

GENERAL DISTRIBUTION

OCDE/GD(94)59

**IMPROVING THE QUALITY OF LAWS AND REGULATIONS:
ECONOMIC, LEGAL AND MANAGERIAL TECHNIQUES**

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris 1994

COMPLETE DOCUMENT AVAILABLE ON OLIS IN ITS ORIGINAL FORMAT

PREFACE

SIGMA (Support for Improvement in Governance and Management in Central and Eastern Europe) is a joint initiative of the OECD/CCET and EC/PHARE, financed mainly by EC/PHARE. In 1993 the Programme's participants were Bulgaria, Czech Republic, Hungary, Poland, Romania and the Slovak Republic. From May 1994 the Programme expanded to also include Albania, Estonia, Latvia, Lithuania and Slovenia.

SIGMA's mission is to support the development of efficient and effective public institutions which can sustain market economies, provide a base for democratic pluralist systems of governance and implement public policies. Improving the management of policy-making is one of the Programme's activity areas. Work in this area includes examining how the regulatory process can be improved through procedural and institutional change in the government and parliament to produce "better" quality legislation and regulation.

In June 1993, a SIGMA workshop on *Improving the Quality of New Laws and Regulations* was held at the Joint Vienna Institute in Austria. Practitioners from the 1993 SIGMA countries, six OECD Member countries and the OECD Secretariat jointly examined the current state of legislative and regulatory management in the SIGMA countries. Using the reform experiences of OECD Member countries as a point of departure, the workshop participants explored some economic, legal and management techniques for improving legislative and regulatory quality that can be implemented in the short-term, at low cost and without radical change to the public sector.

This June 1993 workshop built on topics discussed at the November 1991 "Challenges in Regulatory Reform" meeting that the OECD's Public Management Service (PUMA) organised for OECD Member countries and Central and Eastern European countries.

The chapters in this document were adapted from papers prepared for the June 1993 workshop by the participating practitioners from OECD Member countries and the OECD Secretariat. The contributors are noted in the table of contents. Each chapter presents "quality techniques" for improving the quality of laws and regulations. These techniques provide a menu of ideas that may be adapted on a case-by-case basis to suit specific reform objectives.

The annex lists OECD related publications, including Occasional Papers on Public Management that cover topics related to improving the quality of laws and regulation. These papers provide more extensive information about some of the "quality techniques" presented in this document.

This document is also available in French, under the title, "L'Amélioration de la Qualité des Lois et Réglementations: Techniques Economiques, Juridiques et de Gestion".

Any views expressed do not represent official views of the EC Commission, OECD Member countries, or the Central and Eastern European Countries participating in the Programme.

TABLE OF CONTENTS

<i>Chapter One</i>	
INTRODUCTION: IMPROVING THE QUALITY OF LAWS AND REGULATIONS	7
<i>Contributor:</i>	
Scott Jacobs, Public Management Service, OECD	
<i>Chapter Two</i>	
MANAGING REGULATORY SYSTEMS	17
<i>Contributor:</i>	
Scott Jacobs, Public Management Service, OECD	
<i>Chapter Three</i>	
ENSURING PUBLICATION CONSULTATION AND PARTICIPATION	25
<i>Contributors:</i>	
Jon Bing, Norwegian Research Center for Computers and Law, University of Oslo, Norway	
Maria Castello-Branco, Secretariat for Administrative Modernisation, Portugal	
Scott Jacobs, Public Management Service, OECD	
Mark Schoenberg, Regulatory Information Service Center, United States	
<i>Chapter Four</i>	
ENSURING LEGAL AND TECHNICAL QUALITY	33
<i>Contributors:</i>	
Alain Ménéménis, Conseil d'État, France	
Jan Van Kreveld, Ministry of Justice, The Netherlands	
<i>Chapter Five</i>	
ASSESSING COSTS AND ECONOMIC EFFECTS	39
<i>Contributor:</i>	
John Morrall, Office of Management and Budget, United States	
<i>Chapter Six</i>	
ASSESSING COMPLIANCE AND IMPLEMENTATION REQUIREMENTS	43
<i>Contributor:</i>	
Eric Milligan, The Regulatory Consulting Group, Canada	
<i>Chapter Seven</i>	
COMMUNICATING AND CODIFYING LAWS	51
<i>Contributors:</i>	
Jon Bing, Norwegian Research Center for Computers and Law, University of Oslo, Norway	
Mark Schoenberg, Regulatory Information Service Center, United States	
<i>Annex</i>	
RELATED PUMA PUBLICATIONS	55
List of PUMA Publications and Occasional Papers on Regulatory Management and Reform	

Chapter 1

INTRODUCTION: IMPROVING THE QUALITY OF LAWS AND REGULATIONS¹

Improving Regulatory Quality in the SIGMA Countries

1. Even in a stable governing environment, fashioning sound laws and regulations is a challenging task. Some OECD countries have been trying for fifteen years to improve their legislative and regulatory management practices; none of them is fully satisfied with its performance.
2. In the situations facing many SIGMA countries in 1994, the task is even more daunting, yet the need for sound legislative and regulatory management practices is no less pressing. Overwhelming pressures to create new laws and regulations have arisen from the speed and momentum of the transformation process aimed at establishing market economies and democratic rule of law. Both parliaments and governments were, early in the transition process, faced with a flood of legal and regulatory decisions of long-lasting and profound import for the shape, direction and effectiveness of the new governments, and for the success of the transition itself. It is important that the transition from old to new legal systems proceed smoothly so as to avoid creating legal gaps and uncertainties in the interim. While the pace of legislative activity continues to be vigorous, the focus of reform today includes the construction of more fully-developed regulatory systems, in which such processes as the making of subordinate rules (such as ministerial decrees), implementation, compliance strategies, and public consultation are receiving more attention.
3. The quality of the laws and regulations, and indeed the general effectiveness of the new regulatory systems, is of immediate concern for both economic and democratic development. Regulations that are overly burdensome, complex, or impractical may worsen rather than improve public welfare by slowing economic growth, reducing public cooperation and increasing administrative costs. Poorly-conceived rules can have unexpected and disastrous effects on competitiveness, investment, or job creation.
4. Many officials in SIGMA countries, for example, have observed that there is insufficient planning and management for developing, approving, enacting and implementing laws. Governments are often stretched to their limits simply by producing the text and political consensus for laws and by responding to amendments made by parliaments. Policy officials face a series of day-to-day crises that leave little time for evaluation and coordination of draft laws. These officials are caught between demands from their superiors and parliament for better information, and line ministries with little capacity to generate information.
5. Members of Parliament, despite their key role, generally have even less information than governments. The parliaments often substantially revise governmental legislative proposals, but have little time or capacity to assess the impact of their changes, or their consistency with other changes or laws.
6. Implementation and follow-up of law-making has also been identified as a key weakness. Laws, once completed, may be given over to ministries without the resources and administrative capacities to carry them out. Members of the public may not understand the laws and regulations, and even if they do, may be unable to comply. Appeals processes and judicial systems may not be prepared

¹ This chapter was prepared for SIGMA by Scott Jacobs, Public Management Service, OECD.

to deal with the legal and regulatory burdens of the new legal system. Given these difficulties, governments will not find it easy to translate new laws and rules into reality.

7. It is not surprising that in such conditions, problems such as complexity, inconsistency, lack of coordination, lack of information on the effects of new laws, weak enforcement and implementation mechanisms, and lack of public understanding appear to be wide-spread. Such problems frustrate government officials and members of parliament, harm economic growth and investment, retard private sector development, and undermine the credibility of the new legal system and the governments themselves.

What Role for Regulation?

8. Governments throughout the world engage in three main activities: they tax, they spend, and they regulate. Regulation is the least understood of these policy instruments, but in many countries it has a broader and more far-reaching impact on economic growth, on the development of the rule of law, and on government effectiveness than do tax and fiscal policies.

9. Regulation must therefore be approached cautiously, and with an understanding of its considerable strengths and equally considerable limitations. The ease with which new laws and rules can be written, and the assumption that these new laws and rules solve problems simply by existing, has led, in most OECD countries, to excessive regulation, to badly-designed regulation, and to regulations that are often ignored.

10. Improving how governments use their regulatory powers is in many respects a long-term and far-reaching task involving ministers, parliaments, administrators, courts, and citizens. But this view exaggerates the difficulties: in fact, substantial improvement in regulatory quality can be achieved quickly and at low cost. Such short-term reforms attempt to focus government attention on three important questions: *what* to regulate, *when* to regulate, and *how* to regulate.

11. It is the purpose of this paper to show how various economic, legal, and managerial techniques used in OECD countries can provide ministers, legislators, and regulators with practical guidance on these three fundamental questions, and by doing so improve regulatory quality. The set of techniques discussed here is not comprehensive, but, rather, is intended to provide a useful menu of ideas that may be adapted on a case-by-case basis to suit particular needs in individual countries.

What is Regulation?

12. Before going further, it will be useful to clarify what is meant here by "regulation" and "regulatory system" since there is no accepted international definition of either term. Governments usually define "regulation" as a precise set of legal instruments developed through specific constitutional/legal authorities, but this approach is not feasible when multiple countries are included in the analysis.

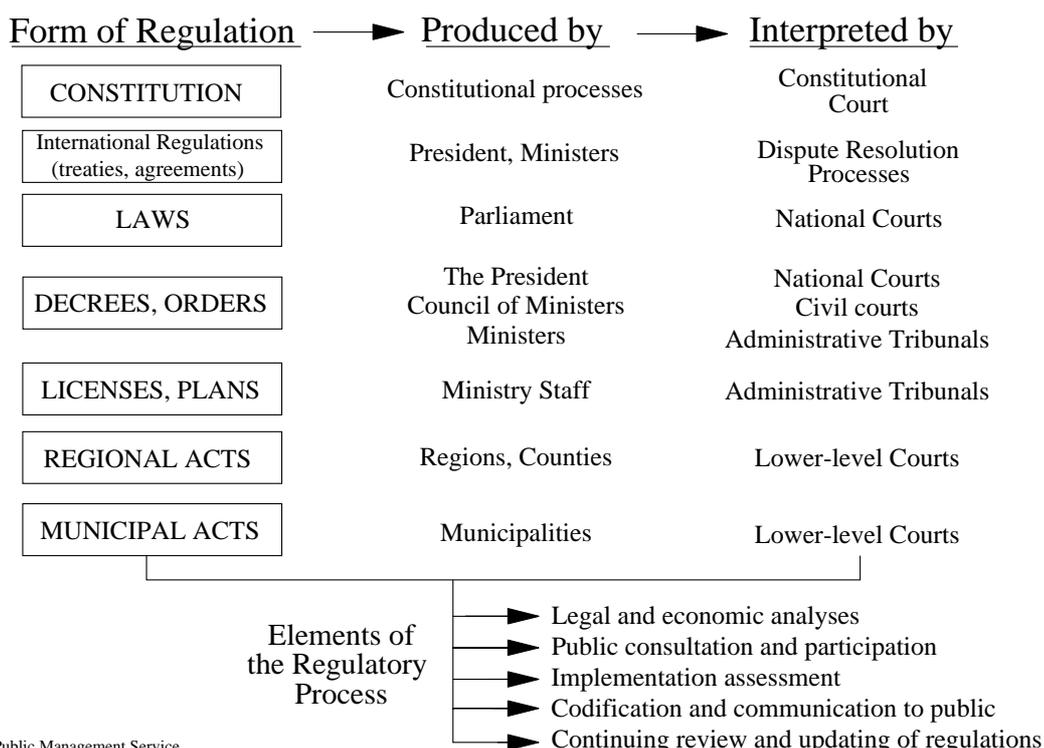
13. A better approach is to define "regulation" as a particular kind of incentive mechanism, namely, a set of incentives established either by the legislature, Government, or public administration that mandates or prohibits actions of citizens and enterprises (which should be broadly interpreted to mean both state-owned and private enterprises). Regulations are supported by the explicit threat of punishment for noncompliance. The notion of regulation as "requirement" also suggests that regulation creates a specific kind of relationship between a government and its citizens.

14. **Regulation in this paper, and generally in the PUMA programme on regulatory management and reform, includes the full range of legal instruments and decisions -- constitutions, parliamentary laws, subordinate legislation, decrees, orders, norms, licenses, plans, codes, and often even "grey" regulations such as guidance and instructions -- through which governments establish conditions on the behaviour of citizens and enterprises.** Despite the distinction between "laws" and "regulations" in the title of this paper, it should be noted that "laws" are a subset, although an important subset, of the set of regulations applied in a country. Members of parliament are, in this sense, regulators.

15. "Regulations" are products of the broad "regulatory system", which includes the processes and institutions through which regulations are developed, enforced, and adjudicated (see Figure 1 below). The regulatory system also includes processes of public consultation, communication, and updating. National regulatory systems encompass not only national rules, but also rules developed by sub-national levels of government such as municipalities, as well as rules developed through international processes such as those in the GATT and the European Community.

FIGURE 1

A Simplified Regulatory System



Source: OECD Public Management Service

The Three Dimensions of Regulation

16. A regulation, any regulation, is a complex policy instrument. Not only does it directly affect the day-to-day activities of citizens and enterprises involved in the specific activity being regulated, its wider effects extend to the broad legal and economic system. In constructing sound regulatory systems, national policy officials must consider the impact of regulation in three dimensions: its effectiveness in carrying out individual policies, its impact on economic activity, and its place within the framework of the rule of law. These dimensions of regulatory impact are not necessarily mutually supportive; governments often must balance one with the other, a process that depends on a careful assessment of all significant consequences of a rule.

