OECD Reviews of Regulatory Reform

Regulatory Policies in OECD Countries

FROM INTERVENTIONISM TO REGULATORY GOVERNANCE

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2002

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Foreword

The quality of government regulations concerns all who are working to establish the conditions for sustainable global economic growth. As the OECD's Public Management Committee has noted, regulatory quality is crucial for economic performance and government effectiveness in improving the quality of life of citizens. The quality of regulations is becoming even more important as rules are internationalised, and national regulations affect the world trading system.

Yet Member countries are experiencing similar and troublesome problems with their use of regulation. Recognising these problems, as well as the substantial work being carried out by Member countries to improve regulatory quality, the Council of the OECD adopted on 9 March 1995 the ***Recommendation on improving the Quality of Government Regulation****.*

The ***Recommendation,*** *the first international standard on regulatory quality, was developed by a network of regulatory policy officials from OECD countries who carry out the work programme of the Public Management Committee on Regulatory Management and Reform. At a meeting in May 1993, these officials agreed that the Secretariat should develop, on the basis of existing practices in OECD countries (see "The Design and Use of Regulatory Checklists in OECD Countries",* **OECD Occasional Paper in Public Management** *[OCDE/GD(93)181]), a guiding checklist of good decision-making principles. A draft "OECD Reference Checklist for Regulatory Decision-Making" was reviewed in mid-November 1994 and forwarded to the Council for adoption as a Recommendation.*

The Public Management Service (PUMA) offers managerial expertise and comparative analysis to support OECD countries in improving public sector efficiency, responsiveness, and effectiveness. Working under the direction of the Public Management Committee, PUMA surveys, analyses, and reports on innovations in public sector management, and offers a forum for Member countries to exchange ideas.

The ***Recommendation*** *was produced within the PUMA work programme on Regulatory Management and Reform established by Member countries to improve comparative information in this area. The regulatory work has several objectives:*

- **Improving the quality of regulation** by examining institutional and procedural strategies for upgrading regulatory decision-making.
- **Supporting the development of more effective management of the regulatory system** to increase regulatory effectiveness and reduce costs, support structural adjustment of economies in the OECD area, improve regulatory flexibility and responsiveness, and increase openness and transparency.
- **Promoting alternative instruments** by increasing understanding of the ways in which innovative regulatory and non-regulatory instruments can be used to advance policy objectives.
- **Strengthening the effectiveness and legitimacy of the international regulatory** system in solving common problems.

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The background reports of all country reviews on regulatory reform have been posted on the OECD Web site: www.oecd.org/regreform/backgroundreports

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Executive Summary

This report charts the emergence of the regulatory policy agenda and the beginnings of the development of the concept of "regulatory governance" in OECD countries as a sub-set of the broader governance agenda.

The regulatory policy agenda has been forged from almost 25 years of efforts aimed at improving understanding of the nature of regulation as a tool of government and increasing the effectiveness of that tool. These efforts have broadened and deepened over that time, commencing with simple notions of deregulation, before moving toward concepts of regulatory reform, regulatory management and, now, regulatory policy.

The regulatory policy agenda contains three major elements: regulatory policies, regulatory tools and regulatory institutions.

Effective regulatory policy, designed to maximise the efficiency and effectiveness of regulation, must be based on an integrated approach to these three mutually supportive elements. Transparency and accountability are goals as well as means of a successful regulatory policy. However, the extent to which OECD governments have implemented these different elements varies widely.

Some four fifths of all OECD countries now have explicit regulatory policies in place.

While some adopted these policies during the 1980s, the later half of the 1990s has seen massive growth in the adoption of these policies. Explicit policies have been found to help signal commitment to reform and aid transparency, as well as promoting consistency and co-ordination between different elements of reform. Comparing different countries' policies shows strong common elements, though there is a clear tendency for policies to broaden in scope and become more detailed as time passes and experience in implementation accumulates. A central principle is the establishment of explicit responsibility for the policy at both political and administrative levels and the adoption of standardised appraisal systems for regulation-making and regulatory review processes. Key elements of most policies also include the adoption of explicit guiding objectives and the enunciation of principles of good regulation.

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The major tools employed to improve the efficiency and effectiveness of regulation include regulatory impact analysis (RIA), the systematic consideration of regulatory alternatives, public consultation and improved accountability arrangements.

In the case of consultation and accountability mechanisms, the context is one in which, despite the fact that most OECD countries have long histories in using these tools, substantial changes in their design and implementation are occurring as they are made to serve new goals and respond to more demanding citizenries. Consultation, in particular, is becoming more open to all groups in society and is being increasingly used as a means of generating objective data to support RIA.

The use of RIA and regulatory alternatives is generally a much more recent phenomenon in OECD countries, but both have spread rapidly in recent years.

Approximately half of OECD governments are now using RIA as an integral part of all regulatory development, while a substantial additional number of countries use it in defined circumstances. The scope and sophistication of RIA continues to expand, and though objective standards of analysis are often not high, this tool has already had a major influence on policy-making through its promotion of the systematic use of the benefit/cost principle as the underlying framework for analysing regulatory decisions. Virtually all countries have reported that they are increasing their use of a wide range of alternatives to traditional forms of regulation, although for the majority this increase occurs from a very low base, and substantial policy learning is still required.

High quality regulatory design cannot result in improved welfare for populations unless regulatory implementation is also effective.

Ensuring regulatory compliance is essential, and involves both sophisticated regulatory design and high quality enforcement strategies.

The nature and functions of regulatory oversight bodies are essential institutional determinants of the performance of a regulatory policy.

Again, the current situation is a mixed one. Regulatory oversight bodies are present in a majority of OECD countries, but face major challenges in mobilising adequate powers, resources and capacities to drive the implementation of regulatory policy. More conspicuous than the creation of central oversight bodies is the establishment during the past decade of dozens of regulators at arm's length from the government, with responsibilities to oversee crucial economic sectors such as utilities and financial services. Their development results from recognition of the need for independence from political and administrative

interference, as well as from regulated companies and other interests, if regulatory objectives are to be properly served. However, a crucial challenge for harnessing the benefits of such independent bodies is to ensure adequate accountability mechanisms and satisfactory policy coherence with government-wide structures and institutions.

Establishing regulatory policy and maintaining reform momentum also requires that a substantial constituencies in favour of reform exists.

This is essential given that all reforms necessarily have negative effects on some groups within society and such groups can be expected to oppose reform vigorously. Developing pro-reform constituencies requires that the benefits of reform are communicated clearly, as are the policy risks of not undertaking reform.

This report concludes by identifying a range of key challenges for the future in completing the development and implementation of the regulatory policy agenda.

These key challenges include:

- Developing regulatory policy into a concept of "regulatory governance" and integrating it with the broad governance agenda now being pursued across the OECD.
- Broadening the scope of regulatory policy to include a substantially greater focus on regulation making at sub-national and supra-national levels, as well as taking account of the importance of co-operative regulatory activity between different governments.
- Promoting an understanding of the economic importance of regulation – that is, ensuring that the size of the public sector's call on private resources that is exercised via regulatory authority is widely understood and informs regulatory debate.
- Engaging on systematic *ex post* evaluation of regulatory policies, tools and institutions.
- Continuing to build the institutions of regulatory reform, including developing improved understanding of their roles and characteristics.
- Working to address regulatory complexity and uncertainty. And
- Improving controls over "grey" or "quasi" regulation and third party standards as integral elements of the regulatory policy tool.

Finally, the report calls for the revision of the 1995 Recommendation of *the OECD Council on Improving the Quality of Government Regulation* and the development of self-assessment tools to help reach a collective improvement of regulatory policies in OECD countries.

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Abstract. *In the past 20 years, few reforms of the public sector have received more attention, and stimulated more controversy, than the reforms made to regulation making and regulatory management. The rise of regulatory policies – an explicit policy that aims at continuously improving the quality of the regulatory environment – show how early notions of "deregulation" or "cutting red tape" quickly gave way to a central good governance notion based on an understanding of how regulatory practices can substantially improve market performance, public sector effectiveness and citizens satisfaction, through a mix or deregulation, re-regulation and better quality regulation, backed up by new or improved institutions.*

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Chapter 1

Introduction

In the past 20 years, few reforms of the public sector have received more attention, and stimulated more controversy, than have the reforms made to regulation making and regulatory management. Today, almost all 30 OECD countries have regulatory management programmes, up from perhaps three or four in 1980, and the debate now focuses almost exclusively on how to improve the regulatory management system, rather than on why one is needed. Rarely in history has a public management reform of such magnitude spread so quickly among countries.

The rise of regulatory policy – that is an explicit policy that aims to continuously improve the quality of the regulatory environment – is not simply the story of the spread of an idea. The nature of regulatory management and reform itself has undergone profound and rapid change over the same 20 years. Early notions of "deregulation" or "cutting red tape" quickly gave way to ideas of regulatory reform, involving a mixture of de-regulation, re-regulation and improving the effectiveness of regulations. However, these conceptions of reform also assumed that reform was episodic in nature, and aimed to restore the regulatory structure to some optimum state through a one-off set of interventions. Experience soon demonstrated that such views were untenable. Thus, they gave way in turn to the concept of regulatory quality management. Regulatory quality management differs in seeing the process of reform as being a dynamic one, which is integral to the role of government and must be pursued on a permanent basis. Its focus, more than that of regulatory reform, is on regulatory quality.

Today, the concept of regulatory quality management has itself largely given way to that of "regulatory policy" in OECD countries. Regulatory policy, as with other core government policies, such as a monetary or fiscal policy, is dynamically focused and founded on the view that ensuring the quality of the regulatory structure is a permanent role of government. However, it is concerned with a pro-active "quality assurance" role, rather than a more reactive "quality management" role. In a few countries that have been engaged with these issues for more than a decade, regulatory policy is itself giving way to regulatory governance. Regulatory governance as a concept is firmly grounded in the wider theme of democratic governance. That is, the tasks involved in exercising regulatory functions go beyond the design and implementation of instruments, or their co-ordination, and also embrace wider issues that are integral to democratic governance, such as transparency, accountability, efficiency, adaptability and coherence. Regulatory governance also refers to a larger domain encompassing the complex interplay of other regulatory "actors" such as the legislature, the judiciary and the sub- and supranational levels of government action.*

This report documents the development of the regulatory quality paradigm and its emergence as the regulatory policy agenda. It reviews policies, tools and institutions adopted in OECD countries, identifying best and promising practices as well as less

* See, for example OECD (2000b), C(2000)111, p. 10.

successful initiatives. It also draws out the links between these elements of regulatory policy and the wider governance agenda. The report draws on a wide range of work conducted within the OECD Secretariat and in member countries to provide an assessment of the current "state of play" in relation to these issues. Most importantly, it adopts a dynamic and forward looking view, focussing on the key priorities for moving forward with the regulatory policy agenda.

The report is also intended to respond to the obligations set out in the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*. It constitutes a progress report to OECD Ministers on the implementation of principles such as those contained in the Recommendation into OECD countries' regulatory structures and concludes with a proposal for a complementary recommendation, which focuses specifically on the dynamic and systemic elements of regulatory policy.

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Chapter 2

The Regulatory Role of Government: History and Development

In 1997, the OECD stated that: "The emergence of the regulatory state in this century was a necessary step in the development of the modern industrialised democracy [...] Regulations have helped governments make impressive gains in protecting a wide range of economic and social values."[1] Regulation has developed as a fundamental tool of government in managing more complex and diverse societies and economies and allowing competing interests to be balanced.

Through most of the century, the regulatory apparatus grew organically. The use of regulation spread into an ever-wider range of areas and the goals of regulation expanded rapidly. Regulation offered a convenient and often highly effective means of resolving the policy issues confronting government. It also represented a less visible means of appropriation of private resources by government than traditional fiscal measures. In sum, a complex array of factors fuelled what is now called "regulatory inflation" (see Box 1). However, few efforts were made to develop an understanding of the nature of regulation as a policy tool and to explore its strengths and weaknesses. The emergence of deregulation and regulatory reform in the early 1970s constituted some of the first attempts to address this question of the nature of regulation, and its limits as a policy tool, in an explicit and sustained way.

This need to better understand the regulatory tool was not, explicitly at least, the driver of the reform agenda at this time. The first efforts at "deregulation" were driven by economic downturn and were based on the view that a too great quantity of regulation was impeding the economy by strangling innovation and entrepreneurialism. However, these early attempts at "deregulation" were, at best, only partially successful. Their failure to yield the desired results led to further examination of the nature of the regulatory problem. Learning about the nature of the regulatory tool continued, as deregulation gave way in the 1980s and 1990s first to regulatory reform, then to regulatory management and, more recently, to the developing regulatory policy agenda.

As the OECD noted in 1997, the road has been rocky.[2] Politicians and civil servants promised much in the 1980s, but by the early 1990s results had often failed to match expectations and many reformers were exhausted and disillusioned. Initial conceptions of regulatory reform as a process of simply eliminating some rules and revising others had evolved toward an understanding of the procedural, institutional, and finally the profound cultural transformations that were required in many areas, within both public and private sectors. What seemed easy in 1980 was slowly revealed as a difficult, complex and multi-faceted reform agenda that most reformers did not have the influence or the tools to carry out. Worse, regulatory reform was revealed as a task singularly ill-suited to the political cycle.

Equally, it became increasingly clear, as external pressures grew and understanding of the roots of the regulatory problem developed, that governments had no choice but to press on. External and internal pressures – such as citizen demands for better services, new technologies, shocks that revealed economic rigidities, and the evolution from manufacturing to service economies – combined to create new environments in which

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Box 1. **The roots of regulatory inflation**

The history of regulatory governance is not one of coherent government strategy, but rather of reactions to changing needs and opportunities in different countries, industries, and policy contexts. Following massive growth in the scope and scale of regulatory interventions through most of the twentieth century, shifts in the economic environment began to reveal more clearly the previously hidden costs of out-dated, low quality and constantly expanding regulatory structures. These factors included the 1970s oil shocks, currency volatility and declining tariffs, as well as growing awareness of the complexity of environmental degradation. Yet, while the problems caused by poor quality regulation were increasingly apparent, reform was consistently being delayed or blocked. Regulatory policy must incorporate an understanding of why governments have found it difficult to control the quality and quantity of regulation and to take corrective action. The major reasons include the following:

- The complexity of reform and uncertainty about its broad consequences have blocked progress. This is in part due to policy fragmentation in the structure of government. Governments have often lacked the co-ordination and planning capacities necessary to move forward with coherent packages of policies and reforms.
- Vested interests have often been able to install and defend regulations that benefit them, blocking needed reform even when its benefits to the wider society are vastly larger than the concentrated (and highly visible) costs to the interest group. In some countries, a "regulatory culture" has emerged, in which businesses have come to look to government protection for survival rather than to their own performance. Lack of transparency is a key problem here. Vested interests are strengthened by opaque decision processes and unaccountable administrative discretion.
- Incentive structures within regulatory bureaucracies have not encouraged effective and accountable use of discretion. Incentives have too often favoured vocal rather than general interests, short-term over long-term views, pursuit of narrow mission goals at any cost, and use of detailed and traditional controls rather than flexible and innovative approaches. Most regulators are not equipped to assess the hidden costs of regulation or to ensure that regulatory powers are used cost-effectively and coherently.
- Good regulation can become bad regulation over time. Governments give too little attention to reviewing, updating, and eliminating unnecessary or harmful regulation. Many regulations currently on the books date from periods earlier in this century when economic and social conditions were very different from what they are today. Governments must find means of responding more quickly to changing environments.
- Too often, legislators issue laws as symbolic public action, rather than as practical solutions to real problems. This problem, which derives in large part from the problem of poor incentive structures noted above, is exacerbated by the lack of focus on compliance, enforcement and *ex post* evaluation of regulatory effectiveness within most OECD governments.
- The locus of regulatory authority has increasingly become diffuse. Regulatory powers are increasingly being exercised at sub-national and supra-national levels, while national governments are tending to "contract out" some regulatory powers via the increasing use of third party standards. This exponentially increases the tendency for duplicative, conflicting, or excessive regulations to arise, as co-ordination between these different sources of regulatory power is often rudimentary or non-existent.

Source: Adapted from OECD (1997), *OECD Report on Regulatory Reform*, Paris.

low-quality regulatory systems increasingly penalised citizens. Regulatory failures were punished more cruelly, while patience with, and faith in, government were eroding. The increasing internationalisation of the world's economies only underlined these trends. Importantly, traditional economic management tools based on monetary and fiscal policies seemed not to work well anymore, and regulatory reform offered new hope to economic policy officials faced with high unemployment, low productivity, and new demands to be internationally "competitive".

Regulatory reform was also part of a more profound economic and social transformation. Many OECD countries faced, and still face, the urgent and difficult task of moving forward with the transition to market-led growth to maintain economic performance in response to technological innovations, changes in consumer demand, and interdependencies in regional and global markets. In this transition, supply-side reforms to stimulate competition and reduce regulatory inefficiencies have become central to effective economic policy. Indeed, it is now accepted in OECD countries that an effective economic strategy for sustainable long-term growth must combine fiscal, monetary, and competition-oriented supply-side policies. Thus, regulatory reform has increasingly become central to the government economic policy agenda.

Mounting pressures to regulate better are also arising from the unabated construction of the regulatory state. In recent decades, governments have tried to achieve more and more through the use of regulation. Regulation has moved into many new areas, while the complexity of rules has also increased. These trends mean that the task of ensuring the quality of regulation is more crucial than ever.

A common myth is that we live in an age of deregulation. This misconception is rooted in the confusion of "market liberalisation", which is indeed underway, with "deregulation", which has occurred in only a few policy areas and in very few countries. In fact, market liberalisation usually requires new and sophisticated regulatory regimes. Privatisation commonly means more regulation, not less. For example, regulation grew quickly in the United Kingdom during the decade of the 1980s, when privatisation stimulated the creation of new regulatory institutions and regimes to foster the newly-competitive markets. Nor, in general, has there been any slowing in the growth of new regulations in social policy areas such as environmental quality, safety and health, consumer protection, and workplace standards. Every available indicator and study show that regulation continues to be one of the most widely used tools of government, and that its use is rapidly increasing. The costs that regulations impose are great – reaching 10% of GDP or more in some countries. These rules must be well designed and applied if the benefits are to be correspondingly large.

Despite its promise, disquiet about regulatory reform has arisen and still persists, with many concerned that the state has retreated too fast and too far in some areas. Policy failures associated with market liberalisation and "re-regulation" have in some cases called these policy directions into question. This has particularly been the case when consumers and citizens generally have been unable to perceive the benefits from reform. A backlash against market forces has appeared, in which regulatory reforms are characterised as little more than deregulation, which itself has become synonymous with the darker side of globalisation. Crises and failures that seem related to poor regulation – energy crises in Auckland and California, rail crashes in the United Kingdom, fears about food safety – fuel demands for more care by governments in how they regulate. The quality tools discussed

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in this report can be a partial response to such concerns. Properly deployed, they can reduce the risks of policy failure – due to bad regulation, over-regulation or under-regulation – that can have such catastrophic consequences.

"Deregulation" was superseded by "regulatory reform" and then by "regulatory management" quite early in the development of the current regulatory policy agenda. This change necessarily entailed a shift away from questions of what regulation should be eliminated and toward how regulatory structures could be improved in terms of design and functioning. Over time, the key elements of regulatory quality management emerged from the experiences of the reformers. That these developments are very recent is indicated by the fact that it was only in 1995, with the adoption of the *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation,*[3] that an internationally accepted set of principles on ensuring regulatory quality was first adopted. The *Recommendation* includes the 10 point OECD Reference Checklist for Regulatory Decision-Making, reproduced as Box 2.

Attempts to promote regulatory quality were first focused, quite naturally, on identifying important areas of low quality regulation, advocating specific regulatory reforms and scrapping burdensome regulations. Increasingly, however, it was recognised that *ad hoc* approaches to reform were insufficient. The size of the task required co-ordinated action on many fronts simultaneously, while the benefits of consistent approaches, and the wide application of policy learning, were too substantial to be foregone.

Thus, the reform agenda began to broaden to include the adoption of a range of explicit overarching policies, disciplines and tools. These were to be permanent, rather than episodic in nature. At the broadest level, this shift has meant providing explicit policy support for the regulatory reform agenda, by adopting a reform policy at the "whole of government" level, often with timelines, targets and evaluation mechanisms. It has also included the adoption of consistent approaches to the rule-making process and the implementation of new policy tools such as the use of regulatory impact analysis (RIA), consultation mechanisms and regulatory alternatives. Perhaps most importantly, the adoption of regulatory policies has meant that responsibility for elements of the programme has been allocated to specific Ministers and government bodies.

The importance of institutions has come to be recognised more recently still, and understanding of this issue remains relatively limited. The institutions required to take forward the regulatory policy agenda are numerous and of many kinds. They include regulatory management and oversight bodies within Cabinets and executive government, within administrations and, increasingly, within Parliaments. They also include independent regulators, as well as other key contributors to regulatory quality, such as specialist law drafting offices.

The development of the regulatory policy agenda has been hampered substantially by the fragmentation that has characterised regulatory reform efforts. Progress in the three key areas of regulatory policies, tools, and institutions has been made at different times and largely independently, with the formation of links between these crucial building blocks being late in developing and remaining incomplete and less than fully understood. A major part of the OECD work on regulatory management and reform over several years has, therefore, been to highlight the importance of these linkages and to develop understanding of their specific nature and characteristics.

Box 2. **The OECD reference checklist for regulatory decision-making**

1. Is the problem correctly defined?

The problem to be solved should be precisely stated, giving evidence of its nature and magnitude, and explaining why it has arisen (identifying the incentives of affected entities).

2. Is government action justified?

Government intervention should be based on explicit evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.

3. Is regulation the best form of government action?

Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

4. Is there a legal basis for regulation?

Regulatory processes should be structured so that all regulatory decisions rigorously respect the "rule of law"; that is, responsibility should be explicit for ensuring that all regulations are authorised by higher level regulations and consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality and applicable procedural requirements.

5. What is the appropriate level (or levels) of government for this action?

Regulators should choose the most appropriate level of government to take action, or if multiple levels are involved, should design effective systems of co-ordination between levels of government.

6. Do the benefits of regulation justify the costs?

Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken.

7. Is the distribution of effects across society transparent?

To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.

8. Is the regulation clear, consistent, comprehensible and accessible to users?

Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.

9. Have all interested parties had the opportunity to present their views?

Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government.

10. How will compliance be achieved?

Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.

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Another closely related issue is fragmentation and lack of co-ordination *between regulatory reform policies and other major policy agendas*. The OECD's horizontal programme on regulatory reform, commenced in 1995, constitutes one of the earliest recognitions of the linkages between regulatory reform and competition and trade policies, as well as their important links to consumer policy and questions of innovation and dynamic efficiency. The horizontal programme documented these links through its combination of five co-ordinated "thematic" studies, backed by six sectoral studies that considered the issues in the context of strategically important sectors of the economy.[4]

The main message from these studies is that regulatory policies must facilitate the operation of efficient markets and that social policies and protections must be delivered in ways that use market incentives where possible and, at the least, suppress or distort the functioning of markets as little as possible. The dynamic efficiencies delivered by efficient markets are crucial to achieving social objectives. Regulation must be managed in such a way as to ensure these efficiencies are not compromised in the pursuit of static goals.

The following sections of this report consider each of the elements of a successful approach to regulatory governance – regulatory policies, tools, institutions – in turn. They will thereby work toward building up a full picture of the regulatory governance agenda, as it is emerging in OECD countries. The different aspects of regulatory policies are also illustrated by the results of two OECD surveys undertaken in 1998 and 2000 on government capacities to assure high quality regulation.[5] Following this, the "state of play" in OECD member countries will be discussed, drawing heavily on the series of country reviews that have been conducted by the OECD Secretariat since 1998. Finally, the main emerging issues are identified and discussed.

Notes

1. See OECD (1997e).
2. See OECD (1997e).
3. OECD (1995a).
4. The OECD Regulatory Reform Programme was launched in 1997. The programme involves five different OECD committees (*i.e.* the Economic Departments, Public Management, Competition Law and Policy, Trade, and Information, Communication, Computer Policy) and the International Energy Agency. Until 2002, 16 country reviews have been conducted: Canada, Czech Republic, Denmark, Greece, Hungary, Korea, Ireland, Italy, Japan, Mexico, Netherlands, Poland, Spain, Turkey, UK, and USA. For further information see *www.oecd.org/regreform/backgroundreports*
5. Responses to the two surveys are now integrated on the OECD *Regulatory Capacities Database*. 26 and 28 countries participated respectively to the 1998 and 2000 surveys. Luxembourg and Slovakia are not included in the 2000 figure. Care should be nonetheless taken as the responses are based on self-assessment only.

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Chapter 3

Regulatory Policies

Beginning with the 1995 Recommendation, OECD countries have been developing consensus on how regulatory policies can be implemented in public administrations in general and among regulators in particular. Regulatory policy is the systematic development and implementation of government-wide policies on how governments use their regulatory powers. This includes addressing the incentives facing regulators, integrating the regulatory policy agenda into administrative procedures and changing the culture of regulators so that flexibility and outcome oriented approaches are systematically favoured in regulatory design.

The experience of leading OECD member countries shows these changes will not be achieved simply by government command. Reformers are almost invariably met with broad opposition, multiple obstacles and considerable inertia. Application of new regulatory disciplines has been the Achilles heel of reform efforts, since governments have not generally followed up with necessary investments in information and human resources. Effective reform is dependent on the development of systematically organised procedures with explicit and sustained political backing and adequate resources.

3.1. Objectives of regulatory policy

All regulatory policies are based on a mix of economic, legal, and public management principles. The underlying policy objectives sought are largely common among OECD countries, though the emphases may differ widely, reflecting their different specific circumstances. The main objectives underlying regulatory policy are:

- Increasing social welfare by better balancing, and more effectively delivering, social and economic policies over time.
- Boosting economic development and consumer welfare by encouraging market entry, innovation, and competition and thereby promoting competitiveness.
- Controlling regulatory costs so as to improve productive efficiency by reducing unnecessary costs in particular for Small and Medium-sized Enterprises.
- Improving public sector efficiency, responsiveness, and effectiveness through public management reforms.
- Rationalising and restating the law. And
- Improving the rule of law and democracy through legal reforms, including improved access to regulation, reduction to excessive discretion of regulators and enforcers, which is a key source of corruption.

Some examples can illustrate the contention that the diversity of policy approaches is largely explained by the specific problems facing the country, and the nature of the political opportunity for progress on reform. In Japan and Korea, where there was a widely held view that the major regulatory problem was one of over-regulation and state interference in the economy, the focus has been on reducing the economic role of the state through deregulation. In the United States, where there are relatively few barriers to entry

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in most sectors but a burgeoning and costly federal regulatory structure in social policy areas, the focus has been on improving regulatory quality through rigorous application of benefit-cost principles. In the Netherlands, which was re-orienting the corporatist state toward a more market-based relation, the regulatory quality agenda has emphasised redesign of regulatory processes, notably consultation, and the reduction of administrative burdens for its businesses competing in Europe. In Mexico, which has been integrating its regulatory frameworks into the North American free trade zone, the priority has been to eliminate inconsistent and overlapping regulation and improve the credibility and enforceability of the law. Within the European Union, the focus has been on effectively implementing the single market programme, by harmonising regulations between member states and eliminating regulatory barriers to cross-border competition in labour, goods and capital markets.

Perhaps the most spectacular and thorough going use of regulatory policies has been made by the economies in transition. The Czech Republic, Hungary and Poland have, in ten years, moved from a planned economy to a marked-led economy. This has necessitated a massive programme of deregulation and re-regulation, a complete rebuilding of the institutional framework and the creation from first principles of strong transparency and accountability measures. The success of these countries in these undertakings, including their achievement of membership of the OECD and rapid movement through the processes of EU candidacy, has been made possible by the adoption of strategic and systemic approaches to the tasks of building regulatory policies, tools and institutions – in short, by the adoption of coherent and effective regulatory policy. For example, the OECD's 2000 country review of Hungary noted that "regulatory reform has been central to policies of democratisation, marketisation, public administration modernisation, devolution to local government and harmonisation with EU legislation."[1]

3.2. Main elements of regulatory policy

While the varying political, constitutional, and administrative environments of OECD countries require different models, the basic elements of effective management do not seem to change across countries. Experience in OECD countries suggests that an effective regulatory policy has three basic components that are mutually-reinforcing: it should be adopted at the highest political levels; contain explicit and measurable regulatory quality standards; and provide for a continuing regulatory management capacity.

Adoption at a high political level

Adoption of the policy at high political levels lends authority to the institutions of reform and ensures that the government has incentives to strive to achieve the policy's objectives and goals. It also aids transparency, as the government is, in effect, committing itself to the achievement of those explicit objectives and goals. It is notable that, by 2000, all OECD member countries with regulatory policies stated that the policies have been either issued, revised, or reaffirmed by the present government.

In many countries, substantial elements of the regulatory policy – such as regulatory impact analysis requirements and consultation procedures – have been adopted in legislation. This has generally been seen as a means of ensuring a high level of compliance, as well as indicating the importance attached to the requirements by government in a tangible way. Legislating for elements of regulatory policy also assists the achievement of

consistent standards and outcomes and ensures that the policy is made highly transparent.

However, some disadvantages of using legislation for this purpose can also be identified. Changing legislation is more difficult and time-consuming than is amending less formal government policy documents. Thus, using laws can make the policy less responsive and adaptable to changing circumstances or policy learning. Moreover, the use of legislation can also be seen as a somewhat "centralised" approach and thus inconsistent with some political traditions.

Content of regulatory policies

The contents of national regulatory policies have evolved very quickly. The prominence given to reforming the regulatory framework has waxed and waned over time in most countries. However, the trend has been consistently toward the progressive expansion in the scope of the policies, including the adoption, development, and refinement of new elements. This is part of the broader evolution of regulatory policy discussed above. In general, new policy elements are added to address newly-defined problems, are widened to include more policy areas, and are deepened to encompass more rigorous quality tools and reflect policy learning. Increasingly, international market opening obligations are also driving a convergence in the broad elements of regulatory policy. Decision processes have become progressively more empirical (see the sections on RIA and compliance, below), relying on efficiency and feasibility assessments to supplement traditional checks on technical legal quality. This is where the 1995 Recommendation of the OECD has had its greatest impact. In countries as diverse as Italy, Denmark, Hungary, and Greece, the Recommendation has provided a benchmark to stimulate the adoption and guide the design of more balanced national regulatory quality policies, and so has accelerated the emergence of regulatory policy.

So rapid has been the expansion in the scope and objectives of regulatory policies that an emerging danger is that they may try to adopt too many quality criteria in pursuit of too many quality goals. The resulting impact on overall regulatory quality may become negative – or at least less effective than a simpler and clearer policy. The danger can arise both because the requirements of the policy exceed the capacity of regulators to respond coherently and because many policy goals involve inherent conflicts – thus providing regulators with discretion as to which goals will be considered paramount and what elements of quality will be favoured.

Figure 1 shows that, by 2000, the majority of OECD countries had included a range of quality tools in their reform policies. Consultation requirements are the most common element; while eighteen countries include a government-wide Regulatory Impact Analysis (RIA) requirement in their policies. About half of OECD countries have a general requirement that consideration be given to regulatory alternatives. Notably less widespread is the use of formal evaluation requirements.

Regulatory policy programmes typically begin with a focus on one or a few reform objectives and broaden their concerns over time as experience accumulates, the agenda appears more complex, and concerns grow over the costs of non-reform for national competitiveness. For many countries with relatively long histories of reform activity, the broadest possible objective – that of enhancing net social welfare – is now increasingly acknowledged as the basis of reform.

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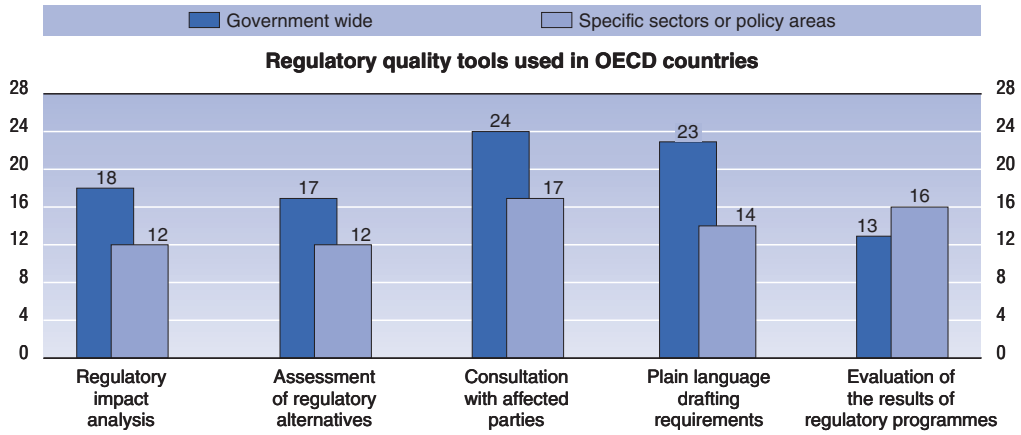
Figure 1. **Selected regulatory quality tools contained in regulatory reform policies in 28 OECD countries**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries.

However, the movement has not been unidirectional. Like most policy initiatives, a regulatory policy is subject to shifting political and social priorities and interests. This is especially so in the early years, before the policy is firmly established, with the benefits not yet apparent to many, while the costs, often more concentrated and hence visible, loom large in the debate. Though regulatory policies have not been formally renounced in any country, early reform efforts in some countries have lost momentum and effectiveness, or effectively been abandoned. Where this has occurred, the longer-term result has usually been the re-establishment of a better-considered and more successful policy as the government returned to the outstanding issues.

To complement and enhance the effective enforcement of their policies, some countries have supplemented general policies with more detailed annual reform plans. In Korea, for example, the Comprehensive Regulatory Improvement Plan requires that agencies and the Regulatory Reform Committee prepare annual plans. In Japan, regulatory reform policies have tended to be promulgated on a three-yearly basis. These shorter-term plans appear to be focused on driving the pace of reform and maximising accountability by creating short to medium term objectives and targets that nonetheless exist within the broader strategic context of the overall plan.

Another potential benefit of these shorter-term policies is that they provide a means of reorienting policy in response to changing priorities or policy learning, while maintaining consistency with the longer-term policy. This may mean that governments are more willing to change approaches in response to mistakes and failures, as there is less political capital associated with the shorter-term programmes, to the extent that they are seen as "tactical" elements within the longer-term strategic plan. However, there is relatively little experience to date with this approach, suggesting the need for further research on these questions.

Management capacities

Successful regulatory policies invariably include some mechanism or mechanisms for managing and co-ordinating the achievement of reform, monitoring and reporting on outcomes. These management capacities can take a range of different forms, with oversight bodies sometimes being created at Cabinet level, at other times being committees of senior officials (such as department heads) and, very often, being dedicated bodies within the administration (see Chapter 6 for further discussion of these latter bodies). Experience suggests that the key success elements are adequate resources, expertise and authority.

These factors suggest that these management capacities must be located at the centre of government and that they must take an important role in driving the achievement of the reform policy's objectives. Many countries, such as Mexico and Korea, have adopted highly centralised approaches to regulatory policy, with powerful bodies located at the centre of government taking on broad-ranging responsibilities for setting goals and priorities, monitoring compliance and reporting on outcomes. This approach can help maintain momentum, ensure consistent application of the requirements and aid accountability and transparency.

However some, particularly smaller, countries have found this centralised model to be less well-suited to their political and institutional contexts and policy-making requirements. For example, the *OECD Report on Regulatory Reform in Denmark* noted concerns that the use of a centralised regulatory oversight body might "increase conflict and formality at the expense of results".[2] Notwithstanding this, the report also noted that a high level Regulation Committee had been established and constituted a step toward a more centralised approach than had previously been taken. In general, the adoption of regulatory policies at the political level is essential in all political and institutional contexts, but implementation mechanisms must reflect the country's specific traditions and context. Nonetheless, the experience of a wide range of OECD countries suggests that a degree of central co-ordination and control is an important element of a successful regulatory policy.

3.3. The two basic dimensions of a regulatory policy

A regulatory policy needs to focus on two dimensions of regulatory activity: it must establish or reform the regulatory appraisal of new regulations (*i.e.* a flow concept) and advocate the reform of existing regulations (a stock concept).

Improving rule-making

All governments have traditionally undertaken substantial external appraisals of the legal quality of the text of draft laws and regulations prior to their enactment or presentation to Parliament. Often this important task is done by powerful institutions established at the end of the drafting process. In civil law countries, they have been moulded on the French Conseil d'État. However, until recently appraisal of the substance of proposed laws has been conducted mainly through peer pressure at the Cabinet level or during internal (*i.e.* inter-ministerial) consultations. Judgements on the expected impacts of proposed laws and on other quality issues were essentially left to self-assessment, as the peer verification was undertaken too late in the process and was too constrained by political choices taken months before to have substantial effect.

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In the last two or three decades, a central innovation has been the reinventing of these crucial check and balance functions. Quality control in relation to the substance of proposed laws is now much more likely to be itself guided by mechanisms set out in administrative procedure laws or other formal government policy instruments, such as Cabinet guidelines. The establishment of such mechanisms has developed as an important element of the content of regulatory policies.

A major objective of these procedural controls on the substance of proposed regulation is to ensure that a rational and comparative approach to the achievement of policy goals has been taken during policy development, and that this has been informed by the involvement of a wide range of affected groups. Thus, legislation or other mechanisms are frequently used to set out specific requirements for RIA and consultation. These issues are discussed later in the sections on tools of regulatory policy.

Related to them is the increasing use of procedural controls to improve the review of substantial issues at the political and highest administrative levels. An example is the use in Hungary of a "two stage" process of review of proposed regulation, in which ministries' proposals are reviewed by an Administrative Secretaries Meeting, and potentially returned for further consideration, prior to being forwarded to Cabinet. The Administrative Secretaries are also informed by the *Referatura*, which provides expert analysis of draft laws and proposals for improvement and is represented directly at their meetings.[3] A similar "two stage" process also exists in the Czech Republic. New technology is also being increasingly co-opted to improve internal co-ordination and scrutiny of the substance of proposed regulation. For example, Canada has implemented a new capacity-building approach, The Learning Tool, which relies heavily on Internet/Intranet technologies. This Learning Tool provides officials with on-line, on-demand access to policies, guidance, and best practices in undertaking appropriate analyses to support the making of informed decisions on regulatory proposals.

A second set of issues is also important. Administrative procedure laws are increasingly widespread and deal predominantly with issues of transparency and accountability in decision-making in relation to both the making and the enforcement of laws, including the specification of appeals processes. As the scope of these laws has broadened, attention is also beginning to turn to a still wider, and more strategic set of issues, embracing the relationship between primary and subordinate legislation, including co-ordination between these two levels of regulation and the consistency of scrutiny and quality control procedures applied to each, as well as the extent and appropriateness of discretions given to the administration to make far-reaching subordinate laws on the basis of "framework" legislation. These constitute some of the most important emerging issues for regulatory policy as it applies to new regulation.

At the institutional level, an essential element of the substantive appraisal of new regulations is their review by a body that is independent of the regulator proposing the regulation, ideally, located at the centre of government (see Section 6.1). This is essential to ensure that a "whole of government" perspective is taken, free from undue influence by sectional lobby groups. This role for an appraisal body within the administration complements the procedures for scrutiny at political or top-level administrative levels, described above, by being carried out earlier in the policy development process and based on a more detailed and expert scrutiny (*e.g.* in relation to issues such as RIA). A similar imperative exists in considering the means of reforming the stock of existing regulations (see next section).

Implementing this requirement may mean that the regulatory policy authority conducts reviews itself, in some cases. However, resource constraints, plus the need to ensure that regulators themselves take responsibility for regulatory quality outcomes, mean that the role of the central authority will in most cases be more indirect. Important indirect roles include helping to approving or establish review priorities, setting out acceptable review processes and methodologies and evaluating and reporting to government and/or Parliament on the outcomes achieved. These roles are likely to be supported in general terms by the provision of training and guidance materials as well as specific technical expertise.

Keeping regulation up to date: dynamic aspects of regulatory policy

The above elements of regulatory policy are essentially static in nature. That is, they are focused on the question of how to ensure systematically that newly adopted regulation is of high quality. But even high quality regulation becomes less effective and less relevant over time as circumstances change. The challenge of keeping regulation up to date – of ensuring that regulatory quality is maintained across time – is in many ways the greater one for regulatory policy.

The most dramatic regulatory reviews have been conducted in those countries (Czech Republic, Hungary, and Poland) undergoing fundamental transitions from central planning to market systems, and simultaneously integrating the 80 000 pages of the European *aquis communautaire* as part of EU accession. In Hungary, for example, 799 of the 983 existing laws were adopted after 1990. A 1998 revision to the Polish constitution also permitted a massive elimination of hundreds of subordinated regulations that did not have a legal justification. But very substantial reviews of existing laws and other regulations were also carried out in other OECD countries, most notably Canada, Korea, Mexico, and Australia. In 1992, the Canadian federal government started a comprehensive review of all existing regulations, "to ensure that the use of the government's regulatory powers results in the greatest prosperity for Canadians". At the end of the review (complete by June 1993), 835 out of a total of about 2 800 regulations then listed in the *Consolidated Index of Statutory Instruments* were identified for revocation, revision or further review. Korea succeeded in eliminating 50% of its regulations in less than a year, while Mexico revised over 90% of its national legislation in about six years. Australia is nearing completion of a six-year review of 1 700 Acts and subordinate regulations that were identified as containing restrictions on competition.

Notably, of these countries, only Australia (in 1994) and Canada (in 1992) designed and launched a national review of regulations without facing a substantial economic crisis. Crises have most often been the spur for major review programmes, as governments have sought to supplement traditional macro-economic tools with supply-side reforms. The broader perspective is that review activity clearly remains too infrequent and too limited. Many countries are just now changing laws and regulations established decades or even centuries ago for very different conditions. Italy found, in 1998, that one in five administrative procedures was regulated by dispositions established before the 1960s. Regulatory rigidities are enormously costly, increasing the risk of policy failure and slowing technical and organisational innovation. Governments commonly underestimate the velocity of change. In the United States, regulatory reforms unleashed a tidal wave of innovation in products, services, and production methods, that served to demonstrate how much the previous regulatory structures had repressed innovation in many sectors. Similar

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results have also occurred in countries including the United Kingdom and Australia following major regulatory shake-ups of major industries such as electricity and telecommunications.

For these reasons, the 1997 OECD *Report* recommends that governments "review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively". A systematic approach helps to ensure consistency in approaches and review criteria, generates momentum and ensures that important areas are not exempted from reform due to lobbying by powerful interests. *Ex post* reviews are a complement to rigorous *ex ante* RIA, rather than a substitute for it. *Ex post* review can help to determine whether legislation is meeting its initial objectives, but cannot substitute for RIA's role in providing a systematic basis for the weighing of policy alternatives from the very beginning. *ex ante* analysis avoids problems, while *ex post* analysis corrects problems early.

Recent years have seen growing investments by national governments review of existing regulations, but the overall picture is not very positive. Only six OECD countries have periodic evaluation processes for all regulations, although 15 evaluate rules in specific policy areas. Sun-setting and automatic review provisions are used in some areas by most countries, but almost nowhere are they widespread.

The quality of evaluations is also suspect. When evaluations occur, they tend to be *ad hoc* and unstructured. Only 12 countries have developed standardised evaluation techniques or criteria to be used during regulatory reviews. Yet, in the absence of such standardised approaches, substantial discretion is left with the regulatory agency conducting the review, inconsistencies necessarily result and quality control cannot be exercised at the whole of government level.

Partly as a result of this lack of a systematic approach, review efforts have often been superficial and focused on marginal changes to complex regulatory regimes that do not significantly improve the total regulatory environment. For example, in the United States, efforts to "reinvent regulation" were reported as having led to the removal of 16 000 pages from the Code of Federal Regulations, or about 11% of the total. But measures of success such as reductions of page numbers or numbers of regulations can be criticised on many grounds. In any case, these page reductions were almost entirely offset by new regulatory requirements in the same period.[4]

Figures such as reduced numbers of pages are easily quantifiable, while impressive sounding "results" can be delivered without disturbing entrenched interests. Though removing "dead weight" improves the transparency of the regulatory environment it reveals little about the quality of individual regulations: their costs or benefits, efficiency or cost-effectiveness. The budgetary and economic costs of regulation are considerably closer to the issues of real interest for reformers, but almost never included in review programmes. The remainder of this section examines five major strategies of regulatory review used in OECD countries.

"**Scrap and build**" **is costly and time-consuming, but can deliver good results.** To produce real change, comprehensive review and rebuilding of entire regulatory regimes is often necessary. This is called "scrap and build" in Japan, and "reinventing regulation" in the United States. It permits prioritisation of reviews for specific sectors and more thorough rethinking of the principles underlying the regulatory regime. It also takes into account the interactions of multiple regulations.

Scrap and build is consistent with the OECD preference in the *1997 Report* for comprehensive reforms based on a complete and transparent package. There are several advantages to comprehensive reform: benefits appear faster (which means that pro-reform interests are created sooner); affected parties have more warning of the need to adapt; vested interests have less opportunity to block change; and reform enjoys higher political profile and commitment. Producing an integrated package of reforms also facilitates balancing of multiple policy objectives and interests.

The scrap and build approach has not been used very often, but, where used, seems to have produced results. Successful examples include the rebuilding of the entire structure of environmental regulation in Denmark, beginning in the late 1980s, and the MDW programme in the Netherlands (see below). Yet scrapping and building is costly and not always feasible, particularly where the resources and expertise able to be devoted to reform are limited. For example, in 1998, to accelerate reforms in important sectors of the economy, the Mexican government established advisory working groups to consider regulation in four economic sectors: textiles, tourism, mining and construction. These groups worked with a similar approach to those concentrating on a single ministry. However, due to lack of resources this group approach was abandoned.

Generalised reviews, in contrast to scrap and build, have often absorbed the energies of governments and delivered only minor results. Generalised reviews are policies that instruct regulatory bodies to review the entire body of their regulations against general criteria such as need and efficiency. Generalised reviews are actions limited in time, and have a broad scope (the entire stock of rules with certain effects, such as business impacts). Perhaps one of the most ambitious of these reviews was launched in mid-1990s by Australia (see Box 3), but in the 1980s, Turkey also carried through an extensive review of its entire stock of legislation.[5] An interesting variant of this approach is the Swedish guillotine initiative. In the 1980s, Sweden enacted a "guillotine" ordinance nullifying hundreds of regulations that were not centrally registered after a certain date. This is a popular approach for governments, because it is highly visible and politically symbolic, but rarely seriously threatens vested interests, unless strong political and institutional supports drive it.

In practice, generalised reviews have tended to be weakened by exemptions, which can exclude from review the most worrisome regulations, by lack of priority-setting, fragmentation, and by the lack of depth and rigor in review that almost inevitably results from the scope of the review process. Many such reviews have been cosmetic efforts, paralysed by bureaucratic or interest group resistance. Reformers have tended to claim victory by citing the number of rules repealed or pages eliminated, rather than more relevant measures of cost reductions or improved benefit/cost ratios.

The Appendix contains further details on a range of generalised review programmes. The central lesson from the numerous relative failures documented is that great care is needed in designing and implementing such regulatory reviews. They must be highly structured and transparent, with genuinely independent oversight of ministerial reviews. Some have found that the management challenge lies in finding the right balance between centralised and decentralised review processes. Overall, it must be concluded that successful generalised reviews are neither as cheap nor as fast as governments had hoped. Yet with the right framework they can work.

Sunsetting and automatic review clauses. Sunsetting is a process in which new laws or subordinate regulations are given automatic expiry dates upon adoption. A closely

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Box 3. **The Australian generalised review**

Australian governments at federal and state levels have undertaken a comprehensive review of regulations at all levels of government to eliminate unjustified anti-competitive effects. It is based on the National Competition Policy agreements signed in 1995. The legislative review programme, originally to be completed by 2001, was subsequently extended to 2002. This review is unprecedented in its scope and ambition in OECD countries.

The programme derived from a Report on National Competition Policy presented to the heads of Australian governments in 1993, which found that "Australia is facing major challenges in reforming its economy to enhance national living standards…"* One of the challenges was "the reform of regulation which unjustifiably restricts competition". Because competition law could not itself correct regulatory barriers to competition, many of which stemmed from other laws, the report stated that "a new mechanism is required": Adoption by all Australian governments of a set of principles aimed at ensuring that statutes or regulations do not restrict competition unless it is in the public interest. This would involve:

- Acceptance of the principle that any restriction of public competition must be clearly demonstrated to be in the public interest.
- Subjecting new regulatory proposals to increased scrutiny, with a requirement that any significant restrictions on competition lapse after a set period, unless re-enacted after scrutiny through a public review process.
- Subjecting existing regulations imposing a significant restriction on competition to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than five years unless re-enacted after scrutiny through a further review process.
- Ensuring that reviews of regulations take an economy-wide perspective to the extent practicable.

In April 1995, the Council of Australian Governments signed the Competition Principles Agreement embodying these recommendations. Each government is able to determine its own agenda and priorities for reform. Regulations restricting competition will undergo review every ten years rather than automatically lapse. Review schedules were agreed to in 1996 and a substantial proportion of the process has been completed.

Interestingly, financial incentives for reform were built into the Competition Principles Agreement, which is expected to increase Commonwealth distribution of federal tax revenues to the States and territories by around AUD 56 billion per year. To share the windfall, the Commonwealth will make "Competition Payments" to each state, unless the state fails to meet deadlines for regulatory review and for "effective implementation" of other commitments in the agreement, such as deregulation of gas, electricity, water, and road transport industries.

* Hilmer, F., Raynor, M. and Taperell, G. (The Independent Committee of Inquiry) (1993), *National Competition Policy*, Australian Government Publishing Service, Canberra.

related tool is staged repeal. Under staged repeal, existing regulations are given "sunset" dates via *ex post* policy action. Staged repeal and generalised sunsetting have been implemented in tandem, through a single piece of legislation, in some cases.

