

**PUBLIC GOVERNANCE AND TERRITORIAL DEVELOPMENT DIRECTORATE
REGULATORY POLICY COMMITTEE**

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Draft OECD Recommendation on Regulatory Policy and Governance

25 May 2011

The draft recommendation was discussed by the Regulatory Policy Committee (RPC) in April 2011 and has been revised to take into account comments from delegates following consultation with the RPC Bureau.

This document is distributed for broad consultation; comments on the draft recommendation are welcome and should be sent to the Secretariat by July 1st 2011 at the address reg.reco@oecd.org.

Further information will be made available at the website: www.oecd.org/regreform.

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Public Consultation on the Draft OECD Recommendation on Regulatory Policy and Governance

1. The following paper introduces a draft Recommendation on Regulatory Policy and Governance and explanatory text. The Recommendation updates existing OECD instruments on regulatory reform and management adopted since 1995. The OECD intends to produce a Recommendation that covers regulatory policy, management and governance as a whole-of-government instrument that can and should be applied by sectoral ministries and regulatory agencies.¹

2. In undertaking this work, the OECD is organising comprehensive and open consultations. This process includes consultations with the OECD Business Advisory Committee (BIAC) and the OECD Trade Union Advisory Committee (TUAC), officials from regulatory agencies and ministries, the private sector, social partners and civil society at large.

3. The attached document contains *i)* draft recommendations, and *ii)* explanatory text and questions to guide the consultation process. The OECD is inviting the public to provide comments both on the specific recommendations as well as the explanatory notes.

Background

4. OECD Ministers requested in 1995 that the OECD examine the significance, direction and means of reform in regulatory regimes in member countries. The *1995 Recommendation for Improving the Quality of Government Regulation* was the first-ever international statement of regulatory principles common to member countries. Building on this fundamental text, and broadening it to embrace market openness, competition policy and microeconomic principles in a multidisciplinary framework, the OECD produced a *Report to Ministers on Regulatory Reform* in 1997. The report's recommendations have provided guidance to member countries to improve regulatory policies and tools, strengthen market openness and competition, and reduce regulatory burdens. Moreover, these recommendations have provided the basis for OECD country reviews of member countries carried out both in sectoral and policy areas.

5. The OECD's *2005 Guiding Principles for Regulatory Quality and Performance*, based on the evidence of the OECD country reviews carried out up to 2004, reflect the state of regulatory policy evolution at the time.² The Principles set out the importance of political commitment to regulatory reform, the desirable characteristics of good regulation, and the links with competition and the elimination of barriers to trade and investment. The Principles, which emphasise effective and continuous regulatory management in order to secure high-quality regulation, were complemented in parallel by the *APEC-OECD Integrated Checklist for Regulatory Reform*.

¹ Once the Recommendation is adopted by the OECD Council, common practice accords all OECD recommendations great moral force as representing the political will of member countries. There is an expectation that they will do their utmost to fully implement the Recommendation, although they do not have a strict legal obligation to do so.

² To date, 24 reviews of member countries have been completed as well as 3 reviews of non-members: Russia (2005), Brazil (2007), China (2008). This body of research is available at [/www.oecd.org/countrylist/0,3349,en_2649_37421_1794487_1_1_1_1,00.html](http://www.oecd.org/countrylist/0,3349,en_2649_37421_1794487_1_1_1_1,00.html). In addition, over the course of 2009 and 2010, the better regulation policies and practices of 15 member countries of the European Union have been reviewed under the framework of the 2005 Guiding Principles. The "EU15" reports can be found at [/www.oecd.org/document/52/0,3746,en_2649_37421_44216500_1_1_1_37421,00.html](http://www.oecd.org/document/52/0,3746,en_2649_37421_44216500_1_1_1_37421,00.html).

The Need for an OECD Recommendation on Regulatory Policy and Governance

6. While the 1995, 1997 and 2005 Principles remain relevant, their coverage should be expanded in the light of more recent experience, additional reviews, and the broad mandate of the Regulatory Policy Committee. Likewise, the forthcoming OECD “Regulatory Policy and the Road to Sustainable Growth,” which synthesises 10 years of OECD work on regulatory reform, calls for a revision and update of collective thinking on regulatory policy and governance.

7. For many countries the learning curve for regulatory policy and reform can be steep. And the challenge of implementation for all is great. As a number of recent OECD reviews show, even for countries at the vanguard, implementing the full pallet of regulatory policy and governance has not yet been fully explored. The Recommendation will help governments to adopt solutions to overcome those challenges and move the regulatory policy agenda forward.

8. The tools, policies and institutions of regulatory management continue to be fundamental to regulatory quality initiatives in government. But the field of regulatory policy is dynamic and a management focus, on which the existing Principles are largely based, is not enough. The Recommendation will need to explicitly consider regulatory governance and how to best integrate it into more traditional management practices.

9. The crisis and issues such as climate change have raised expectations that good regulatory systems will be more effective in averting serious crisis in the future. This presents an opportunity to exploit the unrealised potential and relevance of regulatory policy. This is made more challenging by the fact that policy objectives are becoming more complex, increasingly concerned with global issues, and affect more diverse constituencies. The institutional breadth and diversity of the players is greater than ever. The Recommendation will need to reflect on how regulatory tools and institutions can help government make difficult and often times competing strategic choices, even in conditions of crisis.

10. There is also a need to get closer to the heart of policy-making processes. Fiscal constraints increase the imperative for more efficient policy right across government. The existing OECD Principles, largely through work on RIA, offer a sound foundation for evidence-based approaches policy making. The Recommendation will need to consider how evidence-based approaches can guide the *real politik* approach to policy making which involves negotiation and political compromise.

