Chapter 1

Role clarity

An effective regulator must have clear objectives, with clear and linked functions and the mechanisms to co-ordinate with other relevant bodies to achieve the desired regulatory outcomes. This chapter describes how regulators can have a well-defined mission and distinct responsibilities within regulatory schemes.
### Principles for role clarity

**Objectives**

1. The legislation establishing a regulatory scheme or framework should be written so that the purpose of the regulator and the objectives of the regulatory scheme are clear to the regulator’s staff, regulated entities and citizens.

**Functions**

2. The regulatory powers and other functions to be carried out to achieve the regulator’s objectives should be clearly specified in the establishing legislation and be appropriate and sufficient to achieving the objectives.

3. Regulators should not be assigned conflicting or competing functions or goals. The assignment of potentially conflicting functions to any regulator should only occur if there is a clear public benefit in combining these functions and the risks of conflict can be managed effectively.

4. Where a regulator is given potentially conflicting or competing functions, there should be a mandatory mechanism whereby conflicts arising are made transparent and processes for resolving such conflicts are specified. There should also be legal ground for co-operation and protocols between relevant regulators or bodies.

5. Where a regulator is assigned competing functions, the legislation should provide a framework to guide the regulator in making trade-offs between the functions, or require the regulator to develop such a framework with the necessary bodies (e.g. legislature, executive, and judiciary).

6. Regulators should operate within the powers attributed to them by the legislature and legislation should provide for judicial review for actions that might be held to be *ultra vires* (beyond the scope of the regulator). At the same time the scope of the regulator should recognise where appropriate discretion is needed in the way that regulatory powers are to be interpreted by the regulator to meet its objectives, without engaging in “mission creep”.

7. The responsibility for setting or advising on government policy, particularly relating to the nature and scope of the regulator’s powers and functions, should not principally sit only with the regulator even though the regulator has the most up to date knowledge of the issues in the regulated sector. The principal responsibility for assisting the executive to develop government policy should sit with the responsible executive agency and the regulator should have a formal advisory role in this task. In all cases such policy should be advanced in close dialogue with affected regulatory and other agencies, and there should be specified mechanisms for regulators to contribute to the policy-making process.

**Co-ordination**

8. To reduce overlap and regulatory burden, all regulators should be explicitly empowered and required to co-operate with other bodies (non-government and other levels of government) where this will assist in meeting their common objectives.

9. In the interests of transparency, instruments for co-ordination between entities, such as memoranda of understanding, formal agreements or contracts for service provision, should be published on regulators’ websites, subject to the appropriate removal of information (for example, that which is commercial-in-confidence).
Role clarity

Role clarity is essential for a regulator to understand and fulfil its role effectively. The role of the regulator should be clearly defined in terms of its objectives, functions and co-ordination with other entities. These should be clear to the regulator but also to the regulated bodies, citizens and other stakeholders. This is necessary for a well-functioning regulatory framework with different actors knowing their role and purpose that is complimentary and not duplicative or detrimental toward each other.

Objectives

The legislation that grants regulatory authority to a specific body should clearly state the objectives of the legislation and the powers of the authority (OECD, 2012; House of Lords: Select Committee on Regulators, 2007). The objectives should be written in order to identify the ends to be achieved or the expected outcome, rather than specifying the means by which they will be achieved.

Unless clear objectives are specified, the regulator may not have sufficient context to establish priorities, processes and boundaries for its work. In addition, clear objectives are needed so others can hold the regulator accountable for its performance. Regulated entities have a particular right to know the reason their activities may be directed or limited.

The appropriate degree of prescription or detail in legislation is a matter for judgement. Principle-based legislation is likely to be the most appropriate way of meeting policy objectives in complex or rapidly changing fields (see, for example, Haldane, 2012). Where the key principles and objectives are established in legislation, regulators have discretion as to how they are applied, and may choose from a range of regulatory and non-regulatory tools to meet public policy objectives. Achieving compliance with regulation should not be treated as an objective in its own right, but rather as a means to an end.

Where the objectives established in legislation are strategically broad, this will inevitably mean that there will be a greater deal of regulatory discretion for the regulator in interpreting and achieving the objectives. This is often deliberate where there are uncertainties, or the regulated
environment is dynamic and fast-changing, or where there is a lack of information meaning that the regulator is trusted with the “finer detail” in applying the law. Here it is vital that the other principles in this report are strongly institutionalised within the regulator to ensure the competency and structures are in place to manage this discretion.

The objectives of the regulator and any discretion provided to the regulator should not encourage or provide opportunities for “mission creep”. The regulator should remain within its scope of activity that is defined by legislation, and monitored through the practice of open, transparent and accountable processes, with the judiciary being able to call the regulator to task for exercising beyond its legitimately intended powers (ultra vires).

