

Institutional framework:
Independence and quality
of the National Regulatory Authorities

*Hans Bakker,
director of Regulaid –The Netherlands*

Regulaid

Overview

- Independent regulators – independent from whom and why
- Key institutional safeguards that establish independence
- What accountability in stead?

Independent regulator: why?

- Regulators must establish investors’ confidence
- Confidence is built on perception
- Worldwide history of close relationship of incumbent operator and the State
- Independence of regulator is necessary step to build and maintain confidence

Independent: from whom and why? (1)

- Independent from:
 - incumbent operator
 - state as shareholder
 - all stakeholders
- Why?
 - Impartial arbitrator
 - No conflict of interest
 - Credibility

Independent: from whom and why? (2)

- Also independent from:
 - Political authorities, even if there is no government share in incumbent
- Why?
 - Role conflict with industrial & trade policy
 - Rule of law: predictability and consistency require distance from politics
 - Professional rather than political choices
 - Compare with courts and national banks

Examples:

- Ability to raise prices even if politically inopportune (rebalancing!) or ill-timed
- Popular forms of cross subsidies that have to be readjusted or reformed
- Award of license to new entrant even if fighting tor national champion abroad

Independent in what respects? (1)

- First and foremost: independence when *applying rules in individual cases*
 - *Dispute resolution*
 - *Handling of complaints*
 - *Exercise powers of investigation*
 - *Exercise powers of compliance*

Independent in what respects? (2)

- Preferably also: discretion to develop regulatory policies – no prescriptive legislation ‘if A, then B’
- Examples:
 - Retail price regulation: trade-off between relaxed short term price controls and the development of competition
 - Interaction between network access policy and infrastructure investment

Independent in what respects? (3)

- Independence in running high quality professional organisation
 - Recruiting necessary staff numbers and quality (separation from civil service payment restrictions?)
 - Spending of funds for sensitive purposes (compliance investigations, expensive innovations).
- No “golden chains”.

Independence safeguards (1): institutional separation

- Minimum rule: regulator is not a part of incumbent nor of a ministry that holds market players shares or interests
- Best practice: full legal separation
 - Public agency according to national constitutional and administrative law
 - Private sector entity with (only!) public tasks and powers (RTR Austria)
- Empowered for transactions as in civil law
- Investigative, ruling and compliance powers should be attributed to regulator directly, not indirectly via government

*Independence safeguards (2):
high threshold against political intervention*

- Minimum: Government can not intervene in individual cases
- Best practice: Government can not prescribe policies except by changing the law
- Legislation is not too specific or prescriptive
 - Need for frequent updates will bring regulation back to political arena
 - No room for learning and adjusting without political OK
- If government can give general directives, transparency should be prescribed

*Independence safeguards (3):
position of board members protected*

- Profile for recruitment in law: expertise
- Legal incompatibilities: market, politics
- Transparent recruitment process using checks and balances in state system
- Fixed term, re-appointable?
- Dismissal only in extraordinary cases defined by law
- Salary and legal status defined by law
- Continuity of income in case of resignation or dismissal
- Personal financial liability waiver

*Independence safeguards (4):
budget and staff quality*

- Separate corporate status to act independently under civil law (e.g. staff contracts)
- No obligation to recruit staff from Ministry or incumbent
- Enabled to compete for scarce expertise in labour market
- Sufficient budget also for hiring expensive expertise and legal aid
- Budget approval by independent committee and/or by transparent standards
- Financing:
 - No ‘golden strings’ that can be pulled by government
 - Preferably from levies paid jointly by market players
 - Provided there is no quid pro quo

Remaining government tasks:

- Sector policy
- Legislation and system oversight
- Spectrum allocation (not licensing), refarming
- Network investment stimulation
- Universal service, affordability issues
- International relations of the state
- New policy areas: internet security, privacy, digital divide, sector competitiveness and innovativeness

What accountability in stead?

