

Fundamental elements must be addressed to create a successful regulatory authority. In particular, countries must establish a framework that creates an effective regulator, as well as determine the appropriate legal status of the regulator and the impact, if any, that the organization's legal standing has on its operations and functions. The legal status of the regulatory authority will depend on the country's political and legal systems.

Once the regulator's mandate and competencies have been established, it is important to determine the regulator's institutional design, as well as its relationship with the government, industry, and the public. The institutional design of the regulator will affect the structure of the regulator, including its leadership and management organization and its organizational and administrative structures. Additionally, the successful management of a regulator and the effective exercise of its functions will be affected by the administrative structure of the regulator, such as its staffing process and the ethical conduct of its staff. Overall, it is important that the organizational and institutional framework provides for some measure of regulator independence, transparency and accountability.

Practice Notes

- [Table 5-1: Aspects of Effectiveness \[5.1\]](#)

Reference Documents

- [Bahrain Telecommunications Law](#)
- [Benchmarking Postal Regulator Effectiveness](#)
- [Botswana - Telecommunications Act 1996](#)
- [Estonian National Communications Board Annual Report, 2003](#)
- [Federal Communications Commission - Traits of an Independent Communications Regulator](#)
- [Honduras - Ley Marco del Sector de Telecomunicaciones](#)
- [Impending Growth of Indonesia's Market for ICT and its Regulatory Constraints](#)
- [Independent Communications Authority of South Africa Act 2000](#)
- [Leadership and the Independent Regulator](#)
- [Mexico - Reglamento Interior de la Secretaria de Comunicaciones y Transportes](#)
- [Organisation for Economic Co-operation and Development - Telecommunications Regulatory Institutional Structures and Responsibilities](#)
- [Tanzania - Communications Regulatory Authority Act 2003](#)
- [Uganda - Communications Act 1997](#)
- [Utility Regulators - The Independence Debate](#)
- [World Trade Organization - Reference Paper](#)

6.5.1 ESTABLISHING AN EFFECTIVE REGULATOR

Independence is a critical attribute for a regulator to be effective. However, effectiveness has additional dimensions (see Figure 5-A). In a broad sense, an effective regulator is structurally and financially independent, but the real effectiveness of the regulator will lie in how it achieves successful functionality, ideally in an independent and autonomous manner.

On the one hand, in a structural sense, independence means guaranteeing that the regulator maintains an arms-length relationship with private industry and the other branches of the government.¹ On the other hand, successful functionality is achieved when the regulator establishes clear rules that will govern such matters as its mandate and functions, its funding, and the implementation of its authorities, and then is able to execute those rules fairly and in a timely fashion.

Summary of aspects of an effective Regulator as discussed in this Chapter:

- Providing the regulator with a distinct legal mandate, free of ministerial control.
- Prescribing professional criteria for appointment.
- Involving both the executive and the legislative branches in the appointment process.
- Appointing regulators for fixed terms and protecting them from arbitrary removal.

- For a board or commission, staggering the terms of the members to ensure continuity within the top ranks of the agency.
- Exempting the agency from civil service salary and employment rules that make it difficult to attract and retain well-qualified staff, as well as to terminate poorly performing staff, as necessary where the civil service system and salaries do not seem to work.
- Providing the agency with a reliable and adequate source of funding.

Practice Notes

- [Table 5-1: Aspects of Effectiveness \[5.1\]](#)

6.5.1.1 STRUCTURAL INDEPENDENCE

A regulator can function in an effective manner in a given market within a range of organizational structures. As discussed more fully in Section 5.2, there are various institutional options for structuring a regulator. In some cases, although increasingly rare, the ministry may be responsible for regulating the sector. Alternatively, there may be a unit inside the ministry that acts in the capacity of a regulator. There may be a formal office outside a government ministry that serves as the regulator. Lastly, a regulator can be legally independent; that is, separate from the central governmental structure.

Pursuant to the World Trade Organization (WTO) Reference Paper that requires countries to establish a regulator separate from the operator, in recent years many countries have established a structurally independent regulator, which separates the function of regulating the telecommunication market from that of supplying services.¹ Governments have identified the need to clarify and separate the various functions of the state, as it often acts as: (i) owner/shareholder of enterprises (i.e., incumbent providers of basic services); (ii) regulator (e.g., enacting and enforcing the general rules); (iii) overseer of competition in the market; and (iv) protector of consumer interests.

Providing a regulator with structural independence will reduce the possibility of political or industry capture. When a regulatory body bows to external pressure from operators or other government entities, it often lacks independence and its decisions are neither objective nor transparent. For example, regulators with ties to state-owned incumbents may bar or delay the introduction of new technologies and services or fail to resolve interconnection disputes in order to protect the interests of incumbent operators. However, governments must also ensure that they do not create a situation whereby the regulator itself is effectively “captured” (meaning undue influence by politicians and/or dominant players) because a statute or regulation provides that the regulator is responsible for ensuring the health of the industry (including the incumbents), and as a result, the regulator is of the view that it must take actions protective of the incumbent operators. In addition, regulators are often forced to take certain “protective” actions because of exclusivity provisions imposed on them by government policy (e.g., that the incumbent operator is granted exclusivity over part of the market for a certain number of years in order to prohibit the introduction of new entrants and/or new technologies that may threaten the incumbent’s market share – e.g., VoIP).

These decisions can be detrimental in that they often limit competition that would benefit consumers and erode confidence in the regulator since the regulator is perceived as “captured” by the incumbent or other government entities. Ultimately, the mandate of the regulator should not be to ensure the viability of certain industry participants, but to protect consumer interests.

Although structural independence is an important element of an effective regulatory environment, it alone is not sufficient to ensure successful development of the sector. In order to be fully effective, a regulator also requires financial independence and functionality, as further discussed below.

6.5.1.2 FINANCIAL INDEPENDENCE

The funding sources and budgeting processes of regulatory authorities can have an important impact on their independence, efficiency and cost of regulation. The source of a regulatory authority’s funds and the process by which these funds become part of the authority’s actual budget can directly impact the degree of a regulator’s autonomy and competence when carrying out its responsibilities.

The funding mechanism is critical to ensuring effectiveness of the regulatory function. While a regulator’s budget may come from the government or from the telecommunications sector itself through licensing fees, spectrum fees, fines and other administrative charges, the key is that funding should be free from political and private interest influence.¹

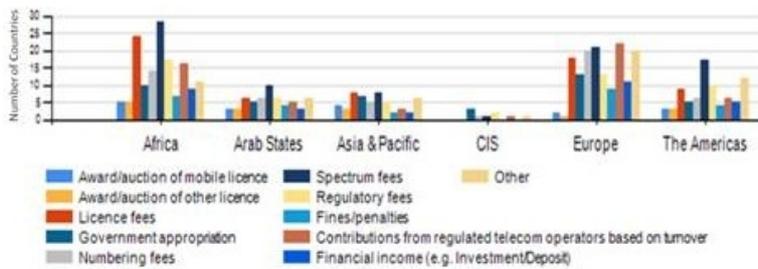
There are two primary vehicles used by countries to fund a regulator’s budget. Although a country may use one or the other, funding for the regulator generally comes from some combination of the two sources. One source of funding is a formal allocation from the government’s budget. The benefits of this approach can include promoting a greater role of the elected government in directing regulation, as well as establishing policies to support the overall economic goals of a country.²

A second approach is to allow the regulator to collect monies from the industry through fees and contributions.³ Regulators may receive payments from operators for spectrum or licensing fees⁴, penalties resulting from enforcement, or charges associated with administrative tasks such as providing numbering resources. Some countries assess special taxes on telecommunication operator revenues (in addition to income taxes imposed by the treasury), of which a portion is often earmarked for universal service purposes.⁵

The ITU’s World Telecommunication Regulatory Database 2010 reveals that, for the most part, telecommunications regulatory authorities are funded through general government budget appropriations, licensing (usually one-time) fees, spectrum fees, regulatory fees (usually annual fees that can be based on a percentage of operator’s turnover or revenues), or a combination of these sources. (See Figure 5-B.) Of the 192 countries that provided information on the breakdown of their regulatory authority’s financing sources, only 28 indicated that the regulator relies on a single source of funding—over 85 per cent rely on some combination of funding sources.⁶

◀ B: Sources of Funding for Regulators

Source: ITU World Telecommunication Regulatory Database 2010



(i) Reliance on government appropriations

In certain countries, the regulator's budget is part of the government appropriations allocated to the ministry under whose authority it resides. In Mexico, the Comisión Federal de Telecomunicaciones (COFETEL) is considered a "decentralized" division of Mexico's Secretaría de Comunicaciones y Transportes (Communications and Transportation Secretariat - SCT) and even though it can make regulatory decisions independently of the SCT, it must do so within the budget assigned to it by the Secretariat.⁷ Similarly, the Comisión Nacional de Telecomunicaciones (CONATEL) in Honduras – a "decentralized" division of the country's Ministry of Finance – proposes its annual budget to the Ministry of Finance, and the Ministry incorporates the proposal budget into its government appropriation proposal, which must be approved by the national congress.⁸ In South Africa, the Independent Communications Authority of South Africa (ICASA) Act of 2000 specifies that the regulatory authority will be funded by a parliamentary appropriation. The same act also indicates that any revenues received by the regulatory authority – other than through the government appropriation – must be paid into the National Revenue Fund within 30 days of receipt.⁹

In these cases, the government's authority to determine the budget gives it a degree of direct influence and intervention, or at least the appearance of such, over the policies and regulations the agency may wish to implement, possibly reducing the agency's effectiveness in regulating its telecommunications sector. The regulator may also face uncertainty as it must rely on the commitment of the government toward the telecommunications sector in order to have the resources necessary to implement its policies and regulations. Lastly, governmental budget limitations may make relying on the government as the only source of funding problematic as the funding level may be inadequate or not released timely in order to meet increasing regulatory needs.

(ii) Use of multiple funding sources, but with little or no control of their budgets

Relying on multiple sources of funding rather than solely on government appropriations allows regulators to have more financial independence and can make them less subject to outside influences. However, having to surrender revenues to the government and having its budget approved by the government can act as a system of checks and balances that prevents a regulatory authority from over-spending and perhaps even over-charging the regulated entities, although this control may be seen as diminishing the regulator's ability to determine the funds it will require to implement the policies and programs needed by the telecommunications sectors.

The National Communications Board (SIDEAMET) of Estonia, which is supervised by the Ministry of Economic Affairs and Communications,¹⁰ relies on a number of sources of funding (e.g., licensing, numbering), but all revenues collected are deposited in a bank account under the name of the Ministry of Finance of the Republic of Estonia. The revenues are deposited into the state budget and it is the government that determines the appropriation to be received by SIDEAMET each year.¹¹

(iii) Use of multiple funding sources and control of their budgets

The majority of telecommunications regulatory authorities have diverse sources of funding which provide some level of financial independence from the government. Although government budget appropriations are a staple in most regulatory budgets, increasingly regulators have developed other funding sources such as: administrative and service fees; numbering fees; authorization fees; fine and penalty fees; and revenues earned from auctions. A few regulators also look to generate funds by investing in property, leasing facilities, earning interest on local bank certificates and fixed deposit accounts, and obtaining loans and grants from multilateral organizations. Financial independence, coupled with the authority to manage and administer their own funds gives regulatory agencies more regulatory certainty so that they can assert more independence in regulating the telecommunications sector. Nonetheless, there should be rules that ensure such charges are not arbitrary, excessive or discriminatory.

In Brazil, the Agência Nacional de Telecomunicações (Anatel) has the Fundo de Fiscalização das Telecomunicações as its only financial resource. All revenues collected by Anatel must be deposited in this fund and it is from this fund that Anatel obtains its expenditures each year. Anatel receives revenues from several income sources, including: government appropriations; credit operations; concessions, permits, authorizations, and spectrum fees; fines and penalties; operating and inspection fees; donations, legacies, subventions and other resources assigned to the Agency; and fees, prices or fines from the sale or leasing of assets as well as publications, technical data and information.¹² The situation is similar in Nigeria as the Communications Act of 2003 requires that the Nigerian Communications Commission (NCC) "establish and maintain a fund from which all expenditures incurred by the Commission shall be defrayed." The NCC receives its funds from government appropriations, licensing fees, spectrum fees, grants, loans, gifts, and aid.¹³ The Uganda Communications Act of 1997 establishes that the Uganda Communications Commission (UCC) "shall operate its own bank account."¹⁴ However, the Commission must declare any surplus from its operations to the Minister of Finance.

The Telecommunications Regulatory Authority (TRA) in Bahrain, which has an independent budget, also has to declare and relinquish any surplus to the country's public treasury within one month after the accounts have been audited. It is only allowed to keep the surplus (or part of it) for future development projects after coordinating with the Ministry of Finance and National Economy and upon approval by the Council of

Ministers.¹⁵ The Tanzania Communications Regulatory Authority (TCRA) submits an estimated budget to the Minister responsible for Communications for approval. At the end of the fiscal year, the TCRA deposits “to a special account all surplus funds of the Authority”¹⁶ and can use the funds from this special account only for “one or more of the following purposes: (a) consumer education or information projects; (b) special non-recurring projects; (c) budgeted capital expenditure; (d) major rate regulating inquiries; and (e) training, research and development.”¹⁷

Another example of a regulatory authority with financial independence is Botswana. The Botswana Telecommunications Authority (BTA) revenues derive mainly from the following sources: government appropriations; licensing fees; service fees; and contributions or endowments from any source. As the BTA has the authority to manage its own budget and can determine what to do with any surplus, the regulator has invested its monies in Bank of Botswana certificates, fixed deposit accounts, as well as in purchasing and leasing properties, thus diversifying its sources of funding to an even greater extent. Presently, BTA has a surplus that allows it to cover operating expenditures for the year, as well as the flexibility to evaluate its capital expenditure options in order to prioritize projects for the next two years.¹⁸

In the United States, the Federal Communications Commission (FCC) operates through a government allocation of funds. However, the FCC is required by Congress to collect regulatory fees to offset a portion of the annual allocation. In recent years, regulatory fees have represented about 90 per cent of the total annual budget. As such, the FCC’s operating budget relies very little on government allocation.

Reference Documents

- [Canada: New Telecommunications Fee Regulations](#)

6.5.1.3 FUNCTIONALITY

The mandate and competences of the regulatory authority as well as its relationship with government and other market players depend on the delegation of powers by the state. The degree of delegation of such powers is determined by the political tradition of the country and on the political will to create an independent and competent regulatory authority. These factors influence the specific responsibilities, authority, and accountability for the performance of the regulator’s specific activities.

Although complete “independence” is nearly impossible to attain, the regulator should have sufficient independence to implement regulations and policies without undue interference from interested parties such as politicians or other government agencies (functional independence). The institutional regulations put in place by laws and regulations as well as the administrative structure of the regulatory authority are critical to ensure such independence. The degree of independence differs considerably from country to country.

Checks and Balances/Balance of Power/Separation of Power

Independence does not mean that regulators should function in a vacuum, particularly in countries where the legal and judiciary infrastructure is weak. Independence must be balanced with clearly identified requirements for accountability, including strict procedural requirements, reporting mechanisms, public consultation, and substantive judicial review. Accountability involves establishing: (i) detailed policies and laws that set forth explicit objectives governing the regulator; (ii) specific requirements for reporting to the government or Parliament; (iii) procedural requirements; and (iv) the possibility of judicial review.

It is clear that even if independent, a regulator is still an administrative body of the government. Accordingly, its actions should be monitored so that it is accountable for its actions, and administrative measures must be in place to oversee the activities of the regulator.

When regulators are first established, there are inevitably strained relations between the regulator and the ministry that formerly performed the regulatory functions.¹ Relations between the regulator and the incumbent may also be strained as the incumbent experiences a policy change (normally associated with the formation of a formal regulator and the inception of its activities). In addition, when appeals are made to the court, the court is often examining new issues arising from new legislation about the powers of a new type of government agency. Thus, there is a learning process for all parties.

One mechanism for this oversight relates to the financing of the regulator. In many cases, the independent regulator’s budget must be approved or endorsed by the government before the finalization of the national budget by the legislative body.

A related issue is the reporting mechanisms for independent regulators. There are three types of reporting mechanisms for independent regulators. As stated in the 2000 OECD Working Party Report,² the most popular mechanism requires the regulator to report to the ministry responsible for telecommunications policy. In some countries, such as Austria, Germany, and the United States, the independent regulator must report to the legislative body. The third model is exemplified in Canada, where the CRTC reports to Parliament through the Minister of Canadian Heritage.³ There are a few countries, such as Belgium and France, which do not impose any statutory reporting obligation on the telecommunications regulator except for the publication of an annual report.

In most of these cases,⁴ the reporting obligation is not very specific. Reporting in many OECD member countries occurs through a publication of an annual report that describes the regulator’s activities. Some countries, however, impose very specific reporting obligations on the regulator. For example, in Australia, ACMA reports each year to the Minister of [Communications, Information Technology and the Arts](#) on significant matters relating to the “performance” of carriers and carriage service providers.⁵

As noted in Section 5.3, another key oversight relationship that influences the independence of the regulator relates to the way in which the head of the regulatory body is appointed and under what conditions he or she can be replaced.

In some cases, the decision-making body of the regulator is composed of commissioners who are appointed by different branches of the government (for instance, some of the commissioners are appointed by the head of the administrative body and the others by the legislative body).

In most OECD member countries, the head of the independent regulator is appointed by the minister responsible for the sector or the

president based on the recommendation of the Cabinet or the minister. For example, in Germany, the president and two vice-presidents of the Federal Network Agency⁶ are nominated by the federal government upon the proposal of the Advisory Council to the Federal Network Agency. Then, they are appointed by the President of Germany. The responsibilities of the president of the Federal Network Agency are stipulated in a contract between the Ministry of Economics and Technology and the president of Federal Network Agency. This contract is subject to approval by the federal government.⁷

Another important element relates to the enforcement of regulatory decisions. In the majority of countries, the independent regulator's decision cannot be overruled except through a court decision. In addition, in many countries, while the court can nullify the decisions of the independent regulator it cannot impose a new decision on the issue. However, there are countries, such as Canada, Hungary, and Mexico, which give the minister or the Cabinet power to make changes to the decisions of the independent regulator either based on appeals or on their own discretion. In Canada, nevertheless, appeals to the Cabinet must be conducted in a public manner and the power of Cabinet is generally limited to requiring the CRTC to reconsider the decision – this is the case with broadcasting. With regard to telecommunications matters, the Cabinet can directly change the decision, although this occurs rarely.

Relationships with Other Entities

The most common institutional structure used today is the establishment of an independent regulatory authority with responsibility for implementing and administering the regulatory framework, but policy-making responsibility resides with a particular ministry. (See Table 5-2.)

