Regulatory Policy

The world has changed and so must rule making

OECD

Contents

1. Why do governments need a new approach to regulatory policy?

Global crises and complex policy problems are forcing governments to rethink the way they regulate. While regulating in "normal times" is already difficult, the COVID-19 pandemic has exposed gaps in domestic and international rule making that have cost lives and money. Addressing climate change, inequality, or ageing populations – in a context of polarisation, distrust in public institutions, and rapid technological change – will require governments to be flexible, regulate faster and better, and co-operate globally.

While governments do assess possible impacts of future regulations in a range of areas, more could be done to understand how the benefits and costs of regulations are distributed. Policy makers need to pay increased attention to the regulatory impacts on gender, wealth distribution, the environment and innovation, to name a few. Ensuring that decisions are based on the best available evidence and devised in partnership with society provides a more complete understanding of potential impacts on all segments of the population.

> **Governments need to strengthen trust in institutions and processes, including in regulators and regulation. Better communication strategies, such as shifting from merely consulting the public to engaging stakeholders, and demonstrating that regulatory institutions are well governed, are essential.**

Once regulations are in place, less than one-quarter of OECD member countries systematically assess whether they work in practice. Investing more in evaluation and taking an "adapt and learn" approach to regulation will help ensure that rules actually work in practice.

Moving toward "regulatory policy 2.0" means creating a "smarter", more agile framework for making and delivering better regulation. It also means improving regulatory governance, to ensure that it serves strategic objectives, such as the Sustainable Development Goals; promotes cross-government co-ordination; and supports system-wide change. The processes used to design, implement and enforce regulations will need to be driven by the risks regulation is supposed to prevent and the goals it is meant to achieve. Existing frameworks will have to be reviewed to see what still works and what could be updated. Governments will also need to identify gaps and tools that are underdeveloped, underused, or applied with unsatisfactory results; harness new technologies; and take into account behavioural barriers and biases.

Finally, as citizens and businesses cross borders all the time, policy makers must also look beyond their own frontiers. The domestic rules of one country can have consequences across the border. Moreover, solving many of today's challenges – managing pandemics, countering cyberthreats, global tax evasion, fighting climate change – will require close regulatory co-operation among countries. Countries can also learn from each other to strengthen their own regulatory frameworks.

2. How can governments design better regulations?

Consult with stakeholders throughout the policy cycle

Stakeholders can provide valuable input on the feasibility and practical implications of laws and regulations, based on their day-to-day experience. Giving members of the public the opportunity to help shape, challenge, and reform rules is important for improving their design and implementation. It also builds trust in government and strengthens democratic values. Meaningful stakeholder engagement can lead to higher compliance with regulations, in particular when stakeholders feel that their views have been considered.

However, stakeholder engagement today tends to be piecemeal. OECD member countries generally consult with stakeholders only once a law or regulation has already been drafted. This is a crucially important stage, as stakeholders can see what the proposed rule would look like and mean for them in practice. But governments also have opportunities to engage stakeholders earlier in the process to gather data and ideas on possible solutions to the problems to be solved. Not only does this help create buy-in and support for resulting policies, it also helps ensure that policies are based on the best available evidence.

The European Commission consults the public early on before any law is drafted and puts its plans, including a roadmap, online. United Kingdom, Iceland, the Netherlands and the Slovak Republic systematically publish draft legal texts online for comment. In many cases the participation has a clear impact on the later law, especially if the government is actually interested in the opinion of stakeholders.

Policy makers should tailor engagement strategies to different groups (citizens, businesses, consumers, employees, the public sector, non-governmental organisations, international trading partners, etc.) to ensure that all voices have the opportunity to be heard. How governments communicate with affected parties is crucial: the most appropriate means of communication will vary depending on the policy proposal, the resources and capacities of affected stakeholders, and the stage in policy development.

The majority of OECD member countries use a central digital platform, such as a government website – for consultations on laws and regulations. Since 2017, there has been an increase in the use of virtual meetings to engage with stakeholders in some countries, at both early and late stage consultations.

Want to know more?

- To see how countries compare when consulting stakeholders, see here: http://oe.cd/reg-outlook
- To see what reforms your country has undertaken and where improvements can still be made, find the country fact sheets here: OECD Regulatory Policy Outlook 2021

Analyse impacts before making a decision

Regulatory impact assessment (RIA) supports decision making by providing objective information about the likely benefits and costs of particular policy proposals. A well-functioning RIA system helps promote policy effectiveness, efficiency, and coherence by clearly illustrating the inherent trade-offs within regulatory proposals. RIA can also reduce regulatory failures by showing, for example, that reducing risks in one area may create risks in another, or that unintended consequences would outweigh any purported benefits.

