Chapter 9

Enabling regulatory reform

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This chapter examines the role of institutions in the promotion of regulatory reform, exploring the link between the existence of specific institutional arrangements and the endorsement of timely and appropriate practices of regulatory management. It highlights how the widespread use of regulatory impact assessment has facilitated the introduction of mechanisms of systematic consultation with those affected by reforms. The chapter then discusses the role played by regulatory management in improving the overall functioning of the government and in ensuring the coherence of its action, thus providing a wider perspective for the definition of reform opportunities. The chapter's last section provides an overview of the literature developed to explain the importance of international organisations in supporting reforms, underlining in this framework the specific methods used by the OECD. In particular, it draws attention to the role of the OECD in improving the regulatory environment in member countries. It emphasises that the OECD does not rely on conditionality in order to promote reform but on "soft methods of co-ordination", which represent a slower, but not necessarily less effective method of disseminating best practice and supporting the timely adoption of reform initiatives.

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If regulation is, as Brown *et al.* (2006) conclude, the least explored of the three main government functions (taxation, expenditure and regulation), the factors which promote regulatory reform have generally received still less attention. Yet the capacity to promote timely and appropriate regulatory management in a situation of ever-increasing economic and technical complexity is of utmost importance, and recent experience has shown how disruptive regulatory inadequacies may be. In the past 20 years, governments have come to understand that regulatory reform is both an end in itself and a means to the end of enabling markets and supporting competition and trade liberalisation, while promoting economic, social and environmental welfare. In the meantime, the nature of the regulatory process has dramatically changed. The transition from a "command and control" model to a model of regulatory governance has been a key focus of public sector reform in many OECD countries. Throughout this period, the understanding of regulatory reform has evolved, from an early concentration on eliminating regulation (deregulation) to a more systemic approach that comprises a mixture of deregulation and reregulation, and focuses on improving the effectiveness of regulation. At the same time, the process of reform itself has changed: once seen as something essentially episodic in nature – a one-off set of interventions – it is now understood as a dynamic process that is increasingly integrated into public policy making.

Today, almost all OECD countries have established explicit institutions and tools to implement regulatory policy. As with other core government policies, such as monetary or fiscal policy, regulatory policy is now an integral part of government activity and is pursued on a permanent basis. However, there is still resistance to a better regulation agenda, in both private and public sectors, and the pace of regulatory reform often lags behind the pace of innovation: telecommunications and financial services are the most instructive examples. This chapter therefore focuses not on the reform of regulatory regimes in specific product or labour markets, which are addressed in other chapters in this volume, but on the development of the institutions and processes that enable governments to generate and adapt high-quality regulation on a continuing basis. It is thus less concerned with the *substance* of regulatory reforms than with the creation of the *capacity* to reform.

The importance of a high-quality regulatory environment has been highlighted by the OECD with the adoption of the "Recommendation for Improving the Quality of Government Regulation" (OECD, 1995), *The OECD Report on Regulatory Reform* (OECD, 1997) and of the "OECD Guiding Principles of Regulatory Quality and Performance" (OECD, 2005). In recent years, the OECD has carried out a large number of regulatory reviews of individual countries, which represent an important source of information on the basis of which it is now possible to draw some important lessons. This chapter takes stock of the accumulated experience of these country reviews in order to explore the link between regulatory management and reform and to identify factors conducive to good regulatory outcomes. In particular, the chapter systematically scrutinises four sets of factors, which have been defined in the context of the overarching "Making Reform Happen" project and points out their relevance in promoting reform:

- the existence of appropriate regulatory institutions;
- the capacity to take into consideration the impact on, and the reactions of, those affected by reforms;
- the timing of reform and the interactions across different policy areas; and
- the role of evidence and international organisations in sustaining reforms.

The existence of appropriate institutions to support reform, from decision to implementation

While regulatory policy needs to focus to a large extent on the design and application of high-quality regulatory instruments, even well designed instruments may be ineffective without the right set of institutions to ensure effective implementation,. The institutional framework within which the "Better Regulation" agenda is to be implemented extends well beyond the executive centre of government, although this is the starting point. A wide range of institutions with regulatory functions or influence play a role in the promotion of regulatory reform. OECD regulatory reviews have highlighted the existence of four different sets of considerations pertaining to the institutional framework that are relevant in this respect. These considerations concern:

- the central government architecture;
- the existence of central oversight bodies for the promotion of regulatory quality;
- the presence of independent regulators; and
- the state of the relations between central and sub-central governments.

The structure of central government institutions can greatly affect the quality of regulatory policy

The scrutiny of central government architecture is essential in order to devise the best options available for the co-ordinated promotion of regulatory reform. Institutional settings and legal systems are country-specific, and every recommendation concerning the most appropriate solution for regulatory management across central government has to be carefully tailored to the specific national context. Some considerations are, nevertheless, valid for every country. They concern the importance of:

- a general policy framework which defines the roles and the competencies of the actors involved in the regulatory process;
- a "whole-of-government" perspective, able to take into account in a dynamic perspective the interplay between the institutions involved in the regulatory process;
- a regulatory culture which favours regular exchange of information and the establishment of a climate of trust and co-operation; and
- a political commitment to regulatory reform, showing the determination of the government to realise the Better Regulation agenda.

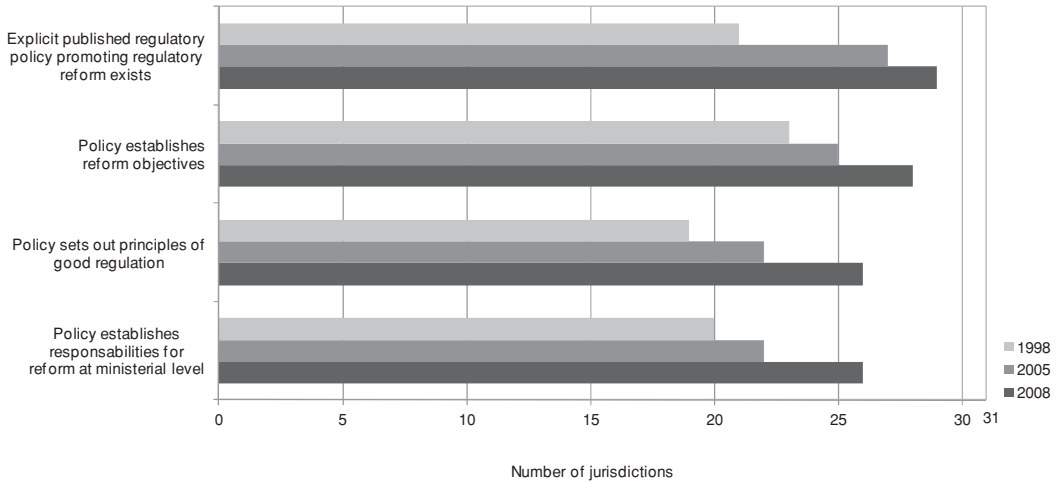
All components of central government have roles to play in the regulatory process. If parliaments have formal responsibility to approve or reject primary legislation, the executive is a key source of regulation, both in terms of proposing new laws to the parliament and defining secondary rules to implement primary legislation. At the same time, the judiciary has an essential role in rule enforcement through the judicial review process, while national audit offices (NAOs) and ombudsmen help to strengthen administrative accountability and to ensure the effectiveness of regulatory regimes. Competition bodies are also important, as they enforce rules which are vital for the effective functioning of markets. As a result, their role has to be carefully defined in order to avoid different interpretations of sectoral laws and to guarantee the coherence of the regulatory framework.

OECD country reviews have consistently found that the institutional context for implanting effective regulatory management is complex and often highly fragmented, and that the involvement of a large number of institutional players can reduce the

transparency of the regulatory process, slow co-ordination and increase transaction costs if competences are not duly defined and mechanisms of co-operation carefully devised. If co-ordination is easier to achieve in small countries with closely knit governments that can rely more on trust and informality, larger countries must find ways of dealing with a higher level of complexity, a task that is sometimes complicated by the existence of multi-layered federal arrangements.

Thus, a first important step for the improvement of regulatory quality across central government is the clarification and, eventually, the simplification of the institutional set-up of the regulatory system, through the development of a general policy framework that defines the roles and competencies of the different actors in the regulatory process and fully articulates their respective jurisdictional authorities, powers, duties and responsibilities. A sound general policy framework for regulatory management should also contain an integrated strategic vision of a Better Regulation policy that clearly articulates its long-term direction and its intended contribution to public policy goals. Countries with explicit regulatory policies and comprehensive general policy frameworks consistently make more rapid and sustained progress than those that lack such policies (OECD, 2002, 2008). By 2008, nearly all OECD member countries had some form of a published regulatory policy promoting regulatory reform (Figure 9.1). Among the first countries to adopt an explicit regulatory policy were the United States, where regulatory reform was pioneered in the 1970s, and Canada, which developed its regulatory reform strategy in 1986. Several more OECD countries introduced elements of a regulatory quality policy during the 1990s. In most countries where an explicit regulatory policy has been put in place, it has been substantially revised and developed in recent years (OECD, 2009a).

Figure 9.1. **Explicit regulatory policy promoting government-wide regulatory reform in OECD countries, 1995, 2005 and 2008**



Note: The sample includes 31 jurisdictions for 2008 and 2005. For 1998, 27 jurisdictions are included as no data were available for Luxembourg, Poland, the Slovak Republic and the European Union.

Source: OECD (2009a), "Indicators of Regulatory Management Systems", *www.oecd.org/regreform/indicators* and *www.oecd.org/dataoecd/44/37/44294427.pdf* (full report).

Effective regulatory policy requires a whole-of-government approach

Regulatory reviews have consistently highlighted the importance of adopting a "whole-of-government" perspective, able to take into account in a dynamic perspective the interplay between the different institutions involved in the regulatory process and to overcome the obstacles created by a traditional compartmentalisation of functions. The

adoption of a "whole-of-government" perspective implies the capacity to devise the mechanisms of co-operation needed to achieve a defined policy objective. OECD country reviews have found that ministries such as finance, justice, trade and industry generally retain important responsibilities linked to the regulatory quality agenda, but accountability for reform results should be increased within all individual ministries.[1] Parliaments are also taking an active interest in regulatory quality and supporting tools. However, the OECD reviews find that there is still considerable room for their integration into regulatory quality systems and processes in most countries.

