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**REGULATORY POLICIES IN OECD COUNTRIES
FROM INTERVENTION TO REGULATORY GOVERNANCE**

This report is presented for discussion at the Regulatory Management and Reform Working Party of the Public Management Committee meeting on 6-7 December 2001 in Paris. It is the new version of the previously called Flagship Report on Regulatory Quality that was discussed by the Working Party last July. Appendixes illustrating best and interesting practices in OECD countries will be circulated at a later stage before the meeting. This report was prepared by Rex Deighton-Smith and César Cordova-Novion, based on an earlier version prepared by Scott Jacobs et al.

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Executive Summary

This report charts the emergence of the regulatory policy agenda and the beginnings of the development of the concept of “regulatory governance” in OECD countries as a sub-set of the broader governance agenda. The regulatory policy agenda has been forged from almost 25 years of efforts aimed at improving understanding of the nature of regulation as a tool of government and increasing the effectiveness of that tool. These efforts have broadened and deepened over that time, commencing with simple notions of deregulation, before moving toward concepts of regulatory reform, regulatory management and, now, regulatory policy.

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

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

The major tools employed to improve the efficiency and effectiveness of regulation include regulatory impact assessment, the systematic consideration of regulatory alternatives, public consultation and improved accountability arrangements. In the case of consultation and accountability mechanisms, the context is one in which, despite the fact that most OECD countries have long histories in using these tools, substantial changes in their design and implementation are occurring as they are made to serve new goals and respond to more demanding citizenries. Consultation, in particular, is becoming more open to all groups in society and is being increasingly used as a means of generating objective data to support RIA.

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

High quality regulatory design cannot result in improved welfare for populations unless regulatory implementation is also effective. Ensuring regulatory compliance is increasingly seen as essential, and involves both sophisticated regulatory design and high quality enforcement strategies.

In terms of institutional setting, the nature and functions of regulatory oversight bodies are essential determinants of the performance of a regulatory policy. As in the case of tools, the current situation is a mixed one. Responsible oversight bodies are present in a majority of OECD countries. However, they still face major challenges in terms of sufficient power, resources and capacities to drive the high quality policies.

More conspicuous than the creation of central oversight bodies is the establishment during the past decade of dozens of regulators at arm's length from the government. Their main objective is to oversee crucial economic sectors such as utilities and financial services. A key proposition in their design is the needed independence from the political and administrative levels, as well as from the regulated companies and other interests. However, a crucial challenge for harnessing the benefits of such independent bodies is to ensure adequate accountability mechanisms and satisfactory coherence with government-wide structures and institutions.

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

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

Developing regulatory policy into a concept of "regulatory governance" and integrating it with the broad governance agenda now being pursued across the OECD;

Broadening the scope of regulatory policy to include a substantially greater focus on regulation making at sub-national and supra-national levels, as well as taking account of the importance of co-operative regulatory activity between different governments;

Promoting an understanding of the economic importance of regulation – that is, ensuring that the size of the public sector's call on private resources that is exercised via regulatory authority is widely understood and informs regulatory debate;

Engaging on systematic ex post evaluation;

Continuing to build the institutions of regulatory reform, including developing improved understanding of their roles and characteristics;

Working to address regulatory complexity and uncertainty; and

Improving controls over "grey" and 'quasi' regulation and third party standards as integral elements of the regulatory policy tool.

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

1. INTRODUCTION

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

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

2. Today, the concept of regulatory quality management has itself largely given way to that of “regulatory policy” in OECD countries. Regulatory policy is also dynamically focused and founded on the view that ensuring the quality of the regulatory structure is a permanent role of government. However, it is concerned with a pro-active “quality assurance” role, rather than a more reactive “quality management” role. In a few countries that have been engaged with these issues for more than a decade, regulatory policy is itself giving way to regulatory governance. Regulatory governance as a concept is firmly grounded in the wider theme of democratic governance. That is, the tasks involved in exercising regulatory functions optimally go beyond the design and implementation of instruments, or their co-ordination, and also embrace wider issues that are integral to democratic governance, such as transparency, accountability, efficiency, adaptability and coherence.¹

3. This report documents the development of the regulatory quality paradigm and its emergence as the regulatory policy agenda. It reviews policies, tools and initiatives adopted in OECD countries, identifying best and promising practices as well as less successful initiatives. It also draws out the links between these elements of regulatory policy and the wider governance agenda. The report draws on a wide range of work conducted within the Secretariat and in Member countries to provide an assessment of the current “state of play” in relation to these issues. Most importantly, it adopts a dynamic and forward looking view, focussing on the key priorities for moving forward with the regulatory policy agenda.

4. The report draws in particular on the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* in approaching these issues. It constitutes a progress report on the implementation of principles such as those contained in the Recommendation into Member countries’ regulatory structures and concludes with a proposal for a complementary recommendation, which focuses specifically on the dynamic and systemic elements of regulatory policy.

2. THE REGULATORY ROLE OF GOVERNMENT – HISTORY AND DEVELOPMENT

5. In 1997, the OECD stated that: “The emergence of the regulatory state in this century was a necessary step in the development of the modern industrialised democracy...Regulations have helped governments make impressive gains in protecting a wide range of economic and social values.”² Regulation has developed as a fundamental tool of government in managing more complex and diverse societies and economies and allowing competing interests to be balanced.

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

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

8. As the OECD noted in 1997, the road has been rocky.³ Politicians and civil servants promised much in the 1980s, but by the early 1990s results had often failed to match expectations and many reformers were exhausted and disillusioned. Regulatory reform seemed to be bottomless – initial conceptions of it as a process of simply eliminating rules and revising others had evolved toward an understanding of the procedural, institutional, and finally profound cultural transformations that were required in many areas, within both public and private sectors. What seemed easy in 1980 was slowly revealed as a difficult, complex, and multi-faceted reform agenda that most reformers did not have the influence or the tools to carry out. Worse, regulatory reform was revealed as a task singularly ill-suited to the political cycle.

9. Yet it became increasingly clear, as external pressures grew and understanding of the roots of the regulatory problem developed, that governments had no choice but to press on. External and internal pressures – such as citizen demands for better services, new technologies, shocks that revealed economic rigidities, and the evolution from manufacturing to service economies – combined to create new environments in which low-quality regulatory systems increasingly penalised citizens. Regulatory failures were punished more cruelly, while patience with, and faith in, government were eroding. The increasing internationalisation of the world’s economies only underlined these trends. Importantly, traditional economic management tools based on monetary and fiscal policies seemed not to work well anymore, and regulatory reform offered new hope to economic policy officials faced with high unemployment, low productivity, and new demands to be internationally “competitive.”

10. Regulatory reform was part of a more profound economic and social transformation. Many OECD countries faced, and still face, the urgent and difficult task of moving forward with the transition to market-led growth to maintain economic performance in response to technological innovations, changes in

consumer demand, and interdependencies in regional and global markets. In this transition, supply-side reforms to stimulate competition and reduce regulatory inefficiencies have become central to effective economic policy. Indeed, it is now accepted in OECD countries that an effective economic strategy for sustainable long-term growth must combine fiscal, monetary, and competition-oriented supply-side policies. Thus, regulatory reform has increasingly become central to the government economic policy agenda.

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

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

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

3. THE KEY ELEMENTS OF REGULATORY POLICY – POLICIES, TOOLS AND INSTITUTIONS

14. “Deregulation” was superseded by “regulatory reform and then by “regulatory management” ” quite early in the development of the current regulatory policy agenda. This change necessarily entailed a shift away from questions of what regulation should be eliminated and toward how regulatory structures could be improved in terms of design and functioning. Over time, the key elements of regulatory quality management emerged from the experiences of the reformers. That these developments are very recent is indicated by the fact that it was only in 1995, with the adoption of the *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*,⁴ that an internationally accepted set of principles on ensuring regulatory quality was first adopted. The *Recommendation* includes the 10 point OECD Reference Checklist for Regulatory Decision-Making, reproduced as Box 1.

Box 1. **The OECD reference checklist for regulatory decision-making**

1. *Is the problem correctly defined?*

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

2. *Is government action justified?*

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

3. *Is regulation the best form of government action?*

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

4. *Is there a legal basis for regulation?*

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

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

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

6. *Do the benefits of regulation justify the costs?*

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

7. *Is the distribution of effects across society transparent?*

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

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

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

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

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

10. *How will compliance be achieved?*

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

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

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

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

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

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

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

21. The following sections of this report consider each of the elements of a successful approach to regulatory governance – regulatory policies, tools, institutions, and policy coherence and co-ordination – in turn. They will thereby work toward building up a full picture of the regulatory governance agenda, as it is emerging in OECD countries. The different aspects of regulatory policies are also illustrated by the results of two OECD surveys undertaken in 1998 and 2000 on government capacities to assure high quality regulation.⁵ Following this, the “state of play” in Member countries will be discussed, drawing heavily on

the series of country reviews that have been conducted by the Secretariat since 1998. Finally, the main emerging issues are identified and discussed.

3.1. Regulatory policies

22. Beginning with the 1995 Recommendation, the OECD has seen consensus developing around how regulatory policies can be implemented in public administrations in general and among regulators in particular. Regulatory policy is the systematic development and implementation of government-wide policies on how governments use their regulatory powers. The management challenges are these: how can incentives be built into the public sector so that regulators are encouraged to produce high-quality regulations? How can the regulatory policy agenda be integrated into administrative procedures so that it is not dependent on continual political intervention? How can the culture of regulators be changed so that they abandon input oriented approaches and habits of control in favour of flexibility and outcome oriented approaches?

23. Achieving these goals requires a carefully designed system of policy development and administrative pressures and incentives for change; as the experience of leading OECD Member countries has repeatedly demonstrated, improvement will not be achieved simply by government command. Reformers who attempt to change or re-invent traditional processes and institutions of rule-making or change existing regulations are almost invariably met with broad opposition, multiple obstacles and considerable inertia. Application of new regulatory disciplines has been the Achilles heel of reform efforts, since there is often considerable opposition, and governments have not generally followed up with necessary investments in information and human resources. Effective reform is dependent on the development of systematically organised procedures with explicit and sustained political backing and adequate resources, including staffing and expertise.

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

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

26. Experiences since 1997 confirm this conclusion. Taken as whole, the country reviews demonstrate that countries with explicit regulatory policies consistently make more rapid and sustained progress than countries without clear policies. The more complete the principles, and the more concrete and accountable the action programme, the wider and more effective was reform. By late 2000, 24 out of 30 OECD countries had adopted regulatory reform policies.⁶ It is striking how new are most regulatory policies based on regulatory quality principles. Most policies are not more than a few years old, and have undergone continual refinements and improvements since adoption.

Box 2.	Year of adoption of government-wide regulatory quality policies in selected countries
1981	United States
1986	Canada
1993-94	Denmark
1994	Netherlands
1995	Mexico
1996	Hungary, Ireland, Finland
1997	Italy
1998	Japan, Korea
2000	Czech Republic, Greece

27. While the causality is not always apparent (reform policies may be either a cause or result of reform commitments), a regulatory reform policy seems to serve several important purposes in implementing, sustaining and deepening regulatory quality reforms:

- It signals the government’s commitment to reform the regulatory environment government-wide. The prominence given to regulatory reform has waxed and waned over time in most countries. However, in 1998, each Member country with regulatory policies stated that the policies have been either issued, revised, or reaffirmed by the present government
 - It sets clear policy objectives and means for reaching them, and can assist in transforming reform into a systematic and permanent process. It establishes accountability for government officials’ use regulatory powers. It increases the centre of government’s powers to implement the policy, and reduces the powers of vested interests to block reform.
 - It enhances the effectiveness of co-ordination and co-operation efforts by establishing a general framework, or policy. This helps ensure coherence and comprehensiveness in reforming the regulatory environment.
 - It makes co-ordination easier among related structural reforms, such as competition policy, corporate governance and sectoral reforms, and so boosts the likelihood of success.
 - It authorises and mobilises action in the administration. Reform is risky and unwelcome for many civil servants, particularly when vocal interest groups support the status quo. Political support and direction is needed both to overcome resistance internal to the administration, and to shield reforms from aggrieved interests.
 - It helps show politicians and the public why the policy objectives are important. The need for political support means that the relevance of regulatory reform to larger social and economic goals must be clarified and communicated with stakeholders and the public.
 - It enhances the credibility and transparency of change, and so speeds up results. Concrete programmes will enhance the credibility of reform, and reduce the costs of reform by providing forward notice and thus facilitating adjustment.
- *It changes the culture of regulation and pressures for regulatory inflation by reversing the burden of proof for regulation, requiring regulators to show why they should regulate.*

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

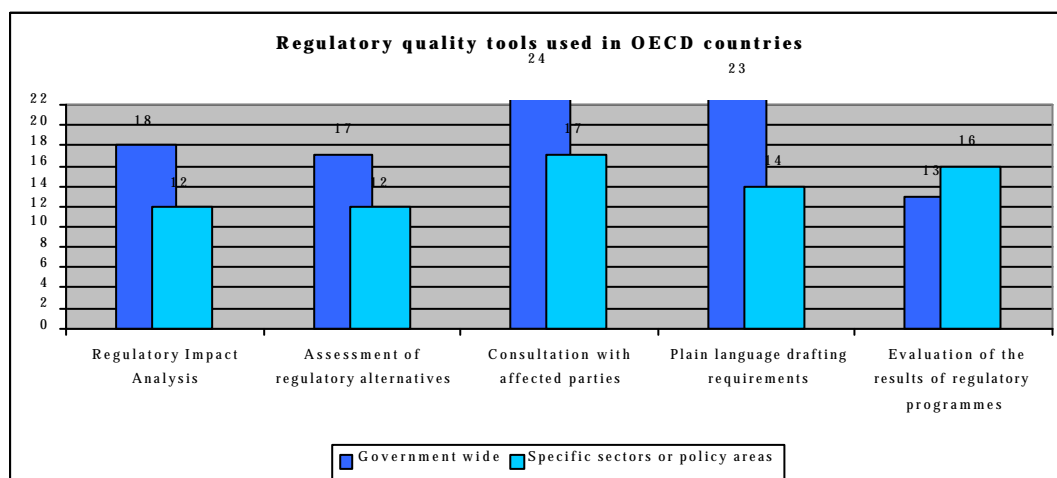
Content of reform policies

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

42. The contents and emphases of these regulatory policies vary, reflecting different national needs and priorities, as well as historical forces. Increasingly, however, common elements can be identified, with convergence being driven more and more by international market-opening obligations contained in regional arrangements or trade and investment agreements.

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

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



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

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

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

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

46. Some examples can illustrate the contention that the diversity of policy approaches is in large part explained by the specific problems facing the country, and the nature of the political opportunity for progress on reform. In Japan and Korea, where there was a widely held view that the major regulatory problem was one of over-regulation and state interference in the economy, the focus has been on reducing the economic role of the state through deregulation. In the United States, where there are relatively few barriers to entry in most sectors but a burgeoning and costly federal regulatory structure in social policy areas, the focus has been on improving regulatory quality through rigorous application of benefit-cost principles. Driven largely by the more-locally oriented Congress, the small business agenda, too, has been popular in the United States. In the Netherlands, which was re-orienting the corporatist state toward a more market-based relation, the regulatory quality agenda has emphasised redesign of regulatory processes, notably consultation, and the reduction of administrative burdens for its businesses competing in Europe. In Mexico, which has been integrating its regulatory frameworks into the North American free trade zone, the priority has been to eliminate inconsistent and overlapping regulation and improve credibility and enforceability of the law.

