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CENTRE ON REGULATION IN EUROPE

CERRE Code of Conduct and Best Practices

for the setup, operations and procedure of regulatory authorities

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About CERRE

Providing top quality studies, training and dissemination activities, the Centre on Regulation in Europe (CERRE) promotes robust and consistent regulation in Europe's network industries. CERRE's current 40 members are regulatory authorities, operators and infrastructure managers in those industries as well as universities.

CERRE's added value is based on:

- its original, multidisciplinary and cross-sector approach;
- the widely acknowledged academic credentials and policy experience of its team and associated research staff;
- its scientific independence and impartiality;
- the direct relevance of its contributions to the policy and regulatory development process applicable to network industries and to the markets for their services.

CERRE's activities include contributions to the development of norms, standards and policy recommendations related to the regulation of service providers, to the specification of market rules and to improvements in the management of infrastructure in a changing political, economic, technological and social environment. CERRE's work also aims at clarifying the respective roles of market operators, governments and regulatory authorities, as well as at strengthening the expertise of the latter, since in many member states, regulators are part of a relatively recent profession.

As provided for in CERRE's by-laws, this study has been prepared in complete academic independence.

The contents and opinions expressed reflect only the author's views, also endorsed by the CERRE academic and general management. However, they do not necessarily reflect and, in any event, in no way bind any member of CERRE, the association's governing bodies or those bodies' individual members.

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CENTRE ON REGULATION IN EUROPE

About the author

Professor Pierre Larouche is the author of this document. He is a Joint Academic Director of CERRE. He is Professor of Competition Law at Tilburg University and a Founding Director of the Tilburg Law and Economics Center (TILEC), as well as Professor at the College of Europe (Bruges). A graduate of McGill, Bonn and Maastricht, he clerked at the Supreme Court of Canada in 1991-1992 and practised law for three years before joining academia. His teaching and research interests include competition law and economic regulation (with focus on network industries), electronic communications law, media law, comparative law and tort law. He has been a guest professor at McGill University (2002), National University of Singapore (2004, 2006, 2008, 2011 and 2013), Northwestern University (2009-2010) and Sciences Po (2012).

The final version of this document has also benefited from comments made by other CERRE Joint Academic Directors and the Director General.

Finally, the explanatory memorandum is largely based on preparatory work and drafts for which the author is very grateful and which have been produced by Dr Antigoni Lykotrafiti and Thierry Denuit, associated at the time with TILEC and CERRE respectively.

CENTRE ON REGULATION IN EUROPE

Foreword by the Director General

When in the mid 80's Jacques Delors launched the objective of completing Europe's Single Market by 1992, it was very clear that liberalisation of Europe's network industries should be an integral part of the project.

It should not be forgotten, however, that, in the vision of Delors and his team at the European Commission, the liberalisation process was to be matched by the development of new, robust and independent regulation systems and practices. The latter should be adapted to the specific institutional, political and cultural idiosyncrasies of the EU and of its Member States. They should enhance the innovative development of what were still called at that time the utilities' sectors (in the broadest sense, including energy, telecommunications, postal, audio-visual media, rail and water services).

Finally, the modern regulation systems and practices to be developed to match liberalisation of network industries should ensure that all consumers everywhere in the EU Member States have access to all services in those sectors. Access should be provided at a high level of quality and at the lowest possible prices. This should, however, take account of the need for the providers to secure sufficient revenues to allow them to develop, maintain and continuously upgrade their services and their offering.

From the end of the 90's, the above background led to the gradual development throughout the European Union of national (and more recently, sub-national) regulatory authorities[1]. Those appeared first in the telecommunications and energy sectors. The process is still not completed everywhere in the EU regarding the postal, rail and water sectors.

More than 20 years after Delors' vision, Europe's experience with liberalisation and competition is rather mixed. It shows nevertheless that the presence of well-functioning regulatory authorities in network industries is a necessary, but not sufficient condition to secure consumers'

[1] The UK has a somewhat longer tradition of independent regulators.

access to regulated network industries' services, and also to foster investments and growth in crucial sectors of the European economy.

With its **Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities**, CERRE wishes to provide a fresh insight into the efficient enforcement of the industries' regulation by regulatory authorities in Europe. Authored by **Professor Pierre Larouche** (CERRE and Tilburg), this new CERRE initiative codifies how regulators should interact with regulated entities and governments at all stages of the regulation process. It also lays out key principles that should guide regulatory action. Finally, it identifies best practices.

On the basis of its analysis, which surveys existing literature and practices, the CERRE Code shows that the regulatory authority must first be given a clear legislative mandate, combined with broad powers to discharge its mandate and that it should be endowed with sufficient budgetary resources to carry out its tasks adequately.

The Code also sets out that, in its operations, the regulatory authority should engage openly and transparently with all stakeholders, and collaborate actively and constructively with national governments, the EU and the European Commission. When considering introducing regulation, the authority should conduct thorough impact assessments and consultations, and give comprehensive reasons for its decisions. Finally, while keeping in mind cost-effectiveness, it should conduct *ex post* assessments of its policies to be able to understand their impact and optimise its interventions.

A vibrant European internal market which delivers benefits to citizens and consumers needs independent, accountable and efficient regulatory authorities. The CERRE Code, which will be expanded and updated as law and practice evolve, provides a critical contribution to the understanding and dissemination of robust governance principles and best practices across Europe's Member States.

Bruno Liebhaberg

CERRE CENTRE ON REGULATION IN EUROPE

CERRE Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities

1. Setup of the regulatory authority

1.1. *Mandate and powers.* **The regulatory authority is given a clear legislative mandate, combined with broad powers to discharge that mandate. These powers include the power to gather evidence, as well as the power to enforce compliance with the decisions of the authority.**

1.2. *Independence from private parties.* **The regulatory authority is independent of any private party, including any firm subject to its authority.**

1.3. *Independence and accountability towards public authorities.* **The regulatory authority is independent of, and accountable to, the national or sub-national executive and legislative powers.**

Independence implies that the regulatory authority does not receive any instruction, threat or inducement from the national executive or legislative powers, directly or indirectly, regarding the decisions it takes or envisages taking.

Accountability can be achieved through many different means, including procedural obligations (e.g. statement of reasons), reporting obligations, appearance before a parliamentary committee, *ex post* evaluations, and judicial review.

1.4. *Head of the authority.* **The regulatory authority is headed by one or more persons, who are appointed by or with the consent of the legislative power.**

These persons are experts in the sector subject to the authority, or in regulation.

These persons are appointed for a fixed term and cannot be removed before the end of that term, save for unfitness for office. At the end of their term, they may be reappointed once; if they leave the authority, they refrain, for a reasonable period, from accepting a position at one of the firms, or sector organisations representing the interest of firms subject to the authority.

