COLLABORATIVE REGULATION:
WHICH IS THE ROLE OF THE REGULATOR IN COLLABORATIVE REGULATION?

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Abstract

Purpose – The purpose of this paper is to analyze in theory and practice the extent and ways the role of regulators in collaborative regulatory systems differs from their roles in more traditional, state-led regulatory systems.

Methodology/Approach/Design – The descriptive and analytical methodology of this paper is supported by primary and secondary sources of research data: books, newspapers, official documentation, independent reports, and private stakeholders' analysis. Moreover, field experiences of eminent professionals and senior civil servants have also been taken into consideration to reach conclusions and provide useful information.

Findings – Main finding is that the regulator in collaborative systems acts as a facilitator or mediator, one who traces and deploys the regulatory activity inside a network of participation, and less as the wielder of state-authority.

Practical implications – The analysis in this paper can be of considerable use to all actors who deploy regulatory activity in order to deliver better regulatory outcomes to society, performing newer and different techniques, assessing the collaborative regulator's role in practical cases.

Originality/Value – This paper analyzes the role of the collaborative regulator by addressing the differences and similarities between collaborative regulation and an array of regulatory styles and approaches.

Keywords: Collaborative Regulation. Role. Regulator. Command and Control. Shift.

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INTRODUCTION

The regulatory activity is designed and performed by an array of strategies, techniques and actors. Its ubiquity can be observed in a daily basis; from "eco-friendly" labelled food to public transportation inspection, from fees paid when using Internet to quality of water. Thus, challenges and demands faced by regulators are complex and dynamic. Regulation shapes and is shaped by the permanent interactions between the State and citizens.

Moreover, the necessity to respond to pressures such as globalization of financial markets, the spread of new telecommunications systems, regulatory competition between jurisdictions and pressures towards more transparency[1] and accountability in Governments' decisions, denote an ever-present concern that regulators may improve their activity and deliver better public outcomes.

Among a sort of different ways to deploy regulation and ensure compliance, collaborative regulation seems to be in line with the decentred analysis of regulation, new governance and better regulation frameworks.

The objective of this paper is to analyze in theory and practice the extent and ways the role of regulators in collaborative regulatory systems differs from their roles in more traditional, state-led regulatory systems. Main findings of this work suggest that the regulator in collaborative systems acts as a facilitator or mediator, one who traces and deploys the regulatory activity inside a network of participation, and less as the wielder of state-authority.

The descriptive and analytical methodology of this paper is supported by primary and secondary sources of research data: specialized doctrine about regulation and governance, newspapers, official governmental documentation, independent reports and private stakeholders' analysis. Apart from referencing a variety of literature, field experiences of eminent professionals and senior civil servants have also been taken into considerations to reach conclusions and provide useful information.

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[1] Although not the focus of this paper, the last financial crisis may also be appointed as a reason to claim more decentered views because "blind faith" on rating agencies and the governments' incapacity to interpret "market signals" were decisive to the outcomes. Additionally, the Organisation for Economic Co-operation and Development (OECD) and the European Commission (EC) have become concerned with decentralized governance, both in relation to their own work and that of governmental regulatory bodies. At the UK level, the government has provided recommendations for increased regulatory transparency, including its Principles of Good Regulation.

This paper will be structured as follows. The first part will focus on the literature review explaining the main ideas, theories and concepts that build the collaborative approach. It will present its main features and contrasts it with more traditional, state-led regulation. Additionally, it will reveal the relationship between collaborative regulation and collaborative governance. Lastly, it will describe what is necessary to implement and sustain the decentred process, as well as the theoretical description of the collaborative regulator's role.

The second part demonstrates that the participative process can be identified in many other regulatory techniques, for example: self-regulation, multi-level regulation and principles-based regulation. Similarities and shared concerns between collaborative regulation and enforcement strategies such as responsive and smart regulation will be also delineated.

The third part will focus on collaborative regulatory policies involving telecommunications in Brazil and environmental matters in Australia and in Canada. The role of regulators will be scrutinized by comparing and contrasting design, implantation and outcomes between the selected cases. These cases will discuss this hypothesis by examining regulators' role, pointing out the differences between their roles in collaborative systems versus their roles in the classic command and control regulation.

Finally, the conclusion intends to contribute to the discussions about how to deliver better regulatory outcomes to society, performing newer and different techniques, assessing the collaborative regulator's role in practical cases.

PART I

Explaining Command and Control and Collaborative Regulation: The Main Features and Hurdles of Collaborative Regulation, What Differentiates It from Traditional Regulatory Approaches and Its Relationship with Collaborative Governance

Command and control regulation is designed to determine standards and obligations to be followed, reflecting direct state's intervention.

The essence of command and control regulation is the exercise of authority trough standards backed by punitive sanctions (BALDWIN et al., 2012). It means rule setting that generates obligations to accomplish and sanctions in case of not achieving the determined criteria set.

The command and control regulator defines what must be achieved by the regulatees, when and how the regulatory activity ought to be pursued.

Consequently, this regulatory modality requires the development of detailed norms and regulations, demanding from the regulator to have an excellent knowledge of the activity to be oversight.

State's intervention in all stages of regulatory activity, reveals an almost omnipresence of the regulator and, in some cases, regulatees' managerial decision-making power may be absorbed by the regulator.

The command and control regulator, besides determining which rules must be complied with, is also responsible for verifying if these rules have been effectively observed and, if not, applying the correct sanction to the infringer.

Hence, the regulator's power to persuade and convince is exercised through the possibility of applying sanctions.

Jackson (1997) describes collaborative regulation (CR) as a mixed regime which incorporates elements of both external regulation (the principles, rules, expectations and conditions which define the scope and nature of regulation as determined by a regulatory authority) and institutional self-regulation (the principles, rules, expectations and conditions which define the scope and nature of regulation as determined by a given institution, which is not subject to external regulatory controls).

Hence, the reach and style of regulation are partly imposed and partly determined through processes of negotiation, between the various components of the regulatory structure.

This concept comprises a spectrum of situations, which involves interaction and negotiations of independent external authorities (like professional and statutory bodies) and independent agencies with responsibilities for accreditation[2]. In this frame, responsibility and authority for maintaining the integrity of the regulatory framework are shared between external regulators and institutions.