**Competing objectives**

Where two objectives could, at least theoretically, be met concurrently, they are defined as competing. Regulators may be given responsibility to make decisions involving the accommodation of two or more competing objectives. The assignment of potentially competing functions can be desirable or necessary; for example, where service delivery functions generate a strong intelligence base that can readily inform regulatory activities and this is most effectively undertaken within an integrated organisation. An example might be fire services that have fire safety regulatory functions. If competing functions are allocated to one entity, it is important that the legislation is clear that the regulator is required to make trade-offs and may make these in the context of a framework of considerations and priorities that is specified in the legislation or developed with the minister (House of Lords: Select Committee on Regulators, 2007). The regulator may either be given scope to decide, or be provided with guidance as to how these issues should be resolved. In either case, the process and the reasoning underlying particular positions adopted by the regulator should be transparent.

**Functions**

By itself, regulation will rarely be effective in meeting government objectives. All regulators have decision-making functions under statute – that is, they make decisions that may affect people’s rights or direct their actions or behaviours, and are subject to judicial review. Generally these are combined with other functions to encourage or discourage certain actions or behaviours, as a means of seeking to reach defined policy objectives.
Consequently, regulators may also have a number of complementary functions which help them to meet their objectives. These could include administration of voluntary or market programmes, education, providing assistance and implementing incentive systems and reward programmes. Where a regulator has the capacity to perform such functions, it is more likely to properly consider alternatives to regulation and only invoke traditional regulation where it is the most effective and efficient means of reaching a particular goal (Coglianese, 2010). Nonetheless this should not be a substitute for regulation in all cases and often the additional programmes are complimentary in addition to regulation.

Moreover regulators should be afforded the appropriate powers to deliver their objectives. The powers should be sufficient and neither stronger nor weaker than necessary for the regulator to be effective. This may relate to not only powers to investigate, enforce and sanction but also may be in relation to information gathering for instance to monitor the performance of the market. The level of these regulatory powers will require the suitable level of accountability mechanisms to ensure proper functioning of the regulatory regime.

**Conflicting functions**

Where a regulator has a range of functions, it is important that these are complementary and not potentially in conflict. This means that the performance of one function should not limit, or appear to compromise, the regulator’s ability to fulfil its other functions (including its core regulatory function).

The assignment to a regulator of both industry development and regulatory functions, such as protecting health or the environment, can reduce the regulator’s effectiveness in one or both functions and can also fail to engender public confidence. Such conflicting functions can impair a regulator’s clear role and they do not contribute to effective performance. For these reasons, this combination should be avoided.

Multi-agenda or multi-purpose regulators (such as independent multi-sector regulators or regional regulatory authorities with many regulatory priorities) may have conflicting functions such as consumer protection and industry development, and therefore have a more challenging function to fulfil. Such arrangements where a regulator is working on different public interests require good regulatory practices in line with the other principles in this report, as well as regulatory discretion to avoid overall detrimental effects and the ability to select the correct regulatory instrument that meets one conflicting function with another, such as stimulating sustainable energy solutions and oversight in competition. Having institutional arrangements that ensure transparency in decision making, accountability of decisions and actions, and access to provide challenge are crucial.²
Box 1.1. UK growth duty for non-economic regulators

The UK government is intending to introduce a “growth duty” to ensure non-economic regulators take account of the economic consequences of their actions, specifically having regard to growth in their decision making. The evidence gathered through the Focus on Enforcement Initiative and the Post-Implementation Review of the Regulators’ Compliance Code found that in the United Kingdom, regulators can see economic considerations as inconsistent with their existing duties, and in some cases feel constrained from supporting growth when they would wish to do so as they do not have a clear objective in support of growth.

The UK government has expressed its belief that the objectives of securing public protection and economic growth are not incompatible and that the proposed duty will provide a framework for regulators explicitly to consider growth alongside their existing duties to protect, where they have not previously felt able to do so. In considering the “Growth Duty”, the government did not wish to detract from nor undermine the core purpose of these regulatory bodies, but to use the resource of these agencies to encourage compliant businesses to grow through proportionate regulatory activity and provision of reliable advice, without compromising the protection of the public. The “Growth Duty” would be complementary to regulators’ existing duties and would sit alongside existing responsibilities.

Source: Department for Business, Innovation and Skills (2013), United Kingdom.

