

# **ITU Workshop on Policy and Regulations for Newly Established Regulators in the Asia Pacific Region**

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## **Legal Framework: Overview (1 &2) Session 1**

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# Why Regulate?

- Address market failure
- Ensure consumer interests are protected
- Create a favourable climate for investment
- Implement safeguards to create effective competition
- Prevent anticompetitive practices
- Optimize use of scarce resources

# What is a regulator?

- Regulator = reform manager who is expected to create a stable regulatory environment within the context of government policy
- Regulator = protector of investors, who is expected to provide assurance against “administrative expropriation” of investments made by private operators
- Regulator = promoter of competition
- Regulator = advocate and defender of socio-political objectives such as universal service/access, promotion of research and development, and consumer protection

# Legal Basis

- Several legal elements must be in place to ensure the success of the regulatory body:
  - Legal framework for ICT sector must be implemented (i.e., ICT law and regulations)
  - Law must give regulator the authority and means to effectively define and apply regulations in a market. These characteristics are important, especially in markets where incumbent operators have extensive political and financial power

# Modifications to Telecommunications Legislation to Address Convergence

- Reforms are taking place to address new challenges posed by convergence
- Merging of broadcasting and ICT regulation
- Primary areas of regulatory reform of telecommunications frameworks:
  - Licensing regimes
  - Spectrum
  - Licensing rights and obligations (interconnection, numbering, and universal service)

# Convergence and regulation

## Expanding cross-sector reach of ICT regulation

- ICT regulation encroaches increasingly on broadcasting and content regulation (e.g. spam, cybersecurity, etc.)
- Requires new legislation or clearer procedures ensuring co-ordination or consolidation of regulatory responsibilities among different entities

## Expanding scope of duties and functions of the regulator

- Increasing ICT industry promotion role played by regulator (e.g. as part of USO objectives and NGN roll-out initiatives)
- Addressing the huge challenge of trying to minimize the market distortions arising from regulatory treatment of different technologies
- to understand engineering and to carry out complex economic and legal analysis

## ICT regulation and other forms of regulation

- Cross-cutting nature of ICT regulation entails co-ordination and familiarity with other laws and regulations (e.g. intellectual property laws, competition law, investment laws, etc.)

# Elements of an Effective Regulator remains

## 1. Structural Independence

- Reduces possibility of political or industry capture
- Separation of regulator from operator, insulation from external pressure, not being wholly dependent on the related ministry in charge of telecom/ICT policy

## 2. Financial Independence

- Funding should be free from political and private interest influence
- Two main sources of budget: (1) allocation from government budget; (2) collection of regulatory fees for licenses, fines, spectrum usage etc.

## 3. Functionality

- Ability of regulator to carry out its daily activities effectively

# Other factors that constitute an effective regulator

- **Ensuring competent management and decision-making**
  - Stipulation of qualifications for board or commission members
  - Provisions for removal in case of failure to perform
- **Safeguards against conflicts of interest and undue influence**
  - Disqualification from appointment where there is a conflict of interest (e.g. interests held in regulated sector)
  - Duty of disclosure in situations of potential conflict
  - Appointment to fixed terms and protection from arbitrary removal
- **Ensuring effective staffing and adequate funding**
  - Flexibility over employment and remuneration decisions (e.g. ability to give higher salaries to professionals, power to engage consultants, etc.)
  - Provision of a stable source of funding for the regulator

# The regulatory process

- Goals of transparency, objectivity, professionalism and efficiency can be achieved by:
- Consultation
  - Use of public processes where time permits
  - Solicitation of opinions and views from all affected parties
- Assessment
  - Gathering of relevant information before regulatory decision-making
  - Examination of the impact of regulatory intervention before implementation
- Publication
  - Publication of significant decisions on publicly available channels
- Simplification and standardization
  - Promulgation of regulations of general application (as far as possible)
  - Stream-lined decision making processes – establishment of clear timelines and schedules

# Benefits of Transparent Procedures

- *Efficiency and Effectiveness:* open processes promote consensus and increase confidence; public participation brings in new ideas and increases support for decisions
- *Certainty and Reliability:* transparency builds stability which in turn attracts investment
- *Accountability and Independence:* reduces political interference
- *Continuity:* transcends political changes

# Coordination Between Entities

- Ministry and regulator each have key role to play
  - ➔ Ministry's key role is to set broad policies for the ICT sector and the state. However, policies should not serve as the "regulations" that are imposed on regulators.
  - ➔ Regulator must have a clear and separate focus on technical, economic and consumer issues.