These persons have the power to hire the personnel of the authority.

1.5. *Resources.* **The authority is endowed with sufficient budgetary resources – directly from State funds, via a tariff surcharge or via a fee on the firms under supervision – to carry out its tasks adequately. In particular, the authority has the necessary resources to conduct or mandate its own technical, economic, legal or other research in the sector(s) under its authority. The authority enjoys autonomy over the use of its resources, subject to the generally applicable disciplines regarding public finances.**

2. Operations

2.1. *Necessity and proportionality.* **In its operations, the regulatory authority is guided by the principles of necessity and proportionality.**

The principle of necessity implies that every action of the authority is linked to the accomplishment of its regulatory mandate.

The principle of proportionality implies that every action of the authority does not exceed what is necessary for the accomplishment of its regulatory mandate, and that any adverse impact of such action is not disproportionate to the expected benefits.

2.2. *Relationship with market forces and competition law.* **As a general principle, regulatory intervention is limited to cases where the operation of market forces, under existing laws, does not on its own lead to outcomes that meet the objectives set out in the regulatory mandate of the regulatory authority.**

In its choice of regulatory measures, the authority takes into consideration the full range of available regulatory instruments, including – next to command-and-control measures – incentive regulation, customer empowerment or protection measures, co- or self-regulation.

EU competition law – including Articles 101, 102, 106 and 107 TFEU and secondary or delegated EU legislation – always remains applicable, unless the authority supervises a sector which does not qualify as an 'economic activity' under EU law. Accordingly, the authority takes EU competition law into account in its actions, consults with competition authorities – at EU and national level – and avoids any action that would cause or induce a violation of EU competition law.

2.3. *Expertise.* **The regulatory authority possesses the requisite expertise over the sector under its authority, and over regulation and related issues. Without prejudice to its impartiality and to the boundary of its powers, the regulatory authority strives to have its own informed understanding of the sector under its authority, of the means available to it, of the impact of its past actions and of the likely impact of any future decisions to be taken.**

2.4. *Consistency.* **Subject to changing circumstances, the actions of the regulatory authority are consistent over time.**

2.5. *Sincere cooperation and loyalty.* **If and when the authority is acting in a sector where its presence is provided for under EU law or where it is otherwise implementing EU law, it is subject to Article 4(3) TEU. Accordingly, it cooperates with EU institutions and with regulatory authorities in other EU Member States (duty of sincere cooperation). It also takes notice of the actions of EU institutions and regulatory authorities in other EU Member States and, through its own actions, contributes to the achievement of the**

objectives of EU law and refrains from any measure jeopardizing such achievement (duty of loyalty).

3. Procedure

3.1. *Evidence-based decision-making and stakeholder involvement.* **The decision-making procedure of the regulatory authority is governed by two leading principles: evidence-based decision-making and stakeholder involvement. The authority aims for its procedure to ensure the best possible quality and legitimacy for its decisions, in order to avoid its decisions being re-litigated *in extenso* at the judicial control (judicial review or appeal) stage.**

3.2. *Dispute settlement and regulatory proceedings.* **Where the authority is acting pursuant to its enabling legislation, in order to resolve a bilateral dispute in the sector under its authority, it follows a procedure that meets the standards for judicial or arbitration proceedings. The following paragraphs are not applicable to such a procedure.**

Where the authority is acting pursuant to its enabling legislation, in order to implement regulatory objectives and outside of the context of specific disputes, it follows a procedure that complies with the elements in the following paragraphs.

3.3. *Transparency and openness.* **The authority is transparent. Its procedure is set out in a publicly available document. Subject to the respect for confidential information and business secrets which might be disclosed by stakeholders to the authority, its procedures are open and its files are accessible to the public pursuant to applicable legislation on access to public documents.**

3.4. *Ex ante assessment.* **The regulatory authority assesses the impact of potential actions beforehand. Such analysis comprises the following steps:**

- **(i) to identify the problem;**
- **(ii) to set out the objectives pursued by the authority;**
- **(iii) to develop the main options available to the authority, taking into account the legal framework, and including the option to undertake no action, if available;**
- **(iv) to analyse the impact of each option;**
- **(v) to compare the options before coming to a conclusion on the action to be taken.**

3.5. *Fixed term.* **Decisions taken by the authority are generally for a fixed period – appropriate to ensure effective regulation whilst respecting proportionality – and subject to review at the end of that period.**

3.6. *Ex post review.* **The authority regularly reviews its past decisions, in order to assess whether those decisions have been effective. Such *ex post* review is conducted with the involvement of an independent third party. Such *ex post* review leads to appropriate consequences for past decisions.**

3.7. *Impartiality.* **The authority – both as an institution and in the person of its members and personnel – conducts its procedures impartially as between the stakeholders.**

3.8. *Consultation, hearings and reasons.* **The authority carries out a broad consultation ahead of significant envisaged actions – also as part of evidence-based decision-making – and invites contributions and comments from stakeholders. In its decisions, the authority reports on the result of the consultation and responds to the main issues raised by stakeholders.**

The authority holds a public hearing ahead of significant envisaged actions, especially where such actions would affect the rights and obligations of one or more stakeholders.

The authority gives comprehensive reasons for its decisions.

Explanatory memorandum

1. Setup of the regulatory authority

Mandate and powers

1.1. **The regulatory authority is given a clear legislative mandate, combined with broad powers to discharge that mandate. These powers include the power to gather evidence, as well as the power to enforce compliance with the decisions of the authority.**

As has been pointed out by numerous authors (see for example Baldwin, Cave and Lodge, 1999), regulatory authorities carry out the will of Parliament as it has been set out in primary legislation. Therefore, in order to guarantee the overall legal certainty of the regulatory framework, it is important that the mandate of the agency be laid out clearly in legislation. Hancher, Larouche and Lavrijssen further point out that "clarity goes beyond mere semantic quality. […] It entails a number of substantive elements as well, concerning what should figure in the legislation." Legislatures should be careful not to confuse clarity with exhaustivity. If the tasks and objectives of a regulator are described in a static manner and in too much detail, they will constrain the regulator in effectively carrying out his activities. The legislative mandate must, therefore, refer to broad sector objectives rather than a prescriptive legislative programme, which is subject to short-term political gains and prone to become outdated soon, especially in rapidly evolving industries. Principle-based legislation is therefore likely to be more appropriate to deal with a changing technological and economic environment (OECD, 2012). In this respect, some authors (e.g. Majone, 2004) point out that European law seems to offer a best practice in the sense that it traditionally contains recitals explaining the purpose of legislation and that the tasks of regulators are laid out as a set of objectives that should be pursued, thereby guaranteeing the flexibility of regulation. For example, the EU Regulatory Framework for Electronic Communications[2] is set out in clear terms, while avoiding being bound by the current state of technology and the prevailing structure of the market (the so-called "technological

[2] EUROPEAN PARLIAMENT AND COUNCIL, "Directive of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services", Directive 2002/21/EC.

neutrality" principle). Furthermore, Hancher, Larouche and Lavrijssen (2004) point out that principle-based regulatory frameworks do not automatically mean that competition law concepts should be used in regulation, but it can nevertheless be argued that broad functional-economic principles have a better chance of standing the test of times.