RIA helps policy makers decide the most appropriate course of action. Recent evidence however suggests that policy makers do not always have all relevant information in front of them on which to base poliyc decisions. There remains a predominace for placing additional emphasis on the preferred regulatory

approach vis-à-vis alternatives – including the decision not to regulate. Such an approach implies that regulation is always warranted and can potentially result in unnecessarily burdensome policies.

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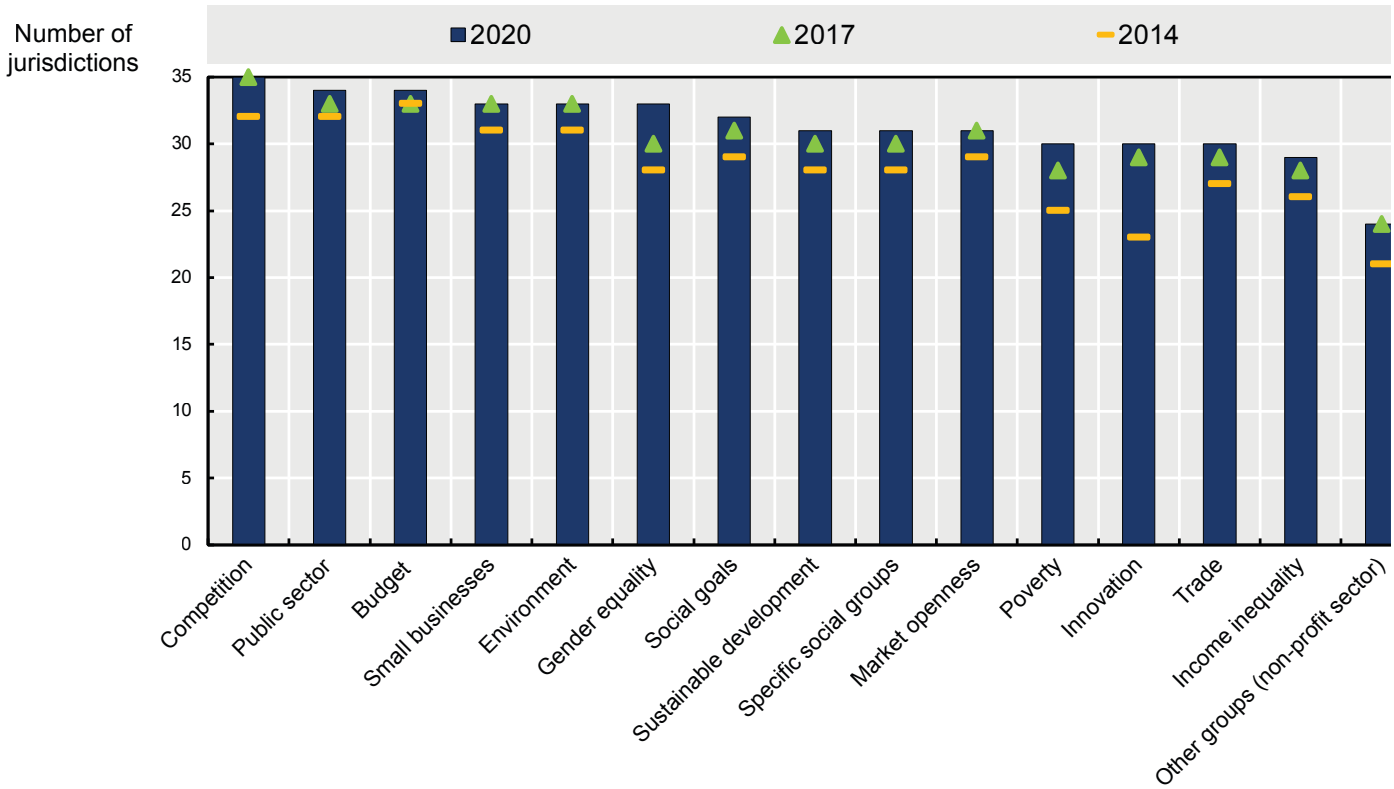
The OECD has developed Best Practice Principles for Regulatory Impact Assessment, which describe the components of a sound RIA framework and provide advice on how to implement RIA successfully. Over the past decade, OECD countries have broadened the range of impacts they consider when developing policies. Yet they still tend to consider more economic factors – such as impacts on competition and budget – than non-economic ones – such as gender equality or other social goals. Going forward, to ensure that decision makers fully understand the potential effects of any proposed rule, it is crucial to look at *all* relevant impacts.