11. Cultural change is required inside government if the regulatory reform agenda is to be fully realised. Regulatory policy and governance is fundamental to public sector reform as it also helps to increase public sector efficiency through improving regulation inside government and fostering policy coherence with e-government. Governments have to channel the collective intelligence of society to identify and resolve problems. They have to encourage social innovation and promote resilience through participative approaches to public policy decisions. The pursuit of this ambition involves cultural change and overcoming the apparent prevalence of resistance to reform and even reform fatigue in public administration. To address these challenges, the Recommendation may have to move beyond purely technocratic prescriptions and delve further into behavioural aspects to both economics and public administration.

Draft

OECD Recommendation on Regulatory Policy and Governance

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality, with clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, distributional effects are considered and that the net benefits are maximised.
2. Orient regulatory policy around the needs of users and adhere to principles of open government, including transparency and participation. This includes providing meaningful opportunities (including online) for the public to be consulted in the process of preparing draft regulatory proposals and the supporting analysis.
3. Establish institutions and mechanisms to actively pursue oversight of regulatory policy procedures and goals, support and implement regulatory policy, and foster regulatory quality.
4. Integrate Regulatory Impact Assessment (RIA) early into the policy process for the formulation of new regulatory proposals. Clearly identify policy goals and evaluate if regulation is necessary and how it can be most effective in achieving those goals.
5. Conduct systematic programme reviews of the stock of regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and fit for purpose.
6. Regularly publish reports on the performance of regulatory programmes and the public authorities applying the regulations, including compliance with regulatory quality measures such as the performance of Regulatory Impact Assessment (RIA) and reviews of existing regulations.
7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, and avoid the risks of conflict of interest, bias or improper influence.
8. Establish systems for the review of the legality and procedural fairness of regulations, and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that businesses and citizens have access to these systems at reasonable cost and receive decisions in a timely manner.
9. Apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.
10. Promote regulatory coherence through appropriate co-ordination mechanisms between the national and sub-national levels of government. Identify cross cutting regulatory issues at all levels of government, including the supra national level; promote coherence between regulatory approaches and avoid duplication or conflict.

11. Foster the development of regulatory management capacity at sub-national levels of government.
12. Ensure that regulatory measures contemplated in all fields take into account any international frameworks for cooperation in the same field. Regulations should be designed to take into account their possible effects on parties outside the jurisdiction where they are to be applied. Consultation should include any external interests with the aim of avoiding unnecessary international frictions.

1. Explicit Policy on Regulatory Quality

12. Regulation is one of the three key levers of formal state power (together with fiscal and monetary policy). Of critical importance in shaping the welfare of economies and society, it may also be considered as the ultimate horizontal policy; when carried out effectively, regulatory policy and government supports the formulation and implementation of all other policies. The objective of regulatory policy is to ensure that the regulatory lever works effectively, so that regulations and regulatory frameworks are in the public interest.

13. Regulatory reviews have consistently highlighted the importance of adopting a “whole-of-government” policy, able to take into account in a dynamic perspective the interplay between the different institutions involved in the regulatory process and to overcome the obstacles created by a traditional compartmentalisation of functions. The adoption of a “whole-of-government” policy implies the capacity to devise the mechanisms of co-operation needed to achieve defined policy objectives.

14. If a “whole-of-government” perspective is essential in order to capture the interrelations which allow a proper functioning of central government and determine the quality of regulation, the promotion of regulatory quality culture can help spread a sense of increased responsibility for reform results. In many countries, administrations have not yet fully integrated the need for regulatory quality into their policy processes.

15. Ensuring the quality of the regulatory structure is a dynamic and permanent role of government. Governments must be actively engaged in assuring the quality of regulation, not reactively responding to failures in regulatory quality. In advanced countries this concept, which implies the need to link the evaluation of existing regulations as they operate to the design of new regulations, is evolving into regulatory governance. Regulatory governance is grounded in the principles of democratic governance and engages a wider domain of players including the legislature, the judiciary, sub national and supra national levels of government and standard setting activities of the private sector. Regulatory policies, tools and institutions make up the elements of the analytical framework that the OECD has advocated for a successful approach to regulatory governance.

16. Political commitment to regulatory reform has been unanimously highlighted by country reviews as one of the main factors supporting an explicit policy on regulatory quality. An effective regulatory policy should be adopted at the highest political level, and the importance of regulatory quality should be adequately communicated to lower levels of the administration. Political commitment can be demonstrated in different ways. The creation of a central oversight body in charge of promoting regulatory quality is a key element to show the political commitment of government to spread awareness among the different actors involved in the regulatory process. That said, the call for strong leadership should not be read as endorsing a top-down approach to reform or a preference for unilateral action by the executive. OECD (2010c) suggests that successful leadership is often about winning consent rather than securing compliance.

17. A key component for a successful system of regulatory quality management is the adoption of a clear political commitment to the established principles for regulatory reform. Governments need to ensure that there is effective leadership and oversight of the regulatory governance process. In addition, the assignment of specific responsibilities for all aspects of regulatory management and reform and the creation of a clear framework of accountability are essential for the success of a regulatory reform programme.

18. The appointment of responsibility for regulatory policy at Ministerial level helps to ensure the political commitment to the goals of the regulatory policy. However, the range of programme

responsibilities within a system of regulatory management is complex and necessarily spread across government. They include portfolio and sector specific responsibilities for ensuring that regulatory quality measures are applied, such as for example, the application of regulatory impact assessment, or simplification measures to the development of regulations in particular policy areas. Beyond the portfolio responsibilities, however, there is also a need to allocate the system wide responsibilities for monitoring and promoting the success of the government wide policy on regulatory reform.

