Regulatory Policy and Governance

SUPPORTING ECONOMIC GROWTH AND SERVING THE PUBLIC INTEREST

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AND SERVING THE PUBLIC INTEREST

OECD

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Foreword

The emergence of regulatory policies to promote better regulation has been an important development for public governance in the OECD, and beyond, over the past thirty years. Why should governments have a regulatory policy? What contribution can effective regulatory governance make to the public policy challenges which now face governments, such as unemployment, ageing populations and climate change? How can regulatory policy help economies and societies find the path to sustainable growth?

These questions need to be debated against a complex and difficult backdrop. The financial crisis and recent environmental disasters have put the effectiveness of regulatory policy to a severe test, and there is evidence of serious regulatory failures. Businesses and citizens continue to complain that red tape holds back competitiveness and takes up the time of ordinary people. Public services are also affected by excessive red tape inside government and in many countries regulatory inflation continues to undermine the clarity of the law. Why have current regulatory institutions, tools and processes failed to deliver consistently "fit for purpose", user-friendly regulations and regulatory frameworks? What needs fixing? Can gaps in regulatory frameworks be filled without imposing unnecessary constraints on innovation and competitiveness? How can regulation – of the right kind – support better lives and better societies?

The report aims to set a framework for a debate over how regulatory policy can help meet public policy challenges to strengthen economies and societies. It encourages the need to "think big" about the relevance of regulatory policy in support of growth and social welfare as countries emerge from the crisis.

This report concludes a major project conducted by the OECD in partnership with the European Commission over the last two years, based on reviews of the regulatory policies of 15 member states of the European Union. The findings from these reviews were considered in combination with those of OECD reviews on other (OECD and non-OECD) countries. The report also takes account of recent OECD conceptual analysis on key issues such as impact assessment, simplification and risk governance.

Acknowledgements. *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest* is the final milestone of the "EU 15" project, which assesses regulatory management in the fifteen initial member states of the EU (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). The 15 country reports, which provided much of the intellectual backbone of this publication, could not have been completed without the co-operation of numerous Government officials across the EU.

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Executive summary

Regulations are indispensible to the proper function of economies and societies. They create the "rules of the game" for citizens, business, government and civil society. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services. At the same time, regulations are not costless. Businesses complain that red tape holds back competitiveness while citizens complain about the time that it takes to fill out government paperwork. Moreover, designing and enforcing regulations also requires resources for government and public administrations. Regulations can also have unintended costs, when they become outdated or inconsistent with the achievement of policy objectives. The 2008 financial crisis – which resulted in part from poorly designed regulatory regimes and the uneven enforcement of existing regulations – and the ensuing and ongoing economic downturn starkly illustrate the potential consequences of regulatory failure.

Given the importance of getting regulation right, this report encourages governments to "think big" about the relevance of regulatory policy. It tracks the development and emergence of a range of tools and instruments, explicit institutions and governance processes which OECD countries have used to improve the effectiveness, efficiency and transparency of regulatory regimes. It describes the comprehensive policy cycle by which regulations are designed, enforced, evaluated and revised at all levels of government. It describes progress developing a range of regulatory management tools including public consultation, Regulatory Impact Assessment, and risk based regulation. It also illustrates the potential of efforts to promote regulatory governance including creating accountability and oversight of regulatory agencies and creating a "whole of government" approach for regulatory design and enforcement. The report describes key elements for developing a robust regulatory environment; a key to returning to a stronger, fairer and more sustainable growth path.

What is regulatory policy?

The emergence and development of regulatory policy has been a key element of public sector reform in OECD countries over the past 20 years. The objective of regulatory policy is to ensure that regulations support economic growth and development, the achievement of broader societal objectives such as social welfare and environmental sustainability, as well as strengthens the rule of law. It addresses the permanent need to ensure that regulations and regulatory frameworks are justified, of high quality and achieve policy objectives. It helps policy makers to reach informed decisions about what to regulate, whom to regulate, and how to regulate. As an integral part of effective public governance, regulatory policy also helps to shape the relationship between the state, citizens, businesses and civil society.

Regulation can be viewed strategically, alongside monetary and fiscal interventions, as one of the three core levers at the disposal of governments for managing the economy, implementing policy and influencing behaviour. In the current economic and political environment, with major constraints on government expenditure and social resistance to higher taxes, regulatory policy may receive more attention as governments use the regulatory lever as primary instrument of public policy.

Regulatory policy is a comparatively young discipline. The emergence of regulatory policy began as deregulation in the 1970s and 1980s, following the rapid growth of regulation through most of the twentieth century and the dawning realisation that the accumulation of this regulatory stock was harmful to business, stifling entrepreneurship and innovation. With policies to increase competition in markets and to "roll back the frontiers of the state" in the 1980s and 1990s, deregulation broadened to become regulatory reform. Regulatory reform aimed at liberalising key sectors of the economy which had been the preserve of monopolies, often state owned. Regulatory reform gave way to the idea of regulatory management, a process that acknowledges the permanent nature of the task, and the need for it to be applied across the board, not just to selected sectors or issues. It also gradually became clear over time that public policy, not just selected issues, could benefit from effective regulatory policy.

The use of regulatory policy to inform and improve policy formulation and decision-making has a number of dimensions. A range of tools must be deployed in a consistent and mutually supporting manner if systemic quality assurance is to be the result. The tools involve strategic approaches and the use of instruments to give effect to regulatory policy. The essential tools include regulatory impact analysis, the consideration of regulatory alternatives, administrative simplification, ensuring regulatory transparency and *ex post* evaluation.

The emergence of regulatory policy has taken different pathways across the OECD, reflecting the diverse range of legal, political and cultural contexts on which countries have built their public governance. Perhaps the most important lesson is that the development of an effective regulatory policy is an evolutionary process which involves a broad scope of issues.

The need for greater regulatory governance

The OECD model of regulatory policy is founded on the view that ensuring the quality of the "rules of the game" is a dynamic and permanent role of government. Governments must be actively engaged in assuring the quality of regulation, not reactively responding to failures in regulation. In advanced countries this concept is evolving into regulatory governance.

Regulatory governance is grounded in the principles of democratic governance and engages a wider domain of players including the legislature, the judiciary, sub national and supra national levels of government and standard setting activities of the private sector. Effective regulatory governance maximises the influence of regulatory policy to deliver regulations which will have a positive impact on the economy and society, and which meet underlying public policy objectives. It implies an integrated approach to the deployment of regulatory institutions, tools and processes.

Attempting to neatly classify any approach to governance is a challenge. Nonetheless, there are a number of strategic considerations that pertain to regulatory governance:

- Political commitment has been unanimously highlighted by OECD research as one of the main factors supporting regulatory quality. Effective regulatory policy needs to be adopted at the highest political level, and its importance should be adequately communicated both across the administration and to lower levels of the government.
- OECD research finds a strong relationship between a well functioning central oversight body and an effective, comprehensive regulatory policy. Promoting regulatory quality often requires the allocation of specific responsibilities and powers to monitor, oversee and promote progress across the whole of government and to maintain consistency between the approaches of the various actors involved in the regulatory process.
- Independent regulators are another key institution, and can be seen as referees enforcing the "rules of the game." Independent regulators are separate "agencies" at arms' length from the political system, with delegated powers to implement specific policies in a number of sectors. The key benefit sought from an institutional framework based around these agencies is to shield market interventions from interference from political and private interests. At the same time, independent regulators represent a significant challenge to the executive and parliamentary powers of government. They represent a special form of institution in most OECD countries, which is neither directly elected by citizens nor managed by elected officials. Their institutional design and the development of their mandate therefore require careful consideration.
- OECD countries are increasingly interested in utilising whole-of-government approaches to policy development and implementation. Whole-of-government approaches are associated with a desire to ensure the horizontal and vertical co-ordination of government activity in order to improve policy coherence, better use of resources, and to promote and capitalise on synergies and innovation that arise from a multi-stakeholder perspective. The promotion of regulatory quality culture can and should benefit from such an approach. Yet in many countries, administrations have not yet fully integrated regulatory quality objectives into their policy processes or across government.
- The issue of how OECD governments prepare for the assessment and management of risk through regulation to avoid the phenomena of reactive regulation and to promote better regulatory practices is of considerable importance to regulatory policy. The gap between the level of risk that is targeted by policy makers and the level that is achievable through regulation is inevitable and has to be explicitly recognised and managed. The lessons from recent crises is that in the future regulators will have to pay more attention to background risks and systemic risk, as well as build in mechanisms for learning from past failures and near misses.

- Increasingly, regulatory impacts need to be achieved across and beyond national boundaries. This has been brought into sharp focus by the financial crisis. Countries need to work together, not separately, to build a resilient and effective regulatory environment. How to achieve closer international regulatory co-operation is a key challenge for the future of regulatory policy and governance. Issues include the institutional architecture of international regulatory co-operation, the identification of important areas for cross-border co-operation, the role of private regulatory initiatives, and standards for openness, consultation and communication across jurisdictions.

What have been the achievements of regulatory policy to date?

Regulatory policy makes significant contributions to economic development and societal well-being. Economic growth and development have been promoted through the contribution of regulatory policy to structural reforms, liberalisation of product markets, market openness, and a less constricted business environment. Regulatory policy has also supported the rule of law through initiatives to simplify the law and improve access to it, as well as improvements to appeal systems. Increasingly, it supports quality of life, social cohesion and the rule of law, through enhanced transparency which seeks out the views of the regulated and through programmes to reduce red tape.

An important area of focus has been exploring the relationship between regulatory performance and economic growth. This body of evidence is both positive and persuasive that the quality of regulation is strongly linked to economic growth and productivity. While one needs to recognise that it is technically challenging to demonstrate this relationship, many studies have found a positive relationship between the openness of national regulatory systems and growth rates for a number of economic indicators.

Likewise, the links between regulatory policy and a range of structural policies has been documented:

- Effective regulatory policy and market openness support each other, opening up pathways for innovation, enhanced consumer benefits, and entrepreneurship. Foreign as well as domestic businesses are encouraged by an effective regulatory environment.
- A strong link exists with competition policy which highlights a close and positive relationship between the objective of promoting competition policy principles and that of promoting high-quality regulation and regulatory reform.
- Product market competition can also play an important role in lowering structural unemployment rates, mainly because competitive pressures eliminate rents and make it possible to expand potential output.
- Regulatory policy was actively used to restructure infrastructure sectors like power, water, telecoms and transport. There is ample evidence that where markets are contestable, the reform of infrastructure – through liberalisation, privatisation and the introduction of incentive regulation – produces positive effects in terms of price reductions, more innovation and consumer choice and higher quality services.

Beyond improving economic performance, regulatory policy has also started to support broader goals for society such as, quality of life, social cohesion and the rule of law. Although the emphasis on this aspect of regulatory policy varies across countries, and it can take different forms, it is fast becoming a strong feature of the regulatory policies across the OECD.

- Regulatory policy has supported a growing transparency in the application of regulatory powers, and a growing direct engagement of the public (the regulated) through its emphasis on the importance of public consultation and communication. It has encouraged more open societies in which user views are heard, by multiplying the approaches to public consultation and communication, and by harnessing ICT and e-government in support of this objective.
- The direct needs of citizens are a prominent driver of regulatory policy in many countries. Several have developed programmes explicitly designed to reduce administrative burdens on citizens, recognising that ordinary people spend considerable time on paperwork, and that this eats into their quality of life.
- An effective application of the rule of law implies attention to a range of issues including some which are directly connected to regulatory policy such as legal transparency, clarity and accessibility, and a well functioning appeal system for administrative decisions. There is a need for rules to be enforced, and applied fairly, without which the rule of law is undermined and corruption can spread. The rule of law thus depends, for many of its aspects, on an effective regulatory policy. The development of regulatory policy has in fact been closely associated in many countries with issues that link to the rule of law.
- An especially powerful reason for some countries to strengthen their regulatory policy is to minimise the opportunities for corruption and reduce its negative economic and social impacts.

What are the challenges for the future?

The 2008 financial crisis and the ensuing and ongoing economic downturn have raised new issues, and sharpened the importance of using regulatory policy to its fullest. Nurturing and sustaining economic growth remains imperative to OECD countries and more widely. As countries emerge from the crisis, regulatory policy can improve economic growth by supporting further structural reforms, which have generally not been carried far enough in most countries. These reforms have taken on a new urgency in the wake of the global financial and economic crisis, since OECD governments now face the challenge of trying to restore public finances to health without undermining a recovery that in many areas may remain weak for some time. To be sure, the financial and economic crises require careful thinking about underlying regulatory frameworks and the "policy paradigm." But the current economic situation has served to strengthen the case for reforms in many areas:

- Product market reforms are an area in which the last few decades have seen a significant degree of convergence among OECD countries. Yet there is still considerable untapped potential from opening up previously protected sectors to competition.

- The global crisis has highlighted the peculiar challenges posed by labour-market reform in many OECD countries. Central to these reforms is the need for reemployment measures and other initiatives to counter the tendency for cyclical unemployment to become structural.
- The basic principles underlying pro-growth tax reform are arguably more important now than ever before. Pressure for fiscal consolidation will compel many countries to seek new revenues in coming years, either through base-broadening or rate increases. In addition, the impact of this process on the recovery will depend largely on their success on promoting economic policy coordination; identifying the revenue sources that are least distorting and avoiding the inappropriate use of regulation as a substitute for fiscal measures.
- For environmental policy reform, one of the most commonly cited difficulties of reform is that the costs tend often to be upfront and concentrated on a few agents, while the benefits take longer to materialise and are generally more diffuse. An additional issue is the unequal spreading of costs and benefits across countries of managing environmental global goods – such as climate, biodiversity or water – or global externalities – such as pollution.
- Public administration reform raises many challenges including path dependence, long time lags, co-ordination among different levels of government and the need to win the support of public sector stakeholders who will be directly affected by reform.

Regulatory policy has an important role to play in order to optimise outcomes and minimise risk in key areas of structural reform. There are strong arguments for using regulatory processes such as impact assessment to assess the costs and benefits of regulatory actions and to use public consultation to inform policy responses and communicate and gain support for the benefits of reform. But there is no recipe book for when and how to apply many of these tools; their most effective scope, their sequence, and how to target them in a context of limited administrative and reform capacities requires a considered assessment of situational challenges to effective governance.

Where do we go next?

Regulatory policy as a framework for improving the quality of regulation is taking shape across all OECD countries. Evidence suggests that it has contributed to delivering economic growth and development and supported the rule of law by helping to make regulation more efficient and effective at delivering policy goals. As countries pursue growth opportunities in the fiscally constrained conditions following the aftermath of the global financial crisis, the contribution of regulatory policy to improving productivity, reducing business costs and promoting innovation will be of even greater importance. For most countries, even those at the vanguard of policy making, achieving this potential will require further institutional development to embed the principles of regulatory policy in their governance arrangements.

Based on the findings of this report, the OECD is developing a new *Recommendation on Regulatory Policy and Governance* to build on existing best practices. For many countries, strong regulatory policy and governance is an unrealised aspiration. The new *Recommendation* will facilitate the practical application of this framework, providing guidance to countries currently dealing with the challenges of regulatory reform and supporting those aspiring to continuously improve their systems of regulatory governance.

This Recommendation will provide a springboard of how to advance the regulatory policy agenda to the next level. The most critical issues which the international community needs to consider include:

- Anchoring effective institutional leadership and regulatory oversight in the political and policy making context, incorporating evidence based approaches to rule making and its review and ensuring its contribution to promoting policy coherence.
- Strengthening the focus on regulatory governance, embracing the institutional breadth and diversity of the roles of all the key agents in the regulatory governance framework, including oversight bodies, regulators, the parliament, the executive and cabinet, and non government actors.
- Taking account of the user and citizen dimension, and in particular the opportunity to exploit the dynamic features of open government enabled by developing social media and communications technologies.
- Extending the principles of regulatory governance to a multilevel context, bringing the regulatory policy tools and practices to supra-national and sub-national rule making and taking into account the role of supra-national and sub-national regulators in developing and reviewing national regulation.
- Ensuring the application of regulatory policy and governance to horizontal policy aims, such as achieving green growth, promoting innovation and mitigating and adapting to the effects of climate change.
- Ensuring that, within governments, regulatory policy includes an appropriate focus on the economic effects of regulation, as well as the issues of legal certainty and promoting the rule of law.
- Recognising the need for regulators to have a clear grasp of the dynamics of the organizations and systems being regulated. This would involve improving the focus on risk assessment and management strategies, including a systemic perspective that includes coordination with other regulators in the same field and evaluating the causes of past failures.
- Incorporating regulatory governance into the culture of government administration, including promoting behaviour change among regulators to encourage flexibility, innovation and outcome orientated approaches to rule making and enforcement.

Key messages

Modern economies and societies need effective regulations for growth, investment, innovation, market openness, to support the rule of law and to promote better lives. A poor regulatory environment undermines business competitiveness and citizens' trust in government, and it encourages corruption in public governance.

Governments face a range of regulatory challenges as countries emerge from the financial crisis. They need to put their economies back on the path to sustainable growth, find ways to handle complex policy areas, and regain the trust of their citizens.

Regulatory reform has already proved its worth, supporting structural reforms, entrepreneurship and market openness. Many countries are more resilient, thanks to the reforms introduced in the past, often in direct response to a crisis and in reference to the OECD guidelines and recommendations.

There is no room for complacency, however. Stronger regulatory governance is needed to move forward, and this will require:

- Institutional leadership and oversight to drive reform priorities and provide early warning to policy makers of regulatory issues that need to be fixed.
- Evidence-based impact assessments to promote effective regulation in support of policy coherence.
- Paying more attention to the voice of users who need to be part of the policy process.
- A renewed emphasis on consultation, communication, co-operation and collaboration across all levels of government, not least in the international arena.
- Reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation, to secure accountability and avoid capture.
- Tools to evaluate and measure performance and progress and to communicate the costs and benefits of reform.

In 2005, the OECD adopted the Guiding Principles for Regulatory Quality and Performance based on the first ten years of regulatory reform as a horizontal programme at the OECD. Moving forward requires a new roadmap and a new OECD Recommendation to meet the current challenges, crystallise a shared understanding and provide a benchmark against which future efforts can be measured.

Chapter 1

Setting the scene: The importance of regulatory policy

Regulation is of critical importance in shaping the welfare of economies and society. The objective of regulatory policy is to ensure that regulation works effectively, and is in the public interest. Regulatory policy, a comparatively young discipline, is taking shape in different ways across OECD members and beyond. Different pathways, however, are tending towards common objectives. Many OECD countries did not have a regulatory policy ten years ago; nearly all do now. There is growing interest in using regulatory policy to address broad societal concerns such as distributional equity and sustainable development. There is no room for complacency for the work which lies ahead to transform regulatory policy into a truly effective support for meeting public policy goals.

What is regulatory policy?

In the past 20 years a key topic of public sector reform in OECD countries has been the emergence and development of regulatory policy. During this period, the nature of regulation has undergone profound and rapid change. It evolved from early efforts of eliminating regulation and gave way to more systemic regulatory reform. These initial reforms, however, often assumed that change was episodic in nature. Moreover, they were based on the idea that it was possible to restore a regulatory structure to some ideal state through one-off interventions. Experience demonstrated that such views were untenable and they gave way in turn to the establishment of permanent regulatory management and governance practices. With time, these processes have become increasingly integrated into public policy making. Today, almost all OECD countries have established explicit institutions, tool and governance processes to implement regulatory policy. As with other core government policies, such as a monetary or fiscal policy, regulatory policy is an integral role of government and is pursued on a permanent basis.

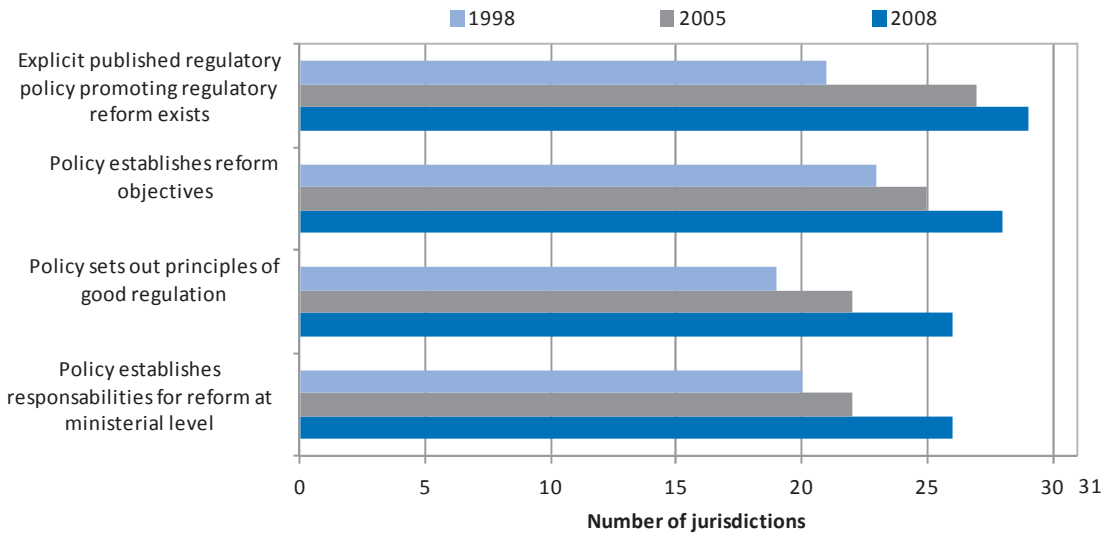
The objective of regulatory policy is to ensure that regulations are in the public interest. It addresses the permanent need to ensure that regulations and regulatory frameworks are justified, of good quality and "fit for purpose". As an integral part of effective public governance, regulatory policy helps to shape the relationship between the state, citizens and businesses. An effective regulatory policy supports economic development as well as the rule of law, helping policy makers to reach informed decisions about what to regulate, whom to regulate, and how to regulate.[1] It has a social as well as an economic dimension. Evaluation of regulatory outcomes informs policy makers of successes, failures and the need for change or adjustment to regulation so that it continues to offer effective support for public policy goals.

Do OECD countries now have a regulatory policy?

Figure 1.1 highlights the spread of regulatory policy across the OECD membership since 1998.

The data need to be interpreted with caution. Whilst indicators can reveal the broad lines of regulatory policy development, country reviews provide a qualitative test of what is really happening on the ground. Although most OECD countries had adopted a regulatory policy by 2008, a closer look reveals that their regulatory policy often consists not of one but of a series of often disjointed regulatory policies. For example, policies to tackle administrative burdens in existing regulations may not be fully joined up with policies for the *ex ante* impact assessment of new regulations. The reviews carried out under the EU 15 project, for example, show that for most of the reviewed countries, there is no single co-ordinated regulatory policy.

Figure 1.1. Adoption of explicit regulatory policy



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

Source: Question 1 a), ai), aii), aiii), 2008 OECD Indicators Questionnaire, *Indicators of Regulatory Management Systems*, *2009 Report*, OECD, Paris, available at *www.oecd.org/regreform/indicators*.

Equally, the data does not reveal the relative strength (or weakness) of countries' regulatory policy in practice. In virtually all countries, the implementation and enforcement of regulations, once they have been enacted, is addressed rather less vigorously than the development phase. It is thus paramount to "mind the gap" between principles and practice. Regulatory policies are often well defined on paper but putting them into effective practice is proving more elusive. Tools and processes may be defined at a strategic level, but considerable work is then needed to give them concrete substance at the practical level of policy and law making. This appears to be especially true of *ex ante* impact assessment.

A core objective of this report is to explore what these issues imply and how to overcome them so as to give better effect to regulatory policy.

Regulatory policy as lever of state power

Regulatory policy can be viewed strategically, alongside fiscal and monetary policy, as one of the three core levers at the disposal of governments for managing the economy and society, implementing policy and influencing behaviour.[2] It may also be considered as the ultimate horizontal policy, supporting all other policies. Regulatory managers on the ground may consider this to be too conceptual, but it does no more than draw attention to a powerful reality, underlining the importance of regulatory policy, the need for it to be mainstreamed and to be at the centre of government's attention.

With major post crisis constraints on government expenditure and social resistance to higher taxes, regulation may receive more attention as a lever of state intervention. Although regulation can be a substitute for fiscal measures and may even be an efficient alternative to direct taxation, this needs careful management. More regulation carries the risk of moving costs to the private sector. The over hasty adoption of inappropriate regulation in reaction to events could add unnecessary burdens, inhibit innovation and harm competitiveness and open markets.

Regulatory policy as part of good public governance

The link between regulatory policy and the broader public governance framework lends it a critically important practical dimension. Good governance implies an effective regulatory policy. Regulatory policy is already a key part of the OECD's work on governance, the goals of which are transparency, legitimacy, accountability, trust in government, efficiency and policy coherence. An effective regulatory policy both depends on other well functioning aspects of public governance, and also contributes to them, for example as regards transparency and citizen engagement. The reform of the public administration will be affected by regulations inside government; and such reform will in turn shape the capacity of the state to support regulatory institutions and effective tools. Research carried out by the OECD into the conditions for effective reform,[3] highlights that key aspects of effective regulatory governance are critical in order to advance policy reforms:

- Policy design needs to be underpinned by solid research and analysis.
- Leadership is critical – whether by an individual or an institution charged with carrying out the reform.
- Appropriate institutions are needed, capable of supporting reform from decision to implementation (a long haul).[4] Quality control and analysis needs to be presented by an authoritative, non-partisan institution that commands trust across the political spectrum.
- Building such institutions takes time, as their effectiveness depends on their reputation. But this repays dividends, as their existence has enhanced prospects for reform in particular areas.

The emergence of regulatory policy

Regulatory policy is a comparatively young discipline.[5] It started to emerge in a few countries in the 1970s and has progressed steadily, through different phases, as a process that can be expected to (and needs to) continue. The OECD community began to give it a collective shape from 1995 onwards, with the adoption by OECD Ministers of a Recommendation on Improving the Quality of Government Regulation, a process which culminated ten years later with the adoption of the 2005 OECD Guiding Principles for Regulatory Quality and Performance (Annex C).

The journey started with a strong focus on economic objectives such as open markets, and the specific goal of deregulation. The significant development of recent years has been the emergence of a much wider vision, which includes the legal dimension of a strong regulatory policy and which puts the benefits for society centre stage. Serving the public interest, for which a strong economy remains essential, is the ultimate goal. The costs of regulation used to be the main preoccupation; its benefits are now more fully

acknowledged. The term regulatory policy can mean different things to different countries. In many European countries it has until recently been largely interchangeable with policies to reduce administrative burdens. In Canada, the term has been applied specifically to the process of developing regulations.

The emergence of regulatory policy was originally in response to changing public policy and especially, economic objectives across the OECD membership. It started life as deregulation in the 1970s and 1980s, following the rapid growth of regulation through most of the twentieth century and the dawning realisation that the accumulation of this regulatory stock was harmful to business, stifling entrepreneurship and innovation. This period saw the first attempts to cut red tape, and the first realisation that regulatory inflation (as it is now called) could be a serious problem. Front runners included the United States in the late 1970s and Canada in the 1980s. Generally speaking, Europe started later.

From deregulation to regulatory reform and the regulatory state

With policies to increase competition in markets and to "roll back the frontiers of the state"[6] in the 1980s and 1990s, deregulation broadened to become regulatory reform. Regulatory reform continued the deregulatory trajectory, but was also now aimed at liberalising key sectors of the economy which had been the preserve of monopolies, often state owned, such as the telecoms sector. The introduction of competition in these sectors required a reinvention of the regulatory framework fitted to their new context.[7] Regulatory reform became an essential adjunct to structural reforms, reaching out beyond the network sectors to encompass product market reforms as well as the liberalisation of professional services.

With the growth of free-market policies came the development of independent regulatory agencies to manage key aspects of economies and society at an arm's length from the political process. This became an important institutional aspect of the regulatory state. The regulatory state paved the way for the emergence of regulatory governance; an evolution from a traditional regulatory management approach to one that takes account of a participatory and accountability approach, which will be considered in more detail in Chapter 4.

From regulatory reform to regulatory management and welfare as the driver

Regulatory reform gave way to the idea of regulatory management in the first few years of this century, a process which acknowledges the permanent nature of the task, and the need for it to be applied across the board, not just to selected sectors or issues. Regulatory reform as a term sometimes implied that the regulatory framework could achieve perfection and that once this ideal state had been reached, regulatory policy makers could simply pack up and go home. It was not so simple.

Understanding grew that a key function of the state was regulation. This required active management if regulation were to be "fit for purpose". In some countries, especially European, members of the OECD, regulatory management entailed significant efforts to simplify and streamline the regulatory stock, with the intention of refreshing and clarifying the legal codes (groups of related laws) that underpin the systems of civil law which are prevalent in much of Continental Europe and beyond.[8]

It also gradually became clear that any public policy, not just selected issues, could potentially benefit from effective regulatory management and the application of regulatory tools and processes, such as Regulatory Impact Assessment. The aim is to enhance overall welfare, not just sectoral interests, and not just for the benefit of business. Some regulations have sector specific implications, but many others have much broader effects. Regulations and institutions for the promotion of social welfare (for example, health and safety) and the environment grew in importance.

This period saw important developments in regulatory institutions, tools and processes. For example, the concept of a central oversight body to encourage the application of regulatory quality principles and of key processes such as Regulatory Impact Assessment took hold, even if it has proved a challenge for many countries to put into place.

Developments at the EU level

The European Union took up the challenge of developing a regulatory policy in the early part of this century, as outlined in Box 1.1. The European Commission unveiled a new Smart Regulation Strategy in October 2010. This sets out plans to further improve the quality and relevance of EU legislation. It will evaluate the impact of legislation throughout the policy cycle, from design, to when it is in place and when it is revised. The European Commission will work with the European Parliament, the Council and member states to encourage the application of smart regulation. The strategy also seeks to strengthen the voice of citizens in the regulatory process.

Box 1.1. Regulatory policy and the European Union: Landmark developments

- **1995: Commission report to the Council:** Application of the subsidiarity and proportionality principles to simplification and consolidation.
- **2000: Lisbon Strategy for Growth and Jobs**: The Strategy identified the need to enhance the competitiveness of the EU economy through increased productivity growth as a key challenge, including measures to improve the regulatory environment for businesses.
- **2001: Mandelkern Report**: The Report develop a coherent strategy to improve the European regulatory environment. The Report made recommendations to member states and to the EU institutions in the areas of impact assessment, consultation, simplification, organisational structures for better regulation, alternatives to regulation, access to regulation, and national implementation of EU legislation.
- **2002: European Commission Communication**: This introduced a new integrated impact assessment system, roadmaps, alternatives to regulation, minimum standards for consultation, and guideline for using expert advice. It prepares the way for the introduction of an EU level impact assessment process.
- **2003: EU inter-institutional Agreement on better law-making**: sets a common framework for action by the European Commission, the European Parliament and the European Council of Ministers.
- **2005-08: EU Integrated Guidelines for Growth and Jobs**: This noted that "to create a more competitive business environment and encourage private initiative through better regulation, member states should reduce the administrative burden that bears upon enterprises, particularly SMEs and start-ups.

Box 1.1. Regulatory policy and the European Union: Landmark developments (*cont.*)

- **2005: Renewal of the EU's Lisbon Strategy for growth and jobs by the European Council of Ministers**: requires EU member states to establish National Reform Programmes, monitored by the European Commission, which issues annual progress reports.
- **2006 European Commission Better Regulation strategy. This strategy was set up as a central element in the efforts to raise productivity.** It set out that better regulation did not mean more or less regulation but rather, the adoption of a policy and processes aimed at ensuring that all regulations are of high quality. The strategy particularly emphasised the needs of businesses and especially SMEs.
  - 2006 Establishment of the Commissions' Impact Assessment Board as central quality control and support function on regulatory and policy proposals.
  - **2007 European Commission Action Programme for Reducing Administrative Burdens.** This was approved by the European Council of Ministers, set a target of reducing administrative burdens in EU legislation by 25% by the end of 2012.
  - 2007 Establishment of EU High-Level Group of officials on Better Regulation to advise the Commission on administrative burdens and simplification issues.
- **2010 European Commission Communication on Smart regulation in the EU.**

The tools of regulatory policy

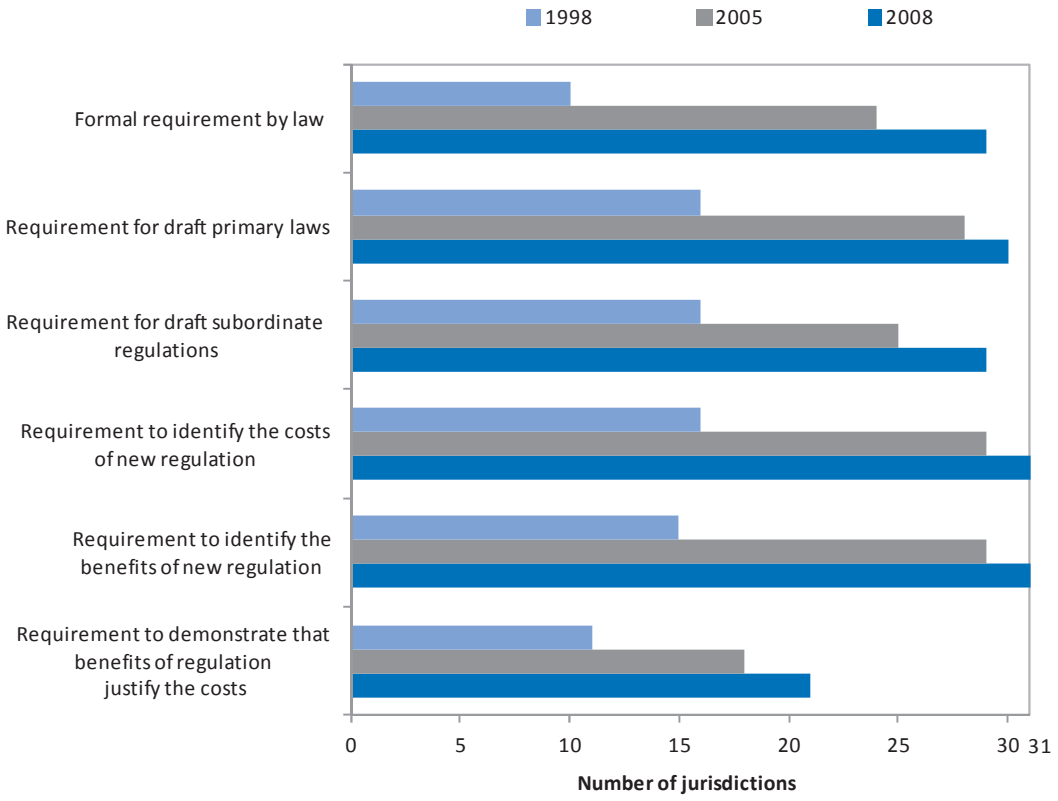
The task of improving regulatory decision-making has a number of dimensions. A range of tools must be deployed in a consistent and mutually supporting manner if systemic quality assurance is to be the result. The tools involve strategic approaches and the use of instruments to give effect to regulatory policy. The essential tools include regulatory impact analysis, the consideration of regulatory alternatives, administrative simplification, ensuring regulatory transparency and *ex post* evaluation.

Regulatory Impact Analysis

A trend toward more empirically based regulation is underway in OECD countries and the widespread use of Regulatory Impact Analysis (RIA) is a clear example of this trend. RIA examines and measures the likely benefits, costs and effects of new or changed regulations. It is a useful regulatory tool that provides decision-makers with valuable empirical data and a comprehensive framework in which they can assess their options and the consequences their decisions may have. A poor understanding of the problems at hand or of the indirect effects of government action can undermine regulatory efforts and result in regulatory failures. RIA is used to define problems and to ensure that government action is justified and appropriate.

The majority of OECD countries began to introduce RIA during the latter half of the 1990s. The use of this tool spread rapidly, and most countries rely on at least some form of RIA (see Figure 1.2).

