



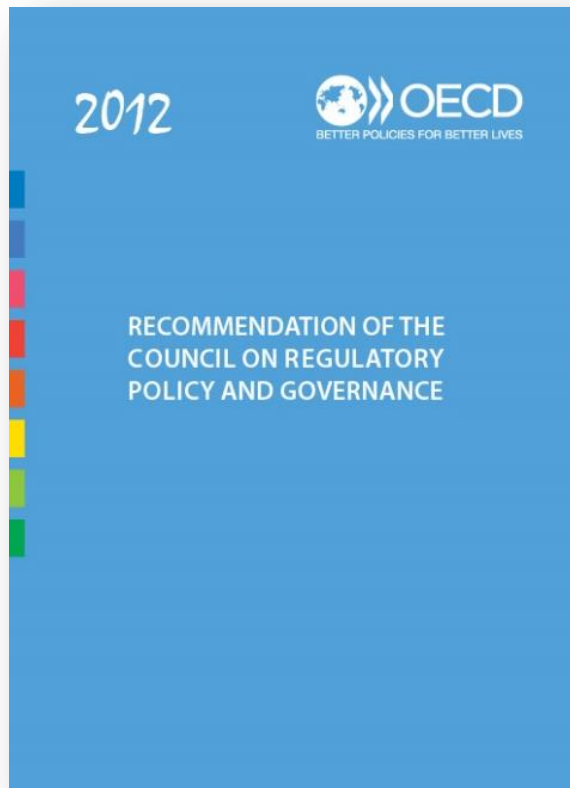
THE REGULATOR AND ITS JUDGE(S)

OECD Perspectives

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OECD recommendation on administrative and judicial review



8. Ensure the **effectiveness** of systems for the **review of the legality and procedural fairness** of regulations and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that **citizens and businesses** have access to these systems of review at **reasonable cost** and receive decisions in a **timely manner**.



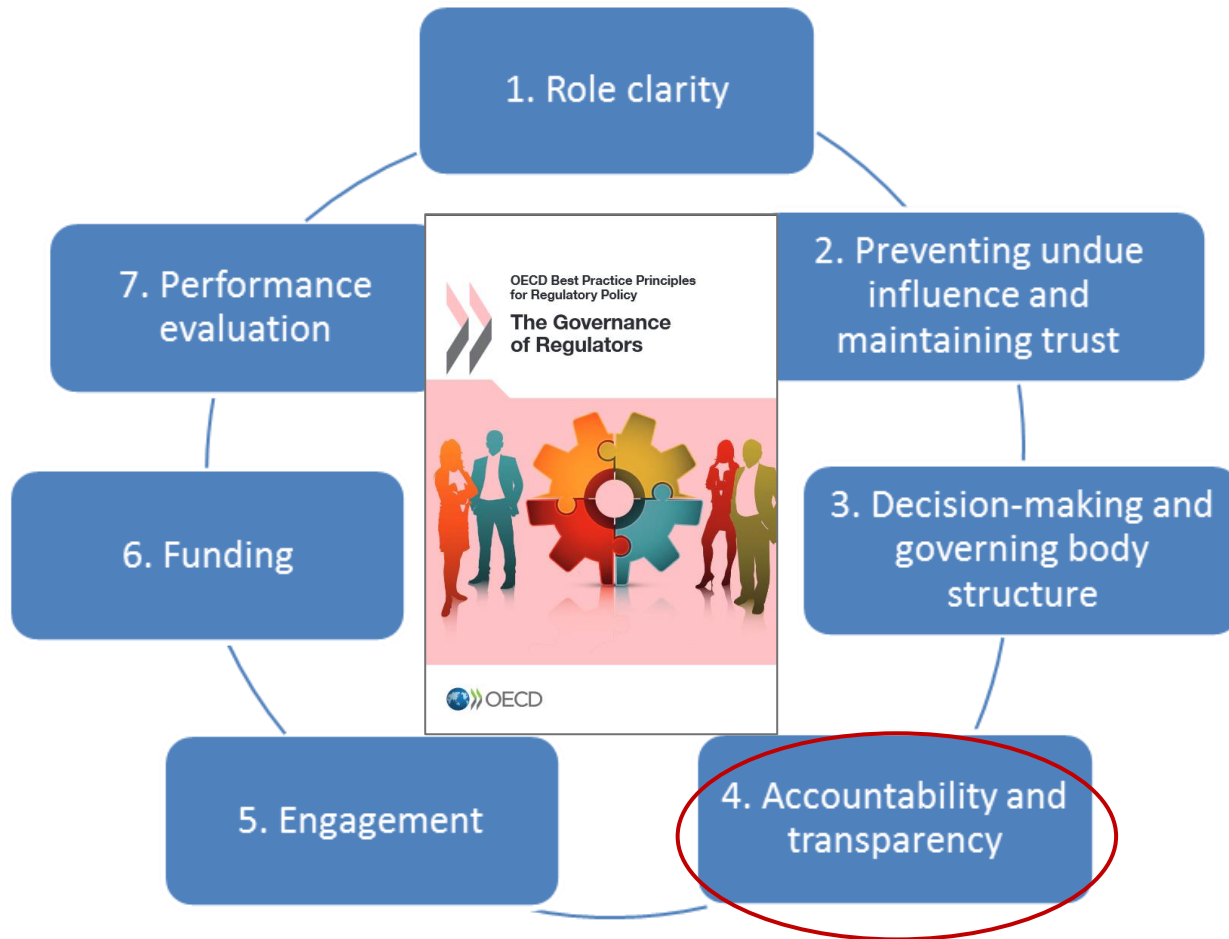
The benefits of effective appeal systems