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

48. However, the movement has not been unidirectional. Like most policy initiatives, regulatory reform is subject to shifting political and social priorities and interests. This is especially so in the early years, before reform is firmly established, with the benefits not yet apparent to many, while the costs, often more concentrated and hence visible, loom large in the debate. Though regulatory policies have not been formally renounced in any country, early reform efforts in some countries have lost momentum and effectiveness, or effectively been abandoned. Where this has occurred, the longer-term result has usually been the re-establishment of a better-considered and more successful policy as the government returned to the outstanding issues.⁷

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

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

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

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

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

Improving the rule-making process

53. All governments have a long history in external appraisal of the quality of the legal text before being enacted or presented to Parliament. Often this important task is done by powerful institutions established at the end of the drafting process. In civil law countries, they have been moulded on the French Conseil d'Etat. However, until recently the appraisal on substance was been left mainly to peer pressure at the Cabinet level and ministerial commission or during the internal communication stage. Judgements on the impacts and on other quality issues of the future regulation were left to self-assessment. This verification was done too late in the process and was constrained by political choices taken months before. In the last two or three decades, a central innovation has been the reinventing of this crucial check and balance functions through a clarification and the reinforcement of the regulatory management system.

54. An essential element of the regulatory appraisal of new regulations is the necessity to be conducted by a body that is independent of the regulator proposing the regulation and, ideally, that is located at the centre of government. This form of appraisal is essential to ensure that a “whole of government” perspective is taken in considering regulatory quality, ensuring that the underlying regulatory governance objective of maximising social welfare is being served. Such a perspective will only be taken consistently if the appraisal is carried out by a body that is free from undue influence by sectional lobby groups and has a “whole of government” perspective and responsibility. Ensuring that this appraisal body is located at the centre of government is essential if it is to have the authority to ensure that negative appraisals are brought to the attention of political decision-makers and that its views have the necessary credibility. A similar imperative exists in considering the means of reforming the stock of existing regulations (See next section).

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

Box 3. Conclusions on regulatory policies

Is this tool still recommended as a best practice? Yes, for all countries

Are there clear best practices? Policies must be designed to meet the needs of the country and the political opportunities that exist. They must reflect sufficient consensus on the nature of the problem to be implemented effectively. Policies should broaden and deepen over time as experience grows and as additional problem areas are identified. The objectives of the policy should be clearly defined, and the quality standards explicit and measurable enough to hold regulatory bodies accountable for implementation. Competition and benefit-cost principles should be included. Gaps in coverage should be reduced to the minimum possible with respect to instruments, institutions, and levels of government. Co-ordination between regulatory quality and related structural policies will yield faster and better results.

Keeping regulation up to date – dynamic aspects of regulatory policy

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

57. The most dramatic regulatory reviews have been conducted in those countries (Czech Republic, Hungary, and Poland) undergoing fundamental transitions from central planning to market systems, and simultaneously integrating the 80 000 pages of the European *aquis communautaire* as part of EU accession. In Hungary, for example, 799 of the 983 existing laws were adopted after 1990. But very substantial reviews of existing laws and other regulations were also carried out in other OECD countries, most notably Korea, Mexico, and Australia. Korea succeeded in eliminating 50% of its regulations in less than a year, while Mexico revised over 90% of its national legislation in about six years. Australia is nearing completion of a six-year review of 1700 Acts and subordinate regulations that were identified as containing restrictions on competition.

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

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

60. Recent years have seen growing investments by national governments review of existing regulations, but the overall picture is not very positive. Only six out of 28 countries have periodic evaluation processes for all regulations, although 15 out of 28 evaluate rules in specific policy areas. Sun-setting and automatic review provisions are used in some areas by most countries, but almost nowhere are they widespread.

61. The quality of evaluations is also suspect. When evaluations occur, they tend to be *ad hoc* and unstructured. Only 12 countries have developed standardised evaluation techniques or criteria to be used during regulatory reviews. Yet, in the absence of such standardised approaches, substantial discretion is

left with the regulatory agency conducting the review, inconsistencies necessarily result and quality control cannot be exercised at the whole of government level.

62. Partly as a result of this lack of a systematic approach, review efforts have often been superficial and focused on marginal changes to complex regulatory regimes that do not significantly improve the total regulatory environment. For example, in the United States, efforts to “reinvent regulation” were reported as having led to the removal of 16 000 pages from the Code of Federal Regulations, or about 11% of the total. But measures of success such as reductions of page numbers or numbers of regulations can be criticised on many grounds. In any case, these page reductions were almost entirely offset by new regulatory requirements in the same period.⁸

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

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

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

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

67. **Generalised reviews**, in contrast to scrap and build, have often absorbed the energies of governments and delivered only minor results. Generalised reviews are policies that instruct regulatory bodies to review the entire body of their regulations against general criteria such as need and efficiency. Generalised reviews are actions limited in time, and have a broad scope (the entire stock of rules with certain effects, such as business impacts). An interesting variant of this approach is the Swedish guillotine initiative. In the 1980s, Sweden enacted a “guillotine” ordinance nullifying hundreds of regulations that were not centrally registered after a certain date. This is a popular approach for governments, because it is highly visible and politically symbolic, but rarely seriously threatens vested interests, unless strong political and institutional supports drive it.

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

69. The Appendix contains details on a range of generalised review programmes. The central lesson from the numerous relative failures documented is that that great care is needed in designing and implementing such regulatory reviews. They must be highly structured and transparent, with genuinely independent oversight of ministerial reviews. Some have found that the management challenge lies in finding the right balance between centralised and decentralised review processes.

70. Overall, it must be concluded that successful generalised reviews are neither as cheap nor as fast as governments had hoped. Yet with the right framework they can work. Examples of successful multi-year generalised reviews can be found in Hungary, Australia, and Korea (see Appendix). Another successful variant has been targeted reviews, which focus on particular sectors (*i.e.* building codes) or kinds of regulations (permits and licences -- see following section on reducing formalities). In Italy, for example, independent reviews by the Antitrust Authority of general aspects of regulatory reform, such as reports about the use of licences and “concessions” restricting market access, have been useful in identifying where reform is needed, although persuading the ministries to actually reform is another matter entirely.

71. **Sunsetting and automatic review clauses.** Sunsetting is a process in which new laws or subordinate regulations are given automatic expiry dates upon adoption. A closely related tool is staged repeal. Under staged repeal, existing regulations are given “sunset” dates via *ex post* policy action. Staged repeal and generalised sunsetting have been implemented in tandem, through a single piece of legislation, in some cases.

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

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

74. Only Australia, which routinely uses sunsetting and staged repeals for subordinate legislation, has extended experience with this instrument. These two tools have been applied in tandem, with regulations automatically repealed every ten, seven, or even five years (in different States). A recent OECD study⁹ reviewed the use of sunsetting in several Australian states and concluded that it has substantially reduced the overall number of regulations in force, removed much redundant regulation from the statute books and encouraged the updating and rewriting of much that remained. Four of the five states using sunsetting opted for a ten year cycle, with New South Wales adopting a five year cycle. However, a decade’s experience has led the major participants in the process to the view that a five year cycle is too short, leading to wasted effort on review requirements and widespread abuse of the limited exemption provisions made in the governing legislation.

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

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

77. **Mandated, or “automatic” review processes** are systematic reviews of existing regulations, in which regulations are grouped according to their age, and progressively reviewed against currently used regulatory quality criteria, thus gradually bringing the stock of regulations into conformance with those standards. A variant of this approach is the insertion of *review clauses* into individual laws, requiring them to be reviewed within a certain period. Automated review processes can be seen as a weaker form of sunseting. Unlike sunseting, a rule will continue unless action is taken to eliminate it. Such *ex post* review requirements are rapidly becoming more common in OECD countries, an example being Japan, whose 1998-2000 regulatory reform programme required the inclusion in new regulations of a fixed schedule for future review.

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

79. **Variance processes** or equivalence of performance tests permit businesses to use lower-cost compliance methods that they show are equally effective as an existing regulation. This approach can permit the rapid *de facto* updating of regulations. There are few examples of the use of this method in OECD countries, and two governments that attempted to put into place government-wide regulatory variance policies (Canada and the Australian state of New South Wales) failed due to fears that variances would undermine regulatory standards. Similarly, a parliamentary law reform committee’s recommendation for such a policy to be adopted in Victoria, Australia, was not taken up. However, small scale uses of regulatory flexibility mechanisms that employ this logic have been implemented. For example, Canada has adopted the concept in its Environmental Performance Agreements, under the 1999 Environmental Protection Act.¹⁰ This may be an area in which further experimentation is warranted. In conceptual terms, variance processes combine the logic of performance based regulation – *i.e.* that regulations should be output, not input, focused – with an ability to harness the creative power of business or other target groups to design more efficient processes.

80. The above mechanisms, which generally include both review and reform elements, are also supplemented in some cases by innovations in terms of the *reform* aspect of the task specifically. A notable tool adopted in recent years in a few OECD countries is the use of subordinated regulations to eliminate burdens and controls established in statutes. This is the central element of the UK’s *Regulatory Reform Act* of 2001 (which replaced the *Deregulation and Contracting Act* of 1994) and of the Italian

“Delegislification” initiative. These Acts have sought to increase the capacity to process reforms in overburdened parliamentary systems by providing a mechanism through which the executive can implement reforms to legislation, subject to mechanisms for continued Parliamentary scrutiny and for disallowance.

Box 4. Conclusions on dynamic change: keeping regulations up-to-date

Is this tool still recommended as a best practice? Yes, regulatory policy must include a clear focus on appropriate policies and tools for updating existing regulation. The dynamic dimension of regulatory quality is an essential part of the process to which adequate effort must be devoted.

Are there clear best practices? A clear set of principles is needed to guide review programmes, including particularly competition principles. These should be complemented by standardised evaluation techniques and decision criteria. The above tools all offer potential benefits for reformers, but sophisticated choices must be made from among them, based on the specific circumstances involved, including the environment for reform and the quality and quantity of resources that can be devoted to it. Moreover, evaluation and learning are still required in the application of some techniques, such as sunseting and variance processes.

3.2. Tools of regulatory policy

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

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

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

Regulatory Impact Analysis

84. A powerful trend toward more empirically based regulation is underway in OECD countries. High-quality regulation is increasingly seen as that which produces the desired results as cost-effectively as possible. There is a developing understanding that all government policy action involves trade-offs between different uses of resources, while the underlying goal of policy action – including regulation – of

maximising social welfare is increasingly being explicitly stated and accepted. The era is past when government officials can respond, as they did in one OECD country in 1993, when asked about the cost of a law: "It's a legal requirement, so the costs are not important."¹¹ Similarly, unbalanced focus on reducing regulatory costs, seen in the use of tools such as "business impact assessments", is also in decline, being replaced by a sophisticated understanding of the need to balance efficiency and effectiveness through adoption of the benefit-cost principle and cost-effectiveness analysis.

85. Notions of efficiency are evolving from static concepts of compliance costs to dynamic concepts that attempt – often with limited success – to take account of effects on innovation, trade, and competition. Better empirical justification of regulatory decisions is also strongly supported by international trade rules. For example, the General Agreement on Trade in Services (GATS) requires that standards on the supply of services be "based on objective and transparent criteria" and be "not more burdensome than necessary to ensure the quality of the service." The proportionality principle used by the European Court of Justice carries much the same impact for EU Members. Hence, the movement toward more efficiency- and results-oriented regulation reduces barriers to international trade and investment by establishing a more transparent standard for national decision-making.

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

87. The 1995 OECD *Recommendation* emphasised the role of RIA in ensuring that the most efficient and effective policy options were chosen. The 1997 *OECD Report on Regulatory Reform* recommended that governments "integrate regulatory impact analysis into the development, review, and reform of regulations." A list of RIA best practices is discussed in detail in the OECD's 1997 report, *Regulatory Impact Analysis: Best Practices in OECD Countries*.¹²

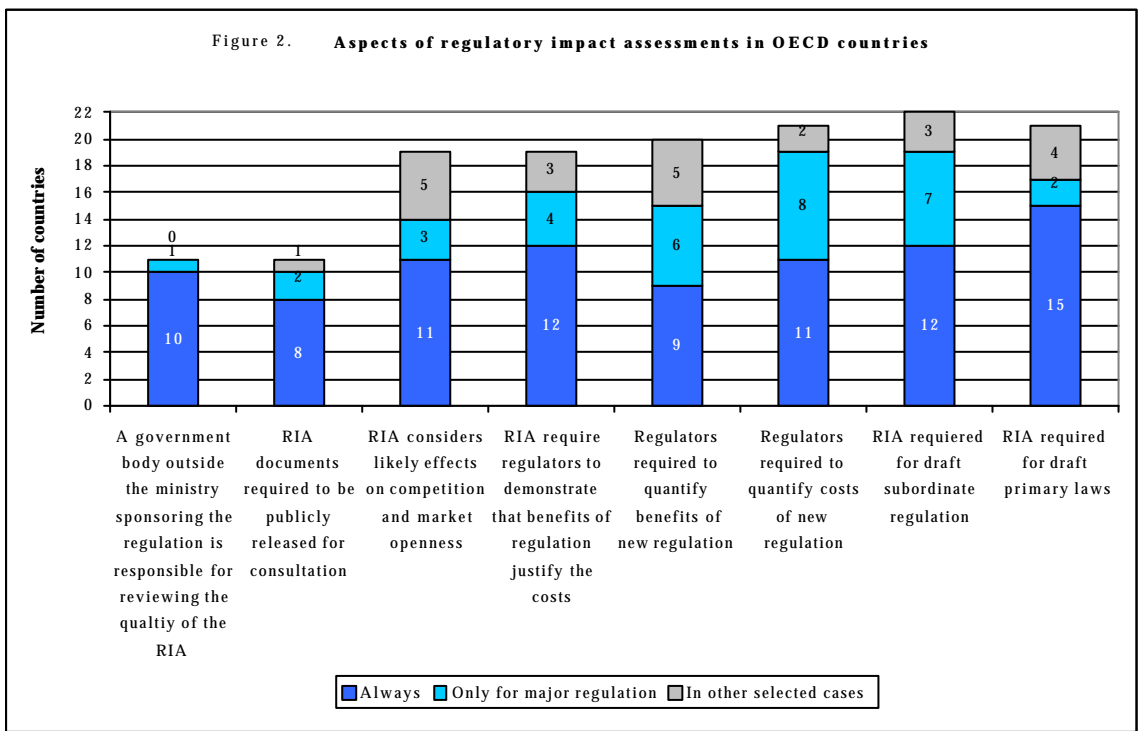
88. RIA has developed quickly, and an increasing proportion of laws and other regulations affecting citizens are being shaped by various forms of RIA. Although only two or three OECD countries were using RIA in 1980, by 1996, more than half of OECD countries had adopted RIA programmes. By end-2000, 14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

89. The trend toward adopting or strengthening RIA accelerated in the latter 1990s and therefore many of the RIA programmes in OECD countries today are relatively new and still evolving. Experience shows that RIA programmes tend to broaden and deepen over time as experience and expertise in their use accumulate. RIA comes in many forms that reflect various policy agendas of governments (see Figure 2). Some countries assess only business impacts, others, administrative and paperwork burdens. Others use full-fledged benefit-cost analysis based on social welfare theories. Environmental impact assessment is used to identify potential impacts of regulations on environmental quality. Other regulators assess how proposed rules affect sub-national governments, or aboriginal groups, or small businesses, or international trade. In each of these cases, RIA is a decision tool, a method of (i) systematically and consistently examining selected potential impacts arising from government action and of (ii) communicating the information to decision-makers.¹³ Both the analysis and communication aspects are crucial.