# Need for Clear Mandate

- Regulatory powers (mandate) are the tools needed by regulators to monitor, enforce and balance the sector:
  - Essential to be an effective regulator
  - Must be clear and provide enough authority
  - Must cover all the key issues of the sector
  - However, regulators should take care not to abuse these powers
  - Independent of the regulator's structure – they can be shared among different entities – in this case though there is a need for clear coordination procedures

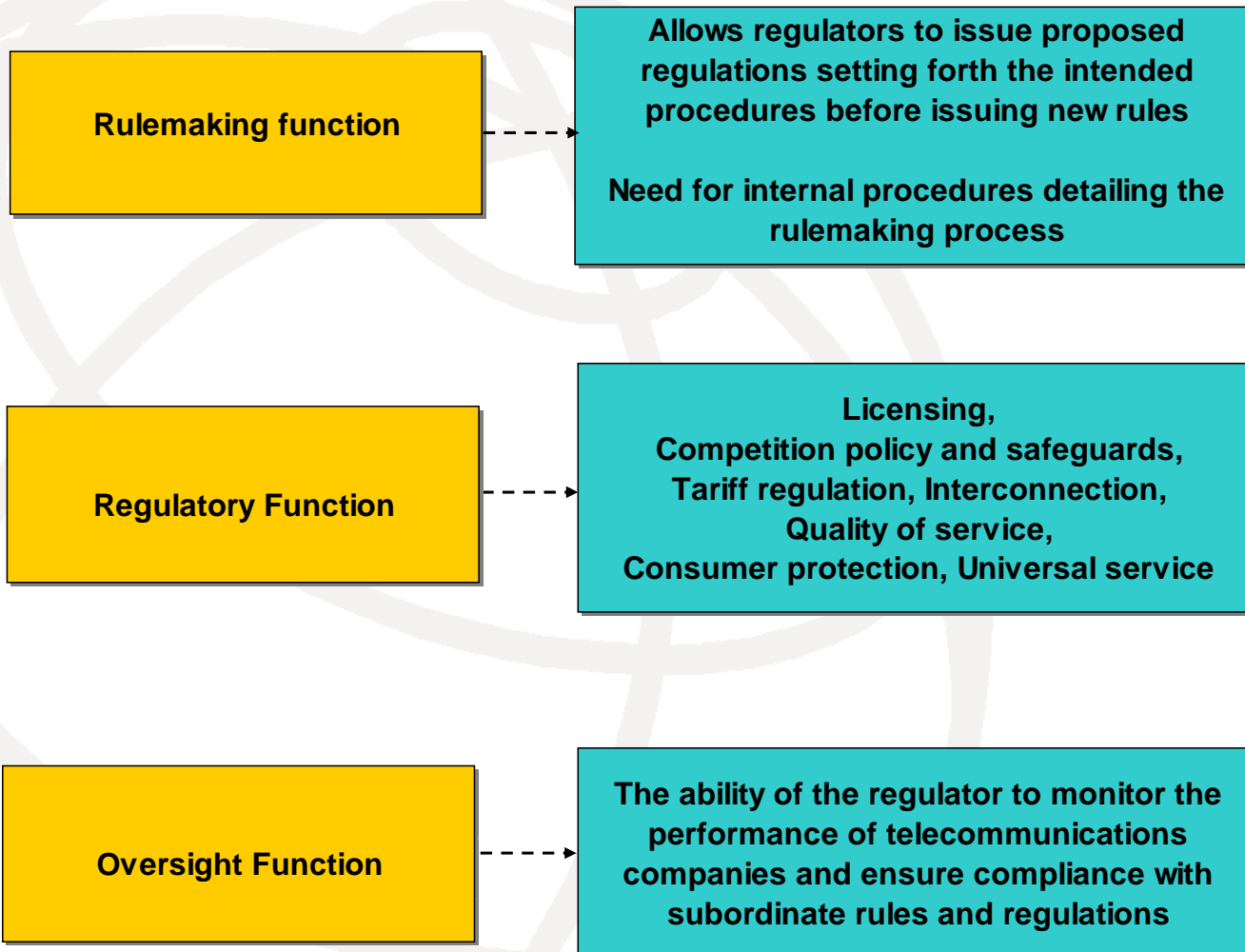
# Scope of regulatory responsibilities changing structures