Figure 1.2. Requirements for RIA at the central government level



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

Source: *Indicators of Regulatory Management Systems*, *2009 Report*, OECD, Paris, available at *www.oecd.org/regreform/indicators.*

There is no single model that OECD countries have followed in developing RIA programmes. Their design has take into account the institutional, social, cultural and legal context of the relevant country. That said, the experiences of OECD countries have made it possible to establish certain practices associated with effective RIA.

- To be successful in changing regulatory decisions in highly-charged political environments, the use of RIA must be supported at the highest levels of government. The most effective programmes have been those that require RIA as a condition for the consideration of new regulations and laws.
- Responsibilities for RIA are generally shared between ministries and quality control bodies. In a majority of OECD countries, ministries are primary drafters of both RIAs and regulations. Ministries have better access to the expertise and information that high-quality RIA depends upon. A number of OECD countries have found that a centrally located body can have an important role in quality control and oversight of RIA.

- Ideally, RIA should be applied to all significant regulatory requirements, regardless of their formal legal status. But analytical capability is a scarce resource that needs to be allocated using some rule of reason. Countries often target RIA where regulatory outcomes will have a noticeable economic impact.
- Data collection is one of the most difficult parts of RIA. The usefulness of a RIA depends on the quality of the data used to evaluate the impact of a proposed or existing regulation.

RIA is a challenging process that needs to be built up over time. It has to be integrated into the policy-making process if the disciplines it brings are to become a routine part of policy development. RIA has been seen in some administrations as an obstacle to decision-making or legislative work. In those situations when RIA is undertaken in the early stages of the decision-making process, it does not appear to slow the process down. Where RIA is not integrated with the policy-making process, impact assessments can become merely justifications of decisions after the fact. Integration is a long-term process, which often leads to significant cultural change within regulatory ministries and among consumers of the analysis, primarily ministers and legislators.

The overall assessment of RIA is mixed. 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. Undertaken in advance, RIA has also contributed to improve governmental coherence and intra-ministerial communication. Yet positive views continue to be balanced by evidence of non-compliance and quality problems. The scope of coverage of RIA remains patchy and exemptions are often broad. RIA is rarely used at regional or local levels.[9] Uneven coverage of RIA programmes seriously reduces effectiveness. Moreover, RIA is most of the time applied to a single regulation, rather than regulatory regimes as a whole. It thus can provide only very broad estimates of the cumulative impacts. Lastly, RIA has mostly been designed for command and control regulations. The increasing use of performance-oriented regulations and regulatory alternative provide substantial challenges to the effectiveness of RIA. The result of these limitations 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.

There are different forms of regulation and a range of other measures that government may adopt to achieve its policy objectives. It is important for regulatory authorities to select the most effective tool to achieve the desired outcome. Thus, a fundamental stage in the regulation-making process is to identify and assess all feasible regulatory forms and other measures that could achieve the desired objective. Unless a full and proper assessment of all viable options is undertaken, the underlying policy problem may not be properly addressed.

Regulatory alternatives

An evidenced-based justification for regulatory action represents a logical first step in developing new regulations. Searching for alternatives represents a second step when investigating how to regulate and achieve policy objectives. Governments need to ensure that the regulations and instruments used to achieve public objectives are effective and efficient. In this context, other options and instruments may be more suited for addressing a particular policy issue and for a public intervention.

Regulation can be viewed as part of a "continuum", rather than as distinct categories, with explicit government regulation representing one end of this continuum, and self-regulation at the other extreme. The main other forms of regulation are summarised below.

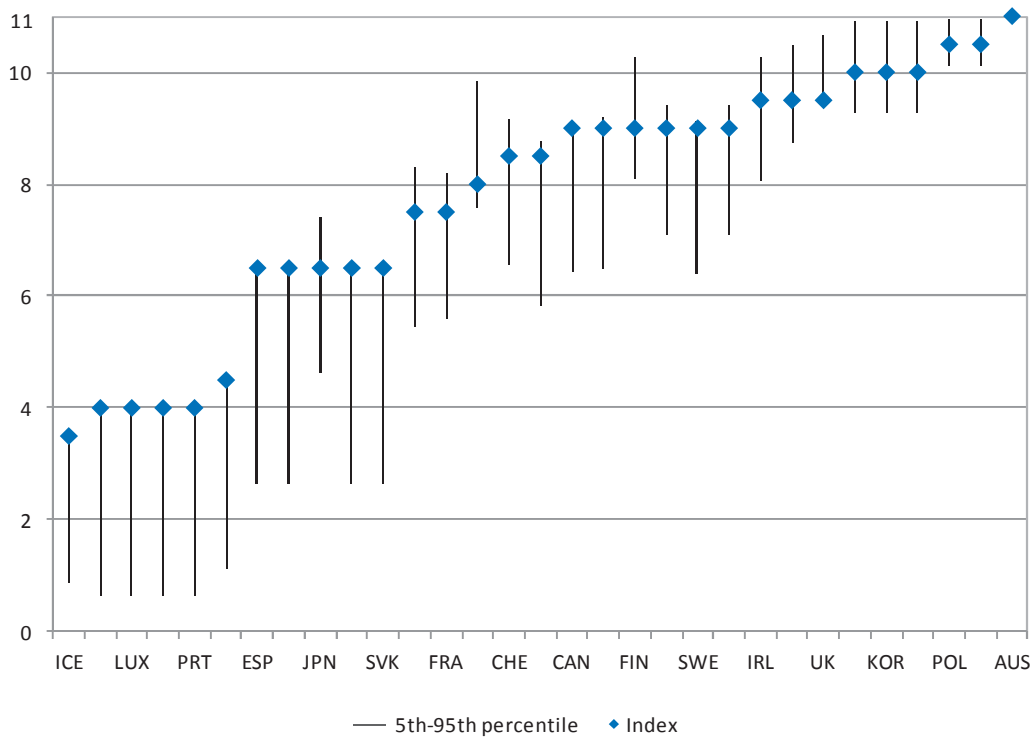
- *Explicit government regulation* is sometimes known as 'black letter law'. It attempts to change behaviour by detailing how regulated parties must act under the law, and it generally imposes punitive sanctions (such as fines or even custodial sentences) in instances of non-compliance with these regulations.
- Performance-based and management-based regulations are more flexible, less prescriptive forms of regulation. Performance based regulation is regulation that sets objectives or standards for outcomes and allows the regulated entity some flexibility to determine the means by which they will meet these objectives. Management based regulation (sometimes called process based regulation) requires businesses to demonstrate that they are meeting regulatory objectives through the requirement to have in place management processes directed at achieving regulatory outcomes.
- *Co-regulation* typically refers to the situation where an industry or professional body develops the regulatory arrangements (e.g. a code of practice, accreditation or rating schemes) in consultation with a government. While the industry administers its own arrangements, the Government provides legislative backing to enable the arrangements to be enforced.
- *Quasi-regulation* refers to the range of rules, instruments and standards whereby governments influence businesses to comply, but which do not form part of explicit government regulation. Governments may assist in developing industry codes of conduct under quasi-regulation (e.g. through official endorsement, representation on monitoring committees, provision of funding), but the Government undertakes no enforcement activity.
- *Self-regulation* is generally characterised by the development of voluntary codes of practice or standards by an industry, with the industry solely responsible for enforcement. The Government's role under this form of regulation is non-existent, or may be limited to the provision of advisory information.

An important regulatory alternative are market-based instruments which aims to change or modify behaviour through the economic incentives facing citizens and businesses. They primarily operate through changing relative prices or making trading opportunities available where they did not previously exist. Businesses and citizens respond by making decisions based on their own assessment of the costs and benefits of various actions given the incentives put in place by the market-based policy instrument. This is in contrast to traditional command and control regulation which often specifies in detail how the objective is to be achieved. The degree of government intervention involved in using market-based instruments to achieve policy objectives varies widely. In some cases the instrument may involve very direct government intervention – such as the manipulation of tax rates or subsidy payment to achieve objectives. In other cases the government's role may be to help establish the legal or institutional structure required for a market to function – but not be involved in the day to day operation of the market.

Information and education campaigns are instruments which aim to change behaviour by making more information available so that businesses and consumers can make more informed decisions. These instruments allow people to make decisions on the basis of greater information than would otherwise be available, rather than imposing a single solution on all as is often the case with traditional command and control regulation. These instruments are often characterised as being 'light-handed' because the degree of direct government involvement in decision making or directing behaviour is more limited than with other instruments. However, even with 'light-handed' instruments, the degree of involvement can vary. In some cases government can require companies to provide greater information to consumers, or government can provide the information itself. Alternatively, government can encourage and persuade businesses to provide additional product information without imposing a formal requirement on businesses to provide the information.

Figure 1.3. Provision of justification for regulatory actions

2008



Note: This figure summarises information about countries' provision of justification for regulation and their search for alternatives. It does not gauge whether these have been effective.

Source: *Indicators of Regulatory Management Systems*, *2009 Report*, OECD, Paris, available at *www.oecd.org/regreform/indicators*.

Finally, at the forefront of regulatory alternatives is an approach that focuses on changing behaviour. This approach aims to improve outcomes without using traditional command and control mechanisms by allowing citizens and business to retain choices but gently pushing them in a particular direction. Thaler and Sunstein (2008) develop a framework of how governments can manipulate "choice architecture" to change behaviour without diminishing choice. Choice architecture is based on an understanding that automatic and instinctive behaviour can prevail over more rational reasoning in determining many choices. It further posit the idea the government policy and regulation can "nudge" behaviour (through the use of default choices and "opt-in" clauses) towards more rational and efficient outcomes. Choice architecture and nudge regulation may be particularly promising in addressing policy problems where command and control options are less viable, such as modifying lifestyle behaviours to reduce the impact on chronic public health issues.

Administrative simplification

One of the most widespread complaints raised by businesses and citizens in OECD countries concerns the amount and complexity of government formalities and paperwork. Enterprises and citizens spend considerable time and devote significant resources to activities such as filling out forms, applying for permits and licences, reporting business information, notifying changes etc. In many cases, practices have become extremely complex, or irrelevant and cumbersome, generating unnecessary regulatory burdens – so-called "red tape". The costs imposed on the economy as a whole are significant. When excessive in number and complexity, administrative regulations can impede innovation, create unnecessary barriers to trade, investment and economic efficiency, and even threaten the legitimacy of regulation and the rule of law.

In response to these challenges, OECD governments have over the past two decades increasingly focussed on reviewing and simplifying red tape. Initiatives to improve the efficiency of transactions with citizens and business have included removing obsolete or contradictory provisions, producing guidelines on administrative regulations, and introducing new ways to measure administrative regulations and reduce their impact. Increasingly, innovative thinking and skilful use of information technology (IT) are leading to new and more effective approaches to administrative regulation.

OECD countries have focused on four broad trends in their efforts to cut red tape. First, and among the most important, is a gradual shift from an approach focused on easing administrative burdens after the event to one that recognises the need to ensure that unnecessary or unreasonable burdens are not implemented in the first place.

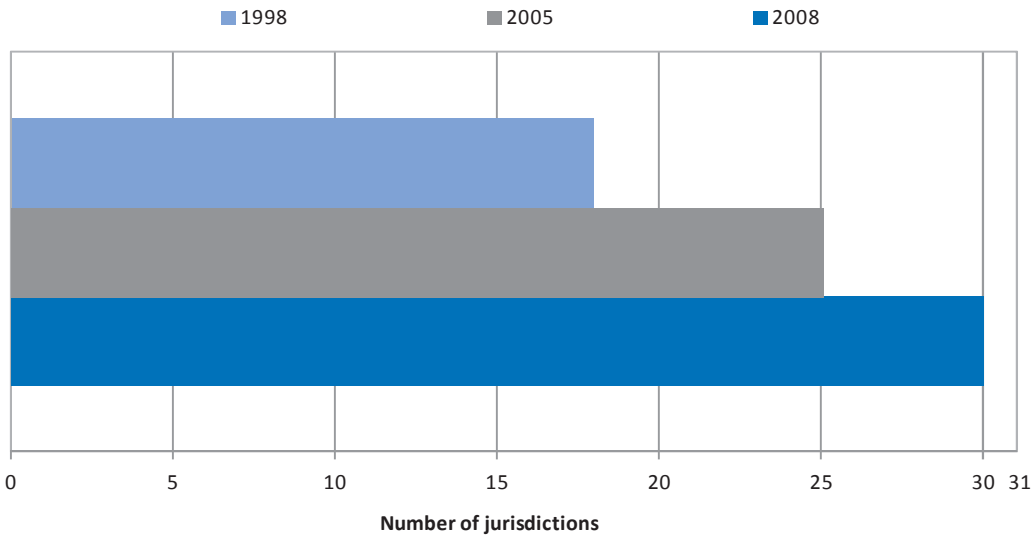
Secondly, while simplification initiatives have generally been "bottom-up" in nature over the past years, they are being supplemented by "top-down" initiatives by governments, and increasingly integrated into broader reform programmes. Typical bottom-up initiatives are business licence services. They often initially serve a specific need of a particular constituency, but tend to broaden their profile over time by identifying additional information and transactions of value to the same or related constituencies A prime example of "top-down" initiatives is the adoption of government Web portals and the merger of one-stop shops.

Third is a trend toward market-based policies that encourage simplification. Administrative simplification policies are increasingly influenced by the idea that economic agents should be free to conduct their business unless compelling arguments can be made for the need to protect the public, replacing previous more restrictive approaches to reform.

Finally, IT is putting governments under increasing pressure to cut red tape. IT is not only the most important "physical" tool enabling governments to reduce the amount of paper-shuffling involved in dealing with the public and business; it also provides strong dynamics and pressure to reduce administrative burdens. The exposure on the Internet of bureaucratic, unclear or duplicative forms has in many cases triggered strong direct reactions from users and media. Such pressure often goes beyond aspirations for further "simplification" of regulations. They can also lead to substantial changes in regulations and how they are applied.

In the absence of evidence-based appraisals, policies to simplify administration are often made in an information vacuum, where governments are unaware of the actual size of the burden and unable to measure progress and setbacks in reducing it. Measuring the existing administrative burden can be an important approach to foster political support for developing a policy to reduce it. Determining the size of the existing administrative burden can also form the basis for evaluating what policy initiatives are needed to improve and sustain long-lasting government efforts.

Figure 1.4. Explicit programme for reducing administrative burdens



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

Source: Indicators of Regulatory Management Systems, 2009 Report, OECD, Paris, available at *www.oecd.org/regreform/indicators.*

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 familiar concept of public consultation, but is considerably broader in scope. 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.

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.

Public consultation is one of the key regulatory tools employed to improve transparency, efficiency and effectiveness of regulation. Consultation improves the quality of rules and programmes and also improves compliance and reduces enforcement costs for both governments and citizens subject to rules. Public consultation increases the information available to governments on which policy decisions can be based. The use of other policy tools, particularly RIA, and the weighing of alternative policy tools, has meant that consultation has been increasingly needed for collecting empirical information for analytical purposes, measuring expectations and identifying non-evident policy alternatives when taking a policy decision.

Ex post *evaluation*

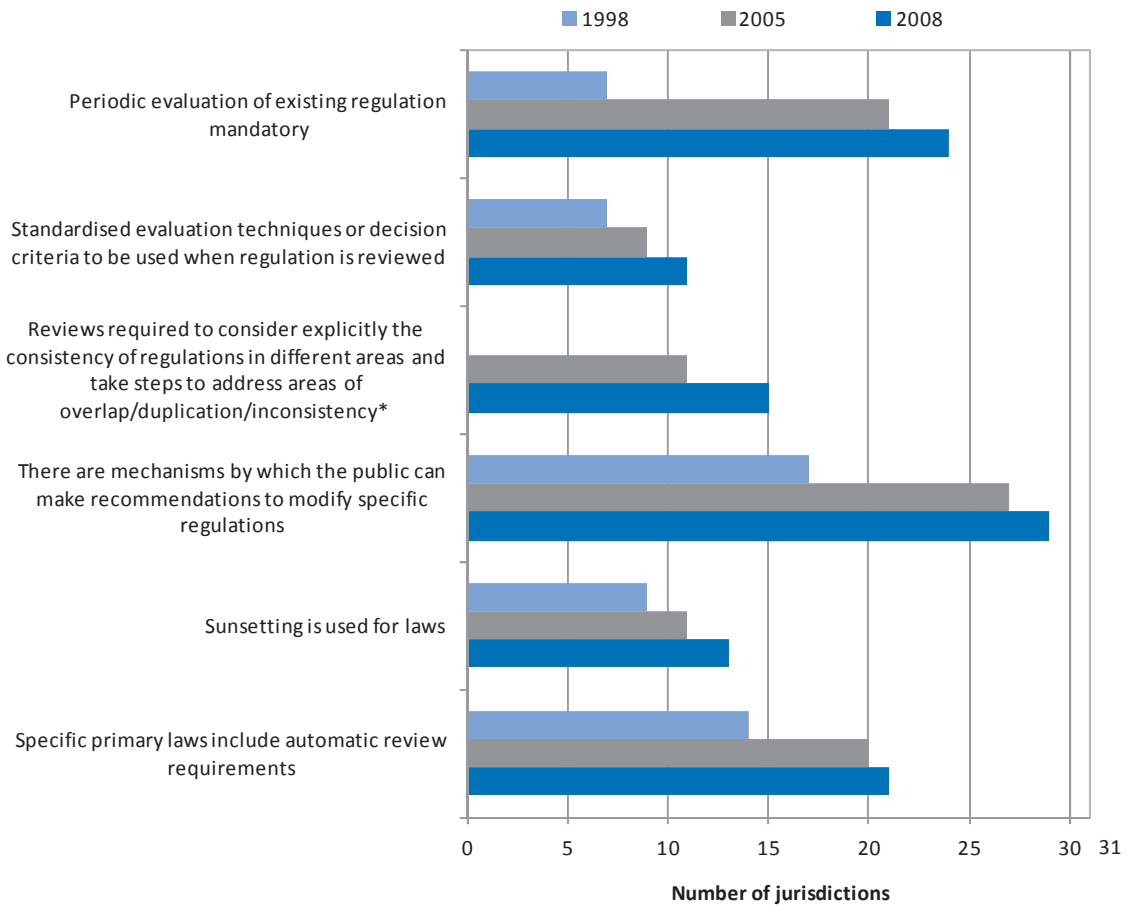
In recent years, policy makers in a limited number of OECD countries have begun to evaluate the implementation of new rules and regulations (*ex post*) to assess the outcomes and results of regulatory decisions. The tools of *ex post* evaluation, in their most sophisticated form, examine the relevance, effectiveness, and impacts of regulatory decisions, as well as identifying unintended outcomes, reasons for failure, and factors contributing to success. Results, derived from this management tool, form a key knowledge input for decision-makers, creating a feedback loop that completes the "regulatory governance cycle" described in Chapter 4.

A number of benefits accrue from the use of this evaluation tool. The formal processes of *ex post* impact analysis can be more effective than *ex ante* analysis at informing ongoing policy debate. At a fundamentally level, *ex post* analysis measures actual costs and benefits and thus uses more reliable data. *Ex post* evaluation is also not subject to the time pressure and political demands of *ex ante* analysis. There are, of course, costs to the use of *ex post* analysis. It can be difficult to direct scarce policy resources to examine existing regulation. There are anecdotal signs of significant resistance, both at the technical and political level, to undertake full scale and systematic reviews of existing regulation. In addition, businesses often complain and have difficulty

adjusting to the changes in the regulatory framework. An excessive use of *ex post* evaluation could result in regulatory uncertainly (albeit with "better" rules) potentially leading to implementation and compliance problems.

Figure 1.5. Regulatory review and evaluation

1998, 2005 and 2008



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

*: No data available prior to 2005.

Source: Indicators of Regulatory Management Systems, 2009 Report, OECD, Paris, available at *www.oecd.org/regreform/indicators*, available at *www.oecd.org/regreform/indicators.*

Taking account of this limited experience, and recognising that more ideas may emerge as *ex post* evaluation processes mature, the OECD and others[10] are attempting to identify a number of "success factors" for the effective use of *ex post* evaluation tools to assess the outcomes of regulatory decisions. They include:

- Integrating the methods of regulatory impact analysis into programmes for the evaluation and revision of existing regulations. These programmes should include an explicit objective to improve the efficiency and effectiveness of the regulations, including better design of regulatory instruments and to lessen regulatory costs for businesses and citizens as part of a policy to promote economic efficiency;
- Establishing clear guidelines that set out general standards, recognise differences between different types of policy goal, and allow flexibility of analytical methods;
- Scheduling evaluations to assess all regulation systematically over time, and reduce regulatory burdens. Priority should be given to regulation with significant economic impacts and/or causing highest irritation among users and/or impact on risk management. The use of a permanent review mechanism should be included in rules, such as through sun setting and review clauses in regulation;
- Monitoring, based on widespread consultation with affected parties, should be set up to facilitate the early identification of problems and progress, including the emergence of unintended negative consequences.

Different pathways moving towards common goals

Regulatory policy development has taken different pathways across the OECD, reflecting the diverse range of legal, political and cultural contexts on which countries have built their public governance. Broadly speaking, European countries have placed more emphasis on regulatory stock management, whilst others have sought to strengthen the *ex ante* impact analysis of new regulations. The European Commission stands out, having advanced on both fronts simultaneously.

The drivers of regulatory policy are diverse. Nearly all countries attach importance to the economic dimension. Entrepreneurship, support for SMEs and the related need to have a more efficient public service in support of business (and citizen) needs, are important factors. Regulatory inflation in some countries is a significant driver, as well as the need to sustain the clarity of the law. A growing factor has been the association of regulatory quality with support for citizens.

From these different perspectives, there is growing evidence of a convergence, as countries have sought to cover a widening range of issues, building on their initial experiences. All now have the same broad understanding that regulatory policy is important and of what it implies in terms of processes. This was not the case when the first OECD country regulatory reform reviews were carried out in the late 1990s. Countries also share the same challenge, to ensure that what they have already put in place can be made to work more effectively. The next step on this evolutionary pathway is to strengthen regulatory governance, an issue that is considered in Chapter 4.

Box 1.2. The Regulatory Cost Model developed by the Bertelsmann Institute

The Regulatory Cost Model (RCM) is a toolkit, developed by the Bertelsmann Institute. It is based on the principles of the Standard Cost Model (SCM). It seeks to measure all regulatory costs including administrative, financial, material costs and "business as usual" and opportunity costs. The model also takes into account irritation costs, without quantifying them.

The costs incurred by duties requiring action can be classified as personnel, material and financial costs. Personnel costs are determined by multiplying the time taken by the associated hourly wage rate, whereby specific standard processes for each type of duty requiring action are used to establish the time required. Material costs include costs for materials, incoming goods, third-party services, financing and infrastructure costs as well as depreciation and amortisation. Financial costs include taxes and other levies such as fees.

Personnel and material costs represent "business-as-usual" costs, either partly or in their entirety, if applicable. Business-as-usual costs are costs which would be incurred even if there were no statutory duty. Additional costs, in contrast, are costs incurred solely by the statutory duty. Financial costs in principle only represent additional costs as the regulated entity would typically not pay taxes to the state without the statutory duty to do so. If "business-as-usual" costs are subtracted from the sum of the personnel, material and financial costs (= Regulatory Costs I), this results in the additional costs (= Regulatory Costs II).

Finally, opportunity costs are calculated on the basis of these additional costs. Opportunity costs are defined as profits foregone, because statutory duties had to be fulfilled. For simplicity, the RCM determines opportunity costs by calculating interest gains foregone over a year. If the additional costs are added to the opportunity costs, the result is the total regulatory cost caused solely by law (= Regulatory Costs III).

As well as individual costs, the RCM offers the possibility of recording subjective burdens. Subjective burdens can be defined as "irritants (annoyance with the statutory duty)". Three sources of irritant are identified: lack of understanding; lack of fulfillment (feasibility); and lack of acceptance of the statutory duty.

Source: Handbook for Measuring Regulatory Costs, Version 1.0 (April 2009), Bertelsmann Stiftung.

European administrative burden reduction programmes have developed significantly from their starting point, which was to assess the information obligations (and nothing else) contained in existing regulations. Targets for burden reduction have started to become net targets, to allow for the fact that new regulations may contain unnecessary burdens which need to be "captured" so that there is real reduction in overall burdens. This has encouraged fresh thinking about *ex ante* impact assessment processes, and the merits of seeking to quantify costs before a new regulation is adopted. At the same time, under pressure from the business community which was dissatisfied with the narrow focus on information obligations, attention has turned to developing an approach that would capture compliance and other costs (Box 1.2).

Country contributions to regulatory policy development

Virtually the whole OECD membership, in one way or another, has been engaged in the development and testing of new approaches to the management of regulation over the last ten years. This has helped the forward movement of regulatory policy and the identification of best practices. Examples include:

- *Transparency and open government.* Denmark, Finland, Norway, Sweden, United States, Australia.
- *Quantifying regulatory costs.* Netherlands, United Kingdom, United States, Canada.
- *Multi-level governance.* Australia, Italy, Mexico.
- *Simplification and one-stop shops.* Austria, Belgium, Mexico, Portugal.
- *Networking within government.* Canada, Denmark, Korea.
- *Independent advisory bodies.* Australia, Germany, Netherlands, United Kingdom, Sweden.
- *Legal quality and access.* France, Germany, Italy.

Principles for better regulation

OECD Principles

OECD member countries collectively adopted a set of principles for effective regulatory management in 2005 (Box 1.3, full text in Annex C). The Principles are based on work which goes back fifteen years, to the mid 1990s. The 1995 Recommendation of the OECD Council on Improving the Quality of Government Regulation provided the first international statement of regulatory principles. Building on this to embrace market openness, competition policy and the link between regulatory reform, structural reforms and economic growth, OECD (1997) established seven principles of effective regulatory management and paved the way for country reviews to evaluate regulatory management capacities and progress. The results of these reviews supported the elaboration of the OECD's 2005 Principles, which kept the seven key points of the 1997 Recommendations, whilst at the same time developing new supporting text.

Box 1.3. OECD 2005 Guiding Principles for Regulatory Quality and Performance

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
2. Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.
3. Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.
4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
5. Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.
6. Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness.
7. Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Country principles

A growing number of OECD member countries have established a set of principles to guide their own regulatory policy, endorsed at the political level, to impose a discipline on the development and management of regulations (Box 1.4).

Box 1.4. Country principles for better regulation

A growing number of countries have established principles of better regulation. An early example is the set of principles established by the United Kingdom's Better Regulation Task Force in 1998, an independent advisory body to the government at the time. The principles include: Transparency, Accountability, Targeting, Consistency and Proportionality.

A more recent example is from Australia. The Council of Australian Governments (COAG) released Principles of Best Practice Regulation in October 2007. COAG agreed that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:

1. Establishing a case for action before addressing a problem;
2. A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non- regulatory approaches, and their benefits and costs assessed;
3. Adopting the option that generates the greatest net benefit for the community;
4. In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that: *i)* the benefits of the restrictions to the community as a whole outweigh the costs, and *ii)* the objectives of the regulation can only be achieved by restricting competition;
5. Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;
6. Ensuring that regulation remains relevant and effective over time;
7. Consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and
8. Government action should be effective and proportional to the issue being addressed.

Ireland, Finland, Canada and several other countries have also established principles of better regulation.

Regional initiatives

The Asia-Pacific Economic Co-operation[11] OECD Integrated Checklist on Regulatory Reform, agreed in 2005, sets out 11 criteria for better regulation, which are consistent with the OECD Principles (Annex D). The participating countries[12] of the MENA (Middle East and North Africa) Initiative endorsed the Regional Charter for Quality in Regulation at the 2009 Ministerial Conference in Marrakesh. The Charter is also consistent with the 2005 OECD Principles.

Pressure from business

In some countries, the business community has been especially active in helping to promote the regulatory reform agenda, challenging their governments over progress in reducing burdens and offering advice on the issues to be tackled (Box 1.5).

Box 1.5. The Board of Swedish Industry and Commerce for Better Regulation (*Näringslivets Regelnämnd- NNR*)

The Board of Swedish Industry and Commerce for Better Regulation, formed in 1982, is an independent, non-political business organisation whose main mission is to advocate on behalf of the Swedish business community for simpler, more business friendly regulations both within Sweden and in the EU. It can be seen as a form of external watchdog and, as a business organisation that only deals in Better Regulation issues, it has no exact counterpart in other European countries. It has a staff of five and is financed by its members, who include 15 Swedish business organisations and trade associations that together represent more than 300 000 companies in every sector and of all sizes. It represents a third of all active enterprises in Sweden.

The *NNR* has, since 2002, published an annual Regulation Indicators report which evaluates policy and progress on Better Regulation and makes proposals for action. The *NNR*'s work covers the whole range of Better Regulation issues, including impact assessment (co-ordinating business views on the quality of impact assessments for new or amended regulations); and administrative burden reduction (collecting proposals from business, work on the measurement of costs). The *NNR* carried out a perception survey of the government's Better Regulation work in 2006 (checking for the "noticeable effects" of government actions). It also carried out an analysis of business regulatory costs in 2006, which it plans to follow up.

The 2008 Regulation indicators report published in June concludes that the government's objectives are aligned with the views expressed by the business community. Many of the tools needed within government to achieve the objective of "a simple and efficient regulatory framework" are being put in place. The big challenge now is that politicians and civil servants must give priority to regulatory simplification and use the tools that are available.

Source: Better Regulation in Europe: Sweden (OECD, 2010).

What has been learned?

Perhaps the most important lesson of recent years is that the development of an effective regulatory policy is an evolutionary process which involves a broad scope of issues. It thus became clear earlier on that deregulation was too simple, that regulatory reform targeted at specific sectors was too narrow, and that a broader approach was necessary.

Some countries have been grappling with the issue of where and how to start the process of embedding regulatory policy as a core element of good governance. An incremental approach has worked in some settings, and many European countries have found it helpful putting their efforts into administrative burden reduction programmes in the first instance, partly because this secured political support. Most of these countries are now branching out to strengthen *ex ante* impact assessment and to consider the relationship with subnational levels of government, among other issues.

Developments can be fairly rapid. The EU 15 reviews show significant developments since previous reviews (carried out only five or so years previously in some cases), and there have been more developments since the reviews were completed.

Institutional complexity and diversity is a feature of many countries and appreciation has grown the importance of this factor in designing and integrating regulatory tools and processes. This goes with a growing appreciation of the diversity of legal and cultural contexts in which regulatory policy needs to take root. Understanding of this has grown with each OECD country review.

Culture change and capacity building within institutions and across government is an essential adjunct to the technical task of designing processes for regulatory management. It is very much a "work in progress". Processes can be unnecessarily "gold plated", whilst inadequate attention is paid to the individuals and organisations who must implement them. Effective regulatory management means new approaches to carrying out familiar tasks across the whole of government, even in the more "mature" countries. There are no magic bullets and this acculturation takes time. There is, not surprisingly, a strong link to broader public sector management and reforms, for example, emerging efforts to link better regulation with performance appraisal systems and ministry budgets.

Communication requires additional attention. One example concerns business administrative burden reduction programmes, where there is an issue of perceptions of progress which appear to undervalue the real progress being made. More broadly, a lack of appreciation and understanding of the whole picture and overall progress can be an issue, including for some inside government. In countries with less developed regulatory policies, awareness of efforts at regulatory management can be very low.

No room for complacency

There have been mistakes, omissions and a failure to grasp the serious consequences of poor regulatory management. The financial crisis and environmental disasters exposed the fragility of some aspects of current regulatory management, and put countries' emerging regulatory governance to an unexpectedly serious "stress" test, at least as regards one key sector of the economy.[13]

However, many of the difficult issues for regulatory management are longstanding. This historical perspective is important. It highlights that core regulatory management skills continue to need attention, alongside the need to address more complex challenges. Principles of effective regulation have often remained just that- principles. "Minding the gap" between principles and practice is a universal issue. For example, although nearly all countries have now established a Regulatory Impact Assessment process, considerable further work is necessary as regards institutional support, methodologies and other aspects before this tool can be considered fully effective.

The financial crisis did, however, put the spotlight on some important emerging issues and gaps in regulatory policy which will help to define the agenda for the future:

- Neglect of the needs and perspectives of the regulated (small businesses, citizens, consumers).
- Failure to grasp fully the complexity of the institutional structure and specifically, the role of regulatory agencies: accountability, gaps, or conversely, overlaps in coverage.
- Failure to take adequate account of the challenges raised by globalisation of international markets and the consequent need for international co-operation.

- The importance of making links between related policies and the need for policy coherence.
- The importance of anticipating systemic risks and risk management.

These issues are explored in Chapters 3 and 4.

Notes

1. Deregulation is not the main purpose of regulatory policy, which is about weighing up the costs and benefits of regulation in different settings. This may lead to the conclusion that regulations need to be removed, but it could also mean that they need to be reshaped, or that alternatives to regulation make more sense. Also, the term regulatory policy is preferred to the term regulatory reform, which can imply a narrower concept built around a "one-off" process, and a limited application to selected sectors.

2 The most fundamental power of the state is its military and administrative control of territory, without which the other powers cannot be exercised.

3. OECD (2010a).

4. The starting assumption is that most countries base their underlying institutional structure on an executive, a legislature and a judiciary.

5. Regulation, by contrast, is centuries old, dating back to the emergence of organised societies and the exercise of political authority over these societies to define the duties and responsibilities of rulers and the ruled. The critical difference of recent times, from the 19th century onwards, is the growing use of regulation by modern states, which is reflected in a growing number of rules.

6. A term used to define the objective of the reforms of the United Kingdom economy in the 1980s.

7. This was often, misleadingly, called deregulation.

8. Codification in systems of civil law means consolidating all the amendments made over time to a set of related laws. It may also mean assembling an original legal act plus all subsequent modifying acts into one new legal text.

9. Australia is a notable exception, where several Australian states have pioneered the use of RIA.

10. See the European Risk Forum (2008).

11. APEC – Asia-Pacific Economic Co-operation. Member economies are: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Philippines, Russia, Singapore, Chinese Taipei, Thailand, The United States, Viet Nam.

12. The MENA member countries are: Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestinian territories (the West Bank and Gaza Strip), Qatar, Saudi Arabia, Ethiopia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

13. In the rush of some commentators to equate regulation overall with financial regulation, and to identify its failings as a main cause of the financial crisis, it is also important to remember that other factors have, and continue to, contribute to the current unsustainable public deficits of many countries. For example, in much of Europe, the financial crisis revealed underlying structural problems, such as failures to reform labour markets, or pensions systems. In fact, regulatory policy has a major role to play in supporting necessary structural reforms as countries emerge from the crisis.

Chapter 2

The achievements of regulatory policy

Regulatory policy has already made a significant contribution to economic development and societal well-being. Economic growth and development have been promoted through the contribution of regulatory policy to structural reforms, liberalisation of product markets, international market openness, and a less constricted business environment. Regulatory policy has also supported the rule of law through initiatives to simplify the law and improve access to it and through improvements to appeal systems. Increasingly, it supports quality of life, social cohesion and the rule of law, through enhanced transparency which seeks out the views of the regulated and through programmes to reduce red tape for citizens.

Regulatory policy and economic theory

Alongside political science, history and the law, the discipline of economics has been a key factor in the development of regulatory policy. Regulatory policy has both learnt from and contributes to developments in economic theory. The analytical framework which underpins the development of regulatory policy is based on a significant stream of economic analysis.[1]

The case for regulation is generally premised on the existence of significant market failure resulting from the existence of externalities, from information imperfections in market transactions, from market power resulting from economies of scale and scope in production, and from resulting income and wealth distribution effects.

