Chapter 15 Regulation

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Abstract

What is the role of the OECD in regulation? What has it achieved? What are the challenges? We answer these questions by providing an historical account of the emergence and consolidation of the ‘better regulation’ agenda, considering the processes that led the organization to become world-leader in the production of regulatory indicators, and looking at the debate on regulatory policy 2.0. The OECD has not been the only international organization orchestrating the regulatory reform agenda, but its position is fundamental. Looking at the future, the OECD itself acknowledges that after thirty years, better regulation needs to be re-configured to meet the socio-technical transformations and political challenges of the present world.

Keywords: Regulatory reform, better regulation; regulatory oversight bodies; indicators of regulatory quality; regulatory budget; regulatory impact analysis

Introduction

What is the role of the OECD in regulation? What has it achieved? What are the challenges? We answer these questions by providing an historical account of the emergence of the 'better regulation' agenda, considering the processes that led the organization to become world-leader in the production of regulatory indicators, and looking at the debate on regulatory policy 2.0 (OECD 2021a: Chapter 1).

Today, the better regulation language covers a broad range of regulatory reforms, policy instruments, and institutions. More precisely, the better regulation discourse has allowed the OECD to consolidate the role of economics in appraising regulation and the widespread adoption of instruments - such as stakeholders consultation, regulatory impact analysis (RIA), ex post regulatory evaluation, risk regulation, and tools for measuring the cost of administrative obligations arising from regulation. In the name of better regulation many countries in the OECD and beyond have set targets on 'red tape' (Trnka and Thuerer, 2019) and re-designed their approach to inspections and enforcement of rules (OECD 2018). As for institutional choice, the OECD has encouraged the adoption of independent regulatory agencies, the formation of networks of regulators, and the creation of regulatory oversight institutions (OECD 2021). Finally, the regulatory reform agenda of the OECD contains the goal of promoting international regulatory competition, which is seen as essentially to the very mission of the organization to promote growth via deeper economic exchanges among countries.

Broadly speaking, regulatory reform as defined by the OECD is a vision to overcome an asymmetry in contemporary governance. Whilst public expenditure and taxation are based on relatively known economic quantities, and the decisions on how much to spend and tax take place in special fora and institutions (such as the Finance Bill, multi-annual public budget plans, and Parliaments), regulations are not managed the same way. To write a rule affecting production processes, economic activity or personal behaviour (think of a licence or how to register for voting or obtaining a passport), a regulator or a government department or a regulator do not need to show that money is available. The regulator will have to establish standards and administrative procedures, not to commit public money – apart from the case in which a new inspectorate has to be created, or the case of regulations affecting directly the public sector. The direct cost of complying with the rule falls on the firm or the individual.

For this reason, the total regulatory costs of new primary and secondary rules are often not calculated, not debated in Parliaments, not budgeted. Regulatory reform OECD-style is a way to make these costs and of course benefits of regulations (in force and new) visible and therefore managed. We do not have as yet a Regulatory Bill counting all the costs and benefits of proposed regulations (Doern 2007): the tools and institutions (in particular regulatory oversight bodies) promoted by the OECD via better regulation go in this direction.

The emergence of better regulation

How did we get there? The early days of OECD engagement with regulation date back to the acknowledgement that public management reforms have profound implications for regulatory quality, and vice-versa, regulation is key to the organization and performance of the public sector. In a 1992 report, the OECD Public Management Committee (called PUMA) reported on the member states' concerns about regulation and the negative impact of badly designed and/or better implemented regulations on economic performance. The publication contained the sketch of a vision of regulation and the need to manage it (OECD Public Management 1992). The report argued for an appraisal of rules grounded in the values of accountability, participation and transparency within the lawmaking process as well as the extent of effectiveness and economic efficiency of regulatory outcome. The report dealt with management and accountability, efficient allocation of resources, regulatory authorities and processes, and sectoral regulatory reform and deregulation.