- ensure that regulators exercise authority within the scope of their legal powers
- enhance trust and legitimacy of regulatory activity as part of economic policy agenda
- provide confidence to businesses and citizens that review process will take place within given timeframes and with certainty of outcomes*
- **provide incentives to regulators: good governance and best-practice principles**



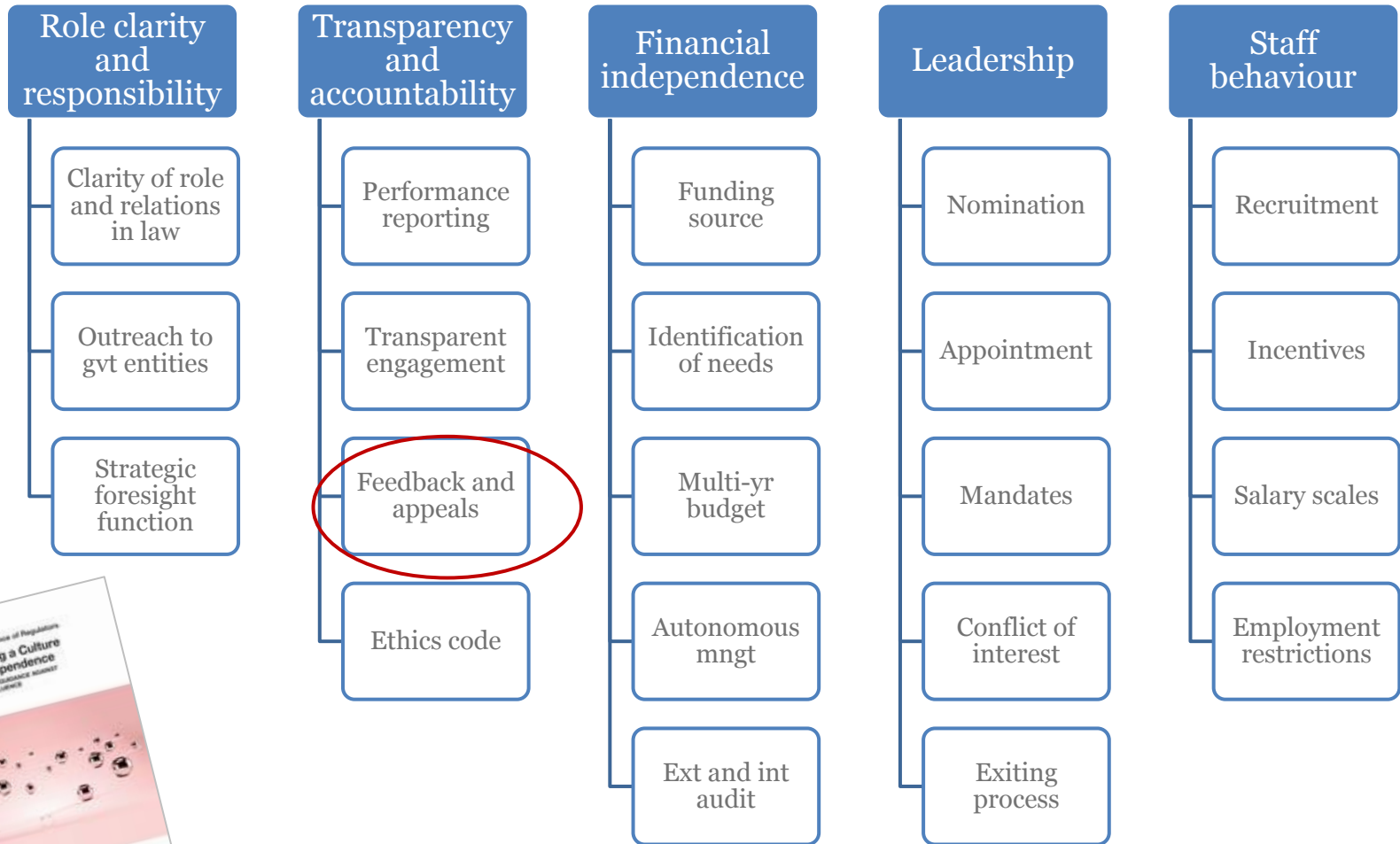


Appeal systems contribute to adoption of best practice accountability





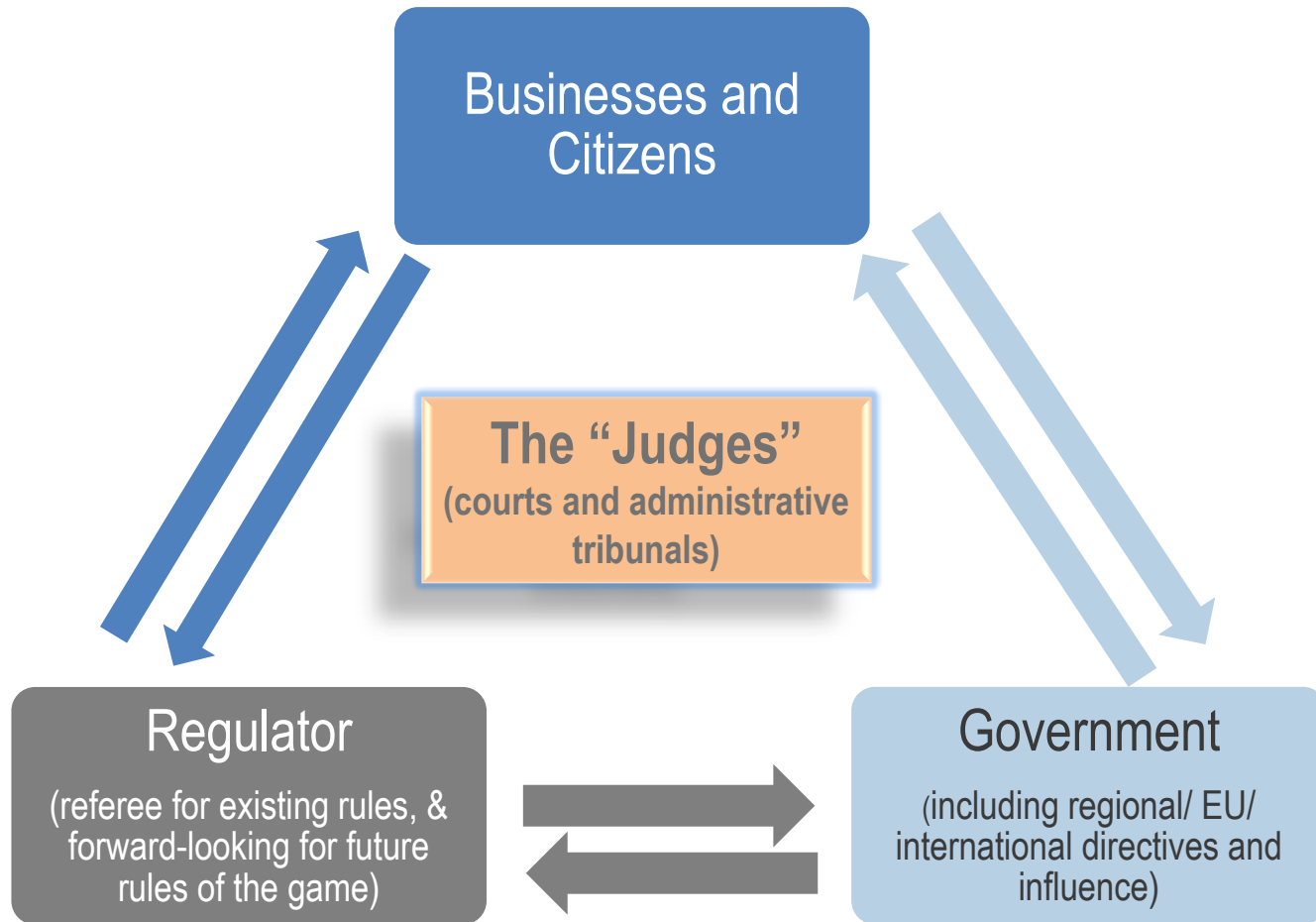
Appeals systems are key measures to create a culture of independence



Source: OECD (2017), *Creating a Culture of Independence: Practical Guidance against Undue Influence*, The Governance of Regulators, OECD Publishing, Paris.



