



# Regulatory agencies performance assessment

Conference report

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# Regulatory agencies performance assessment

## Introduction

**Éric Brousseau**

*Scientific Director of the Governance and Regulation Chair and of the Club of Regulators*

**Anna Pietikainen**

*Senior Policy Advisor, Public Governance and Regulatory Policy, Public Governance Directorate, OECD*

*The "raison d'être" of regulators is to articulate public policies with economic efficiency, while dealing with markets failures. Because they have to balance various stakeholders' interests and to manage the long-term collective welfare, they have to be immune from undue influence by policy makers, large operators, or interest groups. Their independence should however be balanced by accountability. Regulatory agencies operations have to be assessed both to make sure that policies are actually implemented (effectiveness), and that their action results into desirable outcomes for the society and the economy.*

*The issue is then to develop adequate organizational arrangements and to rely on relevant methodologies to assess the performances of the regulatory agencies. Indeed, the observed outcomes in terms of investment, level of activity, distribution of costs and benefits, is due to the intertwined effect of the design of the regulation (by the legislator) and of its implementation (by the regulator).*

*The objective of this conference is to compare and discuss how the performances of regulatory agencies are assessed in different countries. It's co-organised by the Dauphine Club of Regulators and the OECD Network of Economic Regulators.*

*The first roundtable is focused on the institutional organization of performance assessment. What is the role of the parliament and of specialized "higher authorities"? Is a Regulatory Impact Assessment (RIA) policy implemented at the national level? Do the infra-national political authorities check the regulators actions? Does the industry, the users or civic and political organization exercise some oversight? Are the regulators themselves involved in self-evaluation effort? Do the regulators involved in networks operate benchmark analyses of their performance? etc. Among other things, it will be useful to understand if the analysis of regulators performances is a regular activity and the level of requested means to manage such efforts.*

*In a second roundtable, the methodological aspects of impact assessment are discussed. What are the dimensions considered as relevant? What are the difficulties in disentangling the respective effects of the design of the regulation, of the action of the regulator, and of the action of other policy actors/actions? Are derived benefits of the policy – on growth, trade, employment, environment, etc. – systematically assessed and how? If they do exist, how regulatory scoreboard were built? What is their goal and actual role? Are ex ante and ex post impact assessment performed, and combined? Are behavioral impacts considered in addition to direct impact on economic outcomes? etc. This second roundtable inevitably links the methodological issues with the aim of the regulatory impact assessment effort: providing incentives to the regulators, allowing a more informed discussion among the stakeholders of the regulation and public policies, or improving the effectiveness and the efficiency of the regulatory framework.*

# 1st Roundtable – Institutional organization of performance assessment

**Facilitator: Dominique Jamme**

*Managing Director, Commission de régulation de l'énergie (CRE, France)*

The 20th anniversary of the CRE offers a fine opportunity to look back at the development of regulatory institutions and assess their performance. Though this development places great importance on the evaluation of its activities, it does not have a structured framework for this process. The effectiveness of its activities must be deduced from several aspects : the regulatory audits carried out by the French Court of Audit; an annual report to the Parliament, which is more a communication tool than a review; functional reports that indirectly communicate indicators; self-evaluations on selected topics (e.g., network tariffs, incentive regulations); stakeholder feedback, most of which indicates that regulators are transparent and communicate extensively; peer reviews; and benchmarking studies. Better understanding how all the different word-wide regulators represented during this conference deal with this major challenge of their performance assessment will definitely be very interesting.

## Council of European Energy Regulators

**Anne Vadasz Nilsson**

*Vice President of the Council of European Energy Regulators (CEER) (also Swedish Energy Markets Inspectorate Director)*

### European perspective on regulators performance assessment

CEER, the voice of Europe's energy regulators, is a voluntary organisation, in contrast to the Agency for the Cooperation of Energy Regulators (ACER), which is in charge of mandatory decisions and processes according to EU-legislation. CEER focuses mainly on consumers and retail markets including local networks and is composed of 36 members and observers. Members are the EU and EEA countries, including the UK.

