

## 1.2 The Regulator

This chapter examines the role, rationale, and requirements of the ICT regulator and consists of the following five sections

### 1.2.1 RATIONALE FOR AN EFFECTIVE AND INDEPENDENT REGULATOR

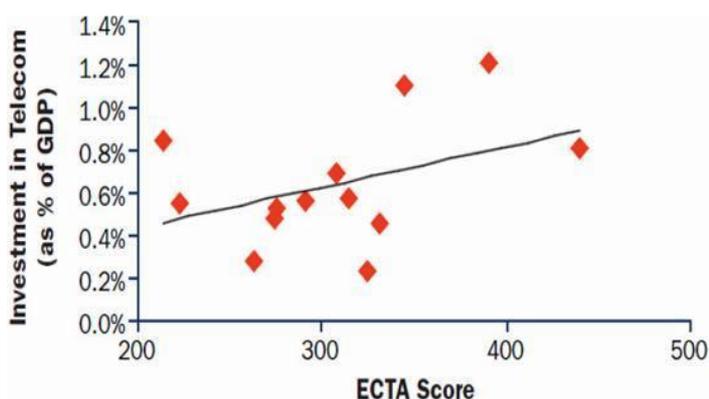
Effective regulators are normally associated with being independent to some degree. The rationale for establishing independent, often sector-specific, regulatory institutions is based on ensuring non-discriminatory treatment of all players in the liberalized market. At the outset of the transformation process the pre-existing monopoly structure allows for discriminatory behavior. The emphasis on non-discrimination arose from four sources which, in part, reflect different constituencies in the market. These four broad imperatives are to ensure that:

- Cooperation is enabled in a competitive environment to ensure that a level playing field exists between unequal entities in the marketplace;
- All equipment suppliers are treated equally where the market is dominated by a single buyer with strong pre-existing relationships with suppliers;
- All new entrants and investors in the telecommunications service sector are treated equally by the dominant competitor, who will be a supplier of inputs (e.g., interconnection) to the businesses of the new entrants; and
- All customers have a “voice” and their complaints and interests receive an adequate response.

Addressing non-discrimination involves building confidence in and the legitimacy of an “independent” regulatory institution. The central issue is establishing a functioning, enabling environment consisting of the regulator(s) and regulations that will attract sufficient and sustainable investment to satisfy existing demand, expand supply and introduce new services. Independence stimulates investor confidence and reduces regulatory risk.

The UN Task Force on Financing ICT supports the introduction of independent regulators, linking such independence to growth in the market. The Task Force has observed that: *“The introduction and strengthening of independent, neutral sector regulation has helped to reinforce investor confidence and market performance, while enhancing consumer benefits.”\**

Reinforcing investor confidence through an independent and effective regulator will attract private investment in the ICT sector. As detailed in the succeeding sections, independence, transparency of the regulatory process and regulatory policies that encourage competition are factors that influence the level of investment in ICTs.\* An effective regulator results in less regulatory risk and increases the likelihood of investment in the sector. Figure 1 shows the relationship between effective regulations and investment. The higher score from the European Competitive Telecommunications Association (ECTA), the more effective the regulations are. As the figure below demonstrates, investments in telecommunications rise as the regulatory environment improves.



◀ **Figure 1. Relationship between Effective Regulation and Investment in Telecommunications**

Source: Impact of Effective Regulation on Investment: an Investor’s Perspective, Zain Group citing the European Competitive Telecommunications Association (ECTA) which annually publishes a regulatory scorecard on the link between effective regulation and investment

- [GSR 2009 Discussion Paper, Impact of Effective Regulation on Investment: an Investor's Perspective](#)
- [Training Regulators in Africa](#)

