
52 Regulation

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Introduction

This chapter explores some of the main issues related to the regulation of the cultural sector, with specific reference to heritage. As the range of activities in the cultural field raises so many different economic questions, not all of them can be dealt with in the space available. Therefore the analysis is restricted mainly to issues connected with built heritage. So far, the topic has not received much attention in the literature:¹ this chapter therefore surveys some of the main issues (what should be regulated, why, how, who should regulate?) and points out the policy implications arising from the analysis.

Government is assumed to provide efficient remedies for market failure in the cultural sector; however, different mixes of government policy instruments – public expenditure, taxation and regulation – can be adopted according to prevailing economic and institutional settings. Here the focus is on regulation² and on the policy implications stemming from its implementation: as Throsby (1997, p.19) has pointed out, ‘regulation, in the sense of specific constraints or directives affecting behaviour, is possibly the most widely used tool in heritage conservation, despite the fact that in most circumstances it is the instrument least favoured by economists’.

The ‘public interest’ theory of regulation based on the welfare economics approach to market failure has been criticized because of its normative content, and attention has turned to a closer consideration of collective decision-making processes. It is assumed that regulators do not necessarily aim at pursuing public interest and that regulated producers are not ‘passive adjusters’, their relationship being depicted by the well-known ‘principal–agent’ paradigm.³ In what follows, the ways in which policy may depart from an efficient outcome in the heritage field are sketched, bearing in mind that lack of information, which represents one of the main justifications for intervention in the heritage sector, leaves more room for discretionary behaviour on the part of the regulator than in other fields,⁴ and this results in the heritage sector being particularly plagued by the above-mentioned problems.

Heritage regulation: economic impact and policy implications

Regulation of heritage

Broadly speaking, regulation can be defined as non-monetary government intervention usually aimed at restricting or modifying the activities of economic agents in line with the government policy objectives.

In the heritage case, regulation is aimed at controlling the stock of heritage, both from the quantitative and qualitative point of view. The fulfilment of this objective is usually pursued by listing or registering (a designation of lower significance) historical and archaeological sites, as well as individual buildings⁵ in order to ensure the existence of the good (for instance, to prevent its demolition) in good shape (for instance, imposing on the owners of designated buildings restrictions on use, on their appearance and the way restoration and re-use is carried out) and imposing limitations on the use of land affecting heritage buildings.

Regulation therefore constrains the exercise of property rights: owners are obliged to comply with prescriptions and penalties are involved for non-compliance. A particular feature of heritage, compared with other areas of the cultural sector, is the share of listed and registered buildings in private ownership in many countries (Schuster, 1998).

In addition to these forms of regulation, which Throsby (1997) defines as *hard regulations*, there are also non-enforceable directives (charters, codes of practice, guidelines and so on) implemented by agreement and not involving penalties, which can be defined as *soft regulations*.

In the heritage field, regulation has certain advantages compared to other government tools. Its adoption or removal takes less time than is required for other forms of public intervention (such as, for instance, subsidies or tax expenditures) and, therefore, it allows for a greater timeliness of public action. Flexibility, in fact, can be extremely useful in heritage to cope with the necessity of quick decisions, such as preventing the demolition of a building. At the same time, heritage regulation exhibits some features related to the definition of the scope of regulation that are worth noting.

Identification of heritage

A feature of regulation in heritage is that the size of regulated sector is not well defined *ex ante*, but is a matter for the discretion of the regulator. This is due to the fact that the identification of what is heritage is not unambiguous, being based to a large extent on the evaluation of experts hired by the government who may have contrasting views on orders of priority concerning the extent and the type of intervention. As Peacock (1994) has pointed out, cultural heritage 'become[s] identified as heritage goods usually by archaeologists and historians who have obtained some form of official

recognition or public acceptance of their status as experts in determining their artistic or historical significance’.