CEER promotes the well-functioning retail energy markets, consistently keeping the consumer at the centre of its focus. In contrast to the wholesale markets the EU has less-integrated retail markets which remain largely national. Though greater harmonisation can be expected with the implementation of the Clean Energy Package, market effectiveness differs significantly across the EU and, in some cases, is sub-par. There is a correlation between wholesale prices and retail prices, but the price gap differs a lot depending on national conditions. When wholesale prices go down, there is a general EU-trend that the price gap widens.

To gain a clearer view of the landscape, the CEER decided to create a framework

for the evaluation of national retail markets. A high-level paper was drafted in 2015 to define the concept of “well-functioning retail markets”, as well as steps toward achieving that state by 2025.

Two high-level principles were set out:

- competition and innovation;
- consumer involvement.

The eight key properties of well-functioning markets were said to be:

- low concentration;
- low market entry barriers;
- a close relationship between wholesale and retail price;
- a wide range of offers;
- a high level of awareness and trust;
- the availability of empowerment tools;
- sufficient consumer engagement;
- and appropriate action.

Twenty-five metrics were determined to follow those properties. For instance, to measure the existence of low-market entry barriers, one can consider the time and effort needed to evaluate licensing procedures or balancing regimes on national markets. The closeness of the relationship between wholesale and retail price can be assessed based on the mark-up observed. The availability of empowerment tools is reflected for instance by the percentage of customers with access to at least one certified or independent comparison tool, or customers having engaged in demand-response schemes.

A Handbook published in 2017 provides guidance on how to track those metrics, alongside the active training offered to regulatory authorities by the CEER. A roadmap was also agreed upon, including data collection practices, self-assessment, gap analysis, and a proposal as to how NRAs (National Regulatory Authorities) could give policy recommendations to the policy legislator to improve market functioning.

Each NRA determines the relevant policy in its national context, choosing the methodology for calculating the metrics and setting the national-level targets. The CEER would like to ultimately see its members make use of all 25 metrics, these being cumulative. Those already doing so are asked to provide their data and gap analysis to the CEER, for publication in a status report, not for benchmarking purposes, but to share progress, experience and illustrative examples.

Since this exercise was initiated in 2018, the speed and completion level of the NRAs has varied. Some struggle with data collection issues, possibly due to unclear responsibility-sharing. Many are held back, not being allowed to set national targets.

CEER has also received reports that the metrics are tricky to implement. In this regard, it is important to emphasise that the aim is to gain an accurate overview, not perfectly capture any individual metric.

Overall, few NRAs have taken this evaluation process full-circle. All the while working to bring more of them on board, CEER have started to work on how to group data into three sets of seven to eight metrics each. The approach is however agile and CEER looks forward to receiving the NRAs' ideas for different groupings.

CEER will continue its work on the status reports as well as the push for well-functioning markets, since progress is a bit too slow within the EU.

## Portugal

**Manuel Cabugueira**

*Coordinator of the Technical Unit for Legislative Impact Assessment (UTAIL),  
Portugal Government Centre for Law Skills, JurisApp*

### The Portuguese experience with RIA and the challenges for regulatory agencies

In Portugal we started to discuss regulatory impact assessment in 2006, when the simplex program and a Simplex text were initially implemented. It was later on, in 2017, that we gave the first concrete steps towards the implementation of a full fledge RIA (Regulation Impact Assessment) exercise. We started with a pilot project mainly focusing on burdens for businesses and, since then, the analyses have grown to become an integral part of the Portuguese legislative cycle assessing a broad type of economics and non-economic impacts.

Since the beginning it was clear that the quality of impact assessment was dependent on the access to data and the involvement of all organizations that were close to implementation and to the market. For this reason, we called to the exercise all public institutions that were related to the central government and we reached out to both technical and economic regulators.

Both groups of institutions reacted very positively to the challenge.

The public bodies that are responsible for technical regulation have been close allies in the implementation and the development of the methodology - we have recently finished the development of a check list for impact assessment on climate change in a close collaboration with the Portuguese Environmental Agency.

The relation with Portuguese independent regulators has followed two different paths: sharing and developing the model; access to relevant data.

It is open for debate if Portuguese independent regulators have to support their intervention with a comprehensive impact assessment analyses. It is true that in the Portuguese Administrative Procedure Code, it is stated that all regulatory interventions



should be supported and justified but it is not clear if the requirements go as far as to impose anything close to a cost-benefit analysis. At the same time it is also true that the Law that establishes the General Framework for independent regulators states that there is an obligation to guaranty that all regulatory solutions are economically efficient.