Laws subject to sunsetting or staged repeal can only continue in effect if remade through normal law-making processes. Sunsetting will therefore tend to reduce radically the average age of a regulatory structure and, at least theoretically, ensure regular review and reform of the stock of regulations.

There is little information on which to judge the success of sunsetting. While most OECD countries say they use sunsetting in some regulatory areas, only a few countries routinely use these approaches and little evaluation has been done on their benefits and costs. Sunsetting may create unforeseen problems and wrong incentives, especially if too brief a period is established. In some cases, SMEs have raised concerns with regulatory sunsetting as it can reduce the predictability of the regulatory environment. Sunsetting may also tend to reduce compliance toward the end of the lifespan of the regulation. It is also potentially costly for regulatory bodies, as resources must be committed to developing new regulation and moving through the regulation-making process.

Only Australia, which routinely uses sunsetting and staged repeals for subordinate legislation, has extended experience with this instrument. These two tools have been applied in tandem, with regulations automatically repealed every ten, seven, or even five years (in different States). A recent OECD study[6] reviewed the use of sunsetting in several Australian states and concluded that it has substantially reduced the overall number of regulations in force, removed much redundant regulation from the statute books and encouraged the updating and rewriting of much that remained. Four of the five states using sunsetting opted for a ten year cycle, with New South Wales adopting a five year cycle. However, a decade's experience has led the major participants in the process to the view that a five year cycle is too short, leading to wasted effort on review requirements and widespread abuse of the limited exemption provisions made in the governing legislation.

Korea has also adopted the sunsetting principle, albeit more recently. Where regulations "have no clear reason to continuously exist", their duration is not "in principle" to exceed five years. Where agencies believe that regulations should be extended beyond this time, they must ask the Regulatory Reform Committee to review them, along with RIA and self-assessments, at least one year prior to their expiry. Government officials have described this as a "soft sunsetting". Korean officials have argued that the choice of a five-year cycle reflects the rapidly changing regulatory environment. There may be gains from a frequent revisiting of the justification of regulation. However, the OECD suggested in the review of Korea that the five year sunsetting of most primary legislation and subordinate regulation runs a real risk of overwhelming RIA review resources and detracting from their strategic targeting.

Other examples of the use of sunsetting include the United States' three year sunsetting period on all government paperwork requirements and Mexico's use of a five year sunsetting for technical standards. The latter has been combined with a requirement that all standards must be reviewed within their first 12 months of operation to determine whether they are operating as anticipated.

Mandated, or "automatic" review processes are systematic reviews of existing regulations, in which regulations are grouped according to their age, and progressively reviewed against currently used regulatory quality criteria, thus gradually bringing the stock of regulations into conformance with those standards. A variant of this approach is the insertion of *review clauses* into individual laws, requiring them to be reviewed within a certain period. Automated review processes can be seen as a weaker form of sunsetting.

Unlike sunsetting, a rule will continue unless action is taken to eliminate it. Such *ex post* review requirements are rapidly becoming more common in OECD countries, an example being Japan, whose 1998-2000 regulatory reform programme required the inclusion in new regulations of a fixed schedule for future review.

Review clauses can act as a powerful adjunct to *ex ante* RIA by checking the performance of regulations against initial assumptions. Automated review appears to be less resource intensive than sunsetting, as there is no need to deploy public resources to remake regulations that pass the quality tests applied. However, the fact that positive action is required to remove regulations that do not pass the test under automated review suggests that there may be more scope for vested interests to defend their privileges. Thus, the relative effectiveness of automated review may also be lower. The lack of a sanction on regulators in case of inaction also weakens the credibility of this type of initiative.

Variance processes or equivalence of performance tests permit businesses to use lower-cost compliance methods that they show are equally effective as an existing regulation. This approach can permit the rapid *de facto* updating of regulations. There are few examples of the use of this method in OECD countries, and two governments that attempted to put into place government-wide regulatory variance policies (Canada and the Australian state of New South Wales) failed due to fears that variances would undermine regulatory standards.[7] Similarly, a parliamentary law reform committee's recommendation for such a policy to be adopted in Victoria, Australia, was not taken up. However, small scale uses of regulatory flexibility mechanisms that employ this logic have been implemented. For example, Canada has adopted the concept in its Environmental Performance Agreements, under the 1999 Environmental Protection Act.[8] This may be an area in which further experimentation is warranted. In conceptual terms, variance processes combine the logic of performance based regulation – *i.e.* that regulations should be output, not input, focused – with an ability to harness the creative power of business or other target groups to design more efficient processes.

The above mechanisms, which generally include both review and reform elements, are also supplemented in some cases by innovations in terms of the *reform* aspect of the task specifically. A notable tool adopted in recent years in a few OECD countries is the use of subordinated regulations to eliminate burdens and controls established in statutes. This is the central element of the UK's *Regulatory Reform Act* of 2001 (which replaced the Deregulation and Contracting Act of 1994) and of the Italian "*delegificazione*" initiative. These Acts have sought to increase the capacity to process reforms in overburdened parliamentary systems by providing a mechanism through which the executive can implement reforms to legislation, subject to mechanisms for continued Parliamentary scrutiny and for disallowance.

3.4. Conclusions on regulatory policies

The 1997 OECD report found that every OECD country with an organised and long-standing programme of regulatory reform has found it necessary to establish an explicit policy statement on reform at the highest levels of government, both to communicate the reasons for reform and to build support for change. The 1997 Report identified the use of regulatory policies as a best practice, recommending that countries "adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation".

Experience since 1997 confirms this conclusion. Taken as whole, the country reviews demonstrate that countries with explicit regulatory policies consistently make more rapid and sustained progress than countries without clear policies. The more complete the principles, and the more concrete and accountable the action programme, the wider and more effective was reform. By late 2000, 24 out of 30 OECD countries had adopted regulatory reform policies.[9] However, it is striking that most regulatory policies based on regulatory quality principles have been adopted very recently. Most policies are not more than a few years old (see Box 4), and have undergone continual refinements and improvements since adoption.

Box 4. **Year of adoption of government-wide regulatory quality policies in selected countries**

1981	United States
1985	United Kingdom
1986	Canada
1993-94	Denmark
1994	Netherlands
1995	Mexico
1996	Hungary, Ireland, Finland
1999	Italy
1998	Japan, Korea
2000	Czech Republic, Greece, Poland

Source: See the Background reports on "Government Capacity to Assure High Quality Regulation" in Canada, the Czech Republic, Denmark, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, the Netherlands, Poland, the United Kingdom, the United States. Those reports are available at *www.oecd.org/regref/*

A regulatory reform policy seems to serve several important purposes in implementing, sustaining and deepening regulatory quality reforms:

- It signals the government's commitment to reforming the regulatory environment government-wide. The prominence given to regulatory reform has waxed and waned over time in most countries. However, in 1998, each OECD country with regulatory policies stated that the policies have been either issued, revised, or reaffirmed by the present government.
- It sets clear policy objectives and means for reaching them, and can assist in transforming reform into a systematic and permanent process. It establishes accountability for government officials' use of regulatory powers. It increases the centre of government's powers to implement the policy, and reduces the powers of vested interests to block reform.
- It enhances the effectiveness of co-ordination and co-operation efforts by establishing a general framework, or policy. This helps ensure coherence and comprehensiveness in reforming the regulatory environment. It makes co-ordination easier among related structural reforms, such as competition policy, corporate governance and sectoral reforms, and so boosts the likelihood of success.

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- It authorises and mobilises action in the administration, improving public sector efficiency, responsiveness, and effectiveness through public management reforms. Reform can be risky and unwelcome for many civil servants, particularly when vocal interest groups support the status quo. Political support and direction is needed both to overcome resistance internal to the administration, and to shield reforms from aggrieved interests.
- It helps show politicians and the public why the policy objectives are important. The need for political support means that the relevance of regulatory reform to larger social and economic goals must be clarified and communicated with stakeholders and the public.
- It enhances the credibility and transparency of change, and so speeds up results. Concrete programmes will enhance the credibility of reform, and reduce the costs of reform by providing forward notice and thus facilitating adjustment.
- It rationalises and restates the law and changes the culture of regulation and pressures for regulatory inflation by reversing the burden of proof for regulation, requiring regulators to show why they should regulate.

In addition to these points, adopting an explicit policy is highly important from the governance perspective. It means that government is making transparent the objectives and strategies of its reform programme, and so creates accountability for the outcomes. Accountability here has both the dimension of government accountability to citizens and accountability by regulators toward government for delivering on the stated policy. Also, as noted above, adoption of an explicit policy favours coherence between it and other related arms of policy.

The 16 country reviews conducted by the OECD between 1998 and 2001 also provide an extensive data source for the analysis of the key weaknesses in the implementation of regulatory reform policies in practice. The major weaknesses identified from this source are:

- **Lack of clearly specified regulatory quality principles**, in particular explicit adoption of the benefit/cost principle, and lack of clarity as to the results to be achieved.
- **Important gaps in the coverage of the policy**, both in terms of the range of national regulation included within its ambit (primary, secondary regulation, regulation not approved by Cabinet, sectoral regulator's regulations, etc.), in terms of the almost universal exclusion of sub-national regulation, as well as substantial exemptions from the policy's general ambit.
- **Lack of consultation during policy development**, leading to a lack of public support for regulatory policy.
- **Lack of institutional and strategic support to sustain the policy**, with fragmentation of responsibility being of paramount concern in the face of entrenched opposition.
- **Lack of guidance on implementing the policy**, for Ministries and other agencies of government.
- **Lack of enforcement powers and mechanisms for the institutions made responsible of the policy**.
- **Insufficient focus on monitoring, evaluation and reporting progress**, both as a means of policy feedback and as a means of maintaining and expanding constituencies for reform.

Finally, it is clear that regulatory policy has not yet made any substantial progress in addressing the issue of the overall call on resources attributable to regulation. Some

estimates suggest that regulatory compliance costs may approach or exceed 10% of GDP in many countries, but the size of this call on resources is little understood. Being so little understood, there has been no concerted effort, in any country, to manage the issue of total regulatory costs, with the limited exception of reporting requirements implemented by the United States Congress in recent years in which the Office of Management and Budget has been required to estimate total regulatory costs.

Making progress on this issue constitutes an enormous challenge, as limited attempts to grapple with the Regulatory Budgeting concept have demonstrated. However, reformers continue to point out that regulation diverts private resources to public ends in a conceptually identical manner to taxing and spending through the budget, so that similar standards of transparency and accountability should be considered appropriate and necessary.

Notes

1. See OECD (2000d), p. 120.
2. OECD (2000e), p. 139.
3. See OECD (2000d), pp. 130-131.
4. General Accounting Office (1997), p. 2.
5. From 1985-1988 Turkey carried through a comprehensive review and codification of all laws and regulations in force. A total of 11 200 laws, statutes and regulations were reviewed and 1 664 inapplicable or ineffective laws and regulations were abolished, whereas the remaining laws were consolidated into a total of 700. See OECD (2002e).
6. Report by the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales. PUMA/OECD. Published by the Regulation Review Committee, Parliament of New South Wales, Report No. 18/51, January 1999. See especially pp. 38-40.
7. See the Regulatory Efficiency Bill in the Regulatory Reform Report on Canada.
8. See OECD (2002c).
9. OECD (2000f).

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Chapter 4

Tools to Improve Regulatory Design

There is little doubt that most governments can substantially reduce regulatory costs, while increasing benefits, by making wiser regulatory decisions. A wide range of anecdotal and analytical evidence supports the conclusion that governments often regulate badly, with too little understanding of the consequences of their decisions, and with little or no assessment of any alternatives other than traditional forms of law and regulations.

The task of improving regulatory decision-making has a number of dimensions. That is, a range of tools must be deployed in a consistent and mutually supporting manner if systemic quality assurance is to be the result. The essential tools are regulatory impact analysis, public consultation, consideration of regulatory alternatives and compliance burden reduction measures. The use of regulatory impact analysis is progressively improving the empirical basis for regulation in most OECD countries. Its role in this regard is supported by greater dialogue with affected parties, through the increasing use of a range of consultation processes and tools. In addition, the policy-makers' "tool-box" is expanding, as greater attention is given to alternatives to traditional "command and control" models of regulation. Finally, numerous efforts to improve the "user friendliness" of regulatory requirements are being put in place, often under the heading of "administrative simplification" or "red tape reduction". These are programmes that seek to reduce compliance costs without compromising regulatory benefits by improving compliance requirements and increasing access to regulation.

This section reviews OECD countries' experiences in implementing these tools, identifies trends and best practices and attempts to summarise the "state of play" in relation to their use. Substantial additional material is provided in the attached appendices, which will function as an extra resource for practitioners.

4.1. Fostering efficiency: the use of Regulatory Impact Analysis

A powerful trend toward more empirically based regulation is underway in OECD countries. High-quality regulation is increasingly seen as that which produces the desired results as cost-effectively as possible. There is a developing understanding that all government policy action involves trade-offs between different uses of resources, while the underlying goal of policy action – including regulation – of maximising social welfare is increasingly being explicitly stated and accepted. The era is past when government officials can respond, as they did in one OECD country in 1993, when asked about the cost of a law: "It's a legal requirement, so the costs are not important".[1] Similarly, unbalanced focus on reducing regulatory costs, seen in the use of tools such as "business impact assessments", is also in decline, being replaced by a sophisticated understanding of the need to balance efficiency and effectiveness through adoption of the benefit-cost principle and cost-effectiveness analysis.

Notions of efficiency are evolving from static concepts of compliance costs to dynamic concepts that attempt – often with limited success – to take account of effects on innovation, trade, and competition. Better empirical justification of regulatory decisions is

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also strongly supported by international trade rules. For example, the General Agreement on Trade in Services (GATS) requires that standards on the supply of services be "based on objective and transparent criteria" and be "not more burdensome than necessary to ensure the quality of the service." The proportionality principle used by the European Court of Justice carries much the same impact for EU member States. Hence, the movement toward more efficiency- and results-oriented regulation reduces barriers to international trade and investment by establishing a more transparent standard for national decision-making.

A danger arising from these attempts to embrace dynamic effects, and from attempts to take a more comprehensive view of static impacts, is that attempts to clarify a wide range of sectoral impacts – on job creation, the elderly, regions, women, or SMEs, to mention only a few – may place impossible strains on regulatory procedures, and undermine the RIA effort. In addition, placing undue emphasis on effects on specific groups or sectors deemed as having particular priority can risk a loss of focus on the central task of ensuring that benefits for society as a whole are maximised. This problem is directly linked to the similar emerging concern, noted above, that some regulatory policies are becoming too complex and over-burdened by often contradictory criteria and requirements.

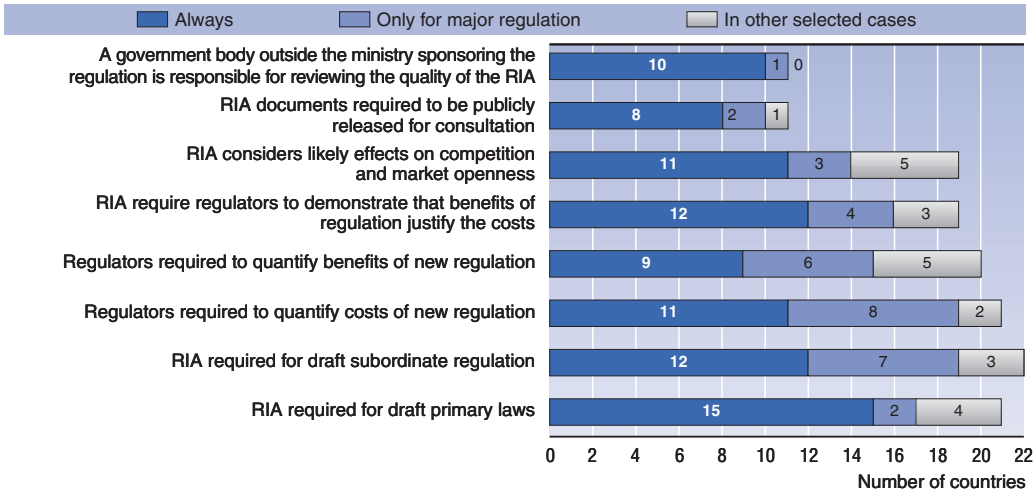
The 1995 OECD *Recommendation* emphasised the role of RIA in ensuring that the most efficient and effective policy options were chosen. The 1997 *OECD Report on Regulatory Reform* recommended that governments "integrate regulatory impact analysis into the development, review, and reform of regulations." A list of RIA best practices is discussed in detail in the *OECD 1997 Report*, *Regulatory Impact Analysis: Best Practices in OECD Countries*.[2]

RIA has developed quickly, and an increasing proportion of laws and other regulations affecting citizens are being shaped by various forms of RIA. Although only two or three OECD countries were using RIA in 1980, by 1996, more than half of OECD countries had adopted RIA programmes. By end-2000, 14 out of 28 OECD countries had adopted universal RIA programmes, and another 6 were using RIA for at least some regulations. As well, RIA is increasingly being applied to primary legislation, where in the past it has principally been used in relation to lower level rules. This will necessarily have a major positive impact on its potential contribution to regulatory quality.

The trend toward adopting or strengthening RIA accelerated in the latter 1990s and therefore many of the RIA programmes in OECD countries today are relatively new and still evolving. Experience shows that RIA programmes tend to broaden and deepen over time as experience and expertise in their use accumulate. RIA comes in many forms that reflect various policy agendas of governments (see Figure 2). Some countries assess only business impacts, others, administrative and paperwork burdens. Others use full-fledged benefit-cost analysis based on social welfare theories. Environmental impact assessment is used to identify potential impacts of regulations on environmental quality. Other regulators assess how proposed rules affect sub-national governments, or aboriginal groups, or small businesses, or international trade. In each of these cases, RIA is a decision tool, a method of *i)* systematically and consistently examining selected potential impacts arising from government action and of *ii)* communicating the information to decision-makers.[3] Both the analysis and communication aspects are crucial.

RIA is sometimes criticised for replacing political accountability with a mechanistic tool, but this criticism is misplaced. In all OECD countries, RIA is an adjunct to good decision-making, not a replacement for political accountability. In the United Kingdom, Regulatory Impact Assessments are used to inform Cabinet ministers of likely costs to businesses and

Figure 2. **Aspects of regulatory impact assessments in 28 OECD countries**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries.

to "identify the key factors on both sides of the equation as an aid (not a substitute for) the government's social and political judgement…"[4] RIA is best understood as one "decision method" among several methods used to reach regulatory decisions. The methods used by regulators in OECD countries to reach decisions can be simplified into five categories:

- **Expert** – The decision is reached by a trusted expert, either a regulator or an outside expert, who uses professional judgement to decide what should be done.
- **Consensus** – The decision is reached by a group of stakeholders who reach a common position that balances their interests.
- **Political** – The decision is reached by political representatives based on partisan issues of importance to the political process.
- **Benchmarking** – The decision is based on reliance on an outside model, such as international regulation.
- **Empirical** – The decision is based on fact-finding and analysis that defines the parameters of action according to established criteria.

Every regulatory decision results from a mix of these decision methods. The mix differs according to national culture, political traditions, administrative style, and the issue at hand. For example, the Netherlands depends more on consensus methods than does most countries, while the United States depends more on empirical methods. Small countries use benchmarking more than do large countries. Crises in newspaper headlines tend to move decisions toward political methods and away from empirical methods.

RIA is an empirical method of decision-making. Its influence is determined, not only by the formal role of empirical methods, but by its contribution to other decision methods. The five decision methods are complementary: RIA itself is neither "necessary nor sufficient for designing sensible public policy",[5] but it can play an important role in strengthening the quality of debate and understanding within the other decision methods.

While RIA does not in itself determine decisions, neither is it neutral. Information is powerful, and the questions RIA addresses, the method of analysis and presentation it uses, and its placement and timing within the decision process can affect the relative influence of the values at stake. It can strengthen or weaken parties involved in the decision and their capacity to marshal arguments, and even render certain decisions impossible to take, depending on the interaction between RIA and the other decision methods. The capacity of RIA to change the nature of the discussion is one reason why RIA remains controversial and difficult to implement.

In essence, RIA attempts to clarify the relevant factors for decision-making. It pushes regulators toward making balanced decisions that trade off possible solutions (including the decision to do nothing) to specific problems against wider economic and distributional goals. Far from being a technocratic tool that can be simply "added on" to the decision-making system by policy directive, it is a method for transforming the view of what is appropriate action, indeed, what is the proper role of the state. Experience makes clear that RIA's most important contribution to the quality of decisions is *not* the precision of the calculations used, but the action of analysing – questioning, understanding real-world impacts, and exploring assumptions. Significant cultural changes are required to make such analysis genuinely a part of increasingly complex decision-making environments.

The 1995 OECD Recommendation begins with two questions: *Is the problem correctly defined?* and *Is government action justified?* RIA has proven to be the best tool for addressing these issues. Defining the problem properly is essential. Many regulatory failures stem from faulty understanding of the problem and from inadequate attention to indirect effects of government action that can undermine results. If the regulator has too narrow a view, full compliance may create perverse results.[6] By the end of 2000, 22 OECD countries had adopted the practice of always explicitly justifying the need for government action before taking a regulatory decision, while five more did so in at least some cases. Only one country reported that this justification was not performed. These justifications were almost always linked to RIA, since RIA provides a useful framework for assessing the options and consequences of action. In Korea, for example, regulatory bodies must, as part of their RIA, seek views from experts, and on that basis, "define the object, scope and method" of the proposed regulations. The Canadian, Australian Commonwealth and New York State processes call for a two-step inquiry. Step one is answering the threshold question of whether any regulatory action can be expected to help, and step two is analysis of the benefits and costs of alternatives. Canada's guide refers to this as "screening alternatives" before any formal economic analysis begins.

The 1997 *OECD Report* on RIA concluded with ten best practices that are associated with effective RIA (Box 5). These ten practices do not imply that a single system for the implementation of RIA is desirable in all countries at all times. Institutional, social, cultural and legal differences between countries require differing system designs. The learning that occurs with RIA over the longer term requires continuing consideration and evolution of system design. However, these elements of "best practice" serve as starting points for the design of a system likely to maximise the benefits of RIA. The 16 country reviews conducted in 1998-2001 assessed RIA programmes against those ten practices, and the Appendix summarises the main findings of the review programme in these ten areas.

Box 5. **Getting maximum benefit from RIA: best practices**

1. Maximise political commitment to RIA.
2. Allocate responsibilities for RIA programme elements carefully.
3. Train the regulators.
4. Use a consistent but flexible analytical method.
5. Develop and implement data collection strategies.
6. Target RIA efforts.
7. Integrate RIA with the policy-making process, beginning as early as possible.
8. Communicate the results.
9. Involve the public extensively.
10. Apply RIA to existing as well as new regulation.

Source: OECD (1997), *Regulatory Impact Analysis. Best Practice in OECD Countries*, Paris.

Problems and best practices

Overall assessment of the results of two decades of investment in RIA show a very mixed picture. On the one hand, there is nearly universal agreement among regulatory management offices that RIA, when it is done well, improves the cost-effectiveness of regulatory decisions and reduces the number of low-quality and unnecessary regulations. RIA has also improved the transparency of decisions, and enhances consultation and the participation of affected groups. Undertaken in advance, RIA has also contributed to improve governmental coherence and intra-ministerial communication. A paper from the Netherlands estimated at 20% the proportion of regulatory proposals modified or retracted as a result of RIA conducted as part of the Dutch MDW programme.[7] The OECD review of Korea found that the first year of operation of an RIA requirement in that country (1998-99) saw more than 25% of regulatory proposals rejected by the Regulation Reform Committee. In Canada, an independent study has shown that prolonged use of RIA, together with the provision of guidance and training, has induced a cultural change among regulators.[8]

Yet positive views continue to be balanced by evidence of massive non-compliance and quality problems in RIA. Of the ten good RIA practices discussed above, most OECD countries rate poorly on several, most commonly data collection, training civil servants and applying RIA to existing regulation. Some reviews in the United States suggest that as many as 40% of regulations adopted fail the benefit-cost test.[9] Even in countries with explicit programmes, many regulations continue to be made without even rudimentary cost analysis.

Another problem is that scope of coverage remains patchy. Only 12 countries use RIA consistently for lower-level or subordinate regulations, while only 15 use it consistently for legislation. Exemptions to RIA programmes are often broad. RIA is rarely used at regional or local levels, with the exception of a few federal countries, such as Australia, where it is used widely at state level and Mexico, where it is also used in some states. Uneven coverage of RIA programmes seriously reduces effectiveness. Given that laws and lower-level regulations can have similar impacts, there is no reason *a priori* to distinguish between them; hence, the differences seem to be related to institutional relationships and historical circumstances rather than to rational programme design. Moreover, RIA is most of the time

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applied to a single regulation, rather than regulatory regimes as a whole, embracing both new and existing regulations. It thus can provide only very broad estimates of the cumulative impacts in time and through jurisdiction. Lastly, RIA has mostly been designed for command and control regulations. The increasing use of performance-oriented regulations and the tendency to adopt standards and other instruments into regulations "by reference" provide substantial challenges to the effectiveness of RIA. Applying RIA to some regulatory alternatives also provides new challenges. The result of these stresses is likely to be the need for further consideration of the design and implementation of RIA requirements, including evaluation of its effectiveness in assessing the likely performance of non-traditional instruments.

The OECD country reviews conducted since 1998, show that there are several broad issues that underlie the problems with implementing RIA and achieving its full potential. These should guide attempts to improve the implementation of RIA programmes in the future.

Technical issues

Problems with analytical methods. At the most fundamental level, there is still disagreement about what analytical methods to employ: what is the mix between qualitative and quantitative estimates the drafters should focus on. These are based both on values (see below) and on views as to what is pragmatically achievable. In addition, analytical methods are not fully developed, and there continue to be disagreements about important issues. This is particularly the case with methods such as benefit-cost analysis, where issues such as establishing a social discount rate, valuing intangible benefits and dealing with risk and uncertainty continue to provoke discussion. As more and more social and environmental regulations are subjected to RIA, questions of assessing and balancing risks is further complicating the question of appropriate analytical methods. Methods for developing and using qualitative analysis need more attention.

Data problems. The generally poor performance of OECD countries in implementing data collection strategies means that the data essential to conducting good analysis is often lacking, while *ad hoc* strategies for data collection often fail on grounds of both timeliness and cost. A particular problem is the failure to utilise fully the potential of consultation strategies as data sources and means of verifying data quality and the quality of assumptions.

Value conflicts and power struggles

Resistance to RIA as a concept. Resistance to RIA at the conceptual level remains high. Some interest groups and regulators continue to oppose RIA as contrary to their ethos. A key issue appears to be RIA's role in making explicit the trade-offs implicit in all policy action, as well as the limits to government's power to act. Such notions are perceived as challenges to their ideals by some interest groups and even some regulators.

RIA's role in changing power relationships. The above discussion highlighted RIA's effect in changing the basis for decision-making, by favouring expert decision-making methods over other forms. Interest groups who benefit from other decision methods consequently feel threatened by new arrangements resulting from RIA, while some groups may perceive this aspect of RIA as being contrary to national traditions and practices of public policy decision-making.

Institutional and resource issues

Incentives and Sanctions. Requirements that regulators carry out analysis are not supported by adequate positive incentives for compliance, while sanctions for non-compliance with RIA requirements are also not very credible in most countries. These incentives and sanctions are of crucial importance, given the contrary incentives that exist for reactive, and even populist, decision-making. The problems in these areas highlight the extent to which the cultural change that is required to truly embed RIA in the public policy-making process, remains unachieved. It also points to problems in converting generalised political commitment to regulatory quality policies into concrete support and actions.

Technical capacities. Many regulators do not have the capacity to carry out high quality RIA, either because of lack of skills or lack of resources. Required analytical methods can be too complex and costly to be practical, given the capacities of regulatory bodies. The lack of skills reflects the fundamental disregard, found in almost all country reviews to date, for the need for large scale, sustained and detailed training to be provided by co-ordinating bodies. A lack of resources for carrying out high quality RIA often results from failure to accord priority to it as an integral element of the policy-making process. This, in turn, indicates that the long-term cultural changes required to embed RIA successfully are far from fruition. The lack of capacity is also linked to failures in targeting RIA. In order to maximise the resources available to assess the impact of major regulations, decision-makers should conduct preliminary assessments to identify those regulations that require full and complete RIA and those that require more simplified analyses – as well as those that fall below a threshold at which RIA is itself likely to have positive net benefits. In Korea, for example, two thresholds are used to determine whether RIA will be applied: does the regulation have a potential impact of at least 10 billion Won annually or does it affect more than a million people.

Legal issues

Legislative constraints. In some cases, laws require regulators to pursue their regulatory missions at all costs and not to weigh other impacts and trade-offs. In other cases, the range of alternative policy tools able to be considered may be tightly constrained by legislation. These problems reflect the fact that the regulatory quality perspectives underlying RIA must permeate the policy-making process if RIA is to achieve its full potential. Attempts to adopt RIA in *ad hoc* contexts will often serve to make larger regulatory policy problems transparent.

Procedural issues

Quality control problems. Quality control is often poor, reducing substantially the potential benefits of RIA. Independent assessment of RIA by regulatory specialists is often lacking, with only 11 OECD countries requiring such assessment. When it is carried out, it is often undermined by resource limitations or by the location of the RIA appraisal body away from the centre of government, so that it does not carry the necessary authority to contest the regulators' assessments and require improvements. This issue relates closely to the problems of inadequate sanctions or incentives, noted above.

Structural design problems. RIAs are often prepared too late in the regulatory process, after decisions are taken. This problem in part reflects the general failure of reformers to

achieve cultural change such that RIA is seen as integral to decision-making. However, the problem is often exacerbated by the design of RIA requirements, which is frequently unsophisticated and fails to ensure or require in effect that RIA commences at an early stage of policy-making. In addition, a recent trend noted above is for a too extensive set of tests and criteria to be incorporated within the RIA requirement, fostering contradictory and often unclear assessments and overwhelming the capacities of regulators. Thus, in many cases, improving structural design may require either a simplification of the tests applied or the use of a weighting system.

Conflicting Incentives. Regulators are under constant pressure to make decisions more quickly, particularly where political imperatives intervene. Analysis and consultation can slow down the process. While the use of both RIA and consultation continue to expand in OECD member countries, a continuing challenge is to ensure that they are integrated into decision-making even where these time pressures are greatest.

Political issues

Political demand for RIA. Although RIA supplies information, there is often not a demand for information from politicians, perhaps because it is difficult to take political credit for making decisions that serve wider and more diffuse interests, relative to narrower programme interests. In addition, politicians tend to conceive of RIA as a short-term fix for regulatory inflation or low quality regulation. In practice, however, an RIA process needs long term investment, linked to a steep learning curve and cultural change. This, plus the fact that it is mostly applied to the flow of new regulation, rather than to the stock of existing ones, often means that initial expectations are too high, and that when they are not met, there can be a backlash against RIA.

Careful programme and institutional design can avert most of these problems. An important lesson derived from countries that have recently implemented RIA is that, despite high levels of political support and the greater understanding of RIA requirements that has now been gleaned via the "early adopter" countries, it is wise to start modestly (for example, through the application of the OECD 1995 Checklist). The scale and scope of RIA can then be expanded, fairly rapidly, once the use of the tool has become more accepted and expertise and experience have begun to develop.[10] However, both regulators and the RIA appraisal body need to be able to integrate the tool progressively into their culture and operations. The above discussion has highlighted some of the major areas of failure at present and, therefore, the priorities for further work. Implementation of a fully functioning RIA system is a long-term task. It must involve the progressive development and dissemination of specific expertise, the refinement of implementation and control mechanisms and the achievement of change in administrative culture. A culture that supports an approach to policy-making based on expert inputs and the goal of social welfare maximisation must be firmly embedded in the administration, at the political level and among stakeholders outside government. Thus, the fact that the effectiveness of RIA in improving policy outcomes has been slow in becoming apparent is unsurprising.

4.2. Regulatory and non-regulatory alternatives

Regulation constitutes only one of a wide range of policy instruments that can be used by governments to achieve their public policy objectives. Different instruments have widely varying characteristics and can be more or less suited to resolving a particular policy issue. Despite this, a 1997 OECD paper argued that they are little analysed and, "… when they are

analysed, they tend to be studied individually, rather than comparatively". Thus they "… are rarely […] examined as possible alternatives. Rather, they are linked to institutions or the culture surrounding particular fields of public policy."[11] That is, the choice of policy instrument tends to be based more on habit and institutional culture than on a rational analysis of the suitability of different tools to addressing the identified policy problem.

Consequently, a crucial challenge for regulatory policy is to encourage cultural changes within regulatory bodies that will ensure that a comparative approach is taken systematically to the question of how best to achieve policy objectives. Efficient and effective policy action is only possible if all available instruments are considered as means of achieving the identified objective. The instruments to be considered include a wide range of non-regulatory instruments, as well as a number of distinctly different forms of regulation. These instruments can be grouped in a number of ways – for example, in terms of efficiency, effectiveness, intrusiveness, accountability, or cost. Figure 3 sets out a (non-exhaustive) "spectrum" of instruments based on the degree of intervention with free markets implied by each. Thus, instruments that tend toward the "market-driven" end of the spectrum include general competition law and information disclosure requirements, while at the opposite end of the spectrum are public monopoly and even bans on all activity in a sector. Further discussion of individual regulatory alternatives is contained in the appendices.

The fundamental problems in implementing the necessary cultural change are to break down entrenched habits that see particular policy areas as necessarily being dealt with via particular policy instruments, and to increase the degree of understanding among policy-makers about the range of policy tools and the characteristics of each. From the

Figure 3. **The spectrum of regulatory and non-regulatory policy instruments**

Competition								***Monopoly***				***No formal economic activity***
Market-driven solutions ←							→ *Government-driven solutions*					
Free market	*Free market governed only by general competition policy*	*Mandatory information disclosure (to enhance consumer choice)*	*Private sector voluntary regulation (voluntary agreements, private standards)*	*Market incentives established by goverment (taxes, pricing signals, property rights)*	*Process regulation (requiring firms to assess risks and take most cost-effective action)*	*Performance regulation (standard objectives set by government)*	*Command-and-control regulation*	*Regulated private monopoly*	*Contracting out monopoly to the private sector*	*Corporatised public monopoly*	*Public monopoly*	*Government ban on economic activity*
Indications for use of various policy instruments												
	Effective competition possible but requires intervention to create appropriate frameworks or supports	Efficient market hampered only by info. Asymmetry – disclosure requirement minimises cost of correction	A high level of good practice exists among market participants *or* enforcement difficult so consent issues are crucial	An essentially efficient market exists, so intervention is aimed at correcting externalities	Performance standards are difficult to specify, this response emphasises benefits of systemic thinking and disclosure	Specific standards easily identified but many tech. solutions possible, tech. change is rapid	Few acceptable options exist, high level of govt. control needed as important values or substantial risks concerned	High degree of natural monopoly, but performance standards can be specified and monitored adequately	Some aspects of provision can be competitive but govt. control of overall process desired because of difficulty of regulating total outputs	Strong national monopoly character, plus difficulty in regulating outputs due to multiple objectives or concerns. Fundamental values involved		

Source: OECD.

regulatory viewpoint, this means changing existing perceptions of a choice between "regulation" (representing orthodoxy) and "alternatives" (representing policy risk), in which there is a necessary presumption operating in favour of a regulatory response, and one which is likely to take the traditional form of "command and control" regulations.

From the regulator's viewpoint, adopting a non-regulatory approach, where command and control regulation is the tool traditionally used, necessarily involves a risk linked to the use of untried approaches and thus to a real or perceived failure to develop adequate responses. The risk arises both because of the adoption of a new, or non-traditional approach *per se* and because the alternative tools under consideration may not be well understood and/or may not have an extensive "track record" in dealing with the policy issue. For both these reasons, the failure of a non-traditional approach is likely to have more serious consequences for the regulator than a failure of traditional regulation.

While governments have always employed a range of policy tools, it is certain that considerable experimentation, "cross-fertilisation" between policy areas and "policy learning" have taken place in recent years, as regulators seek new and improved tools to enable them to meet growing expectations of what regulatory action can achieve. The result of this learning is that many new tools, as well as new forms of regulation, are now available to policy-makers. In addition, the level of understanding of many policy tools has improved greatly, allowing them to be applied in new contexts. Understanding of the possibilities for combining different policy instruments has also increased. This means that innovative approaches to policy objectives very often involve complementing traditional regulation with other instruments, rather than replacing traditional regulation completely.

All of these advances mean that the potential benefits of moving toward more systematic choices among policy instruments have substantially increased. At the same time, rapid change, globalisation and more demanding citizens have all put greater pressure on traditional regulation and reduced its ability to meet expectations. Hence, the use of appropriate alternative policy instruments is fundamental to the regulatory policy agenda.

The current picture in respect of regulatory alternatives is that their use is increasing at a substantial pace, but in which the absolute extent of their use – in contexts in which regulation has traditionally predominated – remains low. Consequently, this remains a high priority area for further efforts by all OECD member countries. The following looks at indicators of progress and key areas for further change.

Indicators of trends in the use of alternatives

Data from the OECD's Regulatory Capacity surveys, show that by end 2000 a substantial majority of OECD countries now require regulators to assess alternative policy instruments – both regulatory and non-regulatory – before adopting new regulation. A total of 21 countries stated that this requirement existed in 1998, while 5 stated that it did not exist. Little movement occurred between 1998 and 2000, with 22 countries answering that such assessments were required "always" or "in some cases" in the latter survey.

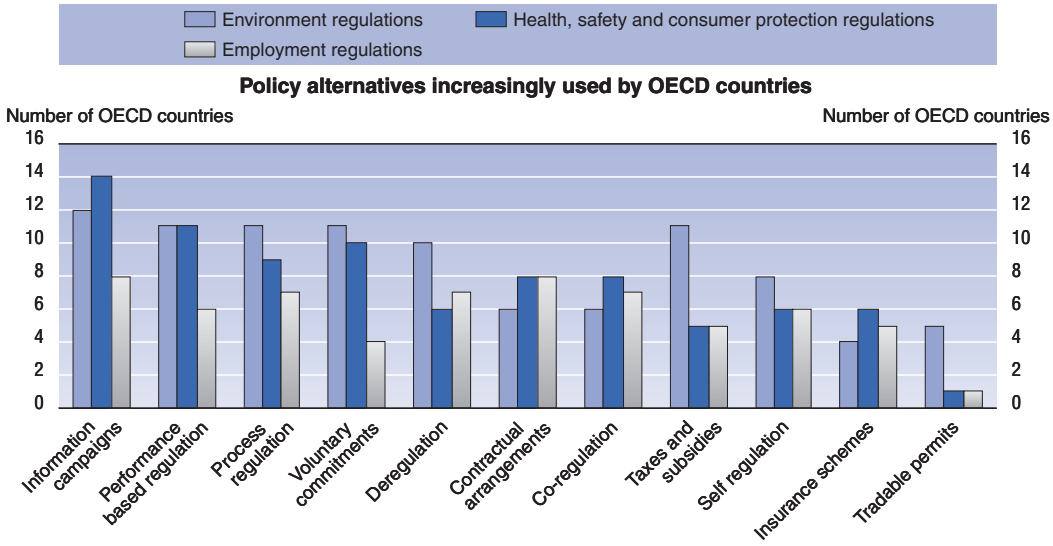
However, a significant change was observed in relation to a key supporting policy. In the 2000 survey, a total of 18 countries stated that guidance on the use of alternative policy instruments had been issued, compared with only 11 countries in the 1998 survey. Guidance material is particularly important in encouraging the take-up of alternatives, given the generally low level of understanding of most of these instruments among policy-makers. In addition, guidance documents allow government to underscore and explain its

commitment to more systematic policy choice and to provide positive endorsements of the use of particular instruments in particular circumstances. Provision of such detail should also provide confidence to policy-makers considering the adoption of alternative policy instruments. Thus, it is likely that this observed substantial increase in the issue of guidance material will be highly important in increasing the future use of alternatives. In this respect, the expansion in guidance material may be a "leading indicator" of an accelerating trend in this area.

Increasing use of alternatives has been observed across a range of major policy areas, although it is noteworthy that the environmental regulation leads the way in most OECD countries in terms of the absolute extent of use of alternatives to traditional regulation. Environmental regulators were found to be both the major users of regulatory alternatives and the most active experimenters with new applications of alternatives in virtually all of the sixteen country reviews of regulatory reform carried out by the OECD to date.

The range of alternatives being taken up increasingly in OECD countries is a broad one. Figure 4 summarises 1998 data of the OECD *Regulatory Capacities Database*. A number of broad observations can be made. First, the relative frequency with which particular alternatives are being increasingly adopted is similar across the three main policy areas considered.[12] For example, the information campaign is, for each of the three policy areas, the alternative reported by the largest number of countries as being increasingly used. Second, alternative forms of regulation rank highly among the range of regulatory and non-regulatory alternatives assessed, with performance based regulation ranking second in two areas and process regulation ranking third in one area and fourth in the remaining two. This indicates an increasingly sophisticated view being taken of the choices within the context of the regulatory instrument itself, as well as a greater willingness to adopt alternatives to regulation. Third, market based instruments rank disappointingly low.

Figure 4. **Policy alternatives increasingly used in 28 OECD countries in major policy areas**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries.

Tradable permits rank lowest or second-lowest in all three areas, while insurance schemes and taxes and subsidies also rank lowly in most areas. Only in the environmental area do taxes and subsidies feature relatively prominently, ranking fourth among the eleven alternatives considered. Given the strong focus of regulatory reform activity on promoting "market-friendly" regulation as a means of capturing dynamic efficiencies, in particular, this must be a priority area for future activity. Fourth, "light handed" approaches, including information campaigns and voluntary commitments, are prominent. This may suggest that regulators are increasingly conscious of the possibilities of adopting co-operative approaches to achieving policy objectives and focused on the ultimate necessity of the consent of the regulated. The fact that co-regulation is also widely reported as being increasingly used seems also to support this conclusion.

Combinations of policy instruments to achieve policy objectives

A significant area for policy learning relates to potentially fruitful combinations of different policy instruments. Such combinations may arise from a process of breaking down regulatory problems into their component issues and identifying the most appropriate tools to address each component part. The ability to combine policy tools to address those issues is a developing theme in OECD countries. Previous research conducted by the OECD indicates the possibilities of improving efficiency and effectiveness by the development of complex policy mixes.[13]

In a recent publication, combinations of policies were categorised as inherently complementary, inherently incompatible, complementary if sequenced, and complementary or not depending on the particular circumstances.[14] Combinations that were identified as inherently complementary include information strategies and all other instruments, voluntarism and command-and-control regulation, broad-based economic instruments and compulsory reporting and monitoring. Combinations that were inherently incompatible include self-regulation broad-based economic instruments, and command-and-control regulations and broad-based economic instruments.

Denmark provides an interesting example of such policy mixes. There, a type of process regulation is being combined with the existing "green tax" reform, which uses economic incentives to reward firms that sign up to voluntary codes. This process regulation known as "energy management", requires enterprises to agree to develop and implement programmes and systems for the management of energy use. The new combination follows recommendations by the OECD's Environmental Performance Review in 1999, which raised concerns about the efficacy of the "green tax" reforms due to high administrative costs of entering and monitoring the voluntary agreements. The use of energy management plans is intended to reduce the need for extensive monitoring and lower the financial cost to business of entering into the voluntary codes.

Concerns with the use of alternatives

Despite wide acceptance of the general rationale for alternatives to traditional regulation, governments, business, public servants, non-governmental organisations (NGOs) and citizens have expressed concerns about their use. From a citizen or consumer perspective, NGOs, consumer organisations, and other associations sometimes raise concerns about the use of alternatives as they are seen as "soft" regulatory options that favour business at the expense of public or consumer protection and thus reflect regulatory capture. Such concerns are especially likely to arise with regard to voluntary commitments

and self-regulatory options. NGOs and consumer groups also raise concerns about the enforceability of alternatives, particularly where regulatory requirements are output focused rather than input focused as, for example, with performance-based regulations. As noted above, in reforms based on variance processes, some equivalent alternatives are feared to undermine regulatory standards or reduce compliance.

As well, both large and small firms can feel threatened by alternatives. There are transaction costs associated with learning how new regulatory regimes operate as well as determining the best business action in response to a new law. Larger firms may be concerned that their familiarity with existing regulation confers a competitive advantage, which will be lost if an alternative approach is adopted. Smaller firms often fear that large firms are better placed to use alternatives. Moreover, some alternatives can have negative effects that are not always easy to predict *ex ante*. For example, self-regulation may provide opportunities for establishing cartels or setting up entry barriers by private organisations and associations.

These considerations must be addressed if regulatory alternatives are to be broadly accepted as legitimate tools of government policy. They often arise due to a lack of transparency and accountability in relation to the detailed design, implementation and enforcement or management of alternatives. This, in turn, is often a reflection of poor design more broadly. At the same time, it must be realised that some of these concerns are based on fears of losing privileged positions or of ceding relative advantages to competitors. Increasingly, policy-makers are acknowledging these issues and responding by involving local communities and interest groups in the design of alternative policy instruments and by incorporating publication and other disclosure requirements into their design.

Best practices in the use of alternatives

No comprehensive guide to best practices in relation to regulatory alternatives is possible at this stage, as insufficient experience has been generated and insufficient policy learning has taken place. However, a number of practices can be highlighted due to their apparent contributions to successes in this area.

As noted above, a majority of OECD countries has implemented a formal requirement to consider alternatives as part of the regulatory process. The challenge in practice is to operationalise such a requirement. A potentially effective means of doing so is to integrate this requirement with the regulatory impact analysis process, effectively making the formal discussion of alternatives a part of the RIA requirement. However, the success of such a strategy will be critically dependent on the RIA being conducted early in the policy development process, before regulators are strongly committed to a particular policy tool. A further measure would be to combine the promotion of widespread awareness and understanding of the characteristics of a range of alternative policy instruments with the formal RIA training programme.

Disclosing to the public how and why regulatory alternatives are adopted or not adopted can be a very powerful means of ensuring policy-makers give due consideration to all feasible policy tools. For example in the Netherlands, the Ministry of Justice's Directives on Legislation require the reason(s) that alternatives to regulation have not been used to be explained to Parliament. The Netherlands has also recently moved to add more transparency to the implementation of alternatives in order to restore and enhance public confidence the use of alternatives and thus allow for their wider use.

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Oversight by an independent agency helps prevent adoption of inappropriate alternatives. For example, in Hungary chambers of commerce and industry and other semi-private bodies have been delegated co-regulatory responsibilities in relation to issues such as start-up licences, issuing of standards, and setting ethical and professional requirements. Hungary's competition authority has interceded a number of times to prohibit the development of barriers to entry such as the setting of minimum levels for the fees of some services or banning of comparative advertising between members.[15]

An oversight function can be used to promote the use of appropriate alternatives. For example in Denmark, the Regulation Committee checks regulatory proposals against the OECD checklist for better regulation. This ensures that ministries consider whether "command and control" regulation is likely to be the most effective policy instrument or whether other options might succeed in achieving policy goals at lower cost. Checking by the Committee occurs at a very early stage in regulatory development and it is a mechanism that encourages ministries to consider alternatives when proposed legislation is not clearly justified.

Once adopted, the progress and effectiveness of alternatives needs to be monitored so that benefits become widely understood, lessons learnt are disseminated and the scope for the application of different policy instruments is better appreciated, both within government and in the wider society. In Denmark there is a policy to promote the evaluation and modification of policy programmes involving alternative instruments. The Ministry of Finance strongly promotes the use of evaluations, particularly where subsidy programmes are employed, while some such evaluations are made publicly available.

4.3. Administrative simplification and license and permit reduction

Few regulatory reforms are more popular than promises to simplify government "red tape". One of the most common complaints from businesses and citizens in OECD countries is the number and complexity of government formalities and paperwork. This reflects the fact that formalities are among the most visible of the regulatory burdens imposed on business by governments, while their importance to the achievement of substantive regulatory objectives is often not clearly apparent. Moreover, reducing permits and licenses can create a political constituency, especially among SMEs, that can assist reformers subsequently in arguing for the adoption of farther-reaching reform initiatives. However, as all government interventions, formalities, are important tools used by governments to carry out public policies. They often constitute indispensable implementation mechanisms for various substantive programmes. In addition, many formalities provide crucial sources of data to government that are essential to the monitoring of existing programmes and the design and development of well-targeted new interventions. Initiatives to simplify administrative regulations will thus often need to confront countervailing forces and succeed through balanced but continuous gains.[16]

Nonetheless, if poorly designed or applied, or outdated, formalities can have substantial effects in impeding innovation and entry and creating unnecessary barriers to trade, investment, and economic efficiency. Regulations and formalities that are outdated or poorly designed to achieve policy goals can impose substantial unnecessary costs. The cumulative effect of many regulations and formalities from multiple institutions and layers of government can be particularly important. This is a problem of which governments may have a low level of awareness if co-ordinated regulatory reform

strategies have not been developed. The result can be to slow business responsiveness, divert resources away from productive investments, hamper entry into markets, reduce innovation and job creation, and generally discourage entrepreneurship. These effects are more costly in global markets, where business competitiveness can be affected by the efficiency of the domestic regulatory and administrative environment. Moreover, they can often act in practice as anti-competitive measures, giving "insiders" protection in some markets. Red tape is particularly burdensome to smaller businesses and may act as substantial disincentives to new business start-ups.

Evidence suggests that the burdens of government formalities have risen significantly in OECD countries in recent years, due to expanding regulations in areas such as the environment, and increasing government demands for information for making and implementing policies. In most countries, the most burdensome area is tax paperwork, followed by paperwork related to employment regulation.

