capitalise on this piece and translate it into positive action, we propose to:

- Continue to use the UKRN Consumer Working Group as a network for sharing good practice on consumer engagement across regulators. Members should agree to support each other in the open forum and bilaterally. This will, over time, move members towards a set of consistently good standards, whilst recognising that the sectors may have different needs and resources.
- Seek to develop the Working Group as an informal centre of professional excellence for consumer engagement for the regulatory sector. This paper and any related or follow-up work to be shared with non-members on request and proactively distributed to those who may benefit from its content – potentially searching out peers within other regulatory bodies.
- Undertake follow-up work on measuring the effectiveness of current engagement, in conjunction with leading consumer organisations.

²¹ "Revenue = Incentives + Innovation + Outputs"

ANNEX – Summary of individual regulators’ consumer engagement work

Ofwat

Direct Consumer Engagement (e.g. market research, standing panels of consumers)	Indirect Consumer Engagement (e.g. engagement with consumer representatives, expert panels)
<p>Example: Ofwat’s Customer Advisory Panel</p> <p>This was set up for the particular purpose of informing its policy development in relation to the price review methodology for PR14. Now that phase of its work is completed Ofwat is exploring how to build on that experience to set up a dynamic mix of mechanisms to hear the customer voice, including potential for:</p> <ul style="list-style-type: none"> - a panel with standing mixed customer membership which might be drawn upon depending on the policy issues on which challenge is sought - stakeholder engagement to hear the expert customer voice through customer representative bodies - spot on line surveys to get snapshot views on issues at any one point in time and - research and intelligence from complaints, both in house and from external sources. 	

<p>Direct Consumer Engagement (e.g. market research, standing panels of consumers)</p>	<p>Indirect Consumer Engagement (e.g. engagement with consumer representatives, expert panels)</p>
<p>Many of Ofcom’s decisions are informed by research evidence collected from consumers. Ofcom carries out a wide range of market research activities of both a recurring and one off nature. This ensures Ofcom has access to a thorough, robust and up to date understanding of consumers in the UK.</p> <p>Ofcom has a duty under the Communications Act to report annually on the state of the UK communications market. We fulfil this duty by publishing the Communications Market Report (CMR). As well as the CMR, we publish a wide range of market research reports each year, including our Consumer Experience Report, International Communications Market Report and our Media Use and Attitudes reports. We also regularly publish the results of ad hoc research projects which have been commissioned to inform specific project work.</p>	<p>Ofcom Consumer Panel – Statutory body set up by the Communications Act to advise Ofcom on policy making and the consumer interest. The Panel incorporates the previously separate Advisory Committee on Older and Disabled Consumers.</p> <p>Nations Advisory Committees – Ofcom maintains staffed offices in Belfast, Cardiff and Edinburgh which, among other things, support independent Advisory Committees that meet monthly to consider Ofcom policy issues and to discuss these with policy officials via video conference facilities / face to face meetings</p> <p>Ofcom also meets quarterly with the Consumer Forum for Communications (CFC), which is open to any consumer stakeholder with an interest in communications sectors. The CFC has an independent Chair, and communicates ad-hoc between meetings via an interactive group website.</p>