Impacts considered by OECD member countries when developing regulations



Source: Adapted from OECD (2021), OECD Regulatory Policy Outlook 2021, OECD Publishing, Paris, http:/oe.cd/reg-outlook.

When done well, RIA provides information on the expected costs and benefits to different stakeholders and analyses economic, environmental and social impacts of all feasible alternatives. OECD members generally assess costs (particularly ones relating to business), but are less likely to assess regulatory benefits. Furthermore, the level of analysis wanes the further countries get from the preferred regulatory option. Policy makers would benefit from a more fullsome analysis of both costs and benefits of all alternatives in order to make more informed decisions.

Ensure that regulations focus on – and are proportionate to – risks

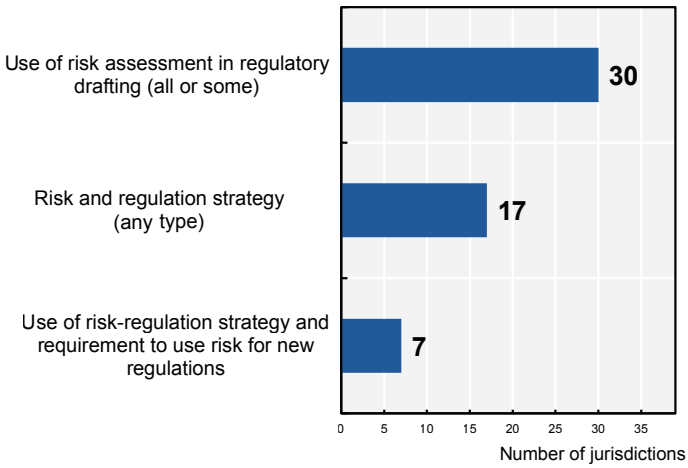
Fundamentally, regulations should address risks – to health and safety, to the environment, to the economy, to consumers, etc. – and their causes. Rules and procedures that are based on science, focused, and proportionate are more effective, and less costly to all parties.

"Risk" is the combination of the likelihood of harm and the potential severity of this harm. Regulation should both target risks and be proportional to them. This means that rules should exist only when the risk is significant and they should address the factors that can lead to harm. The same focus should apply to permit requirements, inspections and enforcement to ensure that they are proportional to the level of risk of the product, service, business, etc., that they fall upon. This can mean, for example, differentiating among different businesses in terms of how much harm they can create to the environment, safety, health, or how likely this is to happen. It can also mean focussing within a business on processes, products, procedures, etc., that can lead to higher risks to health, safety etc. New technologies can help improve risk-based regulation: better availability of data and IT tools mean that it is easier to assess and target risks.

Rules and procedures that do not correspond to genuine risks tend to result in higher costs and burdens, without providing real benefits. Those that do not effectively target the causes of risks, based on findings from research and evidence, likewise fail to deliver. Regulation that is not useful or effective decreases public trust, and harms the economy.

The COVID-19 pandemic has shown just how essential risk-based regulation is. Recovering from the crisis – and preparing for future crises – requires a correct understanding of risk mechanisms. The relative risk levels of different issues (e.g. for COVID-19 prevention: hygiene of surfaces vs. distance between people vs. ventilation, with evidence showing that the former is vastly less important than the latter), facilities, businesses, etc. need to be assessed so that rules address the most risky aspects, and regulators direct resources to the right places. The crisis has shown the shortcomings of regulation when it is not proportionate to risk: burdensome rules with little positive impact on health and safety. Risk-based regulation should thus be an important priority for governments. However, most OECD countries do not have a systematic approach to basing regulations on risk – even though the majority of countries do some risk assessments for some types of rules.

Use of risk and regulation tools according to iREG survey data



Source: Adapted from OECD (2021), OECD Regulatory Policy Outlook 2021, OECD Publishing, Paris, http://oe.cd/reg-outlook.