- *Externalities.* Markets are highly effective institutions for allocating resources efficiently, but markets may fail to do so when important impacts are not considered in decisions by market actors. These unconsidered impacts are termed externalities (Arrow, 1969). For example, pollution can be an external harm of economic activity. Failure to consider the social and environmental harm of pollution results in an excessive level of pollution and an excessive level of the economic activity generating the pollution, compared to the levels that would be obtained in an efficient market were this external harm considered in market actors' decisions. An essential function of regulation is to internalise externalities by inducing market actors to take these impacts into account in their decisions (Laffont, 1987).
- *Asymmetric information.* Markets may be inefficient where some actors have information that others do not, skewing their transactions (Akerlof, 1970). For example, consumers may be unaware of product defects, workers may be unaware of safety risks in the workplace, investors may be unaware of the risks of default or downturn in the activities underlying the loans or securities in which they invest, and insurers may have difficulty monitoring risks taken by their insured policy holders. Excessive risk, which would not be reflected in prices paid, may result from a lack of information. In such cases, appropriate regulation can improve market outcomes by ensuring that more symmetric and full information is available to the actors to make well-informed decisions.
- *Market power.* Concentration of power to influence markets – to affect prices and supplies of goods, services, or factor inputs – can also result into market distortions. For example, a monopolist can raise prices while restricting supply to increase its profits; if competitors cannot enter the market to contest the monopoly price, consumers will be harmed. Regulation can improve market outcomes by limiting market power and ensuring that consumers are able to choose among competitive goods and services (Baumol *et al.*, 1982).
- *Other public policy goals.* Regulation may be needed establish allocation of rights, opportunities and responsibilities and to correct discrimination by market actors (or governments) against citizens because of their group association, or more generally to prevent unfairness.

A key underlying assumption, in both theory and practice, is that regulation is motivated by public interest and improving social welfare. This approach has been criticised by public choice theorists who argue that there may be many advocacy groups that have strong incentives for lobbying the government to implement specific policies that would benefit them, potentially at the expense of the general public (Buchanan, 1972). This line of thinking has been refined in the concept of "regulatory capture", which posits that the regulatory process has a bias in favour of particular interests. Stigler (1971) and Peltzman (1976) argue that regulators are presumed to favour producer interests because of the concentration of regulatory benefits and diffusion of regulatory costs. Some research goes so far as to claim that regulation *always* leads to socially sub-optimal outcomes because of "inefficient bargaining between interest groups over potential utility rents" (Newbery, 1999 and see also Laffont, 1999).

Regulation is also subject to "political capture" where regulatory goals are distorted to pursue political ends (Laffont and Tirole, 1991). The state itself is not perfect, and is made up of structures and individuals who sometimes pursue personal objectives in the name of the general interest. Under political capture, regulation becomes a tool of self-interest within government or the ruling elite (Posner, 1974 and Stiglitz, 1998). More generally, North (1990) develops a line of reasoning where the process and outcomes of a regulatory regime are determined by the specific institutional context of an economy, as reflected in both the formal and informal rules of making economic transactions.

The case for regulatory reform and deregulation takes it genus from the Chicago school of economics which advocates the virtues of open markets free of state interference. Milton Friedman and Fredrick Hayek believed in the inherent self-correction of markets, and that regulation should be kept to a bare minimum, not much more than competition policy enforcement. This thinking exerted a significant influence from the 1980s onwards over government economic policy in countries such as the United Kingdom and the United States. Privatisation programmes from the 1980s onwards were (apart from raising funds for the state) driven by a desire to reduce the presence of the state in markets.

These developments had significant consequences for regulatory management. The objective of free markets encouraged the deregulation of product markets, and with the liberalisation of previously monopoly sectors, opened the way to construct market-based regulatory regimes in these sectors (Armstrong and Sappington, 2006). Autonomous economic regulatory agencies were established, at an arm's length from ministries and the political process, to manage these previously monopoly sectors leading to the so called raise of the regulatory state (Majone, 1994).

Measuring the benefits of regulatory reform and policy

A new area of focus has been exploring the relationship between various kinds of regulatory reform and economic growth. This body of evidence can be described as positive and persuasive that the quality of regulation is strongly linked to economic growth and productively. This section examines the impact of regulatory reform in a number of areas covering broad-based measures and those linked with market openness, competition, labour and product markets.

One needs to recognise, however, that it is challenging to demonstrate a positive impact of good regulatory policies on social and economic outcomes for at least six reasons. First, the number of potential factors that influence economic growth make it difficult to isolate the impact of regulatory policies. Second, the effect on economic growth might be indirect, *i.e*. go through other factors such as investment that influence economic growth. Third, causality can run both ways and it is complex to identify its direction. Not only can better regulatory policies lead to higher incomes, but also higher incomes may lead to more sophisticated regulatory policies. Fourth, good indicators that rank countries on their regulatory policy system, and thus can be used for such analysis are lacking. Fifth, any analytical method is based on assumptions (e.g. that any omitted factors are not correlated with the quality of regulatory policies). The findings of a study are then conditional on these assumptions, i.e. if the assumptions do not hold, the results may not hold. Sixth, lack of good data for a sufficiently high number of countries and years can limit the choice of methods, and affect the quality of results.

With these caveats in mind, many studies use relatively simple indicators of the regulatory environment. These studies tend to find a negative correlation between the restrictiveness of national regulations and growth rates for a number of economic indicators.

- Jacobzone *et al.* (2010) finds that improvements in the quality of regulatory management systems yield significant economic benefits (in terms of increased GDP and labour productivity in the business sector).
- Bouis *et al.* (2011) finds that regulatory barriers to entrepreneurship, explicit barriers to trade and – especially – patent rights protection appear to be fairly robust determinants of long-run cross-country differences in technology. Some other policies and institutions such as trade liberalisation are found to speed up technology convergence.
- Kox and Nordas (2009) finds that regulatory heterogeneity has a relatively large impact on trade. If all 25 OECD countries in the sample harmonised or recognised each other's regulation, service trade through commercial presence could increase by between 13 and 30% depending on the country.
- Using measures of business regulations in 135 countries, Djanko *et al.* (2006) shows that an improvement from the worst quartile of business regulation to the best results in a 2.3% increase in an annual growth.
- Kaufman *et al.* (2005) focuses more broadly on governance and computes an index of approximately 200 countries over six biannual time periods (1996 through 2004). They point to a strong observed correlation between income and governance, and argue against efforts to apply a discount to governance performance in low income countries.
- Hall and Jones (1999) finds that across 127 countries the difference in capital accumulation, productivity and output per worker are driven by differences in institutional and government policies.

The link with market openness

Effective regulatory policy and market openness support each other, opening up pathways for innovation, enhanced consumer benefits, and entrepreneurship. Foreign as well as domestic businesses are encouraged by an effective regulatory environment. The significant overlap between the themes picked up in the OECD's Regulatory Quality and Market Openness reviews underlines this. It is, for a large part, a shared agenda. Regulatory reforms helped to liberalise markets by helping to address non-tariff barriers to trade.

Based on an extensive review of the literature, Nordas *et al.* (2006) assesses to what extent the observed economic growth and deepening market openness are related. The study finds that there is no conclusive evidence that trade-related changes are linked to the long-run rate of productivity growth. There is, however, robust evidence that open economies are richer and more productive than closed economies. Nordas *et al.* (2006) identifies four possible channels through which trade and foreign direct investment affect productivity levels and growth rates: *i)* better resource allocation, *ii)* deepening specialisation, *iii)* higher return to investment in capital and R&D and *iv)* technology spillovers.

A number of other studies, covering both OECD and non-OECD countries, underscore the benefits of market openness and facilitating trade and investment.

- Dee *et al*. (2011) shows how more open markets in goods and services can contribute to creating jobs and increase incomes, especially in the face of post crisis recovery. Reducing tariffs and non-tariff barriers can help in the short run where the economic crisis has led to significant involuntary unemployment by reducing costs of imported products for consumers and by providing new market opportunities for exporters. Taking a longer term view, the report finds that lasting gains can be found from reallocation of resources across sector and from productivity growth.
- Francois and Hoekman (2010) surveys the literature on services trade, focusing on contributions that investigate the determinants of international trade and investment in services, the potential gains from greater trade, and efforts to co-operate to achieve such liberalisations thru trade agreements.
- Dee *et al.* (2003), looks at the effects of trade-openness on total factor productivity growth and finds evidence that openness has had an impact on growth over the last two decades.
- Johnson (2006) argues that FDI should have a positive effect on economic growth as a result of technology spillovers and physical capital inflows and the empirical part of the paper finds indications that FDI inflows enhance economic growth in developing economies but not in developed economies.
- Alfaro (2003) shows that the benefits of FDI vary greatly across sectors by examining the effect of foreign direct investment on growth in the primary, manufacturing, and services sectors. Based on panel data covering 47 countries and 20 years, FDI in the primary sector tend to have a negative effect on growth, investment in manufacturing a positive one while the evidence from the service sector is ambiguous.

The link with competition policy

The competition policy analyses carried out by the OECD as part of its multidisciplinary reviews of regulatory reform highlight a close and positive relationship between the objective of promoting competition policy principles, and that of promoting high-quality regulation and regulatory reform. Competition policies are stronger and more coherent, and regulatory policies are strengthened in a key part of their agenda – promoting competition and market openness – where they have supported each other to promote reform. The specific impacts of competition policy are examined in a number of studies:

- Baker (2003) finds that the benefits of antitrust enforcement to consumers and social welfare, particularly in deterring the harms from anticompetitive conduct across the economy, seem likely to be far larger than what the government spends on antitrust enforcement and firms spend directly or indirectly on antitrust compliance.
- Aghion *et al.* (2001) and Gust and Marquez (2002) show that an increase in the intensity of competition can enhance productivity by improving the allocation of resources at a firm level.
- Nicoletti and Scarpetta (2003) reports that regulatory environments that favour competition have a positive impact on economy-wide productivity even when other potentially important factors, such as human capital and country- and industry-specific effects, are accounted for.

The link with higher employment rates

Product market competition can also play an important role in lowering structural unemployment rates, mainly because competitive pressures eliminate rents and make it possible to expand potential output. The gains in employment rates to be obtained from competition-friendly policies may be substantial. Conservative estimates suggest that many EU countries could raise trend employment rates by up to 2% simply by aligning their regulatory frameworks with the average among OECD countries. Even larger gains could be expected from further product market reforms that would bring EU countries closer to OECD best practice. Part of the explanation for differences in trend employment rates across the OECD can be found in the different pace and scope of product market reforms.

A number of studies have done initial empirical analysis and they generally show a positive effect of competition-friendly policies on employment at both sector and macro levels: Peoples (1998) and Bertrand and Kramarz (2002), use single-country sector-specific proxies for the stringency of regulation; Boeri *et al.* (2000) and Nicoletti *et al.* (2001) use cross-country OECD indicators of economy-wide regulation for 1998; Messina (2003) uses cross-country proxies of entry cost for 2000; and Griffith *et al.* (2004) uses cross-country indicators for 1995 and 2000.

The links with product market regulation

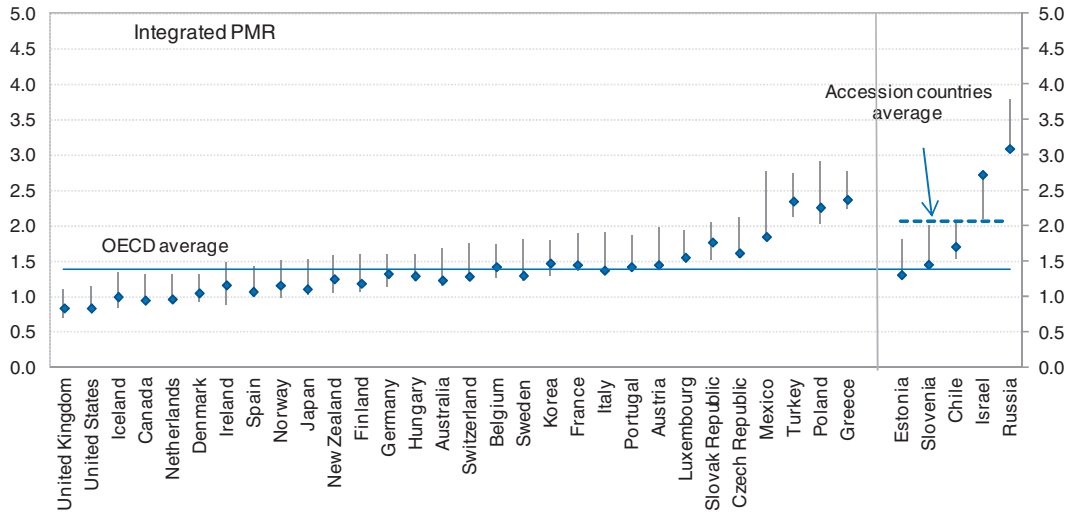
The OECD has developed a unique set of indicators on product market regulation in OECD countries. These indicators summarise a large set of formal policies and regulation and classify into three categories, *i)* state control, *ii)* barriers to entrepreneurship and *iii)* barriers to international trade and investment.

Based on these indicators Conway *et al.* (2006) describes trends in product market regulation in OECD countries between 1998 and 2003. Key findings include:

- State control and barriers to international trade and investment have fallen considerably over the period. Domestic barriers to entrepreneurship have also decreased, though only slightly.
- To a large extent, improvement in product market policies has been supported by regulatory convergence towards more liberalised countries. As a result, there is trend towards more homogeneity in product market policies across OECD countries.
- The approach to competition has also become more consistent across different aspects of regulation in some countries although relative restrictive countries tend to have a high degree of heterogeneity in product market policies. Domestic impediments to competition tend to be lower in countries that have low barriers to foreign trade and investment, suggesting a virtuous circle whereby market openness to foreign operators generates pressure for domestic policy reform.
- Notwithstanding progress in product market reform, a hard core of regulation still curb competitive pressures in many OECD countries, such as in barriers to entry in non-manufacturing industries. Moreover, significant differences persist between countries with relatively liberal and restrictive product market policies.

Figure 2.1. Product market regulation in accession and OECD countries, aggregate level, 2008[1,2]

Index points from 0 to 6 (least to most restrictive)



1. Based on the "integrated" PMR indicator [see OECD (2010f), Box 1 and Wölfl *et al.*, (2009), Figure 1]. Indicator values refer to one particular year and may no longer reflect the current regulatory stance in some (fast-reforming) countries.

2. 90% confidence intervals based on the "random weights" approach [see OECD (2010f), Box 2].

Source: OECD (2010f), "Product Market Regulation: Extending the Analysis Beyond OECD Countries", *Economics Department Working Papers*, No. 799, OECD, Paris; Wölfl *et al.*, (2009), "Ten Years of Product Market Reform in OECD, Countries 1998-2008: Insights from a Revised PMR Indicator", *OECD Economics Department Working Papers*, No.695, OECD, Paris.

OECD (2009b) updates the Product Market Indicators for 2008 (see Figure 2.1) and the following main conclusions emerge from the analysis:

- Reforms appear to have slowed in the most recent period (2003-08) as compared with the earlier period (1998-2003). While countries tend to converge towards the policy stance of the most liberalised countries in both periods, this tendency is less pronounced in the more recent period.
- Over the whole period, easing of product market regulation appears to have been driven to a considerable extent by reforms in sector-specific regulation, notably as regards the gas, electricity and telecommunications markets.
- Despite ten years of liberalisation of regulation, considerable scope for further reform remains, especially as regards reducing controls of governments over businesses, in terms of public ownership and other forms of direct control over firm's decisions.
- Finally, though there has been much progress in reform in certain sectors, there is considerable scope for reform in others, such as professional services and retail trade.

Box 2.1. Relationship between product market policies and regulatory reform

Product market policies aimed at increasing competition have a strong direct relationship with high-quality regulation and regulatory reforms. Traditionally in many OECD countries, product market policies have been underpinned by rules and regulatory frameworks that have the effect of restraining market entry and competition. Regulatory reforms aimed at lowering barriers to market entry – reducing barriers to trade, developing more effective competition policies, easing entry conditions into domestic markets, and increasing the use of market based or incentive mechanisms in difficult sectors such as the network industries – have been central to recent developments in product market policy in many countries:

- *Reducing traditional barriers to trade.* With a few exceptions (such as agriculture) tariff barriers have fallen in the OECD area over recent years. Tariffs rates have declined substantially in most OECD countries. The same can broadly be said for restrictions on FDI, though the picture is more uneven.
- *Promoting domestic competition.* This has taken three main forms, better design and enforcement of general competition laws, liberalisation of entry into non-manufacturing industries, and administrative reforms. Competition laws have been reformed. Nearly all OECD countries have either established or substantially improved their competition laws over the past two decades. Though comprehensive recent data for non-manufacturing industries is not available, often extensive reforms have been carried out in the network sectors, especially in electricity and telecommunications.
- *Simplifying administrative procedures.* In the mid-1990s, procedures, costs and delays for complying with frequently opaque administrative requirements were especially burdensome in the large continental European countries and Japan. These barriers may have fallen in some countries, though this is not universal and in some cases complexity has increased.

Source: OECD (2005), *OECD Guiding Principles for Regulatory Quality and Performance*, OECD, Paris.

Regulatory reform and improving infrastructure

Starting in the 1980s, regulatory reform was actively used to restructure infrastructure sectors like power, water, telecoms and transport. There is ample evidence that where markets are contestable, the reform of infrastructure – through liberalisation, privatisation and the introduction of incentive regulation – produces positive effects in terms of price reductions, more innovation and consumer choice and higher quality services.

Box 2.2. Infrastructure investment and growth

Sutherland *et al.* (2009) examines the relationship between infrastructure and growth. It uses both the stock of infrastructure and the combined investment rate in infrastructure and non-infrastructural capital.[2] The findings reveal that investment in infrastructure can boost long-term economic output more than other kinds of physical investment. In particular, the gains have been larger for countries with comparatively poorly developed energy and telecommunications networks. For countries with mature networks, as is the case for many OECD members, the gains from additional investment have relatively small effects on economy-wide activity. In fact, there is some evidence of potential over-investment in infrastructure, due to either an inefficient use of the extra infrastructure or genuine over-provision.

- *Energy*. For a majority of countries, the findings suggest that investment in generation has been associated with higher output levels. In Australia, Ireland, Korea and New Zealand there is evidence of negative spillovers from additional investment, which could reflect past over-investment and suggest that reallocating investment to other sectors may have boosted output, or the inefficient use of existing infrastructure.
- *Roads*. Positive growth is found for New Zealand and the United Kingdom for total road length per capita. Inversely, investment in roads is estimated to have a negative effect in France, Greece, the Netherlands and Spain. The estimates for motorways are generally positive, possibly reflecting the more recent development of these networks and the fact that they provide services that are more specifically business-related.
- *Rail*. Positive significant effects are found for a number of countries (Australia, Austria, Greece, Korea, New Zealand, and the United Kingdom) suggesting that investment in the rail track was associated with higher output levels. Conversely, estimates suggest that additional investment in rail track would have negative spillovers on output in found for Belgium, Portugal and Spain. Again, this may indicate that there has been over-investment in the sector.
- *Telecommunications*. The picture for telecommunications is mixed. The estimates for fixed mainlines suggests that additional investment would have negative externalities in Australia, Iceland, New Zealand and the United Kingdom, and positive ones in Austria, Greece, Italy, Mexico, Norway and Spain. However, when an alternative measure of infrastructure is used (total subscriptions, including mobile telecommunications) many of these relationships are reversed, suggesting that considerable caution is required in interpreting these results, mainly due to the technological change the sector has experienced.

Source: Sutherland *et al.* (2009), "Infrastructure Investment - Links To Growth and the Role of Public Policies," *OECD Economics Department Working Papers*, No. 686, OECD Publishing, Paris, *http://dx.doi.org/10.1787/225678178357*.

Over the past two decades, a number of studies have examined the influence of infrastructure on output levels and growth. While the primary focus of this analysis has been on optimal levels of investment in infrastructure, this body of research also assesses appropriate regulatory frameworks for infrastructure. OECD (2009b) considers the linkages between the provision of network infrastructure and growth and then examining the interactions between policy settings and investment. A number of conclusions can be drawn from the analysis.

- The network industries are important parts of the economy, particularly with respect to investment, where they can account for between one-tenth and one-quarter of economy-wide investment.
- While the physical level of infrastructure provision has generally increased for all sectors other than rail, there is evidence that the rate of growth has not kept pace with output growth in some sectors and countries.

The impact of infrastructure on output is difficult to pin down and the direction of causality hard to determine empirically. However, there is some evidence, from annual and multi-year growth regressions, that investment has positive effects that go beyond the impact to be expected from a larger capital stock (see Box 2.2 above).

The benefits of reducing regulatory costs

Despite the numerous administrative simplification initiatives launched by OECD governments over the past decades, governments have not always had a detailed understanding of the extent of the burdens imposed on businesses and citizens.[3] Policy has often been made without a clear understanding both of the actual size of the burdens and of the progress that can be made in reducing these. To have a clearer idea of the extent of the burden many OECD countries have attempted to measure burdens, either through business surveys, or through quantitative evidence-based approaches. OECD countries' experiences suggest that quantitative approaches are increasingly supplementing or substituting business surveys as the primary source of information for assessing the burdens.

One of the initial methodologies to measure the administrative burdens on business is the Standard Cost Model (SCM) developed by the Netherlands. The SCM measures the administrative costs imposed on business by central government regulation.[4] The costs are primarily determined through business interviews. These interviews generate data and make it possible to specify in details the time companies spend complying with government regulation.[5] In order to measure regulatory burdens or to evaluate programmes for reducing regulatory burdens with the SCM, a number of countries have developed a "baseline measurement" of the administrative burdens of all existing legislation. This baseline measurement gives an overview of the regulation and a total figure of the administrative burden on businesses; it also shows where burdensome information obligations and related activities lie, and whether they have a national or international in origin.

Programmes to reduce administrative burdens have already generated important benefits across a range of countries:[6]

- Slovenia: a range of specific saving have been made including: EUR 10.66 million per year due to simplification of registration, change and suppression of companies; and the reduction of the average cost of single public contract awarding from EUR 59 to 5.4 million.
- Netherlands: Savings achieved by the end of 3rd Quarter 2009 due to 11% net reduction were EUR 2.3 billion. Substantive compliance costs' reduction was EUR 329 million, towards a total reduction of EUR 544 million in 2011.
- United Kingdom: Reductions of administrative costs were expected to deliver GBP 3.3 billion net savings annually by May 2010.
- Belgium: A clear downward trend is visible from EUR 8.57 billion (3.48% of GDP) in 2000 to EUR 5.92 billion (1.72% of GDP) in 2008.In 2008 alone, administrative burdens decreased by almost EUR 93 million.
- Australia: As part of the Reducing the Regulatory Burden Initiative, the Government of the Australian state of Victoria reduced regulatory burdens by AUD 401 million per annum.
- Sweden: A clear downward trend is visible and administrative costs to businesses fell from SEK 96.5 billion (EUR 10.5 billion) in 2006 to provisionally SEK 89.5 billion (EUR 9.75 billion) net in 2010, this presents a net reduction of approximately 7.3%.
- European Commission: Is on track to deliver on its goals to reduce red tape for businesses. Reduction measures already adopted could lead to savings of EUR 7.6 billion per year, rising to EUR 40 billion if the European Parliament and the Council back the measures pending approval or under preparation.

These programmes have, more generally, helped to address deep seated structural issues in public governance, including improvements in the clarity and accessibility of the legal environment; organisational streamlining through process re-engineering; harnessing the power of information and communication technologies (ICT) for more effective service delivery; and more transparent governance through improved access to information.

Despite the popularity of administrative burden reduction programmes among civil servants and politicians, the perception by those who should mainly benefit from such programmes, businesses and/or citizens, sometimes varies. Even in those countries, where administrative burden reduction programmes brought significant results, businesses did not express much enthusiasm about the results. In the Netherlands for example, the government met its goal to reduce administrative burdens on businesses by 25% in 2007. Despite this achievement, OECD (2010b) finds that business is frustrated at what it considers to be slow progress and the failure to tackle issues that really matter from its perspective.

Reasons for this negative perception by regulated subjects may be the following:

- The absolute and relative numbers representing the burden reduction may seem impressive when related to the whole society or the business sector in a given country.
- There may be a delay in the visibility of results of removing administrative burdens to the stakeholders.

Box 2.3. Perception surveys

Many factors influence perceptions and survey responses, some unrelated to the actual quality of regulation. Governments first need to understand the factors that shape perceptions before they take action. They need to identify why business and citizens express their dissatisfaction with the regulatory environment in most OECD countries, despite clear improvements on indicators such as the SCM:

- The choice of survey design and methodology heavily influence results. Respondents reply differently depending on the phrasing and ordering of questions, and the scale, type and number of response options.
- Stakeholders are sometimes not aware of reforms, or only see part of it. They may simply be more affected by the costs than the benefits of reform, or the benefits of some regulations are diffuse compared to the costs which are businesses experience directly.
- Reforms may have not addressed what really bothers citizens and business, i.e. irritation costs or have caused adaption costs for business which outweigh the immediate cost reductions.

A number of good practices help to make the most of perception surveys. These include sound survey design and both quantitative and qualitative research methods. The UK for instance designed their "Better Regulation, Better Benefits" survey in a two-stage approach. A qualitative phase provided important insights on question formation, perception drivers and individual experiences. The insights gained helped to adjust the design of the quantitative phase (e.g. rephrase questions to ensure respondents understand them correctly) and to better qualify the results.

Best practices include:

- Bringing in business and citizens into the rule making and reform process to: *i)* identify early what irritates business and citizens and to inform reform design and implementation accordingly; *ii)* help business to better anticipate regulatory changes; and *iii)* increase identification and compliance with regulations.
- Improving the service quality of the administration. Perception studies revealed that negative perceptions of regulations are in many cases not linked to the quality of regulations themselves, but to negative experiences with the administration in the attempt to comply with them.
- Adjusting the communication strategy to raise awareness of business and citizens of regulatory reform and its impact. Often awareness of costs is higher than awareness of the benefits of regulations.
- Using the results of perception surveys and studies as a basis for discussion with business and citizen representatives.

Source: OECD research and findings from the OECD June 2010 workshop "Measuring progress in regulatory reform – through the use of perception surveys in OECD countries". Further information: *www.oecd.org/regreform/perceptions*.

- Some countries or agencies may focus on easily removable red tape, for example regulations that are obsolete and/or not actually complied with, regulations that affect the biggest part of the regulated sector (which means that removal of the costs they impose multiplied by the number of affected subjects will be significantly higher).
- Governments do not take into account the perception of regulations by regulated subjects. Sometimes those regulations perceived by regulated subjects as most irritating may not be those that are the most burdensome concerning the result of a quantitative measurement.
- Communication with stakeholders may have been neglected in the past. The results of simplification projects, especially those with quantifiable outcomes may be attractive for the media but may be too abstract for individual citizens or entrepreneurs to understand in terms of their own benefits.

In order to address these concerns, some countries have tried to strengthen communication with stakeholders both in the process of administrative simplification itself but also when it comes to results of such efforts. Perception of regulatory burden by regulated subjects is taken into account often, and qualitative criteria for identification of potential "candidates" for reduction among regulations are being used as a complement to the quantitative ones.

Support for quality of life, social cohesion, and the rule of law

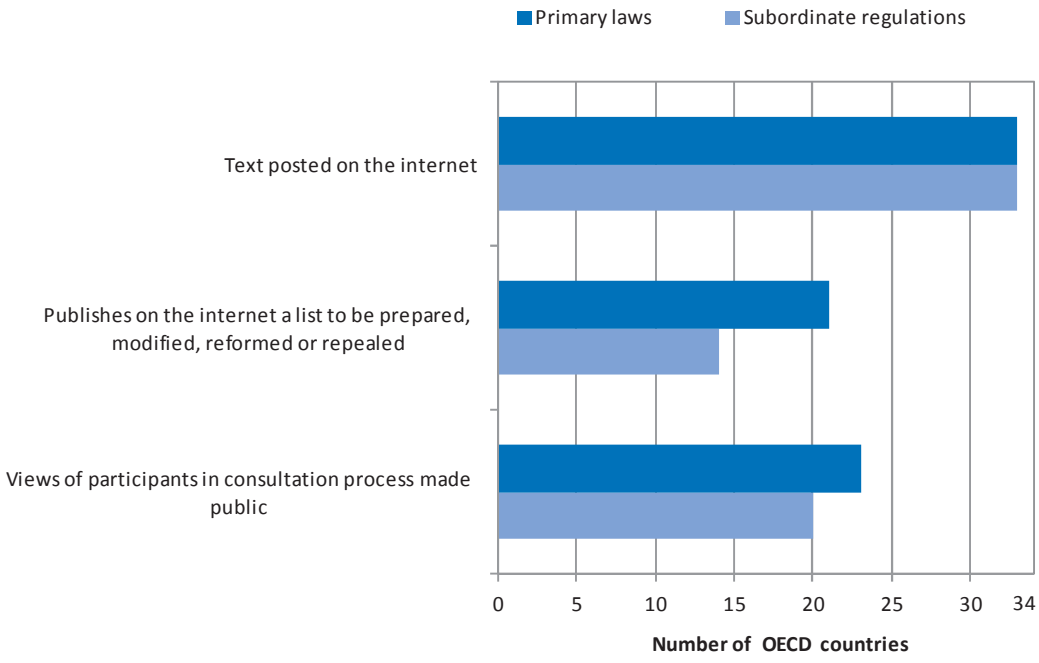
Regulatory policy has also started to support broader goals for society such as, quality of life, social cohesion and the rule of law. Although the emphasis on this aspect of regulatory policy varies across countries, and it can take different forms, it is fast becoming a strong feature of the regulatory policies of most countries.

Social cohesion and support for citizens

Transparency and the engagement of the public

Regulatory policy has supported a growing transparency in the application of regulatory powers, and a growing direct engagement of the public (the regulated) through its emphasis on the importance of public consultation and communication. It has encouraged more open societies in which user views are heard, by multiplying the approaches to public consultation and communication, and by harnessing ICT and e-government in support of this objective. In parts of Europe this has generated a lively diversity of mechanisms for capturing views, the growing use of internet based direct communication often coexisting with the continued use of structured advisory bodies and commissions. Transparency and openness facilitate the enforcement of regulations, improving compliance and limiting the need for coercive enforcement.

Figure 2.2. Public availability of regulatory information

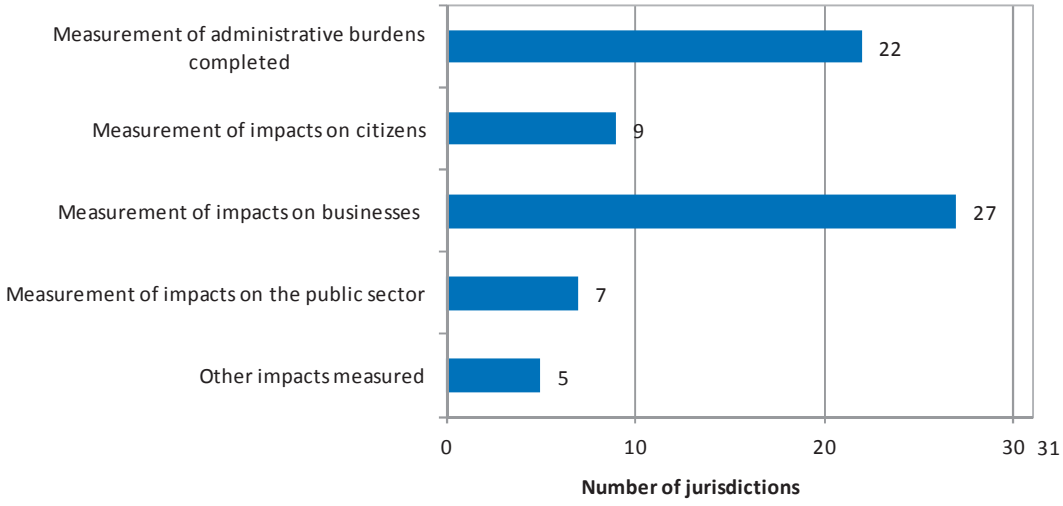


Source: OECD Regulatory Management Systems' Indicators Survey 2008-09, *www.oecd.org/regreform/indicators*.

Reducing red tape for citizens

The direct needs of citizens are a prominent driver of regulatory policy in many European countries and some others. Several countries, for example, have developed programmes explicitly designed to reduce administrative burdens on citizens, recognising that ordinary people spend considerable time on paperwork, and that this eats into their quality of life. Effective regulation in support of social cohesion through efforts to improve public services is also prominent in some countries. This is reflected, for example, in the use by some countries of policies to reduce red tape within the public service, so that public workers (teachers, police, doctors and nurses) at the front line of public service delivery can spend more time attending to the direct needs of their clients.

Figure 2.3. Groups targeted by administrative burden reduction programmes



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

Source: *Indicators of Regulatory Management Systems, 2009 Report*, OECD, Paris, available at *www.oecd.org/regreform/indicators.*

Support for the rule of law

The rule of law (Box 2.4) can be defined, in the simplest terms, as a principle for the organisation of society. It has become, over time, one of the fundamental building blocks for efficient public governance in most countries. An effective application of the rule of law implies attention to a range of issues including some which are directly connected to regulatory policy such as legal transparency, clarity and accessibility, and a well functioning appeal system for administrative decisions. There is a need for rules to be enforced, and applied fairly, without which the rule of law is undermined and corruption may flourish. The rule of law thus depends, for many of its aspects, on an effective regulatory policy. The development of regulatory policy has in fact been closely associated in many countries with issues that link to the rule of law. An especially powerful reason for some countries to strengthen their regulatory policy is to minimise corruption.

Germany provides a particularly clear modern example of giving effect to the rule of law in practice through the concept of the *Rechtsstaat* – which can be loosely translated as the "legal state". A fundamental principle underlying the *Rechtsstaat* is that the exercise of state power should be constrained by the law. The German Constitution is deeply respected, as are the formal process rules which derive from it. German regulatory policy has grown up around structural and procedural traditions which emphasise the importance of legal clarity.

Regulations also provide a transparent framework for making the transition to open, accountable government. The next step is to develop regulations that make sense and meet a high degree of compliance with minimal coercive enforcement. For all countries, sustaining the legitimacy of government actions (the "social contract") post-crisis, when trust in government has been badly shaken, is important.

Box 2.4. The rule of law: Definitions and implications

The principle of the rule of law is embedded in the Charter of the United Nations. This defines the rule of law as, "A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".

Historically, the concept of the rule of law can be traced back to the Greeks. The rule of law and respect for the law is illustrated, for example, through the trial and submission of Socrates. Homer in the Odyssey depicts the island upon which the Cyclops live- each isolated in their caves- as one where there is no need for laws, the better to illustrate that social life requires co-operation under order, and order requires laws. The Romans further developed the notion of a society under the rule of law.

The modern emphasis on the rule of law came after a long period, in Europe and beyond, of civil and international war in the sixteenth and seventeenth centuries, as part of the pacification process whereby states, gaining a monopoly on violent coercion, surrendered part of their freedom to use violence against their own citizens or their neighbours. The rule of law thus includes the fundamental concept that the state itself is, or should be, subject to the law, which it is not free to change. In other words it is a check on the arbitrary use of power.

In the European philosophical tradition, the rule of law took concrete shape from the notion of a social contract between rulers and the ruled, under which the latter give up some of their freedoms to the former, in order to gain social order through the rule of law. Thomas Hobbes (Leviathan, 1651), John Locke (Second Treatise of Government, 1689), and Jean-Jacques Rousseau (*Du contrat social*, 1762) were key figures in the development of the social contract. The American John Rawls (Theory of Justice, 1971) provides a modern update on aspects of the social contract which link it to distributive justice and fair choices, an issue that resonates post crisis today in the search for an approach to regulation in support of fairer societies.

Modern democratic states function on the principle of an implicit contract between the electorate and the government, which is periodically renewed through elections, and which legitimises the use of state power.

For many countries, the Constitution stands as the first line of defence against the arbitrary exercise of state power, supported by the checks and balances of an independent parliament and judiciary to constrain the power of the executive branch of government. Montesquieu (*De l'Esprit des Lois,* 1748) highlighted the need for a balance of political power between the executive, the legislature, and the judiciary. This also resonates today. The origin of most countries' regulatory policy is in the executive, but has started to spill over into both other branches. Countries are grappling with the question of accountability as regulatory power has become more diffuse. The risk of regulatory capture, or indeed, corruption, also puts the spotlight on checks and balances, and where to find these.

