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(Rail Regulator and International Rail Regulator,
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Effective Regulatory Institutions: The Regulator's Role in the Policy Process

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Credentials

- Rail Regulator and International Rail Regulator, Great Britain 1999-2004
- Senior member of group of nine economic regulators of the UK (railways, energy, telecommunications, broadcasting, postal services, water, competition + Scotland and N Ireland)
- Senior member of the Convention of European Rail Regulators
- 17 years in the UK railway industry – before that in energy and infrastructure generally
- From 5 July 2004, partner in White & Case, London
- Global law firm with 38 offices in 24 countries
- Now practising in transport, infrastructure and regulation in UK, Europe and in other countries



Jurisdiction of British Rail Regulator

- Issue and enforcement of operating licences
 - ◆ register of condition, capacity and capability of assets + controls on disposal of land
 - ◆ sound and competent stewardship of network
 - ◆ independent reporters to check sufficiency + efficiency of activities
 - ◆ fair dealings with dependent persons
- Establishing and reviewing structure and levels of charges for use of infrastructure – setting the financial framework, including how much money infrastructure provider will receive for network OMR & E
- Control of the allocation of capacity of track, stations and depots
- Enforcement of competition law
- Certain functions as appeal tribunal – cases of timetabling, network & vehicle change and establishment, change & abolition of mandatory technical standards, veto overrides



Overview

- What makes a regulatory authority effective?
- What is the legitimate role of a regulatory authority in the making and implementation of policy?
- Independence of regulation
- Regulators usually established as expert bodies to do things which government should not do
- Political and bureaucratic intolerance sometimes takes over
- Regulatory failures or political impatience
- Independence is important
- Behavioural independence is as important as legal independence



Introduction

- Governments often misunderstand the purposes of regulation and the importance of respecting and not assaulting its independence and its integrity
- Regulatory authorities which are seen as complacent or complicit in the undermining of their integrity do real harm
- The pretence of independence can be worse than the absence of independence
- Mistakes in the design of regulatory institutions can be very costly
- Transport regulation often the most difficult because (a) the things being transported are more sensitive to disruption and (b) the role of public subsidy



Regulatory design

- Regulatory authorities should not represent an abdication of political engagement
- Ministers retain real responsibility for setting overall transport policy, including levels of public investment, industry structure, taxation, subsidies and legislative framework
- Framework should not be destabilised by arbitrary political action
- Regulatory design principles include government deciding early what they want regulatory authority to do, and then sticking to it
- Should not subject system to violent, abrupt or seismic changes
- Change should ideally be incremental and a function of established change mechanisms rather than legislative intervention



Regulatory jurisdiction

- Jurisdiction must be wide enough to reach the problems in the market
- Governments must have the courage to empower regulatory authorities – a weak regulatory regime is a deterrent to private investment and a drag on the efficient and economical development of the industry
- Major problems arise when government is also a shareholder in the regulated entity
 - other market participants will not accept that government can be impartial and disinterested in regulatory decisions
 - governments usually do not like being told what to do by regulatory authorities – the experience of the UK rail industry



Regulatory policy

- Regulatory authorities not established simply to be obedient instruments of government
- Should do things which government cannot do - highly complex and technical things like price controls – and which require a degree of detachment from the political process, according to non-political criteria
- When does political policy intrude into regulatory policy? Where could the collisions or the encroachments occur?
- If political or bureaucratic players will not tolerate real power in the hands of a regulatory authority, that is a source of considerable tension and likely fracture
- The boundary may have to be adjusted if it has been placed in a politically unsustainable place
- Industry structure is first a matter for political players, but over time may be a matter for regulators