In the absence of effective regulatory functions being conducted, a regulator should still analyse the potential divergence between private and social costs. The effective and impartial regulation of an industry in the public interest can increase consumer confidence in that industry and contribute to its long-term development. However, explicitly assigning a function such as development or promotion of an industry to a regulator can generate material conflicts, as has been observed in particular cases. For example, vigorously pursuing non-compliance by some industry participants, and alerting consumers to this non-compliance, can have an adverse effect on the industry’s reputation in the short-run, but may be necessary to achieve a consumer safety objective.

Combining the functions of service delivery or the funding of external providers with enforcement of regulatory standards can also present conflicts, particularly when the same staff carry out both functions and report to the same decision maker, and therefore should be avoided. These conflicts may arise because rigorous enforcement of regulatory standards can affect supply of a government service or delivery costs. Where there are
limited suppliers, there may also be pressure to accept lower standards to avoid any service disruption. This can lead to concerns by clients and providers about inconsistent application of standards.

Similarly, providing competitive grants to regulated firms to improve their compliance performance can create perceived or actual conflicts if the regulator subsequently considers enforcement actions against these firms. For example, a review of an Australian environmental regulator found that the regulator had issued an infringement notice to one company, having awarded a grant to fund “beyond compliance” improvements to a related company one week earlier (Krpan, 2011, pp. 279-281). Exacerbating this risk, both the team responsible for administering the grants and the regulatory enforcement team were reporting through the same executive.

Combining functions that manage service delivery or funding to external providers with the work of setting (rather than enforcing) regulatory standards that apply to these funded entities does not necessarily present the conflicts outlined above. For example, a telecommunications regulator may be responsible for setting service standards of privately-provided emergency-call taking, and ensuring adequate funding for those services. Combining both functions can assist the making of informed trade-offs between regulatory standards and the implications for service supply and relationships with providers. On the other hand, where regulatory standards apply to both government-funded entities and other organisations that are not government funded, there can be a conflict in combining functions, as the standards that are formulated may be overly onerous or otherwise inappropriate for non-funded entities. In either situation, the risks will in part be mitigated by a high level of transparency and active engagement in the process by which standards are developed and adopted. Public scrutiny should help to ensure that any compromises made between demands are consistent with community priorities.

Structural separation of conflicting functions is generally ideal, but if this is not possible then attention should turn to the separation of teams with these potentially conflicting roles and their reporting lines. Some form of oversight or review of the regulatory activities is also warranted.

There may be limited cases where the assignment of potentially conflicting functions is desirable or necessary; for example, where service delivery functions generate a strong intelligence base that can readily inform regulatory activities and this is most effectively undertaken within an integrated organisation. An example might be farm extension services that also have pest or disease control regulatory functions. However, any combination of potentially conflicting functions needs to be carefully justified on a public benefit basis. In addition, there should be clear
processes for managing the inherent risks, including through sound and robust stakeholder consultation where appropriate, and providing transparency as to how the conflicts are to be navigated.

**Competing functions**

Given that regulatory agencies have limited staff and financial resources, there will always be competition between various functions for priority. It is important for regulators to ensure their obligations to promote regulatory compliance are given sufficient focus. The rationale and evidence behind regulators’ decisions as to the allocation of resources should be clearly set out in the regulator’s business plan with demonstrated links to the regulator’s objectives.

Combining the functions of service delivery or the funding of external providers with enforcement of regulation also raises the risk that there may not be adequate resources and management attention given to the regulatory task. While separate regulatory units promote the quarantining of resources and a focus of management attention, other mechanisms of internal governance may be able to effectively achieve the same outcome.

While enlightened regulators will seek to help those they regulate to go beyond minimum compliance, this should not be at the expense of work to ensure compliance with regulatory standards. In some cases, recognising the good performance of companies that voluntarily go beyond compliance can free up resources to focus on higher priorities (Hampton, 2005).

For multi-purpose regulators, there is a greater challenge in balancing the competing functions. Not only is there the need to ensure there is sufficient focus on regulatory compliance, but they also need to consider how to allocate resources over the different disciplines in accordance with the calculated risk and outcomes in terms of overall social, economic and environmental welfare.

**Box 1.2. A multi-purpose regulator – Netherlands**

The Netherlands Consumer Authority, the Netherlands Competition Authority (NMa) and the Netherlands Independent Post and Telecommunications Authority (OPTA) merged on 1 April 2013, creating the Netherlands Authority for Consumers and Markets (ACM). The Netherlands Authority for Consumers and Markets is an independent authority that creates opportunities and options for businesses and consumers alike. The ACM is responsible for the economic regulation of water, energy, telecommunications and transport, and competition and consumer protection.