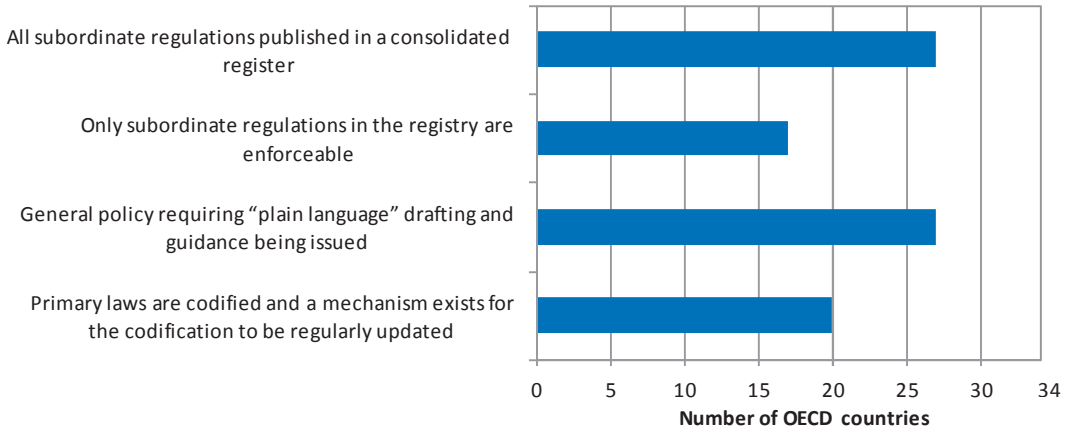
Legal simplification and accessibility

Most European countries include legal quality and legal simplification as one of the main objectives of their regulatory policy. Regulatory inflation, which is a cause for concern in many countries, has serious potential consequences for the rule of law. A proliferation of regulations obscures legal clarity and accessibility of the law, and affects legal certainty. The law is no longer transparent, and businesses and citizens cannot easily

grasp what the law says about what they need to do. Access to regulation includes communication of information, law making capacities based on evidence and clear law drafting. Regulatory uncertainty undermines trust in government, and at a practical level, it reduces the prospects of compliance and sets the scene for corrupt behaviour.

An important issue for developing countries is the legal complexity inherited from different political regimes and colonial powers. As a result, regulations today may be based on a mix of very different legal principles.[7] This legacy from the past generates an additional burden, and highlights the importance of legal simplification, which helps cobat regulatory discretion and corruption.

Figure 2.4. Ease of access to regulations



Source: OECD Regulatory Management Systems' Indicators Survey 2008-09, *www.oecd.org/regreform/indicators*.

Regulatory policy also supports (and depends on) an effective and impartial judicial and appeals system. Rule makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. This supports the fight against corruption. Reducing delays and boosting certainty in the appeals process has been widely recognised as contributing to the quality of the regulatory framework.[8]

Conclusion

It has become increasingly clear that the social and economic outcomes of effective regulation reinforce each other. Economic growth depends on a stable setting, formalised and enforced through an effective regulatory framework. Conversely, a sound (and growing) economy is fundamental to quality of life and the rule of law. Poverty and social conditions which degrade the dignity of people undermine respect for the law and encourage illegal activity outside the formal economy. In many developing and previously planned economies, the transition to a market economy has encouraged a parallel transition toward the rule of law because of its importance to investors (especially for infrastructure investment) and economic development. In particular, property rights (the rights relating to the permissible use of resources, goods and services) are upheld by the rule of law. The establishment of a regulatory policy can help to promote the reform of rigid command and control regulations that inhibit the development of key sectors.

Notes

1. For instance, see Laffont and Tirole (1993 and 2000), Levy and Spiller (1994), and Newbery (1999).

2. This is done in order to capture the impact of infrastructure capital on GDP over and above its affect by increasing the capital stock. This helps focus attention on the possible positive externalities that provision of infrastructure can have on output.

3. The analysis of the impact of regulation on the economy has a long history and shows that regulations can have unintended economic effects. See, for instance, Olsen (1965, 1982) Baumol (1990), North (1990) and Weingast (1995). These effects go beyond those pointed out by standard public interest models, which presume that existing regulations are designed to address market imperfections and enhance efficiency.

4. Detailed information about SCM mythology can be found in "*The Standard Cost Model; a framework for defining and quantifying administrative burdens for businesses*", *www.administratievelasten.nl*.

5. The SCM breaks down regulation into individual components that can be measured: information obligations, data requirements and administrative activities. The SCM then estimates the costs of these components based on three cost parameters: 1) price, which consists of a tariff, wage costs plus overhead for administrative activities done internally or hourly costs for external services; 2) time, which includes the amount of time required to complete the administrative activity; and 3) quantity: which comprises of the size of the population of businesses affected and the frequency that the activity must be carried out each year. The combination of these elements gives the basic SCM formula: Cost per administrative activity = Price x Time x Quantity.

6. See OECD (2010b) and governments' responses to the questionnaire distributed as part of the OECD Cutting Red Tape II project.

7. For example, regulations in the Palestinian Authority are based on a blend of the principles of Islamic Shari'a, the legislation inherited from the Ottoman Empire, British Mandate Law, Jordanian legislation applied to the West Bank and Egyptian legislation applied to the Gaza strip.

8. It is part of the 2005 APEC-OECD Integrated Checklist on Regulatory Reform. The last of the eleven criteria of the Checklist addresses the appeals issue very directly: "Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?" It is also covered in the World Bank's "Doing Business" indicators.

Chapter 3

Challenges for the future

Governments face a range of challenges as they emerge from the crisis. They need to put their economies back on the path to sustainable growth, find ways to handle complex and interrelated policy areas, anticipate and manage risks more effectively, and regain the trust of their citizens. Effective regulation can provide strong support for meeting these challenges. Ineffective regulation, conversely, will slow recovery, brake growth, undermine efforts to address complex issues such as climate change, and reinforce citizens' scepticism of government. Challenges for regulatory policy include the need to strengthen impact assessment and institutional capacities to identify and drive reform priorities, as well as greater attention to the voice of users who need to be part of the regulatory development process.

Economic recovery and sustained growth

The financial crisis and its consequences has raised new issues, and sharpened the importance of addressing pre-existing issues. Three key challenges for governments, and the contribution of regulatory policy to meeting these challenges, are examined below:

- The need for economic recovery and sustained growth.
- The need to manage increasingly complex policy goals.
- The need to regain the trust of citizens.

Nurturing and sustaining economic growth remains imperative to OECD countries and more widely. Growth supports higher living standards. Over long periods of time, even small rates of annual growth can have large effects through the process of compounding. In today's post crisis context it helps to manage otherwise unsustainable debt. Growth in output per capita increases government tax revenues, which can be used to pay for better services.[1] Public debts, deficits and increasing costs of healthcare in an ageing population, as well as pension benefits, are less of a burden in a growing economy. Growth can also help societies afford higher levels of environmental quality.

Finding ways to boost growth is now more important than ever because growth is expected to slow if no action is taken. The OECD estimates that in the long term, world annual growth will average 1.75%, down from 2.25% annually achieved over the seven years preceding the crisis (OECD, 2010a). However, this projected slowdown is not simply a consequence of the global 2008-09 financial and economic crisis. The underlying reasons behind slower economic growth projections are long-term trends such as the slower expansion in potential employment due to ageing populations.

Role of regulatory policy

As countries emerge from the crisis, regulatory policy has a positive role to play in raising growth prospects. As in the past ten years, better regulation can improve economic growth through deregulation and structural reforms, which have generally not been carried far enough in most countries. The importance of a strong overall regulatory framework for investment and innovation should not be underestimated.

A better regulatory framework can influence economic growth in two ways:

- First, it improves market entry, through lower barriers to entry, and cutting red tape for new and growing businesses. It can also facilitate market exit, through better regulations for bankruptcy. As a result, it can improve market mechanisms and competition, which leads to higher productivity and growth prospects. It also reduces the potential for industry sectors to be shielded from competition, towards the best market outcomes.
- Second, it improves investors' confidence through increased clarity and transparency, reducing the risk premium and facilitating investment for key facilities, particularly in the infrastructure sectors such as energy water and transport. A sound regulatory policy that promotes transparency helps to build trust and reduces the scope for costly and unproductive rent-seeking.

Experience shows that regulatory policy has been used successfully in the past to speed recovery and emerge from crisis. Providing empirical evidence of impacts and benefits of regulatory policy can be a challenge, because of the combined effect of the wide range of measures implemented during economic downturns, including – but not limited to – measures involving regulatory policy or reform. The OECD has conducted research on a subset of regulation – product market regulation – and has found that easing anti-competitive regulatory constraints in product markets leads to greater employment and productivity growth, two channels that are the main determinants of economic growth. (See e.g. OECD, 2009b) Observing the pattern of productivity and GDP growth around crises can also be indicative of potential regulatory policy impacts. Figure 3.1 shows the evolution of productivity before and after crises of the early 1990s in Mexico, Sweden and the United Kingdom. All three countries engaged in significant regulatory reform in reaction to economic crises – these efforts appear to have produced a "productivity dividend" (although other measures, including fiscal measures would have also played a role), as the 5-year average labour productivity growth shows a net increase after the crises.

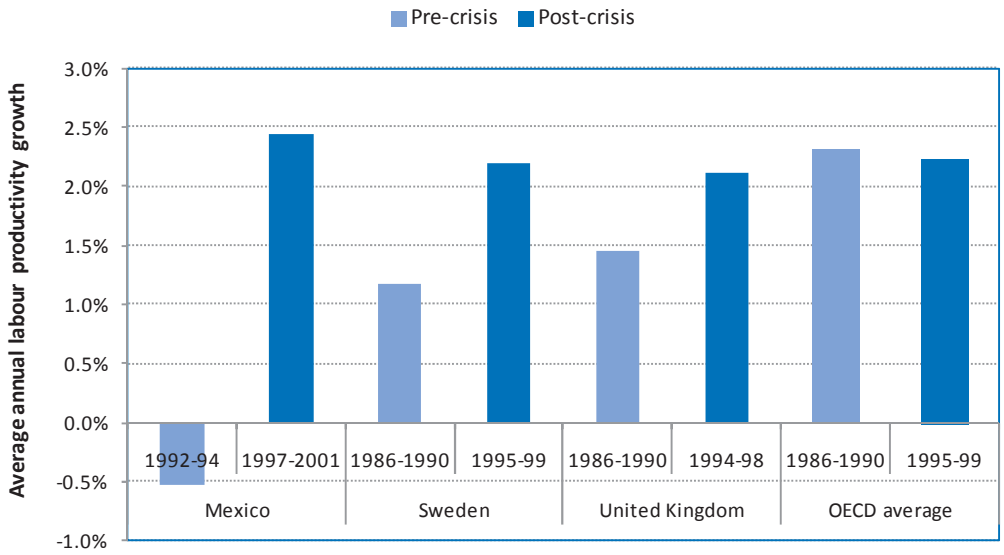
Figure 3.1 shows the evolution of GDP for Korea and Mexico during crises: in both countries, the recoveries from the crises of 1997-98 (Korea) and 1994-95 (Mexico) were strong and relatively quick, as GDP surpassed the previous peak in less than two years. In Mexico, the speed of recovery in 1994-95 far exceeds the recovery from the 1982-85 crises and was the result of comprehensive regulatory reforms following the peso crisis.[2] In the 1982-85 crises, on the other hand, the recovery took longer and was weaker given that the Mexican economy was burdened with an extensive command and control regulatory environment. In Korea, the 1997 crisis led to the implementation of wide ranging reforms, with regulatory reform becoming a key element in the shift to a more market-oriented economy.[3] These reforms played an important role in the speed and strength of Korea's recovery from the 1997 crisis. In addition, Korea was one of the first countries to recover from the 2008-09 global crisis, with GDP surpassing its previous peak (reached in the third quarter of 2008) within a year.

Structural reforms

Over the last few decades, OECD countries have implemented structural reforms in a wide range of areas, with a view to enhancing living standards by raising labour utilisation and productivity, increasing the resilience of the economy to shocks and improving welfare by addressing social concerns such as equity and environmental quality. These reforms have taken on a new urgency in the wake of the global financial and economic crisis, since OECD governments now face the challenge of trying to restore public finances to health without undermining a recovery that in many areas may remain weak for some time. This challenge will be all the greater because, in some domains, the crisis has called into question positions that were previously held to be well-established "policy orthodoxy". To be sure, the events of the last two years have not invalidated prior understandings of many reform challenges; indeed, the crisis has served to strengthen the case for many reforms. The following list is illustrative:

- *Product market reforms* are an area in which the last few decades have seen a significant degree of convergence among OECD countries. The trend towards stronger competition regimes and institutions is widespread, as is the tendency to open up previously protected sectors to competition.

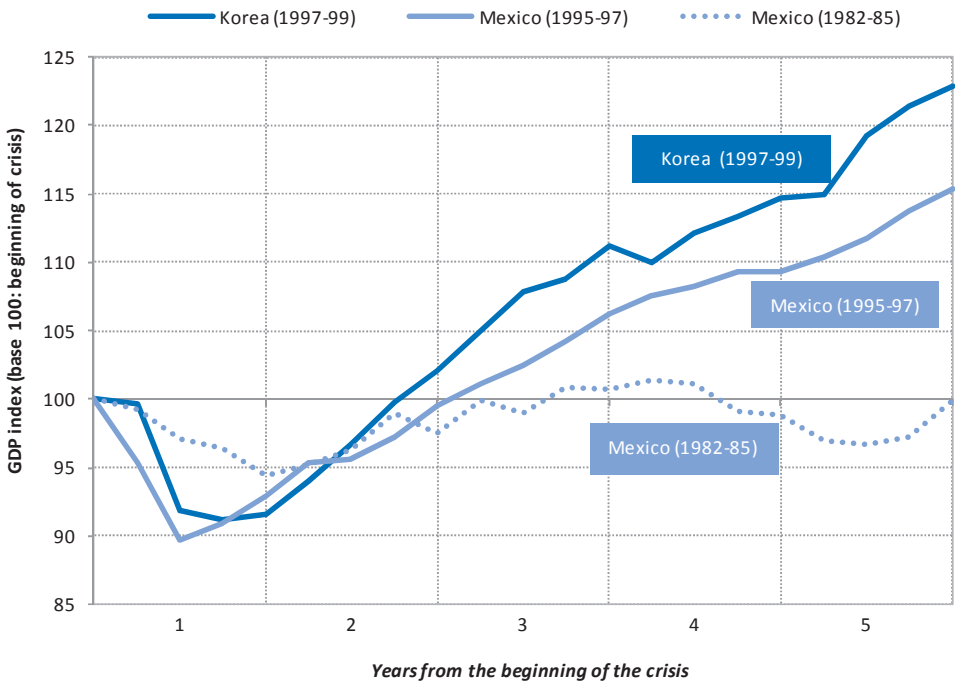
Figure 3.1. Labour productivity growth, before and after crises in selected OECD countries



a. Crises are defined as 1995-96 for Mexico (peso crisis), 1991-94 for Sweden (banking and exchange crisis) and 1991-93 for the United Kingdom (exchange crisis). The OECD average annual labour productivity growth for the five-year periods of 1986-1990 and 1995-99 is presented for reference. Note: data was not available for 1990 and 1991 in Mexico.
b. Labour productivity is defined as GDP per hour worked.

Source: OECD productivity database. Data extracted on 26 Feb 2010.

Figure 3.2. GDP change compared with peak year, crises in Korea and Mexico



Source: OECD.Stat.

- The global crisis has highlighted the peculiar challenges posed by *labour-market reform* in many OECD countries. Central to these reforms is the need for reemployment measures and other initiatives to counter the tendency for cyclical unemployment to become structural.
- The basic principles underlying *pro-growth tax reform* are arguably more important now than ever before. Pressure for fiscal consolidation will compel many countries to seek new revenues in coming years, either through base-broadening or rate increases. In addition, the impact of this process on the recovery will depend largely on their success in identifying the revenue sources that are least distorting.
- For *environmental policy reform,* one of the most commonly cited difficulties of reform is that the costs tend often to be upfront and concentrated on a few agents, while the benefits take longer to materialise and are generally more diffuse.
- *Public administration reform* raises many challenges including path dependence, long time lags, co-ordination among different levels of government and the need to win the support of public sector stakeholders who will be directly affected by reform.

Role of regulatory policy

Regulatory policy has an important role to play in order to optimise outcomes and minimise risk in key areas of structural reform. There are strong arguments for using regulatory processes such as impact assessment to assess the costs and benefits of regulatory actions and to use public consultation to communicate who are the winners and losers of reforms. But there is no clear recipe for when and how to apply many of these tools; their most effective scope, their sequence, and how to target them in a context of limited administrative and reform capacities. But OECD (2010d) has a number of lessons which are relevant to the implementation of structural reforms:

1. *Leadership is critical.* Virtually all of the OECD's assessments point to the importance of strong leadership – whether by an individual policy maker or an institution charged with carrying out the reform. Much of the work also points to the importance of government cohesion in support of reform.
2. *Take a system wide approach.* The size and complexities of the regulatory system are not always understood or appreciated. Regulatory instruments are the products of the regulatory system. Where reforms touch only specific regulations, the reforms cannot address the root causes of regulatory failures. Reformers often pick "low hanging fruit" and hope that good practices are learned and institutionalised later. But regulations emerge from a system where incentives and habits are strong, and that is fully capable of making the same mistakes over again. There is little evidence that easy pickings lead to hard and sustainable reforms. It is more important, more relevant to markets, and more difficult to change how regulation is made and implemented in the future. As evidence accumulates, the reform community seems to be swinging away from easy and short-term reforms to more systemic reforms.

3. *The context matters.* Reform is highly contextual, and should be tailored to suit existing government structures than has been the case in many previous programs.
4. Partly for these reasons, *successful reforms take time.* The more successful reforms examined in OECD (2010d) generally took several years to prepare and adopt, and they often took far longer to implement. By contrast, many of the least successful reform attempts were undertaken in haste, often in response to immediate pressures.
5. *Successful reforms often take several attempts.* Many of the biggest reform successes followed earlier setbacks, and less successful reform attempts can often be seen in hindsight to have helped set the stage for subsequent, sometimes far-reaching, reform initiatives, often by deepening policy makers' understanding of the problems involved.
6. *Focus on implementation.* Implementation of even well-designed reforms remains a continual challenge. Reforms are highly vulnerable during the implementation phase. There is no generalised implementation framework that demonstrably improves success.
7. *Early and continuous assessment of results.* Development of the regulatory reform agenda is hampered by a lack of focus on monitoring and evaluation. Evidence linking particular regulatory policy reforms to changes in market performance or to government policy effectiveness is limited. Better data on the gains from reform can play an important role in generating momentum for further and more comprehensive regulatory governance reforms.

Green growth

Achieving green growth depends on commercial innovation to transform the nature of economic activities and reduce the environmental costs of delivering goods and services. The removal of subsidies for polluting activities is important to provide the right incentives for consumers to switch to non polluting products. Similarly, regulatory privileges that give a market advantage to incumbent firms by creating barriers to entry for new firms are socially wasteful. Governments require high quality regulation that is instrumental to innovation through facilitating entrepreneurial behaviour and the operation of markets. It is particularly important, therefore, that regulation is conducive to the creation of the new firms which will bring new products to the market. In addition regulation should not unnecessarily obstruct the exit of "brown" firms which is part of the process of renewal and can free up capital for new "greener" economic activities.

Regulatory policy and reform can support the achievement of positive environmental and economic outcomes. Firstly, it is the role of regulatory policy to ensure that environmental externalities are taken into consideration in the decision of whether or not to regulate. Secondly, good regulatory design is critical to addressing environmental problems effectively while delivering economic efficiency and avoiding regulatory failure.

Regulatory Impact Assessment is the key *tool* and *decision process* that governments can use to address these policy goals. As a tool supporting decision making, RIA systematically examines the potential impacts of government actions by asking questions about the costs and benefits; how effective will the action be in achieving its policy goals and whether there are superior alternative approaches available. As a decision process,

RIA is integrated with systems for policy development and rule making within government. It should communicate information *ex ante* about the expected effects of regulatory proposals, at a time and in a form that can be used by decision makers, and also *ex post* for the evaluation of existing regulations.

In the absence of market incentives for positive environmental behaviour, there is a *prima facie* case for regulatory intervention to mitigate the impacts of negative environmental externalities. This is often problematic, however, and requires careful consideration of the possible attenuated effects of regulation on the choices of firms and consumers, and of regulators. Addressing climate change and reducing carbon use is a good example. In the absence of more elegant solutions, such as a market price for carbon, regulatory options have to be evaluated for their potential benefits in terms of expected changes in behaviour. Regulation is often a necessary second best option, but it can also lead to market distortions that can be socially wasteful without necessarily delivering the desired environmental benefits.

RIA can make transparent any trade offs in the comparison of alternative regulatory proposals, ensuring that appropriate weight is given to environmental values. OECD experience suggests that RIA can be effective at improving regulatory quality given certain conditions. Characteristic methodological problems are a failure to take into account intangible environmental values, the difficulty of quantifying the expected benefits, and identifying the appropriate weight to be given to short term costs versus long term benefits as reflected in the selection of an appropriate discount rate.

To be effective RIA has to be conducted by policy makers within departments, but it also must be supported by central agencies in the form of tools and methodological guidance to clarify variables. Various initiatives are emerging to incorporate estimates of the impacts of carbon emissions in regulatory design through climate impact assessment tools, though their use is relatively rare.

The US has established a consistent framework for the evaluation of benefits from reduced CO_2 emissions (also called social cost of carbon [SCC]). An estimate of the SCC was established through an interagency work group as the basis for the calculation of benefits of regulatory proposals. It is interesting to note that this is a global value that gives consideration to the impact of climate effects outside of the US territory. The aim of the SCC is to improve coherence of new regulatory initiatives by ensuring that they are compared on the basis of the same analytical parameters. The interagency work group is also responsible for updating SCC estimates over time as science and economic understanding of climate changes evolves serves.

To ensure that regulatory policy is designed to accommodate environmental impacts, the UK requires that all Impact Assessments for new policy across government capture the absolute level of carbon emissions generated (in both the traded and non-traded sector), as well as a number of other environmental costs and benefits. This allows for greater level of scrutiny and analysis of Carbon implications of new policy across Government and by stakeholders. Two carbon values are applied: the first is set for policies that reduce or increase carbon emissions as part of the European Emission Trading System; the second one is defined for policies targeted at sectors which are non-traded. In the long term view (2030 onwards), both prices will be joined to a single traded price of carbon (DECC, 2009, p. 6). The values used in RIA are as follows: for traded sectors GBR 25 in 2020, with a range of GBR 14 to GBR 31 as a short-term carbon price; for non-traded price of carbon GBP 60 per ton CO_2 in 2020, with a range of +/-50%. (OECD, 2011b).

In Austria the impacts of federal policies on environmental issues, especially on climate (*Klimaverträglichkeitsprüfung*) have to be considered and included in the index pages of the assessment document that is required to be attached to the regulation(the *Vorblatt*). The rationale for this is to document effects of legislation on the Austrian climate strategy. It involves the use of a self assessment tool to calculate any reduction or increase in the production of green house gasses including the potential for adaptation and the consideration of less polluting alternatives. The Environment agency assists with the calculation of carbon outputs.

Burden reduction

An increasing number of OECD countries are targeting their regulatory reform efforts to reduce the volume of red tape which in the absence of a process of renewal tends to accrete over time and impedes business flexibility. While no countries have specifically directed their reform programs to the policy objectives of "green growth," administrative simplification strategies are nonetheless complementary as they are designed to reduce the costs of administrative compliance, remove unnecessary procedures and streamline interactions with government.

By reducing paper work and travel time, the removal of unnecessary administrative requirements also reduces waste. For example, the Administrative Simplification Agency (ASA) in Belgium estimated in 2008 that journeys of up to 13 129 925 kilometres were saved through the elimination of a requirement to visit the town hall, which corresponds to a reduction of 2 100 tons of CO_2 emissions (OECD, 2011b).

Complex and interrelated policy goals

Policy coherence refers to the efforts of governments at ensuring that increasingly complex and globalised policy objectives can be met, and that the achievement of high-level policy goals are not undermined by a failure to deal with this complexity. The simplest expression of policy coherence is "joined-up government" (within and beyond national boundaries). This is easier said than done. Ensuring policy coherence is a major public governance challenge.

Some incoherence in policy and programme delivery is inevitable, due to the complexity of managing public affairs in modern pluralist societies. Policy competition may also be promoted to generate the benefits of creative tension and enhance the contestability of policy advice. However, a united (if not coherent) position is essential at the end of the process, if governments are to sustain their credibility, and if goals are to be achieved without wasting resources. It does not serve the public interest if one part of government fails in its role in policy delivery; and it is directly contrary to the public interest if one action of government is counteracted or undermined by an action taken by another part.

Box 3.1. Policy coherence: Principles and practice

OECD Principles for Policy Coherence

The OECD has identified eight key tools for policy coherence:

- Commitment by the political leadership is a necessary precondition to coherence and a tool to enhance it.
- Establishing a strategic policy framework helps ensure that individual policies are consistent with the governments goals and proprieties.
- Decision makers need advice based on a clear definition and good analysis of the issues, with explicit indications of possible inconsistencies.
- The existence of a central overview and co-ordination capacity is essential to ensure horizontal consistency among policies.
- Mechanisms to anticipate, detect and resolve policy conflicts early in the process help identify inconsistencies and reduce incoherence.
- The decision making process must be organised to achieve an effective reconciliation between policy priorities and budgetary imperatives.
- Implementation procedures and monitoring mechanisms must be designed to ensure that policies can be adjusted in the light of progress, new information and changing circumstances.
- An administrative culture that promotes cross sectoral co-operation and a systematic dialogue between different policy communities contributes to the strengthening of policy coherence.

Source: OECD (1996), "Building Policy Coherence Tools and Tensions", Public Management, *Occasional Papers*, No. 12, OECD, Paris.

Recent OECD reviews and experiences confirm that there are a number of challenges with achieving policy coherence:

- Initial plans and programmes can be blown off course by events, new information, and not least, crises, which require an adjustment to original plans. This can complicate the efforts to maintain coherence with initial high-level goals.
- Capacities and mechanisms do not always function effectively, especially when the political context becomes highly charged and at certain parts of the election cycle. In some cases, inherent capacities to steer the process are relatively weak.
- Policy coherence may be achieved at the stage of policy development and decision, only to be lost at the stage of implementation, which is usually in the hands of different actors (for example, regulatory agencies, local governments, and not least for some key issues, at the international level and via the actions of other governments).
- As the term "trade off" implies, policy coherence is not necessarily attainable, if the meaning of policy coherence is to satisfy fully the attainment of all high-level policy goals in equal measure. Some "incoherence" may be unavoidable. Policy trade-offs may only become apparent once the process of developing policies in detail has been engaged.

The last two issues raise growing challenges for governments. Policies are becoming more complex and interrelated. For example, it is impossible to tackle policy for climate change without addressing issues related to transport, energy and housing policies, as these are the three main sources of greenhouse gas emissions. This means that policies need to be assessed at an increasingly aggregate level, and that related laws and regulations cannot be addressed in isolation. In this context, it is no longer adequate to consider whether a single regulation is "fit for purpose", or even whether a whole regulatory regime attached to a policy (considered in isolation) is adequate.

Nor can governments afford to consider only their own actions. The rapid march of globalisation, the rise of concerns over sustainability and climate change, and the growth of systemic and security threats place national actions in a broader context.

Practice of policy coherence

The experience of recent OECD country reviews (including through the EU 15 project reviews) suggest that governments pursue policy coherence in terms of:

- Seeking to meet the high-level policy goals that feature in government programmes or coalition agreements after an election.
- Giving more detailed effect to these high-level policy goals through the development of more specific, detailed policy proposals, which usually emanate from the responsible ministries.
- Ensuring that policy proposals are weighed up and discussed collectively by the government so that the effects of a course of action can be evaluated, which has increasingly involved some form of analysis (such as impact assessment) to capture costs, benefits, trade-offs and consequences (including unintended) of the proposed action.
- Having in place a mechanism at the centre of government for reaching a decision as to whether a policy proposal should go ahead, or not, or should be adjusted.
- Applying the doctrine of collective responsibility, that is to say, binding all the government members to a decision once it has been reached collectively.

This work is usually supported by a unit at the centre of government (prime minister's office or equivalent). The shape and nature of the unit depends on a country's constitutional make-up, political, administrative and cultural traditions. For example, some countries rely on a largely apolitical civil service to manage the relevant processes, whereas in others, the higher reaches of the civil service are political appointees or have political affiliations. In all cases, however, often elaborate technical processes are in place (which may be supported by legislation, or rely on convention and practice) to ensure that preparations for decision-making follow a certain track. Requirements, for example, may be for a period of notice before a proposal can be tabled to the Cabinet or Council of Ministers; or to attach explanatory notes including, increasingly, the results of an impact assessment. Some of these procedures, albeit technical, imply a significant authority and influence for the central unit; for example, in deciding whether and when a proposal will be tabled for Cabinet decision, prioritising between proposals, and helping to resolve conflicts.

Not all proposals are tabled before Cabinet, and those that are, are usually reviewed by groups of ministers and/or officials to address differences and smooth the way for the higher level debate and decision. Several countries have a network of committees and groups to do this work, defined around themes such as the economy and the environment. In some others, the processes can be more informal. There are also variations in terms of the role of the central unit at this earlier stage in the process, with lead ministries responsible in some countries for associating other ministries with the development of their proposal, and the central unit taking the lead in others. Consensus building (formal or informal, beyond as well as within government) is fundamental to the cultures of some countries, so that the final decision can be taken quickly and harmoniously. In some others, ministries retain a significant autonomy to the end.

In nearly all cases, the Finance ministry is involved at some stage before the final decision, in order to assess the budgetary and financial consequences (in countries where impact assessment is well developed, this assessment becomes part of the overall impact assessment).

In some countries (for example in many countries of Continental Europe) a policy proposal is often automatically associated with a draft law or regulation, which is intended to give it effect. Thus a proposal will be tabled before Cabinet with a draft law attached. In these cases, specific additional legal mechanisms and institutions are likely to be involved (Ministry of Justice, Council of State, Constitutional Court or other) in order to check the constitutionality and legal quality of the proposal.

The processes, to function effectively, rely heavily on well-trained officials with the appropriate competences, not only at the centre of government, but in the line ministries responsible for developing specific proposals (capacities to manage the legal and economic aspects, to conduct effective consultations, to synthesise the results etc).

Transparency, users, and trust in government

Reflecting the needs of users in regulation is linked to core values, which are shared across the OECD membership and beyond, such as accountability, transparency, and engaging civil society. Citizens are looking for these values to be reflected in areas that generate considerable public concern such as health, education, employment. Regulatory policy's economic dimension is complemented by a social dimension, and needs to draw inspiration from the widest possible range of stakeholders.

Awareness of the importance of ensuring that regulatory frameworks reflect the needs and interests of citizens and businesses has grown over time. This is partly in reaction to the increased expectations of society. More is demanded of governments, as living standards rise and attention turns to issues of social welfare, equity and the environment, as well as basic economic needs.

Post crisis, and especially in some countries, there is a need to rebuild confidence in government and its capacity to steer the economy and society effectively, not least through the lever of regulation. Support for regulatory policy itself is at stake. Without the support of their citizens, governments will find it increasingly hard to justify the investment in regulatory policy. This is exacerbated, post crisis, by the need for many governments to find savings in order to reduce debt.

The United States is taking this issue forward with a new phase of open government developments, launched in 2009 by U.S President Obama. The Open Government Initiative (OGI) involves building on a long tradition of "notice and comment" procedures. The aim of the OGI is to foster greater transparency in an effort to engaging citizens and business more actively in the regulatory process. The OGI is based on the principle that different opinions and values need to be heard in a pluralist, open society. It represents a commitment to strengthen accountability, secure public trust, and increase efficiency and effectiveness in government. The OGI marks a departure from previous transparency measures. It focuses on 'collaborative governance', meaning that regulatory agencies must take pro active steps to work in collaboration with businesses, citizens and stakeholders. The use of Web 2.0 technologies, see Box 3.2, has been identified as an important tool.

There are specific reasons for promoting a more user friendly and user driven environment:

- *Compliance and the rule of law.* Poorly designed and executed regulations will not be observed. This undermines the rule of law, and jeopardises the achievement of underlying policy goals. Regulations designed and implemented with the user in mind not only stand a much better chance of being observed, but also help to prevent a slide into corruption such as wilful failure to observe the law and the growth of an informal economy.
- *Sustainable societies.* The evidence of the EU 15 reviews is that users support smart regulation (not necessarily deregulation), and in particular, that citizens and consumers are keen to pursue high social welfare and environmental performance standards.
- *Innovation.* Engaging the widest possible range of stakeholders in the regulatory process will ensure that new ideas are captured.
- *Competitiveness.* Integrating the needs of businesses and in particular, their concerns over red tape and compliance costs, helps to ensure that the business environment is competitive.
- *Quality of life.* The removal of red tape has a direct effect on the improvement of citizens' lives. Citizens also benefit from the removal of red tape inside government, releasing front-line public sector workers to concentrate on the delivery of public services.

Role of regulatory policy

Public consultation is starting to be viewed through the prism of a shared government-citizen-business responsibility for promoting the public interest, tapping into the collective intelligence of society. Regulatory policy has traditionally been tackled from the top down, that is to say, from the perspective of regulators (bureaucrats, officials, politicians), rather than from the perspective of the regulated (citizens, businesses, consumers).

Government across the OECD are beginning to change this perspective and involve stakeholder directly in the rulemaking process. This inclusion can point the regulators to difficulties, inefficiencies, and solutions that so far have not been taken into account. Furthermore, public participation increases the likelihood of compliance by building legitimacy in regulatory proposals and may therefore improve the effect of regulation and reduce the cost of enforcement. In short, public participation helps to make regulation user-centred.

Box 3.2. Information technology and rule-making

The use of information technology shows considerable promise in improving public participation in the regulatory process. Electronic Rulemaking (e-rulemaking), based on Web 1.0 technology, may have reduced some of the shortcomings of public consultation, but these improvements fell short of revolutionising the process. Mostly because the use of this information and communication technology (ICT) did not change the way the communication between regulators and stakeholders was organised. Classic read-only websites and limited two-way channel communications did not contribute to the achievement of a fully stakeholder-centric model.

The new Web 2.0, however, has already shown its capacity to influence public life. This new technology, also called the participative web, has the potential to fundamentally alter, if not revolutionise, the rulemaking process. Similar to the developments caused by the social networks, other Web 2.0 technologies affect how information, data or content is produced processed and how it circulates.

Unlike older ICTs, the participative web has thus the potential to create an online meeting point, very much like real-world public meetings, but without the physical inconveniences. Stakeholders may choose on what and when they want to consult, this limiting potential "consultation fatigue." This meeting point can also be used to improve communication and co-operation within government. For example, most OECD members have formal obligations requiring regulators to consult with affected ministries or agencies. Whereas older ICTs can help making these consultations more efficient, Web 2.0 technology fundamentally alters the process: Governmental agencies can actively participate and bring in their expertise during the drafting stage, instead of just giving comments once a first version of the regulation has been finished.