Function	Responsible Organization
Policy development	Government, ministry or executive branch
Regulation	Separate regulatory authority
Network operation/service provision	Privately and/or commercially operated telecommunications operators

◀ Table 5-2: Regulatory Institutional Structure

Within this structure, the division of regulatory tasks differs greatly. Currently, a highly fragmented and inconsistent pattern of regulatory responsibilities exist among countries for telecommunications, postal services, and broadcasting and media matters. In addition, telecommunications regulators can have sector-specific or multi-sectoral regulatory functions (for more detail on the institutional design of regulators, see Section 5.2). This can lead to an inconsistent pattern of the division of regulatory functions (e.g., licensing, numbering, and spectrum management) between policy-makers and regulators around the world.

As stated in the 2000 OECD Working Party Paper on Institutional Structures and Responsibilities,⁸ the ultimate objective of the administrative structure of regulation is not to have an independent regulatory body, but rather an effective regulatory framework. This framework and its implementation determine the ability of a country to achieve policy objectives such as making the market more competitive, stimulating technological diffusion and enhancing efficiency, and ensuring that consumers benefit from these developments.

The regulator is, in fact, a stakeholder in this process of market development. This makes transparent, practical cooperation and communication between the regulator and the policy-maker (as well as with other stakeholders) essential to ensuring that regulation is responsive to government policy decisions and the realities of the market.

Although functionally independent, the regulatory authority must maintain relationships with various other entities in order to ensure that each organization's duties and jurisdiction are clearly delineated, as well as to clarify how the organizations will cooperate where responsibilities overlap.

(a) Coordination with the Ministry in Charge of Communications and Other Ministries

Some countries require that the regulatory authority coordinate most closely with the ministry responsible for telecommunications.⁹ Often the regulatory authority is required to support the minister and other relevant government bodies by preparing technical and strategic documents on its country's international positions for submission to various international fora. The regulatory authority can also propose the general policy for the telecommunications sector to ensure the expansion of telecommunications service offerings and the achievement of universal service objectives. In some cases, the regulator is required to prepare legal texts for the minister to submit to the Cabinet. Other countries require that the minister issue resolutions and regulations regarding, for example, interconnection, pricing and licensing. In some cases the regulator is even required to obtain approval from the minister for licences to be issued.

In addition to the ministry in charge of telecommunications, many regulatory authorities are required to coordinate and interact, from time to time, with various other entities and bodies, such as:

§ The prime minister

§ The ministry responsible for finance or economic affairs

§ The ministry responsible for commerce and industry

§ The ministry responsible for defense and other security entities

- § The ministry responsible for internal administration
- § The ministries responsible for information and broadcasting, media and content
- § The ministry responsible for transportation
- § The ministry responsible for justice
- § The ministry responsible for research and development
- § The ministry responsible for science and technology
- § The competition authority
- § The spectrum administrator
- § Municipalities

Many regulatory authorities are financially and administratively independent. However, in some cases, the annual budget and final accounts must be submitted to the ministry of finance for approval. In addition, some countries require an independent auditor to express an opinion on the final accounts of the regulatory authority to the Cabinet.

While the regulator generally is responsible for overseeing tariff policies, sometimes the basis for determining the service tariffs must be approved by the Cabinet after being evaluated by the ministry of telecommunications and the ministry of finance.

To issue radio licences for the purpose of the radio or television services, some regulatory authorities must obtain the approval of the minister of information or the ministry in charge of broadcasting, media, or content.

(b) Coordination with the Competition Authority

A key relationship within this context is the relationship between the telecommunications regulator and the competition authority. As the telecommunications market shifts from monopoly to competition-based, there has been increasing involvement of the competition authority in the telecommunications sector. In most countries, the telecommunications regulator is responsible for technical regulation (e.g., spectrum allocation, number allocation, type approval, and standard setting) as well as telecommunications-specific economic and social regulation (e.g., licensing, universal service, price regulation, the interconnection regime, and rights-of-way), whereas the competition authority is responsible for anti-competitive behaviour and mergers. In practice, however, there is some overlap between the telecommunications regulatory authority and the competition authorities and within that context, it is important to ensure concurrent jurisdiction and coordination (see Section 3.3) for more detail regarding the role of the competition authority).

(c) Coordination with the Broadcasting and Media/Content Authorities

In countries where telecommunications, broadcasting and/or media (i.e., content) are regulated by different entities, it is critical for clear channels of coordination to be established between the various authorities, particularly as the trend towards greater technological and service convergence continues. In particular, close coordination is necessary to enable the growth of IPTV, which may be hampered if there is conflict between the telecommunications and broadcasting regulatory authorities. In India, for example, the Ministry of Communications and Information Technology (MCIT) is tasked with telecommunications policy while the Ministry of Information and Broadcasting (MIB) monitors content related to television and radio broadcasting and film.¹⁰ In order to clarify the ministries' roles in licensing IPTV services, in August 2008, India's Union Council of Ministers of India approved IPTV guidelines that formally permit telecommunications operators to provide IPTV.¹¹ Under the guidelines, the MIB allows any operator to offer IPTV, without further registration with the MIB, provided that the operator:

- Holds a unified access service and/or commercial mobile telecommunications service license duly licensed by Department of Telecommunications (DOT), which is housed within the MCIT; no further registration with the MIB is necessary;
- Is an ISP with net worth of more than Rs. 100 Crores (USD 22 million) and having permission from the DOT to provide IPTV.

Although IPTV licensing of telecommunications operators and ISPs is under the purview of the MCIT, the MIB is responsible for licensing of cable TV operators. Under the guidelines, any licensed cable TV operator is permitted to provide IPTV services without any further permission. All IPTV providers—whether telecommunications operators, ISPs or cable TV operators—must submit a declaration prior to beginning IPTV services to the MIB, MCIT and TRAI that provides details regarding the proposed service areas, start date and network infrastructure information. Once operators begin providing IPTV services, the MIB has the authority to monitor and inspect the facilities, as well as to address content-related issues.

As India exemplifies, where various authorities hold jurisdiction over telecommunications and broadcasting matters, high-level coordination (e.g., the Council of Ministers) and rules that set out each ministry's responsibilities are important—if not necessary—to ensuring that such converged services are available in the country in a timely and orderly fashion.

(d) Coordination with Non-government Entities

In addition to the various government entities that the regulator must coordinate with, the regulatory authority also is required to interact with users, consumer groups, telecommunications operators and service providers, and investors.

In addition, regulators frequently meet with other regulators either on a bilateral basis or in regional and other international fora (e.g., CITELE, Regulatel, IRG, ERG, CEPT, APT, WATRA, TRASA, COMESA, ETSI, and ITU).

Best Practices in Building Effective Regulatory Institutions

As stated in the 2000 OECD Working Party Paper on Institutional Structures and Responsibilities,¹² the ultimate objective of the administrative structure of regulation is not to have an independent regulatory body, but rather an effective regulatory framework. This framework and its implementation determine the ability of a country to achieve policy objectives such as making the market more competitive, stimulating technological diffusion and enhancing efficiency, and ensuring that consumers benefit from these developments.

The regulator is, in fact, a stakeholder in this process of market development. This makes transparent, practical cooperation and communication between the regulator and the policy-maker (as well as with other stakeholders) essential to ensuring that regulation is responsive to government policy decisions and the realities of the market. At the 2009 Global Symposium of Regulators (GSR-09), the participating regulators established *Best Practices Guidelines for innovative regulatory approaches in a converged world to strengthen the foundation of a global Information Society*.¹³ A key part of these guidelines, related to building effective regulatory institutions, provides for the following best practices:

1. Regulatory authorities should be able to carry out their mandate efficiently, while ensuring consistency and transparency of regulation, equal treatment of market players and accountability of regulatory decisions.
2. Regulator authorities should be empowered with suitable tools to ensure enforcement of the various laws, by-laws, regulations and procedures.
3. The creation of a converged regulator in charge of ICTs and broadcasting could be an effective step towards enabling market integration in a converged environment. Should this not be feasible, closer coordination and collaboration between the sector-specific regulatory authorities in charge of telecom, broadcasting and electronic media, as well as authorities in charge of competition is essential.
4. A converged regulator will require skilled human resources and adequate financial resources in order to perform its extended mandate successfully.
5. Strategic and policy activities to build the information society and to play an inter-sectoral coordinating role should be integrated into the converged regulator's mandate.
6. Close collaboration with other concerned agencies is needed to ensure that appropriate measures and tools are put in place to safeguard Intellectual Property Rights (IPR), Internet safety covering such issues as the protection of the children online and fraudulent activities.
7. Monitoring and examination of the evolution of regulatory institutions should continue in order to develop effective, efficient regulation for the development of domestic markets and consumer welfare, as well as to share best practices
8. International cooperation is necessary between national and regional regulatory authorities in building a harmonized and coordinated approach to oversee the evolution of the converged markets.

6.5.2 INSTITUTIONAL DESIGN OPTIONS

Governments have a range of options for regulating the telecommunications sector. When establishing a regulatory authority, governments must take into consideration the level of development and liberalization of the ICT sector, resources available within the country, as well as the historical context and the administrative and legal frameworks available for regulating the sector.

As competition increases, new regulatory priorities (e.g., market entry regulation) emerge, and issues of regulatory autonomy gain prominence (with the separation of regulation and operation) and can affect the choice of structure for the telecommunications regulator.¹ The main issues relate to ensuring separation between regulation and operation (especially in the case where the historical operator was still under public ownership), guaranteeing an independent and long-term strategy for regulation and competition in the market and ensuring protection of regulation from short-term and sometimes personal political and economic pressures. The regulator also has to be insulated from undue influence by politicians, industry, legacy operators, and consumers. As a result, much emphasis has been placed on the need to create independent regulatory authorities for the telecommunications sector.

Today, a majority of countries have a national regulatory authority for telecommunications -- the ITU T-Reg website lists 131 countries with a "separate regulatory authority."² Although some of the agencies fall into what are generally called "converged"³ regulatory authorities, the majority can still be described as focusing primarily on the telecommunications sector. Initial consensus often led to the establishment of a specific sector regulator, but the growing force of convergence has prompted a new and growing trend towards creating converged regulators. The justification is that a converged regulator is better suited to respond to new technologies and the interdependency of different communications services. Some countries have taken a different approach by including the regulation of the telecommunications sector in the mandate of a multi-sector utilities regulator, or by opting for an approach that veers away from sector-specific regulation and relies on the application of competition and antitrust rules to the communications sector.

In selecting the appropriate institutional structure, countries have various design options available from which to select, including economy-wide, infrastructure-wide, communication-wide or purely telecommunications-focused institutions. The choice depends in part on the extent to which the telecommunications sector is similar to (or different from) other sectors of the economy in a particular country and on the availability of suitably qualified staff. The greater the degree of openness and liberalization in the telecommunications sector, if matched by the other components of the utilities sector (e.g., electricity, water), and the greater the similarity in developments among the sectors, the larger is the scope for the application of cross-sector rules that are applicable to competitive activities in general. A key question that ultimately drives the choice of institutional format is whether the regulatory framework strikes the right balance between recognizing the specificity of the telecommunications sector and promoting the coherence of regulatory decisions across sectors.⁴

As the telecommunications market becomes liberalized and more competitive, disputes among operators, and between users and operators, generally increase. The regulator needs to have the authority to effectively resolve disputes and establish procedures to adjudicate them, and sufficient manpower to oversee enforcement (for further details on dispute resolution, see Section 6.2). These factors impact government decisions regarding the mission statement and mandate of the regulator and in some cases influence the choice of institutional design,

including internal administration and staffing.

Flexibility is also a key issue that must be considered in choosing among the institutional design options. Appropriate regulatory structures change over time as sectors evolve. The change depends on the nature of the issues at stake – in transport and telecommunications, for example, where monopolies previously considered “natural” are eroding, the mandate of regulators is likely to change more rapidly.

The choice of institutional design *per se* will not guarantee success of the regulator. Whatever the institutional design option chosen, several important principles should be kept in mind, including:

§ Regulators must be perceived by industry to be independent – thus the importance of transparency and accountability of the regulator;

§ Regulators should have the expertise to assess and make sound judgments on both technical and industry-specific issues – thus the importance of appropriate appointment and staffing mechanisms;

§ The regulator must take into account various viewpoints and interests, including economic, social and political objectives. This balance should be reflected in the institutional structure and in the system of checks and balances;

§ The institutional design, internal structure, and administration must be flexible enough to allow the regulator to adapt to market realities.

6.5.2.1 OVERVIEW AND COMPARISON OF DIFFERENT INSTITUTIONAL DESIGNS

There are four main institutional designs for telecommunications regulatory entities. First is the single-sector regulator whose sole function is to oversee the telecommunications sector (designated as Model 1 in this Section). The term “single-sector” is somewhat misleading as these entities, which in most cases originated from the separation of the operational and regulatory activities of state-owned post and telecommunications companies (PTTs), often include the postal and telecommunications industry as well as radiocommunications. The second design is known as the “converged” regulator, meaning those regulatory entities that oversee a broader range of services which, in addition to telecommunications, also include information and communications technologies and broadcasting (designated as Model 2 in this Section). The multi-sector regulatory authority (Model 3) usually encompasses various industry sectors that are considered public utilities, e.g., telecommunications, water, electricity, and transportation. The fourth category is not a regulatory authority *per se*, but an approach in which general competition policy is the main method of overseeing the telecommunications sector (designated as Model 4 in this Section).

Characteristics of these models of institutional entities for telecommunications regulatory agencies are as follows.

Model 1 – Single sector regulators

This organizational structure focuses mainly on the telecommunications (and sometimes postal or information technology) sector, with other government entities responsible for broadcasting and content-related media issues. Many countries around the world still use the single-sector regulatory authority approach,¹ including Algeria (Regulatory Authority for Post and Telecommunications), the Comoros (National Society of Postal Services and Telecommunications), Jordan (Telecommunications Regulatory Commission, which includes postal oversight), Egypt (National Telecommunications Regulatory Authority), and Oman (Telecommunications Regulatory Authority).² The single-sector regulator also includes organizational structures where the ministry is a regulator, such as the Ministry of Internal Affairs and Communications in Japan.

Prior to liberalization it was common for a state-owned operator to be responsible for regulating the post and telecommunications industries as well as for radiocommunications issues, and in some cases, even serving as international representatives of their respective countries with regard to their operations. After liberalization, this structure was no longer possible under most countries’ legislation.³ Thus, the operation and regulation functions were separated and independent regulators were established. In many countries, when telecommunications regulators were initially established, they simply took over the “regulatory function” from government-owned PTTs and therefore their mandate almost automatically included the administration of radiocommunications and postal services in addition to telecommunications.

In Europe, once the PTTs were separated and privatized, the regulation of telecommunications, radio and the postal sector often was assigned to one agency.⁴ Telecommunications regulators in Europe were established by combining certain units within the public administration (or from the state-owned operator) or by transferring employees or units from the ministry to the new organization. The units that were transferred often remained the same and were integrated into the structure of the new organization, which was based on fields of activity and communications technologies. Within this context, regulators in Europe were generally organized in a technology/field-oriented regulatory structure and emphasis was placed on the recruitment of technologically-oriented staff (e.g., engineers).

A key advantage of a single-sector regulatory authority is that it can be focused on the complex technical challenges of the telecommunications sector, including network and service development. The telecommunications sector tends to be more dynamic than other utilities and a single-sector regulator can often adapt to this more easily. One disadvantage of sector-specific regulators is that sufficient resources may not be available to staff the different regulator agencies and there may be duplication for regulatory activities that are common to different industries.

A justification for a single-sector regulator is based on the perception that the telecommunications sector includes specific technical issues, such as numbering, that are unique to the telecommunications sector and exhibits specific characteristics that differentiate it from other industries. Decision-making within communications policy is based on the expertise of the regulators. As experts, they participate in drafting laws and act as advisors to the appropriate ministry or other authorities when necessary. Regulators require not only need expertise in the technical, financial, and legal aspects of communications, they also need to systematically analyse present and future developments, and be able to cooperate with other countries on sector issues at the international level. Therefore, it is vital that staff is sufficient in number and suitably qualified to be able to face such a task. The perceived need for a specialized skill-set led the Cape Verde Government to establish a separate ICT specific regulator in 2004 (Institute of Communications and Information Technology – ICTI) in parallel with and despite the existence of a multi-sector (economic) regulator (Autoridade de Regulamentação Económica – ARE) which also has a mandate to regulate telecommunications. Since becoming operational, ICTI has in practice undertaken both the technical and economic tasks in the ICT sector, with

ARE focusing on the other sectors. This has been in part because ICTI has the staff and desire to review a wide range of telecommunications issues, including tariffs, that would normally be within the purview of ARE, and because the two institutions have come to an agreement allowing ICTI to take the lead role on telecommunications issues.⁵

Another advantage of single-sector regulators relates to the origin of their staffing. In many cases, single-sector regulators tend to inherit staff from the former PTT and therefore have a core of specialized professionals from the start with a thorough understanding of the technical issues and strong engineering skills, a key advantage when dealing with complex network issues. Opponents of the single-sector regulatory structure argue that the origin of this specific skill set is, in fact, one of the key disadvantages of establishing a single-sector regulator. These critics argue that staff could be biased in favour of the incumbent, and thus more subject to capture by dominant forces. While this is an issue to be considered, it is not unique to the single-sector regulator. Whatever the option chosen, there must be a series of “checks and balances” to ensure that the regulator can perform its mandate independently.

One major concern within the single-sector model is the possibility of institutional rigidity. Since a single-sector regulator is restricted to telecommunications, this type of structure can limit the effectiveness of the agency and its staff members as it faces the issues raised by convergence. Given that regulatory authority has historically focused on a narrow sector, the regulatory authority may become nearly frozen in time in terms of defining the sector it is regulating. As a consequence, it may not necessarily draw the appropriate staff from across the broader communications sector necessary to be flexible and, therefore, is unable to adapt to the continuous changes in the communications sector. A practical example of such difficulties has been the case of single-sector telecommunications regulators having difficulties when incorporating next generation technologies and services into the regulatory framework.

In recent years, and especially with convergence in the communications sector blurring the boundaries between industries, overlapping responsibilities between sectoral regulators has also become an issue, leading sometimes to duplication of regulations and required authorizations for what are essentially similar services being offered to the public. This can cause conflicting decisions across sectors, or indeed lack of decisions where overlap between mandates cannot be resolved on a political level. The challenges of convergence have led several countries, including South Africa and the United Kingdom, to move away from single-sector regulators and evolve towards a converged regulator, thus merging agencies in charge of the various aspects of the communications sector.

Model 2 – Converged regulator With a **converged institutional design**, all communications services (*i.e.*, telecommunications), including radiocommunications, broadcasting and media (and in some instances postal services), are under the umbrella of one agency.

