

## **Accountability as a bureaucratic minefield: lessons from a comparative study<sup>1</sup>.**

### **Abstract**

The large and growing literature on accountability highlights a variety of mechanisms by which bureaucrats may be held accountable as regards their role in the policy making process. This paper looks at accountability mechanisms from the bureaucrats' perspective using material gathered for a study of bureaucratic roles in rulemaking in Sweden, Germany, the United States, France, the United Kingdom and the European Union. It asks to which of the mechanisms for securing public accountability for executive decisions do bureaucrats pay particular attention when helping develop policy: where are the minefields they feel they have to negotiate? The most important of the minefields is political executive approval. It shapes the way the other mechanisms (group opinion, the legislative and judicial branches of government) are negotiated. Thus "ministerial responsibility" and its equivalents in the other countries remain crucial features of systems of administrative accountability.

### **Introduction**

Bureaucratic or administrative accountability has passed from oxymoron to moderate academic growth industry. Max Weber (1988 [1918]:335) made the fact that bureaucrats were not publicly accountable for their actions the key distinction between the politician and the bureaucrat in his account of modern political systems. Not only is the notion of responsibility and accountability difficult to reconcile with the notion of ultimate subordination and obedience to orders, the essence of a bureaucratic role for Weber, making bureaucrats pay for any failings for which they may somehow be deemed responsible is also exceptionally difficult under conditions where they enjoy security of tenure. However, there is now a significant literature covering an enormous variety of processes and mechanisms of administrative accountability (for an excellent overview see Bovens 2007). This development may possibly result from changes in the perception of the role of the bureaucrat in modern government and from changes in their conditions of employment. Yet the growth of a literature on the notion of administrative accountability might also be a result of an extension of the concept of "accountability" to processes and mechanisms not very directly related to the electoral mechanism, the traditional wellspring of democratic accountability, to include a variety of other checks and balances. Where accountability is viewed as "the obligation to explain and justify conduct" (Bovens 2007: 450) and the stipulation that the body to whom one has to do the explaining is (even if only indirectly) the electorate is dropped, the scope for discussing administrative accountability is significantly widened. Accountability appears to be, as Mulgan (2000) points out, an "ever expanding concept".

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One of the great benefits of this literature is that it has set out a number of different criteria that may be, or should be, used to hold public officials accountable. Thus Behn (2001: 207ff) argues that accountability has tended to focus on finances and fairness but that greater emphasis should be given to accountability for performance, and that the (unsuccessful) pursuit of accountability for finances and fairness have consequences for performance. Bovens, Schillemans and T'Hart (2008) focus on three "perspectives" according to which accountability might be judged: the democratic, the constitutional and the learning perspectives. There is little doubt that the field of accountability has been substantially opened up to include a much wider range of grounds and opportunities for holding bureaucrats accountable. Moreover, there are some excellent classifications of forms and varieties of accountability mechanisms and processes (see Dubnick 2005; Stone 2005) – whether parliamentary committees, freedom of information, courts, the press or ministerial responsibility. Yet this source of strength also has weaknesses. For Koppell (2005: 95) the attempt to include "every imagined meaning" of the term into one concept has "in essence" rendered accountability "meaningless".

If the fact that central concept underpinning this moderate growth industry is acknowledged by leading insiders to be meaningless is bad enough, there is worse news from the sector for anyone looking to see how bureaucratic accountability works in practice. Bovens, Schillemans and T'Hart's (2008) attempt to offer "an instrument", an "integrated tool", for "systematically assessing accountability arrangements" in practice concludes that in the light of the variety of criteria that might be used to assess accountability, as well as the fact that there may be other criteria they might have left out (the "perspectives do not entirely fill the normative space surrounding public accountability"), it is all rather difficult. All one can do is be explicit about which dimension of accountability, which perspective, one is using to assess the term. Moreover, here as elsewhere, it is not entirely clear whether accountability is a property of individuals, positions/offices, organizations or systems, and different units of analysis seem to be referred to interchangeably (see Koppell 2005: ). While Bovens, Schillemans and T'Hart (2008) pose the question "who is accountable?" as a key issue, they do not really give an answer but conclude that, especially in the light of new governance arrangements "accountor" and "accountee" are not "known, coherent, straightforward entities embedded in a single and clear-cut governance system?". In these circumstances it is understandable that such discussions use the vaguer terms of "actor" and "accountability arrangement". However, such semantics leave the fog surrounding the concept and its use largely undisturbed and render unappealing their incitement to others to follow in their footsteps and do more research using their framework.

In trying to look at a range of criteria that *might in principle* be used to hold bureaucrats to account there is a danger that one loses sight of the ability of existing institutions to do the job. We still know very little about how bureaucrats understand and view existing institutions of accountability and how they shape their work. While one might point to a range of such institutions, from the French *Conseil d'Etat* to the UK Select Committees, whether these have much impact at all, still less whether they have much impact specifically on bureaucrats, is far less well understood. What impact do existing mechanisms for securing political accountability have on bureaucracies?