*Source:* Authority for Consumers and Markets (2013), Netherlands.
Regulators’ policy functions

Policy ideas can arise from a wide range of sources, but policy formulation, in its primary sense, belongs to elected governments. Governments determine the principles, objectives, priorities and approaches they take to governing. These are given effect principally through legislation introduced to the legislature, including through funding for specific programmes.

The role of government ministries and agencies is to advise government on policy and deliver the policies of the government of the day. Under ministerial direction, this may involve:

- clarification and elaboration of the implications of government policy;
- application of policy to specific issues;
- research into particular issues and strategies for addressing them;
- consultation with stakeholders;
- development of legislation and subordinate legislation;
- implementation of legislation;
- advice on delivery of programmes and their costs;
- operational programme or service delivery; and
- review of legislation, organisations and programmes.

Some jurisdictions support the principle that independent regulatory agencies should not have primary responsibility for providing policy advice to ministers, and that this should be the role of the relevant ministry.

However, regulators do undertake important policy functions, by virtue of their familiarity with the regulated sector and responsibility for ultimately carrying out regulatory policy (Meister, 2010). First, they must develop more detailed (but often critical) operational policy that guides the implementation of higher-level policy decisions made by ministers or the legislature. Second, they have to develop and approve some higher-level policy, where their authorising legislation has allocated the regulator greater decision-making powers. Third, if policy formulation by ministers is to be well informed, effectively implemented and responsive to changes in the regulatory environment, it is critical that the relevant regulator is actively involved early in the formulation and subsequent refinement of policy to support the development process led by the ministry.
Furthermore, the experience of regulators in operational rules can prompt ministries to review the policy framework within which the regulators operate. Therefore regulators should have a specific and explicit advisory role on government policy. Alternatively, there should be the opportunity for the regulator to input in developing government policy.

The respective roles of the regulator and the ministry should be clear and agreed. Where the regulator has, for whatever reason, been assigned significant policy activities, their parameters and any channels for communicating advice to the minister or ministry should be formally set out, preferably in legislation. Independent regulators should not be exempted from formal requirements to undertake regulatory impact analysis and related consultation processes when developing new regulation. Equally the regulator when undertaking such formal requirements should be conducting such activities as a state-wide actor, not as a subsidiary of the ministry. The priority placed on policy functions and their interaction with the regulator’s other responsibilities should also be clearly articulated.

In addition, regulators should continuously monitor and evaluate the performance of their activities. However, major and periodic policy reviews and evaluation of a regulatory scheme, including the performance of the regulator, should be carried out independently of the regulator. This should be through a transparent process that involves input from the regulator and those affected by its activities.

**Co-ordination**

The effectiveness and efficiency of a regulatory system depends, in part, on the extent to which potential duplication and gaps between regulators are anticipated and avoided in legislative drafting (Rodrigo et al., 2009; Meloni, 2010). Regulators often regulate the same businesses but to achieve different policy objectives. Businesses regulated will sometimes see the activities of different regulators as duplication. Targeted co-ordination of activities can provide opportunities to reduce burdens on the regulated while improving compliance (see for example, Hampton, 2005). However, there needs to be clear authority for co-ordination to remove uncertainty about the legality of any arrangements.

For some regulators, the need for co-ordination may extend to federal regulators, sub-national regulators, or municipal/local government.

Regulators should design appropriate co-ordination mechanisms for regulatory policy practices with all levels of government, including through the use of measures to achieve harmonisation, or the use of mutual recognition agreements (OECD, 2012). Formal co-ordination mechanisms to
clarify roles and responsibilities might include agreements detailing respective roles and co-operation with regulators in other jurisdictions and electronic access to information held by other regulators. The effectiveness of such arrangements will depend on the capacity of regulators to identify opportunities and forge effective working relationships.

Legislation should explicitly empower regulators to co-operate with other agencies and bodies in pursuit of the regulator’s objectives. This will allow regulators to simplify their dealings with business and other entities through delegation, information sharing, joint regulation, and co-regulation. Specific provisions can be included in legislation for accreditation of other bodies’ activities and staff where they are consistent with the standards applied by the regulator. Such provisions will mean that opportunities for improved co-ordination or efficiencies can be easily identified and adopted.

Box 1.3. Legally defined co-ordination mechanisms for the Federal Institute of Telecommunications (IFT), Mexico

i. The IFT will co-ordinate with the federal executive to ensure the installation of a shared public telecommunication network that promotes the effective population access to broadband communication and telecommunication services.

ii. The Congress will create an Advisory Council of the IFT, which will be responsible to act as an advisory body.

iii. The IFT must notify the federal executive before proceeding with the revocation of the concession titles, for him to execute, where appropriate, the powers necessary to ensure continuity of service provision.

iv. The IFT may receive non-binding opinions of:
   - The Ministry of Communications and Transport (SCT) if granting, revocation and authorisation assignments or changes in the control, ownership or operation of companies related to concessions;
   - The Ministry of Finance and Public Credit (SHCP) for fixing the fees or compensations for the granting of concessions and authorisation of services related to these.

