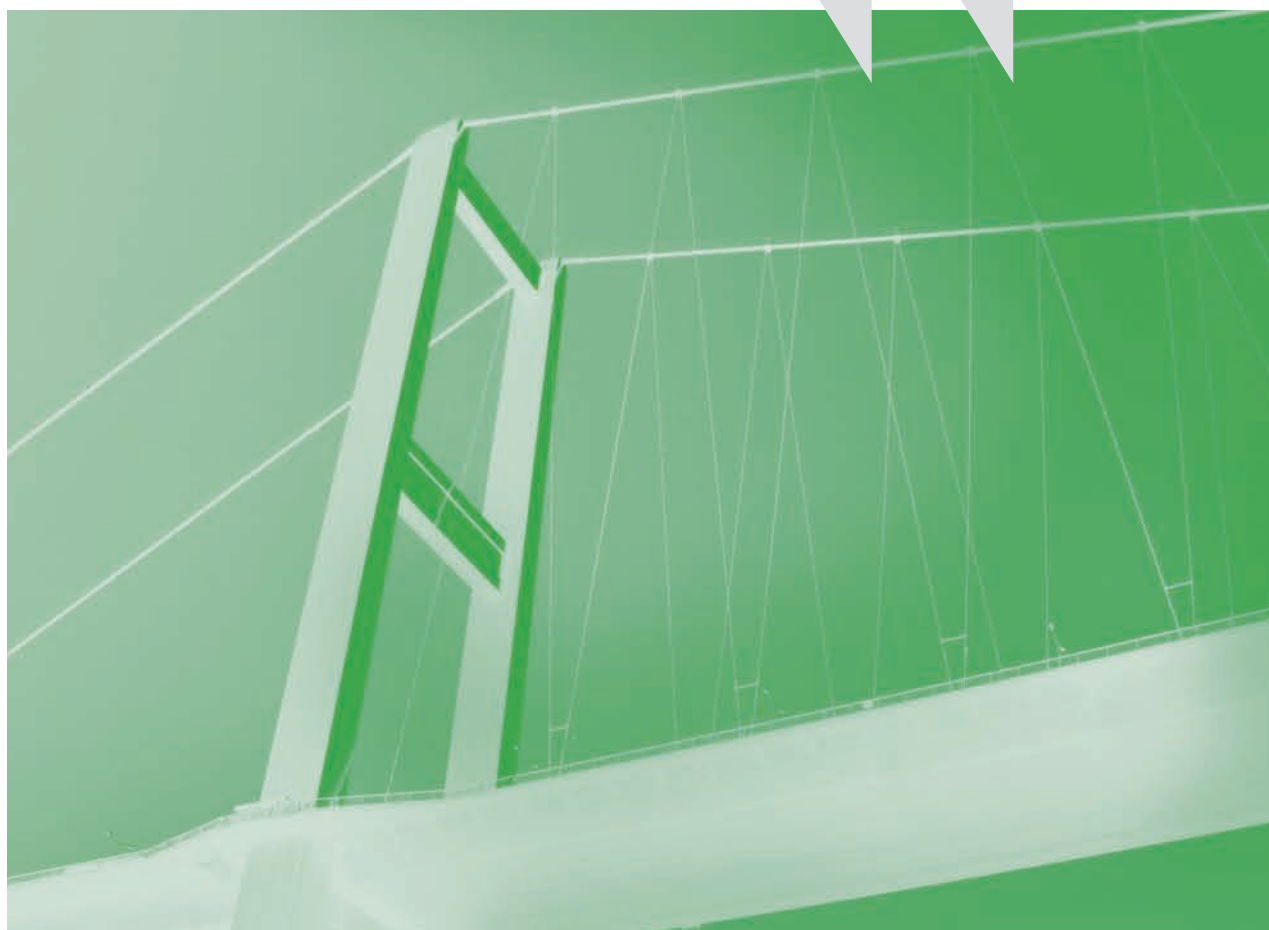


Regulatory Policy and the Road to Sustainable Growth



Foreword

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

These questions need to be debated against a difficult backdrop. The effectiveness of regulatory policy has been put to a severe test with the financial crisis and recent environmental disasters. Businesses and citizens continue to complain about red tape, which holds back competitiveness and takes up the time of ordinary people. Public services are also affected, when there is red tape inside government. In many countries, regulatory inflation continues to undermine the clarity of the law. Why have current regulatory institutions, tools and processes failed to deliver consistently “fit for purpose”, user-friendly regulations and regulatory frameworks? What needs fixing? Can gaps in regulatory frameworks be filled without imposing unhelpful constraints on innovation and competitiveness?

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

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

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Executive Summary

“Regulatory policy is taking shape across the OECD and paths are converging”

Regulation, one of the three key levers of state power (together with fiscal and monetary policy), is of critical importance in shaping the welfare of economies and society. The objective of regulatory policy is to ensure that the regulatory lever works effectively, so that regulations and regulatory frameworks are in the public interest. Regulatory policy, a comparatively young discipline, is taking shape in different ways across the OECD membership and beyond. Different pathways, however, are tending towards common objectives. Many OECD countries did not have a regulatory policy ten years ago; nearly all now do.

“Regulatory policy has made a significant contribution to growth and the rule of law”

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

“Recovery from the crisis and sustainable growth need the support of effective regulation”

Governments face a range of challenges as they emerge from the crisis. They need to put their economies back on the path to sustainable growth, find ways to handle complex and interrelated policy areas, anticipate and manage risks more effectively, and regain the trust of their citizens. Effective regulation can provide strong support for meeting these challenges. Ineffective regulation, conversely, will slow recovery, inhibit growth, undermine efforts to address complex issues such as climate change, and reinforce citizens’ scepticism of government.

“Evidence based impact assessment, strong institutional capacities and giving voice to users will be needed”

If regulatory policy is to support economic and social renewal, its core institutions and processes need to be developed further. This includes:

- a strengthening of evidence-based impact assessment to support policy coherence;
- institutional capacities to identify and drive reform priorities; and not least
- paying more attention to the voice of users, who need to be part of the regulatory development process.

“Stronger regulatory governance is the key to success”

Effective regulation to help meet the challenges facing governments will only be achieved through stronger regulatory governance, closing the loop between regulatory design and evaluation of outcomes. This draws attention to a range of issues, including:

- institutional leadership and oversight;
- reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation with a view to securing accountability and avoiding capture;
- a renewed emphasis on consultation, communication, co-operation and co-ordination across all levels of government and beyond, including not least the international arena; and
- strengthening capacities for regulatory management within the public service.

“A renewal of the OECD’s 2005 Principles will help to crystallise a shared understanding, and provide a benchmark against which future efforts can be measured”

Moving forward to strengthen regulatory policy requires a roadmap, and collective reflection as well as reflection by individual countries on what needs to happen next. Issues for collective reflection include how shared principles can be further developed across different cultural contexts, the scope for newcomers to adapt or even leapfrog towards better regulatory governance by learning from the experiences of others, how to measure performance and progress, and effective sequencing of further change. A renewal of the OECD’s 2005 Principles will help to crystallise a shared understanding, and provide a benchmark against which future efforts can be measured.

Key Messages

- Modern economies and societies need effective regulations to support growth, investment, innovation, market openness and uphold the rule of law. A poor regulatory environment undermines business competitiveness and citizens' trust in government, and it encourages corruption in public governance.
- Governments face a range of challenges as countries emerge from the crisis. They need to put their economies back on the path to sustainable growth, find ways to handle complex policy areas, and regain the trust of their citizens.
- Regulatory reform has already proved its worth, supporting structural reforms, entrepreneurship and market openness.
- There is no room for complacency, however. Stronger regulatory governance is needed to move forward, and this will require:
 - » Institutional leadership and oversight to drive reform priorities and provide early warning to policy makers of regulatory issues that need to be fixed.
 - » Evidence-based impact assessments to support policy coherence.
 - » Paying more attention to the voice of users, who need to be part of the process.
 - » A renewed emphasis on consultation, communication, co-operation and collaboration across all levels of government, not least in the international arena.
 - » Reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation, to secure accountability and avoid capture.
 - » Tools to evaluate and measure performance and progress.
- Moving forward also requires a roadmap. A renewal of the OECD's 2005 Principles for Regulatory Quality and Performance will help to crystallise a shared understanding, and provide a benchmark against which future efforts can be measured.

Chapter 1

Setting the scene: The importance of regulatory policy

Regulation, one of the three key levers of state power (together with fiscal and monetary policy), is of critical importance in shaping the welfare of economies and society. The objective of regulatory policy is to ensure that the regulatory lever works effectively, so that regulations and regulatory frameworks are in the public interest. Regulatory policy, a comparatively young discipline, is taking shape in different ways across the OECD membership and beyond. Different pathways, however, are tending towards common objectives. Many OECD countries did not have a regulatory policy ten years ago; nearly all now do.

What is regulatory policy?

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

Box 1.1. What is regulation?

A regulation may be defined as any instrument by which governments, their subsidiary bodies, and supranational bodies (such as the EU or the WTO) set requirements on citizens and businesses that have legal force. The term may thus encompass a wide range of instruments: from primary laws and secondary regulations to implement primary laws, subordinate rules, administrative formalities and decisions that give effect to higher-level regulations (for example, the allocation of permits), and standards.

Regulations may emanate from non-governmental or self-regulatory bodies to which governments have delegated regulatory powers.

Regulations do not only address the activities of the private sector. They include the rules and procedures that frame the internal operation of public authorities, including ministries and government agencies.

So called “soft law” is increasingly important. This means that, for example, administrative guidance and circulars which are not intended to have legal force, may acquire legal force in practice.

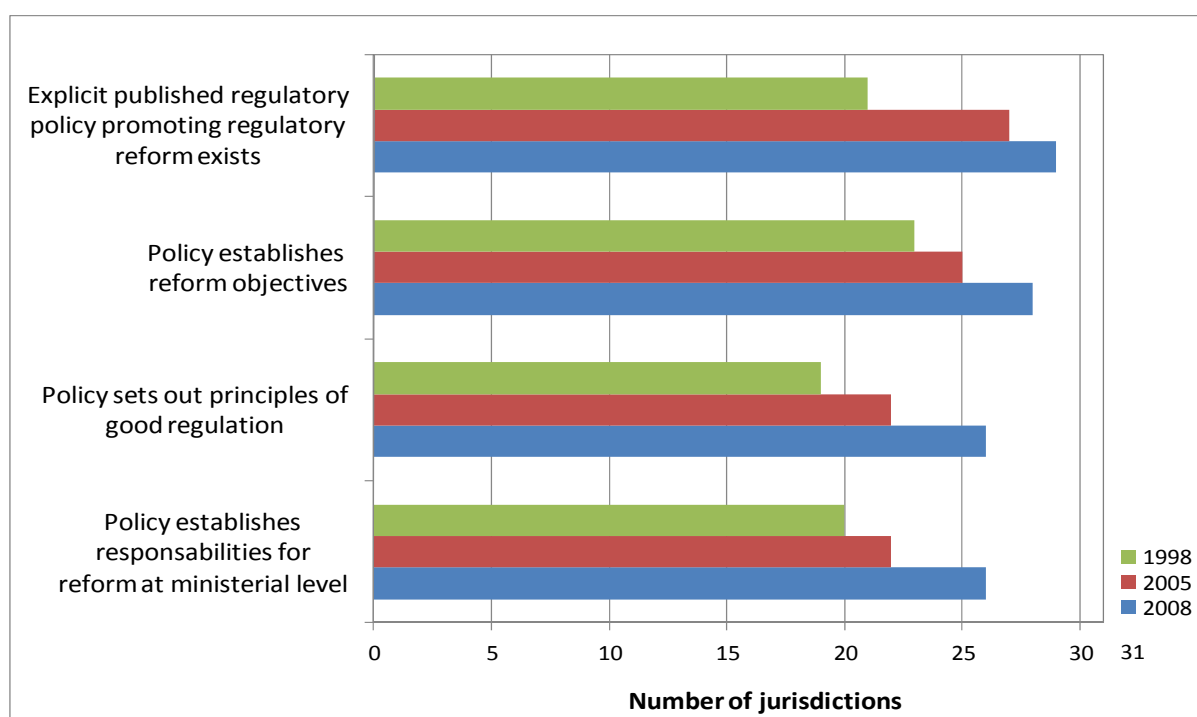
Most countries have a well-established hierarchy of regulations, starting with their Constitution. They usually require that lower-level regulations must not conflict with higher-level regulations, and that the former must derive their legitimacy from the latter.

Do OECD countries now have a regulatory policy?

In a growing number of countries, they do. Figure 1.1 highlights the spread of regulatory policy across the OECD membership since 1998.²

Figure 1.1. Adoption of explicit regulatory policy

1998, 2005 and 2008



Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

The data needs to be interpreted with caution. Whilst indicators can reveal the broad lines of regulatory policy development, country reviews provide a qualitative test of what is really happening on the ground. The reviews carried out under the EU 15 project, for example, show that for most of the reviewed countries, there is no single co-ordinated regulatory policy.

Although most OECD countries had adopted a regulatory policy by 2008, a closer look reveals that their regulatory policy often consists not of one but of a series of often disjointed regulatory policies. For example, policies to tackle administrative burdens in existing regulations may not be fully joined up with policies for the *ex ante* impact assessment of new regulations. In virtually all countries, the implementation and

enforcement of regulations, once they have been enacted, is addressed rather less vigorously than the development phase.

Equally, the data does not reveal the relative strength (or weakness) of countries' regulatory policy in practice. It is important to “mind the gap” between principles and practice.

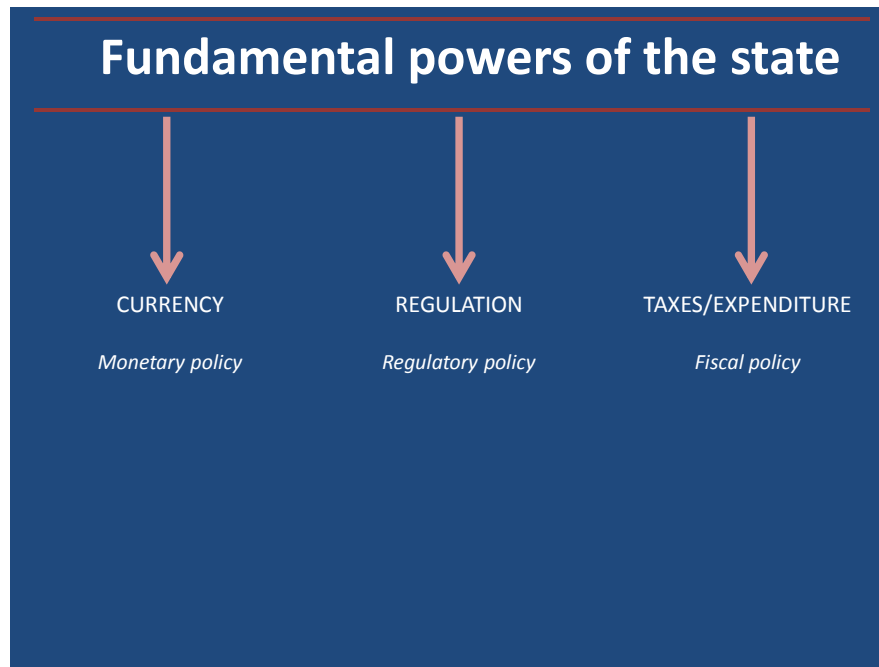
A core objective of this report is to explore what these issues imply for the development of regulatory governance to give better effect to regulatory policy.

Regulatory policy as a lever of state power

Regulatory policy can be viewed, strategically alongside fiscal and monetary policy (Figure 1.2)³ as one of the three core levers at the disposal of governments for managing the economy and society, implementing policy and influencing behaviour. Regulatory managers on the ground may consider this to be too conceptual, but it does no more than draw attention to a powerful reality, underlining the importance of regulatory policy, and the need for it to be at the centre of government attention.

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

Figure 1.2. **Fundamental powers of the state**



Regulatory policy as part of good public governance

The link between regulatory policy and the broader public governance framework is critical. Regulatory policy is already a key part of the OECD's work on governance, the goals of which are transparency, legitimacy, accountability, trust in government, efficiency

and policy coherence. An effective regulatory policy both depends on other well functioning aspects of public governance, and also contributes to them, for example as regards transparency and citizen engagement. Research carried out by the OECD into the conditions for effective reform,⁴ highlights that key aspects of effective regulatory governance are critical in order to advance policy reforms:

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

The emergence of regulatory policy

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

First steps and deregulation

The emergence of regulatory policy was originally in response to changing public policy and especially, economic objectives across the OECD membership. It was not planned as such, and it was not initially called regulatory policy. It started life as deregulation in the 1970s and 1980s, following the rapid growth of regulation through most of the twentieth century and the dawning realisation that the accumulation of this regulatory stock was harmful to business, stifling entrepreneurship and innovation. This period saw the first attempts to cut red tape, and the first realisation that regulatory inflation (as it is now called) could be a serious problem.