Since there is no objective way of identifying what deserves to be listed as heritage and what priority has to be established in setting the agenda for public intervention, the type of expert (archaeologist, art historian and so on) involved in this kind of decision and the features of the decision-making process are quite important in determining the size and the composition of the stock of cultural heritage as well as the type of conservation that can take place. Different meanings can be assigned to the word ‘conservation’: in the World Bank (1994) definition it ‘encompasses all aspects of protecting a site or remains so as to retain its cultural significance. It includes maintenance and may, depending on the importance of the cultural artifact and related circumstances, involve preservation, restoration, reconstruction or adaptation or any combination of these’. The range and intensity of regulation appear to be more the endogenous product of the public decision-making process than just a policy instrument in the heritage field: from this perspective, it is not without significance that the broad discretionary power enjoyed by regulators is coupled with the extension of the concept of heritage observed in some countries.⁶

Though it is outside the scope of economic analysis to define what ‘heritage’ is, it is within it to analyse means and to evaluate the policy implications of government regulation, making clear the shortcomings resulting from the public decision-making process.

Regulation: economic impact

The economic impact regulation varies with different types of heritage; roughly speaking, heritage can be located along a broad spectrum with two ‘polar cases’ – world-renowned heritage with unique characteristics,⁷ and regional or local heritage which is known only within limited boundaries – with many intermediate cases. The degrees of freedom increase along the spectrum because private owners come into the picture and the role of the regulator enlarges. For world-level heritage, the list of the goods deserving conservation is beyond discussion and any decision about conservation comes under the scrutiny of public opinion. On the other hand, according to the ‘stance’ taken by the regulator, there might be room for discussing the extent of regulation for heritage of minor importance as well as the type of intervention to be carried out: for instance, preservation alone or also adaptation. (Preservation is the term used when heritage regulations do not allow ‘compatible’ use even if it is economically viable; adaptation implies the modification of a place for compatible uses.) Adaptation is acceptable where it does not substantially detract from the building or site’s cultural significance; it may be essential if a site is to be economically viable.

The issue of 'minor' heritage has not received attention in the literature, though it is the area in which the regulator's discretion is greatest and the economic impact of regulation can be strong. The choice of the type of conservation implies a basic trade-off. If regulators adopt a conservationist stance and heritage is simply preserved, that prevents its full enjoyment and utilization (for instance, when restrictions prevent alterations needed to bring the interior of an old building up to modern standards of comfort); a substantial amount of the potential benefit is lost and the public-private mix is likely to be adversely affected. The extent of restrictions which are not justified by the public good argument has consequences for the very possibility of conserving historical centres and for local economic development.

The stance adopted by the regulator therefore affects the costs regulation imposes on society. This is a crucial issue in regulation policies⁸ and needs special attention in the heritage field because of the greater discretion involved in the regulatory process. Costs include the administrative and bureaucratic costs related to the production of regulatory acts (permissions, authorizations, demolition orders, standards and so on) and the monitoring of their effective implementation, as well as the compliance costs imposed on all the subjects (regardless of whether private or public) who have to comply with the prescriptions. As stated above, the size of these costs varies according to the strength of the regulatory intervention. For instance, when restoration is carried out, the expected costs are affected by many elements: some can be foreseen in advance because they are closely connected to the conservation (for example, the requirement to use special materials, qualified operators and so on to ensure quality) and find their motivation in the correction of externalities; others are subject to a high degree of uncertainty as a consequence of the regulator's decisions (for instance, an adaptation allowed by urban planning might not be permitted by the heritage regulator (Pignataro and Rizzo, 1997)). Moreover, the indirect costs imposed on any activity that interferes with heritage regulation should not be undervalued. For instance, Peacock (1994) refers to the considerable hidden costs involved by planning regulations imposing the diversion of roads to protect archaeological sites.

The size of the overall costs involved in heritage regulation raises some doubts about the sustainability of the related conservation programmes: a conservationist stance of regulation, because of the related uncertainty, may 'crowd out' private investments for conservation, causing a deterioration of heritage and considerable pressure on public expenditure. As a consequence, the objective of the regulation policy, that is conservation of heritage, can actually be endangered by the excessive expansion of the regulation itself. The need to introduce the opportunity cost concept to drive the decision-making process is, therefore, called for.

Some policy implications

On the grounds of the above considerations, it is useful to sketch very briefly some possible institutional mechanisms available to society to restrain the discretionary scope of regulators and to improve public participation in the political decision-making process. The issue is crucial and controversial at the same time: while it is widely agreed that taxpayers have a legitimate claim to influence public decisions about heritage, as with other policies, it is at the same time true that specific knowledge and expertise is involved, so that these decisions cannot be left entirely to taxpayers' choices.