90. RIA is sometimes criticised for replacing political accountability with a mechanistic tool, but this criticism is misplaced. In all OECD countries, RIA is an adjunct to good decision-making, not a replacement for political accountability. In the United Kingdom, Regulatory Impact Assessments are used to inform Cabinet ministers of likely costs to businesses and to "identify the key factors on both sides of the equation as an aid (not a substitute for) the Government's social and political judgement..."¹⁴ RIA is best understood as one "decision method" among several methods used to reach regulatory decisions. The methods used by regulators in OECD countries to reach decisions can be simplified into five categories:

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

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



92. RIA is an empirical method of decision-making. Its influence is determined, not only by the formal role of empirical methods, but by its contribution to other decision methods. The five decision methods are complementary: RIA itself is neither "necessary nor sufficient for designing sensible public policy,"¹⁵ but it can play an important role in strengthening the quality of debate and understanding within the other decision methods.

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

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

95. The 1995 OECD Recommendation begins with two questions: *Is the problem correctly defined?* and *Is government action justified?* RIA has proven to be the best tool for addressing these issues. Defining the problem properly is essential. Many regulatory failures stem from faulty understanding of the problem and from inadequate attention to indirect effects of government action that can undermine results. If the regulator has too narrow a view, full compliance may create perverse results.¹⁶ By the end of 2000, 22 OECD countries had adopted the practice of always explicitly justifying the need for government action before taking a regulatory decision, while five more did so in at least some cases. Only one country reported that this justification was not performed. These justifications were almost always linked to RIA, since RIA provides a useful framework for assessing the options and consequences of action. In Korea, for example, regulatory bodies must, as part of their RIA, seek views from experts, and on that basis, "define the object, scope and method" of the proposed regulations. Canada, the Council of Australian Governments, and New York State call for a two-step inquiry. Step one is answering the threshold question of whether any regulatory action can be expected to help, and step two is analysis of the benefits and costs of alternatives. Canada's guide refers to this as "screening alternatives" before any formal economic analysis begins.

96. The 1997 OECD report on RIA concluded with ten best practices that are associated with effective RIA (Box 5). These ten practices do not imply that a single system for the implementation of RIA is desirable in all countries at all times. Institutional, social, cultural and legal differences between countries require differing system designs. The learning that occurs with RIA over the longer term requires continuing consideration and evolution of system design. However, these elements of "best practice" serve as starting points for the design of a system likely to maximise the benefits of RIA. The 12 country reviews conducted in 1998-2001 assessed RIA programmes against those ten practices, and the Appendix summarises the main findings of the review programme in these ten areas.

Box 5. Getting maximum benefit from RIA: Best practices

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

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

Problems and best practices

97. Overall assessment of the results of two decades of investment in RIA show a very mixed picture. On the one hand, there is nearly universal agreement among regulatory management offices that RIA, when it is done well, improves the cost-effectiveness of regulatory decisions and reduces the number of low-quality and unnecessary regulations. RIA has also improved the transparency of decisions, and enhances consultation and the participation of affected groups. A paper from the Netherlands estimated at 20% the proportion of regulatory proposals modified or retracted as a result of RIA conducted as part of the Dutch MDW programme.¹⁷ The OECD review of Korea found that the first year of operation of a RIA requirement in that country (1998-99) saw more than 25% of regulatory proposals rejected by the Regulation Reform Committee. In Canada, an independent study has shown that prolonged use of RIA, together with the provision of guidance and training, has induced a cultural change among regulators.¹⁸

98. Yet positive views continue to be balanced by evidence of massive non-compliance and quality problems in RIA. Of the ten good RIA practices discussed above, most OECD countries rate poorly on several, most commonly data collection, training civil servants and applying RIA to existing regulation. Some reviews in the United States suggest that as many as 40% of regulations adopted fail the benefit-cost test.¹⁹ Even in countries with explicit programmes, many regulations continue to be made without even rudimentary cost analysis.

99. Another problem is that scope of coverage remains patchy. Only 12 countries use RIA consistently for lower-level or subordinate regulations, while only 15 use it consistently for legislation. Exemptions to RIA programmes are often broad. RIA is rarely used at regional or local levels, with the exception of a few federal countries, such as Australia, where it is used widely at state level and Mexico, where it is also used in some states. Uneven coverage of RIA programmes seriously reduces effectiveness. Given that laws and lower-level regulations can have similar impacts, there is no reason *a priori* to distinguish between them; hence, the differences seem to be related to institutional relationships and historical circumstances rather than to rational programme design. Moreover, RIA is most of the time applied to a single regulation, rather than regulatory regimes as a whole, embracing both new and existing regulations. It thus can provide only very broad estimates of the cumulative impacts in time and through jurisdiction. Lastly, RIA has mostly been designed for command and control regulations. The increasing use of performance-oriented regulations and the tendency to adopt standards and other instruments into regulations “by reference” provide substantial challenges to the effectiveness of RIA. Applying RIA to

some regulatory alternatives also provides new challenges. The result of these stresses is likely to be the need for further consideration of the design and implementation of RIA requirements, including evaluation of its effectiveness in assessing the likely performance of non-traditional instruments.

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

Technical issues

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

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

Value conflicts and power struggles

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

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

Institutional and resource issues

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

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

Legal issues

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

Procedural issues

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

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

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

Political issues

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

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

Box 6. Conclusions on regulatory impact analysis

Is this tool still recommended as a best practice? Yes, but expectations should be based on a medium-term view for results.

Are there clear best practices? There is no single model of a good RIA programme, but this analysis suggests that the ten best practices identified in 1997 are still good reference points for designing an effective programme. The need to build a RIA programme progressively must also be recognised.

Use of regulatory and non-regulatory alternatives

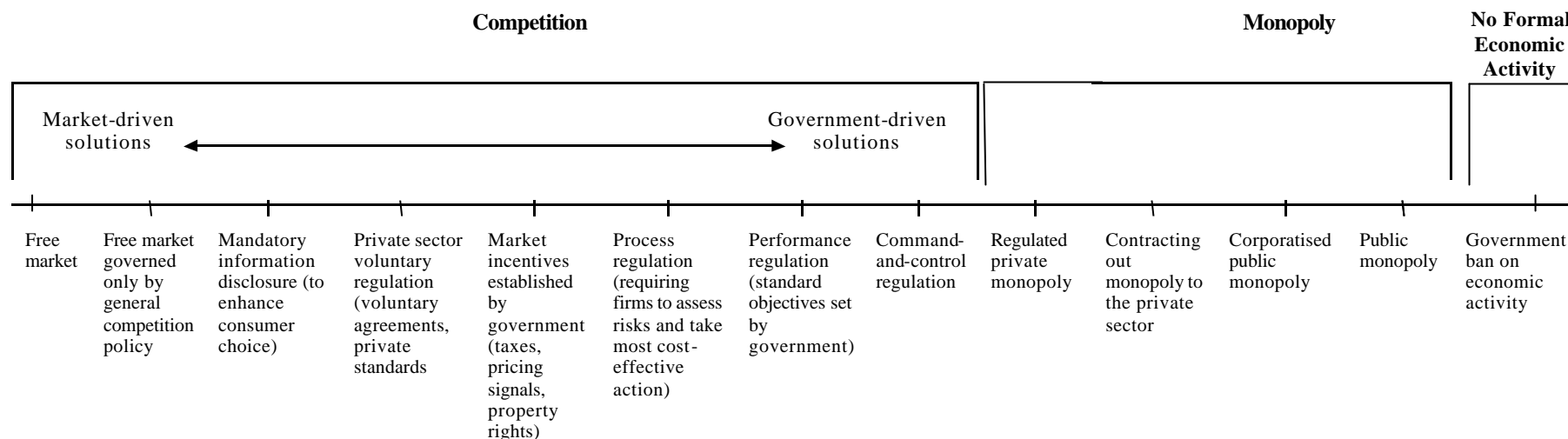
113. Regulation constitutes only one of a wide range of policy instruments that can be used by governments to achieve their public policy objectives. Different instruments have widely varying characteristics and can be more or less suited to resolving a particular policy issue. Despite this, a 1997 OECD paper argued that they are little analysed and, “...when they are analysed, they tend to be studied individually, rather than comparatively”. Thus they “...are rarely...examined as possible alternatives. Rather, they are linked to institutions or the culture surrounding particular fields of public policy.”²⁰ That is, the choice of policy instrument tends to be based more on habit and institutional culture than on a rational analysis of the suitability of different tools to addressing the identified policy problem.

114. Consequently, a crucial challenge for regulatory policy is to encourage cultural changes within regulatory bodies that will ensure that a comparative approach is taken systematically to the question of how best to achieve policy objectives. Efficient and effective policy action is only possible if all available instruments are considered as means of achieving the identified objective. The instruments to be considered include a wide range of non-regulatory instruments, as well as a number of distinctly different

forms of regulation. These instruments can be grouped in a number of ways – for example, in terms of efficiency, effectiveness, intrusiveness, accountability, or cost. Figure 3 sets out a (non-exhaustive) “spectrum” of instruments based on the degree of intervention with free markets implied by each. Thus, instruments that tend toward the “market driven” end of the spectrum include general competition law and information disclosure requirements, while at the opposite end of the spectrum are public monopoly and even bans on all activity in a sector. Further discussion of individual regulatory alternatives is contained in the appendices.

115. The fundamental problems in implementing the necessary cultural change are to break down entrenched habits that see particular policy areas as necessarily being dealt with via particular policy instruments, and to increase the degree of understanding among policy-makers about the range of policy tools and the characteristics of each. From the regulatory viewpoint, this means changing existing perceptions of a choice between “regulation” (representing orthodoxy) and “alternatives” (representing policy risk), in which there is a necessary presumption operating in favour of a regulatory response, and one which is likely to take the traditional form of “command and control” regulations.

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



Indications for use of various policy instruments

Effective competition possible but requires intervention to create appropriate frameworks or supports	Efficient market hampered only by info. asymmetry - disclosure requirement minimises cost of correction	A high level of good practice exists among market participants or enforcement difficult so consent issues are crucial	An essentially efficient market exists, so intervention is aimed at correcting externalities	Performance standards are difficult to specify, this response emphasises benefits of systemic thinking and disclosure	Specific standards easily identified but many tech. Solutions possible, tech. Change is rapid	Few acceptable options exist, high level of govt. control needed as important values or substantial risks concerned	High degree of natural monopoly, but perf. stds can be specified and monitored adequately	Some aspects of provision can be competitive but govt. control of overall process desired because of difficulty of regulating total outputs	Strong national monopoly character, plus difficulty in regulating outputs due to multiple objectives or concerns. Fundamental values involved
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116. From the regulator's viewpoint, adopting a non-regulatory approach, where command and control regulation is the tool traditionally used, necessarily involves a risk linked to the use of untried approaches and thus to a real or perceived failure to develop adequate responses. The risk arises both because of the adoption of a new, or non-traditional approach *per se* and because the alternative tools under consideration may not be well understood and/or may not have an extensive "track record" in dealing with the policy issue. For both these reasons, the failure of a non-traditional approach is likely to have more serious consequences for the regulator than a failure of traditional regulation.

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

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

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

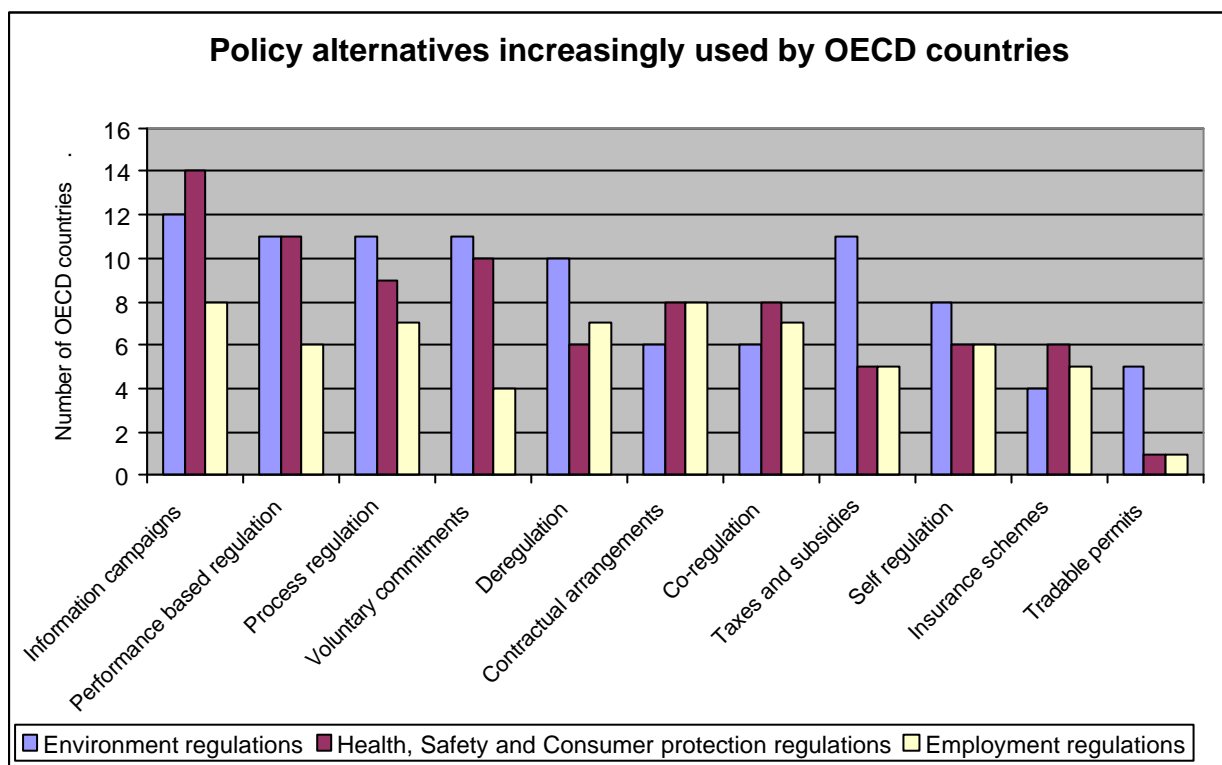
Indicators of trends in the use of alternatives

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

121. However, a significant change was observed in relation to a key supporting policy. In the 2000 survey, a total of 18 countries stated that guidance on the use of alternative policy instruments had been issued, compared with only 11 countries in the 1998 survey. Guidance material is particularly important in encouraging the take-up of alternatives, given the generally low level of understanding of most of these instruments among policy-makers. In addition, guidance documents allow government to underscore and explain its commitment to more systematic policy choice and to provide positive endorsements of the use of particular instruments in particular circumstances. Provision of such detail should also provide confidence to policy-makers considering the adoption of alternative policy instruments. Thus, it is likely that this observed substantial increase in the issue of guidance material will be highly important in increasing the future use of alternatives. In this respect, the expansion in guidance material may be a "leading indicator" of an accelerating trend in this area.