From deregulation to regulatory reform and the regulatory state

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

With the growth of free-market policies came the development of independent regulatory agencies to manage key aspects of economies and society at an arm’s length from the political process. This became known as the regulatory state. The regulatory state

paved the way for the idea of regulatory governance; a necessary evolution from approach to regulatory management which sought to take account of this development, and which will be considered in more detail in Chapter 4.

Regulatory reform as a response to crises

Many OECD countries have used crises and downturns as opportunities to launch and consolidate structural and regulatory reforms. For example, Korea implemented a wide-ranging reform programme in the midst of the 1997-98 crisis; 50% of all regulations were cut, aiming to bring to an end the tradition of political intervention in the economy and business. At the same time, markets were opened and barriers to trade and foreign investment were lowered.

From regulatory reform to regulatory management and welfare as the driver

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

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

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

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

Developments at the EU level

The European Union took up the challenge of developing a regulatory policy in the early part of this century, following the launch of the Lisbon Strategy for Growth and Jobs adopted by the European Council of Ministers in 2000, and publication of the Mandelkern Report in 2001. The European Commission unveiled a new Smart Regulation Strategy in October 2010. This sets out plans to further improve the quality and relevance of EU legislation. It will evaluate the impact of legislation throughout the policy cycle, from design, to when it is in place and when it is revised. The European Commission will work with the European Parliament, the Council and member states to encourage the application of smart regulation. The strategy also seeks to strengthen the voice of citizens in the regulatory process.

Box 1.2. Regulatory policy and the European Union: Landmark developments

- **2000 Lisbon Strategy for Growth and Jobs.** The Strategy identified the need to enhance the competitiveness of the EU economy through increased productivity growth as a key challenge, including measures to improve the regulatory environment for businesses.
- **2001 Mandelkern Report.** The Mandelkern Group was set up by Ministers of Public Administration to develop a coherent strategy to improve the European regulatory environment. The Group's report made recommendations to member states and to the EU institutions in the areas of impact assessment, consultation, simplification, organisational structures for better regulation, alternatives to regulation, access to regulation, and national implementation of EU legislation.
- **2002 European Commission Communication.** This introduced a new integrated impact assessment system, roadmaps, alternatives to regulation, minimum standards for consultation, and guideline for using expert advice. It prepares the way for the introduction of an EU level impact assessment process.
- **2003 EU inter-institutional Agreement on better law-making.** Sets a common framework for action by the European Commission, the European Parliament and the European Council of Ministers.
- **2005-08 EU Integrated Guidelines for Growth and Jobs.** This noted that, “to create a more competitive business environment and encourage private initiative through better regulation, member states should reduce the administrative burden that bears upon enterprises, particularly SMEs and start-ups”.
- **2005 Renewal of the EU's Lisbon Strategy for growth and jobs by the European Council of Ministers.** This strategy requires EU member states to establish National Reform Programmes, monitored by the European Commission, which issues annual progress reports.
- **2006 European Commission Better Regulation strategy. This strategy was set up as a central element in the efforts to raise productivity.** It set out that better regulation did not mean more or less regulation but rather, the adoption of a policy and processes aimed at ensuring that all regulations are of high quality. The strategy particularly emphasised the needs of businesses and especially SMEs.
 - **2006 Establishment of the Commissions' Impact Assessment Board as central quality control and support function on regulatory and policy proposals.**
 - **2007 European Commission Action Programme for Reducing Administrative Burdens.** This was approved by the European Council of Ministers, set a target of reducing administrative burdens in EU legislation by 25% by the end of 2012.
 - **2007 Establishment of EU High-Level Group of officials on Better Regulation to advise the Commission on administrative burdens and simplification issues.**
- **2010 European Commission Communication on Smart regulation in the EU.**

Regulatory policy and economic theory

Alongside political science, history and the law, the discipline of economics has been a key factor in the development of regulatory policy. Regulatory policy has both learnt from and contributes to, developments in economic theory. Since the crisis, there has been a vigorous debate on what may need to change in terms of prevailing economic orthodoxy, and by implication, what needs to change in countries' approach to regulatory governance.

Box 1.3. Regulatory policy and developments in economic theory

The value of free markets

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

This had significant consequences for regulatory management. The objective of free markets encouraged the deregulation of product markets, and with the liberalisation of previously monopoly sectors, opened the way to construct market-based regulatory regimes in these sectors. Autonomous economic regulatory agencies were established, at an arm's length from ministries and the political process, to manage these previously monopoly sectors.

Integrating the concept of welfare

The theory that markets are inherently efficient (the "invisible hand" of Adam Smith) stimulated considerable debate. Some experts argued that market failures are more pervasive than originally thought, highlighting the role of information asymmetries, economies of scale, and game theory. For example Josef Stiglitz argued that the theory of free markets critically does not take account of the problem of asymmetric information in key sectors such as insurance or health care, and the vagaries of human behaviour. It underplays classic externalities. In his words, "Whenever there are externalities, where the actions of an individual have impacts on others for which they do not pay or for which they are not compensated, markets will not work well. But externalities are pervasive, whenever there is imperfect information... that is, always".

Most important, the competitive allocation of resources through the market mechanism as advocated by the Chicago school has a specific approach to welfare maximisation, which only gives limited consideration to distributive implications. The core concept behind welfare economics is the *Pareto optimum* (named after Vilfredo Pareto). The *Pareto optimum* exists when an economy's resources and output are allocated in such a way that no reallocation can make any person (or group) better off.

Pareto optimum theory, however, is silent on how to deal with the problem that one person (or group) becomes better off at the expense of making at least one other person (or group) worse off. The solution was offered by Nicholas Kaldor and John Hicks who proposed an approach (known as Kaldor-Hicks efficiency) whereby an outcome is considered more efficient if a Pareto optimal outcome can be reached by arranging sufficient compensation from those who are made better off to those who are made worse off, so that all end up no worse off than previously. For example, a voluntary market transaction that creates pollution would be a Kaldor Hicks improvement if the buyers and sellers are still willing to carry out the transaction even if they have to fully compensate the victims of pollution.

The transition from regulatory reform to regulatory management (implying that regulatory policy is relevant beyond specific sectors), drew on the insights of welfare economics, extending the approach to assessing costs and benefits from a wider perspective. These insights have had a strong practical influence on approaches to the impact assessment of regulations and especially, analysis of costs and benefits, including distributional aspects and under conditions of uncertainty.

Market failure, but also state failure

Experts have highlighted that there can be state failure as well as market failure, that is to say, the failure of the state to deliver on objectives for well-functioning markets and social welfare. The state itself is not perfect, and is made up of structures and individuals who sometimes pursue personal objectives in the name of the general interest. Bureaucracies can be self interested. Benign neglect and regulatory capture are real dangers. This implies the need for closer scrutiny of the issues raised by state intervention, and its benefits. These issues were brought into sharp focus by the 2008-09 financial crisis.

Growing interest in distributional equity and sustainable development

David Ricardo (1815) had already considered distribution among the classes to be the central question of political economy. Many OECD countries are concerned about distributional equity. The argument is that economic management should be carried out in such a way as to maximise the welfare of the most disadvantaged, paying attention to distributional consequences of policy actions, albeit not beyond the point at which they would impede on overall prosperity. This increased attention to social impacts has also been associated with the need to give greater weight to environmental concerns and the broader issue of sustainable development.

Different pathways moving towards common goals

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

From these different perspectives, there is growing evidence of a convergence, as countries have sought to cover a widening range of issues, building on their initial experiences. All now have the same broad understanding that regulatory policy is important and of what it implies in terms of processes. The first OECD country reviews on the matter in the late 1990s showed that understanding was patchy. Many countries also share the same challenge, to ensure that what they have already put in place can be made to work more effectively. The next step on this evolutionary pathway is to strengthen regulatory governance, an issue that is considered in Chapter 4.

European administrative burden reduction programmes have thus developed significantly from their starting point, which was to assess the information obligations (and nothing else) contained in existing regulations. Targets for burden reduction have started to become net targets, to allow for the fact that new regulations may contain unnecessary burdens which need to be “captured” so that there is real reduction in overall burdens. This has encouraged fresh thinking about *ex ante* impact assessment processes, and the merits of seeking to quantify costs before a new regulation is adopted. At the same time, under pressure from the business community which was dissatisfied with the narrow focus on information obligations, attention has turned to developing an approach that would capture compliance and other costs (Box 1.4).

Box 1.4. The Regulatory Cost Model developed by the Bertelsmann Institute

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

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

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

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

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

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

Country contributions to regulatory policy development

Virtually the whole OECD membership, in one way or another, has been engaged in the development and testing of new approaches to the management of regulation over the last ten years. This has helped the forward movement of regulatory policy and the identification of best practices. Examples (not exclusive) include:

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

- **Legal quality and access.** France, Germany, Italy.

Principles for better regulation

OECD Principles

OECD member countries collectively adopted a set of principles for effective regulatory management in 2005 (Box 1.5, full text in Annex C). The Principles are based on work which goes back fifteen years, to the mid 1990s. The 1995 Recommendation of the OECD Council on Improving the Quality of Government Regulation provided the first international statement of regulatory principles. Building on this to embrace market openness, competition policy and the link between regulatory reform, structural reforms and economic growth, the OECD's 1997 "Report on Regulatory Reform" established seven principles of effective regulatory management and paved the way for country reviews to evaluate regulatory management capacities and progress. The results of these reviews supported the elaboration of the OECD's 2005 Principles, which kept the seven key points of the 1997 Recommendations, whilst at the same time developing new supporting text.

Box 1.5. OECD 2005 Guiding Principles for Regulatory Quality and Performance

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

Country Principles

A growing number of OECD member countries have established a set of principles to guide their own regulatory policy, endorsed at the political level, to impose a discipline on the development and management of regulations (Box 1.6).

Box 1.6. Country principles for better regulation

An early example is the set of principles established by the United Kingdom's Better Regulation Task Force in 1998, an independent advisory body to the government at the time:

- Transparency.
- Accountability.
- Targeting.
- Consistency.
- Proportionality.

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

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

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

APEC and other initiatives

The Asia-Pacific Economic Co-operation⁹/OECD Integrated Checklist on Regulatory Reform, agreed in 2005, sets out 11 criteria for better regulation, which are consistent with the OECD Principles (Annex D). The participating countries¹⁰ of the MENA (Middle East and North Africa) Initiative endorsed the Regional Charter for Quality in Regulation at the 2009 Ministerial Conference in Marrakesh. The Charter is also consistent with the 2005 OECD Principles

A stronger framework for quality regulation

Today, almost all OECD countries have established explicit institutions, processes and tools for regulatory management. These include: the establishment of institutions specifically geared to the promotion of regulatory policy; and significant advances in the

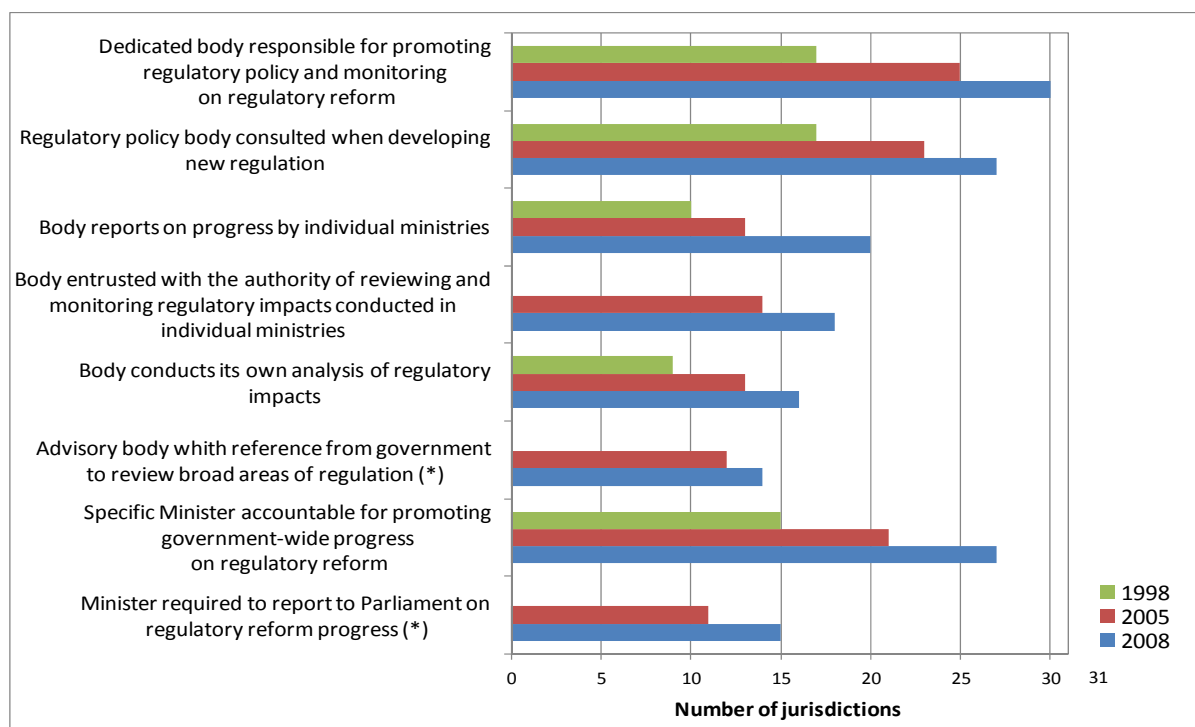
establishment of key processes, including Regulatory Impact Assessment and programmes for the reduction of administrative burdens.

Institutional developments

A growing number of OECD countries have increasingly sophisticated arrangements for oversight of their regulatory policy processes.

Figure 1.3. **Institutional arrangements to promote regulatory policy**

1998, 2005 and 2008



Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

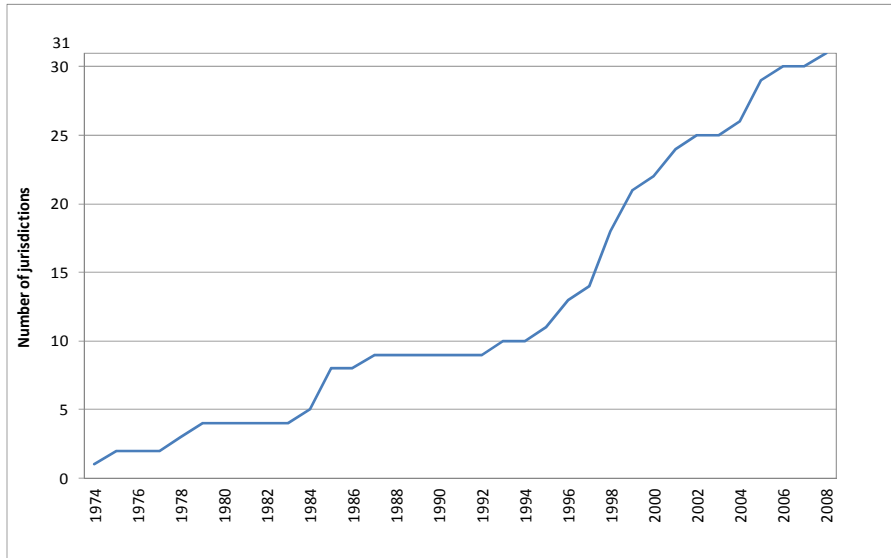
Regulatory Impact Analysis

All OECD countries have now established a process for the *ex ante* impact assessment of regulations.

Reduction of administrative burdens

Nearly all OECD member countries have established programmes to reduce administrative burdens on business. All but one country had set up a programme by 2008, compared with 26 in 2005 and 18 in 1998.

