

The independence of regulators

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Introduction

- Multiple regulators and sectors
- Organisational structures and reporting
- WTO commitments
- ICANN
- Privatisation
- Dispute resolution
- Human resources
- Regulatory capture
- Conclusions

Independence is a generic issue

- Central banks
- Finance and investment regulators
- Food and medicines approval
- Competition authorities
- Gambling regulators
- Railways and energy regulators
- Data protection authorities
- Freedom of information commissioners

Stranded assets

- Changes in political goals and objectives can put a commercial operation at risk:
 - reduce revenues
 - reduce profits
 - bankruptcy or confiscation
- To reduce this risk, governments create an independent regulator:
 - to make the rules transparent
 - to treat all operators as equals
 - to leave ministers to set overarching policies

Introducing mast sharing for GSM operators can reduce costs, but can eliminate the competitive advantage of an operator with wider coverage.

Creating independence

- In the constitution (e.g., Thailand)
- In a statute (e.g., Australia):
- A few countries use a lesser instrument, but that makes changes much too easy
- Structures may be federal:
 - USA for telecommunications
 - Germany for broadcasting

It takes time for an institution to establish its credentials as not being susceptible to short term pressures.

European Central Bank

- Created by the Treaty of Maastricht
- Board is comprised of the heads of national central banks
- Sets its own objectives
- Not responsible to the:
 - European Commission
 - European Parliament
 - European Council of Finance Ministers (ECOFIN)

President Sarkozy of France has argued for greater political influence. While Bundeskanzlerin Merkel has argued against this.

Transparency

- Publication of documents:
 - at least a summary in plain language
 - paper and web versions
- Speeches and press statements
- Provincial public meetings
- Annual workplans and reports
- Code of ethics
- Impact assessments

Accountability for performance

- A published annual report:
 - budget
 - Key Performance Indicators (KPIs)
- A published annual work plan:
 - following a consultation on a detailed proposals
- Parliament:
 - debates
 - questions of ministers
 - committees:
 - hearings
 - reports
 - analytical reports by the auditor-general

Accountability for decisions

- Prior warning of a decision
- Consultation on a document with a proposal:
 - policy options
 - impact assessment
 - reasoned opinion
- Final decision:
 - reasoned opinion
 - why options and opinions were rejected
- Appeal to a court:
 - on procedure and on the substance of the decision
 - reasoned opinion
 - bound by legal precedents
 - further appeals

WTO Commitments – BTA

- The regulatory body should:
 - be separate from the suppliers
 - employ procedures to ensure impartiality towards all market participants
- Regulation of “major suppliers”:
 - one controlling essential facilities that cannot reasonably be duplicated for either economic reasons, technical reasons or both.
- To ensure that they:
 - do not engage in anticompetitive practices
 - use information obtained from competitors
 - withhold needed technical information from competitors
- Ensure interconnection for competitors:
 - at any technically feasible point in the network
 - on nondiscriminatory terms
 - with timely provision
 - reasonable and transparent rates
 - not paying for network components or facilities not needed
 - terms must be publicly available and enforceable
- Universal service policy is justifiable, but must be administered in a transparent, nondiscriminatory and competitively neutral manner

ICANN

- Assignment of Internet Top Level Domain names (TLDs)
- ICANN was created as:
 - a private corporation registered in California
 - contracted by the US Government
- Governmental Advisory Committee (GAC)
- Global circuit of quarterly meetings
- Internet Governmental Forum (IGF)
- Many countries:
 - were very unhappy that the US Government controlled names and numbers
 - are unconvinced by the process making ICANN independent

Can ICANN become independent of the US Government and US Congress?

Privatisation of incumbents

- Seldom complete:
 - often a residual holding by government
 - often a “golden share”
 - a significant part of the economy and the stock market
- Should privatisation be before or after liberalisation?
- An independent NRA can act as a guarantor against abuse by the incumbent operator
- Real concerns that the minister holding the shares will put pressure on the NRA:
 - especially if there is a government contribution to the budget of the NRA

Human resources

- Where to find knowledgeable people who are not committed to one side or another?
 - in small states would they not be better employed in commercial operations?
- How to avoid having good staff stolen by the operators?
- Code of ethics:
 - no shares
 - no benefits (cash or kind) or public register of all gifts
- Salary levels:
 - paid from a tax on customers
 - can go above civil service pay scales to recruit skilled people
 - but then no upper limit or ceiling
- Cooling off period after leaving:
 - Martin “Ronaldo” Bangemann and Telefónica de España
 - CEO of France Telecom became the industry minister

Dispute resolution

- Requires genuine impartiality
- Needs speedy resolution
- Needs to act as a discipline on operators
- NRA is are often the legal back-stop with the right to impose a settlement
- Terms and conditions can be imposed through a Reference Interconnection Offer (RIO)
- For example:
 - UK created ombudsman and adjudication schemes
 - Japan has a Business Disputes Commission

Political interference

- When is political direction wrong?
- National strategies set broad goals:
 - economic and social
 - delivery of ICTs
- Distorting competition:
 - favouring one or a few operators
 - causes the market to perform less well in delivering goals
- Corruption:
 - taking shares and licences
 - taking bribes

South Africa

- Telecommunications Act 1996
- NRA can propose regulations
- Only the minister can adopt regulations
- Sometimes she amended the proposed regulations
- Electronic Communications Act 2005
- NRA can adopt regulations
- Minister can issue directions to the NRA

Which system is more independent?

Conclusions

- Independence:
 - means many different things
 - particular interests interpret it their own way
- Many different national traditions:
 - often with few independent institutions
- Now everyone wants an independent telecoms regulator
- Governments make compromises:
 - in functions assigned and retained
 - in negotiating interpretation of policy goals
- Commitment to independence has gradually increased
 - governments see that it is beneficial
 - regulators become more comfortable acting independently
- All authorities are part of domestic and international networks

Remember why we abandoned direct state provision of telecommunications; government could not make good technological decisions and struggled to find the capital for investments

Thank you

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