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

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



123. The range of alternatives being taken up increasingly in OECD countries is a broad one. Figure 4 above, summarises the responses to this question in the 1998 Regulatory Indicators Questionnaire. A number of broad observations can be made. First, the relative frequency with which particular alternatives are being increasingly adopted is similar across the three main policy areas considered.²¹ For example, the information campaign is, for each of the three policy areas, the alternative reported by the largest number of countries as being increasingly used. Second, alternative forms of regulation rank highly among the range of regulatory and non-regulatory alternatives assessed, with performance based regulation ranking second in two areas and process regulation ranking third in one area and fourth in the remaining two. This indicates an increasingly sophisticated view being taken of the choices within the context of the regulatory instrument itself, as well as a greater willingness to adopt alternatives to regulation. Third, market based instruments rank disappointingly low. Tradable permits rank lowest or second-lowest in all three areas, while insurance schemes and taxes and subsidies also rank lowly in most areas. Only in the environmental area do taxes and subsidies feature relatively prominently, ranking fourth among the eleven alternatives considered. Given the strong focus of regulatory reform activity on promoting “market-friendly” regulation as a means of capturing dynamic efficiencies, in particular, this must be a priority area for future activity. Fourth, “light handed” approaches, including information campaigns and voluntary commitments, are prominent. This may suggest that regulators are increasingly conscious of the possibilities of adopting co-operative approaches to achieving policy objectives and focused on the ultimate necessity of the consent of the regulated. The fact that co-regulation is also widely reported as being increasingly used seems also to support this conclusion.

Combinations of policy instruments to achieve policy objectives

124. A significant area for policy learning relates to potentially fruitful combinations of different policy instruments. Such combinations may arise from a process of breaking down regulatory problems into their component issues and identifying the most appropriate tools to address each component part. The ability to combine policy tools to address those issues is a developing theme in OECD countries. Previous research conducted by the OECD indicates the possibilities of improving efficiency and effectiveness by the development of complex policy mixes.²²

125. In a recent publication, combinations of policies were categorised as inherently complementary, inherently incompatible, complementary if sequenced, and complementary or not depending on the particular circumstances.²³ Combinations that were identified as inherently complementary include information strategies and all other instruments, voluntarism and command and control regulation, and broad based economic instruments and compulsory reporting and monitoring. Combinations that were inherently incompatible include self-regulation and broad-based economic instruments, and command control regulations and broad based economic instruments.

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

Concerns with the use of alternatives

127. Despite wide acceptance of the general rationale for alternatives to traditional regulation, governments, business, public servants, NGOs and citizens have expressed concerns about their use. From a citizen or consumer perspective, NGOs, consumer organisations, and other associations sometimes raise concerns about the use of alternatives as they are seen as “soft” regulatory options that favour business at the expense of public or consumer protection and thus reflect regulatory capture. Such concerns are especially likely to arise with regard to voluntary commitments and self-regulatory options. NGOs and consumer groups also raise concerns about the enforceability of alternatives, particularly where regulatory requirements are output focused rather than input focused as, for example, with performance-based regulations. As noted above, in reforms based on variance processes, some equivalent alternatives are feared to undermine regulatory standards or reduce compliance.

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

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

Best practices

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

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

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

133. Oversight by an independent agency helps prevent adoption of inappropriate alternatives. For example, in Hungary chambers of commerce and industry and other semi-private bodies have been delegated co-regulatory responsibilities in relation to issues such as start-up licences, issuing of standards, and setting ethical and professional requirements. Hungary's competition authority has interceded a number of times to prohibit the development of barriers to entry such as the setting of minimum levels for the fees of some services or banning of comparative advertising between members.²⁴

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

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

Box 7. Conclusions on the use of regulatory and non-regulatory alternatives

Is this tool still recommended as a best practice? Yes, although relatively little progress has been made, limiting the experience base from which to draw conclusions.

Are there clear best practices? Much further experimentation and learning are still needed to understand the risks, benefits and costs of alternative instruments. Each policy instrument should be evaluated separately for best practices, while the potential for mixing different instruments should also be investigated further and may prove a source of great innovations. At the regulatory quality management level, governments should require that regulatory alternatives be considered when creating new regulations, and should publish a regular review of the impact and performance of regulatory alternatives.

Administrative simplification and license and permit reduction

136. Few regulatory reforms are more popular than promises to simplify government red tape. One of the most common complaints from businesses and citizens in OECD countries is the number and complexity of government formalities and paperwork. Government formalities, so-called “red tape,” are important tools used by governments to carry out public policies. However, if poorly designed or applied, or outdated, they can impede innovation and entry and create unnecessary barriers to trade, investment, and economic efficiency. Often, they act in practice as anti-competitive measures giving ‘insiders’ protection in some markets.²⁵ Red tape is particularly burdensome to smaller businesses and may act as substantial disincentives to new business start-ups.

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

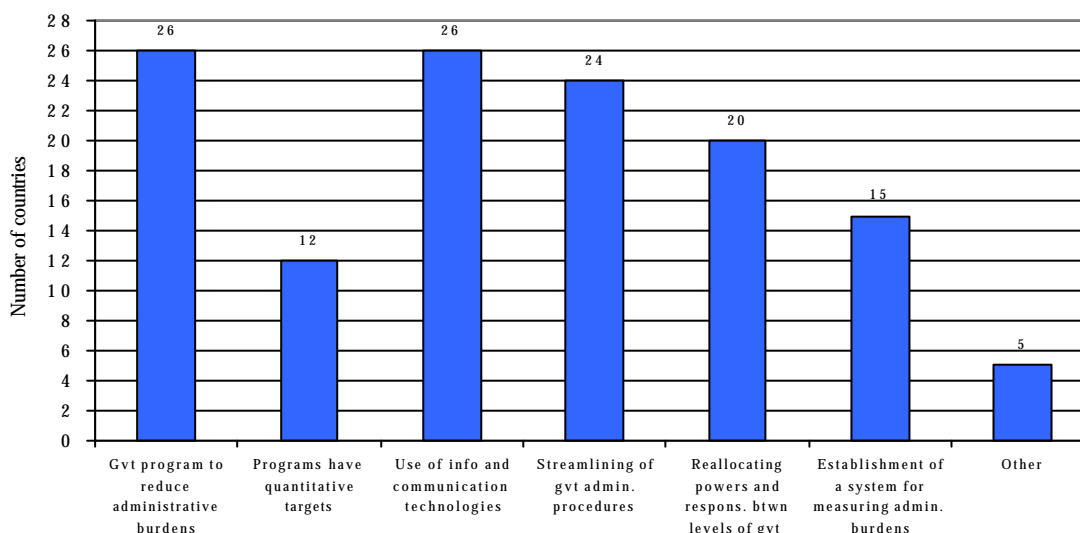
138. The costs of administrative burdens are extremely large, whether considered in terms of time or money. According to a World Bank estimate, opening a business in Mexico can take up to a year and a half, while the costs of complying with all the formalities governing business operations in some cases accounts for 3% of a large firm’s operating expenses, without considering transaction and opportunity costs.²⁶ In Turkey an entrepreneur must proceed through 19 different steps in order to set up a company.²⁷ Additionally, the lack of an appropriate management of formalities prior to recent reforms – sometimes regulatory agencies did not know how many formalities they were responsible for – created a state of uncertainty and opportunities for corruption.

139. The OECD’s multi-Country business survey²⁸ provides additional data on the costs of administrative compliance, based on a survey implemented between April 1998 and March 1999, covering almost 8 000 small and medium-sized enterprises (SMEs) in 11 countries.²⁹ The survey shows that administrative compliance costs are substantial for SMEs themselves and for the economy as a whole. Administrative compliance costs represent around 4% of Business Sector GDP across the countries surveyed and varied from less than 2% in Finland to 7% in Spain, clearly indicating the potential for reducing regulatory costs in this area. On average, each SME spent US\$30 000 per year complying with

the administrative requirements of tax, employment, and environmental regulations. This equates to an average cost of US\$4 100 per employee, or around 4% of the annual turnover of companies. However, the costs are significantly higher for smaller firms, averaging US\$4 600 for SMEs with 1-19 employees, US\$1 500 for medium-sized SMEs (with 20-49 employees) and only US\$900 for large SMEs (with 50-500 employees). On average, around 60% of the costs went toward contracting external experts with the skills to ensure compliance efficiently.

140. The 1997 OECD Report on Regulatory Reform found that “Reducing red tape and government formalities can produce substantial payoffs in government efficiency and economic cost-savings.” It concluded that “Reducing the operating and dynamic costs of *ex ante* permissions and licences is a high priority for governments that wish to increase business start-ups and improve competitive pressures throughout the economy.” By October 2000, twenty-six out of 28 OECD countries had launched programmes to reduce administrative burdens. Figure 5 summarises the main strategies used within these programmes.

Figure 5. Strategies for administrative burdens reducing programmes



141. The specific strategies employed largely belong to one of three categories. These are informational approaches, process re-engineering and technological solutions. In broad terms, longer standing programmes appear to have commenced with informational approaches before progressively moving their focus to process re-engineering and then technological solutions.

Informational approaches

142. The most common informational approach is the “one stop shop” for obtaining licence and permit information. These are now widespread, and are based on the notion of reducing business search costs by providing all information on licences and permits at a single point. The information usually includes the permits required by a given business, application forms and requirements and contact details. As experience with the one-stop-shop” has accumulated, and technology has improved, the services provided have tended to expand. This can include information on related issues, such as codes of practice, lists of applicable laws and regulations, as well as information on licences and permits required by other levels of government. Delivery mechanisms have expanded from telephone and face to face interviews through CD-ROM systems, information kiosks and now to the internet. An interesting trend in Mexico has

been the development of private sector run “one-stop-shops”, typically established by business and industrial associations. For example, the National Industrial Association runs 8 such shops, and the Mexico City Chamber of Commerce runs 7.

143. There has been little evaluation of one stop shops. One independent evaluation was completed in Victoria, Australia, in 1994. It concluded that the benefit to clients of the one stop shop totalled A\$21 million per annum, while the overall benefit/cost ratio of the project was an impressive 15:1. In Italy, the *sportelli unici* has reduced the time needed to set up a business to 3-11 months, instead of 2-5 years, which will boost business start-ups. But in many countries, even with a one-stop-shop, fundamental problems remain in relation to co-ordination between regulatory authorities. Critics have claimed that the new structure merely adds an additional layer to the administration, especially in those cases in which attempts have been made to use one-stop-shops as single licence issuing authorities. Others have suggested that a proliferation of one stop shops undermines the aim of having a single electronic window to government for all purposes.

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

145. Initiatives such as these, as well as the internet publication of laws and regulations, can be seen as serving the administrative simplification and burden reduction agenda as well as contributing to other key parts of the governance agenda such as transparency and accountability. Indeed, a conceptual difficulty in discussion administrative simplification initiatives is that many of the most important exist as part of a wider policy agenda.

146. Also in the category of information based approaches are attempts to count formalities and measure the burdens involved. Clearly, governments must have a sound understanding of the size and nature of the problem before they are able to undertake a strategically focussed effort to address it. However, only eight countries were able to provide a total of the number of business licences and permits in the 1998 OECD Regulatory Indicators Questionnaire. Burden measurement programmes can be seen as forming a link between information provision and process re-engineering approaches – as they provide a basic input to the latter. For example, the Belgian Administrative Simplification Agency recently led a project that identified a total of 300 administrative procedures required by start-up businesses. This, in turn, led to the production of an information sheet for 200 of these procedures, with accompanying documentation (application forms etc), to reduce the effective burden on business of these requirements. Similarly, the ASA carried out a census of all statistical collections from enterprises as an initial step in a programme to ensure that the maximum use is made of statistics collected and that duplications in requests for data can be identified and eliminated. In Norway, too, the Register of Reporting Obligations of Enterprises is maintained as a means of obtaining a transparent overview of requirements on business and assisting efforts to co-ordinate and simplify these obligations wherever possible.

Process re-engineering.

147. Process re-engineering approaches are based on review of the information transactions required by government formalities with a view to optimising them, including reducing their number and reducing the burden of each through redesign, elimination of steps and application of technology, as appropriate. The most common tool in this regard is licence and permit reduction programmes. The *ex ante* licensing or permitting requirement is one of the more damaging forms of regulation, as it necessarily increases investment delays and uncertainties and has disproportionate effects on SME start-up, while being very costly for public administrations to apply. They are pervasive in OECD countries, although there are considerable differences in the extent of their use, reflecting different regulatory traditions and approaches. The following data from Member countries, though not checked for strict comparability, illustrates this point.

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

Country	Number of formalities
United Kingdom	312
Norway	+350
Mexico	834
Hungary	1 600
Finland	+ 1 000
Korea	2 186
Portugal	2 225
Japan	5 737

Source: Responses to OECD survey on regulatory indicators, March 1998; response for Japan does not include “weak” requirements such as notifications or reports.

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

149. The complexity of reforms to permits and licenses is well illustrated by the experience of Japan. In 1990 it was decided that the number of permits and authorisations should be halved,³⁰ yet the numbers increased every year until 1993. Following declines in 1994 and 1995, the number then continued its upward trend in 1996 and 1997. However, according to the Management and Co-ordination Agency, the main reason for the increases in numbers observed during this period was deregulation: activities that had previously been forbidden or restricted were, after deregulation, permitted under certain conditions. Welding tests in nuclear facilities, for example, were shifted to private institutions that had to be certified.

150. On the other hand some successes can be noted. Between 1995-2001 Mexico established a complete inventory of all formalities, reviewing all of them on the basis of a simple RIA prior to their inclusion on the register. As a result of this process, which included a requirement for approval by the regulatory oversight body, almost 80% of the pre-existing formalities were either eliminated or simplified. The Federal Registry of Formalities is now the unique source of enforceable formalities. A further important benefit of this review mechanism was that it permitted a substantial reduction in the excessive levels of discretion being exercised by the lower levels of the bureaucracy, eliminating opportunities for corruption. Poland implemented an equivalent programme in 2000 and was also able to reduce dramatically the list of activities subject to a governmental permit.³¹

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

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

153. In spite of these problems, it appears that there has been, in some cases, real progress. In particular reducing permits and licenses can create a political constituency, especially among SMEs, that can assist reformers subsequently in arguing for the adoption of farther-reaching reform initiatives. Notwithstanding scepticism as to claims for reductions in overall numbers, the size of the reductions achieved in some cases indicates that real gains must be being made. Moreover, even eliminating licences of limited practical effect might contribute toward moving perceptions away from an expectation of licensing requirements and toward one of a presumption of freedom to establish a business. The adoption of the principle of moving away from *ex ante* approvals in a number of countries should have a significant impact in the medium term, even if resistance from vested interests in business and the administration delays implementation in the short term. Additionally, the creation of new licences has, in some areas, been a positive, representing a move from a government monopoly of a particular activity to the creation of a contestable, regulated market in pursuit of efficiency gains and greater economic opportunities.

154. There is also evidence that the average cost of obtaining licences may be falling as technological benefits such as those outlined above and procedural streamlining and standardisation initiatives become widespread. Thus, administrative burden reductions are being generated as a result of both reductions in the burden of particular requirements and a more rigorous and benefit/cost based view of when such requirements should be imposed.

