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GOOD GOVERNANCE AND REGULATORY MANAGEMENT

Background note to session 4: Government Capacity to Assure High Quality Regulation

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1. Introduction

In the past 20 years the regulatory reform agenda has undergone profound and fundamental changes. Early notions of "deregulation" have given way to ideas of re-regulation and regulatory quality management. Even the concept of regulatory management is giving way to that of regulatory policies, reflecting the dynamic and pro-active role of government in providing quality regulation. One of the reasons behind these changes is the recognition – based on years of experience with regulatory reform – that the success of economic and social regulations fundamentally depends on governments' capacities to produce, co-ordinate, implement, and review regulations.

In other words, good governance and regulatory management is essential to regulatory reform because they are important catalysts between reform objectives and reform results. Good governance is inherently linked to economic and social reforms. If government capacities to produce, co-ordinate, implement and review regulatory reform are not in place, there is a high risk that economic or social reforms will be inefficient or fail. The quality of the instruments and institutions of regulation are a defining element of effective governance and of regulatory reform capacities.

Following the objectives of this seminar this note will introduce the analytical framework developed by the OECD to review governments' capacities to assure high quality regulation. This framework has been applied in reviews of countries with very different economic structures, history, legal culture and size, and indeed, in countries with very different experiences with regulatory reform.[1] The note will also provide examples on how OECD countries have addressed some of the challenges of establishing a dynamic and efficient regulatory management system, in particular practises used to upgrade the quality of existing regulations. These practises address challenges that appear very similar to issues currently on the Russian regulatory reform agenda, i.e. the challenge of reducing and simplifying permits and licenses.

2. Strategies for Improving Regulatory Quality

Needless to say, improving government capacities as well as regulatory reform are not objectives in themselves. They are tools serving a range of policies. The justifications given for reform programmes usually suggest three core objectives:

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[1] Countries reviewed so far are: The United States, Mexico, Japan, Denmark, the Netherlands, Hungary, South Korea, Spain, Greece, Ireland, Italy, and Czech Republic. Countries currently under review are: The United Kingdom, Canada, Poland and Turkey

- Improving economic performance
- Improving government effectiveness and efficiency, and
- Enhancing democratic values such as government openness, self-reliance, public participation and responsiveness.

The regulatory management system – including the processes and institutions, through which regulations are developed, enforced and adjudicated – should support these objectives in an efficient, transparent and accountable manner.

Experience in OECD countries shows that governments face a set of more or less identical, basic tasks in reforming their regulatory management systems towards these ends. This has led to the setting up by the OECD of a set of steps or strategies, which governments can take to improve their regulatory management policies. This set of strategies has formed the frame for analysis and recommendations in OECD reviews of - until now - 16 countries' policies to improve government capacities to assure high quality regulation. The strategies focus on establishing capacities on three key areas:

- Building a regulatory management system
- Improving the quality of new regulations
- Upgrading the quality of existing regulations

In the previous country reviews the regulatory management systems have been assessed on the basis of these criteria. This does not suggest that there are universal administrative structures for high quality regulatory management. The capacities to produce good rules can take many organisational forms. While the varying political, constitutional, and administrative environments of OECD countries require different models, the basic elements of effective management do not seem to change across countries.

Building a regulatory management system

Effective reform is dependent on the development of systematically organised procedures with explicit and sustained political backing and adequate resources, including adequate staffing and expertise. Experience in OECD countries suggests that an effective regulatory management system have three basic components that are mutually-reinforcing:

- a regulatory policy adopted at the highest political levels;
- explicit and measurable standards for regulatory quality; and
- a regulatory management capacity.

