



REGULATION AND TECHNOLOGY: CONTENT BED-FELLOWS OR SWORN ADVERSARIES?

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Fintech; the new buzzword in town. While it has become somewhat de rigueur in conversation, it does provide a perfect example of a fast moving and often disruptive technology in action. It begs the question: how can regulators keep pace?

As much as possible, the regulatory framework must act as a policy instrument or tool capable of handling the impact of disruptive technology and innovation as it arises. Certainly the OECD has long recognised the need for regulatory frameworks to deal with technology and innovation more effectively and efficiently. Regulation and regulatory frameworks should be developed with the categorical goal of managing and promoting innovation and technological development. In the UK the Financial Conduct Authority (FCA) recognised that addressing the needs of innovation and rapidly changing technology needed a specific approach. In doing so, in 2014 it launched Project Innovate, an 'innovation hub' dedicated to working with entrepreneurial businesses, providing an 'informal steer' on regulation. Similar initiatives exist in the United States, with the Consumer Financial Protection Bureau's Project Catalyst, and in Australia, with the Australian Securities and Investments Commission's own Innovation Hub.

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However, technological innovation and regulation have always been strange (strained!) bed-fellows, often perceived as adversaries, pulling in opposite directions. Certainly the emergence of disruptive and innovative technologies asks difficult questions of existing regulatory regimes and cause a state of 'regulatory disruption'. 'Regulatory disruption', for example, can occur where the new technology falls within a policy maker's jurisdiction but where the existing regulatory framework does not 'specifically' deal with it. Under normal circumstances one would expect that regulators and policymakers would take a cautious line to the regulation of innovation and new technology, possibly by way of warnings or informal guidance rather than jumping to impose rash and ill-considered directives such as actually banning or shutting down the technology or innovation. This 'cautious line' should not necessarily be considered as the procrastination of a head-scratching regulator who doesn't quite know what to do in the face of new technology. In fact, the apparent caution displayed by regulators and policymakers is often a methodical application of the tools and instruments made available by the regulatory framework at each stage in the policy process in order to create an environment of managed transition or development. The FCA's Project Innovate, and similar initiatives around the globe, are a great step forward to developing a regulatory framework that better accommodates the fractured relationship between regulation and technology. However there's still a long way to go before the

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relationship can be truly considered amicable...

To understand how regulatory challenges created by innovation and technology are met requires an understanding of the framework within which policymakers make decisions. While regulation will often be considered from an institutional or administrative perspective, which is best represented by the legal system, it also includes economic, political, social and cultural norms, imperatives and rules. Indeed, our concept of, or how we define, regulation will be continually influenced by those norms, imperatives and rules as they evolve. An overt focus on administrative law, while obviously important, was called the "mistake of legal exclusivity" by Brownsword in his article *Rights, Regulation, and the Technological Revolution*. He suggested that a focus on the 'law as regulation' would crucially devalue the "mechanics of the social world". In effect, we wouldn't be seeing the bigger picture. Aligning regulation with economic, social and cultural norms (as well as legal) is crucial to gaining acceptance and, ultimately, attaining public trust in any regulatory framework. This is regardless of whether it involves innovation and technology or not but the fact that development of innovations and technology can move so rapidly probably highlights even more the need to look at our concept of regulation as broader than a legal perspective alone. This raises further issues including questioning whether it is even appropriate to assume that the state or government is the sole source of regulatory power.

Interestingly our definition of regulation, what we consider to be regulatory tools and how they are used, will distinguish the efficiency of the prevailing regulatory framework. Regulation is not a static concept and its definition is in a constant state of flux and development. There is often confusion between abstract concepts of regulation and actual policies of regulatory bodies. Regulation does not always enforce or dictate limitations but can enable, expedite, or modify choices, actions and activities. This, as you can imagine, is incredibly important when it comes to dealing with innovation and new technology.

Regardless of the true nature of regulation and the regulatory environment, the effect that governments, policymakers and agencies have on the development of innovation and technology cannot be understated. The slightest influence can have an enormous effect - either positive or negative. The imposition of regulation potentially defines a path for innovation and the future development of the innovation. Indeed, misplaced regulation can be a significant obstacle for the emergence and development of new technology and innovation. The FCA's Project Innovate recently launched its 'regulatory sandbox' which provides an isolated controlled environment to protect and stimulate innovation. The sandbox does, however, operate within 'legally defined parameters of financial services, ensuring the protection of consumers and accordance with the law'. Clearly this is necessary and, hopefully, the 'legally defined parameters' offer the appropriate balance of consumer protection without impeding the development of innovation. While this would clearly be counter-productive, it is always a risk when regulating technology with legislative tools. Interestingly, as an aside, where the prevailing economic, political, social and cultural norms can necessarily influence the regulatory framework, technology too has the power to influence those norms: the implication of a tail-wagging-dog situation is intriguing!

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There is no question that, by their very nature, technology and innovation, disruptive or otherwise, will provide a challenge to regulators

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and policymakers. It can cultivate and promote emergent technology and then even step aside. This approach will potentially deliver innovations to the marketplace in a way in which they could not have developed on their own. Regulation can shape the development of innovation and emerging technology. The implications for policymakers cannot be taken lightly as a misplaced approach can lead to both social and economic implications. With this in mind, perhaps the question should not so much be 'how do we regulate technology and innovation?' but rather 'what tools, instruments and techniques are available to address, promote and manage it in a positive way?' While the recent 'sandboxes' are most welcome progress to the support of innovation and technology entrepreneurs, it remains to be seen whether they will allow a smoother relationship between technological innovation and regulation or whether a broader approach to regulatory framework in respect of innovation and technology is still required. Watching the Fintech space may provide some clarity...

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