Several countries have followed the route of converging their institutions dealing with the communications sector, typically combining formerly discrete agencies responsible for telecommunications, broadcasting or information technology into one entity:

§ In December 1999, the Info-Communications Development Authority of Singapore Act of 1999 disbanded the former telecommunications regulator (Telecommunications Authority of Singapore, TAS) and the information technology agency (National Computer Board, NCB), to create one new statutory board, the Infocomm Development Authority (IDA).⁶

§ The Independent Communications Authority of South Africa (ICASA) is the regulator of telecommunications and the broadcasting sectors. It was established in July 2000 as a result of the Independent Communications Authority of South Africa Act No.13 of 2000. It took over the functions of two previous regulators, the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA).

§ In 2001, the Saudi Arabian Council of Ministers issued a decision changing the name of the Saudi Communications Commission to the Communications and Information Technology Commission in light of new tasks it assumed in information technology.

§ Finland established a converged regulator, the Finnish Communications Regulatory Authority (FICORA) in 2001, which took over the responsibilities of the Telecommunications Administration Centre. In addition to telecommunications-related issues, FICORA is tasked with collecting television and license fees, issuing licenses for short-term television and radio broadcasting, monitoring the content of TV and radio programs and advertisements, as well as monitoring the level and quality of general postal services.⁷ FICORA also centrally administers radio frequencies.

§ In 1997, Italy created a single regulatory body—Communications Regulatory Authority (Agcom)—with responsibility for all telecommunications and broadcasting matters. Austria also established such a regulatory authority in 2001.

§ A similar approach was also taken by the United Kingdom. The Office of Communications (Ofcom) was established in the United Kingdom in December 2003 as a result of the Communications Act 2003 and became the regulator for television, radio, and telecommunications. Ofcom combines five former agencies: the Broadcasting Standards Commission (BSC), the Independent Television Commission (ITC), the Office of Telecommunications (Ofotel), the Radiocommunications Agency (RA), and the Radio Authority.

§ In February 2008, the Korean Government merged the Ministry of Information and Communication (MIC) and the Korean Broadcasting Commission (KBC) to create the converged Korea Communications Commission (KCC), which has jurisdiction over both television and telecommunications-related matters.

§ Even the European Commission’s Information Society Directorate was granted new responsibilities for audiovisual and media policies. The new Information Society and Media Directorate General brings together all three aspects of modern day electronic communications: broadcasting; computer networks; and electronic communication services.⁹

Like the single-sector telecommunications regulator, the converged communications regulator tends to be strong in specialized engineering skills in the communications sector, which is an important core expertise in dealing with complex network issues. In addition, the converged communications regulator also meets the challenges posed by service convergence by bringing in related skills, and therefore overcomes what is generally viewed as being one of the main disadvantages of a single-sector regulator (*e.g.*, a telecommunications regulator overly focused on the telecommunications sector).

This model also better meets the need for flexibility in terms of its internal administration's ability to meet market realities. It gives the regulatory authority and its staff the flexibility to better handle the continuous technological and regulatory changes and developments within the ICT sector. By having all services – which are increasingly provided over a single network – under one regulator, the staff responsible for specific services can work with other parts of the regulator that are dealing with related issues, and therefore the regulator can take a more consistent approach when considering changing technologies and their effect on legacy regulations.

In addition, the converged model tends to resolve some of the overlap between telecommunications and broadcasting that has tended to become one of the regulatory issues regarding convergence. As was clearly shown in the EU's 1997 Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors,¹⁰ and in its "99 Review,"¹¹ convergence in communications has called into question the service-based vertical regulatory system, with industry increasingly demanding a reorganization of the regulatory institutions in order to address the challenges posed by convergence.

As further stated by David Currie:¹²

Ofcom believes that convergence is a reality and that a converged regulator is best placed to nurse that convergence. When the Internet can deliver what looks to all intents and purposes like television broadcasting in a few years' time, then Ofcom and the Government will face awkward choices. Should, in the interests of fairness, the content regulation of terrestrial, cable and satellite broadcasting be rolled out to Internet broadcasters? Or should the content regulation of terrestrial, cable and satellite broadcasters be significantly rolled back, passing the baton to smart navigational devices that allow people to find the content that they want (subject to the law) and avoid the content that they do not want to see or hear? A converged regulator like Ofcom will I hope be able to bring wisdom to that debate.

Model 3 – Multi-sector regulator

Multi-sector regulators oversee not only the telecommunications sector, but other industry sectors with common economic and legal characteristics (e.g., telecommunications, water, energy, and transportation). Costa Rica, the Gambia, Jamaica, Latvia, Luxembourg, Niger and Panama, as well as state public utility commissions in individual states in the United States, have chosen this type of organizational structure.¹³

The advantages and disadvantages of multi-sector regulators have been discussed in various fora, and opinions vary. One of the main arguments generally raised in favour of a multi-sector regulator is based on the perceived lack of resources and the need for economies of scale to effectively regulate the different infrastructure industries and sectors. It is often argued that with this type of structural organization, one set of staff can be used to oversee a variety of industries. The rationale is that telecommunications is considered to form part of the overall infrastructure sector along with other utilities, such as electricity and water, and that infrastructure services share certain aspects: they are aimed at providing basic needs to the public; they often use similar rights-of-way; and they typically involve the economic regulation of large monopolies with network economic characteristics (*i.e.*, high sunk and fixed costs). However, experience in some countries, such as Latvia, has shown that existing multi-sector regulators are performing poorly.

The answer to the staffing question is straightforward on the one hand and more complex on the other. Looking at the question in the strictest sense, single-sector regulators will look for highly technical staff focused on the telecommunications sector and generally organize their staff in industry-based units (e.g., post, telecommunications, radiocommunications). Converged regulators will look for staff that can bring in the expertise and know-how from the different sectors they are regulating. Generally these regulators are organized in functional units or indeed in horizontal, project-based units. Multi-sector regulators will recruit staff specialized in the different sectors, and are generally organized in terms of the sectors within their mandate although some pool legal and economic resources to deal with, for example, tariffing issues that may be common across the different sectors.

An important question within this context, however, is to what extent staff can actually be used across the sectors. Often, staff members within this model are generally recruited in terms of the sector they are regulating and only legal and occasionally economic staff is pooled to deal with specific issues that occur across the sectors. Luxembourg, for example, has organized its agency according to industries/services: telecommunications, electricity, gas, postal and spectrum management issues – these are then divided into smaller issue-specific units.¹⁴ This can also be seen in Belize and Niger. An interesting discussion of this issue vis-à-vis state-level PUCs in the United States is presented in the WDR Discussion Paper # 0204 of March 2002, which claims that:

Examination of the actual organization of U.S. state-level multi-sector regulatory agencies, the Public Utility Commissions (PUCs), does not provide much evidence of economies of regulation, except at the level of the decision-makers, or Commissioners. Generally, staff members specialize in a particular sector such as telecommunications or water and work within distinct divisions that are devoted to sector-specific regulation. Resources are shared at the levels of commissioners, who hear cases pertaining to all sectors, the senior staff who manage the agency as a whole, and the legal staff responsible for hearings and related procedural matters. Generally, the different divisions are located in common facilities and use common amenities such as libraries, which may yield certain savings. ... It must also be noted that U.S. PUCs do not have jurisdiction over frequency management, cable and broadcasting. ... The U.S. PUC experience shows that there may be significant economies in areas such as use of buildings, libraries, and training facilities in common. This does not, however, justify multi-sector regulation as such, only close collaboration among sectoral regulatory agencies.¹⁵

It is also often the case that a multi-sector regulatory authority is not created from scratch, but is the result of merging several existing agencies. In most countries it is not possible to dismiss employees in the course of such a merger, negating the realization of the hoped-for economies of regulation. In addition, a merger of two going concerns often creates significant morale problems and results in increased expenditures.¹⁶

Another disadvantage of this model is that often the telecommunications sector is the most liberalized sector under the auspices of the multi-sector regulator and therefore can be negatively affected if the telecommunications regulator is merged with other more highly regulated and less agile industries. Indeed, it may make matters worse by having telecommunications regulated in an environment with utilities that are progressing at a different pace where the needs and priorities are different, or where resources are practically non-existent. Moreover, by adding sectors, such as electricity and gas, that do not always produce revenues for the regulator, the telecommunications sector may bear a disproportionate share of the costs of regulation, potentially driving up regulatory costs for telecommunications providers.

Supporters of this model argue that having a multi-sector regulator can reduce political and other influences regarding the decision-making process as opposed to, for example, the single-sector regulator. Despite such claims concerning “capture” (meaning undue influence by politicians and/or dominant players), this does not necessarily seem linked to the institutional design option *per se* but is more a product of whether a clear set of “checks and balances” is incorporated in the design of the regulator. Indeed, a risk of the multi-sector regulator could even be that “capture” by a dominant ministry or entity not only affects a single sector but all sectors regulated by the multi-sector regulator. In addition, there may be greater complexity in establishing the legal framework for the multi-sector regulator, including the level of independence and allocation of functions as between the minister and the regulator.¹⁷ Furthermore, potential delays in instituting necessary reforms may result due to the disadvantages mentioned above.

Some argue that using cross-sector institutions to regulate telecommunications is justified in light of the growing convergence between telecommunications and other sectors. Ensuring that cross-sector rules and institutions are used to regulate telecommunications as well as other similar (utility) sectors may bring benefits, such as greater regulatory certainty (as operators may better forecast what to expect by observing how the regulatory framework is applied in other sectors) and lower risks of distortion between different activities. A counterargument is that the rationale behind establishing a multi-sector regulator is more a question of regulatory efficiency than of dealing with convergence in the communications sector. Even within this model it really depends on the mandate of the multi-sector regulator (*i.e.*, whether it deals with just telecommunications or with communications as well as water, electricity, and transport) to determine whether a utilities-based regulator has the staff and internal administration that allows it to effectively cope with the challenges posed by ICT convergence.

As the market develops, and convergence affects the way in which communications is offered to the people, regulators not only are expected to possess high technical expertise, but to have an understanding of the structure and development trends of the communications market. Furthermore, regulators should be able to anticipate potential situations that could threaten or interfere with the development of the electronic communications industry. The concern that staff in a single-sector telecommunications regulator may face difficulties when incorporating next generation technologies and services into the regulatory framework is heightened with a multi-sector regulator since the staff of a multi-sector regulator would not necessarily be as technically focused on the communications sector. Obviously, a multi-sector regulator could recruit staff suited to the task of regulating the communications market, but the risk, especially where economists and legal experts are shared across the utilities sector, is that the pool of expertise becomes more diluted, thus compromising the capability and ultimately the credibility of the regulator.

A clear discussion of the advantages and disadvantages of multi-sector regulators is presented by Schwartz and Satola in the Table 5-3. **18**

Advantages

Disadvantages

- | | |
|---|---|
| <ul style="list-style-type: none"> ■ May reduce risk of “industry capture” because the creation of a regulator with responsibility for more than one sector can help avoid the rule-making process being captured by industry-specific interest groups ■ May reduce risk of “political capture” because a regulator with responsibility for more than one sector will necessarily be more independent of the relevant line Ministries, and, in addition, the broader range of entities regulated by such a regulator will be more likely to resist political interference in a decision on, say, price regulation in one sector since that could set a precedent for other sectors ■ May create more precedents, and therefore less uncertainty for investors because a decision by an MSR in relation to one sector on a regulatory issue common to other sectors will set a precedent that is valuable to potential investors in those other sectors ■ May achieve economies of scale in the use of one set of high caliber professionals | <ul style="list-style-type: none"> ■ May increase risk of “industry capture” by a dominant industry player not only of the single sector regulator but of the entire MSR body ■ May increase “political capture” by a dominant ministry of not only the single sector regulator but of the entire MSR body ■ May increase risk that a precedent set in relation to one sector could be applied inappropriately in another sector (although this can also be mitigated by creating strong sector-specific departments underneath a central cross-sectoral decision-making body) ■ May have a dilution of sector-specific technical expertise required where, for example, the skills of a tariff expert for one sector are not transferrable to similar tariffing issues in another sector |
|---|---|

Model 4 – No specific telecommunications regulatory authority

An alternative approach is to rely on the application of competition and antitrust rules rather than on detailed sector-specific rules and institutional designs. Until the passage of the Telecommunications Act of 2001, New Zealand, for example, had chosen to entrust antitrust authorities with the task of administering all rules controlling market power in telecommunications.¹⁹ There was no sector-specific regulatory requirement except for special obligations on Telecom New Zealand, called the Kiwi Share Obligations, which effectively regulated the price and availability of residential telephone service. Instead of sector-specific regulation, the regulatory regime for telecommunications in New Zealand relied primarily upon general competition law, the Commerce Act 1986, to prevent anticompetitive behaviour. Thus, the primary constraint on the conduct of telecommunications firms in New Zealand was the same competition law that applied to all economic enterprises in New Zealand.²⁰

However, in late 2000, the Minister of Communications determined that New Zealand’s reliance on the Commerce Act and general competition authority was inadequate in some respects to regulate the telecommunications sector.²¹ As a result, the Telecommunications Act 2001, which contained sector-specific provisions, was passed in December 2001 to complement the generic competition provisions of the Commerce Act. Furthermore, the position of a Telecommunications Commissioner, a specialist stand-alone commissioner within the Commerce Commission, was established, *inter alia*, to regulate the telecommunications sector, and in particular to resolve disputes over regulated services, to report to the Minister on further designations or specifications of additional services, and to monitor and enforce the Kiwi Share obligations.²² Additionally, the Telecommunications Commissioner has statutory responsibility for decisions made under the Telecommunications Act.

Advantages	Disadvantages
<ul style="list-style-type: none"> ▪ Simple to implement. ▪ Inexpensive. ▪ Reliance on economy-wide rules and institutions to regulate the sector promotes a coherent treatment between telecommunications and other sectors. ▪ Less risk of political capture where the judges are ultimately in charge of enforcing economic regulation in the telecommunications. Judges are seen to enjoy a clearer and more straight-forward protection against undue pressures from the government and are independent from industry. 	<ul style="list-style-type: none"> ▪ Non-specialized judges are ill-equipped to deal with complex telecommunications regulatory issues (e.g., local interconnection cases in New Zealand).²³ ▪ Legal processes are often not designed to give a voice to those who are not directly parties to the dispute. ▪ Costs of protracted litigation and regulatory mistakes can be very high. ▪ Sector-specific issues such as interconnection and number portability may be difficult to resolve in the absence of sector-specific requirements. ▪ Lack of clear accountability channels renders it unnecessary to set and achieve sector objectives such as universal service, thereby opening the door for ineffective or sometimes unnecessary regulation. ▪ There is no actual functioning example of this model.

6.5.2.2 OVERVIEW AND COMPARISON OF DIFFERENT ORGANIZATIONAL AND ADMINISTRATIVE STRUCTURES

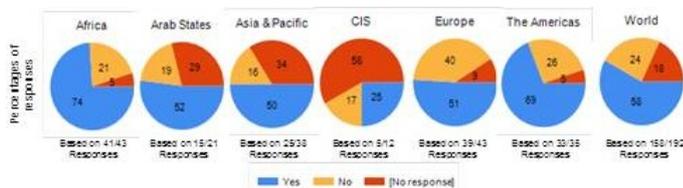
Organizational Structures

Determining the ideal organizational structure for a regulatory authority requires an assessment of various factors including: the country's needs and objectives; political environment; legal requirements; and available expertise in the labor market.¹ There are essentially two models of leadership organization for regulatory authorities: (i) the collegial body (a board or commission composed of multiple members); and (ii) the single regulator (often given the title of chairperson or president). Each has its advantages and disadvantages, and variations of each model are in use around the world.

The collegial body model usually involves a board or commission made up of individuals with different areas of expertise, potentially bringing those varied perspectives to bear on each regulatory issue. In addition, a collegial body could be seen as more independent, as it is less likely that all members would be influenced by the same actors, whether in the government or the private sector. Collegial bodies also often impart a sense of legitimacy in decision-making, as it is less likely that a single individual was responsible for any particular decision. However, as in any decision-making process involving more than one actor, the development of regulatory decisions can be a slower process and more subject to internal struggle.

By comparison, the single regulator model has the potential benefit of a consistent approach to regulation and decision-making, as decision-making authority is vested in a single individual who may have a unified plan for the telecommunications sector. In contrast to the collegial body model, single regulators can make decisions much more quickly, even when constrained by due process regulations. However, the single regulator is also potentially more vulnerable to undue influence exerted by external actors, whether in the government or in the private sector. In addition, a single individual may not be able to match the expertise of a collegial body made up of individuals from different backgrounds, although experienced staff can provide substantial expertise.

The number of regulators led by collegial bodies and single regulators continues to fluctuate as governments restructure their regulatory frameworks for telecommunications. However, based on responses received by the ITU to its annual Telecommunications Regulatory Survey in 2010, approximately 58 per cent of the regulators worldwide are collegial bodies.² Based on 2010 data,³ it can be seen that there are significant differences between the balance of collegial bodies in various regions, ranging 25 per cent in the CIS region to 74 per cent in Africa. (See Figure 5-C.)⁴



◀ Figure 5-C: Collegial Body Regulators around the World

Source: ITU World Telecommunication Regulatory Database, 2010

Management Structure

(a) Regulatory authorities headed by a collegial body

Nearly 60 per cent of the 158 countries that submitted responses to the 2010 ITU survey indicated that their regulatory agencies are collegial bodies.⁵ These multi-member commissions or boards of directors are composed of a varying number of members (usually an odd number from three to seven to minimize tie votes) that oversee and direct all activities of the regulator. One member is the chairperson or president of the commission/board and sometimes has a “casting” or deliberative vote that counts twice and acts as a tie-breaking vote, if necessary.

Depending on the appointment process of the regulator, collegial body members can be appointed by one single branch of government, multiple branches of government and/or other industry stakeholders. This issue is further discussed in Section 5.3 on Staffing and Remuneration.