Adoption of regulatory reform policy at the highest political levels in necessary to organise and drive reform efforts throughout the administration. Explicit standards for regulatory quality and principles of regulatory decision-making should define "regulatory quality" by establishing concrete quality standards and decision criteria to determine if government action is required and whether any proposed regulation is acceptable. Processes should be defined so that regulations are based on principles of good decision-making. The 1995 Reference Checklist for Regulatory Decision-making endorsed by OECD ministers in 1995 contains 10 principles for producing efficient, flexible, and transparent regulations (checklist attached as annex 1). Thirdly, capacities for regulatory management and oversight of implementation of regulatory reform policy must be build. Considerable experience across the OECD has shown that central oversight units are most effective if they have the following characteristics:

- independence from regulators (*i.e.* they are not closely tied to specific regulatory missions);

- operation in accordance with a clear regulatory policy, endorsed at the political level;
- horizontal operation (*i.e.* they cut across government);
- expert staffing (*i.e.* they have the information and capacity to exercise independent judgement); and
- links to existing centres of administrative and budgetary authority (centres of government, finance ministries).

Improving the quality of new regulations

A second key strategy toward establishing government capacities to assure high quality regulation is to reform the processes for developing new regulations. This would help to ensure that regulation is used only when necessary and that the continuing stream of needed regulations meet high quality standards.

In the reviews of OECD country practises, four key strategies are evaluated:

- The use of Regulatory Impact Analysis (RIA)
- Systematic public consultation procedures with affected interests
- Using alternatives to regulation
- Improving regulatory co-ordinations

RIA. RIA is a decision tool, a method of (i) systematically and consistently examining selected potential impacts arising from government action and of (ii) communicating the information to decision-makers. Regulation is often made with too little understanding of its consequences, both in terms of direct costs and benefits and indirect effects such as impacts on innovation, competition, and trade. Lack of a full understanding of consequences means that regulations are frequently less effective and more costly than they could be, and that some regulations adopted are unnecessary and even harmful. Improving the assessment of these kinds of impacts before regulation is adopted is widely believed to an effective strategy for improving the quality of government regulation. At the most basic level, some form of impact analysis is needed to ensure that proposed regulations are necessary and will not cause more problems than they solve. The OECD has developed a set of best practises for RIAs (see annex 2.).

Consultation. A comprehensive policy on public consultation will open up the regulatory process to interested groups and provide regulators with access to valuable information on regulatory impacts. A wide range of different approaches has developed, including publication of future plans, informal consultation, circulation for comments, public notice and comment, hearings, advisory bodies, complaint/ombudsman procedures, and new uses of information technologies. These approaches take numerous forms and are increasingly combined in innovative ways to allow earlier, more meaningful, and wider access to decision processes.

Alternatives. Governments still rely almost entirely on regulatory styles and designs – the so-called means oriented "command-and-control" approach – that have been the mainstay of government for centuries. Yet governments are increasingly dissatisfied with the costs, rigidity, and performance of traditional regulatory approaches, and a broad range of innovative alternative approaches are now being introduced into regulatory systems. These approaches sometimes replace regulation but more often complement traditional regulation as part of a package of instruments meeting a specific public policy objective. A systematic consideration of alternatives to regulation will help governments develop more effective, lower-cost policy instruments. Such assessment should occur very early in the decision process. Governments may wish to establish experimental programmes to assist in developing new approaches.

Co-ordination. A key challenge for regulators is integration of multiple policies that affect each other. Explicit co-ordination procedures are needed across the range of regulatory fields to identify and cope with interactive policy areas. Co-ordination can ensure that economic and social objectives are integrated and related policies are treated coherently. An oversight unit with the characteristics mentioned above would facilitate such co-ordination.

Upgrading the quality of existing regulations

One of the most important tasks facing governments today is updating of the accumulated regulations and formalities that have gone unexamined over years or decades. National regulatory systems require periodic maintenance. Periodic and systematic review of existing regulations is needed to ensure that outcomes are assessed, unneeded or inefficient rules are weeded out, and needed rules are adapted to new economic and social conditions.

The country reviews have in particular been looking at two aspects of up-dating the quality of existing regulations:

- Reviewing and updating existing regulations, and
- Reducing red tape and government formalities

The next sections will provide some examples of the practises and experiences with updating regulations and with reducing red tape and government formalities.

