

ICAEW



# ACTING IN THE PUBLIC INTEREST: A FRAMEWORK FOR ANALYSIS

SUMMARY

MARKET FOUNDATIONS INITIATIVE



# OVERVIEW

To justify a proposal on the grounds that it is in the public interest is a significant challenge and the concept of the public interest should be used sparingly.

We set out a practical framework for use in respect of proposals which may be, or have been, justified as being in the public interest. It takes a distinctive view of public interest validity as drawing on a pattern of behaviour that builds up reputation over time, as well as information directly relevant to the proposal.

The framework will be useful in determining usage of the concept, in focusing and demonstrating the thought process involved, and in challenging usage by others.

## The notion of the public interest

In most societies there is a basic presumption that people should be able to go about their own business in their own interests. In the course of this they will interact with other people and influence and be influenced by their activities. However, there are further influences on people's activities: when governments, regulators and others seek to intervene in the public interest.

The form of intervention we concentrate on is usually by organisations seeking to change people's actions through laws, regulations or other methods of persuasion. However, individuals can intervene by taking public interest actions themselves, for example by overriding confidentiality requirements to disclose bad behaviour by others.

The public interest is an abstract notion. Asserting that an action is in the public interest involves setting oneself up in judgement as to whether the action or requirement to change behaviour will benefit the public overall – a far greater set of people than can be interacted with directly. It involves interference in people's ability to go about their business or sometimes, as a positive policy decision, non-interference in the face of alternative actions.

Other terms can be used, largely interchangeably. Examples include public benefit, the public good, and the common good – the latter in the sense of the public having a common purpose, rather than goods to which there is common access. While we use the public interest throughout, the same issues apply to use of these other terms.

Invoking the public interest requires justification of an ability and right to decide what is for the greater good, in the face of a natural suspicion that those proposing an action in the public interest are actually acting in their own interests.

## Our approach to the public interest

We do not seek to establish a detailed definition of the public interest. There is an infinitely wide set of individual circumstances, which detailed definitions are unlikely to be able to cope with without unintended consequences.

Instead we set out a framework, which seeks to allow for variation in circumstances and public interest meaning. As noted above, it should be of assistance to policy-makers and others who claim to be acting, or implementing measures to act, in the public interest, to understand or test what they really mean. It will also help those with a need to assess such actions, to make their own determination of whether the public interest card has been played legitimately. It can be used as part of the decision making process or as a sense check on the outcome of that process. We expect to evolve the framework in the light of comments received and experience.

Our framework is based around the key issues that need to be addressed by those who are facing the challenge of justifying actions as being in the public interest. The framework covers a number of stages:

- justification of credentials for the right to invoke the public interest;
- identification of whether a matter is actually a public interest matter;

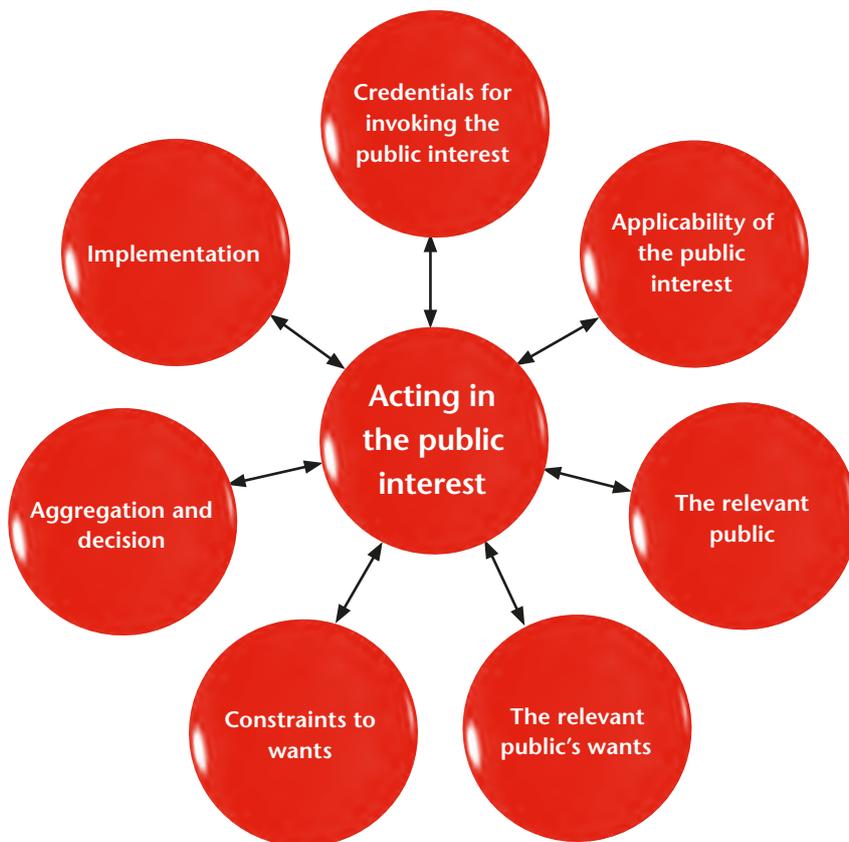
- consideration of who the relevant public are, what they want and whether their wants contrast with needs or other constraints;
- aggregation of sometimes conflicting input and resulting decision; and
- implementation of the desired action.