CAA

Direct Consumer Engagement (e.g. market research, standing panels of consumers)	Indirect Consumer Engagement (e.g. engagement with consumer representatives, expert panels)
<p>The CAA regularly carries out research into consumers' experiences in the markets it regulate. For example:</p> <ul style="list-style-type: none"> • The CAA's departing passenger survey has been running since 1968 and provides vital intelligence for assessing the market served by UK airports, forecasting air transport demand and planning airport facilities. The survey also provides some limited scope to understand consumers' overall satisfaction with their airport experience, and, through survey 'add-ons', allows the CAA to collect consumers' views and perspectives on specific policy areas, such as disability access and passenger rights. • The CAA also carries out consumer research to enable it to discharge its specific statutory duties in ways that best meet the needs of consumers. This has included: research on consumer satisfaction with service quality and the passenger experience at Heathrow, Gatwick and Stansted in line with the CAA's duty to economically regulate airports with significant market power; and research to understand consumers' information needs when purchasing flights (duty to provide information to consumers). Both quantitative and qualitative approaches are used, with techniques such as stated preference/ willingness-to-pay experiments deployed to understand the nature of trade-offs in consumer decision making. 	<p><u>CAA Consumer Panel</u></p> <p>The CAA's Consumer Panel was established in October 2012 following a review of the CAA's approach to consumer representation, which resulted in the abolition of the CAA-funded, arms-length Air Transport Users Council (although the Council's complaint handling service was retained and subsumed into the CAA). The Panel acts as a 'critical friend' to the CAA, and its independent Chair and eight members, drawn from across the policy landscape, are tasked with providing the CAA with advice and guidance, challenging its ideas and scrutinising its work from a consumer perspective. Unlike similar panels in the legal services, financial services and communications sectors that were established as a result of legislation, the CAA Panel has no statutory basis. This means it has no legal power to require the CAA to consider its advice or challenges to our views and respond publicly. Instead, the Panel was set up as a 'critical friend' with a secretariat that sits within the CAA, giving it the freedom to:</p> <ul style="list-style-type: none"> • look at all of the CAA's activities without the boundaries being set by statute; • decide its own goals and work in the best way to achieve them, setting its workload between responding to the development of the CAA's work and pursuing 'own initiative' projects on issues that may not be on the CAA's immediate agenda; and • easily access key documents, such as agendas and minutes for Board and executive committee meetings, that provide it with the intelligence it needs to plan and carry out its work effectively and gives it insight into the CAA's reactions to its interventions. <p><u>Access to Air Travel Group</u></p> <p>The CAA has also convened a group of representatives from disability organisations to help it gain insight into the needs of consumers with special needs when using air travel services and test possible policy solutions aimed at this group.</p>

ORR

<p>Direct Consumer Engagement (e.g. market research, standing panels of consumers)</p>	<p>Indirect Consumer Engagement (e.g. engagement with consumer representatives, expert panels)</p>
<p>Direct engagement by ORR takes form of market research and stakeholder engagement. Market research draws on a range of quantitative and qualitative methods, with some use of behavioural and experimental economics, to understand consumer decision making.</p> <p>The rail sector benefits from two dedicated publicly funded passenger representative groups, Passenger Focus and London TravelWatch. These groups undertake a range of direct research with passengers and consumers, providing a robust source of high-quality research. ORR also undertakes its own direct market research, this is of two types:</p> <ul style="list-style-type: none"> • Corroborating research, which reviews issues identified by stakeholders but in addition asks questions to understand the causes of consumer detriment and potential remedies. • Overall passenger experience research, which researches the decisions and outcomes for passengers’ through-out the process of comparing journeys, purchasing tickets and travelling by rail. <p>The first type of research is intended to directly inform specific policy work. In these cases, ORR builds on existing research (often by a passenger representative group) that has identified an issue. The character and seriousness of an issue must be corroborated and the possible causes understood, to inform development of remedy options. ORR’s work on passenger awareness and take-up of compensation for delays is an example of this type of research (http://orr.gov.uk/news-and-media/press-releases/2014/regulators-study-shows-three-quarters-of-rail-passengers-unaware-of-compensation-and-refunds-rights).</p> <p>The second type is aimed at informing priorities, identifying upcoming issues and establishing an overall ‘measure’ or ‘benchmark’ of the outcomes experienced by consumers. It includes original research but also draws heavily on collecting and assessing the wide range of existing research. An example is the Rail Passenger Experience report (http://orr.gov.uk/publications/reports/passenger-experience-report).</p> <p>ORR’s recent periodic review of Network Rail’s funding and performance for 2014-19 included a number of stakeholder conferences. The subject matter of these was often technical, for example looking at access charges to use the tracks, and direct engagement by consumers, whilst welcome, was not expected. However, it is important to ensure that the decisions and outputs of the periodic review are clearly explained: the review set punctuality targets for trains and investment for performance and safety. To do this, ORR produced a plain English guide to the review that explained who we are, our role in securing safety and value for money and the key decisions made in the review. This plain English guide was produced following feedback from consumer representatives, to minimise jargon and focus on the key issues affecting passengers.</p>	<p>Unlike other regulators, the ORR does not have a primary duty to protect the interests of consumers. Instead, it has a range of duties, which include protecting the interests of users of railway services. Its other duties are varied, for example to promote efficiency and economy by those providing railway services, to promote use of the railway and to allow businesses supplying railway services to plan with a reasonable degree of assurance. Given the potential for competing duties and outcomes when developing a regulatory policy, it is especially important that the ORR can understand the experiences, outcomes and impacts on consumers.</p> <p>To help with this, it has established a consumer expert panel. The panel’s role is to help the ORR understand consumers’ interests, drawing on the panels breadth of experience to advise on approaches to research, relevant examples or cases from other sectors and any risks or issues overlooked by policy makers. A recent example is discussion of ORR’s role in developing a ticket retailing code of practice. This is aimed at ensuring operators and, to some extent, consumers are aware and abide by key consumer law and industry regulations when selling rail tickets. The panel had the opportunity to consider the overall policy objectives and draw on examples from other sectors that may offer a useful example to ORR.</p> <p>The panel is not a substitute for targeted research or other forms of consumer engagement, but its expertise can help to shape research to ensure policy making properly accounts for and balances the interests of consumers alongside other stakeholders.</p>