For the sake of clarity, it is specified that the powers of the authority should include evidence-gathering and the enforcement of its own decisions. The latter issue was analysed in the CERRE report on enforcement and judicial review of NRA decisions, in 2011.

Independence from private parties

1.2. **The regulatory authority is independent of any private party, including any firm subject to its authority.**

When discussing the independence of regulatory agencies, the economic, legal and political science literature systematically distinguishes two types of independence: towards market players and towards the executive and legislative powers. The necessary independence of regulators towards market players is quite uncontroversial, as it is seen as a prerequisite for ensuring fair competition and necessary to build confidence in the regulatory process.

Independence and accountability towards public authorities

1.3. **The regulatory authority is independent of, and accountable to, the national executive and legislative powers.**

Independence implies that the regulatory authority does not receive any instruction, threat or inducement from the national executive or legislative powers, directly or indirectly, regarding the decisions it takes or envisages taking.

Accountability can be achieved through many different means, including procedural obligations (e.g. statement of reasons), reporting obligations, appearance before a parliamentary committee, *ex post* evaluations, and judicial review.

Independence

The independence from the legislative and executive powers is less well-entrenched, even though it is unanimously recommended by the academic literature to improve regulatory outcomes, and despite the general feeling among regulators that political interferences render independence a work-in-progress Various complementary rationales have been put forward in support of independence. First, setting up regulatory authorities that are independent from the legislative and executive powers, is necessary due to the high technical complexity and time-consuming nature of the regulatory process (Majone, 1994). Parliamentarians and high-ranking executive officials do not have the time or technical expertise to deal with regulatory matters.

Second, political decision makers have been shown to have time-inconsistent preferences (Kydland and Prescott, 1977) which will lead them to prefer lower consumer prices in the short term, to the detriment of investment in infrastructure. In contrast, the regulatory authority can be mandated to balance short- and long-term considerations, for the benefit of customers. This might compromise the confidence of investors and thus adversely affect the cost of financing new infrastructure (Majone, 1996). Hancher, Larouche and Lavrijssen (2004) further point out that economic regulation may not become an instrument of macro-economic policies, because investors need guarantees regarding the stability of the regulatory framework in order to be willing to make long-term commitments in networks and other capital-intensive industries.

Finally, a conflict-of-interest rationale has been developed in support of independence. In many European countries, governments still have significant financial stakes in historical operators in regulated industries, and the independence of the regulatory authorities is therefore required to ensure the impartiality of its decisions, and thereby the viability of the competitive environment. Furthermore, as is emphasized by Hancher and Larouche (2011): “In short, even if Member States have no direct interest in any of the market players, regulatory matters are high-stake games where market players will deploy considerable resources to try to influence the outcome (rent-seeking behaviour). Regulatory decisions must therefore be made in an environment which is shielded from undue influence as much as possible: this would imply transparency, independence of the decision-maker, openness, a duty to state reasons and the possibility of review, i.e. the characteristics of a regulatory agency.”

In practice, the degree of independence of a regulatory authority cannot be measured in a straightforward manner, as it depends on a wide array of legal determinants. The academic literature (see for example Hanretty, Koop, 2011 and Larouche, Hanretty, Reindl, 2012) has identified a number of parameters that influence the independence of regulators, such as the degree of ministerial oversight, the appointment procedure and length of the term of the regulator's head, the control over its own budget.

Again, it is important to stress that, although the degree of independence of a regulatory agency will strongly affect its conduct, the determinants of independence are outside of the sphere of responsibility of the regulator and should be seen as external framework conditions within which the regulator must operate. From historical examples, we know, however, as pointed out by Larouche, Hanretty and Reindl (2012) that "regulatory agencies were set up earliest, and granted most independence, in political systems with relatively few veto players in which there was frequent alternation in government of opposing political parties or coalitions, and in sectors most characterised by high technical complexity and network effects (Gilardi, 2002,2005; Elgie and McMenamin, 2005)."

Accountability

In the EU, independence is usually coupled with accountability. Accountability is another important imperative that has often been put forward to increase the quality and legitimacy of regulators' activities (Mandelkern Report (2001), EU White Paper on Governance (2001)). However, it is a loosely defined term which covers many different legal mechanisms: first, it covers the numerous top-down mechanisms focusing on the relationship between the independent regulator and democratically legitimate bodies, such as the legislative and executive branches of government. Second, it also covers a wide array of bottom-up mechanisms, focusing on the relation between NRAs and numerous groups of stakeholders (the sector's operators, the general public, the utilities' customers, NGOs, etc.). Finally, and although this is often overlooked, Hood (1995) has also stressed the importance of "horizontal accountability" towards peers, mostly in European networks (such as BEREC, ACER, ERGP, IRG-Rail, etc.).

Legal provisions which impose strong accountability obligations on regulators, have often been presented as a major trade-off to increased independence. However, Larouche, Hanretty and Reindl (2012) have shown this to be untrue as accountability and independence often go hand in hand. This misconception is mostly due to a poor understanding of what accountability really encapsulates. As has been stressed by Philp (2009), accountability is a relationship which involves 'giving account', that is, informing, explaining and justifying the regulator's conduct. Therefore, many accountability mechanisms relate to the provision of information, e.g. the submission of annual reports, regular hearings with parliamentary committees, consultation with advisory bodies representing consumers, market players and other stakeholders. Therefore, accountability need not, as a matter of definition, involve sanctioning. Philp (2009) explains the distinction as follows: the idea behind making sanctions part of the definition of accountability is that, without them, there would be no motivation on the part of regulatory to commit to accountability mechanisms. On the other hand, as pointed out by Larouche, Hanretty and Reindl (2012), the intuition behind resisting this move is that accountability requires giving account, irrespective of whether certain consequences may follow from doing so. The authors further point out that "the former intuition is strongly encouraged by principal-agent thinking […] and by those who are concerned that without sanctions the process may be toothless. But the latter intuition (resisting sanctions) is related to the recognition that much accountability concerns imparting information, transparency, reporting and justification, and that these processes do not have to be driven by the threat of sanctions to have value."