The importance of judicial review in supporting regulatory reform has also been emphasised. Judicial review can promote regulatory quality and correct legal inconsistencies. At the same time, it may help to resolve conflicts of competence on different regulatory issues. Timescales for judicial decisions and the relative ease or difficulty with which rules can be challenged have been identified as important factors which need to be taken into account in the regulatory process in a whole-of-government perspective. For example, when liberalising infrastructure sectors, it is advisable to consider ahead of time whether and how market opening might be challenged in the courts, as even an ultimately unsuccessful legal challenge can cause uncertainty and delay, adding to the cost of reform. Alternatively, the reform of the court system dealing with such issues may be desirable in order to complete the liberalisation process without major disruptions.

OECD country reviews have also shown that NAOs and ombudsmen are emerging in many countries as important structures for the promotion of regulatory quality. NAOs often play a role which goes beyond accounting for the efficient use of resources and which includes the assessment of the public administration's performance and of the effectiveness of the implementation of regulatory regimes. Moreover, they are independent of government and have the advantage of taking into consideration whole areas of policy, thus overcoming the shortcomings of many more fragmented approaches to regulatory quality. Ombudsmen oversee the investigation of complaints of improper government activity against the citizen and play an important role in the promotion of administrative accountability and, hence, regulatory quality.

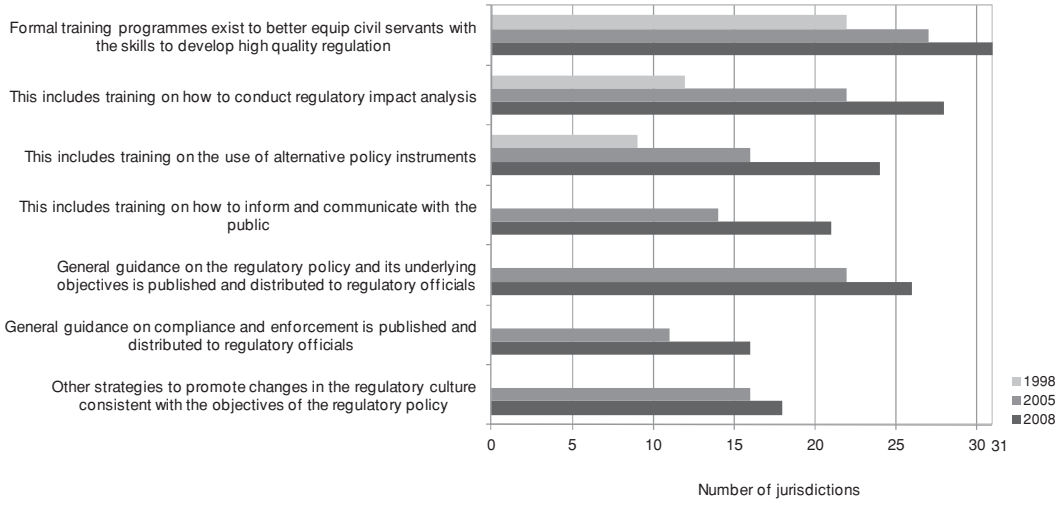
The creation of a culture of regulatory quality across public administration is critical

If a "whole-of-government" perspective is essential in order to capture the interrelations which allow a proper functioning of central government and determine the quality of regulation, the promotion of regulatory quality culture can help spread a sense of increased responsibility for reform results. In many countries, administrations have not yet fully integrated the need for regulatory quality into their policy processes. Improving state-citizen and state-business relationships is the starting point. The administration needs to be approachable, avoiding secrecy, complexity and opacity in administrative acts. Modernising public administration involves promoting a service and client-oriented attitude from the staff of public institutions, and a less bureaucratic and administratively burdensome approach (see Chapter 8). Most countries have already recognised and acted on these aspects of administrative culture. However, much deeper reforms are needed to embed an awareness of regulatory quality and its importance across public administration.

A climate of trust and co-operation and the promotion of a regular exchange of information continue to be critical for the development of an effective regulatory management. The enhancement of a programme of continuous training and capacity building within the government provides an important contribution to the improvement of regulatory culture. This kind of initiative not only improves the technical skills needed in certain processes, such as regulatory impact analysis (RIA) or plain drafting, it also communicates the importance attached to the regulatory quality agenda by the administrative and political hierarchy. Training and capacity-building programmes create opportunities to meet and to discuss the Better Regulation agenda, thus fostering a sense of ownership of reform initiatives and facilitating communication within and

beyond individual institutional settings. Moreover, the use of adequate financial resources to support the organisation of these initiatives is an important sign of political commitment, drawing further attention to the Better Regulation agenda. All OECD member countries report having formal training programmes in place to promote high-quality regulation. Training programmes are also converging in terms of the set of skills they provide to regulators. Approximately 90% of OECD countries report that they provide training in the conduct of regulatory impact analysis, up from 40% in 1998 and 70% in 2005 (OECD, 2009a). Training in the use of alternative policy instruments and communications has also expanded, although less strongly. About four-fifths of OECD countries provide training in alternative policy instruments, while approximately three-fifths train regulators to inform and communicate with the public. The quality and intensity of this training differs considerably across countries (OECD, 2009a) (Figure 9.2).

Figure 9.2. **Training in regulatory quality skills in OECD countries, 1998, 2005 and 2008**



Note: The sample includes 31 jurisdictions for 2008 and 2005. For 1998, 27 jurisdictions are included as no data were available for Luxembourg, Poland, the Slovak Republic and the European Union.

Source: OECD (2009a), "Indicators of Regulatory Management Systems", *www.oecd.org/regreform/indicators* and *www.oecd.org/dataoecd/44/37/44294427.pdf* (full report).

A high level of political commitment is needed to sustain the regulatory reform processes

Political commitment to regulatory reform has been unanimously highlighted by country reviews as one of the main factors supporting regulatory quality. Effective regulatory policy should be adopted at the highest political level, and the importance of the Better Regulation agenda should be adequately communicated to lower levels of the administration. Political commitment can be demonstrated in different ways. As noted earlier, the adoption of a general policy framework for regulatory policy and the organisation of adequately financed training and capacity-building programmes highlight the government's determination to realise the Better Regulation agenda. However, the creation of a central oversight body in charge of promoting regulatory quality is by itself perhaps the most important element to show the political commitment of the central government and to spread awareness about the Better Regulation agenda among the different actors involved in the regulatory process.

Central bodies for promoting regulatory quality can both signal and render a policy effective

OECD reviews find a strong relationship between an effective, comprehensive regulatory policy and the existence of a central oversight body. These structures are best placed at the centre of government, a position which demonstrates the government's commitment to the Better Regulation agenda and which creates the best conditions for these bodies to perform their co-ordinating role from a whole-of-government perspective with sufficient independence and authority.

Promoting reform may require the allocation of specific responsibilities and powers to monitor, oversee and promote progress across the whole of the public administration and to maintain consistency between the approaches of the different actors involved in the regulatory process. In particular, if some countries rely on trust and informality for co-ordination, other countries, with more complex and sometimes fragmented institutional settings, have allocated this function to a structure created for this purpose. More and more OECD countries have established central oversight bodies whose key role is to make certain that regulatory reform: (i) meets quality standards; (ii) is in line with the general policy framework and the general economic strategy of the country; and (iii) makes appropriate use of regulatory tools (such as RIA).

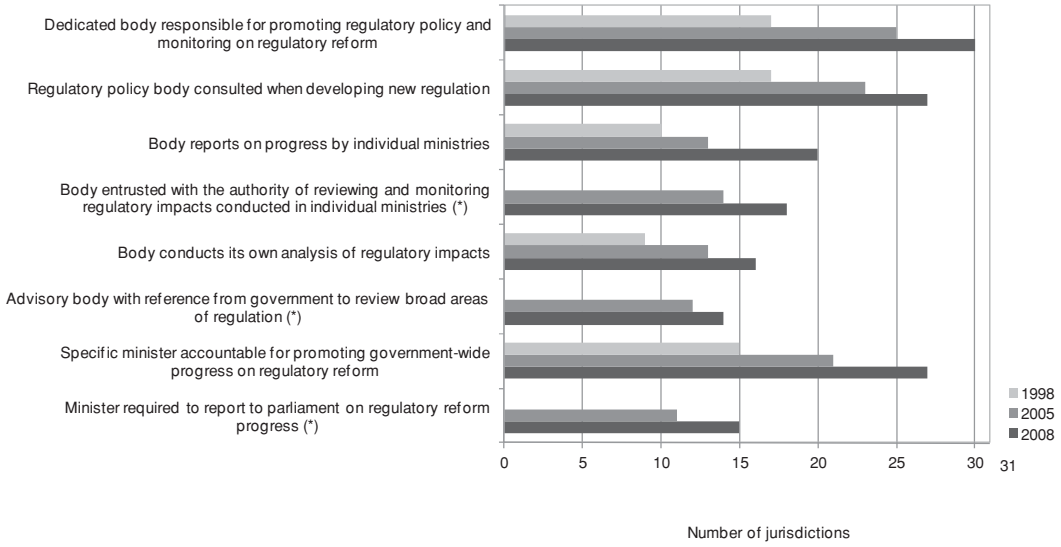
The existence of a specific structure charged with promoting regulatory quality indicates per se a strong commitment to the Better Regulation agenda and, in OECD countries, it is closely correlated with the development of an effective and comprehensive regulatory policy. The functions of central oversight bodies usually go beyond improved co-ordination between existing bodies involved in the regulatory process. In particular, they monitor the progress achieved by the different actors involved in the policy process and scrutinise new policy/regulatory proposals. Moreover, oversight bodies can have a "challenging function", which gives them the power to question regulation and to assess the quality of regulatory policy through RIA. They can also act as gatekeepers, with the power to veto a regulation which does not fulfil the necessary requirements. Central oversight bodies also have an important responsibility in terms of advocacy and communication, encouraging the long-term development of Better Regulation principles across the government and managing external communication of the government's policy on Better Regulation. Central oversight bodies may thus have a variety of roles and structures which reflect the legal, economic, social and cultural characteristics of each country. There is no "one-size-fits-all solution". However, OECD reviews indicate that these structures are best placed when they are located at, or report to, the centre of government, rather than in a line ministry, which is likely to be too closely linked to specific policy and regulatory functions (OECD, 2008). This position is in fact an important indication of the political commitment to regulatory quality and provides the best conditions for these bodies to perform their co-ordinating role from a whole-of-government perspective and with sufficient independence and authority.