## 1.2.2 WHAT IS “INDEPENDENCE” AND HOW IS IT FOSTERED?

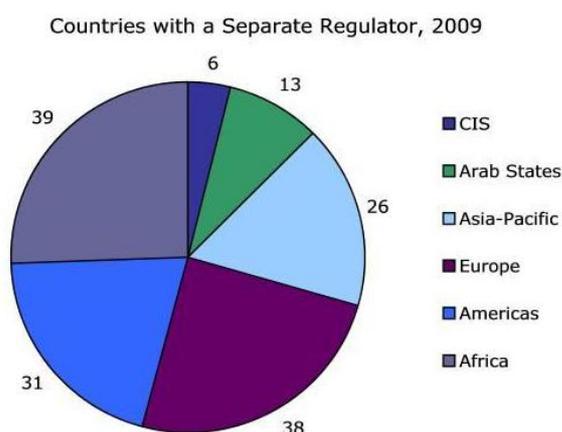
Absolute independence of regulatory bodies is neither possible nor desirable. A regulator should not set and implement its own agenda. “Independent” regulators are expected to be subject to government oversight and a system of checks and balances.

Effective regulation that supports sustainable investment requires some independence from political influences, especially on a day-to-day or decision-by-decision basis. The regulatory body must be an impartial, transparent, objective and non-partisan enforcer of government-determined policies by means set out in controlling statutes of the regulator, free of transitory political influences. The regulator should also be independent from the industry that supplies ICT services.

The regulator should implement the policy of the government and only make decisions that are within its legal authority. However, regulators need insulation from political intervention, so that the regulatory process is not politicized, its decisions are not discredited and the policy of the government is implemented. As discussed in [Module 6, Legal and Institutional Framework](#), a balance is needed to ensure that the regulator is both independent and responsive to the broad policies of the government. Several formal safeguards have been employed to achieve such a balance, such as:

- Providing the regulator with a distinct statutory authority, free of ministerial control;
- Prescribing well-defined professional criteria for appointments;
- Involving both the executive and the legislative branches of government in the appointment process;
- Appointing regulators (the Director General or Board/Commission members) for a fixed period and prohibiting their removal (subject to formal review), except for clearly defined due cause;
- Where a collegiate (Board/Commission) structure has been chosen, staggering the terms of members so that they can be replaced only gradually by each successive government;
- Providing the agency with a reliable and adequate source of funding. Optimally, charges for specific services or levies on the sector can be used to fund the regulator to insulate it from political interference through the budget process;
- Exempting the regulator from civil service salary limits to attract and retain the best qualified staff and to ensure adequate good governance incentives; and
- Prohibiting the executive from overturning the agency’s decisions, except through carefully designed channels such as new legislation or appeals to the courts based on existing law.

There are currently far more regulatory authorities independent from ministerial control around the world than dependent regulators. 153 countries have established regulatory authorities that are separate from the ministries. As shown in Figure 1, Section 1.5, there has been a steady rise in the number of separate regulators over the last 20 years. 125 of these countries with separate regulators have also ensured that the regulator is autonomous – or independent – in the decision-making processes. The separate regulator in the remaining 28 countries must get approval from the relevant ministry or other official body prior to issuing decisions.\*



◀ Figure 1. Number of Countries with Separate Regulators around the World

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- **Independence of the Polish Regulator**

### 1.2.3 ACCOUNTABILITY, TRANSPARENCY, AND PREDICTABILITY

In addition to independence, an effective regulator should demonstrate other characteristics, including accountability, transparency and predictability. These traits should be enhanced by a clear division of responsibilities between the ICT regulator, ministries and other regulatory agencies, such as the competition authority or radio spectrum management body where relevant.