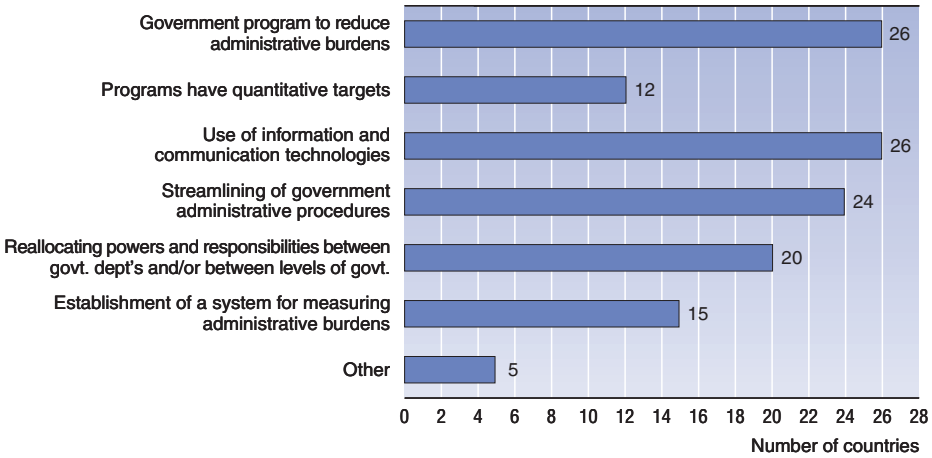
The costs of administrative burdens are extremely large, whether considered in terms of time or money. According to a World Bank estimate, opening a business in Mexico in the late 1990s, could take up to a year and a half, while the costs of complying with all the formalities governing business operations in some cases accounts for 3% of a large firm's operating expenses, without considering transaction and opportunity costs.[17] In Turkey an entrepreneur must proceed through 19 different steps in order to set up a company.[18] Additionally, the lack of an appropriate management of formalities prior to recent reforms – sometimes regulatory agencies did not know how many formalities they were responsible for – created a state of uncertainty and opportunities for corruption.

An OECD's multi-country business survey[19] provides additional data on the costs of administrative compliance, based on a survey implemented between April 1998 and March 1999, covering almost 8 000 small and medium-sized enterprises (SMEs) in 11 countries.[20] The survey shows that administrative compliance costs are substantial for SMEs themselves and for the economy as a whole. Administrative compliance costs represent around 4% of Business Sector GDP across the countries surveyed and varied from less than 2% in Finland to 7% in Spain, clearly indicating the potential for reducing regulatory costs in this area. On average, each SME spent USD 30 000 per year complying with the administrative requirements of tax, employment, and environmental regulations. This equates to an average cost of USD 4 100 per employee, or around 4% of the annual turnover of companies. However, the costs are significantly higher for smaller firms, averaging USD 4 600 for SMEs with 1-19 employees, USD 1 500 for medium-sized SMEs (with 20-49 employees) and only USD 900 for large SMEs (with 50-500 employees). On average, around 60% of the costs went toward contracting external experts with the skills to ensure compliance efficiently.

The 1997 *OECD Report* found that "Reducing red tape and government formalities can produce substantial payoffs in government efficiency and economic cost-savings." It concluded that "Reducing the operating and dynamic costs of *ex ante* permissions and licences is a high priority for governments that wish to increase business start-ups and improve competitive pressures throughout the economy." By 2000, twenty-six of OECD countries had launched programmes to reduce administrative burdens. Figure 5 summarises the main strategies used within these programmes.

The specific strategies employed largely belong to one of three categories. These are informational approaches, process re-engineering and technological solutions. In broad

Figure 5. **Strategies for administrative burdens reducing programmes in 28 OECD countries**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries, Paris.

terms, longer standing programmes appear to have commenced with informational approaches before progressively moving their focus to process re-engineering and then technological solutions.

Informational approaches

The most common informational approach is the "one-stop shop" for obtaining license and permit information. These are now widespread, and are based on the notion of reducing business search costs by providing all information on licences and permits at a single point. The information usually includes the permits required by a given business, application forms and requirements and contact details. As experience with the "one-stop shop" has accumulated, and technology has improved, the services provided have tended to expand. This can include information on related issues, such as codes of practice, lists of applicable laws and regulations, as well as information on licences and permits required by other levels of government. Delivery mechanisms have expanded from telephone and face-to-face interviews through CD-ROM systems, information kiosks and now to the Internet. An interesting trend in Mexico has been the development of private sector run "one-stop shops", typically established by business and industrial associations. For example, the National Industrial Association runs 8 such shops, and the Mexico City Chamber of Commerce runs 7. In Greece, information-based one-stop shops bring local administration services to a dispersed population via the Internet. Through the ARIADNE programme citizens located in hundred of islands across the country can obtain and file most of the government documents and formalities.

There has been little evaluation of one-stop shops. One independent evaluation was completed in Victoria, Australia, in 1994. It concluded that the benefit to clients of the one-stop shop totalled AUD 21 million per annum, while the overall benefit/cost ratio of the project was an impressive 15:1. In Italy, the *sportelli unici* has reduced the time needed to set up a business to 3-11 months, instead of 2-5 years, which will boost business start-ups. But in many countries, even with a one-stop shop, fundamental problems remain in relation to co-ordination between regulatory authorities. Critics have claimed that the new structure

merely adds an additional layer to the administration, especially in those cases in which attempts have been made to use one-stop shops as single licence issuing authorities. Others have suggested that a proliferation of one-stop shops undermines the aim of having a single window to government for all purposes.

A closely related "information based" approach to reducing administrative burdens is to make laws and regulations more widely available and more "user friendly", through means such as enhanced search functions. For example, in Spain, a review of all administrative formalities, begun in 1992, resulted in the publication of an inventory of formalities for the first time in 1995. It was subsequently updated and made available on the Internet in 1997. The current inventory includes a categorisation of the formalities, information on time limits for responses and the effect of non-responses, the objectives of the formality, its legal basis and the responsible administrative unit. Future enhancements are planned including better search capabilities and the publication of a user-friendly guide to finding formalities.

Making existing forms available on the Internet has in many countries created an interesting and often unanticipated side-effect. The immediate access to and exposure of over-bureaucratic forms requesting information in an unclear or duplicative manner, has in many cases triggered strong direct reactions from users and media, urging the issuing authority to simplify the relevant forms. Aware of this effect, agencies pushing the administrative simplification agenda have, sometimes used such "shaming" strategies *i.e.* exposing bad forms on the Internet, as a driver for further simplification among reluctant reformers.

Also in the category of information-based approaches are attempts to count formalities and measure the burdens involved. Clearly, governments must have a sound understanding of the size and nature of the problem before they are able to undertake a strategically focussed effort to address it. However, only eight countries were able to provide a total of the number of business licences and permits in the OECD *Regulatory Capacities Database* (see Table 1). Burden measurement programmes can be seen as forming a link between information provision and process re-engineering approaches – as they provide a basic input to the latter.

For example, the Belgian Administrative Simplification Agency recently launched a project that created a register of approximately 300 administrative procedures applicable to businesses. In addition to enhance transparency the register is used as a vehicle for setting priorities for the review and simplification of procedures (including the merging of formalities and statistical requirements). In Norway, too, the Register of Reporting Obligations of Enterprises is maintained as a means of obtaining a transparent overview of requirements on business and assisting efforts to co-ordinate and simplify these obligations wherever possible.

Process re-engineering

Process re-engineering approaches are based on review of the information transactions required by government formalities with a view to optimising them, including reducing their number and reducing the burden of each through redesign, elimination of steps and application of technology, as appropriate. The most common tool in this regard is licence and permit reduction programmes.

Table 1. **Inventories of permits and licenses required at national level in selected OECD countries (Notifications not included)**

	Number of formalities
United Kingdom[1]	312
Norway	255
Mexico	834
Hungary[1]	1 600
Finland	+1 000
Korea	2 186
Portugal[1]	2 225
Switzerland[2]	278

1. Data from 1998.
2. Responses do not include formalities required by federal law, but applied by cantons.

Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries and further updates by countries, Paris.

The *ex ante* licensing or permitting requirement is one of the more damaging forms of regulation, as it necessarily increases investment delays and uncertainties and has disproportionate effects on SME start-up, while being very costly for public administrations to apply. They are pervasive in OECD countries, although there are considerable differences in the extent of their use, reflecting different regulatory traditions and approaches. The following data from OECD countries, though not checked for strict comparability, illustrates this point.

OECD member countries differ widely in their use of *ex ante* controls, from a general presumption of a freedom to commence a business, with licensing reserved only for those areas in which identifiable risks are identified, to a presumption in favour of licensing for most activities. By the end of 2000, most OECD countries were targeting the particular problems of excessive licensing and business permits through tools such as amalgamations of related licences and "referral authority" arrangements, "silence is consent" clauses, "negative licensing" options and rigorous programmes of review, as well as co-ordination between levels of government. Out-sourcing of certification functions has occurred in technical areas in countries including Italy and Australia. In many OECD countries that have historically used *ex ante* licensing very widely, policy is now in favour of a move toward *ex post* checking. That is, the licence reduction programmes reflect a change in the underlying philosophy about the relationship of the state and the market. Not surprisingly, progress can be extremely slow.

The complexity of reforms to permits and licenses is well illustrated by the experience of Japan. In 1990 it was decided that the number of permits and authorisations should be halved,[21] yet the numbers increased every year until 1993. Following declines in 1994 and 1995, the number then continued its upward trend in 1996 and 1997. However, according to the Management and Co-ordination Agency, the main reason for the increases in numbers observed during this period was deregulation: activities that had previously been forbidden or restricted were, after deregulation, permitted under certain conditions. Welding tests in nuclear facilities, for example, were shifted to private institutions that had to be certified.

Overall performance in reducing licences and permits has been mixed. In a number of cases, claims of substantial quantitative reductions have been made, but closer analysis often reveals a less satisfactory picture. For example, in the Netherlands, the government announced in 1996 that a 1993 goal of achieving a 10% reduction in administrative burdens had been met and a new target of a 25% reduction was adopted. However, the reductions were calculated on a "static" basis, ignoring the impact of additional burdens imposed during the life of the programme due to new regulatory requirements. Moreover, in many cases it has been found that the licences abolished have been the least burdensome, being either those that involve little administrative burden in the first place or those that had, to a large extent, already fallen into disuse.

The United States has sought to control paperwork burdens through a highly detailed law, the *Paperwork Reduction Act* since 1994, and yet the OECD's review of regulatory reform in the United States concluded that "… the programme has not been successful in reducing the burden on the public, though this was a major goal of the PRA." At best, the Act was seen to have slowed the rate of increase in the burden. Such gains may, of course, be real, but they are intrinsically difficult to verify.

Notwithstanding scepticism as to claims for reductions in overall numbers, the size of the reductions achieved in some cases indicates that real gains are difficult to realise. Moreover, even eliminating licences of limited practical effect might contribute toward moving perceptions away from an expectation of licensing requirements and toward one of a presumption of freedom to establish a business. There is also evidence that the average cost of obtaining licences may be falling as technological benefits such as those outlined above and procedural streamlining and standardisation initiatives become widespread. The adoption of the principle of moving away from *ex ante* approvals in a number of countries should have a significant impact in the medium term, even if resistance from vested interests in business and the administration delays implementation in the short term. Additionally, the creation of new licences has, in some areas, been positive, representing a move from a government monopoly of a particular activity through individual concessions to the creation of a contestable, regulated market in pursuit of efficiency gains and greater economic opportunities.

Electronically-based delivery mechanisms

An important mechanism for reducing administrative burdens in recent years has been the explosive development of systems for the electronic interchange of data as an alternative to traditional paperwork transactions. For example the Japanese customs allow exporters, importers and customs brokers to submit their declarations electronically, improving accuracy and speeding up procedures. In Denmark, a recent pilot EDI programme allows for the electronic reporting of accounting information including annual accounts, tax returns and some statistical reports. It is expected that in 2002 the system will be made available to all enterprises. In an increasingly number of countries many taxpayers are able to complete their tax returns through the Internet, rather than as a paper document, thanks in particular to the legal acceptance of electronic signatures.

A central element for these systems is the availability of a single business number, provided confidentiality is assured. In France, the SIREN number permits the filing of all forums as well as interconnection between different agencies. The Australian Business Number system represents an ambitious initiative in this area. Developed in response to the *Small Business Deregulation Taskforce* report, which recommended that a single identifier

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Box 6. **License reduction programme in Mexico and in Belgium**

An interesting approach to a systematically review of all business licenses was undertaken in Mexico between 1995-2001. The review process consisted first to establish a complete inventory of all formalities, second to review all of them by a certification body on the basis of a simple RIA, finally to include the justified ones into a register. As a result of this process, almost 80% of the pre-existing formalities were either eliminated or simplified. The Federal Registry of Formalities is now the unique source of enforceable formalities. A further important benefit of this review mechanism was that it permitted a substantial reduction in the excessive levels of discretion being exercised by the lower levels of the bureaucracy, eliminating opportunities for corruption.

A similar, but more targeted approach was taken by the Agence pour la Simplification Administative (ASA) of Belgium who started in 2000 a review programme to dramatically reduce paperwork burdens on citizens and business. The programme is built on three phases. First, ASA completed an inventory of the most used formalities. Second it assigned an "index" to each one of them. The index is calculated according to a standard formula. The final value is the result of the multiplication of an indicator of the burden of the formality with the frequency of the formality and with the number of persons concerned by the formality. The indicator of the burden of the formality is calculated according to a pre-negotiated table where each parameter like fees, proper guiding information, readability of the form, number of forms, variability of the questions, possibility of electronic exchange is given a number. Lastly ASA convened a working group to discuss with the ministry responsible of the formality, together with other stakeholders, ways to reduce the index changing one or more of parameters composing the index. Thanks to this transparent and negotiated process, ASA created a benchmark from where simplification efforts can be evaluated, but also a system where the different partners can discuss the different simplification approaches applicable to any formality.

be introduced to simplify business dealings with government, the ABN is designed to provide a business registration system, where businesses only need to have a single business identifier for all dealings with government. While the ABN is currently principally utilised for business dealings with the tax office and for business incorporation purposes, it is intended that it will extend to dealings with other government departments and agencies. The Australian Business Register Online (ABR Online) enables online registration and searching of ABNs. State, Territory and local government bodies are also able to utilise the ABN to streamline registration requirements.

Evaluation of administrative simplification and burden reduction programmes

Administrative simplification programmes can constitute a powerful means of confronting entrenched bureaucracy, perhaps especially in countries where administrative procedures tend to heavily shape the work of the public service (*e.g.* civil law countries and countries in transition). By allowing a strategic review of "red tape", they often permit a sharp reduction of formalities that have often accumulated over a period of decades. By controlling the number of formalities and the information requirements, administrative simplification programmes can also reduce the range of bureaucratic discretions over business and other groups as well as minimise the opportunities and incentives for the development of corruption within the administration. These programmes can also promote more

accountable and transparent governments through increasing the access to administrative information and documentation and the breaking of "information monopolies".

Administrative simplification programmes also have the merit of allowing gains to be made without calling into question the larger regulatory architecture. This characteristic combines with the fact that they usually constitute reform on a modest scale, and so have lesser risks attached to them. There is less risk that reforms will be derailed by concerted opposition from sectional interests, or by unanticipated problems. Moreover, tangible results can be delivered within short timelines that suit the political cycle. This means that these programmes can often be extremely important in mobilising constituencies for reform from an early stage in the adoption of such programmes and for maintaining political interest in, and commitment to, reform.

Simplification programmes also differ from much other regulatory reform activity in being "nuts and bolts" reform, driven by technocratic skills and insights, rather than being primarily reliant on political will and support and on overarching reform "frameworks". This characteristic suggests that they may be particularly appropriate as a focus of reform activity in a "counter-cyclical" sense – that is, in moving reform forward during periods where political support is limited.

However, there is a risk that focus on technological fixes and one-stop shop programmes may divert the energies and limited resources of reformers from more fundamental reforms, reducing the degree of critical questioning of the broader regulatory architecture and so reducing the overall effectiveness of a reform programme. These programmes can be seen as "soft" regulatory reform, in that they have less potential to fundamentally disturb vested interests than do other regulatory reforms. Established businesses that benefit from regulatory barriers to competition feel relatively unthreatened by burden reduction programmes. Regulators do not see them as fundamental threats to their regulatory fiefdoms if they can substitute a license or any paperwork by a new requirement or standard.

Moreover, it is possible that the increasing use of systematic reform programmes – including RIA and regular, mandated review requirements – will act to reduce the potential benefits of *ad hoc* programmes over time. It is also true that many of the strategies applied *via* administrative simplification programmes can be more effective if integrated with more systematic elements of the regulatory policy agenda. This would involve, for example, incorporating appropriate principles and guidance into regulatory "best practice" manuals for regulators, covering issues such as:

- The need to make the case for licensing, permitting or other "burden rich" forms of regulatory intervention.
- Adopting systematic approaches to minimising burdens in particular cases – for example taking a critical approach to information requirements, licence renewal periods, etc.
- Identification of the affected group and of potential means of integrating administrative elements of a new regulatory requirement with existing programmes.
- Consideration of less prescriptive (and administratively burdensome) alternatives to administrative regulation, such as transforming *ex ante* authorisation into notification or into standards to be inspected *ex post*.

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Overall, administrative simplification programmes can make important contributions to the broader regulatory policy, particularly during its developmental stages. Continued consideration of the most effective means of implementing its goals of burden reduction within the framework of a given set of regulatory objectives is needed, as noted above, with more systematic mechanisms being a particular area for future focus. In addition, it is important to address the extent to which the lack of objective measures of existing administrative burdens may be limiting the capacity of governments to achieve burden reduction objectives. The absence of such measures makes it difficult to objectively measure the effectiveness of programmes. It also impedes the targeting of burden reduction policies and programmes toward the areas of greatest need. This suggests the importance of more systematic efforts to develop evidence-based goals of administrative burdens and to track them over time, in order to be able to measure reform success and properly target reform priorities.

4.4. Regulatory Transparency

The concept of transparency in government has rapidly become a central theme in governance literature and in public debate. Transparency is also a central demand of civil society groups and serves the basic democratic value of openness. The notion of transparency embodies the more familiar concept of public consultation, but is considerably broader in scope. The term "transparency" is itself non-transparent, being understood to mean quite different things by different groups.[22] These concepts of transparency range from simple notification to the public that regulatory decisions have been taken, to controls on administrative discretion and corruption, better organisation of the legal system through codification and central registration, the use of public consultation and regulatory impact analysis and actively participatory approaches to decision-making. Information on transparency collected in the OECD *Regulatory Capacities Database* showed that country practices and performance vary widely, but no country consistently satisfies what is considered good practice.

In its largest sense, transparency can be understood in terms of the relationships between state, market, and society, which is to say the organisation of how the state projects its power. This is the sense in which transparency is discussed as part of the governance and civil society debate. Among all the governance reforms now underway, an increase in transparency may be the most fundamental and far-reaching in changing relationships. In its most operational sense, which is used in this paper, transparency is the capacity of regulated entities to identify, understand and express views on their obligations under the rule of law. Under this definition, regulatory transparency is far more complex and far-reaching than originally conceived. Transparency is an essential part of all phases of the regulatory process – from the initial formulation of regulatory proposals to the development of draft regulations, through to implementation, enforcement and review and reform, as well as the overall management of the regulatory system.

Transparency's importance to the regulatory policy agenda springs from the fact that it can address many of the causes of regulatory failures, such as regulatory capture and bias toward concentrated benefits, inadequate information in the public sector, rigidity, market uncertainty and inability to understand policy risk, and lack of accountability. Transparency of the regulatory policy itself, as well as its institutions, tools and process is equally important for its success. Transparency encourages the development of better policy options, and helps reduce the incidence and impact of arbitrary decisions in

regulatory implementation. Transparency is also rightfully considered to be the sharpest sword in the war against corruption.

Transparency has democratic as well as economic implications. The continuing development of civil society – including the proliferation of NGOs – in OECD countries has increased demands for greater transparency in all areas of government activity. Governments are seeking to accommodate these changes by developing improved models and approaches for better informing and involving citizens in the policy-making process. The notion of "participatory democracy", embracing this range of interactions with civil society groupings, is a complement to traditional representative democracy, capable of enhancing the capacities of governments to implement policy effectively, with the support of an informed public.[23]

Domestic trends toward openness have been reinforced by a widening set of international trade-related disciplines on regulatory transparency, such as the GATS requirements summarised in Appendix IV. Foreign firms, individuals, and investors seeking access to a market must have adequate information on new or revised regulations so they can base decisions on accurate assessments of potential costs, risks, and market opportunities, but have greater difficulties than domestic market players in obtaining information. Improved transparency in these areas means more intense competition, with its associated economic gains, particularly in dynamic terms. Regulatory transparency has also been improved by the growing use of international standards, which reduce search costs and increase certainty for consumers and market players. Yet, performance is still far from satisfactory, as discussed below.

According to the most recent updating of the OECD *Regulatory Capacities Database*, by the end of 2000, 20 OECD countries had formal government policies on transparency that have government-wide application. Two other countries have transparency requirements in at least some policy areas. Transparency practices are mutually reinforcing and are most effective when applied in combination as part of a structured system. Among the most important elements of regulatory transparency as practised in OECD countries are:

- Consultation with interested parties.
- Plain language drafting.
- Legislative simplification and codification.
- Registers of existing and proposed regulation.
- Electronic dissemination of regulatory material.

The following summarises the most significant trends toward improving the major transparency mechanisms in OECD countries in recent years. A more detailed discussion is contained in Appendix IV.

Despite the progress made, regulatory transparency in OECD countries still falls far short of good practices. All available information – the 1997 *OECD Report*, the regulatory indicators collected in 1998 and 2000 by the OECD, the multi-country business survey, and the on-going series of detailed country reviews conducted by the OECD – demonstrates serious concerns about a continuing lack of transparency with respect to regulatory development and application. The OECD country reviews of regulatory reform have analysed transparency issues in individual countries. Thus, they provide a substantial resource for identifying the current state of play and the major problems that must be addressed by OECD countries as priority issues. Table 2 summarises this

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data, presenting 17 major transparency problems identified in the OECD reviews of countries' regulatory practices conducted between 1998 and 2000. The table also includes the OECD recommendations for addressing each problem, as included in the relevant country review reports.

The OECD concluded in its 1997 report that regulatory transparency had greatly improved in the 1990s due, in particular, to increasing use of a range of public consultation and information accessibility tools. OECD governments have invested considerably in recent years in making more information available to the public, listening to a wider range of interests, and being more responsive to what is heard. Consultations are becoming standardised and the amount of information increasing, particularly as regulatory impact analysis is made accessible. A greater variety and number of interest groups are becoming involved, particularly in those countries with traditions of corporatist relations in which consultation was previously limited to business and labour interests. Forms of consultation that were vulnerable to capture and bias, such as layers of advisory bodies, are being replaced with more open and flexible consultations. New technologies are permitting the establishment of centralised databases with search engines, electronic filing, and institutional re-engineering through one-stop shops. These reforms are doing much to help citizens and businesses find their way through an increasingly complex regulatory state. Continued progress since 1995 has included the adoption in more countries of minimum standards for public consultation, more controls over the use of informal regulatory instruments such as codes of practice and guidelines, and the widespread use of communications technologies such as the Internet.

However, much needs to be done, as Table 2 shows, in terms of the scope and mechanisms of consultation the disciplines applied to regulators. In some countries extensive consultation is breeding new problems and challenges in terms of the efficiency of the mechanisms. Furthermore, a fundamental point is that long-term solutions will require the integration of transparency principles into the redesign of regulatory procedures from "cradle to grave". No country has yet embarked on such a reform.

An additional problem is that some emerging regulatory trends – particularly the adoption of new regulatory styles based on the adoption of quasi-legal measures extending the use of technical standards – are tending to reduce regulatory transparency and so undermine the recent gains documented above to an important degree. The increasing volume, complexity and opacity of much modern regulation far outstrips the capacities of most businesses and citizens to understand their obligations.

As well, the issue of transparency has received relatively little attention in the international trading context. Many businesses involved in international trade and investment argue that regulatory transparency is poor for foreign firms and that this can constitute an important source of competitive disadvantage *vis-à-vis* their local competitors. Such issues have the potential to constitute real impediments to the growth of international trade and investment and to reduce the associated competitive benefits to countries that do not effectively address this wider dimension of regulatory transparency.

Public Consultation

Public consultation is increasingly being used to collect empirical information for analytical purposes, a change that in large part represents the widespread adoption of

Table 2. **Regulatory transparency problems in 12 OECD countries**[1]

Transparency problem	OECD recommendation	Number of countries in which problem identified
Some form of public consultation is used when developing new regulations, but not systematically and with no minimum standards of access. Participation biased or unclear	Adopt minimum standards, with clear rules of the game, procedures, and participation criteria, applicable to all organs with regulatory powers. Use "notice and comment" as a safeguard against regulatory capture. Reduce use of "informal" consultations with selected partners	8
A systemic tendency to exclude less organised or powerful groups from consultation, such as consumer interests or new market entrants	Supplement existing consultation approaches with targeted approaches for affected groups. Include "outsider" groups, such as consumers and SMEs, in formal consultation procedures. Open advisory bodies to all interested persons. Take care that new approaches such as Internet are not biased against small businesses and less affluent parts of civil society	4
Regulatory reform programme and strategy are not transparent to affected groups	Develop coherent and transparent reform plans, and consult with major affected interests in their development	5
Information on existing regulations not easily accessible (particularly for SMEs and foreign traders and investors)	Creation of centralised registries of rules and formalities with positive security, use one-stop shops, use information technologies to provide faster and cheaper access to regulations	5
Legal text difficult to understand	Adopt principle of plain language drafting	12
Complexity in the structure of regulatory regimes	Codification and rationalisation of laws	12
National-subnational interface – more co-ordination and communication needed on interactions	Establish clearer competencies between levels of government; exchange information to avoid duplication	3
RIA is never or not always used in public consultation	Integrate RIA at an early stage of public consultation	9
Inadequate use of communications technologies	Use Internet more frequently in making drafts and final rules available and as a consultation mechanism.	6
Lack of transparency in government procurement	Adopt explicit standards and procedures for decision-making	3
Lack of transparency in ministerial mandates and roles of regulators	Clarify responsibilities between regulators	3
Regulatory powers delegated to non-governmental bodies such as self-regulatory bodies without transparency requirements	Develop guidelines on the use of regulatory powers by non-governmental bodies, and extend all transparency requirements to them	2
Too much administrative discretion in applying regulations	Strengthen administrative procedures and accountability mechanisms. Eliminate use of informal regulations such as administrative guidance and instructions	4
Lack of transparency at regional, state, and local levels	Work to improve regulatory transparency at regional and local levels	8
Inadequate use of international standards	Encourage the use of international standards government-wide, and track the use of uniquely national standards	4
Lack of clear standards in licensing and concessions decisions, such as in telecommunications	Reduce the use of concessions and licenses to the extent possible by moving to generalised regulation, announce clear criteria for decisions on concessions and licenses, use public consultation for changes in existing licenses and concessions	7
Decisions of independent regulators not transparent enough	Apply RIA to independent regulators, ensure that independent regulators also use public consultation processes with regulated and user groups	5

1. This non-exhaustive list is based on the country reviews prepared between 1999 and 2001 of the Czech Republic, Denmark, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Netherlands, Spain, and the United States.

regulatory impact analysis across the OECD membership in recent years and the more general move toward more analytically based models of decision-making discernible in most OECD governments. Basically, five consultative mechanisms exist: informal inquiries, circulation of regulatory proposals for public comment, public notice-and-comment, hearings, and advisory bodies. Their respective strengths and weaknesses in relation to promoting regulatory quality are discussed in Appendix IV. Consultation is a vital support for analytically based decision-making, since it is a cost-effective source of data, as well as providing information on issues such as the acceptability of different policies, which can be essential in determining practicability and designing compliance and enforcement strategies.

Consultation models employed in OECD countries are also being increasingly characterised by greater openness and accessibility, particularly for smaller, less organised interests. In some countries, this reflects larger moves away from corporatist modes of governance toward more pluralist approaches. More generally, the move reflects recognition of the increasingly pluralistic nature of societies and the greater demands for consultation and participation made by more educated and aware citizens. A related point is that consultation mechanisms are becoming more standardised and systematic, again enhancing effective access by improving predictability and thus the level of awareness of consultation opportunities.

A range of information technology innovations have been of substantial benefit in increasing the effective availability of opportunities for consultation. The provision of draft legislation, discussion papers (*e.g.* "white" or "green papers") and other consultation related material via the Internet has empowered less organised groups in particular by giving them greater access to the information needed in order to be able to contribute effectively to a consultation process. Similarly, the ability to submit comments electronically has reduced costs and delays and allowed community groups to operate more effectively in formulating their views and transmitting them to government. OECD governments have generally shown a high degree of willingness to adapt important new IT developments in the service of more effective consultation, but concrete examples are still very rare.

Finally, there is an evolving tendency to adopt different forms of consultation in combination, to improve its overall performance. This reflects growing understanding of the strengths and weaknesses of different consultation strategies and of the fact that they are therefore suited to different specific circumstances and to different stages in the consultative process. As consultation is often beginning much earlier in the policy-making process, it is increasingly common for it to be conducted in several stages, with different mechanisms employed at different times.

Further problems and challenges have also been detected. As was found in the reviews of the UK and Canada, any system of extensive consultation can result in claims of "consultation fatigue" by interest groups that feel overwhelmed by the volume of materials on which views are requested. Although consultation fatigue stems from success in developing highly consultative and transparent regulatory regimes, it represents an important second generation challenge facing advanced regulatory systems. Moreover, consultation fatigue can also arise from weaknesses in the mechanisms for responding to consultation inputs. This is because failure to respond to the views expressed by consulted parties will tend to erode trust in the consultation mechanisms and breed cynicism as to the value of further participation.

Regulatory clarity, communication and access

Another dimension of transparency in which substantial progress has been made is that of improving the clarity of legal and regulatory frameworks and the effectiveness of communication and access arrangements. In many OECD countries, there is an increased use of legislative codification and restatement of laws and regulations, to enhance clarity and identify and eliminate inconsistency. In addition, the adoption of centralised registers of laws and regulations, to enhance accessibility, is now widespread, with 18 OECD countries stating at end 2000 that they published a consolidated register of all subordinate regulations currently in force and nine of these providing that enforceability depended on inclusion in the register.

An even larger number of countries now require the use of plain language law-drafting and most of these (16 countries) support this policy through the issue of guidance materials and/or the adoption of training programmes. These policies support the effective communication of legislation by making laws intelligible to citizens. In particular, they are essential for achieving high levels of compliance and effective enforcement. They also reduce risk of complaints and disputes. However, plain language drafting may reduce accuracy and consistency if not done properly.

The dynamic aspect of transparency has also begun to be considered, with many countries now committed to the publication of future regulatory plans, which increases effective consultation as well as accountability. Finally, there is a high level of electronic dissemination of regulatory documents, with three quarters of OECD countries now making most or all primary legislation available via the Internet.[24]

E-government and regulatory transparency

The use of information communication technologies (ICT) to improve regulatory accessibility, participation and accountability has the potential to transform the standards and practice of transparency. ICT such as the Internet can be used to share information, improve effective access to consultation opportunities, reduce transaction costs and open access to government markets. Many OECD countries are seeking to exploit the potential of ICT-based approaches to improving transparency in areas such as public consultation, electronic data filing, one-stop shops and government procurement.

The Third Global Forum on e-Government held in Naples in March 2001 concluded that ICT can transform the way in which governments work in a range of transparency related areas, such as access to information, strengthening decision-making and policy formation, and improved data collection and analysis. ICT can facilitate information sharing and the involvement of experts, as well as broadening the basis on which governments seek to identify and reconcile conflicting interests and goals. A major potential benefit of ICT lies in its capacity to involve citizens and civil society in the policy debate through direct interaction.

Many OECD countries have taken substantial steps toward ICT use as a tool to promote transparency. For example, in 2000, 23 countries provided public access *via* the Internet to the text of all or most primary laws, up from only 13 two years previously. Similarly, a great deal of information is made available electronically to support consultation processes. This includes the text of regulatory impact analyses as well as consultation papers of different kinds.

Nonetheless, the relationship between regulatory procedures and e-government remains in its infancy, and is unlikely to develop smoothly. ICTs often cannot be added to

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existing procedures, because they can bring substantial changes in the content of work and administrative organisation and may force the re-engineering of the administration to better meet citizens' needs. The countries that are furthest ahead in ICT use, such as the United States, Denmark and Canada, have developed general policy frameworks for information that accommodate ICT. In the United States, for example, paperwork reduction was placed within a comprehensive framework for managing information resources. Paper is viewed as a means of handling information, and is not different in kind from other means such as electronic media.

A further problem is that of the "digital divide", a term that is used to highlight the fact that, while substantial proportions of countries' populations do not have access to Internet and related technologies, the development of e-government initiatives can lead to increasing inequities in terms of access and participation. Some countries have made efforts to address this problem through the provision of free or subsidised Internet access in public places, especially in regional and rural contexts. However, this issue will remain an important consideration in relation to the future development of e-government, including in the regulatory context.

In sum, despite the multitude of initiatives and improvements in regulatory transparency, further work is needed. The scale and depth of the problem of regulatory complexity and inaccessibility are too great to resolve quickly. Indeed, regulatory inflation and technological changes are still tending to make regulations even more complex. The most effective tools available to governments to improve clarity and accessibility are the set of regulatory quality management tools – consultation, regulatory impact analysis, and communication. Codification, registries, plain-language drafting, early planning, and particularly use of information technologies are beginning to make inroads into the regulatory jungles, permitting easier access in some areas. But progress is early and slow, and dissatisfaction among the regulated public is very high. Further refinement of, and investment in, these tools is definitely merited.

Notes

1. Remark by an environmental policy official about a national recycling programme, quoted in *The Economist*, 29 May 1993, "Survey: Environment", p. 18.
2. OECD (1997d).
3. The following several paragraphs are adapted from Jacobs, Scott (1997) in OECD (1997d).
4. OECD (2002d).
5. American Enterprise Institute for Public Policy Research (1996), p. 3.
6. For example, safety regulation on aeroplanes can reduce risks of air crashes, but if air ticket prices go up, some passengers will switch to car travel, which is much more risky. Because the policy goal was not clear enough – save lives rather than prevent air crashes at any cost – a safety regulation may cause more deaths than it prevents. In this case, the more costly and apparently safe the regulation, the more perverse will be the outcome.
7. See S. Formsma (1997), p. 221.
8. OECD (2002c); and The Regulatory Consulting Group Inc. and the Delphi Group (2000).
9. Hahn, Robert (1999).
10. See Cordova-Novion, Cesar (2002), "Implementing RIA in OECD Countries" in the Proceeding of the 2nd Workshop of the APEC-OECD Co-operative Initiative on Regulatory Reform, available at *www.oecd.org/regreform*
11. OECD (1997a), p. 3.

12. The Survey of Regulatory Capacity Database included questions about the use of regulatory alternatives in the areas of environmental regulation; health, safety and consumer protection regulation; and employment regulation.
13. OECD (1997b).
14. Gunningham, N., Grabosky, P., Sinclair, D. (1998).
15. OECD (2000d).
16. OECD (2002a).
17. World Bank (1990), pp. 23-28.
18. OECD (2002e).
19. OECD (2001a).
20. Australia, Austria, Belgium, Finland, Iceland, Mexico, New Zealand, Norway, Portugal, Spain, and Sweden.
21. OECD (1999c).
22. To some, transparency means that the state does what it says it will do, a basic principle of the rule of law. To others, it means that all regulated entities have equal access to regulatory processes, and equally understand their rights and obligations. Transparency can also mean that stakeholders play a role in setting policies that affect them. To yet others, it means that the state is neutral between market players, or that policy results are known and accountable. All are facets of a larger issue.
23. OECD (2000a).
24. OECD (2000f).

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Chapter 5

Tools to Improve Implementation of Regulations

The preceding section of this report has considered the range of specific tools being used to assure that the processes of designing and developing regulation are of high quality and that the quality of the resulting regulation is thereby systematically assured. However, to be effective in achieving policy objectives, regulation must also be adequately applied and enforced. This section considers mechanisms used by OECD countries to ensure that regulation is properly implemented. Understanding this final link in the regulatory policy chain involves consideration of the related issues of the practical application of the regulations, including the rights of redress accorded to the regulated, and of regulatory compliance and enforcement. All these issues involve the set of relationships between the regulators and the regulated: regulators must apply and enforce regulations systematically and fairly, and regulated groups must have access to administrative and judicial review of those actions of the regulator.

Access to review processes ensures that regulatory bureaucrats and the governments they serve are held accountable for their actions, including the use of regulatory discretions. Accountability requirements constitute a necessary corollary to transparency practices, setting out in detail the process requirements that the government is committed to uphold in exercising its regulatory powers and the rights and protections that are afforded to business and citizens in relation to the law-making process and the implementation of those powers. Key instruments in establishing the accountability of governments in OECD member countries are administrative procedures acts, the use of independent and standardised appeals processes and the adoption of rules to promote responsiveness, such as legislated time limits to respond to applications and "silence is consent" clauses.

Ensuring, through means such as these, that regulation is appropriately applied is definitively central to the ability of regulation to achieve its underlying objectives. Similarly, since the level of compliance is perhaps the most fundamental determinant of the effectiveness of regulation in meeting policy objectives, regulatory design and implementation must proceed from an understanding of the factors that determine the willingness to comply of regulated groups. It should be noted at the outset that the distinction between regulatory design/development issues, on the one hand, and regulatory implementation, on the other, is far from clear-cut. For example, many of the determinants of regulatory compliance are themselves related to the quality of regulatory design, as is acknowledged in the following section. Similarly, while independent regulators are primarily concerned with implementing regulatory structures, their expertise necessarily means they form part of the policy "feedback" loop that leads to the redesign of regulatory structures over time.

5.1. Administrative justice

Some OECD countries have long had Administrative Procedures Acts – for example the United States legislation dates from 1946. In recent years a move toward the widespread

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adoption of this legislation, including the replacement of existing acts with updated and extended versions has accelerated. For example, new or enhanced administrative procedures legislation has been adopted in Japan in 1994, in Korea and Mexico in 1996, and in Hungary in 1999 and 2000. Among the many purposes of an APA, two objectives are central to the regulatory management of a country: to assure an effective public administration and to preserve the rights and interests of citizens. In terms of regulatory policies, APAs can thus have a wide scope, often including requirements governing regulation making processes (*e.g.* consultation, RIA, publication requirements, sunsetting, disallowance), implementation and enforcement (availability of rules, rules on administrative discretion, time limits for decision-making), revision and amendment (updating incorporated material) and appeals and due process. The focus of APAs tends to differ widely between countries, reflecting different underlying issues. In Japan, the APA was used to outlaw the coercive use of administrative guidance. In Mexico, by contrast, the focus has been on reducing excessive discretion of enforcers, improving access to information possessed by regulators, and setting clearer administrative appeal mechanisms and time limits for authorities to respond to information requests.

An important general trend has been the more widespread adoption of independent administrative appeals processes. These have in some cases been adopted in general APA legislation, while in other cases they are adopted at a more disaggregated level, with a degree of commonality in approach being provided by guidelines, or merely convention. An important principle, that is being more widely implemented, is that administrative review should include the opportunity for a complaint to be heard by an administrative body other than that responsible for making the initial decision. This provides an additional element of independence and accountability to the review process, as well as helping to ensure that standardised review procedures are followed.

Other accountability mechanisms targeting administrative regulations, such as the adoption of legislated time limits and silence is consent rules, have generally been adopted at a disaggregated level, being incorporated into individual pieces of legislation, rather than into an overarching law. This recognises the diversity of circumstances in which the standards must operate, but also limits the predictability of these requirements and the achievement of consistent, equitable standards across different areas of the administration. Indeed, few countries report widespread use of these tools, suggesting that there is room for significant additional progress on these dimensions of accountability.

5.2. Judicial review

The preceding section on administrative review highlights the need for review by an independent agency within the administration to be available, in order to provide enhanced transparency and accountability. The availability of judicial review of administrative decisions can be seen as the ultimate guarantor of transparency and accountability and is likely to improve the effective quality of the decisions made during administrative review.

In addition to operating in this way as a check on the implementation of regulation in individual cases, judicial review provisions have, in some OECD countries, taken on a wider importance, becoming an important mechanism for regulatory quality control. For example, the recent OECD review of regulatory reform in Ireland found that "The Irish judicial review process has helped to identify poor quality laws and regulations.[1] The

effectiveness of the process arises from the ability of the judiciary to consider regulations' consistency with principles of constitutionality, including notably proportionality and the right to be heard. It also arises from courts' scrutiny of whether delegated legislation is fully consistent with primary legislation, as in the case of a recent High Court decision which struck down restrictions on the supply of taxi licences.

However, while administrative and judicial review processes are essential guarantors of fairness and accountability, and thus of the quality of regulatory implementation, it must be recognised that they are generally costly and time-consuming means of obtaining redress. Consequently, many regulated groups, particularly Small and Medium Enterprises (SMEs) and individuals, are unlikely to use these means to obtain redress and enforce their rights as the regulatory burdens falling on each individual are often small (*i.e.* more waiting days, further paperwork). Instead they will tend to accept the regulatory costs sifting them to consumers or reducing their level of compliance. This highlights the necessity of assuring regulatory quality *ex ante* as well as taking a careful approach to determining the nature and extent of administrative discretions provided in regulation.

5.3. Regulatory compliance

The preceding sections considered the importance of effective controls on the application of regulation as a means of ensuring how regulatory objectives are achieved. However, ensuring that compliance issues are fully considered during the regulatory design phase is arguably the most effective means of ensuring that implementation issues and disputes are limited and the need for the above processes is minimised. Also, a systematic non-compliance is often a clear indicator of the need for a major regulatory reform. The question of compliance, though, has received relatively little attention from regulators until recent times, and yet the continuing increase in the scale and scope of regulation suggest that this issue continues to grow in importance as a determinant of regulatory quality.

The rapid increases in the quantity complexity of regulation in most OECD countries since the 1970s have produced impressive gains in some areas of economic and social well-being, but too often the results of regulation have been disappointing. Dramatic regulatory failures tend to produce calls for more regulation, with little assessment of the underlying reasons for failure. Though there is little hard evidence, a growing body of anecdotes and studies from OECD countries suggests that inadequate compliance underlies many such failures. This trend appears to be related to regulators' increasingly ambitious policy goals and the extent of the resulting "regulatory inflation". At the same time, diminished levels of social consensus as to regulatory goals may mean that the high degree of "consent" which must underlie successful law-making may be diminishing. Lack of compliance is a common but little understood cause of regulatory failure.[2]

Achieving full compliance is rarely possible, at least at reasonable cost, and governments will almost always have to be satisfied with a "reasonable extent" of (non)-compliance. There is no general definition of the "acceptable" level of compliance, because each policy field has its own specifications, differences, and sensitivities. To define an acceptable level of compliance depends in part on the nature of the risks arising from non-compliance. Non-compliance is, for example, more alarming in the nuclear energy industry than in most other policy areas. Moreover, the acceptable level depends in part on the cultural features of the country in a given period: for instance, a non-compliance rate

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can suddenly become a problem, even though the same level of non-compliance may have existed, and not have been seen as a problem, for years previously.

The issue of compliance can also be seen as having two dimensions: those of "formal" compliance and "substantive" compliance. Put another way, there can be important differences between compliance with the letter of the law and compliance in the broader sense of action that ensures the underlying regulatory objective is achieved. The distinction seems to have arisen particularly in the context of the increasing use of performance-based alternatives to command and control regulations. Minimising the opportunities for formal compliance to be achievable in ways that do not lead to substantive compliance is thus an important challenge for regulator. Regulatory design must encourage substantive compliance, if objectives are to be achieved.

Improving compliance involves a detailed understanding of the context in which regulation operates, that is, who is the targeted group, what is the nature of the industry or the operating environment in which it exists. Determinants of the level of (non)-compliance with regulatory requirements are of four broad types.

Knowledge and understanding of the regulatory requirements. Much regulatory compliance is "voluntary", and results from business and citizens' trust in the government to act in society's interests. However, even voluntary compliance is dependent on the target group's knowledge and understanding of the rules. A common problem is that regulators assume that meeting legislated publication requirements will be sufficient to assure the required level of understanding. This is increasingly unlikely to be the case in an environment of regulatory inflation, in which the number and complexity of regulations, as well as their rate of change, continually increase.

As discussed previously, the responsibility of policymakers does not end with publication of the rule. New rules may need to be accompanied by information campaigns to ensure that they are brought to the notice of, and made comprehensible to the target group. Regulatory design issues also intervene: in many cases, rules are plainly too complex ever to become widely known and understood, and the only way to ensure adequate compliance is to simplify and reduce the regulatory burden. Indeed, increasingly there is a need to balance legal precision and certainty with simplicity of regulations. This problem can become particularly acute as regulation is updated and amended over time, with details being added and loopholes closed. For example, the "Robens" reforms to occupational health and safety regulation in the United Kingdom in the 1980s replaced many technical rules with a few easy to understand, flexible, general rules. The aim was to facilitate employer self-regulation of occupational health and safety on an individualised site-by-site basis. However, over time it was necessary to develop many technical and detailed "codes of practice" under the general provisions of the occupational safety and health regulation to address specific hazards and make the law more certain for employers. The proliferation of these codes of practice re-introduced a degree of complexity for businesses, and the current approach by the Health and Safety Executive is towards more risk-based enforcement, with a lighter touch for well performing businesses and greater help toward compliance for more problematic ones.[3] A similar trend has also been evident in Australia, where the same approaches to reforming health and safety regulation have been adopted.

Willingness to comply. Compliance requires both understanding of the law and the will to comply. The will to comply may be voluntary, arising from a sense of good

citizenship, acceptance of the policy goals, it may rely on economic incentives, or it may result from pressure from enforcement activities. Voluntary compliance is likely to be low when the costs (in time, money, or effort) of complying with a rule are considered unreasonably high, whether because substantive standards are too high, the transition time for reaching conformity is too short, or the regulation is inflexible in relation to individual circumstances. Sanction pressures may be inadequate if there are high rewards for non-compliance and low probabilities of detection.[4]

Voluntary compliance due to acceptance of the policy goals will be lost if people do not see a link between technical rules and a substantive purpose.[5] An overly rule-based or "legalistic" approach to compliance can have the same effect, undermining a government's achievement of substantive policy objectives. Research indicates that when business people feel that regulators are being overly legalistic in applying rules and fines, they respond by scaling down their efforts to comply, aiming only for minimal compliance with the letter of the law, rather than with its intent.[6] Overly technical rules can also increase non-compliance by encouraging evasion and creative adaptation.

Ability to comply. Regulators must focus on the feasibility of compliance. For small businesses in particular, the burden of assimilating and complying with many complex and technical rules can be unreasonable and undermine confidence in regulators and the regulatory structure. For example, an OECD report found that in Mexico the accumulation of regulatory formalities increased the arbitrary nature of administration; such detail made it impossible for a business to be aware of or comply with all the procedural requirements, leaving regulators to decide which rules to enforce, and how.[7]

Government capacity to apply and enforce regulations. (Non)-compliance may have a low probability of detection and enforcement if regulatory agency resources are inadequate or there is a lack of strategy in monitoring and enforcement. In such circumstances, the "sanction-based" dimension of compliance will fail. Mexico is rare among OECD countries in having adopted policies that recognise this problem. It has explicit requirements that regulations must be backed by sufficient budgetary and administrative resources to ensure their effective implementation and enforcement.

Perhaps the first attempt to provide regulators with comprehensive guidance on compliance issues, including compliance friendly regulatory design, was the publication in Canada in 1992 of the document *A Strategic Approach to Developing Compliance Policies*. This is a broad-ranging document that considers issues including the role of various stakeholder groups, the factors that affect compliance and the role of enforcement. It also includes a step-by-step process guide. This document is still the key reference on compliance issues for Canadian regulators and Canada remains among relatively few OECD member countries to have adopted a detailed compliance strategy to guide regulators.

The most comprehensive attempt to date to improve the compliance-friendliness of regulatory design is that implemented in the Netherlands. The project was developed jointly by the Ministry of Justice and Erasmus University. Compliance activity is based on the "Table of Eleven" key determinants of compliance, reproduced below (Box 7) which is largely consistent with the discussion of compliance issues in the preceding section. Implementation is via a specific branch of the Ministry of Justice, the Inspectorate of Law Assessment, which acts as an internal consultant to regulators in an effort to improve likely compliance by refining the design and implementation of draft laws.

Box 7. **The Netherlands Table of Eleven (T11) key determinants of compliance**

The T11 factors:

***Spontaneous compliance dimensions* (factors that affect the incidence of voluntary compliance – that is, compliance that would occur in the absence of enforcement):**

T1. *Knowledge of rules*: Target group familiarity with laws and regulation, clarity (quality) of laws and regulations.

T2. *Cost-benefit considerations*: Material and non-material advantages and disadvantages resulting from violating or observing regulation.

T3. *Level of acceptance*: The extent to which the target group (generally) accepts policy, laws, and regulations.

T4. *Normative commitment*: Innate willingness or habit of target group to comply with laws and regulations.

T5. *Informal control*: Possibility that non-compliant behaviour of the target group will be detected and disapproved of by third parties (*i.e.* non-government authorities), and the possibility and severity of sanctions that might be imposed by third parties (*e.g.* loss of customers/contractors, loss of reputation).

***Control dimensions* (the influence of enforcement on compliance):**

T6. *Informal report probability*: The possibility that an offence may come to light other than during an official investigation and may be officially reported (whistle blowing).

T7. *Control probability*: Likelihood of being subject to an administrative (paper) or substantive (physical) audit/inspection by official authorities.

T8. *Detection probability*: Possibility of detection of an offence during an administrative audit or substantive investigation by official authorities. (The probability of uncovering non-compliance behaviour when some kind of control is applied).

