

Legal and Institutional Aspects of Regulation

Global Symposium for Regulators

Roundtable Discussion

Yasmine, Hammamet, Tunisia

14 November 2005



ENSURING TELECOMMUNICATIONS SUCCESS AROUND THE WORLD

Introduction

Objectives of the module:

- Address the importance of an appropriate legal, regulatory, and institutional framework for effective regulation
- provide regulators, policy makers, and stakeholders with best practice guidelines, examples and practical approaches to ICT regulation

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Online Module

Main Study

(divided into different chapters and subchapters as further described in the presentation)

Practice Notes

(consists of case studies and summaries of additional materials related to the subject matter)

Reference Materials

(resources used to prepare the study and module)

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Overview of Online Module

The screenshot shows the 'ICT REGULATION TOOLKIT' website. The page title is 'LEGAL AND INSTITUTIONAL ASPECTS OF REGULATION'. The left sidebar contains a 'TABLE OF CONTENTS' with the following items:

- ICT REGULATION TOOLKIT
 - AUTHORIZATION OF TELECOMMUNICATIONS SERVICES
 - LEGAL AND INSTITUTIONAL ASPECTS OF REGULATION
 - 1 INTRODUCTION
 - 2 WHY REGULATE?
 - 3 LEGAL CONTEXT OF REGULATORY REFORM
 - 4 IMPACT OF CONVERGENCE
 - 5 ELEMENTS OF EFFECTIVE REGULATION
 - 6 ORGANIZATIONAL AND INSTITUTIONAL APPROACHES TO REGULATION
 - 7 FUNCTIONAL ASPECTS OF REGULATION
 - 8 REGULATORY PROCESSES
 - NEW TECHNOLOGIES AND IMPACTS ON REGULATION
 - RADIO SPECTRUM MANAGEMENT
 - COMPETITION AND PRICE REGULATION

The main content area shows the start of the 'LEGAL AND INSTITUTIONAL ASPECTS OF REGULATION' chapter, including an introduction and the first section, '1. Introduction'.

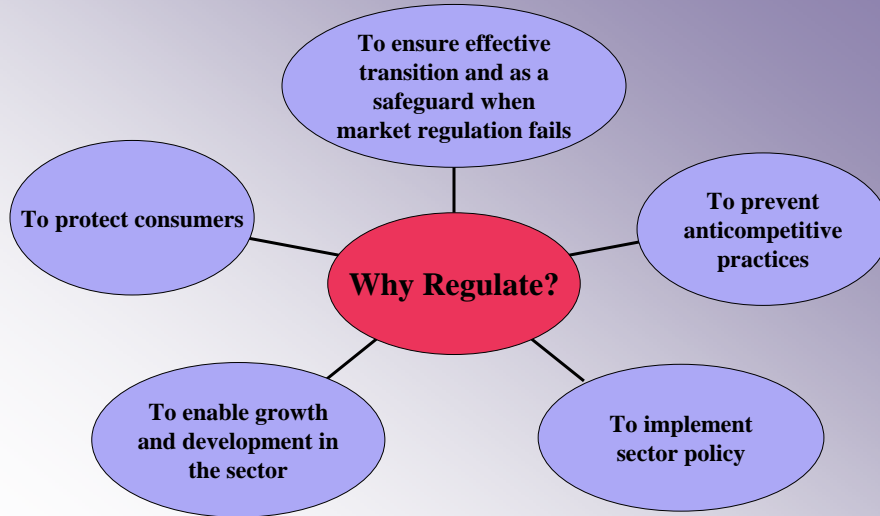
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Why Regulate?



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Legal Context of Regulatory Reform

