Chapter 4

Accountability and transparency

Businesses and citizens expect the delivery of regulatory outcomes from government and regulatory agencies, and the proper use of public authority and resources to achieve them. Regulators are generally accountable to three groups of stakeholders: i) ministers and the legislature; ii) regulated entities; and iii) the public. This chapter provides guidance on the accountability structures and transparency mechanisms that should be in place for effective regulators.
**Principles for accountability and transparency**

**Accountability and transparency to the minister and the legislature**

1. The expectations for each regulator should be clearly outlined by the appropriate oversight body. These expectations should be published within the relevant agency’s corporate plan.

2. Regulators should report to ministers or legislative oversight committees on all major measures and decisions on a regular basis and as requested.

3. Governments and/or the legislator should monitor and review periodically that the system of regulation is working as intended under the legislation. In order to facilitate such reviews the regulator should develop a comprehensive and meaningful set of performance indicators.

**Accountability and transparency to regulated entities**

4. Information and access to appeal processes and systems should be made easily available to regulated entities by regulators. Regulators should establish and publish processes for arm’s length internal review of significant delegated decisions (such as those made by inspectors).

5. Regulated entities should have the right of appeal of decisions that have a significant impact on them, preferably through a judicial process. Such right of appeal shall be allowable, *inter alia*, on the grounds that the regulator has exceeded the powers attributed to it, insufficiency of consultation, and/or material omissions in the evidence and actions that are disproportionate to the issue being addressed.

6. Regulators may rescind decisions as a result of appeal.

**Accountability and transparency to the public**

7. Key operational policies and other guidance material, covering matters such as compliance, enforcement and decision review, should be publicly available.

8. The regulator should recognise its special responsibility in ensuring that members of the public have channels of complaint and possible redress in relation both to the actions of a regulated entity and to the actions of the regulator.

9. All major decisions made by the regulator shall be accompanied by publicly stated reasons.

10. The opportunity for independent review of significant regulatory decisions should be available in the absence of strong public policy reasons to the contrary.

11. The right of appeal of decisions by the regulator should be extended to members of the public where their standing is recognised by the judiciary.
Accountability and transparency to ministers and the legislature

Accountability and transparency is the other side of the coin of independence and a balance is required between the two. Comprehensive accountability and transparency measures actively support good behaviour and performance by the regulator, as they allow the regulator’s performance to be assessed by the legislature or responsible other authority.

The Australian National Audit Office has also argued that:

*Increasing the transparency of, and regulated entities’ confidence in, the regulatory regime, can be expected to increase the level of voluntary compliance. This has the potential to reduce administrative costs for regulators and compliance costs for regulated entities* (ANAO, 2007, p. 25).

The regulator exists to achieve objectives deemed by government and the legislator to be in the public interest and operates within the powers attributed by the legislature. A regulator is therefore accountable to the legislature, either directly or through its minister, and should report regularly and publicly to the legislature on its objectives and the discharge of its functions, and demonstrate that it is efficiently and effectively discharging its responsibilities with integrity, honesty and objectivity (OECD, 2012; Department of Public Enterprise, 2000). A system of accountability that supports this ideal needs to clearly define what the regulator is to be held accountable for, how it is to conduct itself and how this will be assessed.

The judiciary should help ensure that the regulator operates within the powers attributed to it. The regulator has a responsibility to the regulated entities to exercise its powers in a way that increases confidence in the market, rule of law and in general trust in the state. At the same time the regulator is also answerable to the public for how it makes use of its powers and for the way in which it exercises them and whether it achieves the policy goals it is intended to exist for.

**Clear expectations**

A good mechanism for ministers and regulators to achieve clear expectations is for ministers to issue a statement of expectations to each of their regulators (both independent and ministerial regulatory units). Each
statement should outline relevant government policies, including the
government’s current objectives relevant to the regulator, and any
expectations on how the regulator should conduct its operations. The
statement needs to be consistent with the extent of independence of
decision-making enshrined in the regulator’s enabling legislation. The
regulator should formally respond by outlining how it proposes to meet the
expectations of government in its corporate plan or similar document, such
as a statement of intent. This document should include key performance
indicators agreed with the relevant minister. Where competing priorities
exist within a regulator’s functions for a given objective, the corporate plan
should outline a set of prioritising principles.