As mentioned above, the regulatory process is complex and aggregates, among others, law, economics, public management, engineering, sociology and politics. Likewise, collaborative regulation is not a black and white activity. It is embodied within decentred and pluralistic approaches of regulation.

The decentred analysis of regulation (BLACK, 2001) recognizes a shift in the locus of the regulatory activity from the state to other multiple locations and a change in nature of the limitations of the state's competence.

It provides greater scope to other non-state actors to participate in diverse steps of regulation. This may lead to more responsive, legitimate and effective results than the traditional strict approaches. Consequently, deliberation, cooperation and the diffuse learning process are capable to provide better and

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[2] Independent agencies may also be responsible for providing public assurance of quality and standards, which have a considerable degree of autonomy over their own activities.

innovative solutions to common regulatory concerns when utilizing a sort of different knowledge, experience and skills.

Government's monopoly on the exercise of power and control is fragmented and divided among stakeholders. Black (2001) argues that there is regulation in "many rooms"; the regulatory activity is planned and deployed as joint efforts in pluralistic and democratic debates.

This leads to regulatory conversations[3] between the ones in charge of regulation and the ones affected by it (BLACK 2002). Regulators – regulatory agencies, central bank authorities, state departments, national and transnational private institutions, ministries and cabinets provide regulatory conversations with interested regulatees – different levels of government, collective and trade associations, workers unions, technical committees, professions boards, firms, industry groups, businessmen, non-governmental organizations (NGOs) and citizens.

Therefore, CR acquires a communicative, keep talking approach in order to accommodate the different and sometimes sharp divergent interests of each participant.

CR approach encompasses a number of principles. First, the complexity principle, because CR entails a constant dialogue and deliberation in the regulatory process between social and political actors.

Second, fragmentation and construction of knowledge since CR recognizes that no single actor has all the knowledge necessary to solve social problems.

Third, the fragmentation of the exercise of power and control as CR approach acknowledges that social actors have their autonomies and are interdependent; regulatees not only follow rules, but also effectively take part on the regulatory agenda (which may reduce the occurrence of unintended consequences and regulatory loopholes).

Finally, the blur between the public/private distinction principle, because under the CR approach regulators and regulatees work together to find solutions to common problems (which may lead to less blame shifting among stakeholders).

Despite that, CR approach is based on confidence, commitment, reliable communication and flexibility rather than uniformity, the path towards openness, transparency and shared responsiveness may be tortuous and troublesome.

The collaborative process may raise doubts about whether participation represents a means to better decisions through the effective assembling of information by the regulator and non-state stakeholders, or whether participation

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[3] Regulatory conversations are the communicative interactions that occur between all involved stakeholders in the regulatory context.

is an end in itself, which may raise concerns regarding independence and autonomy.

Yet, there are limits to deliberation and inclusiveness because relying on too many actors with diverse interests[4] and agendas can lead to lower common denominator, be time consuming and blur the focus of discussions.

That is why coordination between top managers and staff members of a regulatory body and between them and non-state stakeholders becomes necessary. Equally, power differences between stakeholders may undermine the process. In order to balance stakeholders' power, regulators should provide adequate technical support to the less resourced ones.

Additional concerns are that both regulators and regulatees must detain a deep grasp of regulatory matters (which is time and resources consuming) and citizens may complain that the state is not performing its public responsibility when "privatizing" public interest and responsibilities. The selected case studies and examples will illustrate these and other practical issues.

Collaborative Regulation and its Intrinsic Relationship with Collaborative Governance

The study of collaborative governance, new governance or governance 2.0 is intrinsically linked to collaborative regulation because both provide a framework based on participative actions among states agents and other stakeholders.

Ansell & Gash (2008) define collaborative governance as "a governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets.

Zadek's (2008) definition: "arrangements that involve a deliberative multi-stakeholder collaboration in establishing rules of behaviour governing some or all of those involved in their development and potentially a broader community of actors. Collaborative governance could cover one or more of the elements of rule setting – for example, design, development, and implementation, including enforcement.

As one may observe, despite the fact that collaborative governance draws its focus in broader issues and CR focuses on specific regulatory matters, the

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[4] One example occurred in the Food Standards Agency (FSA) of the United Kingdom. The consultation on genetic modified foods showed tensions between a scientific approach to safety and openness to consumer views.

former supports the latter, as regulation is one of the ways that governments put in practice its governance schemes.

Some authors have been driving their efforts towards the study of collaborative governance.

Freeman (1997) scrutinized important cases of collaborative governance regarding health, safety and environment, appreciating regulators' role to the outcomes. Cashore (2002), Cashore & Stone (2012) and Gunningham (2009) have developed their studies focusing in the intermeshing between environmental policies and collaborative governance, assessing regulators' role in developing participatory policies.

Ansell & Gash (2008) analyzed 137 cases of collaborative governance across a range of policy sectors, identifying variables that influence whether or not this mode of governance could produce successful collaboration. Abbot & Snidal (2009) deployed a broader analysis about new governance, concluding that international regulatory systems should be driven by intergovernmental organizations

Rasche (2010) investigates how existing collaborative governance arrangements enhance corporate responsibility. Ansell (2012) interprets collaborative governance as a democratic reconstruction and claimed that regulatory negotiation helps stakeholders to achieve agreements in complex disputes and Findlay (2014) explores motivations for collaborative regulation in the context of environmental sustainability assessing the role of corporations towards pluralistic directions.

In a broad perspective, the collaborative activity[5] is about multiplicity and hybridity. It may be used to manage conflict, improve coordination, and exploit creativity within an environment with many stakeholders engaged in multilateral interactions about multi-dimensional issues.

The collaborative activity is a governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented and deliberative and that aims to make or implement public policy or manage public programs or assets.

In this context, CR pursues collective problem solving with broad participation. The sharing of regulatory responsibility involves cooperation between a diversity of private, public and non-government institutions, which try to achieve far more collective goals and engage stakeholders to coordinate, adjudicate and integrate the objectives and interests of multiple actors.

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[5] Present in both collaborative governance and collaborative regulation.