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<p>TABLE OF CONTENTS</p> <ul style="list-style-type: none"> » ICT REGULATION TOOLKIT » AUTHORIZATION OF TELECOMMUNICATIONS SERVICES » LEGAL AND INSTITUTIONAL ASPECTS OF REGULATION » 1 INTRODUCTION » 2 WHY REGULATE? » 3 LEGAL CONTEXT OF REGULATORY REFORM » 3.1 Impact of Different Legal Traditions on the Regulatory Framework » 3.2 Impact of International/Regional Commitments » 3.3 Impact of Other Legislation » 3.4 Maturity of the Market » 4 IMPACT OF CONVERGENCE » 5 ELEMENTS OF EFFECTIVE REGULATION » 6 ORGANIZATIONAL AND INSTITUTIONAL APPROACHES TO REGULATION » 7 FUNCTIONAL ASPECTS OF REGULATION » 8 REGULATORY PROCESSES » NEW TECHNOLOGIES AND IMPACTS ON REGULATION » RADIO SPECTRUM MANAGEMENT » COMPETITION AND PRICE REGULATION <p>OTHER RESOURCES</p> <ul style="list-style-type: none"> » Table of Practice Notes » Table of Reference Documents » List of Other Resources 	<p>3 LEGAL CONTEXT OF REGULATORY REFORM</p> <p>The development of an effective regulatory framework for the ICT sector requires the establishment of a comprehensive set of laws, rules, and regulations that clearly identifies the contractual obligations and property rights of governments and stakeholders. The structure of this framework is determined, in part, by the legal and constitutional system of each country. Additionally, this Chapter discusses the other factors that impact the legal context of regulatory reform, including the impact of international and regional commitments, other legislation that impact the sector, and the impact of competition policy as the sector matures.</p> <ul style="list-style-type: none"> 3.1. Impact of Different Legal Traditions on the Regulatory Framework 3.2. Impact of Multilateral and Regional Commitments 3.3. Impact of Other Legislation 3.4. Maturity of the Market - Relationship between Telecommunications Legislation and Competition Policy
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Example: Using the Online Toolkit

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3.3 Impact of Other Legislation

The effective implementation of telecommunications regulation and the achievement of its objectives may be influenced by other laws that affect the sector. In meeting other government objectives, laws may be passed that directly or indirectly affect the development of the telecommunications sector. These laws may enhance or diminish the effectiveness of the telecommunications legal and regulatory framework in creating an enabling environment for the development of the sector, affecting the degree of investment and competitiveness in the sector, and the ease of accessibility by new entrants to the market.

The breadth of legislation potentially affecting the telecommunications sector is quite expansive. This section focuses on the legislation generally considered to most directly impact the sector – tax laws, foreign ownership laws, consumer protection laws, spam legislation, and property laws. The interaction between competition law and telecommunications law is addressed more fully in Section 3.4.

- 3.3.1. Tax Law
- 3.3.2. Foreign Ownership
- 3.3.3. Consumer Protection Law
- 3.3.4. Spam Legislation
- 3.3.5. Property Laws

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Example: Spam Legislation

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[Related Practice Notes](#)

3.3.4. Spam Legislation

Closely related to consumer protection legislation is legislation against spam, or the sending of unsolicited, usually commercial, electronic messages. Spam is a recent phenomenon that has become more prevalent with the growth of Internet usage, although spam can also be carried out through other electronic means, such as facsimile, telephone, short message service (SMS) and instant messaging services. See Box 3-5 for the definition of spam. With the growth of ICT, a continually increasing number of countries have implemented legislation against spamming to supplement existing consumer protection laws (see Figure 3-D). The problems associated with spam are magnified in developing countries, where high volumes of incoming and outgoing spam can cause a severe drain on the limited and costly bandwidth that is available for ICT.[1]

Some countries, however, such as Bangladesh, Burkina Faso, El Salvador, Kuwait, Madagascar, Moldova and Lebanon have no spam legislation, while others such as Bulgaria, Chile, Costa Rica, Malaysia, Mexico, Peru, South Korea and Switzerland have no specific anti-spam legislation, but use alternative laws to address spam issues, such as consumer protection laws, telecommunications law, or data protection law. Several countries such as Argentina, Brazil, Canada, Hong Kong SAR, Russia, Singapore and New Zealand are in the process of enacting specific anti-spam laws, while others such as Australia, Austria, Belgium, China, Czech Republic, Hungary, Japan, Lithuania, the Netherlands, and the United States have already enacted specific spam legislation.[2] In the EU, legislation against spam is codified in the Directive on Privacy and Electronic Communications which requires member states to prohibit unsolicited communications sent via e-mail, SMS, facsimile, or telephone. [3] The Directive's basic principles are that: (a) member states should take an opt-in approach, whereby they ensure under applicable legislation that businesses obtain prior consent before sending unsolicited e-mails for direct marketing; (b) senders must clearly indicate the use of cookies or other tracking devices, including spyware; and (c) the definition of spam is technology neutral.