The theoretical underpinnings of that report are still key to the OECD programmatic vision for regulatory quality and regulatory oversight institutions:

> 'Throughout that review there were also clear references to the theory of delegation and the trade-off between bureaucratic discretion and democratic accountability. 'Ongoing central oversights' were deemed to be necessary for improving the information flow from regulators to elected officials by establishing channels for policy direction and, ultimately, balancing competing social goods (OECD Public Management 1992). Feasibility, risk or cost criteria were indicated as the methods with which to limit and justify the use of regulatory authority — criteria that 'define a

> burden of proof that is expected to be met through analysis before action is taken' (OECD Public Management 1992).' (as quoted by De Francesco 2013, 58).

In the tradition of the OECD publications, the report made reference to international experiences with processes and tools for ensuring regulatory quality. Specifically, Sweden and the United States of America (USA) were mentioned for their experience in measuring regulatory costs; Australia for the sunset clauses (to create an automatic need to update legislation, otherwise they would sunset at a certain date and disappear); and Germany for the overarching Blue Checklist for ensuring regulatory quality through a questionnaire targeting regulators proposing new measures.

In the 1990s the OECD then began to promote a regulatory reform agenda calling member states started to consider checklists and methods of ex ante appraisals that were already common in countries like Germany (checklist), compliance cost assessment (UK), and the USA, where since Reagan federal executive agencies were required to perform regulatory impact analysis (RIA) on proposed regulations. In turn, RIAs were (and still are) checked by a regulatory oversight body, the Office for Information and Regulatory Affairs (OIRA).

The presence of a director of the Public Management Committee with experience with the White House's Office for Management and Budget was an asset in connecting public management reforms with regulatory reform and in particular policy instruments like RIA.

PUMA prepared the intellectual and political ground for the adoption, in 1995, of the Recommendation of the OECD Ministerial Council on Regulatory Reform – effectively the first comprehensive vision of better regulation. For the OECD, regulatory reform was necessary because of "troublesome problems" arising because of the "maturing and expansion of regulatory systems" (OECD 1995, 8). The three central conceptual elements were: the need to govern and manage systematically rules (because, as we mentioned earlier, their costs and benefits are not assessed via a Finance Bill); standards and benchmarks of high quality regulation that, because of their adaptability and flexibility to contextual conditions, could be adopted by all OECD countries and beyond; and, finally, the connection between high quality rules, legitimacy and trust in government. On the latter – the Recommendation observed - "Throughout the OECD area, administrative openness and responsiveness have become more important" (OECD 1995, 8). With generic labels like ‘regulatory reform’, ‘high quality regulation’ and ‘better regulation’ the OECD created a big tent where the clash between explicit de-regulatory agendas and more progressive agendas was reduced. Indeed, the OECD has never endorsed a definition of better regulation based exclusively on cutting red tape and reducing the number and cost of rules, although these strategies could still be pursued by some countries without getting outside the perimeter of the Recommendation. In fact, the Recommendation was not silent on the problem created by increasing regulatory costs and over-regulation.

The OECD Council introduced a checklist for Regulatory Decision-Making (OECD 1995, 10-14). This checklist was inspired by the cross-country experience with RIA, which from that point onwards became the pivotal policy instrument. The checklist included both economic tests and the consultation of stakeholders on the early stage of proposals for both primary and secondary legislation – hence well before the possibility to comment on legislative drafts when they are examined by Parliament. To provide additional guidance, the OECD published a document on best practice in RIA and thematic studies on regulatory reform (OECD 1997a; 1997b). This intellectual background became the base for carrying out regulatory review of individual countries. Over time, the reviews became an influential appraisal of the quality of the regulatory reform efforts and more generally the regulatory environment of a country, from Sweden to China.

The OECD 1995 Recommendation was the origin of a diffusion wave across the OECD countries, supported by the World Bank in developing countries. The European Commission went along with better regulation since the early 2000s (Radaelli and De Francesco, 2007), yet again adopting RIA as the main instrument. On the ground, however, the implementation of RIA has been uneven. The point is that the generic label of RIA allows governments to implement different types of regulatory appraisal. These types differ in breadth and scope of the analysis. In some cases, adoption of the same RIA template is pretty much symbolic. The same can be said of consultation guidelines (Radaelli 2005). This has been a fundamental reason to map out progress with RIA and more generally regulatory reform with indicators. But before we turn to the story of indicators, we need to complete our historical account.