Technology-based mechanisms

155. An important mechanism for reducing administrative burdens in recent years has been the explosive development of systems for the electronic interchange of data as an alternative to traditional paperwork transactions. For example the Japanese customs allow exporters, importers and customs brokers

to submit their declarations electronically, improving accuracy and speeding up procedures. In Denmark, a recent pilot EDI programme allows for the electronic reporting of accounting information including annual accounts, tax returns and some statistical reports. In many countries, such as the United States, many taxpayers are able to complete their tax returns by phone, rather than as a paper document.

156. The Australian Business Number system represents an ambitious initiative in this area. Developed in response to the *Small Business Deregulation Taskforce* report, which recommended that a single identifier be introduced to simplify business dealings with government, the ABN is designed to provide a business registration system, where businesses only need to have a single business identifier for all dealings with government. While the ABN is currently principally utilised for business dealings with the tax office and for business incorporation purposes, it is intended that it will extend to dealings with other government departments and agencies. The Australian Business Register Online (ABR Online) enables online registration and searching of ABNs. State, Territory and local government bodies are also able to utilise the ABN to streamline registration requirements.

Evaluation of administrative simplification and burden reduction programmes

157. Administrative simplification programmes can constitute a powerful means of confronting entrenched bureaucracy, perhaps especially in civil law countries and countries in transition. They allow a strategic review to be undertaken of formalities that have often accumulated over a period of decades and, especially if they incorporate central registries with positive security, can provide an important means of obtaining and maintaining control over the extent of these requirements. By enhancing accountability and transparency in these ways, and reducing the range of bureaucratic discretions over business and other groups, these programmes can also be a means of reducing the opportunities and incentives for the development of corruption within the administration.

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

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

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

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

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

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

Box 8. Conclusions on administrative simplification and reduction of permits and licenses

Is this tool still recommended as a best practice? Yes, a focus on burden reduction is an important element of regulatory policy, particularly for countries recently embarked on reform, including countries in transition. However, it should ideally be more integrated with other policy elements and made more systematic.

Are there clear best practices? Best practices are emerging, but require more assessment. A mix of policy responses, such as one-stop shops and central registries of formalities combined with electronic access, is needed to address various sources of the problem. In selecting priorities, a greater focus on reducing *ex ante* licenses and permits is likely to yield significant economic benefits as investment and market entry increase. Electronic solutions promise considerable gains that are as yet only partly realised. Adopting a more systematic view of the implementation of burden reduction measures *ex ante* – through RIA processes – may also be an area for further consideration.

3.3. Regulatory Transparency

163. The concept of transparency in government has rapidly become a central theme in governance literature and in public debate. Transparency is also a central demand of civil society groups and serves the basic democratic value of openness. The notion of transparency embodies the more familiar concept of public consultation, but is considerably broader in scope. The term “transparency” is itself non-transparent, being understood to mean quite different things by different groups.³² These concepts of transparency range from simple notification to the public that regulatory decisions have been taken, to controls on

administrative discretion and corruption, better organisation of the legal system through codification and central registration, the use of public consultation and regulatory impact analysis and actively participatory approaches to decision-making. Indicators data on transparency collected in 1998 showed that country practices and performance vary widely, but no country consistently satisfies what is considered good practice.

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

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

166. Transparency has democratic as well as economic implications. The continuing development of civil society – including the proliferation of non-governmental organisations (NGOs) – in Member countries has increased demands for higher of transparency in all areas of government activity. Governments are seeking to accommodate these changes by developing improved models and approaches for better informing and involving citizens in the policy-making process. The notion of “participatory democracy”, embracing this range of interactions with civil society groupings, is an increasingly important complement to traditional representative democracy, capable of enhancing the capacities of governments to implement policy effectively, with the support of an informed public.

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

168. According to the most recent updating of the OECD Regulatory Capacities Database, by the end of 2000, 20 OECD countries had a formal government policies on transparency that have government-wide application. Two other countries have transparency requirements in at least some policy areas. Among the most important elements of regulatory transparency as practised in OECD countries are:

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

169. These transparency practices are mutually reinforcing and are most effective when applied in combination as part of a structured system. They are discussed in detail in the appendix to this report. The following summarises the most significant trends toward improving the major transparency mechanisms in OECD countries in recent years. A more detailed discussion is contained in the appendix.

Public Consultation

170. Public consultation is increasingly being used to collect empirical information for analytical purposes, a change that in large part represents the widespread adoption of regulatory impact analysis across the OECD membership in recent years and the more general move toward more analytically based models of decision-making discernible in most OECD governments. Consultation is a vital support for analytically based decision-making, since it is a cost-effective source of data, as well as providing information on issues such as the acceptability of different policies, which can be essential in determining practicability and designing compliance and enforcement strategies.

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

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

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

Improving regulatory clarity, communication and access

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

175. An even larger number of countries now require the use of plain language law-drafting and most of these (16 countries) support this policy through the issue of guidance materials and/or the adoption of training programmes. These policies support the effective communication of legislation by making laws intelligible to citizens.

176. The dynamic aspect of transparency has also begun to be considered, with many countries now committed to the publication of future regulatory plans, which increases effective consultation as well as accountability. Finally, there is a high level of electronic dissemination of regulatory documents, with three quarters of OECD countries now making most or all primary legislation available via the internet.³³

Regulatory transparency in OECD countries continues to fall short of good practices.

177. Despite the progress made, regulatory transparency in OECD countries still falls far short of good practices. All available information – the 1997 OECD Report to Ministers, the regulatory indicators collected in 1997-2000 by the OECD, the multi-country business survey, and the on-going series of detailed country reviews conducted by the OECD – demonstrates serious concerns about a continuing lack of transparency with respect to regulatory development and application. The OECD country reviews of regulatory reform have analysed transparency issues in individual countries. Thus, they provide a substantial resource for identifying the current state of play and the major problems that must be addressed by Member countries as priority issues. Table 2 summarises this data, presenting 17 major transparency problems identified in the OECD reviews of countries' regulatory practices conducted between 1998 and 2000 (Table 2). The table also includes the OECD recommendations for addressing each problem, as included in the relevant country review reports.

Table 2. Regulatory transparency problems in 12 OECD countries

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

Transparency problem	OECD recommendation	Number of countries in which problem identified, out of 12
Too much administrative discretion in applying regulations	Strengthen administrative procedures and accountability mechanisms. Eliminate use of informal regulations such as administrative guidance and instructions.	4
Lack of transparency at regional, state, and local levels	Work to improve regulatory transparency at regional and local levels	8
Inadequate use of international standards	Encourage the use of international standards government-wide, and track the use of uniquely national standards	4
Lack of clear standards in licensing and concessions decisions, such as in telecommunications	Reduce the use of concessions and licenses to the extent possible by moving to generalised regulation, announce clear criteria for decisions on concessions and licenses, use public consultation for changes in existing licenses and concessions	7
Decisions of independent regulators not transparent enough	Apply RIA to independent regulators, ensure that independent regulators also use public consultation processes with regulated and user groups	5

178. Further problems and challenges have also been detected. In some countries like UK and Canada “consultation fatigue” has set in as interest groups have claimed to be overwhelmed by the volume of materials on which views are requested. Consultation fatigue can also arise from weaknesses in the mechanisms for responding to consultation inputs. Failure to respond to the views expressed by consulted parties tends to erode trust in the mechanisms and breed cynicism as to the value of further participation. A larger problem is that emerging regulatory trends – particularly the adoption of new regulatory styles based on the adoption of quasi-legal measures extending the use of technical standards – are tending to reduce regulatory transparency. The complexity and opacity of much modern regulation far outstrips the capacities of businesses and citizens to understand their obligations. Complaints from trade and investment partners about inadequate regulatory transparency in other countries are creating friction within the international trading system that will worsen as the global economy becomes more integrated.

E-government could transform the concepts and practices of regulatory transparency.

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

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

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

182. Nonetheless, the relationship between regulatory procedures and e-government remains in its infancy, and is unlikely to develop smoothly. ICTs often cannot be added to existing procedures, because they can bring substantial changes in the content of work and administrative organisation and may force the re-engineering of the administration to better meet citizens’ needs. The countries that are furthest ahead in ICT use, such as the United States, Denmark and Canada, have developed general policy frameworks for information that accommodate ICT. In the United States, for example, paperwork reduction was placed within a comprehensive framework for managing information resources. Paper is viewed as a means of handling information, and is not different in kind from other means such as electronic media.

What progress is being made?

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

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

Box 9. Conclusions about public consultation, regulatory communication and access strategies

Are these tools still recommended as best practices? Yes, for all countries, and for both primary laws and lower level regulations.

Are there clear best practices?

In terms of public consultation, yes, but approaches are highly contextual, while different forms of consultation may need to be combined, in order to achieve different objectives. In general, more open and accessible procedures are more legitimate, less vulnerable to capture, and more likely to bring in high quality information that improves analysis of policy options. Discretion in deciding who and when to consult should be minimised and transparent in order to avoid giving special access to “insider” interests and systematically excluding “outsider” interests such as weaker, less organised, and new interests. Attention is needed to dealing with evolving civil society interests and to uses of new technological means such as IT.

In terms of regulatory communication, more evaluation is needed of the effectiveness of various tools. Strategies of codification, registries, plain -language drafting, early planning, and information technologies each seem to be effective in addressing facets of the overall problem, but each is insufficient in itself. The centralised business registry with positive security in particular seems to offer substantial benefits to both domestic and international benefits in reducing barriers to entry and competition. Best practices are evolving, however, and more work is needed on how to combine packages of reforms to address user needs.

3.4. *Improving accountability*

185. Accountability requirements constitute a necessary corollary to transparency practices, setting out in detail the process requirements that the Government is committed to uphold in exercising its regulatory powers and the rights and protections that are afforded to business and citizens in relation to the law-making process and the implementation of those powers. Key instruments in establishing the accountability of governments in OECD Member countries are administrative procedures acts, the use of independent and standardised appeals processes and the adoption of rules to promote responsiveness, such as legislated time limits to respond to applications and “silence is consent” clauses.

186. Some OECD countries have long had Administrative Procedures Acts – for example the United States legislation dates from 1946. However, there has been a clear move toward the widespread adoption of this legislation in recent years, including the replacement of existing acts with updated and extended versions. For example, new or enhanced administrative procedures legislation has been adopted in Japan in 1994, in Korea and Mexico in 1996, and in Hungary in 1999 and 2000. APAs can have a wide scope, often including requirements governing regulation making processes (*e.g.* consultation, RIA, publication requirements, sunset, disallowance), implementation and enforcement (availability of rules, rules on administrative discretions, time limits for decision-making), revision and amendment (updating incorporated material) and appeals and due process. The focus of APAs tends to differ widely between countries, reflecting different underlying issues. In Japan, the APA was used to outlaw the coercive use of administrative guidance. In Mexico, by contrast, the focus has been on access to information possessed by regulators, a clearer administrative appeal mechanism, and time limits for authorities to respond to information requests.

187. An important general trend has been the more widespread adoption of independent administrative appeals processes. These have in some cases been adopted in general APA legislation, while in other cases they are adopted at a more disaggregated level, with a degree of commonality in approach being provided by guidelines, or merely convention. Administrative appeals are also increasingly supplemented by effective access to judicial review of administrative decisions, or of poor quality regulation, such as the Mexican Amparo process.³⁴

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

Box 10. **Conclusions about improving due process and administrative certainty**

Is this tool still recommended as a best practice? Yes, orderly and consistent administrative procedures and efficient appeals procedures are needed in all countries operating under the rule of law.

Are there clear best practices? No. Most countries seem to benefit from adoption of administrative procedure acts that establish procedures for making regulations and the rights of citizens, but smaller countries with traditions of consultation and administrative fairness may not need such acts. The silence is consent strategy seems to be effective in many countries, but may not be universally possible or necessary. Appeals mechanisms are often criticised as too inefficient and costly, but governments are tending to create more appeals rights rather than fewer. No best practices have yet been identified, but mediation mechanisms and ombudsmen are being adopted in some countries to supplement administrative and judicial procedures.

4. REGULATORY IMPLEMENTATION

189. Section three of this report has considered the range of specific tools being used to assure that the processes of designing and developing regulation are of high quality and that the quality of the resulting regulation is thereby systematically assured. However, to be effective in achieving policy objectives, regulation must also be properly implemented. Understanding this final link in the regulatory policy chain necessarily involves consideration of the issue of regulatory compliance, since the level of compliance is perhaps the most fundamental determinant of the effectiveness of regulation in meeting policy objectives.

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

191. It should be noted at the outset that the distinction between regulatory design/development issues, on the one hand, and regulatory implementation, on the other, is far from clear-cut. For example, many of the determinants of regulatory compliance are themselves related to the quality of regulatory design, as is acknowledged in the following section. Similarly, while independent regulators are primarily concerned with implementing regulatory structures, their expertise necessarily means they form part of the policy “feedback” loop that leads to the redesign of regulatory structures over time.

4.1. *Improving regulatory compliance*

192. The rapid increases in regulation and government formalities in most OECD countries since the 1970s have produced impressive gains in some areas of economic and social well-being, but too often the results of regulation have been disappointing. Dramatic regulatory failures tend to produce calls for more regulation, with little assessment of the underlying reasons for failure. Though there is little hard evidence, a growing body of anecdotes and studies from OECD countries suggests that inadequate compliance underlies many such failures. This trend appears to be related to regulators’ increasingly ambitious policy goals and the

extent of the resulting “regulatory inflation”. At the same time, diminished levels of social consensus as to regulatory goals may mean that the high degree of “consent” which must underlie successful law-making may be diminishing. Lack of compliance is a common but little understood cause of regulatory failure.⁵⁵ Determinants of the level of (non-)compliance with regulatory requirements are of four broad types.

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

194. As discussed previously, the responsibility of policymakers does not end with publication of the rule. New rules may need to be accompanied by information campaigns to ensure that they are brought to the notice of, and made comprehensible to, the target group. Regulatory design issues also intervene: In many cases, rules are simply too complex ever to become widely known and understood, and the only way to ensure adequate compliance is to simplify and reduce the regulatory burden. This problem can become particularly acute as regulation is updated and amended over time, with details being added and loopholes closed. For example, the “Robens” reforms to occupational health and safety regulation in the United Kingdom were intended to replace many technical rules with a few easy to understand, flexible, general rules. The aim was to facilitate employer self-regulation of occupational health and safety on an individualised site-by-site basis. However, over time many technical and detailed “codes of practice” have developed under the general provisions of the occupational safety and health regulation to address specific hazards and make the law more certain for employers. The proliferation of these codes of practice means that now many businesses in Britain find them too complex and voluminous to be easily comprehensible.³⁶ A similar trend has also been evident in Australia, where the same approaches to reforming OHS regulation have been adopted.