Head of the authority

1.4. **The regulatory authority is headed by one or more persons, who are appointed by or with the consent of the legislative power.**

These persons are experts in the sector subject to the authority, or in regulation.

These persons are appointed for a fixed term and cannot be removed before the end of that term, save for unfitness for office. At the end of their term, they may be reappointed once; if they leave the authority, they refrain, for a reasonable period, from accepting a position at one of the firms, or sector organisations representing the interest of firms subject to the authority.

These persons have the power to hire the personnel of the authority.

This principle is directly inspired by the current content of the relevant EU directives concerning electronic communications and energy, which have the most advanced set of provisions concerning these matters. These directives were reviewed in 2009, and their content was updated to reflect the experience of the Commission, and the case-law of the Court, in the implementation of the relevant EU sector-specific regulatory framework.

Re-appointment should be linked to the duration of the original appointment. Shorter appointments should be renewable, while in the case of longer appointments, it might be preferable to limit the appointment to one term only.

Resources

1.5. **The authority is endowed with sufficient budgetary resources – directly from State funds, via a tariff surcharge or via a fee on the firms under supervision – to carry out its tasks adequately. In particular, the authority has the necessary resources to conduct or mandate its own technical, economic, legal or other research in the sector(s) under its authority. The authority enjoys autonomy over the use of its resources, subject to the generally applicable disciplines regarding public finances.**

The first sentence of this principle is also directly inspired from relevant EU directives and from the experience in the Member States with various means of financing the activities of regulatory authorities.

The second sentence specifies that the resources devoted to the authority should not be strictly restricted to current operations, but should also enable the authority to conduct its own research or to obtain it from third parties. This is consistent with the requirement that the authority – including its head – holds sufficient expertise regarding to the sector under its supervision and to regulation in general.

The last sentence specifies that the authority can decide on the use of its resources. More specifically, the authority should be able to offer competitive remuneration in order to attract the best persons. Of course, like any public entity, it is subject to a series of disciplines regarding public finances, in order to promote openness and transparency, and to prevent fraud.

2. Operations

Necessity and proportionality

2.1. **In its operations, the regulatory authority is guided by the principles of necessity and proportionality.**

The principle of necessity implies that every action of the authority is linked to the accomplishment of its regulatory mandate.

The principle of proportionality implies that every action of the authority does not exceed what is necessary for the accomplishment of its regulatory mandate, and that any adverse impact of such action is not disproportionate to the expected benefits.

At its core, the set-up of regulatory authorities and the definition of their activities should be guided by the related principles of necessity and proportionality. As pointed out by Hancher, Larouche and Lavrijssen (2004), the general principle of proportionality knows of a large number of variants, some of which encompass only part of it. The OECD recommendation states that governments should correctly define the regulatory problems, that regulatory actions should represent the best form of government action and that the benefits of regulation should justify the costs. In the White Paper on European Governance, the European Commission states that policies must be effective and timely, delivering what is needed on the basis of clear objectives, an evaluation of future impact and, where available, of past experience. Effectiveness also depends on implementing EU policies in a proportionate manner and on taking decisions at the most appropriate level. The UK principles of good regulation state that regulation should be proportionate. This means that government should fully consider alternatives to state regulation, as they might be more effective and cheaper to apply.

The principles of necessity and proportionality are clearly linked to effectiveness and efficiency and therefore allow for the incorporation of economic analysis at the core of the regulatory process.

When the choice has been made to proceed with regulation, the UK's Hampton Review (2005) stipulates that "regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection". The Statutory Code of Practice for Regulators (2007), put in place by the UK

Department for Business, Enterprise & Regulatory Reform, following the Hampton Review, explicitly links this to the principle of proportionality by stating that "[regulators] should only adopt a particular approach if the benefits justify the costs and it entails the minimum burden compatible with achieving their objectives". The Code of Practice goes even further in the application of the principle of proportionality by adding that "regulators should consider the impact that their regulatory interventions may have on small regulated entities, using reasonable endeavours to ensure that the burdens of their interventions fall fairly and proportionately on such entities, by giving consideration to the size of the regulated entities and the nature of their activities." It should be mentioned in this respect that, especially in the context of network industries, whose restructuring implies the establishment of new markets and models, the determination of the criterion of necessity in individual regulatory actions is challenging.

The principle of proportionality applies not only to the outcome of the regulatory process, i.e. the measures taken by the authority, but also to the process itself. Among others, the amount of *ex ante* impact assessment (3.4. below) and of stakeholder involvement (3.8. below) should be proportionate to the significance of the decision to be taken.

Relationship with market forces and competition law

2.2. **As a general principle, regulatory intervention is limited to cases where the operation of market forces, under existing laws, does not on its own lead to outcomes that meet the objectives set out in the regulatory mandate of the regulatory authority.**

In its choice of regulatory measures, the authority takes into consideration the full range of legally available regulatory instruments, including – next to command-and-control measures – incentive regulation, customer empowerment or protection measures, co- or self-regulation.

EU competition law – including Articles 101, 102, 106 and 107 TFEU and secondary or delegated EU legislation – always remains applicable, unless the authority supervises a sector which does not qualify as an 'economic activity' under EU law. Accordingly, the authority takes EU competition law into account in its actions, consults with competition authorities – at EU and national level – and avoids any action that would cause or induce a violation of EU competition law.

Relationship with market forces

As a starting point, EU law does not proceed from a neutral stance, but as the Treaties indicate, the EU rests on an internal market with a market economy with undistorted competition. Accordingly, public intervention on such markets needs to be justified, if such intervention is liable to interfere with the internal market or if it significantly disturbs competitive markets. For instance, under EU State aid law, under the moniker of "incentive effect", the Commission now endeavours to test whether the aid influences the behaviour of market parties beyond what market forces would already produce.

At the same time, this code of conduct is concerned with the actions of regulatory authorities. These are generally acting within a previously enacted legislative framework which, as stated earlier, should clearly set out the regulatory objectives which the polity – as represented by the legislative power – wants the authority to strive for, and entrust the authority with a clear mandate in this respect. In principle, there is no need for the authority to engage into its own determination of how markets should work and which outcomes are desirable from a social and political perspective: these normative parameters are already given in the enabling legislation (of course, the authority can provide useful feedback to the legislative power as regards these normative parameters). Rather, the authority should ask itself, before acting, whether the objectives to be attained are not already met through market forces. Such a question forms a central part of universal service regimes, for instance.

Choice of instruments

Once it is established that market forces will not suffice to achieve regulatory objectives, a regulatory authority should still strive to conduct its action within the context of existing market mechanisms. It should understand the incentives of the various actors, on the supply and on the demand side, and try to rely on those incentives as much as possible, instead of ignoring them. Furthermore, not all actors are in the same position; the authority must carefully consider whether to use symmetric or asymmetric regulation.