19. A clear framework of accountability would identify the responsibilities of Ministers to ensure that the requirements of the regulatory management system are implemented within their portfolio areas, as well as the allocation of system wide responsibilities for regulatory policy and governance. System wide responsibilities should be assigned to a specific Ministerial role in cabinet to provide leadership and oversight of the regulatory governance process, and monitor and report on the co-ordination of regulatory reform activities across portfolios. The responsibility includes preparing a report on the performance of the regulatory management system, and identifying opportunities for system wide improvements to regulatory policy settings and regulatory management practices.

20. In some aspects of regulatory management this systemic role may necessarily be shared with the functions of other Ministers whose roles compliment the efficient functioning of regulatory management system. This may include, for example the role of the Minister for Justice in ensuring the legal quality of regulations and maintaining the legislative database, or the role of the Treasurer in promoting government wide economic policy. There is nevertheless merit in assigning a specific role for Regulatory Policy to a lead Minister.

21. This practice is in fact already broadly adopted across OECD. In 2008, 24 jurisdictions reported that their governments had assigned responsibility for promoting government-wide progress on regulatory reform to a specific Minister.

22. Questions for discussion:

- How can we ensure that the new Recommendation on Regulatory Policy and Governance will be useful for member countries and facilitate the practical application of the OECD analytical framework for improving regulatory governance?
- Does the draft statement provide guidance to countries currently dealing with the challenges of regulatory reform as well as to those aspiring to continuously improve their systems of regulatory governance?

Box 1. Draft recommendation on explicit policy on regulatory quality

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality, with clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, distributional effects are considered and that the net benefits are maximised.

1.1 Regulatory policy defines the process by which government, when identifying a policy objective, decides whether to use regulation as a policy instrument, and proceeds to draft and adopt a regulation through evidence-based decision-making consistent with good governance practices. An explicit policy to ensure that regulations and regulatory frameworks serve the public interest should commit governments to:

- Adopt a continuous policy cycle for regulatory decision-making, from identifying policy objectives to regulatory design to evaluation;
- Use regulation when appropriate to achieve policy objectives, applying the *1995 OECD Recommendation on Improving the Quality of Government Regulation*;

- Maintain a regulatory management system, including both *ex ante* impact assessment and *ex post* evaluation as key parts of evidence-based decision-making;
- Articulate regulatory policy goals, strategies and benefits clearly;
- Develop, implement and evaluate a communications strategy to secure ongoing support for the goals of regulatory quality.

1.2 To achieve results, governments should:

- Consider policies, institutions and tools as a whole, at all levels of government;
- Adopt a balanced approach, recognising that specific components such as impact assessment and administrative simplification are not a substitute for a comprehensive programme;
- Systematically review the stock of regulations periodically to identify and eliminate or replace those which are obsolete or inefficient;
- Commit to apply regulatory policy principles when preparing regulations that implement sectoral policies, to ensure that regulations serve the public interest in promoting and benefitting from trade, competition and innovation while reducing system risk;
- Monitor the impact of regulations and regulatory processes.

1.3 Governments should develop and maintain a strategic capacity to ensure that regulatory policy remains relevant and can adjust and respond to emerging challenges. The design of Institutional frameworks and resources necessary to implement regulatory policy and discharge enforcement responsibilities should be assessed to ensure that they are adequate.

1.4 Regulatory policy should include a preference for performance based regulation and the efficient functioning of markets.

1.5 The regulatory policy should clearly identify the responsibilities of Ministers for putting regulatory policy into effect within their respective portfolios. In addition, governments should assign a specific Minister with political responsibility for maintaining and improving the operation of the whole of government policy on regulatory quality and to provide leadership and oversight of the regulatory governance process. The role of the Minister for Regulatory Policy should include:

- Monitoring and reporting on the co-ordination of regulatory reform activities across portfolios;
- Reporting on the performance of the regulatory management system against the intended outcomes;
- Identifying opportunities for system wide improvements to regulatory policy settings and regulatory management practices.

1.6 Clearly identify the responsibilities of Ministers for putting regulatory policy into effect within their respective portfolios.

2. Users of Regulation

23. Users of regulation include citizens, businesses, consumers, public sector organisations, international trading partners and other stakeholders including their organisations and associations, either as beneficiaries or through incurred obligations and associated costs. Adopting a user centered perspective on regulatory policy should be a goal of government; regulators should also bear in mind that it is not always possible to define public interest as the sum of interests of individual users. Open government enables public scrutiny, safeguards against corruption, and promotes citizens' trust in government.

24. All users should enjoy unimpeded access to regulation, free of charge. This increases the transparency of the regulatory framework and reduces possibilities for discretion of officials and for corrupt behavior.

25. Public participation in the regulation-making process as well as in the revision of regulations can help governments understand citizens' and other stakeholders' demands and improve trust in government. Also, it can help governments collect more information and resources, increase compliance, and reduce the risk of conflict. It may enhance transparency and accountability as users gain access to detailed information on potential effects of regulation on them.

26. A wide spectrum of consultations tools should be used to enable covering larger part of population. The more communication channels users have, the easier it is for them to pick up the most suitable one.

27. Collecting information of users' perception of regulation helps governments to structure their policies around users' needs and better prioritise reforms to focusing on those areas of regulation that is perceived as either unregulated (in case of new regulations) or particularly burdensome (in case of regulatory reviews).

28. Reduction of unnecessary regulatory burdens helps to boost the economy, support innovation and competition. It also contributes to regaining public trust in the administration as an effective rule-maker among users of regulation.

29. Questions for discussion:

- Is there a better definition of "users of regulation"? Does this clearly include consumers? Citizens?
- How should the issue of confidentiality of some of the government data be referenced in the recommendation?
- Should access to regulation be provided free of charge, or with a fee to cover government expenses?
- How can the quality and impact of public consultation process be monitored and evaluated?

