



EUROPEAN
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ORGANISATION FOR ECONOMIC
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**BETTER REGULATION IN EUROPE: AN OECD ASSESSMENT OF REGULATORY
CAPACITY IN THE 15 ORIGINAL MEMBER STATES OF THE EU**

PROJECT POLICY BASELINE AND SCOPE

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Regulation: what the term means for this project

The term « regulation » in this project covers any instrument by which governments set requirements on enterprises and citizens. It therefore includes all laws (primary and secondary), formal and informal orders, subordinate rules, administrative formalities and rules issued by non- governmental or self- regulatory bodies to whom governments have delegated regulatory powers. Subordinate regulations may be mandated in the primary laws, or established directly by lower levels of government (state, region etc). For linguistic simplicity, the process of making new regulations is throughout referred to as “rule-making”, and the enforcement of regulations as “rule-enforcement”.

1. Regulatory management systems for today’s economies and societies need to deliver regulations that are not only legally sound, but also efficient in terms of helping governments to meet underlying policy objectives. These policy objectives may relate to a better functioning economy, by raising productivity or improving the regulatory framework for key infrastructure sectors, or to important societal goals such as a cleaner environment and a healthier population. Despite a decade or more of regulatory reforms and the development of increasingly sophisticated regulatory management systems, there remains a widespread concern that there is too much regulation, as well as poor regulation. Part of the problem that the policy-and hence regulatory- agenda now covers issues that have grown considerably in importance and sophistication over the last few years, and that more is expected of governments in areas such as the environment and safety. This is coupled with increasing requirements on business and citizens to provide information and register activities. Part of the problem is also the -as yet- imperfect assimilation of the tools and processes available to rule-makers today. Impact assessment still has an uncertain status in some jurisdictions, for example.
2. A more transparent regulatory environment is also of growing importance, with the need to identify effective mechanisms to secure accessibility to regulations, as well as the participation of stakeholders in the rule-making process. The community of rule-makers may think it has a clear idea of what is needed, but does this reflect the real concerns of businesses and citizens?
3. Although they are at different stages in the process and have taken different routes, all of the 15 countries which will be reviewed under this project have engaged in a critical transition. They have moved from regulatory management based on a narrow concern for legal quality and effectiveness, to the development of systems aimed at delivering better regulations that support rather than hinder the achievement of policy objectives.
4. The project therefore differs from the earlier SIGMA/EU project to assess regulatory capacity in the 10 “new” member states in two important respects. First, it will be reviewing countries that have already, for the most part, accumulated significant experience in effective regulatory management, and are testing or implementing more sophisticated tools for Better Regulation. The second difference is that two years on, there is a need to take a closer look at the multilevel aspects of regulatory management, given the

importance of rule-making at the EU level, as well as the importance of sub-national levels of government in regulation and enforcement, and the spread of independent regulatory or executive agencies. These aspects are, as yet, poorly understood.

5. The core issues covered by the project will therefore be:

- A. Policy(ies) for Better Regulation
- B. Institutional framework and capacities for Better Regulation
- C. Transparency, consultation and communication
- D. Tools and processes: the development of new regulations (flow)E. Tools and processes: simplification and measures to reduce administrative burdens (stock)
- E. Compliance, enforcement and appeals
- F. The broader institutional landscape: sub-national levels of government, the interface with the EU, agencies
- G. The political economy of Better Regulation; Evaluation of regulatory management capacities

6. The project aims to cover -at least in strategic terms- all parts of government that are engaged in rule-making and/or rule-enforcement (national and sub national levels, agencies and other government bodies, executive and legislature).

A. Policy(ies) for Better Regulation

7. Regulatory policy may be defined broadly as an explicit, dynamic, and consistent “whole of government” policy to pursue high quality regulation. A key part of the OECD’s 2005 Guiding Principles for Regulatory Quality and Performance is that countries adopt at the highest political level broad programmes of regulatory reform that establish principles of “good regulation”, as well as a framework for implementation. Experience across the OECD suggests that an effective regulatory policy should be adopted at the highest political levels, contain explicit and measurable regulatory quality standards, and provide for continued regulatory management capacity. It also requires adequate resources. Measures need to be built in to ensure compliance with regulatory quality processes and tools, including sanctions.

8. A regulatory policy issue that is attracting increasing attention is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy (societal risks such as environmental or health risks, as well market related risks). Regulation can aim to reduce the incidence of hazardous events or their severity. Some OECD countries have started to explore the ways in which regulatory policies can better reflect the need to assess and manage risks, and to put institutional structures, guidelines and procedures in place for this.