Management and administrative functions

The day-to-day management and administrative functions of the regulator are handled in varying combinations by: an executive director, chief executive officer (CEO), the chairperson, and/or managing director (collectively referred to herein as managing director). In some countries, like Botswana, Brazil, Canada, Greece, Ireland, Jordan, Malaysia, Mexico, Portugal, South Africa, and Venezuela, the managing director of the regulatory authority is the chairperson of the commission/board.⁶

The managing director acts as a liaison between the commission or board of directors and the departments/divisions that comprise the regulatory authority. In the Dominican Republic, the managing director is part of the board and acts as its secretary, but does not vote.⁷ In Peru, the managing director of the Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL) participates in the board of directors’ meeting sessions, but essentially acts as an observer and cannot vote.⁸

The duties and responsibilities of the managing director differ from country to country. In Bahrain, the general director not only handles the day-to-day affairs of the regulator, but also determines the internal structure and organization of the agency, and has authority to: delegate his functions to other agency staff; employ staff members and consultants; and establish conditions of employment for staff members (this last one with approval from the board).⁹ In Peru, OSIPTEL’s managing director is responsible for managing the regulator and carrying out the policies established by the board of directors and president of the regulator. In addition, the managing director is responsible for: the legal, administrative and judicial representation of the regulator; proposing policies and strategies for the development of OSIPTEL; developing the annual report and the regulator’s budget for approval; and hiring, promoting, suspending and firing staff members (decisions regarding management staff members need approval from the board of directors and president of OSIPTEL).¹⁰

(b) Single individual structure

Single individual regulators are headed by a CEO, president or director general (collectively referred to herein as CEO) who oversees all policy, management, and administrative activities of the regulatory authority. In most cases, the CEO is appointed by the central government, often the minister responsible for communications. The term of office is fixed and generally varies from two to six years. However, in certain countries, including Estonia, Ethiopia, Liechtenstein and Norway, the CEO does not have a specific term of office.¹¹

The duties and responsibilities of the CEO differ from country to country, but they are generally granted a broad scope of authority and responsibility. In Romania, the president of the National Authority for Management and Regulation in Communications (ANCOM) has a broad slate of responsibilities including approving ANCOM’s strategies, activity plans, investment plans and internal regulations, issuing decisions, approving the regulator’s organizational structure, including the powers of the two vice-presidents, and representing ANCOM in its relations with the Parliament, Government, ministries and other public authorities and organizations.¹² In Guatemala, the Superintendencia de Telecomunicaciones (SIT) is headed by a superintendent who is responsible for managing and defining SIT policies, developing the regulator’s organizational structure, appointing and removing SIT employees, preparing its annual budget, and informing (at least twice a year) the Ministry of Communications, Transportation and Public Works of the regulator’s activities and internal administration issues.¹³

The CEO is typically assisted by one or more deputies to whom he can delegate responsibilities. For example, in Romania, the law sets out that the president of the ANCOM is to be assisted by two vice-presidents.¹⁴ Similarly, in Denmark, the director general of the National IT and Telecom Agency is assisted by two deputy director generals.¹⁵

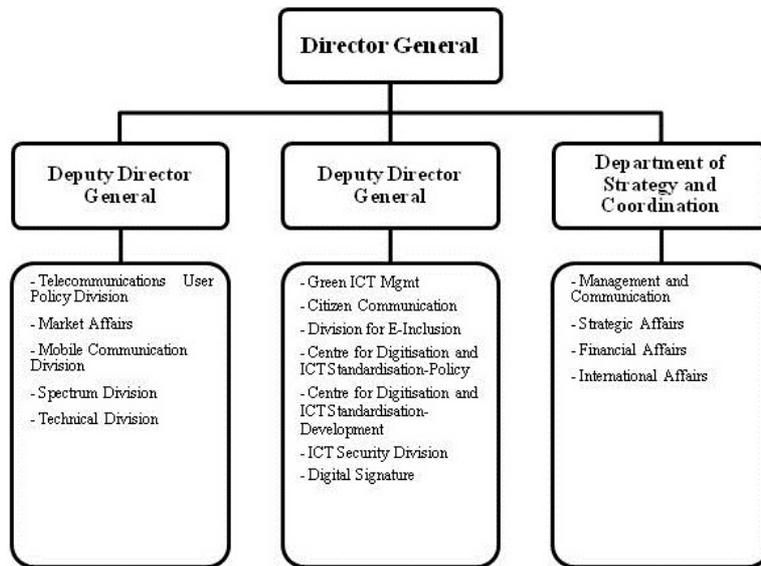
Administrative Structure regarding Functions of Regulatory Authorities

Once the scope of work and type of management structure is established, a country must determine how the functions of the regulatory authority will be organized (e.g., whether by industry/service, function or project).

(a) Industry or service-based departments

Many regulators follow a vertical (all regulatory issues) structure comprised of departments that address specific services areas (e.g., broadcasting, telecommunications, and information technology) under the authority of the regulator, as well as departments typically responsible for operations and administrative functions.¹⁶

Denmark's National IT and Telecom Agency, a converged regulator, is divided into 12 divisions : (1) Telecommunications User Policy; (2) Market Affairs; (3) Mobile Communications; (4) Spectrum; (5) Technical; (6) Green ICT Management and Green ICT; (7) Citizen Communications; (8) E-Inclusion; (9) Digitisation and ICT Standardisation—Policy; (10) Digitisation and ICT Standardisation—Development; (11) ICT Security; (12) Centre for Digital Signature . In addition, the Department of Strategy and Coordination addresses management and communication; strategic affairs; financial affairs and international affairs.¹⁷ Figure 5-D below shows the organizational chart for Denmark's National IT and Telecom Agency.



◀ Figure 5-D: Denmark National IT and Telecom Agency Organizational Chart

Source: <http://en.itst.dk/about/organisation-1/organisation-diagram>

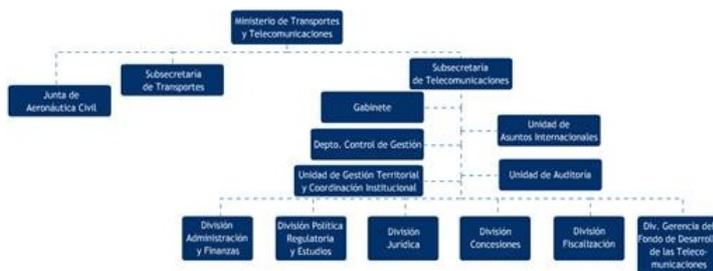
In the case of Luxembourg, which has a multi-sector regulator, departments/divisions are responsible for the following sectors: electronic communications, spectrum management, transport and distribution of electricity and natural gas, postal and railway . Each of these departments/divisions is divided into smaller issue-specific units.¹⁸

(b) Function-based departments/divisions

These regulators follow a horizontal (narrow range of regulatory issues) structure, but they cover all the specific service sectors that are regulated. Function-based departments/divisions have responsibility for areas such as: administration and human resources; enforcement; legal analysis; licensing; public relations; technical analysis and development; research and market analysis; user/customer services; and universal service fund administration.

For example, Chile's Subsecretaria de Telecomunicaciones (SUBTEL) is divided into seven function-based divisions: Administration and Finance; Regulatory Policy and Market Analysis; Legal; Concessions; Enforcement; Universal Access to the Information Society; as well as a division for Strategic Planning, Management Control and Technological Policy. Each of these divisions is subdivided into units that are responsible for more specific topics. The Administration and Finance Division, for instance, is subdivided into five units that are responsible for finance, human resources, procurement, documentation, and a unit that handles information (including claims and suggestions). The Regulatory Policy and Market Analysis Division of SUBTEL is subdivided into three units, one for spectrum engineering and administration, one for economic regulation, and one for strategic studies.¹⁹

Malaysia's Communications & Multimedia Commission (MCMC), a converged regulator, is also divided into function-based divisions. They include: Industry Development; Regulatory State Coordination; Technical; Resource Planning & Management; Monitoring & Enforcement; and Management & Support Services. Similar to the Chilean model, each of these divisions is then subdivided into topic-specific units. The Regulatory State Coordination Division is subdivided into two departments, one for regulatory coordination (which includes units for licensing and for universal service provision) and the other for state coordination (which includes a unit to manage regional office matters).²⁰ Figure 5-E below identifies the organizational chart for Chile's SUBTEL showing how this regulator has divided responsibilities by function:

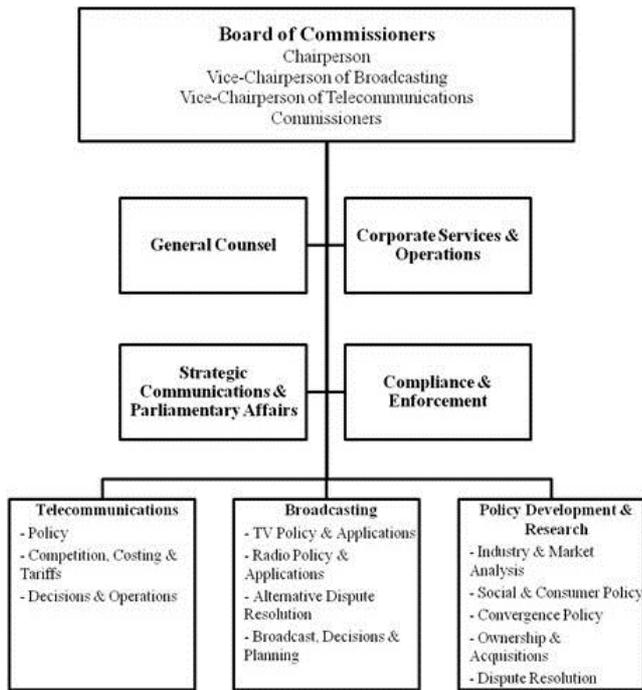


◀ Figure 5-E: SUBTEL Organizational Chart

Source: <http://www.subtel.gob.cl/transparencia/organigrama/websubtel/organigrama.htm>

Some regulators combine aspects of the industry/service and function-based structure models. The Canadian Radio-television and Telecommunications Commission (CRTC) divides the Commission's responsibilities into the following departments/divisions: Broadcasting; Telecommunications; General Counsel; Legal; Strategic Communications and Parliamentary Affairs; Policy Development and Research; and Compliance and Enforcement.²¹ The SIT of Guatemala distributes responsibilities among three main departments/divisions:

telecommunications; administrative; and legal.²² Figure 5-F provides a diagram of Canada’s CRTC showing how a regulatory authority can combine both industry/service and function-based departments/divisions within its organizational structure.



◀ Figure 5-F: CRTC Organizational Chart
Source: <http://www.crtc.gc.ca/eng/about/org1.htm>

(c) Project-based departments/divisions

These regulators can be organized as either industry/service-based or function-based departments/divisions, but they have a horizontal structure because departments/divisions collaborate when a project needs the support and expertise of various competencies.²³ Morocco’s Agence Nationale de Réglementation des Télécommunications (ANRT) is a function-based regulator divided into departments/divisions that deal with technical, administrative and operator issues, but has a horizontal structure because staff members from units within these different departments/divisions are, as a matter of course, brought together to work on projects that require varied skills.²⁴ The Malta Communications Authority (MCA) also utilizes a matrix organizational structure that allows the regulator “to adapt to change and maximize its expertise by shifting emphasis from a functional to a project-based approach.”²⁵ Figure 5-G shows a diagram of Malta’s MCA, showing how this function-based regulatory authority uses a horizontal structure.



◀ Figure 5-G: Malta Communications Authority Organizational Structure

Source: <http://www.mca.org.mt/aboutmca>

However, it should be pointed out that regardless of the departmental/division structure of the regulators, it is often the case that multiple departments and subunits will work together to accommodate the evolving needs of the telecommunications market, as well as facilitate and expedite internal procedures.

6.5.3 ADMINISTRATIVE STRUCTURES: STAFFING AND REMUNERATION

The administrative structure of the regulator, including staffing processes, the legal status of the staff, remuneration principles, and the ability to contract outside consultants provide key insights into the independence, depth of knowledge, and impartiality of the regulator, as well as its ability to attract and retain qualified personnel. By examining a regulator’s qualifications (for both leadership and staff positions), we can discern the types of expertise present among the regulatory leadership and staff, while the appointment and removal processes for regulatory authority leaders can provide an indication of the influence over the regulator wielded by other government agencies. The legal status of the regulator’s staff is an important indicator of the protections afforded to the staff, particularly regarding liability for the decisions made by the regulator, as protection from liability is an important consideration for current and potential staff members. Analysis of remuneration principles for both leadership and staff positions provides insight into multiple issues, including the status afforded to the leadership and staff as compared to other government employees and the flexibility afforded to the regulator to offer salaries that will attract and retain qualified personnel. The ability of regulators to contract outside experts is another important enhancement to the regulator’s ability to act independently and efficiently, providing the potential for impartial analysis, enhancement of capacity that is lacking within the regulator, and solicitation of advice from concerned stakeholders.

6.5.3.1 STAFFING PROCESS (STAFF RETENTION AND RESOURCE DEVELOPMENT)

Qualification Requirements for Heads of Regulatory Authorities

Most regulatory authorities are empowered by laws or regulations that provide some guidance as to the qualifications of the single regulator or collegial body members. Such qualifications vary, ranging from specific disciplines for collegial body members from various backgrounds to general requirements for relevant expertise. For example, under Bulgaria's Electronic Communications Law promulgated in 2007, members of the five-member Communications Regulation Commission (CRC) must be Bulgarian nationals with professional qualification in the field of communications, information technologies, media, economics and/or law.¹

Qualifications for members of TRAI in India are similar to Bulgaria's current requirements—members of the TRAI must have special knowledge of or professional experience in telecommunications, industry, finance, accountancy, law, management or consumer affairs.² However, Indian law also requires that members appointed from within the Government previously must have held a high position in the Government.³

By requiring regulators or collegial body members to have experience in certain professional sectors, an effort is being made to ensure that the regulatory authority is led by individuals with expertise beyond simply telecommunications. Regulators face issues involving questions of law, finance, economics, trade, consumer affairs and security, in addition to telecommunications; thus, it is important that such expertise be reflected not only among the regulatory staff, but also among the regulator's leadership.

The difference between, for example, the former Bulgarian and current Bulgarian and Indian approaches is that Bulgaria's former membership of the CRC always included at least one lawyer and one economist. One potential downside to this approach is that some countries may find it difficult to find appropriately qualified candidates for the specifically mandated positions. If, for example, the authorizing law requires the presence of an economist and a qualified economist is not available, there would be a vacancy among the regulatory authority leadership. This vacancy might not only manifest itself in a lack of economic expertise, but could also complicate decision-making by a collegial body that is a member short of its intended size and/or which lacks a tie-breaking vote. On the other hand, while the balance of areas of expertise among the members of Bulgaria's current CRC and India's TRAI may fluctuate over time and lack certain areas of expertise depending on the composition of the regulatory authority leadership, it also provides for the flexibility to emphasize differing areas of expertise among the regulatory leadership as the government, as well as market conditions and other factors, influence regulatory priorities.

In addition to mandating specific areas of expertise that the regulator must reflect and setting general expertise qualifications, a third approach to determining regulatory authority or collegial body qualifications is to avoid specifying *any* requirements regarding expertise (e.g., Cameroon, Ecuador, Malaysia, and the United States). This approach provides greater flexibility than the Indian and Bulgarian approach, by allowing the regulatory authority to be led by anyone appointed to the task. While this approach certainly provides the most flexibility to appoint regulators, it also opens the door to the possibility of appointing unqualified regulatory authority leaders. However, in practice, it is unlikely that a completely unqualified individual would be appointed to lead a regulatory authority. In cases where appointees are selected by – or at least recommended by – multiple branches of government, such as Ecuador and the United States, it is improbable that multiple stakeholders would approve of an unqualified appointee. Even in countries such as Cameroon and Malaysia, where the regulatory authority leadership is appointed by a single branch of government, the appointing authority runs the risk of not only negatively impacting the telecommunications sector, but also the political risk of being seen as having made an unwise appointment.

Approach	Advantages	Disadvantages
Require regulatory authority to have specific areas of expertise (e.g., one attorney and one economist).	Ensures that certain areas of expertise will always be represented among the regulatory authority leadership.	Because the requirement is written into law or regulation, regulatory authority has less flexibility to adjust its composition in response to changing regulatory needs or market structure. Some countries may face difficulty finding qualified individuals to fill the mandated areas of expertise.
Require all regulatory authority leaders to demonstrate expertise in at least one of several fields.	Ensures that all regulatory authority leaders are well-versed in at least one of several relevant fields. By not mandating which fields must always be represented, regulatory authority retains some flexibility to emphasize certain areas of expertise as necessary. Greater likelihood that regulatory authority leadership posts will not remain vacant due to absence of qualified individuals.	Creates potential for regulatory authority leadership to lack expertise in certain fields.
No specific expertise requirements for regulatory authority leadership.	Provides the most flexibility to appoint regulatory authority leaders.	Potential for appointment of unqualified regulatory authority leaders.

◀ Table 5-5 provides an overview of the advantages and disadvantages of the different approaches discussed above.⁴
Table 5-5: Advantages and Disadvantages of Different Staffing Approaches

Appointment Process

The manner in which the head of the regulatory authority is appointed provides important insight into the independence of the regulator. Generally, if the head of a regulatory authority is appointed by a single branch of government it is less likely to exhibit independence than those who have the support of multiple branches of government. For example, a collegial body may feature members selected by different branches of the government, ensuring that no single branch has excessive influence over the regulatory authority. In Bulgaria, for example, the chair of the CRC is determined by the Council of Ministers and appointed by order of the Prime Minister; the deputy chair and two other members are elected by the National Assembly, and one member is appointed by the President of Bulgaria.⁵

In a 2000 report, the Organisation for Economic Cooperation and Development (OECD) found that the majority of its members were characterized by independent regulators that are led by an individual or individuals appointed by the president or minister upon the recommendation of the cabinet or minister.⁶ In addition, the legislature may be involved in approving the members of the collegial body. For example, a nomination or appointment may be made by the head of government or a minister and then confirmed or approved by another government body (e.g., council of ministers, cabinet, or Senate). In the United States⁷ and Nigeria,⁸ the commissioners are appointed by the president of the country, but require confirmation by the country's Senate. In Portugal, the governing ministry (currently the Ministry of Public Works, Transportation and Communication) proposes board member candidates for the Autoridade Nacional de Comunicações (ICP-ANACOM) and their appointments are made official through a resolution issued by the Council of Ministers.⁹

An interesting example of the appointment process is Colombia, which has a rotating leadership. The Comisión de Regulación de Telecomunicaciones (CRT) is officially headed by the Minister of Communications, who serves as the President of the CRT. However, the CRT is also advised by a Committee of Commissioned Experts (Comité de Expertos Comisionados) selected by the President of Colombia. Each year, this panel of three experts elects one of its members to serve as the Executive Director of the CRT for a one-year term. As such, the President

of the CRT (the Minister of Communications) is a member of the Government, and the Executive Director is an expert who serves at the will of the President of Colombia.¹⁰

In addition to appointments recommended by a cabinet or minister, regulatory authority leaders may be nominated by other industry stakeholders. In Turkey, for example, the Telecommunications Authority collegial body includes members who represent the telecommunications sector and consumers. The member representing the sector is selected from among candidates put forward by each operator who claims at least 10 per cent market share. The member representing consumers is selected from among candidates nominated by the Ministry of Industry and Commerce and the Turkish Association of Chambers and Exchanges.¹¹

In the Dominican Republic, the head of the five member board is appointed by the central government (i.e., the president), but three members are nominated by various industry groups – one by the telecommunications service providers, two by the broadcasting service community (one nominated by the television networks and the other by the radio and cable television networks), and the last member is selected, based on their professional qualifications, to represent consumer interest groups. However, the central government ratifies all nominations.¹² In Uganda, seven commission members are appointed by the Minister with the approval of the cabinet. However, five of the board members are appointed based on a recommendation from each of the following institutions: the Institution of Professional Engineers, the Uganda Law Society, the Broadcasting Council (nominee must be a member of the council), and the remaining two members are well-respected professionals chosen from the public. Similarly, the legislation establishing the regulatory authority may require that the members of the board represent the different regions of the country (e.g., Nigeria¹²).