3. Some examples and experiences with cutting red tape and reducing government formalities

Reviewing and updating existing regulations

Regulatory rigidities are enormously costly, increasing the risk of policy failure and slowing technical and organisational innovation. Today's pace of change means that outdated and unneeded rules penalise countries increasingly.

For these reasons, the 1997 OECD ministerial *Report on Regulatory Reform* recommends that governments "review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively". A systematic approach helps to ensure consistency in approaches and review criteria, generates momentum and ensures that important areas are not exempted from reform due to lobbying by powerful interests.

Six major strategies of regulatory review have been used in OECD countries:

- *Scrap and build;* (comprehensive review, rebuilding entire regulatory regimes)

- *Generalised reviews;* (policies instructing regulatory bodies to review the entire body of their regulation against general criteria such as need and efficiency)

- *Targeted reviews;* (reviews of targeted policy areas or regulatory regimes)

- *Sunsetting;* (a process in which new laws or subordinate regulation are given automatic expiry dates upon adaptation)

- *Automatic review clauses;* (clauses inserted into individual laws, requiring them to be reviewed within a certain period)

- *Variance mechanisms;* (permitting business to use lower-cost compliance methods than prescribed by the law, while still complying with objective of the regulation)

When evaluations occur, they tend to be *ad hoc* and unstructured. In the absence of standardised approaches, substantial discretion is left with the regulatory agency conducting the review, inconsistencies necessarily result and quality control cannot be exercised at the whole of government level.

An important lesson learned from governments' attempts to review existing regulations is that a clear set of principles is needed to guide review programmes, including particularly competition principles. To have the best effect, standardised evaluation techniques and decision criteria should complement these principles.

Reducing red tape and government formalities

One of the most common complaints from businesses and citizens in OECD countries is the number and complexity of government formalities and paperwork. Government formalities, so-called "red tape," are important tools used by governments to carry out public policies. However, if poorly designed or applied, or outdated, they can impede innovation and entry and create unnecessary barriers to trade, investment, and economic efficiency. Often, they act in practice as anti-competitive measures giving 'insiders' protection in some markets. Red tape is particularly burdensome to smaller businesses and may act as substantial disincentives to new business start-ups.

The costs of administrative burdens are extremely large, whether considered in terms of time or money. The 1997 OECD Report on Regulatory Reform found that "Reducing red tape and government formalities can produce substantial payoffs in government efficiency and economic cost-savings." It concluded that "Reducing the operating and dynamic costs of *ex ante* permissions and licences is a high priority for governments that wish to increase business start-ups and improve competitive pressures throughout the economy." The specific strategies employed largely belong to one of three categories. These are informational approaches, process re-engineering and technological solutions.

Informational approaches. The most common informational approach is the "one stop shop" for obtaining licence and permit information. These are now widespread, and are based on the notion of reducing business search costs by providing all information on licences and permits at a single point. The information usually includes the permits required by a given business, application forms and requirements and contact details. As experience with the one-stop-shop" has accumulated, and technology has improved, the services provided have tended to expand. Available evidence clearly suggest substantial advantages of one-stop shops. However, important challenges are emerging in relation to co-ordination between regulatory authorities, the legal status of one-stop shops, the organisational consequences of using one-stop shops, and – on a more general tack – the organisational and co-ordination challenges related to the introduction of e-government.

A closely related "information based" approach to reducing administrative burdens is to make laws and regulations more widely available and more "user friendly", through means such as enhanced search functions.

Also in the category of information based approaches are attempts to count formalities and measure the burdens involved. Clearly, governments must have a sound understanding of the size and nature of the problem before they are able to undertake a strategically focussed effort to address it. Often the process of counting and collecting the vast number of licenses and permits may in itself lead to some deregulation and simplification, simply because bureaucracies detect practises and permits, that they do not want to expose to the broad public.