Example of political collision

- UK rail franchises contain an indemnity against decision of the independent regulator raising access charges payable to the infrastructure manager (Railtrack, then Network Rail)
- When politicians lost patience with Railtrack, they decided to take it back into public ownership using insolvency-based powers in the railways legislation
- Problem: The jurisdiction and independence of the rail regulator; possibility that he would refinance the infrastructure manager and government would have to pay
- That action required the neutralisation of the independent regulator, and therefore threats of emergency primary legislation to take the regulator under direct political control
- Despite the threats, the rail regulator offered a financial rescue to Railtrack, but Railtrack refused
- Major implications for the integrity of the regulatory system and the reputation of the UK government for fairness

Regulatory competition, other assaults and encroachments

- Creation of a politically-favoured competitor regulator also a major problem
- Although there may be no uncertainty in law over the respective jurisdictions of the two authorities, political action and behaviour by one body, asserting a false jurisdiction, can do immense harm – the case of the UK Strategic Rail Authority
- Also, regulatory behaviour which plainly violates regulatory duties (eg EC Directives on charging or capacity allocation) and which instead facilitates political objectives are harmful – e.g. Estonian rail renationalisation; complicity of Office of Rail Regulation (UK) in cutting its jurisdiction contrary to the interests of the industry
- Much depends on the kinds of person appointed to regulatory authorities; recent UK trend has been to appoint instinctively obedient ex-civil servants and those who prefer the shadows of anonymity to the glare of professional and public accountability



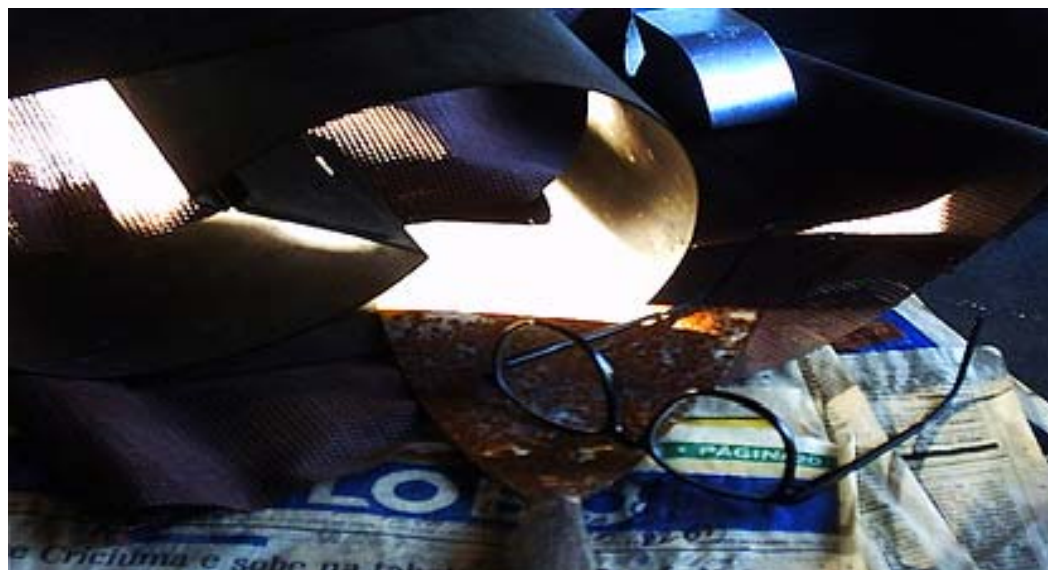
Defences to political intrusion

- Regulatory action and behaviour should be conspicuously of the highest integrity and quality
- Regulatory capture by industry or politicians can do immense harm
- With considerable regulatory power comes the obligation to use that power consistently, proportionately, professionally and fairly
- Regulators should publicly promulgate high professional standards for their own actions, including clear and sound criteria for action, fair procedures and the giving of full reasons for decisions
- They should always act within their legal powers, and never give in to temptation to exceed them
- Regulators which violate these standards, and side with the regulated entities or give in to improper political pressure, destroy their integrity and industry confidence
- It is extremely difficult for a regulatory authority to regain its independence and integrity when it behaves in such a way



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