Box 2. Draft recommendation on users of regulation

2. Orient regulatory policy around the needs of users and adhere to principles of open government, including transparency and participation. This includes providing meaningful opportunities (including online) for the public to be consulted in the process of preparing draft regulatory proposals and the supporting analysis.

2.1 Governments should establish a clear policy for open public consultation on the development of rules.

2.2 All regulations should be easily accessible by all users. The complete and up to date legislative and regulatory database should be available to the public in a searchable format through a user-friendly interface over the internet.

2.3 Governments should have a policy that requires regulatory texts to be drafted in plain language. They should also provide clear guidance on compliance with regulations, making sure that users understand their rights and obligations.

2.4 Co-operate with stakeholders on developing new and reviewing existing regulations by:

- Continuously consulting all relevant stakeholders during the whole regulation-making process through all available channels;
- Consulting with small business and planning for clear communication of regulatory requirements to small business;
- Publishing whole regulatory dossiers including the impact assessment and reasons for regulatory decisions as well as all relevant data;
- Structuring reviews of regulations around users' needs, co-operating with them through the whole process including prioritisation, assessment of regulations and drafting simplification proposals.

2.5 Introduce regular performance assessment of regulations and regulatory systems, taking account of the impacts as perceived by users.

2.6 Eliminate unnecessary regulatory costs imposed on users of regulation.

2.7 Make sure that the policies on inspections and enforcement respect the needs of those subject to the enforcement, causing no unnecessary burdens to those inspected.

3. Regulatory Oversight

30. Political accountability is important, because regulatory oversight bodies need to be able to exert some influence on regulators who may have their own political constituencies. Just as regulatory agencies need oversight, regulatory oversight bodies also warrant oversight, for instance by the head of state, by a minister, by the legislature or by the public.

31. The type of authority accorded to the regulatory oversight body may depend importantly on the source of its mandate. For example, authority conferred by a statute enacted by the legislature may have broader application to reviews of future legislation, whereas authority conferred by order of the president or prime minister may be more confined to oversight of secondary regulation within the executive branch.

32. The exact location of a regulatory oversight body within the structure of government may depend on a number of considerations. Oversight bodies have been placed at the centre of government supervised by the Head of State. There may be the need to locate a regulatory oversight body in a finance or economics-oriented ministry, especially if the centre of government lacks the institutional capacity and resources to carry out regulatory oversight. In addition, mixed institutional arrangements for oversight

bodies are also possible, combining the different responsibilities of oversight and creating a network of bodies operating at different levels of government.

33. Regulatory oversight should be based on expertise, in the form of a trained professional staff capable of undertaking evaluation of regulatory proposals and options, as well as their impacts on business and society. Technical knowledge can reveal and make transparent the significant impacts, tradeoffs, and alternatives of regulatory choices – informing politicians and policy makers as well as the public of both the promise and pitfalls of regulation.

34. Questions for discussion:

- What is the core role of an oversight body?
- Should a distinction be made between ministries charged with oversight functions and oversight bodies?
- What is the appropriate legal form and scope of the mandate for regulatory oversight?

Box 3. Draft recommendation on regulatory oversight

3. Establish institutions and mechanisms to actively pursue oversight of regulatory policy procedures and goals, support and implement regulatory policy, and foster regulatory quality.

3.1 The body charged with regulatory oversight should be politically accountable, such as to the centre of government, to ensure that regulation serves government policy.

3.2 The authority of the regulatory oversight body should be set forth in mandate, such as statute or executive order.

3.3 The regulatory oversight bodies should be tasked with a variety of functions or tasks in order to promote evidence-based decision making. These tasks include:

- Quality control through the review of the quality of impact assessments and returning proposed rules for which impact assessments are inadequate;
- Examining the potential for regulation to be more effective including promoting the consideration of regulatory measures in areas of policy where regulation is likely to be necessary;
- Strategic planning of future regulatory policies;
- Co-ordinating *ex post* evaluation for policy revision and for refinement of *ex ante* methods.

3.4 A regulatory oversight bodies may be located in a variety of institutions, with the choice based on which institution is best equipped and best placed to perform oversight in each system of governance.

4. Regulatory Impact Assessment

35. Regulatory Impact Assessment³ is both a *tool* and a *decision process* for informing political decisions makers on whether and how to regulate to achieve public policy goals. Improving the evidence base for regulation through *ex ante* impact assessment of new regulations is one of the most important

³ RIA is also referred to as Impact Analysis (IA), usually in circumstances where it is applied to policy development more broadly and not confined by administrative procedure to only those policy decisions which involve a consideration of whether or not to use regulation. This is the case, for example, in the European Commission. Regulatory Impact Assessment (RIA) is also routinely referred to as Regulatory Impact Analysis, sometimes interchangeably.

regulatory tools available to governments. The aim is to improve the design of regulations by assisting policy makers to identify and select among the most efficient and effective regulatory approaches, including the non regulatory alternatives before they make a decision. It does this by analysing the costs and benefits of regulation and of alternative means of achieving policy goals to identify the approach that is likely to deliver the greatest net benefit to society.

36. A well functioning RIA system can assist in promoting policy coherence by making transparent the tradeoffs inherent in regulatory proposals, identifying who is likely to benefit from the distribution of impacts from regulation, and how risk reduction in one area may create risks for another area of government policy. A comprehensive RIA incorporates an assessment of the economic, social and environmental impacts. RIA improves the use of evidence in policy making, allows for a proportionate response to an identified problem and reduces the incidence of regulatory failure arising from regulating when there is no case for doing so, or failing to regulate when there is a clear need.

37. However, the effective use of impact assessment is often hampered through poor application or political and bureaucratic resistance. RIA is sometimes misconceived to be a substitute for policy making, when in fact it is intended to complement the policy process, by identifying if regulations are needed and if they will be effective. RIA can also be seen as a procedural hurdle to be satisfied rather than integrated with policy development. OECD experience demonstrates that a strong and coherent focal point helps to integrate impact assessment in the policy and rule-making process, and to raise the quality of assessments.