- i) **Regulation as a Policy Tool.** All regulations carry out specific government policies that can be as simple as setting quality standards for beer or as complex as establishing a pricing mechanism for monopoly utilities. Specialised ministries and administrators almost always focus on this one regulatory function: how can the regulation accomplish the specific mission at hand?²

This regulatory role is extremely important since it provides the immediate rationale for the existence of a regulation. It is also important to recognise that using regulation as a policy response to identified problems in effect **places the burden of proof for a new regulation on the government**: it must show that a problem exists and that a regulation will be effective in addressing it. Unless governments can meet this burden of proof, no regulation is assumed to be better than any regulation. Therefore, the use of regulation as a policy tool inherently establishes constraints on how responsible governments use regulatory powers.

Yet viewing regulation only as a tool for carrying out a specific policy is extremely limited, because it excludes all impacts of a regulation except its effectiveness in carrying out that policy. Regulations often have other effects that are just as, or more, important. These effects are captured in the remaining two regulatory roles.

- ii) **Regulation in the Economy.** All regulations, regardless of their intended objectives, have direct and indirect effects on economic activity, either by imposing direct compliance costs, by providing some economic actors with advantages, or by limiting competition in the market. These effects are often complex and not well understood.

Regulatory compliance costs are the most obvious impact. Each regulation spends some fraction of the national wealth to purchase a benefit for society. But, unlike other government programmes that depend on revenues raised through taxes, regulation spends resources by imposing costs directly on private businesses and citizens. Environmental regulation, for example, may require plant owners to buy new equipment to clean waste water. Food quality standards increase costs to consumers. The true cost of regulation is difficult to assess in most countries; recent estimates in the United States placed compliance costs at up to \$500 billion per year, or about 10 per cent of GDP.

² Policies served by regulation tend to fall into two general categories: economic and social policies. Market economies rest on a framework of rules defining property rights and the conditions of competition. Regulations that are intended to improve the efficiency of markets in delivering goods and services fall into the category of **economic regulation**. Regulations intended to protect social values and rights, such as quality of food, environmental protection, and minority rights are often called **social regulation**. Most OECD countries are reducing direct regulation of economic activities, and increasing regulation of social conditions.

Direct costs of this magnitude are clearly significant for economic growth and job creation, but other kinds of indirect costs may be as or more important. A number of studies have suggested that some kinds of regulations reduce productivity and innovation, and slow the speed of structural adjustment to world markets. Small businesses, often the largest generators of new jobs, are likely to be especially harmed. Many regulations directly or indirectly reduce competition, and increase hidden inefficiencies in the economy. In the longer-term, such negative impacts may affect competitiveness.

Many regulatory costs are justified by the benefits of regulation. Reducing fatalities from car accidents is, in most countries, well worth the extra costs of making safer cars. But in many cases, countries are finding that regulatory costs are poorly spent, that is, yielding little in public benefits or imposing indirect costs that far outweigh any conceivable benefit. Although it may seem that each individual rule has little impact, hundreds or thousands of unnecessary and badly-designed rules can waste substantial national resources and reduce the quality of life for everyone. For that reason, many governments are designing processes to assess and weigh the direct costs of regulation in relation to their benefits.

Regulatory effects on competition are often more difficult to see, but may be more important. While establishing monopolies is the most obvious, all regulations grant market advantages in more subtle ways. For example, rules that ban certain chemicals benefit firms that use alternatives. Rules that require more modern accounting practices benefit those firms that have already purchased computers.

In summary, regulations can have both beneficial and damaging effects on economic activities. Strategies for identifying and controlling those effects are receiving increased attention in many OECD countries.

- iii) ***Regulation and the Rule of Law.*** Regulatory powers lie at the center of a system of law. Rules and laws are, in fact, nothing more than operational statements of how government power is to be exercised. A key concept here is that regulations, by defining the use of power, simultaneously limit that power. Hence, regulations should not be viewed as tools by which government directs citizens, but **as compacts between government and citizens in which the behaviour of both is clearly understood and agreed upon for the benefit of society.**

As this concept suggests, the foundation of a rule of law is built of respect by both government and citizens for the legitimacy of regulation, of openness and clarity in the regulatory system, and of processes by which the contents of laws and rules can be accountable to citizens. Communication and consultation with the public is essential. In short, regulatory systems must reflect democratic values. It is in recognition of the key role of regulation in building a rule of law that there is currently much concern in the SIGMA countries about changing the style of regulation from "authoritarian" to "cooperative" as a way of establishing new relationships between citizens and governments.

What is Regulatory Quality?

17. Everyone can agree on the need for "good" regulation. The problem comes in setting quality standards to define what "good" regulation is. There is no international consensus on quality standards for regulation, although several OECD countries have set explicit standards for the quality of **individual regulations**. These standards include:

- User standards such as clarity, simplicity, and accessibility for private citizens and businesses;
- Design standards such as flexibility and consistency with other rules and international standards;
- Legal standards such as structure, orderliness, clear drafting, terminology, and the existence of clear legal authority for action;
- Effectiveness standards such as relevance to clearly-defined problems and to real-world conditions;
- Economic and analytical standards such as benefit-cost and cost-effectiveness tests, or measures of impacts on small business, competitiveness and trade;
- Implementation standards such as practicality, feasibility, enforceability, public acceptance, and availability of needed government resources.

18. More recently, quality standards for regulatory systems, rather than for individual regulations, have been discussed in some OECD countries. **System standards** include:

- Coherence, consistency, and balance among competing policies;
- Stability and predictability of regulatory requirements;
- Ease of management and oversight, and responsiveness to political direction;
- Transparency and openness to the political level and to the public;
- Consistency, fairness and due process in implementation;
- Adaptation to changing conditions.

Techniques for improving regulatory quality

19. How can governments design their regulatory systems to "build in" desired regulatory qualities? OECD countries have made substantial improvements using economic, legal, and managerial techniques, some of which may be applicable in SIGMA countries. This paper presents several of these "quality techniques," focussing primarily on those that can be implemented in the short-term at low cost and without radical change to the public sector. The quality techniques described in each chapter have been summarised and included in Table 1, "Techniques for Improving Regulatory Quality". This list of techniques is intended to provide a menu of ideas that may be adapted on a case-by-case basis to suit particular needs.

20. ***Managing Regulatory Systems.*** Chapter Two deals with the creation of regulatory management frameworks to discipline and control the development of regulations. Regulatory management at its best gives governments the capacity to make increasingly better decisions on when and how to use legal and regulatory powers. It is routine, systematic, government-wide and responsive to political direction. Strategies for regulatory management include establishing a central oversight body, a checklist of quality standards, and a system to track, register and plan for new regulations.

21. ***Ensuring Public Consultation and Participation.*** Chapter Three looks at how private businesses and the public can directly participate in the development of laws and regulations, and how public participation can be used to improve regulatory quality. Public consultation and participation is also an expression of democratic values of government openness and responsiveness to citizens. Several approaches for fostering public involvement are suggested and the Portuguese Commission of Enterprise/Administration Relationships (CEA) is presented as one model of public participation and consultation. This high-level,

joint public/private sector commission brings together officials from ministries responsible for regulating the private sector and experts from private enterprise.

22. ***Ensuring Legal and Technical Quality.*** Chapter Four examines procedures in central government -- relying on French and Dutch experiences -- for bringing order and legal clarity to the development of new laws and regulations. Because governments are often tempted to act without a sound basis in law, clear and rigorous procedures are needed to preserve the rule of law. Chapter Four also presents some principles of regulatory decision-making and design necessary for producing regulation of high legal and technical quality. Poorly drafted laws can be incomprehensible, inconsistent, ineffective and unenforceable.

23. ***Assessing Costs and Economic Effects.*** Chapter Five discusses how the quality of laws and regulations affects economic viability and well-being. For countries seeking to transform themselves from command to market-oriented economies, economic analysis is a valuable tool. Economic analysis, in considering the full range of costs and other economic impacts, seeks to determine which government actions provide the greatest net benefits for the country as a whole. This "social welfare" approach is to be distinguished from distributive analysis, which is concerned only with the interests of subgroups in society (e.g., farmers, unions, government workers). Suggestions for starting a system of economic analysis include establishing an independent and objective economic analysis unit that provides analyses to legislative and regulatory policy-makers before final decisions are taken.

24. ***Assessing Compliance and Implementation Requirements.*** Chapter Six provides a framework for assessing the implementation and compliance requirements of new regulations. Effective implementation requires attention to the technical quality of the regulation itself (clarity, legality, etc.), the capacity and willingness of government and adjudicative institutions to deliver the regulatory programme, and the capacity and willingness of regulated entities to comply. The proper drafting of regulations is critical for implementability, enforceability and compliance. Strategies for assessing implementation and compliance requirements include improving information, using an implementation assessment checklist, developing compliance strategies, requiring parliamentary consideration and approval of resources for implementation, and training for decision-makers and political staff. Placing a priority on strengthening common elements of regulatory systems, such as adjudicative bodies, can also improve implementation and compliance.

25. ***Communicating and Codifying Laws and Regulations.*** Chapter Seven explores an aspect of regulatory quality that is often neglected: effective communication with citizens on the contents of new laws and regulations. The link between administration and citizens is perhaps the most critical one in the entire regulatory development process, since it is the actions of the public that determine whether the regulation will have the desired effect. The rule of law also rests on the assumption that citizens know and understand their obligations under the law. After legal requirements are issued, governments must ensure that they are universally available to citizens. This chapter discusses how adequate dissemination of the law can be accomplished through national gazettes, periodic codifications, public information offices and intra-governmental work groups.

Table 1. Checklist of Regulatory Quality Techniques

Managing Regulatory Systems

- √ Establish a system for tracking and registering existing laws and regulations, and for planning future laws and regulations
- √ Establish responsibility for improvement at the ministerial or prime minister's level
- √ Establish a central oversight body
- √ Establish a high-level advisory commission
- √ Develop a standardised "checklist" for regulatory decision-making in the ministries
- √ Adopt an administrative procedure law
- √ Establish a system of regulatory analysis
- √ Establish mechanisms for public consultation and participation
- √ Conduct systematic reviews of existing regulations
- √ Promote cultural change within bureaucracies

Ensuring Public Consultation and Participation

- √ Publish an agenda listing the regulations being developed
- √ Establish general requirements for public consultation
- √ Establish notice and comment procedures
- √ Establish public hearing procedures
- √ Facilitate broad consultation through support of disadvantaged interests
- √ Require that decision-makers be informed of consultation results
- √ Set up advisory groups

Ensuring Legal and Technical Quality

- √ Clarify the authority to initiate laws and regulations
- √ Establish standards of legality
- √ Establish standards for quality of drafting
- √ Evaluate the substantive content of regulations
- √ Require implementation feasibility studies
- √ Establish regulatory process standards
- √ Establish centralised drafting, coordination, or review of legal texts

Assessing Costs and Economic Effects

- √ Require impact analysis of the costs and benefits of proposed laws and regulations
- √ Establish a central economic analysis unit
- √ Establish an economic analysis capability in regulatory programmes
- √ Integrate economic analysis into the legislative and regulatory processes

Table 1. Checklist of Regulatory Quality Techniques (continued)

Assessing Compliance and Implementation Requirements

- √ Include implementability and enforceability criteria in drafting directives for legal instruments
- √ Develop systematic compliance strategies
- √ Use an implementation assessment checklist
- √ Require explicit parliamentary consideration and approval of resources required for implementation
- √ Apply project planning and management techniques
- √ Educate and involve the decision-makers
- √ Organise training sessions for ministry staff on implementation assessment
- √ Strengthen common elements of regulatory system
- √ Ease implementation problems by slowing the pace of new regulation

Communicating and Codifying Laws

- √ Require that all legal requirements be comprehensible
- √ Require that amendments to existing laws and rules specify the changes that are being made
- √ Establish editorial review boards
- √ Publish national gazettes
- √ Prepare periodic codifications of laws and regulations
- √ Establish public information offices
- √ Establish intra-governmental workgroups

Chapter Two

MANAGING REGULATORY SYSTEMS³

SYNOPSIS

Many OECD countries, addressing various problems that have arisen from the use of regulation, are developing systematic management frameworks to discipline and control the development of new laws and regulations. Like other central management functions, these management strategies are systematic, centralised, and comprehensive. That is, they apply to laws and regulations produced across the government, including parliament. Their purpose is to allow governments to make increasingly better decisions on when and how to use legal and regulatory powers. Ten basic techniques for establishing a system of regulatory management are outlined here, several of which are elaborated on in succeeding chapters of this paper.

Why Regulatory Management?

26. Regulation by all levels of government -- from the parliament down to the bureaucrat responsible for business licenses -- is an indispensable instrument of public policy in OECD Member Countries.⁴ More significantly, regulatory processes and decisions form the backbone of the democratic "rule of law", and shape the environment within which economic activity can prosper. Yet regulation is often over-used and badly used.

27. In the 1980s, it became obvious in most OECD countries that national regulatory systems were not functioning as well as they could. Serious problems were appearing:

- regulations were too **complex** and too **numerous**, leading to complaints that citizens could not understand the law and administrators could not enforce them;
- **regulatory costs** imposed on businesses were quickly increasing, reducing economic growth, job creation, and competitiveness;
- regulations were too **inflexible** and **rigid** for changing economic and social conditions;
- **inconsistencies** among rules led to administrative confusion and legal disputes;
- regulatory decisions were seen as **remote and hidden**, rather than accountable and open;
- government **intrusion into private life** was reaching levels that were, to many observers, inconsistent with democratic values.

³ This chapter was prepared for SIGMA by Scott Jacobs, Public Management Service, OECD.