A growing number of OECD countries are creating such bodies

Figure 9.3 illustrates the progress observed since 1998, when only 17 of the 27 OECD countries surveyed had a dedicated body responsible for promoting regulatory policy; in 2008 almost all did. The European Commission also reported having one (OECD, 2009a). In the majority of OECD countries, regulatory oversight bodies are placed at the centre of government – in a prime minister's office or a presidential office with some form of interdepartmental co-ordination. Ministries of finance and ministries of justice also play a significant role in hosting these functions (OECD, 2009a). The last decade has also witnessed significant reforms to empower regulatory oversight bodies. In 2008, it was reported that most bodies in charge of promoting regulatory reform were consulted when new regulations were developed. At the same time, the number of bodies that report on progress by individual ministries had almost doubled since 1998. However, the authority to conduct analysis of regulatory impacts remains limited to about half of the regulatory oversight bodies. In 1998, about half of OECD member countries had a specific minister accountable for promoting regulatory reform. By 2008, eight further countries had

assigned this task to a specific minister (out of those countries for which data were available for both years). These included Belgium, the Czech Republic, Denmark, Finland, Germany, Greece, Ireland, Norway and Spain. In about half of OECD member countries, this minister is required to report to parliament on the progress of the regulatory reform agenda.

Figure 9.3. **Institutional arrangements to promote regulatory policy in OECD countries, 1998, 2005 and 2008**



Note: The sample includes 31 jurisdictions for 2008 and 2005. For 1998, 27 jurisdictions are included as no data were available for Luxembourg, Poland, the Slovak Republic and the European Union. (*) indicates data only available for 2005 and 2008.

Source: OECD (2009a), "Indicators of Regulatory Management Systems", *www.oecd.org/regreform/indicators* and *www.oecd.org/dataoecd/44/37/44294427.pdf* (full report).

Interesting examples of central oversight bodies include the Regulatory Reform Committee (RRC) in Korea, which has been set up by law with "a general mandate to develop and co-ordinate regulatory policy and to review and approve regulations." Its main functions are to give some strategic perspective to regulatory reforms, to undertake research, to monitor the improvement efforts of each agency and to make sure there is coherence between their actions. In the Netherlands, a regulatory committee co-ordinates fairly independent ministries, and extensive inter-ministerial co-ordination and supervision have been put in place. In this context, it is also worth mentioning the example of the United Kingdom, where – in contrast to what was suggested earlier – the central oversight body was moved away from the centre of government. The transfer of the Better Regulation Executive (BRE) from the Cabinet Office to the Department for Business, Enterprise and Regulatory Reform (BERR) was motivated by the fact that the Cabinet Office had neither direct practical links with business and other stakeholders nor direct responsibility for policy areas which need to be better regulated. In this case, the need to insulate the main central oversight body in charge of regulatory quality was counterbalanced by the need to bring it closer to the issues and to the interests to be regulated. At the same time, the BRE retains a high degree of autonomy from the BERR via its management structure (Box 9.1).

Box 9.1. **The Better Regulation Executive in the United Kingdom**

The Better Regulation Executive was established in 2006 and given primary responsibility for the government's Better Regulation agenda. The BRE is made up of a strategic support team and three directorates:

- the Regulatory Reform Directorate, which is responsible for the "on the ground" management and promotion of key Better Regulation tools and processes, such as impact assessment and departmental simplification plans, as well as for the management of the EU-related dimension of regulation;
- the Regulatory Innovation Directorate, which functions as a think tank; and
- the Regulatory Services Directorate, which is in charge of service delivery.

The BRE is staffed by civil servants, most of whom are on secondment from departments, as well as business people and professionals seconded from the private sector. The staff comprises around 80 people. It is the central authority for advocacy and co-ordination of Better Regulation policy across the government. In particular, it has the following functions:

- Monitoring and challenge: the BRE monitors the Better Regulation policies and progress of departments and key national agencies through a network of account managers on a day-to-day basis and through the executive chair briefing the prime minister on progress across the government. It scrutinises new regulatory proposals and advises whether they should be examined by the Panel for Regulatory Accountability. It is not, however, a formal gatekeeper, as it lacks the power to block proposals for regulation.
- Advocacy and communication: the BRE encourages the development of Better Regulation principles across government and manages external communication of the government's policy on Better Regulation.
- Institutional co-ordination and cultural change: the executive has developed – and continues to develop – a broad range of relationships within central government as well as outside, including with the National Audit Office, consumers' representatives, parliamentary committees, local authorities and its EU counterparts.
- Support and guidance: the BRE is a facilitator. Its staff offers departments guidance in the development of impact assessment and simplification plans, among other issues. It has produced a wide range of guidance material and training tools.
- Policy and project development and management: the BRE is the main driver for all main Better Regulation initiatives, taking forward projects in this field.
- Handling EU Better Regulation policy (shared with the Cabinet Office): the BRE liaises with colleagues at home, across EU countries and with the European Commission to help drive forward the Better Regulation agenda in the EU.

Source: OECD (2009b), "Better Regulation in Europe: An Assessment of Regulatory Capacity in 15 Member States of the European Union", European Commission and OECD, *www.oecd.org/document/24/0,3343,en_2649_34141_41909720_1_1_1_1,00.html*.

However, some countries find the concept of new central bodies for regulatory quality promotion hard to accept, on the grounds that the guiding function is already embedded in existing policies and structures. In particular, such units may be perceived in large countries as undermining or competing with other more established centres, as well as raising a possible threat to ministerial discretion. By contrast, in small countries, with small homogeneous societies, characterised by close and informal networks of contacts within government and society based on mutual trust, central bodies are sometimes seen as unnecessary (OECD, 2008). The lack of a central regulatory oversight body, however, need not imply the absence of co-ordination of regulatory policy. Instead, it can be the result of a relatively decentralised model of government administration. The

most striking example in this area is Denmark, where the development of a generally favourable regulatory environment has not been promoted by a central oversight body as traditionally understood. Strong traditions of autonomous ministries have supported, on the one hand, the establishment of a number of inter-ministerial committees (which have responsibility for monitoring and developing Better Regulation policies and are involved in vetting draft regulations), and, on the other, the strengthening of informal co-ordination mechanisms between officials in ministries. In this framework, co-ordination is provided by the Co-ordination Committee, a ministerial committee which represents the hub of Better Regulation management (Box 9.2).

Box 9.2. **The Co-ordination Committee in Denmark**

The Co-ordination Committee (Koordinationsudvalget) is a ministerial committee which vets and approves major new policy initiatives and changes. It is also the focal point for the government's Better Regulation policy. It reviews the final version of the annual law programme before approval by the cabinet, and approves individual draft laws before they are sent to the parliament. It endorses ministries' action plans to reduce administrative burdens on business and reviews progress reports from ministries on the De-bureaucratisation Programme. The Co-ordination Committee is headed by the prime minister and includes the most important ministries. Participation can extend to other ministries on occasion. Its Regulation Committee prepares the Co-ordination Committee work on Better Regulation policy. This officials' committee, established in 1998, is formed from the Group of Permanent Secretaries that prepares meetings for the Co-ordination Committee and is the highest level for co-ordination between civil servants. It includes the permanent secretaries of the Prime Minister's Office (chair), the Ministry of Finance, the Ministry of Economic and Business Affairs and the Ministry of Justice. The group vets minsters' proposals for inclusion in the annual law programme, including the impact assessments that must be carried out before a proposal can be tabled, and develops policy on regulatory quality.

Source: OECD (2009b), "Better Regulation in Europe: An Assessment of Regulatory Capacity in 15 Member States of the European Union", European Commission and OECD, *www.oecd.org/document/24/0,3343,en_2649_34141_41909720_1_1_1_1,00.html*.

Independent regulators can help shield regulatory policies from political intervention…

Independent regulators are another key institution, frequently used by OECD countries, which establish separate "agencies" at arms' length from the political system, with delegated powers to implement specific policies in a number of sectors. The term covers regulators found in utility sectors with network characteristics, such as energy and telecoms, but also in other sectors where sector-specific oversight is needed, such as financial services. Their main functions vary significantly across countries and sectors. However, "they tend to be concerned with rule enforcement and the application of sanctions for non-compliance with rules relating to their areas of competence, and authorisations for the issue of licences and permits" (OECD, 2008). OECD experience shows that independent regulators have been most effective and credible where their independence and roles are based on a distinct statute with well-defined functions and objectives. Their independence requires an adequate resource base and staffing policy and should be carefully counter-balanced by the introduction of accountability mechanisms.

Independent regulators may be found in a wide range of institutional settings:

- Ministerial departments are part of the central government and do not have the status of a separate body. They are headed by, or report directly to, a minister, and they are typically funded from tax revenues. They can have statutory independence in carrying out some regulatory functions and considerable administrative autonomy from other ministries.

- Ministerial agencies are executive agencies established at arm's length from central government. They may have a separate budget and autonomous management powers, but they are ultimately subordinate to a ministry and subject to ministerial intervention.

- Independent advisory bodies provide official and expert advice to government, lawmakers and firms on specific regulations and aspects of the industry. They may also have the power to publish recommendations, which may be more or less binding.

- Independent regulatory authorities are responsible for the regulation of specific aspects of an industry. This is the most widespread type of structure. Even if their budgets may be under ministerial control, political or ministerial intervention tends to be prohibited or at least limited to providing advice on general policy matters rather than specific cases.

Independent regulators provide an important contribution to regulatory reform, inasmuch as they can, to some extent, shield market interventions from the direct interference of political and private interests. They therefore have the authority to deal with complex issues, assuring market participants that their decisions are not vulnerable to uncertain, politically driven government action. In particular, independent regulators are often important for providing non-discriminatory access to essential facilities and guaranteeing "fair" regulations. Moreover, in those countries in which the state holds shares in network industries, independent regulators help to mark out the separation of the roles of the state as an owner, as a policy maker and as a regulator. However, independent regulators must be credible in order to promote reform effectively. As a matter of fact, their authority and, hence, their capacity to impose their decisions, depend greatly on the legitimacy of their actions as independent bodies and on the professionalism, openness and fairness with which they are seen to discharge their duties and exercise their powers.