T9. *Selectivity*: The (increased) chance of control and detection as a result of risk analysis and targeting firms, persons or areas (*i.e.* extent to which inspectors succeed in checking offenders more often than those who abide by the law).

***Sanctions dimensions* (the influence of sanctions on compliance):**

T10. *Sanction probability*: Possibility of a sanction being imposed if an offence has been detected through controls and criminal investigation.

T11. *Sanction severity*: Severity and type of sanction and associated adverse effects caused by imposing sanctions *e.g.* loss of respect and reputation.

Source: Dick Ruimschotel, Compliance Methodology Consultants, Amsterdam and But Klaasen, Ministry of Justice, the Hague.

The T11 can be used to analyse the strengths and weaknesses of a draft regulation from the compliance viewpoint. This is done by assigning a numerical score from one to five for each element of the T11, with a lower score indicating potential compliance problems. This produces an overview of the regulation and the likely effectiveness of proposed enforcement and communication measures. In turn, this ensures that all the dimensions of policy design that may affect compliance have been adequately considered and addressed. In looking at existing regulation, this analysis will pinpoint where compliance failures are likely. According to a T11 analysis, regulatory design is optimal when the regulation is simple to implement and produces a maximum level of

spontaneous compliance. If T11 analysis shows that spontaneous compliance is insufficient and cannot be improved in certain areas, then additional controls and sanctions may need to be added in that area to guard against breaches and lead to a reasonable level of compliance.[8]

The OECD's work on compliance has indicated that the task of achieving optimal compliance outcomes must embrace both result-oriented policy, compliance oriented regulatory design and effective regulatory implementation strategies. In its report the OECD identified principles in each of these areas.[9] These principles were proposed as a preliminary checklist applying to the design, implementation, and management of compliance-oriented regulation and are reproduced in the appendix. Importantly, the report concludes that implementing the recommended approach will require governments and regulatory agencies to develop a number of new capacities to process and manage compliance issues.

Compliance-oriented regulatory design and regulatory evaluation requires governments to develop sophisticated tools for analysing the compliance strengths and weaknesses of (existing or proposed) regulations, and for developing strategies for ensuring compliance with policy objectives. Compliance analysis shows whether a proposed regulation is likely to achieve an acceptable level of compliance, and if so, how this can most effectively be achieved. Compliance analysis tools should also be sensitive to the fact that there will often be differing attitudes/groups within target populations. This means that a mix of policy instruments may be necessary to deal with both compliance "leaders" and "laggards".

If governments are to guard against compliance failures, it is important that they develop databases and methodologies for effectively measuring compliance rates. Monitoring compliance trends should also be a key part of *ex post* evaluation programmes for existing regulations. However, most governments find it difficult to collect aggregate and systematic data on compliance trends in other policy areas where quantitative outcomes are more difficult to measure. Monitoring compliance is a relatively new activity in OECD countries; there is little evidence at present that the results of compliance monitoring are used to modify ineffective policies and make enforcement more effective. Ideally governments would collect not only statistically valid behavioural compliance rates, but also outcome data on the achievement of their ultimate policy objectives, in order to determine whether compliance with the rules is contributing to accomplishment of policy objectives. Often these outcome measures are easier to collect than compliance measures.

Awareness of compliance problems is growing among OECD countries, but action to improve compliance is uncoordinated and unsystematic. Improving regulatory compliance requires increased attention to all elements of the chain of government action – from problem definition to compliance monitoring. Those involved throughout the process of developing and enforcing regulations need to be aware of the interdependent nature of their actions, and the need for consistency and co-ordination. Bringing about compliance-friendly regulation requires an integrated strategy.

5.4. Other mechanisms promoting regulatory implementation

The preceding sections examined administrative and judicial review and compliance-oriented regulatory design as key means of ensuring that regulation is implemented effectively and fairly and so is able to achieve its underlying objectives. However, the

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country review programme also indicates that other institutions of governance are making important contributions in this area. The use of an Ombudsman is becoming increasingly widespread, with countries as disparate as Greece and Korea establishing an Ombudsman's office during the 1990s. The Ombudsman mechanism is particularly important in this context for several reasons: it provides a low-cost means of seeking redress, available to virtually all groups in society, it operates informally and has a wide-ranging remit, and it reports to parliament, thus providing for a high level of independence and transparency.

Similarly, national Audit Offices have in many countries, such as Canada, the United Kingdom and Australia, progressively widened their role from a purely accounting perspective. They now often play an important part in assessing the performance of the administration, including its effectiveness in implementing regulation. For example, the OECD Report on Regulatory Reform in the United Kingdom found that the National Audit Office had delivered a number of reports with constructive recommendations, such as reports on making good use of regulatory impact assessments and on network utility regulation.[10] Audit Offices operate at the opposite end of the spectrum to the Ombudsman, being focussed on systemic performance and outcomes. However, they share similar advantages in being independent from government (usually reporting to Parliaments), transparent in their operations and able to operate in a wide range of areas.

These developments indicate that the issues of regulatory implementation are receiving substantially increased attention across a wide range of government institutions and that different mechanisms are used to deal with the wide range of implementation issues that can arise. They also indicate a positive trend in general in terms of transparency and accountability.

Notes

1. OECD (2001b).
2. Much of this section is from OECD (2000c) (available at *www.oecd.org/regreform*). See also OECD (1993).
3. Genn, H. (1993), pp. 219-233, p. 227.
4. Coffee, J. (1981), pp. 386-459.
5. Overly legalistic regulation can also make compliance too costly and regulation too complex to know and understand.
6. Bardach, E. and Kagan, R. (1982), p. 107.
7. OECD (1999b).
8. Information on the T11 was supplied by Dr. Dick Ruimschotel, PO Box 2 681, 1 000 CR Amsterdam. Ph.: +31 20 520 0 420, Fax: +31 20 520 0 421. See also OECD (1999d).
9. OECD (2000c), (available at *www.oecd.org/regreform*).
10. OECD (2002d).

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Chapter 6

Institutions to Drive Regulatory Policies

The role of institutions has been largely neglected in public policy discussion until recent times, but it is now receiving considerable attention. This report has focused to a large extent on designing and applying high quality regulatory instruments, but without the right set of institutions to ensure regulatory implementation, the regulatory instrument will be useless. The institutions required to take forward the regulatory policy agenda are numerous and of many kinds. They include regulatory oversight bodies, within Cabinets and the executive government, within administrations and, increasingly, within Parliaments. They also include independent regulators, as well as other key contributors to regulatory quality, such as specialist law drafting offices.

6.1. Regulatory oversight bodies

The 1997 OECD Report recommended that governments "create effective and credible mechanisms inside the government for managing and co-ordinating regulation and its reform". Country experiences show that a well-organised and monitored process, driven by "engines of reform" with clear accountability for results, is important for the success of the regulatory quality policy. There are several reasons for this. Maintaining consistency and systematic approaches across the entire administration is necessary if reform is to be broad-based and credible. It is often difficult for regulators to reform themselves or integrate new quality disciplines, given countervailing pressures. In Korea, it was found that, prior to establishment of a central regulatory reform committee, "The reform methods employed up to 1997 can be described as a 'bottom-up' approach. Under the 'bottom-up' approach, regulators themselves are responsible in determining which regulation to reform or abolish. Calling for a 'bottom-up' approach in reforms is tantamount to the public asking the regulators to admit that their rules were somehow mistaken or misguided."[1]

Promoting reform requires the allocation of specific responsibilities and powers to agencies at the centre of government to monitor, oversee and promote progress across the whole of the public administration. All countries agree that the primary responsibility for quality regulation and reform must be at the level of the ministry or independent regulator. It is where the expertise lies, and where policies are formulated. Yet most governments have established central regulatory co-ordination and management capacities, (*i.e.* regulatory oversight bodies) supported by ministers with whole of government responsibilities for regulatory policy. In fact, the establishment of these bodies in OECD member countries is one of the most visible signs of the integration of regulatory reform into government management systems. In some countries, such as Norway and the Netherlands, two or three bodies with responsibilities for aspects of regulatory policy co-ordinate formally and informally to drive the policy and push for reforms. Paralleling the multi-faceted nature of regulation, regulatory oversight bodies have been created in administrative, political, and intergovernmental institutions at every level of government.

In several countries, regulatory oversight bodies are supported by other reform-oriented groups, such as ministries of finance and competition and trade authorities. In 2000,

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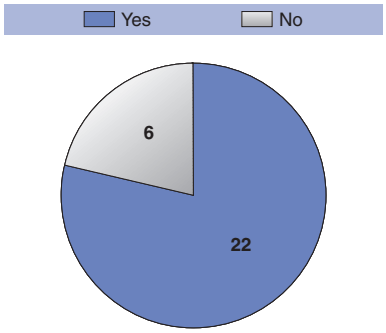
competition authorities in 14 out of 28 countries had roles in reviewing regulatory proposals for their potential impacts on market entry and competition. Private sector engines of reform, such as advisory bodies or private initiatives, can also be helpful in identifying priorities, proposing specific reforms and providing advocacy for reform in general.

Figures 6 and 7 provide a snapshot of the number of regulatory oversight bodies in place by the end of 2000. Figure 6 shows that accountability for progress was assigned to the ministerial level in most countries. Ministerial responsibility has steadily increased over the past several years, which signals that regulatory reform issues are becoming higher priorities on political agendas. The "delegated responsibility" model which relies on ministerial discretion will continue to be used, but within that framework reformers are seeking ways to mandate good decision practices, and reinforce ministerial accountability and incentives for action. In Australia, for example, discretion to exempt rules from review tends to be located higher in the hierarchy, with Prime Ministers rather than ministers, and in some jurisdictions ministers are required to formally "certify" that they have met applicable requirements for regulatory procedures or quality.

Figure 6. **Responses to the question: Is a specific minister accountable for promoting government wide progress on regulatory reform?**

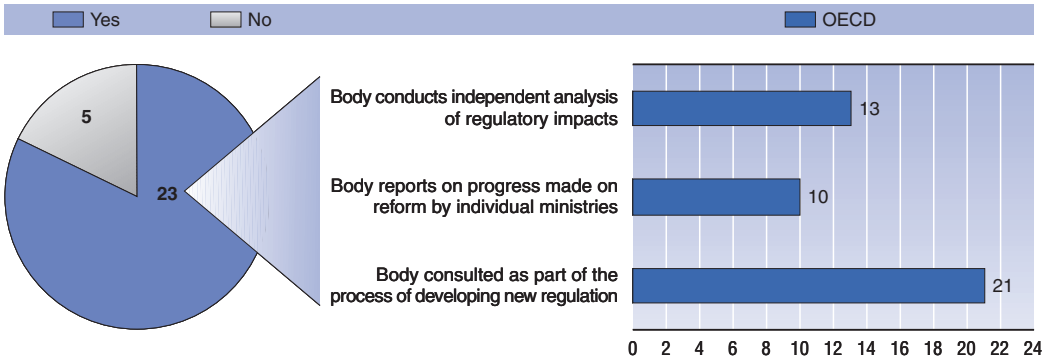


Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries, Paris.

Figure 7 shows that, to carry out the policy, some 23 out of 28 surveyed OECD countries had, by end-2000, established a dedicated unit to play a role in managing regulatory quality, compared with 14 in 1996. Most are located within administrations, although advisory commissions, regulatory reform committees of Cabinet, parliamentary committees and intergovernmental committees are also relatively widespread.

Traditions of ministerial independence in regulatory matters have proven to be a powerful force against central regulatory management, requiring a careful balancing between co-operative and confrontational relationships with the regulators. However, it is notable that a higher degree of central control over issues of legal quality, budget impacts and public service staffing policies has long been accepted in most countries, suggesting that existing notions of ministerial independence in regulatory quality matters may not be immutable. In general, experiences in OECD countries show that reforms to improve the quality of the regulation will fail if it is left entirely to regulators, but will also fail if it is too centralised. Regulators must take primary responsibility under a system of incentives overseen by regulatory management and reform bodies.

Figure 7. **Responses to the question: Is there a dedicated body responsible for encouraging and monitoring regulatory reform and regulatory quality in the national administration?**



Source: OECD (2000) Responses to the Survey on Regulatory Capacities in OECD Countries, Paris.

Responsibilities for regulatory policies are usually established both at political and administrative levels. At the political level, two common alternatives are the nomination of an individual minister as responsible for regulatory reform or the establishment of a Ministerial Committee to take collective responsibility. The use of a Committee has the advantage that the degree of authority exercised is likely to be greater than that which any individual minister can bring to bear, while there is necessarily a large element of "buy in" to the reform policies by a significant sub-section of the Cabinet. An effective example of this approach is the Ministerial Committee responsible for directing the MDW (Functioning of Markets, Deregulation and Legislative Quality) Programme in the Netherlands.[2]

At the administrative level, most countries believe that strong central oversight bodies close to the centre of government are essential to progress. There has been a rapid shift in the location of these units toward the centre of government. Currently 20 of 22 countries with such units locate them either in the Prime Minister's Department/ Office of the President or else the budgeting agency, compared with fewer than half of the countries with dedicated reform bodies in 1996. This rapid shift suggests increasing recognition that the effectiveness of these bodies is enhanced by their being directly linked to the centres of political and administrative authority. It is also consistent with the progressive broadening of the goals of regulatory policies. When the policy was considered primarily a matter of improving the business environment by removing "unnecessary" or "excessive" regulation, it seemed logical for a reform body to be located in an Industry Ministry. Where the primary goal was to ensure high standards of legal quality, location in the Ministry of Justice was favoured. However, as the focus has shifted to a broad conception of regulatory quality and a dynamic approach to regulatory management, location in chief ministers' departments or ministries of finance has increasingly been preferred. This move can assist in developing an understanding of reform as a tool of more efficient and effective government, rather than a policy designed to benefit particular sectional interests.

Despite this general trend, some small countries with traditions of co-operation and consensus have continued to prefer more decentralised solutions. They have also argued that in small administrations the whole apparatus might be redundant and bureaucratic.

Norway, for example, has taken this view. However, rejection of a central regulatory oversight body does not imply the absence of co-ordination on regulatory policy issues. The Danish government, for example, has promoted the co-ordination of reforms across the public administration by establishing an inter-ministerial co-ordinating body on regulatory reform (the Regulation Committee), despite not having established a central oversight unit within the administration until very recently.

Not surprisingly, the strongest central units to promote and oversee regulatory quality are in three countries with presidential systems – Korea, Mexico, and the United States. All three countries have established powerful bodies independent from the regulating bodies, with a variety of legal, procedural, and managerial authorities (Korea and Mexico have created high-level commissions, the United States has built regulatory quality management into its central management and budgeting institution). All three countries have made impressive gains in improving their domestic regulatory systems. More so than most parliamentary systems, presidential systems have the capacity for cross-cutting, top-down policy reforms, and have a tradition of institutional structures to carry out presidential policies.

In countries with relatively weak centre of government co-ordination and management functions, this trend is less apparent. However, increasing attention has been paid to co-ordination between agencies with responsibilities for particular aspects of the regulatory reform programme. For example, in the Netherlands, the Ministries of Justice, Environment and Economic Affairs now co-operates in providing "helpdesk" service that is at the heart of attempts to improve RIA standards across the administration. Many countries, including Germany, Japan, and Portugal have also created independent high-level commissions to assist in determining the shape of regulatory reform policy. In some cases, these have been means of ensuring dialogue with key groups, usually predominantly the corporate sector, and can be seen essentially as a part of the consultative structure of government. In other cases, their function has been central to the development of reform policy.

The 1997 OECD Report noted that there was a split between civil law countries, which favour *ad hoc* commissions, and common law countries, which favour reform bodies within the administration,[3] attributing the pattern to differing legal traditions and institutional dynamics. There is evidence though, that this distinction, if it ever existed, may be breaking down, as countries show greater flexibility in adapting traditional approaches to achieve better results. In fact, the most remarkable aspect of the use of oversight bodies is the variety of different structures and roles that have been developed.

Among reform bodies established externally to the administration, the key distinction is between those that are permanent and those that have a more limited mandate. Where a limited mandate is granted, it generally coincides with the implementation of a major, one-off regulatory reform effort. For example, Australia's Small Business Deregulation Taskforce was created by a new government in 1997 to recommend ways of implementing its ambitious goal of reducing regulatory burdens on business. Permanent committees are perhaps more numerous, perhaps indicating a growing understanding of the regulatory quality agenda as a permanent responsibility of government, rather than as an episodic "regulatory reform" effort. Such permanent committees frequently change over time, in terms of both their composition and the

tasks allocated to them, as government priorities change and evolve. For example, Britain's Better Regulation Task Force, with its broad membership drawn for business, academia, local government and NGOs, evolved from the earlier Deregulation Task Force, which had a narrower, more business oriented membership and, as its name implies, a greater focus on deregulation. By contrast, the current taskforce provides the government with advice and proposals on a wide range of regulatory reform issues and takes on an important advocacy function.[4] An unusual variant of the external advisory group model is provided by Korea's Regulatory Reform Committee, which combines both Ministerial and private sector members.

Despite the wide-variety of bodies operating beyond the administration, regulatory oversight bodies within existing ministries remain much more common. Such bodies are better able to play an active role during the policy development process, identifying emerging problems and lobbying within government for changes to improve quality. The fact that they are staffed by experienced administrators who are deeply familiar with institutional issues and other constraints, also improves their potential effectiveness and, potentially, their credibility among regulators. There has been a long-term movement of these bodies toward centre of government, where most are now located. Nonetheless, many countries continue to share responsibilities for different aspects of reform among different ministries. For example, and as indicated above, the Dutch "helpdesk" model is a co-operative endeavour involving three ministries. In countries with relatively decentralised models of government administration, such a division of responsibilities between agencies may be inevitable. However, it may also be that the increasing range and complexity of the regulatory review policies followed in many countries has also favoured this outcome.

What do the regulatory oversight bodies accomplish?

The specific roles of these regulatory quality institutions are highly dependent on context, varying quite widely in terms of the degree of centralisation of oversight authority. Since regulators themselves (usually as represented by the responsible minister) are primarily responsible for carrying out reform, the management of regulatory reform is essentially decentralised, with varying levels of government-wide quality control, persuasion, and oversight provided by the reform bodies. Nowhere do regulatory management bodies have authorities approaching those wielded by, for example, budget offices, to protect cross-cutting policy objectives.

Figures 6 and 7 above summarise the responses to the questionnaires of the OECD *Regulatory Capacities Database* in both 1998 and 2000. They illustrate some of the variety of roles that the regulatory oversight bodies undertake. Almost all are involved directly in the regulatory development process, at least to the extent of being consulted as a part of the process of developing new regulation. More than half have a more direct role, being able to conduct independent analyses of regulatory impacts. Slightly fewer than half enjoy a more "strategic" role, being responsible for reporting on overall reform progress made by individual ministers. Interestingly, the numbers exercising this latter role appear to have declined significantly between the 1998 and 2000 questionnaires. Review of this material and of the country reviews of regulatory reform suggest that the

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tasks undertaken by these regulatory oversight bodies can be grouped into three broad types, as follows:

Providing advice and support

A fundamental role is to increase regulatory capacities throughout the administration as a means of ensuring systematically that higher quality regulation is generated. Key tasks in support of this role include the publication and dissemination of extensive written guidance and the conduct of training in regulatory quality issues. In addition, specific expertise can be provided to regulators in the context of their development of particular regulations, either through mechanisms such as the Dutch "help desk", which provide expert input directly, or through the ability to fund the employment of outside experts to complete specific tasks.

This role is, potentially, the one with the greatest long-term impact in implementing regulatory policy, since it is based on the need to achieve cultural change among regulators. However, the country reviews suggests that many of these tasks receive relatively little priority. The provision of training on regulatory quality issues, in particular, has been cited as an important priority for improvement in virtually every country review. It may be that, given the limited resources available to most oversight groups, it is difficult for them to divert resources to such uses and away from more immediate tasks such as those involved in exercising the challenge function (see below).

The challenge function

A second role is characterised in Canada as "the challenge function". Here, the focus is on reviewing new regulatory proposals during the policy development process and working to improve quality. The central mechanism for adopting this role is the undertaking of a quality review of RIA.

A central pillar of regulatory policy is the concept of an independent body assessing the substantive (*i.e.* rather than legal) quality of new regulation and working to ensure that Ministries comply with the quality principles embodied in the assessment criteria. The regulatory challenge function centres on this ability of the oversight body to question the technical quality of RIA and of the underlying regulatory proposals. To perform these tasks, the oversight body needs the technical capacities to verify the analysis of impacts and the political power to ensure that its view prevails in most cases, rather than being overridden.

This requirement is one substantive reason for the above-noted long-term tendency to relocate regulatory oversight bodies (and hence the challenge function) at the centre of the government. However, this itself is not without risks. Because an objective assessment can be very disruptive in terms of regulatory processes (especially if RIA is not conducted and assessed as early as possible in the policy process), a clear separation between the regulatory oversight body, as the examiner of RIA, and the gatekeeper to the Cabinet, may be required in order to preserve the independence and freedom to act on the former. Similarly, the requirement for a clear distance between the role of assessor and of enforcer needs to be maintained, in order to safeguard a robust assessment process, reduce any potential "conflict of interests", and create a tension for the regulatory oversight body between its challenge function and its advice and support function. Developing too close relationships in the context of carrying out the latter can clearly tend to undermine its ability to carry out the former role in a strong and independent manner.

The powers wielded by oversight bodies in carrying out the challenge function are of two basic types. First, and more common, is when the oversight body provides to a regulator an assessment on the quality of a regulation (*i.e.* RIA), pointing out flaws and shortcomings and proposing improvements. It may also lobby within government, seeking the support of other Ministries for its view. In some cases the oversight body may publish its comments and assessments, thus providing a powerful pressure for improved performance under a "shame and blame" system. The second, and rarer, form of power is that of the "gatekeeper". That is, when the oversight body has a veto on the quality of the proposed regulation. In some countries (*e.g.* Australia), approval of the adequacy of each RIA is required to be obtained from the oversight body before the regulatory action proceeds. These requirements are rarely absolute, being capable of being over-ridden in various ways, but provide an additional "lever" for the oversight body as well as carrying a broader message as to the level of authority the government has vested in it. A variant of these powers is the opportunity for the oversight body to provide comments challenging the policy in the context of its submission to final decision-makers, whether Cabinet or Parliament. Again, the possession of such a power by the oversight body sends a clear signal to regulators that its views must be weighed seriously.

Other factors contributing to the successful exercise of the challenge function are the need for the oversight body to be working under a clear regulatory policy endorsed at the political level, for it to be adequately resourced, including sufficient expertise in relevant disciplines to allow it to exercise independent judgement, and for it to be linked to existing centres of administrative and budgetary authority (*i.e.* centres of government and/or finance ministries).

Advocacy

Advocacy of regulatory reform is the third major role of a regulatory oversight body. In this context, advocacy refers to the promotion of long-term regulatory policy considerations, including policy change, development of new and improved tools and institutional change, rather than to the context of daily regulatory management functions. Examples of oversight bodies that have played a large role in this regard include The Economic Council of Canada (until its demise in the 1990s) and the UK's Better Regulation Task Force).

The importance of the advocacy function is threefold. First, expert regulatory reformers are clearly the best placed to identify new and promising tools and practices to advance regulatory quality. They also have a broader, government-wide view on regulatory affairs helping coherence and reducing overlap and duplication. Thus, they can advocate reforms to regulatory frameworks in order to enhance their dynamic evolution. Secondly, advocacy also helps to monitor the benefits deriving from reform and disseminate this information within government and the society generally (*i.e.* cross-fertilise regulatory innovations). Lastly, a regulatory advocate can help build and maintain constituencies for reform and undermine vested interests in their efforts to oppose socially beneficial reforms.

The advocacy role can therefore embrace strategies such as publication of information on reform outcomes within and outside government, providing input to inquiries and other policy processes and identifying and promoting new tools and institutional approaches.

Performance assessment

Unsurprisingly, most of the central oversight units argue that they have had a significant, though usually unquantified, role in improving the quality of regulations that are adopted. Quality improvements arise through weeding out poor regulations, better structuring the

decision process so that debates are more honest and fruitful, and in increasing the net benefits of regulations adopted. In Denmark, for example, the intervention of the Regulatory Committee in questioning the need for new laws reduced the size of the legislative agenda in 1998 and 1999 by about 25% compared to earlier years. Another major benefit seen in Denmark is an improvement in parliamentary scrutiny of bills, due to the Committee's ability to ensure that they are introduced to the Parliament earlier in the parliamentary session, providing more time for committee review and parliamentary debate. The number of regulations in Korea were reduced by 50% in less than a year due to the work of the Regulation Committee, perhaps the most visible result of any of the central units.

The OECD country reviews clearly indicate, however, that regulatory managers typically have too little authority and resources to carry out the tasks they are given. They are frequently overwhelmed by the sheer number and complexity of the regulations produced by the ministries. This suggests that the single most important decision of the central units is the prioritisation of their limited resources toward the most important regulatory decisions.

An important step is that regulatory oversight units have become a permanent part of public sector management at federal and state levels. Although their functions and authorities continue to evolve as reformers seek more effective approaches, these units have developed a set of skills and experiences of great value to modern government. Further, the systematic processes of regulatory monitoring, tracking, and oversight for which they are largely responsible enable governments to detect regulatory problems earlier, and to move more quickly in response.

The over-all evolution of the regulatory policy agenda can be speeded up by the right regulatory management structure. Dynamic change can be driven by central units with longer term, whole-of-government views. In the longer term the regulatory management units should be responsible for continuing adaptation and improvement of regulatory systems as external conditions change, information becomes available and new problems arise.

6.2. Emerging role of independent regulators

One of the most widespread institutions of modern regulatory governance is the so-called independent regulator or autonomous administrative agencies with regulatory powers. That is, regulatory institutions at arm's length from the ministries or even from executive power. The use of this kind of institution has mushroomed during the 1980s and 1990s and continues to increase, particularly in connection with the privatisation of former state-owned enterprises and establishment of competition in formerly monopoly based industries.[5] They are found particularly in utility sectors with network characteristics such as energy and telecoms, and in other sectors where sector-specific prudential oversight is needed, such as financial services. Dozens of these bodies have been set up in OECD countries in the last few years alone. This trend is fuelled by WTO agreements, by reforms in Europe from the Single Market, and by policy advice from the OECD, the World Bank, the IMF, and other international institutions. The regulatory practices of these bodies substantially influence the quality of national regulatory regimes.

Table 3 below shows how rapid the emergence of these bodies has been. In the telecommunications sector, few countries had set up regulatory bodies before 1990, but 20 countries – or two thirds of the OECD membership – did so in the ensuing decade, most since 1995. In energy, 11 countries have set up independent regulators during the 1990s. Many countries have also strengthened the independence and other governance structures

Table 3. **A selection of sectoral regulatory and competition authorities in OECD countries**

	Telecommunication	Energy	Financial sector	Competition authority
Australia	Australian Communications Authority (ACA) (1997); Australian Competition and Consumer Commission (ACCC)(1995)[1]; Australian Broadcasting Authority (ABA) (1992)	Australian Competition and Consumer Commission (ACCC)(1995)[1]	Australian Prudential Regulation Authority (APRA) (1998) Australian Securities and Investments Commission (ASIC) (1998)	Australian Competition and Consumer Commission (ACCC)(1995)
Austria	Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR GmbH) (2001)[Formerly Telecom Control (TKC)(1997)]; The Telekom-Control Commission; The Austrian Communications Authority (KommAustria)			Kartellgericht (Competition Authority)
Belgium	Belgian Institute for Postal Service and Telecommunications (BIPT) (Year?)	The Electricity and Gas Regulation Commission (CREG)		Conseil de la Concurrence (Competition Authority)
Canada	Canadian Radio-television and Telecommunications Commission (CRTC) (1968)	National Energy Board (1959)*		The Federal Competition Bureau
Czech Republic	Czech Telecommunication Office (2000); Council for Radio and Television Broadcasting (1992)[2]	Energy Regulatory Office (2001)	Czech Securities Commission (1998);[3] Czech National Bank	Czech Office for Economic Competition (1991)
Denmark	National Telecom Agency (NTA) (1991)[4]	Energy Supervisory Board (1999)[5]		The Danish Competition Authority; The Competition Council (Konkurrenceradet) Pre-1990
Finland	Finnish Communications Regulatory Authority (2001) [formerly Telecommunications Administration Centre (TAC) 1988]	The Energy Market Authority (2000) (Formerly the Electricity Market Authority (SMK) (1995)		The Finnish Competition Authority (FCA) (1988)
France	L'Autorité de Régulation des Télécommunications (ART) (1997)	Electricity Regulation Commission (2000)		Conseil de la Concurrence (The Competition Council) (1 December 1986)
Germany	Regulatory Authority for Telecommunications and Posts (Reg TP) (1 August 1996)[6]		Supervisory Board for Financial Services (Bundesanstalt für Finanzdienstleistungsaufsicht) (May 2002)	Bundeskartellamt (The Federal Cartel Office)
Greece	National Post and Telecommunications Commission (EETT) (1998)[7]	Regulatory Authority for Energy (1999)	Capital Markets Commission (1996)	Competition Committee (1991, strengthening an existing body)
Hungary	Communication Authority, HIF (1993)	Hungarian Energy Office (Magyar Energia Hivatal, MEH) (1994)		Office of Economic Competition, HCO (1990)
Iceland	Post and Telecommunication Administration (PTA) (1999)			
Ireland	Director of Telecommunications Regulation (ODTR) (1997)[8]	Commission for Energy Regulation (2002)[9]	Irish Financial Services Regulatory Authority (IFSRA) (2002)	Irish Competition Authority (1991)

Table 3. **A selection of sectoral regulatory and competition authorities in OECD countries** *(cont.)*

	Telecommunication	Energy	Financial sector	Competition authority
Italy	Communications Authority (for telecoms, television, and publishing) (1997)	Energy Authority (1995)	Banca d'Italia (considered an independent authority only for its competition competencies); ISVAP; CONSOB	Competition Authority (1990)
Japan			Financial Supervisory Agency (1998)	The Japan Fair Trade Commission (Pre-1990)
Korea			Financial Supervisory Commission (1998, unifying several separate bodies)	Korea Fair Trade Commission (1990, building on earlier bodies)
Luxembourg	Institut Luxembourgeois des Télécommunications (ILT) (1997)	Luxembourg Telecommunications Institute, LTI		
Mexico	Federal Telecommunication Comision Federal de Telecommunicaciones (COFETEL) (1995)	Regulatory Energy Comision Reguladora de Energia (CRE) (1995)	Banco de Mexico (The Central Bank); The Banking and Security Industry Commission (Comision Nacional Bancaria y de Valores)	Federal Competition Comision Federal de Competencia (CFC) (1993)
Netherlands	Independent Posts and Telecommunications Authority (OPTA) (1997)			Netherlands Competition Authority, NMA (1998)
New Zealand				Commerce Commission (1986)
Norway	Norwegian Post and Telecommunications Authority (NPT) (1997)[10]	Water Resources and Energy Directorate (NVE) (1986)	The Banking, Insurance and Securities Commission of Norway (Kredittilsynet) (1986)	The Norwegian Competition Authority (NCA) (1994)
Poland	Office of Telecommunications and Post Regulation (URTiP) (replaced URT (Office of Telecommunications Regulation, Oct 2000) on 1 April 2002	Energy Regulatory Authority (1997)	the Bank Supervision Commission (1997); the Polish Communication Insurance Office; the Insurance Guarantee Fund; the National Insurance Supervision Fund; the Bank Guarantee Fund (1990, 2000); the Pension Funds Supervision Office (1997); the Health Insurance Supervision office (1997); The Spokesman of the Insured (1990, 1996)	Office for Competition and Consumer Protection (OCCP)
Portugal	Autoridade Nacional de Comunicações (ANACOM) (formerly ICP created in 1981)	Entidade Reguladora do Sector Electrico (ERSE)		The Competition Council
Slovak Republic	Office of Telecommunications (2000)			
Spain	Commission for the Telecommunication Market (CMT) (1997)	National Energy Commission (Comision Nacional de Energia)	National Commission of the Securities Market, CNMV (1997, reformed)	Direccion General de Politica Economica y Defensa de la Competencia (Spanish Competition Authority); Tribunal de Defensa de la Competencia (The Spanish Competition Tribunal) (Pre-1990)
Sweden	Post-och telestyrelsen, the Swedish National Post and Telecom Agency (NPTA) (1994) (formerly Telestyrelsen, the Swedish National Telecom Agency, 1992)	Swedish National Energy Administration (1998)	Financial Supervisory Agency (Fiansinspektionen)	Konkurrensverket (Swedish competition authority) (July 1, 1992)
Switzerland	Communications Commission (ComCom) (1997); Federal Office for Communication (OFCOM) (1992)		Federal Banking Commission	Commission de la concurrence

Table 3. **A selection of sectoral regulatory and competition authorities in OECD countries** *(cont.)*

	Telecommunication	Energy	Financial sector	Competition authority
Turkey	Telecommunication Board (2000)	Energy Market Regulatory Board (2001)	Banking Regulation and Supervision Agency (1999);[11] Capital Markets Board (1982)	The Turkish Competition Board (1994)[12]
United Kingdom	Office of Telecommunications (OFTEL) (1984)	Office of Gas and Electricity Regulation (OFGEM)[13] (1999)	Financial Services Authority (FSA) (1986) under the Financial Services Act (renamed in 1997)	The Competition Commission[14] The Office of Fair Trading (OFT)
United States	Federal Communications Commission (FCC) (1934)	Federal Energy Regulatory Commission (FERC)[15](1977); Different State Public Utility Commissions		Department of Justice (DOJ); Federal Trade Commission (FTC) (1914)

Note: The date corresponds to the year of creation or of last substantive reform.
In this table only autonomous ministerial agencies and independent regulatory bodies are listed. Other semi-autonomous institutions such as regulatory units within ministries or advisory bodies were excluded. For further discussion on the typology, see source below.

1. At the Federal level.
2. Its powers were enhanced from 2001.
3. It has no rule-making authority but operates as an enforcer and monitor of the market.
4. Restructured with effect from 1 January 1998.
5. Created to replace the Electricity Price Committee and the Gas and Heat Price Committee.
6. The Regulatory Authority was set up as provided for by the Telecommunications Act, in force since 1 August 1996 but only took up its work on 1 January 1998.
7. Established in 1992 by Act 2 075 under the name The National Telecommunications Commission (EET), EET actually commenced its operation in summer 1995. It was renamed as National Telecommunications and Post Commission (EETT) in 1998.
8. It was assigned regulation of postal services in 2000.
9. Formerly Commission for Electricity Regulation, CER (1999).
10. Established in 1987 as the Norwegian Telecommunications Regulatory Authority. It was assigned the monitoring of the postal market in 1997, hence the change of name.
11. Started to operate only on August 31, 2000.
12. Started to operate only in 1997.
13. Formed by combining the functions of the former Office of Gas Supply (OFGAS) and the Office of Electricity Regulation (OFFER).
14. It replaced the Monopolies and Mergers Commission (MMC") on 1 April 1999.
15. To replace the Federal Power Commission.

Source: OECD, various studies; IEA, *Regulatory Institutions in Liberalised Electricity Markets*, Paris; OECD (2002), *Governance of OECD Sectoral Regulators*, Paris, (forthcoming).

of their sectoral regulators during this period. Ten countries have created or substantially strengthened independent competition authorities, which have roles in regulating the network industries. Other bodies are being established in other sectors and policy areas.

The key benefits sought from the independent regulatory model are to shield market interventions from interference from captured politicians and bureaucrats. Independence protects regulators from influence of particular interests, such as the firms regulated, the financial institutions, or other non-governmental groups. Independence also improves transparency, stability, and expertise. Accountability may also be improved particularly where detailed laws setting out explicit objectives govern the regulators and specific requirements to report to the government or parliament are established. There is little doubt that compared to regulatory functions embedded in line ministries without clear mandates for consumer welfare, the independent regulators represent an important improvement. This theoretical point is supported by the empirical observation that the economic benefits of market opening – in terms of both domestic and international investment – have been greatest in precisely those sectors – financial services and telecommunications – where independent regulators are most prevalent, though the causality is not entirely clear. But independent regulators are not immune to serious risks, such as capture, or may contribute to expensive regulatory failures. Furthermore, they can create new potential problems that have not been adequately assessed. A critical assessment of the performance of independent regulators is needed to determine if improved design can avoid future problems with regulatory quality.

In its reviews of regulatory quality in 16 countries, the OECD welcomed the move to establish independent bodies since this trend offers great potential in improving regulatory efficiency. Specialised and more autonomous regulators have created important "checks and balances" to match the powers of ministries and interest groups. They are likely to yield faster and higher quality regulatory decisions and be characterised by more transparent and accountable operations, *vis-à-vis* the Ministry alternative. Where they have been most effective and credible, their independence and roles are based on a distinct statute with well-defined functions and objectives. They also require an adequate resource base and a flexible staffing policy that allows the body to attract and keep competent staff. To give financial independence from the government budget, in Ireland and in some Australian states independent regulators are authorised by Parliaments to raise fees for licences and levies on the regulated industry. This has allowed the regulators to have adequate staff, premises, equipment, services and other resources necessary for their operation.

However, several risks associated with independent regulators could reduce longer-term regulatory quality in these vital infrastructure sectors.[6]

- **Independent regulators may slow structural change**, losing potential gains to consumers. Regulators are often established on sectoral lines and may tend to obstruct convergence between sectors and the emergence of new business models. Similarly, as regulators proliferate, institutional rigidities may increase.
- **The risk of capture is reduced, but not eliminated if the regulator face structural weaknesses**, particularly with sectorally defined regulators lacking resources. Similarly, over-regulation may result where static institutions wish to guard their *raison d'être*.
- **Democratic accountability may be inadequate.** Independence needs to be balanced with accountability mechanisms to avoid creating "governments in miniature".[7] Accountability must be maintained through well-designed statutes, including executive

oversight and powers of direction, strict procedural requirements, reporting mechanisms, public consultation and substantive judicial review.[8]

- **Independent regulators may contribute to the fragmentation of governmental policies and actions,** in particular in the case of competition policy. As sectors restructure and become more competitive, sector-specific issues become less important *vis-à-vis* general competition issues. But inertia and resistance from the regulator is likely to impede transfers of power to the overarching competition regulator. Weaknesses in the judiciary and/or legislative branch also have an impact on the overall performance of the independent regulators.

Many of these risks can be minimised by careful regulatory design but, in many cases, the roles of the principal regulatory authorities have not been clearly defined, and accountability mechanisms have remained opaque. Legal authorities were too weak in some cases, and too wide-ranging in others. Without an explicit set of criteria, priorities and terms of engagement with ministerial agencies, adding non-economic objectives to the mandates of regulators may also reduce their overall performance and reduce the degree of clarity concerning their responsibilities. In some cases, regulators are subservient to ministers, and in others regulators have too much discretion to direct market players. Few countries have a co-ordinated institutional framework for creating and operating sectoral regulators. They tend rather to be established in an *ad hoc* manner, often due to an international obligation or commitment.

Accountability to ministers and to the parliament is a continuing concern that no country has addressed to its satisfaction. Replacing direct political accountability based on ministerial responsibility with managerial/technical accountability between regulators and ministries as well as parliament can create new potential problems. There is the risk that such parliamentary overview will be too loose, allowing the regulator too much or inappropriate discretion, particularly considering that in some countries existing parliamentary staff can be inadequate to support Parliaments to exercise review functions in relation to complex, technically driven regulatory missions. On the other hand, it is important that accountability requirements do not compromise the necessary operational independence of the regulators. A too interventionist Parliament may have the effect of driving the regulator toward making specific market decisions not linked to its regulatory mission. One of the few countries to launch a wide debate on the accountability of the new regulatory bodies is Ireland. In March 2000, the Minister for Public Enterprise published a policy paper entitled Governance and Accountability in the Regulatory Process: Policy Proposals. The document attempts to resolve concerns about a "democratic deficit" which could have an impact on the credibility and legitimacy of the new regulatory institutions.[9]

It is too early to identify comprehensive best practices concerning independent regulators. Though the tendency to create new bodies is significant among OECD member countries, some countries have stated their intention to merge regulators or withdraw powers over economic sectors as effective competition becomes established, favouring the substitution of general competition laws for sector-specific laws at this point. So far, however, there are few concrete examples of regulatory withdrawal following the establishment of workable competition. It is clear, too, that important policy risks are associated with the use of independent regulators. Consideration of the use of

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independent regulators, and of the design of such regulators, should include careful consideration of issues including the following:

- Whether the appropriate model is that of a sector specific regulator or of one or more multi-sectoral regulators. The possible benefits of the former, in terms of greater specific focus and accountability and the ability to build specific expertise may be more than outweighed by concerns about less than optimal use of scarce human resources, duplication between bodies, increased institutional rigidity and fragmentation, and increased risk of regulatory capture.
- Ensuring an appropriate relationship between the Competition Commission and the sectoral regulators. Such relationships must take care to avoid fragmentation of competition policy and the application of inconsistent approaches, while acknowledging important sector-specific issues. Clear understanding of which issues are transitional in nature and mechanisms to ensure regulatory "evolution" during the transition are required.
- Ensuring regulatory quality control. The regulations produced by the regulators should be subject to the regulatory quality management system, such as transparency and RIA requirements.
- Co-ordination and harmonisation mechanisms are required. Where theoretical foundations are similar, essential issues like controlling prices or managing access arrangements for "essential (or network) facilities" or interconnection prices should be approached consistently by different regulatory agencies unless sector-specific structural differences in the industries require divergence.
- Judicial review arrangements must be carefully designed to avoid transforming the appealed judge into the ultimate regulator. Statutes must give clear guidance as to the objectives of regulatory regimes and their relationship to broader issues. Careful thought must be given to the grounds for judicial review and the remedies to be made available.

These issues have led the OECD call for comprehensive reviews of the functioning of the independent regulatory bodies to identify problems and develop consistent solutions. More work by the OECD itself to monitor and assess best practices in the design of these important regulatory institutions would further assist countries in ensuring that they yield the expected benefits in market performance, while respecting norms of transparency and accountability.

Notes

1. OECD (1998a).
2. The MDW programme however is co-ordinated and managed on a daily basis by the Ministries of Justice and Economic Affairs (responsible for competition policy).
3. See OECD (1997c), p. 211.
4. OECD (2002d).
5. Boards and other regulatory commissions have been part of the regulatory scenery in countries like the United States in Canada since the 1920s if not before. However, the widespread privatisations of the 1980s and 1990s have seen much greater use of institutions of this type in a wide range of OECD countries.
6. See OECD (2002b).
7. See OECD (2002c).
8. See Majone, G. (1993).
9. For discussion of governance and accountability see Government of Ireland, Department of Public Enterprise, 2000, Governance and Accountability in the Regulatory Process: Policy Proposals, March, Dublin. For a fuller discussion of "democratic deficit" in the regulatory process, see Ferris, Tom (2000).

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Chapter 7

The "State of Play" for Regulatory Policy

This report presents a picture of the emergence of the regulatory policy agenda. The agenda remains incompletely developed and is not, as yet, widely adopted. Moreover, new elements are emerging calling for "second generation" policies, institutions and tools and reforms. This report indicates, though, the continuing movement toward a broadening and deepening in countries' regulatory policies that continues to gather momentum and that has not been abandoned or reversed by any OECD country. Reflecting countries' experiences of the past decade, three important milestones can be identified. First, 1995 of the OECD *Recommendation on Improving the Quality of Government Regulation* constituted the first international standard on regulatory quality. As such, it marked the formal acknowledgement of a shift in approaches and objectives from making *ad hoc* improvements to regulatory structures to taking a systematic view of regulatory quality and the means of promoting and enhancing it.

Second, the publication of the OECD *Report on Regulatory Reform*, which was welcomed by Ministers in May 1997, saw the first formal acknowledgement of the importance of linking regulatory policy with other key elements of the government policy agenda, most notably competition and trade policy. The subsequent commencement of the "horizontal" programme of country reviews of regulatory reform can be seen as indicating a formal and widespread acceptance of the key aspects of the regulatory policy agenda. This involved the adoption of regulatory quality assurance policies as an essential element of broader government policy – in particular of structural reform programmes – and acknowledgement of the need to integrate regulatory policy with competition, trade and consumer policies.

Third, the OECD's work on governance includes a substantial emphasis on regulatory policies as a fundamental part of the work necessary in pursuit of its goals of transparency, accountability, legitimacy, efficiency and policy coherence.[1] This constitutes recognition that regulatory policy is a central element of the wider business of government and an integral part of its overall management capacities.

However, if the broad outlines of the regulatory policy agenda are becoming apparent, it is equally apparent that there are extensive gaps in implementation, and that much remains to be achieved. At the most fundamental level, the cultural changes among rule-makers and rule enforcers that are required to support a regulatory system that systematically generates high quality regulation and which is fully integrated with the governance agenda are yet to be seen. In most agencies in most countries, the focus continues to favour controls on the legal quality aspects of the rule over the tools and disciplines that promote regulatory quality in the broader sense of the overall ability of the regulation to meet regulatory objectives. Appraisals of these aspects of regulatory quality are still seen as "add-ons" – additional requirements that take time and sap resources – rather than as integral parts of the policy development process. Moreover, the degree of awareness of key regulatory quality issues, as well as the efforts undertaken towards implementing quality regulatory policies in practices remains highly uneven among OECD countries, while it seems that, in some dimensions, the gap between leaders and followers is growing.

This is perhaps inevitable, given the problems that continue to exist at the level of overarching government policy and institutional support. In sum, it might be said that the regulatory policy agenda shows a relatively high level of development of many of the individual policy tools required, but a much less well formed supporting architecture, embracing policies, institutions and integration with other policy agendas. A general summary of the "state of play" in relation to the regulatory policy agenda follows.

7.1. Government policies and rule-making tools

The OECD *Regulatory Capacities Database* indicates that almost all OECD countries have adopted policies on regulatory quality and that, in each case, the policy had been either issued, revised or reaffirmed by the present government. There is also strong evidence that the policies are frequently expanded and updated, progressively becoming more rigorous and farther reaching. In the broadest sense, then, virtually all governments have acknowledged the need for an overarching policy in this area as well as the need to consider it as an evolving document that must change and develop at frequent intervals.

Notwithstanding this, major shortcomings remain. Most policies are less than comprehensive in their coverage, while few incorporate explicit goals or targets with regular reporting requirements. Crucially, many policies do not explicitly propound the principles that must underlie the regulatory quality agenda, in particular its social welfare focus, thus allowing scope for the "capture" of reform efforts by business or other sectional interests. This undermines prospects for the establishment and support of a political constituency promoting high quality regulation as a common good.

Crucially, governments have in general not provided an adequate level of tangible support for the implementation of the policies. The resources devoted to regulatory oversight bodies are few, while the degree of authority conferred upon them is also typically limited. There has been a general improvement in the latter respect, with such bodies increasingly being located at the centre of government. However, governments have generally not conveyed a message that such bodies are expected to act as the agents of a fundamental cultural change within the administration. Success requires a re-engineering of policy development and review processes, rather than the grafting on of individual quality assurance tools such as RIA or consultation.

Substantial progress has been made in the development and the adoption of the key tools considered in this report but, again, it is clear that much remains undone. The use of Regulatory Impact Analysis has rapidly become widespread throughout OECD countries during the 1990s, yet its degree of integration with policy decision-making is low in almost all cases. It is typically regarded as an additional procedural requirement that, at best, explains the merits of a policy decision rather than determining the decision itself. This is a certain symptom of the absence of the cultural change required within the administration to implement the regulatory policy agenda.

The use of RIA also remains partial, with large parts of the regulatory structure in most countries not being subject to its disciplines at all. Important weaknesses in the use of quantification methods, and in particular benefit-cost techniques and evidence-based justifications prevail. Moreover, it remains separated from consultation processes in too many cases, thus reducing its ability to generate the data needed to maximise its effect on decision-making and, at the same time, undermining its acceptance by stakeholders and

the public and thus slowing the cultural changes needed to ensure it becomes a key part of the decision-making process.

The use of consultation itself is considerably further advanced, reflecting the longer standing nature of this tool, as well as a stronger commitment on transparency and accountability by governments.[2] Consultation has, and will continue to serve broader, governance-based ends. However it has been significantly adapted to, and integrated with, the regulatory quality agenda. Where RIA and consultation have been integrated, the provision of additional information prior to consultation commencing has necessarily assisted consultation in serving the wider goals of accountability and transparency, as well as helping it fulfil the RIA related function of improving the empirical basis for decision-making. Consultation has also become progressively more open to the general public and to others beyond the major elements of "corporatist" style discourse in most OECD countries. Nonetheless, the efficiency of consultation has been questioned in some countries. New and complex issues are appearing, such as how to deal with consultation fatigue or to avoid capture of consultation mechanisms by interest groups overriding majority or expert opinions. A particular challenge concerns the search for a new balance between public consultation, flexibility and rapidity in rulemaking.

Consultation is only one element of the broader "transparency" tool. Other elements such as improved communication of the regulatory framework and plain language drafting policies are more recent, but have also reached a high level of acceptance. Other elements of this tool – such as the use of electronic means of data dissemination and the possibilities of electronic transactions – are much newer and less developed still. Overall, however, it appears that the elements of the transparency tool are seen as less threatening to entrenched interests and are therefore meeting less resistance to their implementation than many other aspects of the regulatory quality agenda.

The use of regulatory alternatives remains at a very early stage of development. It is clear that there is widespread interest in this tool and that experimentation with it is increasing in many countries. At the policy level, there is almost universal acknowledgement of the need to look at all available policy tools in a comparative context, rather than continuing to use regulation out of habit and convenience. However, the conversion of this broad policy commitment to action in specific areas requires cultural changes within administrations, a willingness to accept policy risks and substantial support of a technical and practical nature. The increased use of alternatives also poses substantial challenges for the design and implementation of many regulatory quality assurance tools and may require substantial work to develop enhanced or fine-tuned consultation mechanisms or RIA designs that are able to handle performance-oriented regulations, or those that rely on market incentives and mechanisms to a large degree. Better communication, as well as more vigilant approaches to preventing abuses and "capture" may be needed to foster credibility and trust among regulators and regulated parties in connection with the use of alternatives.