At the end of the day it seems that there is a common understanding that regulators should support their intervention by evidence.

This discussion and the interest of independent regulators towards the impact assessment methodology have promoted two lines of contact between the technical unit for impact assessment and those institutions: they have been a frequent participant in all our workshops on impact assessment and we have been invited to present our methodologies in some detail in closed workshops.

It is with enthusiasm that we share our experience not only on the methodology for economic impact assessment, but also the more specific analyses regarding competition impact assessment, impact assessment on innovation, on environment and on society. Our aim is to reinforce the tool box for economic independent regulation.

I believe that evidence-based regulation could be an important ally to support the ongoing and most relevant effort of independent regulators to help the market "fail better".

## Russia

**Andrey Tsyganov**

*Deputy Head, Federal Antimonopoly Service (FAS Russia)*

### Realization of performance assessment of the FAS Russia by external organisations in the context of performance assessment of other state authorities

The first endeavours to conduct regulatory impact assessment in Russia came in the late 1990s. Since 2010, regulatory impact analysis has been an obligation of any governmental authority wishing to initiate legal enactments or amendments to existing legislation, whether on the federal, regional or local level. The federal authority responsible for methodology in this respect is the Ministry of Economic Development. An authority proposing changes to the legislation must deposit its text on a web portal of regulatory acts for comments. Consequently, before approval and enactment, all legal texts are debated by all interested parties: governmental authorities, NGOs, academia, and other stakeholders.

No legislative changes may be introduced before the results of this examination have been presented to the State Duma. The same mechanisms apply not only at the national level, but also within five countries of the Euro-Asian Economic Union (Armenia, Belorussia, Kazakhstan, Kirghizstan and Russia). The Treaty of the Union

provides tools for improving the legislation on this supra-national level.

The Federal Antimonopoly Service conducts both internal and external assessment. This presentation deals only with the public component of this process. The Russian Accounts Chamber and Russian Ministry of Finance conduct budget observance analysis annually; however, the Federal Antimonopoly Service's assessment is also conducted by the State Duma and the Council of the Federal Assembly of the Russian Federation, on a regular basis.

During the "Government Hours", a regular report by the heads of executive authorities before the chambers of Parliament, the Federal Antimonopoly Service presents the Annual Report on the State of Competition in the Russian Federation for the Government.

Drawn up together with NGOs and other government authorities, it contains not only the general provisions on the development of competition over the years, but also an assessment of the Federal Antimonopoly Service's performance and the state of competition in Russia, including information on results achieved in developing competition, implementation of legal and practical measures on developing competition and assessment of the efficiency of these measures by the Federal Antimonopoly Service and external parties.

The Federal Antimonopoly Service is a multi-functional authority, and thus reports also on all its functions, including public procurement regulation or tax regulations. This report is discussed during the meeting of the governments of the Russian Federation by its members, which in turn issues conclusions and guidelines to the governmental authorities.

It is important to note that the Federal Antimonopoly Service's activities are also assessed by a Public Council. It is in charge of exercising public control over: the most significant legal and normative acts developed by the FAS, its participation in and monitoring of quality of public services; the Service's anti-corruption and HR management activities; and the Service's plans for one- to three-year periods. The Public Council is composed of notable Russian experts in the field of competition, public service and other areas of regulation, representatives of the scientific world, academia, the business community and civil society.

Moreover, since 2016, the FAS' performance assessment has been organised by key performance indicators. 84 regional departments of the FAS are subject to an internal evaluation, which gives rise to ratings. This is an important and stimulating tool on the management and administration of this task, based on 34 types of key performance indicators.

The Russian Competition Law itself provides a unique possibility for the Federal Antimonopoly Service to assess the performance of other governmental authorities, in the areas of compliance with anti-monopoly legislation. The law is specific and unique in this respect. Every year, the Federal Antimonopoly Service and our regional offices conduct anti-trust investigations against authorities and their officials.

In accordance with the decree of the President of the Russian Federation, in 2017, responsibility for anti-monopoly compliance was instituted at the federal and regional levels, which are provided with systemic and methodological assistance towards this end.