Although national efforts are the main forces in combating spam, due to the "borderless" nature of spam, it is just as important to have international enforcement cooperation. For example, countries such as Australia, Korea, the United Kingdom and the United States have signed bilateral and multilateral memoranda of understanding to coordinate and improve spam enforcement activities. The OECD countries also agreed on a formal anti-spam framework, in 2003 with the adoption of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*. [4]

Figure 3-D: Anti-Spam Legislation Worldwide

world summit on the information society
 Geneva 2003 - Tunis 2005

International Telecommunication Union

Survey results

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Example: Spam Legislation Practice Notes

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- International Telecommunication Union
- World Bank

Spam Legislation in Three Countries

- > As mentioned in the section above, consumer protection legislation in **Australia** is governed in part by the Spam Act 2003 which regulates commercial electronic messages. The main elements of the Act are: (a) the prohibition against sending unsolicited commercial electronic messages that have an Australian link; (b) prohibition sending any commercial electronic messages that have an Australian link unless they contain accurate information about the sender; (c) prohibition against sending commercial electronic messages which have an Australian link unless they include a functional unsubscribe facility; and (d) prohibition on the supply, acquisition or use of address-harvesting software or a harvested-address list.
- > **Malaysia** does not have a specific anti-spam law, and instead relies on the Telecommunications Law and the Internet Access Service Provider (IASP) Sub-Code to promote self-regulation of spam. Part 10, Chapter 2 of the Telecommunications Law prohibits the fraudulent and improper use of the telecommunications network facilities and network services. Part 11, Article 5 of the IASP Sub-Code requires service providers to implement anti-spam measures (e.g., requiring service providers to articulate a specific definition of spam and include anti-spam principles as contractual conditions in agreements with customers who have a propensity to produce spam, the breach of which would result in a suspension or termination of services).^[1]
- > In the **United States**, the federal Can-Spam Act was enacted in 2003, due to concerns arising out of unsolicited commercial electronic messages, which often contain fraudulent and misleading messages, or vulgar and pornographic messages. The Can-Spam Act supplements some consumer protection provisions established under the Telephone Consumer Protection Act of 1991 which limits unsolicited telephone marketing calls and calls to a paging service, a cellular telephone service, and other radio common carrier services.^[2] The Can-Spam Act requires unsolicited commercial e-mail messages to be labeled (though a standard method is not specified) and to include opt-out instructions (i.e., the ability to reject receipt of commercial e-mail from the sender in the future) and the sender's physical address. The Act also prohibits the use of deceptive subject lines and false headers in such messages. The Federal Trade Commission (FTC), the regulatory authority responsible for consumer issues, is authorized (but not required) to establish a "do-not-email" registry. In addition, state laws that require labels on unsolicited commercial email or prohibit such messages entirely are pre-empted, although provisions merely addressing falsity and deception would remain in place.^[3]

ENDNOTES

[1] Internet Access Service Provider (IASP) Sub-Code for the Communications and Multimedia Industry, Communications and Multimedia Consumer Forum of Malaysia, June 1, 2005.

[2] "Can-Spam: Unwanted Text Messages and E-mail on Wireless Phones and Other Mobile Devices," FCC Consumer Fact Sheet, available at <http://www.fcc.gov/cgb/consumerfacts/canspam.html>.

[3] Controlling the Assault of Non-solicited Pornography and Marketing Act of 2003 (Can-Spam Act), Public Law 108-187, December 16, 2003.

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Impact of Convergence

Regulators are responding in several ways:

- Shift to technology neutral treatment of information and communications infrastructure
- Reform of licensing frameworks
- Converged regulators (e.g., Malaysia, Hong Kong, Singapore, U.K.)
- Development of new laws to regulate ICT (e.g., spam, intellectual property, content, data protection, cyber-crime)

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Elements of Effective Regulation

What is the checklist of items for effective regulation?

1. Adequate legal and regulatory framework
2. Proper consideration of organizational structure ensuring functional independence
3. Appropriate consideration of internal functions of regulatory authority
4. Adequate regulatory processes

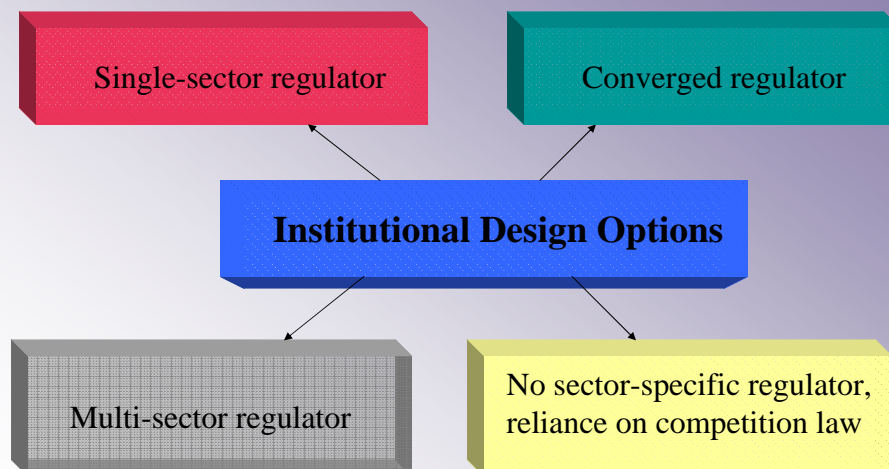
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Organizational and Institutional Approaches to Regulation (1)