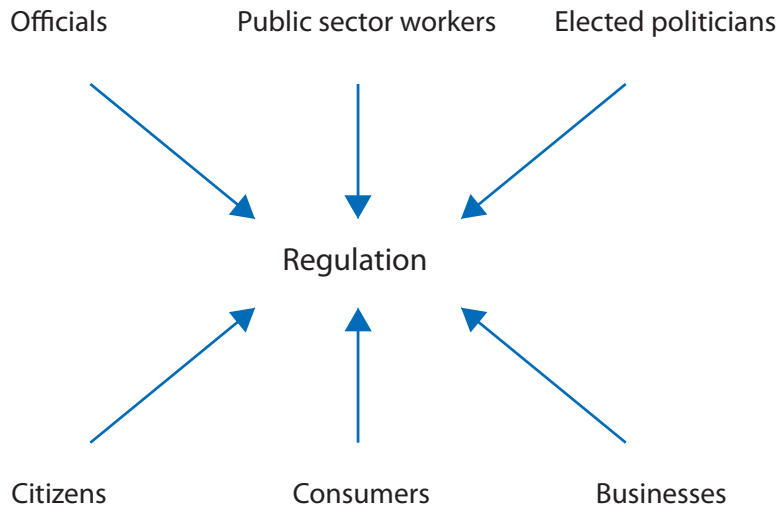
This is not to say that using e-rulemaking at all stages of the regulatory governance cycle is or will become inevitable. The actual applications of Web 2.0 technology to the rulemaking process is still in its infancy. Some regulators have undertaken first (pilot) projects, but are far from exhausting the technology's potential. But given these new possibilities, it seems inevitable to figure out if, how, and where they can be used to improve the regulatory process.

Source: OECD (2011a), "User-Centred Regulation: Open Government and E-Rulemaking", OECD, Paris.

Final thoughts

Stakeholder participation in the regulatory process does raise an important issue for future debate. At the heart of this debate is the lack of an easily defined boundary between the public and private sector. Careful consideration will have to be given to how citizens can directly interact in policy making in the framework of a democracy which generally puts responsibility for decision-making with elected representatives of the people.

Figure 3.3. Shaping regulation



Source: OECD Secretariat.

Notes

1. Economic growth means the growth in output, usually measured by the Gross Domestic Product or GDP of an economy, over time. The evolution of GDP per capita is closely related to improvements in living standards.

2. As described in OECD 2004, Mexico engaged in broad reforms following the peso crisis of 1994-95. At that time, regulatory reform was seen as the least fiscally demanding option in terms of public resources. Mexico's central regulatory oversight body was strengthened, bureaucratic discretion was reduced, transparency and predictability increased and multi-level governance improved. The competition authority resisted anti-competitive mergers, markets were opened to foreign competition and trade was radically liberalised through the adoption of NAFTA. These measures showed a strong commitment to reform, which evolved into systematic and permanent review processes after the crisis.

3. As described in OECD 2005, a wide-ranging and impressive programme of regulatory reform was implemented in the midst of the 1997-98 crisis in Korea. With strong support at the presidential level, 50% of all regulations were cut, an initiative aiming to bring an end to the tradition of political intervention in the economy and business. Increasingly there was a reliance on the market to correct business failures and to drive growth – this was made clear with the failure of Daewoo, which marked an end to the "too big to fail" policy for the biggest conglomerates. At the same time markets were opened and barriers to trade and foreign investment were lowered.

Chapter 4

The need for stronger regulatory governance

Effective regulation to help meet the challenges facing governments will only be achieved through stronger regulatory governance, closing the loop between regulatory design and evaluation of outcomes. This draws attention to a range of issues, including institutional leadership and oversight; reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation with a view to securing accountability and avoiding capture; a renewed emphasis on consultation, communication, co-operation and co-ordination across all levels of government and beyond, including not least the international arena; and strengthening capacities for regulatory management within the public service.

The regulatory governance cycle

Regulatory governance gives practical effect to regulatory policy. Effective regulatory governance maximises the influence of regulatory policy to deliver regulations which will have a positive impact on the economy and society, and which meet underlying public policy objectives. It implies an integrated approach to the deployment of regulatory institutions, tools and processes (such as regulatory oversight bodies, administrative burden reduction programmes and Regulatory Impact Assessment). Regulatory governance is not a new idea. The OECD published a report in 2002 which advanced the idea of regulatory governance (see OECD, 2002). But the evidence of OECD country reviews since then shows that regulatory governance is at best poorly applied in most countries. The relative failure of regulatory policy to deliver consistently effective regulation so far can be linked to inadequate and undeveloped regulatory governance.

A core challenge for effective regulatory governance is the co-ordination of regulatory actions, from the design and development of regulations, to their implementation and enforcement, closing the loop with monitoring and evaluation which informs the development of new regulations and the adjustment of existing regulations.

Figure 4.1[1] below depicts an ideal state in which the different actions that make up effective regulatory governance are co-ordinated. It highlights a number of points:

- *Policy making is closely linked to rule making.* For much of the cycle the tracks converge, and when they separate (for example, when regulations are enforced and evaluated), they join up again later to inform the next phase of policy making. Policy making may give rise to the initiation of a law (or the amendment of an existing law), although this should not be automatic, as a core part of regulatory governance is to ensure that regulatory options are carefully evaluated before adoption.[2]
- *The application of regulatory policy is a dynamic and continuous process.* Like other aspects of public governance, it is, or should be, a permanent feature of the public governance landscape. Simple lists or principles of good regulatory management can fail to convey this point.
- *Different functions need to be met.* The image of the cycle is valuable for stimulating reflection on the functions which need to be met, and the actors who do (or should) take on these functions. Joining up is not just a matter of processes, but of institutions.

The concept and image of the cycle can serve as a starting point for reflection, both collectively and for each individual country, on what needs to be done to strengthen regulatory governance. Current regulatory institutions, processes and programmes have not necessarily failed as such. But how are they joined up? What are the gaps? What are their weaknesses? What existing regulatory governance models – or their particular characteristics – can be looked to for inspiration? How can the responsible institutions be imbued with a more holistic perspective of their contribution to the public interest?

How does the real world match up to the idealised picture? Three practical observations can be made on the actual state of regulatory governance across the OECD so far:

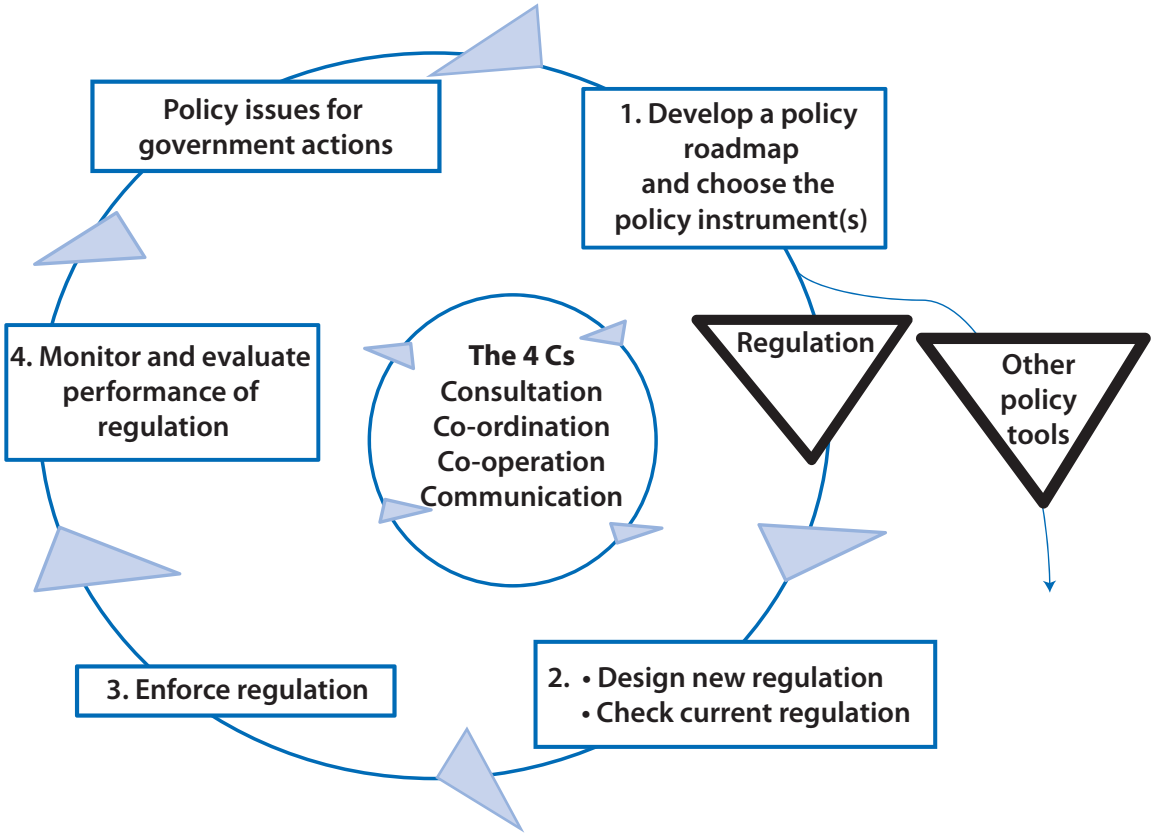
- Countries are, to a greater or lesser degree, failing to close the loop, in other words, failing to make strong connections between the design, implementation and evaluation phases of the regulatory cycle.
- Countries' regulatory policies tend to prioritise certain aspects of regulatory management. Very broadly, the Europeans have, until recently, put more emphasis on regulatory stock management, whilst others have put more effort into the design of new regulation. *Ex post* evaluation – whether of individual regulations, regulatory processes, or regulatory frameworks – is a near universal weakness. No country is strong in all aspects of regulatory management across the cycle.
- There is a widespread weakness in most countries as regards *ex ante* impact assessment of new proposals. Nearly all countries have principles, standards, procedures, criteria and mechanisms for the effective preparation of draft regulations both from the legal and policy perspectives. There is an important task of challenge, co-ordination and supervision to ensure that these principles and procedures are applied, before a final decision is reached on whether to go ahead with a draft proposal.

Ex post evaluation may be the weakest current link in the regulatory governance cycle. Yet evaluation of progress and outcomes is necessary in order to ensure that regulatory governance is delivering on its promises, and to inform the next stage in the policy-making cycle. Evaluation takes several forms:

- the evaluation of individual regulations;
- the evaluation of regulatory management programmes such as Regulatory Impact Assessment; and
- the evaluation of broader policy outcomes which have depended (at least in part) on the presence of an effective regulatory framework.

While it is important to embed the principle of evaluation as an automatic reflex, the approach will need to take account of sensitivities, such as the potential political implications of critical feedback. For evaluation to be well grounded, performance measures will also be required. This is still at an early stage of development in the OECD community. The best placed institutions for evaluation will vary according to the country (and according to the nature of the evaluation). Most countries have not assigned this function to a particular body. It may be useful to build on existing institutions such as audit offices (which already review the efficiency and effectiveness of government spending).

Figure 4.1. The regulatory governance cycle



Source: OECD Secretariat.

Achieving effective regulatory governance

Beyond examination of the component parts of the regulatory governance cycle, there are a number of strategic considerations. These are:

- The issue of overall leadership and oversight;
- The role of regulatory agencies;
- Changing the culture of the administration;
- The need to engage all government players;
- Balancing public and private regulation;
- How to strengthen capacities for regulatory governance;
- The international dimension.

Leadership and oversight

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

OECD reviews find a strong relationship between an effective, comprehensive regulatory policy and the existence of a central oversight body. Promoting regulatory reform often require the allocation of specific responsibilities and powers to monitor, oversee and promote progress across the whole of government and to maintain consistency between the approaches of the various actors involved in the regulatory process. In particular, if some countries rely on trust and informality for co-ordination, other countries, with more complex and sometimes fragmented institutional settings, have allocated this function to a structure created for this purpose.

More and more OECD countries have established central oversight bodies whose key roles include:

- oversight of the rule-making process;
- assisting policy makers in their evidence-based analysis;
- challenging the quality of regulatory proposals;
- advocating for quality regulation/ better regulation.

The existence of a specific body charged with regulatory oversight indicates per se a strong commitment to improving regulatory quality and is closely correlated with the development of an effective and comprehensive regulatory policy. The functions of central oversight bodies usually go beyond improved co-ordination between existing bodies involved in the rule-making process. In particular, they monitor the progress achieved by the different actors involved in the policy process and scrutinise new policy/regulatory proposals. They can also act as gatekeepers, with the power to veto a regulation which does not fulfil the necessary requirements.

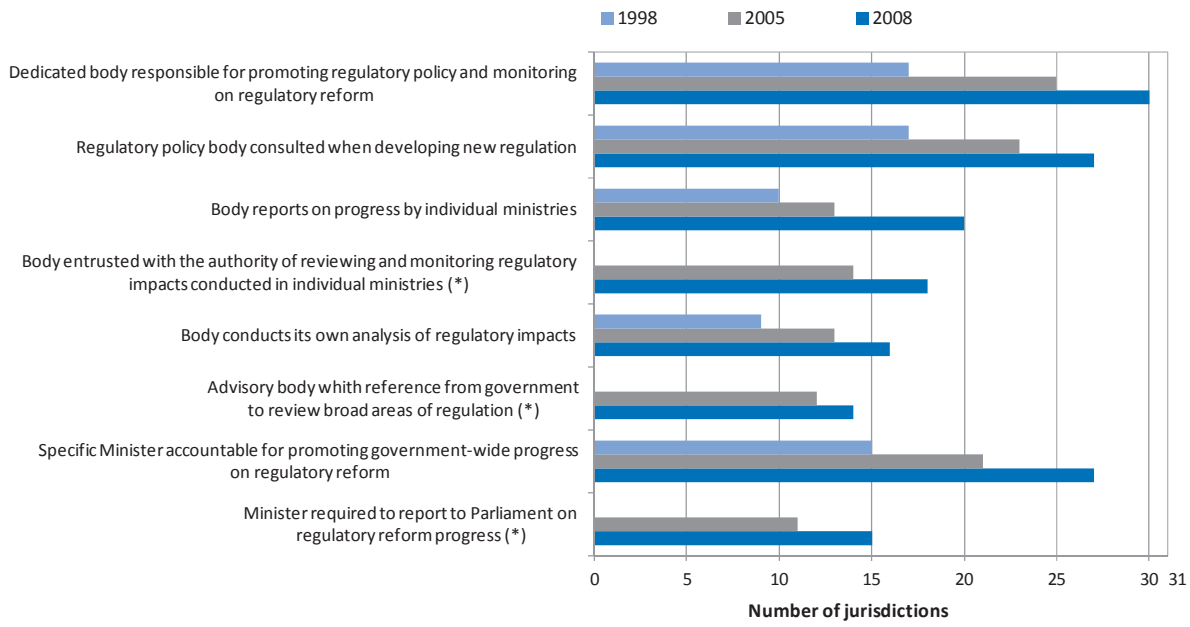
Beyond the need to oversee the rule making process (often referred as the "gate-keeper" role), there is a further need for independent, objective assessment of the quality of a proposal, which includes checking whether impact assessment, consultation and burden reducing processes have been properly carried out. The underlying issue is that regulators cannot self-assess their work. This challenge may be the most difficult function as it can be perceived as (and in some cases is formally set up to be[3]) a gate-keeping function, where the relevant body has the power to hold back a proposal until it is deemed fit to be considered and approved by the government. In some cases, the oversight body may publish its comments and assessments, thus providing a powerful "shaming" pressure for improved performance.

The advocacy function is important for ensuring that reform is understood and accepted, and it also provides a feedback loop for the views of business and citizens. Advocacy requires interaction with business and civil society, seeking support, but also seeking external assessment and perceptions, which will help to drive future regulatory improvements. Advocacy can be internally driven, and may be assigned as a ministerial responsibility, to give it more weight. A different approach is to put it with an external advisory body. This approach has the merit of ensuring that a truly external view of business and citizen needs is captured, countering the bureaucratic view and helping to broaden the "tunnel vision" which can prevail inside government.

Figure 4.2 illustrates the progress observed since 1998, when only 17 of the 27 OECD countries surveyed had a dedicated body responsible for promoting regulatory policy; in 2008 almost all did. The European Commission also reported having one (OECD, 2009a). In the majority of OECD countries, regulatory oversight bodies are placed at the centre of government – in a prime minister's office or a presidential office with some form of interdepartmental co-ordination. Ministries of finance and ministries of justice also play a significant role in hosting these functions (OECD, 2009a). The last decade has also witnessed significant reforms to empower regulatory oversight bodies. In 2008, it was reported that most bodies in charge of promoting regulatory reform were consulted when new regulations were developed. At the same time, the number of bodies that report on progress by individual ministries had almost doubled since 1998. However, the authority to conduct analysis of regulatory impacts remains limited to about half of the regulatory oversight bodies. In 1998, about half of OECD member countries had a specific minister accountable for promoting regulatory reform. By 2008, eight further countries had assigned this task to a specific minister (out of those countries for which data were available for both years). In about half of OECD member countries, this minister is required to report to parliament on the progress of the regulatory reform agenda.

Interesting examples of central oversight bodies include the Regulatory Reform Committee (RRC) in Korea, which has been set up by law with "a general mandate to develop and co-ordinate regulatory policy and to review and approve regulations." Its main functions are to give some strategic perspective to regulatory reforms, to undertake research, to monitor the improvement efforts of each agency and to make sure there is coherence between their actions. In the Netherlands, a regulatory committee co-ordinates fairly independent ministries, and extensive inter-ministerial co-ordination and supervision have been put in place. In the UK the Better Regulation Executive (BRE) is an example, perhaps counterintuitive, of an oversight body moving from the Cabinet Office to the Department for Business, Enterprise and Regulatory Reform (BERR). This transfer was motivated by the fact that the Cabinet Office had neither direct practical links with business and other stakeholders, nor direct responsibility for policy areas which need to be better regulated.

Figure 4.2. Institutional arrangements to promote regulatory policy



Notes: Data for 1998 are not available for the European Union, Luxembourg, Poland and the Slovak Republic. This implies that this figure is based on data for 27 countries in 1998 and for 30 countries and the EU in 2005/2008.

*: No data are available prior to 2005.

Source: Indicators of Regulatory Management Systems, 2009 Report, OECD, Paris, available at *www.oecd.org/regreform/indicators.*

It should be recognised that some countries find the concept of new central bodies for regulatory quality promotion hard to accept on the grounds that the guiding function is already embedded in existing policies and structures. In particular, such units may be perceived in large countries as undermining or competing with other more established centres, as well as raising a possible threat to ministerial discretion. By contrast, in small countries, with small government administrations characterised by close and informal networks and consensus-based governance, central bodies are sometimes seen as unnecessary (OECD, 2008). The lack of a central regulatory oversight body, however, need not imply the absence of co-ordination of regulatory policy. Instead, it can be the result of a relatively decentralised model of government administration. Denmark is a striking example where the development of a generally favourable regulatory environment has not been promoted by a central oversight body as traditionally understood.

Box 4.1. The Co-ordination Committee in Denmark

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

Source: OECD (2010g), *Better Regulation in Europe: Denmark*, OECD Publishing, Paris, available at *www.oecd.org/gov/regref/eu15*.

Cordova-Novion and Jacobzone (2011) analyse the key factors contributing to success of regulatory oversight, including the mandate, powers, structure, location, resources and co-ordination mechanisms. The findings are as follows:

- Oversight bodies are generally *located close to core executive functions*: either at the centre of government itself, or as part of central ministries. Despite significant institutional heterogeneity, *a key issue for success is the existence of a structured unit or dedicated secretariat.* It can be set up within the executive, or as a Council/Committee as part of an arms' length arrangement.
- The credibility of the core unit builds on technical expertise and political support, and is important to ensure coherence, leadership and efficiency. In some countries, the core functions of oversight remain divided among different institutions, with implications for co-ordination.
- *The system of regulatory oversight involves checks and balances*, and often includes opt-out exemptions and time limits. A constant concern is to minimise infringements to ministerial responsibilities, while ensuring commitment at the political level. A balanced approach is necessary, so that no significant loopholes can undermine regulatory quality oversight, such as omitting tax issues, or checking only part of the new regulations. Transparency and accountability mechanisms are required.
- *Countries increasingly tend to adopt networked approaches for regulatory oversight*. A core body, enjoying direct explicit or indirect implicit powers, co-ordinates a network of units in the various ministries. This contributes to policy coherence, while ensuring the interface with policy making in sectoral areas. The units collaborate and complement each other in a dynamic way when fulfilling the core functions. While decentralising the substantive work helps to foster change in the sectoral areas, this also entails issues in terms of balancing powers and priorities.

Box 4.2. The Australian Productivity Commission

The Productivity Commission (PC) is an independent research and advisory body that advises the Australian Government on a range of economic, social and environmental issues that affect the welfare of Australians. Its charter is to improve the productivity and economic performance of the economy, taking into account the interests of the community as a whole, considering environmental regional and social dimensions; not just the interests of particular industries or groups. An important function of the PC is modeling the economic costs and benefits of alternative policy options. It may make recommendations on any matter that it considers relevant, and it is up to the government to determine how to use the advice provided.

The PC plays an important role in advising the government on the impacts of existing regulations by providing *ex post* analysis of the effectiveness of regulatory policies and programs. The PC has an established institutional function that has been effective at separating the policy evaluation process from the political process. A number of factors contribute to this. It has statutory independence and a standing function that is accepted by all major political parties. The PC ensures that it gives clear consideration to the stated objectives of government policy objectives; it does not substitute its own policy objectives. The conduct of reviews is undertaken transparently using broad welfare analysis that takes into account a diversity of policy considerations and the impacts on the overall economy. The review processes of the PC ensure that it receives input from multiple actors, but it provides only one voice in policy debate without crowding out others. All reviews by the PC take a national focus, thereby overcoming the policy fragmentation associated with multiple layers of regulatory authority. The formal processes for consideration of the reports of the PC include a response by government and the tabling of reports in Parliament. Accordingly, although the recommendations of the PC are not always agreed to immediately, the analysis remains in the public domain as a reference to assist policy debate and often proves to be influential in guiding future policy development.

The Government directs the PC on what areas to study through the issuance of formal terms of reference, but the PC is independent in its analysis and findings. The processes of inquiry are public, allowing the opportunity for the participation of interested individuals and groups, and the inquiry reports must be tabled in Parliament within 25 sitting days of the Government receiving the report. The PC cannot launch its own inquiries, although it can initiate supporting research and publish the results via Commission or staff research papers.

The PC is unique among OECD members for its standing inquiry and policy advising work across a range of economic, social and environmental issues.

Source: Productivity Commission (2003), *From industry assistance to productivity, 30 Years of 'the Commission'*; Productivity Commission (2005), "Regulation and its Review 2004-05", *Annual Report Series*; Productivity Commission (2008a), "Annual Report 2007-08", *Annual Report Series*; Productivity Commission (2008c), *A Quick Guide to the Productivity Commission*, Productivity Commission, Canberra.

Cordova-Novion and Jacobzone (2011) also look at the performance of regulatory oversight from a political economy of reform perspective and offer the following observations:

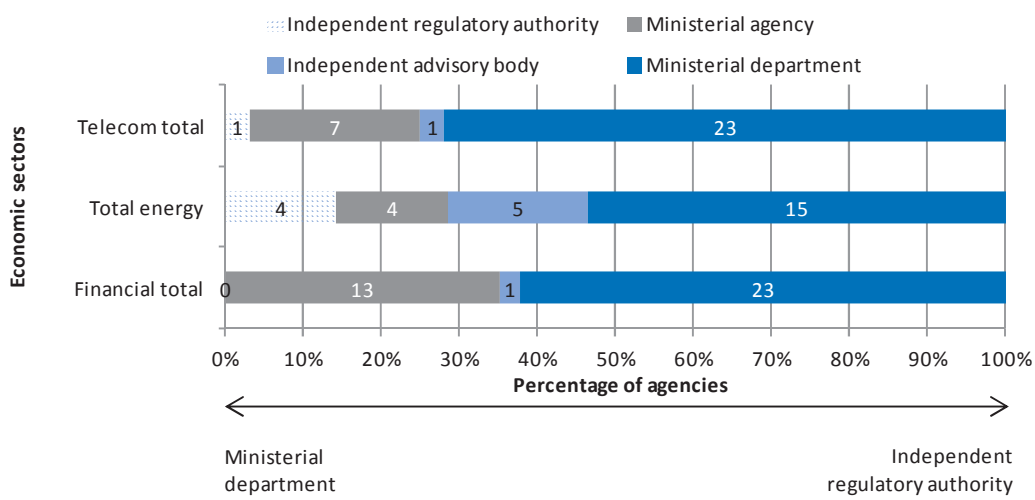
- *Regulatory quality oversight is a key tool for policy coherence*, and benefits in turn from internal coherence in the reform agenda.

- Regulatory oversight needs to be articulated with other core policies, such as microeconomic and competition-oriented reforms, as well as overall reforms of the public administration. This may help to overcome bureaucratic resistance and scepticism.
- Oversight bodies require *institutional stability over time* to sustain the changes that transform "quick wins" into real outcomes. This needs to be reflected through recruitment and resource endowment across economic and political cycles. Countries face different options for reform, *between gradual approaches, or more "big bang" strategies.* Gradualism helps to adapt the rulemaking environment progressively, starting off simple and raising standards through innovation over time. Big bang approaches have often been chosen during crises, with significant opportunities for reform.
- *Forging of a political constituency* requires active communications, political buy in and support from a champion, and an external constituency of interested parties to support advocacy.

The role of regulatory agencies

Independent regulators are another key institution, frequently used by OECD countries, which establish separate "agencies" at arms' length from the political system, with delegated powers to implement specific policies in a number of sectors. The term covers regulators found in utility sectors, such as energy and telecoms, but also in other sectors where sector-specific oversight is needed, such as financial services. Their main functions vary significantly across countries and sectors.

Figure 4.3. Institutional status of regulators (by sector)



Source: OECD (2005b), "Designing Independent and Accountable Regulatory Authorities for High-Quality Regulation", Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January.

In all OECD countries, a regulator's primary role is concerned with rule enforcement and the application of sanctions for non-compliance with rules relating to their areas of competence and authorisations for the issue of licences and permits (OECD, 2008). OECD experience shows that independent regulators have been most effective and credible where their independence and roles are based on a distinct statute with well-defined functions and objectives. Their independence requires an adequate resource base and staffing policy and should be carefully counter-balanced by the introduction of accountability mechanisms.

The reasons for setting up an independent regulator are well known.[4] The key benefit sought from an institutional framework based around these agencies is to shield market interventions from interference from political and private interests. They therefore have the authority to deal with complex issues, assuring market participants that their decisions are not vulnerable to uncertain, politically driven government action. In particular, independent regulators are often important for providing non-discriminatory access to essential facilities and guaranteeing "fair" regulations. Independent regulators are also a necessary institutional development for marking out the separation of the State's roles as policy maker and owner of productive assets. This is a role which is especially important in countries which have chosen to maintain a significant ownership interest in network industries. The move to establish independent regulators also offers great potential in improving regulatory efficiency.

Box 4.3. The structure of regulatory bodies

Regulatory bodies responsible for the design and enforcement of regulations encompass a wide range of institutional settings. They can be classified in four distinct groups.

First, ***ministerial departments*** are agencies that are part of the central government and do not have the status of a separate corporate body. They are part of the civil service and headed by or report directly to a minister. They are typically and largely funded from tax revenue. They can have statutory independence in carrying out some regulatory functions and can have considerable administrative autonomy from other ministries.

Second, ***ministerial agencies*** are executive agencies, set at arm's length from central government, which may or may not have a separate budget and autonomous management. They may be subject to different legal frameworks (where administrative procedures laws or civil service regulations may not apply). They may have a range of powers, but are ultimately subordinate to a ministry and subject to ministerial intervention.

Third, ***independent advisory bodies*** are agencies with the power to provide official and expert advice to government, lawmakers, and firms on specific regulations and aspects of the industry. They may also have the power to publish its recommendations. The scope for public decisions to depart from the advice or recommendations may vary.

Finally, ***independent regulatory authorities*** are agencies charged with regulating specific aspects of an industry. They are typically under autonomous management, and their budget may be under a Ministry. However, there is no scope for political or ministerial intervention with the body's activities, or intervention is limited to providing advice on general policy matters rather than specific cases. These bodies have a varying range of powers. As indicated in Charts 2 and 3, independent regulatory authorities account for approximately two thirds of regulatory agencies operating at arms' length from the government.

Source: OECD (2005b), "Designing Independent and Accountable Regulatory Authorities for High Quality Regulation", Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January.

At the same time, independent regulators represent a significant challenge to the executive and parliamentary powers of government. They represent a special form of institution in most OECD countries, which is neither directly elected by citizens nor managed by elected officials. It is an institution that governments have established to delegate authority at arms' length from elected public authorities. Independent regulators exist at the border between policy formulation, which remains the remit of the elected public authorities under a rule of law, and enforcement of the regulation which is delegated to them.

Defining the respective roles of the regulators and the executive raises a number of political and institutional considerations, in particular how the exercise of regulatory power is to be controlled. The increasing role of independent regulators has raised concerns in certain countries; that they could result in "governments in miniature," blurring the traditional separation of powers (see OECD, 2002a). At the same time, independent regulators can never be fully independent from the political process. They will always operate under the authority of laws and governance structures that can be altered directly by the legislature and courts as well as indirectly by the executive. Thus, effective regulators have to be able to respond to the long-term political direction which will ultimately justify their continuing existence.

The framework based around an independent regulator is also subject to a number of shortcomings. Perhaps the most cited is regulatory capture. Posner (1982) perhaps stated the problem of regulatory capture most directly, "Regulation is not about the public interest at all, but is a process, by which interest groups seek to promote their private interest ... Over time, regulatory agencies come to be dominated by the industries regulated." Robust transparency and accountability procedures are needed to limit the risk that regulators are captured by the regulated firms. Even if OECD reviews of regulatory reform have not found this problem to be extreme there is a considerable body of literature on the problems of regulatory capture.

The design of regulatory agencies

Independent regulatory agencies – at arm's length from executive agencies, should be considered in situations where:

- There is a need for the regulatory agency to be seen as independent in order to maintain public confidence.
- Both the government and private entities are regulated under the same framework and questions of competitive neutrality need to be addressed.
- The decisions of regulatory agencies can have significant economic impacts on regulated parties.
- Significant enforcement activities are performed.
- There is a need to protect the agency's impartiality.

Creating independence between the regulator and the government also raises a number of practical design issues:

- Governance structured independent regulatory agencies are an important consideration to ensure accountability. In theory, a board should offer more opportunities for collegial decision making, thus ensuring a greater level of independence and integrity in decision making.

- Even when independent regulators have been granted some powers and some autonomy, their independence can often be subordinated by administrative regulations. This can be reflected in the provision of instructions to these agencies, or in the possibility of lodging ministerial appeals after decisions have been made.
- The terms of appointment can have considerable influence on the level of independence of regulatory agencies. In general, longer appointments that span political cycles ensure the greatest degree of independence.
- Finally, an important practical issue is also to ensure that independent regulators receive sufficient financial resources to carry out their mandate and that the funding mechanisms will not impact their independence. Several arrangements have been used in OECD countries, including directly levying fees from the regulated entities to central funding from the state budget. Funding is often constrained by the nature of the agency and the possibility of levying sufficient fees from the sector being regulated. It may also be influenced by the need to reduce the risk of capture.

Creating a culture for regulatory quality

OECD countries are increasingly interested in utilising whole-of-government approaches to policy development and implementation. Whole-of-government approaches are associated with a desire to ensure the horizontal and vertical co-ordination of government activity in order to improve policy coherence, better use of resources, and to promote and capitalise on synergies and innovation that arise from a multi-stakeholder perspective. The promotion of regulatory quality culture can and should benefit from such an approach. Yet in many countries, administrations have not yet fully integrated the need for regulatory quality into their policy processes. Much deeper reforms are needed to embed an awareness of regulatory quality and its importance across public administration.

The ways to implement and practice a whole-of-government approach in regulatory policy vary based on country experiences and contexts. Thus, there is no single approach – but rather a spectrum of practices with countries each developing and adapting its use as appropriate to their circumstances. The backbone of a whole-of-government approach is the establishment of co-operative structures in order to more effectively meet government objectives. These structures can be created by hierarchical pressure or can be driven by informal networks and values. Achieving government objectives utilising hierarchical structures implies gaining agreement among the political and administrative spheres on organisational design or intentional re-organisation. Utilising a networked approach implies negotiation as a driver to accommodate differing views that political and administrative actors will have *vis-à-vis* regulatory policy. It is important to keep in mind that working as a single government does not necessarily mean becoming a single institution. Rather, working in a whole-of-government manner means balancing increasing centralisation with decentralisation to achieve a more joined-up public administration.

In order to strengthen their capacity to operate in a single government fashion, public administrations need to utilise a combination of formal cross-cutting structures and mechanisms and informal norms. Among those countries that are explicitly moving towards the use of whole-of-government approaches in regulatory policy (e.g., Australia, Canada, the Netherlands, the United Kingdom and the United States) there is a growing focus on the importance of formal elements such as standardised procedures on evidenced-based analysis and compliance codes for regulators. In addition, performance measurement systems are being developed (where Canada is taking a lead), that provide a common language across organisations on performance expectations and results.

Box 4.4. Whole-of-government approaches in Canada and the United Kingdom

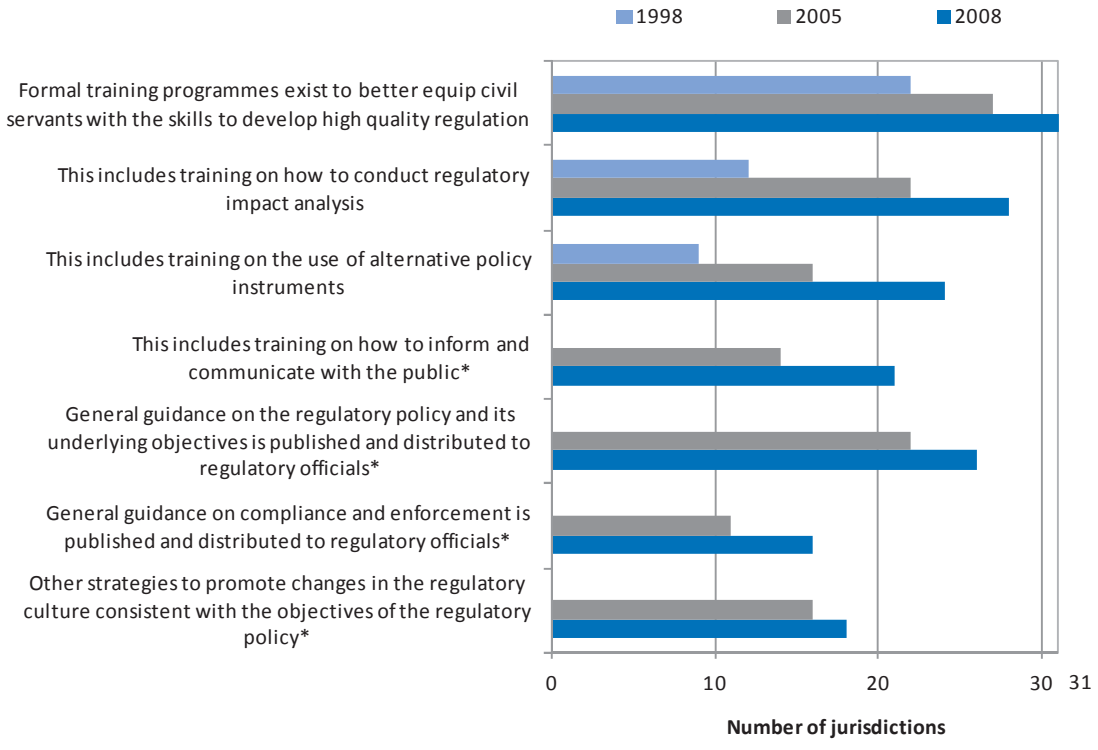
The *Cabinet Directive on Streamlining Regulation (CDSR) of the Government of Canada* requires results-based management and performance information for high-impact regulations. It requires policy analysis and impact assessment that embeds a process of monitoring, evaluation and review. This includes a requirement "measuring and reporting on performance; evaluating regulatory programs; and reviewing regulatory frameworks." High-impact regulations require a Performance Measurement and Evaluation Plan (PMEP) which applies to regulatory activities as well as to related programme activities. They are intended to provide an accurate account of progress and results and demonstrate if the regulatory activities are not achieving the intended outcomes. Since 2007, over 20 PMEPs have been developed for high-impact regulations. The process of developing the plans is time consuming, but it engages departmental senior management with the effects of regulation and promotes cultural change, engaging several units in enforcement and compliance, corporate planning and performance evaluation and by breaking down silos within an organisation. Canada's longer term aspirations are to develop meaningful indicators that assess the impact of Canada's regulatory system on innovation, the economy, the environment, health and the safety and security of Canadians.