In that respect, "command-and-control" regulation is not always the most efficient and effective way to meet regulatory needs. Alternative ways to heavy-handed regulation, such as soft law, co-regulation or self-regulation, often provide a better answer to the regulatory needs each time

considered. Alternative means of regulation are often a more efficient way of obtaining quick results. Selecting the most appropriate legislative instrument therefore tends to improve the effectiveness of regulation, whilst also enhancing compliance.

Regulators should not adopt a dogmatic approach to the exercise of regulatory functions. Clear communication and the provision of information that enhances understanding of regulatory processes is key. This relates to the exercise of traditional regulatory sanctions (e.g. through enforcement of license breaches) as well as more behavioural approaches. [3]

By and large, a more top-down approach can be followed in cases evidencing a clear need for regulatory intervention that can guarantee uniform application and legal certainty.

Soft law in the form of notices, communications, recommendations and guidelines, is not legally binding. It leaves the option to its addressees of stating their disagreement and opting out, whilst constraining the issuing authority. If used strategically, soft law may, therefore, shield regulators from political pressure. Soft law instruments, such as recommendations, can further be used as a means to manage the trade-off between “top-down” and “bottom-up” approaches.

In certain circumstances, where swift and flexible regulation is needed or where the law does not prescribe the use of a legal instrument, alternative methods of regulation might represent added value for the general interest. Co-regulation is particularly adequate a mechanism in cases where implementing measures need to be prepared. In contrast, co-regulation may not be appropriate in cases where fundamental rights or important political options are at stake or in cases where the rules must be applied in a uniform fashion across the board.

Co-regulation occurs when the attainment of certain objectives is entrusted by a legislative act to private parties recognised in the field, such as economic operators, the social partners, non-governmental organisations or associations, whose vast knowledge and expertise represents an asset for the regulatory process. The involvement of the actors most affected by implementing rules in their preparation and enforcement entails wider ownership of the policies in question and better compliance.

[3] For example, the Northern Ireland Utility Regulator has introduced the concept of regulatory letters for its energy companies to help them comply with regulatory requirements. Moreover, in its annual Cost and Performance Report on Northern Ireland Water, it has used reputational incentives to drive improved performance.

Co-regulation does not imply that the responsibility for the rules being implemented is shared. The primacy of the public authority remains intact. Thus, in cases where the co-regulation mechanism has not produced the expected results, the public authority reserves the right to intervene in a more traditional fashion.

Unlike co-regulation, which is complementary to legislation, self-regulation refers to a voluntary initiative by economic operators, the social partners, non-governmental organisations or associations to adopt among themselves and for themselves common guidelines, particularly codes of practice or sectoral agreements. Even if they might not have initiated or encouraged self-regulatory efforts, public authorities might nevertheless want to scrutinise such efforts to verify that they comply with the law, contribute to the attainment of the law's objectives and are satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the self-regulatory commitments given. If this is the case, the public authority can consider it preferable not to act. Nevertheless, the possibility of intervention, if self-regulation proves insufficient or inefficient, cannot be ruled out.

Regulatory experience suggests that, in network industries, full compliance of all market players is essential for the functioning of the system, a reality implying that co-regulation and self-regulation - especially in sectors with many market players - may be less useful. Nevertheless, many market rules still depend on system operators' cooperation. Regulators can thus contribute to lighter regulation by getting involved in self-regulation processes and turning them into co-regulation. Network regulators also feel that the legal freedom to choose from a set of instruments is very restricted (e.g. incentive regulation versus cost plus). By contrast, having a choice of regulatory instruments seems to be particularly appreciated by multi-utility regulators, since it ensures that the regulatory frameworks developed continue to meet the needs of both firms and their consumers within each of the regulated sectors.

Link with competition law

Hancher, Larouche and Lavrijssen (2004) point to the need for sector-specific regulation to respect the general principles of competition policy. This is advisable, first, in order to stream-line regulatory interventions in sectors where more than one regulator has jurisdiction, and, second, to reduce possible conflicts between horizontal competition policy interventions and

sectoral regulatory decisions. This respect for general competition law has already been recommended by the OECD for a number of years (See "Relationship between regulators and competition authorities" (1999).

Expertise

2.3. **The regulatory authority possesses the requisite expertise over the sector under its authority, and over regulation and related issues. Without prejudice to its impartiality and to the boundary of its powers, the regulatory authority strives to have its own informed understanding of the sector under its authority, of the means available to it, of the impact of its past actions and of the likely impact of any future decisions to be taken.**

Appropriate weight should be given to the need for sound expertise as a guarantee of regulatory quality. Expertise allows regulators (staff and management) to behave truly independently from stakeholders, shielding them from lobbying and regulatory capture. Relying on stakeholders for the provision of core information about the way an industry works, its characteristics, challenges, etc. renders regulators vulnerable to regulatory capture, limiting their ability to form a policy line and adhere to it.

Expertise further entails a better "persuasion-based" compliance, whereby the regulatees trust the regulator and communicate in a spirit of cooperation and good faith. Last, a regulator renowned for its expertise will further establish a good reputation among its peers, something which promotes inter-agency cooperation, leading, ultimately, to a degree of regulatory convergence.

Ultimately, expertise is needed because the authority should avoid placing itself in a position where its decision-making is reduced to choosing between rival submissions made before it. In its mandate, the authority is tasked with the pursuit of objectives of public interest, whereas stakeholders making submissions to the authority will understandably pursue their own interest. It cannot be assumed that the most appropriate course of action for the authority will necessarily appear out of these submissions. Only if the authority has its own expertise can it come to its own reasoned conclusion as to which course of action should be taken in the view of its regulatory mandate.

Consistency

2.4. **Subject to changing circumstances, the actions of the regulatory authority are consistent over time.**

The importance of consistency of treatment and coherence has often been stressed (e.g. EU White Paper on Governance (2001), OECD Recommendation on Regulatory Policy and Governance (2012)), both across different utility sectors, and over time. Increased coherence is seen as a means of improving confidence in the regulatory regime.

Sincere cooperation and loyalty

2.5. **If and when the authority is acting in a sector where its presence is provided for under EU law or where it is otherwise implementing EU law, it is subject to Article 4(3) TEU. Accordingly, it cooperates with EU institutions and with regulatory authorities in other EU Member States (duty of sincere cooperation). It also takes notice of the actions of EU institutions and regulatory authorities in other EU Member States and, through its own actions, contributes to the achievement of the objectives of EU law and refrains from any measure jeopardizing such achievement (duty of loyalty).**

This principle flows directly from the Treaty on the Functioning of the European Union, in the light of the practice, as reflected in EU legislation, Commission decisions and Court judgments.

