

# **Global Forum on Governance**

*Modernising Government: Strategies and Tools  
for Change*

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## **The Public/Private Interface: *regulatory authorities***

***balancing independence with accountability***

***Stéphane Jacobzone***

***Senior Economist, OECD Secretariat***

# Setting up Independent Regulatory Authorities (IRAs)

## ● ***Policy Objectives***

- Improve economic efficiency in a market framework shielded from short-term political and administrative risks
- Avoid the risk of capture by specific interests

## ● ***Context***

- Privatising former state-owned enterprises
- Necessity of a sound regulatory framework
- Ensuring market efficiency and protecting consumers' interest in cases of imperfect competition/monopolistic markets

# A Political Challenge

- ***The choice***
  - Self-regulation and competition framework
  - Direct Ministerial Oversight
  - Independent Regulators
- ***The rationale***
  - Delegating power to a regulator at arms' length from the political system
  - Improving the protection of consumer interest in case of market failures or other failures
  - Improving transparency and stability
  - High quality staff and technical expertise

# Towards the "Regulatory State"

- **Clarifying the functions of the State**
  - *Public Ownership General rule making (general rules)*
  - *Enforcing regulation (applying the rules)*
  - *Consumer protection (quality/market)*
- **A challenge to the executive and parliamentary powers**
  - *A regulator entrusted with regulatory powers, including sanctions, licences, and even some rule making*
  - *A Government in Miniature?*
  - *Establishing the legitimacy of a "non majoritarian" institution*

# The international context

- Trend towards participation of the private sector for the delivery of core services/network industries
- The European dimension
- The impact of the GATS
- OECD Work

# **Independent Regulatory Authorities in the proposed**

## *2005 OECD Recommendations on Regulatory Quality*

### ● **Broad regulatory perspective**

- Establish regulatory arrangements that ensure that the public interest is not subordinated to those of regulated entities and stakeholders
- Ensure that regulatory institutions are accountable and transparent

### ● **Competition dimension**

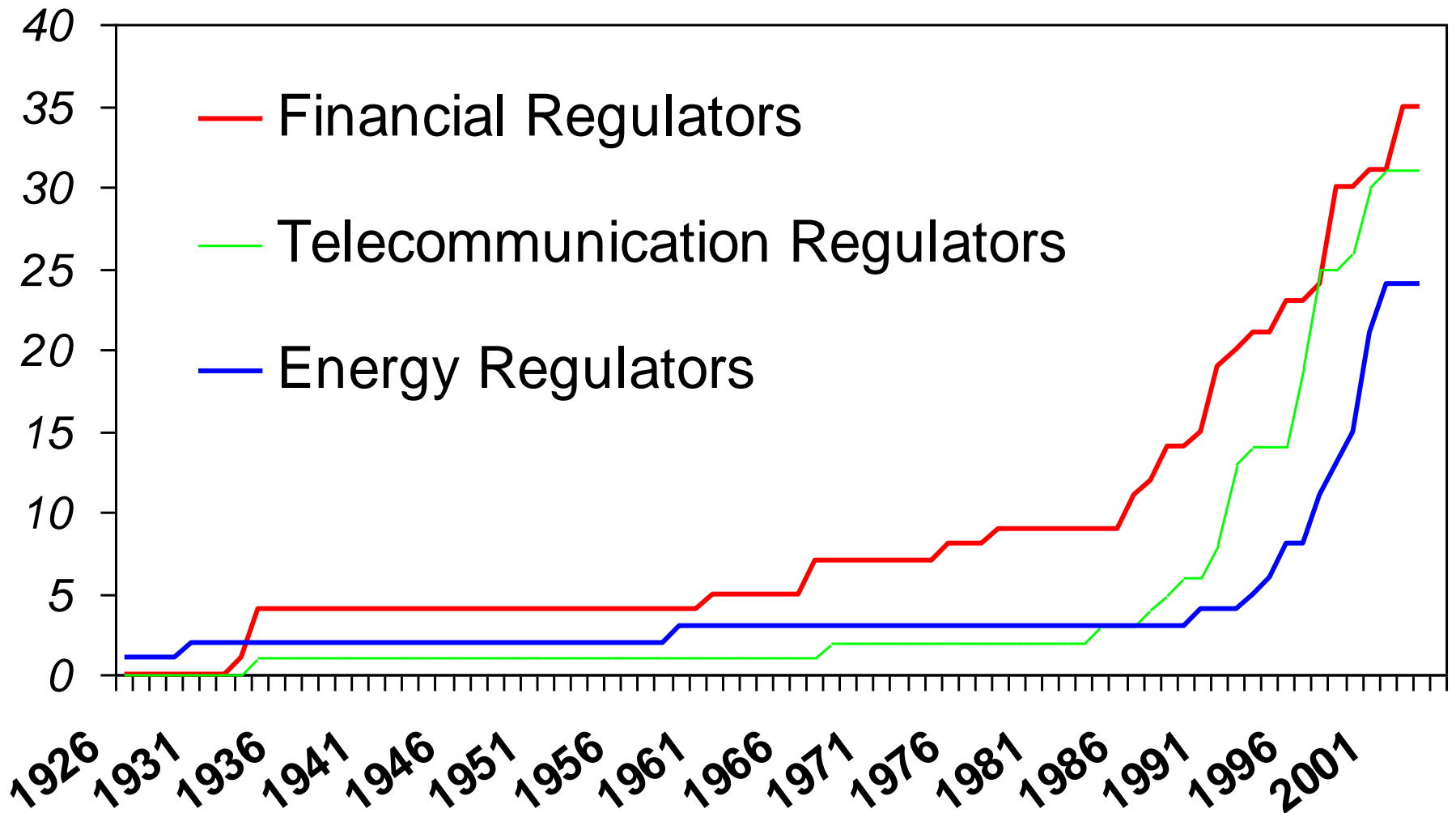
- Ensure that regulatory restrictions of competition and market openness are limited and proportionate to the public interests they serve
- Periodically review the need for universal service obligations, their effectiveness and the need to maintain restrictions on entry and prices
- Promote efficiency and the transition to effective competition where economic regulations continue to be needed (abuse of market power): separate competitive activities from regulated utility networks, promote non discriminatory access to essential network facilities, promote interconnection of networks, use price caps and other mechanisms to encourage efficiency gains.