By comparison, regulatory authority heads that serve at the pleasure of the government – or the pleasure of one particular branch of the government – may be viewed as less independent because their job security is closely linked to one particular actor. Cases in which regulatory authority heads are appointed by a single or limited group of actors include Barbados¹⁴ and Indonesia.¹⁵ In Botswana, the Minister for Science, Communications and Technology appoints all five members of the Board of Directors, including the Chairperson of the Board.¹⁶

A variation of the view of such appointees as less independent is when they are appointed by a figure outside the government, such as a monarch. For example, the head of Morocco's ANRT is appointed by a royal decree and can only be removed from office by another royal decree.¹⁷ In the case of Morocco, this arrangement theoretically confers a *greater* degree of independence upon the ANRT's director general with respect to the government, because the director general serves at the pleasure of the king, rather than the government or the prime minister. However, while the director general enjoys a degree of independence from the government, he or she may still be removed from office by the king at any time.

Fixed Terms

A large majority of countries mandate fixed terms for the heads or members of the board of the regulatory authority. Of the 85 countries that responded to the 2005 ITU Telecommunication Regulatory Survey, 75 indicated that their regulators had fixed terms, with the majority ranging between two and five years. The remaining 10 countries indicated that no fixed term of office was specified in their laws or regulations.¹⁸ Similarly, a 2000 OECD report noted that most member states had fixed terms for their regulatory authority heads.¹⁹ In some countries, like Bahrain, Panama and South Africa, the term can vary depending on the position the person holds within the authority.²⁰ In most countries, collegial body members can serve no more than two consecutive terms of office.

Individuals with fixed terms of office, particularly those that do not coincide with changes in government, are likely to feel more secure in their position and exhibit more independence than those individuals who serve at the pleasure of the government. Often the applicable law or regulation indicates whether individuals can be reappointed to a position after their term has expired. Much like term limits for legislators and heads of state, it is debatable whether limiting an individual's tenure in a regulatory leadership position permits them more freedom to act without regard for reappointment or forces qualified individuals to give up their position due to an arbitrary regulatory or legislative provision.

Removal from Office

Just as important as the appointment process and criteria in establishing regulatory independence is the power of removal of regulatory heads from office. Legislation or regulation often specifies the cases in which a regulatory authority head or collegial body member may be removed from office (such as conflict of interest or failure to perform official duties). For example, in Canada, members of the Canadian Radio-television and Telecommunications Commission (CRTC) must not have any direct or indirect role in a telecommunications undertaking or business and may only be removed during his or her term for good cause.²¹ Similar conflict of interest prohibitions are common among telecommunications regulators. For example, in Uganda, a member of the Uganda Communications Commission may be removed if the officer 1) is continuously and persistently unable to discharge the functions of the office; 2) engages in misbehavior or abuse of office; 3) is subsequently disqualified from membership due to holding any interest in a telecommunications company, bankruptcy or mental/physical illness that prevents performance of duties; or 4) fails to disclose to the Commission any interest in contract or proposed contract or any other matter before the Commission.²² In some cases, conflict of interest extends to cover the immediate family of the regulatory body official, as is the case in Jordan where a board member of the Telecommunications Regulatory Commission may be removed if the board member, spouse or first-degree or second-degree relatives have a direct or indirect investment in the ICT sector during the member's term of office.²³ In India, members of the collegial regulatory body, TRAI, can also be removed from office for conflict of interest reasons or for abuse of their position, although the Supreme Court must support such a dismissal.²⁴

In addition, it is not uncommon for laws or regulations to specify that regulatory authority heads or collegial body members can be removed from office for failure to commit appropriate time to their duties. In Hungary, members of the Communications Regulatory Commission's collegial body are to be removed from office if they are unable to carry out their duties continuously for more than 90 days.²⁵ In Jordan,²⁶ Sudan,²⁷ and Tanzania,²⁸ members of the collegial bodies can be removed from office for failure to attend a minimum number of meetings. In India, for example, TRAI board members may be removed from office if they fail to attend three consecutive sessions or six non-consecutive sessions in one year without a reason acceptable to the board. Similar to conflict of interest or abuse of power rules, minimum attendance or participation rules increases the likelihood that regulatory authority leaders are carrying out the job to which they were appointed.

Some regulators also hold their agency leaders to a high moral standard. In India, for example, members of the TRAI can be removed from office

as a result of offenses which are judged to involve “moral turpitude” or as a result of a loss of mental or physical function that prevents the member from fulfilling their duties.²⁹ Similar moral qualifications are found in the laws and regulations governing membership in the collegial bodies of telecommunications regulators in countries including Brazil,³⁰ Jordan,³¹ and Sudan.³²

Legal Status of Staff

In the majority of cases, the staff members of regulatory authorities are considered public employees (or other similar terms, such as civil servant or public servant), making their employment subject to the same rules applied to public employees throughout the government.

In some cases, the head(s) of the regulatory authority are also considered to be public employees for some or all purposes. For example, the Canadian Radio-Television and Telecommunications Commission Act specifically states that Commission members are public employees for purposes of superannuation.³³ All collegial body members and other employees of the TRAI in India are considered public employees.³⁴ Similarly, all members, officers, and employees of Singapore’s Infocomm Development Authority (IDA) are considered public servants for the purposes of Singapore’s penal code.³⁵ The Singapore penal code includes statutes relating to crimes carried out by public servants, as well as punishments for crimes carried out against public servants and contempt for the authority of public servants.³⁶ In cases such as Singapore, the explicit application of the penal code to all IDA personnel is in line with the conflict of interest and abuse of power rules previously discussed, stating that IDA members and staff are not immune to the laws of conduct applicable to other citizens.

However, not all regulatory authorities classify their employees as public employees. In Botswana, employees of the BTA are considered parastatal staff in which the terms and conditions of staff employment is determined by the board in the staff members’ respective contracts of employment.³⁷ No other civil service rules apply to BTA staff. In addition, as will be discussed below, the fact that BTA employees are not classified as public employees provides the regulatory authority with greater flexibility to offer competitive salaries and benefits. Although not subject to civil service regulations, BTA staff is protected from liability for actions taken in their professional capacities by principles of common law.³⁸ Similarly, Singapore IDA personnel (including collegial body members, officers and staff) are also protected from personal liability for actions taken in good faith or to carry out the provisions of the IDA Act.³⁹

In some jurisdictions, such as India, the law specifically protects not only the personnel authority, but also extends protection to the federal government and the authority itself from liability for any actions carried out in good faith under the law or relevant regulations.⁴⁰ Despite the freedom conferred by such protections, some countries do permit the assignment of liability to regulatory authority personnel. For example, all personnel of Venezuela’s Comisión Nacional de Telecomunicaciones (National Telecommunications Commission - CONATEL) are jointly and severally liable under civil, penal and administrative law for the decisions undertaken by the regulator.⁴¹ While such laws are likely intended to impress upon all regulatory personnel the importance of taking the appropriate regulatory actions, they are more likely to result in an overly conservative regulatory approach due to fear of personal liability among authority personnel.

Protection from individual liability is important to the functioning of a regulator, as it empowers regulatory personnel to make their best efforts in support of the regulator’s goals, or the duties assigned to the regulatory authority by applicable laws and regulations, without fear of being held personally liable for adverse consequences. This freedom is an important protection for employees (and incentive for potential employees) who have an interest in contributing to the effective regulation of the telecommunications sector, but who cannot afford the risk of personal liability for regulatory actions. Protection from liability for actions carried out on behalf of the regulatory authority is a specific protection afforded to regulatory personnel; however, in certain countries, such as Singapore, that protection does not confer immunity from all criminal laws and rules of conduct upon all regulatory authority personnel.

6.5.3.2 STAFFING DESIGN

Many factors affect the staffing design of a regulatory authority. Principally among these are market conditions, established objectives and goals, scope of the regulator’s responsibility, selected management structure, distribution of responsibilities/duties within the regulator, and available resources.

In most cases, the head of the regulatory authority is empowered by the applicable law or regulation to hire appropriate staff as deemed necessary to conduct the business of the regulatory authority provided such appointments are made within the confines of the regulator’s budget. The hiring of staff for the regulatory authority also is usually subject to national civil service or public employment laws or regulations.

Often the regulatory authority has detailed requirements that it must follow when filling a vacancy within the agency. India’s TRAI, for example, must fill each position by promotion, deputation or direct recruitment, with specific guidelines laid out for each method.¹ Detailed regulations, such as TRAI’s, provide transparency to the public, ensure that candidates are informed of selection procedures, and facilitate the orderly internal process of hiring new staff.

However, the fact that regulatory authorities may be empowered to hire staff does not guarantee an abundance of qualified applicants. Regulators face significant challenges in recruiting and maintaining qualified staff. First, they need to identify individuals with the relevant expertise. Second, they must be provided by the government with the resources to offer compensation packages that will attract such qualified individuals. Third, they must be able to retain their staff members despite a highly fluid sector in which technologies, business plans, and regulations change with some frequency. Without addressing such challenges, regulators are likely to face staff shortages and high turnover rates.

In general, telecommunications regulators are composed of a diverse group of professionals that include: attorneys, economists, engineers, market analysts, accountants, and administrative support personnel. In addition, depending on the needs and resources of the regulatory authority, some have provisions that allow them to hire consultants on an “as needed” basis.

According to the results of the ITU’s World Telecommunication Regulatory Database survey for 2010, telecommunications regulator staff sizes range from three (Micronesia) to over 2,300 employees (Germany).² (See Table 5-6 below.)

Region of the World	Country	Staff Size
Africa	Namibia	7
	South Africa	300
Americas	St. Lucia	5
	United States	1,993
Arab States	Comoros	17
	Egypt	429
Asia and Pacific	Micronesia	3
	Korea (Rep.)	1600
Europe & CIS	Liechtenstein	6
	Germany	2,238

◀ Table 5-6: Lowest and Highest Staff Size of Regulators per Region

Gender composition, a factor taken into consideration by many human resources departments within telecommunications regulators, shows that the number of male staff members is usually much higher than that of women. According to the 2010 ITU World Telecommunication Regulatory Database, 36 of the 149 (about 25 per cent) responding countries indicated that their regulators currently have at least 50 per cent females on their staffs.³ Notably, however, female staff members in an additional 39 countries make up between 40 and 50 per cent of the total staff. As such, women comprise at least 40 per cent of the total staff members in over half of the responding countries.⁴ The table below (Table 5-7) shows those countries, per region, which have at least an equal number of female and male staff members:

Region	Country and Percentage of Female Staff Members (50% or more)
Africa	<i>Rwanda (60%)</i>
Americas	<i>Antigua and Barbuda (50%), Bahamas (59%), Barbados (84%), Canada (59%), Colombia (62%), Dominica (57%), El Salvador (54%), Grenada (50%), Guyana (60%), Jamaica (55%), St. Vincent and the Grenadines (63%), Suriname (52%), Trinidad and Tobago (52%), United States (55%), Venezuela (55%)</i>
Asia and Pacific	<i>Samoa (60%), Philippines (50%), Solomon Islands (50%)</i>
Arab States	<i>Lebanon (50%)</i>
Europe & CIS	<i>Austria (56%), Bosnia and Herzegovina (57%), Bulgaria (60%), Cyprus (50%), Czech Rep. (52%), Estonia (53%), Greece (51%), Latvia (58%), Kazakhstan (50%), Kyrgyzstan (50%), Serbia (53%), Spain (54%), TFYR Macedonia (55%), Ukraine (60%)</i>

◀ Table 5-7: Percentage of Female Staff Members by Region

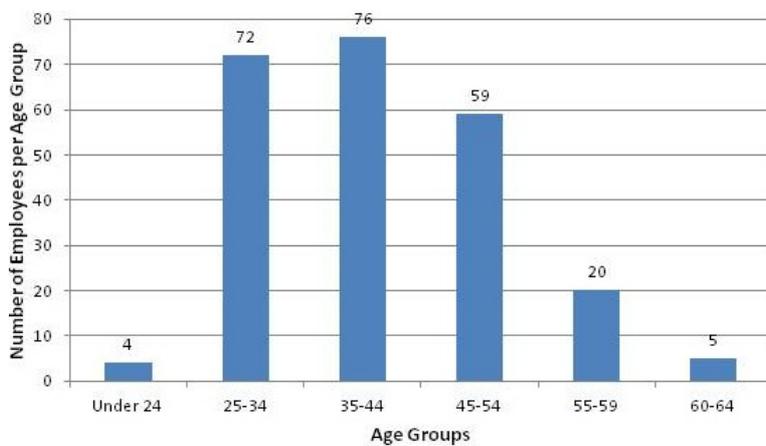
Source: ITU World Telecommunication Regulatory Database (2010)

Interestingly, developing countries are likely to have more equal numbers of female and male staff members within their telecommunications regulators as developed countries. Overall, however, Barbados has the highest percentage of female staff (84 per cent) while Saudi Arabia and Micronesia have the lowest, with no women working at the regulator. (See Table 5-8 for the lowest and highest percentages of female staff members by region).⁵

Country	Percentage of Female Staff
Africa	Cape Verde 0.5%
	Rwanda 60%
Americas	Belize 10%
	Barbados 84%
Arab States	Saudi Arabia 0%
	Tunisia 45%
Asia and Pacific	Micronesia 0%
	Samoa 60%
Europe & CIS	Iceland 18%
	Bulgaria, Kazakhstan, Ukraine 60%

◀ Table 5-8: Lowest and Highest Percentage of Female Staff per Region 5Region of the World

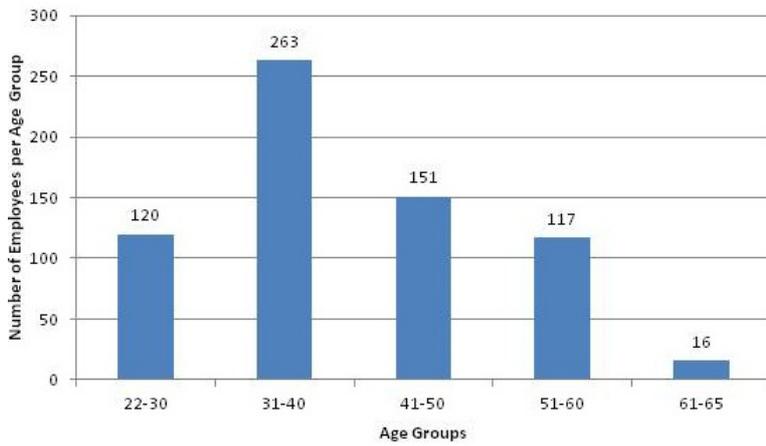
The average age of employees is another aspect of a regulator’s staffing composition. For the most part, regulatory authority staff members around the world range from 25 to 65 in age, with the 25 to 34 and 35 to 44 age groups being the most significant in number. In Chile, for instance, SUBTEL’s staff of 236 employees had the following age group composition in 2009 (Figure 5-H):6



◀ Figure 5- H: SUBTEL Staff by Age Group

Source: SUBTEL, Balance de Gestión Integral Año 2009

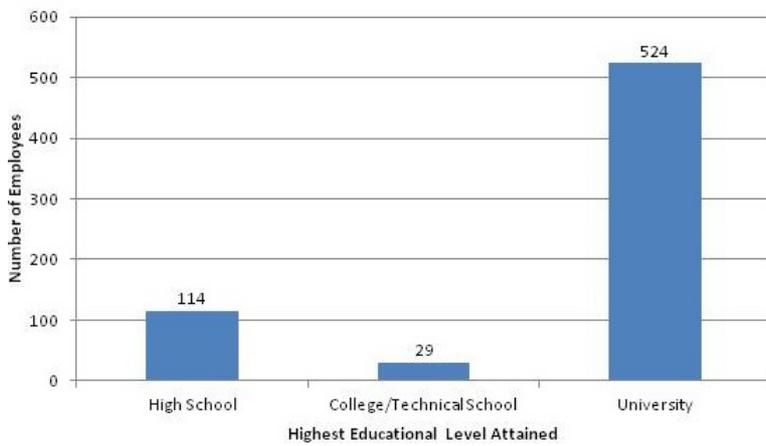
While the 45 to 50 age range is the largest age group of SUBTEL employees, Romania’s ANCOM has perhaps a slightly younger staff composition with nearly 40 percent of employees between the ages of 31 and 40 years. (Figure 5-I):7



◀ Figure 5-I: ANCOM Staff by Age Group

Source: ANRC Annual Report 2008

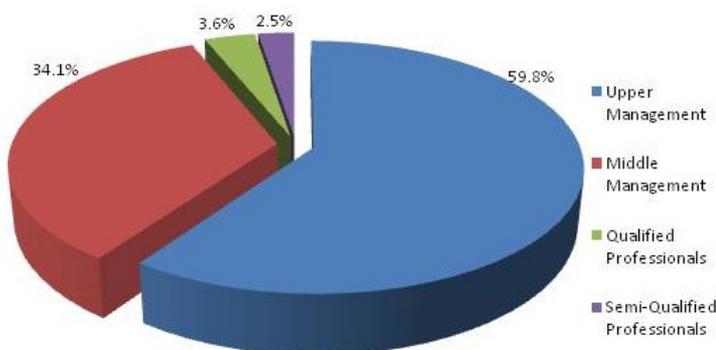
The academic levels of staff members vary from one regulatory authority to another, but usually include: higher education (university degrees such as Ph.D., M.A. and B.A. or their equivalents), vocational/technical education, and high school education. As Figure 5-J shows, of the 667 positions filled at Romania's ANCOM, nearly 85 percent of employees held a degree in higher education (i.e., college/technical school or university). Of those with higher education degrees the majority hold them in technical fields, as well as economics, law and humanities.