Our report is relevant to the accountancy profession and more broadly. It considers all circumstances in which organisations seek to change people’s actions through laws, regulations or other methods of persuasion. In this context the framework should be useful to anyone as a tool for challenge, and relevant to any of the wide range of actions that are asserted to be in the public interest. However, the framework also has a role for individuals considering an action such as disclosure of a matter that would otherwise be confidential, in the public interest. In some circumstances, transparency requirements will be lower for an individual undertaking his or her own action than for an organisation advocating change in others’ behaviour, but scepticism about motive is still appropriate and the same principles and questions can be applied.

The true measure of whether someone is acting in the public interest lies in the confidence of those affected, not those making the pronouncements. Therefore the need for those asserting that they are acting in the public interest to consider actual and perceived threats to fitness to decide, and the application of relevant safeguards, will apply throughout the process. The way a public interest action is determined, and seen to be determined, and the public interest appropriateness of the solution, will influence the acceptance of the measure. This will in due course affect the reputation of those implementing the action and that, in turn, will help with future acceptance and implementation.

### Public interest framework

The stages in the framework interact and the whole process is iterative. The diagram below and the summaries that follow it set out the seven key areas to be considered in making the assessment. The full report analyses these further.



## Credentials for invoking the public interest

Trust in those making assertions that they are acting in the public interest is vital, as a validation, as a motivation to comply, and, ultimately, to reduce the need for evidence to support the assertion.

As illustrated in the diagram, the elements of the framework interact in this respect: the rationale for invoking the public interest generally involves persuasion and justification, and that justification influences the amount of trust engendered in the relevant public. This in turn affects the effectiveness of the persuasion.

People in many societies today are generally distrustful of the motives of those in authority. Indeed there is academic evidence to support a presumption that invoking the public interest is a smokescreen to disguise self-interested action, whether deliberately or subconsciously. It is helpful therefore for proponents of public interest actions to consider what the key threats to trust by the relevant public might be (eg, conflicts of interest) as well as threats to making the right decision (eg, past mistakes).

Safeguards to be applied will generally include measures to improve process and accountability. They could include, for example, transparency of process, impact analysis, feedback enabling learning from past errors, sense checking, and oversight. Publicised undertakings to apply all or some of these can help in their own right, provided they are followed through.

## Applicability of the public interest

The use of the concept of the public interest as justification will present a challenge. It should be used only where it needs to be used and where it can be supported – ie, the matters raised in this framework can be addressed satisfactorily.

The public interest is an abstract notion; to argue and be able to hold out that an action (or inaction) is in the public interest can require consideration of a number of complex factors and impose a burden of proof. Flaws in the argument or the outcome can rebound upon the reputation of those asserting that they are acting in the public interest, which will harm acceptance of future matters said to be in the public interest. Alternative means of justification may be preferable, where much of the public is scoped out, or can opt out.

Matters to consider might include: the purpose of seeking to invoke the public interest; whether the matter is really intended to be for the benefit of society, as represented by the relevant public – this will involve a wide section of the public, whether they like it or not; whether the locus or remit of those seeking to act in the public interest permit or require a public interest perspective; and whether there are political or other practical considerations that might result in a sub-optimal outcome from a public interest perspective.

Even if the issue is not a public interest matter, the framework may still be useful to those advocating an action that impacts upon a fairly wide group of people, but the justification used should fit the purpose.

It is important to consider whether the likely debate would be about what outcome would be in the public interest. It may instead be that while the desired outcome is agreed, there are different expectations of what is likely to happen in the future, leading to different views on what actions are needed to achieve that outcome.