The statement of expectations and corporate plan (including key
outcomes, outputs, quality and timeliness performance indicators and targets
agreed between the minister and the regulator) should be published on the
regulator’s website. The performance of the regulator should be clearly
aligned to the achievement of the government’s policy objectives. Through
this process, it becomes clear to all stakeholders what the regulator is there
to achieve and what it is accountable for. The statement of expectations and
corporate plan should be reviewed by the minister and regulator when there
is a significant change in government policies or change in the operational
environment, or a new minister is appointed.

Involving relevant stakeholders, where appropriate, in defining the
expectations will improve the extent of stakeholder buy-in of the regulatory
activity and the outcome.

Accountability to the legislature

The legislature confers powers on the regulator and the regulator should
report on its activities and outcomes to the legislature (OECD, 2012;
Department of Public Enterprise, 2000).2

Independent regulators should report on their performance annually to
the legislature, such as legislative oversight committees, directly or via their
minister, and publish a report. The annual report should primarily report
against key agreed outcomes and indicators and include any additional
direction from the minister made after the issue of the statement of
expectations and the minister’s endorsement of the regulator’s corporate
plan.

Ministerial regulatory units should report on their activities and
outcomes either within ministry annual reports or separately. Reporting
should be rigorous and provide a level of disclosure to the community
similar to that of independent regulators, while reflecting the size and
importance of the regulatory unit.
The responsibility for the overall regulatory framework is not with the regulator. This remains with the government and or legislature who should conduct monitoring and periodic reviews of overall regulatory system. Regulators should assist in this important task by having comprehensive and meaningful performance indicators to furnish such oversight activities (see Chapter 7).

**Transparency of operational policies**

In addition to publishing objectives, clear operational policies covering compliance as well as enforcement and decision reviews should be made publicly available by the regulator, with any necessary guidance material to aid understanding of these matters. All operational policies and guidance materials should be consistent with the outline contained in the statement of expectations of how the regulator is to conduct itself, and explain to stakeholders how the policy contributes to regulatory outcomes. Disclosure by the regulator of these policies and guidance materials should contribute to the public and regulated entities having confidence and understanding of what is expected of them and how their compliance will be monitored, judged and enforced in the event of breaches of the law (Deighton-Smith, 2004).

The regulator should disclose what rules, data and informational inputs will be used to make decisions. However, where such disclosure would likely lead to gaming of the regulatory system by regulated entities, it would be appropriate for the regulator to be permitted to limit such transparency.

**Box 4.1. Limitation to transparency in Netherlands**

Regulators may opt to limit transparency for several reasons. In the Netherlands the Authority for Consumers and Markets may do so:

- when it concerns information that is specifically sensitive to the regulated entities. In those cases, transparency is expected to cause a detriment to the regulated entities. In the Dutch Freedom of Information Act (Wet openbaarheid van bestuur) some exceptions are outlined for the public sharing of governmental information;
- when information sharing can cause have a negative influence on the market; and.
- when the regulated entity is involved in an investigation by the regulator.

Transparency in the actions and decisions of regulators is beneficial for preventing reviews of decisions. By being open and providing explanations of decisions regulators can avoid the risk of a large number of appeals to those processes provided the decisions are perceived to be fair and evidence based.

Enforcement actions should also be disclosed in a timely and readily accessible manner. However, limiting transparency may be appropriate where confidentiality is required, for example, in relation to enforcement actions that have not yet been resolved (and where disclosure may prematurely affect the reputation of a regulated entity.)