### ● **Assessment**

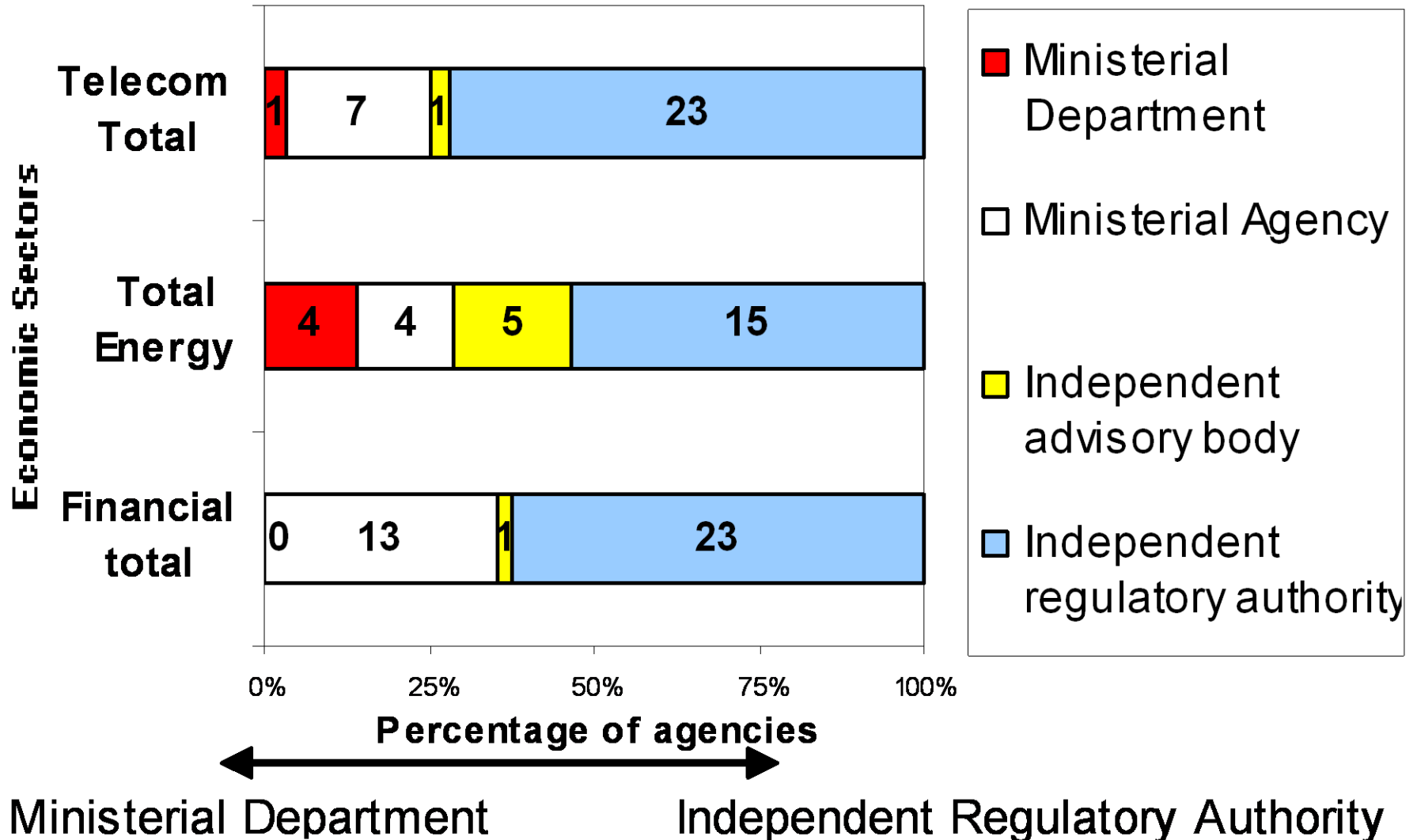
- Use performance-based assessment of regulatory tools and institutions, to assess how effective they are in contributing to good regulation and economic performance