There are no clear boundaries between state and civil society due to participatory dialogue, consensus-building practices and to some extent, a shift from state's hierarchy to community's heterarchy. For instance, Prosser[6] (2010) outlines the regulatory participation and deliberation as an enterprise, emphasizing collaboration with government, discretion and responsiveness.

The Role of the Regulator in Collaborative Regulation

The role of the regulator changes because collaborative regulation yields a move from top-down command and control regulation to a decentralized and polycentric approach. Under a command and control approach the "classic" regulator works within the "pyramid of regulation" or regulatory triangle. The regulator is required to find the right balance between stakeholders needs (firms on the one side and other social actors on the other) and to follow state's policy. The regulator is the agent of the principal's authority (the State).

In contrast, the collaborative regulator must build and sustain regulatory networks. It could be argued that in these networks both regulators and regulatees have agent and principal roles. The regulator behaves like a facilitator: adjusting, balancing, structuring, negotiating and enabling regulation. This multi-task professional is the one in charge of reuniting stakeholders, listening to them, refining their ideas, trying to pacify their divergences, proposing common efforts and targets and remaining open and inclusive to possible new stakeholders' ideas. The regulator provides a forum in which participation and deliberation can take place (PROSSER, 2010).

The approach of the collaborative regulator is softer, lighter and friendlier than in command and control regulation. The regulator acts as an integrative orchestrator because whenever necessary he behaves as the leader of the process and engages face-to-face dialogue, facilitates trust-building between stakeholders and develops credible commitments and shared understandings. Under the CR approach the regulator and regulatees are not rivals but partners. The regulator performs not as us versus them but us and them.

Leadership skills are crucial to set and maintain clear ground rules, facilitate dialogue, explore mutual gains and to ensure integrity in the consensus-building process. When the regulator is able to build an environment based on communication, commitment and shared understanding the preparation, policy

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[6] By his view, the major role of the regulatory institution is to provide procedural means for resolving problems, either through a forum for compromise of different views or as a source of learning to seek a consensus.

development, and decision-making progress will be easier and faster accomplished. This symbolizes the shift from regulators commanding and regulatees following; it shows a change from hierarchical regulation to an egalitarian one (HOOD, 2000). As result, this brings a new balance amongst actors but also raises new possibilities in terms of accountability, responsiveness and transparency matters.

Regulators can act to "stable forces" when necessary, however interventions usually are indirect and less intense than in command and control regulation[7]. It is important to express that CR does not mean lack of state authority at all. The focus of CR is not to deal with endless talks about regulation; but rather to organize effective conversations towards common endings. CR does not exist in anarchical environment, rather requires a democratic and organized one.

PART II

The Relationship between Collaborative Regulation and Other Regulatory Techniques and Enforcement Styles

The second part will focus on the similarities between collaborative regulation and other regulatory techniques and enforcement styles, stressing their essential features and the role of the regulator.

Collaborative Regulation and Principles-Based Regulation

Following Principles-Based Regulation (PBR) agenda, regulators only set general guidance by means of general principles[8] and regulatees are instructed by a kind of soft orientation; the regulator avoids detailed instructions and his attention relies more in outcomes than in means (BALDWIN et al., 2012).

PBR entails CR approach because it is constructed by repeated and reasoned interchanges between different actors; the objective is to provide clear guidance and to solve disputes with purposive interpretation and integration (Black, 2008). Similarly, the practical use of PBR shares concerns as the CR because both require regulators' huge knowledge about key issues on which regulation should focus and regulatees' strong sense of responsibility to use the power and flexibility that is given to them (which adds innovation and effectiveness to the activity).

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[7] This and other issues regarding compliance and enforcement will be analyzed later.
[8] In the UK, the Financial Services Authority (FSA) is appointed as the leader of regulation based in principles and offers relevant experience to be observed. There are other regulatory bodies operating by PBR basis, for instance, OFCOM (UK), the U.S. Commodity Futures Trading Commission and The U.S. Securities and Exchange Commission (SEC).

The relationship between regulatees' compliance and regulators' enforcement provides useful lessons to evaluate both CR and PBR challenges. In order to achieve proper credibility levels, regulators must deliver some authoritative messages to both market and society. Nevertheless, the main point is that regulators cannot be over punitive; otherwise, the regulatory process may turn into rigid command and control regulation.

As stated before, PBR demands closer relationship between regulators and firms. This adds additional difficulties depending on the firm's level of willingness and capability to comply. A succinct explanation may clarify this frame.

When regulators handle with firms that are well-disposed to comply and highly capable of doing so, the relation between both sides is backed in trust and mutuality. There are no misunderstandings or communication flaws. It results in real collaboration.

When facing a well-disposed and low capable firm, regulators may face some problems. It is known that PBR requires great level of expertise on firms; however, some of them fail when trying to achieve regulatory outcomes due to lack of wisdom or resources. One possible solution to this case is based on regulators keeping constant contact with firms, especially with new entrants or small undertakers, which resembles the communicative regulatory path.

Double complications are faced when regulators deal with ill-disposed and low capable firms. These firms are unwilling to comply and also do not know or have the necessary skills to achieve the outcomes outlined by principles or agreements. These untrustworthy ones may be controlled by hard command and control basis, which as it will be reviewed latter on the study cases, may be inevitable.

Finally, regulators also deal with firms that are ill-disposed and highly capable to comply. Even principles being harder to manipulate than rules and PBR avoiding creative compliance[9] there are firms that are well disposed to disguise or conceal its activities, looking for possible advantages. Although they have high layers of knowledge and know very well how to interpret principles, they are always assessing the benefits of no compliance. The remedies to struggle against them are a combination of detailed rules and styles that are more general.

Collaborative Regulation and Self-RegulationBlack (2001), defines self-regulation as collective arrangements that may be non-legal, and/or entail no

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[9] It refers to the process by which firms can seek to structure their arrangements or activities in a way that complies with the detailed requirements of rules but which, while compliant, undermines or avoids their purpose.

government involvement, bilateral arrangements between firms and the government, unilateral adoption of standards, the involvement of industry in rule-formation, neo-corporatist arrangements in which the collective shares in the state's authority to make decisions about standards of conduct, monitoring, and enforcement, but in which the relationship with government may vary, and/or in which those other than the persons being regulated may play a role (auditors, stakeholders).