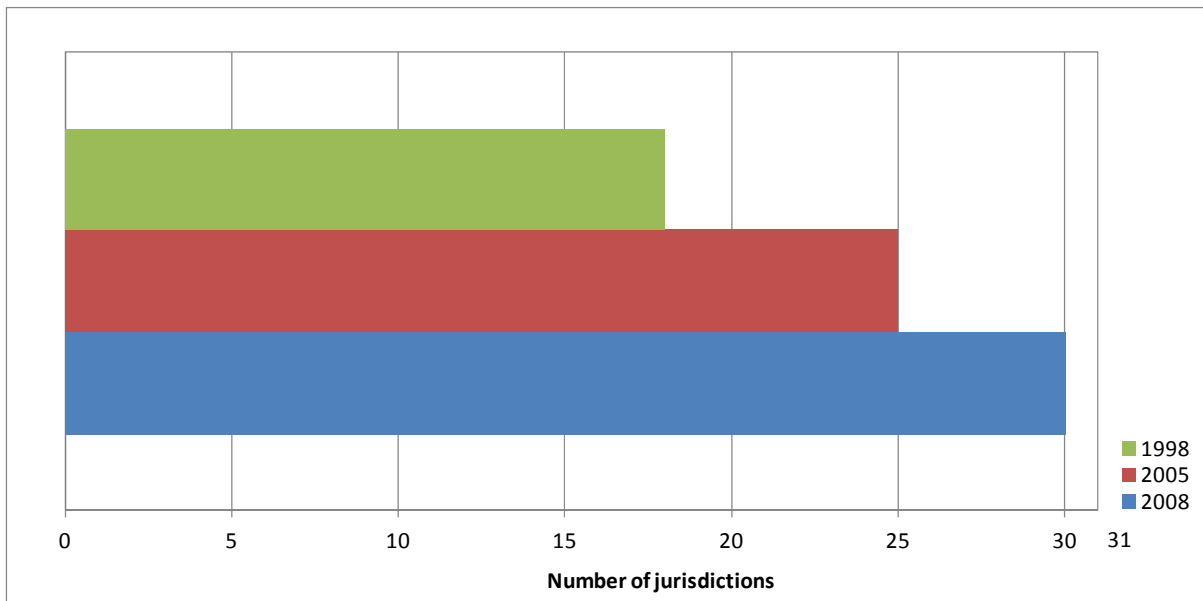
Figure 1.4. Trend in Regulatory Impact Assessment adoption by central government (1974-2008)



Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

Figure 1.5. Explicit programme for reducing administrative burdens

1998-2005-2008



Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

What has been learnt?

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

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

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

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

“Minding the gap” between principles and practice is an issue for nearly all countries. For example, although nearly all countries have now established a Regulatory Impact Assessment process, considerable further work is necessary as regards institutional support, methodologies and other aspects before this tool can be considered fully effective.

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

Lessons from the financial crisis “wake up call”

The financial crisis and environmental disasters have exposed the fragility of some aspects of current regulatory management, and put countries’ emerging regulatory governance to an unexpectedly serious “stress” test, at least as regards one key sector of the economy.¹¹ Specifically, it has highlighted these important gaps:

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

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

These issues are explored in Chapters 3 and 4.

Notes

1. Deregulation is not the main purpose of regulatory policy, which is about weighing up the costs and benefits of regulation in different settings. This may lead to the conclusion that regulations need to be removed, but it could also mean that they need to be reshaped, or that alternatives to regulation make more sense. Also, the term regulatory policy is preferred to the term regulatory reform, which can imply a narrower concept built around a “one-off” process, and a limited application to selected sectors.
2. Front runners included the North Americans: the United States in the 1970s, and Canada in the 1980s. Generally speaking, Europe started later. It should also be noted that the term regulatory policy currently means different things to different countries. In many European countries the term has until recently been largely interchangeable with policies to reduce administrative burdens. In Canada, the term has been applied specifically to the process of developing regulations.
3. The most fundamental power of the state is its military and administrative control of territory, without which the other powers cannot be exercised.
4. Reform Beyond the Crisis, OECD 2010.
5. Regulation, by contrast, is centuries old, dating back to the emergence of organised societies and the exercise of political authority over these societies to define the duties and responsibilities of rulers and the ruled. The critical difference of recent times, from the 19th century onwards, is the growing use of regulation by modern states, which is reflected in a growing number of rules.
6. A term used to define the objective of the reforms of the United Kingdom economy in the 1980s.
7. This was often, misleadingly, called deregulation.
8. Codification in systems of civil law means consolidating all the amendments made over time to a set of related laws. It may also mean assembling an original legal act plus all subsequent modifying acts into one new legal text.
9. APEC – Asia-Pacific Economic Cooperation. Member economies are: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Philippines, Russia, Singapore, Chinese Taipei, Thailand, The United States, Viet Nam.

10. The MENA member countries are: Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestinian territories (the West Bank and Gaza Strip), Qatar, Saudi Arabia, Ethiopia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.
11. In the rush of some commentators to equate regulation overall with financial regulation, and to identify its failings as a main cause of the financial crisis, it is also important to remember that other factors have, and continue to, contribute to the current unsustainable public deficits of many countries. For example, in much of Europe, the financial crisis revealed underlying structural problems, such as failures to reform labour markets, or pensions systems. In fact, regulatory policy has a major role to play in supporting necessary structural reforms as countries emerge from the crisis.

Chapter 2

Achievements of regulatory policy so far

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

Support for economic growth and development

Structural reforms

Regulatory reforms and some key structural reforms of the recent past have worked hand in hand. In the late 1990s, it was important to adapt regulatory frameworks in support of the structural reforms taking place in the telecoms and other infrastructure sectors such as power. The reforms aimed at opening these sectors up to competition (a process which is ongoing). This process required a new way of thinking about regulatory supervision, and saw the emergence of autonomous regulatory agencies, at an arm's length from ministries, across Europe.¹

Product market competition

Product market regulatory reforms (mainly involving deregulation through the removal of regulatory barriers to market entry) have been an important component of structural reforms over the last decade.

OECD countries have developed an increasing awareness of the important linkages between product market policies and performance. Two important links can be made, the first with productivity, and the second with employment rates.

The link with a better productivity performance

To achieve reform, governments have to become more flexible and adaptive. The challenge lies in initiating and sustaining regulatory reform in the absence of a crisis, where pressures for doing so are weak and constituencies are diffuse. Countries that have extensively reformed their product markets experienced an acceleration of productivity

over the 1990s, while a productivity slowdown (or stagnation) continued in other countries. Both the promotion of competition and privatisation are found to have a significant positive effect on productivity growth, with productivity gaps relative to best practice being bridged faster in countries that have competition-oriented industry-level regulations.

The link with higher employment rates

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

Box 2.1. Relationship between product market policies and regulatory reform

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

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

Source: Taking stock of Regulatory Reform: A Multidisciplinary Synthesis, OECD 2005.

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

Investment and market openness

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

The removal of competition distorting regulations has not been confined to domestic product markets. It was also applied in the international context, in support of greater market openness. The application of competition principles is one of the six efficient regulation principles for market openness. The market openness chapters of the OECD's Multidisciplinary Reviews of Regulatory Reform underline a number of competition policy best practices, such as strong competition oversight and enforcement mechanisms, which support international trade and investment.

Administrative simplification has been important in efforts to reduce the scope for unnecessary trade restrictiveness, in customs procedures and more generally (Box 2.2).

Box 2.2. Administrative simplification, trade facilitation and market openness

Decisive action by governments to reduce administrative burdens on business can be extremely helpful to trade and investment. Important areas of action include service delivery (including through the Internet and one-stop shops) improved dialogue between government and businesses, and customs procedures.

The market openness reviews underline the growing trend for e-Government and electronic service delivery, which benefits both foreign and domestic firms. One-stop shops increasingly make skilful use of the Internet. Online facilities may for example group administrative requirements such as permits together, allow one transaction to cover all the required start-up procedures, and bring together business related information. But such arrangements are not yet common practice.

Simplified, automated customs procedures offer another important avenue for minimising trade restrictiveness. The extent of automation in border operations has emerged as a key indicator of capacity and commitment to market openness, though other issues beyond automation are also needed for optimal customs administration. Customs requirements themselves may need to be simplified for example. Some countries have gone a long way, with fully automated pre arrival review systems (the electronic processing of information before goods reach the border), online customs information services, and special arrangements for the faster movement of low risk goods. Electronic Data Interchange (EDI) allows firms and customs to communicate electronically for all documentation and authorisation actions. The EU's Common Customs Code is promoting the harmonisation of simplified procedures.

But impressive progress by some countries masks important challenges. Persistent shortcomings include non-interoperability or geographic exclusivity of certain computer systems which compromise the value of EDI, and the lack of interface with licensing authorities. More broadly, the weakness of multilateral trade rules to guide development of transparent and predictable customs procedures contribute to uneven implementation of rules at different border crossings and discretionary abuses by customs officials in some countries.

Source: Taking stock of Regulatory Reform: A Multidisciplinary Synthesis, OECD 2005.

Innovation, entrepreneurship and SMEs

Administrative burden reduction programmes

The Netherlands were pioneers in the development of a measurement system for administrative burdens, originally labelled MISTRAL,² which gave rise to an international

brand (the Standard Cost Model – SCM), that has been adopted by a growing number of countries in recent years. This has provided the impetus for the wide-ranging efforts now in place across Europe to address administrative burdens.

Programmes to reduce administrative burdens have already generated important benefits across a range of countries³:

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

Box 2.3. Administrative Burden Reduction Programmes for Business

Administrative simplification programmes generally aim to: improve the regulatory framework; streamline administrative procedures; and reduce paperwork through four approaches:

- **Legal review and improvement.** Governments can improve the regulatory environment by designing administrative rules that are fairer, predictable, enforceable and efficient. Such rules provide for more consistent responses to policy challenges, changing societies and the need to limit regulatory burdens.
- **Process re-engineering and organisational streamlining.** Approaches that rationalise workflow, reduce transaction costs and make organisations more efficient can include the use of one-stop shops (OSS), modern information management systems, administrative re-organisation, specialisation and other steps that help create synergies and avoid unnecessary repetition.
- **The use of information and communication technologies (ICT).** ICT multiplies the impact of other administrative simplification tools as it improves management, dissemination and transaction of information. Furthermore, connection to the Internet extends geographic and temporal access to services and allows for paperless administrative systems.
- **Broader access to information and improved transparency.** All administrative procedures and their rules should be made public in a clear and comprehensive way. A consistent and predictable administrative environment encourages and supports those who must comply with rules and administrative procedures to respect their obligations.

In some countries, the business community has been especially active in helping to promote the regulatory reform agenda, challenging their governments over progress in reducing burdens and offering advice on the issues to be tackled (Box 2.3).

Box 2.4. The Board of Swedish Industry and Commerce for Better Regulation (*Näringslivets Regelnämnd – NNR*)

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

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

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

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

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

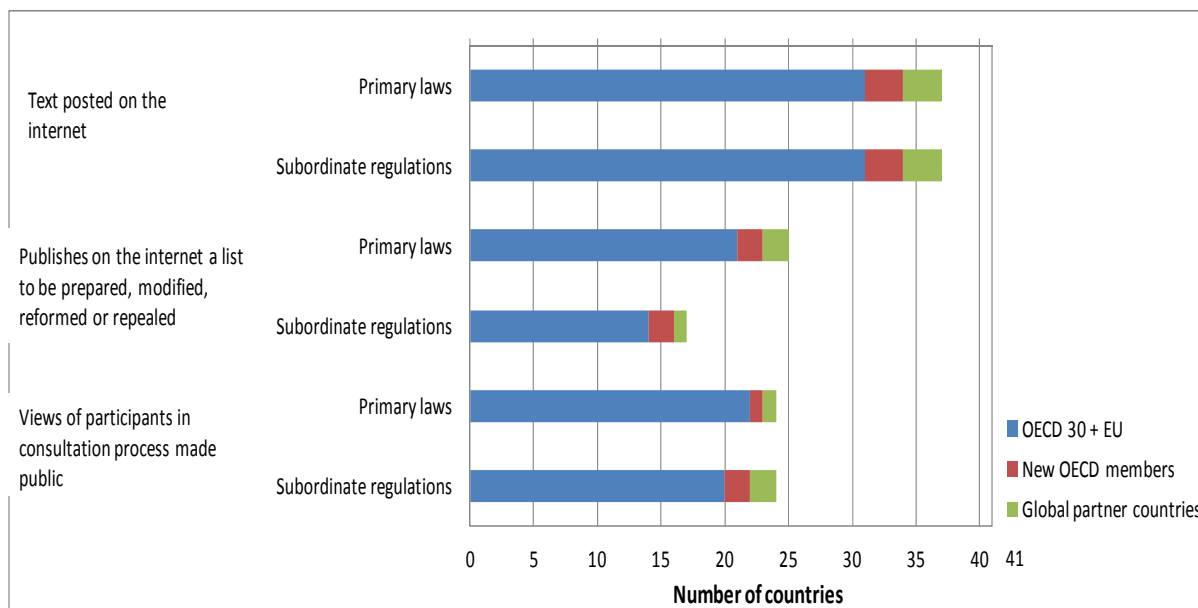
Regulatory policy has also started to support broader goals for society such as, quality of life, social cohesion and the rule of law. Although the emphasis on this aspect of regulatory policy varies across countries, and it can take different forms, it has emerged as a strong feature of the regulatory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

Social cohesion and support for citizens

Transparency and the engagement of the public

Regulatory policy has supported a growing transparency in the application of regulatory powers, and the engagement of the public (the regulated) through its emphasis on the importance of public consultation and communication. It has encouraged more open societies in which user views are heard, by multiplying the approaches to public consultation and communication, and by harnessing ICT and e-Government in support of this objective. Transparency and openness facilitate the enforcement of regulations, improving compliance and limiting the need for coercive enforcement.

Figure 2.1. Public availability of regulatory information



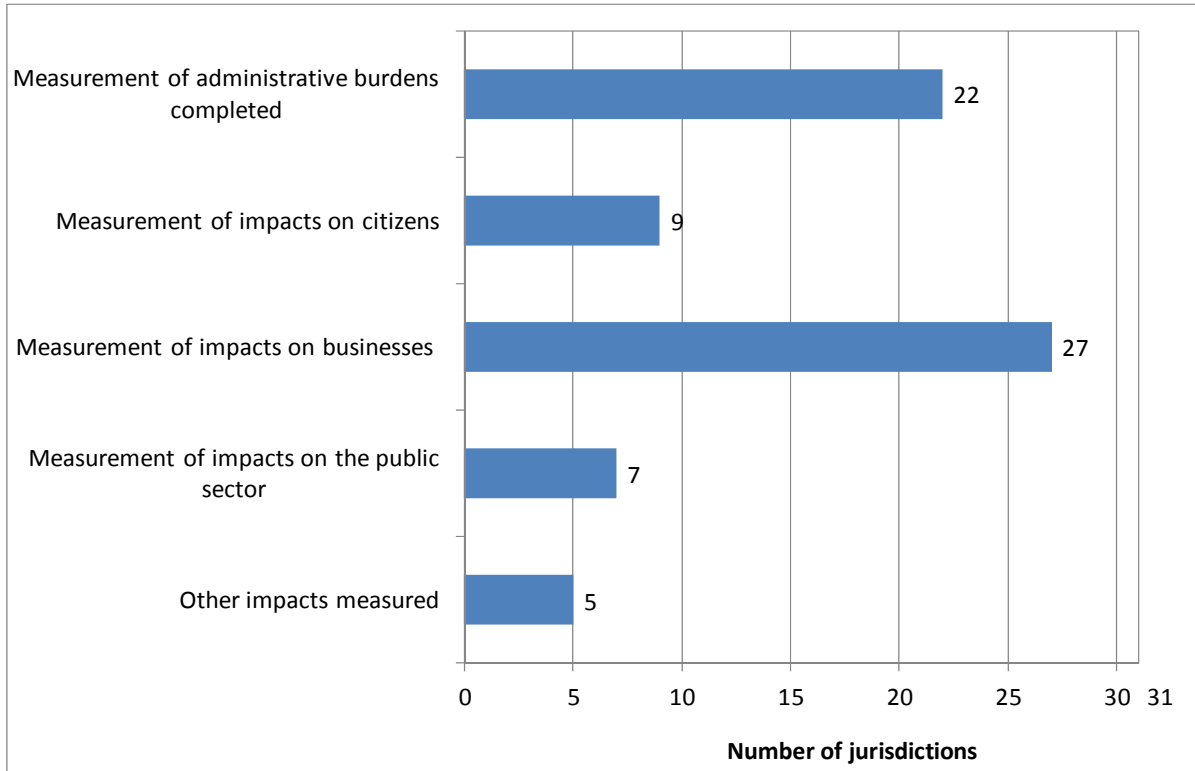
Note: Data for new OECD members and global partner countries is preliminary and applies to the situation in 2009.

Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

Reducing red tape for citizens

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

Figure 2.2. Groups targeted by administrative burden reduction programmes



Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

Support for the rule of law

The development of regulatory policy has been closely associated in many countries with issues that link to the rule of law, including legal transparency, clarity and accessibility, and a well functioning appeal system for administrative decisions. Modern societies are governed by rules, which need to be enforced, and applied fairly. A powerful reason for some countries to strengthen their regulatory policy is to minimise corruption.

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

Box 2.5. The rule of law: Definitions and implications

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

Historically, emphasis on the rule of law came after a long period, in Europe and beyond, of civil and international war in the sixteenth and seventeenth centuries, as part of the pacification process whereby

states, gaining a monopoly on violent coercion, surrendered part of their freedom to use violence against their own citizens or their neighbours. The rule of law thus includes the fundamental concept that the state itself is, or should be, subject to the law, which it is not free to change. In other words it is a check on the arbitrary use of power.