3. Procedure

Evidence-based decision-making and stakeholder involvement

3.1. **The decision-making procedure of the regulatory authority is governed by two leading principles: evidence-based decision-making and stakeholder involvement. The authority aims for its procedure to ensure the best possible quality and legitimacy for its decisions, in order to avoid its decisions being re-litigated *in extenso* at the judicial control (judicial review or appeal) stage.**

The two main principles underpinning regulatory procedure are set out here. The first one is typically inspired by literature from economics and other social sciences, and it relates more to the quality of the outcome than of the procedure as such: decision making should be carefully made in the light of available evidence, in order to reach the highest possible quality in the decision as such. If necessary, additional evidence can be produced or commissioned, in order to improve the basis for decision.

The second principle is more legal in nature, and concerns the procedure as such. Very crisply put, stakeholders should be involved, which implies a wide range of procedural rules, such as consultation, respect for the rights of defence (and of parties in general), access to the file, transparency, etc. These procedural features do not necessarily increase the quality of the decision – although most of them do, if properly used – but they endow the decision of the regulatory authority with greater legitimacy amongst the stakeholders, which is required for the authority to be respected and to be able to carry out its mandate.

These two principles sometimes imply trade-offs. For instance, extensive judicial review might provide ironclad protection to the rights of the parties, but it could result in a qualitatively good decision being undermined through the actions of a less expert review court. Even if that is not the case, delays induced through judicial review can also degrade the quality of the regulatory process. This is why, as a general rule it is preferable to invest resources in maximizing the quality and legitimacy of the original decision of the regulatory authority, rather than multiplying and intensifying subsequent review and control mechanisms. Judicial review should ideally be for cases of genuine disagreement on the substance of the decision, which would not have been addressed at the decision-making stage.

Dispute settlement and regulatory proceedings

3.2. **Where the authority is acting pursuant to its enabling legislation, in order to resolve a bilateral dispute in the sector under its authority, it follows a procedure that meets the standards for judicial or arbitration proceedings. The following paragraphs are not applicable to such a procedure.**

Where the authority is acting pursuant to its enabling legislation, in order to implement regulatory objectives and outside of the context of specific disputes, it follows a procedure that complies with the elements in the following paragraphs.

The decision-making practice of regulatory authorities often includes proceedings of different types.

Many authorities are entrusted with dispute settlement powers, whereby two regulated firms can come to the authority with a dispute concerning the application or implementation of regulation as between the two of them. When the authority settles such disputes, it is acting in a quasi-judicial – or arbitral – capacity. As such, it seems appropriate that it would follow a procedure which is closely modelled on the adversarial procedure characteristic of courts and arbitral tribunals.

Most of the time, however, authorities are acting by way of implementing regulation, for instance by making market assessments in the framework of the SMP regime for electronic communications or fixing access tariffs for transmission or distribution networks for energy. Those proceedings concern the industry as a whole, and thus involve a multitude of parties, each with its own position and interests. In such cases, the procedure to be followed involves a mix of judicial and legislative features; it is detailed in the subsequent principles.

Transparency and openness

3.3. **The authority is transparent. Its procedure is set out in a publicly available document. Subject to the respect for confidential information and business secrets which might be disclosed by stakeholders to the authority, its procedures are open and its files are accessible to the public pursuant to applicable legislation on access to public documents.**

Transparency and openness contribute to greater accountability, in line with principle 1.3. Hancher, Larouche and Lavrijssen (2004) summarize transparency as follows: “prior to decision-making, it entails that the rules governing decision-making are open and publicized, and that the agenda (both substantive and procedural) is known. In the course of decision-making, it implies that the decision-maker will not operate behind closed doors, will disclose the record on which the decision is to be based and will issue reasons for the decision. Following decision-making, transparency requires the decision to be made easily accessible.”

Aside from promoting compliance by increasing the level of information available to all stakeholders, the OECD Recommendation on Regulatory Policy and Governance (2012) also points out that "this increases regulatory transparency and reduces possibilities for abuse or discretion and for corrupt behaviour from public officials". Due to their high level of expertise and frequent contact with involved parties, regulators can also be in charge of publicising relevant legal documents to stakeholders. This is for example recommended by the UK's Statutory Code of Practice for Regulators (2007), when it states that "regulators should provide authoritative, accessible advice easily and cheaply".

Ex ante assessment

3.4. **The regulatory authority assesses the impact of potential actions beforehand. Such analysis comprises the following steps:**

(i) to identify the problem;

(ii) to set out the objectives pursued by the authority;

(iii) to develop the main options available to the authority, taking into account the legal framework, and including the option to undertake no action, if available;

(iv) to analyse the impact of each option;

(v) to compare the options before coming to a conclusion on the action to be taken.

The Hampton Review (2005) states that "regulators and the regulatory system as a whole should use comprehensive risk assessment to concentrate resources in the areas that need them most." It also explains that "the fundamental principle of risk assessment is that scarce resources should not be used to inspect or require data from businesses that are low-risk, either because the work they do is inherently safe, or because their systems for managing the regulatory risk are good."

The idea that regulatory enforcement should be grounded in risk analysis is based on "Responsive Regulation", a 1992 book by Ian Ayres and John Braithwaite, which defined an 'enforcement pyramid'. The Hampton Review (2005), following Ayres and Braithwaite, explains that regulators should progress along this enforcement pyramid, depending on the seriousness of the regulatory risk, and the non-compliance of the regulated business. Ayres and Braithwaite (1992) believed that regulatory compliance was best secured by persuasion, with inspection and sanctions being used for more risky businesses further up the pyramid.

A means to improve the quality of legislation is by embedding impact assessments in the regulators' working methods. Regulatory Impact Assessments (RIAs) follow an evidence-based decision-making logic, whereby regulatory intervention is justified on the basis of concrete evidence rather than on abstract assumptions and estimations. RIAs examine the social, economic and environmental effects and side effects of different policy choices. In doing so, they quantify, and, if possible, monetise the costs and benefits associated with the various options. To succeed in the identification of the optimal policy choices, RIAs follow a set of key analytical steps.

The first step is the identification of the problem. Problems cannot be assumed. This step involves the comprehension of its nature and scale, its consequences and implications and its root causes. Identifying the problem is key in determining the need for regulatory intervention.

In a second step, the problem is examined against the objectives set out for the regulatory authority in enabling legislation.

The third step involves the development of the main policy options to tackle the problem. This presupposes consideration of the proportionality, effectiveness, efficiency and coherence of the various options. At this stage, the presence and impact of competition law should also be factored in.

In a fourth step, the economic, social and environmental impacts of the various policy options are analysed and, if possible, quantified and monetised against a clear baseline scenario (usually doing nothing).