B. Institutional framework and capacities for Better Regulation

9. Regulatory management needs to find its place in a country’s institutional architecture, and capacities for promoting and implementing better regulation need to be built up. The OECD’s country reviews highlight the fact that the institutional context for implanting effective regulatory management is complex and often highly fragmented. Approaches need to be customised, as countries’ institutional settings and legal systems can be very specific, and range from systems adapted to small societies with closely knit governments that rely on trust and informality, to large federal systems that must find ways of dealing with high levels of autonomy and diversity.

10. A wide range of institutions with regulatory functions or influence needs to be harnessed to the regulatory management agenda. Many are long established, some are new, and some have a new or developing role. Some are very helpful to regulatory quality, others less so. Can all relevant institutions be encouraged to support the regulatory quality agenda? How can this be achieved? A central oversight body has proved very helpful to many countries. This is not to usurp the role of specific actors, but rather to give the process focus, coherence and momentum. What role should each actor have, taking into account accountability, feasibility, and balance across government?

11. Whilst the executive branch of government is often the first subject of attention for Better Regulation, the legislature and the judiciary are also of critical importance. Their precise roles vary according to the constitutional/legal structure of a country, but their influence will in all cases be significant. Parliament, for example, may be the prime proposer of new primary legislation, and even where it is not, proposals from the executive rarely if ever become law without integrating the changes generated by parliamentary scrutiny. The judiciary may have the formal role of constitutional guardian, and even where this is not the case, they are generally responsible for ensuring that the executive acts within its proper authority, and are likely to play a major role in the interpretation and enforcement of regulations, when regulations are appealed.

Resources and training

12. Investment in resources and training for regulatory management is essential. Continuous training and capacity building within government, supported by adequate financial resources, contributes to the effective application of tools for Better Regulation. Beyond the technical need for training in certain techniques such as impact assessment or plain drafting, training communicates the message to administrators that this is an important issue, recognized as such by the administrative and political hierarchy. It can be seen as a measure of the political commitment to Better Regulation. It also fosters a sense of ownership on reform initiatives, and enhances coordination and regulatory coherence. These are also key elements to ensure a whole-of-government perspective.

C. Transparency, consultation and communication

13. The way in which countries secure transparency in the regulatory environment is a fundamental cross-cutting issue for this project. Transparency is one of the central pillars of effective regulation, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardized processes for making and changing regulations, consultation with stakeholders, effective communication of regulations and plain language drafting, publication and codification to make them accessible, controls on administrative discretion, and effective implementation and appeals processes. It can involve a mix of formal and informal processes.

14. The project will seek to gain an overview of these issues, based on the more detailed information gathered from an analysis of the specific tools and processes for Better Regulation. The analysis will take account of the use made of ICT and e-government to improve transparency, consultation and communication.

D. Tools and processes: the development of new regulations (flow)

Procedures for making new regulations: forward planning, administrative requirements

15. Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. Many countries use administrative procedure laws and rules to establish mandatory procedures in rule-making. These cover issues such as requirements for

transparency and consultation (within or outside government), publication, scrutiny by legislatures, and due process for appeals.

16. Forward planning is a helpful tool for improving transparency and coordination in rule-making. Some countries periodically assemble lists and descriptions of forthcoming laws and subordinate regulations. These may be internal documents aimed at enhancing coordination between government institutions, or they may be publicly available, serving both to raise awareness of consultation opportunities and to allow interested parties more time to prepare for consultation.

Procedures for making new regulations: legal quality

17. Regulations define rights, obligations and powers. They must therefore always be constitutionally correct, clear and consistent with other regulations, including international obligations. Countries typically seek to ensure this through training in drafting skills for the preparation of regulations, including plain language, oversight by expert bodies, and/or specific guidance material for drafters.

Assessment of the impact of new regulations

18. Impact assessment is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the “no regulation” option), using evidence-based techniques to justify the best option and identifying the trade-offs involved when pursuing different policy objectives. Where relevant, the costs of regulation should not exceed their benefits, and alternatives should also be examined. However the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true- impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule-making process, and helps to raise the quality of assessments.

19. Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have -or should have- a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

Alternatives to regulation, delegated regulation and self regulation

20. The use of a wide range of mechanisms, not just traditional “command and control” regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardization, conformity assessment, to self regulation in sectors corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use “soft” approaches such as self regulation, to ensure that regulatory quality is maintained.

21. Delegated regulation, self regulation and co-regulation are significant areas. Governments may delegate rule- making, certification, or inspection and enforcement functions to non-governmental bodies. Self regulation may be an established feature for some sectors. Approaches of this kind can aid effectiveness by increasing acceptance of regulation, by drawing on relevant expertise, and by reducing

costs. But problems can arise if regulation is used anti-competitively and if transparency and accountability are undermined. Careful supervision by governments of delegated powers is therefore necessary. Self regulation often requires monitoring to ensure that it is not being abused.