◀ Figure 5-J: ANCOM Academic Level of Employees

◀ Source: ANRC Annual Report 2008

Telecommunications regulators usually organize their staffs hierarchically. There are various levels including: high-ranking management staff; professionals (which can have different levels based on their expertise, as well as their degree of responsibility); technical staff; administrative staff; and others, including consultants. It is not only the hierarchical levels that differ between regulators, but also the distribution of their staffs within each of these levels. For example, ICP-ANACOM in Portugal has the following levels and distribution (Figure 5-K):8

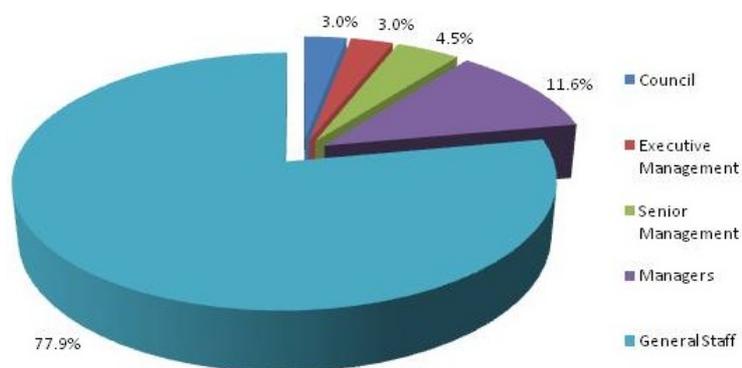


◀ Figure 5-K: ICP-ANACOM Staff Organization and Ranking

◀ Source: Annual Report and Accounts, ICP-ANACOM 2009

In contrast, the Independent Communications Authority of South Africa (ICASA) shows the following levels and distribution of staff within them (Figure 5-L):9

Figure 5-L: ICASA Staff Organization and Ranking
 Source: ICASA Annual Report, 2009



These graphs show how two regulators, with a somewhat similar hierarchical staff structure, can have very different distribution of their employees. While almost 50 per cent of ICP-ANACOM's staff is upper/senior management and its semi-qualified professionals represent 30 per cent of the total staff, ICASA seems to have an inverted pyramid in comparison, as its senior management is only 6 per cent of the total staff and its administration staff members represent almost 60 per cent of all employees.

Staff members are commonly selected based on their professional background, experience in the sector, and academic accomplishments. Similar to other staff composition characteristics, this distribution also varies among regulatory agencies. In the case of OSIPTEL in Peru, the agency relies on lawyers, engineers and economists for 70 per cent of its staff (Table 5-9):

Professional Background	Total Number of Employees	Percentage (of total staff)
Accountants	11	8%
Attorneys	37	28%
Economists	23	17%
Engineers	32	24%
Other Professions	14	11%
Secretaries	15	11%
Total	132	100%

Table 5-9: OSIPTEL Staff Background
 Source: OSIPTEL Annual Report 2003

In Colombia, lawyers, engineers and economists make up 82 per cent of the staff of the Comisión de Regulación de Telecomunicaciones (CRT) (Table 5-10):

Professional Background	Total Number of Employees	Percentage (of total staff)
Administrative Support/Programmers	11	28%
Attorneys	11	28%
Business/Finance	3	8%
Economists	3	8%
Engineers	10	26%
Journalists	1	2%

Table 5-10: CRT Staff Background
 Source: Jaime Andres Estrada, Commissioner, CRT (2005)

The U.S. Federal Communications Commission (FCC) shows the following distribution by profession, based on respondents to the annual employee survey (Table 5-11):10

Professional Background	Total Number of Employees	Percentage (of total staff)
Attorneys	185	31.2%
Clerical & Administrative Support	29	4.9%
Consumer Affairs & Consumer Outreach	28	4.7%
Economists	20	3.4%
Engineers	85	14.3%
Finance/Accounting/Auditing	31	5.2%
Information Technology	19	3.2%
Management/Program Analyst	58	9.8%
Specialist	78	13.2%
Other	60	10.1%

◀ Table 5-11: FCC Staff Background
Source: 2009 Annual FCC Employee Survey Results

As shown above, the FCC, OSIPTEL, and the CRT all rely heavily on attorneys, accountants, engineers and other technical specialists. However, there are no specific guidelines regarding the percentage of employees per profession that should comprise a regulatory authority’s staff. The particular expertise required is better determined by assessing the needs and upcoming workload of the regulatory authority. In addition, the legislation establishing the regulatory authority often allows the regulator to hire outside consultants and experts if the need arises, as will be discussed in Section 5.3.5.

Another aspect that certain countries consider regarding the staffing design is racial/ethnic diversity. In South Africa for instance, ICASA strives to have a staff that reflects the demographic diversity of its society (Table 5-12):

Race/Ethnicity	Total Number of Permanent Employees	Percentage (of total staff)
African	241	72%
Asian	17	5%
Colored	23	7%
White	54	16%
Total	335	100%

◀ Table 5-12: ICASA Staff demographics
Source: ICASA Annual Report 2009

6.5.3.3 JOB DESCRIPTIONS

In general, most regulatory agencies include the following information on job descriptions:

§ key responsibilities and duties;

§ experience required;

§ qualifications/evaluation criteria;

§ special skills (if needed); and

§ how to apply (application instructions and procedures).

Some countries establish specific professional qualifications and background for members of the collegiate body (commissioners/board members) who are chosen on the basis of their knowledge and expertise in the communications field. They can come from both the public and private sectors and have different professional backgrounds (e.g., lawyers, economists, engineers, finance/accounting, academics, and government officials). In some countries, however, the professional background of the chairperson of the commission/board and some members is specified. In India, for instance, members of the TRAI can be drawn from a variety of fields, but the Chairperson must be, or should have been, a Supreme Court Judge or a Chief Justice of a High Court.¹ In the Philippines, the National Communications Commission (NTC) consists of the Commissioner and two Deputy Commissioners, preferably one being a lawyer and the other an economist.² In the United States, it is not only the professional background of the candidates that is taken into consideration when considering the composition of the commission, but also their political affiliation. Of the five FCC commissioners, no more than three can be of the same political party at any given time.³

Certain regulatory agencies, like the Telecommunications Regulatory Commission (TRC) in Jordan, have minimum requirements for professional applicants, regardless of the position for which they are applying. These qualifications include a degree from an accredited university, fluency in both English and Arabic (spoken and written), and knowledge of MS Office applications. They also must be Jordanian citizens.⁴ OSIPTEL in Peru also includes minimum requirements for professional applicants, among them: university degree (in specific field depending on the job position), experience, and an intermediate knowledge of English.⁵ Similarly, the Office of the Telecommunications Authority (OFTA) in Hong Kong includes entry requirements for professional candidates, such as: a Hong Kong university degree (or equivalent), fluency in English and Chinese (spoken and written), and knowledge of MS Office.⁶

Countries such as Canada, Dominican Republic, Nigeria, Panama and South Africa require that commission/board members be citizens of the country.⁷ In Panama and Peru, commission/board members must have at least ten years of experience in the telecommunications industry and a university degree (master's degree equivalent) in order to be considered for nomination.⁸

Source: ComReg (Ireland) - <http://www.comreg.ie/recruitment>

For those regulatory agencies that provide job descriptions, the amount of information requested and/or provided can vary from the most general to the most specific. For instance, below is a sample of a job description published by the Commission for Communications Regulation (ComReg) in Ireland (Box 5-2): **Box 5-2: ComReg Sample Job Description**

Senior Legal Advisor

Reporting directly to the Commissioners, your prime responsibility will be to provide strategic, mission-critical legal advice to the Commissioners and the organisation, and to handle legal matters arising from ComReg's remit and activities.

You will develop and implement strategies which result in the provision of well- rounded legal advice to senior management and to the organisation as a whole; oversee the full legal process, including court actions where necessary; and lead and manage ComReg's relationships with external legal advisors. You will also act as a mentor to other lawyers working in the organisation.

The seniority of this position requires that you are a qualified solicitor or barrister with at least 10 years PQE, and have an outstanding professional record and reputation of providing excellent legal advice at the highest organisational levels. You will have a recognised expertise in competition and regulatory matters preferably relevant to the activities of ComReg - namely the electronic communications and postal sectors, and to demonstrate the ability to contribute effectively as a member of the senior management team.

ComReg is an equal opportunities employer.

In comparison, a job description published by the Infocomm Development Authority (IDA) in Singapore provides more detailed information with regards to the duties and requirements of the position (Box 5-3):

IT Infrastructure Project Manager

Responsibilities:

- Involve in the design, management and enhancement of the corporate ICT infrastructure. Lead a small project or assist the Project Manager of a medium to large project, to conceptualise, develop and execute the project plan.
- Responsible for the client computing, messaging, networking and server aspect of the projects from initiation to implementation. Study business and application specific requirements, review organisational ICT infrastructure as well as design and implement the ICT architecture to meet current and future requirements.
- Manage the designated vendor and ICT contract to ensure the designated vendor meets contractual obligations, leading to successful delivery of the project.
- Conduct ICT strategic review, identifying and exploiting suitable technologies, strategies and solutions to meet organization needs. Develop solutions / architectures based on technology trends and standards, to exploit new and emerging technologies and products to meet present and future business needs.
- Manage the customer's expectations, develop and actively engage customers so as to enhance customer intimacy and influence their alignment with the eGovernment agenda, and to achieve customer satisfaction.

Requirements:

- Degree in Computer Science, Computer or Electronics Engineering or Information Technology
- 5 - 6 years of relevant IT experience in designing and deploying enterprise level network and systems infrastructure (Experience in network security and/or development of IT Technical Architecture plans will be an added advantage)
- Good knowledge of servers, network, IT security, desktop and ICT operations to effectively manage vendors
- Experience in designing and managing enterprise infrastructure for application hosting
- Excellent communication (both oral and written) as well as strong project, vendor and contract management skills
- Pro-active, dynamic, dedicated and responsible self-starter with strong customer orientation and multi-tasking capabilities

Successful candidates will be posted to work in customers' premises such as ministries and statutory boards.

◀ Box 1 IDA Sample Job Description

Source: IDA (Singapore) – Careers @ IDA
<http://www.ida.gov.sg/Careers/20090804162533.aspx>

Certain regulatory agencies, such as OFTA in Hong Kong and the FCC in the United States, are even more explicit in the information they include in their job descriptions. OFTA, for example, indicates the term of the appointment (length of contract), newspapers in which the advertisement has appeared, and the policy for applicants with disabilities, among others.

The FCC indicates that it is an equal opportunity employer, whether a security clearance is required or not, whether relocation expenses will be covered or not, the policy for applicants with disabilities and preference in hiring veterans, and information that should be included in the curriculum vitae. In addition, FCC applicants must complete a Declaration for Federal Employment to determine their suitability to work for a government agency and to authorize a background investigation.⁹

Job descriptions for regulatory agencies can readily be found on most regulatory authority websites. However, many regulators do not provide specific job descriptions on their websites. Instead, they provide a description of the different departments/divisions of the regulatory authority and encourage those interested to submit their curriculum vitae for consideration.

The means used to hire employees in the regulatory industry vary from one regulatory authority to the next. For instance, in Nigeria and South Africa, telecommunications regulator employees are considered public/civil servants and as such are entitled to the same salary levels, pension and benefits as other public/civil servants.¹⁰ In Canada, employees of the CRTC are appointed in accordance with the country's Public Service Employment Act.¹¹

In Latvia, Peru, Philippines, and Poland, regulators support the professional advancement of their employees by encouraging their participation in specialized training courses, seminars, and workshops.¹² For example, in an effort to prepare its employees for the country's ascension into the EU, the URTiP in Poland organized capacity building courses in foreign languages, as well as courses focused on issues related to Europe's integration.¹³ In Latvia, the Public Utilities Commission (PUC) supports efforts by its employees to further university studies at Latvian universities and sponsors employees interested in pursuing foreign language studies and in-service capacity building in regulatory institutions abroad.¹⁴

In Botswana, in addition to supporting employees' interests in obtaining specialized training and pursuing university degrees, the BTA has established the Botswana Telecommunications Authority Staff Pension Fund and assists employees in obtaining personal, car, and home loans. The BTA has also established a performance management system with the objective of rewarding performance and encouraging productivity among its employees. This system also helps the regulator determine the training needs of its staff.¹⁵

In Senegal, employees of the Agence de Régulation des Télécommunications (ART) have access to a pension fund and are offered diverse bonuses and loans, as well as medical coverage and grants for mobile phone service and home remodeling. A capacity building plan has been developed to strengthen employee skills in various areas (*i.e.g.*, management and technical) and training is carried out in Senegal and abroad. In 2004, the ART focused its capacity-building efforts on effective regulation to ensure that all staff involved had the same level of knowledge and understanding of the subject matter. In 2005, the agency focused its efforts on providing top management personnel with training, based on

each individual's needs, most of which was carried out abroad. Similar to the BTA in Botswana, the ART has established a performance management system that evaluates each employee's annual performance based on their accomplishments and those areas where improvement is needed. Employees are awarded a year-end bonus (a maximum of 1.5 times their net salary) based on the results of this evaluation.¹⁶

Although various ways exist to engage employees and thus improve a regulator's efficiency and effectiveness, establishing a performance management system - such as that in place in Botswana and Senegal - can ensure consistency in achieving a regulator's objectives and goals.

Regulators must keep in mind that staff turnover is a business risk requiring management.¹⁷ A high turnover rate can be harmful as it can lead to lack of continuity and diminishes the ability to achieve the regulator's goals and objectives. Therefore, regulators need to establish the measures necessary to create a working environment that will keep staff members motivated and enhance their desire to stay with the regulator. However, a low or non-existent turnover rate is not advisable either, as new employees can often bring new skills and insights with them, so measures should be balanced to also attract new employees to the regulator.

Regulators also should continually re-examine their organizational and administrative structures in order to be prepared for changes that may occur within it, as well as in the sector it regulates. Establishing a solid and well-prepared staff can be instrumental in helping a regulator manage internal and external changes in a successful manner.¹⁸ A regulator and its staff should aim to have the skills necessary to keep abreast of the needs and changes of the country's telecommunications market sector and thus be able to respond to these changes in an independent and transparent manner.

6.5.3.4 REMUNERATION PRINCIPLES

Remuneration for Leadership of Regulatory Authority

Often, the compensation of regulatory authority heads or collegial body members is lower than what could be earned in equivalent executive positions in the private sector. As noted below, this also presents a challenge regarding staff remuneration. However, particularly in the case of leadership positions, it is not uncommon for regulators to be composed of individuals who are less concerned about compensation than about some combination of public service along with the experience, public exposure and contacts that can be gleaned through a regulatory leadership position.

In several cases, the governing law or regulation specifies the manner of compensation for the head(s) of the regulators, with many reserving the right for the government or its appointed representative to adjust salaries as necessary. A typical formulation is found in Uganda's Communications Act, which states, "The Chairperson and other members of the Commission shall be remunerated upon terms that the Minister shall approve."¹ Another common approach is for the salary of the regulatory authority head(s) to be determined in the decree or other instrument of appointment, as is the case in Jordan.² Such arrangements provide a clear determination of who sets salaries, but provides the flexibility for salaries to be adjusted as necessary by the responsible party. For those regulators in which the board or commission members serve part-time, they are often paid a per-meeting fee, as well as reasonable expense reimbursement.

In some cases, however, the salaries for the head of the regulatory authority or the collegial body members are set by law, although not in explicit numerical terms. For example, the salary of the chairman of the collegial body of Bulgaria's Communications Regulation Commission (CRC) is set at 90 percent of the basic remuneration of the Chairperson of the National Assembly, while the salaries of the deputy chairman is set at 95 percent of the basic remuneration paid to the CRC's chairman and remaining Commission members' salaries are set at 90 percent of the CRC chairman's salary.³ Similarly, the collegial body members of Hungary's are paid salaries that tied to the compensation and benefits paid to permanent secretaries,⁴ Such arrangements serve the dual purpose of ensuring that the head of the regulator's salaries are adjusted in concert with legislators or senior ministry officials, and imbuing the regulatory leadership positions with a level of status on par with such senior government officials. The latter can help to lend legitimacy to regulatory leaders, as well as to attract qualified candidates. Directives regarding remuneration may also be linked to civil service regulations, as is the case in the United States. By law, each member of the U.S. Federal Communication Commission's (FCC) collegial body receives a salary at a particular level of the public employee pay scale.⁵

Remuneration for Staff

In countries where regulatory authority employee salaries are tied to government-wide public employee regulations, it is much more common for salaries to be lower than those offered in the private sector. In such cases, the ability of the regulator to attract qualified candidates can be stifled by the availability of higher-paying private sector opportunities. Further complicating the ability to attract qualified candidates, regulatory authority leaders may be required to obtain permission to pursue additional paid employment, as is the case in Australia (for full-time collegial body members),⁶ or simply prohibited from pursuing additional employment, as is the case in the United States.⁷ Such restrictions are intended to ensure that employees devote their full attention to their regulatory duties and to eliminate conflicts of interest, but can also prevent candidates from obtaining additional income that would help make up for the income forfeited when accepting a position at the regulatory authority.

In an attempt to circumvent the issues of low civil service salaries or restrictive civil service employment regulations, regulators have attempted to design creative and attractive compensation packages to attract experienced and qualified personnel. In a study of the Botswana Telecommunications Authority, the ITU noted that at the time of the study, the BTA offered an attractive set of fringe benefits and salaries that were likely higher than those available in private sector telecommunications jobs, as shown by the high number of private sector applicants for BTA positions.⁸ In the case of Botswana, these fringe benefits combined with the fact that civil service rules do not apply to the regulator, allowed the BTA to offer competitive salaries and benefits to attract the most qualified candidates. A similar arrangement is in effect in Singapore, where the IDA is not required to adhere to the hiring, firing, and benefits practices in place for most public employees, allowing the regulator more flexibility to offer compensation packages that are more competitive with the private sector.⁹

In some cases, the non-leadership staff compensation levels are based upon national public employee regulations when regulatory authority heads are empowered to hire staff as necessary, as long as they comply with applicable public employment laws and regulations. Such is the case in the United States where the majority of the employees of the FCC receive compensation based on a government-wide schedule of

compensation in which there are several compensation “bands” and multiple levels within each band.¹⁰ In such cases, staff remuneration is adjusted in concert with other public employees across the majority of government agencies.

6.5.3.5 CONTRACTING OF CONSULTANTS

Options for Contracting out Services

Acknowledging that regulatory authorities may sometimes be best served by contracting certain functions to outside experts, many regulators are empowered to enter into contracts with outside organizations for specific functions. It should be noted that such outside experts may be private sector individuals or companies, but may also be assigned to the regulator by other branches of government. A typical formulation of the authority granted to the regulator is found in Bahrain’s Telecommunications Law, which authorizes the Telecommunications Regulatory Authority’s General Director (the head of the TRA’s staff) to employ such consultants as will enable the TRA to meet its obligations under the Law, while also taking budget considerations into account.¹ Another arrangement is for the outside expertise to be provided by a regional regulatory authority, as is the case in the eastern Caribbean states. In that case, the Eastern Caribbean Telecommunications Authority (ECTEL) serves its members as a shared regulatory body and provides specific expertise, such as tariff reviews or impact assessment studies.²

In addition to hiring outside experts, many regulators are also empowered to delegate their powers not only to particular divisions within the authority, but also to outside experts. In Singapore, the IDA is empowered to create committees for purposes which the IDA feels would be better managed or regulated by a committee. Such committees may be comprised of personnel from either within or outside the IDA, and the regulator may delegate any of its authority to such committees, with the exception of the power of delegation.³ The Australian Communications and Media Authority (ACMA) may also delegate powers, but to a more limited pool of experts, namely those within the ACMA or those made available to the ACMA by other government authorities.⁴ Other examples of regulators who may delegate some or all of their authority are found in Bahrain,⁵ Hong Kong (SAR),⁶ India,⁷ and Tanzania,⁸ among others. The power to delegate provides the regulator with additional flexibility to determine the most effective or efficient method for regulation of any particular aspect of the telecommunications sector.