- telecommunications:
  - ➔ EU National Regulatory Authorities (NRAs) such as Austria and France
- telecoms and radio spectrum:
  - ➔ many EU NRAs, Estonia, Jordan
- communications sector (converged regulators):
  - ➔ ACMA (Australia), FCC (United States), CRTC, ICASA (South Africa), OFCOM (United Kingdom), MCMC (Malaysia)
- multi-sector utilities:
  - ➔ Bahamas, Jamaica, Germany, Rwanda, Latvia, Malawi
- international co-ordinator:
  - ➔ ECTEL

# Changes in institutional design & expanding mandate

- Three primary **institutional designs** for telecommunications regulatory entities:
  - ➔ Single-sector regulator: sole function is to oversee the telecommunications sector.
  - ➔ Multi-sector regulatory authority: usually encompasses various industry sectors considered to be public utilities, *e.g.*, telecom, water, electricity, and transportation.
  - ➔ "Converged" regulator: tend to have oversight for information and communications technologies, including broadcasting.

# Powers of the Regulator



# Regulatory Functions: Licensing

- Licensing responsibilities generally include:
  - Preparation and publication of model licenses
  - Development of license application guidelines and evaluation criteria
  - Management of licensing process
  - Establishment of license fees
  - License renewals
  - Monitoring and enforcement of licensing conditions

# Regulatory Functions: Spectrum Management

- Spectrum management is typically a function of telecommunications regulators
  - Includes development of a national frequency plans, allocations and licensing
  - International coordination (ITU, regional)
- Necessary to ensure efficient use of a scarce resource
  - Monitoring of spectrum use to avoid interference and illegal use
- Clear rules and transparent planning (public spectrum charts)
- If the authority is divided among agencies:
  - Need a clear “map” of who does what regarding spectrum management
    - Government management
    - Regulatory management
    - Coordination mechanisms

# Regulatory Functions: Interconnection

- Regulators play a critical role in overseeing interconnection
  - It is one of the most important regulations to put in place before competition can be successfully introduced
  - It is the most contentious regulatory issue given its fundamental impact on the overall operation of competing telecommunications networks.
- To facilitate competition, regulators must ensure that:
  - the interconnection framework is clearly defined
  - interconnection charges between networks are based on objective, economically sound, and solidly substantiated costs

# Regulatory Functions: Competition Safeguards

- Specific obligations may be imposed on dominant operators or service providers or those providing universal service
- Differences in regulatory treatment are due to differences in position in the market
- In order to guarantee transparency in relation to companies, all criteria and procedures by which specific obligations may be imposed must be specified in the license or authorization or in the applicable rules

# Regulatory Functions: Universal Access/Service

- The tool for regulators to make certain that telecom/ICTs services are accessible to the widest number of users at affordable prices
- Regulators may decide which operator/s must provide universal service
  - One operator to provide universal service – nationwide
  - Different operators – divide the territory or the elements of the universal service.
  - Designation mechanism must be efficient, objective, transparent and non-discriminatory
- Regulators may decide the services to be included in universal service
  - Need for input from operators and consumers
- Regulators decide on the financing instrument
  - Universal Service Funds or others (e.g., taxation)
  - Establish clear procedures to manage the financing instrument

# Regulatory Functions: Cost Accounting Issues

- Key Action Points for Regulator:
  - ➔ Ensure existence of detailed cost modeling model
  - ➔ Define Type of Cost Accounting Methodology to be used (e.g.: LRIC)
  - ➔ Effective Disclosure of Parameters used for assessing Cost Accounting Methodologies (e.g.: number of subscribers, key for cost allocation between network components,...)
  - ➔ Ensure Publication of Accounts in accordance with obligations
  - ➔ Effective Enforcement of Cost Accounting Separation Obligations by Regulator

# Regulatory Functions: Rate Regulation

- Rate regulation facilitates opening the market to competition and prevents abuse of dominance
  - ➔ Rate regimes must be effective and transparent in order to contribute to the orderly evolution to competition in the telecommunications sector
- Asymmetrical for dominant operators before markets are competitive
  - ➔ Ex ante regulations prevent abuse of dominance
- Prices should be just and reasonable
  - ➔ A balance between allowing competition and not constraining dominant operators
- Clear and transparent: explain methodologies
- Meet with operators to obtain their inputs