38. Impact assessment processes should be closely linked with general consultation processes for the development of new regulations. The results of the consultations, together with individual contributions, should be made publicly available (online) in order to ensure a high level of transparency and prevent regulatory capture.

39. The consideration of a range of alternative approaches to traditional “command and control” regulation helps to ensure that the most efficient and effective approaches are used for meeting policy goals. Experience shows that governments must lead strongly to overcome inbuilt inertia, risk aversion and a “regulate first-ask questions later” culture. At the same time care must be taken when deciding to use light handed approaches such as self regulation, to ensure that regulatory quality is maintained.

40. Questions for discussion:

- How can governments best ensure that RIA makes a genuine contribution to the development of evidence based policy and regulation?
- How can governments develop their capability to select and design better regulatory instruments and alternatives to regulation?
- What framework will ensure that the best mix of policy instruments including regulation to maximise policy objectives is identified?

Box 4. Draft recommendation on regulatory impact assessment

4. Integrate Regulatory Impact Assessment (RIA) early into the policy process for the formulation of new regulatory proposals. Clearly identify policy goals and evaluate if regulation is necessary and how it can be most effective in achieving those goals.

- 4.1 Adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that considers the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects.
- 4.2 *Ex ante* assessment polices should identify a specific policy need, such as a market failure, that justifies the use of regulation.
- 4.3 *Ex ante* assessment policies should include a consideration of alternatives to regulation, including non regulatory alternatives to identify and select the most appropriate instrument, or mix of instruments to achieve policy goals. *Ex ante* assessment should identify approaches likely to deliver the greatest net benefit to society.
- 4.4 When regulatory proposals would have significant impacts, *ex ante* assessment of costs, benefits and risks should be quantitative whenever possible.
- 4.5 Regulatory Impact Analysis should be provided transparently and made publicly available along with regulatory proposals in a suitable form and within adequate time to assist decision making.
- 4.6. Competition should only be restricted if it is necessary to achieve the public interest and that the benefits cannot be achieved by other less restrictive means.
- 4.7 When carrying out an assessment, officials should:
 - Assess economic, social and environmental impacts;
 - Evaluate if the adoption of common international practices will efficiently address the identified policy issues with minimal disruption to national and international markets;
 - Evaluate the impact on small business and demonstrate how compliance costs are minimized.
- 4.8 RIA should be supported with clear policies, training programmes, guidance and data collection. It should be integrated early in the processes for the development of policy and supported within agencies and at the centre of government.

5. Reviews of the Regulatory Stock

41. The evaluation of existing policies through *ex post* impact analysis is necessary to ensure that regulations are effective and efficient. In some circumstances, the formal processes of *ex post* impact analysis may be more effective than *ex ante* analysis at informing ongoing policy debate. This is likely to be the case for example, if regulations have been developed under pressure to implement a rapid response. Consideration should be given early in the policy cycle to the performance criteria for *ex post* evaluation, including whether the objectives of the regulation are clear, what data will be used to measure performance as well as the allocation of institutional resources. It can be difficult to direct scarce policy resources to existing regulation; accordingly, it is necessary to systematically programme the review of regulation to ensure that *ex post* evaluation is undertaken. Practical methods include embedding the use of sunset clauses or requirements for mandatory periodic evaluation in rules, scheduled review programmes and standing mechanisms by which the public can make recommendations to modify existing regulation.

42. In the absence of a process of renewal, the volume of red tape tends to accrete over time and impedes business flexibility. Red tape can be particularly burdensome to small business, where the proportion of resources diverted to administrative functions is greater than for large firms. Reducing the burden of government regulations on business and citizens should be a part of the Government's strategy to improve economic performance and productivity. Nevertheless, reducing other regulatory burdens is equally important as administrative costs represent only a relatively small percentage of the overall costs governments impose on users of regulation.

43. Questions for discussion:

- What are the most effective mechanisms for ensuring that systematic *ex post* analysis is programmed into the regulatory policy cycle?
- Is there merit in continuing to mandate targets for proposed reductions in administrative burdens?

Box 5. Draft recommendation on reviews of the regulatory stock

5. Conduct systematic programme reviews of the stock of regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and fit for purpose.

- 5.1 The methods of regulatory impact analysis should be integrated in programmes for the review and revision of existing regulations. These programmes should include an explicit objective to improve the efficiency and effectiveness of the regulations, including better design of regulatory instruments and to lessen regulatory costs for businesses and citizens as part of a policy to promote economic efficiency.
- 5.2 Reviews should be scheduled to assess all regulation systematically over time, and reduce regulatory burdens. Priority should be given to regulation with significant economic impacts and/or causing highest irritation among users and/or impact on risk management. The use of a permanent review mechanism should be included in rules, such as through sun setting and review clauses in regulation.
- 5.3 Systems for reviews should assess progress toward achieving regulatory policy coherence.
- 5.4 Procedures should be developed at the sub-national level to assess areas for which simplification is most urgent.
- 5.5 Programmes of administrative simplification should include measurements of the aggregate burdens of regulation and consider the use of explicit targets as a means to lessen administrative costs for citizens and businesses. Qualitative methods should complement the quantitative methods to better target the efforts.
- 5.6 Administrative simplification programmes should be evaluated for their "value-for-money". Evaluation should not only focus on the quantification of administrative burdens reduced but also on other outcomes and effects for society.

6. Reviewing Performance of Regulatory Programmes

44. Information on the performance of regulatory programmes is necessary to identify and evaluate if regulatory policy is being implemented effectively and if reforms are having the desired impact. Regulatory performance measures can also provide a benchmark for improving compliance by agencies with the requirements of regulatory policy, such as, for example, reporting on the effective use of impact assessment, consultation, simplification measures and other practices.