195. **Willingness to comply**. Compliance requires both understanding of the law and the will to comply. The will to comply may be voluntary, arising from a sense of good citizenship, acceptance of the policy goals, it may rely on economic incentives, or it may result from pressure from enforcement activities. Voluntary compliance is likely to be low when the costs (in time, money, or effort) of complying with a rule are considered unreasonably high, whether because substantive standards are too high, the transition time for reaching conformity is too short, or the regulation is inflexible in relation to individual circumstances. Sanctions pressure may be inadequate if there are high rewards for non-compliance and low probabilities of detection.³⁷

196. Voluntary compliance due to acceptance of the policy goals will be lost if people do not see a link between technical rules and a substantive purpose.³⁸ An overly rule-based or “legalistic” approach to compliance can have the same effect, undermining a government’s achievement of substantive policy objectives. Research indicates that when business people feel that regulators are being overly legalistic in applying rules and fines, they respond by scaling down their efforts to comply, aiming only for minimal compliance with the letter of the law, rather than with its intent.³⁹ Overly technical rules can also increase non-compliance by encouraging evasion and creative adaptation.

197. **Ability to comply.** Regulators must focus on the feasibility of compliance. For small businesses in particular, the burden of assimilating and complying with many complex and technical rules can be unreasonable and undermine confidence in regulators and the regulatory structure. For example, an OECD report, found that in Mexico the accumulation of regulatory formalities increased the arbitrary nature of administration; such detail made it impossible for a business to be aware of or comply with all the procedural requirements, leaving regulators to decide which rules to enforce, and how.⁴⁰

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

199. Achieving full compliance is not always possible and governments will almost always have to be satisfied with “a reasonable extent” of (non-)compliance. There is no general answer to the question of what is a “reasonable extent” of non-compliance because each policy field has its own specifications, differences, and sensitivities. To define an acceptable level of non-compliance depends in part on the nature of the risks arising from non-compliance. Non-compliance is, for example, more alarming in the nuclear energy industry than in most other policy areas.

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

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

202. The T11 can be used to analyse the strengths and weaknesses of a draft regulation from the compliance viewpoint. This is done by assigning a numerical score from one to five for each element of the T11, with lower score indicating potential compliance problems. This produces an overview of the regulation and the likely effectiveness of proposed enforcement and communication measures. In turn, this ensures that all the dimensions of policy design that may affect compliance have been adequately considered and addressed. In looking at existing regulation, this analysis will pinpoint where compliance failures are likely. According to a T11 analysis, regulatory design is optimal when the regulation is simple to implement and produces a maximum level of spontaneous compliance. If T11 analysis shows that spontaneous compliance is insufficient and cannot be improved in certain areas, then additional controls and sanctions may need to be added in that area to guard against breaches and lead to a reasonable level of compliance.⁴¹

Box 11. **The Netherlands Table of Eleven (T11) key determinants of compliance**

The T11 factors:

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

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

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

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

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

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

Control dimensions (the influence of enforcement on compliance):

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

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

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

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

Sanctions dimensions (the influence of sanctions on compliance):

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

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

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

203. The OECD's work on compliance has clearly indicates that the task of achieving optimal compliance outcomes must embrace both result-oriented policy, compliance oriented regulatory design and effective regulatory implementation strategies. In its report on regulatory compliance published in 2000, the OECD identified principles in each of these areas. These principles were proposed as a preliminary checklist applying to the design, implementation, and management of compliance-oriented regulation and are reproduced in the appendix. Importantly, the report concludes that implementing the recommended approach will require governments and regulatory agencies to develop a number of new capacities to process and manage compliance issues.

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

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

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

Box 12. Conclusions on good practices in regulatory compliance

Is this tool still recommended as a best practice? Yes. Attention to regulatory compliance issues is an essential element of regulatory quality assurance

Are there clear best practices? Effective forms of compliance analysis are emerging, but require additional refinement as experience is acquired with their use in practice. Importantly the degree of compliance is related to the adequacy of regulatory design. This means that achieving compliance relies on good regulatory design as well as appropriate and effective enforcement tools.

4.2. Regulatory oversight bodies

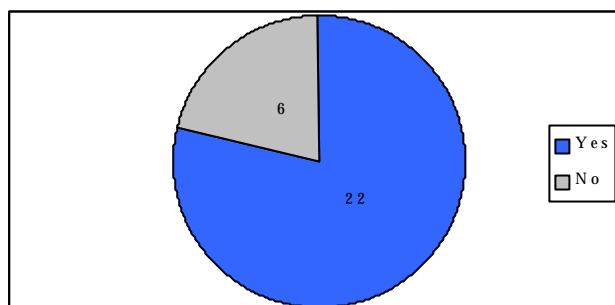
207. The 1997 OECD report recommended that governments “*create effective and credible mechanisms inside the government for managing and co-ordinating regulation and its reform.*” Country experiences show that a well-organised and monitored process, driven by “engines of reform” with clear accountability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

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

209. In several countries, regulatory oversight bodies are supported by other reform-oriented groups, such as ministries of finance and competition and trade authorities. In 2000, competition authorities in 14 out of 28 countries had roles in reviewing regulatory proposals for their potential impacts on market entry and competition. Private sector engines of reform, such as advisory bodies or private initiatives, can also be helpful in identifying priorities, proposing specific reforms and providing advocacy for reform in general.

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

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



211. Figure 7 shows that, to carry out the policy, some 23 out of 28 surveyed OECD countries⁴² had, by end-2000, established a dedicated unit to play a role in managing regulatory quality, compared with 14 in 1996. Most are located within administrations, although advisory commissions, regulatory reform committees of Cabinet, parliamentary committees and intergovernmental committees are also relatively widespread.

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



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

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

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

215. Despite this general trend, some small countries with traditions of co-operation and consensus have continued to prefer more decentralised solutions. They have also argued that in small administrations the whole apparatus might be redundant and bureaucratic. The Danish government, for example, does not believe that a centralised autonomous unit directing regulatory policies would work well within Danish policy structures, and might increase conflict and formality at the expense of results. The Norwegian government has taken a similar view on this issue. However, rejection of a central regulatory oversight body does not imply the absence of co-ordination on regulatory policy issues. The Danish government, for example, has promoted the co-ordination of reforms across the public administration by establishing an inter-ministerial co-ordinating body on regulatory reform (the Regulation Committee).

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

217. In countries with relatively weak centre of government co-ordination and management functions, this trend is less apparent. However, increasing attention has been paid to co-ordination between agencies with responsibilities for particular aspects of the regulatory reform programme. For example, in the Netherlands,

the Ministries of Justice, Environment and Economic Affairs now co-operates in providing “helpdesk” service that is at the heart of attempts to improve RIA standards across the administration. Many countries, including Germany, Japan, and Portugal have also created independent high-level commissions to assist in determining the shape of regulatory reform policy. In some cases, these have been means of ensuring dialogue with key groups, usually predominantly the corporate sector, and can be seen essentially as a part of the consultative structure of government. In other cases, their function has been central to the development of reform policy.

218. The 1997 Report noted that there was a split between civil, law countries, which favour *ad hoc* commissions, and common law countries, which favour reform bodies within the administration,⁴³ attributing the pattern to differing legal traditions and institutional dynamics. There is evidence though, that this distinction, if it ever existed, may be breaking down, as countries show greater flexibility in adapting traditional approaches to achieve better results. In fact, the most remarkable aspect of the use of oversight bodies is the variety of different structures and roles that have been developed.

219. For example, in Italy, a guardian of regulatory quality was created from the Department of Legal and Legislative Affairs (DAGL) in the Prime Minister’s Office, supplemented by a wholly new body, the Regulatory Simplification Unit (Nucleo) established in the Ministry of Public Administration in 1999. Australia created its *ad hoc* Small Business Deregulation Taskforce in 1997 to complete a one-off report to the government identifying means of reducing regulatory burdens. The Taskforce, supported by a secretariat drawn from the administration, was composed entirely of business representatives. In the United Kingdom, the Better Regulation Taskforce. Interestingly, the BRTF a permanent body with a broad membership drawn for business, academia, local government and NGOs, provides the government with advice and proposals on a wide range of regulatory reform issues and takes on an important advocacy function.⁴⁴

220. A variant of this approach was adopted in Korea. Membership of the Regulatory Reform Committee combines 13 private sector representatives and seven ministers. The committee has been the centerpiece of the ambitious reform programme in Korea in recent years, wielding extensive authority over ministries in terms of the design and implementation of reform programmes. It reports only to the Prime Minister. This model is unusual in combining Ministerial and private sector representation. It is also unusual in the degree of involvement and authority over other important government policy areas that it grants to individuals who are not part of the government or the administration, probably reflecting the historically close relationship between government and business in the context of Korean economic development. Notably, the committee’s predecessor body, the Presidential Commission on Administrative Reform, included even wider representation, including both labour and the press, and, given the growing role of civil society organisations in Korea, the Regulatory Reform Committee is likely to also evolve in this direction.

221. Mirroring the Committee of Ministers model (as in the Netherlands) is the recently introduced Danish model of a Regulation Committee is composed of the most senior bureaucrats in each of five major ministries. The role of the Regulation Committee in relation to reform policy is a broad and influential one, particularly as it operates in the absence of a ministerial level equivalent. The latter fact appears to reflect the relatively autonomous nature of Danish Ministries, with a relatively small and weak central co-ordination/management function, together with a preference for flexible and pragmatic policy solutions over the development of broadly applicable policy prescriptions and models.

222. Despite the wide-variety of these bodies operating beyond the administration, regulatory oversight bodies within existing ministries remain much more common. Most countries have allocated primary responsibility for reform to a specific group within the administration. While these are now largely located at

the centre of government, many countries continue to share responsibilities for different aspects of reform among different ministries. For example, in Denmark the Ministry of Finance and the Ministry of Business and Industry both have central roles, while the Dutch “helpdesk” model has been noted above. In Australia, both the Treasury (via the independent Productivity Commission) and the Office of Small Businesses, within the Department of Industry, Science and Technology, are heavily involved in regulatory reform. In countries with relatively decentralised models of government administration, such a division of responsibilities between agencies may be inevitable. However, it may also be that the increasing range and complexity of the regulatory review policies followed in many countries has also favoured this outcome.

223. Frequently though, the regulatory oversight bodies need to co-ordinate with existing and recent bodies and institutions. In many countries State Councils play check from an independent viewpoint the quality and substance of laws and regulations. This is the case for instance in Spain, Greece or Turkey for secondary legislation. In parallel, some aspects of the broad agenda on regulatory policies have been delegated to new institutions. In Canada the General Audit Office has become a key player in terms of evaluating the application of policies and regulations. Ombudsman institutions in some countries, like in Ireland, have taken important steps to promote transparency and ad hoc reforms

What do the regulatory oversight bodies accomplish?

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

225. Figure 6 above summarises the responses to the OECD Regulatory Indicators Questionnaire in both 1998 and 2000. It shows that the regulatory oversight bodies have a variety of tasks. Almost all are involved directly in the regulatory development process, at least to the extent of being consulted as a part of the process of developing new regulation. More than half have a more direct role, being able to conduct independent analyses of regulatory impacts. Slightly fewer than half enjoy a more “strategic” role, being responsible for reporting on overall reform progress made by individual ministers. Interestingly, the numbers exercising this latter role appear to have declined significantly between the 1998 and 2000 questionnaires.

226. More broadly, the country reviews undertaken to date suggest that their roles fall into three general categories: improving the quality of new regulation (through conducting or assessing RIA, or advocating better regulatory approaches); improving the stock of existing regulation (by conducting reviews or advocating priority areas for review) and improving the capacities of regulators and the regulatory system (by conducting training, providing guidance materials and conducting research on better regulation).. Some are trusted intermediaries between the political and administrative levels – the role of monitoring and reporting to ministers and to the parliament (or Congress) the progress made (or lack of it) is important in this regard. Importantly, most have a mix of many or most these roles, while the mix, and the prominence of each element within it, tend to vary over time.

227. Unsurprisingly, most of the central oversight units argue that they have had a significant, though usually unquantified, role in improving the quality of regulations that are adopted. Quality improvements arise through weeding out poor regulations, better structuring the decision process so that debates are more honest and fruitful, and in increasing the net benefits of regulations adopted. In Denmark, for example, the intervention of the Regulatory Committee in questioning the need for new laws reduced the size of the legislative agenda in 1998 and 1999 by about 25% compared to earlier years. Another major benefit seen in Denmark is an improvement in parliamentary scrutiny of bills, due to the Committee's ability to ensure that they are introduced to the Parliament earlier in the parliamentary session, providing more time for committee review and parliamentary debate. The number of regulations in Korea were reduced by 50% in less than a year due to the work of the Regulation Committee, perhaps the most visible result of any of the central units.

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

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

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

Box 13. Conclusions on mechanisms for promoting, co-ordinating, and tracking regulatory quality reforms

Is this tool still recommended as a best practice? Yes, though the degree of centralisation and location within the administration is specific to the administrative structure and culture. Most countries find that strong oversight bodies at the centre of government are needed to push forward a consistent reform programme and apply an ambitious regulatory policy across the government. If there is a high degree of consensus on goals and a small administration where co-ordination is easier, less centralisation might be needed.

Are there clear best practices? Very few, since institutional effectiveness is highly contextual and oversight must fit into domestic policy-making structures. In general, countries find that the capacities for promoting regulatory quality work better if placed in the centre of government, preferably close to traditional management functions such as budgeting or policy oversight, rather than in a line ministry. Ministerial responsibility for the function increases effectiveness, as does expertise, capacity to intervene in the regulatory process, and capacity to advise on quality of individual regulatory measures.

4.3. *Emerging roles of independent regulators*

231. One of the most widespread institutions of modern regulatory governance is the so-called independent regulator or autonomous administrative agencies with regulatory powers. The use of this kind of

institution has mushroomed during the 1980s and 1990s and continues to increase, particularly in connection with the privatisation of former state-owned enterprises and establishment of competition in formerly monopoly based industries.⁴⁵ They are found particularly in utility sectors with network characteristics such as energy and telecoms, and in other sectors where sector-specific prudential oversight is needed, such as financial services. Dozens of these bodies have been set up in OECD countries in the last few years alone. This trend is fuelled by WTO agreements, by reforms in Europe from the Single Market, and by policy advice by the OECD, the World Bank, the IMF, and other international institutions. The regulatory practices of these bodies substantially influence the quality of national regulatory regimes.

232. Table 3 below shows how rapid has been the emergence of these bodies. In the telecommunications sector, 20 countries have set up new bodies in the 1990s, most since 1995. In energy, 11 countries have done so. Many countries have also strengthened the independence and other governance structures of their sectoral regulators during this period. 10 countries have created or substantially strengthened independent competition authorities, which have roles in regulating the network industries. Other bodies are being established in other sectors and policy areas.

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

Table 3. Creation of independent regulators and competition authorities in OECD countries since 1990

	Telecommunication	Energy	Financial sector	Competition authority	Other areas
Australia	Australian Communications Authority (ACA) (1997); Australian Competition and Consumer Commission (ACCC)(1995)	Australian Competition and Consumer Commission (ACCC)(1995)*		Australian Competition and Consumer Commission (ACCC)(1995)	
Austria	Austrian Regulatory Authority for Telecommunications and Broadcasting (RTR GmbH) (March 31, 2001) {Formerly Telecom Control (TKC)(1997)}			Kartellgericht (Competition Authority)	
Belgium	Belgian Institute for Postal Service and Telecommunications (BIPT) (Year?)			Conseil de la Concurrence (Competition Authority)	
Canada	Canadian Radio-television and Telecommunications Commission (CRTC) (1968)	National Energy Board (1959)*		The Federal Competition Bureau	
Czech Republic			Commission of Securities (1998)	Czech Office for Economic Competition (1991)	
Denmark	National Telecom Agency (NTA) (1991)	Energy Supervisory Board (1999) ¹		The Competition Council (?) Pre-1990	
Finland	Finnish Communications Regulatory Authority (Sept 1st 2001) {formerly Telecommunications Administration Centre (TAC) 1988}	The Electricity Market Authority (SMK) (1995)		The Finnish Competition Authority (OFC)	

* At the Federal level.

