The governance of regulators

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I. INTRODUCTION

A. What is governance?

1) Broad concept
   i. OECD Best Practice Principles for Regulatory Policy - The Governance of Regulators published in July 2014
   ii. Corporate governance
   iii. Guberna Center of Public Governance

2) Governance and independence **"two sides of the same coin"**

"The independence of regulatory authorities is a key principle of good governance and a fundamental condition for market confidence."
Proposal of EU Regulation establishing an Agency for the Cooperation of Energy Regulators

3) Internal governance versus external governance

B. Which regulators?

1) <u>Public regulators (v. private regulators)</u>

2) <u>Independent regulators (v. regulators within a Ministry)</u>

3) <u>Sector-specific (v. plurisectoral/polyvalent regulators)</u>

4) <u>Subject of our study: 2 Belgian independent and sector-specific regulators</u>
    - Financial Services Market Authority (FSMA)
    - Commission de régulation de l’électricité et du gaz (CREG)

II. FSMA

- Created in 1935 for the supervision of the banking sector;
- The “Banking Commission” becomes the “Banking and financial Commission” in 1990;
- Status of an autonomous public institution;
- Major reform in 2002;
- Merger with the “Office des Contrôle des Assurances” in 2004 , to become the “CBFA”;
- Twin peaks reform in 2011: prudential control of financial institutions is entrusted to the National Bank of Belgium;
- +/- 300 members of staff.

FSMA (continued)

COMPETENCES

- Supervision of the financial markets and of company information provided by listed companies;
- Supervision of the marketing of investment products to the general public;
- Authorizing and supervising certain categories of financial service providers and intermediaries;
- Financial education;
- Overseeing compliance by financial intermediaries with codes of conduct (MiFID), and
- “Social supervision” of supplementary pensions.

FSMA – two tier board

FSMA governance

- Management Committee (MC)
  - 4 members, including the Chairman;
  - Administration and management of the FSMA;
  - Determines the policy orientations.
- Supervisory Board (SB)
  - 10 to 14 members;
  - General supervision of the financing and the legally compliant and effective operation of the FSMA;
  - Review of the implementation of the supervisory action plan drawn up by the MC and advise on the FSMA's supervisory policy;
  - Audit committee (4 members of the SB with no conflicting interest or mandate) examines internal audit reports, budget and financial statements before their approval.
- Sanctions Committee
  - 10 members (including 6 magistrates);
  - Independent body that determines the imposition of administrative sanctions.
- Chairman
  - Head of the FSMA and chairs the MC.

III. CREG

- Created in 2000 following the implementation of the Energy Directives and the liberalisation of the electricity and natural gas markets;
- Federal regulator in Belgium (VREG, CWAPE and BRUGEL are the regional regulators) in charge of supervising and enforcing the laws and regulations regarding the organization and operation of the electricity and natural gas markets;
- Its independence was increased after implementation of the third energy package in 2009;
- Transfer of competences to the regions since 1st July 2014 for setting distribution tariffs. For other “federal” matters, CREG remains competent over tariffs;
- 67 members of staff in addition to the MC.

CREG (continued)

Management Committee (MC)

- One-tier board – no supervision by a board of directors;
- Composed of a chairman and three other members appointed for a term of six years (renewable once);
- Minister has still influence on the appointment /dismissal of the members of the MC;
- Responsible for the operational management of the CREG;
- Chairman of the MC is responsible for managing the CREG.

Gas and electricity advisory board

- Previously the General Board in charge of supervising the Management committee;
- Now organically separated from the CREG to comply with EU independence requirements;
- Composed of representatives of various authorities and industry players;
- To be transferred to the Central Council of Economy of the FPS Economy.

IV. OECD PRINCIPLES OF GOOD GOVERNANCE

- Clear objectives and well-defined mission;
- Preventing undue influence and maintaining trust;
- **Decision-making models and governing body structures for independent regulators;**
- Accountability and transparency;
- Engagement with stakeholders;
- Funding process should be transparent and enable the regulator to fulfill it objectives;
- Performance evaluation.

V. SELECTED GOVERNANCE MATTERS

- Who runs the regulator?
  - One-tier versus two-tier boards;
  - CEO/chairman.
- Who controls the regulator? Is the regulator accountable?
  - Reporting and publication;
  - Legal review by court.
- Committees
- Public consultation and advisory committees

VI. WHO RUNS THE REGULATOR?

One-tier board = unitary model

single board system, which may still differentiate executive and non-executive directors

➡ Roles of Chairman and CEO can be combined = CEO duality

Two-tier board = dual model

dual board system, comprised of

- a management with executive directors and,

- a supervisory board, with non-executive directors

➡ Roles of Chairman and CEO are split

Advantages of a dual structure

- Board's roles are control, strategy and service. The board will oversee and control the executive actions of the management;
- Increased independence;
- If not possible to create two layers, at least a distinction between executive and non-executive directors and a seperation between the roles of Chairman and CEO should be done;
- Roles of chairman and CEO vary widely:
  - Chairman is in charge of leadership of the board;
  - CEO is running the business.

VII. WHO CONTROLS THE REGULATOR?

- Need for checks and balances - accountability
- Internal control of the management by the board
- External control by
  - Reporting obligations (political accountability: annual report, budget, ... to be submitted to Parliament + hearing)
  - Transparency obligations (website, publication of decisions/ procedure,...)
  - Legal accountability (control by the judiciary courts)
    - Legal action against a decision of the CREG is made possible before the Court of Appeal of Brussels;
    - Legal action against a decision of the FSMA can be introduced either before the Court of Appeal of Brussels or before the Council of State depending on the nature of the decision.

VIII. COMMITTEES

- Remuneration, nomination and audit committees (recommended or mandatory in corporate governance)
- Purpose: to increase board effectiveness and independence
- Tasks:
  - to handle issues which require specific expertise or to save time to the board;
  - to prevent conflicts of interests.
- Audit committee of the FSMA

IX. PUBLIC CONSULTATION AND ADVISORY COMMITTEES

- OECD 5th principle = engagement with stakeholders
- Regulators should interact with stakeholders, but avoid regulatory capture and conflicts of interest
- Public consultation regarding regulator's decisions or rules
  - Guidelines on CEER's Public Consultation Practices (8 weeks consultation period);
  - CREG's internal regulations (3 to 6 weeks consultation period) regarding decisions of the MC;
  - FSMA's open consultation is the procedure whereby the content of a decree or a regulation is submitted in a consultative document published on the website, with the parties concerned being invited to give their comments.
- Advisory committees (e.g. Gas and electricity advisory board)

X. CONCLUSION

- No “one size fits all” answer;
- Some corporate governance principles may apply;
- Other governance rules may apply to regulators, if required by their independence and public role;
- Governance set by law, but freedom to set up additional governance rules;
- Comply or explain.

Thank You!

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