Despite other definitions[10]and labels of self-regulation, what is relevant for this study is that, as observed in CR, self-regulation may arise from non-governmental actors. Self-regulation entails the existence of regulatory systems that exist separately from strict government ordering and uses decentred rule making. In addition, self-regulation may operate in an informal, voluntary manner, or it may involve bidding rules.

Self-regulation occurs when private entities plan, design and effectively deploy actions to meet social targets. They execute their internal rule making efforts seeking to achieve specific public goals set by government (regulators). This regulatory technique is also issued according to CR templates because it pursues innovative and flexible solutions using regulatees (firms, in this case) expertise and experience (BALDWIN et al., 2012).

Since regulatees must have a strong grasp about their own activities, they are able to design and implement more specific and targeted rules and compliance norms. There is no "hit them all" regulation (LODGE & WEGRICH, 2012). This may lead to less costly and more effective and efficient measures as well as reduce the regulatory burden (COGLIANESE & LAZER, 2003). The hybrid use of public and private resources or co-production regulation may be seen as proof that the state is not omnipresent and must employ resources outside public sector to meet broader regulatory goals (GRABOSKY, 1995).

Examples of the use of this regulatory method are the United States' Agencies Food and Drug Administration (FDA) and the Environment Protection Agency (EPA). Difficulties arise in the process when firms, especially small or medium ones, do not have skills or resources necessary to follow self-regulation schemes.

Self-regulation, likewise CR, will not be successful with no faith and responsibility between firms and regulators. One way to tackle these concerns is to broaden regulatory conversations in order to spread the knowledge among

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[10] Depending on the author and on the point of view, self-regulation is also called: management-based regulation, co-regulation, new governance principles, enforced self-regulation, industry or professional self-regulation, output or process-based regulation, quasi-regulation, quasi-law.

stakeholders, remove suspicious barriers and strengthen trust[11] and loyalty within the regulatory network.

Collaborative Regulation and Multi-Level Regulation

Collaboration has a special place in multi-level approach in the extent that it is designed after rounds of discussions and to be fully implemented it requires trust, shared understandings and common goals.

International regulatory processes are having an ever-increasing impact on European and national regulatory activities. This section of the paper will focus, first, in multi-level regulation in European context[12] and then moves to global cases and examples.

The Regulatory State in Europe has been challenged in the last three decades, among other motives, by transnational technological and economic changes, overseas regulatory competition and European Union/European Commission (EU/EC) pressure towards a common regulatory agenda (liberalization of markets, privatizations of utilities, creation and empowering of regulatory agencies) (MAJONE, 1997) (THATCHER, 2009).

This framework triggers supranational responses by regulators that may be performed by multi-level or multi-tier regulation, and it occurs when, for instance, the EC issues its directives, regulations and decisions that should be followed by its Member States (MB).

The Directives (also called green or white papers) possess a striking importance because they set up general guidelines in a range of subjects (financial, telecommunications, electricity, medicines, pesticides) and at the same time let discretion to the MB to implement the regulations in the way that they judge more appropriate[13]. The European Court of Justice (ECJ) plays a similar role when deciding supranational lawsuits and thus reducing uncertainty about international legislation.

Following decentred basis, multi-tier regulation is also performed at international level by non-state institutions such as World Trade Organization (WTO), World Health Organization (WHO) and International Standards

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[11] Gunningham and Sinclair about the Australian mines case: Two mine companies should follow similar standards; however due to the lack of trust between employees and the principal, one firm performed well and the other collapsed.

[12] This paper chose to focus in the European cases due to their pioneering and prominence of researched bibliography.

[13] When the papers should turn into national regulation, depend on the subject and institutional features of each country.

Organization (ISO), which emit worldwide certifications, labels and guides regarding their activities.

Environmental field provides flourishing cases of multifaceted regulation as well. Due to failure of intergovernmental negotiations regarding environmental concerns (particularly after RIO 92), a move from stated-centred intergovernmental discussions to a non-state driven one is noted. Thereafter, institutions like Word Wide Foundation (WWF) and Greenpeace issue patterns and certifications (among many other activities) adopted by nations worldwide.

Moreover, transnational regulation also plays an important role regarding standard setting, information gathering and behaviour modification because it can be used as cognitive and financial shortcuts especially for less wealthy/equipped nations.

Collaborative Regulation and Responsive Regulation

Ayres & Braithwaite's (1992) remarkable theory arose precisely from the necessity for a response to two opposing currents: the traditional model, in which the state exercises its authority based on punitive sanctions (such as in command and control regulation) and deregulation, defended by those who believed that stakeholders could take self-regulatory measures.

The Authors presented the outlines of responsive regulation, in which the regulator has a series of regulatory remedies to be applied according to the regulator's greater or lesser willingness to cooperate.

Following this schedule, they elaborated the so-called regulatory pyramid, which has become a classic approach within the theory of regulation, and symbolizes the fundamentals of responsive regulation.

The responsive regulator seeks the correct understanding between punishment and persuasion. The base of the pyramid represents resolution without adoption of sanctions, achieved, for example, through education or persuasion. The remaining steps symbolize application of mild (warnings, notifications) and moderate sanctions (fines, conduct adjustments) up to severe sanctions (expressive financial fines or specific obligations).

Responsive regulation theory advocates that regulation is provokable and forgiving (AYRES & BRAITHWAITE, 1992). Both responsive and collaborative regulation share the idea that punishment to regulatees' failures should be used as a last resort and more severe sanctions would be avoided as far as regulatees cooperate with the regulator's enforcement.

Hence, the collaborative path through education, persuasion and warning should be primarily tried. The role of the responsive regulator is to find the right balance between punishment and behaviour-modification using softer measures.

However, likewise CR, responsive regulation does not imply lack of power and control. When regulators detain political support and necessary resources, they are able to escalate the enforcement pyramid towards more punitive measures to correct or keep the stability of the regulatory process. Thus, the regulator creates a network of commitment with regulatees and uses the right enforcement method against different types of misbehaviour, avoiding over sanctioning a simple misdoing or under punishing a serious failure.

