

Is the EU always a  
"union of law"?  
How "priority" political  
considerations can influence or  
even overrule the existing  
regulatory order & Bird & Bird

Johannes Kindler  
Paris, 26 March 2015



EEG 2.0

# What is regulation?

People hold strong views about regulation, but do they know what "regulation" means?<sup>1</sup>

- **General:** Principle or rule employed in controlling directing or managing an activity, organization or system.
- **Law:** Rule based on and meant to carry out a specific piece of legislation. Regulations are enforced usually by a regulatory agency formed or mandated to carry out the purpose or provisions of a legislation.<sup>2</sup>

Numerous French people have expressed their view on what regulation means, even Raymond Aron who gave his name to this room...

*1) Barak Orbak, 30 Yale Journal on Regulation 1 (2012)*

*2) BusinessDictionary.com*

# What makes regulation so complicated?

- **The (vertical) multi-level aspect:** Local and national rules need to be sorted with European and global standards and agreements (e.g. WTO).
- **The (horizontal) institutional aspect:** Local, national European and global institutions (e.g. WTO, IMF etc.) need to be integrated into the decision building. How to organize majorities for a consensus?

# What makes regulation so complicated?

All kind of lobbyists, including NGO's and the media will try to influence the process. The last Doha round, the post Kyoto process and TTIP are impressing examples.

**Different cultural, historical, political, technical, economic and legal traditions** are intermingling with each other, creating new legal "**styles**" and new legal "**units**". The "local village" is interconnected with the "global village" and tries to benefit from it-however without accepting the inconveniences.

# What makes regulation so complicated?

- **The multi-purpose aspect:** The rule/regulation must be investor, customer and competition friendly, technologically progressive and socially compatible.
- **The struggle for national interests:** National governments feel obliged to push their national position through at any price. Flexibility on "basket 1" needs to be "compensated" by gains from "basket 2". This leads to horse-trading and rotten; thus, frustrating compromises.

All this is daily practise, legal and most often legitimate.  
Remarkable progress in European and international integration  
has been reached.

# However, all these often contradictory elements that need to be "reconciled", generate:

- Unclear and often deliberately ambiguous formulations
- Lack of transparency
- Overcomplexity
- New loopholes

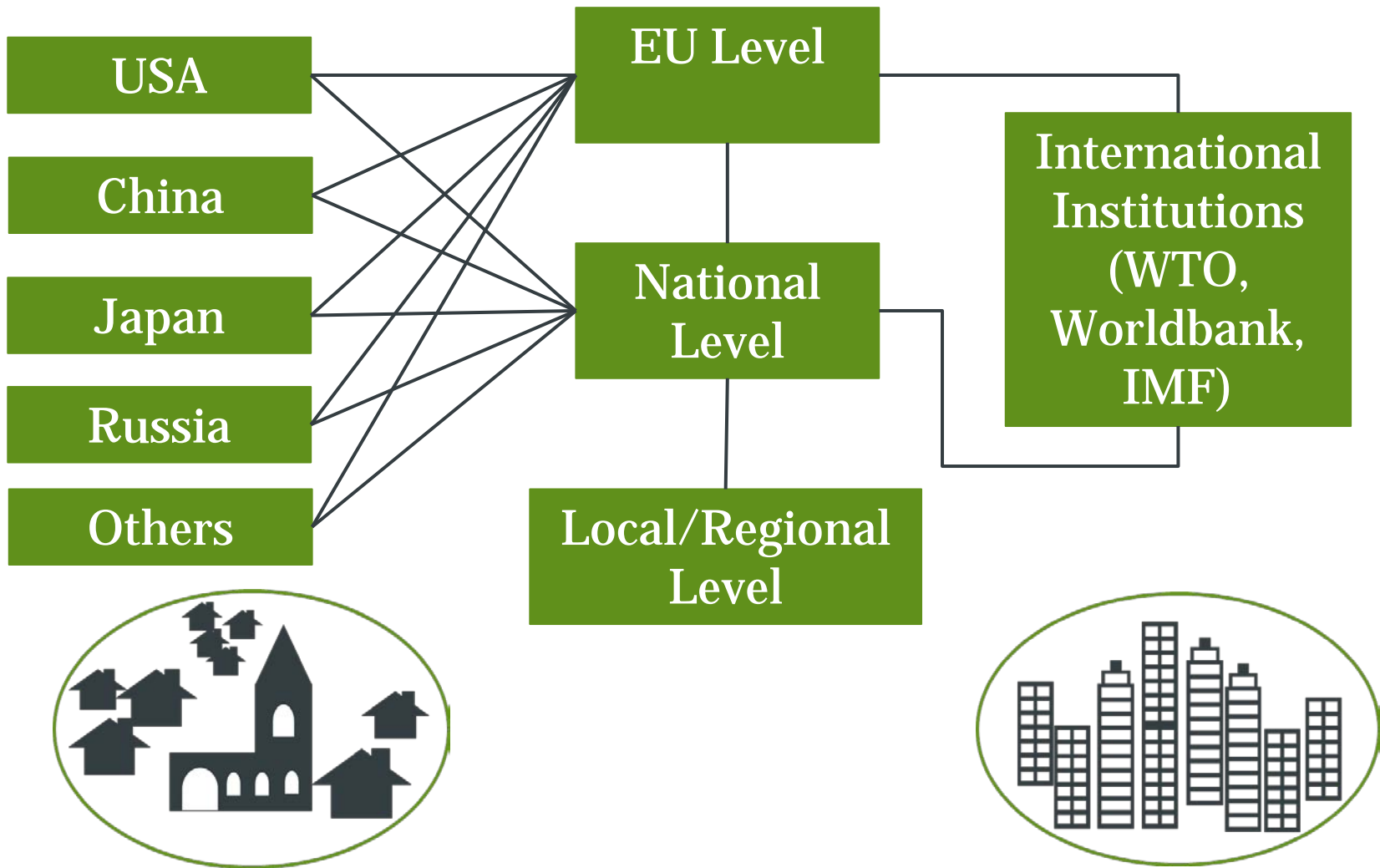
**To well informed and legally smart public and private institutions<sup>3</sup> they frequently allow**