Subsequently, the various options are compared in the light of the defined objectives with a view to arriving at a decision.

In line with the principles of transparency and openness, *ex ante* assessments should be made public.

At the regulatory level, agencies are often subject to constraints which, while not necessarily equivalent to a full-fledged RIA ahead of a legislative act, are nonetheless inspired by the same line of thought. For instance, the complex procedure set out at Articles 15 and 16 of the Framework Directive for electronic communications (Directive 2002/21) mimics an RIA: national regulatory authorities are bound to analyse relevant markets so as to identify if there is

significant market power and what type of concerns flow from the presence of such power. They must then identify the most appropriate remedy to address that power. Generally, there is no harmonised approach across the EU Member States towards the systematic conduct of RIAs. Regulators, nevertheless, tend to conduct such assessment when prices are affected or where an analysis of market power and mark ups is required to establish the legal basis for regulatory intervention. Whilst, therefore, regulators seem to enjoy certain discretion concerning the conduct of RIAs, in certain jurisdictions it is required that all rules be consulted with social partners, regional governments and the industry.

Fixed term

3.5. **Decisions taken by the authority are generally for a fixed period – appropriate to ensure effective regulation whilst respecting proportionality – and subject to review at the end of that period.**

Regulatory decision should be subject to review, revision or sunset clauses, to the extent permitted by the enabling legislative framework. Review clauses require that reviews be conducted within a certain period. If no action is taken to revise the law, the latter remains in force. Revision clauses stipulate that a legislative act will have to be amended by a set date without necessarily defining the nature of that amendment. Sunset clauses are a form of expiry dates for legislation. Once the specified period of time has lapsed, unless action is taken by the regulator to revise the relevant legislative instrument or prolong its period of application, the latter ceases to apply.

To function as a catalyst for regulatory quality, the use of review or sunset clauses should be carefully considered on a case-by-case basis with some caveats in mind. As already mentioned, evaluation is a resource-intensive and time-consuming task. In a resource-constrained and globalised environment with huge needs for regulation, a generalised obligation to systematically review the entire body of legislation would risk paralysing the policy process. Furthermore, the widespread use of sunset clauses in particular might undermine legal certainty, curbing investments and growth. At the same time, the presence of sunset clauses could be misused by interest groups to obstruct progress and disorientate public opinion. Contrary to conventional wisdom, blanket sunsetting could negatively impact on regulatory quality,

providing an excuse for regulators to opt for the lowest common denominator, in the knowledge that regulatory failures could be rectified in the next evaluation round.

Ex post review

3.6. **The authority regularly reviews its past decisions, in order to assess whether those decisions have been effective. Such *ex post* review is conducted with the involvement of an independent third party. Such *ex post* review leads to appropriate consequences for past decisions.**

Prospective or forward-looking analysis of policy options in the form of *ex ante* evaluations or RIAs should be complemented with retrospective or backward-looking analysis in the form of *ex post* evaluations. Whilst *ex ante* evaluations focus on the expected impact of interventions, *ex post* evaluations focus on the actual impact thereof. Yet, both forms of evaluation contribute to a better evidence base for policy-making.

Ex post evaluation consists in a set of tools, providing an evidence-based assessment of results and impacts of interventions, the latter encompassing a variety of activities such as regulatory measures, policies and spending programmes. *Ex post* evaluation can be conducted globally, looking back at the activities of the authority for a given period, or it can be conducted with respect to individual decisions (as is implied by the SMP regime for electronic communications, for instance). Here as well, proportionality as well as cost-effectiveness play a role. In any event, even a global review will unavoidably individually discuss the most important measures taken during the evaluation period. Evaluations of separate measures are an important input into fitness checks, the latter being comprehensive policy evaluations assessing if the regulatory framework for a policy area is fit for purpose.

Ex post evaluations fulfil a variety of purposes. First of all, they assess whether the objectives pursued by the various interventions have been attained and, moreover, with a minimum amount of resources. The experience gained from this assessment contributes to improving the quality of future interventions. *Ex post* evaluation ultimately enhances transparency and accountability.

To meet their purposes, evaluation activities must be appropriately organised and resourced, a task that calls for devolution of responsibility to the relevant services, in combination with

central support and coordination. Moreover, for evaluation results to be available in due time for operational and strategic decision-making and reporting needs, transparent and consistent planning is necessary. By the same token, evaluation design must provide clear and specific objectives, and appropriate methods and means for managing the evaluation process and its results. The conduct of evaluation activities itself must guarantee reliable, robust and complete results. Succeeding in this task is challenging, since *ex post* evaluations need to grapple, among others, with the multi-dimensionality problem: whilst typically many measures are implemented, only rarely is it possible to separate results of individual measures. As a result, it is often unclear which measure contributes to the objectives set and which one does not or even has the opposite effect than the one intended. To overcome the challenges associated with *ex post* evaluations, evidence-based and rigorous analysis, sound expertise, independence and regular assessment of the quality of the evaluation are required. Last, evaluation results must be communicated effectively to ensure their maximum and optimal utilisation by decision-makers and stakeholders.

The European Commission has developed a number of evaluation standards, expressed as a set of guiding principles. Arguably, regulatory authorities should enjoy a margin of discretion when deciding which regulatory instruments to subject to *ex post* evaluation and how often. Reviews of this type are resource-intensive and time-consuming, a reality that calls for careful prioritisation and management of regulatory work. Nevertheless, systematic reviews are a prerequisite for regulatory quality, especially in dynamic areas of the law, normally at the interface with technology or the marketplace. The use of permanent review mechanisms in legislation is, in such cases, indispensable. The same could not be said about areas of law dealing with fundamental rights, especially where no limitation periods apply.

Ex ante evaluation and *ex post* evaluation constitute two sides of the same coin. This reality calls for coordination and coherence between these two forms of evaluation with a view to enhancing their effectiveness and efficiency. This may only be achieved if evaluation is integrated in the regulators' strategic planning and programming cycle. This is particularly so given the increasing tendency to evaluate, next to expenditure programmes, also legislation and other non-spending activities. Careful planning is crucial to avoid duplication of efforts and a multitude of separate evaluations on the same subject in too narrow a time frame.

Although national regulators might find this requirement cumbersome and hard to apply in practice, regulatory practice suggests that *ex ante* and *ex post* evaluations actually meet during review processes. *Ex post* evaluation often takes place when reviewing measures. The *ex ante* evaluation (if embedded in the measure) is then often analysed also. Regulatory practice further suggests that coordination takes place in cases where the objective set is quite concrete (e.g. the specific behaviour of a company). If the objective is more general (e.g. more competition in the market by lowering entry barriers), then the evaluation includes the general assessment of the market and afterwards trying to pin down possible reasons for unwanted developments.