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Organizational and Institutional Approaches to Regulation (2)

- Separation of power & relationship with other entities
 - The regulator needs functional “independence” to enact and implement regulations without undue influence
- Legal status of regulatory authorities
 - Depends on the legal and political system of each country
 - Most regulators are either public or semi-public institutions, and some are corporate bodies
- Funding of regulators
 - Usually through one or combination of: government budget appropriations, licensing fees, spectrum fees, other regulatory fees

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Functional Aspects of Regulation (1)

1. Clear definition of functions and competencies of the regulator

Regulatory functions generally includes:

- ✓ Rule-making
- ✓ Enforcement & dispute resolution
- ✓ Licensing
- ✓ Spectrum management and allocation
- ✓ Interconnection
- ✓ Price regulation
- ✓ Universal service obligations
- ✓ Establishing and approving technical standards
- ✓ Competition safeguards
- ✓ Management of quality of service

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Functional Aspects of Regulation (2)

2. Staffing and remuneration

- Appointment process
- Professional qualifications
- Issues of conflict of interest in appointment of Board members
- Removal from office
- Independence from outside influence
- Determination of salary

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Functional Aspects of Regulation (3)

3. Ethics

a. Avoidance of Conflict

- Rules on gifts
- Rules on confidentiality of information
- Rules on disclosure of information

b. Disclosure of Interests

- Prohibitions on financial and personal gain
- Divestment of interests
- Resignation
- Recusal

c. Post Employment

- Disclosure of outside employment offer
- “cooling off” period before undertaking new employment

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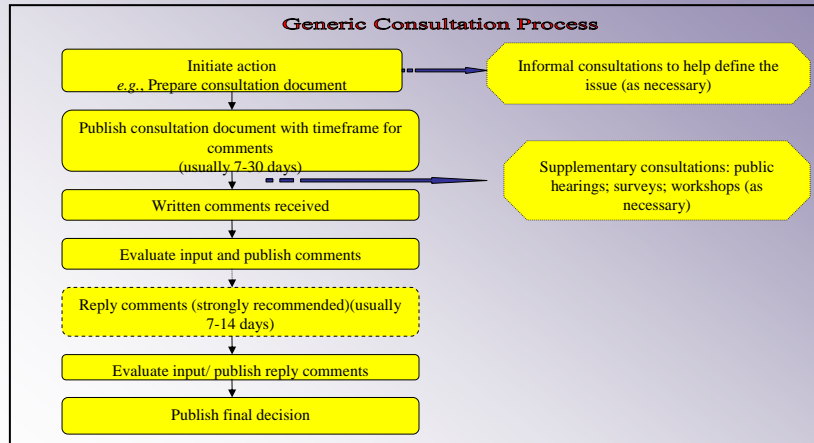
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Regulatory Processes (1)

1. Decision-making processes – ensure principles of transparency, openness and public participation



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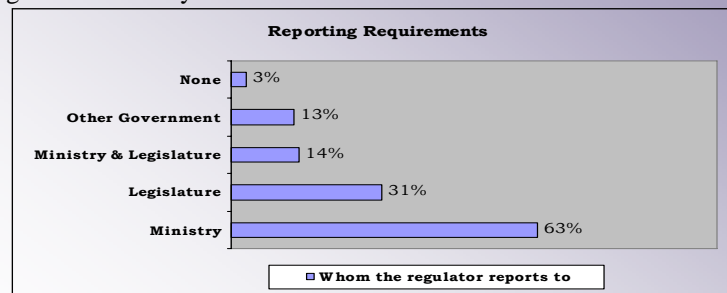


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Regulatory Processes (2)

2. Accountability and consumer protection

- Responsibility over consumer complaints, consumer education, protecting consumer interests in policies and regulations
- Accountability to government (government oversight & judicial review)
- Most regulators have reporting requirements to sector ministry or other government body



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Regulatory Processes (3)

3. Dispute resolution

Dispute resolution mechanisms generally include:

1. “Official mechanisms” – derived from the constitutional, legislative and regulatory framework applicable to the telecommunications sector, *e.g.*, regulatory adjudication, courts
2. “Non-official mechanisms” – or alternative dispute resolution (ADR), where individuals associated with such procedures do not discharge any judicial or executive duties
 - Negotiation
 - Mediation
 - Conciliation
 - Arbitration

Regulatory Processes (4)

4. 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



Thank You

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