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

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

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

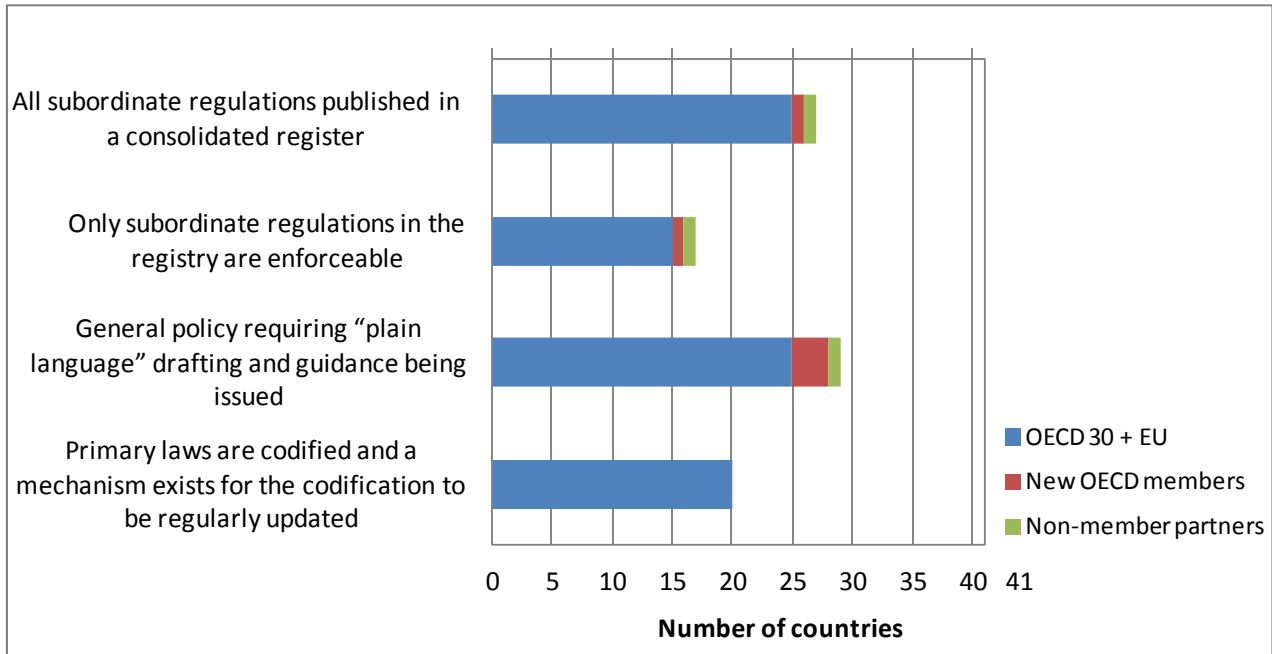
Germany provides a particularly clear modern example of giving effect to the rule of law in practice, through the concept of the *Rechtsstat* – which can be loosely translated as the “legal state”. A fundamental principle underlying the *Rechtsstaat* is that the exercise of state power should be constrained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

Legal simplification and accessibility

Most European countries include legal quality and legal simplification as one of the main objectives of their regulatory policy. Regulatory inflation, which is a cause for concern in many countries, has serious potential consequences for the rule of law. A proliferation of regulations obscures legal clarity and accessibility of the law, and affects legal certainty. The law is no longer transparent, and businesses and citizens cannot easily grasp what the law says about what they need to do. Access to regulation includes communication of information, law making capacities based on evidence and clear law drafting. Regulatory uncertainty undermines trust in government, and at a practical level, it reduces the prospects of compliance and sets the scene for corrupt behaviour.

An important issue for developing countries is the legal complexity inherited from different political regimes and colonial powers. Regulations may today as a result be based on a mix of very different legal principles.⁴ This legacy from the past generates an additional burden, and highlights the importance of legal simplification, which helps combat regulatory discretion and corruption.

Figure 2.3. Ease of access to regulations



Note: Data for new OECD members and global partner countries is preliminary and applies to the situation in 2009.

Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

Impartial appeals systems

Regulatory policy also supports (and depends on) an effective and impartial judicial and appeals system. Rule makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. This supports the fight against corruption. Reducing delays and boosting certainty in the appeals process has been widely recognised as contributing to the quality of the regulatory framework.⁵

Mutually reinforcing social and economic outcomes

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

Notes

1. In North America regulatory agencies already existed, but they too needed to adapt in order to provide effective support for the liberalisation process.
2. Meet Instrument Administratieve Lastendruk.
3. Governments' responses to the questionnaire distributed as part of the OECD Cutting Red Tape II project.
4. For example, regulations in Palestine are based on a blend of the principles of Islamic Shari'a, the legislation inherited from the Ottoman Empire, British Mandate Law, Jordanian legislation applied to the West Bank and Egyptian legislation applied to the Gaza strip.
5. It is part of the 2005 APEC-OECD Integrated Checklist on Regulatory Reform. The last of the eleven criteria of the Checklist addresses the appeals issue very directly: "Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?" It is also covered in the World Bank's "Doing Business" indicators.

Chapter 3

Challenges for the future

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

The challenges facing governments post-crisis

The first big phase of regulatory policy development may be over, but it will be propelled forward by the effects of the global financial and economic crisis and the need to remain relevant to the challenges that governments now face. Chapters 1 and 2 showed how regulatory policy has already helped governments to meet important goals of public policy. Regulatory institutions, tools and processes were established. They did not always deliver all that was necessary, but they made considerable headway in areas such as impact assessment, burden reduction and legal simplification. To remain relevant, this framework needs to be updated and strengthened. For example, the challenges of climate change and ageing populations were less compelling ten years ago than they are today. The financial crisis and its consequences has raised new issues, and sharpened the importance of addressing pre-existing issues. Three key challenges for governments, and their relationship with regulatory policy, are examined below:

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

Economic recovery and sustained growth

Economic growth remains imperative. Why? The main reasons for wanting growth have not changed. Growth supports higher living standards. Over long periods of time, even small rates of annual growth can have large effects through the process of compounding. In today's post crisis context it helps to manage otherwise unsustainable debt. Growth in

output per capita increases government tax revenues, which can be used to pay for better services.¹ Public debts, deficits and increasing costs of healthcare in an ageing population, as well as pension benefits, are less of a burden in a growing economy. Growth can also help societies afford a greater environmental quality.

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

Low growth can lead countries to “fall behind”. In the 1900s, Argentina’s average income was only slightly behind those of the world’s leaders (Romer 2001). After dismal growth performance over much of the twentieth century however, Argentina’s relative position has worsened, achieving today a middle-income status. The effect works both ways. Countries that have experienced high-growth rates, such as Korea and other Asian countries, have much improved their relative incomes, and closed the gap with industrialised nations.

Some have argued that there is a trade-off between economic growth and environmental quality – that gains in living standards must be at the expense of the environment. However, it depends where growth comes from. Gains in productivity either mean more production with the same amount of inputs, or they mean the same amount of output, with fewer inputs. With a small increase in the labour force and high growth, most of the growth comes from productivity increases, in essence doing more with less. This applies to pollution as well. Innovation-led growth has generally meant that newer technologies are more productive than before, use fewer resource inputs, and pollute less.

Complex and interrelated policy goals

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

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

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

- Initial plans and programmes can be blown off course by events, new information, and not least, crises, which requires an adjustment to original plans. This can complicate the efforts to maintain coherence with initial high-level goals.

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

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

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

Box 3.1. Policy coherence: Principles and practice

OECD Principles for Policy Coherence

The OECD has identified eight key tools for policy coherence. These are:

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

- An administrative culture that promotes cross sectoral co-operation and a systematic dialogue between different policy communities contributes to the strengthening of policy coherence.

Practice of Policy Coherence

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

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

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

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

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

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

The processes, to function effectively, rely heavily on well-trained officials with the appropriate competences, not only at the centre of government, but in the line ministries responsible for developing

specific proposals (capacities to manage the legal and economic aspects, to conduct effective consultations, to synthesise the results etc).

Source: Findings of the EU 15 country reviews; OECD public governance reports and OECD 1996, Building Policy Coherence, Tools and Tensions-Public Management.

Transparency, users, and trust in government

Reflecting the needs of users in regulation is linked to core values, which are shared across the OECD membership and beyond, such as accountability, transparency, and engaging civil society. Regulatory policy's economic dimension is complemented by a social dimension, and needs to draw inspiration from the widest possible range of stakeholders.

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

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

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

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

- **Compliance and the rule of law.** Poorly designed and executed regulations will not be observed. This undermines the rule of law, and jeopardises the achievement of underlying policy goals. Regulations designed and implemented with the user in mind not only stand a much better chance of being observed, but also help to prevent a slide into corruption such as wilful failure to observe the law and the growth of an informal economy.
- **Sustainable societies.** The evidence of the EU 15 reviews is that users support smart regulation (not necessarily deregulation), and in particular, that citizens and consumers are keen to pursue high social welfare and environmental performance standards.

- **Innovation.** Engaging the widest possible range of stakeholders in the regulatory process will ensure that new ideas are captured.
- **Competitiveness.** Integrating the needs of businesses and in particular, their concerns over red tape and compliance costs, helps to ensure that the business environment is competitive.
- **Quality of life.** The removal of red tape has a direct effect on the improvement of citizens' lives. Citizens also benefit from the removal of red tape inside government, releasing front-line public sector workers to concentrate on the delivery of public services.

Role of regulatory policy

Raising growth prospects through support of structural reforms

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

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

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

Measuring and proving these effects is a challenge. Some may be measured directly using macro-econometric techniques. Others are more related to specific country experiences, or sector specific conditions (for example, innovative sectors in the areas of green growth or pharmaceuticals). Some effects translate into more positive perceptions by business and citizens, which generate more favourable market conditions, with lower-risk *premia*. These reflect indirectly on the quality of the regulatory framework, albeit working in harness with the macroeconomic environment.

Structural reforms

Structural policies and reforms are a powerful complement to fiscal and monetary stabilisation policies in creating healthy conditions for sustained growth. A country's structural policies have an important influence on its performance. Specifically, labour and product market policies can have a significant impact on structural unemployment, trend labour force participation, and the potential for labour productivity growth.

An effective, up-to-date regulatory framework remains important to support structural reforms and for particular sectors. The financial crisis has exposed the need for further structural reforms, of different kinds, depending on the country. There is considerable unexploited potential for regulatory policy to support these reforms in important areas of public policy, post crisis.

Some policy agendas vital to structural reform have not received enough attention. Along with this, the linkages between them highlight the need for a “whole-of-government” approach, and for taking regulatory policy and governance to the political level.

- **Higher education.** The need to review regulatory frameworks of institutions responsible for the formation of human capital and sustaining it over the working life of adults.
- **Environment.** The need to review the regulatory frameworks for environmental regulations, the need for risk reduction, and the importance of promoting green growth.
- **Labour market regulations.** The need to balance flexibility with essential social protection.
- **Housing.** The importance of regulatory frameworks for a well-functioning housing market. This is essential to labour mobility, but constrained by regulations which lead to boom-and-bust cycles which trap families in debt, and make housing unaffordable for many even in the middle class in key locations. Housing will also be critical to progress toward green growth as regulations promote the generation and take-up of new technologies, and the renovation of the existing stock.

It is always legitimate, and sometimes critical, to ask what role regulatory policy could, or needs to play, in order to optimise outcomes and minimise risk in key areas of public policy. There are strong arguments for using regulatory processes such as impact assessment to assess the costs and benefits of regulatory actions to support change in such diverse areas as pensions or labour market reforms. If, for example, labour market policy includes the objective of improving the participation rate of older workers, as it does in many countries with an ageing population, then regulatory tools and processes can help to ensure that the objective is met, at least cost.

Regulations or regulatory frameworks that once made sense may stand in the way of effective structural reforms. In other words, structural reforms and regulatory reforms cannot be detached from each other. Also, some structural reforms are a work in progress. They need to be completed, which means that the regulatory frameworks on which they depend need to be adapted as this process unfolds. Not only do reforms need to be anticipated, but they must not be closed down once a set of reforms has been concluded. Further reforms are needed over time in order to adapt to new circumstances (or to complete the work started, as for example with pension reform in many countries).

Investment and innovation

Lower burdens, and a better economic assessment of new rules will foster opportunities for innovation and innovative start-up companies. Reforming outdated anti-competitive regulations is a good place to start, as well as adopting regulatory policies that will ensure

that future regulations do not hinder market entry, and the entry of new and innovative products on markets. Higher requirements in terms of product safety and quality may also have the potential to stimulate innovations. Product regulation can create incentives for firms to compete on quality. However, it needs to be associated with markets that will be wide enough to provide sufficient returns to innovation, calling for seamless national economies, when such regulations are made at a subnational level.

Deregulation and the removal of red tape

Removing redundant regulations and minimising or removing barriers to market entry remains important. It is unfinished business in many countries and for certain sectors. The most regulated economies are likely to benefit the most. Many emerging and middle-income economies are highly regulated, comparatively speaking, highlighting the need for further investment in regulatory policy. The service sectors of many countries remain subject to excessive regulation which stifles entry and curbs competitive pressures.

Regulatory Impact Assessment in support of policy coherence

Regulatory policy is intimately bound up with policy making, implementation and evaluation. In fact it is virtually impossible to separate the two processes, which tend to converge for much of the policy cycle. In many European countries, policy making is synonymous with law making (this however, carries the convergence too far, as it tends to be associated with regulatory inflation). This means that regulatory policy has a significant and necessary contribution to make to policy coherence. Its contribution, however, will require adjustment of current institutional arrangements and for the process of impact assessment.

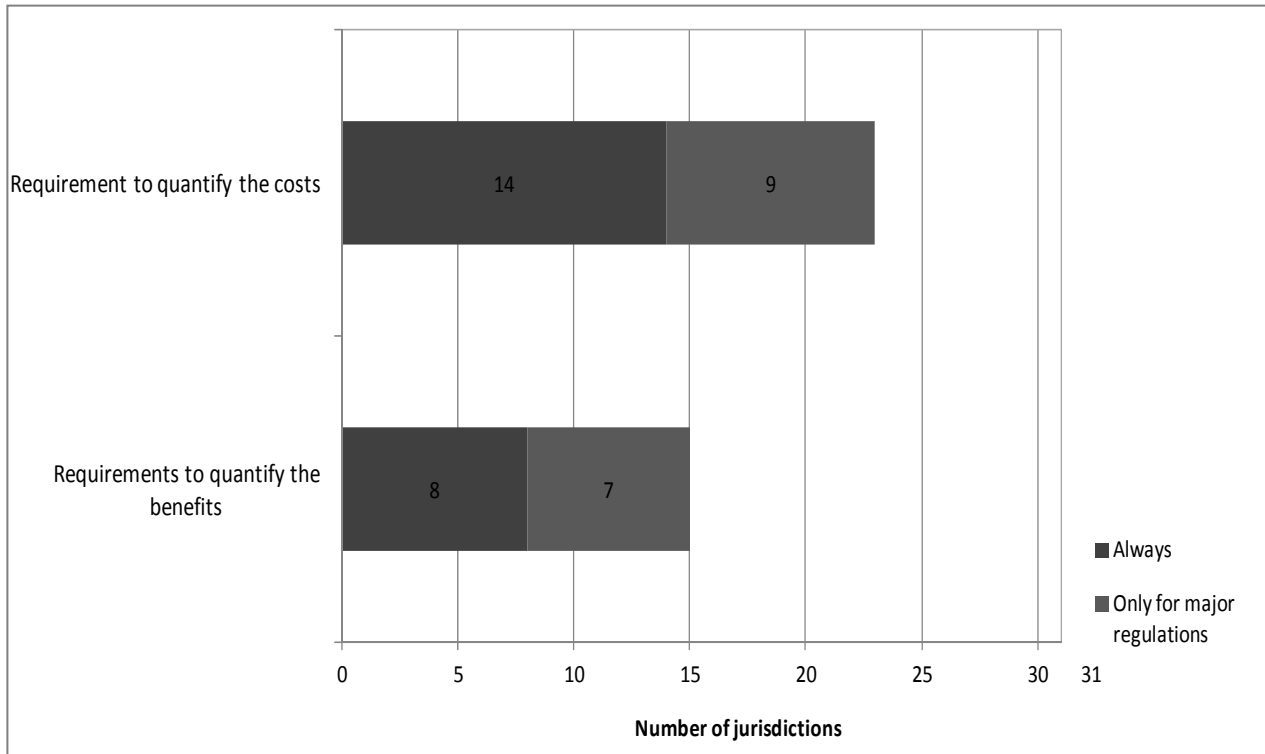
If regulatory governance is to support policy coherence effectively, impact assessment processes require significant strengthening.