The issue of regulatory compliance – both with individual rules and with whole regulatory regimes and policies – continues to be largely unexplored. Much more effort is required to measure compliance rates, determine the sources of key compliance stresses and refine and expand tools to improve compliance levels, and thereby regulatory effectiveness. These challenges are particularly acute in the case of emerging and transition countries as well as those countries that are rapidly harmonising regulations

and converging with higher regulatory standards. A comprehensive approach to these issues would incorporate both *ex post* review of the effectiveness and efficiency of existing regulations as well as assessment of enforcement efforts and capacities and the development of strategic approaches to their improvement.

In the longer term, policies also require effective monitoring and analysis of experiences and of the capacities required to support the adoption of different tools. This is needed to promote the policy learning that will reduce the risks associated with their use and allow more detailed and practical assistance to be provided to policy-makers, thus broadening further their use and the benefits obtained from them.

7.2. Dynamic aspects of regulatory quality

Perhaps the least developed element of the regulatory policy agenda is the updating of existing regulation to ensure that quality is maintained in the dynamic sense. Many strategies have been developed and applied – from scrap and build, to targeted reviews, staged reviews, generalised reviews and sunsetting or "automatic revocation" clauses. But few are systematic in nature or have been applied broadly. As noted above, most major review processes have been the product of economic crises. They have almost invariably been episodic in nature, rather than being integrated into the longer-term policy agenda.

Thus, a sophisticated understanding of regulation as something that is likely to become progressively less effective and less appropriate over time, as the economy and society change and policy learning continues, is far from widespread. The need for regular review and renewal of regulation is a fundamental lesson that remains largely unlearned to date, at least at the practical level. The importance of this lesson is increasingly apparent, as the relative significance of dynamic costs due to the effect of poor regulation in inhibiting innovation and the development of new markets becomes more widely understood. It is increasingly apparent that the dynamic costs of poor quality regulation are, while far less visible, nonetheless likely to be much larger than the apparent static costs.

7.3. Regulatory institutions

Chapter 6 of this report shows that there is a developing understanding of the important institutional capacities required for implementing high quality regulation in practice. There has been substantial experimentation with different forms of specialist bodies to support regulatory policies, both within and outside the administration. This experimentation continues, in particular in relation to bodies located outside the administration, though there has been a clear trend toward relocating internal bodies within the centre of government – *i.e.* in chief ministers' department or finance ministries.

While there is emerging consensus on the location of these bodies, and substantial similarities in the roles they undertake, there certainly remain substantial problems in terms of the inadequacy of both resources and authority, which limit their ability to deliver on ambitious reform agendas. To some degree, the lack of formal authority may be an inevitable result of wider conventions of ministerial and departmental autonomy and the direct political accountability of ministers, and may be a long-term constraint requiring innovative and adaptive solutions. However, it seems that reluctance to provide formal authority can also be linked to the lack of resources. Both may be explained by a lack of detailed understanding of the nature and breadth of the regulatory policy agenda at the political level, together with continued hostility to aspects of it from among vested

interests within the administration. This points to the necessity of continued and strengthened dialogue between administrative and political levels of government to build these bridges and deepening understanding of the potential of reform to deliver government objectives. Advisory committees and other "external" reform bodies may have as well an important role as advocates of better regulation in the general framework.

In most OECD countries, the rise of independent regulators has been seen to be both very recent and highly successful as a means of ensuring high quality regulation of newly liberalised network based industries in particular. However, the extremely rapid rate of change in many of these sectors creates substantial challenges both in ensuring that these bodies and their governing legislation remain relevant and in guarding against the possibility that they may themselves become impediments to gains derived from factors such as industry convergence. Thus, while the experience of independent regulators has been a positive one, there is a need for priority to be given to further research into the conditions for their success and monitoring of their performance in these sectors.

7.4. Policy successes and failures

The regulatory compliance agenda has strong links to the issue of evaluation in the public policy context. Few OECD governments have implemented consistent or comprehensive evaluation policies and the level of *ex post* evaluation of government policy initiatives – including those implemented through regulation – remains generally low. This constitutes an important limitation on policy feedback capacities, preventing timely detection and adjustment of failing policies to improve their functioning and ability to meet initial objectives. It is an important issue in relation to the question of dynamic approaches to policy effectiveness and efficiency.

It is clear that there have been substantial changes in the approaches taken to regulation in major policy areas in many OECD countries. The series of country reviews of regulation reform conducted since 1998 indicate that, in many cases, the regulatory structure has been substantially rebuilt in recent years in areas such as the environment and occupational health and safety. In the case of the environment, a key feature of this rebuilding has been the adoption of various regulatory alternatives to supplement regulatory approaches, from covenants in the Netherlands to subsidies for the use of cleaner technologies in Denmark and waste production charges in Korea.

While it is difficult to attribute improved economic performance directly to these changes, it is clear that countries that have adopted regulatory policies have gained in terms of higher productivity and wealth creation. This has constituted an important incentive to continue and broaden them over time. There are no known cases of such regulatory policies being abandoned, notwithstanding that reforms were often opposed vigorously at the time of implementation by a range of stakeholders. This suggests a high level of satisfaction with the results.

Some of the best known regulatory failures have arisen in the context of the privatisation and/or introduction of competition to industries that had previously been operated as government monopolies, such as in the energy and telecommunications sectors or other network industries. It is unsurprising that such failures have concentrated in the network industries. The regulatory task of designing a pro-competitive system of regulation based on the separation of potentially competitive and natural monopoly sections of this type of sector, was an unfamiliar one for governments and presented

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enormous technical and economic difficulties. Moreover, rapid technological changes often unsettled assumptions as to what elements of the industries were contestable and what had natural monopoly characters, while the issue of "convergence" added additional degrees of difficulty. Another uncertainty in assessing these failures is the question of what would have happened in the absence of reform. In many areas it was arguable that the negative consequences of non-reform could easily have outweighed the observed instances of regulatory failure.

Nonetheless, some of the failures can clearly be attributed to specific mistakes made by those designing regulatory systems, particularly where governments have faced contradictory incentives. For example, the need to maximise consumer welfare by designing pro-competitive market regulation can conflict with the desire to maximise returns from the sale of government assets – particularly where these are occurring in the context of pressing need for fiscal consolidation. Thus, the development of competition has sometimes been delayed by, for example, failure to restructure a public monopoly before its privatisation or to ensure, in a timely way, adequate system inter-connect capacity. The actions of powerful interest groups have often added further to the pressures for departing from sound market regulation.

Equally, governments and price regulatory authorities have sometimes erred in favour of ensuring that buyers of privatised assets reap substantial short to medium term returns. This can be seen as a means of promoting confidence in the market ahead of future asset sales and, more generally, as a way of ensuring that the privatisation and market restructuring is seen as a success. However, these outcomes have in many cases been bought at the cost of delaying the benefits to consumers of the reform. In some cases, price gains have been many years in arriving, while overly lenient regulatory standards have allowed substantially above normal profits to be reaped. Poor regulation has also meant that consumers have sometimes suffered significant declines in service standards, further undermining support for the reforms. The situation has also been complicated in some instances by the fact that reform has often lead to the rapid removal of non-transparent and unaffordable subsidies, meaning that consumer costs are seen to be attributable to the reform process, even where poor regulatory performance has not been the culprit.

Though there are some cases of such policy failures, public expectations of the regulatory system have tended to increase and the cost of not reforming would clearly have been unsustainable in most cases. Moreover, as experience has accumulated with pro-competitive industry reforms, understanding has developed of the need to ensure consumer benefits are delivered quickly. If they are not, support for reform, and thus the momentum of reform, are quickly eroded.

7.5. Evaluating regulatory policies

In the last twenty years OECD member countries have introduced a set of tools designed to improve the quality of government regulation, focussing on both the institutional framework of the regulatory process and to the development of general regulatory policies. The main assumption underlying these efforts is that a systematic approach to regulation making – embodied in high quality regulatory policies – is the key to ensuring successful regulatory outcomes. A high quality regulatory structure can only be the product of a high quality regulatory development process. This relationship between regulatory policies and regulatory results has not been clearly empirically established,

although the OECD's country reviews of regulatory reform documents a relationship between longstanding regulatory policies, as implemented in, for instance, Canada, the US, and the UK and better economic performance.

As the concept of broad-scale regulatory policies becomes more widespread and more entrenched, increasing attention has been paid to the need to assess and evaluate whether regulatory policies actually deliver better regulatory results. This reflects not only a need to justify the substantial and increasing resource allocation and costs of regulatory policies, but also it is a logical development in the process of improving regulatory policies. To date, the key benchmarks for assessing the quality of a regulatory process, such as those set out in the 1995 and 1997 recommendations of the OECD Council on regulatory quality, have been essentially qualitative in nature, being based primarily on procedural and good governance standards and essentially guided by common-sense considerations. Further progress in measuring the effectiveness of different elements of regulatory policy and the benefits of regulatory policy overall require intensified efforts to identify clearer, more quantitatively based indicators and to evaluate performance in relation to empirical evidence on the relative costs and benefits of the use of different regulatory tools and institutions.

7.6. Communication of the impacts of reform

Consumer benefits must not only be delivered, they must be seen to be delivered in order to sustain a strong pro-reform constituency. A long-standing observation about the nature of regulatory reforms that, while the losers from reform are often a small group, each of whom individually bears relatively large losses, the gainers from reform are often large, dispersed groups, to whom the gains are small and often invisible. This characteristic of reform has meant that some alleged "regulatory failures" have been more apparent than real. For example, a substantial backlash against Australia's National Competition Policy initiative recently developed, particularly within rural and regional communities, who perceived that they, as a group, had been losers as a result of the implementation of the policy. An independent report commissioned by the federal government[3] found that this perception was not supported, with all but one region having benefited overall from the policy and many of the supposed costs of the policy actually resulting from other changes. Despite this evidence, the perception has remained little altered in many communities, arguably indicating the importance of actively arguing the case for reform before such negative perceptions become entrenched.

Experiences such as these underline the importance of communicating with citizens and stakeholders about the implementation of regulatory policy. This is an element of regulatory policy that is still little developed and should constitute a priority, particularly for governments that are undertaking or contemplating large-scale reform efforts. The effectiveness of communication about reform is crucial to the development and maintenance of constituencies for reform. The benefits of reform must be identified, and an understanding of the multi-dimensional nature of reform developed: that is, all groups will benefit from some parts of a reform programme, while bearing costs from other parts. Promotion of an understanding of the "regulatory policy" perspective, which sees reform efforts as a whole, rather than a series of piecemeal changes, will increase the acceptance of reforms. However, it is also important that the losers from particular reforms are informed early and honestly about the expected effects of reforms on them. This can improve their capacities to adjust to change as well as providing better opportunities to

mediate any necessary transitional arrangements, in cases where the distributional or transitional effects of reform are especially severe.

7.7. Summary

If empirical data to confirm the benefits of adopting regulatory policies are relatively scarce, one strong indicator of their efficacy may be the fact that governments continue to dedicate resources and effort to them and to do so at an ever increasing rate. While the degree of reform activity has waxed and waned to some degree with political cycles and priorities, the long-term direction is toward more wide-ranging activities being undertaken in an ever-increasing number of countries. No government has definitively abandoned or scaled back its reform activity, while all that have adopted policies have tended to deepen, broaden and expand them over time.

Moreover, this activity is not confined to OECD countries. Regulatory reform is prominent on the agenda of many other inter-governmental forums. For example, the Asia Pacific Economic Co-operation (APEC) has adopted regulatory reform principles which parallel those of OECD.[4] Late 1999, a group of European high-officials started an ambitious project to review rule-making practices in order to improve European regulation across levels of governments.[5] The European Union funded SIGMA programme provides regulatory policy advice to economies in transition in eastern and central Europe. The World Bank and the Asian Development Bank have developed regulatory reform programmes, while most of these organisations are drawing on OECD expertise and the experience of its member countries in designing and implementing their programmes. The World Trade Organisation has also been discussing the need to improve transparency procedures in rule-making.

In sum, despite the uncompleted agenda and the need for further cultural and institutional changes in relation to regulatory capacities, the regulatory policy field shows considerable dynamism, with constant experimentation with new methods and a rapidly developing international pool of experiences. A consensus about good regulatory practices has rapidly developed, centred around the 1995 OECD Recommendation. The question today is not whether regulatory quality tools are needed, but which ones are more effective, and how to design, implement and evaluate them.

Notes

1. See, for example, OECD (2000b), C2000(111).
2. OECD (2000a).
3. Productivity Commission (1999), Impact of Competition Policy Reforms on Rural and Regional Australia, Canberra. *www.pc.gov.au*.
4. *www.apecsec.org.sg/whatsnew/press/rel53_2000.html*
5. *www.cabinet-office.gov.uk/regulation/europe/mandelkern.htm*

Table 4. **Conclusions on regulatory tools**

Regulatory policy tool	Is this tool still recommended as a best practice?	Are there clear best practices?
1. Regulatory policies	Yes, for all countries	Policies must be designed to meet the needs of the country and the political opportunities that exist. They must reflect sufficient consensus on the nature of the problem to be implemented effectively. Policies should broaden and deepen over time as experience and expertise grow and as additional problem areas are identified. The objectives of the policy should be clearly defined and the quality standards explicit and measurable enough to hold regulatory bodies accountable for implementation. Competition and benefit-cost principles should constitute the core of much policy. The coverage of the policy should be as broad as possible with respect to instruments, institutions, and levels of government. Co-ordination between regulatory quality and related structural policies will yield faster and better results.
2. Systematic programmes for keeping regulations up-to-date	Yes, for all countries	A clear set of principles is needed to guide review programmes, including particularly competition principles. These should be complemented by standardised evaluation techniques and decision criteria. Review processes should be transparent and should provide for involvement by key stakeholders and the general public.
3. Regulatory impact analysis	Yes, but expectations should recognise that implementation is a medium-term task	There is no single model of a good RIA programme, but the country review programme demonstrates that the ten best practices identified in 1997 are still good reference points for designing an effective programme. The need to build an RIA programme progressively must be recognised. However, all RIA programmes should be based on the benefit/cost principle and the principle of comparative policy analysis.
4. Systematic consideration of regulatory and non-regulatory alternatives	Yes, although relatively little progress has been made, limiting the experience base from which to draw conclusions	While further experience and learning are needed to fully understand the benefits, costs and risks of alternative instruments, it is clear that there are many circumstances in which policy tools other than traditional command and control regulation are likely to be more effective in meeting regulatory objectives. Governments should require that regulatory alternatives be considered when creating new regulations, should provide guidance in their use to regulators and should publish a regular review of the impact and performance of regulatory alternatives.
5. Administrative simplification and reduction of permits and licenses	Yes, particularly for countries recently embarked on reform, including countries in transition. However, it should ideally be more integrated with other policy elements and made more systematic	Best practices are emerging, but require more assessment. A mix of policy responses, such as one-stop shops and central registries of formalities combined with electronic access, is needed to address various sources of the problem. In selecting priorities, a greater focus on reducing *ex ante* licenses and permits is likely to yield significant economic benefits as investment and market entry increase. Electronic solutions promise considerable gains that are as yet only partly realised. Adopting a more systematic approach to the implementation of burden reduction measures *ex ante* – through RIA processes – may also be an area for further consideration.
6. Public consultation, regulatory communication and access strategies	Yes, for all countries, and for both primary laws and lower level regulations	Best practices in public consultation are highly contextual, while different forms of consultation may need to be combined, in order to achieve different objectives. In general, more open and accessible procedures are more legitimate, less vulnerable to capture, and more likely to bring in high quality information that improves analysis of policy options. Discretion in deciding who and when to consult should be minimised and transparent in order to avoid giving special access to "insider" interests and systematically excluding "outsider" interests such as weaker, less organised, and new interests. Attention is needed to dealing with evolving civil society interests and to uses of new technological means such as IT. In terms of regulatory communication, more evaluation is needed of the effectiveness of various tools. Strategies of codification, registries, plain-language drafting, early planning, and information technologies each seem to be effective in addressing facets of the overall problem, but each is insufficient in itself. The centralised business registry with positive security in particular seems to offer substantial benefits to both domestic and international benefits in reducing barriers to entry and competition.
7. Due process and administrative certainty	Yes, for all countries	Administrative procedures acts or other high-level instruments are needed to ensure that administrative decisions are subject to appropriate appeals mechanisms, with independence from the initial decision-maker, an important principle. The extent of administrative discretions must also be carefully considered, while mechanisms such as the "silence is consent strategy" can be effective in encouraging more responsive administrative actions. Mediation mechanisms and ombudsmen are being adopted in some countries to supplement administrative and judicial procedures, with the accent being on improving accessibility of these processes.
8. Adopting regulatory compliance strategies	Yes, for all countries	Effective forms of compliance analysis are emerging, but require additional refinement as experience is acquired with their use in practice. Importantly compliance levels are closely related to the adequacy of regulatory design. This means that achieving compliance relies substantially on good regulatory design as well as appropriate and effective enforcement tools.

Table 4. **Conclusions on regulatory tools** *(cont.)*

Regulatory policy tool	Is this tool still recommended as a best practice?	Are there clear best practices?
9. Mechanisms for promoting, co-ordinating, and tracking regulatory quality reforms	Yes, for all countries	Very few best practices have yet been identified, since institutional effectiveness is highly contextual and oversight must fit into domestic policy-making and administrative structures. In general, countries find that the capacities for promoting regulatory quality work better if placed in the centre of government, preferably close to traditional management functions such as budgeting or policy oversight, rather than in a line ministry. Ministerial responsibility for the function increases effectiveness, as does expertise, capacity to intervene in the regulatory process, and capacity to advise on quality of individual regulatory measures. Care should be taken, however, in differentiating the advisory, challenge and advocating functions.
10. Independent regulators	Yes, but careful design is needed to avoid substantial policy risks	No best practices have yet been identified, but good practices are needed as a benchmark. The OECD is attempting to develop good practices in design and operation of these arms-length regulatory bodies.

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Chapter 8

An Agenda for the Future – Emerging Issues for Regulatory Policy

This section of the report identifies key emerging issues for the continuation and further development of the regulatory policy agenda, drawing on the above analysis of the current state of play and the issues arising from the Secretariat's recent work, including the country review programme. The general theme is the need for a continuation in the processes of broadening the scope and integration of the elements that have been identified as fundamental to the development of the regulatory policy agenda from its early days. The priorities identified are in three areas: policies, tools and institutions. Consistent with the emphasis on integration underlying this report, it is regarded as fundamental that progress be pursued simultaneously on all these fronts.

8.1. Regulatory policies

Linking regulatory policy to the governance agenda

A major theme of this report has been the need to acknowledge the conceptual and practical links between regulatory policy, as it has emerged, and the broader governance agenda. The "horizontal" approach pioneered by OECD to understand regulation and improve the regulatory environment nation-wide is an important asset where further work can build on. Strengthening these links will contribute substantially to the "cultural" changes identified as being required within the administration if the benefits of the regulatory policy agenda are to be fully realised. Linking regulatory policy with governance will also cement acceptance of regulatory policy as a permanent feature of government and public administration and one that is central to its overall performance and ability to meet citizens' expectations.

One aspect of this focus on regulatory governance will be to cement an acceptance of the underlying purpose of regulatory policies as being to enhance social welfare generally, rather than as being a tool designed to assist a particular sector or sectors. The genesis of "deregulation" and "regulatory reform" policies, centring on declining economic performance, has meant that there is a persistent tendency in some quarters to see regulatory policy as being primarily an element of industry policy. This trend is illustrated by the frequent tendency for reform programmes to become captive to an "industry promotion" agenda, even in countries with long histories of reform activity, as noted above.

Therefore actions which help to establish regulatory policy as being motivated by broad social welfare considerations, rather than the promotion of sectional interests, can greatly enhance its credibility and acceptability to a wide range of stakeholders. Efforts also need to go in hand with better communication and awareness-raising strategies to sustain the policy through time. This in turn can be crucial in helping to build broad-based constituencies in favour of reform and so cement the reform agenda and increase the rate of progress in implementation.

Essential linkages that should be explored and developed further in this regard include the importance of transparency and accountability, trust in government, policy responsiveness and policy coherence. A particular challenge to this inter-linkages

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dimension should be to better understand and respond to regulatory failures. In all of these areas, pursuit of these governance values can directly assist the implementation of regulatory policy reforms and the achievement of its objectives.

Broadening the application of regulatory policies

This report has shown that the regulatory policy agenda has tended to broaden continuously over time, encompassing new objectives and tools and making its presence felt throughout the administration. However, it is also clear that the bulk of the activity to date has been concentrated within national government administrations. The potential for a regulatory policy to achieve its objectives will be greatly enhanced if other important actors such as sub-national governments, independent agencies, international and inter-governmental bodies and legislatures also take on appropriate roles in implementing the agenda.

It is clear that ***sub-national governments*** have been active in reforming their regulations and regulatory capacities for some time in a minority of countries, particularly those with federal structures. In some cases, they have been drivers of the reform agenda. For example, in Australia, several states pioneered the use of RIA, as did New York State in the United States. Illinois, also in the United States, has taken a leading role in the use of regulatory alternatives. However, the experience of Mexico where, following a substantial federal programme of lobbying and encouragement, almost all of the 31 State and territory governments have now adopted a regulatory reform policy, indicates the potential for national governments to play a leading role in "kick-starting" reform activity at State and regional government levels. Alternatively, substantial experience in Australia, including that of the National Competition Policy, indicates the potential for co-operatively negotiated reform agendas that embrace both federal and state governments

Supra-national organisations have been little involved in regulatory quality issues, and yet their influence on the shape of regulation in most countries continues to increase. The European Commission has been an important player, adopting policy innovations such as the mutual recognition model and a range of innovative alternative means of product certification, as well as adopting guiding legislative principles such as proportionality and subsidiarity. Recent initiatives to improve the regulatory environment in the European Union include the Commission's *White Paper on European Governance* (July 2001) and its Communication to the Leaken European Council on improving and simplifying the regulatory environment (December 2001). In this context, the European Commission presented in June 2002 a detailed Action Plan for simplifying and improving the European regulatory environment. Moreover, it outlined an initiative to establish a new, coherent regulatory impact analysis before the end of 2002. Nonetheless, much remains to be done. Similarly, despite the increasing tendency to adopt international standards in regulation, little has been done by most private standard setting bodies to adopt quality control mechanisms such as the use of RIA in a comparative policy context. Substantive reform is needed in these areas if national regulatory quality policies are not to be undermined by the failures of other players.

Parliaments have essential responsibility for assuring regulatory quality in the broadest sense. However, there appears to be considerable scope for development of mechanisms and approaches to improve performance. For example, in some cases legislation now exists requiring specialised scrutiny committees to scrutinise regulation and report to the parliament against a specific range of criteria: the Italian Senate and Chamber of Deputies issued a joint circular to all parliamentary committees in 1997 setting

out scrutiny requirements that were closely based on the 1995 OECD Recommendation on regulatory quality. Measures such as this are likely to contribute to the adoption of more consistent and methodical approaches to scrutiny, as well as improved transparency. Moreover, aligning such criteria with the regulatory quality approaches adopted within the administration would effectively provide for reinforced quality controls and may help to embed the required cultural changes within the administration.

Consideration of the inter-governmental dimensions of regulatory policy necessarily takes in the question of models of ***regulatory harmonisation***. As the regulatory policy agenda has become increasingly integrated with trade policy and focused on competition and market efficiency considerations, much effort has been expended in developing models of regulatory harmonisation, including regulatory convergence through adoption of "common essential requirements", various mechanisms for achieving regulatory uniformity and the development of mutual recognition approaches. Each of these has demonstrated some practical advantages, while the initial adoption of looser harmonisation arrangements has sometimes led by stages to closer convergence, and even uniformity.

Despite this developing body of experience and learning, best practices have not yet emerged in relation to choosing between the different strategies in different circumstances. One notable area for further research relates to the relative benefits of uniformity *versus* "***policy competition***". That is, while some have argued the case for mutual recognition or for loose regulatory harmonisation approaches based on pragmatic acceptance that the transaction costs of achieving uniformity can be too great, others have argued that uniformity arrangements can breed sclerotic regulatory systems and lead to the loss of the positive demonstration effects that can constitute dynamic "regulatory competition". Further research on this issue should be a priority area for regulatory policy in the medium term and should aim to provide guidance on the circumstances in which different tools may be preferred, and/or ways of maximising the benefits of the different approaches and minimising their drawbacks.

Promoting understanding of the economic importance of regulation

It was noted at the beginning of this report that regulation constitutes a less visible means for government to divert private resources to social ends than fiscal tools. Other OECD publications* have pointed to the very great uncertainty as to the overall costs imposed by regulation – an uncertainty that is exceeded, however, by the total lack of reasonable estimates of regulatory benefits. This lack of a ***quantitatively based understanding of the importance of regulation*** is a fundamental impediment to the conduct of the broader debates to which the development of the regulatory policy agenda should give rise. Is there too much regulation, or too little? Is regulatory effort properly targeted? Is it possible to derive policies for targeting regulatory "expenditures" effectively?

Addressing this informational issue should be a high priority. Among the few estimates of aggregate regulatory costs that do exist is the suggestion that they may amount to 10% or more of GDP (see above). Even this estimate is statically based, and ignores dynamic costs to the economy that are increasingly likely to be seen as larger still, and more important to long term economic health. If costs are of this order of magnitude,

* See OECD (1997d), particularly Chapter 11.

the lack of understanding of them, and the associated lack of transparency and accountability in relation to regulatory "expenditures" contrast starkly with the fiscal budget and the disciplines on government associated with it.

Little progress has been made to date in addressing this issue. The ***Regulatory Budgeting*** concept represents an important demonstration of the conceptual possibilities that would arise were the impacts of regulation better understood. These include exercising control over the total quantum of regulatory expenditures and requiring regulators to optimise within given constraints. It also includes the possibility of comparing and debating the relative calls on private resources made through fiscal and regulatory means. However, it is clear that, notwithstanding the rapid development of regulatory impact analysis in OECD countries, the empirical basis for regulatory budgeting is almost completely lacking.

Thus, developing the tools to enable a better understanding of the economic importance of regulation should constitute a priority for further development of the regulatory policy agenda. This should include studying approaches to create incentives for optimisation of regulatory "expenditures" by regulators and means of enabling informed debates about aggregate regulatory burdens on particular sectors and groups. The specific tools to enable these advances in regulatory policy are as yet largely undeveloped, but fruitful efforts in this area may well come via the further development of regulatory impact analysis requirements and from an increased focus on *ex post* evaluations and reviews of regulation.

8.2. Evaluating regulatory policies

A central challenge for most OECD countries is to enhance the *ex post* evaluation of their regulatory policies, tools and institutions. The performance appraisal of framework conditions is intrinsically difficult, due to the problems of drawing links between multiple process and policy requirements and different indicators of policy success. Such attempts are in their infancy, at best, in OECD countries. Moreover, *ex post* policy review and evaluation is, in general, under emphasised by all governments. Negative incentives partly explain this: all organisations, including those responsible for the regulatory policies, are naturally threatened by outcomes they may not foresee and by the possibility that their own performance will be called into question. At the political level, too, policy evaluation poses obvious risks. This is also related to the weak budgetary position of many central oversight bodies, which are reluctant to invest in "past actions" instead of focusing on the current or future situation and reforms.

Nonetheless, the understanding of both successes and failures is crucial to the dynamic evolution of regulatory policy. As shown in Chapter 7, while substantial progress has been made, the full adoption and implementation of the regulatory policy concept is far from complete in any OECD country, while in many it has barely begun. The completion of this process necessarily requires that more resources are devoted to understanding the outcomes of the steps taken to date, addressing failures and systematising and embedding successes.

Information on the extent to which regulatory objectives are being met is essential to improve future decision-making, resource allocation and accountability in the regulatory/policy process. However, reliable measurement and monitoring of compliance face a host of technical and methodological problems. Self-assessment and evaluation processes would require internationally comparable data on the costs and benefits of regulations and on regulatory design. Moreover, underlying policy objectives are often not clearly stated in

laws and regulations. Nevertheless, there seems to be ways to overcome some of these problems, and to generate information on the results of regulations/policies.

8.3. Regulatory institutions

Building regulatory policy institutions

Understanding of the most effective institutional basis for driving a regulatory policy agenda remains limited. This report has discussed the roles of institutions such as ***specialised oversight bodies*** in the administration, advisory committees and independent regulators. In none of these areas is there a clearly defined set of best practices. In the case of specialised oversight bodies, with which there is the longest experience to date, good practices are emerging, as discussed above. However, the extent of their adoption is limited, while more work is clearly needed to address the issue of how these bodies can be positioned and given the resources and authority to carry out the tasks required of them, or how they can best balance their challenge, advocacy and guidance roles. These tasks typically range from providing technical support and training and assessing RIA, to raising awareness and understanding of regulatory reform policies and assisting in achieving the required cultural changes within the administration. These roles clearly have the potential for internal conflict. For example, an emerging issue is how an oversight body can sustain an independent challenge function if it has participated in the development of the regulation from the beginning as part of its advice and support function. Resolution of these issues may even require consideration of a separation of functional responsibilities, so that regulatory oversight bodies become specialised and separated over time.

The state of play seems broadly similar with regard to ***independent regulators***. Some good practices are emerging, as the dangers inherent in this model and the means of minimising them are becoming better understood. However, major tasks remain. These include reaching a better understanding of the relative merits of sector-specific *vs* overarching regulators and determining the circumstances in which each model is likely to be more appropriate. They also include determining appropriate means of providing independence from day to day political pressures while retaining democratic accountability and maintaining general coherence with other policies and state institutions.

Integrating ***parliamentary scrutiny bodies*** into the wider regulatory policy effort is a programme that requires much further work. These bodies have, in many cases, a long history of performing regulatory quality assurance functions in the parliamentary context and well developed procedures and roles within this framework. But little work has been done on means of ensuring that these roles are made as consistent and mutually reinforcing as possible with other elements of the regulatory quality agenda as it is developing. A key area for development in this context may be to ensure that full account is taken in the parliamentary context of empirical information obtained through application of RIA, consultation and other tools in the development of legislation within the administration.

Also quite undeveloped are best practices for the use of ***external advisory bodies*** to government. This is potentially an extremely complex area, since the nature and composition of these bodies seem to vary widely across different OECD countries. For example, bodies like the Netherlands' Social and Economic Council have a constitutional role and a long history, while bodies such as Australia's Small Business Deregulation Task Force were established by administrative decision, were *ad hoc* in nature and were created,

in essence, to perform a single function. In between are various standing committees that were created administratively and have broader functions, such as the United Kingdom's Better Regulation Task Force.

While this report has documented some of the general characteristics of the different forms of advisory bodies, the challenge of identifying good practices for the use of these different approaches is a considerable one for the future. At the same time, the issue of the use of such bodies and their linkages to other regulatory institutions is clearly central to the ongoing task of addressing the continuing fragmentation of the regulatory policy agenda and ensuring the efforts made are focused, harmonised and, thus, effective.

8.4. Regulatory practices

Addressing regulatory complexity and uncertainty

As noted above, much legislation throughout OECD countries has been substantially rewritten in performance-oriented terms in recent years, with generalised framework legislation establishing general duties often replacing larger quantities of specific legislation. Such changes contribute to a reduction in regulatory complexity. However, the implementation of these approaches has seen offsetting effects arise, indicating that complexity continues to be a key priority – indeed arguably of increasing concern – for the regulatory policy agenda.

Prominent among these trends is the adoption of large quantities of ***quasi-regulation***, very often outside the disciplines of regulatory tools such as RIA and public consultation. This approach to regulation was conceived as a means of providing for a user-friendly and uncomplicated legislative framework that was supported by detailed rules that were, as far as possible, uniform and consistent with best practice. However, the ease of adoption of huge quantities of technical material has reduced incentives on regulators to take a critical view of what matters require regulation and what degree of detail is needed. Thus, the original intent of reducing regulatory complexity is often fatally undermined. This outcome can occur even where such material is, in strict terms, to be regarded as "guidance", rather than as part of the regulatory body per se. This will occur particularly where there is a reversal of the onus of proof (so that non-compliance with the guidance material creates a *prima facie* offence). However, it can also arise where business adopts a conservative approach and conforms with guidance documents in preference to investing in the development of its own means of reaching compliance with "performance-based" regulation.

"Third party" standards and grey regulation

The trend for regulators to adopt large quantities of technical material into the body of regulations has implications for regulatory quality beyond those of complexity. An important concern is that such standards are generally not designed to function as legislative instruments, necessarily giving rise to questions of appropriateness (*e.g.* are the standards specifying "best practice", or "minimum acceptable practice") as well as enforceability issues. Moreover, the use of "grey regulation" or "soft law" – that is, the adoption of guidelines and other material of uncertain legal status – necessarily raises questions of transparency and accountability.

Thus, an important future challenge for the regulatory policy agenda is to reach a fuller understanding of the implications of these changes to the form of regulation and seek to specify rules or guidelines that can maximise the benefits of these instruments

while minimising the costs. A key element of this may be to improve understanding of the different forms of regulatory harmonisation and uniformity, seeking to identify the circumstances in which each may be an appropriate means of adopting them most efficiently and effectively.

"Outsourcing" regulatory functions

Regulatory policy has increasingly emphasised the importance of ensuring that regulation supports efficient markets and avoids distorting market incentives. Unsurprisingly, governments have increasingly applied this "market-based" perspective to the delivery of regulatory services. In particular, there has been increasing use of ***non-governmental institutions,*** including the private sector, applying regulations and providing regulatory services such as inspections and approvals of activities and processes. For example, in Australia a wide range of building inspections are conducted by private certifiers, while design approvals can also be obtained privately. In most airports, security companies are in charge of controlling the boarding of planes. While this phenomenon is relatively new and not yet widespread, there are indications of substantial efficiency gains from opening the provision of these "regulatory services" to the market, provided they are overseen and regulated by the state. These gains have also flowed back to improved public sector performance, as government certifiers are required to compete with private sector service providers.

The scope for development in such trends merits further investigation. For example, at present, these "outsourcings" are generally limited to situations in which the regulatory approval is based solely on the determination of compliance with set technical or design standards, rather than the exercise of discretion or judgement in applying rules or policies that are open to interpretations. The scope and desirability of applying these innovations to this wider field should be considered. Some risks are often too big to be delegated to private operators and thus require some sort of last resort State responsibility. In addition, the conditions for success in "outsourcing" these roles, including matters such as the role of accreditation and professional indemnity insurance, should be investigated further.

8.5. Integrating the elements of regulatory policy

This report has generally concluded that while important steps have been taken to link the different elements of the regulatory policy agenda, much of the fragmentation that has characterised regulatory reforms over the past two decades remains. A priority for the further development of regulatory policy must be to realise fully the links between the main policies, tools and institutions. This effort must include further attempts to bring together the "economic" and "juridical" perspectives on regulatory quality, which are clearly complementary, arguably correlating with the "design" and "implementation" elements, respectively, of the policy process. Governments may also acquire important lessons for further policy improvement by systematically comparing *ex ante* assessments, such as those obtained through RIA, and *ex post* evaluations of the outcomes achieved by the regulation.

In addition, the links between the regulatory reform and competition policy agendas have only begun to be forged. The increasing focus on regulatory reform as being, in significant measure, a process of reducing regulatory distortions of markets and providing frameworks in which effective competition can operate, clearly favours the development of policy linkages in this respect. Similarly, the synergies between regulatory reform and

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trade policy must continue to be pursued. As tariffs, quotas and other "at the border controls" are dismantled, the number of trade disputes related to regulatory issues is increasing alarmingly. These new non-tariff barriers can be more complex and less transparent, especially as they often include sub-national market openness dimensions. Moreover, globalisation is requiring a degree of formalism in the national regulatory management system to support market confidence and avoid undue preferences for insiders or 'big players'. This is a particularly acute challenge for small countries.

The focus of this report has largely been on executive government and the administration as actors in the regulatory policy story. But other bodies such as parliaments and constitutionally created bodies such as the Dutch Social and Economic Council or the French Council of State also exercise functions with actual or potential relevance to this agenda. This constitutes a crucial area for future research and discussion. There must be an attempt to determine the feasible and efficient roles for each type of group, based on capacities as well as accountability and legitimacy issues. Moreover, if these other types of institutions are to play a larger role it is essential to ensure the interactions between them are properly managed and that their roles are mutually supporting, rather than duplicative and overlapping. Finally, in a broader regulatory governance and rule of law agenda, a policy that neglects the quality of the judiciary – including the timelines with which it can deliver its decisions – will dilute the effects of improved regulatory quality.

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Chapter 9

Conclusion: Updating the 1995 Recommendation on Regulatory Quality

This report has reviewed in detail the policies, tools and institutions of regulatory policy as they are being applied in OECD countries. In so doing, it has provided a detailed assessment of the continued relevance of the 1995 *OECD Recommendation on Improving the Quality of Government Regulation*. It is clear that the 1995 Recommendation remains valid and that the ten point checklist that forms part of the recommendation also remains appropriate as a mechanism for ensuring that best practice process standards have been followed in developing new regulation.

However, this report has also indicated areas in which these instruments can be improved and extended. In relation to improvements to the existing checklist, two extensions of its scope could be considered. These are:

- To include the need to review the regulatory proposal in the light of existing regulation and ensure that they are consistent and appropriate, and that the aggregate regulatory burden to be imposed on all identifiable groups of stakeholders remains reasonable.
- To include reference to the question of institutions, in the context of the compliance question – *i.e.* "Regulators should ensure that adequate and appropriate institutional arrangements are in place to ensure proper monitoring, compliance and enforcement activities can be undertaken".

More fundamentally, the 1995 checklist focus is static and concentrates on assuring the quality of individual regulations. A key message of this report is that regulatory policy, particularly as it evolves into the regulatory governance agenda, must adopt a dynamic and systems oriented focus. This means adopting processes and institutions that will assure the quality of regulation is maintained and improved over time and that regulatory structures are considered as an integrated whole, rather than being reviewed and evaluated piecemeal, as a collection of unrelated elements.

Recognition of these requirements suggests that a key advance in terms of regulatory quality would be to complement the 1995 checklist – which identifies itself as a checklist for regulatory decision-making – with another checklist that is based on ensuring the quality of regulatory *systems* over time. Some key characteristics of such a checklist would be:

- That it was based on the recognition of the three key elements of regulatory policy: policies, tools and institutions.
- That it emphasised the dynamic element of regulatory policy and the need to ensure that regulatory quality is maintained over time.
- That the links between regulatory policy and wider governance values are acknowledged and taken into account.
- That the interactions between different regulations, and different regulatory systems are considered systematically. And
- That inter-governmental aspects of regulatory policy are fully taken into account.

The development of an updated Recommendation on Regulatory Quality, incorporating a new checklist with the characteristics enumerated above, would constitute

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an important further step toward defining and implementing the regulatory governance agenda in OECD countries and should be considered to be a high priority for future regulatory policy efforts.

The move towards a process-oriented and dynamic perspective on regulatory policies has also implications on collective improvement tools. In that sense, a self-assessment instrument to help countries to detect better practices and, on the other hand, to evaluate levels of capabilities at a certain point in time against a baseline as well as where they lie, could further improve understanding and foster better regulatory governance across OECD countries.

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Annexes

Annex I

The Use of Regulatory Impact Analysis

The OECD published in 1997[1] a set of ten best practices in the design and implementation of a system of regulatory impact analysis. These best practices have since been used as the basis for the assessment of RIA systems conducted as part of the series of country reviews of regulation reform, begun in 1998. The following discussion draws on OECD work on RIA conducted since 1997 – including the series of OECD country reviews undertaken up to the time of writing – to discuss in detail the importance of each of these ten points and provide examples of good practices in each area.

Maximise political commitment to RIA. If RIA is to be successful in changing regulatory decisions in what are usually highly-charged political environments, the use of RIA must be supported at the highest levels of government. Most OECD countries rate well on this criterion. RIA is supported by high-level instruments such as laws or prime ministerial decrees in most OECD countries, and tends to be visibly integrated into the policy process, for example, by being attached to legislation being sent to parliament, or included in the papers required to be sent to Cabinet prior to its consideration of draft legislative proposals.

The most effective programmes seem to be those where RIA is required as a condition for the consideration of new regulations and laws. In **Italy**, for example, RIA is required for all government drafts that are discussed and approved in the Council of Ministers. In the **United States**, regulatory agencies are instructed not to publish their regulations unless a RIA is attached. To further increase accountability, it seems to be useful to require that RIA be signed by ministers or by high level officials. One important means used in **Mexico** to achieve political commitment is the requirement that RIAs for proposed laws, presidential regulations (*reglamentos*) and decrees be signed by high-level officials such as the deputy minister, and for other subordinate regulations by general directors.

Allocate responsibilities for RIA programme elements carefully. Experiences in OECD countries shows that RIA will fail if left entirely to regulators, but will also fail if it is too centralised. To ensure "ownership" by regulators, while establishing quality control and consistency, responsibilities for RIA should be shared between ministries and a central quality control unit. In virtually all countries, the responsible ministries are the primary drafters of both regulations and RIAs, for two reasons: first, RIA is a tool to improve the skills, culture, and accountability of the regulatory bodies, and second because an RIA needs the best information and expertise. If RIA is to engender cultural change within ministries so that they learn to ask the right questions about regulations, it must be performed by them.

On the other hand, oversight and quality control are exercised by various bodies that are mostly independent of the regulating ministries. Where countries have not clearly identified independent oversight functions and authorities, RIA has been slow to develop, and ministries have tended to neglect the analysis. So far, out of 28 OECD countries,

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11 have established central oversight bodies to review RIA quality. Ten of these require the central oversight body to review all RIA prepared – up from seven in 1998. The most powerful oversight bodies are established at the centre of government and have the resources and technical capacities to conduct reviews and the power to enforce RIA discipline. Experience in countries like the **Netherlands** shows that the "check and balance" function of the RIA can be substantially enhanced through a strong alliance between RIA oversight and powerful institutions such as the budgeting authorities.

Oversight bodies perform a variety of functions, including reporting on ministerial compliance with RIA, providing technical assistance, and reviewing the quality of individual RIAs. The review function requires substantial investments to enable the central body to review and assess large numbers of RIAs each year, covering a variety of issues and areas, some of which are very technical. Such investments are sometimes queried, but their size must be considered in relation to the regulatory costs they are reviewing and seeking to minimise.

Oversight of RIA by the legislature is rare in OECD countries, although there are indications in a few countries that this may be an effective means of quality control. In both **Italy** and the **United States** Congress, legislators seem to be taking more interest in the use of RIA to judge the quality of new laws and regulations. In several **Australian States**, legislators have specific responsibilities, set out in legislation, for ensuring that RIA requirements are properly met. While the skill levels of legislators seem to be low at present, more action by legislators in using RIA would greatly assist in the effective integration of RIA with political decision-making. Thus, this is likely to be an important area for future development of RIA practices.

Train the regulators. Regulators should have the skills to conduct high quality RIA, including an understanding of essential methodological and data collection issues, and should understand the role of RIA in assuring regulatory quality. The stringency of RIA requirements should be progressively increased as the skills and capacities of the regulating ministries improve.

Most countries rate poorly on this criterion. The level of RIA sophistication achieved in practice is low partly as a result. There is generally too little follow-up of RIA policies with investment in human skills. Provision of training is particularly important in the early stages of an RIA programme where both technical skills and the cultural acceptance of the use of RIA as a policy tool need to be improved. However, a high level of investment must be maintained over time, to counter staff turnover and assist in developing the broader cultural changes that must be achieved within whole organisations. A significant additional investment in developing training strategies is needed in most countries. One way to improve RIA is to incorporate RIA training into national training programmes for the public administration, few of which offer courses on RIA such as those now offered in **Italy** and **Korea**. The problem of inadequate training persists even in the **United States**, with its decades of experience with RIA. OMB in 1998 recognised the need to expand training and technical assistance for agencies to improve RIA quality.[2]

Manuals or written guidance are important complements to training, but not a substitute for it. Most countries have issued manuals or guidance on aspects of RIA, many based on OECD materials such as the 1997 RIA report.[3] Some guidance material has been hampered by being too legalistic, or too detailed, or too impractical. The best materials seem to be those that are simple and based on concrete examples or case studies, and

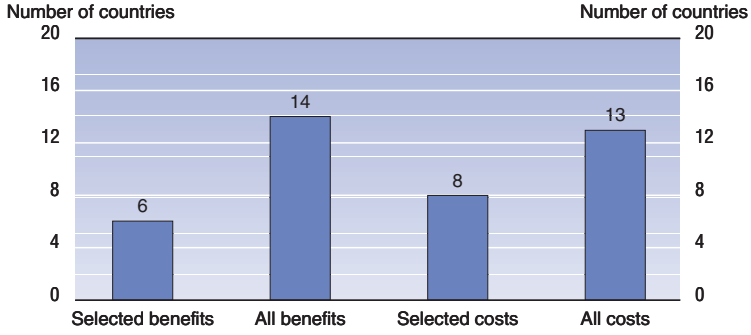
provide practical guidance on data collection and methodologies. For example, the **United Kingdom**'s guide to "Guide to Regulatory Impact Assessment" provides an exceptionally well-designed set of tasks guiding the analyst in drawing a vivid picture of cost and benefit magnitudes and their distribution across those affected by regulation. Total cost estimates must be accompanied by analyses showing the effects on a "typical" business and on small businesses. The **United States** guide in less than 40 pages manages to encompass virtually every issue that an economist could raise about regulatory consequences, and its guiding principles of full disclosure and transparency are soundly applied. Guidance material must also be updated frequently to reflect changes in the specific RIA requirements being implemented, given the need for RIA requirements to progressively gain in rigour and scope as skills and experience accumulate within administrations. Updating is also important in order to ensure that new learning about regulatory tools, methods and institutions is properly reflected in the guidance material.

Some OECD countries have established help desks or other means of offering expert advice to ministries. An inter-ministerial help desk in the **Netherlands** permits regulators to discuss assessments with specialists in the relevant areas (*e.g.*, business impact, environmental impact) at an early stage. The help desk is able to assist with the design of analyses, the collection of necessary data, and its analysis and interpretation.

Use a consistent but flexible analytical method. The question of what RIA method should be required is central to the design and performance of any system. Several RIA methods are employed in OECD countries: benefit/cost analysis, cost effectiveness or cost/output analysis, fiscal or budget analysis, socio-economic impact analysis, consequence analysis, compliance cost analysis and business impact tests. The trend is strongly toward adopting more rigorous and standardised methodologies over time, as experience with, and expertise in, the use of RIA accumulates. More countries are adopting benefit-cost analysis. **Canada**'s "socio-economic impact analysis" requirement changed in 1986 to formal use of benefit/cost analyses as part of the Regulatory Impact Analysis Statement. **New Zealand** supplemented its fiscal analysis with compliance cost assessment in 1996. By contrast, no country has moved away from RIA once having adopted it, or has moved to a substantially less rigorous form of analysis than it has previously used. Figure 8 shows that all important costs and benefits are now required to be assessed in almost half of OECD countries, while around a quarter of OECD countries assess selected benefits and costs.

A risk to be avoided is the layering of more and more analysis to satisfy interest groups that their interests are represented in the RIA. This can result in impractical and analytically indefensible requirements. Indeed, too many goals and assessments create confusion and overlap. In addition, many of the tests are so imprecise and difficult to assess that they have little analytical credibility, and the criteria for regulatory efficiency are not clear. There is unlikely to be any clear and consistent basis for comparing the relative importance of counter-acting impacts on the different groups identified. In **Ireland**, proposals submitted to the Cabinet for new legislation are subject to a Quality Regulation Checklist, which includes assessing implication for SME's and competition generally. However, in a separate submission, all substantive proposals to the Cabinet – whether or not they are legislative proposals – should be "proofed" for their impact, if any, in seven identified public policy areas. These priority policy areas include impact on woman, rural communities, people at risk poverty, etc. Ireland is currently trying to reconcile and integrate these proofings, though.

Figure 8. **Analysis of potential costs and benefits in RIA**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries.

The trend toward adopting benefit/cost analysis is consistent with OECD countries acceptance of the 1997 OECD Report's principle that regulations should "produce benefits that justify costs, considering the distribution of effects across society". This principle is referred to in various countries as the "proportionality" principle or, in a more rigorous and quantitative form, as the benefit-cost test. This test is the preferred method for considering regulatory impacts because it aims to produce public policy that meets the criterion of being "socially optimal" (*i.e.*, maximising welfare). Where this test is not applied, there is no objective standard by which ministries justify the need for regulations, no public testing of their conclusions, and little basis for challenge. Some 19 OECD countries now use the benefit-cost test for some or all regulations. This is a significant advance compared to 1990, when only two or three countries did so.

The benefit-cost principle should not be rejected simply because, quantitatively, benefit-cost *analysis* can be difficult. The best practice is that a RIA system should require use of the benefit-cost *principle* for all regulatory decisions, but the form of analysis employed should be based on practical judgements about feasibility and cost. Since all other analytical methods are essentially partial benefit-cost analyses, whatever analytical information is generated can be used to support decision-making in accordance with the broad benefit-cost principle. Experience shows that, over time, governments will tend to improve RIA programmes gradually so that they better support the application of the benefit-cost principle. This step-by-step approach will help instil the benefit-cost principle as a "habit of mind" within the administration, but recognises the practical and conceptual difficulties of this analytical method in the shorter-term.