⁴ As defined in Chapter 1 (paragraph 14), "regulation" includes the full range of legal instruments and decisions -- constitutions, parliamentary laws, decrees, orders, norms, licenses, plans, codes, and often even "grey" regulations such as guidance and instructions -- through which governments establish conditions on the behaviour of citizens and enterprises. "Regulations" are products of the broad "regulatory system," which includes the processes and institutions through which regulations are developed, implemented, enforced, adjudicated and revised.

What is Regulatory Management?

28. In response to these problems, most OECD countries in the 1980s initiated administrative reforms to enable them to regulate more carefully and effectively. These reforms have today developed into **systematic management frameworks to discipline and control the development of new laws and regulations**.

29. **Regulatory management** in its most vital sense refers to the capacity of governments to make increasingly better decisions on when and how to use legal and regulatory powers. It should be seen as a core capacity of a flexible and disciplined government. Regulatory management has many of the same characteristics as other central management functions of government, such as budgeting. It is:

- **routine** and **systematic**, that is, carried out as a normal part of the process of developing new laws and regulation; it is not an "extraordinary" action needed only when problems are found;
- **government-wide**, applying to all ministries and government bodies that develop laws and regulations;
- **overseen** by a body with authority to identify non-compliance and enforce regulatory policies;
- part of the **administrative control system** by which governments ensure that public powers are used within legal and political limits;
- **responsive** to political direction to ensure that politicians are able to establish the objectives of the management process.

Objectives of Regulatory Management

30. The core problems of regulation addressed by regulatory management can be grouped into three areas: **excessive quantity and cost, inadequate quality and coherence, and legitimacy**.

31. **Excessive Quantity and Cost.** One important goal of regulatory management in OECD countries is to establish comprehensive monitoring of the quantity and costs of new laws and rules so that politicians may be warned when the limits have been reached. Too much regulation, even good regulation, can have serious and adverse economic and social consequences.

32. Government administrations and the private sector may be unable to understand and cope with the flood of new rules. In this case, imprudent regulatory expansion will weaken the rule of law itself by leading to over-regulated societies in which compliance with the law is impossible. When citizens and governments are forced to pick and choose which rules to obey and to enforce, respect for the law is diminished.

33. Controlling regulatory costs is a top priority. The cost of regulation is rising as or more quickly than its quantity. Administrative costs to governments are an increasing problem as budget constraints become tighter. The compliance costs borne directly by citizens and businesses are far larger, however, than government costs. These hidden costs of regulation can be enormous. In the United States, as noted in Chapter One, aggregate costs of federal regulation were calculated at up to \$500 billion in 1992, or about 10 percent of GDP and one-fourth of on-budget spending.

34. **Inadequate Quality and Coherence.** Regulatory management has also focused on improving the "quality" of laws and rules. As noted in Chapter One, several OECD governments have set explicit quality standards for individual regulations and for regulatory systems.

35. The search for efficient and lower-cost policy instruments has led to the use of new kinds of regulation. Countries have become disillusioned with the effectiveness and cost of traditional styles of "command-and-control" regulation. In the environmental area especially, many OECD countries are using charges or taxes, marketable permits, and deposit-refund systems to reduce costs, increase flexibility and innovation, and raise revenues. Information disclosure, such as consumer labelling and education, is replacing direct regulation of product standards. This last strategy underlies the "mutual recognition" approach adopted by the European Community to carry out its Single Market Programme.

36. Some countries have made significant gains in improving regulatory quality. The United States since 1981 has applied a rigorous benefit-cost test to regulatory proposals, and believes that costs of new regulations have been reduced by billions of dollars as a result. The Single Market Programme of the European Community is expected to produce large gains in economic growth by eliminating regulatory inconsistencies that block trade and competition. Several countries have swept away outdated laws and re-ordered legal systems to improve clarity and accessibility. Turkey, for example, completed a codification programme that eliminated 1,600 laws and consolidated 12,000 laws into 700. Other countries, such as the United Kingdom and Germany, have noted that simply asking the right questions, through the use of "checklists" or lists of principles, can help sensitise regulators to a broader set of issues, such as costs, and result in more balanced regulations.

37. These results suggest that good regulatory practices and techniques can significantly reduce burdens and improve effectiveness.

38. **Legitimacy.** Regulatory processes and requirements have become key determinants of the scope and form of government authority. In some countries, there is a sense that control and decision-making within centralised regulatory bureaucracies are reaching their limits in view of the democratic values of these societies. This perception is obviously closely linked to the rising volume of regulation discussed above.

39. Some of the reforms intended to strengthen legitimacy, such as public participation and consultation or information disclosure, affect regulatory processes. Some, such as devolution to local administrations, affect the distribution of regulatory authority. Others, such as reporting to ministers and parliamentary oversight and review, are intended to establish direct links to politically accountable officials. "There is widespread concern, well-merited in our view, that Parliament has lost control of the regulatory process," a parliamentary committee in Canada warned in early 1993.

40. Issues of legitimacy are likely to intensify through the 1990s, due to the increasing use of international bodies and agreements to regulate issues formerly left to national governments.

A Framework for Regulatory Management

41. Every OECD country that has strengthened regulatory management has found that the results warrant continuation or expansion. In some countries, the benefits have been substantial. Even minimal efforts have produced results, suggesting that the scope for potential improvement is large, and that real gains can be won with small investments. While there is no "model" strategy, some elements of success and failure are repeated across countries. These suggest that the following **framework for programme design**, accompanied by **application of quality techniques** such as the ten listed below, can reduce the cost and improve the effectiveness of laws and regulations.

i) Political support is crucial to improving regulatory quality

42. In democracies, regulation is essentially a political instrument. Regulatory reform is often nothing less than self-discipline of the political and legislative processes of government, much as fiscal budget processes are intended to self-discipline spending decisions. Without active self-criticism by ministers, cabinets, and parliaments of their regulatory decisions, the scope of reform will be limited. This suggests that more attention is needed to the quality of laws as they are developed and amended through political processes, and also that working relationships between government and parliament should be more co-operative and mutually supportive. Information about the reasons for and impacts of new legal proposals and amendments, for example, should be generated and shared between ministers and members of parliament to inform the political debate.

ii) The need for political support means that the objectives and strategies of improving laws and rules must plainly support larger social and economic goals

43. Most countries agree that regulatory reform cannot be viewed as a technocratic or legalistic exercise isolated from the mainstream of public sector reform. If reform is to have the necessary political backing and access to resources, it must be integrated into broad policies, and should support and improve the standards and results of the government in general. Improved communication with politicians and ministers on the importance of high-quality law is critical. The effects of regulatory activities on larger social and economic concerns of government should be clarified, and the intended objectives of reform and linkages to other goals should be explicit.

iii) Improving regulation requires a carefully designed system of policy development and administrative pressures and incentives for change; improvement will not be achieved simply by Government command

44. New regulatory disciplines must be designed as operative elements embedded in the regulatory system itself. The most common failing in regulatory reform in OECD countries over the past decade has been over-reliance on directives from the political level. Too little attention has been given to changing the machinery of government and the incentive structures that produced the existing problems.

Checklist of Quality Techniques for Regulatory Management

√ **Establish a system for tracking and registering existing laws and regulations, and for planning future laws and regulations**

45. A system for tracking and registering regulations is an essential first step to regulatory management. Surprisingly, many OECD countries have no central registry of existing regulations, or any system to track or plan for new rules. Yet it is difficult to see how a regulatory system can be understood or managed without knowing what regulations exist, or who is regulating what, or what new laws and regulations are under development.

46. Several countries have instituted systems to account for existing and new regulations. In 1985, Sweden enacted its well-known "guillotine" rule nullifying hundreds of regulations that were not centrally registered. Norway is considering this approach today. The United Kingdom began in late 1992 to assemble a central database on all regulations affecting businesses. Canada and the United States have for years carried out systematic regulatory planning to identify new rules proposed for the next year.

47. Central registries, codifications, and future regulatory plans or agendas are useful management and oversight tools. Since new regulations become easily visible to people outside of the regulatory body, they attract more scrutiny. Co-ordination becomes much easier. These systems are also important for transparency, e.g. to communicate obligations and new legal developments to citizens and businesses.

√ **Establish responsibility for improvement at the ministerial or prime minister's level**

48. The task of improving laws and rules should have the personal, sustained attention of a senior minister or the prime minister. Conflicts and disagreements on the substance and direction of the reform policy will inevitably erode its effectiveness unless a credible enforcement capacity exists at a high political level. In Canada, for example, a senior minister, President of the Treasury Board, has been designated as the Minister Responsible for Regulatory Affairs.

√ **Establish a central oversight body**

49. An independent and horizontal oversight unit has been identified by several countries as an essential element of the reform programme. Sweden has noted that central regulatory managers should have broad policy responsibilities so that they can identify cross-cutting issues and promote alternatives to traditional regulation. Japanese officials have written, "There is a limit to the reform by Ministries and Agencies of their own initiatives, though they have primary responsibility for regulation...." Germany has remarked that a neutral reviewer is needed to represent reform goals; otherwise reform will "be forced to take a back seat" to other concerns. Other countries have observed that independent authorities can raise issues that regulators find too sensitive or are unwilling to consider, and act as a "check-and-balance" to the narrower perspectives of regulators.

50. Such units are placed in many locations in OECD countries: top-level policy offices reporting to prime ministers, central management or budget offices, audit bureaus, industry ministries, legal oversight offices. There is a growing and logical preference, however, for siting this function in traditional central management offices. These independent bodies carry out a multitude of tasks ranging from intensive day-to-day review of individual rules to co-ordination among ministries to general monitoring of regulatory activity and advising the politicians. In general, they act as "watch-dogs" over the regulatory and legislative process.

51. It is critical that these oversight bodies be involved as early as possible in the process of developing new laws and regulations. It is too late if they are involved only when legal drafts emerge from ministries. At that point, the important decisions have already been made and ministries will be reluctant to make significant changes. To influence the final regulation, new ideas and concerns should be brought into the process at the very beginning.

52. One of the most difficult tasks in setting up oversight units is determining how they will relate to the regulatory bureaucracies that possess the legal authority and expertise to develop and make regulations (or propose them to ministers). Traditions of ministerial independence have proven to be a powerful force against central management. In the end, the nature of the influence and authority given to a central regulatory manager depends on the goals of reform and the likelihood that individual ministries will satisfy those goals on their own.

√ **Establish a high-level advisory commission**

53. Some countries, such as Germany, Japan, and Portugal, have also used independent high-level commissions to promote regulatory reform. Such commissions, with either private sector or both public/private members, are not attached to any ministry. They report directly to the council of ministers, to ministers responsible for administrative reform, or to the prime minister. As independent

and horizontal bodies, commissions can take unpopular stands that ministries are unable or unwilling to take, and consider broader issues that may not be obvious to individual ministries.

54. The tasks of these commissions may include reviewing proposals from ministries, providing independent advice to ministers, identifying existing problems and proposing solutions, monitoring progress within ministries, holding public hearings, and collecting information.

55. Advisory commissions work best when they have a legal mandate for 3-5 years, well-known and respected members, authority to collect information from ministries, support from a central management body such as the finance ministry, and direct links to senior ministers.

√ **Develop a standardised checklist for regulatory decision-making in the ministries**

56. Another successful approach is the use of "checklists" established by a decision of the Government or Council of Ministers to guide regulatory development.⁵ Several OECD countries have adopted "checklists" containing questions to be answered by regulators to determine if a regulation is needed, and, if so, how it should be designed. The "Blue Checklist" used in Germany since 1984 has been widely copied for this purpose. Such checklists typically require regulators to verify the need for a new rule, consider alternative forms of government action, assess administrative and economic costs and benefits, determine the right level of government to take action, and so forth.

57. Regulatory checklists can improve the quality of regulation in several ways: (1) they establish and communicate the fundamental regulatory principles and policies of the Government (the need to minimise economic impacts on the private sector, for example); (2) as an internal government regulation, they foster administrative responsiveness to political priorities; (3) they can establish an orderly regulatory process by laying down the steps for taking a decision (such as inter-ministerial consultation); (4) they establish quality standards (such as cost-effectiveness analysis) for the content of regulation; (5) they direct attention to the implementation of regulation; (6) they promote cultural change and education by informing regulators of key issues; and (7) they facilitate managerial oversight of the regulatory system by providing a coherent framework for broader policy review.

58. Gains in regulatory quality have been won simply by inducing regulators to ask the right questions. In fact, decision frameworks appear to have had greater impact by raising the general level of awareness about important concepts, than in always producing the correct answers. As Portugal has noted, "The spread of new ideas generates, by itself, readjustments in internal actions."

√ **Adopt an administrative procedure law**

59. Many OECD countries have some form of administrative procedure law governing rule-making and decision-making processes within government administrations. Administrative procedure laws seek to establish, for the government as a whole, core principles of democratic administrative behaviour, such as equal administrative conduct, legal certainty, and the maintenance of a fair administrative process. In doing so, administrative law attempts to balance efficient administration with rights of citizens.

60. Such laws often apply to rule-making by setting down standards for decision-making, such as "proportionality", or by requiring regulators to follow procedures for public notification, consultation, and openness. In the United States, for example, regulators must make all background information available to the general public, and give the public adequate opportunity to submit critical comments,

⁵ This management strategy is explored in more detail in the PUMA paper, "The Design and Use of Regulatory Checklists in OECD Countries" [PUMA/REG(93)3/REV1].

before making any regulatory decision. Such laws are the most powerful means of establishing an orderly and standardised regulatory process, since non-compliance can result in a court invalidating a regulation.