As one may observe, some hurdles are shared between CR and RR. For instance, in critical situations there might be no time to start the enforcement process with lighter measures and when dealing with amoral calculators (KAGAN & SCHOLZ, 1980), the ill-disposed and well-resourced ones, the communicative approach may be time consuming and no effective.

Collaborative Regulation and Smart Regulation

Smart regulation, aiming for a new paradigm capable of transcending the regulation-deregulation dichotomy, goes beyond responsive regulation because it is based on a broader variety of regulatory actors (GUNNINGHAM et al., 1998).

Smart regulation design combines a mix of motivational and informational mechanisms and instruments, voluntary instruments, market instruments based on price and property rights and properly regulatory instruments (GUNNINGHAM & YOUNG, 1997).

It involves more than the two usual ones – state and private entrepreneurs. Smart regulation emphasizes the need to take regulation beyond the punitive pyramid and to think laterally where necessary - for instance, by placing more emphasis on ex ante controls such as screening or considering whether resort to non-state controls will work better than state sanctioning.

The pyramid of smart regulation is three-sided – state, businesses (as self-regulators) and quasi-regulators (industry associations, professional bodies, collective associations, NGOs) and considers the possibility of regulation using several instruments implemented by a number of parties.

This pyramid is built upon four fundamental axes: a) its positioning beyond the antagonism between regulation and deregulation; b) valorization of self-regulation, enforced self-regulation and compliance programs; c) obedience to regulatory republicanism, in which private and public sectors, through deliberation and constructive participation, can contribute to the regulatory process; and d) a common vision of legal pluralism.

The relationship with CR comes from the fact that smart regulation adds more creativity and flexibility to the process and requires trust, commitment and shared understanding of each participant's role and duties. Furthermore, it is easier to apply and less costly than responsive regulation because when escalating

the enforcement pyramid the regulator can move not only up to a single face of it but also from one face to another (from a state control to a corporate measure using other professional body instrument).

As any other enforcement technique, smart regulation is not free of criticism. The creation of regulatory networks and the process of coordinating responses across three different faces of the pyramid may be difficult due to information management, clarity of messages to regulatees, resources and time consumption and political dissimilarities of actors.

Therefore, the collaborative professional has a menu of regulatory measures and enforcement styles that can be used alongside CR in order to delivery better results to society.

PART III

Collaborative Regulation in Practice: Cases

The third part will be structured as follows: Section 1 analyzes three environmental Australian cases of collaborative regulation presented by Gunningham (2009), highlighting the importance of regulators' role in each situation. Moreover, it scrutinizes similarities and differences among regulators' activity within the three examples.

Section 2 assesses one telecommunications case, held in Brazil, addressing how regulators performed. Furthermore, it examines similarities and differences among regulators in this case and in the three Australian cases presented above.

Section 3 evaluates two environmental cases, presented by Sranko (2011) - one from Australia and the other from Canada - addressing regulators' behave in both cases. Additionally, it analyzes similarities and differences in how regulators acted in these two situations and in the other mentioned cases.

Section 4 appreciates the role of regulators in all the case studies, comparing how they have deployed their activities and what separates or approaches them from the collaborative regulator.

The five environmental case studies (four in Australia and one in Canada) were chosen because of their public prominence and relevance to the topic. The Brazilian telecommunications case was selected because it provides interesting data for investigation and it is useful to illustrate and compare the use of CR in different continents, purposes and sectors.

Section 1: The Australian Cases

The Australian Government often shows innovative strategies regarding its domestic affairs, for instance, the pioneer use of new public management (NPM). They also took the lead in the exercise of collaborative regulation when dealing with environmental issues.

Environmental Improvement Plans

The first Australian case is the Environmental Improvement Plans (EIP), designed and implemented by the Victorian Environmental Protection Authority (EPA) to reduce polluting emissions from major industrial sites.

It involved constructive proposals from local governments, the EPA, polluting firms, non-government stakeholders and interested citizens represented by the Community Liason Committee (CLC).

Its newness from command and control regulation was based on the prevention of pollution rather than the punishment of polluters; a decentred organization bringing not just regulators and firms but also other actors, such as NGOs and industry associations; and faith on greater polluters' self-management.

The planning and decision processes took advantage of the CLC's expertise on local environmental issues, allowed citizens oversight (apart from participation) and was backed on EPA's direct intervention in the cases of firm's misbehaviour or under fulfilment of targets.

EPA developed a less strict role because they let interested stakeholders and regulated enterprises discuss towards common outcomes. Moreover, as will be soon stressed, the maintenance of EPA's sanctions as a guarantee of compliance was of huge significance to the case's success.

Neighborhood Environmental Improvement Plans

The second case is the Neighbourhood Environmental Improvement Plans (NEIP), also held by the Victorian EPA. It was deeper than EIP because it engaged in diffuse and complex environmental problems, involving multiple actors at a neighbourhood geographic scale in order to deal with spillover effects[14].

It was underpinned in five main criteria. The first was to look for flexible solutions where the environmental problems occur (local level). Second, similar to EIP, the plan was to facilitate community-based process of decision-making and action. Third, encompassing the first two conditions, collaborative solutions were developed between multiple stakeholders in the community[15]. The fourth and most important condition was that the collaboration was voluntarily.

Although no stakeholder was obliged to participate in the process, once they engaged their tasks were binding and thus required to be met. Penalties for

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[14] Spillover effects are a secondary effect that follows a primary effect and may occur in distant time or place from the event that acuse the primary effect. It is a common outcome regarding environmental issues.
[15] Including stakeholders that contributed to the creation of the problem and those who tried to solve it.

breaching these agreements were much less tough than the ones applied by traditional enforcement.

Finally, using community participation, voluntarism and a broader decision-making activity, NEIP was seeking to mobilize new resources to achieve effective environmental outcomes, especially those at local level.

Regional Natural Resource Management

The third Australian case is the Regional Natural Resource Management (NRM). It was even more challenger than NEIP because it implied multiple stakeholders, multiple levels of government, industry and civil society engaged in a larger neighbourhood scale.

Its main target was to elaborate and carry out natural resources management within regional bodies composed of landholders, regional communities, NGOs, industry, local, state, territory and Commonwealth governments.

This case promoted regulatory networks, characterized by fragmentation of priority setting, focus on plural arrangements and knowledge exchange. Regional NRM received substantial public funds and denoted that each ecosystem/environmental issue should be analysed by distinct views.