The *national audit office* in the United Kingdom scrutinises public spending on behalf of parliament and has produced a number of reports since 2001 on aspects of regulatory reform, in particular the impact assessment process, the administrative burdens reduction programme, and business perceptions of regulation. One important finding is that despite considerable efforts to improve the business experience of regulation, there has been little discernable progress in improving business perceptions of regulation.

In February 2011 it produced a report entitled *Delivering Regulatory Reform*. The report examines the overall management of regulation across central government, focusing on the impact of regulation on business, how departments choose to regulate, and the implementation of regulation. In concludes that as with government spending, achieving sustainable reductions in regulatory costs whilst maintaining public value requires a structured and planned approach sustained over a period of years. While departments and the better regulation executive have developed important elements of such an approach and have delivered significant benefits since 2005, they are not yet in a position to achieve value for money in their management of regulation. This is because gaps remain in two important areas: understanding the impact on businesses and developing a coherent framework to manage regulatory reform (available at *www.nao.org.uk/publications/1011/delivering_regulatory_reform.aspx*).

Equally important to institute a whole-of-government approach is the use of cultural change within the public administration and as applied to processes and behaviour. This includes the use of a strong and unified set of values, values-based management, trust, collaboration, team building, involvement of outside stakeholders, and improved capability (e.g., training and self development) of public servants. A climate of trust and co-operation and the promotion of a regular exchange of information continue to be critical for the development of effective regulatory management. The enhancement of a programme of continuous training and capacity building within the government provides an important contribution to the improvement of regulatory culture (see Figure 4.4 for recent progress across the OECD). This kind of initiative not only improves the technical skills needed in certain processes, such as RIA or plain language drafting, it also communicates the importance attached to the regulatory quality agenda by the administrative and political hierarchy. Training and capacity-building programmes create opportunities to meet and to discuss the need for high-quality regulation, thus fostering a sense of ownership of reform initiatives and facilitating communication within and beyond individual institutional settings. Moreover, the use of adequate financial resources to support the organisation of these initiatives is an important sign of political commitment, drawing further attention to the regulatory policy agenda.

Figure 4.4. Training in regulatory quality skills in OECD countries



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

Source: Questions 13a), a(i), a(ii), a(iii), b(i), b(ii), c), 2008 OECD Indicators Questionnaire, *Indicators of Regulatory Management Systems*, *2009 Report*, OECD, Paris, available at *www.oecd.org/regreform/indicators*.

Engaging government actors across levels of government

Effective regulatory governance needs a firm anchor across all the relevant parts of a country's institutional architecture and the support of all the relevant institutions and actors. Governments need to acquire a complete picture of the players in order to improve their regulatory governance. Who is engaged in the regulatory process? Who decides whether regulations should be developed? Who produces regulations? Who implements and enforces regulations? Regulation includes a wide range of activities, including, for example, the individual decisions that are taken by regulatory agencies and local governments to give effect to regulations in matters of planning and licensing. It may also cover the activities of the judiciary, insofar as some judicial systems involve active review and reshaping of regulations.

The overall institutional setting and the institutional sources of regulatory activity have grown in complexity. The range of actors is more than was previously understood. This has emerged as one of the key findings of the EU 15 reviews. Strengthening regulatory governance to support an integrated regulatory policy starts with the question of who exercises regulatory power, a comprehensive understanding of "who does what" in terms of regulation, and how the different actors interact (including, and not least, private sector actors). A core challenge for governments is to build up a more comprehensive picture of the regulatory landscape. This complete overview tends to elude countries (and the international community).

Again, there is scope for both collective reflection, as well as reflection by individual countries. If, for example, a country's regulatory policy aims to capture primary laws, then the role of parliament becomes important. If the legal system is based on common law rather than civil law, then there may be interest in engaging the judiciary or reviewing what emerges from their decisions that is relevant to future regulation.

Subnational levels

Application of regulatory quality to the local level needs further attention. In most OECD countries the local level of government has important responsibilities which may include the delivery of public services, enforcement of higher-level regulations, and the delivery of licences and permits. Efforts to integrate subnational levels of government into regulatory governance are considerably more in evidence than they were a few years ago. In particular, efforts are being made to secure better co-ordination between national and local levels, so that the latter have an opportunity to help shape the regulations which they will need subsequently to enforce. Co-ordination across local levels is also beginning to take off. Although federal jurisdictions raise some different issues, the evidence of the OECD reviews suggests that whatever the nature of the jurisdiction, there are delicate issues of autonomy that need to be respected across the different levels of government. The impact on regulatory policy of fiscal arrangements for the different levels of government is an important issue that has so far not received enough attention. For example, some of the EU 15 reviews hinted at perverse incentives to take regulatory actions, such as setting higher licence fees, linked to a shortage of local revenues.

Box 4.5. Multi-level regulatory governance

In Australia, it is acknowledged that initiatives to improve regulation are required at all levels of government. Regulatory reform has been an important undertaking for state and territory governments, with most implementing or continuing regulatory reform. In March 2008, the Council of Australian Governments (COAG) agreed to a regulatory reform agenda covering 27 specific areas of business regulation where significant gains could be made through applying a nationally consistent approach, as well as broader work on regulatory reform processes and an invigorated programme to progress a series of national competition reforms. On 29 November 2008 COAG agreed on a new National Partnership that provides funding of USD 550 million over five years to the states and territories to facilitate and reward the delivery of these reforms. The COAG has also published "Best Practice Regulation: A guide for Ministerial Councils and National Standards Bodies". This document provides guidance on regulation making and review as a way "to maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition."

In Belgium, the regulatory policy is framed by the progressive federalisation started in 1970, which aims at the distribution of competences between national and regional governments (the government of the 3 regions and the 3 communities are federated authorities whose competences remain at the same level as those of the national government). Each federated entity houses its own legislative, executive and administrative powers. Law is issued by federal parliament, royal and ministerial orders by the federal executive power, and the federated entities rule through decrees and ordinances. Local governments, provinces and communes have a residuary power derived from either decentralisation or deconcentration. Co-operation mechanisms among federal entities have been established in parallel to guarantee the harmonisation of rules and equal treatment.

In Canada, a Federal, Provincial and Territorial Working Group on Regulatory Reform has been created as a forum to help build a shared approach to regulatory reform. Its work includes developing common regulatory principles, developing a consistent approach to regulatory impact analysis and sharing best practices. The aim of the group is to develop government's capacity to produce quality regulation and encourage regulatory co-operation across jurisdictions. Over the last 10 years, municipalities have been the object of provincial regulatory reform – moving from a traditionally rule based system to today's flexible framework. This new legislative framework allows municipal councils greater discretion in making decisions on behalf of their electorate in an open and accountable manner.

In Mexico, subnational governments have extensive regulatory powers, and there is considerable scope to improve the regulatory quality of its subnational units if it is to create a friendly business environment and improve competitiveness. There has been progress by state governments: 18 out of 32 states have issued regulatory reform laws, 12 have decentralised commissions working on regulatory improvement, and 20 have a unit within a state ministry (usually, the Ministry for Economic Development) addressing the issue. Despite these achievements, the progress and sophistication varies from state to state and even the most outstanding ones have wide scope for learning from best international practices.

In Sweden, there is no explicit regulatory policy framework for multi-level governance. The democratic basis of local government is set out in the Constitution, as the basic notion is that local governments are mainly the implementers of national policies and regulations, while retaining limited areas where they may regulate as well. General principles on regulatory quality are stated in a number of binding ordinances and guiding documents to ensure uniformity and high quality in the legislation.

Source: Charbit and Michalun (2009), "Mind the Gaps: Managing Mutual Dependence in Relations among Levels of Government", *OECD Working Papers on Public Governance*, No. 14, OECD Publishing, Paris, *http:// doi:10.1787/221253707200*.

The OECD's 2005 Guiding Principles for Regulatory Quality and Performance refer in general terms to the need for better regulation at all levels of government. The EU 15 reviews and other recent OECD reviews highlight the need to go further in defining how this is to be done. Effective regulatory management across levels of governments matters because poor multilevel regulatory management affects competitiveness, in particular by raising barriers to the seamless operation of internal markets (an issue which has received considerable attention at the level of the EU but less so within countries). The economic objective, however, may generate tensions with political sensitivities over the autonomy of local governments. A degree of creative competition in approaches is also desirable. Processes and tools to help define the right balance are needed to determine in what cases it makes sense to harmonise approaches and when an issue deserves a jurisdiction specific response.[5] Performance measures need to be developed to assess the effectiveness of processes and achievements.

The regulatory governance cycle may be a useful way of identifying where actions need to be engaged or existing initiatives strengthened. Central and subnational levels of government may read the chart in order to identify the areas where they have autonomy of action and those where they depend on, or are closely associated with, the actions of other levels.

Balancing public and private regulation

Governments may be responsible for regulatory policy, but they cannot do their job alone. Regulatory governance involves addressing public-private co-operation more effectively, and taking a closer look at the place of self regulation in the mix. Governments need to assign (and review) responsibilities which they have, or intend to delegate to the private sector, international organisations (such as private standard setting bodies), the charitable (or voluntary) sector, and even citizens.[6] The regulatory structures of the twentieth century, however efficient in themselves, tended to be silo-based, creating barriers (sometimes embedded in law) to co-operation across the public-private sector divide, frustrating good governance (and in the case of the financial sector, generating a crisis). There is debate about the right balance, especially in the wake of the financial crisis, which shook assumptions about the merits of self regulation. The debate raises important issues of accountability, regulatory capture and the need to avoid regulatory gaps as well as overlaps.

The debate needs to be set in a broader context, and take account of important differences between OECD countries. These offer a complex and very variable picture of state and private interactions, with differences in the definition of the public sector, linked to deeply embedded views about the role and responsibilities of the state in the economy and society. This means that the role of the private sector is not the same everywhere. In some parts of Europe, for example, state ownership has traditionally been seen as the best way to manage a wide range of activities, some of which may be deemed commercial activities that could be carried out in a competitive environment under private ownership. As well as health and education, activities have also included industrial sectors such as the car industry. Although the extent of state ownership has declined significantly across Europe over the last decade or so, it remains extensive in some European countries, including at local level. A specific effect of these differences is in the relative role of ministries (as owners of enterprises) and regulatory agencies in shaping the regulatory environment.

Many countries have traditionally assigned an important role to the social partners (the unions and employers' representatives) in regulatory management.

Box 4.6. Public consultation in Austria

Austria's public consultation approach is structured around formal and informal institutional relationships (including not least with the social partner) and the individual practices of ministries. The approach is robust in many respects, as the institutionalised relationships cover a wide range of relevant interests, and there is evidence of specific good practices. Some ministries, for example, put consultation results on their websites. The consultation process has a pre-consultation phase, and an official consultation phase. There is no administration wide forward legislative plan to use as a practical starting point for citizen engagement. In the first phase the competent federal ministries are responsible for commencing the development of regulations, including initiating contact with colleagues in other ministries as well as with relevant stakeholders including the Social Partners, the *Länder* and the Court of Audit. This part of the consultation exercise is not public, but depending on the political salience of the issue, Ministries may use the internet or mass media to inform the public.

The approach is largely dependent on formal and informal relationships with the Social Partners, which can raise issues of exclusion. Of itself, the emphasis on consultation with the Social Partners is not necessarily detrimental to the development of good policy. The Social Partners can together claim membership representative of the majority of Austrian citizenry. The role of Social Partners at the pre-consultation stage is important for ensuring that representative views are taken into account in the development of regulations. But care is needed not to block out other interests. There is a risk that consultation processes do not provide opportunities to account for the views of all citizens, and may not pick up innovative perspectives. An effective system of public consultation must be able to assure the public that there is an opportunity for their views to be heard and considered outside the institutional relationships. The main challenge here appears to be to develop a systemic approach to facilitate early and open participation of citizens and other groups in policy development.

Improving the governance of risk regulation

The issue of how OECD governments prepare for the assessment and management of risk through regulation to avoid the phenomena of reactive regulation and to promote better regulatory practices is of considerable importance to regulatory policy. The gap between the level of risk that is targeted by policy makers and the level that is achievable through regulation is inevitable and has to be explicitly recognised and managed. This will require increased guidance on general principles on risk assessment and management and international co-operation. The lessons from recent crises is that in the future regulators will have to pay more attention to background risks and systemic risk, as well as build in mechanisms for learning from past failures and near misses.

The OECD report on *Tools for Regulatory Quality for Financial Sector Regulation* (Black, J. *et al.*, 2009) states that among the acknowledged main regulatory shortcomings that contributed to the global financial crisis, was a lack of co-ordinated integration of relevant information by supervisors nationally and internationally, and ultimately fatal weaknesses in risk assessment and risk management by all those involved, including but not limited to regulators. It concludes that there are a number of areas relating to regulatory practice where the OECD principles could be further developed, with wider application than just the financial sector. These are notably with respect to risk

management and the need for regulators to have a detailed understanding of the dynamics of the organisations and systems that they regulate. Revisions to the principles should reflect these lessons.

The global nature of risks creates the need for increased convergence between risk management procedures internationally. Collaboration and convergence on risk issues have been advanced through the work of the Transatlantic Risk Assessment Dialogue. This joint work by the EU, the USA and Canada was launched in July 2008 and aims to promote a better understanding of the systems of the respective jurisdictions, and to establish a framework for convergence on methodological aspects and some substantive risk issues, such as emerging risks. It aims to move towards more consistent approaches through the exchange of information and the launching of common projects regarding particular risks or methodological issues. It provides a mode of working that could potentially be extended to other countries.

The failure in financial regulation was an example of deficiencies in regulatory frameworks for the governance of risk. Well designed risk governance frameworks have the potential to improve social welfare by ensuring that regulatory approaches are efficient, effective and account for risk/risk tradeoffs across policy objectives. They include the development of guidelines to ensure that risk assessors do not deal with risk issues in variable and inconsistent ways. Arbitrary variation in analytical practices undermines the credibility of agencies and can spur political backlash from stakeholders. Despite this few governments in the OECD have attempted to develop a coherent policy on the management of risks through regulation (OECD, 2009e).

There is considerable potential for further work by the OECD on the development of risk governance practices, including research on country practices that are transferable between regulatory agencies that can lead to guidance for regulatory bodies and central agencies. It could focus on the important organisational features for ensuring effective risk management by regulators. This would, for example, refer to how regulatory agencies use stakeholder participation and public deliberation in the development of risk responses and the use of scientific and economic assessment in these processes. This work is necessary to help to diffuse good practices among the regulators of different countries in spite of cultural and institutional differences.

The international challenge

Increasingly, regulatory impacts need to be achieved across and beyond national boundaries. This has been brought into sharp focus by the financial crisis. Countries need to work together, not separately, to build a resilient and effective regulatory environment. How to achieve closer collaboration requires further discussion. Issues include the identification of important areas for cross-border regulatory co-operation, and standards for openness, consultation and communication across jurisdictions. Problems with a strong regulatory dimension that do not respect national boundaries have become widespread, a side effect of globalisation and greater mobility.

A relatively recent phenomenon is the emergence of bilateral regulatory co-operation initiatives. This process has been fostered by discussions on good regulatory practice in the WTO TBT (Technical Barriers to Trade) Committee with the emphasis on eliminating or reducing regulatory barriers to trade. Such efforts are seen as an element of good regulatory practice. Activities to date have been largely embryonic in nature but they represent a new element in the regulatory reform and market openness agenda. Regulatory co-operation initiatives are largely voluntary and informal in nature where regulators from different countries exchange information on their regulatory systems and different national approaches to regulation and conformity assessment. However, these efforts offer longer term promise for improved international harmonisation leading to the reduction in regulatory barriers to trade.

Box 4.7. The regulatory framework for EU countries

Perhaps half or more EU member country rules now come from Brussels. The EU is also shaping whole regulatory regimes. The single EU market agenda involves a mix of deregulation and market opening alongside rule harmonisation, so that goods and services can move freely within the EU/EFTA region. The coverage is wide. It includes product markets (such as cars), professional and other services, and horizontal policies such as state aids, public procurement, and competition policy, as well as social and environmental issues.

The EU plays a prominent role in the reform of network industries (telecoms, energy, rail, posts, etc.), where it usually sets *de minimis* regulatory requirements, such as the nomination of an independent regulatory authority, and the separation of competitive from non-competitive activities. The EU's common external trade policy is another large area of relevant work. The single market programme has been a major driver of deregulation and regulatory harmonisation. It has helped to open up economies and promote trade and investment flows. EU rules have often helped to enhance social, environmental, health and safety, and consumer interests.

At a broader level the EU has helped in the development of the concepts of proportionality and subsidiarity in the application of rules.

The EU also generates an increasing number of rules, which confronts it with the same rule inflation problem as its member states. Reflecting the EU policy-making process itself is an issue that needs to be tackled from both ends: efforts from Brussels (not just the European Commission, but all the EU institutions), combined with efforts from member states too. Influencing the EU decision-making process, consulting with and informing the business community and other interested parties, effective implementation and transposition of EU rules, avoiding confusion between national and EU laws, and co-ordination with national sector regulators are issues requiring ongoing attention. The EU interface was a strong theme of the EU 15 reviews. There is a particular desire to improve the articulation of EU impact assessment with national impact assessments.

The EU is perhaps the most obvious current example of an international dimension to policy and rule making within which national authorities need to work, see Box 4.7. Important work in this regard also has been the adoption of the Regulatory Co-operation Framework by Canada, the US and Mexico in 2005. The Framework outlines policies and approaches for regulatory co-operation through multilateral engagement. International co-operation is seen as an important mechanism to improve competitiveness and promote innovation and investment by reducing duplicative regulatory requirements. Among the Framework's proposals are:

- to strengthen regulatory co-operation, including at the outset of the regulatory process;
- to streamline regulations and regulatory processes;
- to encourage compatibility of regulations, promote the use or adoption of relevant international standards, as well as domestic voluntary consensus standards, in regulations;
- and to eliminate redundant testing and certification requirements, consistent with our WTO obligations.

The adoption of international standards will likely be a key tool for regulatory harmonisation (and an important mechanism for facilitating trade.) However, outside the WTO SPS Agreement,[7] there are no mechanisms to monitor the domestic adoption of international standards, guides and recommendations. The lack of comparative data on national adoptions of international standards makes it difficult to assess the relevance and impact of international standardisation on domestic regulatory policy. This requires greater co-operation between governments, national standards bodies and international standards bodies in order to develop the appropriate tools. National data bases of both standards and standards referenced in regulation are also important factors in the adoption of standards by facilitating regular revision and updates and increasing knowledge of foreign market requirements.

Scope for different approaches

There are important differences among OECD countries as regards underlying public governance and institutional frameworks, and not least legal traditions (Box 4.8). Institutional arrangements for effective regulatory governance need to take account of these. One of the major lessons of recent OECD country reviews, especially under the EU 15 project, is that "one size does not fit all" and that effective governance may even be held back by efforts to introduce institutional arrangements and processes that do not take account of existing structures. A single central oversight body, for example, has been consistently recommended by the OECD for a number of years, yet many countries have found it difficult to establish. There is a need to look behind these difficulties to understand why this approach does not always work, and whether there are viable alternatives.

It is not an issue if differences emerge as each country constructs its institutional framework for regulatory governance, so long as there is clarity about leadership, and who is accountable and responsible for what. Different bodies may in fact be necessary for different functions to preserve objectivity, reduce the risk of capture and corruption, and ensure freedom from short term political influence. For example, *ex post* evaluation of regulatory outcomes is probably best carried out by an institution other than the one that develops the regulation or regulatory framework in the first place.

Box 4.8. Civil law and Common law: Implications for regulatory governance

Broadly speaking the legal systems of OECD countries are based on two approaches: common law and civil law. Common law originated in England in the Middle Ages. Civil law systems originated in Continental Europe, based on Roman law and the French Napoleonic Code of the early 19th century. Neither is wholly distinct from the other, both have points in common, and modern legal systems have evolved to integrate elements of each. However, their roots are very different, and this has implications for the institutional framework, which need to be taken into account in the development of stronger regulatory governance.

Systems based on common law

Common law, also known as case law, is developed by judges through decisions of courts, rather than through legislation enacted by parliament or actions by the executive branch of government. The core principle of common law is that it is based on precedent. If a similar issue has been resolved by a court in the past, the court is bound to follow the reasoning used in the prior decision (a principle known as *stare decisis*). However, if the court finds that the current issue is fundamentally distinct from all previous cases, judges have the authority and duty to make law by creating precedent.

Legal systems in modern societies based on common law are more complex. Common law usually interacts with other forms of legal authority which may include:

- *Constitutional law* (the highest level of legal authority which cannot generally be contradicted by lower level legislation or decisions with legal force).
- *Statutory law* (law which is enacted or approved by parliament).
- *Regulatory law,* which is promulgated by agencies attached to the executive branch of government.

In common law jurisdictions, legislatures operate under the assumption that statutes will be interpreted against the backdrop of pre existing common law.

The increasing interaction with other forms of law, notably constitutional and statute law, means that the distinction between common law based systems and civil law based systems is becoming less sharp.

Systems based on civil law

Jurisdictions based on civil law (which is also known as code law because it is traditionally structured around codes – groups of related laws) give less weight to precedent, which means less freedom of interpretation for the courts. Interpretation of the legal text is paramount in civil law systems. Academic legal experts can play a significant role in the interpretation of legal texts. Civil law statutes tend to be more detailed than statutes under common law systems.

As with systems based on common law, civil law based systems are more complex and the boundaries of each system are becoming increasingly blurred. Thus the growing importance of jurisprudence (case law in all but name) is bringing civil law systems closer to common law systems.

Implications for regulatory policy

Countries with a civil law tradition tend to place emphasis on the clarity of legal texts, and the need to ensure that the structure of the law overall remains coherent (through codification and related measures).

Box 4.8. Civil law and Common Law: Implications for regulatory governance (*cont.*)

There are also important institutional implications. Countries with a civil law tradition are more likely to have institutions such as constitutional courts and councils of state (although constitutional courts may also be a feature of common law jurisdictions such as the United States). These institutions may play an important *ex ante* or *ex post* role in review of regulations from the perspective of their legal basis, or the "opportunity" of a regulatory proposal. In some cases, councils of state may be powerful advocates of regulatory improvement. The overall role of the judiciary (courts) in countries with common law traditions is likely to be stronger than in civil law countries, because of the importance of precedent.

Judicial review of administrative decisions may also reflect the underlying legal system. Courts in common law-based systems are likely to have more power in this regard.

Notes

1. Different jurisdictions may use different vocabulary to express the functions depicted in the figure, which are not always easily translatable. They are so closely associated with the country context that some terms take on a country specific meaning. For example, in Europe, enforcement may also be referred to as supervision, inspection or execution.
2. In some, especially European countries, it nearly always does give rise to a law or regulation.
3. In the United States, for example, the Office of Information and Regulatory Affairs (OIRA) has the authority to return draft regulations to agencies for consideration. In other countries, such as Japan, the role is more limited, checking compliance with basic requirements.
4. There is a rich body of theoretical and empirical research covering independent regulators in network industries. For seminal reviews see Laffont and Tirole (1993, 2000); Levy and Spiller (1994) and Newbery (1999).
5. In Australia, The Council of Australian Governments (COAG) agreed to a new model of co-operation underpinned by more effective working arrangements. Area by area, jurisdictions are to consider the merits of a uniform, harmonised or jurisdiction specific model.
6. For example, the United Kingdom government has proposed the "big society" theme under which citizens, communities and independent providers have greater delegated responsibilities for managing issues.
7. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

Chapter 5

Drawing a roadmap for regulatory policy

Developments in regulatory policy over the past ten years reveal convergence on the paths of regulatory policy across OECD. Despite progress, there remains considerable potential to improve the process of rule making and the functioning of regulation to contribute to sustainable growth across the OECD. This will require collective and individual effort by countries. A roadmap can set out the important collective goals for governments and guide the development of the regulatory policy agenda for the immediate future. The road map should usefully provide avenues for countries to develop their own practices in different cultural contexts, but shared principles are necessary to assist countries to learn from the experiences of others and to guide the development of regulatory policy and governance as a field of its own. A starting point is a consideration of how elements of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance *can be refocused to crystallise a better framework for regulatory policy and governance, and provide a basis for developing a benchmark against which countries can measure their efforts.*

Addressing the gaps in regulatory governance

Regulatory policy as a framework for improving the quality of regulation is taking shape across all OECD countries. Evidence suggests that it has contributed to delivering economic growth and development and supported the rule of law by helping to make regulation more efficient and effective at delivering policy goals. As countries pursue growth opportunities in the fiscally constrained conditions following the aftermath of the global financial crisis, the contribution of regulatory policy to improving productivity, reducing business costs and promoting innovation will be of even greater importance. For most countries, however, achieving this potential will require further institutional development to embed the principles of regulatory policy in their governance arrangements.

As noted throughout this report, there remains considerable potential to improve the process of rule making and the functioning of regulation to contribute to sustainable growth across OECD. The EU 15 reviews identified that countries often face "gaps" between the stated goals of the administrative mechanisms of regulatory policy, and how they are implemented in practice. For example, while all OECD countries report having developed regulatory policies, in practice it is still relatively rare for countries to have a fully joined up strategy. Strong regulatory policy often wants for the necessary political support and is not always clearly linked to public policy goals.

The OECD model of regulatory policy is founded on the view that ensuring the quality of the regulatory structure is a dynamic and permanent role of government. Governments must be actively engaged in assuring the quality of regulation, not reactively responding to failures in regulation. In advanced countries this concept is evolving into regulatory governance. Regulatory governance is grounded in the principles of democratic governance and engages a wider domain of players including the legislature, the judiciary, sub national and supra national levels of government and standard setting activities of the private sector. The integration of evidence based impact assessment of new and existing regulation, building strong institutions for regulatory management and placing a greater focus on users of regulation are all critical elements.

Adapting from past experience and sequencing institutional reforms

The work currently underway by countries on specific reform programmes to improve regulatory governance should continue: all countries can build upon the foundations of their existing regulatory policies and programmes. For example, administrative burden reduction programmes continue to have considerable merit in themselves as well as benefit from the experience of OECD members.

There is potential to adapt and apply the lessons from many countries to improve the development of regulatory policy and governance practices. This is particularly so for developing and transition countries. For example, countries that have not yet commenced a process of systematic simplification of their regulatory framework can use the experience of those OECD countries that have pioneered administrative simplification strategies. Based on the lessons of experience, newly designed programmes on administrative burden reduction can be better targeted at the most burdensome and irritating regulations. They can also avoid the mistakes of others and benefit from the advance preparation of comprehensive communication strategies and the development of

monitoring and evaluation mechanisms. There is also considerable shared experience in the development of institutional settings that can be emulated, particularly in relation to the management of the stock and flow of regulation and the co-ordination of regulatory agencies.

Practical approaches for sharing the lessons of OECD

The OECD community is clearly well placed to develop mechanisms for strengthening co-operation and exchanging best practices in regulatory policy through regular meetings and the dissemination of country studies and thematic reports. It is in the mandate of the Regulatory Policy Committee to share the lessons of OECD members on developments in regulatory policy, through peer reviews comparative studies and evidence of good practices. The mandate also calls on the Regulatory Policy Committee to promote "the wide diffusion of lessons and examples... including in guidelines and principles." (OECD 2009d)

Peer review learning is an unparalleled source of comparative advantage for the OECD. Through access to the practices of thirty-four countries and major G-20 economies, peer reviews increase the relevance of OECD work for the individual countries under study and provide broad lessons for others. The horizontal relevance of OECD's conceptual analysis that takes account of institutional and cultural differences is another key strength. The political relevance and integrity of the peer review process underpin the quality of OECD studies and distinguishes OECD results from academic analysis. Over the past ten years the OECD has undertaken regulatory reform reviews for 14 member countries and Brazil, China and Russia. Each of these reviews has afforded individual country members the opportunity to see their countries in the context of international policy developments. Taken together, this body of country assessments has shaped the international development of the policy field. There is no other comparable set of assessments.

Possible new approaches could include the development of standing arrangements to evaluate and share country experiences on a regular basis. For example, other policy areas within OECD have established dedicated regional fora to address issues of particular relevance to joint communities including APEC and non members, such as the Asian Senior Budget Officials Meeting. Another practice is the regular publication of an OECD Outlook to report on developments. An annual Regulatory Policy Outlook covering all OECD countries could be warranted to ensure that the research collected in the EU 15 project remains up to date and continues to inform OECD members of relevant developments across member countries.

The OECD-Mexico project to strengthen competitiveness is the first sustained example of how the OECD can work with a member country to support the implementation of OECD recommendations. The project focuses on reducing regulatory burdens on business, increasing productivity and improving the international business environment for Mexico. The project is an operational exercise "in real time" of direct practical relevance to a member country. On several occasions, Mexico has benefited from the experiences of other countries, and its own practices have also been shared internationally. This type of dedicated technical assistance could be emulated for other countries or regions.

The indicators of the regulatory management systems of OECD countries are a unique source of descriptive information covering all OECD countries to complement the detailed country reviews. The indicators have been built up through consecutive national surveys in 1998, 2005 and 2008 to identify *de jure* arrangements for quality regulation based on accepted approaches to good practice in regulatory management. The dataset is the result of collective efforts by officials in member countries and a process of peer review which has progressively improved the quality of the data and its consistency in key policy areas. These indicators help to inform the policy debate on trends across OECD countries, and are being extended to include other advanced economies. The focus of future surveys will be refined to collect information on relevant specific aspects of regulatory policy.

Measuring and communicating the performance of regulatory policy

OECD member countries are investing significant resources in the development of regulatory policies and reform programmes to improve the quality of their regulations. In line with this increase in allocated resources, there is increasing pressure for more accountability and the use of performance information to demonstrate the effectiveness of regulatory programmes. Part of the solution is to embed evaluation and review arrangements into the design of regulatory programmes and the performance of regulators. In addition, demonstrating how improvements to regulatory governance deliver actual economic benefits to business and citizens and broader public welfare benefits is a key concern to government.

Evidence of good practice and measurement of results can be used to evaluate and inform the design of regulatory reform programmes. There is clear demand for advice on methodologies and best practices for developing regulatory performance indicators within OECD countries. The prospective field of performance measurement in regulatory policy is complex and challenging. While there are a number of indicators used by countries as a proxy for the performance of regulatory systems, they all have acknowledged drawbacks. Further, there is not yet any agreement within the regulatory policy community about reliable indicators, or a framework for common practice. There is significant benefit in the membership of the OECD Regulatory Policy Committee evaluating potential approaches to evaluation and then sharing their experiences of applying methods within their countries.

There is also considerable work to be done in the development of robust approaches for measuring the performance of individual regulations. If the design of new regulations is to be influenced, then performance measures need to be integrated at an early stage. In practical terms, this involves issues such as ensuring the availability of data for measuring performance, as well as the allocation of institutional responsibilities for review and evaluation. There are, however, considerable challenges to assessing performance, not the least of which is reaching an agreement on what should be measured. Across jurisdictions, even individual regulations and regulatory frameworks in similar sectors can have multiple policy aims, and so are not easily measured. Overly simple indicators are open to misuse and may create the wrong incentives for performance. There is potential to improve the design and use of performance information by identifying good practices and through sharing cross-comparative experience of performance evaluation in different sectors.

Communicating regulatory policy

The EU 15 Reviews demonstrated that the political and communication dimension of an effective regulatory policy is fundamental to progress, and that regulatory policy will only thrive if it has political support and civil service "buy in" and if external stakeholders perceive it to be relevant. When there is no clear communications strategy and no way to link regulatory policy to high-level public policy goals, regulatory policy is undermined.

Effective regulatory governance depends upon building and sustaining support for regulatory policy. Governments need to be able to answer questions from those who are regulated, and those who seek the protections of regulation, about the scope and effectiveness of their regulatory policy, and how the government measures its success. Clear communication is crucial. If governments do not communicate what they are doing and why regulatory quality is important for the economy and social welfare, it cannot be assumed that support will follow. It is not easy to explain the abstract and complex nature of regulatory issues in a media environment which focuses on policy failures and simplifies events.

Communications strategies should also focus on building a constituency for regulatory policy by demonstrating its costs and benefits. The lesson of administrative burden reduction programmes is that policies that realise tangible benefits will be supported by politicians. The publication of impact assessments and associated information on costs and benefits of regulations has already started in some countries. This is another way to raise consciousness of regulatory policy and engage citizens. As Gary Banks, the Chair of the Australian Productivity Commission has noted, building political and community awareness of the costs of the status quo and the potential gains from regulatory reforms is an important element in harnessing support for regulatory policy initiatives. He also points out that, while the public may be ignorant about complex policy matters, they are not oblivious to good process. Because of this "they look to institutions in which they can put their trust, and those institutions and processes can become politically very important in advancing reform" (Banks, 2011, p. 12).

Conclusion: Promoting a shared vision

The OECD's 2005 Guiding Principles for Regulatory Quality and Performance, based on the evidence of the OECD country reviews carried out up to that point, reflect the state of regulatory policy evolution at the time. The Principles set out the importance of political commitment to regulatory reform, the desirable characteristics of good regulation, and the links with competition and the elimination of barriers to trade and investment. The detailed text accompanying the Principles emphasises effective and continuous regulatory management in order to secure high-quality regulation.

All of these elements remain fundamental to the successful design of regulatory policy and programs. In addition, reflections on the evaluation of the experience of the past ten years and the identification of emerging priorities through the analysis of the EU 15 reviews has highlighted a number of new challenges which are clearly not fully covered in the 2005 OECD Principles. These issues provide a launching pad for a discussion of the important features of a new OECD new *Recommendation on Regulatory Policy and Governance* as a policy instrument that can help to support the 2005 principles and also provide a clearer framework for the implementation of regulatory policy within governments dealing with emerging challenges. The most critical issues include:

- Anchoring effective institutional leadership and regulatory oversight in the political and policy making context, incorporating evidence based approaches to rule making and its review and ensuring its contribution to promoting policy coherence.
- Strengthening the focus on regulatory governance, embracing the institutional breadth and diversity of the roles of all the key agents in the regulatory governance framework, including oversight bodies, regulators, the parliament and the cabinet and non government actors.
- Taking account of the user and citizen dimension, and in particular the opportunity to exploit the dynamic features of open government enabled by developing social media and communications technologies.
- Extending the principles of regulatory governance to a multilevel context, including applying it to international rule making and sub national regulatory authorities.
- Ensuring the application of regulatory policy and governance to horizontal policy aims, such as achieving green growth, promoting innovation and mitigating the effects of climate change.
- Ensuring that, within governments, regulatory policy includes an appropriate focus on the economic effects of regulation, as well as the issues of legal certainty and promoting the rule of law.
- Recognising the need for regulators to have a clear grasp of the dynamics of the organisations and systems being regulated. This would involve improving the focus on risk assessment and management strategies, including a systemic perspective that includes co-ordination with other regulators in the same field and evaluating the causes of past failures.
- Incorporating regulatory governance into the culture of government administration, including promoting behaviour change among regulators to encourage flexibility, innovation and outcome-orientated approaches to rule making and enforcement.

Regulatory Policies, Tools and Institutions make up the elements of the analytical framework that the OECD has advocated for a successful approach to regulatory governance. Despite progress, for most countries, strong regulatory governance is still an unrealised aspiration; the new *Recommendation on Regulatory Policy and Governance* has to build on the 2005 principles to facilitate the practical application of this framework, providing guidance to countries currently dealing with the challenges of regulatory reform and those aspiring to continuously improve their systems of regulatory governance.

There has been considerable progress in regulatory policy across the OECD. In general, OECD countries have taken deliberate steps to adopt and implement the key features and practices of regulatory management. This has laid the groundwork for the development of a more strategic approach to regulatory governance. The development of regulatory policies within countries allows for them to communicate more clearly what they aim to achieve, for whose benefit and for what purpose.