√ **Establish a system of regulatory analysis**

61. Processes of regulatory analysis have also proven to be effective in focusing the attention of regulators on impacts, and in providing better information to ministers and to legislators for their decisions. Two OECD countries -- the United States (since 1981) and Canada (since 1992) -- require regulators to formally assess benefits and costs, and to issue only regulations for which the benefits are greater than the costs. Several other countries -- among them Sweden, the United Kingdom, and France -- and the Commission of the European Communities have increased or adopted the use of regulatory analysis in the past several years⁶.

√ **Establish mechanisms for public consultation and participation**

62. A powerful strategy for improving regulatory quality is public participation and consultation. Beyond its value as a key element of open and transparent government, public consultation offers two major benefits: (1) consultation can be used to identify the real-world impacts and problems of proposed laws and rules, and to design less costly and more effective regulations; and (2) consultation can be used to achieve agreement among key segments of the public on the objective and design of regulations, and so improve compliance.

63. There are many approaches to public consultation, which range from systematic publication of proposed regulations for public comment ("notice and comment" systems) to establishment of advisory groups composed of members of affected businesses. This issue is discussed in more detail in Chapter Three.

√ **Conduct systematic reviews of existing regulations**

64. Government programmes funded in national budgets tend to be scrutinized every year with new funding decisions. One general problem with regulations, by contrast, is that they are long-lasting and immutable. Unless special efforts are made to evaluate them (usually when an embarrassing crisis occurs), regulations survive, often disappearing into jungles of other rules, and continue to impose costs even if they become outdated by changes in economic or social conditions, public values, or new laws. Sometimes the original law or regulation turns out, when applied, to have been poorly-conceived. Even good regulations tend to accumulate steadily over the years until the total burden begins to overwhelm the public. For these reasons, it is important that governments adopt systematic processes to review and assess existing regulations to determine if they are still needed or could be improved.

65. In several OECD countries, such reviews are carried out on a rolling basis by the ministries responsible, who then report the results of the review to a central authority, such as the Council of Ministers. These reviews should provide for public input. By listening to the public's experiences with regulations, governments can better ensure that requirements continue to be sensible and effective.

√ **Promote cultural change within bureaucracies**

66. In the longer term, improving the quality of laws and rules requires "counter-cultural" change within regulatory institutions themselves. External controls and oversight are necessary but are not in

⁶ This management strategy is discussed in more detail in Chapter Five of this paper and in the PUMA paper, "Improving the Analytical Basis for Regulatory Decision-making" [PUMA/REG(93)1].

themselves sufficient to overcome bureaucratic resistance and the embedded "command-and-control" philosophy. A number of approaches are used -- training and information, rewriting of job descriptions and evaluation criteria, and establishing reform units inside regulatory bodies.

67. Experience has made clear that bureaucratic reform should be viewed as a long-term investment in government effectiveness rather than as a solution to today's problems. Dysfunctional regulatory habits are deeply embedded in existing laws, institutions, and administrative "cultures", and are often protected by special interests. Changes in the ways that bureaucrats view regulations may not be achieved for decades. The long-term nature of cultural change highlights the need **in the short term** for centralised management capacities to promote and energise the reform process.

Chapter Three

ENSURING PUBLIC CONSULTATION AND PARTICIPATION⁷

SYNOPSIS

This chapter examines the benefits of effective public consultation and participation. Most efforts to improve regulatory management include attention to establishing or improving mechanisms for public consultation and participation. Substantial benefits can be gained by having affected parties participate not only in compliance, but also in the development, issuance, and review of regulatory requirements. The information provided and the involvement of the various interests can help avoid unnecessary or overly-expensive regulations. Improved quality and coherence can be achieved and the legitimacy of both the regulatory process and the resulting legal requirements can be enhanced. Voluntary compliance will likely be increased, reducing reliance on enforcement and application of state coercion.

There are many approaches to improve public consultation and ensure broader public participation in the regulatory system. Portugal has had success with a high-level, joint public/private-sector commission. The commission is charged with improving relations between public administration and small and medium-scale enterprises and reducing bureaucratic constraints on economic development. Government officials and experts from private businesses act jointly to identify bureaucratic problems for business, propose solutions, and monitor and report on corrective action by ministries. The approach in Portugal may be particularly interesting for SIGMA countries because it has proceeded as part of a long-term programme to change the role and style of government with respect to economic activities and citizens.

The Problem

68. Involvement of citizens and private businesses in the development, issuance, and review of regulatory requirements can substantially strengthen democratic legitimacy, regulatory effectiveness, and public acceptance of regulation:

- Regulation is a key instrument of the governing process, and hence decision-making procedures must meet appropriate standards of openness, communication, and accountability if democratic values are to be preserved. In some countries, such as the United States, public consultation is held to be such an important part of open and fair decision-making that regulations issued without adequate consultation may be reversed by the courts.
- On efficiency grounds, public scrutiny, criticism, and discussion of proposed rules may also help to improve the quality of final decisions. In the United Kingdom, businesses are consulted on ways to write regulations to reduce compliance costs.

⁷ This chapter has been adapted from papers prepared for SIGMA by Jon Bing, Norwegian Research Center for Computers and Law, University of Oslo, Norway; Maria Castello-Branco, Secretariat for Administrative Modernisation, Portugal; Scott Jacobs, Public Management Service, OECD; and Mark Schoenberg, Regulatory Information Service Center, United States.

- Compliance may increase if affected groups have an opportunity to assist in the development of regulations, and are satisfied that their concerns were fairly heard.

69. Governments should consider the importance to regulatory quality of involving potentially affected parties during the entire life of legal requirements -- development, revision, and deregulation. By taking such a "cradle-to-grave" approach to public participation, governments can increase the chances that their requirements will be based on an accurate understanding of the problem, of the consequences of government action, and of the ability of affected parties to comply.

General Lessons From OECD Countries

70. A variety of approaches can be used to provide information on regulatory initiatives and to ensure an opportunity for public participation in the regulatory process. In most governments, several different mechanisms are employed. These may be separated into three main categories:

- **Notification**, which consists of providing information to citizens and businesses on what the government will do, is doing, or has done. Notification is one-way communication from government to public;
- **Consultation**, which consists of asking citizens or businesses to provide comments and advice on regulatory proposals. Consultation is two-way communication between government and public. It provides government with a way of collecting information and data on which to base its decisions;
- **Participation**, which consists of providing citizens and businesses an opportunity to assist in establishing the regulatory objectives, choosing the general strategy, and drawing up the initial regulatory proposal. While government may have final responsibility for the decision, public participation processes bring non-government actors into the decision-making process from the earliest stages.

71. In practice, these three approaches to government openness are not alternatives but complements. The optimal strategy will probably be a mixture, tailored for the specific issues being regulated. Further, the choice of mechanism and the exact design of each process will be influenced by considerations such as the constitutional structure and organization of the government, legal distinctions among regulatory bodies and types of legal instruments, political setting, and relative capabilities of the affected interests.

72. The experience of public consultation in OECD countries does, however, offer some general lessons. One lesson is that introducing public participation can require significant changes in existing regulatory processes, and significant changes in the attitudes of administrators. OECD countries contain many examples of ineffective or superficial public consultation that waste time and resources, and generate cynicism on the part of the public. In particular, consultation processes imposed onto administrations from above without training and oversight often lead to government officials going through the motions of consultation, without any real effort to educate and listen to the public.

73. Another lesson is that, if it is to be genuine, public consultation processes must ensure that the public is well-informed on the issues. Simply releasing a 200-page draft law is not sufficient, since many members of the public are unable to read legal text and understand the practical consequences. Governments must be pro-active about generating usable information, such as analyses, summaries, and examples of what is proposed.

74. Consultation must occur at an early enough stage to affect decisions. Waiting until the minister has already approved a proposal may be too late for public input to be seriously considered.

75. Accessibility to the consultation process should be fair, and not biased toward narrow interest groups. Allowing only affected businesses to participate, for example, can easily lead to unbalanced decisions that do not adequately consider community, labour, or consumer interests. Balanced participation is key to the quality of the information collected, and the legitimacy of the regulatory process.

76. Processes of consultation and participation must be carefully structured to contribute to the quality and credibility of the regulatory process, and so that they do not introduce intolerable delays or costs. Governments have many options here. Advisory groups balanced between interests, for example, may offer a quicker response than general public hearings.

77. Effective communication of regulatory processes and proposals to affected citizens is a particular concern. Clarity, simplicity, and legal transparency of regulatory proposals and decisions are needed, and should perhaps be supplemented by systems for notification, publication, codification and interpretation to provide consistent and accessible information to the public.

78. Finally, an energetic and involved network of organised interest groups -- a healthy "civil society" -- is critical to the success of public consultation. Governments can do much to help create such a civil society; in fact, establishing rights of public participation can help stimulate the emergence of organised groups whose interests are affected. Organisations of businesses, consumers, trade unions, local governments, communities, and other interests can work with government on a continuing basis to educate their members, respond to proposals, and generate information.

Checklist of Quality Techniques for Ensuring Public Consultation and Participation

79. Several of the most common quality techniques to public notification, consultation, and participation are outlined below.

√ **Publish an agenda listing the regulations being developed**

80. Agendas of laws and regulations that are under development or planned for the future give potentially affected parties the earliest possible notice of future compliance obligations. This early warning allows the parties to respond to the proposals sufficiently early to influence the final requirements. It also allows businesses to plan for future regulatory costs earlier in the business cycle. Such agendas should be prepared by a central unit on the basis of periodic reports from ministries.

√ **Establish general requirements for public consultation**

81. Governments may wish to require -- either in an administrative procedure act, as in the United States, or in an "administrative" directive from the Council of Ministers, as in Canada -- that all regulatory matters be the subject of public notice and consultation. Ministries would probably be responsible for carrying out such a requirement. Flexible criteria could be specified, such as ensuring that notice is given to key affected interests and that sufficient time be allowed for them to make representations to government officials. Such broad criteria would leave considerable flexibility for responsible authorities to customize their notice and consultation processes, but ensure that minimum performance criteria are specified for this aspect of the regulatory system.

√ **Establish notice and comment procedures**

82. Notice-and-comment procedures, perhaps the broadest-based approach to notification and consultation, typically consist of publication of proposed rules for the scrutiny of the general public, and consideration of the comments of any person or institution who wishes to respond. The United States codified this approach in 1946; Portugal adopted in 1992 a law prescribing a similar approach. The success of notice and comment procedures depends on effective communication from the ministries, the response of active and informed members of the public representing a spectrum of views, and a careful screening of responses.

√ **Establish public hearings procedures**

83. But even the best of consultation processes will fail to involve many affected parties. Governments can obtain useful information on the quality of regulatory proposals from parties that would not participate in other consultative forum by holding structured public hearings before issuing regulations. The openness of the hearings can contribute to the legitimacy of both the process and the resulting rule, particularly if hearings are conducted throughout the country, such as at the community level.

√ **Facilitate broad consultation through support of disadvantaged interests**

84. Some affected interests will be at a disadvantage in participating in the consultative process. Typically, these are broad interests that are not well organized, which have few resources at their disposal, and whose members individually have a small stake in the outcome of the process. A good example would be individual consumers of a public utility service such as telephone, hydro-electric powers, or water. The cost to consumers of becoming involved in a rate increase proceeding might far exceed the extra amount they would pay with a rate increase. By contrast, the utility and major commercial customers would have a significant financial stake in the regulatory decision. Consultation which focuses on only selected and well-organized interests may produce biased information which can skew regulatory decision-making. Governments can improve opportunities for balanced participation by assisting disadvantaged groups, either directly, or by making it easier for them to obtain information and provide input.

√ **Require that decision-makers be informed of consultation results**

85. One way to ensure that consultation is carried out and that the results are reflected in final proposals is to require that briefings or regulatory impact analyses provided to senior officials and decision-makers include information on how the process was conducted, who was consulted, and what they said. This option can be a powerful technique for ensuring that balanced information is provided to decision-makers. It also can significantly reinforce process-related requirements such as those outlined above.

√ **Set up advisory groups**

86. Several OECD countries have successfully used permanent or temporary advisory groups to assist in the development of new laws and regulations, and in the review and elimination of old laws and regulations. Germany has established a high-level advisory group chaired by a secretary of state with the authority to question ministries and to report directly to the chancellor. Japan has established a rolling series of three-year councils made up of representatives of business, academia, journalism, and so forth, who draw up reform recommendations for the Diet. In addition, every ministry in Japan draws on the advice of specialised advisory groups that work in defined areas. The United Kingdom recently established business advisory councils to assist in its deregulation programme. A successful public sector/private sector advisory group in Portugal is described in more detail below.

Building Public Consultation and Participation: The Case of Portugal

87. The last decade has seen important developments in the Portuguese public sector. Re-privatization, deregulation and de-bureaucratisation have been essential to Portugal's successful integration into the single European Community market. The government's methods of problem-solving and decision-making have changed in essential ways, leading to new attitudes in citizens, politicians and public employees.

88. One of the principal challenges has been the change to **a more open society**. This has been driven both by a philosophy that the citizen should be closely involved in the search for better and cheaper solutions to problems, and by the reality of closer interaction with the EC. Public participation and consultation were also seen as necessary to support policies for economic growth, inflation control, deficit reduction, improved employment rates, international competitiveness, the challenges of the EC, and salary competitiveness between the public and private sectors. Those are, in fact, the general aims of the Social and Economic Council, a constitutional tripartite body composed of government, trade union, and business representatives.

89. Openness was particularly important in reforms aimed at restructuring and modernising the economy and strengthening the social fabric, since many of these directly affected the private sector. Specific strategies have included an inter-ministerial program of de-bureaucratisation and improvement in relations between the public administration and small and medium-scale enterprises (SMEs).