# Regulatory Functions: Consumer Protection

- Consumer Protection function:
  - ➔ Involves the regulator's oversight of operators' obligations to ensure protection of consumer rights
    - Accurate billing
    - Privacy
    - Contract policies & procedures
    - Consumer complaints
    - Slamming & cramming, etc.
    - Quality of Service

# Oversight Function

- The oversight function of a telecommunications regulator consists of its ability to **monitor** the performance of telecommunications companies and ensure **compliance** with the telecommunications regulation and other subordinate rules
- To ensure the effectiveness and transparency of the oversight function, regulators must put in place detailed subordinate guidelines such as dispute resolution and **enforcement** procedures

# Appeals

- Procedures to overturn regulatory decisions
- Another mechanism to ensure the accountability of regulators is to allow for appeals of regulatory decisions to a higher level in the regulatory and institutional framework. The legal framework for individual countries is of paramount importance when considering what mechanisms are available for appealing or overturning regulatory decisions. The effectiveness of the regulator can be undermined if the appeal process is closely linked to the executive branch, if regulatory decisions are put on hold or “stayed” during the appeal process, or if the appeal process is easily manipulated for the benefit of particular stakeholders.
- In the first instance, the country’s telecommunications law usually articulates the general process for appeals or reconsiderations of the regulator’s decisions, and then the regulatory authority implements detailed internal procedures for reviewing and appealing administrative decisions. Clear and transparent appeal procedures enhance the independent regulator’s credibility and give operators and other stakeholders, including consumers, a sense of stability in the regulatory process.

# Dispute Resolution: Role of the Regulator

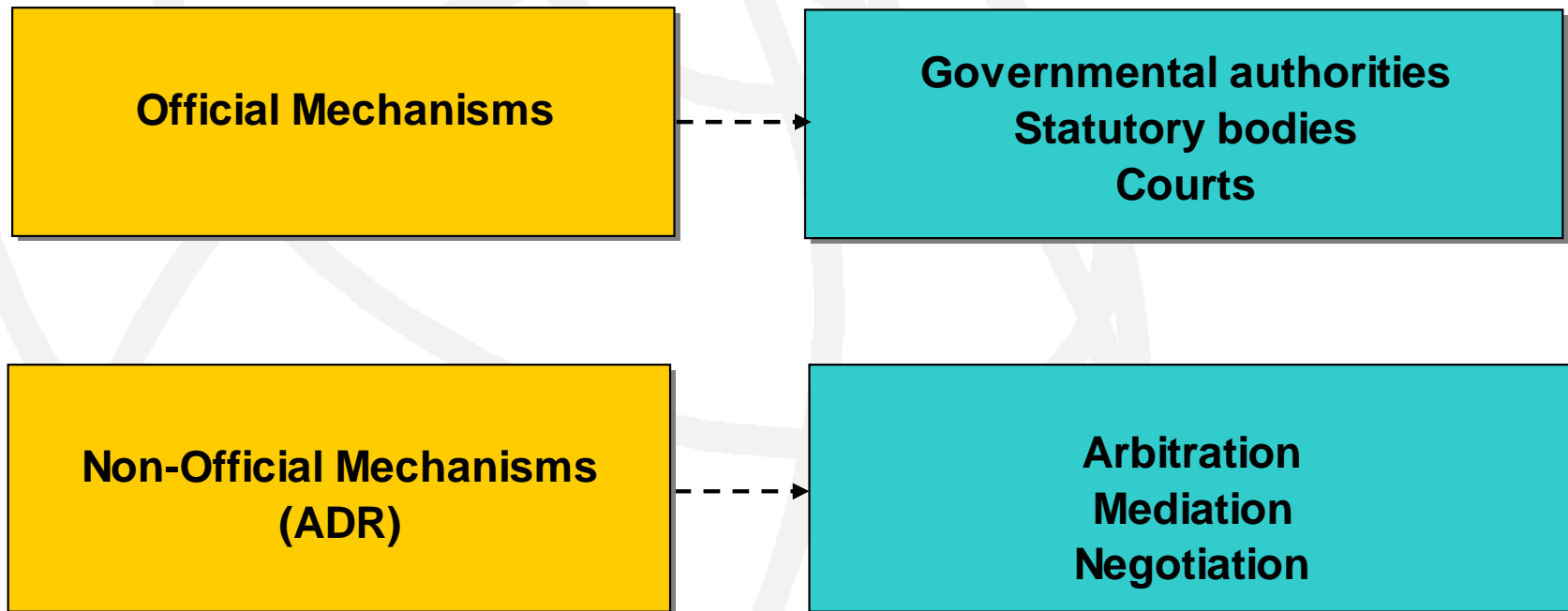
- The role of the regulator in the dispute resolution might be one or both of the following:
  - ➔ *Mediator / conciliator*, a neutral part in order to facilitate the contractual negotiations. As a neutral part the regulator guides the negotiation process, advising and listening to all sides, and helps the parties arrive, if possible, at a “win-win” settlement, or at best one which the parties can live with
  - ➔ *Adjudicator*, exercise of their legal powers to make decisions and adjudicate on disputes brought before them
- Ultimately the role of the regulator depends on its legal mandate