Instead of setting up a range of interesting criteria that might be used and offering little more empirical evidence than is barely necessary to illustrate that each one might have some merit, this paper takes a rather different view of bureaucrats and accountability in two respects. First, instead of looking from the perspective of an outside observer, whether academic, politician, political activist or commentator, and devising the ways in which we might want to hold bureaucrats accountable and for what, I ask the question of what existing accountability mechanisms mean for the bureaucrats who are their target. How do bureaucrats see the various mechanisms or institutions that are supposed to ensure their public accountability? Second the paper concentrates on how such mechanisms inform and shape what bureaucrats do rather than seek to enumerate the occasions when such mechanisms have been used to offer criticism of bureaucrats.

The actual impact of accountability mechanisms and processes might not be detectable in their exercise alone. The assumption behind this argument is that for every case of a newspaper finding out about an ill, of a legislative investigation throwing up ineptitude or skulduggery, there might be more wrongdoings that remain undetected, but there could also be a significant number of such infringements that remain uncommitted. The mechanisms commonly included under the rubric of “administrative accountability” might thus minimise such infringements, either because they act as a deterrent (bureaucrats calculating that blameworthy behaviour might be found out and is thus best avoided) or because officials are forced to pay attention to them (such as where observing the kinds of concerns such mechanisms might express are built into the routines of bureaucratic policy). Of course, if one believes that the essence of accountability is that it is seen to be done through the public airing of grievance/complaint and response, i.e. through the spectacle of the exercise of accountability itself, then actions taken or avoided in anticipation of sanctions do not amount to “accountability”. But even here bureaucratic behaviour aimed at avoiding being the focus of such a spectacle would count as an effect of mechanisms designed to secure accountability, if not an exercise of accountability itself.

Methods of supervision of bureaucracy and methods of ensuring accountability are often described through somewhat dramatic terms such as “police patrols” and “fire alarms” (McCubbins and Schwartz 1984). This particular simile is useful in that it makes a distinction between deliberate quests by supervisory or scrutiny bodies to launch and complete inquiries on their own initiative into the work of bureaucrats on the one hand and on the other hand methods of control triggered by some obvious sign of a problem (such as a complaint by an individual or interest group). From the perspective of a bureaucrat developing a policy there is unlikely to be much of a difference between the two. A police patrol is not all that different from a fire alarm that has gone off: what matters is when the fire engines show up, and one means of summoning them is not invariably faster, or more certain to produce results, than another.

A similarly dramatic but more serviceable analogy, when we adopt the perspective of the bureaucrat anticipating problems arising from institutions and methods of exercising

accountability, is the minefield. As a bureaucrat, it is possible for you or your work to be seriously harmed if you do not pay attention to a variety of devices designed to make the bureaucracy accountable. The simile should not be taken to suggest that bureaucrats feel threatened by these mechanisms, or that see them as the work of an enemy. They most certainly do not. Rather the simile emphasises that like mines in a minefield, they need to be treated with respect and caution and should be carefully negotiated. The central questions for this paper are: where from the perspective of the bureaucrat are these mines located and how are they negotiated? In other words, which, if any, institutions or procedures associated with the exercise of accountability do bureaucrats have to pay attention to when developing policy and how do they do it?

This paper explores some preliminary findings from a six-jurisdiction study (US, UK, Sweden, Germany, France and the European Union) of regulation writers from the perspective of how such mechanisms impinge on their everyday work. The study, based on an analysis of an average of just over eight regulations in each jurisdiction, cannot offer a comprehensive account of the way *all* regulations are written in each jurisdiction. It might be validly objected that the way a regulation is written depends upon its precise legal or constitutional characteristics, the sector in which it operates, the range of issues it affects, its relation to existing regulations and its perceived importance -- among many other things. There is no way of telling how “representative” the selected regulations are as there is little by way of a known sample frame, or accepted dimensions along which such regulations vary, to be used to assess how “atypical” the selection might be. Some aspects of the procedures involved in producing the regulations in the sample are likely to be standard for almost all regulations (e.g. the requirement in most European countries for the minister to sign off) and some apply to a class of regulations in one country (e.g. *Conseil d’Etat* procedures apply to *décrets en Conseil d’Etat* but not to *arrêtés*), yet there are aspects of the procedure for which one cannot say how widespread they are. Worse still, short of a handful of obvious examples such as those just mentioned, even guesswork about which aspects fall into which of these three categories is likely to be unfounded. What one can be more confident about, and what less, to some degree depends on what precisely the results suggest. Therefore I will return to this question of generaliseability at the end of the paper.

### **What mines are we looking for?**

Seeing inside someone’s head, learning their innermost fears, is difficult in almost any context, and in a bureaucratic context it is no easier. One cannot say with any confidence that somebody changed the way they wrote a regulation because they were worried about it being taken to the *Conseil d’Etat* or about facing a charge of maladministration from an ombudsman. One can, however, point out how the routines and procedures of bureaucratic life encourage (or deter) officials from negotiating the different kinds of mines that surround them. In the rest of this paper I will be presenting some results from the six-jurisdiction comparison that looked at a small sample of 50<sup>□</sup> items of

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□ The study is incomplete, two more regulations remain to be included. Moreover, the regulations were not selected primarily to explore accountability but rather as a means of examining wider aspects of

“secondary” or “delegated” legislation , an average of around 8 or 9 in each jurisdiction. In particular in this paper I will be looking at the effort devoted to ensuring that the institutions and mechanisms designed to ensure accountability are addressed – how much effort and what form it takes. What particular mechanisms should we be looking for?