At last, Regional NRM showed a combination of different levels of government, non-state actors and stakeholders, pointing out the role of federal government as coordinator and facilitator of regional decision-making.

Analyzing Outcomes and the Role of Regulators

The EIP case was the one with less participants and the role of EPA was decisive. EPA defined the main features of the collaborative approach (structure and functional definition of a CLC, size and nature of participating enterprises); it offered incentives (regulatory reliefs) to firms participate in the discussion or even compelled those (by indicating that tougher inspections could happen in case of no show) and was prone to deploy direct intervention.

Its success can be measured in the extent that EIP empowered local communities, increased pressures on polluters to improve their performances and through effective communicative process, enhanced the relationship between EPA, firms and stakeholders. All these outcomes occurred due the EPA's strong role. In this case, the trustful mood was built under the willingness of the EPA to deploy more punitive actions to correct failures in the collaborative process.

The outcome of the second case was different. EPA lacked proper enforcement and incentives to persuade firms to congregate towards effective regulation. Despite some positive points (bringing together for the first time government, businessmen and non-state actors to share concerns and solutions), NEIP failed because it relied on voluntarily collaboration to deal with different

and sometimes heavily divergent interests - clean environment x spillover effect x industry's profit. There were no incentives or advantages to participate and the sanctions applied (informal disapproval of other participants or naming and shaming) did not concern key polluters (such as small and medium firms).

In the regional NRM regulators' role can be interpreted in two main ways. First, they set the criteria that regional bodies should obey regarding their formation and operation. The approach was more output oriented than detailed, regulators outlined objectives to be achieved but let discretion to industry determine how to achieve them; a technique that resembles both principles and self-regulation. Second, federal government offered large sums of money to stakeholders create and participate into regional bodies. In addition, in case of unsatisfactory results the funds could be withdrawn.

Since these measures are relatively new, there are no concrete outcomes to be assessed yet. However, it is clear that this last form of regional NRM is more pluralistic and deliberative than the former attempts and the state (regulator) plays a decisive role by assuring funds to initiate regional bodies and threatening to withdraw it if deemed necessary.

Section 2: The Broadband Project in Urban Public Schools

The next case study is about telecommunications in Brazil. Since the privatization period in the middle of the 1990's, the telecommunications sector in Brazil has enormously increased[16]. Nowadays regulators' challenges are to improve the quality of widespread services (fixed line, mobile telephony and radio communications) and to universalize others, especially broadband Internet access. Additional preoccupations arise when dealing with a huge and socially unequal territory like Brazil. In order to tackle these constrains and spread telecommunications networks around the country using broadband Internet infrastructure, the Federal Government has implemented an ambitious collaborative initiative called Broadband Project in Urban Public Schools (BPUPS).

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[16] Data from Anatel (2014) register that Brazil has reached the milestone of 237 million active mobile lines (more than one per inhabitant), 156 million broadband accesses and more than 18 million subscribers of cable TV. These numbers are remarkable improvements in all sectors, since 20 years ago mobile communication and cable TV were almost inexistent in the Country.

The Brazilian Federal Government released BPUPS[17] in 2008. Its goal was to bring broadband Internet to more than 64,000 urban public schools in Brazil (federal, state and municipal schools of elementary and secondary education), covering over 50 million students - 86% of the Brazilian students, with no costs to the Federal State and Local governments until the end of 2025.

This ambitious and collaborative project was planned and implemented through a combination of efforts by the Presidency of the Republic, the Civil House and the Ministries of Education (Portuguese acronym MEC), Communications (Portuguese acronym MC) and Planning, Budget and Management (Portuguese acronym MPOG).

The management project was made jointly by the MEC and the Telecommunications Regulatory Agency of Brazil (Portuguese acronym Anatel), in partnership with state and municipal (local) Departments of Education. The Project also included participation of the main fixed telephony firms: Telecommunications of Sao Paulo SA, Telemar Norte Leste SA, Brazil Telecom SA, Telecommunication Company of Central Brazil and Sercomtel SA.

This project resembles the third Australian case (regional NPM) because it took several non-state actors and multiple layers of government. Furthermore, during the implementation step and in present days the Project is even more decentralized in the extent that principals, teachers and administrative employees of the schools must keep in touch with the firms, MEC, Anatel and educational departments in order to guarantee the its proper continuity.

Analyzing Outcomes and The Role of Regulators

Anatel is responsible for the supervision and monitoring of the Project. From the beginning of the Project, likewise the EIP case, the regulator has played a decisive role. Anatel invoked firms' participation, set deadlines for implementation (end of 2010), defined the number of schools and stipulated standards for quality of the Internet connection (from 1 to 10 MB, depending on schools' needs and physical capacity).

Monitoring and enforcement endeavours have occurred through random field supervision, sampling, punctual oversights and remotely, via monitoring systems and extensive communication with the firms. Moreover, schools' complaints were determinant to sustain the good quality of the service. As will be explained below, formal sanctions were deployed against unwilling firms.

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[17] There is another digital inclusion program to implement access to Internet in the rural Brazilian schools..

The Project was possible due to an exchange in the legislation made by the regulatory body. The initial contractual goals of universal service (which obliged firms to provide public telecommunication spots with telephone booth and dial-up Internet computers) were replaced by the obligation to bring infrastructure of broadband networks to all municipalities, connect all urban public schools and maintain the service free of charge until the year 2025.

Despite costs are borne only by firms, the government provided and still creates incentives to firms. The former obligations were more costly than the new ones and students, teachers and others may request (and pay) the access to broadband Internet in their houses to keep developing their activities, which will increase firm's profit.

The Project goes beyond pure financial interests. At least in theory, some kind of intrinsic motivation could be expected by these multinational enterprises. They may be proud to effectively participate in a Project that provides, besides social inclusion, education, citizenship and the spread of telecommunications networks all over the country.

Data from the Brazilian Telecommunications Association, Anatel and MEC reveal that the Project has performed well. By the end of 2010, more than 66,000 urban public schools were connected and the Project's initial goals achieved[18].

However, the path until this positive outcome was not easy or free of problems. The Project involved coordination of many public organizations representing the three tiers of government (ruled by different parties) and supranational corporations, a challenge with natural barriers.