…provided that their own independence and impartiality are adequately safeguarded

OECD reviews show that independent regulators have proved to be more credible where their independence and roles are based on distinct statutes with well-defined functions and objectives. Key aspects concern governance structure, the transparency of, and respect for, procedures, the selection and the appointment of staff, and financing. As far as governance structures are concerned, a board is considered more reliable for decision making, inasmuch as collegiality is expected to ensure a greater level of independence and integrity. As a result, the great majority of independent regulators in OECD countries have a board. Strict rules for the transmission of instructions to regulators and for ministerial appeals against them are needed in order to ensure transparency and to maintain the market's confidence in the regulator's own procedures. The terms of appointment of staff also have considerable influence on the autonomy of regulators. In general, longer appointments, which span political cycles, ensure a greater degree of independence. Moreover, a flexible staffing policy is needed in order to allow these bodies to attract and keep competent and authoritative staff. Finally, country reviews find that independent regulators need adequate resources to enjoy an appropriate level of independence from ministers. Several arrangements have been used in OECD countries, ranging from directly levying fees from the regulated entities to central funding from the state budget. Funding is often constrained by the nature of the agency and the possibility of levying sufficient fees from the sector being regulated. It may also be influenced by the need to reduce the risk of capture.

However, independent regulators also present a number of risks. The main risk is "regulatory capture". This may involve political capture (*i.e.* the subordination of the regulator to the government or some elements of it) and/or capture by the regulated entities. Moreover, insofar as independent regulators are often established along sectoral

lines, they may tend to obstruct convergence between sectors and favour the fragmentation of government policies. In particular, OECD competition reviews show that when network sectors have restructured rapidly, driven by technological innovation, sector-specific issues have tended to become less important *vis-à-vis* general competition issues. However, regulators tend not to transfer their powers to competition authorities, thus hindering the establishment of a single level playing field for economic activities across different sectors.[2] In this sense, they may slow structural changes and cause potential losses to consumers. However, many of these risks can be minimised by careful regulatory design. The independence of regulators raises the issue of accountability, perhaps the biggest challenge for their future development. Evaluation mechanisms for their performance and governance structures need attention. At the same time, as mentioned earlier, appeal systems against independent regulators need to be carefully evaluated in order to avoid undermining their independence.

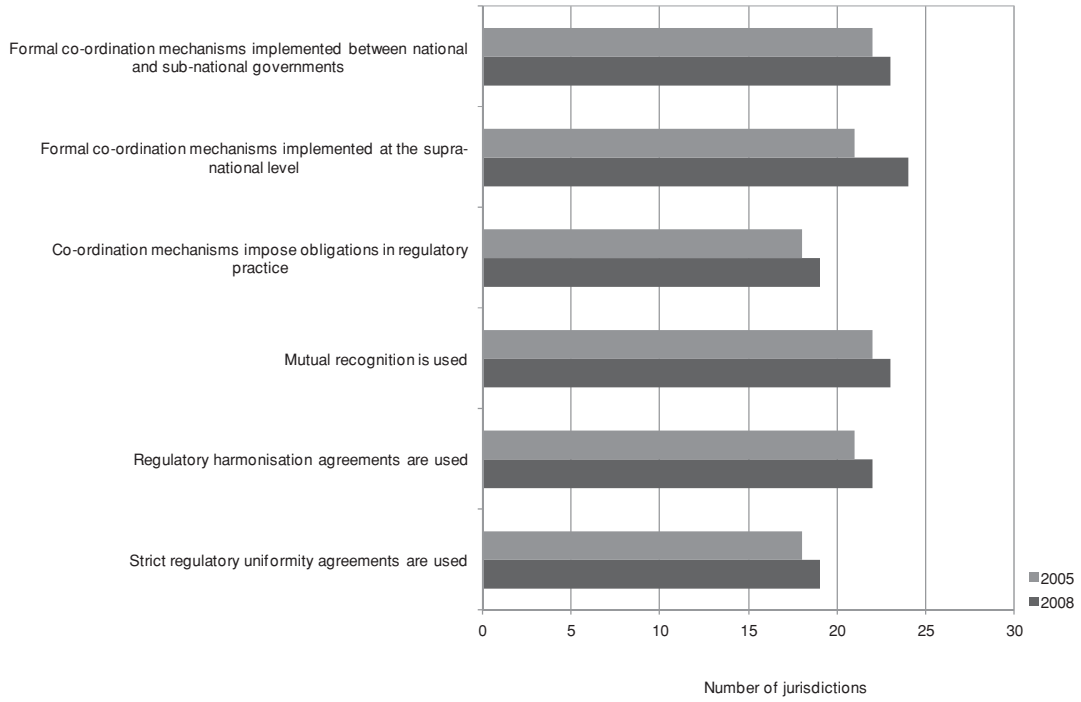
Multi-level governance presents additional challenges and opportunities for reform

The promotion of regulatory reform has to take into account the competences, capacities and co-ordination mechanisms existing at different levels of government. If a strong and strategic direction for regulatory quality must be retained at the centre, local governments need increasing flexibility in order to meet their goals and to retain the capacity to promote regulatory reform provided the specificities of local context. The importance of regulatory multi-level governance has emerged clearly in country regulatory reviews as relevant to all countries. As a matter of fact, local governments are of increasing importance not only in federations but also in unitary states, including historically strong ones, and a failure to carry out effective regulation at one level of government can undermine efforts elsewhere. As a result, regulatory reform needs to be "cascaded" systematically in order to be effective (OECD, 2008).

In many countries, local governments are entrusted with several tasks which cover issues having a direct impact on the welfare of businesses and citizens. This may include social services, health care and education, as well as licensing, housing, environmental protection, planning and construction issues. OECD experience shows that regulatory responsibilities have to be allocated across the different levels of government, taking into consideration the nature of the policy area concerned and the regulatory capacity existing at each level. This should be done bearing in mind that if a strong and strategic direction for regulatory quality must be retained at the centre, it is important to find the right balance between central authority and local autonomy on regulatory issues. As a matter of fact, local governments need increasing flexibility in order to meet their economic, social and environmental goals, provided the specificities of their geographical and cultural settings.

In this framework, co-ordination across levels of government, through the conclusion of appropriate agreements between central and local authorities, is needed in order to manage the complexity generated by the large number of players engaged in the regulatory process. Co-ordination mechanisms at the national and supra-national levels are reported to be in place by approximately four-fifths of OECD member countries (Figure 9.4).Co-ordination of regulatory policies across levels of government can involve a forum for regular dialogue among jurisdictions and, in a supra-national context, among countries, thus facilitating sharing of experience and the emergence of champions of reform. It can also facilitate agreement on a set of Better Regulation principles, thus helping strengthen regulatory quality within each jurisdiction. The data presented in Figure 9.4 confirm that the institutionalisation of the dialogue across levels of government is facilitating the use of mechanisms for better regulation. As a matter of fact, three-fifths of OECD member countries report that co-ordination mechanisms commit jurisdictions to adopt better regulation practices. At the same time, countries increasingly rely on mutual recognition and harmonisation to lower regulatory and technical barriers across jurisdictions (OECD, 2009a).

Figure 9.4. **Intergovernmental co-ordination on regulatory policy in OECD countries, 2005 and 2008**



Note: Data is presented only for the 30 member countries as this question is not relevant for the European Union.

Source: OECD (2009a), "Indicators of Regulatory Management Systems", *www.oecd.org/regreform/indicators* and *www.oecd.org/dataoecd/44/37/44294427.pdf* (full report).

Multi-level regulation creates both opportunities and challenges to the promotion of regulatory quality. As a matter of fact, multi-level regulation can help bring decision making closer to the citizens and be better tailored to local needs and circumstances. Moreover, it can create competition across levels of government, thus helping improve efficiency and effectiveness of government services. "Special Zones for Structural Reform" – geographically limited areas where certain regulations can be eased or lifted – were launched in Japan in June 2002 in order to stimulate local economies and to act as a testing ground and first step for reforms to be implemented at the national level. The Special Zones initiative was intended to trigger innovative endeavours of "regulatory competition" among municipalities in order to attract domestic and foreign companies. An implicit yet clear motivation behind this idea was to use the creativity and knowledge of local authorities and private actors to remove obstacles to growth and overcome vested interests which were hindering or blocking reforms (OECD, 2004a).

However, multi-level regulation can also raise barriers to national and international trade in goods and services, increase administrative costs and create regulatory duplication and overlap that constrain and fragment the development of markets (OECD, 2009a). Concerns about regulatory quality at local level have been highlighted in many country reviews. As a matter of fact, there is often a lack of resources and training to promote more effective rule making at this level. Local governments have been active in promoting regulatory quality in only a few countries, where they have sometimes been important drivers of reform. However, other countries still have room to improve their regulatory frameworks at the local level. In particular, local governments need adequate resources in order to accomplish their missions and it is important to match regulatory responsibilities with budget allocations, especially where new or broader mandates are

given. It is equally important to establish the right incentives to promote cost control and encourage the use of cost-benefit analysis at local level.

Recent OECD evidence suggests a move towards deepening and strengthening inter-governmental co-ordination on regulatory policy across OECD countries (OECD, 2010a). Belgium reports that federal, local and regional governments signed a co-operation agreement that aims to ensure co-ordination, stimulate synergies and create scale effects due to common efforts. Denmark has also strengthened co-ordination across levels of government through mechanisms that facilitate buy-in from local jurisdictions (OECD, 2010b). Australia has renewed its commitment to stronger inter-governmental co-operation through the Council of Australian Governments (COAG), a forum for systematic dialogue on regulatory reform across jurisdictions which was active since 1992 (Box 9.3). In 2008, COAG introduced an ambitious regulatory reform agenda, supported by incentive payments to facilitate implementation of agreed policies, and reinforced its commitment to better regulation practices across jurisdictions (OECD, 2009a). Multi-level regulatory governance is particularly important in those countries where micro, small and medium-sized enterprises are particularly important and where local authorities are in charge of licensing activities. In Mexico, for example, the Federal Regulatory Improvement Commission (COFEMER) established a specific Rapid Business Start-up System (SARE) in order to co-ordinate all levels of government and to make start-up easier and faster.