Just as Ordata, the US Government database, lists over 800 varieties of mine in use, there are many and varied individual institutions that could be described as serving the goal of securing administrative accountability – a German administrative court, the collective scrutiny of the Swedish cabinet and the enforcement mechanisms of the World Trade Organization could all be classed as forms of accountability in the wider sense of the term. To make things manageable I will classify such accountability mechanisms according to their broad constitutional/institutional character. Three types are quite easily described: judicial, legislative and (political) executive controls. Many kinds of policy, certainly those that involve some form of legislation (whether primary or secondary), can be challenged by courts and other judicial bodies. Legislatures also may have, in some jurisdictions, a range of mechanisms designed to ensure that the executive acts within the powers that, in many though not all cases, parliaments have delegated to them. While this article will not examine intra-bureaucratic controls – such as interdepartmental workgroups or procedures and scrutiny by administrative superiors -- as candidates for securing bureaucratic accountability since the concern here is with *public* forms of accountability , the control by *political* executives, ministers and or political appointees, is important not least because it reflects the most common and basic mechanism of administrative accountability: ministerial responsibility.

In addition, a variety of formal and informal procedural routines can open up the decision making process to bodies outside government, notably interest groups and a wider public. This could result from a mandatory requirement in some jurisdictions that some regulations be opened to public consultation – the publication of a draft rule and careful weighing of the responses by interested parties is an important part of the US Administrative Procedure Act and the associated legislation that governs rule making in America. They can also result from the informal use of seeking the views of the public as well as from other indirect forms of consultation (discussed further below).

There is a danger that my focus on long-standing and traditional institutional arrangements ignores major changes in government over the past few decades, most notably the move from government (by authority and hierarchy) to governance (by

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bureaucratic involvement in policy work. The regulations were not randomly selected, not least because many randomly selected regulations would yield no insight into bureaucratic roles in policy making as they would include, for instance, the large number of UK regulations covering road markings in defined stretches of road or French arrêtés naming members to serve on a minor committee. Selection was first made on a reading through a regulation for evidence of some policy issue, however minor, being at stake. The regulations were further selected on the basis of getting a spread, where appropriate, of different (constitutional-legal) forms of regulation, of different ministries/departments issuing them and, above all, that they were recent (to make interviews possible). In the event, the choice was not nearly as large as the absolute number of regulations, in some countries well into the thousands, would suggest. The numbers covered in each country vary for the most part because of the unpredictability of the availability of permission for interviews.

networks and negotiation) and the related trend to New Public Management (and even post-New Public Management) with its emphasis on less traditional mechanisms of accountability and control, including markets, quasi-markets, new steering instruments and autonomous professions (see Christensen and Lægveid 2008: 24). Truth to be told, in this particular branch of government activity – regulation making in central/federal government – there is not a whole lot of new-style governance going on, whether this is in the NPM or post-NPM mould. Certainly what comes out of the process – the laws that are made -- might not be very traditional, and some of the cases analysed did indeed involve laws that on some interpretations follow a governance or NPM agenda. Moreover, there are some instruments associated with NPM involved in the process (such as Regulatory Impact Assessments -- RIAs). But overall the worlds of policy bureaucracies are embedded in hierarchy, where hierarchy, rules and accepted procedure give firm shape to the process and even RIAs appear more as another set of rules to be conformed to than a diagnostic or deliberative tool<sup>3</sup>. Certainly this is not to deny that changes in governance and public management have an impact on accountability and how one assesses it, but bureaucratic policy making in central government does not appear to be a forum where such features are particularly noticeable.

### **Minding their step**

How do we know whether much care was taken when drafting any of the 50 regulations to handle the mechanisms of accountability that can be associated with the executive, legislative, judicial branches as well as responsiveness to a wider public or group representatives? We can describe the effort involved in dealing with each of these four broad sets of institutions in three main ways. Using interviews with 84 officials involved in writing these regulations it was possible to assess whether such bodies were *uninvolved*, in the deliberations surrounding the development and drafting of a regulation, whether they were involved but only at a *procedural* level, or whether the involvement of these bodies involved some form of *engagement* with them.

Procedural involvement largely occurs where the officials are obliged to, or feel they should, inform the body or institution at one or more stages in the development of the policy, but otherwise the institution makes no directly observable contribution to the deliberation over the policy. As will be discussed below, procedural involvement does not mean “mere formality” as officials can make significant efforts to ensure that informing does not trigger a more substantial reconsideration of the policy – this form of involvement can therefore have indirect influence on the way that policies are handled. Engagement refers to the existence of some form of dialogue between officials writing the regulations and the type of institution or some discernible effort by officials to avoid engagement with it. This happens when an institution is given an opportunity to seek to shape the development of the regulation and takes it. This might result from a formal mechanism (such as the requirement that, say, the *Conseil d’Etat* is required to comment

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<sup>3</sup> Arguably the process of law making has become progressively more hierarchical in the past decades: compare Kent’s (1979) account of the informal relationships that develop between the lawyers drafting (primary) legislation and senior civil servants and politicians in the 1930s through to the 1950s with the less direct and hierarchically mediated relationships between bill teams of middle ranking officials and lawyers in the 21<sup>st</sup> century (Page 2009).

on some kinds of French *décrets*) or from an informal understanding (e.g. that “stakeholders” are consulted on the development of some UK regulations).