# Recent Trends

## Independent Regulatory Authorities in OECD Countries



# A heterogeneous institutional status



# Independence

## the formal dimension

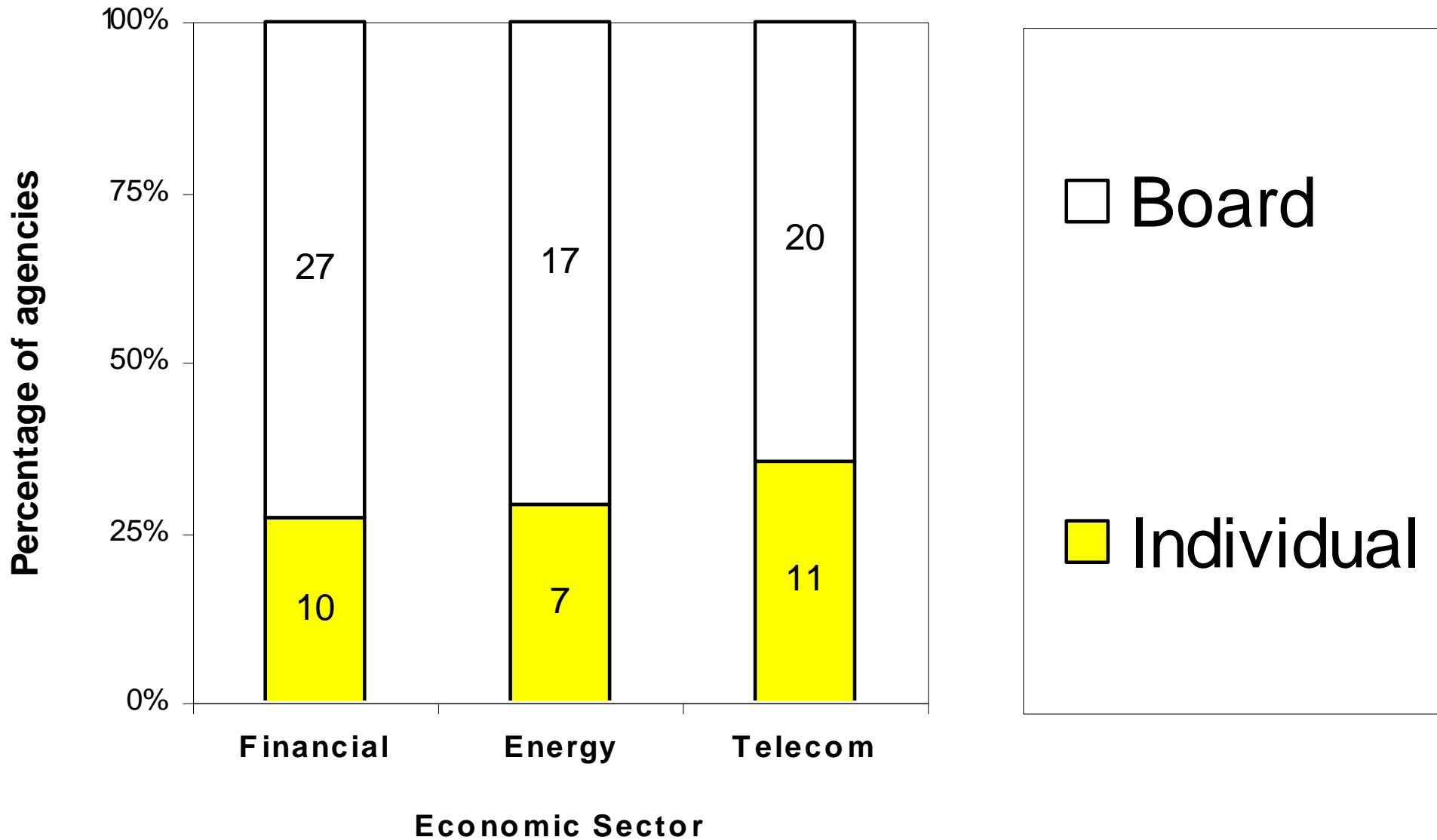
- The executive structure of the regulator:  
Single head / board
- Duration, nomination, renewal  
*(link with Parliamentary terms?)*
- Rules for the staff vs. the sector (hiring, firing)
- The possibility of overturning the decision:  
appeals
- The Brazilian case:
  - Structures comparable to other OECD countries
  - Different administrative and cultural background