E. Tools and processes: simplification and measures to reduce administrative burdens (stock)

Simplification

22. The large stock of regulations and administrative formalities accumulated over time needs regular review and updating to weed out obsolete or inefficient material. Approaches vary from consolidation, codification, recasting, repeal, guillotine rule (nullifying rules that are not centrally registered by a certain deadline, which can be triggered by governments finding out that they are unable to compile a list of regulations in force), *ad hoc* reviews of the regulations covering specific sectors, and sun setting mechanisms for the automatic review or cancellation of regulations past a certain date. The concept of simplification can also be extended to the need to modernise existing rules to adapt regulatory frameworks to changing societal needs and technological developments.

23. The deployment of ICT and e-government is an increasingly important tool in support of simplification. Effectively implemented, these technologies should not only improve the ease with which information is available to business and citizens, but also be a lever of change in the ‘back office’ *i.e.* help to streamline the administrative processes themselves.

Burden reduction

24. Government formalities are important tools to support public policies, and can help businesses by setting a level playing field for commercial activity. But they may also represent an administrative burden as well as an irritation factor for business and citizens, and one which tends to grow over time. Difficult areas include employment regulations, environmental standards, tax regulations, and planning regulations. Permits and licences can be a major potential burden on businesses, especially SMEs. A lack of clear information about the sources and extent of administrative burdens is the first issue for most countries. Burden measurement has been improved with the adoption by a growing number of countries of standard cost model (SCM) analysis to information obligations imposed by laws, which also helps to sustain political momentum for regulatory reform by quantifying the burden. Techniques such as Common Commencement Dates (CCDs) can make it easier for business to digest regulatory requirements.

25. The use of ICT and e-government, by facilitating the provision of information to business and citizens, and promoting more efficient and user-friendly public services, is of increasing importance.

26. The role of local governments in burden reduction has tended to be overlooked in policies set at the national level and this needs further attention.

Regulation inside government (optional)

27. Regulation inside government refers to the regulations imposed by the state on its own administrators and public service providers (for example government agencies or local government service providers). The changing role of the state over recent years, often characterized as a shift to the ‘regulatory state’, means that tasks that used to be carried out within government have been progressively decentralized and delegated at arm’s length. At the same time the expectations of society in matters such as health and safety, environmental protection, and efficient public service delivery, have tended to rise. A growing framework of regulation is now in place to regulate the government’s decentralized activities (a mirror image, inside government, of the regulatory frameworks that have been put in place to regulate the liberalized and privatized companies which used to be an integral part of the state).

28. A number of governments have started to consider the issue of administrative burdens inside government, with the aim of improving the quality and efficiency of internal regulation in order to reduce costs and free up resources for improved public service delivery. Fiscal restraints may preclude the allocation of increased resources to the bureaucracy, and a better approach is to improve the efficiency and effectiveness of the regulations imposed on administrators and public service providers. The effective deployment of ICT and e-government is, again, of increasing importance as a tool for reducing the costs and burdens of regulation inside government.

F. Compliance, enforcement and appeals

29. Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation. An *ex ante* assessment of compliance is increasingly a part of the regulatory process in OECD countries.

30. Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them. Tools that may be deployed include administrative procedures acts, the use of independent and standardized appeals processes, and the adoption of rules to promote responsiveness, such as “silence is consent”. Access to review procedures ensures that rule-makers are held accountable, accountability being a necessary corollary to transparency. Review by the judiciary of administrative decisions can be an important instrument of quality control. For example scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

31. The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

G. The broader institutional landscape: sub-national levels of government, the interface with the EU, agencies

32. Governments today face an increasingly complex institutional regulatory landscape. A significant part of regulatory activity is not generated by central government, but by other institutions - local levels of government, the EU level, and regulatory agencies. Better Regulation policies, tools and processes are needed at these levels too; otherwise the overall goal of Better Regulation cannot be adequately met. The potential sources of poor regulation and administrative burdens are numerous, and it is important to be clear, as far as possible, on these sources and their relative contribution to the issues that need to be tackled. The multilevel dimension is of particular importance to businesses, who may feel that they are facing cumulative burdens from all sides. Governments increasingly need the capacity to steer and manage complex regulatory networks.