**Table 1: Institutions and forms of involvement in administrative rulemaking (numbers of regulations)**

	Legislative	Executive	Judicial	Public/Group
Uninvolved	31	2	31	6
Procedural	6	18	6	11
Engagement	13	30	13	33
TOTAL	50	50	50	50

Table 1 sets out the frequency with which these different kinds of involvement are found in the 50 regulations examined across the six jurisdictions. The numbers created by legislative and judicial involvement (each uninvolved in 31 of the 50 cases) suggest they are among the least important accountability mechanisms *operating while the policies are being put together*, and both have identical numbers, 6 and 13 respectively, in the “procedural” and “engaged” categories. The second most important set of institutions from this perspective are groups and the wider public. As will be discussed below, the opportunities for such wider involvement come in different forms and are not simply straightforward consultation on a draft proposal. Groups and the wider public are involved in 44 of the 50 cases, in 33 of them they engage with the bureaucrats writing the regulations. The political executive – political leaders and their appointees and advisors in the bureaucracy – is involved in 48 of the 50 cases, in 30 of them they are classed as “engaged”. The rest of this paper discusses the role of each of the groups of institutions in descending order of their involvement.

#### *Political Executives*

The notion that top political executive control – often described as “ministerial accountability” – is the main route for securing the accountability of bureaucracy has come under challenge (see Flinders 2002: 67). After all, how is it possible for a minister or top political executive to be aware of, let alone significantly shape, what goes on in sometimes vast organizations with diverse activities and subunits? The ability of ministers to shape what goes on in the multi-organizational networks that characterise modern “governance” is even smaller. It might not appear at first glance surprising that almost all regulations required some kind of involvement by political executives. The rules governing the secondary legislative process usually require that a minister or political executive approves and signs a regulation. In fact the two regulations where the political executives were uninvolved might need more explanation than the cases where they were involved. These two cases, both European Commission Regulations, were effectively consolidations of existing law – in one case there was no change to the existing law at all and in another the changes were marginal – did require a Commissioner’s signature and could have been classed as a form of procedural involvement, however, as one respondent pointed out about the regulation which

produced a marginal change: “The commissioner and *cabinet* were certainly not involved. This was nothing new, so there was nothing in terms of new policy for them to get involved in”.

However, the procedural involvement and engagement of top political executives makes them impossible to dismiss as the most important accountability mechanism: political executives not only constitute the most common type of mine, but the efforts made by officials to deal with such mines generally dwarf even the efforts devoted to public and group consultation. This accountability mechanism, moreover, is usually associated with “Westminster” or “Parliamentary” systems of government. The evidence from the 50 regulations suggests it is no such thing. Not only is ministerial/political executive involvement almost universal in our six jurisdictions, but also it is just as important in the US system, where political executives were actively engaged in deliberations covering six of the nine US regulations studied, as it is in the parliamentary systems.

It is far from Polyanna-ish to argue that ministerial/top political executive accountability has a significant impact on the way bureaucrats develop regulations. One can offer one basic hypothesis as to why it should have such influence: officials do not tend to like wasting their time developing policies that will not get through. There is a related hypothesis: officials who waste time on proposals that get turned down by top political executives feel their careers are less likely to flourish because of this. Testing either of these hypotheses is impossible with the type of interview material gathered here. However the corollary of the hypotheses can be examined: bureaucrats feel less need to ensure that the political executives are onside for issues that are politically uncontroversial, and are likely to be nodded through, than for those that are contentious and likely to be held up.

If we examine the issues where the contact with the minister was essentially a formality, it was treated as a formality because there was little doubt that the minister would sign and, in some cases, to involve ministers in uncontroversial issues would be judged by superiors (if they could not prevent a junior from taking up such contact) as a failing. A French official working on a public health related *décret* that could only take effect if it was signed by the minister was fairly typical of many officials who believed that

[What about the minister?] If it is a decree then it has to be signed by the minister. I think we prepared a note for the minister to ask if we could go ahead. I have no idea whether something like this went to the minister, it probably went to the *cabinet* [the group advising the minister]. They had no problem with it. I have never had any problem with them. I have done [similar] regulations [in the past]. If we had proposed a radical change ... I expect they'd come back and say “no, you have to be careful, huh”. But this one was quite straightforward.

Similarly a British official explaining why there had been so little contact with the minister over a regulation argued “this was settled policy and there was not contact with the minister apart from him signing the draft order”.