## United Kingdom

**Charles Nancarrow**

*Director (Regulation and Trade), National Audit Office (NAO)*

**Rich Sullivan-Jones**

*Audit Manager (Regulation, Consumers & Competition), National Audit Office (NAO)*

### Regulatory performance and evaluation in the UK

The National Audit Office, though independent, works for the UK Parliament in that it helps hold regulators to account for their performance. Regulatory performance and accountability have proved to be difficult aims to harness, and work has been ongoing for several years to improve performance measurement and the quality of the information which Parliament and the public can use to hold regulators to account.

In 2016, working alongside other regulators in the UK, the NAO published a booklet to foster good performance, including: measures recommended, types of information to be collected, reporting standards, and the government structures that can facilitate positive outcomes.

The public has high expectations of regulators. With respect to energy, it counts on them to create a landscape in which energy is: available at the best prices; in line with ecological standards; and accessible uninterruptedly, in line with the principle of security of supply. Yet these aims come in conflict with one another, and the authority must make trade-offs between them.

At the political level, regulators are independent in law, but entrusted with objectives by the policy department. Effective assessment of their performance requires clarity about their remit and interconnection with government, as well as data sufficient to measure progress.

Regulators exist to correct market failure. To do so, they must: have a grasp on the problems at hand; envision their aim; and be able to set out a road towards that vision. It is on the last aspect that they have tended to falter.

In the UK, performance assessment is required for changes that have come about by act of Parliament. However, this assessment is not subject to formal constraints, and the UK's market does not function smoothly enough for the regulator to do without tighter and clearer guidance. It is too remote from the consumer-provider relationship first of all, and moreover charts out courses of action the effectiveness of which is often not visible for years or even decades.

The National Audit Office has been pushing to encourage regulators to have a broader suite of indicators and a deeper understanding of their impact on these. Its recent work shows improvements in the range of indicators used and communication about its work, but still inadequate reflection as to the interconnection between the two. Post-implementation reviews and assessments are rarely published. Some of the larger regulators are starting to separately use their own evaluations and larger intentions, which has facilitated improvements. Nonetheless, public reporting has not yet reached the desired levels.

## Debate

### ***Dominique Jamme***

It is always interesting to hear the viewpoint of the UK, a forerunner to independent regulation in Europe.

Evaluating performance assumes creating counterfactuals to assess the impact on innovation: how does Portugal do this, Mr Cabugueira?

### ***Manuel Cabugueira***

Creating counterfactuals is most definitely a challenge, especially when dealing with innovations. The guidance on regulations has shifted from an expectation that they be "fit-for-purpose" to "fit-for-future" and, now, "resilient". Counterfactuals require having truly brought stakeholders on-board to benefit from their understanding of the market, and thus create foresight models. Moreover, analysis should extend horizontally into other aspects: for instance, when examining innovation, the regulator could consider the results of studies done on competitiveness or SMEs.

### ***Anne Vadasz Nilsson***

I agree on the significant challenges inherent in this process, as well as on the need to see the context as a whole, rather than being guided by individual metrics or key performance indicators. Agility is essential in this respect, especially as some contexts are very dynamic and difficult to predict, such as energy.

### ***Charles Nancarrow***

The introduction of any counterfactual into ex post evaluation can be difficult, when no prior expectations, data collection requirements or aims have been set. In impact assessments, randomised control trials can be used as a predictive counterfactual and proves effective in communication to consumers.

### ***Andrey Tsyganov***

Regulators are expected to submit results and predict future trends daily. The Russian Competition Authority sees the key lines of action as: comparing

alternative types of government intervention; fine-tuning the public procurement system; adjusting tariff regulation in regulated industries; prioritising competition law enforcement across areas and regions of the country. We also wish to launch ex post analysis of the impacts of previous decisions. The future looks very interesting.

# 2nd Roundtable – Methodological aspects of impact assessment

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## **Facilitator: Anne Yvrande-Billon**

*Director Economy, Markets and Digital, Autorité de Régulation des Communications Electroniques et des Postes (ARCEP, France)*

## Brazil

### **Carmen Silvia Sanches**

*Regulation Specialist, Agencia Nacional de Energia Eletrica (ANEEL)*

### Methods, data and evidence for RIA from a Brazilian agency perspective and practice

The Brazilian Electricity Regulatory Agency (ANEEL) is responsible for creating favourable conditions for the development of the electrical power market, with a balance among agents and for the benefit of society. Since the first Regulatory Impact Assessment report was performed in 2011, it has completed 193 impact assessments.