45. Transparency is an important feature for ensuring the effectiveness of the information. This depends on the public release of reviews and of performance data to allow external stakeholders to consider and comment on performance information, and to provide incentives to agencies to improve their practices.

46. Regulation inside government refers to the regulations imposed by the state on its own administrators and public service providers (for example government agencies or local government service providers). Improvements to regulatory services will deliver better outcomes for citizens. Because fiscal constraints may preclude the allocation of increased resources to the bureaucracy, it is necessary to improve the efficiency and effectiveness of the regulations and the practices that apply within the administration and by public service providers. The reduction of administrative burdens inside government can improve the quality and efficiency of internal regulation in order to reduce costs and release resources for improved public service delivery.

47. Questions for discussion:

- What should be included in performance criteria and reporting? What are the best sources of performance information?
- Which agencies in government are best placed to collect and report this performance information?
- Should regulation inside government be treated more prominently in the recommendation?

Box 6. Draft recommendation on reviewing performance of regulatory programmes

6. Regularly publish reports on the performance of regulatory programmes and the public authorities applying the regulations, including compliance with regulatory quality measures such as the performance of Regulatory Impact Assessment (RIA) and reviews of existing regulations.

6.1 Review the means of interaction with business and citizens to satisfy regulatory requirements and put in place programmes to reduce the transaction costs.

6.2 Review the form and delivery of regulation inside government to ensure that it is effective and efficient and meets clearly identified objectives for public service delivery.

6.3 Employ the opportunities of information technology and one stop shops for licences permits and procedural requirements to make service delivery more streamlined and user focused.

6.4 Design and assess data collection strategies to ensure that the necessary information is available for the preparation of reports while avoiding the imposition of unnecessary administrative burdens.

7. The Organisation of Regulators

48. Legislation that grants regulatory authority should explicitly specify the objectives in making the legislation. The legislation should spell out the policy objective it aims to achieve rather than the process by which the objectives will be achieved. The appropriate degree of prescription or detail in legislation is a matter for judgement. Principle based legislation is likely to be the most appropriate way of meeting policy objectives in complex or rapidly changing policy environments.

49. It is important to consider how the integrity of the regulatory agency will be protected through external governance arrangements. Creating a regulatory agency with a degree of independence from the government and from those it regulates can provide greater confidence that decisions are impartial. This may be warranted when the decisions of the regulatory agency have significant financial and market consequences and are required to be arms length from the political process to reduce the regulatory risk of investments. Accordingly, when a separate regulatory function is established, consideration should be given as to whether the regulatory agency is set up under legislation outside ministerial structures (while still being accountable to the government) or is set up as an administrative unit within a Ministry.

50. A regulatory agency exists to achieve objectives deemed by the government to be in the public interest and operates using the powers conferred by the legislature. Therefore, a system of accountability needs to take account of the performance of regulatory duties. Regulatory agencies should report regularly – either to the legislature or the responsible Ministry in their policy area – on the fulfilment of their objectives and the discharged of their functions, including through a comprehensive set of meaningful performance indicators. Key operational policies and other guidance material, covering matters such as compliance, enforcement and decision review should be publicly available. Regulatory agencies should establish processes for and publish arm’s-length internal review of significant decisions. Likewise, regulatory agencies should seek independent review of regulatory decisions especially those that have significant economic impacts on regulated parties.

51. Questions for discussion:

- Within one’s own jurisdiction, does legislation provide suitable and consistent regulatory powers to meet government-wide policy objectives?
- Are regulatory agencies evaluated on a systematic basis?
- Within one’s own jurisdiction, can regulatory functions be effectively preformed within a Ministry or does it require arm’s length distance to protect regulatory integrity?
- Within one’s own jurisdiction, are there legislative requirements for regulatory agencies to be held publicly accountable for the discharge of their duties?
- What are the best means of systematising public accountability of regulators?

Box 7. Draft recommendation on the organisation of regulatory agencies

7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, and avoid the risks of conflict of interest, bias or improper influence.

7.1 In developing legislation that provides regulatory power, governments should clarify the objectives of making the legislation.

7.2 Independent regulatory agencies should be considered in situations where:

- There is a need for the regulatory agency to be seen as independent in order to maintain public confidence;

- Both the government and private entities are regulated under the same framework and questions of competitive neutrality need to be addressed; and
 - The decisions of regulatory agencies can have significant economic impacts on regulated parties and there is a need to protect the agency's impartiality.
 - Agency performance should be regularly evaluated.
- 7.3 A system of public accountability is required that clearly defines how a regulatory agency is to discharge its responsibility with integrity, honesty and objectivity.

8. Administrative Appeals

52. The proper exercise of regulatory authority depends upon processes of procedural fairness and natural justice. This requires regulatory authorities to exercise their authority only within the scope permitted by their legal powers, to treat like cases in a like manner and to have justifiable reasons for regulatory decisions, and for any departure from regular practice. Embedding the principles in law and providing for effective appeals processes prevents the unjustifiable use of discretionary authority, and preserves the integrity of the regulatory system.

53. One difficulty, however, is in ensuring that access to appeal procedures is swift and uncomplicated without the excessive burden of legal costs. It is also necessary to prevent creating the incentives for forum shopping, or vexatious challenge by those affected by regulatory decisions, which unnecessarily ties up the resources of regulators and reduces regulatory certainty.

54. Questions for discussion:

- How best can the core principles and practices of administrative justice be standardised in the authorities given to regulators?
- How can timely access to appeal processes be assured given the potential for delays and blockages in the courts systems and legal costs?
- What scope exists for building in cost effective processes administrative review into the decisions of regulators?