Basic challenges

Regulatory Impact Assessment (RIA) faces a number of basic issues in many countries which currently stand in the way greater effectiveness and support for policy coherence. Cultural acceptance of the process is slow, methodologies (especially for the assessment of benefits) need further development, and public consultation and communication on impact assessments remains weak in some countries. The assessment of benefits are neglected compared to assessments of burdens and costs.

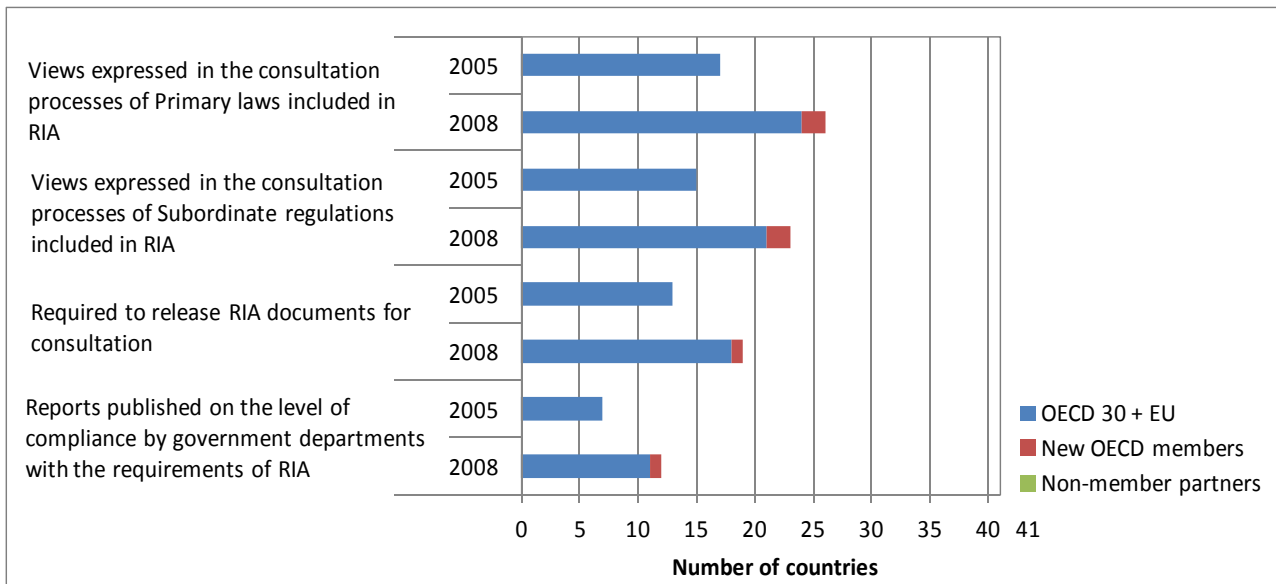
21 countries and the EU reported in 2008 that they had completed some form of administrative burden measurement, and 14 countries and the EU reported that they regularly repeat it. However, considerably fewer countries regularly quantify costs of regulations, and even fewer regularly quantify benefits.

Figure 3.1. Quantification of costs and benefits



Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

Figure 3.2. Transparency in Regulatory Impact Analysis



Note: Data for new OECD members and global partner countries is preliminary and applies to the situation in 2009. No data is available for those countries for 2005.

Source: OECD Regulatory Policy Committee, Indicators of Regulatory Management systems, 2009 Report.

Towards policy coherence

The challenge of achieving green growth provides a particularly sharp example of the need for policy coherence. Green growth strategies require a policy focus that takes account of environmental externalities and growth policy objectives. The regulatory framework needs to balance a diverse set of social, economic and environmental values. Robust impact assessment procedures can provide an assessment of market and non-market benefits and identify how regulatory interventions (or alternatives) can be designed to benefit the environment and promote economic efficiency. Institutional arrangements for regulation (including across governments) are also critical for coherence.

The Australian Productivity Commission (PC) provides one successful example of institutional support for policy coherence. It provides objective support, at an arm's length from government and the political process, for identifying what reforms are needed and how these need to be translated into the regulatory framework. This helps to achieve coherence through the policy and regulatory cycle, by *ex post* evaluation that feeds back into the next cycle of policy making. The PC is one way of achieving this. However, other countries may consider using existing institutions, such as audit offices, for part or all of this role. The function is what matters here. It is then a question of deciding where and how the function could be carried out.

Box 3.2. Australian Productivity Commission

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

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

The Australian Productivity Commission (PC) is unique among OECD members for its standing function focussing on developing policy advice to raise Australia's level of productivity and standard of living.

Importantly, the scope of the Commission's work covers all sectors of the economy, including the public and private sectors and Commonwealth as well as State and Territory responsibility. Primarily the Commission undertakes applied economic analysis of policy issues with a focus on ways of achieving a more productive economy as the key to higher living standards.

The Government directs the PC on what areas to study through the issuance of formal terms of reference, but the PC is independent in its analysis and findings. The processes of inquiry are public allowing the opportunity for the participation of interested individuals and groups, and the final inquiry

reports must be tabled in Parliament within 25 sitting days of the Government receiving the report. The PC cannot launch its own enquiries, although if it can initiate supporting research and publish the results via Commission or staff research papers. The outputs of the PC include:

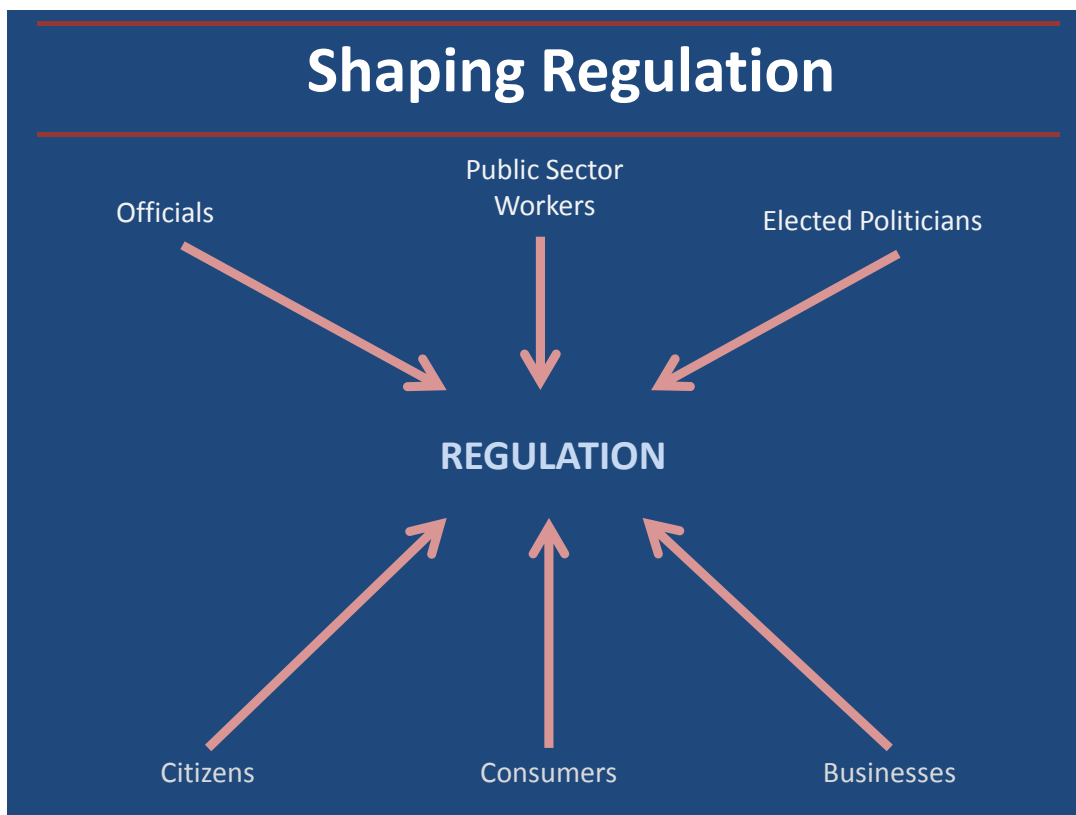
- public inquiries and research studies requested by the Australian Government;
- performance monitoring and benchmarking of government services; and
- assessing competitive neutrality complaints and supporting research and annual reporting on productivity performance, industry assistance and regulation.

Source: Productivity Commission (2003; 2005; 2008a; 2008c; OECD (2008).

Achieving a more user-friendly environment

Regulatory policy has traditionally been tackled from the top down, that is to say, from the perspective of regulators (bureaucrats, officials, politicians) rather than from the perspective of the regulated (citizens, businesses, consumers). This has started to change, but not enough, and considerable complaints continue to be heard about the “regulatory cascade” which hits users as victims of, rather than as participants, in the regulatory process. Figure 3.3 is one way of illustrating what needs to happen. Regulations need to be shaped by users as much as by officials and politicians. For this to happen, users need to find their voice. How do users make their voices heard? How do they get noticed, engaged?

Figure 3.3. Participants in the regulatory process



Finding out what users want

How do users experience and perceive regulation? What are they looking for? How can this be found out? If they are used alongside other tools and if their results are interpreted with caution, perception surveys are a helpful means of testing user views and needs. They are increasingly used by OECD countries to evaluate the success of their reforms. They tend to show that citizens and businesses do not necessarily react positively to the improvements in the regulatory environment achieved through, for example, burden reduction programmes.

Box 3.3. Perception surveys

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

- The choice of survey design and methodology heavily influence results. Respondents reply differently depending on the phrasing and ordering of questions, and the scale, type and number of response options.
- Perceptions are influenced by general attitudes towards government and by expectations. Expectations may rise over time, and surveys may therefore not show any positive trend in perceptions.
- Stakeholders are sometimes not aware of reforms, or only see part of it. They may simply be more affected by the costs than the benefits of reform, or the benefits of some regulations are diffuse compared to the costs which are businesses experience directly.
- Reforms may have not addressed what really bothers citizens and business, *i.e.* irritation costs or have caused adaption costs for business which outweigh the immediate cost reductions.

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

Best practices include:

- Bringing in business and citizens into the rule making and reform process to: i) identify early what irritates business and citizens and to inform reform design and implementation accordingly; ii) help business to better anticipate regulatory changes; and iii) increase identification and compliance with regulations.
- Improving the service quality of the administration. Perception studies revealed that negative perceptions of regulations are in many cases not linked to the quality of regulations themselves, but to negative experiences with the administration in the attempt to comply with them.
- Adjusting the communication strategy to raise awareness of business and citizens of regulatory reform and its impact. Often awareness of costs is higher than awareness of the benefits of regulations. This calls for a user-centric communication strategy of the benefits of regulation and reform. Of course the communications strategy should not downplay negative side-effects. Its aim should be to ensure that business and citizens fully understand the impact of regulations and regulatory reform.

- Using the results of perception surveys and studies as a basis for discussion with business and citizen representatives.

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

The networked communication modes of web 2.0 create new opportunities for regulatory policy which will affect the relations between regulators and the regulated, enhancing transparency. Web 2.0 applications which facilitate interactive information sharing, interoperability, user-centred design and collaboration have become common place. An examination of Web 2.0 practices should be part of a broader analysis of the best practices for promoting transparency. These tools have the potential to reach large numbers of people rapidly at low cost, supporting “bottom up” issues based communities, as demonstrated by the organising effect of networking sites on the outcome of the US election. They are already displacing traditional means of communication among actors in public, private and academic and civil society communities.

Note

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

Chapter 4

The need for stronger regulatory governance

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

What is regulatory governance?

Regulatory governance gives practical effect to regulatory policy. Effective regulatory governance maximises the influence of regulatory policy to deliver regulations which will have a positive impact on the economy and society, and which meet underlying public policy objectives. It implies an integrated approach to the deployment of regulatory institutions, tools and processes (such as regulatory oversight bodies, administrative burden reduction programmes and Regulatory Impact Assessment). Regulatory governance is not a new idea. The OECD published a report in 2002 which advanced the idea of regulatory governance.¹ But the evidence of OECD country reviews since then shows that regulatory governance is at best poorly applied in most countries. The relative failure of regulatory policy to deliver consistently effective regulation so far can be linked to inadequate and undeveloped regulatory governance.

The regulatory governance cycle

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

Figure 4.1² below depicts an ideal state in which the different actions that make up effective regulatory governance are co-ordinated. It highlights a number of points:

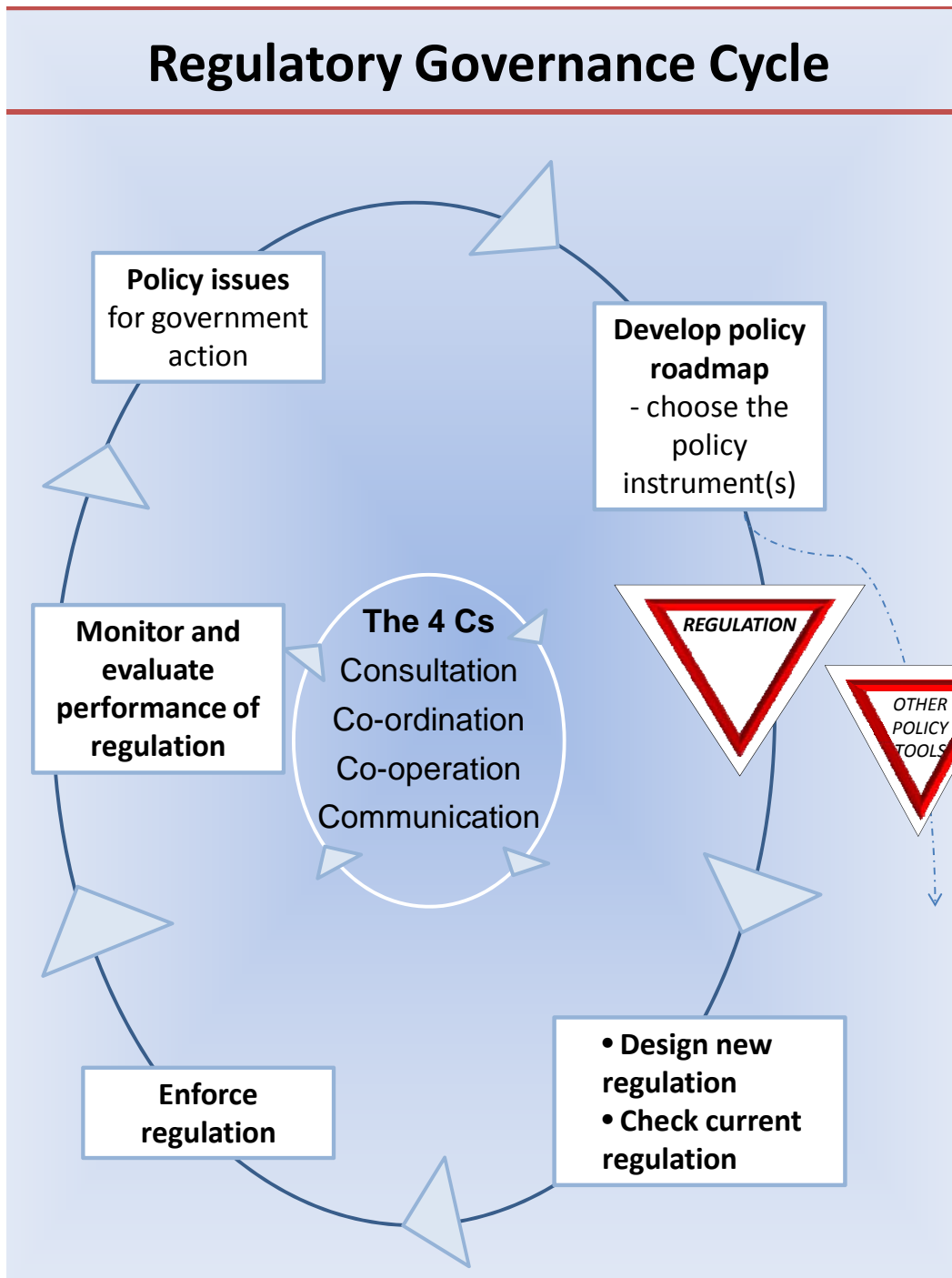
- **Policy making is closely linked to rule making.** For much of the cycle the tracks converge, and when they separate (for example, when regulations are enforced and evaluated), they join up again later to inform the next phase of policy making. Policy making may give rise to the initiation of a law (or the amendment of an existing law), although this should not be automatic, as a core part of regulatory governance is to ensure that regulatory options are carefully evaluated before adoption.³
- **The application of regulatory policy is a dynamic and continuous process.** Like other aspects of public governance, it is, or should be, a permanent feature of the public governance landscape. Simple lists or principles of good regulatory management can fail to convey this point.
- **Different functions need to be met.** The image of the cycle is valuable for stimulating reflection on the functions which need to be met, and the actors who do (or should) take on these functions. Joining up is not just a matter of processes, but of institutions.