The independence of the regulator must be balanced with accountability. The regulator's authority provides it with significant power to redistribute income among different constituents in the economy. Therefore, safeguards are required to ensure that the regulator does not become corrupt or inefficient. Citizens and regulated firms must know who is responsible for a decision and the reasoning behind the decision. Interested parties must be able to provide relevant input to a decision through consultation processes. They must be able to obtain redress easily and quickly when the regulator has acted arbitrarily or incompetently. These types of safeguards produce a balance between independence and accountability. Several formal safeguards have been employed to achieve this balance, such as:

- Publishing the statutes of the regulator that clearly specify the duties, responsibilities, rights and obligations of the regulator, as well as differentiating between primary and secondary regulatory goals where there are multiple goals;
- Ensuring that the decisions of the regulator are subject to review by the courts or some other non-political entity although some "threshold" should be established to deter frivolous challenges that simply delay the implementation of decisions;
- Requiring the regulator to publish annual reports on its activities and requiring a formal review of its performance by independent auditors or oversight committees of the legislature;
- Establishing rules for the removal of regulators if they show evidence of misconduct or incompetence;
- Allowing all interested parties to make submissions to the regulator on matters under review; and
- Mandating that the regulator publishes its reasoned decisions.

Transparency in **interconnection, authorization and licensing practices**, and **universal service obligations** is a specific requirement of the World Trade Organization (WTO) and a general requirement of the EU regulatory package. Transparency entails the regulator making available all relevant information in a timely fashion. Transparency enhances the confidence of interested parties in the effectiveness and independence of the regulator and strengthens the legitimacy of the regulator. Consequently, all regulatory rules and policies, the principles for making future regulations and all regulatory decisions and agreements should be a matter of public record. ICT regulation is an important policy issue, and all citizens need information about the policy to evaluate the performance of government.

Transparency is an important contributor to good governance in general. Importantly, transparency reduces the probability that interested parties, especially those adversely affected by a regulatory decision, will believe that decisions are biased, arbitrary or discriminatory. The reasoning behind regulatory decisions, including the principles and evidence that guided them, will be apparent when they are clearly presented in the public record. Discriminatory or corrupt decisions will become evident and more difficult to substantiate once transparent processes are in place.

A successful market that attracts investors requires a predictable regulatory process. Independent regulators are predictable if they adhere to the rule of law. The most important features of the rule of law are respect for precedent and the principle of *stare decisis*, particularly in common law jurisdictions. Respect for precedent means that regulators do not reverse policy decisions unless there is evidence that those decisions have led to significant problems or that new circumstances warrant a change in the rules. The principles of *stare decisis* require that cases with the same underlying facts be decided in the same way every time. This is of particular relevance in the resolution of disputes. Adherence to these principles enhances confidence in and the credibility of the regulator and reduces regulatory risk, which reverberates positively with investors.

## Practice Notes

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- **Interconnection Principles Contained in the WTO Regulation Reference Paper**

- [Using the Web to Increasing Licensing Transparency](#)

## Reference Documents

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- [World Trade Organization - Reference Paper](#)

### 1.2.4 WHAT IS THE ROLE OF REGULATORS?

Often there are sector-specific regulators, general regulators (such as competition authorities), and special agencies or ministries charged with specific tasks (such as spectrum management), that all share common duties. As noted by the UN Task Force on Financing ICT, this Toolkit and other sources, the most important duties of the regulator(s)\* include:

- Implementing the authorization framework that provides opportunities for new companies and investors to establish ICT businesses. Simple authorization procedures tend to maximize new entry (see [Module 3](#), Authorization of Telecommunication/ICT Services).
- Regulating competition (including tariffs) involving the effective enforcement of fair and equitable competitive market principles, restraining the power of dominant suppliers and leveling the playing field for new entrants (see [Module 2](#), Competition and Price Regulation).
- Interconnecting networks and facilities. Normally transparent rules are established for interconnecting all types of traditional and new communications networks and associated cost-based payments (see [Module 2](#), Competition and Price Regulation).
- Implementing universal service/access mechanisms to ensure the widespread (and affordable) diffusion of ICT (see [Module 4](#), Universal Access and Service).
- Managing the radio spectrum effectively to facilitate new entrants and new technologies, which is particularly relevant to new broadband wireless opportunities such as Wi-Fi and wimax (see [Module 5](#), Radio Spectrum Management).
- Establishing sufficient safeguards to ensure that consumers, particularly children, are protected against bad business practices, cyber crimes and violations of data privacy (see [Module 6. Legal and Institutional Framework](#)).
- Minimizing the burden and costs of regulation and contract enforcement (see [Module 7](#), New Technologies and Impacts on Regulation).