It is interesting to note that the problem we face (the need for a governance structure to restrain the discretionary scope of the regulator) is common to regulation in general. Of course, in the heritage field, for the reasons given above, such a mechanism becomes crucial. An interesting issue raised by Levy and Spiller (1996), in another context, is that no unique solution can be provided to the regulatory governance structure when the choice is constrained by what they call the 'country's institutional endowment', which affects the form and the severity of regulatory problems. Levy and Spiller identify five elements of a nation's institutional endowment: legislative and executive institutions, judicial institutions, custom and other informal norms, the country's administrative capabilities and the character of the contending social interests, including ideology. It follows that, to improve the efficiency and effectiveness of regulation, attention should be paid to the institutional design.

Various means can be envisaged. On the one hand, devolution is usually indicated as a means of increasing the accountability of government and in the heritage field its positive effects seem to be even stronger than is usually claimed because the links between regional/local communities and heritage are very close. However, the findings of recent research (Rizzo and Towse, 2002) show that devolution as such is not enough to provide a framework of rules enhancing the accountability and responsiveness of heritage regulators to public opinion if no adequate incentive system is introduced in the regulatory decision-making process.

Attention, therefore, has to be concentrated on that process. Forms of greater public participation in decision making as well as compulsory assessment consultation or review procedures might be included in the regulatory process; for instance, Peacock (1994) proposes that public participation could be enhanced if greater openness were to characterize the appointments of 'lay' persons to decision-making bodies and if citizens who are active in heritage matters were allowed to vote for their own representatives within these bodies. However, the benefits should be weighed up taking into account the likely increase in administrative costs and decrease

in the process which would derive from it. The use of direct democracy tools, such as referenda, has been advocated to assess public evaluation of heritage policies but, again, the costs should not be underestimated.

At the same time, the role that voluntary associations and groups expressing society's interests can play in the decision-making process might be enhanced.⁹ They can carry out information activities and/or promotional campaigns both to raise funds and to influence the authorities, representing a plurality of interests at a decentralized level. Moreover, the introduction in decision making of a systematic assessment of the economic impact of regulation could help to reduce asymmetrical information and offer evidence for public scrutiny of the regulators' decisions.

Finally, it might be useful at the local level to adopt codes of practice or guidelines agreed between the regulator and those involved in restoration activities (architects, building firms, engineers and so on) in order to make prior commitments and reduce the uncertainty related to investment in heritage conservation.

Concluding remarks

A general argument stems from this analysis: the range and intensity of heritage regulation cannot be justified in all the cases on normative grounds since they often appear to be the endogenous product of the public decision-making process: the fact that the considerable discretionary powers enjoyed by heritage regulators are coupled with the extension of the concept of heritage observed in some countries offers evidence in this respect.

As a consequence, the objective of the regulation policy, the conservation of heritage, could actually be endangered by the excessive expansion of the regulation itself because it would impose an unsustainable pressure on public funds and would, at the same time, discourage private investment in heritage.

There is no unique solution to meet the need for a governance structure to restrain the discretionary scope of the heritage regulator, the solution being constrained by the specific institutional framework in which regulation takes place: forms of greater public participation in decision making, such as devolution, and the improvement of the information system are some of the means suggested here.

Notes

1. See Giardina and Rizzo (1994), Throsby (1997), Rizzo (1998), Throsby (2000).
2. Regulation may be used as an independent tool as well as a complement or a substitute for other policies (Giardina and Rizzo, 1994).
3. For a survey of the extensive literature, see Hagg (1997).
4. For a general overview, see Sugden (1993).
5. This is a very simplified way of summarizing the complex array of legislation existing in

different countries; a comparison between British, French, Italian and Spanish cases is provided by Bobbio (1992).

6. Benhamou (1998) reports that the number of listed historic monuments in France increased continuously and substantially (by almost 60 per cent) in the period 1960–95. The concept of heritage has been extended to numerous buildings that somehow constitute a memory of the past, including restaurants and factories. That study also indicates a very extensive listed heritage in the UK.
7. This is the case, for instance, of UNESCO listed world heritage sites.
8. A general overview of this issue is offered by Hahn (1998).
9. The extent of this form of participation varies across countries, being very well developed in Great Britain.

See also:

Chapter 32: Heritage; Chapter 48: Principal–agent analysis; Chapter 49: Public choice.

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