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Heims, Eva Maria (2024) Regulatory Capture - Short Guide for Practitioners. Report.

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Regulatory capture – a short guide for regulators

This is a short guide about ‘regulatory capture’ for practitioners working in any field of regulation, especially staff working in regulatory agencies. The guide focuses exclusively on regulatory capture of regulatory agencies and does not discuss regulatory capture of government or legislatures. More details, and analysis specific to your organisation can be provided by the author. Please get in touch via eva.heims@york.ac.uk.

What is ‘regulatory capture’?

There is discussion about the finer nuances of how to define regulatory capture amongst scholars, but the most recent scholarship highlights that *industry influence on regulators is not the same as ‘regulatory capture’*.¹ Rather, regulatory capture refers to industry influence that causes harm by interfering with a regulator’s work. *Regulatory capture is matter of degrees* or ‘shades of grey’. Strong capture of a regulator significantly impinges on a regulator’s ability to serve the wider public interest, but strong forms of capture occur far less frequently than weak capture.

Regulatory capture refers to excessive influence of special interests on regulators’ operations or decisions, resulting in a shift from serving the public interest to serving special interests. Usually, this is excessive influence by the regulated industry, but regulators can also be captured by other types of regulated entities, or third parties (e.g. NGOs).

A key problem with the concept of regulatory capture is that it is often invoked without any precise definition. This means that commentators frequently use a ‘you know it when you see it’ approach to regulatory capture. This allows them to attribute actions of regulators that they see as undesirable to be the result of capture. Capture is usually seen as a plausible explanation for regulators not taking appropriate action and it is always a ‘good story’. This means that stories about regulatory capture easily get traction, even if they lack a definition of regulatory capture and even if they do not use adequate evidence to substantiate claims of capture.

Regulators that respond to political pressure to favour the regulated industry are not captured under the above definition. Instead, they do not have sufficient formal and/or informal independence from government. While some guidance treats these dynamics as equivalent to each other,² academic scholarship regards them as two different dynamics that require different reforms and tools to tackle them.

¹ Carpenter, D. and Moss, D.A. (Eds.). (2014). Preventing regulatory capture: Special interest influence and how to limit it. Cambridge University Press.

² OECD (2017). *Creating a Culture of Independence – Practical Guidance Against Undue Influence*, The Governance of Regulators, OECD Publishing, Paris.

Bottom line: Regulatory capture refers to *excessive* special interest influence on regulators, but capture is a matter of degree. Weak capture is relatively common, but strong capture is rare. Capture is often misdiagnosed due to the absence of clear definitions and lax standards for evidencing capture.

‘Symptoms’ of regulatory capture

Regulatory capture can manifest in many ways. The avenues that are most talked about in scholarship and the media relate to the effects of industry-funding of a regulator, the ‘revolving door’, cognitive or ‘cultural’ capture, and information capture.

It is often claimed, especially in the media, that regulators that are fully funded through fees by the regulated industry cannot be independent from the industry. However, this perspective neglects to consider that regulators that are publicly funded are far more likely to get unduly influenced by elected government (which can be a conduit of industry influence too).³ Indeed, there is no clear evidence that industry-funding results in capture. However, industry fees may raise the likelihood of regulators thinking and speaking of regulated entities as their ‘clients’. While this does not mean they are captured, it can result in regulators being less willing to critically question the regulated industry. This, in turn, can lead to capture.

The ‘revolving door’ refers to regulatory staff leaving to work for the regulated industry and vice versa. Regulators get promised a lucrative job in industry in exchange for regulatory favours to the industry, the argument goes. Conversely, people that join the regulator from the regulated sector lack ‘distance’ from the industry, resulting in lenient regulation. The existence of revolving door dynamics is often, wrongly, equated with regulatory capture. There is hardly any high-quality scholarship on the effects of the revolving door on regulator behaviour. The few studies that exist highlight that the revolving door does not necessarily result in capture. Instead, research has found that industry likes to hire people who were ‘tough’ regulators, instead of people who were lenient on them.⁴ Indeed, people may ‘go through the revolving door’ for professional development, and people with industry experience have highly relevant expertise to be effective regulators. In short, the presence of the revolving door itself does not amount to capture.

The revolving door may, however, be relevant for another avenue of capture, so-called cognitive or cultural capture. This refers to capture that occurs when regulators share the same worldviews as the regulated industry or because of cultural and social similarities or socialising between the regulator and the regulated.⁵ In short, this refers to capture that happens because regulators are unable to question those they regulate critically due to similar backgrounds and outlooks. Often, this type of capture is invoked when a regulator is accused of having been captured, not least because it is often easy to find some evidence that seems to fit this narrative. However, hardly any accounts of capture evidence precisely how shared worldviews result in excessive industry influence on a regulator. Rather, the existence of shared frames of thinking (e.g. particular schools of economic thought), and similar backgrounds (e.g. attendance of the same universities) are, incorrectly, equated with capture.

³ Barkow, R.A. (2010). *Insulating Agencies: Avoiding Capture Through Institutional Design*. New York University, School of Law, *Public Law & Legal Theory Research Paper Series Working Paper No. 10-82*.