# Independence

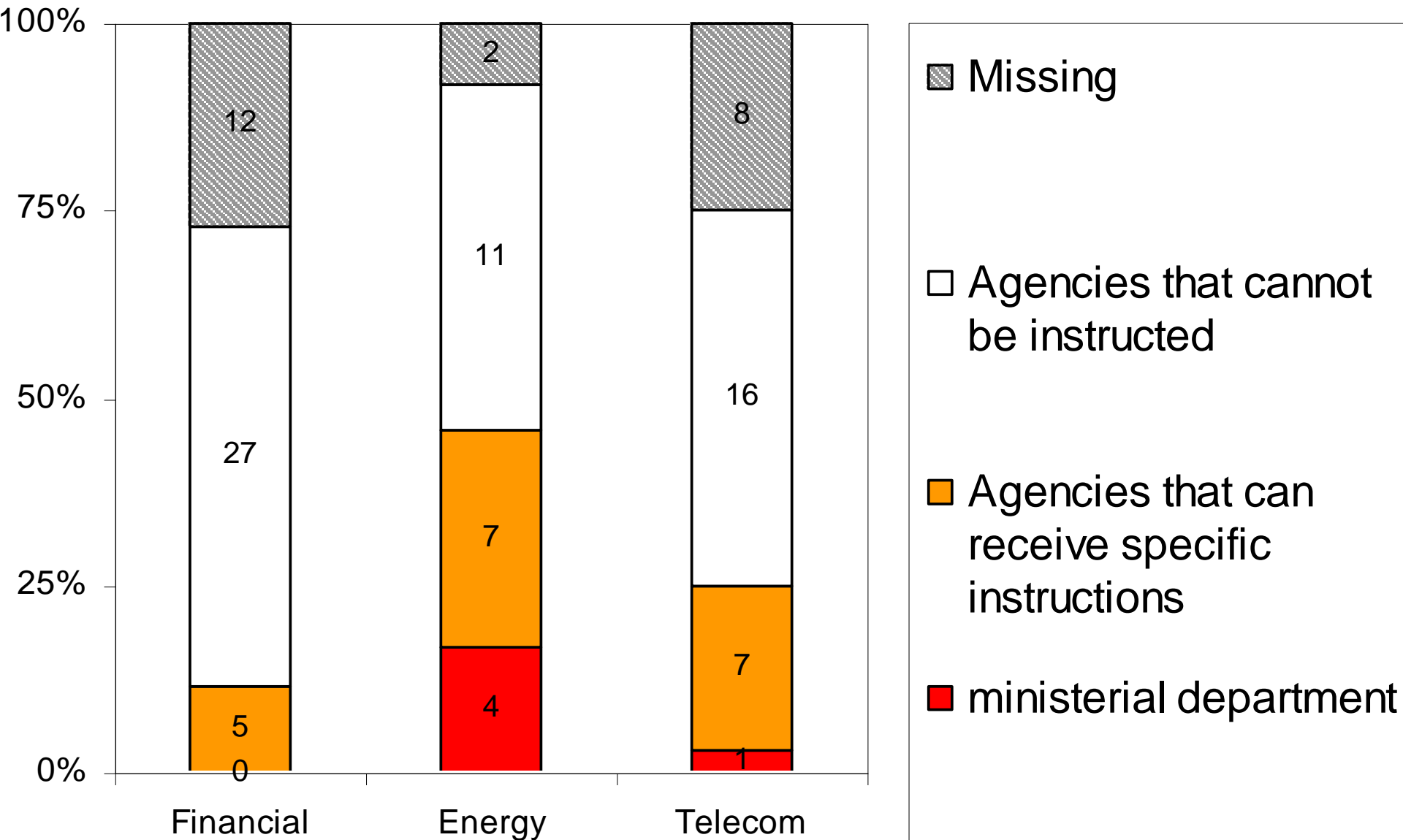
## Independence in practice

- The role of experience, respecting the terms
- The leadership of the first head
- Relations with elected politicians  
(See Mark Thatcher/LSE UK)
- The ability to manage crises  
(e.g. peak in energy prices, energy rationing, currency fluctuations or telecommunication prices)
- Quality of the staff
- The issue of Brazil
  - Nominations to the board
  - Need to have complete boards
  - Role of the public debate in a multi centric democracy