The interface between national and sub-national levels of government

33. Multilevel regulatory governance- that is to say, taking into account the rule-making and rule-enforcement activities of all the different levels of government, not just the national level- is another core element of effective regulatory management. The OECD's 2005 Guiding Principles for Regulatory Quality and Performance “encourage Better Regulation at all levels of government, improved coordination, and the avoidance of overlapping responsibilities among regulatory authorities and levels of government”. It is

relevant to all countries that are seeking to improve their regulatory management, whether they are federations, unitary states or somewhere in between. In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. These issues have a direct impact on the welfare of businesses and citizens. The role of sub-national levels in regulation is of growing importance. The regional and local levels of government within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, sub-national levels of government may be taking on a growing responsibility for the implementation of EC regulations. An effective multilevel regulatory governance policy, in particular within the EU context, requires a proactive consideration of

- the allocation/sharing of regulatory responsibilities at the different levels of government (which can be primary rule-making responsibilities; secondary rule-making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or sub-national regulations; or responsibilities for service delivery)
- the capacities of these different levels to produce quality regulation
- the coordination mechanisms between the different levels, and across the same levels

The interface between member states and the EU

34. The transposition of regulations emanating from the EU is of growing importance for member states, with an increasing proportion of national regulations originating at EU level. Whilst EC Regulations (not to be confused with the generic use of the term “regulation” for this project) have direct application in member states and do not have to be transposed into national regulations, EC Directives need to be transposed, raising the issue of how to ensure that the regulations implementing EC law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

35. The role of sub-national levels of government appears to be of growing importance for the implementation of regulations that start in Brussels. Examples of the kind of regulation that has a direct impact on local governments include public procurement, food policy and environmental standards. The role of independent regulatory agencies is also important, for example as regards EC regulations for the infrastructure sectors.

36. The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the EU Commission to improve the quality of EC regulations. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

Independent regulatory agencies

(Note that the aim is **not** to go into the detail of any specific agency or agencies, but rather, to identify the broad issues relating to agencies’ rule-making functions that matter for Better Regulation).

37. Independent/autonomous regulatory agencies (which can cover both economic and non-economic sectors, and be locally as well as nationally based) are part of an OECD-wide trend to clarify and separate two distinct functions: central government policy making from the implementation of these policies through delegated powers of regulation, and both of these functions from government ownership of regulated companies, where appropriate. The aim is to put regulatory functions in the hands of entities that are independent both of commercial interests and of short term political pressures. In many countries, the approach has been successfully deployed to secure an independent regulatory oversight of newly liberalized or privatized infrastructure sectors. It is also used in a range of other situations, such as the oversight of financial markets. Agencies do, however, pose a challenge for most jurisdictions. A few countries have a longstanding tradition of delegating responsibilities in this way, but for most countries the concept does not fit easily with existing structures, and a pro-active approach to developing the relationship is needed.

38. Since agencies are increasingly a core part of the institutional framework for rule-making, generate a significant proportion of the regulations affecting key sectors of the economy, may sometimes be instrumental in changing existing regulations, have important powers of enforcement, and may be directly engaged in the implementation of EC regulations covering their sector at the EU and national levels, it is important to understand more of how they manage this process, and their interaction with parent ministries and other relevant institutions.

H. The political economy of Better Regulation; Evaluation/measurement of regulatory management capacities

39. The political economy of reform is of growing interest. How can ongoing support be secured for regulatory quality work? One issue relates to stakeholders' perceptions of regulatory achievements and how progress can be more effectively communicated. For example the perception of regulatory burdens by stakeholders may not match the reality (business may continue to complain about regulatory issues that are better managed than previously).

40. Governments are accountable for the often significant resources as well as political capital invested in regulatory management systems. There is a growing interest in the systematic assessment of regulatory management performance - "measuring the gap" between regulatory policies as set out in principle and their efficiency and effectiveness in practice. How do specific institutions, tools and processes perform? Do effective regulatory policies and tools for Better Regulation deliver effective regulation? Part of the answer to developing a better understanding of the link between regulatory quality processes and actual regulatory performance is the application of *ex post* evaluation and measurement techniques. What contributes to the effective design of regulatory tools and institutions? Some countries already have an explicit strategy for the *ex post* evaluation of these issues (covering for example impact assessment, consultation mechanisms, simplification and burden reduction strategies, and institutions such as central units and independent regulators). Evaluation can help to strengthen these tools and institutions. Challenges remain, including methodological challenges, resource issues, some resistance from participating institutions, the need to find a home for regular audits, and data problems.

41. A yet more difficult challenge is to assess the link between well functioning regulatory management and outcomes for broad areas of policy or for the economy and society, such as productivity performance. How is Better Regulation linked, and how does it contribute, to performance at these levels? How can we tell? Are there any specific examples of regulations or regulatory frameworks which can be demonstrated to underpin an effective policy (or conversely of regulations that have failed to support policy goals)?