90. The modernisation programme began with a review of the interaction between the state, its social partners and citizens. This review led, in the 1991 Government programme, to an emphasis on the need for **improved responsiveness** by the administration. The **interdependence and joint responsibility of citizens and public administration** were recognised as key to improving the quality of life in all sectors. A Major Options Plan established in 1993 cited several objectives of the new process for policy-development:

- De-bureaucratisation
- Transparency of government decision-making
- Responsiveness and quality of service to the public, including providing information about services provided, and collecting suggestions or opinions about improvements, new services and products
- Management flexibility
- Rationalisation in the use of public money
- Upholding of citizens' rights

91. The Government policy has included the following strategies to modernise government and its relationship to citizens:

- Permanent methods of collecting public opinion, such as suggestion boxes or complaint books in public locations
- New forms of communication including video films, pens, bags, folders, posters
- Vocational training programmes
- Motivating and enhancing skills of public servants
- New working methods within the administration, including sectoral plans for administrative reform
- Creation of the Commission of Enterprise/Administration Relationships (CEA)

The Commission of Enterprise/Administration Relationships (CEA)

92. The public/private Commission of Enterprise/Administration Relationships (CEA, or Comissão Empresas Administracao) brings together experts from private enterprises and officials from ministries directly connected with enterprises. Its mandate is to improve relations between public administration and SMEs through the reduction of bureaucratic constraints on economic development. Officials and experts act jointly to identify problems for private businesses, to propose solutions, to coordinate among different ministries, and to monitor and report on corrective action taken by the ministries.

93. The CEA's work is based on the premise that interaction between the private and public sectors will produce better mutual understanding of each side's values and attitudes. Bringing together those who make the law and those whom it affects is likely to produce a more efficient law for which compliance is feasible. And by involving the private sector enterprises affected by the law, the CEA opens the decision-making process to those who must use the law.

94. The interaction fostered by the CEA is based on the following assumptions:

- Enterprises are essential to economic growth;
- Small and medium enterprises (SMEs) are the core of Portuguese industry;
- SMEs are more burdened by government action than other enterprises;
- SMEs and the state are mutually dependent, especially with respect to regulation.

95. The CEA was established by a 1987 Cabinet resolution supported by the Secretariat for Administrative Modernisation (SMA), a high-level agency reporting to the Prime Minister. In 1992, the CEA was reformulated and currently is chaired by the State Secretary for Administrative Modernisation, and supported by SMA.

96. Members of the CEA are both private (experts designated by major business associations) and public (representatives of government offices having contact with enterprises), and hence it has been described as "a privileged forum for dialogue between entrepreneurial associations and the Administration."

97. Specifically, its duties include identifying administrative procedures that encumber private enterprises, selecting specific problems for analysis by the responsible ministries, proposing measures for simplification, maintaining contacts between the private sector and the public administration, and reporting periodically (each six months) on progress. It is important to note that the State Secretary chairing the CEA has the power to determine, after internal consultation, whether draft laws should be presented to the CEA for its review and comment before they are submitted to the Council of Ministers.

Setting Priorities

98. In organising its work, the CEA identified four areas in which enterprises faced particular difficulties: (1) getting started; (2) obligations to supply statistical and financial information to the administration; (3) complying with tax law; and (4) gaining access to government benefits. Paperwork burdens were seen as a particular concern. A survey by the CEA of 100 companies found 113 requirements for questionnaires, notes, and forms from 42 separate government offices. Another survey of forms for tax and financial benefits found that 11 categories of benefits were controlled by 397 regulations.

99. The CEA also collected suggestions from the private sector and the ministries for debureaucratization. Hundreds were received, tabulated, and organized according to subject area. These suggestions provided a basis for further work.

The CEA's Methods of Work

100. In 1988, the CEA proposed to the Cabinet an interministerial programme of debureaucratization. The programme established seven Project Teams for Debureaucratization in key sectors: Industry, Tax Affairs, Justice, Transportation, Building and Housing, Planning, and Local Administration. Each team was staffed by full-time ministry officials and was under the supervision of a State Secretary responsible for the sector. The teams were responsible for taking initiatives in their areas to co-ordinate activities, simplify existing bureaucratic procedures and prevent new unnecessary procedures. Although not responsible to the CEA, the teams reported to the CEA on their activities.

101. Team initiatives have included the simplification of forms and tax administration, computerization of customs procedures, and dissemination of information to users of public services. The project team for Local Administration has collaborated with ten municipalities to simplify their procedures for businesses.

102. The teams were also charged with examining new legislative and regulatory proposals in their areas "to prevent an increase in the burden and administrative costs". Drafts of proposed regulations and bills with direct impacts on business activities are circulated to the CEA during routine processes of interministerial consultation, and its advice is considered as part of the give-and-take of reaching Cabinet consensus.

103. After the reformulation, those teams were replaced by "ad hoc" teams that perform similar duties, but give the CEA more flexibility in its work.

104. The CEA may also act independently of the task forces. For example, to facilitate the creation of new businesses, the CEA and the Small and Medium Industries Institute have issued a guide on "legal aspects of setting up a new enterprise" and "how to create an industrial enterprise". The CEA is examining new legal procedures for registration of enterprises, including the establishment of "one-stop shops," which are expected to reduce costs and difficulties for new businesses. In addition, a systematic analysis of bureaucratic difficulties in economic sectors is underway. The CEA is, for example, co-operating with industrial associations for public works, textiles, clothing, shoes and food processing to make an inventory of bureaucratic difficulties in these sectors.

105. The CEA does not deal with government policies *per se*, but rather with the improvement of the administration. Its aims are to solve bureaucratic difficulties, to simplify, to debureaucratize, and to reduce administrative burdens on the private sector. The public sector must respond to its requests for information and its activity plans are approved by Cabinet and have the status of mandatory orders.

Checklist for Evaluating Draft Laws

106. In addition, the CEA has developed a draft checklist for evaluating the effects of a draft law. The checklist, reproduced below, is not mandatory, but was prepared in order to improve the quality of the Commission's written opinions on draft laws.

Draft Checklist for Evaluating the Effects of a Draft Law

1. Name and goals of the draft law
2. Enterprises that will be specially affected:
 - 2.1 activity sectors
 - 2.2 dimension
 - 2.3 geographic zones
3. Will the enterprise have to take special measures to comply with the law?
4. Effects on:
 - 4.1 investment
 - 4.2 employment
 - 4.3 new starting enterprises
 - 4.4 competition (internal, external)
 - 4.5 taxes
 - 4.6 bureaucratic costs
5. Does the draft law have a special regime for SMEs?
6. Suggestions for changes

Conclusions about the CEA

107. The CEA has been an evolving organism, interested in self-reform, making new working plans, and introducing new concepts into its own working methods. It has, for example, proposed innovative methods of consultation with the private sector, including the use of an "impact measurement card" that would be filled out by business representatives when analysing legislative proposals. Its success to date is due to a combination of factors, including the high level of political and private sector support for the approach and for the institution. Ultimately, however, its greatest asset may be the power of the concepts underlying the Commission: that society will cooperate with the administration and the state only when improvements in the public sector are a reality, and that better mechanisms of interaction between the public and private sectors will produce a better understanding of each side's values and attitudes.

Chapter Four

ENSURING LEGAL AND TECHNICAL QUALITY⁸

SYNOPSIS

Strategies for ensuring the orderliness of the rule-making process, the legality of government action, and the legal and technical quality of laws and regulations are common features of regulatory management in most countries. These goals, important with respect to the efficiency and accountability of the administrative process, are also crucial to the maintenance of a stable, logical, and usable body of law.

Drawing on the Dutch and French experiences, this chapter provides several quality techniques for how governments might establish clear responsibility for initiation of proposed laws and rules, develop standards for drafting and content, foster specialized drafting skills, and establish centralised review bodies.

Background

108. There is often a tension between a government's desire to take action in response to pressures, and the need to ensure that the action has a firm legal basis. This tension can manifest itself in several ways. Society, politicians and civil servants often expect laws to have too much actual force in daily life. When devising new policies and drafting laws, they do not pay enough attention to the practical feasibility and enforceability of the new law. They like to think that there will be complete compliance with the law, and that it will be fully effective. Their expectations are not often met. In response to failure, they -- surprisingly -- may be inclined to simply strengthen the legal provisions, or they may be inclined to seek a large degree of administrative discretion to take further actions within the law, or even to act without a legal basis.

109. While discretionary action or actions taken without a reference to existing legal authorisations might produce simple, cheap and flexible administrative results, such actions may also be unpredictable and arbitrary. Moreover, if the actions lack legitimacy and popular acceptance, they may not be as effective as expected. For similar reasons, such actions are more likely to be annulled by the courts than those with a sound basis in the law.

110. Good intentions are not sufficient to ensure that legislation meets expectations for substantive content, legality, comprehensibility and adherence to process. Governments need to establish explicit standards for these attributes and mechanisms to ensure that the standards are met. Such standards can be established as internal administrative requirements or may even be given the force of law.

111. France and the Netherlands have put into place highly-evolved regulatory management mechanisms designed to ensure that their governments can pursue policy objectives through legal instruments that meet high standards of legal and technical quality. For example, in the Netherlands,

⁸ This chapter has been adapted from papers prepared for SIGMA by Alan Ménémenis, Conseil d'État, France, and Jan Van Kreveld, Ministry of Justice, The Netherlands.

the Minister of Justice has drafted 346 *Directives on Legislation* that must be complied with by every minister. The Dutch Parliament has also enacted the first part of a *General Administrative Law Act*; three more parts are being prepared. This legislation is intended both to harmonize and simplify the law and to codify relevant case law. An examination of the approaches adopted by these two countries reveals seven quality techniques for writing good law.

Checklist of Quality Techniques for Ensuring Legal and Technical Quality

√ **Clarify the authority to initiate laws and regulations**

112. A key step in establishing an effective system of regulatory management is to ensure that there is a clear delineation of the authority to initiate laws and regulations. In many countries, this will be reflected in the constitution. Most likely, the functional head of the government, speaking in the name of the government as a whole, will be invested with the bulk of the formal authority to advance laws and regulations. The regulatory competence of each minister, however, should be very clearly defined. Where responsibility for development of draft bills and regulations has been delegated through internal administrative arrangements, the assignment of responsibilities and processes for collective review must be specified and made clear to the public.

113. Although parliaments adopt legislation, most normative material in democratic countries originates from elected governments. In France, for example, about 90 percent of new legislation is developed within the government. It is vital to know exactly who in the government or executive has the authority to introduce a bill into Parliament and to adopt implementing regulations. If each minister has this authority independently, there is a danger of contradiction, disorder and contention, all of which can impair the quality of the laws that are advanced.

114. In France, the responsibility is clearly specified and well-understood. Under the Constitution and subject to the prerogatives of the President of the Republic, the prime minister is responsible for legislation and is alone empowered to regulate by decree. This arrangement does not prevent individual ministers and government departments from drafting legislative texts. Indeed, every decree issued by the French prime minister is countersigned by the minister(s) who prepared it and who will implement it.

√ **Establish standards of legality**

115. Explicit standards of legality can assist considerably in the improvement of the quality of laws and regulations. In some cases, these standards may already be found in constitutional provisions, laws of interpretation, administrative procedure laws, or case law. Compilation of existing principles and elaboration where necessary may be required, however.

116. The Netherlands has highly elaborated standards for the verification of the legality of laws and regulations. All regulations must comply with the principles of legal equality, of legal security (no retroactive force, reasonable transitional provisions), and of proportionality (measures adopted must be proportionate to the intended objective). The Dutch *General Administrative Law Act* requires a careful gathering of the necessary information and weighing of all interests (the principle of carefulness). Regulations must be based on reasonable and proper grounds, which must be published.

117. Dutch and French citizens, as well as regional and local bodies, can be subjected to an obligation only if the Constitution or an Act of Parliament has established the power to impose the obligation. This power must be well-defined, with no broad discretionary powers permitted. Delegation by parliament of a regulatory power to the cabinet of ministers and, in case of technical details or very urgent measures, to an individual minister is acceptable, provided that the delegating act

contains the principal elements. Certain issues, such as the creation of social security rights, cannot be delegated by the Parliament.

118. New regulations must fit into the existing legal structure, meaning that all normative instruments must comply with higher levels of domestic or international laws. All democratic countries have administrative or judicial mechanisms for assessing legality, at least at the highest level of the legal system; in France, for example, the Conseil d'État may advise the Government of the constitutionality of proposed laws in advance of their adoption, and, following adoption, the Constitutional Council may declare a bill, in whole or in part, in breach of a constitutional principle. Similarly, all Dutch regulations must comply with the civil rights established by the *Constitution*. Moreover, they should not deviate without good reason from the *General Codes* concerning private law, criminal law and administrative law (all-inclusive procedural law), the *General Environmental Act* and the *General Acts* on Municipalities, Provinces and Water Authorities.

119. International treaties and EC law are increasingly relevant to determining the legality of national legislation. In EC member states, the increasing scope of Community law is requiring member states to pay more attention to the consistency of their laws with Community legislation. National laws that do not comply with EC obligations will be declared invalid by the European Court of Justice in Luxembourg or the national courts of member states. Member states can also be ordered by the courts to pay compensation to their citizens if they violate the substance of EC law or do not implement EC regulations within the period prescribed.

120. Many bilateral and multilateral international treaties (in the fields of private law, criminal law, environmental law, patent law, etc.) are directed at harmonisation or convergence of the domestic regulations of signatory countries. These kinds of international laws are intended to permit co-operation between governments, to prevent private enterprises and citizens with international activities from being faced with a diversity of regulatory requirements, or to eliminate non-tariff trade barriers.

121. Treaties on civil rights, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, can also be important for the content of domestic regulation. According to the Dutch Constitution, Dutch courts may not apply any law or regulation that does not comply with these treaties.