FCA

Direct Consumer Engagement (e.g. market research, standing panels of consumers)	Indirect Consumer Engagement (e.g. engagement with consumer representatives, expert panels)
<p>The FCA frequently commissions primary market research in response to policy (and other) project needs, enabling it to answer specific questions about consumers’ attitudes and behaviours to complement the firm-specific knowledge that it also possesses.</p> <p>The FCA’s Market Research function provides the organisation with an in-house resource of market research specialists who work across firm and consumer research projects and provide the link between the research industry and the FCA project team. The team helps to refine the research objectives and methodological approach and works to ensure that the research outputs are tailored to deliver insights of particular relevance to the regulatory environment and the specific needs of an individual research project. The resource enables the FCA to ensure that research agencies get the appropriate level of input from different parts of the regulator and provides oversight and quality assurance of the whole research project. It is also a primary point of liaison for discussions on research with external stakeholders.</p> <p>In addition to classic market research that involves engagement with ‘real’ consumers, the FCA has developed a record in the innovative use of mystery shopping approaches to inform its work. This approach has enabled the FCA to look at sales practices from a regulatory perspective by providing extensive audio and document material for expert assessment. It also opens up the possibility to also explore general insight into the consumer perspective by asking the mystery shoppers questions about the shopping experience.</p> <p>The FCA has organised several events with ‘real’ consumers. These have been arranged in partnership with its consumer group stakeholders. For example it ran workshop events with young unemployed adults in Glasgow and members of the Women’s Institute in Oxfordshire to gain an understanding of the needs and priorities of these groups to inform future FCA policymaking.</p>	<p>The FCA’s Partnerships Team owns the relationships between the FCA and consumer organisations. It advises internal stakeholders on how to engage with them in the most beneficial way to both parties, and then brokers and facilitates that engagement. It tailors bespoke engagement programmes for particular policy or project work. There is an emphasis placed on avoiding duplication of requests to ensure consumer organisations with limited resources are not inappropriately overloaded.</p> <p>The function helps to build/maximise capacity for engagement of its partners. It works with the consumer organisations’ own timetables and constraints, for example by running consultation events during their own annual conferences. It is willing to facilitate consultation responses in non-standard forms if an organisation lacks the resource to submit a full response: by telephone, email and face-to-face meetings. By working with trusted partners across all UK countries it has developed a model of consultation and ‘listening events’ which are accessible to smaller organisations which would not have the resource to submit a full written response or travel to London for a roundtable event.</p> <p>An important part of the relationship-building approach is to internally champion requests on issues of concern to them, such as for speakers and policy updates. The premise being that all are equal partners and the FCA cannot just “take” from consumer organisations – it needs to engage on what matters to them too.</p> <p>A keystone of the FCA’s partnership work is its Consumer Network. It holds biannual meetings at which members are updated on the latest regulatory developments from relevant FCA staff. The format is an open, interactive forum with members given the chance to raise any issues or concerns they may have and update the FCA and other members on their current workstreams and priorities.</p> <p>The FCA has a programme of seconding staff, for free, to certain Network members to build capacity. It has also established formal data sharing agreements with a number of them. The Network membership has also been leveraged to create expert advisory groups on specific issues, such as consumer credit and consumer vulnerability.</p>