By contrast, issues that are politically sensitive not only need careful handling when asking a minister to sign off on a regulation, they also require ministerial support even to start work on them. The support of the agency political leadership, and possibly also the Cabinet Secretary responsible for the agency, is particularly important in the US system, where the opportunities for preventing a regulation from reaching the statute book are greater than in the other four nation states, as well as in the case of European Commission (rather than Council) regulations. When a regulation is called in for scrutiny by the US Office of Management and Budget, for example, it offers a significant opportunity for those opposed to the regulation to argue their case again, and regulations can be killed off by this particular mine. On one regulation that pitted an Agency on one side against the lobbying and legal departments of several major multinational IT corporations the official pointed out

[In the Agency] there was a lot of groundswell to start [work on this regulation] and [we said] we'd like to go through a public rulemaking process. Resources are part of the decision to go ahead with this, another is are we on firm enough ground, is there policy support? It was not my final decision. It went on above me .... I report to the Assistant Secretary, a political appointee. At that level there were conversations – conversations at a policy level. It was something we were preparing for and working out how to deal with press inquiries, briefing the media and public affairs people. There were lot of queries about this from companies. This was a big rulemaking issue. ... X [the political head of the agency] knew about it and we had her support, we briefed her. She even presented the final rule. The Department has a policy planning board meeting and it is presented there before it is published. Y [The Secretary of State] led the charge on that – she knew about it. You've got to have that level of support or you're going nowhere.

On the same lines, where ministers wanted something included in a regulation, they tended to get it. A UK official pointed out that one particular part of the regulation attracted ministerial attention “The minister was keen on the diversity agenda – that was big, and he wanted it included in there”.

The seven Swedish regulations proved the exception to this general rule that what was perceived to be contentious issues were the ones where ministerial authority and consent had to be especially carefully handled. But only in the sense that *every* regulation was developed with the active engagement of (most often) political advisers, the appointed State Secretaries or the ministers themselves. As one Swedish official put it:

This regulation, most like others, started with a political will – the politician X and his advisers let us know “this is what we want you to do”. It was all quite informal. Sometimes they give a general hint, sort of “try something in this direction” or “we ought to think about doing something for the disabled”, but this one was quite specific. In this case they were quite clear [about who precisely should benefit from] ... these regulations.

Another Swedish official working on what would in most jurisdictions have been considered an uncontroversial issue pointed out the origins of his regulation: “The politicians have lots of people working for them. They are working away all the time at political initiatives and they came to us and asked what we thought of it. They are the

real motor in the whole process”. Moreover, while the Social Democrats were in office at the time, they relied upon the parliamentary support of the Left Party and the Greens. Although the minister involved in this regulation was a Social Democrat, the advisers pushing it forward were from the Left and Green Parties (and they did not agree).

In the other jurisdictions, apart from Sweden (where ministers, advisers and state secretaries were closely involved in most of the regulations in the study) *presumed* ministerial wishes were often used as a guide to developing policy even if the contact with the minister was no more than procedural, thus table 1 certainly underestimates the importance of ministerial approval in developing regulations. As a UK civil servant pointed out, in his experience direct ministerial involvement was unusual as officials had plenty of opportunity to gauge what their political leadership wants: “Ministers intervening or imposing [a provision or] removing it – that would be an exception. There is lots of guidance and lots of places where ministers can say what their priorities are [e.g. in Parliament, in the press and in conversations with officials], and what they are not, so they do not need usually to intervene”.

None of this is to suggest that there is a clearcut and objective way of assessing controversy, and that it is impossible for officials to get it wrong and pass something off (whether deliberately or not) as uncontroversial that politicians disagree with. Moreover, it is possible for officials to seek to circumvent the wishes of their political leadership – one case from the 50 might be considered to fall into this category (though it actually resulted from the efforts of a bureaucrat to try to comply with a court mandate rather than the skulduggery of a renegade). The incentives, however, for the most part are more likely to work in favour of erring on the side of checking with a minister or political appointee that an uncontroversial rule is acceptable than trying to slip something controversial through. Neither is this to suggest that such clearing with ministers guarantees good or accountable government – ministers may well accept officials’ word that a particular proposal is uncontroversial out of a failure to understand or deem relevant any wider issues that might be involved, or through impatience to get through a pile of papers passed to them for signature. “Good governance” is not the point being made here – rather the point is that insofar as they are aware of controversy in what they do, officials routinely defer to ministers or their direct political advisers and representatives.

### *Groups and publics*

Public consultation is mandatory for many regulations in many systems. In all the UK, US and French cases officials had to pay attention to some form of wider consultation involving individuals and representatives from outside government. The nature of these consultations and the degree to which they proved tricky to negotiate varied substantially. We know, for instance, in the United States (Balla 2005; Yackee 2006) that the influence of groups on the secondary legislative process varies even with the same “notice and comment” procedures. In the US cases, the statutory requirement that regulations (though not all regulations) be published, consulted on and the agency should give a clear and convincing answer to the points raised meant that comments on the proposed legislation had to be handled with care. The agency response to the comments can be,

and were in two of the 10 US regulations, central to the rejection of earlier versions of the regulation by the Office of Management and Budget

There are multiple chances these people get to make their case. OMB allowed those who wanted to be in on it to come in for a quasi hearing. We go and listen – we cannot participate. This gives them another shot – they state their position. This happens in between the draft and the final rule. There were five of the big companies. ... and they all bring in their counsel and they say the things they like and the things they didn't like. We went along and wrote away preparing for what may come later if we were challenged.

As discussed above, with strong political support, such objections can be resisted. In general group and outside views, while frequently sought are generally perceived, at least judging by the efforts made to address them, to be less likely to destroy the regulation or significant parts of it if they blow up unless the groups can gain support of political executive leadership. This calculation was made by a German bureaucrat: “You have to consult before and try and sort out opposition -- if the minister sees there is opposition to anything, he won't sign”. A British civil servant, when asked how he decides which particular objection or comment he paid serious attention to, argued

I went to meetings with [some of the largest groups with an interest in this regulation]. They said their concerns had not been met. Representative organizations will have self-interested views. The challenge for us is to try and work out what is a legitimate and what is not a legitimate concern. [*How do you do this?*] The first thing is to ask yourself “what do ministers want to achieve”?