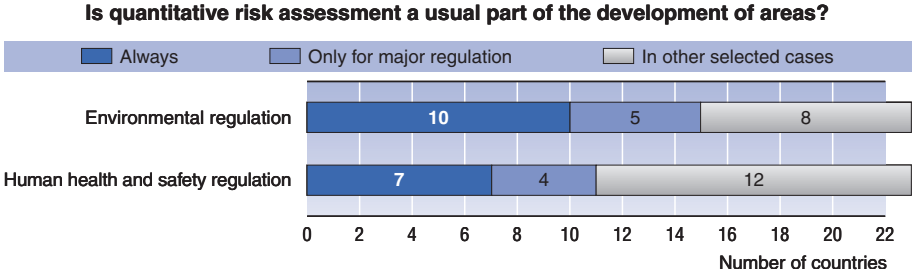
In any case, quantitative benefit-cost analysis must usually be supplemented with other methods. Neither efficiency nor fairness effects can always be plausibly expressed in monetary terms or even quantified in other dimensions. Inability to quantify does not equate to lack of importance, and a guidance document should not subordinate qualitative factors to those that are quantitative in situations where the former are widely recognised as important. An analysis should be sufficiently comprehensive to include and weigh all effects of importance, including identification of potentially irreversible consequences.

Regulators should have some flexibility in applying the analytical methods, within a standardised framework. This recognises that good economic analysis requires professional judgement, and cannot be the result of applying a formula. The number of permissible

analytical methods should be reduced to a few, essentially consisting of a more rigorous method for high-cost regulations and a less rigorous method for low-cost regulations. Guidelines for applying each method should also be standardised, including such parameters as the social discount rate, the use of best estimates, and the presentation of assumptions. Standardisation of methods establishes expectations for adequate analysis, allows analysis to be compared across regulations, allows education and training to be cost-effective and improves public understanding of RIA. Where methodology is not specified, the result has, invariably, been low analytical standards.

An analytical method that is gaining ground in OECD countries is quantitative risk assessment, which allows regulators to understand more clearly the risks for humans or the environment from a particular factor, and the contributions of a regulation in reducing the risk. Quantitative risk assessment improves the capacity of a government to focus on the most important risks and reduce them at lowest cost, while identifying those risks that fall below a threshold justifying government action. Risk assessment has rapidly become among the most high-profile and controversial regulatory issues in the OECD area, and has become one of the most frequent sources of trade and investment disputes. Figure 9 shows that, while only 7 OECD countries use risk assessment consistently when regulating human health and safety, 23 countries use risk assessment at least sometimes. There is considerable potential for more investment in this method, given its value in preventing illnesses, accidents, and fatalities.

Figure 9. **Use of quantitative risk assessment in the development of regulations**



Source: OECD (1998), Responses to the Survey on Regulatory Capacities in OECD Countries.

Develop and implement data collection strategies. Countries rate poorly on this criterion. Data limitations are the main limit on analytical precision. The usefulness of a RIA depends on the quality of the data used to evaluate the impact. Since data issues are among the most consistently problematic aspects in conducting quantitative assessments, the development of strategies and guidance for ministries is essential if a successful programme of quantitative RIA is to be developed.[4]

Public consultation is one important means of collecting information, but this must be carefully structured and the information gleaned must be reviewed and tested critically to ensure that it is of the quality needed for quantitative analysis. A key concern is the possibility of the selective provision of data by stakeholder groups seeking to promote their own sectional interests. More open consultation mechanisms can be one means of guarding against this problem, both by increasing the likely number of data sources and by subjecting material submitted by one interested party to scrutiny and comment from other

groups. Another important means of ensuring better data quality is to seek out expert groups that do not have strong sectional interests in the issue as part of the consultation process. These can include academic and other research bodies, for example.

In addition to consultation, other targeted means of collecting information at relatively low cost have been developed by a number of countries in recent years. For example, **Denmark** has adopted two innovative strategies to improve the flow of information to ministries on the likely impacts of regulation. In its Business Test Panels, a cross-section of businesses is asked directly about the expected administrative burdens of proposed legislation. However, experience has shown the precision of test panel data to be low, and the system is largely seen as an "early warning system" for unanticipated major impacts. The model enterprise programme is intended to produce more statistically robust data, and consists of the selection of a number of "model" enterprises that are statistically representative of their particular industry segment and the use of existing statistical databases to compute total administrative burdens from extensive interviews with a limited number of model enterprises. The **Italian** RIA manual suggests a number of data collection mechanisms to regulators, including opinion surveys, direct interviews, and the use of focus groups.

As indicated above, the development of these strategies is generally at a relatively early stage of development, and significant experimentation seems to be confined to a relatively few countries. Thus, there is no possibility as yet of identifying best practices. However, this is clearly a priority area for further experimentation and research. A notable common thread is that a number of the tools identified above can be seen as a form of "managed" or "guided" consultation. Thus, the continued willingness of business and other stakeholder groups to assist these programmes will be crucial to their success. This, in turn, suggests the need to ensure that they receive adequate feedback and have grounds for seeing substantial benefits as a result of their involvement.

Target RIA efforts. Since regulations differ enormously in the size and complexity of their effects, it makes little sense to examine each regulation with similar thoroughness. At the same time, it is essential to ensure that RIA is applied to all significant regulatory requirements, regardless of their formal legal status. Many countries' RIA systems exclude large areas of regulatory activity with insignificant impacts (*e.g.* nomination of high officials, changes of names of official bodies, etc.). But, analytical capability is a scarce resource that needs to be allocated using some rule of reason. It is vital to target RIAs toward those proposals that are expected to have the largest impact on society and to ensure that all such proposals are subject to RIA scrutiny.

The amount of time and effort spent on regulatory analysis should be commensurate with the improvement in the regulation that the analysis is expected to provide. This suggests that a two-step RIA process may be necessary – a light initial screening to determine what level of more detailed analysis may be needed. The criteria to be employed should be clear and, as far as possible, objective in order to avoid politicisation of the process and the possibility of important regulations slipping through the net.

The **Korean** RIA system requires a rough estimate of costs for all regulations, and defines as "significant" regulation those that have an annual impact exceeding KRW 10 billion (USD 0.9 million), an impact on more than 1 million people, a clear restriction on market competition, or a clear departure from international standards. Significant regulations, as defined, are subject to the full RIA requirements. This is a well-chosen set of criteria in

terms of its ability to highlight regulation likely to require a full and detailed analysis. The **United States** adopts similar criteria, requiring a full benefit/cost analysis where annual costs are estimated to exceed USD 100 million or where rules are likely to impose major increases in costs for a specific sector or region, or have significant adverse effects on competition, employment, investment, productivity or innovation. This means, OMB currently reviews roughly 600 regulations a year (around 15-17% of the rules published), of which fewer than 100 (around 1-2% of the rules published) are "economically significant", and thus require a full benefit/cost analysis. The **Mexican** approach can be characterised as "partially targeted", in that, while the RIA requirement applies to all draft regulations, three broad levels of analytical rigour and effort are distinguished by guidelines, depending on the importance of the regulation.

The **Netherlands** adopts a two part approach to targeting RIA effort. The first stage involves the application of a set of criteria, similar to those discussed above, with the effect that only about 8 to 10% of draft regulations are subjected to RIA. The second stage involves the adaptation of the questions to be addressed in the RIA to the specific regulation. A Ministerial Committee reviews the regulatory proposal and determines which of the 15 standard questions contained in the Directive governing RIA must be answered for each regulation. This "customisation" of the RIA requirement has been taken quite far, with no case having occurred since 1995 of every question having to be answered for a single regulatory proposal.

In sum, substantial efforts are being made to target RIA efforts, with a range of appropriate criteria having been identified to ensure efforts are well directed. However, there are clearly substantial gaps in the coverage of RIA requirements that mean that substantial regulatory initiatives are not being subjected to RIA disciplines. These relate, in particular, to the tendency for legislation or other instruments that establish RIA requirements to specify only a relatively limited range of legislative instruments as being subject to RIA. A significant potential innovation in this regard would be to specify the scope of RIA requirements in "performance oriented" terms. That is, RIA should be applied to all instruments of a legislative character, subject to certain thresholds or other targeting mechanisms, rather than being confined to only primary laws or only subordinate regulations or other categories that are based on legal status, rather than on the extent of their economic, social and environmental effects.

Integrate RIA with the policy-making process, beginning as early as possible. Integrating RIA with the policy making process is essential if the disciplines it brings are to become a routine part of policy development. Were RIA is not integrated into policymaking, impact assessment becomes merely an *ex post* justification of decisions, or meaningless paperwork. Integration is a long-term process, which often implies significant cultural changes within regulatory ministries and among consumers of the analysis, primarily ministers and legislators.

To some extent, integration is a result of good programme design and timing. However, it is also to some degree a product of how well the other RIA best practices are implemented. If there is strong political commitment and effective oversight and incentives, RIA will become influential in policy choice. If effective training programmes are implemented, there is a much greater chance of changing regulators' perceptions of the role of RIA as a tool of good policy development. A 1996 evaluation of the **Dutch** RIA programme found that most regulators now see RIA as "an essential and natural part of

their policy choices" and "expect it to speed the decision-making process on legislation in the Council of Ministers due to the improved preparation".[5] The changes in this regard followed the adoption of a much higher profile for regulatory reform policy generally, with substantial political support being engaged.

Communicate the results, and involve the public extensively. The assumptions and data used in RIA can be improved if they are tested through public disclosure and consultation. OECD countries rate poorly on this criterion. Only a minority of OECD countries who use RIA consistently make the RIA public. Public involvement in RIA has several significant benefits. The public, and especially those affected by regulations, can provide the data necessary to complete RIA. Consultation can provide important checks on the feasibility of proposals, on the range of alternatives considered, and on the degree of acceptance of the proposed regulation by affected parties. Releasing RIAs along with the draft regulatory texts in any consultation procedure constitutes a powerful way to improve the quality of information on new regulations, and therefore the quality of the regulations themselves. Thus, improvements in this area of best practice will also feed back into improvements in data collection (see above).

Denmark has several mechanisms by which to ensure public involvement in the development of policy. At the earliest stages of policy development, the committee structure used for developing legislative proposals ensures wide representation of both experts and organised interest groups and can act as a conduit of RIA data. The custom of releasing legislative proposals for public consultation provides another opportunity for input into policy content and impact assessments. A key initiative being taken in 1999 is the release of the results of business impact assessments conducted as part of the RIA process on an Internet site. Business Test Panels provide for input on specific inputs from a large number of individual business entities.

The use of committees of experts and stakeholders is also standard practice in **Norway**. There the committee's involvement begins at such an early stage that it is possible that the result of a committee report will be a decision not to proceed with legislation.

Apply RIA to existing as well as new regulation. Significant gaps in the coverage of RIA arise because it is not typically applied to assessing the need for already-existing regulations. RIA disciplines are equally useful in the review of existing regulation as in the *ex ante* assessment of new regulatory proposals. Indeed, the *ex post* nature of regulatory review means that data problems will be fewer and the quality of the resulting analysis potentially higher. Despite this, few countries currently require standard RIA tests to be implemented as part of their programmes of review of existing regulations. Indeed, in most cases, such reviews exhibit a very limited degree of methodological consistency, due to a lack of clear direction from the centre of government on the requirements to be met and a lack of reporting and oversight requirements. The consistent application of RIA to existing regulation should constitute a key area of priority for the further development of RIA programmes in OECD countries.

Notes

1. OECD, (1997d).
2. OMB, (1998).
3. This paragraph is largely based on Hopkins, Thomas (1997) in OECD (1997d).
4. For further guidance see Broder, Ivy and Morrall, John F. III (1997) in OECD (1997d).

In 1993, the US Government increased the threshold to streamline the number of RIA being reviewed by OMB. This targeting effort reduced the number of reviews to 600 regulations per year rather than 2 200. See John F. Morrall III. (2001), in OECD-APEC Co-operative Initiative, Proceedings of the Singapore Conference, February, Singapore, *www.oecd.org/regreform*

5. Formsma, Symen (1998).

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Annex II

Regulatory Alternatives

Section 4.2 of this report provides an overview of the range of regulatory alternatives available to governments, a general appreciation of the characteristics of each and a summary of the contexts in which each is likely to constitute an appropriate tool of policy. The following discussion provides a more detailed analysis of each of the regulatory alternatives outlined in the report. It encompasses both alternative forms of regulation and alternatives to regulation.

Performance-Based Regulations. Performance-based regulation specifies required outcomes or objectives, rather than the means by which they must be achieved. Firms and individuals are able to choose the process by which they will comply with the law. This allows them to identify processes that are more efficient and lower cost in relation to their circumstances, and also promotes innovation and the adoption of new technology on a broader scale. The focus of regulation is shifted to results or outputs, rather than inputs, and the degree of government intervention in markets is effectively reduced. Adoption of performance-based regulation can also simplify and clarify regulations, since they can be written in terms of underlying objectives, rather than requiring large amounts of detailed, prescriptive standards to be set out in legislative terms. The use of performance-based regulation is rapidly developing in OECD countries. Its use has been increasing significantly in relation to health, safety, consumer protection and environmental regulation in particular. According to the *OECD Regulatory Capacities Database*, 11 OECD countries have increased their use of performance-based regulation in recent years.

There are costs associated with performance-based regulations. They can be difficult to develop, as they require measurement or specification of desired outcomes, which are not always apparent where prescriptive regulation is analysed. Moreover, the very fact that they allow for a range of different compliance strategies suggests that the verification of compliance is likely to be more difficult, and that administrative and monitoring costs may be increased as a result. Similarly, they require the dissemination of sufficient operational guidance to provide adequate understanding and knowledge of the requirements to ensure compliance. Small businesses in particular often do not welcome performance-based regulations, since they can impose a greater responsibility to develop appropriate compliance strategies and create uncertainty as to what is required for compliance.

As a consequence of the recognition of these problems, most countries have adopted guidelines or "safe harbours" (*i.e.* "deemed to comply" provisions) in conjunction with performance-based regulations. The safe harbours are intended to allow the benefits of certainty of compliance associated with prescriptive regulation to be attained, while also allowing more innovative firms to take advantage of the benefits of performance-based regulation. Guidelines function as a "lighter handed" approach, providing information on appropriate compliance strategies and thus also helping to enhance certainty of compliance.

However, the use of guidelines and safe harbours can bring its own problems, as there is a danger they can become *de facto* prescriptive regulations, undermining the benefits of performance-based rules. This will occur if there is widespread adoption of the safe harbour, and inspectors and other stakeholders come to assume that these represent the norm for compliance. Similarly, guidelines that are written in detailed and prescriptive terms almost necessarily come to be seen as quasi-regulations.

Thus, policy-makers need to adopt a sophisticated approach to the question of when performance regulations are likely to be appropriate and what level of guidance material is required. The use of performance-based regulation necessarily requires that those regulated are able to develop and implement compliance strategies based on a sound understanding of the objectives and standards set out in the regulation. Similarly, guidelines and safe harbours, where used, should be developed from a basis of a clear understanding of the characteristics and capacities of the regulated group and the likely effect of adopting such documents on compliance efforts and strategies.

Process based regulations

These regulations are so named because they require businesses to develop processes that ensure a systematic approach to controlling and minimising production risks. They are based on the idea that, given the right incentives, producers are likely to prove more effective in identifying hazards and developing lowest-cost solutions than is a central regulatory authority. They are particularly useful where there are multiple and complex sources of risk, and *ex post* testing of the product is either relatively ineffective or prohibitively expensive.

In the **Netherlands**, businesses are required to develop individual management plans, based on their own assessments of health, safety and environmental risks pertaining to their specific operations. These plans consist of priority listings of key risks, budgets for addressing those risks, along with timeframes, and evaluation methods. Firms that prepare good plans benefit from a more flexible approach to their activities by the Environment Ministry.[1] This rewards the firm's good regulatory performance and allows the ministry to dedicate its resources to areas where there are greater concerns.

Process regulation is also being used in **Mexico**, where Eco-audits, which are an in-depth and interdisciplinary review of a company's production process, are used to identify major pollution problems and risks. Following the audit, the company signs an agreement with the authority on the steps it will take to clean up its operations, committing itself to timelines. By agreeing to this process, the firm avoids criminal sanctions and can often reduce its insurance premiums. By August 1997 the Environment Ministry had approved 2 110 audits and 698 had been completed.[2]

In the **United States**, the FDA's Hazard Analysis at Critical Control Points (HACCP) programme regulates seafood safety. Producers are required to document and analyse the different stages of the production process, identifying key points at which hazards arise and putting into place site-specific strategies to manage them. The benefits of HACCP, compared with previously used regulatory approaches, have been estimated to be in the range of USD 1.4 billion to USD 2.6 billion, with up to 58 000 illnesses from contaminated seafood avoided annually. HACCP approaches have been recommended by the UN-based Codex Alimentarius Commission and other countries (**Canada** in relation to seafood) have also moved toward HACCP.[3] In Victoria, **Australia**, food businesses are required to complete HACCP-based "food

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safety programmes" and to update them regularly, with independent auditing. Similarly, operators of cooling towers are required to adopt HACCP-based Risk Management Plans and Systems (RMPS) to minimise the risks of legionnaires' disease, while water supply authorities are also shortly to be required to adopt HACCP-based systems.

Co-regulation

Under co-regulation the regulatory role is shared between government and industry. It is usually effected through legislative reference or endorsement of a code of practice. Typically, the industry or a large proportion of industry participants formulate a code of practice in consultation with government, with breaches of the code usually enforceable *via* sanctions imposed by industry or professional organisations rather than the government directly. This approach allows industry to take the lead in the regulation of its members by setting standards and encouraging greater responsibility for performance. It also exploits the expertise and knowledge held within the industry or professional association.

Co-regulation affords government the opportunity to involve industry and interested parties in the investigation and enforcement of the regulations. This can lead to significantly greater levels of compliance, as industries become co-monitors, while it also encourages participants to see good industry-wide performance as a common good, through its impact on public perceptions. From the government viewpoint, co-regulation can be highly cost effective, as industry experts will often participate on a voluntary basis, while the "arms length" relationship with government can also mean lower overheads and greater responsiveness.

However, there is a substantial risk attached to co-regulation arising from the possibility that it will become the vehicle for anti-competitive activities created by the industry regulators. Evidence from numerous countries suggests that such risks are widespread. For example, when regulations governing the professions was subjected to the general competition law for the first time under **Australia**'s National Competition Policy reforms, substantial changes were required to bring the existing regulatory structure into compliance. Similarly, when the **Netherlands** introduced a new competition law in 1998, a five year exemption was required for the regulations of the Professional Boards to allow time for compliance to be achieved.[4]

This highlights the importance of proper regulatory design that focuses on transparency and follows specified regulatory principles to guide the development of codes. Opportunities for regulatory barriers to entry to develop must be minimised and careful scrutiny maintained. Transparency is of crucial importance in this regard, since the close relationships required between industry groups and government regulators under the co-regulatory model necessarily implies a higher than normal risk of "regulatory capture" developing.

Economic instruments

At a theoretical level, the use of economic instruments should *a priori* be the preferred means of achieving policy objectives in a wide range of situations. This is because these tools – taxes, subsidies, tradable permits, vouchers and the like – operate directly through the market, thus harnessing market incentives and avoiding the substantial potential for distorting market incentives inherent in most forms of regulation. Indeed, the fundamental

goal of a regulatory instrument is precisely to reduce existing distortions in the operation of markets by better aligning price incentives with the broad social welfare.

There are good theoretical reasons to believe that economic instruments offer the potential for substantial static and dynamic efficiency gains, compared to traditional command and control regulation. Economic incentives offer two important advantages over traditional "command and control" regulation. First, they allow business and others to achieve regulatory goals in the least costly manner. Second, market incentives reward the use of innovation and technical change to achieve these goals.

A recent study related to the use of economic instruments in environmental policy has found that little empirical evidence is available on the scale of efficiency gains from economic instruments, though indirect evidence suggests that such gains exist. Evidence from the **United States** indicates that a tradable permit programme for sulphur dioxide has led to substantial efficiency gains.[5] Part of the problem in generating data is that a considerable period of time is needed before the benefits of economic instruments are fully realised. Another problem is that economic instruments are often applied within the context of larger policy packages, which makes it difficult to single out the effect of a particular instrument.[6] The distributional effects of these instruments have also raised concerns in some quarters, though the evidence on this point is not very clear.

There is a large range of economic instruments that governments can utilise to better align incentives with socially optimal outcomes. They operate by internalising external costs or providing subsidies to account for external benefits, and include taxes, charges, subsidies, user-pays pricing or refund schemes. By raising or lowering the cost of engaging in a particular activity, governments can provide powerful incentives to undertake the desired behaviour or to avoid the undesirable behaviour. They can be used to force companies or citizens to internalise the external costs (externalities) of their actions. Alternatively, they can be used to ensure adequate pricing of previously under-priced resources, such as the environmental quality of water or air.

In **Denmark**, the "Green Tax System" is used to pursue environmental objectives. This system uses taxes on energy use, CO_2 emissions, SO_2 emissions, and wastewater discharge to influence behaviour in relation to a wide range of environmental goals. The Green Tax System is complex, involving the application of several different tax rates for different uses or means of generation of pollutants. The size of the impact of the scheme is quite significant with receipts from levied taxes expected to reach 1.2% of GDP by 2000.[7]

Subsidies can be used to encourage desired actions. In the **Netherlands**, income tax deductions are available for commuting via public transport and, as in a number of other countries, differential indirect tax rates favour the use of unleaded petrol. In **Korea**, long-term low interest loans are available to firms that establish facilities that prevent, treat or recycle pollutants.

Another type on economic instrument is a tradable permit, first pioneered in the **United States**, but also used now in other OECD countries. Perhaps the best-known example of such trading is the acid rain programme operated by EPA, which was designed to reduce **United States** sulphur dioxide emissions by 10 million tons annually from 1980 levels. In the programme, emitters of SO_2, a precursor to acid rain, were issued a finite number of allowances (permits) that can be used over the next 50 years. The SO_2 trading programme was launched in 1992. It has produced significant cost savings and reductions in emissions are ahead of schedule. Estimates of cost-savings just from allowing trading

range from 25 to 43%. In 1990, the EPA estimated that the cost of SO_2 reductions in 2010 would be between USD 2.6 billion and USD 6.1 billion (in 1995 dollars). However, a 1998 study projected that these costs would be just over USD 1 billion (in 1995 dollars).[8] Other examples of the use of tradable permits include:

- Airlines in the United States that are trading landing slots at busy airports at prices in the range of USD 1-10 million per slot, with the total value of slots traded estimated to be around USD 400 million.
- A programme of tradable Regional Contribution Agreements in New Jersey which has allowed towns to meet their obligation to provide low- and moderate-income housing by trading the housing requirement to another willing municipality through a regional contribution agreement (RCA). This involves a cash payment from one municipality (usually suburban) to another municipality for the purpose of building or refurbishing low- and moderate-income housing in the receiving municipality. These obligations have been recently traded at a cost of USD 27 000 per unit.[9]
- Permits for agriculture, including fisheries licenses, fishing quotas for plaice and sole, manure spreading rights and milk quotas that are traded in the Netherlands.
- In Korea an emissions charge was established as a means to ensure compliance with permissible discharge limits. The charges are levied in relation to a set of 10 air pollutants, 17 water pollutants and two specific types of livestock wastewater pollution. From 1991 to 1996, the total number of charges levied varied between 3 099 and 4 267 and the total amount levied varied from KRW 22.2 billion to KRW 10.4 billion. In 1997, the incidence of the charge was varied so those firms now face an incentive to reduce emissions to around 30% of their permitted levels as opposed to a straight penalty system, thus rewarding better performers.
- Entry to the United Kingdom emissions trading scheme is open to any entity responsible for emissions in the UK. Companies in Climate Change Levy negotiated agreements are able to use emission trading as a way of reducing the costs of meeting their negotiated agreement targets.

Information and education

The most widely used alternative approach to regulation in OECD member countries is information and education campaigns. These approaches address information asymmetries and empower citizens and consumers to adopt actions or make informed choices that match their preferences and align their sensibility to risks. While many information campaigns simply seek to inform citizens and enhance consumer choice, some information campaigns are more explicit in seeking to change behaviour. This form of campaign, based on attempts at "moral suasion" by the government, is generally found where the behaviours sought to be modified have substantial externality effects. For example, in campaigns aimed at reducing speeding when driving, or mustering anti-smoking or anti-litter behaviours.

In **Denmark**, initiatives have included information campaigns on the disposal of electric batteries and on reducing drinking water consumption. Another is the EPA's "List of Undesirable Substances", a list of approximately 100 chemical substances or groups of substances known to have harmful effects on humans and/or the environment and to be used in significant quantities. The purpose of the list is to exercise a "moral suasion" in

discouraging the use of these chemicals, with future regulatory action a possible, but not inevitable next step.

Since 1987, the **Netherlands** has used an information disclosure strategy in the "eco-labelling" of products – that is, the provision of information to consumers on the environmental aspects of the manufacture, use and/or recycling of the product. In 1994, **Hungary** introduced a similar programme of eco-labelling, called "Environmentally Friendly Product" which certifies around a hundred products, with a fee for the use of the logo paid to the government.

Guidelines

One kind of information campaign is the promulgation of quasi-regulatory "guidelines" by a regulatory authority, setting out processes or providing interpretations to aid understanding of government objectives by business and citizens. They may be designed to accompanying existing regulations, particularly those written in performance-based terms (see Annex II), but are also increasingly used as stand-alone documents. Guidelines are helpful where there are many acceptable solutions to a regulatory problem because they do not limit the range of options for compliance.

Guidelines are widely used as an alternative to regulation in the area of consumer protection in **Denmark**. The Consumer Ombudsman sees guidelines as a means to influence the behaviour of particular industries that is more flexible than formal regulation. Where significant non-compliance with guidelines occurs, the Ombudsman is able to instigate court proceedings. Guidelines have evidentiary status in court proceedings, being regarded as interpretations or clarifications of the application of legislation to the particular industry or situation. Business has a clear incentive to support guidelines once made, as their cancellation (which might occur in cases of widespread non-compliance) is likely to lead to the promulgation of more detailed regulations, which are likely to diminish flexibility and increase compliance costs.

Guidelines, while offering significant advantages in terms of flexibility, can potentially have negative impacts on competition. There are strong incentives for existing producers to lobby for guidelines that pose barriers to new entrants or that legitimise existing anti-competitive behaviours. This requires that attention be given to safeguarding openness and transparency in the procedures under which guidelines are made.

Voluntary approaches

Voluntary approaches are arrangements initiated and undertaken by industry and firms, sometimes formally sanctioned or endorsed by government, in which self-imposed requirements which go beyond or complement the prevailing regulatory requirements. They include voluntary initiatives, voluntary codes, voluntary agreements, and self-regulation and can vary in regard to their enforceability and degree of voluntarism.

There are two underlying reasons why firms would participate in voluntary approaches. First, companies who take voluntary action to redress a policy concern may stave off more onerous government regulation. A government with a credible threat of possible future regulation can encourage an industry to deal with the issue itself rather than actually taking the step of implementing regulation. Second, firms may enhance their reputation and hence increase sales via participation in voluntary associations.

For the community as a whole, arrangements that are undertaken and implemented by firms voluntarily offer the advantages of speed, consensus, and flexibility, as opposed to arduous, adversarial, and formal rule-making. Costs of compliance can be lowered, while incentives to comply can be strengthened compared to traditional sanctioning approaches. At a minimum, voluntary arrangements have the potential to promote interaction among groups who normally interact through the regulatory process as adversaries.

An early, and very successful example of a voluntary arrangement is the chemical industry's Responsible Care Programme, now used in over 40 countries. Responsible Care, aims to accelerate environmental improvements in the chemical industry by promoting the adoption of rules for sound environmental management practice, including a "cradle to grave" product lifecycle management approach. The degree to which this voluntary programme circumscribes firm activity depends on the country and the circumstances in

Box 8. **Environmental covenants in the Netherlands**

The Netherlands has used covenants since the mid 1980s and they have become increasingly popular, particularly as an environmental policy instrument, over the past ten years. Covenants reflect a desire for co-operative, rather than adversarial, relationships between industry and government in working toward environmental goals.

Covenants are used in three ways: as a temporary instrument pending the passage of legislation, as a supplement to legislation to achieve higher standards and as an alternative to legislation. Three broad categories of covenant are: those that relate to environmental aspects of products, those that relate to pollution caused by companies, and those that contain agreements on the exercise of certain government powers.

As experience with covenants has grown, efforts have been made to standardise their content and roles, notably through the issue in 1992 of a Code of Conduct for covenants and a subsequent Cabinet Regulation, adopted in 1995. The fact that many covenants are enforceable may have been important in encouraging the adoption of these attempts at greater standardisation and transparency. Significant dissatisfaction had arisen with the early use of covenants, based on their lack of clear obligations to achieve results, uncertain legal status, lack of third party involvement and concern that the role of parliament was being supplanted. The 1995 Cabinet Regulation includes criteria for the use of covenants, binding of the parties, openness, making objectives and obligations explicit, accounting for the interests of third parties, dispute resolution and evaluation.

By the time of the 1992 Code of Conduct, over 150 covenants were already in existence. By 1998, there were over 50 in the environment area alone, covering areas such as basic metals, paper and cardboard production, dairy products, batteries, PET bottles, CFC and phosphate use and wastes. Evaluation suggests that the mechanism has been successful in achieving an integrated focus on firms' environmental problems and that the process of devising and implementing the covenants is now well accepted. Overall, covenants are seen as an important adjunct to more traditional regulation.

Note: See OECD (1999), *Regulatory Reform in the Netherlands*, Paris, p. 131, and Bastmeijer, K. (1997), "The Covenant as an Instrument of Environmental Policy: A Case Study from the Netherlands", published in Huigen, H. (ed), OECD (1997), *Co-operative Approaches to Regulation*, PUMA Occasional Papers No. 18, Paris.

which the particular programme was developed. In **Canada**, where the programme was pioneered in 1984, it is characterised by ambitious targets and strict control procedures. These were the result of an imminent threat of new legislation, consumer boycotts, and local pressure against the chemical industry in the wake of the Bhopal disaster. By contrast, in **France**, where the programme was adopted in 1990, it was developed in the absence of any threat of additional regulation or international chemical industry disaster. Hence the programme involves recommendations rather than mandatory requirements, self-reporting, and the only sanction is exclusion from the association of members of the programme. Despite differences in scope between countries, the Responsible Care Programme has significantly improved relationships between the chemical industry and local communities. It has improved environmental practices, and has given the industry the flexibility to achieve cost-effective outcomes without being subject to new regulation.[10]

In the **United States**, a variety of voluntary programmes was developed in the 1990s, such as the Pesticide Environmental Stewardship Program, Encouraging Environmental Excellence, and Common Sense Initiative. A study found that these programmes combine the features of the unilateral, negotiated, and public voluntary approaches employed in the **European Union**.[11] Most **United States** voluntary efforts are co-operative, non-mandatory strategies.[12]

In some countries legislation is used to demonstrate a strong credible threat of potential government action, which in turn provides considerable incentive to develop, join and participate in voluntary approaches. For example, in **Denmark** legislation gives Ministers the power to issue a formal order making voluntary agreements enforceable and mandating that non-participant firms within the industry comply with the agreement's conditions. While this power is rarely used it is believed to have substantially increased the degree of commitment of firms to the various voluntary approaches.[13]

As in the US, the large majority of voluntary arrangements in EU countries are non-binding in nature.[14] The exception tends to be The **Netherlands**, where Dutch covenants which tend to be more coercive as they rely on legally binding obligations.

Notes

1. OECD (1999d), p. 132.
2. OECD (1998c), pp. 135-151 and Procuraduria Federal del Medio Ambiente (1998).
3. Chenok, Daniel J. (1997).
4. OECD (1999d), pp. 147-8.
5. Government of the United States (1997).
6. OECD (1997b); OECD (1994); OECD (1995b).
7. OECD (2000e).
8. United States Government (1999), p. 198.
   See *www.geocities.com/flower1_20007/ANCW.html*
9. Haddad (1997).
10. OECD (1999f), p. 67.
11. Mazurek, Janice (1998).
12. OECD (1999e), p. 149.
13. OECD (2000e).
14. EEA (1997), Oko-Institut (1998), cited in OECD (1998d), pp. 12, 15.
    EEA (1997), Oko-Institut (1998), cited in OECD (1998d), *op. cit.*, pp. 12, 15.

Annex III

Administrative Simplification and the Use of E-government Tools

This report has discussed a range of administrative simplification and licence reduction programmes, grouping them according to whether they are based on information provision, process re-engineering or electronically-based mechanisms. It also considered the question of measurement of the size of administrative burden as a basic informational input to the design, implementation and evaluation of burden reduction mechanisms. The following provides some additional detail of country experiences with the implementation of these programmes in order to highlight additional promising practices and practical difficulties. It also focuses on important technologically-based mechanisms for reducing administrative costs based for a range of transactions between business and government in two key areas: custom procedures and government procurement.

SMEs-driven administrative simplification programmes

A large and persuasive body of evidence demonstrates that small businesses are disproportionately affected by red tape.[1] Governments have increasingly become concerned that administrative burdens can constitute significant barriers to entrepreneurialism by discouraging new small business start-ups. In response, a significant element of burden reduction programmes has been targeted specifically at the SME sector.

Denmark in 1995 established a committee of ministerial and business representatives to recommend ways to reduce administrative burdens on SMEs. As a result of an action plan, twenty-five initiatives were implemented. These included the abolition of a range of fees regarded as especially burdensome to SMEs, exemptions from statistical reporting requirements, establishment of a telephone hotline to answer questions on administrative formalities and a guide to environmental regulation. A pilot programme for Business Test Panels, to gather information *ex ante* on the likely impact of new regulatory proposals on administrative burdens, was also begun. One of the key purposes of this programme was to ensure that SME impacts were taken fully into account in developing new regulation.

A variant of these approaches, in the sense that it provides for potentially different licensing requirements in response to the different circumstances of business, is the "Supply Model" approach to permit and licence requirements adopted in **Germany** in 1996. The central element is a flexible approach in which investors can choose among different licensing procedures, each with different risks and costs for the investor. The supply model provides a range of permitting options for the investor that differ according to the time required and the degree of risk accepted by the investor if the project is not in compliance with legal requirements.[2] Through this mechanism, the functioning of business licensing

is able to be "self-tailored" to different business circumstances and the preferences of individual managers.

In **Greece**, a 1997 law simplified industrial licensing procedures by synchronising industrial development and environmental protection licensing arrangements for SMEs. It consolidated permits for establishment of industrial activities into a single licence, issued by the regional department of the General Secretariat for Industry (GSI) in each Prefecture. However, the law did not produce the efficiency gains anticipated, because the lack of resources and co-ordination with other departments did not allow GSI services to meet prescribed deadlines and requirements. To deal with these problems, the Ministry of Development codified all requirements and displayed them on the Internet with an interactive guide to help applicants in filling them out online.

Electronic simplification in customs procedures

Japan's use of the customs electronic data interchange (EDI) system, adopted in 1978, illustrates how ICT solutions must be based on general changes in procedures. With the EDI system, exporters, importers and their customs brokers can submit their declarations electronically from their offices. The EDI system improves the accuracy of declarations and speeds up customs procedures as a whole.

However, customs procedures are not the only regulations at the border. There are others such as quarantine, sanitary, phyto-sanitary, food security, and import/export licences. Under the Japanese Customs law, merchandise not cleared through the border controls of agencies other than Customs cannot obtain import permission from Customs. Trade-related procedures required by other agencies' regulations were, until very recently, neither computerised nor linked electronically to the Customs EDI system. The lack of electronic linkage among computer systems reduced the value of the Customs EDI system from the point of view of paperless and smooth information flow and avoidance of input duplication and error. That resulted in delays to import clearance, raised storage costs, and reduced the competitiveness of foreign products.

In **Denmark**, nine pilot tests of an EDI system were initiated in 1999 and, by 2000, EDI-based reporting of accounting information including annual accounts, tax returns and some statistical reports was possible. Electronic processing of payments will also form part of the system. A second project involving EDI of information related to employees (taxes, wages, pension entitlements, etc.) has also been undertaken. Denmark also adopted a programme to rationalise customs operation throughout the country, which incorporates a new EDI system in an attempt to establish an immediate clearance procedure, as one of the two procedures available for importers. Just-in-time custom clearance should be possible if relevant electronic information is received two hours before the imports arrive. It will be supplemented with an optimal risk assessment procedure, aimed at minimising fraud and mistakes.

In the **United States**, Federal agencies have used IT to collect information more efficiently and rapidly by "taking the paper out of paperwork". An initiative by the Internal Revenue Service (IRS) to offer Telefile to most individuals allows over 4 million taxpayers who used to file a paper form to file tax returns using a touch-tone phone. In the Telecommunications industry, an online Equipment Authorisation Database allows applicants to electronically file applications for equipment authorisation and to check their status; and a "Frequently Asked Questions" site clearly outlines procedures for

importation of electronic equipment and radio transmitters, linking users to relevant provisions in the Code of Federal Regulations.

Mexico is among the leading countries in the implementation of an integrated electronic-based customs system. Mexico has established an Integral Automated Customs System (SAAI) which allows for the electronic exchange of information between the General Customs Administration, Customs offices, Customs brokers, warehouses and authorised banking institutions to collect duties. Under SAAI, entry documents can be validated or refused prior to the actual clearance of goods, thereby providing for more transparency and predictability for traders. These changes have resulted in efficiency gains for all concerned parties in terms of the improvement in the transparency of procedures. The programme has seen the maximum clearance time for goods fall from anything up from 24 hours to a few minutes. Moreover, the number of Customs officials in entry ports has been able to be reduced by more than 20% between 1994 and 1997 as a result of the efficiency gains obtained, while the number of import and export operations increased by more than 25% and 62% respectively during the same period. The more transparent system has also resulted in improved efficiency in duty collection and the reduction of discretionary power by Customs officials, with improved integrity levels.

In **Spain**, customs authorities oversee 125 customs entry ports. They have applied a computerised system based on the United Nations Electronic Data Interchange Protocol and harmonised data-set (UN/EDIFACT) since 1994 for export transactions and 1996 for import transactions.[3] The EDI system enables users to submit their import and/or export declarations to customs authorities and to receive customs permissions through electronic exchange. Spanish authorities estimate that EDI declaration forms are used on about 70% of import declarations and 95% of export declarations. With the proper use of EDI-based declaration forms, goods can be customs cleared within a few seconds. Before the implementation of the computerised EDI-based system for imports, Spanish authorities estimated that the average customs clearance time was four hours per transaction.

In **Korea** too, the introduction of an Electronic Data Interchange (EDI) system constitutes a major technological initiative being pursued to reduce administrative costs. This is currently being implemented in relation to import/export clearances.

Government procurement

In March 1996, **Mexico** began an innovative process of government procurement through the Internet, known as COMPRANET, to improve the transparency of overall procedures. Through the use of the Internet, significant efficiency gains can be realised for both government purchasers and suppliers in terms of time and cost saved by retrieving and delivering relevant technical tendering documentation, government laws and regulations electronically.

In addition, small firms in remote locations and foreign enterprises can have the same access to procurement information as large domestic enterprises. Government agencies gain from a more competitive tendering process that is likely to yield lower prices and/or better service. Mexican authorities intend to further develop COMPRANET to make it possible for participating agencies to carry out all necessary follow-up and control of the procurement process through electronic means. With the development of electronic signatures, cryptography and international standards in the electronic data transmission, possibilities will emerge for the submission of bids through COMPRANET.

In **Korea**, the Internet is also used in the field of government procurement as information on government contracts is published not only in the official gazette and daily newspapers, but also increasingly on the Internet.[4] A summary in English is attached to the public notice on invitation to bid for the delivery of products and services (including construction) that are covered by the WTO Agreement on Government Procurement (GPA).

In **Italy**, access to information has been facilitated by the development of electronic procurement at the EU level and the Italian initiative on e-procurement. An Internet site (*www.acquisti.tesoro.it*) provides a virtual catalogue of all tenders by the public administration. This significantly improves transparency as it gives all firms, including foreign firms, timely and full information on opportunities regarding the supply of goods and services to the Italian public administration.

Notes

1. For a discussion on the effects and ways to measure administrative burdens, see OECD (2001a).
2. See The OECD (1997c), p. 228.
3. The United Nations rules for Electronic Data Interchange for Administration, Commerce and Transport comprise a set of internationally agreed standards, directories and guidelines for the electronic interchange of structured data, and in particular that related to trade in goods and services between independent, computerised information systems. For more information consult the Internet site (*www.shedi.net.cn/edi-stand*).
4. Information on public procurement is available on the Internet site of the Supply Administration of the Republic of Korea at the following address: *www.sarok.go.kr*

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Annex IV

Regulatory Transparency

This section provides additional discussion to that included in the main body of the report in relation to the key elements of regulatory transparency. In particular, it considers a range of country experiences and looks in depth at the characteristics, advantages and disadvantages of a number of different tools of regulatory transparency.

4.1. Public consultation

More so than most other regulatory quality tools, public consultation has long been widely acknowledged as key to regulatory quality. Many OECD countries, with a wide range of institutional and historical backgrounds, have long-standing and extensive consultation structures. Based on this large body of historical experience, the 1995 *OECD Recommendation* identified in some detail the mechanisms by which consultation contributes to regulatory quality:

> *Consultation and public participation in regulatory decision-making have been found to contribute to regulatory quality by* i) *bringing into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected;* ii) *helping regulators to balance opposing interests;* iii) *identifying unintended effects and practical problems;* iv) *providing a quality check on the administration's assessment of costs and benefits; and* v) *identifying interactions between regulations from various parts of government. Consultation processes can also enhance voluntary compliance, reducing reliance on enforcement and sanctions.*
>
> *Consultation can be a cost-effective means of responding to other regulatory principles in this checklist, such as identification of the problem, assessment of need for government action, and selection of the best type of action.*[1]

Despite its long history, the use of public consultation in OECD countries is evolving rapidly. Consultation is becoming more open and more broadly participative. Its objectives and mechanisms are changing. The underlying pressures favouring an extended use of public consultation include:

Why public consultation is important?

Consultation significantly increase the stock of information available to governments on which policy decisions can be based. The increasing use of the quality assurance tools discussed in Chapter 4, particularly regulatory impact analysis and the weighing of alternative policy tools, has meant that consultation is increasingly needed for collecting empirical information for analytical purposes such as:

- Analyses of the policy problems prior to taking a decision that action is warranted.
- Regulatory impact analysis to measure the expected impacts of policy options. And

- Identification and consideration of policy options (regulatory or non-regulatory).

These tools are information intensive. Yet data gathering is inherently costly, and much data relevant to policy-making is held by regulated entities. Consultation represents a highly cost-effective means of information collection, though the quality of information must be carefully managed and assessed. As a result, governments are increasingly looking to affected parties as sources of data. The range and volume of data that governments seek to collect through consultation has greatly increased and this has had major implications for the design of consultation processes.

Consultation can also help offset the fragmented and uncoordinated nature of regulatory structures in most countries, since it constitutes the only reliable source of information on aggregate impacts and overall regulatory consistency. That is, such information can only reliably be obtained from the users of regulation. Of course, the success of any such attempts to give greater weight to issues of co-ordination and limiting aggregate regulatory burdens also depends on the forging of productive co-operative relationships between regulatory departments within government.

Demands for greater participation and accountability

Changes in the nature of civil society and the relationships between government and the population are also pushing governments toward more extensive use of consultation. Better educated and informed citizens are demanding more information from government and more say in what governments do and how they do it. Open and consultative policy-making arrangements are part of these demands, creating pressure for more open consultative mechanisms, with better information and more effective opportunities for participation and dialogue. At the same time, advances in information technology are enhancing governments' abilities to meet these demands, as well as the abilities of civil society groups to organise to pursue and promote their goals.

While governments sometimes complain about the costs of greater transparency – which are felt in terms of delays in completing the regulatory process, as well as the possibility that stronger pressure groups can undermine regulatory quality – wider participation also contributes to regulatory quality. Strong accountability arrangements mean that governments pay a higher price for poor decision-making, for paying undue attention to the demands of narrow interests, and for poor implementation.

Domestic trends toward openness have been reinforced by a widening set of international trade-related disciplines on regulatory transparency, such as the GATs requirements summarised in Table 5. Foreign firms, individuals, and investors seeking access to a market must have adequate information on new or revised regulations so they can base decisions on accurate assessments of potential costs, risks, and market opportunities, but they have greater difficulties than domestic market players in obtaining information. Regulatory transparency has also been improved by the growing use of international standards, which reduce search costs and increase certainty for consumers and market players.

Facilitating implementation and improving compliance

Regulation will only achieve its objectives if there is a high level of compliance (see Section 5.3). Consultation can improve compliance levels by communicating new regulatory requirements in a timely way and maximising the time available to those who

Table 5. **Summary of selected GATS requirements pertaining to transparency in domestic trade-related regulation**

Procedures to be employed by members in their domestic jurisdictions	Procedures to be employed between WTO members
Article III ● Prompt publication or other means of making publicly available all relevant measures of general application which pertain to or affect the operation of GATS. ● Establish one or more contact points for handling requests from other members for information on relevant measures of general application which pertain to or affect the operation of GATS. **Article VI** ● In sectors where members have specific commitments, they shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. ● Each member shall maintain or establish judicial, arbitral or administrative tribunals or procedures for prompt review and remedy of administrative decisions affecting trade in services. Where such review is conducted by the decision-making agency, members shall ensure the procedures provide for objective and impartial review. ● Where authorisation is required for supply of a service, the competent authorities shall without undue delay provide the applicant with information about the status of the application and inform the applicant of the decision concerning the application within a reasonable period of time.	**Article III** ● Respond promptly to requests from other members for information on relevant measures of general application which pertain to or affect the operation of GATS. ● Notification to WTO of enquiry point details. ● Annual notification to WTO of new, or changes to existing, laws, regulations and administrative guidelines affecting sectors where the member has specific commitments. ● Opportunity to notify other members' measures to the Council for Trade in Services. **Article VII** ● Notification of existing recognition agreements, opening of negotiations on recognition, and the adoption or modification of a new recognition agreement. **Article VIII** ● A member may request the Council for Trade in Services to request another member to supply specific information concerning a monopoly supplier of that member. ● Notification of new monopoly rights regarding supply of a service covered by a member's specific commitments.
Procedures to be employed by members in their domestic jurisdictions	**Procedures to be employed between WTO members**
● In sectors where a member has made specific commitments, it shall apply any licensing and qualification requirements and technical standards based on objective and transparent criteria, ensuring they are not more burdensome than necessary, or a restriction on the supply of the service. ● In sectors where a member has undertaken commitments on professional services, it shall provide adequate procedures to verify the competence of professionals of other members.	**Article IX** ● A member is obliged to enter into consultations when requested by another member in order to eliminate practices that may constrain competition and restrict trade in services. The member subject of the request shall supply publicly available information and other information of a non-confidential nature.
Reference Paper on Basic Telecommunications ● Provision on a timely basis to other service suppliers of technical information about essential facilities and commercially relevant information necessary for their provision of services. ● Procedures for interconnection must be publicly available and major suppliers shall make publicly available either its interconnection agreements or a reference interconnection agreement. ● Universal service obligations shall be administered in a transparent, non-discriminatory and competitively neutral manner and shall not be more burdensome than necessary. ● Licensing requirements shall be publicly available and the reasons for denial of a licence will be made available to an applicant on request. ● Any procedures for the allocation and use of scarce resources will be carried out in an objective, timely, transparent and non-discriminatory manner.	

Source: Adapted from OECD (2001), *Strengthening regulatory transparency: insights for the GATS from the regulatory reform country reviews*, Paris.

must comply to adjust to new regulatory requirements. Where those affected have been actively involved in the development of the regulation, a sense of legitimacy and shared ownership is more likely and the level of "voluntary compliance" is likely to rise. Consultation is also likely to reveal compliance problems with regulatory proposals and hence allow them to be addressed before the regulatory standard is finalised.

Quickening responsiveness

The first section of this report noted that, as the pace of change in the regulatory environment increases, due to factors including technological change and globalisation, the effective life of regulation is contracting. High quality regulation is increasingly a dynamic concept, synonymous with responsive and adaptable policy-making. Consultation can help enhance responsiveness by allowing needed changes to be identified more quickly. Building consensus and political support through consultation has also been cited as way to speed up the implementation of controversial regulatory decisions. At the same time, the need for responsiveness can be a factor working against consultation: if consultation is perceived as cumbersome and time-consuming, governments concerned about speeding up decision-making may try to circumvent it.

The implications of these changes toward more participative and open regulatory processes are profound. The more systematic approach to policy-making and the informational and managerial requirements it entails are leading governments to a new view of the public as a valuable partner in governing, including in the development of regulations and regulatory management. Governments are realising that they cannot do everything and must share tasks with those directly affected. In many OECD countries, this is leading to the public taking on new roles in the development, implementation, and revision of regulations.

How much OECD countries consult?

Figure 10 below shows that public consultation is widely but not universally used in OECD countries. Twenty countries apply systematic public consultation procedures to the development of new primary laws, and another seven sometimes use consultation, in addition to parliamentary debates, which are themselves a form of public consultation. For subordinate regulations, the record is not so good. Only 14 out of 28 countries have systematic public consultation procedures for subordinate regulations, while the other half use public consultation sometimes or in some areas. For both primary and subordinate regulations, non-EU countries seem to consult more systematically than do EU countries. There is little difference between new and older OECD member countries, which suggests that new members are rapidly adopting best practices.