**Accountability to regulated entities and the public**

Citizens and businesses that are subject to the decisions of public authorities should have ready access to systems for challenging the exercise of that authority (OECD, 2012). Equally regulators should also recognise its duty to provide avenues for complaint and redress. This is not only in relation to the actions of regulated entities, but also in relation to its’ own actions. This demonstrates the regulators’ acknowledgement that such corrective procedures are vital in maintaining the trust of stakeholders as well as ensuring the desired outcomes, while limiting unintended consequences.

Such channels should include internal review of delegated decisions, as well as more robust external review by a body such as a court. An important distinction can be made between the principle that specific decisions of a regulator should be subject to judicial review, and the regulator’s ultimate accountability for its performance to the legislature and/or minister.

Delegated decisions (such as those of inspectors) can have a material effect on regulated entities and should be subject to a timely and transparent internal review process on request. The regulator should advise the regulated entity of any options for internal review when they are informed of the decision. The internal review process should be published and made accessible to regulated entities. The internal review unit should be as operationally separate from those responsible for the initial decision as practicable. For significant decisions such as those by inspectors, the internal review process should be at arm’s length from the regulator. Where the review upholds the original decision, the regulated entity should be given a reason as to why the decision was upheld.

There should also be timely, transparent and robust mechanisms for the external review or appeals of significant regulatory decisions. External reviews or appeals can act as an accountability mechanism and can improve
the quality of the regulator’s decision-making and internal review processes. The regulator should outline on its website the process by which regulated entities may seek an external review or appeal. In many cases, such decisions will be able to be reviewed by an Administrative Tribunal or Court. If the appeal is successful then regulators should be able to rescind on those decisions.

Formal complaints can be made about the regulator to an Ombudsman or similar public “watchdog” if the conduct complained of falls within the Ombudsman’s jurisdiction and the complaint has not been able to be resolved between the regulator and the complainant. The contact details for the Ombudsman or similar complaints body should be published on the regulator’s website.

### Box 4.2. Reviewing regulatory decisions in the United Kingdom

A common finding in the United Kingdom is that businesses thought that there was a lack of appropriate appeal mechanisms or not enough information about what appeal rights existed or how a regulator’s decision could be challenged or a second opinion given. As a result, the UK government launched a specific review of how appeals and complaints mechanisms operate across the range of local and national regulators.

The revised Regulators’ Code has clarified the requirements regarding appeals mechanisms. The Code states that regulators should:

1. Provide an impartial and clearly explained route of appeal against a regulatory decision;
2. Provide a timely written explanation of any right to representation or appeal that can be clearly understood; and
3. Clearly set out information on how those they regulate can make a complaint.

1. Further details about the review can be found at: [http://discuss.bis.gov.uk/focusonenforcement/closed-focus-areas/regulatory-appeals-mechanisms](http://discuss.bis.gov.uk/focusonenforcement/closed-focus-areas/regulatory-appeals-mechanisms).


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

The right to appeal is often permissible on the grounds that the regulator has exceeded its own attributed powers, or it did not engage in sufficient consultation before taking a decision, or it made material omissions in the evidence it based its decision on, or the actions taken were disproportionate to the issue being addressed. As good practice, all major decisions taken by regulators should be made publicly available with the justification for those decisions.
Other accountability structures, such as independent reviews of significant regulatory decisions should also be encouraged as a matter of course, not just where an issue has been raised. Such scrutiny bodies may compliment the accountability of regulators to the legislature. The United Kingdom’s Regulatory Policy Committee (RPC) is an independent advisory non-departmental (non-governmental) public body tasked with providing independent scrutiny of proposed regulatory measures put forward by the UK government. As of July 2013, the RPC has a new role under the Accountability of Regulatory Impact (ARI) scheme. Under the ARI, non-economic regulators, such as the Health and Safety Executive and the Environment Agency, that are planning a significant change in policy or practice will be expected to assess and quantify the impact of that change on business, and share their assessment with businesses affected, and where possible agree it with them. Where an agreement cannot be agreed, the RPC will investigate, assess and determine the best means of resolving the dispute, which may include arbitration.