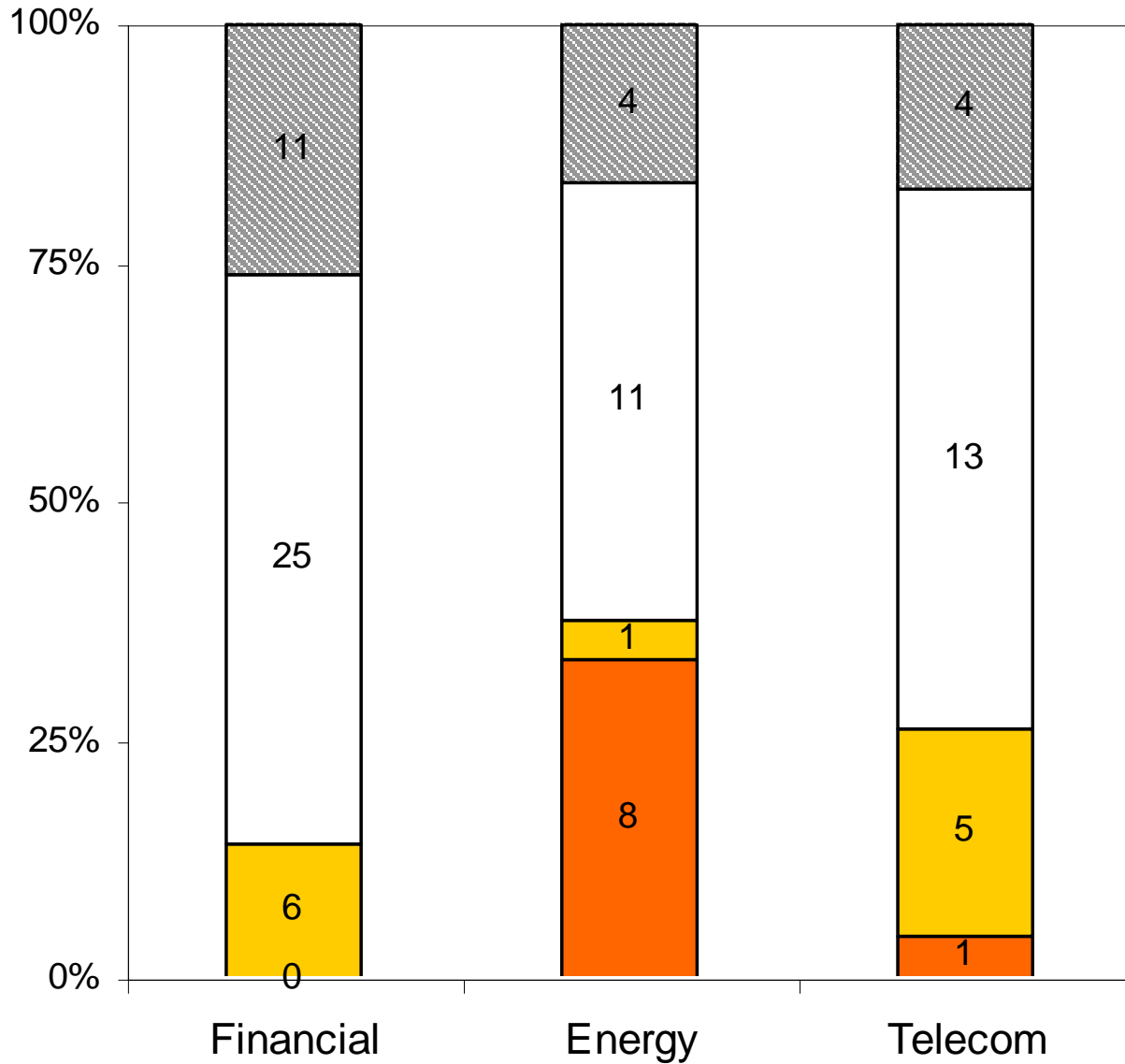
# Governance structures



# Possibility of Instructions



# Appeals

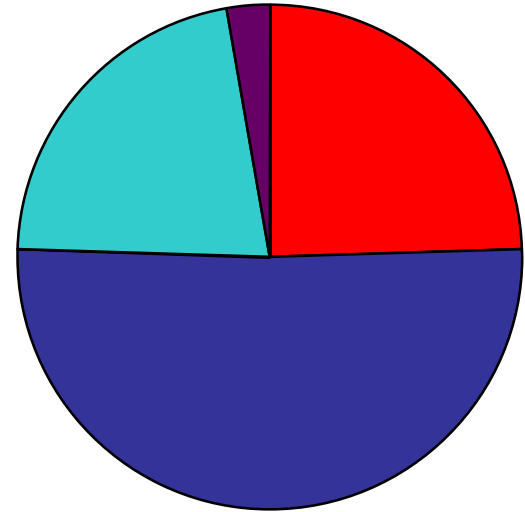


- Missing
- Agencies that cannot be overruled
- Agencies whose decisions can be overruled by government
- Ministerial department