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

Two general observations can be made on regulatory governance across the OECD so far:

- Countries are, to a greater or lesser degree, failing to close the loop, in other words, failing to make strong connections between the design, implementation and evaluation phases of the regulatory cycle.
- Countries' regulatory policies tend to prioritise certain aspects of regulatory management. Very broadly, the Europeans have, until recently, put more emphasis on regulatory stock management, whilst others have put more effort into the design of new regulation. *Ex post* evaluation – whether of individual regulations, regulatory processes, or regulatory frameworks – is a near universal weakness. No country is strong in all aspects of regulatory management across the cycle.

Figure 4.1. The Process of Regulatory Governance



Achieving effective regulatory governance

Leadership and oversight

Governments are ultimately responsible for regulatory policy, which means that they are also responsible for defining who does what. In particular, governments need to ensure that there is effective leadership and oversight of the regulatory governance process. Who

will do what to oversee the different parts of the process in the cycle? Does there need to be an overall leader?

What functions need to be met?

Strategic foresight and the management of risk

A core challenge for governments in the twenty first century is to become more effective at anticipating risks. Some sectors and markets are already known to be high risk, or to carry systemic risks which greatly amplify the effect of an inadequate regulatory framework. The financial sector is the most obvious example of a sector subject to systemic risk, but there are others, such as the energy sector. The capacity to identify and manage systemic risks needs to be part of effective regulatory governance.

Beyond these clear examples of risk prone sectors, other emerging risks need to be identified before it is too late. An effective regulatory policy needs to be built around the capacity to foresee, manage and respond to complex and continuously evolving policy and regulatory challenges. How can emerging risks be spotted in time? Governments need to be able to identify weak parts in the regulatory structure which may not generate obvious systemic risk issues, but which still need attention if regulations for a particular sector or issue are to be “fit for purpose”. They need to find ways of avoiding moral hazard while preventing systemic risk.

This implies the need for regulations and regulatory frameworks to be flexible and to be adapted before a crisis forces the need for change. An approach is needed which is capable of giving early warning that a regulation or regulatory framework is not working as intended; a feedback loop that informs policy and rule makers of the need for change, before it is too late. Among other issues, this requires identifying the players who are best placed to provide this feedback, and who know their clients. State failure is as much an issue as market failure. It is therefore important to address the issue of capture, and to secure effective accountability, including through performance evaluation based on a system for measuring performance.

Co-ordination and supervision

Nearly all countries have principles, standards, procedures, criteria and mechanisms for the effective preparation of draft regulations (*i.e.* the first stage of the regulatory governance cycle) both from the legal and policy perspectives. The task of co-ordination and supervision is to ensure that these principles and procedures are applied, before a final decision is reached on whether to go ahead with a draft proposal. In many European countries, the starting point has been pre-existing administrative and legal quality procedures, to which broader impact and burden analysis has been added.

Challenge and scrutiny

Beyond the basic need to check that procedures have been followed (the task of co-ordination/supervision), there is a further need for independent, objective assessment of the quality of a proposal, which includes checking whether impact assessment, consultation and burden reducing processes have been properly carried out. The underlying issue is that regulators cannot self-assess their work. This challenge may be the most difficult function as it can be perceived as (and in some cases is formally set up to be⁴) a gate-keeping function, where the relevant body has the power to hold back a proposal until it is deemed fit to be considered and approved by the government. In some cases, the oversight body

may publish its comments and assessments, thus providing a powerful “shaming” pressure for improved performance.

Training, advice and technical support

Regulators need assistance and encouragement to carry out their regulatory tasks effectively, and for cultural change to take root. The main tools for this are guidance and training.

Advocacy

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

Evaluation

Last but not least, evaluation of progress and outcomes needs to be assured in order to ensure that regulatory governance is delivering on its promises, and to inform the next stage in the policy-making cycle. Evaluation takes several forms:

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

For evaluation to be well grounded, performance measures will be required. This is still at an early stage of development in the OECD community. The best placed institutions for evaluation will vary according to the country (and according to the nature of the evaluation). Most countries have not assigned this function to a particular body. It may be useful to build on existing institutions such as audit offices (which already review the efficiency and effectiveness of government spending).

Scope for different approaches

There are important differences among OECD countries as regards underlying public governance and institutional frameworks, and not least legal traditions (Box 4.1). Institutional arrangements for effective regulatory governance need to take account of these. One of the major lessons of recent OECD country reviews, especially under the EU 15 project, is that “one size does not fit all” and that effective governance may even be held back by efforts to introduce institutional arrangements and processes that do not take account of existing structures. A single central oversight body, for example, has been consistently recommended by the OECD for a number of years, yet many countries have found it difficult to establish. There is a need to look behind these difficulties to understand why this approach does not always work, and whether there are viable alternatives.

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

Box 4.1. Civil law and common law: Implications for regulatory governance

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

Systems based on common law

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

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

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

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

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

Systems based on civil law

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

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

Implications for regulatory policy

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

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

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

Engaging all government players

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

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

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

Subnational levels

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

EU 15 reviews hinted at perverse incentives to take regulatory actions, such as higher license fees, linked to a shortage of local revenues.

The OECD's 2005 Guiding Principles for Regulatory Quality and Performance refer in general terms to the need for better regulation at all levels of government. The EU 15 reviews and other recent OECD reviews highlight the need to go further in defining how this is to be done. Effective regulatory management across levels of governments matters because poor multilevel regulatory management affects competitiveness, in particular by raising barriers to the seamless operation of internal markets (an issue which has received considerable attention at the level of the EU but less so within countries). The economic objective, however, may generate tensions with political sensitivities over the autonomy of local governments. A degree of creative competition in approaches is also desirable. Processes and tools to help define the right balance are needed, and to determine in what cases it makes sense to harmonise approaches, and when an issue deserves a jurisdiction specific response⁵ model. Performance measures need to be developed to assess the effectiveness of processes, and achievements.

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

Box 4.2. Mexico and the Multi-level Regulatory Governance Agenda

Mexico is a federal state integrated by 31 subnational states and the Federal District (D.F.), which are as well divided into about 2 443 municipalities. There is wide diversity regarding the competitive situations and regulatory arrangements in each of these subnational units, as well as huge co-ordination challenges for such a large number of jurisdictions.

Subnational governments have extensive regulatory powers in Mexico. Federal, state, and municipal authorities have the capacity to design, implement, and enforce their own regulations. In some cases, boundaries for each level of government are defined, but in many others, the regulatory framework establishes that the three levels will concur in specific governance matters. Mexico therefore provides a good basis for analysis of multilateral governance which could be relevant to other jurisdictions.

Mexico needs to improve the regulatory quality of its subnational units if it is to create a friendly business environment and improve competitiveness. An entrepreneur has to meet formalities at the federal, state, and municipal levels.

There has been progress by state governments. 18 out of 32 states have issued regulatory reform laws, 12 have decentralised commissions working on regulatory improvement, and 20 have a unit within a state ministry (usually, the Ministry for Economic Development) addressing the issue. In most cases, these entities have the roles to facilitate and advocate the implementation of regulatory policies and, some of them, also have the attribution to challenge new regulations based on quality standards and a systematic method of analysis, such as a RIA. The Mexican Association of Economic Development Secretariats (AMSDE) has even set up a formal commission on regulatory reform.

Despite these achievements, the progress and sophistication varies from state to state and even the most outstanding ones have wide scope for learning from best international practices. Some of the main challenges at the subnational level include the following:

- While in some states, such as Colima, Jalisco, and Nuevo Leon, there is strong political commitment to advance regulatory reform, in others the topic is not prominent in the agenda. The same finding applies to municipalities as, usually, a strong commitment at the state level is transmitted to the municipal level. In consequence, regulatory reform (and the resources devoted to it) still has to be institutionalised in several states.

- Engagement of business groups and civil society in the regulatory policy agenda varies widely from state to state. Best practices have been identified in Jalisco, where the State Committee for Regulatory Reform (COMERJAL), includes a wide span of business and citizen groups.
- Not so many states apply a systematic approach to control the flow of regulations, such as a RIA. While some states have the RIA as a formal requirement (*Puebla*), others have developed *ad hoc* methodologies to assess the impact of regulations. For example, in Baja California there is a Consulting Committee to Promote Competitiveness and Economic Development that reviews regulatory proposals.
- Co-ordination between the three levels of government should be strengthened to achieve a significant simplification of critical economic processes, such as business start up. The System for Quick Business Start Up (SARE)⁶ has proved to be effective and has led to the formal establishment of 188 391 business, creating 499 241 jobs and USD 27 806 million pesos of investment. Despite these figures, only 178 municipalities have adopted SARE.⁷
- The adoption of e-Government tools to advance regulatory reform is quite advanced in a few states, such as Colima. However, most states still have to realise the full potential of e-Government to improve their regulatory procedures.
- Despite some sparse efforts to review the stock of regulations at the state level (Baja California and Nuevo Leon are replicating the *Base Cero* initiative⁸); these exercises have not been systematic or periodic. The same applies at the municipal level.

Balancing public and private regulation

Governments may be responsible for regulatory policy, but they cannot do their job alone. Regulatory governance involves addressing public-private co-operation more effectively, and taking a closer look at the place of self regulation in the mix. Governments need to assign (and review) responsibilities which they have, or intend to delegate to the private sector, international organisations (such as private standard setting bodies), the charitable (or voluntary) sector, and even citizens.⁹ The regulatory structures of the twentieth century, however efficient in themselves, tended to be silo-based, creating barriers (sometimes embedded in law) to co-operation across the public-private sector divide, frustrating good governance (and in the case of the financial sector, generating a crisis). There is debate about the right balance, especially in the wake of the financial crisis, which shook assumptions about the merits of self regulation. The debate raises important issues of accountability, regulatory capture and the need to avoid regulatory gaps as well as overlaps.

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

Another difference is that many European countries have traditionally assigned an important role to the social partners (the unions and employers' representatives) in regulatory management.

The issue of regulatory agencies

Regulatory agencies are increasingly common across the OECD and elsewhere, but their numbers, functions and powers can vary significantly. In North America, for example, regulatory agencies at an arm's length from the central government executive have existed for many decades and are commonly given significant delegated authority to develop and implement secondary regulations.¹⁰ In many parts of Europe by contrast, extensive rule-making powers have not been delegated, and the development of regulatory agencies has been more recent. The central state may thus have shrunk in some countries (giving rise to the "regulatory state"), but the overall activities of the state have not generally diminished anywhere in the OECD.

Governments need to consider their own situation when they address this part of their overall regulatory governance framework. Specifically, it is important to consider the extent of powers delegated to regulatory agencies: how much they can do on their own initiative and how much they depend on ministries to set the policy and regulatory agenda which drives their work. This will help to determine the relative importance of this part of the regulatory landscape.

Box 4.3. Defining regulatory agencies

Regulatory agencies cover a range of activities. There are two broad categories:

- **Economic agencies.** These are found in utility sectors such as energy, transport and telecoms, as well as in the financial sector.
- **Agencies in charge of health, safety and the environment,** as well as agencies responsible for a (growing) range of other issues such as **standards setting.** In some countries these are known as executive agencies, since they execute policy, which distinguishes them from ministries, which make policy.

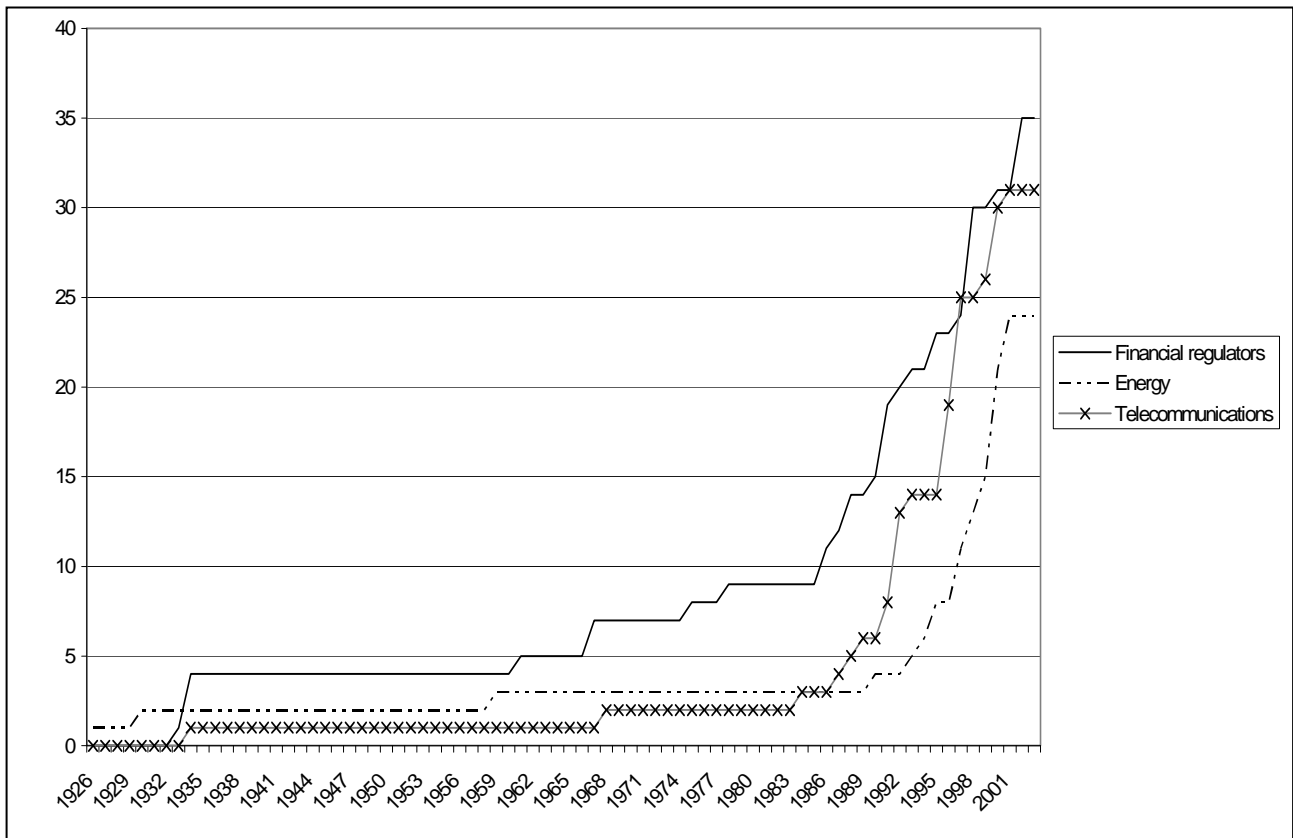
In most countries, there is no single framework approach to regulatory agencies. Key elements in their design are likely to vary across agencies. Key design factors are the extent of their independence from the central executive (ministries); linked to this, the mechanisms for accountability (for example, this may be to parliament or to the central executive, or to both); and the extent and nature of their powers (to make regulations, to enforce regulations, to take decisions on individual cases, to impose sanctions etc). Economic regulators are, however, likely to share similar characteristics across countries. These include a high degree of independence (perhaps enforced through a legal act setting them up as a separate legal entity), and own budgets separate from the budget of the central executive. All regulatory agencies have been set up with a degree of autonomy to carry out the functions assigned to them.

The development of regulatory agencies across the OECD has been widely considered in a very positive light. In particular, the economic regulators for the utility sectors have been an important step forward for the more effective management of these sectors in conditions of competition, shielding newly liberalised markets both from political and private interference (important in core economic sectors where the state retains a direct role as a shareholder). They can also be powerful advocates for further and more effective reforms, and are closer to the issues which concern users than ministries. Success does not come overnight for the more recently established regulators. For example, in parts of Europe they have had to establish themselves in an institutional landscape which is often not well suited to their integration, and they need to build up trust and confidence.

There is now, however, a greater awareness of issues and dangers:

- **Institutional inflation.** Regulatory agencies reflect a growing decentralisation of regulation. The number of regulatory agencies has grown rapidly in many countries. Some countries have difficulty keeping track of their range and numbers. This can have serious implications for the ability of governments to spot gaps in the regulatory framework and conversely, to deal with inefficiencies and accountability issues caused by overlapping responsibilities.
- **Regulatory capture and corruption.** Lines of accountability have not been sufficiently anchored and this, combined with sometimes excessive discretion, has raised problems of the relationship between regulator and regulated. In some countries, institutional inflation can feed corruption.
- **Specific issues with some (very important) regulatory agencies.** The financial and environmental crises have put a negative spotlight on financial and environmental regulatory agencies in some jurisdictions.

Figure 4.2. Trends in independent regulatory authorities in OECD Countries



Source: OECD Inventory of Regulatory agencies, 2005.