Process re-engineering. Process re-engineering approaches are based on review of the transactions required by government formalities with a view to optimising them, including reducing their number and reducing the burden of each through redesign, elimination of steps and application of technology, as appropriate. The most common tool in this regard is licence and permit reduction programs. The *ex ante* licensing or permitting requirement is one of the more damaging forms of regulation, as it necessarily increases investment delays and uncertainties and has disproportionate effects on SME start-up, while being very costly for public administrations to apply. In many countries that have historically used *ex ante* licensing very widely, policy is now in favour of a move toward *ex post* checking.

Technological solutions. Finally, an important mechanism for reducing administrative burdens in recent years has been the development of systems for the electronic interchange of data as an alternative to traditional paperwork transactions. Most evidently, this includes electronic one-stop shops. In addition to this, to simplify administrative requirements imposed on business and citizens, governments increasingly use time-limits for decision-making and use of the silence is consent (or denial) rules.

4. Concluding remarks

This note has outlined OECD's conceptual framework for reviews of regulatory management capacities, taking a particular look at practices used to update the quality of existing legislation. This framework and the identification of "best practices" is based on experiences collected in 16 OECD countries with very different economic structures, and legal and cultural environments.

There is no presumption that the described framework and practices are valid and applicable to all aspects of the Russian regulatory reform agenda. Nevertheless there are significant similarities between many of the regulatory management challenges experienced by OECD countries and the issues currently on the Russian regulatory reform agenda (such as reducing and simplifying permits and licenses, improving enforcement mechanisms and clarifying the regulatory authorities between the federal and regional level). This suggests that practices collected among OECD countries are worth consideration in the context of regulatory management in Russia.

Annex 1

The OECD reference checklist for regulatory decision-making

1.   Is the problem correctly defined?

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

2.   Is government action justified?

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

3.   Is regulation the best form of government action?

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

4.   Is there a legal basis for regulation?

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

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

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

6.   Do the benefits of regulation justify the costs?

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

7.   Is the distribution of effects across society transparent?

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

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

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

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

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

10.   How will compliance be achieved?

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

Annex 2

Getting Maximum Benefit from RIA: Best Practices

1.   **Maximise political commitment to RIA.** Reform principles and the use of RIA should be endorsed at the highest levels of government. RIA should be supported by clear ministerial accountability for compliance.

2.   **Allocate responsibilities for RIA programme elements carefully.** Locating responsibility for RIA with regulators improves "ownership" and integration into decision-making. An oversight body is needed to monitor the RIA process and ensure consistency, credibility and quality. It needs adequate authority and skills to perform this function.

3.   **Train the regulators.** Ensure that formal, properly designed programmes exist to give regulators the skills required to do high quality RIA.

4.   **Use a consistent but flexible analytical method.** The benefit/cost principle should be adopted for all regulations, but analytical methods can vary as long as RIA identifies and weighs all significant positive and negative effects and integrates qualitative and quantitative analyses. Mandatory guidelines should be issued to maximise consistency.

5.   **Develop and implement data collection strategies.** Data quality is essential to useful analysis. An explicit policy should clarify quality standards for acceptable data and suggest strategies for collecting high quality data at minimum cost within time constraints.

6.   **Target RIA efforts.** Resources should be applied to those regulations where impacts are most significant and where the prospects are best for altering regulatory outcomes. RIA should be applied to all significant policy proposals, whether implemented by law, lower level rules or Ministerial actions

7.   **Integrate RIA with the policy-making process, beginning as early as possible.** Regulators should see RIA insights as integral to policy decisions, rather than as an "add-on" requirement for external consumption.

8.   **Communicate the results.** Policy makers are rarely analysts. Results of RIA must be communicated clearly with concrete implications and options explicitly identified. The use of a common format aids effective communication.

9.   **Involve the public extensively.** Interest groups should be consulted widely and in a timely fashion. This is likely to mean a consultation process with a number of steps.

10.   **Apply RIA to existing as well as new regulation**. RIA disciplines should also be applied to reviews of existing regulation.