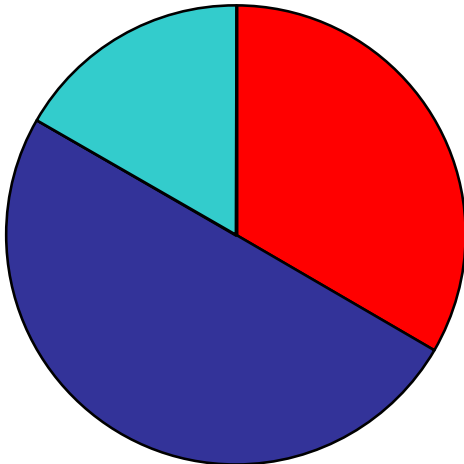
# Appointment of Heads

- One or two ministers
- Government collectively
- Parliament
- Parliament and Government
- Members of the board in charge
- Other
- Missing

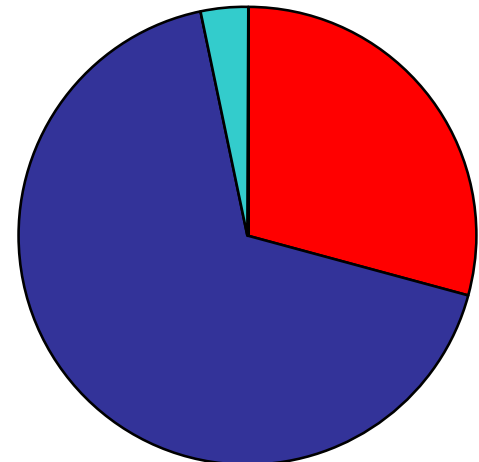
Financial



Energy



Telecommunications



# Terms of Appointment



# Financial resources and staffing

## ● **Financial resources**

- Use of central public funds: binding constraints
- Implicit pressure of budgeting ministries
- Control of audit offices
- Fees/Levies on the regulated industry: setting an independent formula ?
- Recent Brazil examples

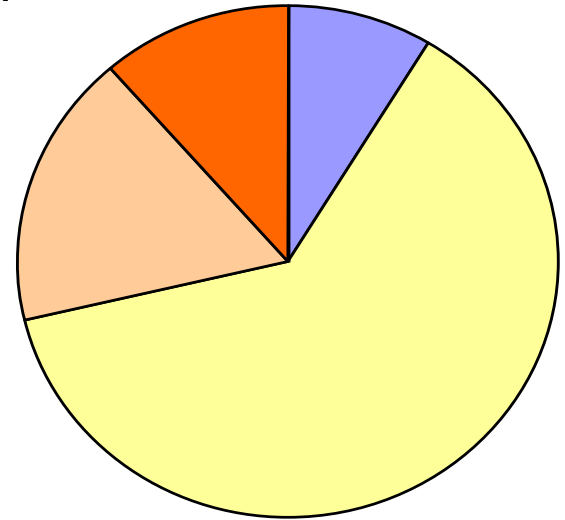
## ● **Human resources**

- A difficult challenge for small countries (multisector regulation)
- Rules for conflicts of interest, cooling off period (OECD Recommendations)
- Need for a specific framework for regulatory authorities?

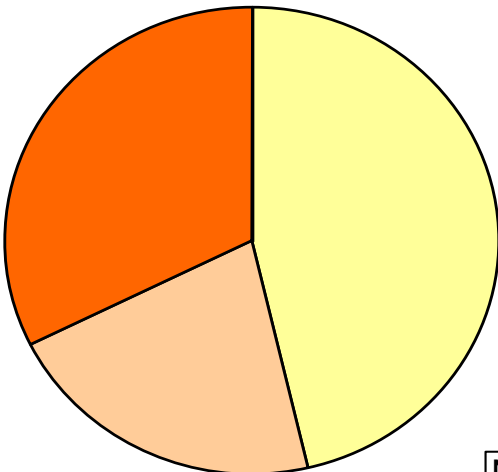
# Financial Resources

- Other (National Bank for specific financial regulators)
- Fees levied on the regulated industry or non budgetary resources
- Mix of State budget and fees
- State budget only
- Incomplete