All of the above continue to evolve and to present new challenges in the context of market and technological developments, especially the growing availability of broadband and the increasing prevalence of convergence. For example, many countries have adopted consumer protection regulations specifically designed for ICT customers, which are enforced by the ICT regulator and/or a designated consumer protection agency. The Australian Communications and Media Authority (ACMA) has instituted measures to protect consumers' interests in the Internet Age by investigating complaints about online content and gambling services; encouraging the development of codes of practice for ISPs; and educating the public about Internet safety and privacy risks, particularly for children.\*

To better adapt to the new converged landscape, governments have also been developing coherent national broadband strategies as a vital component of overall deployment and access to broadband services. For instance, those OECD countries leading in broadband penetration rates have typically established national broadband policies. These countries include Korea (Rep.), Denmark, the Netherlands, Sweden, Finland, and the United Kingdom.\* As a step towards improving its ranking for broadband penetration among OECD countries, the United States is currently developing a National Broadband Plan to be presented to the U.S. Congress in February 2010. Rather than engage in broad regulatory intervention, the government's role in the provision of broadband should be based on sound economic principles limited to ensuring that markets function effectively and access is reasonably available to all.

The role of the regulator in broadcasting is similar to some of the functions of the ICT regulator such as allocating and managing the radio spectrum, licensing service providers and ensuring universal access. But broadcasting regulators have additional duties regarding the social and cultural impact of the sector. They are also charged with overseeing content and ensuring diversity, protecting minors, the right of reply, etc. Furthermore, if there is a Public Service Broadcaster (PSB), the regulator performs some form of oversight of it and private channels.

The proliferation of broadband and the digitalization of content are bringing about a profound and rapid transformation of the media/content landscape, which may change regulatory functions. Russia, for instance, has issued several Internet Protocol Television (IPTV) licenses. It is quite common for a radio "chat show" to take a call from someone living overseas

and listening to the program on the Internet. Both the Russian TV and the chat show channels are licensed but many service providers are not. The aggregate audience for the unlicensed self-produced and “long tail” content exceeds that of traditional broadcasters in some countries. For example, in July 2009 alone, YouTube’s audience exceeded 120 million people in the United States – or approximately one-third of U.S. population. The explosion in content provision is a huge challenge to content regulation (how does the regulator screen everything?), which is made even more difficult because a large proportion of the content may originate in other jurisdictions. As “mass markets” retreat, it will be necessary to reconsider the regulation of national broadcasting institutions and thereby the functions of the regulator.

Where PSBs, cable and satellite channels remain in a strong position, the regulator(s) will have a role to play in the application of competition policy, including merger control. This competition policy issue centers on the relationship between dominant/non-dominant access providers and dominant/non-dominant content providers.

In light of the recent global economic crisis, regulators can also play a key role in increasing confidence, reducing risk and encouraging investment in the ICT sector overall. In particular, regulators are able to play a role in investment by 1) lending financial support through “stimulus packages” and public private partnerships and 2) lowering the costs of doing business by deferring license fees and taxes, as well as implementing rules that enhance efficiency. \*

\* GSR 2009 Discussion Paper, Mandla Msimang, Effective Regulation: The “Stimulus Plan” for the ICT Sector at .