Judges as independent reviewers of regulatory processes





JR enhances regulatory practice...

- Appeals and judicial review provide an incentive for regulators to adhere to best practice principles
- Regulators may see appeals as a threat / obstacle in the short-run but ultimately judicial reviews are a Litmus test of good regulatory practice
- Stronger accountability to businesses and citizens and effective independence are more likely to be preserved in the presence of effective appeal systems
- **Future-proof regulatory systems are necessarily more appeal-proof as well**



... but also raises issues that needs addressing

- To what extent can the judicial process block or delay regulatory action?
- Are appeals available to all stakeholders (citizens, businesses, regulators and governments)?
- Should claims be allowed on the grounds of legality only, or also on the merits of a decision?
- **No one-size-fits-all in the OECD, member countries have a diversity of practices**



Diversity of approaches in OECD countries

Mexico

CNH and CRE's decision can only be appealed via *amparo indirecto*, whereby the constitutionality of a decision is examined

ASEA's decision can be challenged both by businesses and citizens on administrative grounds

Australia

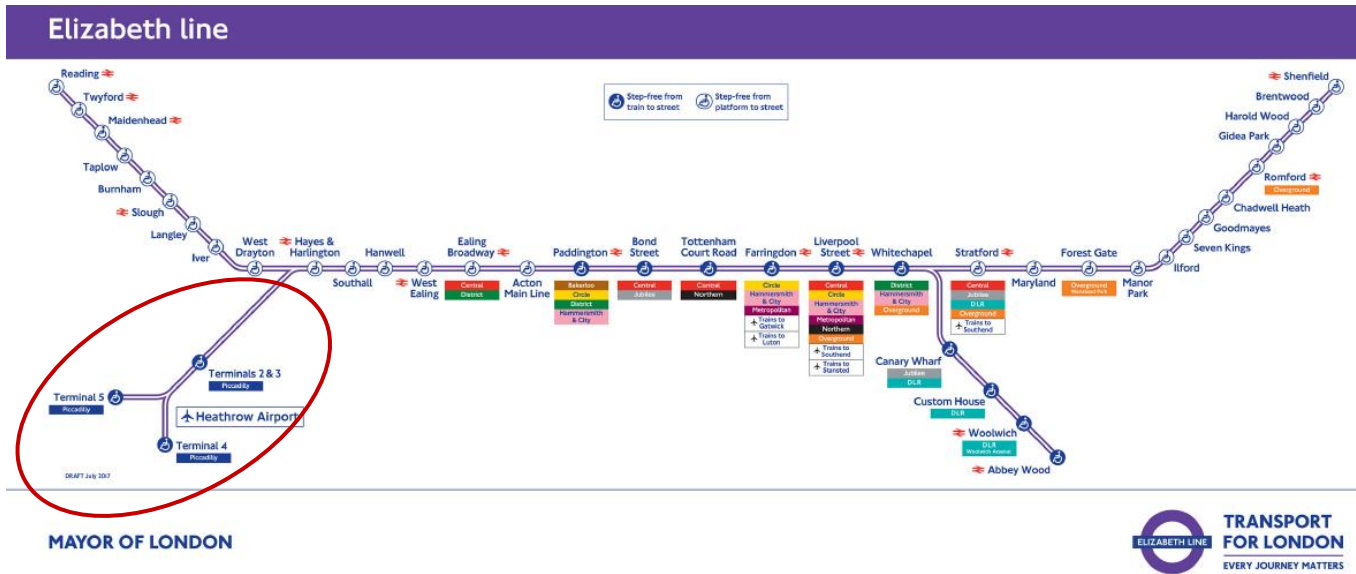
Merits reviews reconsider the facts, law and policy aspects of the original decision and determine the correct or preferable decision – e.g. AER challenged on economic benchmarking

United Kingdom

Courts have wide scope for judicial review (unwritten constitution) but are wary of interfering with the subject matter



Case study: HAL v ORR (United Kingdom)



- ORR rules that HAL cannot recover historical cost of building Heathrow Spur
- HAL challenges the decision as being irrational and lacking evidence
- High Court rules that ORR did not act irrationally as it identified an alternative source of funding
- **“this Court is not an appellate fact-finder; it would not be enough to conclude that the ORR’s decision was wrong” (para 65)**



Thank you

For more information:

❖ OECD on regulatory policy: www.oecd.org/gov/regulatory-policy/

❖ OECD Network of Economic Regulators:
www.oecd.org/gov/regulatory-policy/ner.htm

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