The main conclusion of this report is that it is necessary to strengthen the focus on the goal of integrating regulatory policy into governance practices. This will allow the tools and institutions for regulatory management, which countries have been progressively building up, to be deployed more effectively. Critically, it will help to ensure that regulatory management becomes an integral part of good policy making. Today countries have to approach this goal from different starting points, but there is a shared need to move forward on this issue if regulatory policy is to remain relevant and supportive of the public policy challenges which need to be addressed in the next decade.

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Annex A

Findings of the EU 15 country reviews

This annex summarises the findings of the EU 15 country reviews. The discussion of each topic concludes by succinctly identifying the relevant issues to be considered by countries when implementing regulatory policy.

A) Strategy and policies for better regulation

Economic context and drivers of regulatory policy

What is the economic context for regulatory policy? Why is regulatory policy pursued? What is the link with other goals and policies?

- The justification for regulatory policy varies between countries. As might be expected, economic growth, competitiveness and the needs of business are usually (not always) prominent reasons for engaging in regulatory policies. Not all countries, however, cite only these factors. For some, the justification is also associated with societal goals such as sustaining quality public services and making life easier for citizens. This is then reflected in a different range and balance of regulatory policies, with more effort for example on reducing burdens for citizens. Better Regulation can have strong and mutually reinforcing links with public sector reform.
- International good practice is considered important. Most countries want to know about good practice from other countries, and to know where they stand in international rankings. Countries are keen to learn from each other, and this can also be a driver of change.
- Substantiating the link between regulatory policies and the achievement of public policy goals, including economic performance, is a challenge. There is little analysis by countries to support generalised arguments in favour of a positive link. Yet this is critically important for sustaining support for regulatory policy over the long run. One factor might be that such evidence can only be built at the cross-national level where there is sufficient statistical variance and material to build the proof. These are more challenging to construct at the national level. Many governments focus on the estimates that have emerged from SCM based administrative burden reduction programmes. These involve baseline measurements of burdens that can be translated into a percentage of GDP, which normally yields a suitably "scary" figure. These have been used as powerful policy and communication tools to drive change across government ministries and agencies.

Issue: How can the link between regulatory processes and outcomes be substantiated?

Overall strategy, guiding principles, main policies

Regulatory policy may be defined broadly as an explicit, dynamic, and consistent "whole of government" policy to pursue high quality regulation. A key part of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance is that countries adopt broad programmes of regulatory reform that establish principles of "good regulation", as well as a framework for implementation. Experience across the OECD suggests that an effective regulatory policy should be adopted at the highest political levels, contain explicit and measurable regulatory quality standards, and provide for continued regulatory management capacity.

- It is rare to have a fully "joined up" Better Regulation strategy, and a clear overall strategy is often difficult to identify. Regulatory policies tend to be scattered across different parts of government. This can mean that high-level political support is weakly expressed, achievements understated, and that regulatory policy is not always clearly linked to high-level public policy goals.
- The scope of regulatory policies has developed. Depending on the country, it now extends to cover new risk-based approaches to enforcement, administrative burden reduction programmes that reach out to citizens and inside the administration as well as to businesses, renewed impact assessment processes, and linkages with subnational levels of government.
- The quality of some more established regulatory policies has generally improved. This includes consultation processes, procedures and forward planning for new regulations.
- *Ex ante* impact assessment remains a weak area. Nearly all countries are struggling to establish the process so that it is taken seriously by officials and politicians.
- Securing an appropriate balance between Better Regulation policies needs attention. The pendulum over the last few years in much of Europe has been in favour of significant effort and resources for policies aimed at the reduction of administrative burdens on business. Policies for the management of new regulations have received comparatively less attention.

Issue: How can "regulatory policies" be turned into a stronger more coherent "regulatory policy"?

Communication of Better Regulation strategy and policies

Effective communication to stakeholders is of growing importance to secure ongoing support for regulatory quality work. A key issue relates to stakeholders' perceptions of regulatory achievements (business, for example, may continue to complain about regulatory issues that are better managed than previously).

- Communication requires growing attention. For the more mature Better Regulation countries, this manifests itself most clearly in the communication issues which are being experienced with business administrative burden reduction programmes, where there is an issue of perceptions of progress which appear to undervalue the real progress being made. Communication issues, however, are not just about this one policy. A lack of appreciation and understanding of the whole picture and overall progress can be an issue, including for some inside government. This can be a major issue for countries with less developed regulatory policies. In these countries awareness of efforts at regulatory management can be very low. A recommendation for many of the reviews was to establish a communications strategy.

Issue: What are the priorities for communication?

Ex post evaluation of Better Regulation strategy and policies

Governments are accountable for the often significant resources as well as political capital invested in regulatory management systems. There is a growing interest in the systematic evaluation of regulatory management performance – "measuring the gap" between regulatory policies as set out in principle and their efficiency and effectiveness in practice and making the link with outcomes. How do specific institutions, tools and processes perform? What contributes to their effective design? The systematic application of *ex post* evaluation and measurement techniques can provide part of the answer and help to strengthen the framework.

- *Ex post* evaluation of the effectiveness of Better Regulation policies and strategy has improved but tends to be ad hoc. Countries often carry out specific exercises, often with the help of their National Audit Office. But this is often not systematic, and not all programmes are covered. Also, a broad assessment of progress, achievements and weaknesses is often still missing. Incoming governments like to "reinvent the wheel". This reinvention could be usefully informed by analysis of past policies. Linked to this, there is often little collective knowledge among today's civil servants of the history of past achievements and failures.

Issue: What institutions are most helpfully associated with *ex post* evaluation?

E-Government in support of Better Regulation

E-Government is an important support tool for Better Regulation. It permeates virtually all aspects of regulatory policy from consultation and communication to stakeholders, to the effective development of strategies addressing administrative burdens, and not least as a means of disseminating Better Regulation policies, best practices, and guidance across government, including local levels.

- E-Government is proving to be an essential support tool for the effective deployment of Better Regulation policies. Transparency, effective consultation processes and communication now rely heavily on the extensive use of websites for information and increasingly interactive tools such as searchable databases and online consultation and exchanges. E-Government is also used to implement more business and citizen friendly administrative procedures. More fundamentally, in one country at least, e-Government is the driver of regulatory policy, in the context of broader reforms to the public administration aimed at culture change. In some other countries, however, the strategic link between the two policies has not been clarified. E-Government is, however, resource intensive, and the technical architecture can easily become fragmented without a reasonably strong central direction. Its uptake by the local levels of government can be uneven. These issues appear to need attention in some countries.

Issue: Is there a sufficiently strong and naturally supportive link between regulatory policy and e-Government policy?

B) Institutional capacities for Better Regulation

Public governance and policy making context

Regulatory management needs to find its place in a country's institutional architecture, and have support from all the relevant institutions. The institutional framework within which Better Regulation must exert influence extends well beyond the executive centre of government, although this is the main starting point. The legislature and the judiciary, regulatory agencies and the subnational levels of government, as well as international structures (notably, for this project, the EU), also play critical roles in the development, implementation and enforcement of policies and regulations.

What role should each actor play, taking into account accountability, feasibility, and balance across government? What is the best way to secure effective institutional oversight of Better Regulation policy?

The OECD's previous country reviews highlight the fact that the institutional context for implanting effective regulatory management is complex and often highly fragmented. Approaches need to be customised, as countries' institutional settings and legal systems can be very specific, ranging from systems adapted to small societies with closely knit governments that rely on trust and informality, to large federal systems that must find ways of dealing with high levels of autonomy and diversity.

- Complex institutional environments, with multiple actors playing a role in regulation, emerge as a key factor. Future progress will depend on a more sophisticated understanding of all the actors involved, how they connect, and what they each contribute. Some institutions are perhaps not well enough connected, yet may have important observations or contributions to make on regulatory developments (national audit offices for example, or parts of the judiciary).
- The institutional reach of regulatory policies has expanded. A few years ago the focus was almost exclusively on central government (within a country). Parliaments are increasingly present, and local levels of government have also been drawn into regulatory governance.
- Minding the gap between principles and practice is critical. Regulatory policies are often well defined on paper but putting them into effective practice is proving more elusive. Tools and processes may be defined at a strategic level, but considerable work is then needed to give them concrete substance at the practical level of policy and law making. This appears to be especially true of *ex ante* impact assessment.

The executive centre of government and co-ordination of Better Regulation across central government

- A single central regulatory management unit with full coverage and control of all the relevant issues is a challenge to set up. Some countries question whether this is the only approach. Even where one appears to exist it does not cover everything – perhaps because there is too much to cover in complex modern societies, not just for internal political reasons. A new approach to the central institutional driver for regulatory policy may be emerging in some countries, with a radial network of relationships fostered by a central unit which does not necessarily integrate all the relevant ministries, supported by a well-functioning network of government committees and flanked by an external advisory group with a challenge function. This definition is an aggregate of the most effective parts of the structures currently found in the reviewed countries. However, this approach has not yet proven its effectiveness over the long run.
- Many countries have difficulty determining the best location for a central unit, if they are trying to establish one. Possible locations which have been tested include the centre of government (prime minister's office or equivalent), enterprise ministry, finance ministry, justice ministry, and home affairs ministry. This is very country specific, reflecting traditions and the relative weight given, for example, to the economic or legal context for regulatory policy. In countries with a long regulatory management tradition, location may vary over time (for example between the centre of government and the enterprise ministry). The differences also reveal a more fundamental issue: regulatory management affects a wide range of ministries and does not have an automatic "home" (as does, for example, fiscal policy). One or two countries have set up units made up of secondees from key ministries. This appears to be a very promising approach. There are advantages and disadvantages to a single location. For example centres of government are often reluctant to take on substantive tasks which may compromise their key function of arbitration and strategic management; finance ministries may be too engaged in other parts of their portfolio to pay enough attention to regulatory

management (although they are important because of their power); enterprise ministries are closer to the clients than centres of government but may lack authority over other ministries.

- The financial crisis and its aftermath have raised issues in some countries over future resources for central regulatory units. This sharpens the need for regulatory policy to prove its worth.

Issue: An external evaluation of networked approaches to regulatory management and oversight could help to establish whether this is a viable alternative to more centralised management.

Issue: Is effective use being made of all the institutions which may have a useful perspective or contribution to bring to regulatory developments?

Regulatory agencies

Regulatory agencies may exercise a range of regulatory responsibilities. They may be responsible (variously) for the development of secondary regulations, issue guidance on regulations, have discretionary powers to interpret regulations, enforce regulations, as well as influencing the development of the overall policy and regulatory framework.

- The role of regulatory agencies varies across countries. In some countries, regulatory agencies appear to play an increasingly important role, in a wide variety of settings (not just, for example, as economic regulators for the network sectors). In most cases regulatory agencies have significant powers to enforce regulations agreed at a higher level, which they may share with local governments. They are less likely to have wide ranging powers to make regulations.
- Institutional inflation appears to be an issue in some countries, which harms transparency as well as raising regulatory costs. Regulatory agencies are probably more numerous than a few years back and some governments, conscious of this, are trying to cut them back, or to rationalise their structures. Agencies appear to play an ambiguous role in the promotion of better regulation. They are increasingly associated with the regulatory policies of the central executive. They often have valuable "hands on" understanding of business and citizen needs. At the same time, their independence from the central executive, which varies, can lead to a fragmentation of regulatory management approaches, which is confusing for stakeholders, even if for broader institutional reasons, it is important that they should preserve their own room for manoeuvre.

Issue: How should independent regulatory agencies be brought into the regulatory policy agenda?

The legislature

Parliament may initiate new primary legislation, and proposals from executive rarely (if ever) become law without integrating the changes generated by parliamentary scrutiny.

- The role and interest of parliaments in regulatory quality appears to be growing, even if the pace and nature of the interest differs across countries. This seems to be regardless of the nature of a country's political system. Whether they are driven by coalitions or based on a dominant party does not seem to matter, though it does affect the specific way in which parliament interacts with the executive. Some parliaments have committees that take a specific interest in regulatory processes such as impact assessments. More often, there are no special regulatory policy committees, which poses a challenge for the diffusion of effective messages regarding regulatory policy. In some parliaments, officials take the lead, in others individual members emerge as better regulation "champions".
- An emerging challenge is how to "join up" the efforts of the central executive and the legislature in a positive way. Some parliaments appear to play a valuable challenge function with regard to draft regulations and this could be more effectively used by the executive, whereas others make possibly excessive demands on the government to account for its better regulation policies.

Issue: What parts of the regulatory policy agenda can be usefully shared by the legislature and the executive, without undermining the separation of powers?

The judiciary

The judiciary may have the role of constitutional guardian, and is generally responsible for ensuring that the executive acts within its proper authority, as well as playing an important role in the interpretation and enforcement of regulations.

- The importance of the judiciary in the regulatory framework depends to a large extent on the country's legal system. In Continental European systems, the scope for "reviewing" the substance of a regulation may be far less than in common law based systems. However judicial or quasi judicial entities may play a key role in assessing the constitutionality of a law, and are increasingly drawn into the EU dimensions. There is some anecdotal evidence of a growth in the role of the judiciary, with more frequent judicial reviews against the background of increasingly litigious societies.

Issue: To what extent can or should the judiciary be involved in regulatory policy?

Other key players

- National audit offices and external advisory bodies often play a significant role to challenge and monitor progress on better regulation. In some countries, the national audit office plays an important role evaluating progress. The same is true of independent oversight bodies, whose numbers have grown recently. Other key players may be councils of state and the social partners (representatives of the unions and employers).
- External challenge bodies are a positive development. But they raise issues about the appropriate extent of their powers, especially if they have duties relating to impact assessment of draft regulations.

Issue: What should be the role and limits of the powers of external oversight bodies?

Capacities, resources and training

Continuous training and capacity building within government, supported by adequate financial resources, contributes to the effective application of Better Regulation. Beyond the technical need for training in certain processes such as impact assessment or plain drafting, training communicates the message to administrators that this is an important issue, recognised as such by the administrative and political hierarchy. It can be seen as a measure of the political commitment to Better Regulation. It also fosters a sense of ownership for reform initiatives, and enhances co-ordination and regulatory coherence.

- Culture change is a "work in progress". Capacities and resources to implement Better regulation policies need reinforcement. A linked challenge is spreading culture change and new approaches to carrying out familiar tasks across the whole of government, even in the more "mature" countries. There are no magic bullets and the process takes time. There is, not surprisingly, a strong link to broader public sector management and reforms, for example, emerging efforts to link better regulation with performance appraisal systems and ministry budgets.
- Training for regulatory management skills (such as impact assessment) is patchy. It is usually addressed as an add-on to more general training for civil servants, although there are developments towards more specialised training.
- Regulatory policy now attracts (and consumes) more resources within governments. Against the common background in Europe of public sector and civil service cuts, which is driven by the need for efficiency gains to combat the effect of ageing populations and sustain social welfare systems, Better Regulation must increasingly justify its share and fight for any increase. At the same time, civil service cuts can concentrate the mind for necessary change and "doing things differently". There is some evidence of this at work, for example, with the move towards more proportionate and risk-based enforcement in some countries.

- Legal quality remains important, as well as the development of economic skills. The growing attention and resources allocated to regulatory policies such as *ex ante* impact assessment and administrative burden reduction may be undermining good practice in law making, including attention to legal quality, but also policies to rationalise and codify the regulatory stock, which appear to receive less attention today. Economists may be displacing lawyers in the fight for resources and attention. This may be a welcome corrective to past legal dominance, but both skill sets are needed.

Issue: What tools and processes could be developed to encourage further cultural acceptance of regulatory management? Links to performance evaluation? Fiscal incentives? Training? Recruitment policy?

C) Transparency through consultation and communication

General context

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as Common Commencement Dates (CCDs) can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

Two main elements of transparency are public consultation and communication. Other aspects include procedures for rule making, codification and appeals.

- A major distinction needs to be made between those countries with a "corporatist" tradition and others with a more "anglo saxon" tradition. In many countries, open forms of consultation are not part of the tradition, which relies instead more on committee structures (ad hoc or permanent), and the social partners (unions and employers representatives). This framework, however, is evolving, partly through the use of ICT tools which imply more open forms of consultation, and which were often initially deployed for administrative burden reduction programmes as a means of assessing business needs directly. Many countries now use a mix of both traditional and ICT based forms of public consultation. The search for a consensus and the use of expert advice on developing proposals remains a strong feature in many countries.
- Another noticeable difference across the reviews is between larger and smaller countries (in terms of population size). It appears to be generally easier for small countries to adopt informal approaches, based on underlying cultures with high levels of transparency and trust between governments and their citizens. Regardless of country size, however, a shared danger appears to be complacency and the development over time of silo mentalities (ministries or other entities that have become used to dealing with a set of partners and which do not readily extend their consultations beyond these).

- Federal states also present specificities. The political nature of these systems often means that consensus building with key partners is essential within and across governments to ensure that proposals can ultimately be agreed. This can mean that the full range of external stakeholders is not engaged until later in the process.

Public consultation on regulations

- Significant efforts are being made to reach out to all relevant stakeholders (where this is not already the case). A range of processes is being developed to facilitate the task for consultees, though this is still a "work in progress". Administrative burden reduction programmes have been a strong motor for the development of more open consultation.
- There seems to be a significant unsatisfied demand for effective consultation on the part of stakeholders. Many interviews revealed palpable frustration. The reviews revealed that most countries experience some issues concerning lack of feedback, uneven quality, and keeping to the response time. Stakeholder perceptions matter, not least because transparency is key to sustaining support and legitimacy for reform and regulatory actions over the long term.
- There appears to be uncertainty over "where to next". Some countries are grappling with the issue of how to secure an effective policy for public consultation, especially in support of major reforms (how and when to consult, and with whom). This is a major challenge for modern complex societies. Although guidance notes are increasingly available to help officials decide on the best approach (as well as covering more detailed issues such as the need for feedback and response times) they do not appear to be addressing effectively the issue of different approaches for different needs (projects in their early stages, for whole processes such as administrative burden reduction programmes, or for specific draft laws). Different instruments may serve different purposes (internet portals, expert meetings, green or white papers).
- Some ministries (and regulatory agencies) are better at public consultation than others. However, sharing experiences and best practices is not common and several reviews carried the recommendation that this would be a helpful way to make progress without expending too many resources.
- Parliaments are increasingly interested in the issue of public consultation. They are revising questions about the extent to which the executive has consulted prior to tabling a draft law before the legislature. Parliaments sometimes give more publicity than the executive to draft proposals (for example, publishing these on their websites).

Issue: Greater clarity on the deployment of different approaches to public consultation would appear desirable, to address the fact that there are different issues and stages of regulatory and policy development which may need different treatment. What is the purpose of public consultation and what does this imply in terms of the best practical approach?

Public communication on regulations

- Access to regulations is generally strong, but a work in progress in some cases. It is increasingly linked to the deployment of ICT. Not all regulations are always covered, depending on the underlying legal system (codified systems are usually stronger in this regard). Common Commencement Dates for the entry into force of new regulations are beginning to spread (from a low base).

D) The development of new regulations

Trends in regulatory production

- Regulatory inflation is a major issue in some countries. Countries undergoing significant federalisation or decentralisation where the process is not yet complete are especially vulnerable to regulatory inflation, as new governments seek to consolidate newly acquired competences by establishing new regulatory frameworks.
- Trends in new regulations are rarely monitored systematically, and when they are, not all regulations are covered. Efforts to gain information on this for the reviews suggest that the issue is more complex than might appear at first sight: for example, including amendments to regulations in the count may overstate production. Yet measurement could be helpful in assessing the effectiveness of policies to manage the flow of new regulations.

Issue: Is there value in monitoring regulatory policy trends and if so, what should be monitored?

Procedures for making new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

- Most countries have some arrangement for forward planning of regulations, which is not always robust. In some cases for example, forward planning is confined to primary laws. Plans are often internal, and not circulated externally, which frustrates stakeholders who need this information in order to plan their engagement.
- Procedures for the development of laws and regulations are reasonably robust. Most countries have procedures for the development of laws. Procedures for secondary regulations may be weaker, despite the fact that in many jurisdictions, these are critical to fleshing out the primary law's intention. Procedures are not always legally based (via administrative procedure laws) but they are usually clearly set out in guidance.

- Most countries have scrutiny of draft laws by a body other than the proponent ministry. These bodies (Councils of State in some cases) can play a significant role. Even if their role is formally confined to advice, their standing and reputation often ensures that advice is heeded. Advice may be formally confined to legal checks and the "opportunity" (timeliness and administrative appropriateness) of a draft proposal, but this may encompass valuable and apolitical advice on whether the proposal makes broader sense. Once a law has been adopted (sometimes before), Constitutional courts or equivalent institutions may check for conformity with the Constitution. Again, these bodies carry weight because of their reputation. These institutions were generally established some decades (if not centuries) ago, reinforcing the message from other OECD work that it takes time to set up effective regulatory institutions, but that it is worth the wait.
- There is a noticeable overlap in some countries between the (traditional) procedures for the development of regulations, and the (newer) impact assessment processes. The two processes are not always very joined up (and sometimes even on parallel tracks, despite potential synergies between the two). This often reflects a clash of two cultures; the legal culture underpinning the traditional process, and the economic culture which drives impact assessment.
- Legal access, clarity and quality are issues that worry a large number of countries. In many countries, the proliferation of regulations over time, and the speed with which new regulations may need to be drafted, have overstretched legal resources in ministries and undermined the clarity of the law. Some countries have been very proactive in addressing the situation, for example by streamlining the legal drafting and development process using ITC, and investing resources in plain language training.

Issue: How much effort, proportionally, should go into measures to strengthen legal clarity?

Ex ante impact assessment of new regulations

Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the "no regulation" option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. However the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (impact assessment is a tool that helps to ensure that a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues.

- The reviews revealed major weaknesses across most of the reviewed countries, and further significant development is needed. The good news is that formal policies are gaining ground and being improved, yet this is one of the most important tools available to assist policy makers in deciding whether and how to regulate in order to achieve policy goals. There is growing awareness that this is a key tool. Key institutional actors are increasingly engaged (parliaments and regulatory agencies as well as central ministries). The Standard Cost Methodology

(SCM) is helping to change cultures and encourage the idea of quantifying costs. But on the negative side, there is a relative lack of integration into the policy making process, assessments are often done too late in the process, consultation is not always robust, oversight needs more teeth, and overall political buy in is weak.

- Impact assessment in many countries has tended to evolve from existing processes to check financial or budgetary impacts, or environmental impacts. Other impacts have been added over time (e.g. competition, gender). In a few cases, the main focus is administrative burdens on business. Some countries' processes have not evolved much further than legal quality mechanisms already in place.
- Impact assessment often does not yet make a real difference to outcomes (it is applied too late in the process). There is a need to establish effective evaluation and measures of success (did an impact assessment influence the outcome? Were predictions realised?).
- There is an important but not always clearly articulated link between impact assessment processes and administrative burden reduction programmes. These usually have net targets (i.e. they capture new regulations, at least as far as the business dimension is concerned).

Issue: What approach, or approaches, are likely to be most effective in strengthening Regulatory Impact Assessment?

Institutional capacities: Experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

- A strong conclusion from the reviews is that the broader institutional context for policy making (not just law making) needs to be understood first. This needs to be the starting point for working out how/where/when impact assessment can be more effectively embedded.

- Line ministries are universally responsible for doing impact assessments (as they should be). A minority have set up dedicated impact assessment support units or staff. The framework for central oversight varies a lot. Some countries have established central units (in prime minister's Office, or Enterprise/Finance ministries), a few others rely on a "network" approach, some have added an external watchdog to ministry arrangements. Existing structures (such as Justice Ministries or Councils of State) may be used, in which case impact assessment is added to existing processes for checking the legal quality of draft regulations.

- Setting up a single central unit has been problematic for many countries. They appear to be more easily set up for administrative burden reduction programmes, and are often "rejected" by the culture when required to serve broader purposes, closer to political decision making. Resources and competences of central units can be an issue. Guidance tools and manuals for doing impact assessments, often available online but also supported by courses, are quite well developed, and growing fast. Overall the central challenge function is mostly weak. Sanctions for poor or late impact assessments are undeveloped, clear carrots and sticks to

promote a consistent and high quality performance are not evident. In order to force change, a few countries have resorted to making impact assessment a legal requirement, with sanctions if it is not observed.

- Parliaments are starting to take an interest in impact assessment. A few have organised themselves for this purpose through special committees. They do not always have access to full impact assessments for draft laws, and have started to ask for this.

Issue: Is there a viable alternative to a central unit for the oversight of Regulatory Impact Assessment? How can central units be equipped for an effective role? How should they be articulated with external watchdogs?

Methodology and process: The costs of regulations should not exceed their benefits, and alternatives should also be examined. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The legal scope of impact assessments varies. They generally cover primary laws, less so secondary regulations. A number of countries are pondering how best to tackle the issue of proportionality- ensuring that all relevant regulations are captured, whilst not overburdening officials. There does not appear to be a single clear answer. In terms of institutional scope, central ministries are covered, regulatory agencies are not automatically covered by central arrangements (reflecting in some cases the need to respect their autonomous status). Autonomous agencies may have their own arrangements. This appears to be especially the case for the economic agencies.

- Most impact assessment processes are not integrated (to give an overall picture of costs and benefits) but fragmented. They may cover a range of issues, from economic (competition effects) to social (gender effects) to environmental and distributional effects. There is a growing appreciation that impact assessment, if well done, can pick up unintended consequences of a proposal. Sustainability impact assessments are starting to be developed, which by their nature may help to secure a greater coherence across different impact assessments, but they are some way from being operational.
- The systematic quantification or monetisation of costs and benefits is not widespread. It is mainly applied for administrative burdens. Most countries do not require that costs must not exceed benefits for a proposal to be adopted, preferring an approach that clarifies the costs and the benefits and leaves it at that. Many countries are anxious to underline that regulations have benefits, and are concerned that the emphasis on costs has overshadowed this point.
- The late timing of impact assessments is a widespread issue. Often, impact assessments are carried out at a late stage in the development of regulations (when a draft is close to submission to the cabinet for example). Requirements for an impact assessment to be attached to early draft proposals are rare. If processes are not observed and impact assessments are done late or inadequately, sanctions are weak. This reinforces the vicious circle of some ministries believing that they can 'get away' with a poorly executed impact assessment.

Issue: What further development of methodologies would be most useful? Should there be a focus on how to capture benefits? How can timing be improved?

Public consultation and communication: Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have- or should have- a close link with general consultation processes for the development of new regulations.

- The requirement to consult as part of impact assessment is common, but in practice, ministries often go their own way. Some do well, others less so. Consultation as a result may be late, and may not cover all the relevant stakeholders. The links between consultation for impact assessment and broader public consultation processes is often weak or non-existent.
- Requirements to publish full impact assessments are relatively rare. Many countries publish a short version, when the draft regulation goes to Parliament. Some countries now realise that publication can be a powerful (*ex post*) lever to change ministry attitudes (for the better), to some extent replacing the need for an oversight body, through the potential public shaming effect of publication. Publication of impact assessments does raise the issue of when to publish in the development process for a proposal. Full publication from the start, when proposals are at a very early stage, does not appear to be desirable. Too many rounds of publication may generate consultation fatigue.

Issue: At what stage (or stages) should Regulatory Impact Assessment be publicised/published?

Alternatives to regulations

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

- It is not clear that alternatives to regulation are given adequate attention, or have been developed significantly. The reviews did not address alternatives to regulation in any depth. Alternatives are certainly deployed, but suited to the country's particular conditions. For example, some countries use self regulation linked to their traditions of giving social partners and others room for participation in regulatory management. Encouragement to consider alternatives is not always strong in the impact assessment processes. It sometimes surfaces in the context of the development of risk-based approaches to rule making and enforcement (no regulation zones for example). Guidance on alternatives to command and control regulation can be relatively weak and out of date. Although instructions to consider alternatives are generally found in the impact assessment guidance, their application does not appear to be systematically checked.

Issue: How can the option of alternatives to "command and control" regulation be brought more forcefully to the attention of regulators?

Risk-based approaches for the development of new regulations

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule making can better reflect the need to assess and manage risks appropriately.

- Risk-based approaches to the development of new regulations are under discussion and analysis in a small number of countries. Practical tools and processes are not yet in place, and new approaches are some way from becoming operational.

E) The management and rationalisation of existing regulations

Simplification of regulations

The large stock of regulations and administrative formalities accumulated over time needs regular review and updating to remove obsolete or inefficient material. Approaches vary from consolidation, codification, recasting, repeal, *ad hoc* reviews of the regulations covering specific sectors, and sun setting mechanisms for the automatic review or cancellation of regulations past a certain date.

- The legal simplification of regulations is a concept quite distinct from administrative burden reduction programmes. The aim is to rationalise or clarify the whole body of law, and to do so for issues that go beyond information obligations (the main initial target of administrative simplification). Systematic codification of the regulatory stock is mainly found in countries with a civil law tradition, which emphasises completeness and clarity of the legal "acquis", and which was originally built around codes (groups of related laws), which have fragmented over time. Regulatory inflation can be a strong motor for legal simplification in some countries. Legal simplification is also considered useful by countries with a complex legal history, made up of layers of different traditions. Some countries with a common law tradition do not see the necessity of legal simplification.
- Legal simplification, however much supported in theory and by officials who understand its importance for sustaining legal clarity, is often the "poor relation" of regulatory strategy. As a long term programme without any strong communication angle, it is difficult to sell to politicians. It is generally less well resourced than other regulatory management programmes. It is potentially resource intensive, needs to be sustained over the long haul, and does not yield any headline achievement (compared with administrative burden reduction programmes which can put a figure on cost savings). The trend is therefore for legal simplification to be overshadowed or overlaid by burden reduction programmes. More ad hoc, practical approaches are emerging such as selective targeting of regulatory clusters under administrative burden reduction programmes.

- Processes for cleaning up the regulatory stock based on individual regulations are deployed in some countries. Mechanisms such as sunset clauses may be deployed (albeit not universally). Generally, there is not much evidence of systematic processes to review regulations.
- The review of regulations relevant to particular sectors of economic or social activity (which are unlikely to map on to legal codes) is undeveloped.

Issue: How can support for legal simplification programmes (in countries where this matters) be enhanced?

Reduction of administrative burdens

The reduction of administrative burdens has gained considerable momentum over the last few years. Government formalities are important tools to support public policies, and can help businesses by setting a level playing field for commercial activity. But they may also represent an administrative burden as well as an irritation factor for business and citizens, and one which tends to grow over time. Difficult areas include employment regulations, environmental standards, tax regulations, and planning regulations. Permits and licenses can also be a major potential burden on businesses, especially SMEs.

- Administrative burden reduction programmes are well established, not just for the business community but also (in some countries) for citizens, and public sector workers inside government. For much of Europe, regulatory investment has been in this area, partly as a means of raising support and interest for the further development of regulatory processes.

Process and methodology

A lack of clear information about the sources of and extent of administrative burdens is the first issue for most countries. Burden measurement has been improved with the application by a growing number of countries of variants on the Standard Cost Model (SCM) analysis to information obligations imposed by laws, which also helps to sustain political momentum for regulatory reform by quantifying the burden. Programmes to reduce administrative burdens may include the review and simplification of whole regulatory frameworks or laws, so there can be some overlap with policies aimed at simplification via consolidation etc. There may also be some overlap with the development of new regulations, as administrative burden reduction programmes are often conducted on a net basis that is, taking account of the impact of new regulations in meeting target reductions.

Use of e-Government

- The effective deployment of e-Government is of increasing importance. It is being used as a tool for reducing the costs and burdens of regulations on businesses and citizens, as well as inside government.

Administrative burdens for business

- Generally good results are emerging with the achievement of reduction targets and (sometimes) the setting of new ones. Programmes usually have a quantitative target with a fixed timeline (same as the EU 2012 date, or a date ahead of the EU). Targets are net targets i.e. programmes cover new as well as existing regulations, and the burdens from new regulations are counted in the assessment of whether targets are being met. The best programmes make an explicit link with *ex ante* impact assessment for this (the burdens of new regulations must be part of the documentation available to decision makers).
- The means by which burdens are being addressed often include clusters of laws which are causing a large part of the problem. Fiscal burdens may not be included.
- Running programmes on the basis of the full traditional SCM methodology is expensive. Newcomers, learning from more experienced countries, are experimenting with lighter approaches. Measurements of burdens in terms of impact on GDP are made but the methodology merits further collective attention.
- Some programmes are experiencing a loss of momentum. It is hard to run the "last kilometre" once the "low hanging fruits" have been picked.
- Business often remains unhappy, despite the efforts and achievements. The reasons for this are complex. Efforts are being made to work more closely with business in order to identify the real issues for them (including irritants), rather than the issues identified by civil servants. Negative business perceptions may have roots in substance as well as presentation and communication, for example concerns about effective control of the flow of new regulations which cancel out achievements on the regulatory stock. There is a need to engage local governments, where this is not already being done, as they are usually a key interface with business.
- Business pressures are leading to analysis of how to broaden programmes beyond information obligations. The proposal is to cover all compliance costs, as well as "irritants" (requirements which are perceived as burdensome by companies even if they are not costly measured by the standard cost methodology). Attempts are being made to extend the reach of some programmes and integrate full compliance costs, with some difficulty.
- Licences and planning permits appear to remain an issue in many countries. The reviews did not go into any depth. However, it appears that they are often the subject of reform efforts, for example the application of the "silence is consent" rule. A country with a large number of licence requirements may need to ask itself if they are all necessary, as well as taking steps to streamline processes.
- The picture for the development of one-stop shops is patchy, but appears to have been given a boost by the EU Services Directive.

Issue: What should be the "next frontier" for administrative burden reduction programmes? How should this work be integrated with *ex ante* impact assessment?

Administrative burden reduction for citizens

- Programmes to address burdens on citizens are increasingly common, using the experience of the business programmes. They are often considered important (as are programmes addressing public sector workers) to show that the state is at the service of citizens, not just business. A soft version of the SCM methodology is often used and targets are not usually quantified, raising issues of how progress can be monitored.

Issue: How can methodologies be strengthened for the measurement of burdens on citizens, in order to provide a sound basis for evaluation of progress?

Administrative burden reduction for the administration

A number of governments have started to consider the issue of administrative burdens inside government, with the aim of improving the quality and efficiency of internal regulation in order to reduce costs and free up resources for improved public service delivery. Regulation inside government refers to the regulations imposed by the state on its own administrators and public service providers (for example government agencies or local government service providers). Fiscal restraints may preclude the allocation of increased resources to the bureaucracy, and a better approach is to improve the efficiency and effectiveness of the regulations imposed on administrators and public service providers.

- Programmes to address burdens on frontline public sector workers (e.g. teachers, police) are also increasingly evident, as part of efforts to improve public services and their efficiency. Some countries find this sensitive, as it may imply that the productivity of the public sector workers is in question. Finance ministries are important because they are often responsible for public sector resource management, but are not always sufficiently integrated with their Better Regulation colleagues on this matter.

Issue: Should burden reduction programmes for regulation inside government be given greater prominence?

F) Compliance, enforcement, appeals

Compliance and enforcement

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

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

- Compliance is rarely monitored systematically. Some countries suggest that this is unnecessary and it is more important to focus on effective enforcement. The reviews frequently recommended that compliance be monitored more systematically. There is an important link with both *ex ante* and *ex post* evaluation of regulations, which some countries are starting to make, albeit against the background of a generalised weakness as regards impact assessment and evaluation. A well functioning *ex ante* impact assessment process should include an assessment of likely compliance, and *ex post* evaluation can check the outcome against the initial prediction.

Issue: Should compliance rates be monitored more systematically? To what extent do impact assessment and evaluation processes need strengthening to include a sharper focus on expectations of compliance and actual outcomes?

- Risk-based methods of enforcement are taking root in some countries. There is a growing interest in proportional approaches to inspections, based on whether a business is considered high or low risk. There is a growing understanding that this can help to reduce burdens on business and release public resources for more productive tasks. However this development is not universal. Some countries and cultures remain somewhat stuck in an approach that assumes inspections must be systematic.