Governments have often been reluctant to intervene and micromanage regulatory agencies, which would defeat the purpose of setting them up with any degree of independence. They have also, until recently, been more focused on their cost to the public purse, than on their important role in regulatory governance. This means that many regulatory agencies have been shielded from the discipline of regulatory oversight and the

application of a coherent set of principles for regulatory management. It also means that accountability mechanisms have sometimes been neglected. Regulatory agencies need to be brought within the ambit of regulatory governance without upsetting their independence. This suggests the need for *ex post* reviews (which some countries have done), and strong mechanisms to prevent capture and maintain integrity.

Strengthening human capacities for regulatory governance

Everywhere, countries are confronted with the need to improve cultural acceptance of regulatory governance. Strengthening capacities for the effective implementation of processes such as impact assessment is an important part of this process. This needs to take account of the needs of the leadership and oversight bodies; as well as the needs of the wider public service. In both cases, attention appears to be needed on:

- **Competences.** In some countries, legal capacities are stronger than economic capacities. Both are needed. At the core, regulators need to be equipped to play an effective role in the rule making and rule development process. For this, they need to be trained in the appropriate competences.
- **Professional civil service.** Effective frameworks for remuneration and performance management help to increase accountability of individuals. A (very) few countries have started to experiment with performance evaluations linked to performance on regulatory governance. Put simply, officials need to know that their work on impact assessment or burden measurement is valued. Fiscal incentives for good regulatory performance by ministries of regulatory agencies may also play a role.

The implementation of regulatory policy is fragmented across government. In countries that have a tradition of closely associating policy making and implementation with the development and enactment of laws and regulations, it is the “bread and butter” of most officials. By contrast, fiscal and monetary policy can be, and are, handled (entirely) by a small group of officials working in a small number of ministries and agencies. This raises a considerable challenge for capacity building, but it also highlights the close relationship of regulatory policy with public management and a strong civil service.

E-Government and the application of ICT have proved a powerful tool in some countries for unblocking cultural change.

Box 4.4. Regulatory policy and e-Government

Portugal’s regulatory policy strategy is closely linked to and supported by e-Government policies aimed at promoting more effective public governance and regulatory management. Portugal has an ambitious policy to develop the Information Society and a focus on putting public sector services on line. Drawing full benefits from simplification through e-Government services however, meant that the government has needed to address the digital divide. Portugal’s programmes for the reduction of administrative burdens and legal quality rely heavily on the use of information and communication technologies (ICT) to reduce the cost of administrative procedures, and to dematerialise the legislative process. For example, in the field of administrative simplification, the effort to put registration procedures in the transport sector on line has highlighted the need to simplify the registration requirements themselves, and the Official Gazette is available online

Development of Better Regulation structures has also been closely associated with managing the transformation of the public sector. Reflecting the political attention given to the reform of the public sector, responsibility for the reform has been placed at the centre of government, and regulatory policy programmes are also led from the centre.

In Belgium, the Crossroads Bank for Enterprises is a register of business identification aimed at connecting different databanks of the administrations and thereby allowing re-use of data across administrations. Institutional support is provided by the Administrative Simplification Agency whose annual action plan covers not only initiatives to reduce burdens in federal regulations, but also long term projects shared with the other Belgian governments.

The Crossroads Bank for Enterprises is one of a number of examples of cross government co-operation, which include other projects such as the penal data register, the Crossroads Bank for social security, and the *Telemarc* public procurement project.

A number of other countries have made effective use of e-Government to leverage change in their public administration and advance their regulatory policy agenda, for example through the use of online tools to communicate and consult with businesses and citizens.

The international challenge

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

The EU is perhaps the most obvious current example of an international dimension to policy and rule making within which national authorities need to work.

Box 4.5. The regulatory framework for EU countries

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

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

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

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

Notes

1. “Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance”, OECD 2002.
2. Different jurisdictions may use different vocabulary to express the functions depicted in the figure, which are not always easily translatable. They are so closely associated with the country context that some terms take on a country specific meaning. For example, in Europe, enforcement may also be referred to as supervision, inspection or execution.
3. In some, especially European countries, it nearly always does give rise to a law or regulation.
4. In the United States, for example, the Office of Information and Regulatory Affairs (OIRA) has the authority to return draft regulations to agencies for consideration. In other countries, such as Japan, the role is more limited, checking compliance with basic requirements.
5. In Australia, The Council of Australian Governments (COAG) agreed to a new model of co-operation underpinned by more effective working arrangements. Area by area, jurisdictions are to consider the merits of a uniform, harmonised or jurisdiction specific model.
6. SARE is a risk-based approach, applied to low risk businesses, that attempts to simplify the procedures for start-ups at the three levels of government by ensuring that the entrepreneur receives the license to begin operations within 72 hours of the request.
7. Figures from *www.cofemer.gob.mx*.
8. *Base Cero* is a regulatory review initiative launched by President Calderon in January 2010. Its objective is to develop a regulatory system that favours productivity in economic activities and facilitates technology absorption, so that economic growth is increasingly based on innovation.
9. For example, the United Kingdom government has proposed the “big society” theme under which citizens, communities and independent providers have greater delegated responsibilities for managing issues.
10. Beginning in the late 19th century, much of regulation in the US started to emanate from regulatory agencies under the authority of primary law (statutes). The Interstate Commerce Commission, Federal Trade Commission, and Federal Communications Commission were, for example, established several decades ago, followed by non economic regulators such as the Environmental Protection Administration.

Chapter 5

A roadmap

Moving forward to strengthen regulatory policy requires a roadmap, and collective reflection as well as reflection by individual countries on what needs to happen next. Issues for collective reflection include how shared principles can be further developed across different cultural contexts, the scope for newcomers to adapt or even leapfrog towards better regulatory governance by learning from the experiences of others, how to measure performance and progress, and effective sequencing of further change. A renewal of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance will help to crystallise a shared understanding, and provide a benchmark against which future efforts can be measured.

Closing the gaps across countries

Adapting, sequencing

What has been learnt from the front runners, which can be applied by newcomers? Where should newcomers start the process? How can the momentum be sustained? What are the priorities? In the move towards joined up regulatory governance, an important point to be made is that the work underway on specific processes should continue. For example, administrative burden reduction programmes continue to have considerable worth in themselves, even if they need to develop further.

For developing and transition countries especially, there is the question of adapting what has been established elsewhere. Countries that have not yet started with the systematic simplification of their regulatory framework should use the experience of countries that can be considered as pioneers in the administrative simplification area while designing their own programmes on administrative burden reduction, better targeting their efforts to the most burdensome and irritating regulations, designing comprehensive communication strategies before launching the projects and creating permanent monitoring and evaluation mechanisms. There is much also to learn from others' experience on the institutional front, especially as regards the management of regulatory agencies.

Practical approaches

There are a number of options for strengthening co-operation and exchanging best practices. These might include the establishment of regional fora, and the development of a Regulatory Policy Outlook publication. The OECD-Mexico project to strengthen competitiveness, focuses on reducing regulatory burdens on business, increasing productivity and improving the international business environment. It is the first sustained

example of how the OECD can work with a member country to support the implementation of OECD recommendations. The project is an operational exercise “in real time”, of direct practical relevance to a member country. Building on this experience may prove worthwhile for other countries or regions.

Measuring performance

There is some way to go in the development of robust approaches for measuring performance, not only of individual regulations, but also of regulatory programmes such as impact assessment and administrative burden programmes, as well as specific regulatory agencies, of key sectors of activity (sectors undergoing structural reform). Benchmarking progress is necessary not just for making necessary adjustments, but also for transparency, and to justify the resources allocated to regulatory policy – demonstrating the practical effectiveness of regulatory processes, and identifying where resources should be allocated to maximise effectiveness.

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

Box 5.1. Canada: The Cabinet Directive on Streamlining Regulation (CDSR)

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

Communicating regulatory policy

Effective regulatory governance is also about building and sustaining support for regulatory policy. Governments need to be able to answer questions from those who are regulated about the scope and effectiveness of their regulatory policy, and how they measure its success. Clear communication is crucial. If governments do not communicate what they are doing and why this is important for the economy and social welfare, they cannot expect support. What should governments do to strengthen communication and to

mobilise businesses and citizens around the regulatory policy agenda? What should public communication focus on? Who should do this? There is an important link with the advocacy function explored in the previous chapter. A core challenge is how to explain the abstract and complex nature of regulatory issues in a media environment which focuses on policy failures and simplifies events.

Communications strategies might usefully focus on building a constituency for regulatory policy by demonstrating its costs and benefits. The lesson of administrative burden reduction programmes is that policies that realise tangible benefits will be supported by politicians. The publication of impact assessments and associated information on costs and benefits of regulations has already started in some countries. This is another way to raise consciousness of regulatory policy and engage citizens.

Box 5.2. Communication: The evidence of the EU 15 reviews

The political and communication dimension of an effective regulatory policy is fundamental to progress. The reviews highlight that regulatory policy will only thrive if it has political support, civil service “buy in” and if external stakeholders perceive it to be relevant. However, the lack of a clear strategy, and failure to link regulatory policy to high-level public policy goals undermines this.

Promoting a shared vision

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

Box 5.3. OECD 2005 Guiding Principles for Regulatory Quality and Performance

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

Shared principles need to be applicable in sometimes very different cultural contexts. This raises the issue of whether there can be a “grand theory”. More pragmatically, it raises the issue of where to pitch collectively agreed principles which will help to guide countries further. A balance needs to be struck between excessive generality, and excessive detail. As this report highlights, there is observable convergence in the paths which countries have taken so far. There is also a wide range of underlying legal, cultural and institutional traditions.

Experience points to a number of challenges which were not fully anticipated by the 2005 OECD Principles. This may be the best starting point for reflection on a development of the Principles. These include:

- Anchoring effective institutional leadership and oversight.
- Capturing the institutional breadth and diversity of the players.
- Including the user/citizen dimension.
- Scoping the international and subnational dimensions.
- Drawing out the relevance of regulatory policy to green growth.
- Articulating regulatory policy as a dynamic, not a static concept.
- Balancing a focus on economic regulation and deregulation, with legal clarity, and rule of law connection.
- Developing policy coherence and inter-connectedness.
- Strengthening the focus on regulatory governance.
- Risk aspects.

Conclusion

The encouraging conclusion of this report is that there has been considerable progress over the last couple of decades, and especially the last ten years. Countries started with regulatory management, which laid the groundwork for a more strategic vision. Regulatory policies began to take shape, allowing countries to communicate more clearly what they were doing, for whose benefit and for what purpose.

However, there is no room for complacency. The main conclusion of this report is the need to take this evolution a stage further, with a strong focus on regulatory governance. This will allow the tools and processes for regulatory management, which countries have been building up, to be deployed more effectively. Critically, it will help to ensure that regulatory management becomes an integral part of good policy making. Countries have different starting points, but there is a shared need to move forward on this issue, if regulatory policy is to remain relevant and supportive of the public policy challenges which need to be addressed in the next decade.

Annex A

Findings of the EU 15 country reviews

A) Strategy and policies for better regulation

Economic context and drivers of regulatory policy

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

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

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

Overall strategy, guiding principles, main policies

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

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

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

Communication of Better Regulation strategy and policies

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

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

Issue: What are the priorities for communication?

Ex post evaluation of Better Regulation strategy and policies

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

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

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

E-Government in support of Better Regulation

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

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

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

B) Institutional capacities for Better Regulation

Public governance and policy making context

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

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

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

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

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

- **A single central regulatory management unit with full coverage and control of all the relevant issues is a challenge to set up.** Some countries question whether this is the only approach. Even where one appears to exist it does not cover everything – perhaps because there is too much to cover in complex modern societies, not just for internal political reasons. A new approach to the central institutional driver for regulatory policy may be emerging in some countries, with a radial network of relationships fostered by a central unit which does not necessarily integrate all the relevant ministries, supported by a well-functioning network of government committees and flanked by an external advisory group with a challenge function. This definition is an aggregate of the most effective parts of the structures currently found in the reviewed countries. However, this approach has not yet proven its effectiveness over the long run.
- **Many countries have difficulty determining the best location for a central unit, if they are trying to establish one.** Possible locations which have been tested include the centre of government (prime minister's office or equivalent), enterprise ministry, finance ministry,

justice ministry, and home affairs ministry. This is very country specific, reflecting traditions and the relative weight given, for example, to the economic or legal context for regulatory policy. In countries with a long regulatory management tradition, location may vary over time (for example between the centre of government and the enterprise ministry). The differences also reveal a more fundamental issue: regulatory management affects a wide range of ministries and does not have an automatic “home” (as does, for example, fiscal policy). One or two countries have set up units made up of secondees from key ministries. This appears to be a very promising approach. There are advantages and disadvantages to a single location. For example centres of government are often reluctant to take on substantive tasks which may compromise their key function of arbitration and strategic management; finance ministries may be too engaged in other parts of their portfolio to pay enough attention to regulatory management (although they are important because of their power); enterprise ministries are closer to the clients than centres of government but may lack authority over other ministries.

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

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

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

Regulatory agencies

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

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

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

The legislature

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

- **The role and interest of parliaments in regulatory quality appears to be growing, even if the pace and nature of the interest differs across countries.** This seems to be regardless of the nature of a country’s political system. Whether they are driven by coalitions or based on a dominant party does not seem to matter, though it does affect the specific way in which parliament interacts with the executive. Some parliaments have committees that take a specific interest in regulatory processes such as impact assessments. More often, there are not special regulatory policy committees, which poses a challenge for the diffusion of effective messages regarding regulatory policy. In some parliaments, officials take the lead, in others individual members emerge as better regulation “champions”.
- **An emerging challenge is how to “join up” the efforts of the central executive and the legislature in a positive way.** Some parliaments appear to play a valuable challenge function with regard to draft regulations and this could be more effectively used by the executive, whereas others make possibly excessive demands on the government to account for its better regulation policies.

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

The judiciary

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

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

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

Other key players

- **National audit offices and external advisory bodies often play a significant role to challenge and monitor progress on better regulation.** In some countries, the national audit office plays an important role evaluating progress. The same is true of independent

oversight bodies, whose numbers have grown recently. Other key players may be councils of state and the social partners (representatives of the unions and employers).

- **External challenge bodies are a positive development.** But they raise issues about the appropriate extent of their powers, especially if they have duties relating to impact assessment of draft regulations.

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

Capacities, resources and training

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

- **Culture change is a “work in progress”.** Capacities and resources to implement Better regulation policies need reinforcement. A linked challenge is spreading culture change and new approaches to carrying out familiar tasks across the whole of government, even in the more “mature” countries. There are no magic bullets and the process takes time. There is, not surprisingly, a strong link to broader public sector management and reforms, for example, emerging efforts to link better regulation with performance appraisal systems and ministry budgets.
- **Training for regulatory management skills (such as impact assessment) is patchy.** It is usually addressed as an add-on to more general training for civil servants, although there are developments towards more specialised training.
- **Regulatory policy now attracts (and consumes) more resources within governments.** Against the common background in Europe of public sector and civil service cuts, which is driven by the need for efficiency gains to combat the effect of ageing populations and sustain social welfare systems, Better Regulation must increasingly justify its share and fight for any increase. At the same time, civil service cuts can concentrate the mind for necessary change and “doing things differently”. There is some evidence of this at work, for example, with the move towards more proportionate and risk-based enforcement in some countries.
- **Legal quality remains important, as well as the development of economic skills.** The growing attention and resources allocated to regulatory policies such as *ex ante* impact assessment and administrative burden reduction may be undermining good practice in law making, including attention to legal quality, but also policies to rationalise and codify the regulatory stock, which appear to receive less attention today. Economists may be displacing lawyers in the fight for resources and attention. This may be a welcome corrective to past legal dominance, but both skill sets are needed.

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

C) Transparency through consultation and communication

General context

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

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

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

Public consultation on regulations

- **Significant efforts are being made to reach out to all relevant stakeholders (where this is not already the case).** A range of processes is being developed to facilitate the task for consultees, though this is still a “work in progress”. Administrative burden reduction programmes have been a strong motor for the development of more open consultation.
- **There seems to be a significant unsatisfied demand for effective consultation on the part of stakeholders.** Many interviews revealed palpable frustration. The reviews revealed that most countries experience some issues concerning lack of feedback, uneven quality, and keeping to the response time. Stakeholder perceptions matter, not least because transparency is key to sustaining support and legitimacy for reform and regulatory actions over the long term.