Apply behavioural insights both in policy design and to the policy process itself

Behavioural insights (BI) are lessons derived from the behavioural and social sciences, including decision making, psychology, cognitive science, neuroscience, organisational and group behaviour. Public bodies around the world are increasingly using BI to design and implement better public policies based on evidence of the actual behaviour and biases of citizens and businesses. The OECD has developed a toolkit that provides a step-by-step process for analysing a policy problem, building strategies, and developing behaviourally-informed interventions.

A change in thinking about how regulatory decisions are made is also needed. Government is, after all, created and run by people who have behavioural biases and barriers just like everyone else. Developing behaviourally informed solutions to regulatory governance problems is a promising new avenue for helping governments make more effective policies.

Assess and improve regulatory oversight

Regulatory oversight bodies (ROBs) play an important role in ensuring better regulation. They can co ordinate regulatory reforms, advocate for better regulation, oversee regulatory quality, help implement tools such as RIA, and find new ways to achieve regulatory goals such as international regulatory co-operation. They should promote the systematic, appropriate and consistent use of evidence and stakeholder engagement in the design and revision of rules, as well as strong institutional co-ordination and risk-based and innovative approaches to regulation.

Finally, ROBs can help make the performance assessment of regulatory management tools more transparent and systematic, thus improving governments' ability to reap the benefits from regulatory reform.

Currently, all OECD members have at least one ROB in charge of promoting and monitoring regulatory policy reform, and some of these ROBs have assumed new responsibilities since 2017. However, oversight continues to focus primarily on impact analysis, rather than on the quality of *ex post* evaluations and stakeholder engagement.

3. How can governments know – and show – that regulations are working?

Evaluate existing regulations

All rules are experiments: governments make decisions based on imperfect information with the intention of changing the behaviour of regulated individuals or businesses. Sometimes rules noticeably fail and it is clear that a course correction is needed. But even if rules are not noticeably failing, it is important to check whether they are working as intended. Contexts change, so it is critical that rules are sufficiently flexible to change with the times and continue to benefit the community.

Ex post evaluation allows policy makers to assess whether regulations have achieved their intended results. Reviewing laws and regulations provides an opportunity to build on successes and to learn from mistakes and, ultimately, to ensure that regulations maximise community well-being over time. The OECD has developed Best Practice Principles for Reviewing the Stock of Regulation, which provide guidance on designing a sound *ex post* evaluation system and conducting evaluations.

Still, less than one-quarter of OECD member countries systematically assess whether rules are working as intended. This represents a lost opportunity to ensure a more competitive, innovative and dynamic economy. It highlights that a great number of rules are never reviewed and that a "set and forget" mentality still prevails in many governments.

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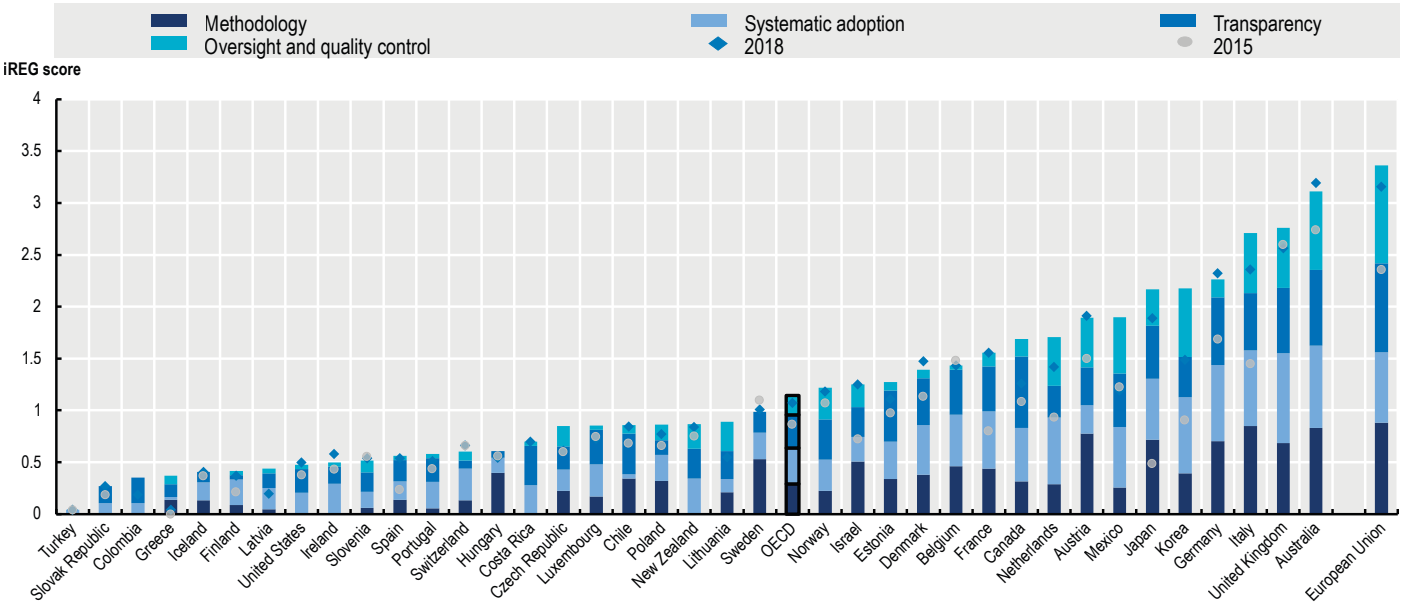
When carried out, countries would benefit from linking their evaluations to the RIA produced when the rule was made. For instance, Japan is one of nine OECD members that currently systematically refers to the RIA that formed the basis for the original design of the regulation. This helps to ascertain whether impacts have eventuated as they were originally anticipated, and also allows those conducting *ex post* evaluations to establish whether the original rationale for policy intervention remains in the public interest. Similarly, citizens and business can help identify the actual costs of complying with regulations. They can also provide input on aspects that are working well and on challenges that remain. Governments have yet