In addition to hiring outside consultants and delegating authority, another method of outsourcing is the establishment of advisory or consultative committees. Advisory committees are generally comprised of interested parties or key stakeholders as identified by the regulator. The advisory committee structure provides regulatory authorities with outside expertise that can be drawn upon in the course of normal business, but which are not employed to carry out a particular regulatory task or empowered with any delegated authority role. Regulators empowered to employ such advisory committees include Australia,⁹ Bahrain,¹⁰ Hong Kong (SAR),¹¹ and the United States.¹²

Consultative committees generally do not have the power to carry out actions on behalf of regulatory authorities. However, they may provide valuable input to the regulators in devising positions and strategies on domestic and international issues. In Hong Kong (SAR), for example, the Office of the Telecommunications Authority (OFTA) currently has advisory committees addressing radio spectrum, numbering, technical standards, regulatory affairs and consumer issues.¹³ All five Hong Kong (SAR) committees provide advice on domestic issues, while the spectrum and standards committees also assist OFTA in the formation of positions and inputs to international fora. Similarly, the U.S. FCC currently has eight advisory committees, including committees on consumer issues, diversity, media security and reliability, network reliability and interoperability, and numbering.¹⁴ The Australian ACMA provides a standard formulation of the authority to establish advisory committees, in which it states, “[t]he ACMA may, by writing, establish advisory committees to assist in performing any of its functions,” and furthermore the ACMA holds the authority to appoint the committee members as well as revoke membership, and provide the committee with specific instructions.¹⁵

The ACMA Act also notes that committee appointments are not appointments to public office under the terms of Australian law governing remuneration, which brings about another common feature of advisory committees: members are not paid by the regulatory authority for their service. Instead, they provide input to the regulator in order to shape regulatory decision-making, whether for the good of the telecommunications market as a whole or for the good of the stakeholder(s) that they represent.

Reasons for Outsourcing

As more regulatory authorities have been established or reorganized in recent years, outsourcing certain regulatory functions has served as a means for the regulators to perform their duties while building internal capacity and ultimately minimizing the need of outside experts. In the cases of Bahrain and Uganda, a consulting firm was contracted to carry out many of the functions of the regulators as they developed their own internal competencies, which helped to get the regulators quickly functioning after their establishment. In other cases, it may be that a particular staff competency is currently lacking and the regulator determines such a role is better filled by an outside consultant. For example, in the Cayman Islands, an outside consultant was hired to serve as general counsel.

In both of these cases, the deployment of external resources in a regulatory authority can be coordinated so as to maximize opportunities for knowledge transfer. In particular, consultants and regulatory authority personnel can be integrated into teams that address weaknesses in the authority’s capabilities. Such arrangements provide opportunities for the regulatory authority personnel to become more familiar with the relevant issues and stakeholders, and to learn from the consultants how best to address such issues. In order to maximize the potential for knowledge transfer, regulators employing external resources should consider three primary factors, and at different phases of the integration:¹⁶

- *Traits of the consultant or expert*, such as perceived reliability and motivation, which are important to ensuring successful transfer of knowledge at the initiation of any such collaboration;
- *Traits of the recipient*, such as ability to absorb knowledge, which affects how well the authority personnel will employ the knowledge gained;
- *Level of understanding of subject matter*, which can affect the effectiveness and difficulty of knowledge transfer at all times.

As the knowledge transfer process continues and regulatory authority personnel are better able to take on the roles initially assigned to

consultants, the authority gains the freedom to redeploy the consultants in other areas in which their skills may be needed.

Regulators, both established and new, may also choose to outsource certain functions not because they lack the internal capacity, but because such functions may be best provided by outside experts. In this respect, outsourcing regulatory functions is similar to the outsourcing of business functions: focused on functions and processes that have been problematic and have led to dissatisfaction.¹⁷

It is also not uncommon for regulators to contract outside experts on an ad hoc basis for specific short-term needs. For example, regulatory authorities commonly outsource parts of tender processes, such as the development of terms of reference, feasibility studies or evaluation of bids. In Botswana, the regulator employed consultants in 2004 to assist in the evaluation of bids to procure an automated frequency management and monitoring system. Similarly, regulators have engaged the services of consultants to assist in bid evaluation for mobile licence tenders in many countries, including Jordan and the Maldives.

In addition to providing a competency that the regulator may lack, the employment of impartial external analysts for tasks such as bid evaluations may help to avoid conflict of interest issues in environments where the regulator is populated by individuals with close ties to or histories with bidders. This concern extends beyond bid evaluation to any issue for which there is reason to suspect that the regulator may not be able to make an impartial decision, or to cases in which the regulator's actions would be further legitimized by being based on external analysis and evaluation.

While not quite on an ad hoc basis, outside experts can also be contracted to address short term needs in conjunction with a particular project. For example, a concession contract may include a provision requiring outside consultants to monitor adherence to the terms of the contract or to ensure the quality of the service being offered by the concessionaire. Furthermore, outside experts often have established networks of expert contacts that enable them to gather relevant information and best practices in a more effective and efficient manner than a regulator, particularly a new independent regulator.

On an operational level, it is also not uncommon for regulatory authorities to outsource certain other functions, such as security, maintenance and cleaning, as well as employing outside contractors to fill temporary staff vacancies or to recruit support personnel.

Outsourcing can also involve different types of deliverables from the outside experts. In some cases, consultants provide a set of key issues and potential options for the regulator to take, but leave the ultimate decision up to the regulator. In other cases, the consultant may be offered the opportunity to provide binding recommendations that the regulator has no choice but to implement.

Outsourcing can be a useful tool, allowing regulators to act more independently and efficiently, providing impartial analysis of key issues or processes, and augmenting the regulator's own capacities (or lack thereof). Seeking advice from concerned stakeholders provides the regulator with important insights into the current state of the telecommunications sector as well as the possibilities for its future.

6.5.4 LEGAL STATUS OF REGULATORY AUTHORITIES

The legal status of the regulatory authority is a product of the political and legal system of each country. Most regulatory authorities are either public or semi-public institutions, although some regulatory bodies are established as corporate bodies.¹

6.5.4.1 CORPORATE BODY VS. ADMINISTRATIVE BODY

The legal status of the authority is generally based on providing the most appropriate organizational structure in order to ensure consistency with the legal and administrative framework of the country. Portugal and Austria are two examples of countries that structured their regulatory authority as a corporate body instead of as an administrative body. In Portugal, the new statutes of the Instituto das Comunicações de Portugal (ICP) changed the previous legal status of ICP from a public institute to a public corporation named ICP-AUTORIDADE NACIONAL DE COMUNICAÇÕES (ICP-ANACOM) endowed with administrative and financial autonomy, as well as its own assets.¹ This new legal form was intended to enhance the powers and procedures of the regulator and to provide greater legal and financial flexibility through its regulatory instruments. In practice, the change of legal status had an impact on the internal administration of ICP-ANACOM because the Board was granted more flexibility with regard to internal administrative matters, including salaries of the Board Members and staff, the internal organization of the Institute and procurement of goods. However, the budget is still approved by the Ministry of Public Works, Transportation and Communications and the members of the Board of Administration are appointed by resolution of the Council of Ministers, upon a proposal from the member of government responsible for communications. In terms of regulatory functions, ICP-ANACOM has wide-ranging powers, with the Ministry responsible for the establishment of licence fees. ICP-ANACOM, however, must coordinate with other entities as follows:

- *Numbering Plan:* The member of government responsible for the communications sector approves the guidelines and general principles of the national numbering plan and then ICP-ANACOM administers the plan and grants the numbers.²
- *Tariff approval:* The pricing system of the provision of universal service is established through an agreement signed between the central government, represented by the Department of Commerce and Competition (DGCC), ICP-ANACOM and the organization with universal service obligations.³
- *Technical standards:* ICP-ANACOM must coordinate with the National Standardization Organization (Instituto Português da Qualidade).
- *Frequency allocation:* ICP-ANACOM must coordinate with the sector ministry which is responsible for public tender procedures.⁴

In Austria, the independent regulator (RTR GmbH) is also a corporate body – specifically, a private sector, non-profit, limited-liability company, and 100 per cent of its shares are owned exclusively by the Austrian federal government. These shares are administered by the Federal Chancellery in cooperation with the Federal Ministry for Transport, Innovation and Technology. RTR's share capital totals €5,741,153.90 and was solely contributed by the federal government. Additional financing of the regulatory authority is governed by law, and inflows of funds include licence fees and financing amounts contributed by telecommunications providers operating in Austria. RTR's regulatory activities with regard to broadcasting are financed by contributions from broadcasting organizations located in Austria.

RTR is in charge of running the day-to-day regulatory business and also acts as the managerial unit of the Austrian Communications Authority (KommAustria – the broadcasting regulator)⁵ and the Telekom Control Commission (TKK, which acts as the judicial arm of the regulator.)⁶ The members of the RTR Advisory Board are appointed by the Austrian Federal Ministry of Transport, Innovation and Technology and by the Federal Chancellery. RTR is split into two specialized sections (broadcasting and telecommunications) and has fairly typical functions and duties of a telecommunications authority.

Since October 1, 2010, KommAustria has also been responsible for legal supervision of the Austrian Broadcasting Corporation (ORF) and its subsidiaries, for the legal supervision of private providers of audiovisual media services on the Internet, and for certain tasks under the Austrian Act on Exclusive Television Rights.⁷ Thus, in practice, regulators legally established as corporate bodies appear to function in much the same way as regulators which are administrative bodies in terms of reporting lines, budget and internal administration.

6.5.5 ETHICS RULES AND CONFLICTS OF INTEREST

A major component of effective and transparent telecommunications regulation is the management of conflict of interest issues between private interests and public service duties.¹ Regulators must be fair, impartial and transparent, and just as importantly, the public must perceive them as such in order for the regulators to inspire confidence of the industry and of investors. For instance, in order to maintain the public confidence and address the conflict of interest over the roles of the Telecom Regulatory Authority of India (TRAI) as a regulator and an adjudicator, TRAI amended the telecommunications legislation in 2000 to create an independent Telecom Disputes Settlement and Appellate Tribunal (TDSAT), transferring to it all powers for dispute resolution in the sector. (For a more detailed analysis, see the practice note on the case of India in Section 7.4.1 in the online module.) The ability of a regulator to govern legitimately and effectively is based on the real and perceived integrity, honesty and ethical behavior of its officials and employees and their decisions. Thus, it is necessary for regulators to implement an ethics framework to govern the activities of their employees and ensure the adherence to minimum standards of professional and ethical behavior. Box 5-3 below provides an example of the core values of civil service for Hong Kong (SAR).

- Commitment to the rule of law;
- Honesty and integrity;
- Accountability for decisions and actions;
- Political neutrality;
- Impartiality in the execution of public functions; and
- Dedication, professionalism and diligence in serving the community.

◀ Box 5-3 Core Values of Civil Service in Hong Kong (SAR)

Source: Hong Kong (SAR) Civil Servants' Guide to Good Practices: 2

At the heart of any ethics framework is the prevention of conflicts of interest, which can jeopardize the ability of a regulator to make an objective and transparent decision. One way to establish the core values and standards of conduct that should govern public service is to adopt and enforce a code of ethical conduct that binds all employees. A code of ethics can be part of a more comprehensive administrative code, such as the United Kingdom's Civil Management Code,³ or it can be promulgated as separate legislation, such as Canada's Conflict of Interest and Post-employment Code for Public Office Holders.⁴ Other regulators, such as Bahrain's TRA, include conflict of interest provisions in the telecommunications legislation. In general, the ethics codes for the public service sector in most countries serve as general ethical guidelines for all government agencies, including independent regulatory entities, although different departments, agencies and regulators may develop supplemental guidelines to take into account their specific functions and circumstances. Ethics codes can vary in content, but should generally address the following:⁵

- Establishing provisions for disclosure of personal and financial conflicts of interest (which include provisions regarding gifts, impartiality in performing official duties, and seeking outside employment);
- Rules for maintaining confidentiality of information;
- Setting procurement rules;
- Rules on staff relations (such as prohibitions on sexual harassment);
- Establishing methods to report and handle misconduct and what the proper grounds are for disqualification or dismissal; and
- Safeguarding agency assets through rules on spending and financial reporting.

Generally, ethics rules prescribe four approaches to avoiding or mitigating ethical conflicts, whether real, potential or apparent: (1) avoidance, (2) disclosure, (3) divestment or resignation, or (4) recusal.⁶ A code of ethics may encourage employees to take precautions to avoid situations that may result in a potential conflict of interest or give the appearance of impropriety. For example, the Hong Kong (SAR) Civil Servant's Guide provides the following guidelines: "avoid being placed in a position of obligation to anyone by accepting excessive entertainment or favors" and "avoid putting yourself in a position that may arouse any suspicion of dishonesty, or of using your official position to benefit yourself, your family, relations or friends."⁷ Employees are also typically required to disclose any conflicting financial interests or personal interests or the receipt of any gifts over a certain monetary value. Where a conflict of interest is identified, the employee may be asked to resign or to divest the conflicting interest. Another resolution may be the recusal, the disqualification or removal, of the employee from the particular matter that involves a conflict of interest. The Organisation for Economic Co-operation and Development (OECD) provides guidelines in dealing with conflict of interest situations (Box 5-4).

The main issues regulators encounter regarding ethics can be grouped into three broad categories: (1) acceptance of gifts; (2) personal and financial conflicts of interest; and (3) post-employment prospects.

Most recently in 2009, immediately upon inauguration, United States President Barak Obama issued an Executive Order requiring that every

appointee in his Administration adhere and commit to an ethics pledge.⁸ The pledge includes bans on accepting gifts from lobbyists or lobbying organizations for the duration of service as a political appointee as well as restrictions on communications with employees of the former government agency.⁹

6.5.5.1 ACCEPTANCE OF GIFTS

Most ethical codes of conduct prohibit the improper acceptance of gifts between employees or from outside sources, which can influence the independent judgment and performance of official duties of a public employee to the benefit of the gift giver.¹ In almost all countries, civil employees cannot solicit and must decline any gifts, hospitality or other benefits from persons dealing with the agency that give rise to impropriety or the appearance of impropriety, which could influence them in their personal judgment and integrity.² For example, the Charter for the Public Service in Africa, which serves as a policy framework for public service administrations of African countries and as a source of inspiration for the development, strengthening or updating of national codes of conduct, states that: "Public service employees shall not solicit, accept, demand or receive, directly or indirectly, any payment, gifts or other advantage in kind in return for performing or refraining from performing their functions or obligations. It shall be reprehensible for public service employees to offer gifts or other advantages that might influence in their favor or in favor of family members and friends, the judgment or decisions of another person."³

Where it is impossible to decline a gift, there are different ways to handle it, such as disclosing the gift and reporting the gift to one's supervisor immediately,⁴ returning the gift or paying its market value,⁵ or obtaining permission prior to accepting the gift.⁶ For example, in Hong Kong (SAR), civil employees are required to seek permission from an authorizing officer before accepting or soliciting any prohibited gifts, and the approving authority may either allow the acceptance or solicitation of the gift unconditionally or subject to certain conditions, or refuse permission. If the gift is already in the civil employee's possession, the approving authority may (i) require the gift to be returned to the donor, (ii) require the gift to be donated to a charitable organization, or (iii) require the disposal of the gift in such other manner as the approving authority may direct.⁷

The practice of gift-giving is common in building and maintaining business or personal relationships, and may not always constitute bribery, so it is important to clearly define the difference between token niceties and outright bribery or influence-buying. Therefore, rules regarding the acceptance of gifts usually contain certain exceptions to account for local customs, for gifts below a certain monetary value, or for situations where acceptance of gifts is permissible. Differentiating between token gifts and improper bribes can be done in several ways:⁸

1. By a general rule prohibiting any gifts, invitations or courtesies;
2. By establishing situational guidelines on acceptance of gifts (e.g., whether there is an impending hearing involving the giver or whether acceptance may be justified on policy grounds, such as to fund or pursue training or developmental programs);
3. By setting guidelines on the nature of the gift (e.g., meals or invitations to ribbon-cuttings may be acceptable, while leisure resort weekends or substantial cash payments would be forbidden);
4. By imposing ceilings on the value of the gift; or
5. By requiring the declaration and registration of all gifts in a central register.