In 2012, the OECD published a second Recommendation (OECD 2012). This time RIA was cast in a wider set of tools, with the overall ambition to manage the whole life cycle of regulations, from the cradle to the grave to speak, with risk assessment, periodic reviews of legislation, systematic engagement of stakeholders, judicial review, and co-ordination mechanisms between levels of government. The policy instruments suggested by the OECD have a great advantage. They are not sensitive to the specific sector or domain of governmental intervention. They can be used for environmental, social, economic regulations. As standard templates, they can be deployed in a variety of circumstances, allowing for comparison and for cumulative appraisals. To illustrate, one can calculate the total costs and benefits of new regulations introduced in a period by adding up the benefit/cost estimates and rations in the RIAs supporting these regulations. Going back to what we said at the beginning, this is similar to creating the sketch of a regulatory budget.

On 6 October 2021, the OECD Council adopted a Recommendation on Agile Regulatory Governance to Harness Innovation (OECD 2021). With this recent Recommendation, the reach of better regulation extends to innovation. The 2021 Recommendation is anchored to appraisal instruments (including horizon scanning and scenario analysis to enhance the performance of RIA in rapidly changing sectors) and regulatory assessment cycles. The ambition is to produce rules that are "fit for the future" and "help innovators navigate the regulatory environment" (OECD 2021: 4). The presence of disruptive innovations is a component of the challenging scenario in which the OECD regulatory policy needs to be re-launched or re-invented, a point we will go back after we talk about regulatory indicators.

Regulatory Indicators

The OECD has experimented with indicators since the 1990s when 'better regulation' took a proper shape. Three waves of surveys were carried out in 1998, 2005 and 2008/2009. The data was built on self-reported questionnaires. Interestingly, the series 1998 to 2009 do not report information on individual countries, most likely an indication of the resistance of government delegates to explicit comparisons. In the 2010s, however, the OECD was in a different position. First, the Regulatory Policy Committee created in 2009 (RPC, the successor of PUMA, but with a dedicated, specific and exclusive mandate on regulation) was consolidating its role and sense of membership among the delegates in the 2010s (Radaelli 2020). Second, the expertise of the Secretariat of the RPC allowed for more emphasis on examples and fact-checking to support the answers provided by the delegates. This led to the creation of sophisticated composite measures (Arndt et al. 2015). To understand this step-change, we have to trace the process and the fora where the decisions were taken.

The Committee is supported by OECD staff within the Regulatory Policy Division – which in turn belongs to the Public Governance and Territorial Development Directorate. The Division has over the years gained in analytical capacity by hiring staff with skills in governance, public policy and statistics. The Regulatory Policy Division serves as Secretariat of the RPC.

The presence of a new Committee, the RPC, with its own relatively stable membership and an intellectually powerful chair (Gary Banks, at that time Dean of the Australia and New Zealand School of Government) assisted in the generation of a common sense of purpose and trust. It soon became clear that there had to be a change on how the answers were collected, validated and for the first time compared explicitly.

Upon completion of the composite indicators, they are made publicly available with the name iReg[1]. These indicators are supplemented by more qualitative considerations in the Regulatory Policy Outlook of the OECD. In a sense, they are the spine of the Outlook (OECD 2021a). The regulatory indicators cover the dimensions of stakeholders engagement, RIA, and ex post evaluation (on the latter, see OECD 2014). The consensus inside the RPC (see Radaelli 2020 for this process of consensus building) has led to the identification of four dimensions that combine design and implementation – to correct the discrepancy between on-paper similar adoption and very different implementation on the ground. These four dimensions are methodology, transparency, systematic adoption and oversight institutions / quality control.

Challenges

After some thirty-years of better regulation, the world appears very different from what it was at the time of the first OECD Recommendation (1995). One question that the RPC has raised in recent years is what better regulation 2.0 may consists of. The need for a new, adapted or re-invented better regulation comes from two sources. First, technology and the economy

[1] https://www.oecd.org/gov/regulatory-policy/indicators-regulatory-policy-and-governance.htm

have changed. The presence of disruptive innovations and a digital space for economic and social interactions has posed new issues on the table of those willing to define and implement high quality regulation. Political-administrative contexts matter. Some administrative procedures have been hard to implement in certain political and administrative settings, so they need structured and rationalized decision-making. But these same procedures may come across as too rigid in settings that are more supple, informal, and trust-driven. The OECD's emphasis on formal administrative procedures—consultation, impact assessment, risk analysis, and evaluation—may not perform well in some contexts for different reasons.