Once constituted the IFT, where it reached agreements with other regulators, these should be published, since in the reform of Article 28, Section IX, the law states that IFT promotes government transparency under the principles of digital government and open data.

Source: “Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 60., 70., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones” (2013).
An example of the type of co-ordination that can be encouraged by empowering regulators to co-operate is the Primary Authority scheme in the United Kingdom. Under this scheme, a business operating across council boundaries can form a primary authority partnership with a single regulator from one local council. That regulator then becomes the sole regulator in the defined regulatory area for that business, across all the councils in which it operates, and its regulatory decisions are automatically recognised by all other local regulators.

**Box 1.4. Regulatory co-ordination: UK Primary Authority scheme**

Established in 2008, **Primary Authority** drives consistent and proportionate regulation and reduces duplication of paperwork and inspections. Legally binding agreements between local authorities and businesses provide a single point of contact and assured advice for companies operating across authority boundaries. Primary Authority partnerships already cover 807 businesses with 64,000 premises spread over 107 local authorities. The scheme currently operates in relation to environmental health and trading standards legislation, or specific functions such as food safety or petroleum licensing. It is set to be expanded to cover more regulations and extended to businesses within trade associations and franchises in October 2013.

*Source: Department for Business, Innovation and Skills (2013), United Kingdom.*
Applying the principles – Role clarity

### Objectives

- What are the objectives of the legislation?
- To what extent are trade-offs between objectives likely to be necessary?
  - is there a means for the minister to provide direction on priorities; or
  - is there clear guidance in the legislation as to how the regulator should resolve any trade-offs between objectives in any decision?
- How will any trade-offs between objectives in decision making be made explicit? Is this information clear, comprehensible and available to regulated entities?
- Are the objectives clearly defined? Is there the potential for interpretation that could lead to “mission creep”?
- Is regulatory discretion afforded in legislation? If so why? How will this be managed?

### Functions

- How is the regulator to meet or contribute to the objectives of the legislation (i.e. what are its duties or functions)?
- Does the legislation provide suitable powers to fulfil these functions and meet the objectives?
- Are these powers proportionate to the scale of risk or hazard with which it will be required to deal?
- Is there a need for regulatory discretion being afforded to the regulator? How will this be managed (i.e. what levels of transparency and accountability will be institutionalised)
- Are there conflicts or potential conflicts between any of the regulator’s functions? (Conflicts are most likely between regulatory enforcement and industry development or service provision functions.)
- Are there good policy reasons for keeping conflicting functions together? Do these outweigh the benefits of separating these functions?
- How will any conflicts between functions be managed (e.g. how will any conflicts arising be made transparent, and by what process will any conflicts be resolved)?
- Does legislation allow for a judicial review if the regulator goes beyond the scope and objectives of the legislation?
• Are the respective roles of the minister, ministry and regulator in policy development clearly defined and supported by processes to ensure effective collaboration?

• Is there an explicit advisory role for regulators in policy development?

• What institutionalised processes have been established to ensure close and effective dialogue between the regulator and the relevant ministry in the development of legislation and funding priorities?

• Does the legislation outline the review process to which it and the regulator will be subject (e.g. regular, ad hoc, comprehensive, issue-based, etc.)?

**Co-ordination**

• Have potential overlaps or gaps with other regulators been identified? How will these be handled?

• Does the legislation give the regulator capacity to co-operate with other bodies with shared objectives? These might include capacities to:
  – accredit others’ programmes or schemes as contributing to functions under the legislation;
  – authorise others’ officers for specific functions (e.g. inspection, compliance);
  – enter into agreements with other bodies; or
  – share relevant and appropriate information with other regulators.

• How will information about shared and co-operative programmes be made available to the regulated entities?
Notes

1. These functions are sometimes described as quasi-judicial.

2. For more information, see Georgosouli (2013a).

3. For example, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (2011) described the combination within the then Mineral Management Service of revenue collection and regulation as “Mixing Oil and Water” (p. 64) and noted that for at least 15 years Directors of the Service focused mostly on royalty issues at the expense of offshore regulatory oversight (p. 76).

4. Changing technologies might lead to unanticipated gaps in regulatory regimes. For example, national or sub-national regulation that previously protected privacy through controls on publications might not be effective in a world where information that is anonymously “published” in another jurisdiction is much more readily available.