Box 9.3. **The Council of Australian Governments**

The Council of Australian Governments (COAG) is the peak inter-governmental forum in Australia. It comprises the prime minister, state premiers, territory chief ministers and the president of the Australian Local Government Association (ALGA). The role of COAG is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require co-operative action by Australian governments. Under the auspices of COAG, the Commonwealth, states and territories have engaged in a significant programme of co-ordinated national reform over the period 2008-13 to improve the productivity of the national economy. They have agreed on a reform agenda focussing on competition, regulatory reform and human capital. This involves significant changes to the management of inter-governmental financial relationships to give the states and territories more autonomy and accountability for the delivery of services to citizens in key areas under a new agreement for funding arrangements, including financial incentives to facilitate or reward reforms. Regulatory reform is at the core of the reform agenda. It involves actions to improve the quality of the stock and flow of regulation within the governments of the states and the Commonwealth, and to promote regulatory harmonisation and the removal of regulatory overlap and duplication. The reforms also aim to preserve regulatory competitiveness and innovation where this is beneficial to the national economy.

Source: Council of Australian Governments, *www.coag.gov.au*.

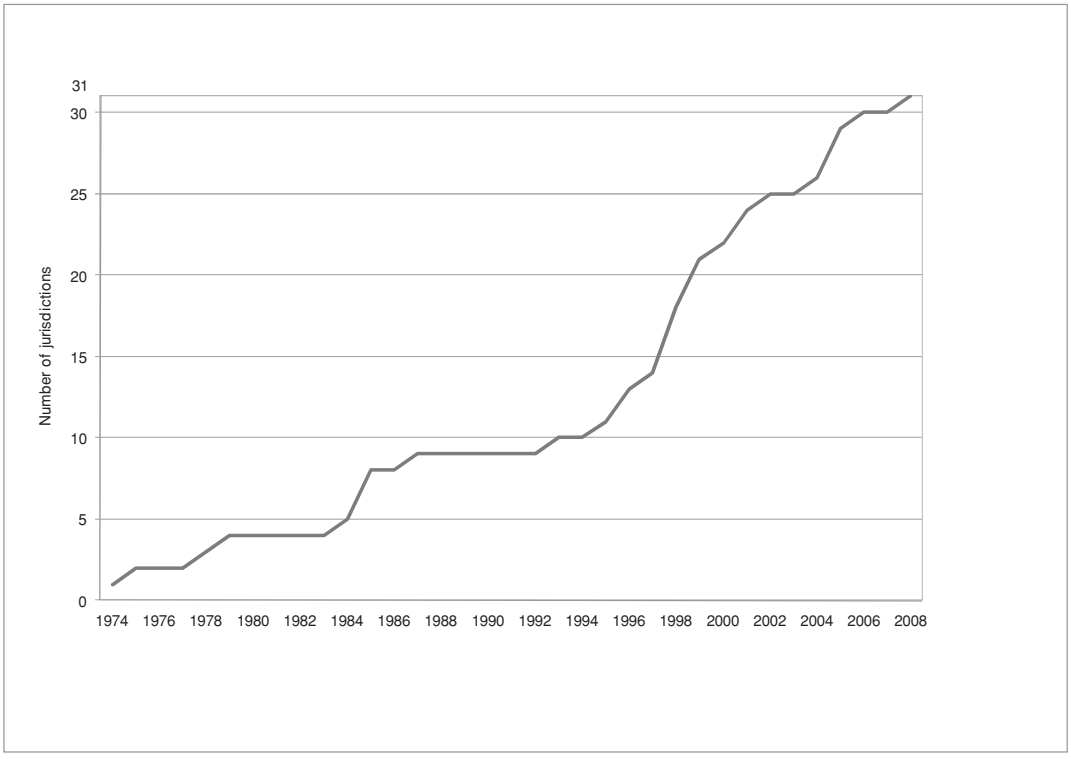
The impact and reactions of those affected by reforms

Inclusive policy processes can improve the quality of reforms and make adoption easier

Reforms require building constituencies with strong policy drivers and political support. Indeed, reforms require bringing domestic constituencies on board, creating participation in procedure, educating the general public and taking stakeholders fully into account in the design of regulatory reform policies. The capacity to take into account the impact of regulation and the reactions of those affected by reform can therefore improve the effectiveness of proposed regulations and provide a precious source of information that can contribute to well-timed reform. The growing use of regulatory impact analysis has given policy makers an important tool to enlarge the basis for empirically based decision making and for systematic consultation with those affected by reform. The use of RIA has become widespread among OECD countries. If in 1980, only two or three countries were adopting it, by 2000 this number increased to 14 (of

28 members) and by 2005 all member countries were systematically carrying out some form of RIA on new regulations before finalising and implementing them (Figure 9.5) (OECD, 2009a). At the same time, the establishment of advocacy bodies in many OECD countries has favoured the strengthening of constituencies to support reform. The challenge here is in ensuring that these practices become part of the culture of policy making, instead of contributing to the fragmentation of the regulatory process.

Figure 9.5. **Adoption of regulatory impact analysis by central governments in OECD countries, 1974-2008**



Note: Data for 1998 are not available for Luxembourg, Poland, the Slovak Republic and the European Union. This means that this figure is based on data for 27 countries in 1998 and for 30 countries and the EU in 2005-08.

Source: OECD (2009a), "Indicators of Regulatory Management Systems", *www.oecd.org/regreform/indicators* and *www.oecd.org/dataoecd/44/37/44294427.pdf* (full report).

The move towards evidence-based policy making is intended to strengthen support for regulatory reform, clarifying the cost-benefit balance of policy initiatives. RIA examines and measures the likely benefits, costs and effects of new or changed regulations and aims to provide guidance on how better to achieve policy makers' aims in a cost-effective way. In doing so, it provides a comprehensive framework for assessing the consequences of alternative policy decisions and to ensure that government action is justified and appropriate (Box 9.4). The need for consultation as part of the RIA process is also crucial, as only by holding consultation processes with key stakeholder groups can policy makers really know what the potential impacts of the proposed regulation will be. The systematic inclusion of consultation practices into RIA processes has helped to draw new or previously unheard stakeholders into the policy debate. Information gathered during the RIA process to ensure that government action is justified and appropriate is a valuable resource which opens channels of communication and dialogue with relevant social parties and which thus provides a stimulus for appropriate and timely reform.

Box 9.4. **The use of regulatory impact analysis in OECD countries**

There is no single model that OECD countries have followed in developing RIA. However, there are certain elements that remain consistent to the methodology and that should be understood when considering the implementation of a RIA programme. In its practical application, RIA commences with an analysis and an articulation of the problem, which creates the context for regulation, and proceeds through an evaluation of costs and benefits, including a consideration of the processes for the implementation of the regulatory action. As a support to decision making, RIA includes an evaluation of a number of possible alternative regulatory and non-regulatory approaches – including a "do-nothing" approach – with the overall aim of ensuring that the final selected policy and regulatory approach provides the greatest net public benefit. In order to do that, RIA requires detailed information about the potential effects impact of regulatory measures in terms of costs and benefits. This systematic process of questioning at the beginning of the policy cycle facilitates reflection on an important range of details to be taken into account when designing and implementing a regulation. In particular, from a business perspective, one very important element is the determination of the responsibilities to be allocated to different government agencies for enforcement and compliance. It is vital to know how the proposed regulation will be enforced and to understand the capacity of the affected parties to comply with it. Recent assessments have underlined three different categories of factors which determine the success of RIA. These relate to: the design of RIA processes and methodologies; the level of formal authority and political support for the process; and the incorporation of specific quality assurance mechanisms (OECD, 2009c).

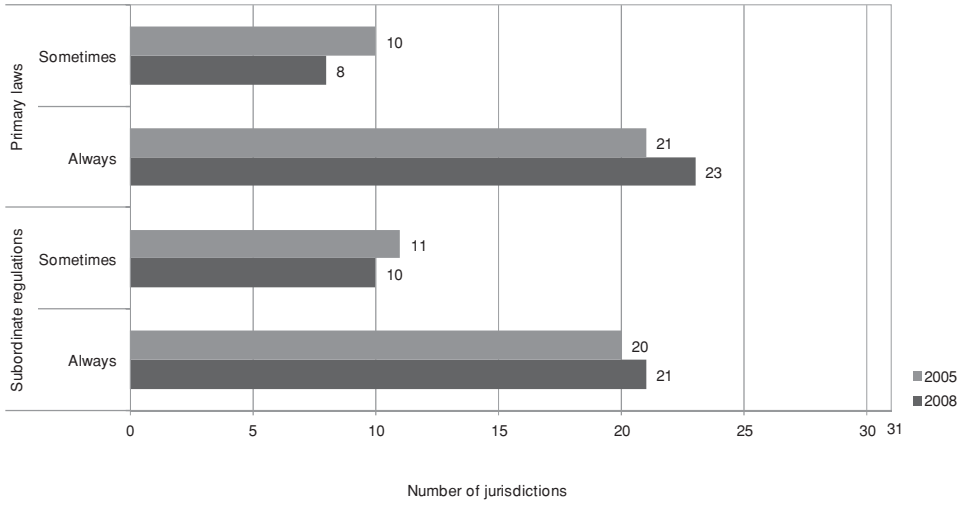
In terms of the design of RIA processes, OECD work has highlighted the importance of commencing RIA at an early stage of policy development, ideally at the inception of a policy proposal. As a matter of fact, only in this case RIA may be appropriately integrated into the policy-making process. By contrast, when it is included at the end of the policy cycle, it risks being used to justify regulatory choices that have already been made. The breadth of application of RIA has also been highlighted as an important element of the regulatory policy process which contributes to the effectiveness of impact assessment. Analytical capability is a scarce resource that needs to be allocated efficiently, and RIA should not be required in respect of relatively minor regulations. Many countries have adopted "filtering" mechanisms that imply the definition of quantitative and sometimes qualitative thresholds for the selection of regulations to submit to RIA. The impact of a regulation may be calculated not only in its entirety, but also partially depending on the relevance of the expected effects across the different interests affected. As regards the design of methodologies, OECD experience has shown that cost-benefit analysis is the "gold standard" for RIA. However, a wide range of other methods are also regularly employed, partly because of the difficulties of performing quantitative benefit-cost analysis in respect of certain types of regulatory proposals and partly because of the costs of fully fledged cost-benefit analyses.