- **to stretch the interpretation beyond the "ratio legis"**
- **to arbitrarily over- and underweight important parameters**

**In extremis this can lead to decision-making à la carte.**

*3.) Governments, courts, all sorts of public administrations, private companies, NEO's etc.*

# From the "local" to the "global" village – and back



# How can "priority" political considerations change or preserve the regulatory landscape?

**Any legislative or regulatory activity has a political aim.** Generally, the legislator and the regulator have a discretionary power which is, however, limited by the constitution and the existing legal framework.

The above described shortcomings in the legislative or regulatory process can deliver "techniques" to obtain the "right" decision.

In some cases however sheer political, even irrational essentials can overrule any legal reasoning, for instance the decision – making of the "German Atomausstieg" (see below).



# How can "priority" political considerations change or preserve the regulatory landscape?

## Some examples from experience:

### 1. National level:

The most spectacular decision in the area of legislative and regulatory power was the decision to shut down almost overnight 8.000 MW of nuclear capacity after Fukushima

- without any justification regarding nuclear safety
- without having examined the impact to German security of supply and
- without having examined the impact on our neighbouring countries that are fully, or at least partly depending on German electricity supply.



# How can "priority" political considerations change or preserve the regulatory landscape?

Only thanks to the excellent cooperation of European TSO's, power producers and regulators critical situations, especially in the following winter have been avoided.

In the meantime, the situation seems to be under control, thanks to fossil power plants that create **additional CO<sup>2</sup>-problems**, and necessitate additional and costly regulatory countermeasures.



# How can priority political considerations change or preserve the regulatory landscape?

## 2. EU-Commission Level

The most spectacular decision was the "**Juncker plan**" to launch an "**Energy Union Package**". The programme was announced

- without a due assessment of the state of play of the ongoing implementation of the "Third Energy Package" that is still aiming the achievement of an **internal energy market**,
- **overambitious** programme of **15 points** to be realized within a 5-year timeframe,
- very ambitious intention to strengthen the competence of the Commission in the energy sector and the "European Energy Regulator " ACER.

This "**overtaking priority**" is not illegal. However, it looks incoherent, irritates investors and other stakeholders and is unprofessional.

# How can "priority" political considerations change or preserve the regulatory landscape?

## 3. European Court of Justice Level

The European Court of justice is a front runner of European integration. The judgment of 1 July 2014 in the **Aland Windkraft** case is politically spectacular.

**The case:** The **Finish** windkraft generator Aland exports its electricity to **Sweden**. He applied for **Swedish** subsidies for renewable electricity that, according to the Swedish regime, are only granted for electricity generated in Sweden. As the authorities refused, he challenged their decision before the court.

# How can "priority" political considerations change or preserve the regulatory landscape?

The European Court of Justice had to answer the question whether the Swedish subsidy regime is compatible with EU law.

The **General Attorney** considered - **with excellent arguments** - that this restriction in the Swedish regime was **not** compatible with the principle of the **free movement of goods** within the EU.

**However: If his position had been adopted by the court, the current and very successful model of support to the renewables, practised in many Member States, would have exploded.**

# How can "priority" political considerations change or preserve the regulatory landscape?

The **European court was clearly aware of this danger**: on the **one hand** it supported the General Attorney's opinion that the Swedish scheme was capable of hindering imports from other Member States and therefore, constitutes a **restriction** for the free movement of goods.

On the **other hand**, it stated that the restriction "is justified by the public interest objective of promoting the use of renewable energy sources in order to combat climate change".

Under these circumstances, the court ruled that the Swedish support regime is "**consistent** with the principle of the free movement of goods".

# How can "priority" political considerations change or preserve the regulatory landscape?

**Undoubtedly a stretch of the European Treaty but politically very smart!!**

**Even more political and important will be the judgment of the European Court regarding the "Quantitative easing" programme of the European Central Bank.**

# Thank you & Bird & Bird

**Johannes Kindler**

**Carl-Theodor-Straße 6  
40213 Düsseldorf**

**Tel.: +49 (0)211 2005 6293**

**E-mail: [johannes.kindler@twobirds.com](mailto:johannes.kindler@twobirds.com)**



Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 15 Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.

[twobirds.com](http://twobirds.com)