How do we know that the existence of such mechanisms seriously enters the process of policy making and that bureaucrats devote serious attention to shaping policies to reflect such wider consultation? The simple answer is that for the most part we do not know. The general direct influence of such consultations (other than the indirect influence through political executives) appears to be highly variable. In the UK regulations it was uncommon to learn that the consultations produced any significant change in the way the regulation was framed. This could be, in part, because the officials involved could anticipate the reactions of groups to consultations and defuse any potential conflict before approaching them. One UK civil servant argued that they tried to take account of any likely comments which could have met with ministerial support before sending the regulation out for consultation as “we wanted to avoid the position where new feedback came in”. Or it could be because the consultations are not expected to show up much that is new. One UK civil servant pointed out, one of the key issues in his regulation concerned the scope of the regulation – should a narrow or broad range of individuals be caught up in it?

The ... consultation asked if people wanted it [broad or narrow]. We were always clear we did not want to [be broad]. We had some support – we included in the consultation a leading question “should the provision be [broad or narrow]”? Certainly here [in this department] we ruled [the broad option] out early on.

Somewhat surprisingly, given the traditional assumption that the French state eschews the influence of “sectional interests” in favour of the “general interest” (discussed in Schmidt

2006: 123), all the French regulations appeared to pay greater attention to group views than could be found in the UK regulations. Indeed many of the French regulations were made at the suggestion of interest groups, which are described by French officials under the far more acceptable name “*organismes professionnelles*”. These included the pigeon racers who initiated a change in the laws dealing with avian flu and the food producers who managed to change the form of regulation in their particular sector from one based on statute to one based on codes of practice. Moreover, the advisory groups that were sometimes required by law to be involved in making regulations (either by proposing or offering an opinion) provided direct or indirect opportunities for interest group involvement. A regulation involving transport on the River Rhine was produced by a specialised international committee made up of industry representatives as well as state officials, in a regulation affecting social security payments for disabled people the working parties producing the regulation had representatives of disability groups and a regulation covering osteopaths was produced following the deliberations of a working group involving representatives of osteopaths, doctors and physiotherapists, and the broad thrust broadly shaped by it.

For two of the four EU Commission regulations (as distinct from the Council or Council/Parliament regulations drafted in the Commission) engagement with groups involved, in this context only, the member state representatives that sit on the *comitologie* committees – the Committees that advise and in some cases instruct and veto Commission officials. In one case the Committee effectively determined the content of the regulation – the regulation was effectively a list of permitted veterinary medicines, and it was the Committee (composed of veterinary bureaucrats from member states) that supplied it. In addition for the same regulation there was an unofficial consultation with veterinary associations which took the form of sending drafts of the proposals as well as an open public consultation. In the other case, with no other interest group consultation, the *comitologie* committee’s view was similarly negotiated with some care even though there was, according to an official, “no real risk of rejection anyway”. He added “they had to be neutral or favourable. If they had been against it it would have been finished. So “not rejected” was what we were after”. For one of the remaining two Commission regulations there was no *comitologie* procedure and in the other it was a formality requiring little effort.

The Council and Council/Parliament Regulations in the sample were entirely different since they were exposed to intense inter-institutional bargaining. This exposure gives the Commission officials a job that bureaucrats in the other jurisdictions did not have: a supporting role in direct negotiations between other executive (including Council officials and COREPER) and legislative bodies. It is thus in this indirect way that Commission bureaucrats making proposals for Council and/or Parliament regulations have to handle interests carefully. Yet because this aspect of rule making took place in the unpredictable world of inter-institutional bargaining, the effort taken by officials to second guess what would come up from interest groups was limited, the focus of attention for those involved was the direct participants in the bargaining. Commission officials in two of the three interinstitutional cases stressed the importance of the Presidency -- as one put it, “In negotiation with the Council the trick was trying to get the

trust of the Presidency...”. In the third, where the chances of agreement between member states on a highly sensitive matter was limited, the direct role that officials below the Commissioner could play was limited and remained essentially servicing the Commissioner as he took part in late night negotiations.

### *Legislatures*

Legislatures only became engaged in few of the sample of regulations, all of them in the case of the UK (6), the European Commission (3 – regulations requiring co-decision), Germany (3) and Sweden (1). While Congress in the US does have powers under the 1996 Congressional Review Act to offer the chance to review and reject agency rules, this has only been used on few occasions up until 2008 (it was discussed after Obama’s election as a means of reversing any last minute regulations of the Bush Administration to which Democrats might object) and only one regulation was reversed entirely as a result. In the Swedish and German cases the involvement of parliamentarians was ad hoc rather than the result of a procedural requirement – the Swedish regulation, concerning payments to farmers, was the result of a large negotiation in which parliamentarians, among others took part. It was sent to parliament “for information .... Parliament commented on it – a small issue. The comments were minor because the big [party political] difference ... had been sorted out beforehand. And the reference group discussions [the main political forum for discussing the issue] had aired all the arguments”. This was more a case of squaring things with the political parties in parliament rather than a concern with parliament as a deliberative forum.