Box 8. Draft recommendation on administrative appeals

8. Establish systems for the review of the legality and procedural fairness of regulations, and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that businesses and citizens have access to these systems at reasonable cost and receive decisions in a timely manner.

8.1 Citizens and business that are subject to the discretionary authority of public officials should have ready access to forums for challenging the exercise of that authority.

8.2 This should include rights to appeal the decisions of regulators on legal grounds and principles of procedural fairness and due process.

8.3 Final administrative review should be undertaken by a separate authority to the body responsible for making the original regulatory decision.

8.4 The legality of rules should be open to challenge and review by the courts.

9. Risk and Regulation

55. Regulation is often developed as a measure to respond to a perceived risk. In such cases, the design of regulatory solutions should be risk based and targeted based on an assessment of the risk that they are designed to address. Governments should have developed systems for applying scientific principles to the estimation of risks. Whenever relevant, policy proposals should be examined for their potential risk-risk tradeoffs, where a reduction in risk in one area inadvertently gives rise to an increased risk in another area.

56. Risk assessment, risk management and risk communication are part of a cycle of responsive regulation. Risk assessment is a key analytical tool to identify and assess the extent of a likely hazard and to estimate the probability and consequences of negative outcomes for humans, property or the environment. Risk management refers to the design and implementation of actions and remedies to address risks through a consideration of potential treatments and the selection of the most appropriate course, or combination of courses, of action. Risk communication is fundamental to the entire risk policy cycle, and assists in identifying the nature and extent of the risks as well as educating and informing the public about risks when making risk tradeoffs. Improving public understanding of the nature of the risks and the risk management measures can increase the public acceptance of the risk elements that cannot be reduced through further management.

57. Furthermore, as demonstrated by the international financial crisis, the risk assessment and management systems of regulators have to be explicitly designed to take into account the consequences of systemic risk and of rare catastrophic events. This is complex but will involve having systems to incorporate the lessons of past crisis and of narrowly averted events.

58. Questions for discussion:

- What is the appropriate scope for guidance on risk methodologies – what should be included?
- Who should be responsible for developing this guidance?
- How can governments ensure that regulators incorporate the features of systemic risk into their risk models?

Box 9. Draft recommendation on risk and regulation

9. Apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies.

- 9.1 Governments should develop guidance on the methodologies for risk assessment, management and communication concerning the use of regulation to achieve public and environmental protection.
- 9.2 Regulators should develop, implement and review regulatory compliance strategies against risk based criteria.
- 9.3 Regulators should seek independent review of risk assessments and cost-benefit analyses accompanying major regulatory proposals.
- 9.4 Evaluate the likely effectiveness of risk strategies against their capacity to identify and inform regulatory actions that will help to avoid or ameliorate systemic risks. Ensure that risk systems incorporate lessons from past events, including failures and close calls.
- 9.5 Governments should promote the use of risk based approaches in the design and enforcement of regulatory compliance strategies to increase the likelihood of achieving compliance goals and to minimise the imposition of costs on businesses and citizens through compliance and enforcement procedures.
- 9.6 Where the precautionary principle is adopted, guidance should be provided as to how it can be applied to assist in the evaluation of regulatory alternatives.

10. Regulatory Coherence across Levels of Government

59. The distinction between federal and unitary countries does not encompass the range and variety of the institutional context within which all countries are decentralised to one degree or another. What is consistent is that the relationship among levels of government resulting from decentralisation is characterised by mutual dependence, since it is impossible to have a complete separation of policy responsibilities and outcomes among levels of government. It is necessarily a complex relationship, simultaneously vertical, across different levels of government, horizontal, within the same level of government, and networked.

60. The exercise of regulatory authority by multiple levels of government should, in principle, operate in concert to achieve national economic policy goals, such as the creation of common markets and the equal protection of citizens and the environment. However, the complexity of these relationships creates the potential for horizontal and vertical gaps in the capacities of government to operate effectively and in harmony. These gaps, as identified by the OECD (2009b), include: the *fiscal capacity* of governments to meet obligations, *information asymmetries* between levels of government, gaps in *administrative accountability*, with administrative borders not corresponding to functional economic and social areas at the sub-national level, *gaps in policy design*, when line ministries take purely vertical approaches to cross-sectoral regulation that can require co-design or implementation at the local level and often a lack of *human, or infrastructure resources* to deliver services.

61. OECD member and non-member countries are increasingly developing and using a wide variety of mechanisms to help bridge these gaps and improve the coherence of regulatory multi-level policy making. These mechanisms may be “binding”, such as legal mechanisms, or “soft”, such as platforms of discussion, and they must be sufficiently flexible to allow for territorially specific policies. Involvement of sub-national governments in regulation-making takes time, but medium-long term benefits should outweigh the costs of co-ordination. Countries that successfully approach regulatory reform in this way can

expect to reap productivity benefits across the economy, through the redesign of regulatory process and the removal of regulatory burdens and better co-ordinated action.

62. Questions for discussion:

- How to make the most of multiple layers of government and actors in regulatory policy making, without creating too complex or costly procedures?
- How can governments ensure that regulatory Policy across multiple levels of government is focused on achieving national economic goals?

Box 10. Draft recommendation on regulatory coherence across levels of government

10. Promote regulatory coherence through appropriate co-ordination mechanisms between the national and sub-national levels of government. Identify cross cutting regulatory issues at all levels of government, including the supra national level, to promote coherence between regulatory approaches and avoid duplication or conflict.