Appeals

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes (administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman), and the adoption of rules to promote responsiveness, such as "silence is consent". Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example, scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

- Most countries have a well-developed hierarchy of appeal routes against administrative decisions, though their precise nature may vary. For example, some countries do not favour specialised courts or tribunals and prefer to rely on the general court system. Others offer a range of avenues for appeal, starting with administrative tribunals attached to the agency against which the appeal is made, keeping judicial review in reserve. Nearly all countries, however, have established a mediator or ombudsman to help settle issues out of court if possible. These mediators are often vocal about what is wrong with regulations and the regulatory system which needs to be fixed. Their insights can provide valuable information, but do not appear to be much used.

- The reviews overall did not pick up any major issues over appeals. Systems are well established, a process which usually requires a long period of time, but which repays dividends. Delays in reaching decisions, however, can be a major issue, with negative effects on businesses which need to know where they stand. Some appeal systems appeared opaque, and in need of publicity and explanation so that businesses and citizens can fully understand their rights and how to access them. Very few countries have carried out an evaluation of their appeal systems.
- There were some hints across the reviews that the number of appeals was increasing. However this would need to be checked.

Issue: Should there be more systematic evaluation of appeal systems for administrative decisions?

G) The interface between member states and the European Union

An increasing proportion of national regulations originate at European Union (EU) level. Whilst European Commission (EC) regulations have direct application in member states and do not have to be transposed into national regulations, EC Directives need to be transposed, raising the issue of how to ensure that the regulations implementing EC law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, avoid "gold plating" and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

General context

- The EU interface was a strongly recurring theme across all the reviews, generating anxiety. Countries do not feel that they control the situation effectively. The importance of the EU dimension to better regulation is hardly surprising given the weight of EU law. Although hard specific data is often not available, it can be broadly stated that at least 50% of national regulations have their origin in EU legislation. For this reason and because transposition (and to a lesser extent negotiation) raise issues in most countries, the reviews often recommended that the country undertake a strategic review of EU regulatory management.
- The methodology for calculating the EU origin share of regulations may deserve more attention. Most estimates are based on what emerges from national calculations of administrative burdens and their origin. Some academic research has been done which suggests that the figure is not as high as some countries or groups sometimes imply.

Negotiating EU regulations

- Countries want to find ways of exerting stronger influence on the development of EU legislation. This is important for them in order to avoid creating technical as well as more fundamental policy problems for the transposition (implementation) of EU directives into national law, and the creation of unnecessary burdens. But they often find this process frustratingly hard. Considerable energy, time and resources are often deployed for EU issues, not just by central ministries but also regulatory agencies which have a stake in EU legislation (telecoms for example).
- Responsibility for overseeing negotiations is usually either with the prime minister's Office or the Foreign Affairs ministry. In a few countries the process relies on a ministerial network with no specific lead, which appears to work just as well. Co-ordination structures to cover the interests of different ministries and keep track of developments are often sophisticated and rigorous, standing out in contrast to the less well networked arrangements for domestic regulatory management. They ensure that negotiating positions are clear, but their real impact in terms of what needs to be achieved around the negotiating table is less clear. It was recommended to several countries that prioritisation of dossiers might help, to ensure that focus and resources went to key directives. Specific guidance and training is often (not always) available for officials engaged in EU negotiations.
- A recurring recommendation in the reviews was to suggest that co-ordination approaches for the EU might inspire ideas for more effective co-ordination of national regulatory work. For example, this could be the establishment of a dedicated committee for national regulatory policy chaired at a high level at the centre of government.
- Parliaments are directly involved in EU related regulation, even when they do not play a major role in domestic regulatory management. Dedicated committees for the management of EU affairs have usually been set up. There is a small but clear tendency for parliaments to acquire stronger powers, for example to approve negotiating positions (if they do not already have this power).
- *Ex ante* impact assessment of draft directives is a grey zone. It may be implicitly required as part of a country's overall impact assessment policy, but the reviews suggest that it is often not carried out. This seems to be partly because of uncertainty over its real value, as negotiations often generate major changes to a draft directive before it is adopted, and because efforts are made to use the European Commission's own impact assessments. National and EU level processes are not yet joined up.
- There is a major difference between unitary and federal states. Federal states must observe the constitutionally delineated division of powers and competences between the different levels of government. Formal provisions are generally in place to manage this, apparently to good effect. Unitary countries do not have this constraint, but are increasingly aware that EU regulations may have an impact on local regulatory management. A few unitary countries have started to involve sub national levels of government, seeking their views on draft directives.

Issue: How can greater coherence in the timing of EU level and national level impact assessments be achieved?

Transposing EU regulations

- The transposition of EU regulations is often considered problematic. The issues are varied:
  - Underlying policy differences which were not resolved in negotiation resurface when the directive needs to be accommodated into the national context.
  - The clarity of legal texts once they emerge from successive rounds of negotiation (Council working group, Council of ministers, European Parliament) is much reduced (some texts are no longer coherent), complicating the task of transposition.
  - Some countries use the opportunity of transposition to amend existing national laws, which can complicate matters.
  - A few countries "goldplate", that is, they go beyond what is strictly necessary to implement a directive. This can be for fear of not doing enough, to avoid subsequent infringement proceedings, or to maintain high standards which are at risk from a "lower standard" EU directive (this can be deemed a failure in negotiation).
  - In other cases, the directive is literally translated into national law, without regard for necessary adjustments to pre existing regulations, as this may be seen as the only practical solution to an incoherent and complicated text, or reflect a worry that the country will be challenged if the wording is not strictly followed.
- The speed with which directives are transposed has improved, with countries showing smaller deficits over time. There is strong awareness of the importance of timely transposition, and countries are generally now meeting the 1% target set by the EU Council of Ministers. There is a need for caution over the interpretation of these trends. Some calculations compare the number of directives transposed with the total stock of directives going back to 1957, which of course yields a small and decreasing percentage. Transposition may be notified upon adoption of the first of several implementing acts (meaning that the process is not complete even if the directive is said to have been transposed).

Issue: The reviews did not consider infringement proceedings, which could be revealing of the real effectiveness of transposition.

- As with negotiation, institutional and co-ordinating structures for transposition are generally well established. Most countries use existing national regulatory mechanisms for transposition (laws and secondary regulations approved by parliament for example). A few have fast track processes for approval. There are some institutional weaknesses. Monitoring of transposition is, surprisingly, not always done systematically. For example, not all countries have databases to track progress. The use of correlation tables (to check the provisions of the directive against national provisions) is relatively rare. Impact assessments prior to transposition are often not carried out. This partly reflects uncertainty as to their value, since the directive cannot be amended, and may already be very prescriptive.

Issue: Is there value in using Regulatory Impact Assessment to explore how a directive will be implemented in detail, so as to minimise burdens, for example?

- Federal states face a particular challenge, for which a strong institutional framework is required. The policy areas covered by directives may cut across competences within federal states, requiring concerted action if a directive is to be transposed fully and effectively (for example, if part of a directive relates to the federal competence and other parts to the competences of sub federal governments). Since the federal level cannot impose requirements that relate to sub federal competences, this can raise issues.

Interaction with EU Better Regulation policies

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

- There is a particular wish to improve the articulation of EU impact assessments with national impact assessments. Influencing the Commission's own regulatory management strategies is important for many countries. EU level impact assessments are carried out before a draft directive reaches the European Parliament. This means that amendments by the latter, which can be significant, are not assessed (an issue picked up by the recently published European Court of Auditors report on EU impact assessment). Another issue is that EU level assessments do not necessarily capture the issues of concern to specific countries and settings (it may be hard for them to do so).

H) The interface between subnational and national levels of government

Taking into account the rule making and rule-enforcement activities of all the different levels of government, not just the national level- is another core element of effective regulatory management. The OECD's 2005 Guiding Principles for Regulatory Quality and Performance "encourage Better Regulation at all levels of government, improved co-ordination, and the avoidance of overlapping responsibilities among regulatory authorities and levels of government". It is relevant to all countries that are seeking to improve their regulatory management, whether they are federations, unitary states or somewhere in between.

General context

- There are some determined efforts to reach out to the local levels of government. This movement has given rise to interesting new initiatives aimed at strengthening co-operation between central government and the often fiercely autonomous and politically sensitive local levels of government, even in so called unitary states. Better regulation is now seen as a concept that has to embrace local levels. The question has turned to how this can best be achieved.

Structure and funding of local governments

- Structures vary considerably, partly related to the size of the country (small countries tend to have fewer layers), but also historical roots which can go back centuries. In some cases the retention of traditional structures reflects the need to preserve an historical identity, even if the resulting structure is somewhat complex. A few countries have carried out recent rationalisation of their sub national structure. In some others the (often highly politicised) debate over whether to rationalise has been engaged, but there is no agreement as yet. Progress on better regulation appears to be easier with simpler structures.
- Federal states are at different stages of evolution. Some are mature, others are a work in progress. It is easier to make headway with settled structures. Where there is still evolution, the context is often too politically charged to allow rapid development of better regulation policy, even if it may be particularly necessary to counteract the effects of regulatory inflation arising from the decentralisation of competences.
- Funding arrangements vary considerably and are usually complex. Some local governments can raise a significant part of their funding directly (including taxes), most rely to some extent on central government grants, and some countries have established fiscal equalisation schemes to equalise access to public services and living standards across the territory. Some of the reviews hinted at perverse incentives for regulatory management. For example unfunded mandates or simply a lack of funds could be encouraging inappropriate regulatory actions such as higher licence fees.

Issue: How do funding arrangements for local government affect their approach to issues such as licensing, public service delivery and enforcement practices?

Responsibilities and powers of local governments

Regulatory responsibilities at the different levels of government can be primary rule making responsibilities; secondary rule making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or subnational regulations; or responsibilities for service delivery). In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. Licensing can be a key activity at this level. These issues have a direct impact on the welfare of businesses and citizens. Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, they may be taking on a growing responsibility for the implementation of EC regulations.

- Federal states by definition have shared competences between different levels of government and this may cut across policy areas. They thus need to find ways of dealing with overlaps as well as gaps, in order to secure policy and regulatory coherence.

- For unitary states, the relative autonomy of local levels varies considerably. This is linked to the constitutional, political and governance framework which defines the nature of their relationship with central government. In practice, regardless of the system and of formal autonomy (which may be anchored in the constitution or in a special law), local levels of government tend to be fierce guardians of their autonomy, sensitive to imposition from above, and central governments have to tread carefully. This includes their efforts to encourage the adoption of better regulatory practices. Better regulation is encouraged less through the imposition of obligations (politically sensitive) and more through the reinforcement of co-operative mechanisms and exchanges.
- In all the reviewed countries, municipalities have a critical interface with small businesses and citizens. This is manifested through their responsibilities for public services, for the enforcement of national regulations (which may be shared with regulatory agencies), and for their role in the allocation of licences and planning consents. However responsibilities can vary considerably.

Co-ordination

- Sensitivities over local government autonomy have encouraged central government efforts to set up structures for voluntary co-operation and co-ordination, especially where this was weak in the first place. Some innovative approaches are being tested. Opening up a productive dialogue between the levels is often the first priority. Local governments often complain that they are victims of a "regulatory cascade" from the centre over which they have no control. New initiatives aim to put them in a situation where they can help to shape regulations, as active participants.
- There are growing efforts by central governments to include local levels in central programmes such as administrative burden reduction. Some countries are making considerable efforts to encourage their local levels into better regulation. In a few other countries, very little is evident. Institutional support can take the form of new institutions, or (more frequently) working with existing local government umbrella associations.
- Local governments themselves are beginning to co-ordinate among themselves. This can be held back where there are fears that this could be precursor to rationalisation.

Issue: What best practices are emerging to support co-ordination between central and local levels of government? Among local governments?

Better Regulation policies deployed at local level

- The extent to which local levels of government are adopting better regulation practices varies. Some municipalities are taking their own initiatives.
- Capacities for better regulation at this level are an issue in many countries. Local governments can be very small and already overstretched, and do not necessarily have the skills or training to perform better regulation processes such as consultation effectively. A partial answer deployed in some countries is to share best practices. Some of the reviews included a recommendation that there should be more sharing of ideas and practices at this level.

- Federal states appear to do better in a general sense. Better regulation tends to be adopted at all levels of government, albeit unevenly, spurred by inter government competition. Competitive benchmarking can be valued as a means of making progress, so the developments may be different. It is not clear to what extent different approaches can negatively impact the single market within a country.
- The EU Services directive has encouraged local levels of government to accelerate the establishment of one-stop shops and the use of ICT to facilitate the flow of administrative information and transactions. The directive (implementation deadline end 2009) is a major step in the completion of the EU Single Market (which has so far focused on goods), to help businesses offer their services across EU borders. It seeks to achieve this by reducing red tape, in particular via a "single passport" system, delivered by a firm's country of origin to show conformity with that country's regulations, and which would allow that firm to do business anywhere in the EU without any further formalities. It also requires countries to set up one-stop shops through which businesses can access all the relevant documentation for doing business across the Single Market.

Issue: What can be done to enhance capacities for Better Regulation at local level?

Annex B

Landmarks in the development of regulatory policy

1995: Recommendation of the OECD Council of Ministers on Improving the Quality of Government Regulation, sets up a Reference Checklist for Regulatory Decision Making.
1997: OECD "Report on Regulatory Reform" with a set of seven Recommendations for effective regulatory management, is endorsed by the OECD Council.[1]
1998: Launch of the first wave of OECD country reviews on regulatory reform.
1999: APEC Economic Leaders' Declaration, containing the APEC Principles to enhance Competition and Regulatory Reform.
2000: EU Lisbon Strategy for Growth and Jobs, adopted by the European Council of Ministers, emphasises the importance of enhancing productivity and competitiveness, including measures to improve the regulatory environment for businesses.
2001: EU Mandelkern Report recommends that member states and the European institutions establish structures and processes for regulatory management.
2002: OECD publication "Regulatory Policies in OECD Countries: from Interventionism to Regulatory Governance", examines developments and challenges in the application of regulatory policy.
2002: Communication from the European Commission, prepares the way for the introduction of an EU level impact assessment process.
2003: EU inter-institutional Agreement on better law-making, sets a common framework for action by the European Commission, the European Parliament and the European Council of Ministers
2004: OECD publication "Taking Stock of Regulatory Reform", a synthesis of findings from the twenty country reviews carried out so far.
2005: OECD Guiding Principles for Regulatory Quality and Performance, adopted by the OECD Council of Ministers, confirm the seven principles of the 1997 Recommendations, adding new supporting perspectives.
2005: APEC-OECD Integrated Checklist on Regulatory Reform, adopted by the Executive body of the APEC and the OECD Council of Ministers.
2005: Renewal of the EU's Lisbon Strategy for growth and jobs by the European Council of Ministers, requires EU member states to establish National Reform Programmes, monitored by the European Commission, which issues annual progress reports.
2006: European Commission adopts Better Regulation Strategy, puts a particular emphasis on business and especially SMEs, and promotes the reduction of administrative burdens.

2006: Establishment of EU High-Level Group of officials on Better Regulation.
2007: European Commission Action Programme, approved by the European Council of Ministers In January 2007, sets a target of reducing administrative burdens in EU legislation by 25% by the end of 2012.
1998-2010: Completion of twenty three OECD regulatory reform reviews, of three monitoring updates (Japan, Korea, Mexico) and of three reviews of non members (Russia, China, Brazil).
2005-07: OECD-European Commission project assesses the regulatory policies of the 12 country candidates for membership of the EU, prior to their accession.
2008-10: EU 15 project, a further partnership between the OECD and the European Commission, assesses the regulatory policies of the original 15 EU member states.
1998-2010: OECD reports analyse and evaluate different aspects of regulatory policy, including impact assessment, administrative simplification etc.[2]
2009: Indicators of Regulatory Management Systems, Regulatory Policy Committee, 2009 Report, December 2009.
2009: Establishment of the OECD Regulatory Policy Committee, replacing the OECD Working Party on Regulatory Management and Reform, and the OECD multi disciplinary Group on Regulatory Policy, with a mandate to promote an integrated, horizontal and multidisciplinary approach to regulatory quality.

Notes

1. Volume 1: Sectoral Studies (telecoms; financial services; professional business services; electricity; agro-food; product standards; conformity assessment and regulatory reform. Volume 2: Thematic Studies (economy-wide effects; regulatory quality and public sector reform; competition, consensus and regulatory reform; regulatory reform; industrial competitiveness and innovation; international market openness and regulatory reform).

2. Some of these reports include: Building an Institutional Framework for Regulatory Impact Analysis: Guidance for Policy Makers (OECD, 2008); Cutting Red Tape: Why is Administrative Simplification so Complicated (OECD, 2010); Regulatory Impact Analysis: A Tool for Policy Coherence (OECD, 2009); Risk and Regulatory Policy: Improving the Governance of Risk (OECD, 2010).

Annex C

OECD Guiding Principles for Regulatory Quality and Performance

The goal of regulatory reform is to improve national economies and enhance their ability to adapt to change. Better regulation and structural reforms are necessary complements to sound fiscal and macroeconomic policies. Continual and far-reaching social, economic and technological changes require governments to consider the cumulative and inter-related impacts of regulatory regimes, to ensure that their regulatory structures and processes are relevant and robust, transparent, accountable and forward-looking. Regulatory reform is not a one-off effort but a dynamic, long-term, multi-disciplinary process.

The first set of OECD policy recommendations for regulatory reform was endorsed by Ministers in 1997. They have provided guidance to member countries to improve regulatory policies and tools, strengthen market openness and competition, and reduce regulatory burdens. The country reviews of regulatory reform launched in 1998 and the monitoring exercises of implementation launched in 2004 document the considerable progress that has been made and identify lessons about implementation to promote a strong competition culture and liberalisation of entry barriers, the use of regulatory impact analysis and consideration of alternatives to regulation, and the integration of market openness criteria in regulatory processes.

The concept of regulatory reform has changed over the last decade, a change that is reflected in the title for these principles. The focus in the 1990s was on steps to reduce the scale of government, often carried out in single initiatives. Isolated efforts cannot take the place of a coherent, whole-of-government approach to create a regulatory environment favourable to the creation and growth of firms, productivity gains, competition, investment and international trade. Removing unneeded regulations, notably in sectors that meet public needs, is still important, but does not tell the whole story. When governments turn elsewhere for provision of services, regulation is necessary to shape market conditions and meet the public interest. "Regulatory quality and performance" captures the dynamic, ongoing whole-of-government approach to implementation.

From 1997 to 2005: The evolution of regulatory policy

The 1997 Recommendations have stood the test of time. Based on the lessons of experience drawn from 20 country reviews and other studies, these recommendations have been carefully examined and updated to help countries face the challenges of the 21st century with a renewed commitment toward better regulation. The original 7 principles have been retained, but the explanatory notes and subordinate recommendations have been expanded. Issues which receive greater attention in 2005 than in 1997 include: policy coherence and multi-level co-ordination; *ex ante* assessment

of proposals for policy; competition policy for network utilities that meet public needs; market openness; risk awareness; and implementation. This agenda calls for a cross-sectoral, pro-active approach to make regulations more responsive yet predictable. The OECD Guidelines for Regulatory Quality and Performance highlight the dynamic, forward-looking process by which regulatory policies, tools and institutions are adapted for the 21st century.

More non-member countries are taking an interest in regulatory reform issues, as demonstrated by the recent review of Russia, the first of a non-member country, the participation of Brazil and Chile as observers in the Special Group on Regulatory Policy, conferences on regulatory policies in China in 2003 and 2004, the Regulatory Governance Initiative as part of the Investment Compact for South East Europe, and the completion of the APEC-OECD Integrated Checklist for Regulatory Reform. Regulatory Reform is a key theme in the Programme on Good Governance for Development in Arab Countries, supported by the OECD and the UNDP. The implementation of policies for better regulation however is difficult in many transition and developing countries, when institutional and democratic systems are still fragile. Bilateral and multilateral development assistance programmes are helping to build capacity for regulatory impact analysis and regulatory policy systems in many countries, where over time, regulatory processes and standards can be expected to improve transparency, accountability and economic outcomes. The 2005 Principles will therefore have an impact beyond OECD member countries, wherever governments strengthen domestic policies and institutions in ways that improve investment and trade.

This set of principles was discussed by the Competition and Trade Committees and the Working Party on Regulatory Management and Reform in the context of stocktaking exercises to identify lessons about implementation drawn out of the 20 country reviews completed through 2003, and summarised in the synthesis report "Taking Stock of Regulatory Reform". The Special Group on Regulatory Policy approved the Principles at its 4th meeting on 15 March 2005, and the Council of the OECD endorsed them on 28 April 2005.

Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.

Commit to regulatory reform at the highest political level, recognising that key elements of regulatory policy – policies, institutions and tools –should be considered as a whole and applied at all levels of government. Articulate reform goals, strategies and benefits clearly to the public.

Establish principles of "good regulation", drawing on the 1995 OECD Recommendation on Improving the Quality of Government Regulation. Good regulation should: *i)* serve clearly identified policy goals, and be effective in achieving those goals; *ii)* have a sound legal and empirical basis; *iii)* produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account; *iv)* minimise costs and market distortions; *v)* promote innovation through market incentives and goal-based approaches; *vi)* be clear, simple, and practical for users; *(vii)* be consistent with other regulations and policies; and *viii)* be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.

Create effective and credible co-ordination mechanisms, foster coherence across major policy objectives, clarify responsibilities for assuring regulatory quality, and ensure capacity to respond to a changing, fast-paced environment. Ensure that institutional frameworks and resources are adequate, and that systems are in place to manage regulatory resources effectively and to discharge enforcement responsibilities. Strengthen quality regulation by staffing regulatory units adequately, conducting regular training sessions, and making effective use of consultation, including advisory bodies of stakeholders.

Encourage better regulation at all levels of government, improve co-ordination and avoid overlapping responsibilities among regulatory authorities and levels of government; apply regulatory quality criteria such as transparency, non-discrimination and efficiency to regulation inside government, and encourage private bodies such as standards-setting organisations to adopt criteria for regulatory quality based on the OECD Recommendations.

Adopt a dynamic approach to improve regulatory systems over time to improve the stock of existing and the quality of new regulations, and ensure that reforms are carried out in a logical order and that related markets are liberalised together, where practicable. Make effective use of *ex post* evaluation.

Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.

Review regulations (economic, social, and administrative) against the principles of good regulation and from the point of view of those affected rather than of the regulator; update regulations through automatic review procedures such as sun-setting.

Consider alternatives to regulation where appropriate and possible, including self-regulation, that give greater scope to citizens and firms; when analysing such alternatives, consideration must take account of their costs, benefits, distributional effects, impact on competition and market openness, and administrative requirements.

Use performance-based assessments of regulatory tools and institutions, to assess how effective they are in contributing to good regulation and economic performance, and to assess their cost-effectiveness.

Target reviews of regulations where change will yield the highest and most visible benefits, particularly regulations restricting competition and market openness, and affecting enterprises, including SMEs.

Review proposals for new regulations, as well as existing regulations, with reference to regulatory quality, competition and market openness; ensure compliance with quality standards when drafting or reviewing regulations preferably overseen by a body created for that purpose.

Integrate regulatory impact analysis into the development, review, and revision of significant regulations, and use RIA to assess impacts on market openness and competition objectives; support RIA with training programmes, and with *ex post* evaluation to monitor quality and compliance; include risk assessment and risk management options in RIAs. Ensure that RIA plays a key role in improving the quality of regulation, and is conducted in a timely, clear and transparent manner.

Minimise the aggregate regulatory burden on those affected as an explicit objective to lessen administrative costs for citizens and businesses and as part of a policy stimulating economic efficiency. Measure the aggregate burdens while also taking account of the benefits of regulation.

Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.

Establish regulatory arrangements that ensure that the public interest is not subordinated to those of regulated entities and stakeholders.

Consult with all significantly affected and potentially interested parties, whether domestic or foreign, where appropriate at the earliest possible stage while developing or reviewing regulations, ensuring that the consultation itself is timely and transparent, and that its scope is clearly understood.

Ensure that firms in an industry are not subject to firm-specific benefits or costs arising from regulation, unless such benefits or costs are demonstrably necessary to benefit the public or to prevent the exercise of market power.

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. Electronically accessible, interactive Web sites should be a priority to make rulemaking information available to the public, and to receive public comment on regulatory matters.

Ensure that administrative procedures for applying regulations and regulatory decisions are transparent, non-discriminatory, contain an appeal process against individual actions, and do not unduly delay business decisions; ensure that efficient appeals procedures are in place.

Ensure that regulatory institutions are accountable and transparent, and include measures to promote integrity.

Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.

Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways. Competition law enforcement and sector regulation to promote competition and trade liberalisation should be co-ordinated to ensure consistency.

Enforce competition law vigorously where collusive behaviour, abuse of dominant position, monopolisation or anticompetitive mergers risk frustrating reform. Employ effective tools such as leniency programmes to detect and deter hard-core cartel violations. Sanctions imposed against anti-competitive conduct should be sufficient to deter violations; that is, they should be proportionate to the violators' expected gain, the risk of detection and the risk of public harm.

Provide competition authorities with the authority and capacity to advocate reform, and support public awareness of the role and benefits of competition.

Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.

Ensure that regulatory restrictions on competition are limited and proportionate to the public interests they serve.

Periodically review those aspects of economic regulations that restrict entry, access, exit, pricing, output, normal commercial practices, and forms of business organisation to ensure that the benefits of the regulation outweigh the costs, and that alternative arrangements cannot equally meet the objectives of the regulation with less effect on competition.

Promote efficiency and the transition to effective competition where economic regulations continue to be needed because of potential for abuse of market power. In particular: *i)* in appropriate cases such as privatisation and the reform of markets that are in the process of opening up to competition, separate potentially competitive activities from regulated utility networks, and otherwise restructure as needed to promote competition; *ii)* promote non-discriminatory access to essential network facilities to all market participants on a timely and transparent basis; *iii)* promote inter-connection of networks between geographically neighbouring areas; and *iv)* use price regulation mechanisms including price caps and other mechanisms such as price monitoring and disclosure regimes to encourage efficiency gains when price controls are needed.

Promote choice by consumers of the firm with which they deal so that they can switch firms at efficient cost and without undue restrictions.

Periodically review the state ownership stake or financial interest in undertakings with market power and whether they unduly impair competition or impede pro-competitive reforms.

Periodically review the need for universal service obligations, their effectiveness and the need to maintain restrictions on entry and prices.

Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness.

Better integrate the consideration of market openness principles within the design and implementation of regulations and the conduct of RIAs, taking account of the increasing role of domestic regulatory environments in determining market openness in light of advances in trade and investment liberalisation.

Implement, and work with other countries to strengthen international rules and principles to further liberalise trade and investment paying particular attention to transparency, non-discrimination, avoidance of unnecessary trade restrictiveness, harmonisation towards international standards, streamlining of conformity assessment procedures and application of competition principles.

Reduce as a priority matter those regulatory barriers to trade and investment arising from divergent and duplicative or outdated requirements by countries.

Support the development and use of internationally harmonised standards as a basis for domestic regulations and their review and improvement in collaboration with other countries, to assure they continue to achieve their intended policy objectives efficiently and effectively.

Elaborate clearly defined criteria for accepting foreign standards, measures and qualifications as equivalent to domestic ones when they pursue the same regulatory objective. Provide transparent and accessible avenues for foreign producers and service suppliers wishing to demonstrate equivalence.

Expand recognition of other countries' conformity assessment procedures and results through, for example, mutual recognition agreements (MRAs), unilateral recognition of equivalence, promotion of supplier's declaration of conformity or other means. Encourage the development of domestic capacity for accreditation and ensure its ease of access.

Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Apply principles of good regulation when reviewing and adapting policies in areas such as reliability, safety, health, consumer protection, and energy security so that they remain effective, and as efficient as possible within competitive market environments; pursue liberalisation when the benefits of competition and market openness are consistent with the achievement of other key policy objectives; broaden the scope for regulatory quality to include public services. Recognise that as policy objectives multiply, the task of designing and evaluating regulations becomes more challenging.

Assess risk to the public and to public policy in a changing environment as fully and transparently as possible, thereby contributing to a better understanding of the responsibilities of all stakeholders.

Review non-regulatory policies, including subsidies (both direct and indirect) and procurement policy, and adjust them where they unnecessarily distort competition and market openness.

Ensure that programmes designed to ease the potential costs of regulatory reform are focused and transitional, and facilitate, rather than delay, the process of adjustment.

Annex D

APEC-OECD integrated checklist

A – Horizontal criteria concerning regulatory reform

Regulatory reform refers to changes that improve regulatory quality to enhance the economic performance, cost-effectiveness, or legal quality of regulations and related government formalities. Reform can mean revision of a single regulation, the scrapping and rebuilding of an entire regulatory regime and its situations, or improvement of processes for making regulations and managing reform. Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance.

Regulatory, competition and market openness policies are key drivers for a successful and coherent regulatory reform.

A1 To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies?

A2 How strongly do political leaders and senior officials express support for regulatory reform to both the public and officials, including the explicit fostering of competition and open markets? How is this support translated in practice into reform and how have businesspeople, consumers and other interested groups reacted to these actions and to the reforms in concrete terms?

A3 What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?

A4 To what extent do regulation, competition and market openness policies avoid discrimination between like goods, services, or service suppliers in like circumstances, whether foreign or domestic? If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them?

A5 To what extent has regulatory reform, including policies dealing with regulatory quality, competition and market openness, been encouraged and co-ordinated at all levels of government (e.g., Federal, state, local, supranational)?

A6 Are the policies, laws, regulations, practices, procedures and decision making transparent, consistent, comprehensible and accessible to users both inside and outside government, and to domestic as well as foreign parties? And is effectiveness regularly assessed?

A7 Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing?

A8 To what extent are there effective inter-ministerial mechanisms for managing and co-ordinating regulatory reform and integrating competition and market openness considerations into regulatory management systems?

A9 Do the authorities responsible for the quality of regulation and the openness of markets to foreign firms and the competition authorities have adequate human and technical resources, to fulfil their responsibilities in a timely manner?

A10 Are there training and capacity building programmes for rule-makers and regulators to ensure that they are aware of high-quality regulatory, competition and market openness considerations?

A11 Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?

B – Regulatory policy

Regulatory policies are designed to maximise the efficiency, transparency, and accountability of regulations based on an integrated rule-making approach and the application of regulatory tools and institutions.

B1 To what extent are capacities created that ensure consistent and coherent application of principles of quality regulation?

B2 Are the legal basis and the economic and social impacts of drafts of new regulations reviewed? What performance measurements are being envisaged for reviewing the economic and social impacts of new regulations?

B3 Are the legal basis and the economic and social impacts of existing regulations reviewed, and if so, what use is made of performance measurements?

B4 To what extent are rules, regulatory institutions, and the regulatory management process itself transparent, clear and predictable to users both inside and outside the government?

B5 Are there effective public consultation mechanisms and procedures including prior notification open to regulated parties and other stakeholders, non-governmental organisations, the private sector, advisory bodies, accreditation bodies, standards-development organisations and other governments?

B6 To what extent are clear and transparent methodologies and criteria used to analyse the regulatory impact when developing new regulations and reviewing existing regulations?

B7 How are alternatives to regulation assessed?

B8 To what extent have measures been taken to assure compliance with and enforcement of regulations?

C – Competition policy

Competition policy promotes economic growth and efficiency by eliminating or minimising the distorting impact on competition of laws, regulations and administrative policies, practices and procedures; and by preventing and deterring private anti-competitive practices through vigorous enforcement of competition laws.

C1 To what extent has a policy been embraced in the jurisdiction that is directed towards promoting efficiency and eliminating or minimising the material competition-distorting aspects of all existing and future laws, regulations, administrative practices and other institutional measures (collectively "regulations") that have an impact upon markets?

C2 To what extent do the objectives of the competition law and policy include, and only include, promoting and protecting the competitive process and enhancing economic efficiency including consumer surplus?

C3 To what extent does the Competition Authority or another body have *i)* a clear mandate to advocate actively in order to promote competition and efficiency throughout the economy and raise general awareness of the benefits of competition, and *ii)* sufficient resources to carry out any advocacy functions included in its mandate?

C4 To what extent are measures taken to neutralise the advantages accruing to government business activities as a consequence of their public ownership?

C5 To what extent does the agency responsible for the administration and enforcement of the competition law (the "Competition Authority") operate autonomously, and to what extent are its human and financial resources sufficient to enable it to do its job?

C6 To what extent is the role of enforcement decision- makers transparent, especially when there are multiple government bodies involved in decision making, for example, regarding who the decision maker was, factors taken into account by such a decision maker, and their relative weighting?

C7 To what extent is there a transparent policy and practice that addresses the relationship between the Competition Authority and sectoral regulatory authorities?

C8 To what extent does the competition law contain provisions to deter effectively and prevent hard-core cartel conduct, abuses of dominant position or unlawful monopolistic conduct, and contain provisions to address anti-competitive mergers effectively? To what extent does the broader competition policy strive to ensure that this type of conduct is not facilitated by government regulation?

C9 To what extent does the competition law apply broadly to all activities in the economy, including both goods and services, as well as to both public and private activities, except for those excluded?

C10 To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?

C11 To what extent do firms and individuals have access to *i)* the Competition Authority to become apprised of the case against them and to make their views known, and *ii)* to the relevant court(s) or tribunal(s) to appeal decisions of the Competition Authority or seek compensation for damages suffered as a result of conduct contrary to the domestic competition law?

C12 In the absence of a competition law, to what extent is there an effective framework or mechanism for deterring and addressing private anti-competitive conduct?

D – Market openness policies

Market openness policies aim to ensure that a country can reap the benefits of globalisation and international competition by eliminating or minimising the distorting impact that may result from border as well as behind-the-border measures, including measures at different levels of government. These policies influence the range of opportunities open to suppliers of goods and services to compete in a particular national market (e.g., through trade and investment), irrespective of whether these suppliers are domestic or foreign.

D1 To what extent are there mechanisms in regulatory decision making to foster awareness of trade and investment implications?

D2 To what extent does the government promote approaches to regulation and its implementation that are trade-friendly and avoid unnecessary burdens on economic actors?

D3 To what extent are customs and border procedures designed and implemented to provide consistency, predictability, simplicity and transparency so as to avoid unnecessary burdens on the flow of goods? To what extent are migration procedures related to the temporary movement of people to supply services transparent and consistent with the market access offered?

D4 To what extent has the government established effective public consultation mechanisms and procedures (including prior notification, as appropriate) and do such mechanisms allow sufficient access for all interested parties, including foreign stakeholders?

D5 To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?

D6 Do regulatory requirements discriminate against or otherwise impede foreign investment and foreign ownership or foreign supply of services? If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them, to ensure equivalent treatment with domestic investors?

D7 To what extent are harmonised international standards being used as the basis for primary and secondary domestic regulation?

D8 To what extent are measures implemented in other countries accepted as being equivalent to domestic measures?

D9 To what extent are procedures to ensure conformity developed in a transparent manner and with due consideration as to whether they are effective, feasible and implemented in ways that do not create unnecessary barriers to the free flow of goods or provision of services?

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Regulatory Policy and Governance

SUPPORTING ECONOMIC GROWTH AND SERVING THE PUBLIC INTEREST

This report encourages governments to "think big" about the relevance of regulatory policy and assesses the recent efforts of OECD countries to develop and deepen regulatory policy and governance. It provides ideas on developing a robust regulatory environment, a key to returning to a stronger, fairer and more sustainable growth path.

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Chapter 4. The need for stronger regulatory governance

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Further reading

Better Regulation in Europe (2010)

Cutting Red Tape: Why is Administrative Simplification so Complicated? (2010)

Indicators of Regulatory Management Systems (2009)

OECD Reviews of Regulatory Reform: Regulatory Impact Analysis – A Tool for Policy Coherence (2009)

OECD Reviews of Regulatory Reform: Risk and Regulatory Policy – Improving the Governance of Risk (2010)

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