Active engagement with parliament resulted in the German cases from the federal structure and the requirement that regulations falling within the competence of the *Länder* be agreed by the upper house representing the states – the Bundesrat. Respondents involved in these cases emphasised that Bundesrat approval cannot be seen as a formality. In part because

The problem is that with [primary legislation] there is a parliamentary mediating committee [to resolve differences], but with a decree there is nothing. Take it or leave it. If we did not accept it, the decree was dead and we'd have to come up with yet another decree.

In part this resulted from the unpredictability of the process. Securing agreement for federal proposals among *Land* bureaucrats is not necessarily a guarantee that the *Länder* will agree to it because it is often at the political level that the agreement or bargaining positions are decided. When asked whether the state bureaucrats were good at reading what the Bundesrat position will be, one federal official said

Well they would be the first to tell you that they don't really know. They give their views as technical experts, but it is not the administrative departments [*Ressorts*] that count in the Bundesrat, so they can also be surprised by what is decided. In the Bundesrat what is decided is not the product of the ministries, but of the *Staatskanzleien*. It can be that [another ministry that was involved, apart from the one I had been negotiating with,] had other ideas and they get their way.

In this particular regulation the *Länder* raised a financial point which the federal ministry had to agree to. The engagement with Parliament in Germany is not always procedural

requirement of the federal structure – in one of the three regulations engaging with Parliament the contact was taken up mainly to get an understanding of what the minister was likely to accept: it was part of the “background material” that the official used to work out what should go in the regulation. In another the official sent the item to the *Länder* anyway as he could then tell the minister that they did not object to it even when they had the chance to: “The regulation was did not require Bundesrat approval, but I send things to them nevertheless”.

The UK Parliament can examine bureaucrats’ work on regulations from two perspectives. First, under the Joint Committee on Statutory Instruments, a quasi judicial perspective of ensuring that regulations, among other things, do not exceed the powers delegated to the executive in the primary legislation under which the regulations are issued (i.e. is not *ultra vires*), and that it is not “defectively drafted”. Second, under the Select Committee of the House of Lords on the Merits of Statutory Instruments allowing a review of the wider policy issues involved and can, according to its terms of reference, draw regulations “to the attention of the House” where it, “is politically or legally important or gives rise to issues of public policy likely to be of interest to the House” (Merits Committee 2008). Both committees can and did raise objections in the UK sample of regulations and they had to be addressed in some form. Three regulations in the sample were changed significantly following JCSI comments (the Committee did not have to produce a report, sometimes a comment from the Committee lawyers can be enough) and two regulations were reported to the Merits Committee. There was strong evidence from the interviews that the JCSI role was taken especially seriously while the legislation is being drafted. “With the JCSI if it is just a question of the words you use not looking right ..., you agree to amend it at the next opportunity. Where you worry is if the issue of *vires* is raised”. The Merits Committee is somewhat less predictable in terms of what it is looking for, as one put it “With the Merits committee it is hard to see what they would be interested in” and appeared to be less anticipated in the process – it did not produce any substantial changes in the legislation either.

### *Judicial*

The most consistent judicial involvement in regulations was found in the French cases where part of the regulatory process involves, with certain types of *décret* (“*décrets en Conseil d’Etat*”) a hearing before the *Conseil d’Etat*. A rapporteur from the *Conseil* is assigned to the regulation, the officials who wrote it are called to a meeting and a report is then passed on to the full section meeting of the *Conseil*: officials may attend the section meeting, but they do not participate in it. The *Conseil* can, and did in the sample of regulations, call for changes. Substantial efforts are made before the *Conseil* is invoked to avoid having to change the regulations, though at times apparently unpredictable conclusions appeared, in a couple of cases, to reduce the attraction among officials writing regulations of trying to guess what the *Conseil* would say

We go to the *Conseil d’Etat*. They never come to us. It was me, the chef de bureau and the deputy director .... We discuss things [they say] “it is better if you write it like that”, “Can I change the organisation of the decree?” “[Does such and such a provision apply in this or that particular situation?]” They are the legal advisers of the government, they are meant to check the legal aspects of the text.

Then there is the section meeting at the *Conseil D'Etat*. There you get, in my opinion, some rather opportunistic changes to the text from whoever happens to be there.

While in several regulations the *Conseil d'Etat* insisted on, and achieved, significant changes, to be declared unlawful by the *Conseil d'Etat*, as was one regulation in the sample, did not prevent it from coming into effect (and the ministry concerned envisaged making new primary legislation that would make the regulation less vulnerable to defeat before a legal challenge was mounted).

Similar forms of checking for legality are not absent in the other jurisdictions – they just happen to be carried out by non-judicial organizations. In the United Kingdom, as discussed above, the Joint Committee on Statutory Instruments (JCSI) can make comments broadly similar to those of the *Conseil*, though its direct powers to insist on changes are far fewer than those of the *Conseil*. Moreover, in the cases where the JCSI did create an engagement between bureaucrats and parliament, the engagement was above all with the JCSI officials who recommend actions to the MP members of the Committee rather than to the MPs themselves. The checks on legality to be found in Germany are largely internal: the Justice Ministry has to check and approve a regulation for its “compliance with the principles of law” before it can come into effect. In the US departments or agencies it is generally the Office of General Counsel or its equivalent that has the responsibility for checking for legality, though this procedure changed nothing in the US sample of legislation.