Box 4.3. Accountability and transparency practices in Australia

The Australian Competition and Consumer Commission (ACCC) and Australian Energy Regulator (AER) each maintain websites containing a broad and detailed range of documents to assist stakeholders in understanding the nature of their work. The ACCC and AER provide public versions of all draft and final regulatory determinations on their website. In addition to these transactional documents, the ACCC and AER both produce guidance for stakeholders on operational policies.


The AER is currently undertaking a Better Regulation reform programme (www.aer.gov.au/Better-regulation-reform-program), which includes the publication of a series of guidelines by 29 November 2013 that set out their approach to regulation under new National Electricity and Gas Rules. The AER has published draft guidelines on its website, which have been the subject of consultation with stakeholders.

## Applying the principles – accountability and transparency

### Accountability to minister and the legislature

- Has the minister or other appropriate oversight body provided a written statement of expectations to the regulator? If not, how have the expectations of the regulator been provided?
- Does the regulator publish a corporate plan outlining how the regulator intends to meet objectives set by legislation and the minister’s or appropriate oversight body’s statement of expectations?
- When are the statement of expectations and corporate plan reviewed and revised?
- Is there a legislative requirement for the independent regulator to produce an annual or regular report to the legislature?
- Is there a legislative requirement for all major measures and decisions to be reported to the minister or legislature?
- If the regulator is a ministerial regulator, does it provide the same level of public reporting on its activities and outcomes as would be required if it were an independent regulator?
- Do the agreed performance indicators provide sufficient and clear information to enable meaningful assessment of the regulator’s performance across the range of its responsibilities? Do they contribute to government and or legislature’s monitoring and periodic reviews of the regulatory framework?
- Have key outcome indicators for publication in the annual report been agreed with/by the minister and/or legislature?

### Accountability to regulated entities

- Does the regulator provide easily accessible guidance material on appeals processes and systems to regulated entities?
- What is the regulator’s process for internal review of significant delegated regulatory decisions?
- Are regulated entities advised that internal review of significant delegated regulatory decisions is available when they are informed of the outcome of the decision?
- Is the right of appeal through judicial process available for regulated entities? Under what circumstances?
- Can the result of the appeal mean that regulators can rescind the decision?
- Is the process transparent, timely and conducted at arm’s length?
- Is the internal review unit as operationally separate from the decision-making body as possible?
Accountability to the public

- Has the regulator published its key operational policies?
- Are there good public policy reasons for not publishing some of this information? What are the reasons?
- Is the information on reviews and appeals processes easily accessible and communicated in an easy to understand format?
- Are all major decisions made by the regulator published? Is the justification published or made public?
- Are there any strong public interest reasons why all the significant regulatory decisions should not be able to be subject to both internal review and external appeal?
- Can independent external reviews of significant regulatory proposals be conducted? Under what circumstances? Does there need to be strong public interest or concern to conduct it?
- What independent bodies can conduct independent external reviews?
- What decisions can be appealed by the public?
- On what grounds can decisions be appealed by the public?
- During the appeals process, are decisions suspended or overturned, or do they remain in force until a decision has been made?

Notes

1. This proposal was introduced in Uhrig, John (2003). The more routine and ad hoc communication that can occur between Ministers and regulators is discussed in Section 3.4.1 of this paper.

2. Some implicitly argue that higher accountability requirements imply less independence for a regulator. An index of the independence of regulators created by Gilardi (2002) was used to measure the impact of regulatory independence on investment by Cambini and Rondi (2011). In this index, Gilardi has formulated it so that formal obligations for a regulator to report to the Government or the legislature lead to a lower score for independence. Hanretty, Larouche and Reindl (2013) using similar indices found no such trade-off between regulators’ accountability scores and independence scores. This can easily be understood if legislators bestow greater initial independence in other respects if they are assured (or have trust) that the regulator will come back to report to them.