In Brazil, public service employees are prohibited from receiving a salary or any other prohibited remuneration from a private source, or receiving any means of transportation, lodging or any favours that could generate doubts as to the employee's honesty or integrity. However, the public service employee's participation in seminars and conferences is permitted provided that the information on any financial compensation and/or payment of travel expenses by the event promoter, who must not have a personal interest in any decisions made by the employee, is disclosed. Additionally, items are not considered gifts if they do not have any commercial value, or they are distributed by an entity as courtesy, for publicity purposes, as a customary public affairs matter, or on the occasion of a special event or commemorative date, and do not have a value of over BRL 100.⁹

In the United States, exceptions to the acceptance of gifts under the Standards of Ethical Conduct for Employees of the Executive Branch include, among others: (i) gifts with an aggregate market value of USD 20 or less, provided that the total value gifts received from the same person does not exceed USD 50 in one calendar year; (ii) gifts based on a personal relationship, such as a friend or family; (iii) awards and honorary degrees, other than cash or an investment interest, with an aggregate value of USD 200 or less if such gifts are a bona fide award given for meritorious public service or achievement; and (iv) discounts and similar benefits given to all government employees.¹⁰

In Hong Kong (SAR), acceptance of gifts (advantages) is permissible for: (i) gifts, discounts, loans of money or passages from tradesmen, companies or other organizations which are available on equal terms to non-civil servants; (ii) gifts, discounts, loans of money or passages from a relation; (iii) gifts and/or passages not exceeding in total HKD 2,000 from a close personal friend or HKD 1,000 from any other person on each occasion when gifts are traditionally given or exchanged, and not exceeding HKD 400 in total from a close personal friend on each other occasion; and (iv) loans of money from a close personal friend or any other person not exceeding HKD 2,000 and HKD 1,000 respectively, provided it is repaid within 14 days.¹¹ Additionally, acceptance of entertainment, which is defined as the provision of food or drink, is not considered an advantage, and is not a criminal offense. However, a public service employee is advised to refuse lavish or unreasonably generous or frequent entertainment that might result in embarrassment in performing one's duties or bring the public service into disrepute.¹²

In addition to ethics rules adopted by regulators, many countries also have laws against bribery of government officials. The Canadian Criminal Code states that: "...every one commits an offense who being an official or employee of the government, demands, accepts, or offers or agrees to accept, from a person who has dealings with the government, a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him."¹³ In the United States, under the Foreign Corrupt Practices Act (FCPA), it is unlawful for U.S. persons to bribe foreign government officials to obtain or retain business.¹⁴ In Hong Kong (SAR), under the Prevention of Bribery Ordinance, which is enforced by the Independent Commission Against Corruption (ICAC), it is considered a

bribery and an offense for public officials to solicit or accept any gifts offered as an inducement to or reward in connection with the performance of their official duty, and it is also an offense for any person to offer such gifts.¹⁵

In some countries, specific local practices are prohibited. For example, the Hong Kong (SAR) Civil Servants' Guide also notes that the red packet (*hong bao*), traditionally given during Chinese New Year, is a gift of money and is considered a prohibited advantage under Section 4 of the Prevention of Bribery Ordinance, unless it is between family relations.¹⁶ The Kenya Public Officer Ethics Act 2003 explicitly prohibits the solicitation and collection of *harambees*.¹⁷ In Kenya, *harambee*, which means "pulling together," is a local practice that entails voluntary contributions in cash and in kind, such as labour, for community activities and projects such as schools and health clinics, and is considered to predispose people, particularly politicians, to corruption because it provides a means for people who steal public funds to legitimize themselves to the public.¹⁸

6.5.5.2 PERSONAL AND FINANCIAL CONFLICTS OF INTEREST

Another major consideration in establishing a code of ethical conduct is the conflict of interest arising from an employee's pecuniary interests, personal affiliations and family relations. A conflict of interest is likely to arise when a public office employee's loyalty to the government conflicts with his loyalty to: (a) family and other relations; (b) personal friends; (c) clubs and societies to which they belong; (d) professional colleagues in the private sector; or (e) any person to whom they owe a favor or are obligated in any way.¹

Common examples of such conflicts include an employee's participation in proceedings that involve close associates or family members (nepotism), an employee's stockholdings in companies that have dealings with the employee's agency, or stockholdings in companies that the employee has gained confidential information through official capacities.² For example, the Brazilian telecommunications regulator Anatel's internal administrative regulations prohibit the agency's employees from participating in administrative procedures in instances where they: (i) have a direct or indirect interest on the subject matter being acted upon; (ii) have participated or may participate as an expert, witness or representative, or if such situations involve a spouse, relative or relative in the third degree of consanguinity; or (iii) are in judicial or administrative litigation with the interested party. Anatel employees who find themselves in one of the above situations must communicate this information to their superior and abstain from participating in the procedure. Employees may be subject to investigation if there is suspicion that they have intimate friendship or enmity with any of the interested parties or their respective spouses, companions, or relatives up to the third degree of consanguinity.³

Similarly, Peru's telecommunications regulator, OSIPTEL, issued a Transparency Regulation that governs transparency in the agency's procedural and administrative activities and in the activities of its employees. Article 7 of the Regulation requires that OSIPTEL directors or employees who have decision-making powers or whose opinion on the substance of the proceeding can influence the decision at issue, shall abstain from participating in activities in the following instances:⁴

1. If their participation can affect their own economic interests, or the interests of their spouse or family member up to the fourth degree of consanguinity or second degree of affinity;
2. If their participation can affect the economic interests of their partners, organizations, companies or groups of which they are a member;
3. If their participation can affect the economic interests of individuals or legal entities with whom they are seeking employment;
4. If they are a family member to the fourth degree of consanguinity or second degree of affinity with any of the other parties or their representatives, or the other party's management staff;
5. If they have acted as advisor, expert or witness in the same proceeding, or if they have taken a stand on the issue at hand, except if their manifestation on the matter involved the correction of an error or the appeal of the decision; and
6. If they have worked in the past year with any of the other parties directly involved in the proceeding or have participated in any project with any of the other parties regardless of whether the project was actually carried out.

To avoid conflict of interest, many regulators also prohibit their employees from holding shares in companies that they regulate. For example, the Romanian Telecommunications Law prohibits the regulator's employees, including the president and vice-president, from having shares or participating as board members in any company under the regulator's competence.⁵ Similarly, the Telecommunications Act of the Independent Communications Authority of South Africa (ICASA) disqualifies persons from being a councilor if they or their family members have a substantial financial interest in the telecommunications or broadcasting industry, or if they or their business partners are employed by any person or entity in the telecommunications or broadcasting industry.⁶ The Kenya Public Officer Ethics Act prohibits a public office employee from holding shares or any interest directly or indirectly, in a corporation, partnership or any other body, which would result in a conflict of personal interests with official duties.⁷ Such conflicts of interest must be reported and the employee must refrain from participating in any deliberations with respect to the matter.⁸ The Act also prohibits the practice of nepotism or favouritism.⁹

Civil employees should not take advantage of their positions to further their own private interests, nor should they allow private interests to conflict with their public position. Conflicts may arise when employees use confidential information obtained in the course of employment to further personal interests. In Canada, for example, public office employees are not permitted to give preferential treatment in relation to any official matter to relatives or friends, or to any organization in which they, relatives or friends have an interest, nor are they allowed to use information obtained in their position as a public office employee that is not generally available to the public to further their own or any person's private interests.¹⁰

Ethics legislation in most countries also mandates the disclosure of financial and personal interests and even the divestment of such interests in order to prevent personal or financial interests from influencing the independent judgment of a civil employee. The Kenya Public Officer Ethics Act, for example, requires every public employee to annually declare their income, assets and liabilities, as well as those of their spouse(s) and dependent children under 18 years of age.¹¹ In Canada, other than "exempt assets,"¹² public office employees must declare and/or divest themselves of "controlled assets," which are those assets that could be directly or indirectly affected as to value by government decisions or policy in which the employee's agency has some role.¹³ Public office employees are also prohibited from participating in outside activities and

employment that could impact their ability to perform their official duties and responsibilities objectively.¹⁴

6.5.5.3 POST-EMPLOYMENT PROSPECTS

Regulatory provisions regarding post-employment prospects are intended to prevent any suspicion that the public office employee's duties and decisions might be influenced by the expectation or hope of future employment with a particular firm or organization, and to avoid the risk that a particular firm or organization might gain improper advantage over its competitors by employing someone who had access to information on the competitor through the course of their prior official duties.¹ In order to prevent conflicts between the employee's current responsibilities and outside employment, ethics regulation typically require employees to report any outside appointment if there is a potential conflict, such as when an employee had significant contacts with a company while in office, or if the company was a party to the matter that the employee's department was in charge of handling.² In addition to reporting requirements, former employees may be required to either avoid certain proceedings or obtain permission from a former employer prior to taking a new appointment for a specified time period after termination of employment.

In Brazil, the members of the Board of Directors of the telecommunications regulator Anatel have a four month "quarantine" period (*quarentena*) before they can undertake a new position after termination of employment if the Public Ethics Commission finds that there exists a conflict of interest between the employee's former appointment and his new position.³ Pursuant to Article 13 of the Code of Conduct for Senior Government Officers, any proposals of future work or business in the private sector as well as any negotiations for work that may involve a conflict of interest must be communicated immediately to the Public Ethics Commission, regardless of whether it was accepted or rejected. Article 15 of the Code states that in the absence of a law specifying a different period of time, there shall be a four-month period beginning from the date of their departure from public service, during which former public service employees are barred from performing any activity that is incompatible with the office held previously. Within this period, former public service employees must comply with the following rules: (a) they may not accept any position as a manager or counselor, or establish professional relationships with an individual or legal entity with which they had previously maintained a direct official and relevant relationship within the last six months prior to their departure from public position; and (b) they may not interfere for the benefit of, nor on behalf of, any individual or legal entity, before any federal government entity or agency, with which they had a direct and relevant official relationship during the last six months prior to their departure from a public position.⁴ In addition, the Telecommunications Law prohibits the former Board member from representing any person or interest before Anatel for a period of one year after termination of employment.⁵

The United Kingdom's Civil Service Management Code provides that under specific circumstances, within two years of leaving government service, civil employees must file an application pursuant to the Business Appointment Rule and obtain government approval before taking any full-time, part-time, or fee-paid employment in the United Kingdom or overseas in a public or private company or in the service of a foreign government or its agencies. Such specific circumstances requiring government approval include: (i) if the employee is at a senior level; (ii) if the employee has had any official dealings with the prospective employer during the last two years of employment or if they had official dealings of a continued or repeated nature with their prospective employer at any time during government employment; (iii) if the employee has had access to commercially sensitive information of competitors of the prospective employer; or (iv) if the employee's official duties during the last two years of government employment involved giving advice or decisions benefiting the prospective employer for which the offer of employment could be interpreted as reward, or have involved developing policy, knowledge of which might be of benefit to the prospective employer. All civil service employees are required to report if they are considering any approach from an outside employer offering employment. Civil employees dealing with procurement or contract work must report any offer of outside employment whether or not they are considering the offer. The government's approval of an application under the Business Appointment Rule can be: (i) unconditional; or (ii) conditional subject to a waiting period before taking up the new appointment; or (iii) include a ban on the involvement of the applicant in dealings with the prospective employer and the government or with competitors of that employer.⁶

Canada's Conflict of Interest and Post-Employment Code for Public Office Holders requires that before leaving office, all public service employees must disclose in writing to the Ethics Commissioner all firm offers of outside employment that could place the employee in a position of conflict of interest, and any employee who accepts an outside offer must disclose in writing the acceptance of the offer. If the employee is engaged in significant official dealings with the future employer, the employee will be removed from their current duties and assigned to other responsibilities immediately. Within one year of leaving office, or two years for ministers of the Crown or ministers of state, employees are prohibited from accepting service contracts, appointments to a board of directors of, or employment with an entity with which they had direct official dealings during the one year period preceding the termination of employment, or to represent an entity in front of a department that they had direct and significant dealings with during public office.⁷ Additionally, employees who have official dealings, other than dealings consisting of routine provision of a service to an individual, with former public office employees who are or may be governed by the post-employment compliance measures of the Code must report those dealings to the Ethics Commissioner.⁸

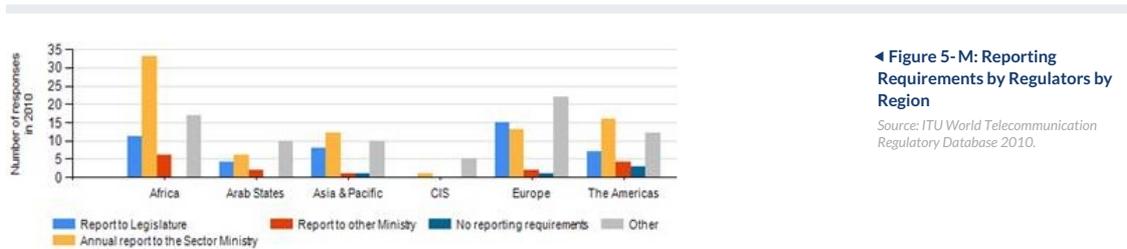
6.5.6 ACCOUNTABILITY OF REGULATORS AND JUDICIAL REVIEW

The accountability of regulators can be monitored by implementing regulatory transparency and reporting regulatory activities to the government. Additionally, the regulator is also accountable to the public whose interests are affected by the regulator's activities, so adequate mechanisms should be implemented to educate and protect consumers, and allow consumers to voice their opinions and concerns with the regulator. This section will provide an overview of different approaches to ensure the accountability of regulators.

Parliamentary oversight and judicial review

The accountability of regulators is determined by various factors, but principally by the organizational structure of the regulator and its place within the governmental structure. In many cases, telecommunications regulators report administratively to sector ministries or other governmental agencies.¹ (See Figure 5-M below on Reporting Requirements.) Accountability can be facilitated if regulators adopt internal procedures to guarantee transparency in their activities (such as ensuring an open and participatory decision-making process through public consultations, as discussed in Section 7.2) and staff accountability, and by fulfilling obligations to report to the legislature which provides external control. Additionally, most telecommunications regulators have the obligation to provide annual reports to Parliament or other

executive branch entities such as ministries. According to a recent ITU survey of 192 countries, nearly all indicated that they must provide regular reports to the sector ministry, other ministry, the legislature and/or other governmental body.² Only five countries, Cambodia, Ecuador, Nicaragua, Turkey and Uruguay have no reporting requirements.³



◀ Figure 5-M: Reporting Requirements by Regulators by Region

Source: ITU World Telecommunication Regulatory Database 2010.

Note: Regulators may be required to report to more than one entity.

The Canadian Radio-television and Telecommunications Commission (CRTC), which was established by Parliament in 1968, is a typical example of an independent public authority that reports to Parliament, in this case, through the Minister of Canadian Heritage. The accountability of the CRTC is addressed by various mechanisms. The CRTC must submit annual Departmental Performance Reports (DPR) to Parliament. These reports are based on specific principles contained in the DPR Preparation Guide and must reflect a comprehensive, balanced, and transparent picture of the organization's performance for each fiscal year. This report is made available on the CRTC's website.⁴ The CRTC also must prepare and publish its financial results in accordance with Treasury Board Guidelines and submit an annual report to the Standing Committee on Justice and Human Rights.

Additionally, Canada has implemented a "Proactive Disclosure" public policy so that all Canadians are better able to hold Parliament, their government, and public sector officials accountable. Under this policy, there is a requirement of mandatory publication on departmental websites of travel and hospitality expenses for selected government officials, contracts entered into by the Government of Canada, and reclassification of positions.

Procedures to overturn regulatory decisions

Another mechanism to ensure the accountability of regulators is to allow for appeals of regulatory decisions to a higher level in the regulatory and institutional framework. The legal framework for individual countries is of paramount importance when considering what mechanisms are available for appealing or overturning regulatory decisions. The effectiveness of the regulator can be undermined if the appeal process is closely linked to the executive branch, if regulatory decisions are put on hold or "stayed" during the appeal process, or if the appeal process is easily manipulated for the benefit of particular stakeholders.

In the first instance, the country's telecommunications law usually articulates the general process for appeals or reconsiderations of the regulator's decisions, and then the regulatory authority implements detailed internal procedures for reviewing and appealing administrative decisions. Clear and transparent appeal procedures enhance the independent regulator's credibility and give operators and other stakeholders, including consumers, a sense of stability in the regulatory process.

(a) To whom regulatory decisions are appealed

Typically, regulatory decisions may be appealed to the regulatory authority itself as an initial step. After reconsideration by the regulator, the decision usually may be appealed to a higher authority, such as the sector ministry, or to a court. In the Philippines, for example, appeals of the National Telecommunications Commission Board's decisions, rulings, orders, and resolutions can be filed with the Supreme Court.⁵ In many countries, including Malaysia and Nigeria, the regulator may require that all other remedies for review and appeal provided under the telecommunications law be exhausted before a person can seek judicial review.⁶ Sometimes regulatory decisions may be appealed to a specialized body established within the regulatory agency itself, such as an Appeal Tribunal or Appeal Board. For example, Hong Kong (SAR)'s OFTA has established an Appeal Board comprised of a chairman and deputy chairman that are "eligible to be appointed a judge of the High Court" and panel members who are not public officers. The decision of the Appeal Board is final.⁷ In Kenya, the Communications Act established an Appeals Tribunal with powers to adjudicate matters between the regulator and consumers, with powers of the High Court.⁸

When the appeal to the judiciary concerns policy matters or technical issues, the trend is for courts to defer to the specialized regulatory authority. Rather than making a decision on policy or technical matters, courts will often "remand" or refer a decision back to the authority for further review and action, sometimes indicating the scope of the further review.⁹

The ITU World Telecommunication Regulatory Database indicates that the judiciary has the authority to overturn a decision of the regulatory authority in almost two-thirds of the countries responding to the survey. Only 14 per cent of the respondents stated that the sector ministry had ultimate authority to overturn the regulator's decisions. Appeals to other government authorities also may be possible. For example, in the Maldives, parties who believe that a decision by the regulator, the Telecommunications Authority of Maldives (TAM), adversely affects their interests may first appeal to the minister charged with the responsibility of telecommunications, and if the aggrieved party remains dissatisfied with the decision of the minister, then a petition of appeal may be presented to the President of the Maldives.¹⁰ The President's decision is final and binding on the aggrieved person.

(b) Timeframe for an appeal to be filed and decided

The timeframe for aggrieved parties to file an appeal varies from 10 days, such as in the Dominican Republic,¹¹ to 30 days, as in the United States.¹² Countries such as Singapore, and the Philippines have deadlines of 14-15 days for filing an appeal against the regulator.¹³

The timeframe for resolving an appeal can range from under a month (e.g., 10 days from filing the appeal with the Dominican Republic regulator, Instituto Dominicano de las Telecomunicaciones (Indotel), to no specific timeframe (e.g., the United States). Most countries responding to the

2005 ITU World Telecommunication Regulatory Database indicated that they did not have a defined timeframe for resolving an appeal; among those which did have a timeframe, it was usually one to six months.

(c) Reasons for filing an appeal

An aggrieved party may file an appeal of a decision made by the regulatory authority in specific instances usually set forth in the telecommunications law. The reasons can be quite broad (any decision made by the regulator) or more narrowly focused to allow only procedural appeals. In New Zealand, for example, appeals from the Telecommunications Commission to the High Court are limited to questions of law.¹⁴ On the other hand, in the Philippines, the authority to appeal a decision is very broadly defined, where “a party adversely affected by a decision, order, ruling or resolution may, within 15 days from receipt of a copy thereof, file a motion for reconsideration.”¹⁵ In Hong Kong (SAR), the scope of an acceptable appeal is more carefully defined as:

(1) Any person aggrieved by:

(a) an opinion, determination, direction or decision of the Authority relating to:

(i) anticompetitive practices, abuse of position, misleading or deceptive conduct, and non-discrimination, or (ii) any licence condition relating to any such section; or

(b) any sanction or remedy imposed or to be imposed under this Ordinance by the Authority in consequence of a breach of any such section or any such licence condition, may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be.¹⁶

(d) Effect of an appeal on a regulatory decision

The question of what happens to a regulatory decision during the appeal process can have a serious effect on the regulator’s ability to enforce its decisions. If decisions can easily be appealed and are stayed or put on hold, then parties have an incentive to appeal every decision of the regulator to delay the implementation process of new rules and regulations that might affect them. This is particularly true of incumbent operators when faced with new rules dealing with the introduction of new licensing regimes or competition.

When asked about the effect of an appeal on a regulatory decision in the 2005 ITU World Telecommunication Regulatory Database, the vast majority of responding countries reported that they either: (i) allowed a regulatory decision to remain in force while it is under appeal; or (ii) depending on the merits of the particular case, either permitted suspension of the decision (or a stay) or allowed a choice between putting the decision on hold or allowing the regulation to remain in force. Hong Kong (SAR) is an example of the latter case, where it is the subject matter of the appeal that determines whether the appeal suspends the operation of the decision.¹⁷ A much smaller number of countries, about ten per cent of those responding, automatically stay a regulation when it is undergoing an appeal process.¹⁸

[Next: 6.6 Functional Aspects of Regulation](#) ➔

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