## Practice Notes

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- [Case Study Converged Regulator: Ofcom \[6.1.1\]](#)
- [Case Study Multi-Sector Regulator: Latvian Public Utilities Commission \(PUC\) \[6.1.1\]](#)
- [Case Study Single Sector Regulator - Instituto das Comunicações de Portugal \(ICP-ANACOM\) \[6.1.1\]](#)
- [Case Study Single Sector Regulator: Botswana Telecommunications Authority \(BTA\) \[6.1.1\]](#)
- [Facilitating Cooperation between Regulatory Agencies – Memorandums of Understanding and Cooperation Protocols](#)

## Reference Documents

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- [GSR 2009 Discussion Paper, Consumer Protection: Meeting the Expectations of the Connected](#)
- [GSR 2009 Discussion Paper, Effective Regulation: The “Stimulus Plan” for the ICT Sector](#)
- [Netherlands: Agreements between the Commission of the Independent Post and Telecommunications Authority \(OPTA\) and the Director General of the Netherlands Competition Authority \(the NMa\) on the method of cooperation in matters of mutual interest, 2004](#)
- [Nigeria: Memorandum of Understanding between the Consumer Protection Council and the Nigerian Communications Commission](#)

### 1.2.5 CONVERGENCE AND REGULATORS

Platforms fulfilling different functions have traditionally been regulated differently for many reasons. For example, as illustrated in [Module 6](#), telecommunications has been regulated in a different manner than broadcasting. In the context of convergence, where a single platform is capable of delivering all forms of electronic communications, should separate regulatory bodies merge or remain distinct institutions? Or should there be one regulator for platforms and another for content?

There remain many multi-utility regulators, which include telecommunications, although the number of “converged” regulators has grown over recent years. In Malaysia, the issue of a converged regulator was addressed at an early date when the Communications and Multimedia Act 1998 established the Malaysian Communications and Multimedia Commission (MCMC) as the sole regulator of telecommunications, broadcasting, and computing industries. In 2008, the Korean government created the Korea Communications Commission (KCC) by consolidating the separate telecommunications regulator and broadcasting regulator, which were the Ministry of Information and Communications (MIC) and Korean Broadcasting Commission (KBC), respectively. The KCC merged telecommunications, spectrum allocation and broadcasting, including content, under a single regulatory authority in order to adapt to the rise of converged technologies, particularly Internet Protocol Television (IPTV). The introduction of IPTV in Korea had been delayed for several years due to disputes between the MIC and KBC over jurisdiction. Within a few months of the KCC’s creation, however, the converged regulator finalized the rules enabling operators to provide IPTV. By the end of 2009,

Korea had over one million IPTV subscribers.\*

Establishing converged regulators in the EU has been more challenging. Although EU Member States are implementing a “future-proof” single regulatory framework for electronic communications, only four out of 27 Member States (as of 31 December 2009) have what could be regarded as “converged” regulatory bodies.\* These are Finland, Italy, Slovenia, and the United Kingdom.

It is not just the EU that lacks converged regulators since most OECD Members have not yet implemented laws to consolidate regulators. Only seven of the 30 OECD Members have single bodies dealing with all four regulatory forms of telecommunications; broadcasting carriage; broadcasting spectrum allocation; and content. These countries are Australia, Finland, Iceland, Japan, Korea (Rep.), the United Kingdom and the United States.\* For each of the EU Member States listed above, at least one of the four regulatory functions lies outside the “converged” regulator.

Converged regulators – with responsibilities for media and content as well as ICT services – face a daunting challenge by taking on extensive, and often complicated, workloads. However, in a converged environment, traditional telecommunications regulators may struggle to resolve certain issues, such as consolidation between media content and telecommunications service providers.\* Further, the absence of a converged regulator allows for the possibility of unequal regulatory treatment of different platforms delivering overlapping content or unequal regulatory treatment of different content delivered over any platform. Here there is the issue of technology-neutral regulation, meaning that the regulatory treatment of a particular service, regarding authorization, spectrum, interconnection, universal service, and numbering, is the same irrespective of the technology used to deliver it. Convergence poses challenges to both the structure of regulatory bodies and the instruments they use.

\* GSR 2009 Discussion Paper, Rory Macmillan, Connectivity, Openness and Vulnerability: Challenges Facing Regulators at

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- [Case Study Converged Regulator: Ofcom \[6.1.1\]](#)

[Next: 1.3 Authorization and Competition →](#)

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The ICT Regulation Toolkit is a joint production of infoDev and the International Telecommunications Union (ITU).



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