

We need to make our regulators more politically accountable

By Ali Nikpay

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We ought to be wary of unelected officials making decisions that should be left to politicians

Whisper it but there is an argument that the US Federal Reserve is now the most powerful entity in America – not only is it keeping much of US business alive (and the US government afloat) but its actions, some of which may arguably have been illegal, have probably prevented far greater social unrest than we have seen in American cities over the last few months. And its decisions over the next decade may become even more significant if, as seems likely, government spending does not fall back to pre-Covid levels.

That raises a critical question – should unelected, unsackable officials exercise that degree of power in a democracy? Paul Tucker, a former deputy governor at the Bank of England, recently examined this question in his outstanding book *Unelected Power*. He concluded that democracies can accommodate even the most powerful of independent regulators as long as two conditions are met. First, that the regulators' powers are limited to dealing with questions of how best to grow the size of the economy. Second, that they are given clear mandates that ensure that their role is essentially one of implementing government policy rather than developing it.

As Tucker notes, this is easier said than done. The trouble comes when mandates are ambiguous – as often they are – or inevitably draw agencies into determining issues of fairness and distributional justice. Many of these bodies now make decisions that often go beyond the technical application of policies drawn up by politicians and involve value choices about what is or is not in the public interest and whether the views of one group in society should prevail over another. Despite engaging in unprecedented actions over the last ten years, central banks in the US, the EU and the UK had – until very recently – arguably met Tucker's tests.

Their mandates had remained clear and their interventions had been designed to protect the macro economy overall rather than, for example, protecting particular companies or regions. This changed, at least in the US, when Jay Powell, the Chair of the US Federal Reserve, announced that higher inflation rates would be tolerated in part to promote employment for minorities. This change in policy is entirely understandable in the light of both the recent social unrest in the US and the Covid shut downs which have had a disproportionate impact on many minority groups.

However, the decision to tolerate higher levels of inflation in order to promote employment amongst particular groups within society involves trade-offs which clearly should be made by democratically elected politicians



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rather than civil servants. This risks pulling the Fed into difficult political debates which could potentially undermine its legitimacy. Fortunately for the UK, the new Governor of the Bank of England, Andrew Bailey, clearly understands the risks of politicising his role and has deftly avoided falling into the trap into which Jay Powell appears to have jumped with both feet.

What of other independent bodies? Many probably fail Tucker's tests – their mandates are often ambiguous and draw them into distributional questions and issue of high policy. However, whilst their activities are important, their impact is limited to discrete issues or certain parts of the economy.

Not so competition authorities. Like sectoral regulators, their mandates are vague, allowing these bodies to develop policy independent of politicians. However, they have extraordinary powers that extend over whole economies. The European Commission for example can impose fines of up to 10 per cent of worldwide turnover on any company with sales in the EU whilst the powers of the UK's Competition and Markets Authority (CMA) go even further – it has the ability to order the break-up of companies operating in the UK.

For much of the last 30 years this was not a problem. There was political consensus regarding the goals of competition policy and the authorities defined their scope of action narrowly. That consensus, at least in the UK, is now breaking down. In its last election manifesto, the Labour Party signalled that it would adopt a far more aggressive approach to competition enforcement than that favoured by the Conservatives.

More importantly, a number of competition authorities themselves have taken the initiative to adopt policies that are significantly different from those they had applied in the past. The CMA has been one of the most active in this regard and has, amongst other things, moved the UK from having one of the lightest touch regimes governing mergers and takeovers to one of the strictest. According to its critics, it is also stretching – arguably well beyond their limits – its consumer enforcement powers.

Ignoring the merits of these policy innovations, the question is whether the CMA has the democratic mandate to make such significant changes. On the one hand, a degree of political oversight is provided by Parliamentary select committees, albeit in a relatively light way. Moreover, as with the Bank of England, ministers appoint the most senior officials. More importantly, the Treasury determines the CMA's budget.

Beyond that, and other than in cases where it imposes a fine, the CMA is a power unto itself with only limited judicial supervision by the Competition Appeal Tribunal. For example, the CMA can impose any requirement it deems necessary on companies which operate in markets which the CMA has found to be insufficiently competitive. That includes the power to force firms to sell part of their business, as it did when it required BAA to sell Gatwick Airport. To challenge the CMA's decision in these cases, those negatively affected have to show that it acted unreasonably. In most cases this is almost impossible to do.

Is it time to reconsider whether a body as powerful as the CMA should be more accountable to the courts or elected politicians? For most experts the answer is an unequivocal no. For them, the CMA is essentially a law enforcement entity like the Crown Prosecution Service and should be treated as such.

In reality, however, only a part of the work done by the CMA is law enforcement; many of its interventions involve decisions that require trade-offs and value judgements. For example, should a large firm be able to pass on cost reductions to consumers even if that leads to smaller, less efficient companies in regions with high levels of unemployment going bankrupt? Similarly should the CMA allow a merger between foreign companies that leads to lower prices for UK consumers but harms a strategically important UK business in the process? These are, ultimately, political questions that cannot be answered through technical analysis.

The recent announcement of a review of the competition regime by the thoughtful former minister, John Penrose provides a real chance for ministers to consider whether changes need to be made to increase the political accountability and

legitimacy of the UK system. And there is a proven model from which Penrose can draw inspiration – ironically, it's the one the UK had before the adoption of the 2002 Enterprise Act by New Labour.

Under that system one body (the Office of Fair Trading) was responsible – independent of ministers – for law enforcement work whilst a second body (the Competition Commission) investigated the more politically sensitive matters, like mergers, and took most decisions but left ministers with the ability to intervene to protect the wider public interest. That system wasn't perfect – for example like the CMA, the OFT not only investigated whether the law had been broken but also what punishment should be dished out. But in terms of political accountability the old

system ticked a lot of boxes.

Changes along these lines will be fiercely resisted by many. They will fear that politicians will meddle in issues that require more considered deliberation than is sometimes possible in the rough and tumble of day-to-day politics. That fear may well be justified. However, the increasing polarisation seen in many Western countries requires new ways of thinking about the powers of regulatory institutions and whether fundamental reform is needed to systems that were developed in a gentler time.

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