1. Created to replace the Electricity Price Committee and the Gas and Heat Price Committee.

	Telecommunication	Energy	Financial sector	Competition authority	Other areas
France	L'Autorité de Régulation des Télécommunications (ART) (5 January 1997)	Electricity Regulation Commission (March 2000)		Conseil de la Concurrence (The Competition Authority)	
Germany	Regulatory Authority for Telecommunications and Posts (Reg TP) (1 August 1996 ²)			Bundeskartellamt (The Federal Cartel Office)	
Greece	National Post and Telecommunications Commission (EETT) (1992) ³		Capital Markets Commission (1996)	Competition Committee (1991, strengthening an existing body)	
Hungary	Communication Authority, HIF (1993)			Office of Economic Competition, HCO (1990)	
Iceland	Post and Telecommunication Administration (PTA) (1999)				
Ireland	Director of Telecommunications Regulation (ODTR) (June 1997) ⁴	Commission for Electricity Regulation, CER (1998)		Irish Competition Authority (1991)	Airports Regulatory Body (2001)
Italy	Communications Authority (for telecoms, television, and publishing) (1997)	Energy Authority (1995)	Pre-1990	Competition Authority (1990)	Agency for Protection of Personal Data (1996) Agency for Surveillance of Public Procurement (1994)
Japan			Financial Supervisory Agency (1998)	The Japan Fair Trade Commission (Pre-1990)	
Korea		Anticipated 2001	Financial Supervisory Commission (1998, unifying several separate bodies)	Korea Fair Trade Commission (1990, building on earlier bodies)	
Luxembourg	Institut Luxembourgeois des Télécommunications (ILT) (21				

2. The Regulatory Authority was set up as provided for by the Telecommunications Act, in force since 1 August 1996 but only took up its work on 1 January 1998.
3. Established in 1992 by Act 2075 under the name The National Telecommunications Commission (EET), EET actually commenced its operation in summer 1995.
4. It was assigned regulation of postal services in 2000.

	March 1997)				
	Telecommunication	Energy	Financial sector	Competition authority	Other areas
Mexico		Regulatory Energy Commission, CRE (1995)		Federal Competition Committee (1993)	
Netherlands	Independent Posts and Telecommunications Authority (OPTA) (1997)			Netherlands Competition Authority, NMA (1998)	
New Zealand				Commerce Commission	
Norway	Norwegian Post and Telecommunications Authority (NPT) (Year?)			The Competition Authority (NCA)	
Poland					
Portugal	Instituto das Comunicações de Portugal (ICP) (1989)	Entidade Reguladora do Sector Electrico (ERSE)		The Competition Council	
Slovak Republic	Office of Telecommunications (1st July 2000)				
Spain	Commission for the Telecommunication Market (CMT) (1997)		National Commission of the Securities Market, CNMV (1997, reformed)	The Spanish Competition Tribunal (Pre-1990)	Commission of the Tobacco Market, CTM (1998)
Sweden	Post-och telestyrelsen, the Swedish National Post and Telecom Agency (NPTA) (1 March 1994) (formerly Telestyrelsen, the Swedish National Telecom Agency, founded on 1 July 1992)	Swedish National Energy Administration (1 January 1998)		The Competition Authority	
Switzerland	Communications Commission (ComCom) (1997)			The Competition Commission	
Turkey	Telecommunication Board (2000)	Energy Market Regulatory Board (2001)	Banking Regulation and Supervision Agency (1999) ⁵ ; Capital Markets Board (1982)	The Turkish Competition Board (1994) ⁶	Radio and Television Supreme Council (1994); Sugar Board (2001)

5. Started to operate only on August 31, 2000.

6. Started to operate only in 1997.

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	Telecommunication	Energy	Financial sector	Competition authority	Other areas
	Telecommunication	Energy	Financial sector	Competition authority	Other areas
United Kingdom	Office of Telecommunications (OFTEL) (1984)	Office of Gas and Electricity Regulation (OFGEM) ⁷ (1999)		The Competition Commission	
United States	Federal Communications Commission (FCC) (1934)	Federal Energy Regulatory Commission (FERC) ^{8*} (1 October 1977); Different State Public Utility Commissions	Pre-1990	Department of Justice (DOJ); Federal Trade Commission (FTC) Pre-1990	

Source: OECD, various studies; IEA 'Regulatory Institutions in Liberalised Electricity Markets'. Paris.

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- 7. Formed by combining the functions of the former Office of Gas Supply (OFGAS) and the Office of Electricity Regulation (OFFER).
 - 8. To replace the Federal Power Commission.

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

235. However, several risks associated with independent regulators that could reduce longer-term regulatory quality in these vital infrastructure sectors.⁴⁶

- **Independent regulators may slow structural change**, losing potential gains to consumers. Regulators are often established on sectoral lines and may tend to obstruct convergence between sectors and the emergence of new business models. Similarly, as regulators proliferate, institutional rigidities may increase.
- **The risk of capture is high**, particularly with sectorally defined regulators. Similarly, over-regulation may result where static institutions wish to guard their *raison d'être*.
- **Democratic accountability may be inadequate**. Independence needs to be balanced with accountability mechanisms to avoid creating “governments in miniature”. Accountability must be maintained through well-designed statutes, including executive oversight and powers of direction, strict procedural requirements, reporting mechanisms, public consultation and substantive judicial review.⁴⁷
- **Independent regulators may contribute to the fragmentation of governmental policies and actions**, in particular in the case of competition policy. As sectors restructure and become more competitive, sector-specific issues become less important vis-à-vis general competition issues. But inertia and resistance from the regulator is likely to impede transfers of power to the overarching competition regulator. Weaknesses in the judiciary and/or legislative branch have also an impact on the overall performance of the independent regulators.

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

237. Accountability to ministers and to the parliament is a continuing concern that no country has addressed to its satisfaction. Replacing direct political accountability based on ministerial responsibility with managerial/technical accountability between regulators and ministries as well as parliament can create new potential problems. There is the risk that such parliamentary overview will be too loose, allowing the regulator too much or inappropriate discretion, particularly given concerns as to the effective capacities of many Parliaments to exercise review functions in relation to complex, technically driven regulatory missions such as those of many independent regulators. On the other hand, it is important that accountability requirements do not compromise the necessary operational independence of the regulators. A too interventionist Parliament may have the effect of driving the regulator toward making specific market decisions not linked to its regulatory mission. One of the few countries to launch a wide debate on the accountability of the new regulatory bodies is Ireland. In March 2000, the Minister for Public Enterprise published a policy paper entitled *Governance and Accountability in the Regulatory Process: Policy Proposals*. The document attempts to resolve concerns about a ‘democratic deficit’ which could have an impact on the credibility and legitimacy of the new regulatory institutions.⁴⁸

238. It is too early to identify comprehensive best practices concerning independent regulators. Though the tendency to create new bodies is certain across OECD membership, some countries have lately started to merge regulators or withdraw powers over economic sectors as competition sets in. A case in point is Canada, in which the degree of independence of many regulators has been progressively reduced and/or constrained by accountability measures and co-ordination mechanisms.⁴⁹ However, the above identifies some of the more important policy risks involved. Consideration of the use of independent regulators, and of the design of such regulators, should include careful consideration of issues including the following:

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

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

Box 14. Conclusions on good practices in independent regulators

Is this tool still recommended as a best practice? Yes, but careful design is needed to avoid substantial policy risks.

Are there clear best practices? Not yet, but good practices are needed as a benchmark. The OECD is attempting to develop good practices in design and operation of these arms-length regulatory bodies.

5. THE “STATE OF PLAY” FOR REGULATORY POLICY

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

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

242. Third, the OECD’s work on governance includes a substantial emphasis on regulatory policies as a fundamental part of the work necessary in pursuit of its goals of transparency, accountability, legitimacy, efficiency and policy coherence.⁵⁰ This constitutes recognition that regulatory policy is a central element of the wider business of government and an integral part of its overall management capacities.

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

undertaken towards implementing quality regulatory policies in practices remains highly uneven among OECD countries, while it seems that, in some dimensions, the gap between leaders and followers is raising.

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

Government policies and supporting mechanisms

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

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

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

Regulatory management and reform tools

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

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

250. The use of consultation itself is considerably further advanced, reflecting the longer standing nature of this tool, as well as a stronger commitment on transparency and accountability by governments⁵¹. Consultation has, and will continue to, serve broader, governance based ends. However it has been significantly adapted to, and integrated with, the regulatory quality agenda. Where RIA and consultation have been integrated, the provision of additional information prior to consultation commencing has necessarily assisted consultation in serving the wider goals of accountability and transparency, as well as helping it fulfil the RIA related function of improving the empirical basis for decision-making. Consultation has also become progressively more open to the general public and to others beyond the major elements of “corporatist” style discourse in most Member countries. Nonetheless, the efficiency of consultation has been questioned in some countries. New and complex issues are appearing, such as how to deal with consultation fatigue or to avoid capture of consultation mechanisms by interest groups overriding majority or expert opinions. A particular challenge concerns the search for a new balance between public consultation, flexibility and rapidity in rulemaking.

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

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

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

Dynamic aspects of regulatory quality

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

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

Implementation of regulatory policies

256. Section 4 of this report shows that there is a developing understanding of the important institutional capacities required for implementing high quality regulation in practice. There has been substantial experimentation with different forms of specialist bodies to support regulatory policies, both within and outside the administration. This experimentation continues, in particular in relation to bodies located outside the administration, though there has been a clear trend toward relocating internal bodies within the centre of government – *i.e.* in chief ministers' department or finance ministries.

257. While there is emerging consensus on the location of these bodies, and substantial similarities in the roles they undertaken, there certainly remain substantial problems in terms of the inadequacy of both resources and authority, which limit their ability to deliver on ambitious reform agendas. To some degree, the lack of formal authority may be an inevitable result of wider conventions of ministerial and departmental autonomy and the direct political accountability of ministers, and may be a long-term constraint requiring innovative and adaptive solutions. However, it seems that reluctance to provide formal authority can also be linked to the lack of resources. Both may be explained by a lack of detailed understanding of the nature and breadth of the regulatory policy agenda at the political level, together with continued hostility to aspects of it from among vested interests within the administration. This points to the necessity of continued and strengthened dialogue between administrative and political levels of government to build these bridges and deepening understanding of the potential of reform to deliver government objectives. Advisory committees and other “external” reform bodies may have as well an important role as advocates of better regulation in the general framework.

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

259. The issue of regulatory compliance – both with individual rules and with whole regulatory regimes and policies – continues to be largely unexplored. Much more effort is required to measure compliance rates, determine the sources of key compliance stresses and refine and expand tools to improve compliance levels, and thereby regulatory effectiveness. These challenges are particularly acute in the case of emerging and transition countries as well as those countries that are rapidly harmonising regulations and converging with higher regulatory standards. A comprehensive approach to these issues would incorporate both *ex post* review of the effectiveness and efficiency of existing regulations as well as assessment of enforcement efforts and capacities and the development of strategic approaches to their improvement.

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

Integrating the elements of regulatory policy

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

262. In addition, the links between the regulatory reform and competition policy agendas have only begun to be forged. The increasing focus on regulatory reform as being, in significant measure, a process of reducing regulatory distortions of markets and providing frameworks in which effective competition can operate clearly favours the development of policy linkages in this respect. Similarly, the synergies between regulatory reform and trade policy must continue to be pursued. As tariffs, quotas and other at the border controls are dismantled, the number of trade disputes related to regulatory issues is increasing alarmingly. These new non-tariff barriers can be more complex and less transparent, especially as they often include subnational market openness dimensions. Moreover, globalisation and is requiring a degree of formalism in the national regulatory management system to support market confidence and avoid undue preferences for insiders or 'big players'. This is a particularly acute challenge for small and participatory countries.

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

Policy successes and failures

264. The above considers the “state of play” at the level of policies and institutions, but consideration of the direct evidence for the successes and failures of regulatory reform must also be attempted, notwithstanding (or perhaps especially because of) the widespread lack of evaluation efforts and the difficulties of assessing a work in progress.

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

266. New occupational health and safety legislation has very often been characterised by a move toward performance-based rules and the adoption of wide-ranging legislation based on general duties. Thus, the legislative structure has generally been simplified and made more consistent across related areas, while at the same time becoming more flexible and output oriented.

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

268. Some of the best known regulatory failures have arisen in the context of the privatisation and/or introduction of competition to industries that had previously been operated as government monopolies, such as the energy and telecommunications sectors. It is unsurprising that such failures have been relatively common. The regulatory task, of designing a pro-competitive system of regulation based on the separation of potentially competitive and natural monopoly sections of “network” based industries, was an unfamiliar one for governments. Moreover, rapid technological changes often unsettled assumptions as to what elements of the industries were contestable and what had natural monopoly characters, while the issue of “convergence” added additional degrees of difficulty.

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

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

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

Communication of the impacts of reform

272. Consumer benefits must not only be delivered, they must be seen to be delivered. A long-standing observation about the nature of regulatory reforms that, while the losers from reform are often a small group, each of whom individually bears relatively large losses, the gainers from reform are often large, dispersed groups, to whom the gains are small and often invisible. This characteristic of reform has meant that some alleged “regulatory failures” have been more apparent than real. For example, a substantial backlash against Australia’s National Competition Policy initiative recently developed, particularly within rural and regional communities, who perceived that they, as a group, had been losers as a result of the implementation of the policy. An independent report commissioned by the federal government⁵² found that this perception was not supported, with all but one region having benefited overall from the policy and many of the supposed costs of the policy actually resulting from other changes. Despite this evidence, the perception has remained little altered in many communities, arguably indicating the importance of acting to argue the case for reform before such negative perceptions become entrenched.

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

Summary

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

275. Moreover, this activity is not confined to OECD countries. Regulatory reform is prominent on the agenda of many other inter-governmental forums. For example, the Asia Pacific Economic Co-operation (APEC) has adopted regulatory reform principles which parallel those of OECD.⁵³ Late 1999, a group of

European high-officials started an ambitious project to review rule making practices in order to improve European regulation across levels of governments.⁵⁴ The European Union funded SIGMA programme provides regulatory policy advice to economies in transition in eastern and central Europe. The World Bank and the Asian Development Bank have developed regulatory reform programmes, while most of these organisations are drawing on OECD expertise and the experience of its Member countries in designing and implementing their programmes. As well, the World Trade Organisation has also been discussing the need to improve transparency procedures in rule making.

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

6. AN AGENDA FOR THE FUTURE – EMERGING ISSUES FOR REGULATORY POLICY

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

Regulatory policies

Linking regulatory policy to the governance agenda

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

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

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

281. Essential linkages that should be explored and developed further in this regard include the importance of transparency and accountability, trust in government, policy responsiveness and policy coherence. A particular challenge to this inter-linkages dimension should be to better understand and respond to regulatory failures. In all of these areas, pursuit of these governance values can directly assist the implementation of regulatory policy reforms and the achievement of its objectives.