to make consultation a hallmark of reviews. Thirteen OECD members now systematically consult on *ex post* evaluations, thus recognising both its importance and value. Nevertheless, this is less systematically done than that undertaken during initial regulatory design. Furthermore, less than one-fifth of OECD countries systematically inform stakeholders of forthcoming reviews of laws and regulations.

At a more general level, better integrating *ex ante* impact assessment with *ex post* evaluations helps to ensure that reviews are better embedded into regulatory policy, which is currently utilised by New Zealand as part of its "regulatory stewardship" programme and by the European Commission through its "evaluate first" principle.

Findings and recommendations from *ex post* evaluations are usually reported to government or parliament. In some cases, responsible ministries are provided with the *ex post* evaluation and, based on this input and their own assessment, they decide whether there is the need for regulatory change. However, only in a minority of OECD countries do governments provide, in practice, a public response to recommendations made in *ex post* evaluations.

Composite indicators: *Ex post* evaluation for primary laws, 2021



Notes: Data for 2014 is based on the 34 countries that were OECD members in 2014 and the European Union. Data for 2017 and 2021 includes Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score.

Source: OECD (2021), OECD Regulatory Policy Outlook 2021, OECD Publishing, Paris, http://oe.cd/reg-outlook.

Ex post evaluation in times of crisis

The COVID-19 pandemic had a profound impact on many regulatory practices, as a number of actions had to be taken in an emergency context. OECD members self-reported a total of 190 specific regulations that were issued in response to the COVID-19 pandemic as of 18 September 2020. Around half of these regulations included a sunset clause (a clause that specifies that the regulation will automatically cease if not remade or amended by a fixed date), while automatic evaluation requirements were much less frequently used.

Ex post evaluation is a priority area for the recovery. Systematically assessing what worked, what didn't, and what could have worked better will be crucial to improving future well-being and prepare better for future crises. It presents an opportunity for governments to retain emergency rules that have had unintended positive consequences. It also allows governments to review whether other rules introduced during this time remain in the public interest.

Ex post evaluation is even more important where *ex ante* impact assessment was limited or non-existent because of the urgency to regulate. However, only four OECD members formally require *ex post* evaluations of regulatory proposals that bypass *ex ante* impact assessment processes during emergencies. For some OECD members, the COVID-19 pandemic was the first time that general review provisions had ever been used.

Source: OECD (2021), OECD Regulatory Policy Outlook 2021, OECD Publishing, Paris, http://oe.cd/reg-outlook.

4. How can governments more effectively implement regulations?

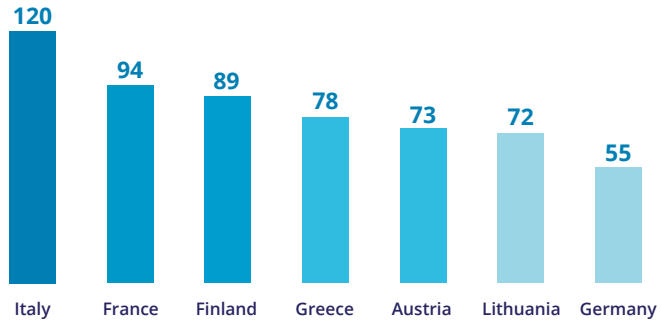
The way in which regulations are designed is a major factor in both the quality of the regulatory environment for businesses and citizens and the outcomes achieved. But how regulations are implemented and enforced, and how compliance with regulatory requirements is assured and promoted, are also critical determinants of whether the regulatory system is working as intended.