The regulatory cycle at ANEEL begins from the agenda, determined with the input of the general population, through public hearings. When the public was first invited to contribute, the number of topics up for discussion increased dramatically, to approximately 700 per year, of which a surprisingly high proportion (70%) was kept for 2021-2022. The cycle continues with a regulatory impact assessment report, the presentation of the draft regulation, and the final approval of the regulation itself.

The formulation of the impact assessment report must include a summary of the regulatory issue, a presentation of the stakeholders, a listing of intervention methods, alternatives, and qualitative and quantitative comparisons. It is the result of intensive research carried out by ANEEL.

Problems encountered during the impact assessment include choosing the best-suited methodologies, and taking into account all the objectives at hand. ANEEL, operating at the crossroads between different stakeholders, is accustomed to this balancing role. It calls on such tools as cost-benefit analysis and multi-criteria analysis (qualitative and quantitative) in the majority of cases.

As the data available are scattered across various agencies, however, they sometimes require authorisation of access prior to utilize and release and have not necessarily been collected for the purpose for which they will be used. ANEEL also makes use of secondary data, drawing on an integrated database of several

organisations, curated to maximise quality, and for instance short videos or seminars published on the social media.

ANEEL is now producing an internal guide to impact assessment, developing guidelines based on the experience of accounts as well as pilot processes. It is working to improve its training capacity in methodology and assessment, and supports the technical staff dedicated to regulatory assessment and impact, developing institutional capacity, working on data quality and data governance policy, and in the future, regulatory caps, compliance, cost and risks.

## France

**Laurent Clerc**

*Director for Research and Risk Analysis, Autorité de contrôle prudentiel et de résolution (ACPR - Banque de France)*

### Performance assessment impact in the financial sector

When it comes to financial regulation, authorities need to strike the right balance between financial stability and growth, to the extent that regulation is detrimental to growth. Two main challenges arise in this regard: the market and financial players are usually short-sighted and focused on short-term benefits; financial cycles are asymmetric : on the upside, expected gains generate an alignment of interest of all financial players and financial booms are generally accompanied by a deregulation process; on the downside, conflicts of repartition may arise due to moral hazard ("gains are privatised, losses mutualised"), generating a strong demand for regulation, which is sometimes criticised as financial repression. It is thus particularly important to set the appropriate incentives and avoid unintended consequences.

The financial sector is like an organism, continually adapting to its regulatory and economic environment. Financial innovation can, in this regard, be used to circumvent the new rules.

The cost and benefits of policies are determined by:

- Assessing consistency (measures adopted must not offset the benefits of other regulations)
- Calibrating requirements (the degree of leverage which institutions can take on board or the amount of liquidity), based on intensive quantitative impact studies. The challenge is that these requirements apply across the industry, yet must also be in keeping with national legislations, or apply to sets of institutions with different business models.
- Measuring the impact of incentives, behaviours (consumers and investing firms will adapt) and broadly on financial markets and the macro-economy. This

step is much more challenging in that it requires substantive economic and financial analysis, especially where financial regulation or measures interact with other policy measures, often fiscal or monetary.

To determine the impact of a measure, quantitative impact studies must be carried out with industry, an approach that intrinsically carries a strong bias: for industry, there is incentive to exaggerate the negative impact of the regulation and minimise benefits; for the regulator, an incentive to propose the most stringent parametrization. As a consequence, several rounds of impact studies may be needed before getting a satisfactory impact assessment, with usually very poor data quality in the first rounds. So the ex ante evaluation process can be costly.

- The need to factor in the systemic dimension is particularly relevant in the context of financial markets, as these do not work in isolation.

To enhance the regulatory process, peer review assessment by a regulator from a different scope is recommended, followed by ex post revisions (review clauses) to regulations where needed.

## OECD

**Alex Durand**

*Regulatory Policy Division Analyst, Directorate for Public Governance, OECD*

### Assessing the performance of regulators: Evidence from reviews and indicators

Over the course of the OECD's numerous in-depth reviews of regulators, three lessons have emerged about performance assessment on these bodies:

- the need for linkages between strategy and performance indicators;
- the need for balance between input, process, output and outcome indicators;
- the importance of the fusing indicators and performance information.