# Oversight functions: Enforcement

- Maintains order in the sector and imposes compliance with laws and policies
- Facilitates predictability, stability and growth of the sectors
- Stimulates competition
- Deters wrongdoing
- Protects consumers and ensures effective exercise of licensees' rights
- Ensures service quality
- Guards public safety and other services from interference and promotes efficient use of scarce resources such as spectrum

# Regulatory Processes: Dispute Resolution

Dispute resolution mechanisms generally include:



# Regulatory Processes: Enforcement

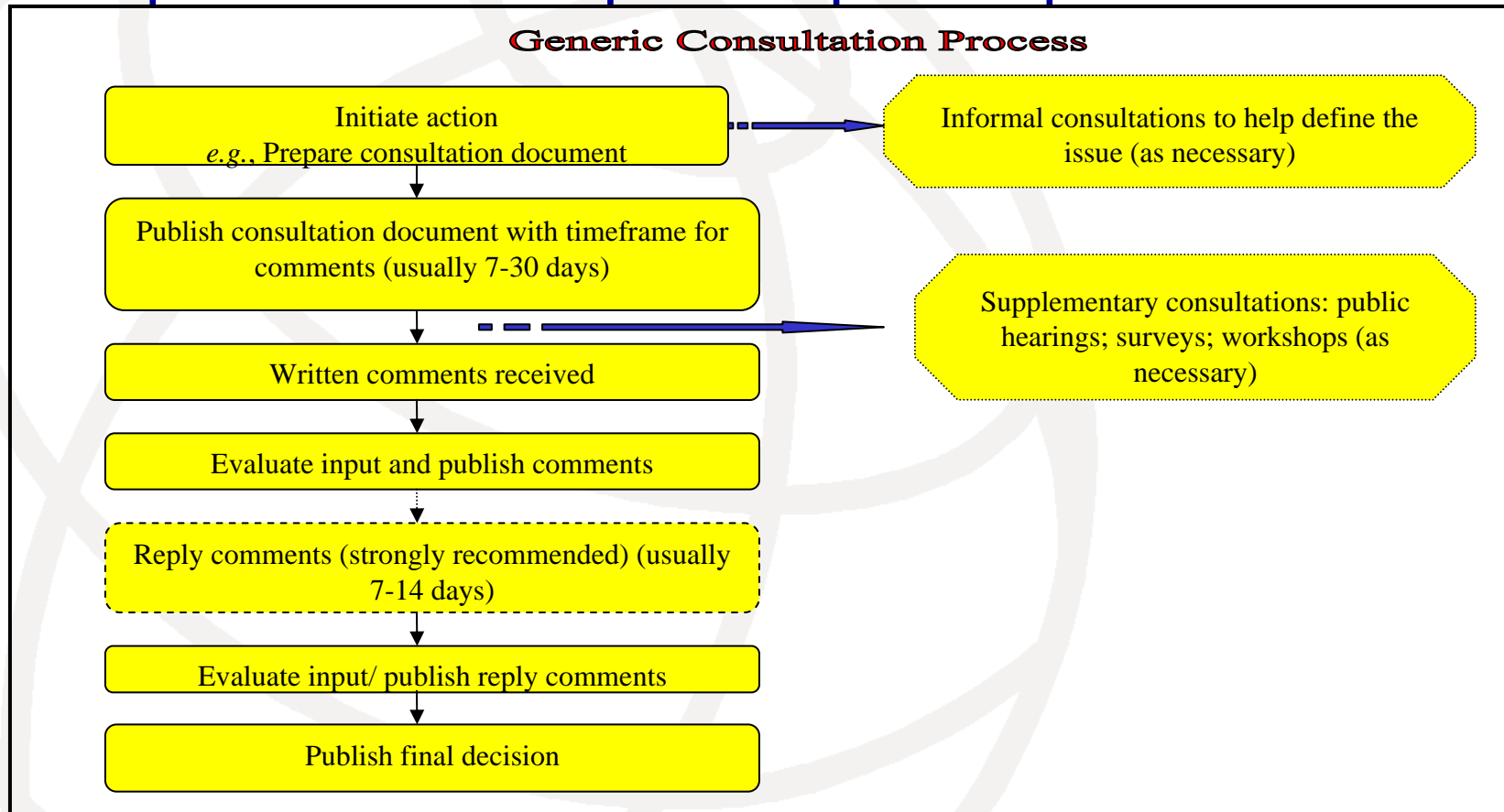
- Minimum attributes of an enforcement regime:
  - Adequate resources for regulator to exercise enforcement activities
  - Enabling legislation empowering regulator with ability to: dispose of substantive matters, conduct inquiries, collect and request information, determine culpability, impose sanctions
  - Efficient mechanism for dealing with complaints regarding non-compliance of rules, regulations and license conditions
  - Transparent procedures for investigations, judgment criteria, sanctions and appeals, and dispute resolution
  - Accountability and appeal mechanism to a higher level within the regulator or outside body, such as a court or ministry