Broadening the application of regulatory policies

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

283. It is clear that *sub-national governments* have been active reforming their regulations and regulatory capacities for some time in a minority of countries, particularly those with federal structures. In some cases, such as Australia, they have been drivers of the reform agenda. However, the experience of Mexico, where almost all of the 31 State and territory governments have now adopted a regulatory reform policy, indicates the potential for national governments to play a leading role in “kick-starting” reform activity at State and regional government levels. Alternatively, substantial experience in Australia, including that of the National Competition Policy, indicates the potential for co-operatively negotiated reform agendas that embrace both federal and state governments.

284. *Supra-national organisations* have been little involved in regulatory quality issues, and yet their influence on the shape of regulation in most countries continues to increase. The European Commission has been an important player, adopting policy innovations such as the mutual recognition model and a range of innovative alternative means of product certification, as well as adopting guiding legislative principles such as proportionality and subsidiarity. Even there, however, much remains to be done – as recognised by the programme of reform of RIA requirements currently being undertaken. Similarly, despite the increasing tendency to adopt international standards in regulation, little has been done by most standard setting bodies to adopt quality control mechanisms such as the use of RIA in a comparative policy context. Substantive reform is needed in these areas if national regulatory quality policies are not to be undermined by the failures of other players.

285. *Parliaments* have essential responsibility for assuring regulatory quality in the broadest sense. However, there appears to be considerable scope for development of mechanisms and approaches to improve performance. For example, in some cases legislation now exists requiring specialised scrutiny committees to scrutinise regulation and report to the parliament against a specific range of criteria. This may contribute to the adoption of more consistent and methodical approaches to scrutiny, as well as improved transparency. Moreover, aligning such criteria with the regulatory quality approaches adopted within the administration would effectively provide for reinforced quality controls and may help to embed the required cultural changes within the administration.

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

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

Promoting understanding of the economic importance of regulation

288. It was noted at the beginning of this report that regulation constitutes a less visible means for government to divert private resources to social ends than fiscal tools. Other OECD publications⁵⁵ have pointed to the very great uncertainty as to the overall costs imposed by regulation – an uncertainty that is exceeded, however, by the total lack of reasonable estimates of regulatory benefits. This lack of a *quantitatively based understanding of the importance of regulation* is a fundamental impediment to the conduct of the broader debates to which the development of the regulatory policy agenda should give rise. Is there too much regulation, or too little? Is regulatory effort properly targeted? Is it possible to derive policies for targeting regulatory “expenditures” effectively?

289. Clearly, addressing this informational issue should be a high priority. Among the few estimates of aggregate regulatory costs that do exist is the suggestion that they may amount to 10% or more of GDP (see above). Even this estimate is statically based, and ignores dynamic costs to the economy that are increasingly likely to be seen as larger still, and more important to long term economic health. If costs are of this order of magnitude, the lack of understanding of them, and the associated lack of transparency and accountability in relation to regulatory “expenditures” contrast starkly with the fiscal budget and the disciplines on government associated with it.

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

291. Thus, developing the tools to enable a better understanding of the economic importance of regulation should constitute a priority for further development of the regulatory policy agenda. This should

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

Ex post evaluation of policies and regulation

292. A central challenge for most OECD countries is to enhance the *ex post* evaluation of their regulatory policies, tools and institutions. No doubt this is a difficult task. Overall, the performance appraisal of framework conditions is in its infancy. Shortages of funds militate even further to ‘look back’ instead of moving forward. All organisations, including those responsible for the regulatory policies, are naturally threatened by the outcomes they may not foresee. However, the understanding of failures as well as successes are crucial for moving faster and reaching deeper. An appropriate starting point could be to better monitor and publish assessments of compliance with the specific tools such as RIA, the use of alternative, public consultation, or enforcement measures. Systematic weaknesses and non-compliance could be identified and addressed. Publication of report cards to regulators may trigger a virtuous competition towards best practice. A medium term objective would be to explore new evaluation methodologies.

Regulatory institutions

Building regulatory policy institutions

293. Understanding of the most effective institutional basis for driving a regulatory policy agenda remains limited. This report has discussed the roles of institutions such as *specialised oversight bodies* in the administration, advisory committees and independent regulators. In none of these areas is there a clearly defined set of best practices. In the case of specialised oversight bodies, with which there is the longest experience to date, good practices are emerging, as discussed above. However, the extent of their adoption is limited, while more work is clearly needed to address the issue of how these bodies can be positioned and given the resources and authority to carry out the tasks required of them, or how they can best balance their challenge, advocacy and guidance roles. These tasks typically range from providing technical support and training and assessing RIA, to raising awareness and understanding of regulatory reform policies and assisting in achieving the required cultural changes within the administration.

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

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

parliamentary context of empirical information obtained through application of RIA, consultation and other tools in the development of legislation within the administration.

296. Also quite undeveloped are best practices for the use of *external advisory bodies* to government. This is potentially an extremely complex area, since the nature and composition of these bodies seem to vary widely across different Member countries. For example, bodies like the Netherlands' Social and Economic Council have a constitutional role and a long history, while bodies such as Australia's Small Business Deregulation Task Force were established by administrative decision, were *ad hoc* in nature and were created, in essence, to perform a single function. In between are various standing committees that were created administratively and have broader functions, such as the United Kingdom's Better Regulation Task Force.

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

Regulatory practices

Addressing regulatory complexity and uncertainty

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

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

“Third party” standards and grey regulation

300. The trend for regulators to adopt large quantities of technical material into the body of regulations has implications for regulatory quality beyond those of complexity. An important concern is that such standards are generally not designed to function as legislative instruments, necessarily giving rise to questions of appropriateness (*e.g.* are the standards specifying “best practice”, or “minimum acceptable

practice”) as well as enforceability issues. Moreover, the use of “grey regulation” – that is, the adoption of guidelines and other material of uncertain legal status – necessarily raises questions of transparency and accountability.

301. Thus, an important future challenge for the regulatory policy agenda is to reach a fuller understanding of the implications of these changes to the form of regulation and seek to specify rules or guidelines that can maximise the benefits of these instrument while minimising the costs. A key element of this may be to improve understanding of the different forms or regulatory harmonisation and uniformity, seeking to identify the circumstances in which each may be appropriate and means of adopting them most efficiently and effectively.

“Outsourcing” regulatory functions

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

303. The scope for development in such trends merits further investigation. For example, at present, these “outsourcings” are generally limited to situations in which the regulatory approval is based solely on the determination of compliance with set technical or design standards, rather than the exercise of discretion or judgement in applying rules or policies that are open to interpretations. The scope and desirability of applying these innovations to this wider field should be considered. In addition, the conditions for success in “outsourcing” these roles, including matters such as the role of accreditation and professional indemnity insurance, should be investigated further.

7. CONCLUSION: UPDATING THE 1995 RECOMMENDATION ON REGULATORY QUALITY

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

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

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

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

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

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

308. The development of an updated Recommendation on Regulatory Quality, incorporating a new checklist with the characteristics enumerated above, would constitute an important further step toward defining and implementing the regulatory governance agenda in OECD countries and should be considered to be a high priority for future regulatory policy efforts.

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

NOTES

1. See, for example *Governance Outreach Initiative: Progress Report and Next Steps* Report to the OECD Council, C(2000)111, p. 10.
2. See *The OECD Report on Regulatory Reform*. OECD, Paris, 1997. Vol. 2, p. 193, "Regulatory quality and public sector reform."
3. See *The OECD Report on Regulatory Reform*. OECD, Paris, 1997. Vol. 2.. "Regulatory quality and public sector reform."
4. *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* OECD, Paris, 1995.
5. Responses to the two surveys are now integrated on the OECD Regulatory Capacities Database. 26 and 28 countries participated respectively to the 1998 and 2000 surveys. Care should be nonetheless taken as the responses are based on self-assessment only.
6. OECD Regulatory Capacities Database, 2000.
7. See, for example, the experience of Denmark, discussed in *Regulatory Reform in Denmark*. OECD, Paris, 2000.
8. General Accounting Office (1997), "Agencies' efforts to eliminate and revise rules yield mixed results", p. 2.
9. *Report by the Public Management Service of the OECD on Regulatory Impact Assessment in New South Wales*. PUMA/OECD. Published by the Regulation Review Committee, Parliament of New South Wales, Report No. 18/51, January 1999. See especially pp. 38-40.
10. See OECD (2002, forthcoming) *Regulatory Reform in Canada*, Background report II, Paris
11. Remark by an environmental policy official about a national recycling programme, quoted in *The Economist*, 29 May 1993, "Survey: Environment," p. 18.
12. OECD (1997a), Paris.
13. The following several paragraphs are adapted from Jacobs, Scott (1997) "An overview of regulatory impact analysis in OECD countries," in OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris.
14. OECD (2002 forthcoming), *Regulatory Reform in the United Kingdom: Background Report on Government Capacities to Assure High Quality Regulation*, Paris.
15. American Enterprise Institute for Public Policy Research (1996), *Benefit-cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles*, 12 February, Washington, D.C., p. 3.
16. For example, safety regulation on aeroplanes can reduce risks of air crashes, but if air ticket prices go up, some passengers will switch to car travel, which is much more risky. Because the policy goal was not clear enough – save lives rather than prevent air crashes at any cost – a safety regulation may cause more deaths than it prevents. In this case, the more costly and apparently safe the regulation, the more perverse will be the outcome.

17. *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague, 1997. See S. Formsma, "Assessment of Draft Legislation in the Netherlands", p. 221.
18. OECD (2002, forthcoming), *Regulatory Reform in Canada: Background Report on Government Capacities to Assure High Quality Regulation*, Paris; and The Regulatory Consulting Group Inc & the Delphi Group (2000), "Assessing the Contribution of Regulatory Impact Analysis on Decision Making and the Development of Regulations". Ottawa, August.
19. Hahn, Robert – reference to be included.
20. *Choices of Policy Instruments*, PUMA(97)1, OECD, Paris, 1997, p. 3.
21. The Regulatory Indicators Questionnaire included questions about the use of regulatory alternatives in the areas of environmental regulation; health, safety and consumer protection regulation; and employment regulation.
22. OECD (1997), *Evaluating Economic Instruments for Environmental Policy*, Paris
23. Gunningham N, Grabosky P, Sinclair D (1998), "Smarter Regulation: Developing Environmental Policy", Clarendon Press, Oxford, 1998.
24. OECD (2000) *Regulatory Reform in Hungary: Background Report on Government Capacities to Assure High Quality Regulation*, Paris.
25. This is often the case in sectors regulated by concessions granted for a fixed time without open tendering, M. D'Alberti (1998).
26. World Bank (1990), *Mexico Industrial Policy and Regulation*, pp. 23-28.
27. OECD (2002, forthcoming) *Regulatory Reform in Turkey: Background Report on Government Capacities to Assure High Quality Regulation*, Paris.
28. OECD (2001) *Businesses' Views on Red Tape. Administrative and Regulatory Burdens on Small and Medium-sized Enterprises*, Paris.
29. Australia, Austria, Belgium, Finland, Iceland, Mexico, New Zealand, Norway, Portugal, Spain, and Sweden.
30. OECD (1999) *Regulatory Reform in Japan: Background Report on Government Capacities to Assure High Quality Regulation*, Paris
31. OECD (1999), *Regulatory Reform in Mexico*, "Background Report on Government Capacities to Assure High Quality Regulation", Paris and OECD (2002), *Regulatory Reform in Poland*, "Background Report on Government Capacities to Assure High Quality Regulation", Paris, forthcoming.
32. To some, transparency means that the state does what it says it will do, a basic principle of the rule of law. To others, it means that all regulated entities have equal access to regulatory processes, and equally understand their rights and obligations. Transparency can also mean that stakeholders play a role in setting policies that affect them. To yet others, it means that the state is neutral between market players, or that policy results are known and accountable. All are facets of a larger issue.
33. OECD Regulatory Indicators Questionnaire, 2000.

34. See OECD (1999), *Regulatory Reform in Mexico*, "Background Report No.2: Administrative Capacities to Produce High Quality Regulation", Paris.
35. Much of this section is from OECD (2000) "Reducing the risk of policy failure: challenges for regulatory compliance," (Paris). See also OECD (1993) "Improving Regulatory Compliance: Strategies and Practical Applications in OECD Countries," (Paris).
36. Genn, H. (1993), "Business responses to the regulation of health and safety in England" 15, *Law & Policy* pp. 219-233, p. 227.
37. Coffee, J. (1981), "No soul to damn: No body to kick: An unscandalized inquiry into the problem of corporate punishment," 79 *Michigan Law Review*, pp. 386-459.
38. Overly legalistic regulation can also make compliance too costly and regulation too complex to know and understand.
39. Bardach, E. & Kagan, R. (1982), *Going By the Book: The Problem of Regulatory Unreasonableness*, Temple University Press, Philadelphia, p. 107.
40. OECD (1999) *Regulatory Reform in Mexico: Background Report on Government Capacities to Assure High Quality Regulation*, Paris.
41. Information on the T11 was supplied by Dr. Dick Ruimschotel, PO Box 2681, 1000 CR Amsterdam. Ph. +31 20 520 0 420, Fax: +31 20 520 0 421.
42. Luxembourg and Slovakia are not included in this figure.
43. See OECD (1997), *Report on Regulatory Reform: Volume 2-Thematic Studies*, S. Jacobs, et al, "Regulatory quality and public sector reform," p. 211.
44. OECD (2002, forthcoming) *Regulatory Reform in the United Kingdom: Background Report on Government Capacities to Assure High Quality Regulation*, Paris.
45. Boards and other regulatory commissions have been part of the regulatory scenery in countries like the United States in Canada since the 1920s if not before. However, the widespread privatisations of the 1980s and 1990s have seen much greater use of institutions of this type in a wide range of OECD countries.
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46. See OECD (2002, forthcoming) *Key Issues in the Design of Economic Regulatory Institutions for the Network Industries*, Paris; and Jacobs, Scott (2001) "Building Credible Regulators for Liberalized Utility Sectors", Presented At the First Workshop of The APEC-OECD Co-operative Initiative on Regulatory Reform, 19–20 September 2001, Beijing, China, <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-2-nodirectorate-no-20-8450-2,FF.html>
47. See Majone, G. (1993), *Controlling Regulatory Bureaucracies: Lessons from the American Experience*. EUI Working Papers in Political and Social Sciences, European University Institute, Florence, Italy.
48. For discussion of governance and accountability see Government of Ireland, Department of Public Enterprise, 2000, *Governance and Accountability in the Regulatory Process: Policy Proposals*, March, Dublin. For a fuller discussion of 'democratic deficit' in the regulatory process, see Ferris, Tom (2000), "Regulation of Public Utilities", *Irish Banking Review*, Winter.

49. OECD (2002), *Regulatory Reform in Canada*, "Government Capacities to Assure High Quality Regulation", Paris, forthcoming.
50. See, for example, OECD (2000), *Governance Outreach Initiatives: Progress Report and Next Steps*, C2000(111).
51. OECD (2000), *Citizens as Partners. Information, Consultation and Public Participation in Policy-Making*, Paris.
52. Productivity Commission, 1999, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Canberra. www.pc.gov.au.
53. http://www.apecsec.org.sg/whatsnew/press/rel53_2000.html.
54. <http://www.cabinet-office.gov.uk/regulation/europe/mandelkern.htm>
55. See OECD (1997), *Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris, particularly Chapter 11.