Despite the major efforts that have been expended in redesigning and expanding consultation programmes, the level of satisfaction with consultation arrangements remains quite low among some regulated entities and, quite frequently, the general public. The recent PUMA multi-country business provided stark evidence of this in the eleven countries in which it was administered. It found that managers of SMEs perceived that the degree of consultation during the process of developing new regulations is low, with the vast majority of companies (77%) believing that businesses were seldom or never consulted and only 9% of companies believing that businesses are often or always consulted.[2]

Several factors seem likely to be contributing to this dissatisfaction. On the one hand, there is the necessary tension between government's need to complete policy action in a timely fashion and the need to provide adequate time for groups that are often poorly resourced to participate effectively in consultation. Resource limitations can also mean that notice of the existence of a consultation opportunity does not penetrate as widely as might be desirable. In other cases, consultation is still being confined to designated groups, rather than being open to all interested parties. The design and implementation of

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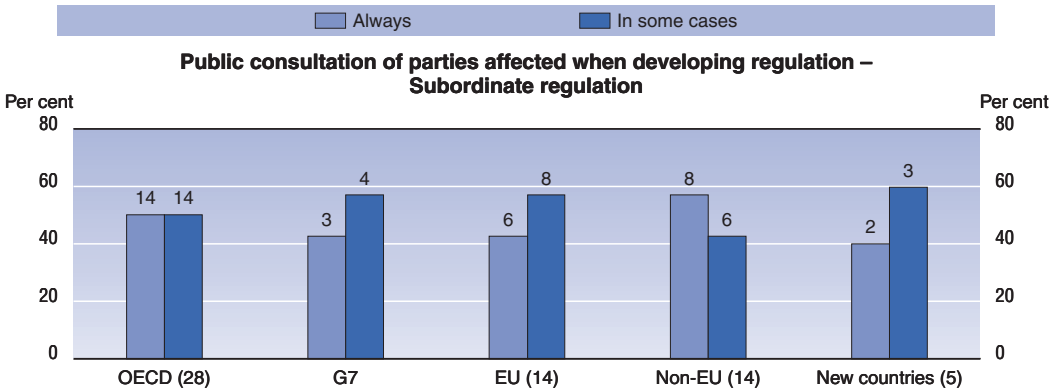
Figure 10. **Use of public consultation for primary and subordinate regulations in 28 OECD countries**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries.

consultation programmes must match government and civil society capacities, but the capacities of interest groups have often been neglected in deciding how to consult.

What is public consultation?

The term "consultation" is defined broadly in this report. "Public consultation" describes three related forms of interaction with interested members of the public, as follows:

Notification is the communication of information on regulatory decisions to the public, and is a key building block of the rule of law. It is a one-way process of communication in which the public is treated as a passive consumer of government information. Notification does not, itself, constitute consultation, but can be a first step. In this view, prior notification allows stakeholders the time to prepare themselves for upcoming consultations. Notification is required in many countries for different kinds of regulatory actions, including adoption of primary and subordinate legislation, the exercise of various forms of administrative discretion, and the intention to regulate in the future (such as the annual Regulatory Plans published by the **United States** federal government). Notification is also a strategy for achieving the objective of facilitating implementation and improving compliance (see Section 5.3).

Consultation involves actively seeking the opinions of interested and affected groups. It is a two-way flow of information, which may occur at any stage of regulatory development, from problem identification to evaluation of existing regulation. It may be a one-stage process or, as is increasingly the case, a continuing dialogue. Consultation is increasingly concerned with the objective of gathering information to facilitate the drafting of higher quality regulation.

Participation is the active involvement of interest groups in the formulation of regulatory objectives, policies and approaches, or in the drafting of regulatory texts. Participation is usually meant to facilitate implementation and improve compliance, consensus, and political support. Governments are likely to offer stakeholders a role in regulatory development, implementation and/or enforcement in circumstances in which they wish to increase the sense of "ownership" of, or commitment to, the regulations beyond what is likely to be achieved *via* a purely consultative approach. For example, there

is a participative "co-regulatory" approach to the regulation of professions such as lawyers and doctors in many countries. Due to questions about the legitimacy and capture risks resulting from involving private interests in decisions of the state, there is a need for clear principles to guide participative approaches, including robust transparency requirements.

In practice, these three forms of interaction are often mingled in public consultation programmes, complementing and overlapping each other.

Which tools are used for public consultation?

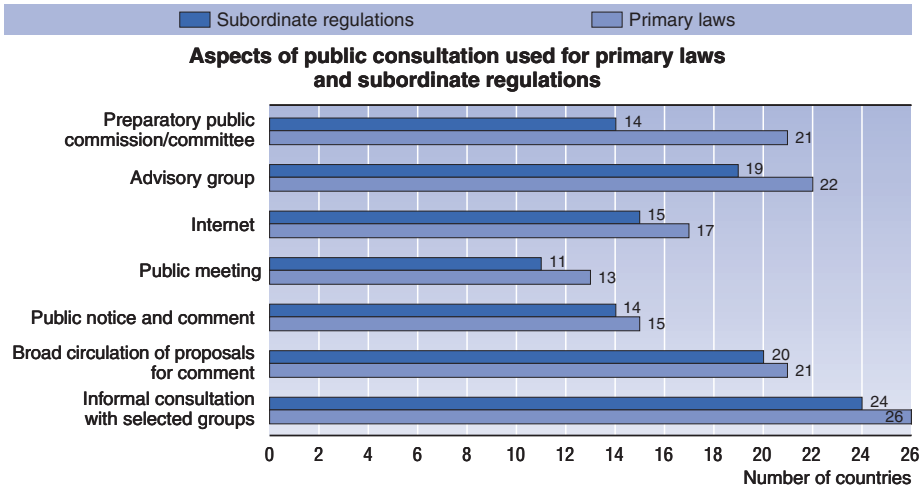
A wide range of consultative tools are in use in OECD countries (Figure 11) and continue to evolve. This section describes five main consultative tools and discusses their characteristics in terms of strengths and weaknesses in relation to promoting regulatory quality. The five tools are:

- Informal consultation.
- Circulation of regulatory proposals for public comment.
- Public notice-and-comment.
- Hearings.
- Advisory bodies.

Informal consultation includes all forms of discretionary, *ad hoc*, and unstandardised contacts between regulators and interest groups. It takes many forms, from phone-calls to letters to informal meetings, and occurs at all stages of the regulatory process. The key purpose is to collect information from interested parties, but informal consultation can also involve tacit agreements on the content of proposed regulations. Informal consultation is carried out in virtually all OECD countries – only 2 countries state that they do not conduct informal consultation – but its acceptability varies tremendously.

In the **United Kingdom**, regulatory bodies have traditionally had close and informal contacts with major interests, particularly businesses, and informal consultation is seen as

Figure 11. **Forms of public consultation used in OECD countries**



Source: OECD (2001), Businesses' Views on Red Tape. Administrative and Regulatory Burdens on Small and Medium-sized Enterprises, Paris.

a norm of the regulatory process, prior to formal consultation in line with the code of practice on written consultation. The same tradition of informal contacts exists in **France**. In **Japan**, informal consultation is crucial in shaping consensus around the final product. In **Canada**, the government has encouraged regulators to consult informally prior to formal consultation. By contrast, informal consultation is viewed more suspiciously in the **United States** as a violation of norms of openness and equal access, and in many cases is a violation of the administrative procedure act requiring equal access for all interested parties.

In **Denmark**, extensive, informal co-ordination conducted day-to-day between ministries and organisations is a common means of ensuring that stakeholder views are taken into account. Officials note that such approaches have the advantages of flexibility and responsiveness, but the OECD warned that they also risk "locking out" important interests that are not a part of the regulating ministry's usual network. This can be a particular problem for less well-organised interests or new market entrants. In the **Netherlands**, a wide range of informal consultation is used before a regulation is finalised. Use of open notice-and-comment procedures is increasing in attempts to increase participation by a greater range of interests, but evidence also suggests that informal consultations are increasingly being used to do much the real work of consensus building, with formal legislated processes often becoming a formality.[3]

Informal approaches can be less cumbersome and more flexible than more standardised forms of consultation. Hence, they can have important advantages in terms of speed and the participation of a wider range of interests. Informal consultation also has the advantage of providing an immediate and iterative exchange of views in face-to-face or in other types of direct contacts. The disadvantage of informal procedures is their limited transparency and accountability. Access by interest groups to informal consultations is entirely at the regulator's discretion. Informal consultation resembles "lobbying", but in informal consultation it is the regulatory agency that plays the active role in establishing the contact. The line between these two activities, however, is potentially difficult to draw.

Informal procedures are thus likely to be increasingly subject to scrutiny, partly due to their lack of transparency and partly due to concerns that they can be the means of undue influence being exercised by major interest groups. Their use in combination with other, more formalised and open mechanisms could be a means of obtaining their benefits while defusing these criticisms.

Circulation of regulatory proposals for public comment

A straightforward way to consult with interested groups is to send regulatory proposals directly to affected parties and invite comments. This procedure differs from informal consultation in that the circulation process is generally more systematic, structured, and routine, and may have some basis in law, policy statements or instructions. Affected groups on the circulation list expect to receive drafts of important regulations. This flexible procedure can be used at all stages of the regulatory process – but is usually used to present concrete regulatory proposals for consultation. Responses are usually in written form, but regulators may also accept oral statements, and may supplement those by inviting interested groups to hearings.

The circulation-for-comment procedure is among the most widely used form of consultation, with 24 OECD countries resorting to it in 1998. There are long traditions of using this approach, and many of these countries have passed laws or government

ordinances requiring it. Regulators generally retain much discretion over access and process but, in practice, important proposals are circulated widely and systematically. Countries have begun to explore the possibilities for improving access and timeliness of consultation that are provided by information technology. The Internet is increasingly being used for this purpose.

Circulation-for-comment is a relatively inexpensive way to solicit views from the public and, being a targeted procedure, it is likely to induce affected parties to provide information. Furthermore, it is fairly flexible in terms of the timing, scope and form of responses. The Achilles heel of this procedure is the process of deciding who will be included, a question usually left to regulators. Important groups will not usually be neglected, as this is likely to create difficulties for the regulatory proposal when it reaches the cabinet or parliament. However, less organised groups are in weaker positions in this respect. Another drawback is that if a draft regulation is circulated without a clear and plain-language explanatory note or a RIA, the public may find great difficulties to estimate the potential impacts of the measure. Circulation-for-comment is, therefore, likely to perform less satisfactorily in terms of providing access to new and shifting interest groups, since the task of targeting who will receive notice of the regulation is more difficult and the risk of neglecting key interests increases. Moreover, the selective nature of participation under this mechanism may itself increasingly come to be seen as at odds with an increasing drive to wider participation and more openness and transparency.

Public notice-and-comment

Public notice-and-comment is more open and inclusive than the circulation-for-comment process, and is usually more structured and formal. The public notice element means *all* interested parties have the opportunity to become aware of the regulatory proposal and are thus able to comment. There is usually a standard set 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, although most countries find that participation remains at a quite low level for all but a few controversial proposals.

Public notice-and-comment is used both for laws and lower level rules. In many countries, it is regarded as particularly important in regard to lower level rules because it provides some scrutiny to regulatory processes inside ministries which do not benefit from the open law-making processes applying to legislation debated in parliaments.

Notice-and-comment has a long history in some OECD countries, and its use has become much more widespread in recent years. It was first adopted for lower-level regulations in the **United States** in 1946. The practice was subsequently adopted in **Canada** in 1986 – called "pre-publication" – and in **Portugal** in 1991. By 1998, 19 OECD countries were using public notice-and-comment in at least some situations. **Japan** adopted notice-and-comment requirements for all new regulatory proposals (and revisions to existing rules) in April 1999. In other countries such as **Hungary**, use of the process is proceeding on an *ad hoc* basis, with individual Ministries deciding their own policies.

Procedures vary widely. In the **United States** and **Portugal**, the procedure is prescribed by law and judicially reviewed, while **Canada** has adopted the procedure through a policy

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directive that has no legal force. The United States model is the most procedurally rigid: comments are registered in a formal record of the rule-making and regulators are not permitted to rely on factual information which is not contained in this public record. United States policymakers may accept or reject comments at their discretion, but those who ignore major comments risk having the regulation overturned in court. In **Denmark**, by contrast, notice-and-comment arrangements are also widely used in the preparation of "substantially important" lower level rules, but there is no standardised, formal, and systematic set of requirements.

Notice-and-comment is, at least theoretically, more open and inclusive than other mechanism such as circulation-for-comment. Regulators may receive significantly greater amounts of information, especially where their knowledge of the range of interested parties is poor. In addition, the openness and formality of notice-and-comment procedures mean that regulatory agencies and policymakers are more confident that significant views have been heard and that the risks of policy failures are known. The high level of openness also means that democratic values are well served, which may be a major reason for the increasing use of this mechanism.

However, many countries have found that levels of participation have in practice been low. The **Netherlands** has been disappointed with the lack of public response to notice-and-comment. This can be particularly so when the mechanism is first introduced, because familiarity is lacking. Established groups may prefer to keep their special relations with government officials than to participate in more open processes. 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.

Public hearings

A hearing is a public meeting on a particular regulatory proposal at which interested parties and groups can comment in person. Regulatory policymakers may also ask interest groups to submit written information and data at the meeting. A hearing is seldom an independent procedure; rather, it usually supplements other consultation procedures. By 1998, 16 OECD countries used public meetings as a form of consultation, but there were significant differences in their use vis-à-vis other aspects of the consultation process.

In the **United States** a hearing is attached to the notice-and-comment procedure as needed. Hearings tend to be formal in character, with limited opportunity for dialogue or debate among participants. Experimentation with "online" hearings has begun. In **Germany**, a regulatory agency circulating a proposal for comment may arrange a hearing instead of inviting written comments, or may do both. In **Finland**, where hearings are a relatively new approach, a hearing is usually arranged instead of, or combined with, the invitation of written comments. In **Canada**, hearings are a formal part of the development of all primary regulatory law – conducted by committees in Parliament. Regulatory departments also often hold public consultation meetings, particularly on major regulatory or secondary legislation proposals.

Hearings are usually discretionary and *ad hoc* unless connected to other consultation processes (for example, notice-and-comment). They are, in principle, open to the general public, but effective access depends on how widely invitations are circulated, the location

Box 9. **Best practices in consultation: notice-and-comment in the United States**

The 1946 Administrative Procedure Act (APA) established a legal right for citizens to participate in rule-making activities of the federal government, based on the principle of open access to all. It sets out the basic rule-making process to be followed by all agencies of the **United States** Government. The path from proposed to final rule affords ample opportunity for participation by affected parties. At a minimum, the APA requires that in issuing a substantive rule (as distinguished from a procedural rule or statement of policy), an agency must:

i) Publish a notice of proposed rule-making in the Federal Register. This notice must set forth the text or the substance of the proposed rule, the legal authority for the rule-making proceeding, and applicable times and places for public participation. Published proposals also routinely include information on appropriate contacts within regulatory agencies.

ii) Provide all interested persons – nationals and non-nationals alike – an opportunity to participate in the rule-making by providing written data, views, or arguments on a proposed rule. This public comment process serves a number of purposes, including giving interested persons an opportunity to provide the agency with information that will enhance the agency's knowledge of the subject matter of the rule-making. The public comment process also provides interested persons with the opportunity to challenge the factual assumptions on which the agency is proceeding, and to show in what respect such assumptions may be in error.

iii) Publish a notice of final rule-making at least thirty days before the effective date of the rule. This notice must include a statement of the basis and purpose of the rule and respond to all substantive comments received. Exceptions to the thirty-day rule are provided for in the APA if the rule makes an exemption or relieves a restriction, or if the agency concerned makes and publishes a finding that an earlier effective date is required "for good cause". In general, however, exceptions to the APA are limited and must be justified.

The American system of notice-and-comment has resulted in an extremely open and accessible regulatory process at the federal level that is consistent with international good practices for transparency. The theory of this process is that it is open to all citizens, rather than being based on representative groups. This distinguishes the method from those used in more corporatist models of consultation, and also from informal methods that leave regulators considerable discretion regarding whom to consult. Its effect is to increase the quality and legitimacy of policy by ensuring that special interests do not have undue influence.

and timing of the hearing, and the size of the meeting room. Public meetings provide face-to-face contact in which dialogue can take place between regulators and wide range of affected parties and between interest groups themselves.

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 dispassionate discussion of particularly complex or emotional issues all but impossible, limiting the ability of this strategy to generate empirical information.

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Advisory bodies

Besides informal consultation and circulation-for-comment, the use of advisory bodies is the most widespread approach to public consultation among the OECD countries. Some 24 countries use advisory bodies in some form during the regulatory process. Advisory bodies are involved at all stages of the regulatory process, but are most commonly used quite early in the process in order to assist in defining positions and options.

Depending on their status, authority, and position in the decision process, they can give participating parties great influence on final decisions, or they can be one of many information sources. 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 in areas such as social welfare or health care. There are many different types of advisory bodies under many titles – councils, committees, commissions, and working parties. Their common features are that they have a defined mandate or task within the regulatory process (either providing expertise or seeking consensus) and that they include members from outside the government administration.

Their relationships to regulatory bodies can vary from reacting to a regulator's proposals (such as the **Netherlands**' Social and Economic Council, or **Germany**'s expert advisory commissions) to acting as a rule-making body, in which advice is only one of several regulatory functions (such as the **United Kingdoms** Health and Safety Commission). Advisory bodies may themselves carry out extensive consultation processes involving hearings or other methods. For example, in **Germany**, the mandate of the Deregulation Commission stated that it "may hear experts from research institutions, the business community and associations, and administration if it deems this necessary".[4] In **Mexico**, businesses and other interested parties now participate in an advisory committee to the Federal Regulatory Improvement Council (COFEMER), through a dozen or more *ad hoc* consultation groups organised to review existing formalities and new regulations. **Korea**, too, has 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), and hence the diversity of views to be incorporated into policy decisions. Committees are generally used as means of improving regulatory quality by assuring the flow of expert advice and information to regulators, but are also important in increasing the perceived legitimacy of laws.

In clarifying the important characteristics of advisory bodies used in OECD countries, two distinctions are important.

First, advisory bodies pursue one of two major goals – building consensus or providing expertise – that determine their membership and method of work. Where advisory bodies are a mechanism to build consensus, their members participate as representatives of interest groups and the method of work is a bargaining or negotiating process that leads to a final package balanced among competing interests (that is, they are consensus-driven). Advisory bodies that provide technical expertise are quite different. Members participate in their personal capacities as professionals or experts, and the method of work is an information-seeking process defined by objectives established by the regulator (that is, they are efficiency-driven).

Consensus-driven bodies are more likely to narrow options early, producing politically-acceptable solutions that may compromise the original objectives, but enable

effective implementation. Consensus bodies are driven by values of social co-operation and strategic positioning. As a result, they tend to serve their own interests and are less amenable to political or administrative control. Efficiency-driven bodies, by contrast, focus on achieving the objectives originally established, and are more likely to identify new options for meeting them, but will often have less regard for public opinion, balancing opposing goals, and feasibility of implementation. Efficiency-driven bodies are generally seen as more neutral and trustworthy on issues of fact and science. As members do not participate as representatives of groups, efficiency-driven bodies are more amenable to government direction.

Second, advisory bodies play very different roles depending on the seemingly trivial point of whether they are permanent or *ad hoc*. Some governments are moving away from mandatory participation by permanent tripartite bodies (*e.g.* the **Netherlands** and **Sweden**) and similar models of strong interest group representation (Finland), and toward *ad hoc* bodies with changing membership and limited mandates. Permanent bodies tend to establish rigid and lengthy processes, to function as defenders of narrow interests, to be less responsive to the needs of the administration, to exclude new or emerging interests, and to exert more control over the outcomes of consultation. *Ad hoc* bodies, on the other hand, are more flexible in membership and mandate, more time-sensitive, and amenable to more control by administrators with respect to work methods and outputs.

Permanent bodies tend to be consensus-driven, and *ad hoc* bodies tend to be efficiency-driven. Hence, a move to *ad hoc* groups is also consistent with a general trend toward fact-finding and empirically based consultation, rather than consensus-based consultation.

The move to *ad hoc* advisory bodies also involves disadvantages that are not, as yet, systematically addressed. Permanent advisory bodies are likely to be more transparent because their role in the decision process is clear and predictable and their membership known. Matching this level of transparency where *ad hoc* bodies are used requires the adoption of clear general guidelines for their use. Permanent advisory bodies are also better placed to provide consistent and informed advice over the long term. Importantly, their membership is less vulnerable to manipulation by regulators to produce preferred answers on specific issues.

While the use of advisory bodies has spread, changes in their design and membership are reflecting broader trends toward more flexible and responsive means of consultation and away from rigid and narrower approaches. In part, this reflects the developing pluralism of society in most OECD countries, while it is also reflective of the greater emphasis on regulatory efficiency rather than consensus among selected interests. These two factors are not unrelated, as consensus inevitably becomes a less realistic goal in the context of greatly increased pluralism.

Combining different tools of consultation

The benefits of combining the strengths of different consultation tools at different stages of the regulatory process are becoming clearer. While consultation is most widely used in the later stages of regulatory development, most countries now begin consulting at the earliest stages. In 1998, out of 27 countries, 14 stated that they consulted prior to formulating broad regulatory proposals, 18 consulted prior to formulating detailed proposals and 24 consulted after formulating detailed proposals. Moreover, 11 countries

Box 10. **The shift in the Netherlands to more transparent consultation**

A core principle in the **Netherlands** consultation is that of "separation of advice and consultation", which reflects the twin purposes of consultation in obtaining both expertise and consent. There are two formal and distinct consultation structures. The "advisory" function is served by a wide range of *ad hoc* advisory bodies, created by individual laws. Membership is based solely on expertise, although in practice direct interests are also represented. "Consultation" is served through a network of advisory bodies created under the Industrial Organisation Act of 1950. Here, the tripartite principle is the underlying factor determining representation. The chief consultative body under the Act is the Social and Economic Council (SER), composed of 15 members representing employers' interests, 15 representing employees and 15 independent experts appointed by the Crown on the advice of the government.

These bodies were historically used within the corporatist system to introduce checks and balances into decisions, to increase the social legitimacy of legislation, and to improve the level of "voluntary" compliance, including a smooth and rapid implementation of new legislation, once agreed. In recent years, however, these structures have been criticised as unsuited to contemporary realities. They are regarded as dampening policy responsiveness, limiting the role of Parliament by locking in "consensus" solutions at an early stage, and as promoting excessive regulatory complexity by trying to balance inconsistent objectives. In addition, the separation of "advice and consultation" has been compromised in practice, while the corporatist and cartel-like structures established under the Industrial Organisation Act are increasingly seen as inconsistent with EU competition principles.

The **Dutch** Government responded to the criticisms with major reforms. The number of advisory boards was drastically reduced over a number of years, from 491 in 1976 to 161 in 1991 and 108 in 1993. The remainder were abolished in 1997 and replaced with a single advisory body for each Ministry. This reform aims to more clearly separate advice and consultation, and to refocus these bodies on major policy issues rather than details. The ministries are concerned that too many consultative groups have been re-established following the abolition, but they believe that the change has, nonetheless, improved the situation. Old habits die hard, however, and, without limits on their numbers, there is a continuing trend toward proliferation of "new" advisory bodies.

consulted at all three of these stages of regulatory development, while another 7 consulted at two of the three stages.

Informal consultation and circulation-for-comment approaches are likely to be favoured as means of testing the views of limited numbers of key players at an early stage in regulatory development, while an *ad hoc* advisory group of experts may be created to gather reliable data before moving to open notice-and-comment or public hearing processes which allow input from the general public and promote legitimacy and consent. In **Finland** and **Sweden**, the reports of advisory committees and working parties are routinely subject to wide circulation-for-comment. In this way comments and information can be obtained from those interests groups not represented in the committee or working group.

In the **United States**, regulatory negotiation, a relatively new tool, is often used in conjunction with the notice-and-comment procedure. When a regulator decides to negotiate with specific interest groups, it must establish a negotiating committee. Before

establishing a committee, a notice must be published in the national gazette including a list of the interests likely to be significantly affected, and a list of persons proposed to represent these interests. If any person or interests believe they are inadequately represented, they must be given an opportunity to apply for membership. In **Japan**, the recent adoption of notice-and-comment procedures supplements, rather than replaces, more traditional tools of consultation. In **Spain**, new legislative requirements adopted in 1997 set out a multi-faceted approach to consultation. Several consulting methods are now used for regulations, including circulation-for-comment, consultation with formal advisory groups (473 by 2000) and, increasingly, notice-and-comment. In addition, the Economic and Social Council serves as a peak consultative body, organised along tripartite lines. The Council of State provides a quality control mechanism by assessing the extent and results of the consultation conducted.

Problems identified with public consultation

The design of public consultation methods must recognise the specific cultural, institutional and historical context of the country, as these factors are crucial in determining the effectiveness and appropriateness of particular approaches. Hence, it is not possible to take a prescriptive view of what consultative tools should be used or of how and when they should be applied. However, there is considerable agreement within OECD countries on a number of key principles or elements in the design of a "best practice" system of public consultation.

To some extent, best practices are based on common consultation problems. Table 2 in Chapter 4 identifies some common problems, including:

- Some form of public consultation is used when developing new regulations, but not systematically and with no minimum standards of access. Participation is biased or the right to participation is unclear.
- There is a tendency to exclude less organised or powerful groups from consultation, such as consumer interests or new market entrants.
- RIA is never or not always used in public consultation.
- Regulatory powers are delegated to non-governmental bodies such as self-regulatory bodies without adequate safeguards in relation to transparency and accountability.

Perhaps the most serious of these is *de jure* and *de facto* exclusion. Figure 12 below shows that in less than half of OECD countries can interested members of the public choose to provide views on draft regulations. Indeed, even where such a right exists, problems with *de facto* exclusion remain. This is true of even the most accessible consultation approach – notice-and-comment – the effectiveness of which seems to depend on the nature and organisation of civil society. It works best where multiple interest groups strive to influence the decision process by advancing empirical or legal arguments supporting their positions.

When notice-and-comment works well, it becomes a valuable public battleground of ideas and arguments. It also operates as a last safeguard against regulations. However, even where notice-and-comment is most advanced, problems remain. In the **United States**, where it has been used since 1946, consultation has become formalistic and driven by the legalistic and adversarial tendencies of the American system. Dialogue, co-operation, and communication with less organised groups suffer. This suggests that, in

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Box 11. **Using information technologies to strengthen public consultation**

Information technologies are being used in many countries to strengthen public consultation by broadening access to more groups, speeding up information flows, and reducing the costs of distributing and obtaining information. Seventeen OECD countries now use the Internet in consulting on draft legislation.

In **Japan**, study groups are the principal method for analysing policy problems and proposing solutions. In response to public pressures for transparency and accountability, study group proposals are today sometimes publicised in advance over the Internet.

In the **European Commission**, information on proposed regulations is increasingly provided at an early stage of elaboration on the respective Internet sites of the Directorates-General.

In the **United Kingdom** all consultation documents, including RIAs are published on departmental Web sites and on the *www.ukonline.gov.uk* Web site. In addition, the Small Business Service operates Direct Access Government for Business, a web gateway that includes all the consultations about regulations affecting small businesses.

In **Spain**, new electronic procedures hold the promise of opening up consultations to a wider range of interests. The Ministry of Justice is experimenting with a new consultation procedure based on the Internet.

For Danish technical regulations and standards, Dansk Standards, the Danish standardisation body, has been designated as an enquiry point for **Denmark** for the purposes of both the EU and WTO notification systems. It provides information on technical barriers to trade, including through the use of the Internet. The titles of notified draft regulations are accessible at Dansk Standards' Home Page.

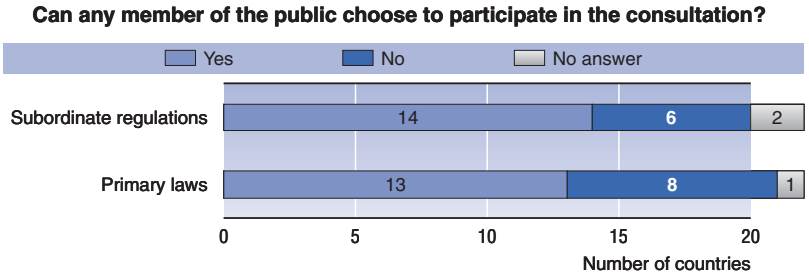
In **Hungary**, ministries post the texts of draft legislation on the public electronic bulletin boards of the Zold Pók (Green Spider) network, together with a submission deadline.

In **Italy**, on the Web site of the Ministry for Public Administration (*www.funzionepubblica.it*), the regulatory reform body (the Nucleo) has begun publishing for notice-and-comment the drafts of consolidated texts and simplification decrees. Since 1999, the telecommunications ministry and regulator have started to use the Internet for public consultations, such as those on UMTS, wireless local loop and the general authorisation regime.

countries with less organised and adversarial civil societies, the use of notice-and-comment might in practice exacerbate, rather than counteract, the exclusion of less organised groups.

Another problem is that information collected through consultation is often of poor quality or even biased, a problem compounded by "consultation fatigue" among interest groups. Information received from interest groups may be one-sided, of poor quality, or irrelevant to the issues. These problems can be countered, in part, by having the regulatory policymaker pose specific issues or questions in the notice and request for comments, as well as providing additional explanatory and analytical information such as regulatory impact analysis to help the public focus its review. It can also be countered ensuring that as wide a range of interests as possible is consulted, and by supplementing passive methods such as notice-and-comment with active methods such as advisory groups. Both of these methods will tend to focus greater scrutiny on data supplied and assist in uncovering bias or poor quality.

Figure 12. **Accessibility of public consultation mechanisms, October 2000**



Source: OECD (2000), Responses to the Survey on Regulatory Capacities in OECD Countries.

A third problem is that consultation mechanisms are themselves vulnerable to capture by specific interests, and hence can be a new source of risk in the regulatory process. When consultation procedures are complex or costly (for example where little background information is provided in relation to difficult technical questions), well-financed groups have the advantage. When consultation mechanisms are closed or difficult to access, "insider" interests have the advantage. When consultation mechanisms resemble legal proceedings, as in the **United States**, interests with deep legal expertise have the advantage. The risk of harmful capture is increased by the tendency in OECD countries for consultation mechanisms to proliferate in specific subject areas. In many countries, specific acts establish different consultation mechanisms, which increases overall complexity, adds to confusion and reduces access.

Best practice principles

Public consultation has become a norm of modern regulatory systems and, given current pressures for more open and participative government, will continue to deepen and expand. Qualitative information indicates that most OECD countries believe that the quantity and quality of information available to regulators is improved as a result of consultation. Similarly, most or all believe that consultation does affect the content of regulations finally made. In 1997, the OECD identified the general elements that contribute to an effective consultation programme. The information gathered and analysis conducted since 1997 corroborate those elements, and add some refinements. The key elements of a best practice consultation process are:

Combining consistency and flexibility. Consultation programmes must be flexible enough to be used in very different circumstances, but operate within a framework of minimum standards, in order to provide consistency and confidence. Regulatory issues differ greatly in impact and importance, scope and number of affected groups, information needs, timing of government action and resources available for consultation. Within the framework of a consistent government-wide consultation policy, regulators should be able to design a consultation process to suit particular circumstances.

- The use of consistent consultative approaches across different policy areas enhances the quality of the process in three ways. First, minimum standards provide clear benchmarks to all parties as to whether consultation has been properly undertaken, and so protects all interests. It provides clear guidance for regulatory policy-makers. Where a single, widely understood set of procedures is employed, dissatisfied parties – particularly those

less organised – can identify procedural problems. In turn, this enhances confidence in the consultation process, and means that it is likely to be better balanced, in terms of the range of interests participating, and less prone to capture by small, highly organised groups with major interests in the outcome.

- Second, consistent procedures enhance the ability to participate of a wide variety of stakeholders. Because the procedures will be more widely understood, opportunities for input are less likely to be missed, as the input sought is likely to be better understood.

- Third, adopting a consistent process permits better co-ordination of regulatory quality initiatives across a wide range of policy areas. Allowing individual ministries significant discretion could endanger this, either because of a lack of understanding of the requirements of a good consultation process or because of a degree of "capture" of the ministry by specific interests. A consistent process is thus a key quality control mechanism.

- Within the government framework, flexibility should be maintained so that the effective breadth of consultation can be maximised. Where potentially important stakeholders are known to be harder to reach or less able to participate, specific measures may be required to actively seek and ensure their input. This could include the extension of time limits, more intensive information provision, further iterations of consultation or the provision of specifically tailored opportunities for dialogue. Similarly, the need to depart from a standard process may arise because of the nature of the issue being regulated. Considerations could include the need to prevent opportunities for strategic behaviour and requirements to meet inter-jurisdictional obligations and agreements. Any additional steps should supplement the minimum process, while departures from it should be subject to clear guidelines and controls. Moves to create flexibility must always be weighed in terms of the implicit trade-off that often exists between flexibility and accessibility.

- Another reason for flexibility is that consultation programmes should include a range of strategies, including formal and informal approaches, earlier and later approaches, and approaches offering wide access to affected groups as well as focused fact-finding among experts. These approaches can be combined into an iterative process as needed to suit the regulatory issue under discussion. The increasing use of multi-staged consultation calls for sophisticated choices among the different consultation tools available. Choices must be based on a clear understanding of the characteristics, strengths and weaknesses of each tool in meeting the goals sought at each stage. It is likely that more targeted consultation, aiming at gathering objective information and ascertaining the views of key stakeholders, will be emphasised at early stages. More open processes are likely to be more important subsequently to help identify unanticipated effects and help develop consensus.

Consultation is more effective at identifying the best policy options when information is made available earlier. The increasing use of consultation at earlier stages of the policy process should help identify better policy options prior to the broad direction of regulation being settled. Consultation documents should explicitly identify both the underlying policy objective and the widest possible range of alternatives. It should also make clear that an objective of the process is to uncover additional policy options that may not have been apparent to policy-makers. The "regulatory culture" prevailing among policy-makers must be open to this kind of input. Such broad thinking is further supported if the public is systematically and periodically notified of regulatory measures that regulators are developing or plan to develop in the future (pre-notification).

- Communication with consulted groups can also be improved by making information more accessible at lower cost, including through better use of information technologies. Regulators should work harder to communicate with the public, with less-organised groups, and with the media by packaging information into understandable formats, using plain language, and clarifying the issues at stake, particularly for complex and technical issues. Information on regulatory impacts, for example, can be collected more effectively if regulators make available preliminary impact assessments (perhaps based on an earlier stage of consultation) that clarify the potential impacts on consulted groups, the presumptions of the regulators about the nature of the problem, and the effectiveness of the proposed solution. The release of the RIA can then support consultation on the basis of the detailed regulatory proposal. Emerging experiences with IT are promising and merit more attention.

Consultation should be broadly based and balanced amongst different interest groups. Imbalance in participation (or even client capture) is a common problem. Regulators should be sensitive to the possibility that consultation will reflect a limited set of organised, highly-expert, or well-financed interests, and that other interests may be unheard. Procedures for effective and timely input from more organised parties, such as affected businesses and trade unions, consumer or environmental organisations, or other levels of government, may need to be supplemented by pro-active efforts or more accessible consultation approaches to bring in interests with less capacity to respond. The ability of many groups – particularly the less organised and less well-resourced – to participate in consultation is directly affected by the extent and nature of the information provided. Providing basic information enables the regulatory context to be widely understood and helps to focus the consultation process on key issues and maximise the usefulness of inputs received. Regulators should focus particularly on ensuring that information provision supports the participation of less organised groups. Initiatives can include:

- Using innovative methods to disseminate information (including those created by information technology).
- Packaging information into easily understandable formats.
- Focusing on plain language drafting of material. And
- Clarifying the issues at stake, particularly for more complex policy issues.

Structuring a continuing dialogue with a wide range of interests can result in more intensive examination of the issues, faster introduction of (and reaction to) new ideas, improvement of trust and mutual confidence between affected groups and regulators, and establishment of more effective working relations in the longer-term as regulations are implemented. However, dialogue-oriented consultation processes may be difficult to manage, especially when consultation is occasional, and ongoing working relationships between interests are not established.

Ensure the transparency and responsiveness of consultation. If they are to contribute to administrative openness, consultation processes themselves must be transparent and responsive. As noted, they must take place within the framework of an explicit and systematic consultation policy that allows the public to understand how and when it will be able to participate. Consultation programmes are more effective when regulators clarify why information is needed (*e.g.*, to reach consensus or to collect facts?), explain the process of decision-making, and respond substantively to all comments received, either individually or collectively. To protect the credibility of the process and guard against

"consultation fatigue", explicit mechanisms are needed to ensure that public comments made during consultation are adequately taken into account. There are a number of ways in which regulatory policymakers can demonstrate credibly that they have taken comments into consideration in determining the content of a regulation:

- Responses to public comments can be provided as the comments are received, as is often the case where the process is statutorily governed.
- Regulatory policymakers can indicate when issuing the final regulation, in general terms, whether or not they agree with public comments received, and why.
- A central regulatory reform authority can be given the responsibility to ensure that regulatory policymakers consider the public comments or to review these public comments themselves.

This issue is particularly important for countries that rely on public notice-and-comment procedures, since these procedures do not usually incorporate active dialogue with participants. To the extent that a country relies upon more interactive forms of consultation – such as informal consultation, hearings, or advisory bodies – the need for separate or specific measures to show that public comments are considered is less.

Investment in evaluation and review of current consultative approaches, including examination of new approaches such as better use of information technologies, can help improve the cost-effectiveness of consultation and ensure that changes to consultative processes occur in a timely way in response to changed requirements and social trends.

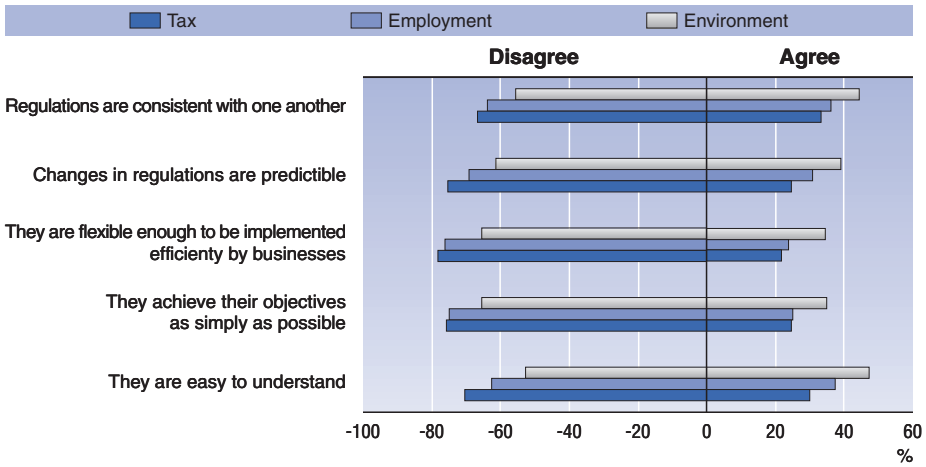
A habit of consultation must be built into the administrative culture of regulatory organisations. Consultation is more than just a set of procedures, it is in part a way of thinking. Regulators must be convinced that it supports them in acquitting their role. This is not easy to do – the costs of consultation tend to be seen in the short-term, while the benefits emerge over the longer-term. If a consultative culture is to be sustained, consultation policies must be explicitly supported at high political levels, and reinforced with staff training, incentives, and resources.

4.2. Regulatory clarity, communication, and access

The aspect of regulatory transparency most closely related to the rule of law is the accessibility of the rules for regulated entities. Regulatory transparency requires that governments effectively communicate the existence and content of all regulations to the public. The 1995 *OECD Recommendation* asks if regulations are accessible to users and recommends that: "*the strategy for disseminating the regulation to affected user groups should be considered*". Notwithstanding its fundamental nature, this aspect of transparency is one of the most criticised by OECD countries. Concerns about growing regulatory complexity, fragmentation, inconsistency, unreadability, and problems with simply identifying relevant regulations are heard throughout the OECD area. For instance, the OECD multi-country business survey of 2000 showed that fully 60 to 80% of SMEs reported problems in understanding regulations and responding to unpredictable changes (Figure 13).

The economic implications of these kinds of problems can be high. The relationships between regulatory accessibility and clarity, on the one hand, and high levels of market entry and robust competition, on the other hand, are increasingly recognised, particularly in relation to international trade and investment regimes. In addition, opportunities for corruption and incentives for non-compliance increase with complexity and

Figure 13. **Quality of regulations – average for all countries Percentage of businesses saying they agree fully or mostly minus % disagreeing mostly or fully**



Source: OECD (2001), Businesses' Views on Red Tape. Administrative and Regulatory Burdens on Small and Medium-sized Enterprises, Paris.

inaccessibility. Table 2 of this report identifies several such transparency problems encountered in the course of the country review programme:

- Information on existing regulations is not easily accessible (particularly for SMEs and foreign traders and investors).
- Legal text is hard to understand.
- Complexity in the structure of regulatory regimes reduces understanding.
- National-sub-national interface is poorly managed, and more co-ordination and communication is needed on interactions.

The solutions traditionally used in OECD countries to communicate regulations are inadequate to the scale and importance of the current problem, which is deeply rooted in the problems of mounting regulatory inflation and pursuit of legal certainty, while also reflecting the fragmented structure of government. Virtually all OECD countries have experienced very high rates of "regulatory inflation" since the 1970s, whether measured in terms of the number of legislative instruments in force, the number of pages of legislation or the resources devoted to regulatory matters within national administrations. The result is that the proliferation of regulation and the lack of structure and consistency between the different regulations have become perhaps the most fundamental barrier to achieving regulatory transparency.

The traditional responses have been simply to publish new laws and regulations in official Government Gazettes or Bulletins and to require regulating Ministries and the Parliament to keep copies of all current regulations available for inspection by the public. These mechanisms, while important, have come to be seen as inadequate. Regulatory inflation and rapid regulatory change mean that there is an increasing need for new efforts to permit the public to identify the complete set of regulatory requirements that they face. Section 3.3 of this report discusses methods of regulatory review of existing regulations such as "scrap and build" and codification that can be very helpful in rationalising many regulations at once. This section discusses five other tools being used to make regulations easier to find and understand:

Legislative simplification and codification

Rationalisation and clarification of complex legal regimes that have accumulated haphazardly over the years often require comprehensive legal codification. Codification can improve both juridical and substantive regulatory quality, and by doing so can greatly improve accessibility and clarity.

In **France**, an ambitious codification project to be completed in 2000 aimed at making the law simpler, clearer, and more accessible to citizens and enterprises. In **Turkey**, the situation was by the mid-1980s particularly difficult. Some 12 000 laws had accumulated over many decades of democratic and non-democratic governments. The laws were neither consolidated nor concordant. It was difficult to identify which laws were operative, and citizens, government officials, and even courts found it almost impossible to understand the validity and scope of the laws. In the late 1980s, a series of teams from ministries and public enterprises began the process of codifying and co-ordinating the 12 000 pieces of legislation. By the early 1990s, 1 600 laws had been eliminated, and the others had been consolidated into only 700.

- Legislative codification.
- Centralised regulatory registers.
- Plain-language drafting of regulation.
- Publication of future plans to regulate.
- Electronic dissemination of regulatory documents.

In **Ireland**, the Department of Enterprise, Trade and Employment set up in 1999 a Company Law Review and Consolidation working group with the objectives of modernising the statutes, procedures and supervision of companies and also consolidating all rules and regulations into a basic company law. As a first step, departments and offices were required by the Department of the Prime Minister and the Statute Law Revision Unit to list relevant legislation identifying the scope for consolidation, revision or repeal. The second stage consists of prioritising consolidation work. The initiative is limited to clarity and transparency of the legal system. The review strategy did not encompass principles of good regulation (*i.e.* proportionality, impact assessment, choice of policy instruments).

Comprehensive regulatory registers

The 1997 *OECD Report* recommends that governments "create and update on a continuing basis public registries of regulations and business formalities, or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them."

Efforts to count and register regulations accomplish more than regulatory transparency; they are also useful management and oversight tools. Registering the number of regulations creates a new sense of responsibility and discipline by making apparent the size and scope of the regulatory system and its rate of growth. It also assists co-ordination of the efforts of different regulatory authorities by ensuring a better and more systematic flow of information within the public administration. This reduces the risk of overlapping and inconsistent regulation. Establishing a central registry also assists governments in making one-stop shops available to businesses.

Regulatory registries are multiplying, as an increasing number of OECD countries are adopting electronic registers of laws and lower level rules. In **Japan**, the reform of permits and licenses was begun by establishing a comprehensive count of such requirements

Box 12. **Regulatory registers: Some country practices**

In **Denmark**, the government has established the Legal Information Database, a computerised, easily searchable register covering all legislation and lower level rules. Use of the system has been free of charge since January 1998 and it is accessible via the Internet.

In **Finland**, the Norms Project of 1986-1992 reduced the total number of norms from 7 500 to 5 500, and was concluded with the establishment of a special registry for subordinate regulations.

In **Hungary**, The government publishes annually a compendium with all the laws and decrees enacted ("Collection of Acts and Decrees" and every five years a "Collection of Legal Rules in Force" (Hatályos Jogszabályok). The government also prepares a trilingual official gazette in Hungarian, English, and German.

Mexico has established a comprehensive Federal Register of Business Formalities, and a compendium of all current laws and other major legal regulatory requirements is also maintained. In 1998, a free telephone service was established to provide access to the information in these inventories. The success of these initiatives has lead to similar approaches now being pursued in a number of states and municipalities. In addition, recent years have seen substantial participation by the private sector in this form of information provision. A number of private entities now produce compendia of laws and regulations in CD ROM format, while lists of regulations are also available on the Internet, with search capacities and other value-adding devices. This represents a clear recognition of the expected commercial value of this information for regulated companies.

In **Korea**, all laws and regulations are available on the Internet *via* the homepage of the Ministry of Legislation. In addition, a comprehensive register of regulations in force has been compiled by the Regulatory Reform Committee and can be searched by the general public. The register has positive security, meaning that only those regulations listed in it are enforceable.

In the **United States**, once a regulation is adopted, it is easily accessible to affected entities. To become effective, final regulations must be published in the Federal Register, which is also available online. Most final regulations are indexed and published in the consolidated Code of Federal Regulations, which is also available online.

In **Australia**, most State governments have searchable databases containing the full text of most or all laws and regulations available through the Web sites of their respective Parliaments. Federally, a proposal to establish a Legislative Instruments Register has been under development for some time, but awaits the passage of enabling legislation.

across the government, and tracking new requirements. In **Portugal**, a programme to simplify licensing procedures that began in January 1997 was launched by assembling a database of all existing licensing procedures at central and local levels. In **Finland**, the Norms Project of 1986-1992 reduced the total number of norms from 7 500 to 5 500, and was concluded with the establishment of a special registry for subordinate regulations. **Mexico** has also recently established its first comprehensive Federal Register of Business Formalities (see Box 12). Information technologies add new possibilities to this work.

In most countries that have so far established central regulatory registers, the rule of "positive security" has been adopted. This means that only those rules that are included on the register can be enforced. Positive security has two key advantages. For the user, positive security provide certainty that, if all requirements listed on the register have been met, full

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compliance with the law is achieved. The regulator cannot demand compliance with rules not contained on the register, while the register is the authoritative source where any dispute arises as to different editions or variants of a rule. From the central agency perspective, positive security provides strong incentives for regulating ministries to ensure that all rules are registered and thereby ensures the integrity of the register.

Establishment of a comprehensive compilation of regulations with "positive security" does not complete the process of helping individuals, businesses, and institutions understand what regulations affect them and how to obtain them. Given the different ways in which regulatory programmes are structured and implemented, transparency requires that governments and regulating ministries develop a comprehensive strategy to help those involved to find and understand regulations, structured in accord with the nature of both the regulations and interested parties involved.

Plain-language drafting

The need for plain-language drafting of regulation has long been recognised. Governments need to ensure that regulatory goals, strategies, and requirements are articulated clearly to the public. This is essential to public confidence in the necessity and appropriateness of regulation. It is also a fundamental element in ensuring compliance. It requires, fundamentally, that legal texts be able to be read and comprehended by non-experts.

A number of OECD countries have had plain language drafting policies in place for many years, and most of these provide formal guidance to regulatory policy-makers on how to implement these policies. The Checklist accompanying the 1995 *OECD Recommendation* recognised the importance of plain language drafting when it asked "Is the regulation clear, consistent, comprehensible, and accessible to users?" The checklist explains the need for plain language in drafting:

> *Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible. This step in the decision process can improve not only the text of regulations, but can reveal unexpected ambiguities and inconsistencies. Clear and precise language also reduces the costs of learning about rules, minimises disputes during implementation, and improves compliance. Regulators should also examine regulations for consistency of language and format with other regulations, the logical sequence of drafting, and the adequacy of definitions. Use of technical jargon should be minimised. Regulations incorporated by reference should be easily available. Finally the strategy for disseminating the regulation to affected user groups should be considered.*[5]

Legal clarity is also essential to achieving high levels of compliance and effective enforcement. If rules and regulations are poorly written or unnecessarily complex in structure, disputes regarding meaning and impact will arise and both voluntary compliance efforts and enforcement programmes will be more costly. This is an issue of particular relevance to Small and Medium Enterprises (SMEs) who are unlikely to be in a position to hire specialists to advise them on regulatory interpretation.

Countries with more extensive experience in implementing plain language principles have often moved to strengthen oversight of the policy and provide more specific and detailed guidance. In **Denmark**, a series of initiatives to improve legislative quality includes a Prime Ministerial Circular mandating an intensified programme of "plain language" scrutiny of all Bills, under the responsibility of the Ministry of Justice. This is being supplemented by a new general handbook for ministries on drafting bills. In the **United**

States, a "simplicity and clarity" policy was adopted in 1998 through a Presidential instruction to civil servants to write all documents "in plain language". An associated initiative to improve communication of regulatory text was the publication by some regulators of plain language "Small Business Compliance Guides" distributed by "outreach" programmes. These are the latest in a long series of plain language initiatives reaching back to at least the late 1970s.

The successful adoption of plain language requirements requires adequate advice and assistance, as well as monitoring and enforcement by central agencies, and this is frequently lacking, particularly in the early stages of a policy's implementation. In **Korea**, a policy requiring legislation to be drafted in plain language was recently adopted and guidance material on plain language drafting techniques was issued. However, the OECD's review of regulatory reform in Korea noted that "the role of the Ministry of Legislation in assuring drafting quality is less extensive than in many other OECD countries…", suggesting that the capacities to ensure that the policy is effectively implemented had yet to be fully developed. The implementation of plain language policies, like that of many other regulatory quality tools, usually requires sustained effort and refinement over time.