## The relevant public

The whole of the public must be eligible for consideration in respect of a matter which is asserted to be of public interest, by its very nature. However, as a practical point, there will be large numbers of people whose welfare will not actually be affected by the action.

The relevant public will therefore only be a sub-set of the whole public: those 'affected'. This will include those whose welfare will be advantaged or disadvantaged, although this is not always clear-cut; also, others with a legitimate interest, for example NGOs, representative bodies and others with a mandate to speak on behalf of people who are affected. Within the relevant public there will also be degrees of impact, which may be relevant in determining how to weight views.

The relevant public will not include those whose interest merely lies in finding something interesting. That is a different meaning of interest altogether.

## The relevant public's wants

Having determined who comprises the relevant public, the proponent of the public interest action's first consideration in determining what is in their interest should be what their wants are and whether the action is consistent with those. In some circumstances fundamental values may be the starting point but popular opinion must be relevant. However, determination of opinion is not easy. First, by its nature, the relevant public in a public interest matter will be broadly based. Second, what people want is complicated: it usually revolves around happiness, which is a subjective notion built around a whole series of factors that often conflict with each other, those of other people and those of other cultures. Wants therefore tend to conflict. Third, interests can coincide with those of others and interest groups will be created. Inevitably some will have a public interest perspective and some not. Some are more articulate or otherwise better at making themselves heard than others and expressed opinion will not necessarily be the same as actual opinion.

Having sought out representative opinion from the relevant public, it can be helpful to apply a sense check. A rational imputation of wants will consider: what would we expect the relevant public to want standing in their shoes? Intelligence and creativity have an important role to play in making the assessment too. Sometimes it may be difficult or impossible to gather opinion and a theoretical assessment will be the only option. This does impose a greater burden of proof of ability and right to decide, as the assessment will inevitably be challenged by those with different views.

## Constraints to wants

The relevant public's wants may be incompatible with a public interest outcome for a number of reasons. The overall impact of individual wants may be a sub-optimal outcome through the effect of one person's activities directly affecting another's, or through what the public think they want being distorted by incomplete or wrong information. Common goods and services and other externalities and public goods result in a different marginal cost-benefit to individuals than to society as a whole, especially taking qualitative issues into account. Over-riding values may arise, for example, from seeking to lead a change in attitudes. Finally, when trading current against future effects, people tend to discount the latter very heavily in their minds.

As a result, the relevant public's wants may need to be adjusted. However, the assertion that 'we know better' is rightly open to challenge and there will be an onus on those asserting an action to be in the public interest to explain why they know better.

## Aggregation and decision

Those determining a public interest action need to apply, and be seen to be apply, judgement to information gathered about individual wants. There may be a series of measurement issues to overcome, including: quantification; interaction; weighting; and how to maximise the end result when there may be several acceptable solutions.

A logical approach is needed to determine what outcome would be in the public interest, or in instances where there is a range of potentially positive outcomes, what would be most in the public interest. A decision based on a rational basis of calculation will assist transparency but is easier said than done. Use of informed intuition and impact analysis of costs, benefits and probabilities may be relevant, although this will at least partially depend on the nature of those determining a public interest action.

## Implementation

If a proposed public policy action is in the public interest it follows that it is in the public interest for that action to be implemented, and implemented effectively. This requires post-decision action by those charged with implementation, following consideration of how best to do it. That in turn depends on three key aspects. First, how will those affected actually be expected to react to the changes being implemented, given human nature? Is it even clear (especially in an international context) what the 'right' thing to do is? Many public policy initiatives have foundered because they are based on perceptions of how people should react, rather than how they actually do behave. Second, are those affected able to be assured that the advocate of the action can be trusted to make a decision in the public interest? This is considered under the first element of the framework but is also relevant here as people's perception of motives will affect that reaction. Third, practicalities: what remit and authority does the advocate have, and what education, publicity and support tools will be available?

The answers to these questions will all inform the decision on the relative degrees with which persuasion is balanced with outright requirements. Reaction needs to be anticipated in assessing the various combinations of 'carrot, stick or sermon' that may be needed.

# CONTACT US

We welcome views and comments on this report and the other themes of the *Market Foundations* programme. For a copy of the full report, or for further information, please email [marketfoundations@icaew.com](mailto:marketfoundations@icaew.com).

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