These reviews are underpinned by the OECD's normative work on the performance of regulators, in particular the Best Practice Principles on the Governance of Regulators, and its excellent guidance on performance evaluation as a key contributor to good governance. These best practice principles outline the key considerations when measuring the performance of regulators, from identifying scopes to defining indicators and using performance evaluation.

The reviews are conducted at the request of the economic regulators, considers their internal and external governance and gives rise to recommendations. The methodology has been applied to a very diverse range of regulators from different sectors, national and cultural contexts. Each review reflects how the regulator understands, measures and reports on its performance.



Some regulators have a clear linkage between strategic objectives and specific indicators. This linkage makes it possible for the regulator to measure progress in a way that creates connection and consistency within the operational system, as well as between different timescales. The Peruvian Transport Regulator, for instance, connects its high-level strategic objectives to its performance indicators using “strategic actions”. It also ranks its indicators by priority level, and thus knows where it should allocate its resources at any given time. Regulators could certainly share experiences and learn from one another in this regard.

As part of the review process, the OECD categorises regulators' performance indicators into four blocks:

- input (efficiency and effectiveness of measures instituted),
- process (quality of action for regulatory activities, accuracy, timeliness, accessibility),
- output (effectiveness of actions, reach, resilience to external review),
- and outcome (direct impacts of regulators' decisions, market structure, service and infrastructure quality, consumer welfare, industry performance – all “watchtower indicators” that help the regulator identify issue areas, problems and priorities, and orient decision-making).

Ideally, regulators' indicators will satisfy all four of these categories. In reality, however, there is imbalance, with more reliance on output indicators as opposed to the quality of processes or impacts on sectors. Data also show that some types of performance information are neglected. The OECD indicators across network sectors show that 20% or more of regulators do not habitually collect information about the quality of their regulatory processes or those falling into the input category. Younger agencies may rely more on input simply as a matter of necessity or to encourage the development of strong international procedures and foundations. The Mexican Agency for Safety, Energy and Environment is one example of a recent agency that has committed to better balance the information it reports.

Determining the appropriate indicators is part of the battle; monitoring and assessment can be very resource-intensive, and must be balanced. Thereafter, the information collected must be put to actual use. Internally, the regulator may draw on it to reorganise priorities and resources, while externally, it can back up messages on the regulator's work and attest to the latter's value. Regulators that take the most deliberate approach and begin with the end in mind perform the most successful evaluations.

# Debate

## ***From the floor***

What are some good indicators in times of transformative change?

Which impacts are the most difficult to measure?

## ***Laurent Clerc***

Whereas banks were the cause of the problem in the previous financial crisis, they are now part of the solution. Thus, insofar as they can facilitate the financing of the economy, it might be appropriate to either relax part of the existing regulation or postpone the implementation of measures designed to rein in their action. The regulatory response is not obvious.

## ***Alex Durand***

In the early stages of transformational change, the stakeholders may hold the most valuable information. It is thus important to capture their responses and feed them back into the relevant regulatory action. Australia, with its standing Consumer Council, and Latvia, where the Public Utilities Commission regularly surveys stakeholders and customers, offer two illustrations of this approach.

## ***Anne Yvrande-Billon - Conclusion***

We have been able to enjoy such diversity in today's discussion because there exist so many reasons and audiences for regulatory action. Furthermore, they are often in flux, constantly changing. The strategic frameworks defined by regulatory authorities for assessment are tools but also contribute to building a common identity, culture and sense of process.

Beyond the institutions' walls, assessment is important for "external relations", communicating the direction and purpose of the regulatory authority. I am thus very pleased that several speakers brought up stakeholder involvement in defining indicators or monitoring itself. These are independent but nonetheless accountable authorities and should be subject to scrutiny, by the legislative or even executive powers.

I was similarly encouraged to hear examples of the extent to which regulators can go beyond their role as defined in law, when required by their strategic objectives.

We heard about many areas of challenges that remain: defining the right indicators and targets; striking the balance between clarity and excessive dependence on metrics; quality of data; and compliance with data provision requirements by the regulatory entities themselves.





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