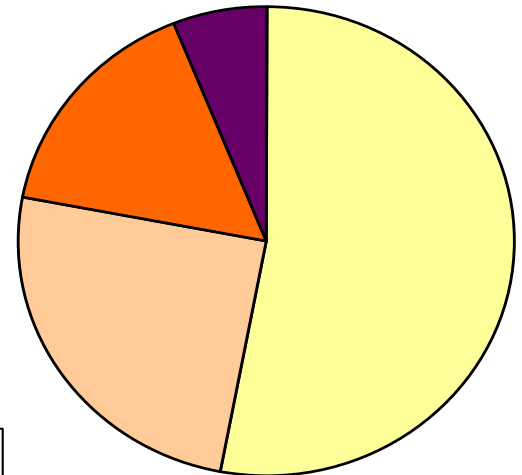
**Financial**



**Energy**



**Telecommunications**



Note: Number of agencies of each type financed by type of financing

# Functions and powers of regulatory authorities

## ■ Economic functions

- Enforcing market rules
- Licensing (entry, exit)
- Fixing prices of access to the Grid or the Network

## ■ Managing risks

- Inspection, Control
- Prudential ratios for financial institution
- Avoiding rupture of service
- Assuring Universal Service Provision

# The rule making power

- Normally power of the ministers/cabinet (political trade offs) but views may differ
- In practice some rule making power given to independent regulators technical standards vs. laws:
- A tension between delegating rule making and respecting independence
- But jurisprudential approach: set of precedent decisions ↔ rule

## Solutions

- *Possibility of suggesting official amendments of the existing rules (annual report to Parliament)*
- *Possibility of proposing rules to Government*

# The issue of strategic planning and law making

- Not a regulator's attribute
- Need to separate enforcement from law making
- Need for capacity in the ministries:
  - Example of EPE in Brazil
  - The case of transport (GEIPOT)
- The role of national councils to develop a strategy
- Building consensus in a diverse democracy

# The power of sanction

**An independent regulator ⇔ government in miniature**

*Executive power, preparing rules and judging?  
(settling disputes)*

*Problem vs. the traditional setting of democracies*

## **In practice**

- Respect of certain judicial forms for applying sanctions: separating investigation from deciding on the sanction
- Adapt the level of sanctions: Inapplicability of penal law:
- Efficient sanction: to deter from inappropriate behaviour and make it "ex ante" worthless

# Link with the judiciary

- The regulators' effectiveness depends on the quality of the judicial environment
- Issue in middle income countries
- Often crucial aspect
- Need to ensure:
  - Consistency
  - Technical expertise for decisions
  - Speed
- Need for a common system of appeal for competition authorities and regulators
- Avoid creating a "regulator of the regulator"

# Horizontal Design

## ***Coordination with Competition Authorities***

### ***SDBC in Brazil***

## ***Coordination among regulatory authorities***

- Common doctrine and consistent time frame
- Minimising the burden of compliance w
- Regular meetings and public hearings
- Request mandatory opinion  
(competition, environment)
- Examples: IBAMA / ANEEL, ANTAQ / ANTT,  
ANATEL / CADE

# Horizontal Design and sectoral specialisation

- Single goal, single sector agency: clarity, efficiency
- But "Silo Effect": Risk of non coordination and of regulatory burden stemming from multiple specialised agencies
- Multi-sectoral agency:
  - Minimises the risk of capture,
  - Softens human resource constraints,
- Core issues in Brazil
  - Approach to combined rail/road transport ANTAQ ANTT
  - Convergence TV/Telecommunications/)

# Balancing Independence with Accountability

- A condition of success
  - "non majoritarian" institutions (Majone)
  - Political credibility of the regulator
- No explicit mechanism for reporting and establishing legitimacy
- Procedural and political aspects
  - Often demanded by the independent regulators themselves (cf dialogue with Parliament)

# Ensuring Accountability: How ? without undermining independence

## *Systems of checks and balances*

- Transparency and procedural requirements  
Administrative procedure laws
- **Dialogue with citizens and Parliament**  
Annual report, dialogue with Parliament (expertise)  
Links with consumers' associations
- Substantial judicial/legal review:

# Link with the judiciary

- The regulators' effectiveness depends on the quality of the judicial environment
- Issue in some countries transition, middle income
- Often crucial aspect, need to ensure:
  - Consistency
  - Technical expertise for decisions
  - Speed
- Avoid creating a "regulator of the regulator"

# Ensuring Accountability and High quality regulation

- **High quality regulation:**

Subject the regulators' decisions to requirements for high quality regulation :