The level of formal authority and political support for RIA procedures is also important. According to the 2004 RIA inventory, there are four different bases from which RIA policies may derive their authority: (i) law; (ii) a presidential order or decree; (iii) a prime ministerial decree or guidelines of the prime minister; (iv) a directive or a resolution of the cabinet or the government. It may appear that the establishment of RIA via legislation would convey the greatest authority. However, there appears to be little, if any, evidence to support this supposition. It appears that the formal basis on which RIA policies are established may be less important to RIA quality than other factors, like the level of political support at the centre of government (OECD, 2009c).

Finally, there remains the question of quality assurance mechanisms. The requirement for RIA to be assessed by an independent body within the government administration constitutes the most common form of quality assurance. However, many countries have implemented additional mechanisms for assessment and/or review of RIA. In particular, if RIA – when conducted in respect of a new regulation – is necessarily *ex ante* analysis, requirements for *ex post* review of regulatory impacts can also have a positive impact on the quality of the assessment. The knowledge that the RIA will be revisited within a relatively short period may act to undermine any incentives that regulators would otherwise have to manipulate the analysis in a manner which favours the case for the proposed regulation (OECD, 2009c).

Public consultation, however, is one of the key regulatory tools in and of itself. It is employed to increase the information available to governments for decision making and to improve the transparency, efficiency and effectiveness of regulation. Consultation enhances the quality of rules, strengthens compliance and reduces enforcement costs for both governments and citizens subject to rules. Public consultation procedures when developing new primary laws and regulations exist in all OECD countries as well as in the European Union (Figure 9.6).

Figure 9.6. **Public consultation in developing draft primary laws and subordinate regulations in OECD countries, 2005 and 2008**



Note: Data for 2005 and 2008 are presented for the 30 OECD member countries and the European Union.

Source: OECD Regulatory Management Systems' Indicators Survey, 2005 and 2008, *www.oecd.org/regreform/indicators*.

OECD countries use a wide range of mechanisms for policy consultations

Consultation processes differ widely across countries with respect to timing, the availability of guidelines and the degree of openness of the process (Box 9.5). In 2008, 25 OECD countries reported mandatory consultation processes at the inception of regulatory proposals, but consultation guidelines were only mandatory in only 12 jurisdictions for both primary laws and subordinate regulations (Figure 9.7) (OECD, 2009a). Countries claim to have increased the openness of their consultation processes. Most countries report publishing the views of participants in the consultation process and granting access to any member of the public to participate in the consultation. The number of countries included the views expressed in the consultation process in RIA rose from 17 in 2005 to 24 in 2008, for primary laws, and from 15 to 21 for subordinate regulations. Processes for monitoring the quality of consultations exist to varying degrees in at least seven jurisdictions.[3] In Poland, for instance, the quality of the consultation process is monitored by the Chancellery of the Prime Minister, which provides opinions on the scope of consultations before proposals can be transmitted to inter-ministerial clearings (OECD, 2009a). Extensive consultations appear, however, to have resulted in consultation fatigue by interest groups, which may feel overwhelmed by the volume of materials on which views are requested. Consultation fatigue may be a positive signal and stems from success in developing highly consultative and transparent regulatory regimes. Alternatively, it may arise from weaknesses in the mechanisms for responding to consultation inputs and eventually erode trust in the process (Malyshev, 2006).

Box 9.5. **Public consultation in OECD countries**

OECD countries have five different ways of performing public consultation:

1. *Informal consultation* includes all forms of discretionary, *ad hoc*, and non-standardised contacts between regulators and interest groups. Informal consultation is carried out in virtually all OECD countries. However, if it is widely accepted in some countries and is seen as a norm of the regulatory process, other countries view informal consultation with suspicion. In the United States, for example, it is perceived as a violation of norms of openness and equal access, since interest group participation in informal consultations is entirely at the regulator's discretion.

2. *The circulation of regulatory proposals for public comment* is a relatively inexpensive way to solicit views from the public. Furthermore, it is fairly flexible in terms of the timing, scope and form of responses. It is among the most widely used forms of consultation. This procedure differs from informal consultation in that the circulation process is generally more systematic and structured and may have some basis in law, policy statements or instructions. It can be used at all stages of the regulatory process. Responses are usually in written form, but regulators may also accept oral statements and may invite interested groups to hearings. The negative side of this procedure is again the discretion of the regulator deciding who will be included in the consultation.

3. *Public notice-and-comment* is more open and inclusive than the circulation of regulatory proposals for comment, and it is usually more structured and formal. Notice-and-comment has a long history in some OECD countries, and its use has become much more widespread in recent years. Procedures vary. In some countries, the process is prescribed by law and judicially reviewed, while in others it has no legal force. The public notice element implies that all interested parties have the opportunity to become aware of the regulatory proposal and are thus able to comment. There is usually a standard body of background information, including a draft of the regulatory proposal, discussion of policy objectives and the problem being addressed and, often an impact assessment of the proposal and, perhaps, of alternative solutions. This information – and particularly the RIA elements – can greatly increase the ability of the general public to participate effectively in the process. Many countries, however, have found that levels of participation have in practice been low. Participation is also dependent on the ease of response and the expected results of participation, including the effectiveness of the notice process, the amount of time allowed for comment, the quality and nature of the information provided to interested parties and the attitudes and responsiveness of regulators in their interactions with participants in the comment process.

4. A *public hearing* is a meeting on a particular regulatory proposal at which interested parties and groups can comment in person. A hearing usually supplements other consultation procedures. Hearings tend to be formal in character, with limited opportunity for dialogue or debate among participants. Experimentation with online hearings has begun. Hearings are usually discretionary and *ad hoc* unless connected to other consultation processes (for example, notice-and-comment). A key disadvantage is that they are likely to be a single event, which might be inaccessible to some interest groups, and thus require more co-ordination and planning to ensure sufficient access. In addition, the simultaneous presence of many groups and individuals with widely differing views can render a discussion of particularly complex or emotional issues impossible, limiting the ability of this strategy to generate empirical information.

5. *The use of advisory bodies* is the most widespread approach to public consultation among the OECD countries. The role of such bodies can vary from reacting to a regulator's proposals to acting as a rule-making body, in which advice is only one of several regulatory functions. Advisory bodies may themselves carry out extensive consultation processes involving hearings or other methods. Many countries have greatly expanded its use of consultative committees in recent years. This has coincided with a massive rise in the number of non-governmental organisations (NGOs). Advisory bodies are involved at all stages of the regulatory process, but are most commonly used early in the process in order to assist in defining positions and options. Regulatory development – drafting and reviewing proposals, or evaluating existing regulations – is rarely the only, or even the primary, task of advisory bodies. Some permanent bodies, for instance, may have broad mandates related to policy planning.

Source: Malyshev, N. (2006), "Regulatory Policy: OECD Experience and Evidence", *Oxford Review of Economic Policy* 22:2.

A growing number of countries rely on reform-advocacy bodies to make the case for change

In order to communicate the need for reform, governments have often established advocacy bodies with a clear mandate to campaign for reform. Advocacy bodies should not be confused with the increasing number of institutions set up by governments to improve consultation with stakeholders, which can be assimilated to traditional advisory bodies.[4] The nature of advocacy bodies is a function of countries' local political, administrative and cultural traditions. However, five main characteristics have been highlighted (OECD, 2007):

- The key mandate of an advocacy body is to conduct research and persuade the government, legislators and society in general of the need for reforms. It works with and through the regulatory bureaucracy, consults stakeholders, engages in legal proceedings, as well as other means to fulfil its mandate.
- Non-governmental personalities participate on the executive board of the advocacy body. They serve as the voice of business, labour or some other civil society constituency, as well as bringing the citizens' perspective in challenging vested interests, overcoming resistance or even bureaucratic inertia to reform in the public sector.
- The advocacy body and its supporting secretariat are mostly financed from the state budget, though the participation of non-governmental members – in particular through their time – might complement its resources.
- The advocacy body has the capacity to provide independent advice to the government, though framed under accountability rules.
- The advocacy body does not administer government programmes or exercise executive power.

In some countries, the advocacy bodies have become central and influential operators in the institutional framework for better regulation. Their value has been acknowledged and supported. A clear performance indicator is the fact that they have continued to be politically supported by successive governments. Some of these institutions, like ACTAL in the Netherlands and the Office of Best Practice Regulation (OBPR) in Australia, have even seen their mandates expanded by the government (OECD, 2007). Advocacy bodies are "part of a governance toolkit, and represent government's response for pressure to reform when blockages exist, and when new ideas are needed to steel political will for reform. Equally they provide "a voice and support for regulatory reform as well as a forum for dialogue, co-operation and co-optation" (OECD, 2007).

Successful, credible and sustainable reforms rely on the capacity to build wide coalitions, identify external drivers and pressures and bring them into the policy-making process. In this framework, regulatory policy can provide an important contribution. More open, evidence-based and accessible procedures are more legitimate, less vulnerable to capture and more likely to bring high-quality information that improves analysis of reform opportunities and policy options. However, the integration of RIA, of consultation policies and of advocacy activities into policy making is a challenging process that needs to be built up over time, if they are to become a routine part of policy development. Both RIA and consultation practices are sometimes seen as an unnecessary burden which slows down the policy process. In this view, RIA – and possibly also consultations – can degenerate into "incremental form filling", promoting a "box-ticking" that does not seriously influence policy development (OECD, 2009c). The big challenge here is in ensuring that these practices become part of the culture of policy making and, instead of contributing to the fragmentation of the regulatory process, develop into an important element of a "whole-of-government" approach which enhances the coherence of the government action.

Timing and the interactions across different policy areas

Timing and sequencing issues represent a key concern when dealing with regulatory reform

The definition of a long-term regulatory reform programme requires careful identification of targets and the prioritisation of reform activities. Moreover, the interactions and spillovers between reforms in different policy areas are a critical factor not only in ensuring the effectiveness of the reform programme, but also in winning public support. Reform in one market may fail to deliver results, if not accompanied by reform in others. Moreover, a "critical mass" of reforms may be needed for benefits to be visible (OECD, 2007). Experience has also highlighted the benefits of proceeding with multiple reforms in parallel in order to realise potential complementarities among reforms[5] and reduce the risks of winners and losers (OECD, 2007).