Impartiality

3.7. **The authority – both as an institution and in the person of its members and personnel – conducts its procedures impartially as between the stakeholders.**

This principle requires little explanation. The regulatory authority needs to be impartial and also to appear to be impartial in the conduct of its proceedings. This is essential both for the proper conduct of proceedings and in order to ensure their legitimacy.

Of course, impartiality in the conduct of the proceedings does not mean that the authority should abandon its regulatory mandate, in cases where the authority is bound to protect the interest of customers. The authority must be impartial in receiving contributions and statements from all stakeholders, but having gathered evidence and heard the stakeholders, it can give priority to the interest of specific stakeholders (consumers) in the course of its decision.

Consultation, hearings and reasons

3.8. **The authority carries out a broad consultation ahead of significant envisaged actions – also as part of evidence-based decision-making – and invites contributions and comments from stakeholders. In its decisions, the authority reports on the result of the consultation and responds to the main issues raised by stakeholders.**

The authority holds a public hearing ahead of significant envisaged actions, especially where such actions would affect the rights and obligations of one or more stakeholders.

The authority gives comprehensive reasons for its decisions.

Public consultations constitute another mechanism to enhance regulatory quality. In a system of representative democracy, establishing a channel of communication with the addresses of the law enhances public trust in the policy process. Involvement and participation of interested parties increases transparency and accountability, positively impacting on compliance.

Regulators are obliged to make clear the subject-matter of the consultation, the mechanisms used to consult, the stakeholders consulted and the reasons for their being consulted and the rationale behind the policy choices made. Interested parties, for their part, must render clear the interests they represent and the degree of inclusiveness of their representation. Effectiveness requires that interested parties be involved in the development of a policy at a stage where they can still have an impact. Consultation must, therefore, start as early as possible and, if necessary and proportionate, be conducted in stages. Last, the need for coherence requires the regulators to include in their consultation processes mechanisms for feedback, evaluation and review.

The Commission's minimum standards for conducting public consultations, whilst not legally binding, are relevant for regulatory authorities. The first standard concerns the clear content of the consultation process. All communications relating to consultation should be clear and concise and include all necessary information to facilitate responses. The second standard concerns the definition of the consultation's target groups. Safeguarding adequate coverage of all relevant stakeholders is necessary for the representativeness and reliability of the data and evidence collected. The engagement of all target groups presupposes adequate awareness-raising publicity. The third standard is therefore concerned with communication tools. For open public consultations, a single access point for consultation should be established. At the same time, alternative communication channels should be established to safeguard the consultation's widest possible reach. The fourth standard concerns the timeframe within which the consultation process should take place. Consultation periods should strike a reasonable balance between the need for adequate input and the need for swift decision-making. The last standard aims at enhancing accountability, as well as the credibility of the consultation process. It, therefore, requires that contributions be acknowledged and results of open public consultations be displayed on websites linked to the single access point on the internet.

Here as well, the guidelines set out in the previous paragraphs may apply to regulatory processes as well as to legislative processes, with some adaptations if necessary.

National Regulatory Authorities are often bound by legislation to organise public consultations for a number of decisions, especially those having a significant impact on the market. This requirement comes on top of the regulatees' right to be heard before any decision is adopted which affects their interests. When conducting a public consultation, general principles of administrative law (e.g. non-discrimination, the right to be heard, transparency) and other procedural guarantees are applicable. Irrespective of the often mandatory character of public consultations, regulators generally find that enhancing stakeholder engagement processes is one key initiative for enhancing regulatory quality.

It is noteworthy that national regulators often conduct "pre-consultations" in order to define a proposal, which is then submitted to a formal consultation. Pre-consultations are informal (and often selective). They enable regulators to determine the most suitable proposal without having to draft a fully-fledged decision, therefore, saving them time during the run-up to decision-taking. Pre-consultations cannot substitute for formal consultations, however.

Although the general principles and minimum standards governing European consultations are a source of inspiration and guidance for national regulators, certain scepticism has been expressed concerning their usefulness for national purposes. This is because, especially in small economies, wide stakeholder participation can be easily achieved.

Finally, successful accountability mechanisms can be made two-directional, with regulators not only giving account of their actions to the various stakeholders, but also listening to the latter's opinions and concerns. In its Recommendations on Regulatory Policy and Governance (2012), the OECD explicitly elicits the benefits which can be derived from increased stakeholder engagement: "A process of communication, consultation and engagement which allows for public participation of stakeholders in the regulation-making process as well as in the revision of regulations can help governments understand citizens' and other stakeholders' needs and improve trust in government. Also, it can help governments collect more information and resources, increase compliance, and reduce uninformed opposition. It may enhance transparency and accountability as interested parties gain access to detailed information on potential effects of regulation on them." Nevertheless, despite the benefits of involving stakeholders in the regulatory process, regulators should not underestimate the limitations associated with processes such as public consultations. Information asymmetries, whereby

business interests are well-represented and defended thanks to the wealth of information available to the affected industries, as opposed to the public's interests, should not skew the regulatory outcome. Addressing information asymmetries via information campaigns and/or the organisation of a public dialogue, whilst allowing for sufficient time for the public to react is an option that should, therefore, be considered by regulators, especially in cases where the interests at stake expand far and wide.

Hearings and reasons

In carrying out their administrative duties, regulatory authorities should respect the fundamental right to good administration. The latter includes: a. the right of every person to be heard, before any individual measure adversely affecting him or her is taken; b. the right of every person to have access to his or her file; and. c. the obligation of the administration to give reasons for its decisions. Next to procedural guarantees provided for by law, regulatory authorities should develop, when necessary and appropriate, their own mechanisms to guarantee sound administration. In doing so, they should make sure that they do not create additional obligations or negatively affect citizens' rights.

Sound administration requires that excessive or unjustified administrative costs and burdens be eliminated. Achieving public-policy objectives in the least burdensome way for business and citizens is an indicator of regulatory quality. Measurement of such costs and burdens is therefore necessary. Reduction of administrative costs, which usually take the form of information obligations on business, should not undermine the attainment of the objectives pursued by such obligations. Equally, elimination of administrative burdens, which take the form of costs specifically linked to information that businesses would not collect and provide in the absence of a legal obligation, should occur with due regard to the benefits they bring.

Although the rules on procedure are centred on the parties directly concerned, regulators should guarantee that the rights of third parties are adequately protected. Especially in areas such as competition law, where complainants provide the regulators with invaluable information, the protection of the right to be heard, is necessary. Without prejudice to any confidentiality issues, access to the file should be generally unimpeded, enhancing the transparency of the decision-making process.

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