- Government/legislator will stay in charge of framework and appointments
- Individual decisions challenged in court or appeals board
- Forms of ‘horizontal’ accountability
 - Transparency
 - Consultations
 - Interest group committees
- Periodical independent & professional evaluation

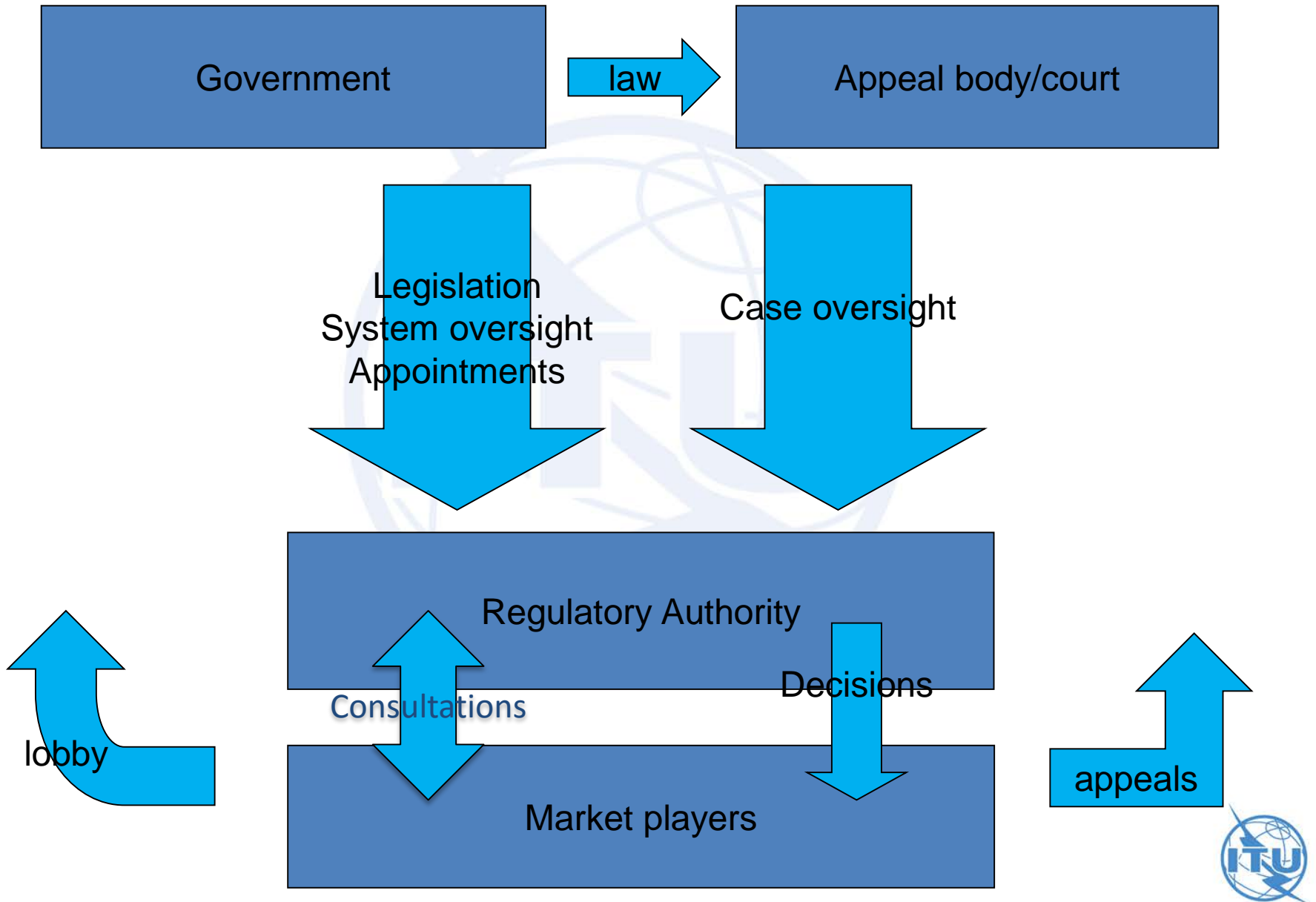
Appeal system: bad design may undo effects of institutional efforts

- Equally independent
- Sufficiently speedy decision making
- Appeals do not suspend decisions automatically
- Appeal body models:
 - General court: needs training and/or staffing
 - Special appeal board
 - Appeal board on merits, high court on law

Transparency. predictability and regulatory dialogue

- Publication of all regulations and decisions
- Consultations of stakeholders on important upcoming decisions
 - Publicize draft paper
 - Call for written inputs
 - Consultation meetings or industry forum
 - Respond to inputs in final decision document
- Publication and consultation on work plan

Checks and balances for accountability of an independent regulator



Thank you

hbakker@regulaid.com