- **There appears to be uncertainty over “where to next”.** Some countries are grappling with the issue of how to secure an effective policy for public consultation, especially in support of major reforms (how and when to consult, and with whom). This is a major challenge for modern complex societies. Although guidance notes are increasingly available to help officials decide on the best approach (as well as covering more detailed issues such as the need for feedback and response times) they do not appear to be addressing effectively the issue of different approaches for different needs (projects in their early stages, for whole processes such as administrative burden reduction programmes, or for specific draft laws). Different instruments may serve different purposes (internet portals, expert meetings, green or white papers).
- **Some ministries (and regulatory agencies) are better at public consultation than others.** However, sharing experiences and best practices is not common and several reviews carried the recommendation that this would be a helpful way to make progress without expending too many resources.
- **Parliaments are increasingly interested in the issue of public consultation.** They are revising questions about the extent to which the executive has consulted prior to tabling a draft law before the legislature. Parliaments sometimes give more publicity than the executive to draft proposals (for example, publishing these on their websites).

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

Public communication on regulations

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

D) The development of new regulations

Trends in regulatory production

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

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

Procedures for making new regulations

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

- **Most countries have some arrangement for forward planning of regulations, which is not always robust.** In some cases for example, forward planning is confined to primary laws. Plans are often internal, and not circulated externally, which frustrates stakeholders who need this information in order to plan their engagement.
- **Procedures for the development of laws and regulations are reasonably robust.** Most countries have procedures for the development of laws. Procedures for secondary regulations may be weaker, despite the fact that in many jurisdictions, these are critical to fleshing out the primary law's intention. Procedures are not always legally based (via administrative procedure laws) but they are usually clearly set out in guidance.
- **Most countries have scrutiny of draft laws by a body other than the proponent ministry.** These bodies (Councils of State in some cases) can play a significant role. Even if their role is formally confined to advice, their standing and reputation often ensures that advice is heeded. Advice may be formally confined to legal checks and the "opportunity" (timeliness and administrative appropriateness) of a draft proposal, but this may encompass valuable and apolitical advice on whether the proposal makes broader sense. Once a law has been adopted (sometimes before), Constitutional courts or equivalent institutions may check for conformity with the Constitution. Again, these bodies carry weight because of their reputation. These institutions were generally established some decades (if not centuries) ago, reinforcing the message from other OECD work that it takes time to set up effective regulatory institutions, but that it is worth the wait.
- **There is a noticeable overlap in some countries between the (traditional) procedures for the development of regulations, and the (newer) impact assessment processes.** The two processes are not always very joined up (and sometimes even on parallel tracks, despite potential synergies between the two). This often reflects a clash of two cultures; the

legal culture underpinning the traditional process, and the economic culture which drives impact assessment.

- **Legal access, clarity and quality are issues that worry a large number of countries.** In many countries, the proliferation of regulations over time, and the speed with which new regulations may need to be drafted, have overstretched legal resources in ministries and undermined the clarity of the law. Some countries have been very proactive in addressing the situation, for example by streamlining the legal drafting and development process using ITC, and investing resources in plain language training.

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

Ex ante impact assessment of new regulations

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

- **The reviews revealed major weaknesses across most of the reviewed countries, and further significant development is needed.** The good news is that formal policies are gaining ground and being improved, yet this is one of the most important tools available to assist policy makers in deciding whether and how to regulate in order to achieve policy goals. There is growing awareness that this is a key tool. Key institutional actors are increasingly engaged (parliaments and regulatory agencies as well as central ministries). The Standard Cost Methodology (SCM) is helping to change cultures and encourage the idea of quantifying costs. But on the negative side, there is a relative lack of integration into the policy making process, assessments are often done too late in the process, consultation is not always robust, oversight needs more teeth, and overall political buy in is weak.
- **Impact assessment in many countries has tended to evolve from existing processes to check financial or budgetary impacts, or environmental impacts.** Other impacts have been added over time (e.g. competition, gender). In a few cases, the main focus is administrative burdens on business. Some countries’ processes have not evolved much further than legal quality mechanisms already in place.
- **Impact assessment often does not yet make a real difference to outcomes (it is applied too late in the process).** There is a need to establish effective evaluation and measures of success (did an impact assessment influence the outcome? Were predictions realised?).
- **There is an important but not always clearly articulated link between impact assessment processes and administrative burden reduction programmes.** These usually have net targets (*i.e.* they capture new regulations, at least as far as the business dimension is concerned).

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

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

- **A strong conclusion from the reviews is that the broader institutional context for policy making (not just law making) needs to be understood first.** This needs to be the starting point for working out how/where/when impact assessment can be more effectively embedded.
- **Line ministries are universally responsible for doing impact assessments (as they should be).** A minority have set up dedicated impact assessment support units or staff. The framework for central oversight varies a lot. Some countries have established central units (in prime minister’s Office, or Enterprise/Finance ministries), a few others rely on a “network” approach, some have added an external watchdog to ministry arrangements. Existing structures (such as Justice ministries or Councils of State) may be used, in which case impact assessment is added to existing processes for checking the legal quality of draft regulations.
- **Setting up a single central unit has been problematic for many countries.** They appear to be more easily set up for administrative burden reduction programmes, and are often “rejected” by the culture when required to serve broader purposes, closer to political decision making. Resources and competences of central units can be an issue. Guidance tools and manuals for doing impact assessments, often available online but also supported by courses, are quite well developed, and growing fast. Overall the central challenge function is mostly weak. Sanctions for poor or late impact assessments are undeveloped, clear carrots and sticks to promote a consistent and high quality performance are not evident. In order to force change, a few countries have resorted to making impact assessment a legal requirement, with sanctions if it is not observed.
- **Parliaments are starting to take an interest in impact assessment.** A few have organised themselves for this purpose through special committees. They do not always have access to full impact assessments for draft laws, and have started to ask for this.

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

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

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

- **Most impact assessment processes are not integrated (to give an overall picture of costs and benefits) but fragmented.** They may cover a range of issues, from economic (competition effects) to social (gender effects) to environmental and distributional effects.

There is a growing appreciation that impact assessment, if well done, can pick up unintended consequences of a proposal. Sustainability impact assessments are starting to be developed, which by their nature may help to secure a greater coherence across different impact assessments, but they are some way from being operational.

- **The systematic quantification or monetisation of costs and benefits is not widespread. It is mainly applied for administrative burdens.** Most countries do not require that costs must not exceed benefits for a proposal to be adopted, preferring an approach that clarifies the costs and the benefits and leaves it at that. Many countries are anxious to underline that regulations have benefits, and are concerned that the emphasis on costs has overshadowed this point.
- **The late timing of impact assessments is a widespread issue.** Often, impact assessments are carried out at a late stage in the development of regulations (when a draft is close to submission to the cabinet for example). Requirements for an impact assessment to be attached to early draft proposals are rare. If processes are not observed and impact assessments are done late or inadequately, sanctions are weak. This reinforces the vicious circle of some ministries believing that they can ‘get away’ with a poorly executed impact assessment.

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

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

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

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

Alternatives to regulations

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

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

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

Risk-based approaches for the development of new regulations

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

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

E) The management and rationalisation of existing regulations

Simplification of regulations

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

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

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

Reduction of administrative burdens

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

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

Process and methodology

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

Use of e-Government

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

Administrative burdens for business

- **Generally good results are emerging with the achievement of reduction targets and (sometimes) the setting of new ones.** Programmes usually have a quantitative target with a fixed timeline (same as the EU 2012 date, or a date ahead of the EU). Targets are net targets *i.e.* programmes cover new as well as existing regulations, and the burdens from new regulations are counted in the assessment of whether targets are being met. The best programmes make an explicit link with *ex ante* impact assessment for this (the burdens of new regulations must be part of the documentation available to decision makers).
- **The means by which burdens are being addressed often include clusters of laws which are causing a large part of the problem.** Fiscal burdens may not be included.
- **Running programmes on the basis of the full traditional SCM methodology is expensive.** Newcomers, learning from more experienced countries, are experimenting with lighter approaches. Measurements of burdens in terms of impact on GDP are made but the methodology merits further collective attention.
- **Some programmes are experiencing a loss of momentum.** It is hard to run the “last kilometre” once the “low hanging fruits” have been picked.
- **Business often remains unhappy, despite the efforts and achievements.** The reasons for this are complex. Efforts are being made to work more closely with business in order to identify the real issues for them (including irritants), rather than the issues identified by civil servants. Negative business perceptions may have roots in substance as well as presentation and communication, for example concerns about effective control of the flow of new regulations which cancel out achievements on the regulatory stock. There is a need to engage local governments, where this is not already being done, as they are usually a key interface with business.

- **Business pressures are leading to analysis of how to broaden programmes beyond information obligations.** The proposal is to cover all compliance costs, as well as “irritants” (requirements which are perceived as burdensome by companies even if they are not costly measured by the standard cost methodology). Attempts are being made to extend the reach of some programmes and integrate full compliance costs, with some difficulty.
- **Licences and planning permits appear to remain an issue in many countries.** The reviews did not go into any depth. However, it appears that they are often the subject of reform efforts, for example the application of the “silence is consent” rule. A country with a large number of licence requirements may need to ask itself if they are all necessary, as well as taking steps to streamline processes.
- **The picture for the development of one-stop shops is patchy, but appears to have been given a boost by the EU Services Directive.**

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

Administrative burden reduction for citizens

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

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

Administrative burden reduction for the administration

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

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

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

F) Compliance, enforcement, appeals

Compliance and enforcement

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

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

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

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

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

Appeals

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

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

- **Most countries have a well-developed hierarchy of appeal routes against administrative decisions, though their precise nature may vary.** For example, some countries do not favour specialised courts or tribunals and prefer to rely on the general court system. Others offer a range of avenues for appeal, starting with administrative tribunals attached to the agency against which the appeal is made, keeping judicial review in reserve. Nearly all countries, however, have established a mediator or ombudsman to help settle issues out of court if possible. These mediators are often vocal about what is wrong with regulations and the regulatory system which needs to be fixed. Their insights can provide valuable information, but do not appear to be much used.
- **The reviews overall did not pick up any major issues over appeals.** Systems are well established, a process which usually requires a long period of time, but which repays dividends. Delays in reaching decisions, however, can be a major issue, with negative effects on businesses which need to know where they stand. Some appeal systems appeared opaque, and in need of publicity and explanation so that businesses and citizens can fully understand their rights and how to access them. Very few countries have carried out an evaluation of their appeal systems.
- **There were some hints across the reviews that the number of appeals was increasing.** However this would need to be checked.

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

G) The interface between member states and the European Union

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

General context

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

Negotiating EU regulations

- **Countries want to find ways of exerting stronger influence on the development of EU legislation.** This is important for them in order to avoid creating technical as well as more fundamental policy problems for the transposition (implementation) of EU directives into national law, and the creation of unnecessary burdens. But they often find this process frustratingly hard. Considerable energy, time and resources are often deployed for EU issues, not just by central ministries but also regulatory agencies which have a stake in EU legislation (telecoms for example).
- **Responsibility for overseeing negotiations is usually either with the prime minister’s Office or the Foreign Affairs ministry.** In a few countries the process relies on a ministerial network with no specific lead, which appears to work just as well. Co-ordination structures to cover the interests of different ministries and keep track of developments are often sophisticated and rigorous, standing out in contrast to the less well networked arrangements for domestic regulatory management. They ensure that negotiating positions are clear, but their real impact in terms of what needs to be achieved around the negotiating table is less clear. It was recommended to several countries that prioritisation of dossiers might help, to ensure that focus and resources went to key directives. Specific guidance and training is often (not always) available for officials engaged in EU negotiations.
- **A recurring recommendation in the reviews was to suggest that co-ordination approaches for the EU might inspire ideas for more effective co-ordination of national regulatory work.** For example, this could be the establishment of a dedicated committee for national regulatory policy chaired at a high level at the centre of government.

- **Parliaments are directly involved in EU related regulation, even when they do not play a major role in domestic regulatory management.** Dedicated committees for the management of EU affairs have usually been set up. There is a small but clear tendency for parliaments to acquire stronger powers, for example to approve negotiating positions (if they do not already have this power).
- **Ex ante impact assessment of draft directives is a grey zone.** It may be implicitly required as part of a country’s overall impact assessment policy, but the reviews suggest that it is often not carried out. This seems to be partly because of uncertainty over its real value, as negotiations often generate major changes to a draft directive before it is adopted, and because efforts are made to use the European Commission’s own impact assessments. National and EU level processes are not yet joined up.
- There is a major difference between unitary and federal states. Federal states must observe the constitutionally delineated division of powers and competences between the different levels of government. Formal provisions are generally in place to manage this, apparently to good effect. Unitary countries do not have this constraint, but are increasingly aware that EU regulations may have an impact on local regulatory management. A few unitary countries have started to involve sub national levels of government, seeking their views on draft directives.

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

Transposing EU regulations

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

Transposition may be notified upon adoption of the first of several implementing acts (meaning that the process is not complete even if the directive is said to have been transposed).

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

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

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

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

Interaction with EU Better Regulation policies

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

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

H) The interface between subnational and national levels of government

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

General context

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

Structure and funding of local governments

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

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

Responsibilities and powers of local governments

Regulatory responsibilities at the different levels of government can be primary rule making responsibilities; secondary rule making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or subnational regulations; or responsibilities for service delivery). In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and

environmental protection. Licensing can be a key activity at this level. These issues have a direct impact on the welfare of businesses and citizens. Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, they may be taking on a growing responsibility for the implementation of EC regulations.

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

Co-ordination

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

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

Better Regulation policies deployed at local level

- **The extent to which local levels of government are adopting better regulation practices varies.** Some municipalities are taking their own initiatives.

- **Capacities for better regulation at this level are an issue in many countries.** Local governments can be very small and already overstretched, and do not necessarily have the skills or training to perform better regulation processes such as consultation effectively. A partial answer deployed in some countries is to share best practices. Some of the reviews included a recommendation that there should be more sharing of ideas and practices at this level.
- **Federal states appear to do better in a general sense.** Better regulation tends to be adopted at all levels of government, albeit unevenly, spurred by inter government competition. Competitive benchmarking can be valued as a means of making progress, so the developments may be different. It is not clear to what extent different approaches can negatively impact the single market within a country.
- **The EU Services directive has encouraged local levels of government to accelerate the establishment of one-stop shops and the use of ICT to facilitate the flow of administrative information and transactions.** The directive (implementation deadline end 2009) is a major step in the completion of the EU Single Market (which has so far focused on goods), to help businesses offer their services across EU borders. It seeks to achieve this by reducing red tape, in particular via a “single passport” system, delivered by a firm’s country of origin to show conformity with that country’s regulations, and which would allow that firm to do business anywhere in the EU without any further formalities. It also requires countries to set up one-stop shops through which businesses can access all the relevant documentation for doing business across the Single Market.

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

Annex B

Landmarks in the development of regulatory policy

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

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

Notes

1. Volume 1: Sectoral Studies (telecoms; financial services; professional business services; electricity; agro-food; product standards; conformity assessment and regulatory reform. Volume 2: Thematic Studies (economy-wide effects; regulatory quality and public sector reform; competition, consensus and regulatory reform; regulatory reform; industrial competitiveness and innovation; international market openness and regulatory reform).
2. Some of these reports include: *Building an Institutional Framework for Regulatory Impact Analysis: Guidance for Policy Makers* (OECD, 2008); *Cutting Red Tape: Why is Administrative Simplification so Complicated* (OECD, 2010); *Regulatory Impact Analysis: A Tool for Policy Coherence* (OECD, 2009); *Risk and Regulatory Policy: Improving the Governance of Risk* (OECD, 2010).

Annex C

OECD Guiding Principles for Regulatory Quality and Performance

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

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

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

From 1997 to 2005: The Evolution of Regulatory Policy

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

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

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

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

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

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

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

Create effective and credible co-ordination mechanisms, foster coherence across major policy objectives, clarify responsibilities for assuring regulatory quality, and ensure capacity to respond to a changing, fast-paced environment. Ensure that institutional

frameworks and resources are adequate, and that systems are in place to manage regulatory resources effectively and to discharge enforcement responsibilities. Strengthen quality regulation by staffing regulatory units adequately, conducting regular training sessions, and making effective use of consultation, including advisory bodies of stakeholders.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Create and update on a continuing basis public registries of regulations and business formalities, or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them. Electronically accessible, interactive Web sites should be a priority to make rulemaking information available to the public, and to receive public comment on regulatory matters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Annex D

APEC-OECD integrated checklist

A – Horizontal criteria concerning regulatory reform

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

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

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

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

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

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

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

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

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

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

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

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

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

B – Regulatory policy

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

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

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

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

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

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

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

B7 How are alternatives to regulation assessed?

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

C – Competition policy

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

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

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

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

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

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

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

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

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

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

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

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

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

D – Market openness policies

Market openness policies aim to ensure that a country can reap the benefits of globalisation and international competition by eliminating or minimising the distorting impact that may result from border as well as behind-the-border measures, including

measures at different levels of government. These policies influence the range of opportunities open to suppliers of goods and services to compete in a particular national market (*e.g.*, through trade and investment), irrespective of whether these suppliers are domestic or foreign.

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

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

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

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

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

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

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

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

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

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