Second, there have always been limits in how better regulation 1.0 was designed. Its focus on procedural steps is not particular relevant to countries who design high quality regulation by drawing on informal cooperation rather than rigid procedures. Further, better regulation, as we have seen, is semantically ambiguous. It is a sort of semantic big tent (or coalitional magnet, see Béland and Cox 2016) covering too many things, from war on red tape to attempts to give role to values like human dignity in the design of new regulations. New Zealand has experimented with a new language of regulatory stewardship (Van der Heijden 2021) anchored to the core belief that regulations are assets. An asset is expected to generate a flow of benefits. Since regulations are expected to produce net benefits over time, regulatory frameworks covering policy domains (such as climate or pensions) should be conceptually framed and managed as assets. This stands in contrast to regulation as liability, or regulation as red tape, potential obstacle to business activity, and other negative framings of the regulatory enterprise (Prosser 2010).

Another point is that the Sustainable Development Goals push towards broader and more inclusive interpretations of whose interests and for what reasons must be included in RIA (Radaelli 2021). This has led some to talk about re-tooling the tools of regulatory reform towards more ambitious and inclusive goals, like the one of Agenda 2030 of the United Nations (Radaelli et al. 2022). Finally, international regulatory cooperation – a must for the OECD – is questioned at a time of de-globalization where economic and military blocks turn competition into conflict, as shown in the aftermath of the Russian invasion in Ukraine.

A survey of RPC delegates and experts has identified four clusters of beliefs about regulatory policy 2.0 (Radaelli et al. 2022). The clusters point to (1) improving governance processes and fostering innovation; (2) delivering on accountability and enhancing the role of citizens in the regulatory enterprise in looking for missing stakeholders; (3) becoming more pragmatic and critical in calling for robust reality checks and prudence before embracing grandiose expectations; and (4) re-defining the mission of regulatory policy as an aid to internal government and regulatory processes—or as a tool for "those inside the decision-making tent," so to speak.

Interestingly, the survey did not find anywhere support for a radical objection to better regulation and its tools – the respondents do not think that RIA or regulatory oversight institutions are obsolete, but they may have different views on whether regulatory oversight should be independent from central government or assist central government from within so to speak. a call for prudence also emerged about layering regulatory reforms with new additions. Foresight, algorithmic regulation, and technological fixes – the respondents said (Radaelli et al. 2022) - will not deliver unless supported by vision. Thus, at least as far as the RPC is considered, we expect the OECD toolbox to remain anchored to the classic tools, augmented perhaps by foresight and scenario analysis. The European Commission, in its more recent communication, seem to go in the same direction (European Commission 2021).

Conclusions

The OECD accomplishment in the field of regulation is remarkable. The organization has promoted a process of diffusion of a regulatory reform agenda under the semantic label of better regulation. At the same time, the role of other organizations like the World Bank and the European Commission should not be under-estimated. But the focus and reach of the OECD are undeniable.

The presence of regulatory indicators allows for systematic comparisons across tools and dimensions of reform, although it is always difficult to establish the final impact of these reforms. Indeed, a crucial question for better regulation is to what extent the adoption and implementation of RIA, risk assessment, regulatory evaluation programs and consultation has an impact on final governance outcomes such as the quality of the business environment or the control of corruption (Jalilian et al. 2007; Dunlop et al. 2020; OECD 2014).

At the same time, the world is rapidly changing, economically, socially and geo-politically. The OECD is engaged in better regulation 2.0, although it is not clear whether this effort will usher is a refinement of the agenda or a radically new approach. Regulation has become more political and more contested, so, independently of the opinions of the RPC delegates, what is ‘high quality regulation’ and ‘for whom’ will not depend exclusively on the OECD Recommendation and Guidelines.

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