The dichotomy between social policy and private profit was sharp, as all sides registered complaints and dissatisfactions. The governmental institutions were unpleased with the pace of the implementation. Firms appointed hurdles to achieve the targeted number of schools. They listed similar states' projects, inaccessibility of some schools and access points due to geographical or violence issues and schools' principals that did not known about the Project, not granting permission to employees' firms accomplish their jobs.

In order to solve mutual constraints and sustain the quality of the services, the collaborative approach was applied. Backed in the responsive regulation enforcement pyramid, massive meetings to establish agreements among participants, advices, recommendations and warnings (to all participating firms)

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[18] In its peak, the Project activated 24 institutions per day, totalizing 41,406 municipal institutions, 24,334 state and 798 federal schools.

were (and still are) used by the regulator. The regulators' role was very important not just when incentivizing firms to engage in the process, but also sanctioning firms when the Projects' targets were not met.

Due to the necessity to send stronger messages to firms and society and after the deployment of other instruments, some harder sanctions were applied. Formal sanctions and huge financial fines ranging were applied to the biggest firms engaged in the process (Telecommunications of Sao Paulo SA and Telemar Norte Leste SA).

The Brazilian case did not face the same hurdles faced by the second Australian case (NEIP). On the contrary, the regulator took active part in the process since the beginning, providing indirect financial incentives and the opportunity to engage in a great social Project[19]. Besides that, formal sanctions were applied to all participants. Finally, pressures from different layers of government and non-state actors (NGOs, parents' board) were also important to correct firms' misbehaviour.

Section 3: Queensland Forest Agreement (SEQFA) and the Great Bear Rainforest Agreement (GBRA)

This section summarizes two examples of integrated policy solutions achieved through collaborative efforts after years of intractable conflict (SRANKO, 2011). At last, it goes on assessing regulators approach in these two situations and in the other mentioned cases.

Queensland Forest Agreement

In South East Queensland, Australia during the 1990's the Development (with the intent to continue logging of native forests) and the Environmental Coalitions (with the goal to protect biodiversity and prevent further loss of irreplaceable habitat) were in furious battle[20].

Once more, on one hand economic and developmental concerns and one the other hand the maintenance and protection of biota[21].

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[19] Especially in the poorest corners of Brazil, it was the first time that students had contact with computers and Internet.

[20] The SEQ region encompasses about 6.1 million hectares in the South Eastern corner of Queensland, with about 45 per cent covered in forest. About 55 per cent of the native vegetation has been cleared for urban development and agriculture. In the early 2000s, the forest industry in Queensland contributed approximately $1.7 billion to the state economy and directly employed around 17,000 people.

[21] Local flora and fauna.

Regional Forest Agreements (RFAs) were signed between authorities (Australian States and the Commonwealth) in order to promote an intergovernmental policy framework for the management of forests.

However, due to the high politicization of the process, the local RFA failed in the achievement of both a comprehensive forest reserve to protect biodiversity and a native forest logging industry. Consequently, Commonwealth and Queensland government officials took control of the process and excluded the scientific reference panel from meetings as forest management options were developed.

This command and control Commonwealth approach and the incapacity of the RFA to accommodate innovative solutions brought dissatisfaction to all sides (conservationists, the timber industry and key State agencies).

In order to find a solution, competing coalitions undertook direct negotiations outside the RFA framework and collaboratively drew an innovative temporal solution. The key concept underlying the success of the agreement was the provision for the timber industry to make a complete transition from native-forests to a plantation-based resource by 2025[22].

This innovative, integrated solution addressed the interests and objectives of both coalitions, in contrast with the typical RFA approach defended by the Commonwealth and implemented in the other States. Furthermore, it forced government officials and agencies to support the new paradigm.

The Great Bear Rainforest Agreement

Likewise, SEQFA the Great Bear Rainforest Agreement in British Columbia, Canada (GBRA) denoted government inadequacy in response to economic adjustment, domestic civic engagement and a strengthening biodiversity and sustainability discourse.

Tensions achieved intractable levels due to international market pressures. By the end of the 1990's as forest industry and the British Columbia (BC) government continued to operate under an established industrial forestry paradigm that privileged development over conservation, environmental groups successfully mobilized public support for the protection of globally significant old growth forests.

The environmental coalition strengthened connections with international environmental advocacy networks and renewed commitments to market action in

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[22] It means immediately protecting 425,000 ha (62% of the area) of the high conservation value forests, with continued logging on 184,000 ha (26% of the area) to be phased-out over 25 years and future management options to be decided on 80,000 ha (12% of the area).

the United States and Europe aimed at targeting large consumers of BC's old growth. The outcome was that by late 1990's BC's forest companies were losing millions of dollars in contract because of the market boycotts in the US and Europe.

Facing the incapacity of the Land and Resource Management Planning (LRMP), the BC's government primary institutional strategy for minimizing land-use conflict, the four largest local forest companies began to meet and formed a negotiating group called the Coast Forest Conservation Initiative (CFCI). Its intent was to create new templates to work with environmental groups to develop a conservation plan for forests on the Central and North Coast of British Columbia that would be credible both locally and globally.

After the engagement of First Nations (indigenous) groups in the process, the outcomes started to be relevant and the provincial government finally took part in the discussions. By July of 2000, an agreement was forged between forest companies and environmental groups, whereby environmental groups agreed to halt their market campaigns in return for a promise from Weyerhaeuser and Western Forest Products not to log in 30 sensitive watersheds.

Further agreements occurred during the following years. Federal government, BC government and private non-profit organizations agreed to commit $120 million to support economic development opportunities for First Nations. In 2007, BC Government introduced a new legal framework for the Central and North Coast of B.C. that established Ecosystem-Based Management, covering forest operations in all areas outside of protected areas. By 2009, the total protected area within GBR reached approximately two million hectares (33 per cent of the region), including 114 conservancies covering approximately 1.37 million hectares.

In the end, self-interests became aligned with mutual interests. The Government increased its credibility by proclaiming leadership in negotiating a truce and members needed the legitimacy of government endorsement. This case exemplifies multi-level regulation and decentred expertise. New actors such as local and transnational environmental groups and the cross-coalition collaborative alliances brought influential diffuse knowledge to the process.