⁴ Cohen, J. E. (1986). The dynamics of the “Revolving Door” on the FCC. *American Journal of Political Science*, 30(4), 689–708; Gormley, W. T. (1979). A test of the revolving door hypothesis at the FCC. *American Journal of Political Science*, 23(4), 665–683; also see

⁵ Kwak, J. (2014). Cultural capture and the financial crisis. In D. Carpenter & D. A. Moss (Eds.), *Preventing regulatory capture: Special interest influence and how to limit it* (pp. 71–98). Cambridge University Press.

‘Information capture’ is another possible type of capture. This occurs when regulated entities overwhelm the regulator with information (e.g. in a consultation or an approval process), leading the regulator to base their decisions solely on the information supplied by the industry.⁶ This may happen because the regulator simply does not have the time to consult other sources of information or because it lacks the capacity to adequately handle the high degree of complexity of the information provided by the regulated industry. This type of capture has received less attention in the media than it has by scholars, and comes closer to the realities of many regulatory processes. It highlights that even well-intentioned regulators with a generally critical presupposition to the regulated can be captured. However, as with the other types of capture, there is temptation to equate an industry’s information advantage with capture.

Bottom line: The presence of industry funding, the revolving door, shared worldviews between regulators and the regulated, and a monopoly over information by the regulated industry *may* be symptoms of capture. But they are not enough to make a diagnosis of capture.

How to ‘diagnose’ regulatory capture

Often, *the opportunity* for regulated entities to influence the regulator is regarded as sufficient to diagnose capture. Even scholarship on regulatory capture often jumps to conclusions about the existence of capture based on evidence of frequent interactions between the regulated and regulators, or, for example, the presence of the ‘revolving door’. Scholarship in economics, on the other hand, usually uses correlations between regulatory decisions and regulatory outcomes that benefit the regulated industry as evidence of capture. But, according to the most recent wave of scholarship on regulatory capture, this is not enough for a capture diagnoses. To diagnose capture accurately, we need to analyse regulatory processes, and check whether and how industry influence significantly impacted on a particular process.⁷ Ultimately, diagnostic tools for detecting capture need to be tailored to each regulator and their organisational set-up, tasks and processes. However, there are some generic checks for capture that regulators can use to adjust to their circumstances if there is a concern that capture may have occurred.

Regulators should try to *trace the effects of the revolving door*. This means mapping the career trajectory of staff involved in a decision that raised concerns about capture (or a sample decision-making process if there is concern about more widespread capture in the organisation). If there are staff members that recently joined from a regulated entity or that left for the industry soon after a particular decision was taken, it needs to be verified what role the person played in decision-making, i.e. which views they expressed, if these were particularly favourable to the industry, and what influence that individual (or individuals) had on the actions that followed.

⁶ McCarty, N. (2014). Complexity, capacity, and capture. In D. Carpenter & D. A. Moss (Eds.), *Preventing regulatory capture: Special interest influence and how to limit it* (pp. 99–123). Cambridge University Press; Wagner, W. E. (2010). Administrative law, filter failure, and information capture. *Duke Law Journal*, 59, 1321–1432.

⁷ Heims, E. and Moxon, S. (2024). Mechanisms of regulatory capture: Testing claims of industry influence in the case of Vioxx. *Regulation & Governance*, 18, 139-157.

To diagnose capture accurately, we need to analyse how regulatory processes unfolded, step-by-step. This allows us to check whether and how industry influence significantly impacted on a particular process.

To assess the presence of ‘cultural capture’, regulators need to assess to which extent a particular (sample) decision-making process *questioned regulated industry critically*. This involves step-by-step tracing of how a process unfolded and how industry arguments were evaluated: were there any instances of regulators repeating arguments (and even wording) used by regulated entities? In internal and in regulatory interactions, did the regulator seriously entertain the possibility that the regulated entities’ arguments or actions may be wrong or require further investigation? Did regulatory staff at any point dismiss views/information countering the industry’s position easily and without substantive justification of this? Did regulated industry try to discredit information/positions coming from third parties and how did the regulator handle this? If there was a lack of critical questioning of the industry position and very quick dismissals of positions/information that counters the position of regulated entities, concerns about capture are warranted.

Similar tools apply to the detection of information capture: regulators *need to assess to what extent their processes and decisions are based on expertise and information provided by the industry*. This means re-tracing a particular process (e.g. the making of new rules or guidelines, the approval of a new product or an enforcement procedure), while analysing: what information/knowledge or expertise did the regulator base their assessments and decisions on? Was the regulator able to handle the amount and complexity of information supplied to them by regulated industry? Was there enough time and expertise to process industry information? Was the regulator able to consider independent sources of information? Why or why not? If a process overwhelmingly relied on information supplied by the regulated entities without either the resources to consider these closely or to consider other types of information, it is possible that capture was at play.

These are generic examples of a process-based approach to diagnosing capture. Ideally, regulators should have a committee tasked with *post hoc* evaluation of their decision-making processes to check for the presence of capture. In practice, such committees can be difficult to establish and institutionalise as they require critical evaluation of the actions of past and present colleagues’ work. However, the more this becomes a routine part of ‘doing business’ the more effective it is likely to be. Ultimately, this can help regulators to show that they are monitoring the risk of capture on a continuous basis.