Regulatory Impact Assessment

Transparency

Predictability

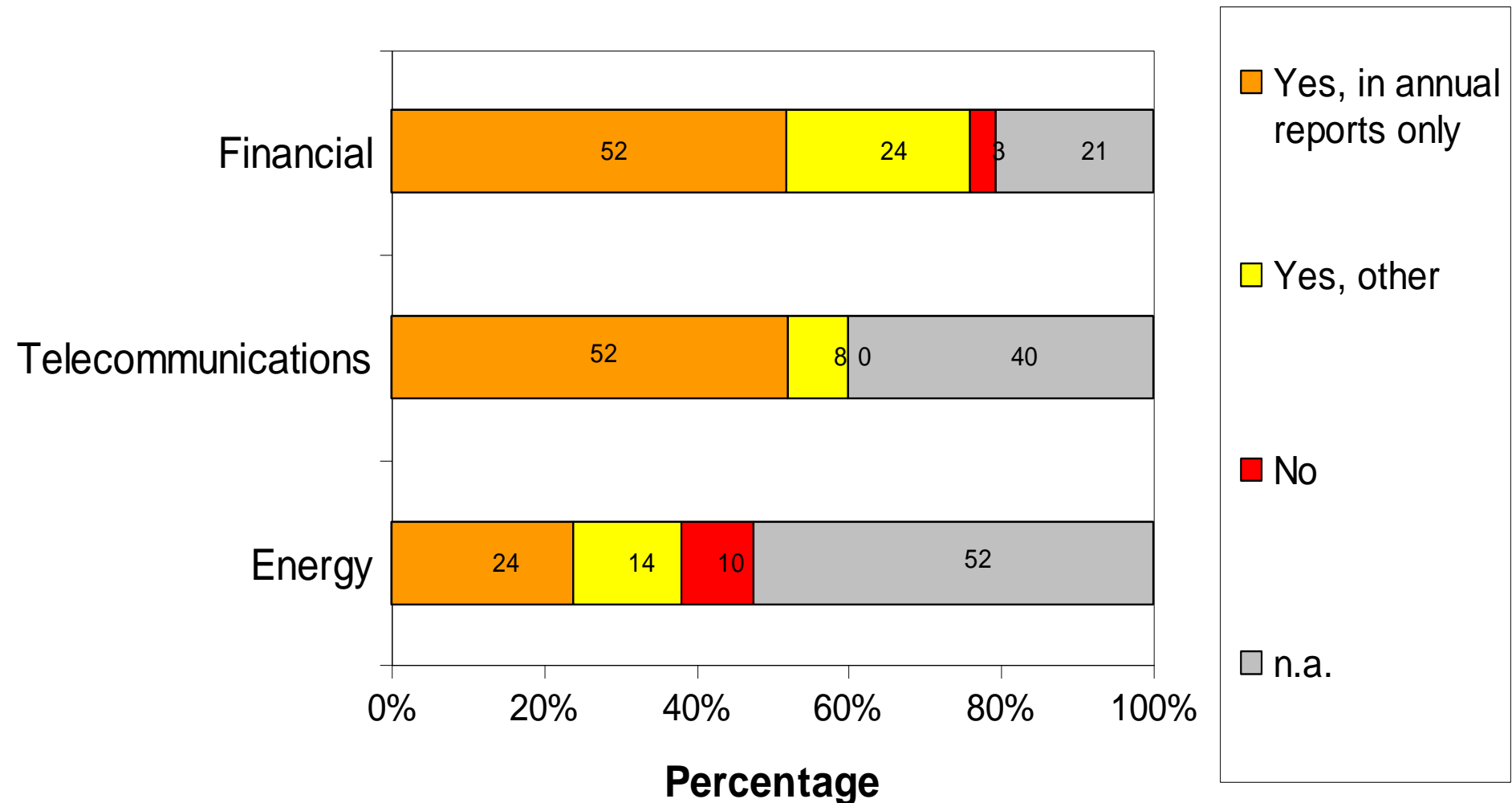
- **Key for industry and for credibility**

- **Cf PRO-REG project in Brazil**

# Assessing quality Performance evaluation

- *OECD recommendations*
- *Several dimension*
  - legal, judicial review
  - accounting/auditing
  - overall economic assessment
  - Recent UK example on capability assessment, Treasury reviews, National Audit Office

# Mandatory Release of Periodic Assessment Reports on Achievement of Objectives



# Performance Assessment of regulators in Brazil

- *Self assessment by regulators*
- *Role for TCU / CGU*
- *Role for consumers: IDEC/IADB*
- *Role for foreign investors: AMCHAM reviews*
- *National academic studies*
- *Evaluations by WB/IADB (PPIAF Study)*

# Conclusion

- Designing independent and effective regulators
- The need for high quality regulation
- No "pre cooked recipe"
- Respect national institutional settings while adopting international standards
- Significant policy turmoil in Brazil, in a moving regulatory environment:
- *Regulatory authorities have stood the test of time but may need some fine tuning and adaptation*