Direct consumer engagement (e.g. market research, standing panels of consumers)	Indirect consumer engagement (e.g. engagement with consumer representatives, expert panels)
<p>Example: Ofgem’s Consumer First Panel</p> <p>Running since 2008, this is a deliberative panel which comprises up to 100 people, meeting 3-4 times a year, in 4-5 locations. It gives Ofgem insight into consumer attitudes and allows them to test emerging thinking.</p> <p>Example: Retail Market Review</p> <p>Ofgem was a 2013 finalist in the prestigious annual Awards run by the Market Research Society, the world’s leading research association. This was in the ‘best application of research’ category, for the consumer insight that has underpinned every aspect of Ofgem’s Retail Market Review – described in parliament by Energy Secretary Edward Davey as a ‘rich evidence base.’</p> <p>Ofgem heard from thousands of consumers in 2010-13. Led by the regulator’s Consumer Insight team, and involving numerous Retail Markets and Consumer Policy colleagues, this programme comprised 20 separate projects undertaken with eight different research agencies.</p> <p>Consumer research helped fgem identify and define the problem, develop and test detailed proposals, and refine our solutions. Having done this, it then put in place an approach to monitor and evaluate the effectiveness of the RMR interventions, drawing heavily on further consumer research.</p> <p>This research programme involved a wide range of techniques. Highlights included: testing consumers’ ability to choose between different tariff options, work which included bespoke work with 300 vulnerable consumers; and groundbreaking events at which Ofgem brought together consumers and suppliers to discuss priorities for the new Standards of Conduct that require suppliers to treat consumers fairly.</p>	<p>Example: Ofgem’s Consumer Challenge Group</p> <p>Ofgem’s Consumer Challenge Group (CCG) acts as a ‘critical friend’ to the regulator provides an external perspective to help ensure that price control settlements for energy network businesses are in the best interests of existing and future consumers.</p> <p>The CCG is not a decision-making body but acts in an advisory capacity to help inform the Authority’s decision-making processes. A more intensive form of engagement with experts in energy consumer interests, its members provide input and challenge which might not come through other means such as primary consumer research.</p> <p>For example, during the current electricity distribution price control review, the CCG input its views on network operators’ planned outputs and the impact of their plans on prices. It considered Ofgem’s views of the plans, challenging where it felt necessary. It met with each of the network operators to discuss their plans and presented its views to the RIIO-EDI Committee of the Authority. It also has a seat on the wider stakeholder Price Control Review Forum.</p> <p>Members are appointed as individuals rather than as representing particular organisations. They are typically people who have worked for, or currently work for, organisations representing domestic or business consumers, in energy and/or other regulated sectors, or they have in some other way gained particular expertise and insight into consumer issues. They are appointed for the duration of a particular price control process, rather than being a standing body, although some members have been reappointed to subsequent processes to ensure consistency.</p>