122. International law-making is rapidly increasing. Even though SIGMA countries may not be signatories to some international agreements, legal consistency may be desirable for economic and strategic, rather than legal, reasons.

√ **Establish standards for quality of drafting**

123. The quality of new legal instruments depends to a large degree on the quality of the legal drafting. Several standards can be applied. Provisions and prohibitions must be clear. In particular, a new normative instrument must specify which, if any, existing instruments it repeals or amends. The objectives of a new law must be explicit. If they are not, there is risk that the legislation will have no real normative value; it may be useless, impractical, confusing or downright dangerous.

124. The merits of draft proposals are easier to evaluate -- during development and also at later dates -- if they are prefaced with a statement of intent. The statement should be more than a mere paraphrase, but clearly set out the purposes of the legal instrument.

125. General guidelines for the drafting of laws and regulations can facilitate the production of clear and unambiguous legal requirements. Some sample guidelines include:

- Short sentences, short articles and clear, simple language are very important. Definitions should follow ordinary language as closely as possible.
- The same words should have exactly the same meaning within one regulation. It is also important to promote a common vocabulary in the whole body of the national law (this can be done through guidelines and directives on legislation).
- Avoid abbreviations and non-regulatory provisions (such as political statements and other vague declarations).
- Restrict references to other articles, particularly articles from other regulations. Avoid references to any article that itself contains references.
- Establish a standard structure (i.e, organisation of chapters, divisions, sub-divisions, etc.) for regulations. For example, regulations could be organised as follows:
 - definitions
 - general rules
 - establishment of authorities, (advisory) committees
 - substantive provisions (private, criminal and/or administrative law)
 - powers of administrative authorities in individual cases (permits, dispensations, levies, commands, subsidies)
 - delegated regulatory powers of administrative authorities
 - procedural provisions to be complied with by citizens and administrative authorities
 - obligations concerning the provision of information
 - administrative inspections
 - criminal investigation powers
 - powers of appeal to a court or administrative authority
 - evaluation of the regulation itself
 - transitional provisions (a very important subject)
 - the date of coming into force and the method of publication

√ **Evaluate the substantive content of regulations**

126. Of course, the policy content of proposed laws and regulations must be evaluated to ensure that the solution fits the problem, that costs are not excessive (see Chapter Four), and so forth. Many governments have developed standards, criteria, or policies regarding the substantive content of proposed laws and regulations. These policy instruments may be grouped under the term "regulatory checklists" suggested in Chapter Two (paragraphs 56-58). Common elements of these checklists include: (1) confirmation of the problem; (2) justification for government intervention; (3) identification and assessment of alternatives; (4) assessment of the social and economic impacts of the proposed law or regulation; and (5) an assessment of implementation feasibility.⁹

127. From a *legal* quality perspective, perhaps the most important of these evaluation criteria is the question of whether legislation is really necessary. Can the problem be dealt with under existing law or can less costly and cumbersome solutions be found? A strong and sustained effort must be made to avoid legal proliferation, which undermines the legal security of economic and social actors and carries heavy administrative and economic costs.

⁹ See the PUMA paper, "The Design and Use of Regulatory Checklists in OECD Countries" [PUMA/REG(93)3/REV1].

√ **Require implementation feasibility studies**

128. Important legislation should be backed by an implementation feasibility study (see also Chapter Six). There is no point in examining a new measure if its cost is exorbitant or if the administrative infrastructure (human and material) is insufficient for implementation.

√ **Establish regulatory process standards**

129. Ministries must allow themselves adequate time to prepare detailed proposals. An orderly and systematic process of regulatory decision-making may, in some cases, require ministries to spend more time developing proposals for laws and regulations, but will also deliver higher-quality proposals. On the other hand, a systematic decision-making process can save time by identifying and averting mistakes early and by producing for ministers and councils of ministers better information for their decisions.

130. The process for developing new regulations could be designed so as to involve several routine steps, including coordination or close collaboration with other government bodies, such as the Ministry of Finance; consultation with economic and social partners; or advice from independent committees created to closely examine the proposals. Process requirements may be given legal force, such as in the Dutch *General Administrative Law Act* and the U.S. *Administrative Procedure Act*, or may be established through directives from the council of ministers, as in Canada's *Regulatory Policy*.

√ **Establish centralised drafting, coordination, or review of legal texts**

131. Laws and regulations are typically produced by many parts of the administration. Even if each part does its job well, differing approaches can cause serious problems in the body of law, such as inconsistencies or even contradictions in policy content, diversity of legal structure and technique, jurisdictional confusion, and overlaps and duplications. One answer is the establishment of a central ministry or government legislative unit responsible for drafting or reviewing individual laws and regulations, and for preserving the quality of the whole body of the law. Such drafting units are already well-established in many of the SIGMA countries.

132. In the Netherlands, every ministry is required to have a central legislative unit that is responsible for the quality of laws and regulations drafted by that ministry. In addition, drafts of all laws and cabinet regulations are reviewed by the Ministry of Justice (General Legislation Policy Division) before they are sent to the cabinet.

133. In France, the Prime Minister requires a governmental co-ordinating body, the Government General Secretariat, to co-ordinate the legal drafting done by different ministries and departments and oversee the process of reaching consensus on final decisions when ministers do not agree. The Secretariat is a compact group with a staff of about 100. It looks after the Cabinet's working agenda, organises inter-ministerial meetings, puts an official stamp on the Prime Minister's decisions, and ensures the smooth running of the process by which legislation is drafted and approved.

134. The French Conseil d'État, in its role as a consultative body rather than an administrative court, ensures that certain principles and methods are observed in the development of legislation. All bills and the most important draft regulations are submitted to the Conseil d'État for an opinion on its quality before the bills are tabled in Parliament or the regulations are adopted.

Chapter Five

ASSESSING COSTS AND ECONOMIC EFFECTS¹⁰

SYNOPSIS

One of the key objectives of regulatory management is to ensure that the economic impacts of regulation are assessed, and that any negative impacts, such as costs to businesses, are reduced to the lowest level possible. Particularly for countries seeking to transform themselves from command to more market-oriented economies, economic analysis of new laws and regulations can be a valuable tool in preventing costly mistakes.

Economic analysis seeks to determine what government actions provide the greatest net benefits for the country as a whole. It begins by asking if there is an economic need for regulation. When a rationale for government intervention exists, alternative regulatory solutions should be analyzed. In general, regulations that harness or mimic the market itself are the most cost-effective. The chapter outlines several quality techniques for establishing an effective economic analysis capacity and for integrating economic analysis into legislative and regulatory processes.

The Problem

135. The quality of its laws and regulations are a crucial determinate of the economic viability and well-being of a country. Indeed, that is one of the important lessons of economic history after World War II. Countries that adopted laws and regulations that encouraged capital formation, foreign investment, market competition and international trade grew rapidly. Those that did not adopt such policies were left behind.

136. These principles and policies are now accepted and being implemented around the world. But difficult questions of how these policies are best implemented in specific institutional contexts remain. In particular, how should countries that must rapidly transform themselves from command economies to more market-oriented and democratic societies proceed to assess the economic impacts of new laws and regulations? The premise of this chapter is that **economic analysis** can provide a practical methodology to guide and design the laws and regulations needed for this transformation.

137. The key purpose of economic analysis in improving regulatory quality is to determine whether specific proposals for government action provide net benefits for the country as a whole. That is, considering both winners and losers, will the country be better off with this regulation than without it? Economic analysis is in constant tension with distributive analysis, which is concerned with the interests of only subgroups in society, such as farmers, big business, labour unions or government workers.

138. Economic analyses of laws and regulations, and the experience of many countries over the last 20 years in responding to the conclusions of economic analysis, suggest certain principles that can guide countries that wish to follow this approach. This chapter cannot hope to communicate all the knowledge gained by the economics profession and policy analysts on this subject. It can

¹⁰ This chapter has been adapted from a paper prepared for SIGMA by John Morrall, Office of Management and Budget (OMB), Executive Office of the President, United States. The views expressed here do not necessarily represent the views of OMB.

communicate, however, an appreciation for how economic analysis can improve the quality of laws and regulations.

139. The basic procedure for using economic analysis is conceptually simple: at some point before laws and regulations come into force, an assessment of the economic effects on income growth, jobs and inflation must be undertaken. This assessment must then be reviewed by experts and discussed in an open forum.

Approaches for Addressing the Problem

140. The ideal approach to integrating economic analysis into legislative and regulatory processes involves several possible steps. First, a government should establish a general requirement that all ministries producing draft laws and regulations should prepare an impact analysis of any proposal. Ideally, the impact analysis should include an estimate of total costs, to both public and private sectors, and of total benefits. Parliaments may also decide to establish an analytical capacity to assess quickly the financial and economic impacts of new legal proposals and amendments so that such information can improve the quality of the political debate before a law is adopted.

141. The cost of doing this analysis should not exceed the benefits expected from improvements in regulation that result from the analysis. Therefore, the quality of the analysis should depend on the potential impact of the regulation. Low-cost regulations may require only a brief, qualitative estimate of benefits and costs, while regulations with major impacts on entire industries may require a full-fledged quantitative benefit-cost analysis, involving surveys and extensive collection of data. Three kinds of analysis should be considered: **cost analysis** of direct compliance costs to determine where the major impacts will fall; **cost-effectiveness analysis** of a range of regulatory approaches to determine which approach achieves the objective at the lowest cost; and **benefit-cost analysis**, to determine whether society as a whole will be better off with the regulation.

142. Second, a government should establish an independent analytical unit at the centre of government to advise the Council of Ministers as it reviews new laws and rules; to assist the ministries and oversee the quality of their impact analyses; and to provide its own economic analysis of proposed laws and regulations. The group should be composed of trained economists and analysts familiar with economic theory, econometric modelling, and the experience of other countries. To establish the credibility of the analysis, the facts should be checked and the analysis reviewed by outside experts and made publicly available before final enactment of the legislation or regulation.

143. The analysis should begin by asking: Is there an economic need for the legislation or regulation? The presumption of market economics is that a market failure should be established before markets are regulated. If no such market failure exists, the best government policy is presumed to be no regulation at all, or the elimination of existing regulation. Market failures can be divided into three types:

- i) **Externality.** An externality or "spillover" occurs when one party's actions impose uncompensated benefits or costs on another party outside of the market transaction. An example is pollution such as chemicals from a factory, motorcycle noise, or side-stream smoke from cigarettes.
- ii) **Natural monopoly.** Natural monopoly exists where a market can be served at lowest cost only if production is limited to a single producer. Local telephone, gas, and electricity services are historical examples, but changes in technology can eliminate this condition.

- iii) **Inadequate information.** If one side of a market transaction has more information than the other side, then a potential exists for the first side to take advantage of the other. Consumers, for example, have no way of knowing what chemicals have been added to food if labels are not provided. But since information is not costless, the solution is not always the provision of more information to those who are less informed.

144. Once the rationale for government intervention has been determined, alternative regulatory and non-regulatory solutions must be considered and analyzed. Economic analysis can inform regulators which solution is the best. In general, it has been found that solutions that harness or mimic the market approach itself are the most cost-effective, providing the most benefits at the least cost.

145. In the case of negative externalities such as pollution, for example, the economically efficient approach is to set allowable pollution levels (such as sulphur from a power plant) at the level where the incremental cost of reducing pollution is equal to the incremental benefit to the rest of society of that reduction. The key task is the balancing of social costs and benefits: a society would probably be worse off if pollution levels were set at zero, forcing the plant to close and eliminate jobs. Equally, society would probably be worse off if pollutants were to injure large numbers of people in the surrounding area. Environmental regulation, therefore, must ensure that the costs of pollution reduction are proportional to the value of the benefits of reducing pollution.

146. Other solutions that are more market-oriented than simply telling each firm to install a filter at the end of the smokestack include:

- i) performance standards expressed in tons of pollutant per plant;
- ii) a pollution charge or tax per ton of pollutant equal to the cost per ton inflicted on society; and
- iii) a marketable permit system that allows plants to trade permits to emit a pollutant (e.g., sulphur) among themselves. The last approach, which has been implemented in the United States, provides the greatest pollution reduction for the least cost.

147. In the case of natural monopoly, the last 20 years has shown that the number of natural monopolies is ever decreasing. The "textbook" natural monopoly was considered to be the telephone service, but now with the rise of the cellular phone, and cable TV lines, even local phone service is no longer a natural monopoly. The lesson is that regulations that establish entry barriers to most industries are not likely to confer net benefits to society. Economic analysis of regulations that restrict entry and pricing should carefully consider the pace of technological developments and the experience in these industries in other countries.

148. Finally, regulations mandating information disclosure must weigh the cost of providing the information against its practical utility. It is possible, for example, to label each loaf of bread with the names and proportions of its ingredients, but consumers may not wish to pay the extra cost of such information. Attention also must be paid to the international harmonisation of information provision requirements. There are important efficiencies to be gained from standardising the amounts and kinds of information provided for internationally traded goods and services.

Checklist of Quality Techniques for Assessing Costs and Economic Effects

149. A few broad suggestions, reflecting approaches that have proven useful in OECD countries, are listed below.

√ **Require impact analysis of the costs and benefits of proposed laws and regulations**

150. Ministries that develop new laws and regulations should routinely prepare an impact analysis of the potential costs and benefits which accompanies the proposal as it is reviewed by policy officials and ministers. Impact analysis will not only help regulators to make better decisions, but will assist ministers and members of parliament to understand the relevant aspects of proposals. Requirements for impact analysis usually come from the centre of government, i.e. the Prime Minister or the Council of Ministers, and are embodied in an internal government directive. Impact analysis is not always easy to perform, particularly when information is unavailable or highly unreliable. Yet governments can collect helpful information through a variety of low-cost techniques, such as through surveys of enterprises that will be affected, through estimates of impacts on "model" enterprises, and through public consultation. Even if information is inadequate, the process of asking the right questions and applying the information available imposes a useful rigor and discipline that in itself improves the final decision.