- 10.1 Design appropriate co-ordination mechanisms to develop regulatory policies and practices that for all levels of government;
- 10.2 Develop effective tools to diagnose regulatory issues that cut across levels of government (including supra-national organisations) to identify and reform overlapping regulations;
- 10.3 Capitalise on the proximity of sub-national governments to local firms and citizens to develop effective consultation procedures in the design of regulation and better reflect local needs in overall regulatory policy, at all levels of government;
- 10.4 Promote information sharing and transparency mechanisms between levels of government to overcome asymmetries of information and promote complementarities across regulations;
- 10.5 Disseminate innovative regulatory practices that take place at the local level, in particular for climate change and innovation policies;
- 10.6 Facilitate local variations and experimentation in regulatory approaches when it is nationally beneficial.

11. Regulatory Management Capacity at Sub-national Level

63. Co-ordination across levels of government should be accompanied by efforts to develop regulatory management capacity at sub-national level. National governments have a role to play in supporting the development of local capacities for regulatory management, through appropriate governance and fiscal arrangements and incentives.

64. Gaps in capacity not only involve the ability of sub-national governments to implement national regulation but also to define their own strategy for regulatory management, including the assessment of regulatory impact and reforms needed. As demands for regulatory governance become more strategic, the capacity of the sub-national level is often insufficient or reveals important disparities among local actors (in particular across urban and rural areas). There is also a trade-off between the salience of information available at the local level (through close contact with citizens and firms) and the risk of capture, or a narrow conception of the public interest.

65. Limited capacities impact both the implementation of regulation and its design across levels of government. Inter-dependencies across levels of government permeate public policy with both domestic and global implications. Most of the investment for green growth and in infrastructure takes place at the local/regional levels. In energy policy, cities emit about 76% of the world's energy-related greenhouse gases. To be effective the commitments assumed by central governments need to be properly implemented at the local level. For example, the lack of adequate regulation on land-use is a key contributor to urban sprawl, and a main factor in the increase of CO₂ emissions since the 1950s.

66. Questions for discussion:

- How can the risks of non-compliance at the sub-national level best be reduced, given the rising costs of regulation enforcement for local jurisdictions?
- What is the appropriate role of the national government in fostering capacity at the sub-national level?

Box 11. Draft recommendation on regulatory management capacity at sub-national level

11. Foster the development of regulatory management capacity at sub-national levels of government.

To enhance the efficiency and effectiveness of regulation at sub-national level to achieve policy goals including on innovation, green growth and public services when these involve local responsibilities; to promote risk management and compliance, to reduce regulatory costs and barriers at the local or regional level which limit competition and impede investment, business growth and job creation, governments should implement regulatory policy and programmes at the sub-national level. In particular, they should:

- 11.1 Implement programmes to assess and reduce the cost of the compliance of regulation at the sub-national level;
- 11.2 Set regulatory charges according to cost recovery, not revenue raising motivations;
- 11.3 Support capacity-building for regulatory management at sub-national level through the promotion of e-government and administrative simplification when appropriate, and relevant human resources management policies;
- 11.4 Foster the use of Regulatory Impact Assessments (RIAs) by sub-national governments through appropriate incentives, especially in areas with greatest needs (risk management);
- 11.5 Develop incentives to foster horizontal co-ordination across jurisdictions to eliminate barriers to the seamless operation of internal markets and limit the risk of race-to-the bottom practices, develop adequate mechanisms for resolving disputes across local jurisdictions;
- 11.6 Prevent conflicts of interests through clear separation of the roles of Sub National Governments as regulators and service providers.

12. International Regulatory Co-operation

67. In an increasingly globalised economy, international regulatory co-operation must become integral to risk management and long-term policy planning including enhancing transparency for citizens and businesses.

68. A role for international regulatory co-operation is generally acknowledged, but formalised governance arrangements for international regulatory co-operation, and their practical consequences, are not well understood. The crisis of 2008 exposed regulatory gaps in the financial sector; problems in the energy, health, environment, transport and consumer safety fields are also evident. Globalisation has been and will remain a key agent of change, raising issues of competitiveness in any assessment of a country's domestic regulatory agenda. The domestic regulatory policy agenda must take account of the problems of cross-border risks, and contribute to preventing the development of international systemic problems which will have consequences within a country's borders. Governments have to balance the goals of preventing regulation from becoming an impediment to trade in goods and services, while also ensuring that regulatory systems are effective at protecting consumers and promoting confidence in the capacity of the regulatory system.

69. The challenges are pre-eminently a governance issue, involving both foreign and domestic stakeholders and authorities. Potentially regulatory co-operation can be practised at an agency level or on a government-wide basis; it can involve a commitment to exchange information about current regulations and new regulatory initiatives, or to consult with counterpart agencies in other jurisdictions before taking action; or it can be based on the collaborative identification of regulatory problems to be addressed and the

joint identification of a regulatory agenda. In the latter case, co-operation in the performance of various technical and policy analyses is needed to arrive at solutions to the problems selected for action, and the joint development of regulatory texts.

70. At a minimum, governments should ensure that systems for rule making take into account the potential impacts on parties outside of the national boundaries and provide opportunities for consultation with external trade partners on the development of regulations. The development of rules in international forums should be informed by good impact assessment practices.

71. Questions for discussion:

- What steps can be taken to ensure that international standards are developed according to best practice regulatory procedures?
- In what sectors is regulatory co-operation already working? Most needed?
- How can regulatory tools for impact analysis, consultation, etc. be shared among jurisdictions?
- How can better co-operation promote a transparent, level playing field for trade and investment?

Box 12. Draft recommendation on International Regulatory Cooperation

12. Ensure that regulatory measures contemplated in all fields take into account any international frameworks for cooperation in the same field and are also designed to take into account their possible effects on parties outside the jurisdiction where they are to be applied. Consultation should include any external interests with the aim of avoiding unnecessary international frictions.

12.1 Governments should take into account international regulatory settings when formulating domestic regulatory proposals and should co-operate with other countries to promote the development and diffusion of good practices and innovations in regulatory policy and governance.

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