# Summary incumbent compliance programme

- effective internal compliance works
- features of compliance programme:
  - ensures awareness where necessary
  - tailored delivery
  - embed into culture
  - auditable process with regular review
- enforcement:
  - failures will still occur
  - effective and speedy resolution key

# Regulatory Processes: Decision Making

- Ensure principles of transparency, openness and public participation



# GSR 09 Best practice guidelines

## ■ **Building effective regulatory institutions**

- We recognize the importance of regulatory authorities being able to carry out their mandate efficiently, while ensuring consistency and transparency of regulation, equal treatment of market players and accountability of regulatory decisions.
- We stress the importance for regulatory authorities to be empowered with suitable tools to ensure enforcement of the various laws, by-laws, regulations and procedures.
- We recognize that the creation of a converged regulator in charge of ICTs and broadcasting could be an effective step towards enabling market integration in a converged environment. Should this not be feasible, closer coordination and collaboration between the sector-specific regulatory authorities in charge of telecom, broadcasting and electronic media, as well as authorities in charge of competition is essential.
- We recognize that a converged regulator will require skilled human resources and adequate financial resources in order to perform its extended mandate successfully.
- We stress the importance of integrating into the mandate of the converged regulator strategic and policy activities to build the information society and to play an inter-sectoral coordinating role.
- We recognize the importance of close collaboration with other concerned agencies to ensure that appropriate measures and tools are put in place to safeguard Intellectual Property Rights (IPR), Internet safety covering such issues as the protection of the children online and fraudulent activities.

# GSR 09 Best practice guidelines

- We recognize that, in order to stimulate investment to grow converged markets, regulators need to further:
  - Foster competition in converged services over wireless networks through efficient and integrated spectrum management, using market based tools such as auctioning to assign spectrum more efficiently while recognizing that spectrum is a public good.
  - Apply effective, proportionate and non-discriminatory regulatory measures to enable the development of convergent bundled services while promoting competition among market players, and offering a level playing field for small niche players.
  - Raise awareness of the benefits and risks of technological progress for the market and consumers and consider regulatory measures to address issues such as personal and data protection, consumer rights, protection of minors and vulnerable segments of the society and protection of end-users.
  - Involve all stakeholders in policy setting, improve transparency, conduct public consultations and consider other collaboration mechanisms to further dialogue with industry, consumers and other stakeholders, employing self-regulatory measures to the widest extent feasible.

# Conclusions

- Key elements that regulators should incorporate:
  - Regulatory flexibility
  - Neutrality
    - Network neutrality
    - Technology neutrality
    - Service neutrality
    - Spectrum neutrality
  - Licensing – keep it simple
  - Seek industry input
  - Need to keep in mind that an effective modification of the regulatory framework to address convergence requires an interwoven solution that addresses all key areas and changes to one area will affect other areas
  
- All these issues are addressed in ITU/*infoDev* Regulatory Toolkit – [www.ictregulationtoolkit.org](http://www.ictregulationtoolkit.org)