√ **Establish a central economic analysis unit**

151. Several OECD countries have established a centralised economic analysis unit for reviewing proposed legislation and regulations. This option must be "sold" to the most senior political and administrative officials, and funding and organization structure must be determined. Such an economic analysis unit should be viewed as objective and independent. It should be composed of professional economists or analysts who have the ability to apply the economic theory, econometric modelling techniques and international experience to real non-theoretical policy problems. Such a unit could advise Members of Parliament as well as ministers and bureaucrats.

√ **Establish an economic analysis capability in regulatory programmes**

152. Even if a centralised economic analysis unit is established, the ultimate objective of a regulatory management system should be to ensure that regulatory proposals are developed from their earliest stage with a proper and complete appreciation of the economic impacts. Establishing the necessary economic analysis capability in regulatory programmes is a formidable task for any government, but the long-term benefits in terms of improved regulation and more efficient public administration can be substantial. One good first step would be to ensure that trained economists work with officials involved in developing or reviewing legislation and regulations. In addition, a brief course in regulatory economics might be given for a broader range of officials.

√ **Integrate economic analysis into legislative and regulatory processes**

153. Economic analyses and cost assessments should be presented to, discussed, and understood by legislative and regulatory policy makers before final actions are taken. Careful thought must be given as to how analysis can best be integrated into the legislative and regulatory process of a government; approaches appropriate in one country may require substantial modification in another due to political, constitutional, or organisational differences. Models for this option range from simple disclosure of the information to mandating that new initiatives pass a benefit-cost test. The usefulness of economic analysis depends, ultimately, on commitment at the political level. Councils of ministers and parliaments, for example, may decide to consider only proposals accompanied by adequate economic analyses, but if they routinely ignore this requirement, economic analysis will soon become a paper exercise, or disappear altogether.

Chapter Six

ASSESSING COMPLIANCE AND IMPLEMENTATION REQUIREMENTS¹¹

SYNOPSIS

As most government administrators are well aware, it is not enough to write a good regulation. The government must also be able to make it work. This requires careful planning, sound public management practices, and attention to a multitude of detailed and often technical implementation concerns. This chapter provides a framework for assessing implementation and compliance requirements for laws and regulations, with a checklist of quality techniques for governments that wish to improve in this area.

Improving Attention to Implementation and Compliance

154. Writing high-quality regulation is an essential step toward producing an effective and efficient body of law, but if governments stop there, the regulatory system will generate more failures than successes. Compliance and implementation strategies, focusing on the interface between the administration and the public, are also essential to the development of well-running regulatory programmes. Insufficient attention to compliance and implementation can create damaging problems for governments:

- **Non-compliance:** People may not be aware of legal requirements, and people who are unwilling to comply may have no incentive to do so;
- **Inconsistency and Unfairness:** Adjudicative bodies may be unable to deal effectively with non-compliance; enforcement may be uneven, disproportionate, and inequitable;
- **Corruption:** Lack of control over programme delivery risks corruption in public and private sectors; and
- **Lack of legitimacy:** Discrepancy between expectations and performance may undermine trust between citizens and government, resulting in a questioning of the legitimacy of the legal system and reduced commitment to the rule of law.

155. Conversely, doing a better job of implementation, particularly in achieving greater compliance, can bring significant operational benefits for regulatory programmes and, indirectly, for the government as a whole. Among the most important benefits are:

- An orderly, controlled progression from approval of laws and regulations to full implementation;
- Improved levels of compliance with regulatory requirements;

¹¹This chapter was prepared for SIGMA by Eric Milligan, The Regulatory Consulting Group, Ottawa, Canada.

- Increased fairness and consistent application of the legislation by enforcement authorities and adjudicators;
- Improved procedural fairness and due process;
- Lower compliance costs for the public; and
- More efficient and better controlled use of available resources for delivery of regulatory programmes.

Factors Affecting The Implementability of Regulations

156. Effective implementation of laws and regulations requires attention to three key factors:

- i) The technical quality of the legal instrument itself (its content, legal validity, and manner of expression);
- ii) The capability of administrative and adjudicative organisations to carry out needed regulatory functions in a consistent, open, and fair manner; and
- iii) The capability and willingness of regulated entities to comply.

The First Factor: Technical Quality of Legal Instruments

157. As was noted in Chapter Four, the quality of drafting of a legal instrument can affect implementability, enforceability, and the overall level of compliance. Regulatory requirements should be clearly expressed, logically organised, and consistent both internally and with other legal instruments. Regulatory requirements should be unambiguous; the potential for differing interpretation by regulatory officials and adjudicators should be minimised. Compliance with the rules should be discernible by observation of actions or conditions that are visible or that can be objectively established and that can be conclusively proved under applicable rules of evidence in legal proceedings. Information necessary to determine compliance should be available at minimal cost to enforcement authorities and regulated entities.

158. Considerations such as these are found in the regulatory checklists of many countries. The *Directives for Legislation* checklist employed by the Government of the Netherlands (see Chapter Four) place considerable importance on this aspect of preparing legislation and give detailed instructions for good drafting practices. Although there are common principles of clear legal expression, differences in language, legal systems, principles of legal interpretation, and drafting conventions among countries will inevitably result in somewhat different approaches.

The Second Factor: Capability of Government Institutions

159. A second factor affecting implementability is the capability of a government to establish the institutions and carry out the functions required for “delivery” of the regulatory programme. An assessment of programme delivery requirements requires a methodical examination of the functions, administrative controls, resources, organisational structures, information requirements, and control and accountability arrangements required to support the regulatory provisions.

160. The following framework can be used, with adjustment as necessary, for identifying and assessing regulatory programme delivery requirements.

Institutional Design

161. **Definition of Roles and Responsibilities:** Specific roles and responsibilities within the regulatory programme should be defined. These should flow from the legal structure of the regulatory programme as reflected in the legislation, the chosen strategy for securing compliance with the regulatory requirements and from an assessment of the specific functions of the institution.

162. **Administrative Controls:** Control over the use of regulatory enforcement powers to prevent abuses and corruption by government officials is fundamental to the legitimacy of the regulatory system. The development of working control systems -- through general administrative procedures, auditing, transparency processes, and judicial review -- should go hand-in-hand with the development of compliance programmes. This effort is related to the larger issue of developing a public service culture and ethical system.

163. **Human and Financial Resources:** Identification of the level and type of resources required for implementation should follow from the definition of required functions. This assessment should cover human resources (skills, experience, aptitudes, training needs), operational budget requirements, and capital requirements.

164. **Organisational Structure:** The organisational structure of the regulatory programme should be based on the determination of functions, roles and responsibilities, the identification of required resources, and requirements relating to delivery of, and access to, programme services.

Planning, Policy, Consultation, and Rule-Making Functions

165. **Planning, Priority-Setting, and Periodic Review Mechanisms:** Planning systems allow priorities to be set in advance for developing new regulations, compliance monitoring activities (e.g., inspections, audits, and other surveillance methods), investigations, prosecutions, and other adjudicative functions. These systems should ensure that priorities are based on factors such as risk, magnitude of actual or potential harm, compliance history, and economic or social significance.

166. **Policy Development and Rule-Making:** Developing regulatory policies and individual rules are obvious components in regulatory programmes of OECD countries. There is a need for a strong capability in research, economic and legal analysis, and legal drafting both in the Government and parliament. Specialised expertise in cost-benefit analysis and risk analysis is becoming increasingly important.

167. **Consultation Mechanisms:** Regulatory programmes usually require consultation mechanisms for two-way communication between the regulatory authorities and regulated interests on a variety of matters including broad policies, proposed new regulations, and compliance strategies. Increasingly, however, regulatory programmes are adopting multi-lateral approaches to achieve a consensus among a broader range of affected interests, including beneficiaries of the regulatory programme (e.g., consumers, workers) and other levels of government.

Compliance Activities

168. **Compliance Promotion Activities:** Providing basic information on regulatory requirements is an essential activity to promote compliance. A good regulatory programme will communicate with members of the regulated group, those who benefit from the regulatory regime and, often, with the general public. In a good programme, communication will be, at the very least, a two-way exercise.

169. **Compliance Monitoring Activities:** The traditional approach to monitoring is to employ inspectors, laboratory testing facilities, investigations, periodic compliance surveys, mandatory reporting requirements, etc. However, regulatory surveillance is a severely limited tool to achieve compliance. In most areas of broad regulation, it is impossible for regulatory officials to be in all the right places at all the right times.

170. **Enforcement Activities:** The ability to invoke enforcement measures when violations of regulations are discovered is necessary to ensure the long-term effectiveness of a regulatory regime and to ensure fairness in its administration. There is, in theory, a wide range of possible enforcement responses available to regulators:

- Verbal or written warnings;
- Tickets with a monetary penalty attached;
- Administrative directives or orders;
- Increased regulatory burden (e.g. more stringent reporting requirements, more intensive inspections, cost recovery of additional inspections);
- Administratively imposed monetary penalties;
- Negotiated solutions to non-compliance, enforceable by various methods (e.g. performance bonds, consent orders, suspended penalties);
- Adverse publicity;
- Licensing sanctions (e.g. increased restrictions, short-term renewals, suspension);
- Contract listing (loss of right to government contracts);
- Other civil remedies (injunctions, more punitive fines, restitution); and
- Criminal prosecution (which may also result in a wide array of possible remedial orders).

171. **Adjudication Mechanisms:** Adjudication may be carried out by a variety of courts within the country's judicial system, administrative tribunals, designated officials, ministers, cabinet, or in some cases, by legislative bodies. Adjudication usually requires some degree of independence from other components of the regulatory system and is probably best treated as a discrete sub-system for implementation purposes. The implications of a regulation for the adjudicative mechanism's planning and management systems, human and financial resources, information systems, document control systems, administrative and adjudicative procedures, security, etc. should be considered.

Managing the Institution

172. **Specialised Skills:** Having the enforcement powers, however, and being able to use them effectively are quite different matters. Enforcement activity requires specialised skills (legal, investigative, scientific), planning, co-ordination, information systems, standardised procedures, security arrangements -- most of the key elements found more broadly in the regulatory system as a whole.

173. **Data Collection and Information Systems:** Good information on the external regulatory environment, market activities, compliance levels, administrative and enforcement activities, adjudicative activities, and research, policy and legislative developments in other jurisdictions is essential for sound planning and management in regulatory programmes.

174. **Management Mechanisms:** The institution will need mechanisms for human resource management, financial planning and management systems, security and access to information arrangements and will have to develop procedures for all critical functions in the regulatory programme including planning, information systems, training, operational co-ordination, inspections, testing, investigations, prosecutions, adjudications, periodic review, budgeting, and human resource management.

The Third Factor: Capacity and Willingness of Regulated Entities to Comply

175. The third factor affecting implementability of regulations is the capacity and willingness of regulated entities to comply. A primary objective of implementation should be to deploy limited resources to those areas where they will do the most good. One hundred percent compliance is not possible, hence governments should plan strategically to focus on the highest priorities. Compliance does not flow automatically from the mere existence of a regulation and threat of a sanction. Compliance with any particular rule will be determined by a complex interplay of factors that are partly external to the government and partly arising from the actions of regulatory authorities.

176. Research conducted in several jurisdictions has identified the following as important factors affecting levels of compliance with government regulations:

- Understanding and acceptance of the objectives and rules;
- Enforceability of the rules;
- High costs and other factors affecting the capability of the regulated group to comply;
- Social, cultural, and psychological factors;
- Capability of the regulatory programme to promote voluntary compliance, monitor compliance, and to take effective enforcement action when violations occur;
- Strength of civil society and expectations of social responsibility.

177. One option for a strategic approach to implementation is to maximise the “leverage” of government resources and activities as much as possible by *strengthening* the external factors working in favour of compliance and by *weakening* or eliminating those working against. Early development of a detailed compliance strategy that assesses the regulatory environment -- the strengths and weaknesses of the external factors that influence compliance -- and maps out a cost-effective approach to securing compliance (see discussion below) can help regulatory officials create sensible regulations and should be a key step in planning for implementation.

Checklist of Quality Techniques for Assessing Compliance and Implementation Requirements

178. Drawing on the three factors identified above, the following 10 quality techniques could improve the assessment of compliance and implementation requirements for new regulations.

√ **Include Implementability and Enforceability Criteria in Drafting Legal Instruments**

179. The time to think about *how* compliance will be achieved and *what* will be necessary to implement a regulation is when it is being prepared and approved. Including implementability and enforceability criteria in drafting proposals for new laws and regulations would require ministries to address these issues at an early stage. This, in turn, would ensure that information on programme delivery requirements is available to government decision-makers and to members of parliament.

√ **Develop Systematic Compliance Strategies**

180. A related approach to assessing the implementability of regulations is to require comprehensive compliance strategies for regulatory programs that are being created or substantially altered through new laws. A compliance strategy would be an internal document that would:

- Explain the policy objectives of the proposed reform, summarise the substantive requirements, and identify all authorities who would exercise decision-making powers under the reformed system;
- Describe and analyse the general economic and social environment in which the new regulation would be operating;
- Identify key stakeholders (including regulated interests and beneficiaries);
- Identify and assess the economic, social and psychological factors working for and against compliance;
- Propose a strategy for programme delivery that would exert maximum leverage on the external factors by strengthening those operating in favour of compliance and weakening or eliminating those working against; and
- Describe the specific activities that would be undertaken under the strategy for compliance promotion, compliance monitoring, and enforcement.
- Describe the system of administrative controls that will prevent abuse or corruption by government officials.

