

Regulation Seminar

After ably covering aspects of regulation there are some consequences that I thought to raise at this final session and consequences that may be worthy of academic exploration. First of all the unintended and often unforeseen consequences of legislation are more widespread than may be imagined. Legislators and regulators are often fixed in their focus and not given to exploration of possible side effects of their intentions. The circumstances around Lufthansa flight 44, in which, at the beginning of this year, the co-pilot Lubitz determinedly flew the plane into the mountain taking everyone's life, is a frightening example of unintended consequences. The locked doors to the cock pit were introduced following 911 and who would have envisaged a circumstance in which a pilot was unable to return to his controls. The solution to the problem was really straight forward and no doubt will be brought into airline regulations after this dreadful unintended consequence. We now learn that Lubitz had a history of depression. Then there are the regulations regarding medical patient confidentiality and to what degree that they should apply to pilots, surgeons or even bus drivers. The debate on the issue is set to run for the long term.

Sometimes though the consequences are broadly as envisaged but the costs are unintentionally heavy. The NHS is full of such examples, but a classic one arose out of the report by Robert Francis QC into the appalling care and deaths of elderly patients at the Mid Staffordshire Foundation Trust hospital. The emphasis in the two Francis reports centred naturally on the healthcare systems and the quality of care and the seemingly absence of compassion. Efficiency came into the recommendations but at all points the recommendations required extra resources. No report in the history of the NHS has gone through the whole system as has the Francis Report.

Thankfully no trust could now be run like the Mid Staffs hospital; the lessons of Francis have been taken in at all levels. But the costs of applying the standards have also been felt at all levels. Under great pressure hospital services are universally balancing the countervailing imperatives of quality and cost containment. At present the majority of healthcare provider trusts are failing to achieve a satisfactory balance, choosing rightly to edge toward the quality side but with overspending as a consequence.

Any legislative basis for regulation needs to be coloured by a risk assessment that examines the consequences both direct and indirect. The opportunities for avoiding the regulation need also to be assessed. I oversaw regulations introduced at the Employment Department that were implemented but had virtually no effect. For example the Codes of Practice on the closed shop and the Codes on the disclosure of information to employees went through wide consultation with stakeholders and I then had to see them through votes in the House of Commons and then the House of Lords. To my knowledge at no point did any Court apply the Codes as a standard of reasonableness in applying its judgements.

Often the initiators of the regulations assume that they will trigger a cultural shift in favour of the desired practice. But the shift might never occur. Risk assessments are now built in to all legislative proposals coming before Parliament. But I suspect that Governments rely too heavily upon Parliamentary examination to expose the risk areas and the potential lacunas in legalisation which might well let through inevitable avoidance schemes. This whole area of risk assessment in the

Government's introduction of legislation is well worth academic examination.

A sizeable proportion of new legislations gets introduced through some dramatic event. Inquiries into the football disaster at the Hillsborough ground in April 1989, where 98 people were crushed to death has been long and arduous. In its first impact it lead to the creation of all seating football stadiums and strict control over the arrival and departure arrangements from grounds. All this is to the good. Problems had occurred at the Hillsborough ground before 1989 and indeed the ground had been avoided by FA Cup managers for 6 years. Regulations had been introduced to enforce the building of crush barriers, but everybody seems to have avoided the central issue to emerge - namely police competence in controlling the crowd. Only when the full documents were provided for the public at Andy Burnham's request could the cause of the disaster be accurately identified. The papers had been available to the Lord Justice Taylor enquiry but not available for the families of the people killed during the event. Any regulations therefore introduced were based on assumptions not the evidence required for the effectively designed regulations. All standing stadiums are now once again being built but there is a real question on how these stadiums are to be regulated and what it is they will aim to regulate.

The Foot and Mouth epidemic of 2001 provides another example of Government's staggering through stages of regulation. The epidemic was believed, during the crisis, to have started in the small holding of Bobby Waugh at Heddon on the Wall but later evidence provided some grounds that the

disease was spreading in sheep in the south some weeks earlier. The regulation of carcass disposal was centred on the European Commission directive 85/511 which determined that carcasses' should be transported to collective funeral pyres and at the same time the directive strongly restricted burial. The Commission also regulated the stage at which mass vaccination of the animals could be carried out. Funeral pyres burned across all rural areas, access was restricted, cars and shoes disinfected and rural areas were really isolated. Yet the contagion continued to spread. Finally the Government brought in the army. They took over available landfill sites including some engineered solely for inert waste. In these they buried as many of the animals as the site would hold. In one Durham landfill for example, over 20,000 sheep cows and pigs were buried even though the site had been engineered only for inert waste. Hundreds of farmers went out of business despite the Government pumping over £1.3 billion to compensate farmers. Farmers seemed to be split between those who suffered bankruptcy and those who made millions out of the compensation fund. Until the epidemic there were inadequate controls over the movement of farm animals. We learnt that infected animals, some from the Waugh farm went through many markets. In 9 days in February 2001 over 25,000 sheep went through the Longtown market and were exposed to the virus.

The consequences for farmers was in many cases dire. For the countryside as a whole it was disastrous period. DEFRA the Government Department was abolished and a successor department formed. The Countryside Alliance was wound up and the job of regulating the rural economies handed to the regional development bodies. Regulations arising from the

Foot and Mouth disease were introduced in a vast area of business, farming and waste management, it was one of the biggest extension of regulation ever experienced. Apart from 9/11 of course. There is a real opportunity for research into this whole process.

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