In this framework, regulatory policy provides a framework for collaboration that favours the identification of potential synergies within and across government. Increasingly, governments are seeing the linkages and interrelationships between regulatory reforms and other policies. OECD regulatory reviews show that different disciplines are mutually supportive and contribute to quality regulation. The Better Regulation principles give competition policy a prominent place. Regulation which unnecessarily restricts competition imposes costs on society and the calculation of these costs may be desirable in order to establish proper limits to regulation. Substantial synergies also exist between e-government and regulatory policies. In particular, the ability of government to best exploit and utilise these synergies can greatly improve the overall environment for service delivery and speed up regulatory reform which highly benefits from the use of information and communication technologies (ICTs).

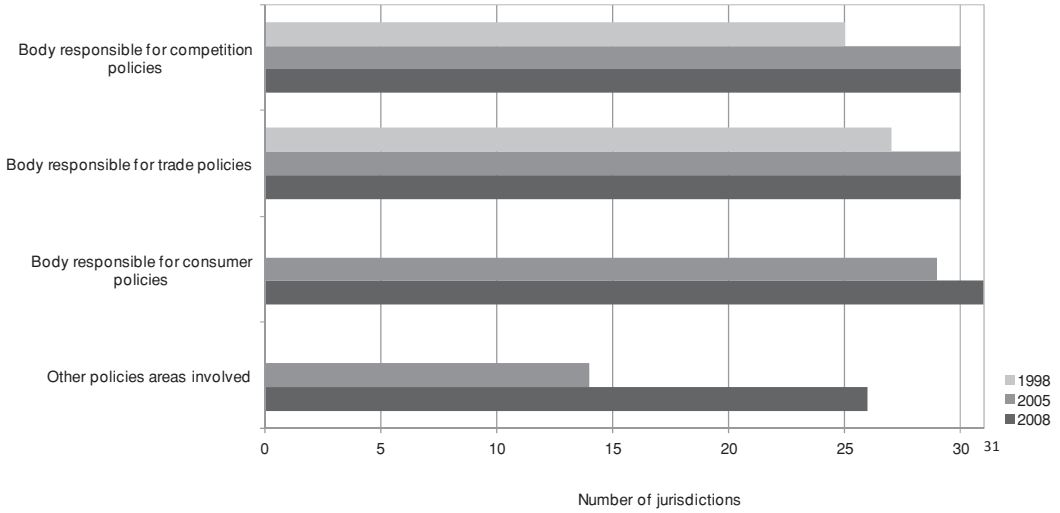
The interconnectedness of different policy domains requires the capacity to establish links across policy areas in order to foster policy coherence. Most countries have some form of consultation within government on competition, trade and consumer policies (Figure 9.7). In only around half of OECD countries is such consultation always mandatory (OECD, 2009a). In Switzerland, for example, consultation within government is mandatory for every regulation adopted by the government and includes all seven ministries and the main agencies, as well as any other affected agency. In Belgium this intergovernmental consultation is also mandatory for all regulations concerning finance, trade, economy, social affairs, social security, justice and environment (OECD, 2009a).

Comprehensive reform packages have attractions, but can "overload" the public administration

The problem of timing and sequencing is also connected with the choice of an incremental or of a "big-bang" approach to regulatory reform. Better regulation policies have largely evolved and been implemented by OECD countries on an incremental, rather than a "big-bang" basis. In part, this has been due to the way in which the regulatory policy agenda has itself been forged over the years. Initially, the focus was on improving understanding of the nature of regulation as a tool for government and increasing the effectiveness of such a tool. Efforts have broadened and deepened over time, progressing from ideas of deregulation towards concepts of regulatory management and regulatory governance. However, some OECD members, which have come more recently to implementing a regulatory policy, have attempted to introduce a myriad of reforms in one go: a *de facto* big-bang approach (*e.g.* Greece). The choice of a big-bang strategy is understandable, given the link between a well functioning regulatory framework and economic growth. However, given the interdependence of regulatory policy and other enabling factors – such as leadership, political support, staffing capacities and resources, availability of appropriate training and support at central level, etc. – big-bang approaches to regulatory reform should be undertaken with caution. As a matter of fact, the pace of regulatory reform has to take into consideration the capacity of the system to

ensure, for example, that staff have access to training, guidelines, advice and support, which are necessary in order to enable them to cope with the new challenges they confront. Proceeding too rapidly on too many fronts raises the risk that officials and other stakeholders will experience "reform fatigue", seeing policy innovations as unnecessary burdens rather than opportunities, and thus making effective implementation more difficult.

Figure 9.7. **Consultation within government on competition, trade and consumer policies in OECD countries, 1998, 2005 and 2008**



Note: The sample includes 31 jurisdictions for 2008 and 2005. For 1998, 27 jurisdictions are included as no data were available for Luxembourg, Poland, the Slovak Republic and the European Union.

Source: OECD (2009a), "Indicators of Regulatory Management Systems", *www.oecd.org/regreform/indicators* and *www.oecd.org/dataoecd/44/37/44294427.pdf* (full report).

In many cases, crises might serve as a driver for reform and allow politicians to justify the necessity and cost of change. This may induce governments to wait for a crisis in order to find momentum for reform. However, crises may induce worse regulatory outcomes, as governments may be tempted to adopt a big-bang approach and regulatory responses may be too heavy-handed. Moreover, reform options have to be considered in light of the budgetary cycle. As a matter of fact, governments may have a greater capacity to implement reforms in times of relative prosperity, when they are more likely to have the resources to compensate those who are expected to lose from reform. At the same time, those who are expected to benefit from reform are more likely to facilitate the introduction of change in times of relative prosperity (OECD, 2007).

The role of evidence and international organisations in supporting reforms

Recent research has shown that international organisations can foster reform not only by using incentives and coercion, but also through education, teaching and learning at the national level. Such a "policy-dialogue approach" is supposed to favour reform by persuasion, rather than bargaining over conditions and rewards. Such "soft methods of co-ordination" represent a slower, but not necessarily less effective, means of supporting the timely adoption of reforms.

There are growing doubts about the utility of strong forms of conditionality

There is a wide body of literature on the role of international organisations in supporting reforms. In particular, much has been written on the methods used to promote domestic compliance and induce countries to follow a path of reform. In this framework, conditionality has certainly attracted more attention than other methods. Conditionality is technically a means to ensure the execution of a contract, "a promise by one party to do something now in exchange for a promise by the other party to do something else in the future" (Mosley, Harrigan and Toye, 1991). It implies the use of "sticks" and "carrots", with the offer of positive incentives – such as promises of more aid, trade concessions, seats at international negotiating tables or protection by foreign troops – and the threat of negative disincentives – such as aid cuts, sanctions of various kinds, military intervention and commercial or diplomatic retaliation (Edwards, 1999).

Reliance on conditionality has grown enormously in scale and scope since the 1980s debt crises in the developing world. In particular, its use has been associated with the operation of the World Bank and, especially, the International Monetary Fund, whose assistance has at times been conditional on wide-ranging changes in economic, environmental or social policies, such as macroeconomic stabilisation, privatisation or increased investment in health or education. However, in recent years, there has been a large expansion of the application of conditionality to the promotion not only of economic policy changes, but also of a wide range of political and institutional reforms. During the 1990s, organisations such as the North Atlantic Treaty Organisation, the European Union and the Council of Europe offered membership to various countries in eastern Europe and the former Soviet Union on the condition that they execute reforms that went far beyond the standard conditionality packages of the main international financial institutions (IFIs). In these cases, conditionality touched the core political and institutional attributes of the countries to which it was applied. Among these institutions, the European Union has undoubtedly developed the most impressive set of instruments, using incentives ranging from full membership to trade concessions, technical aid, co-operation agreements and institutional ties, and applying them not only to aspirant members, but also to third countries (Smith, 1997).[6]

Nevertheless, there is wide agreement that policy-based conditionality has been broadly ineffective in most arenas.[7] Checkel (2000) summarises the criticisms of conditionality along three key dimensions. The first has to do with the politicisation of conditionality: international institutions have been pressured to release funds despite failures in national compliance and, more and more often, states know they can get "something for nothing", thus "undermining the entire incentive logic behind conditionality" (Checkel, 2000).[8] The second has to do with a problem of domestic ownership. Particularly in cases where conditions for rewards are strictly posited and strongly backed, reforms are seen to be the result of external imposition and support for policy change lacks a strong domestic political base. Thus, compliance and implementation become problematic. The third criticism has to do with the poverty and fragmentation of the policy environments. When political institutions have collapsed or are in the process of collapsing, countries are often unable to effectively enhance reforms. In these situations, "it is almost as if proponents of conditionality assume that it is imposed in a vacuum, where history and institutions do not matter" (Checkel, 2000). These kinds of considerations have led different critics to highlight the "shallow intellectual environment" that has characterised the thinking on conditionality and to stress that conditionality is "profoundly a-historical" (Killick, Gunatilakia and Marr, 1998).

"Softer" methods take longer but can often achieve greater legitimacy and ownership of reforms

Recent research has shown that international organisations can induce reform not only by using incentives and coercion, but also through education, teaching and learning at the national level (Checkel, 2001). The effectiveness of the so-called "soft methods of co-ordination" in order to promote reform has been at the centre of the attention, in particular in the field of EU studies. As a matter of fact, when the traditional "Community

method"[9] is not at hand, the European Union has tested other methods in order to promote policy integration.[10] Such a "policy-dialogue approach" is supposed to favour reform by persuasion, rather than bargaining for conditions and rewards. The OECD has made an important contribution by promoting "good practices" for regulatory policy as embodied in the 1995, 1997 and 2005 Council Recommendations, a form of soft law. These have been disseminated to a wider group of countries through the development of an OECD/Asia-Pacific Economic Cooperation (APEC) checklist on regulatory reform. The exchange of experiences and good practices which has taken place in this framework has facilitated cases of "policy transfer" from one country to the other (Dolowitz and Marsh, 2000). At the same time, the institutionalisation of regular meetings between public officials working across different OECD countries on similar issues has provided a precious opportunity for discussion, contributing to the promotion of policy convergence and to the convergence of regulatory practices (Radaelli, 2000).