In **Spain**, training programmes on drafting techniques have been implemented and the Council of State has published a series of recommendations emphasising the importance of ensuring a clear understanding of their rights and duties among those who must comply with regulation. Further, the Ministry of Public Administration (MAP) has published manuals for administrators on style and accessibility. Currently, the MAP is working on an ambitious effort to harmonise the design of all government documents, including establishing standard formats based on principles of legibility and user-friendliness.

While plain-language drafting is widely supported, many OECD countries have not made major steps in this direction. In **Mexico**, law-drafting has not been regarded as part of the far-reaching regulatory reform programme adopted in recent years and no policy on "plain language" has been established to improve the simplicity and clarity of regulations. The OECD review of Mexico found that the complexity in the structure of the regulatory regime and the lack of comprehensibility of regulatory text were important regulatory quality problems.

Implementing plain language drafting is difficult because of the different priorities of those who read the regulation. Lawyers are primarily concerned with accuracy and consistency in meaning and tend to pursue this goal by adopting complex grammatical structures and technical terms that have been used and interpreted by parliaments and courts for previous decades. For many, plain language drafting carries grave risks of ambiguity, loss of precision, unexpected or unintended interpretations by courts and difficulties in enforcement. Regulatory policymakers may want to stress the underlying goals of the regulation and can be less concerned with, or even less aware of, the technical details that enforcement-minded lawyers may want to include. Individuals or private institutions complying with or lobbying for regulations are likely to want wording and structure that have everyday meaning. The essence of plain language drafting is to meet this fundamental requirement without sacrificing precision and consistency. The efforts of a growing legal specialisation are establishing the means of achieving this in a range of different national and legal contexts.

In light of the competing concerns noted above, successful implementation of plain language drafting policies requires that drafting be given adequate priority and resources, including the employment of adequately qualified specialist drafters to ensure that high

Box 13. **The growing use of quasi legal measures**

The increasing use of non-legislative material, such as national or international standards or codes of practice, in devising regulatory standards, poses problems for regulatory clarity. In many cases, these materials are used as a means of removing detailed technical standards from regulation. This can enhance the clarity and legibility of the regulation by allowing the text to focus on the objectives and general duties of the regulation, with the specific technical requirements being housed elsewhere. However, this trend has had a number of negative consequences.

As technical standards that are incorporated "by reference" in regulation effectively take on enforceable status, they are operationally equivalent to regulation. Thus, while the regulation proper may become more readable, for those who must comply, the task is likely to become yet greater: the ease with which whole, complex, technical standards can be adopted means that their widespread use has itself been a powerful contributor to regulatory inflation. For example, in **Australia** over half of the more than 5 000 standards adopted by the Standards Association of Australia have been incorporated into law in one or more of the State or Federal jurisdictions.[1] Standards are usually referenced *in toto*, rather than through a careful selection of relevant parts. Thus, much material that may be largely irrelevant to the regulatory objective is adopted. Moreover, there is no incentive for regulators to keep standards simple when a pre-existing set of standards can be adopted "off the shelf".

A related problem is that these standards are generally not drafted with a legislative purpose in mind. Thus, they will often fail to meet the quality standards applicable to legislative drafting, which might seriously compromise their enforceability. Also detracting from enforceability is the fact that technical standards are frequently updated, often being quite radically altered. This can raise serious questions as to which edition of the standard is relevant to the regulation, as well as difficulties in obtaining the relevant standard. This latter difficulty is compounded to the extent that foreign standards are adopted, as is often the case in smaller countries.[2] Such standards may be all but impossible to obtain in the country adopting them in regulation.

Moreover, where updated standards are automatically adopted in regulation there is a significant risk that new editions may have shifted their focus substantially, resulting in the standard no longer addressing the original regulatory objective or in it adopting a different approach to the problem than that endorsed by the regulator.

1. See Commonwealth Interdepartmental Committee on Quasi-regulation (1997) *Grey-Letter Law, Report on the Commonwealth Interdepartmental Committee on Quasi-regulation*.
2. For example, in Australia, it is not uncommon for either British or United States standards to be adopted by reference, notwithstanding that neither is usually widely available.

quality is consistently achieved. Drafting, particularly of subordinate regulations, is conducted by non-specialists in many OECD countries. Formal training in lawdrafting is not widely available, with virtually all countries relying on "on the job" accumulation of experience, or informal training, for the development of the necessary skills. If lawdrafting *per se* is inadequately recognised as a speciality, recognition of plain language drafting as a skill, capable of being taught in a structured way, is likely to be lagging further.

Publication of future plans to regulate

Publication of lists of proposed future regulation is also a rapidly developing strategy for improving transparency. Around 12 countries currently have publicly accessible registers of forthcoming primary legislation, while 7 have publicly accessible registers of forthcoming lower-level rules. Publication promotes the democratic value of openness in relation to the regulation-making process. The participation of interested parties in dialogue on proposed regulations is fostered as early as possible in the process, also improving the likely quality of subsequent consultations. For ministries, registers of forward plans to regulate provide a means to review and co-ordinate regulatory policymaking in a broader, whole of government context.

A large range of models is possible, each with different characteristics and expected outcomes. The following discussion of country experiences illustrates some of this diversity.

Hungary has developed a complex forward planning system of legislative and regulatory actions that is more advanced than systems in most OECD countries. Currently, two forward regulatory planning procedures are in place. The Act on Legislation requires that the government establish a five-year programme listing all the laws and major government decrees to be prepared. In addition, the government has developed shorter-term legal programmes spanning from six months to three years. These plans are important tools for internal and external consultation. By law, the government consults with the Supreme Court, the Public Prosecutor, social and business representatives and local governments, in addition to the central administration. After approval, the government makes public the programmes in the official gazette and in the mass media. Additionally, each six months the Ministry of Justice updates the legislative plan, reporting progress to the Parliament and improving, through this mechanism, the management of its the legal responsibilities.

In the **Czech Republic**, the government approves the Plan of Legislative Works of the Government for the year based on the Outlook of the Legislative Works of the Government for the remaining years of its term, from one to three years. The programme statement of the Government is worked out in detail and incorporated at the end of every year into the resolution of the government, which specifies the plan of legislative work for the next year and is issued every 6 months. Based on this schedule, a time is set for each department to present the Government with either the material intent or a draft of the law for evaluation.

The **United States** takes a more specific or "instrumental" approach. It has no equivalent to the long-term strategic plans of government contained in the **Mexican** and **Hungarian** models. However, the **United States** *Unified Agenda of Federal Regulatory and Deregulatory Actions*, published twice a year in the national gazette, is probably the most comprehensive of such publications. It contains outlines of regulatory proposals, or plans, covering the entire administration and includes detail on the regulation's priority, its impact on SMEs and on other levels of government and a timetable for action. The Unified Agenda also includes *ex post* reporting on the status of regulation proposed in previous editions.

A similar approach has historically been taken in **Canada**, where the annual *Federal Regulatory Plan* describes major proposed regulatory initiative (other than primary legislation, which is covered in the Speech from the Throne) expected during the next year, and provided summary information on impacts. More recently, the *Plan* has been decentralised, so that each regulatory Ministry is required to report to Parliament twice annually – once in relation to plans and a second time in relation to performance outcomes.

In **Korea**, the approach differs in focusing on planned reviews of existing regulation. The Basic Act on Administrative Regulations requires each ministry to prepare annual review plans for existing regulation. Ministries are required to seek the views of affected groups as the basis for formulating these plans, while the plans must be reviewed and, ultimately, approved by the Regulatory Review Committee to ensure that they meet Government objectives for reform.

The models discussed above are all centralised, but a number of OECD countries have adopted more decentralised approaches which are more consistent with their general models of government. In these models, each regulating ministry conducts its own notification. In **Sweden**, each ministry notifies other government bodies and interest groups twice a year about regulatory proposals that will be issued in the next six months. The notification usually takes the form of lists sent to concerned parties. In **Finland**, although there is no formal requirement to provide notification of future regulatory activities, some ministries and agencies voluntarily publish their regulatory projects and future plans.

Electronic dissemination of regulatory documents

Advances in information technology, in particular improved data storage and the rapid development of the Internet, have provided major opportunities to improve the dissemination of regulatory material and so to enhance regulatory transparency. Many OECD countries have responded vigorously to this opportunity and have achieved much in making a large quantity of regulatory material widely available.

Most OECD countries have now adopted some form of computerised dissemination of regulation, and this practice is quickly expanding. A wide variety of public data including official publications, legal texts, administrative information, administrative forms and public procurement tenders is now available on the Internet. Access to the information is in almost all cases unrestricted and free of charge.

The nature and extent of countries' electronic dissemination initiatives differ substantially. Some countries, including **France**, the **United Kingdom** and **Canada**, have adopted plans to make all public documents available online. Numerous others are generalising the online publication of material such as draft legislation, green papers and parliamentary reports. This effectively provides near universal access to a wide range of regulatory resources, where these documents were previously only communicated to small groups of people or organisations who were directly interested in the issue and/or regular interlocutors of the regulatory policy-maker. One result is an effective expansion and standardisation of the consultation process, particularly in countries that did not traditionally have a systematic process for such consultations.

Access to online public documents is available at anytime, and instantaneously, reducing administrative burdens for both users and government ministries. This, as well as the generalised availability of e-mail addresses and the online publication of administration directories, facilitates interaction between administrations and the private sector. The consequent gains in regulatory transparency are clearly considerable and will grow further along with access to the Internet, and familiarity with its use as a research tool.

The potential gains in transparency from these technological advances are far from fully achieved. Typically, little if any of the stock of legislation enacted before the adoption of the online publication plans is available online, while texts are not always available in their consolidated version. Relevant information may also be spread over different

databases, particularly due to inadequate co-ordination between levels of government. In some cases, "information overload" may limit transparency gains if key data is not made readily accessible by being supported by adequate search capacities. Limited access to the Internet is also a factor, at least in the short term: while rapid growth is continuing, even the countries with the greatest Internet penetration still have more than half of the population without Internet access.

Notes

1. OECD (1995a).
2. OECD (2001a).
3. See OECD (1999d), pp. 126-128.
4. Federal Republic of Germany (1991).
5. OECD (1995a).

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Annex V

Regulatory Accountability – Improving Due Process and Administrative Certainty

Transparent and consistent processes for making, implementing and revising regulations are fundamental to ensuring public confidence in the regulatory process and safeguarding opportunities to participate. Objective criteria for making administrative decisions, and procedures for when and in what ways to document these decisions are providing necessary checks and balances around the exercise of regulatory discretion. Regulating the exercise of regulatory discretion helps assure greater consistency and fairness in managing regulations. In turn, a stable, fairly administered and neutrally overseen legal framework assures greater integrity in government actions, boosts market confidence and investment, and reduces the opportunities for government favouritism or corruption. The following sections identify and analyse a number of important mechanisms for assuring due process and administrative clarity.

Administrative Procedure Acts

A basic tool for controlling excessive administrative discretion is the administrative procedure act (APA). Many OECD countries are adopting or amending administrative procedure laws to improve the orderliness of administrative decision-making, to define the rights of citizens more clearly, and to detail standard procedures for making, implementing, enforcing and revising regulation. Adopting these practices in legislative form effectively transforms them into rights that the public can assert. By strengthening citizens' rights and controlling arbitrary regulatory actions, these acts are fundamentally changing the relationships between the public administration and the citizen. The importance of these kinds of reforms for improving certainty and reducing regulatory risk in the market, while enhancing democratic accountability, can hardly be over-estimated.

APAs can have a wide scope, as indicated by the following general list of more or less frequently included matters, organised under headings broadly related to the regulatory "lifecycle".

- **Making regulation:** Consultation requirements at different stages of regulatory development, preparation of regulatory impact analysis; consideration of alternative instruments; publication requirements; dates of entry into effect; duration (including automatic "sunsetting") and disallowance.
- **Implementation and enforcement:** Availability of regulations; rules on incorporated material; general rules on extent and exercise of administrative discretions, including publication of objective criteria for judging applications, time-limits for decision-making, publication requirements for administrative decisions, requirements to give reasons for rejecting applications.

Box 14. **Use of ICT in regulatory communication**

In **Japan**, information on important regulations and policies can be found electronically on individual ministries' and agencies' Internet sites.

The **European Commission** has created new information points, notably on its Internet Web site. A one-stop Internet shop for business recently opened on the European Commission Internet Web site under the name "Dialogue with Business".[1] It provides business with general information on Single Market rules and some key issues, such as technical standards and public procurement. The site is linked to "Euro Info Centres" which are set up all over the **European Union** and specialise in technical standards. They can provide business with information on the application of standards, conformity procedures, CE-marking or quality initiatives in Europe. The European Commission has also opened a Web site in co-operation with the European standardisation bodies which gives information on European New Approach Directives and harmonised standards.[2]

In **Denmark**, information technology is being used as part of administrative burden reduction efforts. The government has decided that all forms used by businesses in communications with public authorities should be made available on the Internet. Legislation and regulations are normally published in the official Danish media, the Legal Gazette, which is also available on electronic media, for instance on the Web site of the Parliament. It has also published all business impact assessments on an Internet site since 1999.

In the **United States**, increasing use of the Internet provides linkages and research capacities, and user-friendly electronic one-stop shops. The daily and the annual consolidated national gazettes, the Federal Register and the Code of Federal Regulations, are available, free of charge, on the Internet. The electronic one-stop link Business.Gov (*www.business.gov*) provides practical assistance to businesses through answers to frequently asked questions, search capacities for Federal information, browsers for Government documents, and viewing of business-related items from Federal agencies. The **United States** makes active use of leading edge technology to communicate information to the public. Dissemination of information in this way typically knows no borders and access to online information is unrestricted and free of charge. Extensive US use of the Internet across a wide range of government agencies and departments is a powerful tool in enhancing the transparency of regulatory processes and regulations.

In **Mexico**, complex and unclear regulation, and difficulties at the judicial level with interpretation and enforcement, have meant that regulation has been the source of considerable uncertainty and confusion to citizens. In 1996, an inventory of business formalities was prepared and published on the Internet, including more than 2 400 business formalities applied by federal authorities, and became the data set of existing formalities to be reviewed. In 1998, this Internet inventory of formalities was completed by the addition of the official list of standards (NOMs) and a compendium of all current laws and other major legal regulatory instruments. The same year, a free telephone service was established to provide access to the information in these inventories. Similar approaches are now being pursued in states and municipalities. Based on the six digit ISIC definition of activities, a user-friendly online search tool available on Federal Regulatory Improvement Commission (COFEMER) web page (*www.cde.gob.mx*) permits any person to retrieve a list of formalities needed to start up or operate his business. With the transformation of the inventory into the official federal registry, these lists will provide near 100% accuracy and legal security.

Box 14. **Use of ICT in regulatory communication** *(cont.)*

In **Spain**, information technology initiatives have provided better and faster access to public services and products. The government has been working on a series of initiatives to improve regulatory information. Most are based on a growing use of information technology. An important scheme has been the setting up of a consolidated registry of administrative procedures on the Internet. An ambitious project to create one-stop shops (*Ventanilla Unica*) has been launched, and will soon be supported by citizens' assistance centres (*Centros de Atención al Ciudadano*). These initiatives are closely connected with the administrative simplification policy. The MAP is developing information technology systems to support the expanding Web of one-stop shops. The PISTA project will permit the interconnection of registries and files of all the administrations. "Positive security" means that regulations must be included in the registry to have legal effect, which ensures against any non-compliance by ministries. This system, based in Electronic Data Interchange (EDI) technology, should implement the legal right, established since 1992 but technically infeasible until now, of permitting applicants to provide only once the requested information or documentation to any authority. The authorities would share their data banks.

In **Hungary**, in 1997, through extensive use of IT, the government reformed the regulatory framework and "reinvented" administrative mechanisms for registering start-up enterprises. Based on the French model, the government developed a system to complete a mandatory registration form and send it electronically to the Court of Registration through the Chambers' offices. A computerised system run by the Company Registration and the Company Information Service of the Ministry of Justice co-ordinates the system. The system is slowly improving the reliability of the Company Registry, although important investments in IT are still to materialise.[3] In the near future, expansions to the system are planned.

Korea has implemented measures to assure the accessibility of laws, and will shortly take another major step by making all laws and regulations available on the Internet via the homepage of the Ministry of Legislation (*www.moleg.go.kr*). A comprehensive register of regulations in force has been compiled by the Regulatory Reform Committee and can be searched by the general public. The register has positive security, meaning that only those regulations listed in it are enforceable. The competition authority's decisions (and its other documents and guidelines) are made available on its Internet home page and online services.

In **Italy**, in 1999, a programme was launched called "Regulations on the net" (*Norme in rete*). The Internet site will offer free and easier access and search mechanisms for European, national and regional laws (*www.normeinrete.it*). The Parliament already publishes all bills under discussion on the Internet, while the Prime Minister's Office Internet site (*www.palazzochigi.it*) has a list, regularly updated, of regulatory measures approved within the Government.

In the **United Kingdom** all draft and final statutory instruments and Parliamentary Bills are published on the HMSO Web site. The small Business Service operates Direct Access Government for Business, a web gateway that brings together all the information about regulation relevant to small businesses. In addition, it co-ordinates Infoshop: this project is an IT-based one-stop shop, which allows local government front-line staff to answer complex queries from the public or businesses. The project involves local authority departments working together with central government to ensure that the provision of high-quality information is given to businesses and the public across a range of services, (*e.g.*, Food Hygiene, Health and Safety and Planning), in a cost effective manner.

Box 14. **Use of ICT in regulatory communication** *(cont.)*

In **Canada**, the Government Online initiative is a top priority, and has a stated goal of providing Canadians with electronic access to all federal programmes and services by 2004. The government's recently launched central Internet portal at *www.canada.gc.ca* serves as the main information and service gateway for all federal department and agencies. It operates in both official languages and includes hyperlinks to the home pages of all departmental/agency Web sites as well as links to official Web sites of Canada's thirteen provinces and territories. The Canada site also features three main sub-gateways for Canadians, Canadian Business and non-Canadians: the last two areas take the user to a wealth of information on doing business in Canada, including links to the extensive network of Canada Business Service Centres.

In **Greece**, considerable effort is being made to better inform the public about tax laws, procedures, and forms. Information is provided within the local administration *via* electronic means over the Internet, such as the Adriane programme. Information kiosks have been provided in 39 prefectures. A recent law on electronic signatures will build on these mechanisms to permit online filing of forms and authorisations.

1. *http://europa.eu.int/business/en/index.html*
2. *www.newapproach.org*
3. European Commission (1999), Section 3.5.

- **Revision and amendment:** Application of general procedural rules to amendments of existing regulation, rules on updating of incorporated material.
- **Appeals and due process.** Hearing procedures in relation to disciplinary actions for violation of the rights of regulated entities or for appealing rules and administrative actions such as enforcement and sanctions.

Few APAs cover the entire range of matters enumerated above. The content of administrative procedure laws therefore can vary quite widely between countries, with individual laws often reflecting the specific regulatory and administrative issues that have given rise to the legislation in the particular country. Box 15 summarises some key features of these laws in different OECD member countries.

A few OECD countries have used informal rather than formal requirements to achieve consistency in administrative procedures and to gain public confidence in the integrity and transparency of procedures. However, the success of this approach seems dependent on cultural and historical factors and is not likely to be able to be generalised. For example, in **Denmark**, there appear to be constitutional impediments to the adoption of an Administrative Procedures Act, arising from the possibility that such legislation would be seen as limiting the government's constitutional right of sole legislative initiative.[1] As a result, detailed law-drafting requirements are set out not in legislation but in Prime Ministerial Circulars. A high degree of flexibility exists for regulators. There are no legally binding standardised procedures for consultation with affected parties in relation to either primary legislation or lower level rules. However, Danish tradition and political practice, which place high value on consensus and participation, have nurtured practices of widespread and effective consultation over time.

Box 15. **Some elements of administrative procedure laws in OECD countries**

In **Italy**, **Mexico** and **Spain**, the silence-is-consent or tacit authorisation rule switches the burden of action entirely: if administrators fail to act within time limits, the citizen is automatically granted approval.

Japan used its 1994 administrative procedure law to attack the problem of administrative guidance by forbidding the use of coercive guidance and establishing transparency standards for voluntary guidance.

In the **United States**, the cornerstone of the regulatory system is the 1946 Administrative Procedure Act, which established a legal right for citizens to participate in rule-making activities of the government on the principle of open access to all.

Mexico's reforms to its Federal Law of Administrative Procedures in 1996 established a broad framework of principles for regulatory quality and measures to enhance administrative transparency and consistency. These include rights of public access to information possessed by regulators, a clearer administrative appeal mechanism, time limits for authorities to respond to a public request for information or authorisations and minimum criteria to be followed by public officials during an inspection.

In **Hungary**, the 1987 Act on Legislation established the limits to legislative action, defined the different types of regulatory instruments, regulated the process of preparing them, distributed the responsibilities of the different bodies involved in the process, and set out other important aspects such as the use of public consultation. The Act was heavily revised in 1999 and 2000 to improve these administrative controls, with an emphasis on legal harmonisation with the **European Union**.

A series of amendments to the 1958 Administrative Procedure Law were adopted in **Spain** to increase accountability and transparency across the public administration, that is, to move away from the authoritarian traditions of the Franco regime to new relations between the government and citizens. The powers of the Spanish central government organisation were redefined to separate the political from the administrative levels throughout the administration.

Korea has adopted in recent years several significant pieces of legislation providing controls on administrative discretion. The Administrative Procedure Act of 1996, which took effect in January 1998, sets out general requirements for making and implementing regulation, establishes the Administrative Appeals Commission to hear a wide range of administrative disputes and limits the use of informal "administrative guidance". The Administrative Disclosure Act seeks to make transparent the reasons underlying administrative decision-making in a range of areas. The Basic Act on Administrative Regulations, as the primary legislative driver of regulatory reform, includes additional procedural requirements for law-making (including Regulatory Impact Assessment and consultation) and emphasises transparency. Resistance to this legislation within the administration was strong. The Administrative Procedures Act was passed only after a decades-long battle against major opposition from the bureaucracy, which worried about the limits on administrative discretion implied by greater transparency and stricter procedures.

Silence-is-consent

Delays in obtaining regulatory approvals, and therefore being able to commence, expand or alter operations, constitute a major source of regulatory related costs to

business. Traditionally, legislation has been largely silent on the question of timely responses by the administration to requests for regulatory approvals. However, this is changing as part of the New Public Management driven shift toward entrenching a greater degree of "customer" orientation in the provision of government services and, indeed, throughout government administration. Imposing a statutory time limit on decision-making enforces a degree of accountability in the use of regulatory discretion. Under the "silence-is-consent" rule, legislation deems an authorisation to be granted if no formal decision is made and notified within the specified time period. Alternatively, some APAs establish a 'silence is negation' rule. The advantages of this type of rule, is that the applicant can go directly to the administrative court after the end of the period – deeming the authorisation was negated – instead of waiting further for a response.

Hungary's General Rules of Public Administrative Procedures Act require that within 30 days from the submission of an application or from the launching of a procedure *ex officio*, a decision must be made. Exceptions to this rule can only be granted by law or government decree. **Spain** has gone further than most countries in pursuing the "silence-is-consent" initiative. The Common Administrative Procedure Law incorporates this rule and a review was begun in 1992 which aimed to ensure that it was explicitly contained in all administrative formalities subject to that law. However, by 1997, five years later, it was found that less than 23% of formalities incorporated the "tacit authorisation" rule, while most of these incorporated the maximum response time permissible under the Common Administrative Procedure Law. This led to a second review programme in 1999, with responsibility given to the Inter-Ministerial Simplification Commission and explicit deadlines being set.[2]

Italy has adopted the "silence-is-consent" procedure as part of a larger effort to improve the accountability and efficiency of official decisions. With the enactment in 1990 of the Administrative Procedure Law and its successive reforms, hundreds of administrative procedures contain the "silence-is-consent" rule. In addition, the principles of the law are applicable to all levels of governments and include critical obligations requiring administrations responsible for procedures:

- To establish a time limit for the completion of a procedure.
- To identify an accountable officer for every procedure ("*responsabile del procedimento*"), responsible for providing information to applicants.
- To prepare a resolution ("*obbligo di motivazione*") in which the administration gives the legal and factual reasons for its decisions.
- To communicate the start of the procedure, to provide the right to intervene, to provide additional information and comments to the applicant, and to permit appeals if these principles are not followed.
- To institutionalise the "right of access" ("*diritto di accesso*"), whereby the public and the applicant have the right to obtain administrative information, and the authorities are required to explain and reveal, whenever possible, the internal actions that led to their decisions.

According to the *OECD Report on Regulatory Reform* in Italy, changes to the culture of civil servants have started to occur as a result of these arrangements, though this has been slower than expected, due in part to the lack of awareness by some parts of the population of their new rights. More importantly, some early results are visible. The "silence-is-consent" rule together with the establishment of a single approval process has permitted a dramatic reduction in time for business start-ups.[3]

Appeals processes that are clear, predictable, and consistent

The 1997 *OECD Report on Regulatory Reform* recommends that governments: "Ensure that procedures for applying regulations [...] contain an appeals process ..." Transparent and impartial appeals processes require the possibility of recourse to a body – whether administrative or judicial – independent of the original decision-maker. Providing an appeal to an impartial body protects the appellant from arbitrariness, favouritism and corruption, supports compliance with concepts of regulatory quality, and enhances the legitimacy of government regulation.

By 1998, 21 OECD countries provided those affected by administrative decisions with appeal rights in all cases, while a further 5 provided such access in some cases. This appears to indicate a high degree of take-up of the 1997 OECD Report's principles. However, the independence of the appeals arrangements is less widely established. Only 11 countries stated that appeal to an independent administrative body is possible in most cases, while 15 countries stated that appeal to the body responsible for the original decision is possible "in most cases". However, 22 countries stated that judicial review is possible "in most cases".

A range of appeal bodies with specific mandates is used. In **France** a network of Administrative Tribunals is headed by the Council of State and the Mediator's Office, which are judicial bodies with the task of judging alleged administrative abuses. Similar arrangements exist in **Italy** and **Spain**.

Consistency and accessibility are fundamental virtues for an administrative appeals process, and governments are increasingly establishing centralised Administrative Appeal Tribunals, with jurisdictions ranging across most areas of administrative decision-making, in large part in pursuit of these goals. This reform was made, for example, in **Mexico** in 1994 and in **Korea** in 1996. In addition to maximising consistency, independent administrative bodies have the advantages of improving the independence of the appeal body from ministries and allowing specific expertise to be developed among Tribunal members.

Another broad-based approach increasingly used is the creation of the office of Ombudsman (Ombudsman in **Finland** and **Sweden**, Médiateur de la République in **France**), a high-level civil servant to whom citizens can address any complaints arising from their dealings with public authorities. The Ombudsman often functions as a "residual" jurisdiction when other forms of appeal are not available. It differs from other administrative appeals bodies in operating in a relatively informal way, and with remediation powers usually limited to the ability to recommend that decisions be reviewed or reversed. In the **Czech Republic**, the Ombudsman Act was adopted in 1999 to protect public rights. In contrast to other countries, the ombudsman is not appointed by the government but selected by the Senate and elected by the Chamber of Deputies. In theory, this method of appointment will create more credibility and independence. Appeals can be made to the Ombudsman's Office, and bodies must submit evidence requested by the Ombudsman. If the Ombudsman finds that a complaint is justified, he may ask for a remedy but has no right to order a correction. He does, however, have means to seek a resolution. These include asking parliament for a remedy or approaching the media. In **Hungary**, several Ombudsmen are appointed by the Parliament and report exclusively to it. Special ombudsmen have been set up to protect certain constitutional rights, such as the rights of ethnic minorities and data protection. In the case of an appeal, the ombudsmen may propose redresses to the Constitutional Court. They have also suggested changes to laws and regulations in their annual reports to the parliament.

An important issue in designing appeals processes is the relationship between administrative and judicial appeals processes. In some cases, these operate strictly sequentially. For example, the OECD review of **Hungary** found that appeal to the courts can only occur once all internal administrative procedures have been exhausted or where specific laws allow direct recourse. This approach (which has been criticised as making the process too complex and lengthy) differs from that taken in several other OECD countries, where judicial supervision is regarded as an alternative to internal administrative appeals. Where the two types of appeal operate as alternatives, there can be substantial differences in the relative extent to which each is used. For example, **Japan** has an active administrative appeals procedure, and a little-used process for litigating administrative cases. About 36 000 administrative appeals were filed in 1994 under the Administrative Appeals Law, but review by the judiciary is not often used in practice. The reasons for lack of judicial review are unclear, but may be related to high costs of court action, fear of retribution by the administration, or cultural issues such as avoidance of adversarial resolutions. The experience of the **United States**, in which judicial avenues of appeal are almost routinely employed, provides a stark contrast.

In addition to their value in terms in efficiently resolving regulatory disputes, effective appeal mechanisms have in many countries acted as *feedback mechanisms* for improving the regulatory framework by providing "reality checks" and *ex post* validation. Recognising that the incidence of appeals may reflect the quality of regulatory policies, some countries have installed systematic processes to collect information about problems with existing regulations. One of the most intensive of such efforts is in **Japan**, where the Management and Co-ordination Agency, a special body for public management in the Prime Minister's office, carried out an administrative inspection programme, and oversees an administrative counselling programme, through which citizens can directly complain about problems.

A regulatory appeals process must be clear, predictable, and consistent. However, consideration is needed of the time delays in different procedures, the likely costs of appeals, for both government and appellant, and the kinds of technical issues that may arise. It may be optimal to have several avenues of appeal, depending on the nature of the issue being appealed. These could include direct administrative appeal within the regulatory ministry, an Ombudsman, more formal appeals to administrative tribunals or, where necessary, to the courts (with the attendant delays and costs for legal representation).

The procedures controlling the appeals process need to maintain an appropriate balance between predictability and consistency, on the one hand, and adaptability to accommodate different cases, on the other. For example, appeals by individuals or SMEs may require a less formal approach to procedure, documentation and evidence than would be the case where a major corporation is challenging the fundamental basis of a regulation.

Notes

1. See OECD (2000e).
2. See OECD (2000g).
3. The new "concessioni de apertura" consolidates all requirements for open business into a single permit, which takes 2 to 5 months to obtain, unless the activity needs an environmental impact analysis, in which case a maximum of 11 months applies. This compares with the previous situation in which from 15 to 43 permits or procedures were required and 2-5 years was typically taken to complete the process. See OECD (2001c).

Annex VI

Strategies for Review of Existing Regulation

This report has identified and briefly discussed four mechanisms commonly used by OECD member countries as strategies to review and update existing regulation. They are:

1. Scrap and build.
2. Generalised reviews.
3. Registration and codification (discussed in more detail in 3.3.2).
4. Review clauses.

The following provides additional detail on several of these mechanisms, focusing particularly on the experiences of individual member countries in implementing the strategies discussed. Its purpose is to help shed additional light on some critical success factors and identify pitfalls in the application of these tools.

1. Scrap and build

This report has noted that "scrap and build" is a costly and time-consuming reform mechanism and, perhaps as a result, has been relatively little used in OECD countries to date. However, a prominent recent success of the use of "scrap and build" is the Dutch *Functioning of Markets, Deregulation and Legislative Quality* (in Dutch MDW) programme.

In the **Netherlands**' MDW programme, targeted reviews of specific areas of regulation are focussed on a particular regulatory "theme", or an industry, activity or profession. Review projects undertaken in the first three years of the programme included occupational health and safety, environmental permits, hospitals, product liability and food regulation, regulation of lawyers, accountants, real estate agents, the electricity industry, and taxis and professional pension schemes. The reviews are completed on an approximately annual cycle.

Review proposals are formulated by the Civil Service Commission and submitted to the MDW Ministerial Commission for approval. Selection of issues for review is based on several criteria:

- Economic significance of the subject.
- Likelihood of achieving fewer regulations and thus stimulating the economy and increasing employment.
- Whether dealing with the subject in the MDW framework adds value.
- Practical considerations, such as whether the project can be completed within one year.
- The balance and representativity of the overall review package.

Selection of areas for review by the Civil Service Commission includes consultation with relevant interests including employer and employee groups, consumer associations,

special interest groups (*e.g.* environmental groups) and the parties responsible for implementation of the regulations. Once the Ministerial Council has approved the reviews, Working Groups are established to conduct research and draft reform proposals.

The MDW programme has been central to regulatory reform in the **Netherlands** since 1994. The OECD found in 1999 the Dutch regulatory reform programme to be "… extraordinarily dynamic […] the search for better solutions continues through a pragmatic, results oriented approach."[1]

2. Generalised reviews

This report has noted that generalised reviews frequently consume considerable resources while delivering relatively few results, due in part to their tendency to be weakened by exemptions and by lack of priority-setting. The lack of rigorous and externally verified review criteria and processes has also been important. Clearly, the design of such reviews is highly important. A number of reviews that have had limited success can be noted to illustrate this point.

In **Greece**, a systematic review programme was begun in 1999 by the Ministry of the National Economy. This programme systematically reviewed all regulations made over the last five years within the Ministry. The 1995 *OECD Recommendation* was used as a guiding principle to assess the quality of the regulations. The assessment involved the establishment of a regulatory reform group, composed of senior officers from divisions within the ministry, who prepared the first inventory of regulations including legislation, presidential and ministerial decisions.[2] However, the review concluded that all legislation, presidential decrees, and ministerial decisions within the Ministry were effective and necessary, including the 54 ministerial orders that govern the financial sector and the 23 ministerial orders that governed capital markets. The only negative conclusion was that more could have been done to ensure the success of the one-stop shop investment promotion agency.

Consideration of the review's design indicates a number of weaknesses that would have substantially compromised its ability to identify areas for reform. In particular, the review lacked an independent and rigorous assessment of the impacts of regulations – the key information needed to test regulatory quality. Instead the review began with qualitative statements about what the laws required. Without independent input, self-assessment by regulatory departments did not yield highly critical conclusions. This observation underlines the general argument made in this report regulatory reform should be co-ordinated by a central agency or at arms-length of the ministries being reviewed.

Canada's experience with generalised reviews was in some ways similar. In 1992-93, the largest programme of reviews of existing regulations ever launched in Canada were undertaken, involving 26 federal departments and agencies. Here too, each department managed its own reviews, although the review processes did include public consultation and support from the central Treasury Board Secretariat. As a result of the programme, some 835 regulations (almost one third of the total) were revised or eliminated. However, despite this impressive total, the Treasury Board Secretariat concluded that, while the reviews benefited from the fact that regulators could design their own review procedures and hence "owned" the exercise, the result was that "the review may not have been as complete as the government had originally hoped".[3] Moreover, departmental reviews were found to be unable to cope with overlapping interdepartmental regulation and with cumulative burdens.

The **Japanese** approach to the review of existing regulation can also be seen as following a "generalised review" model, since it depends on the identification by Ministries of specific reform "items" from within the structure of the legislation for which they are responsible. One result of this mechanism has been that the importance of the different items varies enormously, from some which are substantial in economic terms to others which are trivial or which constitute recommendations for further study.

Independent oversight by the Deregulation Committee consists of tracking ministerial responses to the "items". This system can claim credit for many of the reforms that have occurred in **Japan**, and has in general improved the transparency of reform and the attention to the reform programme by ministries. Against stubborn opposition, the Japanese government has organised the machinery to identify regulatory problems, include them in structured programmes, and monitor outcomes. Also, Japan's review programmes have become progressively more ambitious, moving toward more comprehensive sectoral reviews based on consistent principles of good regulation. Methods of review have improved, particularly the move by the 1995-1997 Administrative Reform Committee to conduct its discussions with ministries in public, short-circuiting the private negotiations that have slowed and undercut reform in the past.

However, the OECD concluded in its review of regulatory practices in Japan that the item by item approach had proven slow and not very effective in producing concrete results in economic and policy performance. The principles guiding this bureaucratic activity allow very wide latitude in interpretation and action that often frustrates reform. It is not an adequate basis for coherent, consistent, and sustained programmes of reform, nor for changing deep-seated habits and cultures in the public administration. One reason for this is that ministries and businesses can produce an almost infinite number of "items" for action. The value of these items is quite another matter. The most widely cited fact about the 1995-1997 Deregulation Action Plan is that it contained over 2 800 items, and about the 1998-2000 plan is that it started with 600 items. This focus on numbers has obscured the fact that the importance of the individual items varies widely. There has, as a result, been little in the way of a strategic focus in these deregulation plans to date, and few concrete effects on market performance.

Given the disappointing results from many generalised reviews, it is clear that great care is needed in designing and implementing such regulatory reviews. It is essential that such reviews be highly structured and transparent, with genuinely independent oversight of ministerial reviews. Some have found that the management challenge lies in finding the right balance between centralised and decentralised review processes. In **Australia**, most reviews conducted in the mid-1980s were internal, conducted solely by regulators at the direction of ministers, and did not produce satisfactory results. However, in 1994-95, a historic agreement between all Federal and State governments[4] established a highly structured generalised review process, which was mandated to continue over a multi-year timeframe. This agreement contained a substantial number of elements that encourage the reform process to remain focused on priority areas of reform and ensure that it will be pursued vigorously throughout the multi-year timeframe envisaged.

First, the agreement targets a broad subset of the legislative structure: those laws that impose restrictions on competition. Second, explicit review criteria were set, with a presumption that anti-competitive restrictions will be removed unless a rigorous net public benefit argument establishes that they are the only means of achieving the

Box 16. **Successful generalised reviews in Hungary and Korea**

The Hungarian government-wide regulatory review of 1995-1998 was co-ordinated by a central unit, the Government Commissioner, assisted by a small secretariat and advised by a Deregulation Council. The review was based on a three-year planned schedule of ministerial submissions and included subordinated regulations as well as laws.

The revision was divided into two stages. The first 18 months concentrated on laws and regulations existing before 30 June 1990; the next 18 months focused on the review of regulations enacted after that date. An important element of the programme was the preparation by the Ministry of Justice of a precise inventory of existing laws and regulations. Based on this inventory, the Government Commissioner and the horizontal ministries presented a detailed schedule covering the whole three years government's period. A submission process was designed which in theory included a RIA checklist (albeit seldom used). A special justification memorandum was requested for maintaining regulations enacted before 23 October 1989. The Government Commissioner could recommend that the government reject such regulations or could ask for further analysis. Last, the Ministry of Justice was charged with preparing a specific "deregulation instrument" to be issued by the government or presented to the Parliament listing unnecessary regulations abrogated.

In parallel to this item-by-item approach, the government took a comprehensive approach to a few key policy areas vital to the proper functioning of democratic and market-oriented systems. For example, the civil code was reviewed in its entirety under the "deregulation of merit" process. Due to the size, complexity and impact of such codes or "codex", the revision was organised through working groups that work for two or three years. The reviews consisted not only of amending and replacing whole sections but also of re-organising texts which in some cases, like the Civil Code of 1959 had been reformed more than twenty different times since 1990.

According to the government, the 1995-1998 review was more successful than earlier attempts. Clear timetables and programme objectives, leading up to omnibus "deregulation measures", concentrated ministries' efforts and provided greater visibility and accountability to achievements. Mechanisms were used to boost the outreach of the programme and implicated a wider public in the national effort. The Deregulation Council and the Government Commissioner commissioned from academics and researchers a series of studies on deregulation. To encourage public involvement in the programme, they launched massive public campaigns to "turn deregulation into a *national event*", through hearings and consultation meetings at national and regional levels. They arranged a national contest in the newspapers where nearly 400 proposals were presented. Prizes of up to HUF 100 000 rewarded useful ideas. "Deregulation days" were launched, with the participation of regulators, professional organisations, and citizens, where the best presentations and proposals were published in the "Deregulatory Forum" column of the "Magyar Közigazgatás" newspaper.

Korea: The review programme was launched with the President's commitment, now implemented, to reduce the number of regulations by 50%. Overall, 5 430 regulations were eliminated within approximately one year – a result which achieved the 50% target initially set. A further 2 408 regulations, or more than 40% of those remaining, were revised to greater or lesser extent as part of the program. Finally, 1 840 "informal regulations", not resting on proper legal authority were identified and either abolished or, in a minority of cases formalised.

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Box 16. **Successful generalised reviews in Hungary and Korea** *(cont.)*

This initial focus on deregulation and reducing regulatory burdens reflected Korea's starting point. There was a large volume of low quality regulation, particularly in the economic sphere. The ambitious 50% reduction target was set in order to force a rapid reduction in burdens and create confidence in the government's commitment to reform.

The size of this quantitative reduction is important. Experiences in other countries show that it is not difficult to produce impressive results if non-monetary units such as page numbers or numbers of regulations are used instead of more relevant measures. Regulation that is no longer relevant or not enforced can be credited with removal from the statute books and consolidation of regulatory requirements can reduce the apparent number of rules. Also, regulators can compensate for the loss of regulations by writing new ones. However, in Korea, ministries facing a dramatic reduction of 50% over an extremely short timeline of one year could not escape real and significant changes, particularly when combined with the strong scrutiny of the Regulatory Reform Committee over every regulation reviewed.

The ability to achieve a 50% reduction in regulations was dependent on strong support for reform from the highest political levels. The President strongly supported the reform targets, while the Office of the Prime Minister had a central role. The programme was based on a number of clear review criteria. Organisational support was key: the role of the high-level Regulatory Reform Committee was crucial in ensuring that the target was met. Some Ministries' proposed reform programmes were returned to them several times by the Committee for improvement before being accepted.*

The quality aspects of regulations were not developed very deeply in this programme – members of the Committee indicate that most of the regulations eliminated could not be justified under any current public policy, and hence they failed the most basic tests of need. The process, however, had severe weaknesses that suggest that it should not be repeated. In particular, there was a lack of time and capacity to assess regulatory benefits and costs, which are the best tests of regulatory desirability. The process was almost entirely reactive, and could not address the regulatory gaps and institution building that are needed in a quality regulatory system. The process of review and elimination was not very transparent to those not directly involved. The government has now indicated that it will move away from the quantitative approach and will further develop attention to regulatory quality in future reform activity.

* For example, the Ministry of Public Administration's draft plan went to the RRC three times before approval was granted.

identified public benefits. This reflects the view that regulatory reforms should maximise the scope for efficient markets and ensure that social goals are pursued in the most efficient way possible.

A third element is that major reviews are required to be conducted publicly, while overall reporting requirements (*e.g.* the annual reports and other summary reports of the National Competition Council) ensure that high levels of transparency and public involvement are factored into the process. Fourth, the agreements include a dynamic element, requiring equivalent tests to those being applied in the review of existing regulation to be also applied wherever new laws are proposed. These too include public

involvement and scrutiny, through a regulatory impact statement process, by independent expert reform units.

Examples of other successful multi-year generalised reviews can be found in **Hungary** and **Korea**. Box 16 provides further detail on this review processes. Another successful variant of the generalised review has been targeted reviews, which focus on all regulation within particular sectors (*i.e.* building codes) or on all regulations of a certain type (*e.g.* permits and licences). In **Italy**, for example, independent reviews by the Antitrust Authority of general aspects of regulatory reform, such as reports about the use of licences and "concessions" restricting market access, have been useful in identifying where reform is needed, although persuading the ministries to actually reform is another matter entirely.

3. Registration and codification

Tracking, registration, and codification processes are often a necessary first step to understand what actually exists in the regulatory system so that systematic review can begin. Surprisingly, many OECD countries still have no registry of existing regulations, or any system to track regulations. Yet it is difficult to see how one can understand or reform regulations without knowing what regulations exist, or who is regulating what. In **Australia**, in 1979, the parliament found that even the number of regulatory agencies was not known,[5] although this situation has certainly changed with the construction of the regulatory quality management system in place today.

Codification can be limited to legal reorganisation, which is difficult enough, but can also provide a means of substantive review and revision of legal regimes. In **Spain**, for example, codification aims to update existing regulations in accord with modern principles and criteria. Indeed, comprehensive codification can evolve into "scrap and build" reform. Some countries have adopted highly innovative approaches to codification that have produced good results. **Sweden** and **Italy** provide two examples.

In the 1980s, **Sweden** enacted its well-known "guillotine" rule nullifying hundreds of regulations that were not centrally registered. In 1984, the government found that it was unable to compile a list of regulations in force. The accumulation of laws and rules from a large and poorly-monitored network of regulators meant that the government could not itself determine what it required of private citizens. To establish a clear and accountable legal structure, it was decided to compile a comprehensive list of all agency rules in effect. The approach proposed by the Government and adopted by the Riksdag was simple. The Government instructed all government agencies to establish registries of their ordinances by July 1, 1986. As these agencies prepared their lists (over the course of a year), they culled out unnecessary rules. Ministry officials also commented on rules that they thought were unnecessary or outdated, in effect reversing the burden of proof for maintaining old regulations. When the "guillotine rule" went into effect, ""hundreds of regulations not registered... were automatically cancelled," without further legal action. All new regulations and changes to existing ones were henceforth to be entered in the registry within one day of adoption.

This approach was considered a great success. In the education field, for example, 90% of rules were eliminated. The government had for the first time a comprehensive picture of the Swedish regulatory structure that could be used to organise and target a reform programme. The registry may also have had the indirect effect of slowing the rate of growth of new regulations, and by 1996 the net number of regulations had indeed dropped substantially.

Italy confronts what has been called "legal hypertrophy" caused by a huge stock of thousands of laws and subordinate regulations, many of which are decades old. Two recent schemes are currently in place to attempt to deal with the problem: the consolidation of texts and the "delegislation" of laws to eliminate and improve administrative procedures and organisations.

As most countries, Italy has traditionally used the codification of laws to clarify and reunite in a single code or framework law all rules and matters concerning a specific policy area. In fact, Italy has a long tradition of *testi unici*. Recently, the government has strengthened the mechanism. With the launching of a fast-track "consolidation of texts" initiative in 1999, Parliament and government accelerated the process in an attempt to re-organise and reduce the stock of existing laws. The new procedure works as follows: after receiving a parliamentary mandate and agreeing on the policy areas to be "consolidated", the Nucleo prepares a new text, taking into account the benefits and costs of the new regulatory regime, and its impacts on competition. After approval by the Council of Ministers, the new text is sent to the Council of State for an opinion (with a 30 day time limit), and then to the Parliament's committees which have 30 days to provide non-mandatory but "nearly binding" advice. Finally, the government enacts the text. The resulting code has a mixed legal nature, joining in a single text statutory law provisions with regulatory provisions. To prevent confusion about the juridical nature of the text, three drafts are published in the Official Gazette: one containing primary law, one containing secondary law, and one with the consolidated text (only the first two are "sources of law", while the third is only for communication). In October 1999, the government and Parliament agreed to prepare 11 "consolidated texts" by December 2001. To prepare the consolidated texts, the Nucleo has set up task forces working with competent ministries. The new annual simplification bill improves the codification activity by giving the Nucleo more resources and identifying ten new "sectors" to be codified, repealing more than 350 old laws.

4. Review clauses

Review clauses are requirements in regulations for reviews to be conducted within a certain period, and can be seen as a weaker form of sunsetting. Unlike sunsetting, a rule will continue unless action is taken to eliminate. Such *ex post* review requirements are rapidly becoming more common in OECD countries and can act as a powerful adjunct to *ex ante* RIA by checking the performance of regulations against initial assumptions.

Japan's 1998-2000 regulatory reform programme required the inclusion in new regulations of a fixed schedule for future review. The programme stated that "as a rule" regulations (and new laws) shall include clauses requiring them to be subjected to *ex post* review after a fixed period of time. Much regulation has already incorporated such requirements, with review periods ranging from about 3 to 10 years after introduction. Ministries and agencies are required to release review findings "promptly after the closing of each ordinary session of the Diet in a format that can be readily understood by the public", thus providing an element of transparency, although there is no requirement to take comment from the public.

A **Danish** initiative involves the establishment of a monitoring system for major legislation that collects relevant data for a "comprehensive evaluation and review process, also involving regular reports to the relevant Parliamentary Committee".[6] Officials indicate

that it is likely to be based on the implementation of a process of mandatory *ex post* reviews of legislation three to five years after introduction.

In **Australia**, the use of review clauses is also becoming more widespread. As noted in the previous section, one element of the National Competition Policy programme is a requirement that all new legislation containing restrictions on competition be subjected to regular review. However, in addition to this, it is becoming increasingly common for new legislation, at both State and Federal levels, to contain review clauses, generally specifying that the legislation must be reviewed within three to five years of coming into effect. These requirements have in large measure developed as a matter of practice, in the absence of overarching policy. They can represent a means of indicating a responsive attitude where the initial legislation has been controversial and doubts have been expressed as to its likely performance in practice. Indeed, there is some evidence that this trend has been initiated or at least actively supported at the political level in many areas.

In **Ireland**, a new regulatory reform programme requires through the "Quality Regulation Checklist" that rule-makers verify if new laws and regulation can incorporate automatic review mechanisms, such as sunsetting, a precise review date or mandatory substitution (adding a rule only when a corresponding reduction or repeal accompany it). However, to date no application criteria or guidance has been issued to support the use of these mechanisms.

The **United Kingdom** has recently taken steps to make systematic the use of automatic review mechanisms. RIA requirements implemented during 2000 include an obligation for regulators to set out how any proposed regulation would be monitored and reviewed. Moreover, recent policy proposals would require every government department to conduct an *ex post* review of the impact of major pieces of regulation within three years of their implementation.

Notes

1. OECD (1999d), p. 143.
2. Ministry of the National Economy (2000). The review examined 17 pieces of legislation, 12 presidential decrees, and 100 ministerial orders.
3. Government of Canada (1996), p. 7.
4. The agreements also included the two self-governing Territories.
5. Commonwealth Senate Standing Committee on Finance and Government Operations (1979).
6. Danish government communication to the OECD, February 1999.

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