181. A compliance strategy of this type provides a comprehensive analytical framework. It establishes a strategic approach to programme delivery to maximise the cost-effectiveness of scarce government resources. It tries to strike a balance between activities and resources devoted to promotion of voluntary compliance and those devoted to enforcement.

182. As an added bonus, compliance strategies can be easily converted to public statements of government compliance policies by prudent editing. Governments can publish the proposed compliance policy together with a draft law or other regulatory instrument. This would allow people to see not only what the law says, but how it would be applied.

√ **Use an Implementation Assessment Checklist**

183. Another approach would be to develop an implementation assessment checklist, perhaps as a detailed sub-elaboration of a general regulatory checklist. This checklist could address all three factors affecting implementability: technical quality of the legal instrument, programme delivery requirements, and compliance.

184. The following is an example of a simple checklist for assessing implementation requirements:

Model Regulatory Implementation Assessment Checklist

1. Is the law drafted in a way that will facilitate implementation and enforcement?
2. What is the strategy for securing compliance with the regulation?
3. What functions will be required to make this strategy work properly?
4. How will compliance promotion and other communications activities be carried out?
5. How will compliance monitoring be carried out?
6. How will regulatory requirements be kept up to date?
7. How will enforcement be carried out?
8. How will adjudication be carried out?
9. What types of information will be required for operation of the programme? How will it be generated, compiled, protected, and disseminated?
10. What kind and level of human and financial resources will be required? How will they be acquired and managed?
11. What organisational structure will be optimal to provide a suitable balance of control, accountability, and freedom to provide services?
12. What arrangements will be required for security?

185. This checklist addressing implementation requirements could be used in conjunction with the drafting guidelines described in Chapter Four. It could also be used on its own by a central regulatory oversight body, the Ministry of Justice, the Treasury Ministry, the Cabinet office or by originating ministries.

186. A potentially powerful application of the checklist would be to use it to structure the information that is submitted to individual ministers, the council of ministers, the prime minister or president, special legislative review councils, external advisory bodies, or to parliament itself concerning a new regulation. In some cases, the checklist could serve as an agenda for discussion of the proposed regulation.

187. With both the drafting instructions and the checklist strategies, it will be important to have realistic expectations about the magnitude and speed of improvements. As with economic analysis, the quality of analysis about implementation and compliance requirements may not be high at first. It will improve over time, however, and any attention to the issues is better than none at all. Perhaps the most important effect of a checklist is the discipline that it brings to the process of developing new regulations. Over time, officials and politicians begin to think differently about regulation.

√ **Require Explicit Parliamentary Consideration and Approval of Resources Required for Implementation**

188. Another approach to instilling discipline into the creation and the implementation of new regulations is to require explicit parliamentary consideration and approval of any new resources required for implementation. This could be accomplished by requiring that spending authority be included in the bill establishing the new law. Another approach might be to require a separate bill specifically devoted to securing the resources for programme delivery.

√ **Apply Project Planning and Management Techniques**

189. Significant advantages can be gained by applying project planning and management techniques to the implementation of new regulations. Project planning requires a comprehensive and detailed identification of all areas of activity and all tasks that must be carried out. This, by itself, would require ministries to address each component of the programme delivery framework described above.

190. A proper implementation plan would also identify dependencies and interrelationships or co-ordination requirements among different streams of activity. Accurate time estimates for completion of the work would be required and managers would be required to assign resources (including programme administrators). Senior-level approvals for the plan would be required and “buy-in” from the implementation team would be necessary. Management of the implementation activities could be carried out under the plan, which would provide a basis for periodically reviewing progress and holding team members accountable for their performance.

√ **Educate and Involve the Decision-Makers**

191. A supplementary approach would be to discuss general problems of regulatory implementation with government decision-makers and with Members of Parliament and to jointly seek solutions. Such discussions could sensitise the decision-makers to the practical problems facing officials and might help establish more effective lines of communication and engender greater trust among the various actors. Discussions should touch on the potential consequences of widespread implementation problems on the commitment to the rule of law and on the legitimacy of the government process; these concerns are no doubt shared by Members of Parliament, Members of the Government, and by officials.

√ **Organise Training Sessions for Ministry Staff on Implementation Assessment**

192. Again, as a supplementary measure, training sessions on implementation assessment might be held for ministry staff.

√ **Strengthen Common Elements of Regulatory System**

193. As was noted above, some elements of a regulatory programme may be external to the government body which has primary responsibility for administration. Examples might be investigative services, the courts, administrative tribunals, common rule-making systems, common legislative information systems, and administrative law systems. If these elements are strengthened, all regulatory programs that rely on or link with them will benefit.

√ **Ease Implementation Problems by Slowing the Pace of New Regulation**

194. A common strategy is to allow more time for implementation by slowing the pace at which new laws and other forms of regulation are created. This could be accomplished through the legislative planning systems currently functioning in the governments.

Chapter Seven

COMMUNICATING AND CODIFYING LAWS¹²

SYNOPSIS

For any government, a key element in successful regulatory management is communication of laws and rules to citizens and government administrators. Effective communication strategies further legitimise regulatory actions and also help to ensure that regulatory requirements will be better written, easier to comply with, and easier to enforce. There are two essential elements to communication: comprehensibility and accessibility.

This chapter reviews a variety of quality techniques that address both elements. It points out that a great deal can be accomplished through relatively low-cost initiatives that do not require investment in information technologies. As the need develops and resources become available, the basic systems can be enhanced through adoption of more advanced technology, particularly by the use of automated legal databases and computer networks offering both government and private sector virtually instantaneous access to current texts of laws and regulations as well as synopses of those under development.

Ensuring Comprehensibility of Legal Requirements

195. As discussed in previous chapters, sound laws and regulations are developed by methods such as using appropriate analysis, consulting with the affected public, capturing the details in appropriate “legal language”, and applying a sensible enforcement scheme. The final crucial steps to success or failure, however, are public access to the regulation and public understanding of the regulation. Laws and regulations must communicate clearly to those who must comply with the requirements. In this sense, laws and regulations should be seen as an “information system” linking administration and citizens. This chapter examines the mechanisms through which these linkages operate.

196. A variety of serious problems can arise from incomprehensible legal requirements:

- low levels of compliance
- uncertainty regarding obligations (both for citizens and administrators)
- problems with enforceability and consistency
- isolation of the law from the general populace and weakening of the commitment to the rule of law.

Several kinds of communication techniques can help avoid these sorts of problems.

¹² This chapter was prepared for SIGMA by Jon Bing, Norwegian Research Center for Computers and Law, University of Oslo, Norway; and Mark Schoenberg, Regulatory Information Service Center, United States.

Checklist of Quality Techniques for Comprehensibility

√ **Require that all legal requirements be comprehensible**

197. A government-wide checklist, such as is discussed in Chapter 2 (paragraphs 57-59), can include a strong statement of policy from the executive to ministries drafting laws and regulations that all legal instruments should meet certain standards of "plain language." The German Blue Checklist, for example, requires administrators writing new regulations to assess, "Will the new provision be readily understood and accepted by the average citizen?" Numerous other examples can be seen in OECD countries. A checklist can sensitize administrators to the problem and, if accompanied by concrete suggestions and examples, can help educate them in techniques for simplifying legal language.

√ **Require that amendments to existing laws and rules specify the changes that are being made**

198. A consistent, orderly and logical legal structure reduces the costs and confusion of understanding the law. Reading a law should not be like solving a puzzle with parts scattered through the legal code. To this end, governments should specify exactly any changes that result from legal amendments rather than make general statements that amendments take precedence over existing requirements. This clarifies the intent of the amendments and facilitates the codification of laws and rules. In Austria, for example, "Guidelines for Drafting and Formulating Laws" include detailed instructions on how to amend laws to avoid the creation of "separate norms" that must be read to understand the meaning of the original law.

√ **Establish editorial review boards**

199. Editorial review boards, established at a central review level or in the individual ministries, can help ensure that legal requirements meet commonly agreed upon standards for comprehension. Some countries have established central drafting offices -- attached to the parliament, to the council of ministers, or to the ministry of justice -- who may be better able than administrators in line ministries to draft new laws in a consistent and high-quality fashion.

Checklist of Quality Techniques for Dissemination of Legal Requirements

200. After legal requirements are issued, governments must ensure that they are easily available to citizens. Universal availability of the law, in fact, is one of the fundamental legal principles inherited from the Romans and, before them, from the ancient Athenians. Accessibility to the law is a defining characteristic of democratic systems, but there is a practical side as well: only by adequately disseminating information about their legal requirements can governments hope to achieve reasonable levels of compliance. One of the most common causes of noncompliance in OECD countries is that citizens are simply ignorant of the existence of laws and regulations.

201. Again, governments may select from a variety of quality techniques to accomplish these objectives and may "fine-tune" the approaches to suit the particular circumstances of the country, including available resources, current state of information dissemination systems, availability of technology, geography, multiple language requirements, etc. Several SIGMA countries developed systems of codification under the socialist regimes, which may now be used as the basis of more proactive strategies of communication.

√ **Publish national gazettes**

202. National gazettes containing new laws and rules or amendments to old ones, which are published on a known schedule and easily available to the public, can ensure that affected parties have the ability to know about new requirements they must observe. Such gazettes may be either centralised so that they publish **all** new laws, regulations, and amendments, or they may be issued by individual ministries in their jurisdictions. In either case, an effort must be made to order and present the gazette material in a readable fashion, and to disseminate the gazettes as widely as possible among citizens who may need to know. Some consideration should also be given at the national level to establishing a system of regional or local gazettes for subnational governments writing laws and regulations.

√ **Prepare periodic codifications of laws and regulations**

203. An important first step to improving the quality of laws and regulations is to prepare a comprehensive organised code of laws and rules in which all existing legal requirements can be found. By preparing publicly available periodic codifications, governments can ensure that there is a database of current legal requirements. Codification also helps to ensure that the contents of the database are less likely to be subject to multiple interpretations. At the ministerial level, a registry or list of regulations is a second-best, but still useful, alternative that can help the public identify relevant regulations. Codifications should also be considered at the regional and local levels, as was suggested for the gazette, if those levels of government are important sources of laws and other types of regulation.

√ **Establish public information offices**

204. Governments can establish, at ministries and the legislature, offices to provide citizens with information about the latest legal requirements, their interpretation by enforcement officers, and any proposed changes that may be under development. A contact point in each ministry for citizens to call with questions about how to identify and interpret regulations on specific issues can also be enormously valuable in helping the public comply. Public information offices should not act as compliance offices that identify violations and "tell the public what to do," but as out-reach initiatives that assist a sincere but often confused citizenry. More pro-active public information offices may also pursue public information and education campaigns, such as by giving seminars to businesses, that "market" new policies to the public.

√ **Establish intra-governmental workgroups**

205. Governments can establish workgroups between related ministries and organisations to help disseminate information about legal requirements within the government. In addition, these workgroups can be asked to work together to prevent duplication, overlap, and inconsistency of legal requirements.

Further Steps using Technological Solutions

206. The quality techniques listed above generally do not involve great expense or technical sophistication. Many of them are basic systems which lend themselves to more sophisticated technological solutions as the need develops. For example, as the number of laws and rules grows, the government may wish to have its legal information available in a unified automated system. If the data have been kept in a consistent format, the transfer of that data to an automated system should be quite straightforward. Of course, almost regardless of its original format, material can later be edited to fit a common computer format.

207. In other cases, the national government may have delegated law-making powers to subnational levels of government, such as regional governments. If funding becomes available, it may be

determined that it would be beneficial to place all national and regional requirements in a common database in order to identify a wider range of requirements that affect a regulated group. Such a database could also be used to identify inconsistencies between national and regional requirements. Later, supranational and/or international requirements may be added to the database to provide even more complete information.

208. Most importantly, governments should try to maximise the availability of legal information for their citizens and for their own internal use. By doing so, they not only further legitimise their actions but also help ensure that the requirements they develop will be better written, easier to comply with, and easier to enforce.

Annex

RELATED OECD PUBLICATIONS

Occasional Papers on Public Management

The "Occasional Papers on Public Management", launched following the establishment of the Public Management Committee in 1990, include short reports prepared as contributions to the Committee's work. The papers focus on specific aspects of administrative modernisation, such as budgeting, human resource management, regulatory reform, and the use of information technology.

Regulatory Management and Reform Series:

- No.1 **Regulatory Management and Reform: Current Concerns in OECD Countries** by the Secretariat [OECD/GD(92)58]
- No.2 **Controlling Regulatory Costs: The Use of Regulatory Budgeting** [OECD/GD(92)176]
- No.3 **Improving Regulatory Compliance: Strategies and Practical Applications in OECD Countries** [OECD/GD(93)63]
- No.4 **The Design and Use of Regulatory Checklists in OECD Countries** [OECD/GD(93)181]
- No.5 **Using Information Systems in Regulatory Management** (forthcoming 1994)
- No 6 **Techniques and Practice of Regulatory Analysis** (forthcoming 1994)

SIGMA Publication

Public Management Profiles, SIGMA Countries [OECD/GD(93)129]

OECD Observer Articles

Jacobs, Scott (1992) "Controlling Government Regulation: A New Self-Discipline" **The OECD Observer**, April/May, pp.4-8

Jacobs, Scott (1994) "Why Governments Must Work Together" **The OECD Observer**, February/March, pp.13-16

In order to obtain the above publications, please contact:

OECD, SIGMA Programme
2, rue André-Pascal
75775 Paris Cedex 16
France

Tel: (33-1) 45 24 82 00
Telex: 640048