## **Conclusions**

A small sample of regulations cannot speak for all, still less can the activity of regulation making speak for all bureaucratic activity. So what is gained from looking at a small cross section – albeit containing a larger number of case studies than most cross-national comparisons? The most striking conclusion has already been highlighted: there is evidence that ministerial responsibility/accountability is a highly pervasive medium of accountability since bureaucrats take significant efforts to make sure that their political leaders approve of what they do. This is not simply a matter of relying on the goodwill or democratic sentiments of bureaucrats, but it is more importantly an essential part of the job of being a policy bureaucrat. Insofar as bureaucrats feel they have to square things with political leadership to avoid not only the strong possibility of wasted effort when they operate without knowing what the politicians are likely to sign off on but also to appear to be competent and good at their job, there is a powerful self-interest among bureaucrats to seek political approval. Conventional rational choice and principal-agent approaches to bureaucracy stress the potential for conflict between bureaucrats and politicians and the potential in the relationship for bureaucratic “shirking” (see, for example, Frey 1993). However the incentives for bureaucrats can, at least in the cases examined here, work entirely in the opposite way.

If we consider some of the other criteria for accountability discussed in the introduction, above all accountability for results or performance, the evidence suggests unsurprisingly

that politics is trumps. While bureaucrats might try to persuade their political leadership that a particular policy or a particular approach to a policy might not be a good idea, or that inaction would have unwelcome consequences, the political will is more important than the personal or professional desire of the bureaucrat to do a good job. The reasons are simple. First, serving political leadership is an important part of the self-perception of bureaucrats, and service includes accepting in principle the clearly expressed decisions of the political leadership taken under full advice as final. Second, if persuading the political leadership does not work, the options open to the bureaucrats are limited. It might be possible for the bureaucrat to circumvent the political leadership, perhaps through recourse to a judicial or constitutional measure (as with, for example, the ability of UK legislative drafters, Parliamentary Counsel, to appeal to a Law Officer concerning instructions given by ministers see Daintith and Page 2000), or the bureaucrat might try to gain political support through leaking to the press or some other means. Such measures are possible, and doubtless, should the issue warrant it, mean that officials do not merely have to obey orders. However such strategies are only used *in extremis*, and for most purposes, and certainly for any understanding of how accountability works in everyday practice, they are likely to be the rare exception – the highly unusual and possibly personally risky exception rather than part of the general framework of accountability within which policies are developed.

The importance of political control as posing sets of mines that need to be carefully negotiated is further underlined by the finding that it also is related to other forms of control over the bureaucracy. While the position of the political leadership shapes the significance for the bureaucrat of other intended checks on the bureaucracy, it applies above all to the role of groups as potential mines to be negotiated. The regulations examined here support the common assumption that the US system offers greater opportunities for interest participation in bureaucratic decision making, though not primarily because of the direct role of Congress, but because of the opportunities for the Office of Management and Budget to veto proposals. With strong political support group objections can be avoided, but in general the process requires careful handling and incorporation of group interests. In some of the French cases too, where significant group opposition elevated the issue to *cabinet* level the bureaucrats

The general low profile of true parliamentary involvement in bureaucratic calculations as far as our fifty cases are concerned is hardly surprising. Where parliamentary influence is found, it is because of the specifics of the parliamentary role (in Germany the role as representative of the *Länder*, in the UK as a scrutineer of secondary legislation, in the EU as necessary for legitimising particular types of legislation). More generally, however, and even in countries where parliaments are given such roles, the interest of elected MPs in the mechanics of how the details of policy are put together tends to be limited – the low take-up of the constitutional opportunities for true deliberative parliamentary scrutiny by MPs (as opposed to the officials employed by legislatures) hardly makes this finding news.

From the perspective of bureaucrats the most important means of trying to mineproof your work is to get political support. Getting political executive support is important not



only because their opposition on its own is likely to kill a proposal, or at the very least require restructuring the contended parts of it, but because their support makes the other parts of the minefield more easily negotiable. Political executive support also means that the issue of administrative accountability of the bureaucrat begins to become less important and the political responsibility of the minister, secretary or agency leadership begins to become more important once the policy proposal becomes law. When political support or even acquiescence is given, political leaders start to have greater incentives to defend the decisions taken in their name precisely because they have agreed to them. Even when some of the accountability mechanisms that hardly seem to feature in the everyday calculations of bureaucrats, such as an investigation by the UK Parliamentary Commissioner for Administration or a *Cour des Comptes* report, do investigate bureaucratic roles in policy development, political executives can pursue a variety of options including sticking to the ministerial/agency line (even sometimes to the most indefensible of lines) or proposing remedial action. It is extremely rare for them to leave policy bureaucrats high and dry as scapegoats. This places a lot of importance on the original “sell” by bureaucrats to the politicians of the measures they propose to put in place, whether these measures result from policy initiatives suggested by politicians or bureaucrats themselves. Once bought, the fortunes of bureaucrats and politicians become even more closely entwined and administrative accountability starts to become overshadowed by political accountability.

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