Several authors have argued that, since the mid-1990s, the development of the Better Regulation agenda has been shaped by a high degree of internationalisation, both in terms of the crucial role of international organisations such as the OECD in setting the agenda (Lodge, 2005) and the transnational exchange between high-level bureaucrats working on regulatory issues (Wegrich, 2009). In particular, the diffusion of the standard cost model (SCM) for measuring administrative burden has been used as a case to explore the mechanisms facilitating policy diffusion in this domain. The analysis developed by Wegrich (2009) reveals patterns of rapid diffusion of the SCM between 2003 and 2007, when the example of the Netherlands was followed by 15 other countries (including almost all the EU15 member states). A similar tendency has been highlighted with the diffusion of RIA. As a matter of fact, while the United States was at the forefront in adopting regulatory impact analysis early in the 1980s and different sector-specific impact assessments have been carried out since the mid-1980s in various countries, the diffusion of RIA accelerated only from the early 2000s, when the majority of the EU15 member states and several of the 2004 accession countries started adopting this tool (Radaelli, 2005).

The OECD has long promoted mechanisms of "soft co-ordination" between member countries, using ingredients, such as peer reviews, recommendations and benchmarking, which are at the core of the organisation's daily activity in promoting policy reform (OECD, 2003). The use of soft methods of co-ordination between member countries has allowed the OECD to promote policy convergence without the use of conditionality. Member countries are not asked to adopt the same policies, with the exception of a series of basic undertakings, which represent the core of the "like-mindedness" of the members of the Organisation (OECD, 2004b). OECD countries are asked to exchange experiences and to be open to learn from each other. This allows members to retain ownership of reforms and to avoid the contradictions that underlie conditionality strategies (OECD, 2009d).

Conclusions

Over the past 20 years, the OECD's work on regulatory policy has been instrumental in building policy support and identifying the necessary skills, tools and processes needed by member countries to promote the development and the implementation of high-quality regulations. The "OECD Indicators of Regulatory Management Systems" (Jacobzone, Choi and Miguet, 2007) indicate that almost all OECD countries have now adopted broad programmes of regulatory reform, which also establish clear objectives and frameworks for implementation. The precursor to the "OECD Guiding Principles for Regulatory Quality and Performance" (2005), the "Recommendation of the OECD Council on Improving the Quality of Government Regulation" (1995) was the first-ever international statement of regulatory principles common to member countries. These principles have been endorsed by all OECD members and have often been the basis for reviews of regulatory reform efforts in member countries. To date, country peer reviews of the regulatory processes in force in 24 member countries have been completed, as well

as three reviews of non-members: the Russian Federation (2002-05), Brazil (2007), China (2005-08).

The OECD has served as an international forum to exchange experiences, ideas, techniques and benchmark progress across member countries and has suggested, but not imposed, preferred options for reform. In this sense, the OECD represents an exception in comparison with other international organisations. As Cremona and Hillion (2006) observe, "it is hard to reconcile true joint ownership with the unequal relationship implied by conditionality" and the often unilateral definition of a series of conditions to fulfil in order to receive certain rewards limits the possibility of supporting a serious process of learning between countries. The absence of a range of incentives to distribute in order to promote a preferred option for reform is not – in this view – a weakness but is rather a point of strength of the OECD, which can provide a framework to facilitate the exchange of experience between member countries and support mutual learning without coercion. Member countries are free to follow a specific example, to adapt it to the peculiarities of their national contexts or to reject it outright. The assistance of the OECD secretariat and the involvement of OECD committees notwithstanding, every reform adopted is fully "owned" by national authorities who decide autonomously on the strategy to pursue.

This chapter has highlighted information on four sets of factors which are likely to promote regulatory reform. Moreover, it has underlined that successful, credible and sustainable reforms rely on the capacity to build wide coalitions, identify external drivers and pressures and bring them into the policy-making process. In this framework, regulatory policy can provide an important contribution. As a matter of fact, good regulatory practices put the basis for more open, evidence-based and accessible procedures which are more legitimate, less vulnerable to capture and more likely to generate high-quality information. This improves analysis of reform opportunities and policy options. At the same time, the integration into the policy-making process of appropriate practices of regulatory management allows governments to develop a more coherent approach to policy formulation. In particular, regulatory policy provides a framework for collaboration that favours the identification of potential synergies within and across government, and allows them to overcome the obstacles created by a traditional compartmentalisation of functions.

Implementing an effective regulatory policy requires governments to tackle a number of challenges:

- Leadership: experience from across OECD countries has illustrated that a more coherent approach to policy and regulatory formulation requires not only high-level and cross-governmental support, but also the capacity to lead and develop a pro-active approach.

- Embedding cultural change: an awareness of the importance of regulatory quality is needed throughout the public administration and among key private sector actors in order to promote deeper reforms, together with the establishment of a climate of trust and co-operation and the promotion of a regular exchange of information between the actors involved in the regulatory process.

- Skills, competencies and training: the enhancement of a programme of continuous training and capacity building within the government continues to be the key for the development of an effective regulatory management. This kind of initiative not only improves the technical skills needed in certain processes, it also communicates the importance attached to the regulatory quality agenda by the administrative and political hierarchy and helps to embed cultural change. Training and capacity-building programmes allow officials to meet and discuss the Better Regulation agenda, thus fostering a sense of ownership of reform initiatives and favouring communication within and beyond individual institutional settings.

- Transparency and volume of regulation: ease of access to regulation, through printed or electronic means, is essential. From a business perspective, being able to readily access information on new regulations, as soon as they are approved, is key to ensuring compliance. Easier access to codified legislation also simplifies the process for those seeking to enter the market.

- Availability of data: a challenge for many OECD countries is the availability of suitable, independent, *ex ante* data that can best inform the policy-making process. The availability of these data allow policy makers to develop appropriate indicators to measure the effectiveness and outcomes of regulation, without creating unnecessary burdens for citizens, business and the public service.

The creation of the new Regulatory Policy Committee by the OECD Council in October 2009 represents a recognition of the importance of assisting member and non-member countries in building and strengthening their regulatory reform efforts. The committee is to foster a multi-disciplinary approach to regulatory quality in the OECD and assist institutions in managing risks and reducing regulatory gaps, while adhering to good governance principles.

Notes

1. To this end, different proposals have been advanced, such as the introduction of mechanisms to better monitor the regulation performance of all executive bodies.

2. Regulatory and competition reviews show that the relationship between competition authorities and sectoral regulators is central in determining how competition principles are applied. Their approach to the same issue may diverge, with the added complication that there may be more than one relevant law which is applicable to the same case (OECD, 2008).

3. Australia, Canada, Poland, Sweden, Switzerland, the United Kingdom and the European Union.

4. Traditionally, governments have explicitly endowed oversight bodies in charge of regulatory quality policy with some advocacy functions (*e.g.* the Mexican COFEMER). Other governments have clearly dissociated advocacy and oversight bodies. Some other oversight bodies, such as the Netherlands' ACTAL, clearly separate their activities when acting in their advisory and advocacy roles (OECD, 2010c).

5. Reform complementarities arise when the co-ordinated pursuit of multiple mutually reinforcing reforms may increase the benefits generated by each; this is distinct from, but related to, the notion of policy coherence. Whereas policy coherence is largely seen as a constraint, the notion of policy complementarities highlights the potential to realise positive benefits from co-ordinated reforms. See Braga de Macedo and Oliveira Martins (2008).

6. The conditions set for the accession of Central and Eastern European (CEE) countries in 1993 at the Copenhagen European Council were undoubtedly the most detailed and comprehensive ever formulated, and conditionality is, without any controversy, the basic strategy through which the European Union has promoted compliance by the candidate countries (Checkel, 2000). The use of incentives to alter a state's behaviour or policies was designed to minimise the danger of new entrants becoming politically unstable and economically burdensome, with the dual purpose of, on the one hand, reassuring reluctant "old" member states that disruption risks would be minimal and, on the other, guiding CEE applicants down the road to membership (Grabbe, 2002).

7. See, *inter alia*, Mosley, Harrigan and Toye (1991); Killick (1998); Dollar and Svensson (2000); Burnside and Dollar (2000); OECD (2009d).

8. Creditors often worry about getting their loans serviced, but ever since the Napoleonic Wars (and arguably even going back to Roman times), wealthier states have also used international loans to promote military, economic and ideological objectives (OECD, 2009d). Such objectives have been especially prominent since the latter part of the 20th century, when the "international financial institutions, which have embodied the values of the more

advanced capitalist states, have been more concerned with promoting particular domestic changes in borrowing countries than with being repaid" (Krasner, 1999).

9. See *http://european-convention.eu.int/glossary.asp?lang=EN&content=C*. The "Community method" is the expression used for the institutional operating mode for the first pillar of the European Union. It proceeds from an integration logic and has the following salient features: (i) EU Commission monopoly of the right of initiative; (ii) general use of qualified majority voting in the Council; (iii) an active role for the European Parliament in co-legislating frequently with the Council; (iv) uniformity in the interpretation of Community law ensured by the Court of Justice. The method used for the second and third pillars is similar to the so-called "intergovernmental method", with the difference being that the Commission shares its right of initiative with the Member States, the European Parliament is informed and consulted and the Council may adopt binding acts. As a general rule, the Council acts unanimously.

10. In particular, a lot has been written on the use of the "open method of co-ordination" (OMC) in order to expand policy activities beyond legally limited spheres and speed up European decision making. The main institutional ingredients of the OMC are common guidelines, national action plans, peer reviews, benchmarking, joint evaluation reports and recommendations (Ferrara, Matsaganis and Sacchi, 2002). These ingredients are organised in relatively structured processes, which are repeated over time, promoting, on the one hand, trust and co-operative orientation among participants and, on the other hand, learning dynamics. Thus, even in the absence of hard regulation and sanctions, the OMC creates several incentives for compliance and proves a strong potential of conditioning partner states. The OMC was codified for the first time during the Portuguese presidency in 2000; it was originally applied in the area of employment and then extended to a wider array of other policy areas. In contrast to the traditional Community method, this approach has been defined as "soft" and "national state friendly" (Ferrara, Matsaganis and Sacchi, 2002). It has been indicated as a panacea to enhance policy integration, expand policy activities beyond legally limited spheres (de la Porte and Nanz, 2003) and speed up European decision making (Héritier, 2003). The use of benchmarking adds objective points of reference to the process described here and gives countries yardsticks with which to assess the direction and the pace of reform.

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