Analyzing Outcomes and the Role of Regulators

These last two cases of collaborative regulation show a different role of the regulators. They trace an indirect, but, in the end, important approach of the government (by issuing the necessary regulatory changes and incentivizing the continuity of the new policies). The regulatory bodies were not the wielder of state's authority but the wilder of non-state actors' decision-making.

In both cases after years of open conflict, sharply rival groups construct collaborative processes in response to government incapacity and institutional failure. There were no state actors monopolizing problem definition, setting goals or defining implantation steps. The opponent coalitions managed to achieve consensus based on mutual interests.

Because of the decentred rule-making, government agencies discovered themselves in the "shadow of collaboration"[23] (SRANKO, 2011) compelled to respond and integrate innovative policy solutions under intense political pressure.

Despite the severe differences on regulators' role between the previous examples (especially the Brazilian and the first Australian case) and these two environmental examples, one can realize that in all of them, positive outcomes only were possible due to policy change.

Regulatory modifications occurred after rounds of negotiation between stakeholders. The difference lies in the fact that, for example, in the Brazilian case since the outset of the initiatives the regulator was in charge of negotiations, and in both SEQFA and GBRA agreements, governmental institutions faced a well-deployed pluralistic approach, that was determinant to increment the necessary policy changes. By this frame, policy change reflects interdependence - one of the main features of CR, in the extent that social actors realized that their interests are interdependent and agreements could be beneficial for all.

The materialization of voluntary collaborative efforts in the SEQ and GBR, apart formal government arms, showed that rival sides realized that it was in their best interest to cooperate to develop mutually beneficial outcomes rather than exacerbating the conflict by continuing to focus on self-interests. In line with new governance and decentered analyzes of regulation both cases signalized a shift in public management from command and control to negotiation and persuasion as the preferred environmental management approach.

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[23] In opposition to the notion of the "shadow of hierarchy" (SCHARPF, 1993. GUNNINGHAM, 2009), under which reluctant adversaries are compelled to cooperate in response to pressure by the state authority (the "shadow of hierarchy" the "credible threat of state agents is more likely to force non cooperative actors into successful negotiations" (VIEHOER, 2000, p. 280); in the "shadow of collaboration" societal actors and the threat of public opinion can force non-cooperative, including state, actors into negotiation.

Section 4: What Practical Cases of Collaborative Regulation Imply

All cases exposed the necessity of regulators and regulatees to work together to achieve something that they cannot achieve alone[24]. It was realized the potential for an integrative solution based on collective problem-solving techniques. In these cases, attempts were made to build participation and deliberation into the heart of the regulatory process. The intent of the regulatory networks was to go towards the mix of economic and social responsibilities.

The EIP, the BPUPS (and in some extent regional NRM) cases would not have performed nicely in the absence of constructive designing and implementing of policies by diverse stakeholders. Similarly, a more decisive role of the collaborative regulator was welcomed. Regulators provided incentives and the necessary enforcement in order to guarantee the correct flow of the process. The features that made these participatory initiatives a success were absent in the NEIP case. The regulatory network was built but not sustained. Non-state actors were unwilling to effectively engage and the regulator did not offer proper incentives/enforcement.

The SEQFA and GBRA cases exhibited a collaborative style of governance with negotiation based on mutual-interest and community-based management. Both cases embody decentred regulation when denoting that legitimacy shifts to become more citizens focused. The outcome of these cases were positive due to power sharing among non-state actors and the recognition by the government that participants with innovative solutions can play a decisive role in institutional redesign or transformation.

In these cases, the success came from the policies elaborated by the non-state players and implemented by regulators. The regulatory network was built and underpinned by the modifications made by governments. The old-fashioned command and control regulator gave space to participative boards characterized by new ideas and policy goals developed by a sort of different societal actors.

CONCLUSION

This paper has developed a compendium about the main characteristics and practical uses of collaborative regulation, analyzing its sources and the differences between regulators' role on this approach and traditional command and control ways to perform regulation.

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[24] Prosser (2010) analyzed valuable examples of collaboration in different agencies of diverse countries and sectors. One striking case is the FSA. This Agency provides publication of advice to ministers, holds open meetings with consumers and is receptive to stakeholders.

It was advocated that CR is not a ready and pure concept; on the contrary, the democratic approach of regulation lies on ongoing conversations between all interested parties. It is constructed under shared understandings based on confidence, mutuality and interdependence.

The theoretical framework traced similarities and barriers faced by practitioners of the collaborative style and a range of regulatory techniques and enforcement styles.

The selected case studies offered basis to conclude that participative actions may be deployed in a sort of situations, sectors and countries. Collaborative techniques were present from environmental cases in Australia and Canada to broadband Internet expansion in Brazil. Pluralistic participation and decentred knowledge were decisive in both SEQFA and GBRA cases. The regulator behaving as facilitator, adjusting, provoking and granting the correctness of the process was essential in the EIP, regional NRM and BPUPS situations.

It was illustrated the view that collaborative regulation may be used to demolish walls between divergent actors, even in highly politicized arenas or multimillionaire arrangements.

Decentred expertise and skilful regulators were applied in order to settle down agreements seemly intractable (SEQFA, GBRA), to find the right balance between social and environmental purposes and firms' profit and to guarantee the stability and deepening of positive results in complex domains.

Because of its complexity, the collaborative approach is intricate and may present pitfalls during its execution. Similar to other regulatory tools scrutinized in the second part, CR requires time, resources and loyalty between regulators and regulatees. Effective commitment is required, practitioners must detain good grasp of the regulatory activities and believe that common understandings can lead to mutual arrangements.

One may think that with such strong barriers collaborative regulation is utopia or delusion. Nevertheless, the selected cases (among many others) proved that, despite all obstacles, real participative regulation might overcome the continuous challenges faced by regulators. Furthermore, this approach defends that regulation is not always a burden and regulators' role and that it goes beyond the attempts to correct market failures.

The paper hopes that the nception of regulators as part of a complex network of decision-makers at different levels be more valuable than concentrating on regulators in isolation and believes that regulators should perform their activities in a way to determine the correct balance between all interests that take part in the regulatory activity.

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