Effective implementation and enforcement of regulations is particularly essential to safeguarding and reinforcing public trust in rule of law and in government. In a situation, which many have characterised as a "crisis of confidence" moment, this trust in the effectiveness of law and public administration is essential for democratic governance. This also requires meaningful transparency, i.e. regulatory institutions reporting not only on the volume of their activities, but on the organisational principles and operational logics, and on the effectiveness of these interventions in terms of public welfare. Inadequate regulatory delivery systems can, by contrast, produce a "cycle of distrust" whereby the most "distrust-based" systems (limiting discretion of civil servants, emphasising criminal sanctions etc.) lead to worse results and more distrust, rather than help to restore confidence. By contrast, regulatory approaches that are risk-based and risk-proportional can contribute to reinforcing public trust because they are transparent in terms of organisational principles, expected results, and effective outcomes – and because they have repeatedly been found to deliver superior outcomes in terms of public welfare.

Inspections are one of the most important ways to enforce regulations and to ensure regulatory compliance. There are many core activities that inspections have in common and that are relevant

for all or most sectors where inspections take place. These activities include planning and better targeting inspections, communicating with regulated subjects, preventing corruption, and promoting ethical behaviour, as well as the organisation of inspections and the governance of inspection authorities.

Number of regulatory inspectors in environment, food and occupational safety for 100 000 businesses with more than 10 employees



Source: OECD Regulatory Policy Outlook 2021, http://oe.cd/reg-outlook

Resources dedicated to enforcing regulations vary enormously among comparable OECD countries, and depend on institutional structures and legacy, rather than being proportional to risks.

The OECD has developed a Regulatory Enforcement and Inspections Toolkit that presents a checklist of 12 criteria to help officials, regulators, stakeholders and experts assess the level of development of the inspection and enforcement system in a given jurisdiction, or of a particular institution or structure, to identify strengths and weaknesses, and potential areas for improvement.

Strengthen the governance of economic regulators

Economic regulators in essential sectors such as energy, e-communications, transport and water act as rule-setters and market referees. They are well positioned to observe how their sectors perform in terms of quality and affordability for consumers, for example, and can provide data and other input into reviews of regulations. Well-governed regulators tend to be better performers, demonstrating more technically rigorous, objective and predictable decision making. Regulators also play a key role in developing trust among and with actors in a sector, navigating perspectives from government, industry and consumers. Governance arrangements that safeguard the independence of regulators provide confidence that decisions are made with integrity, free from undue influence from government, the regulated industry and other stakeholders. At the same time, with greater independence comes greater responsibility to remain accountable. OECD finds that there is scope for regulators to improve how they monitor and report on their *own* performance, to enhance accountability and transparency, and help build trust in regulatory regimes.

The OECD has developed Best Practice Principles on the Governance of Regulators, which look at facets such as role clarity, preventing undue influence and maintaining trust, decision making and governing body structure for independent regulators, accountability and transparency, engagement, funding and performance evaluation.

5. How can countries work together to tackle global challenges?

As citizens and companies cross borders all the time, policy makers must also look beyond their own frontiers. The COVID-19 crisis has highlighted that rules have effects on populations far and wide, further testing governments' capabilities to co-operate and to come up with common solutions for common, global challenges.

To make rules work for all, an ambitious paradigm shift in rule making across all policy areas is crucial to keep up with today's interconnected, digital reality. This is true across policy fields, and particularly applicable to address cross-border policy challenges, such as those related to the environment. International regulatory co-operation (IRC) can improve rule making in all policy fields, allowing policy makers to learn from others and find common solutions to shared problems. Reducing global tax evasion, preserving the ozone layer or prohibiting child labour are only a few of many important results of close regulatory co-operation among countries. Despite these successes – and the many more global challenges countries are facing – IRC is not yet fully embedded into the DNA of policy makers. Many IRC efforts are made in specific policy fields, particularly to reduce unnecessary barriers to trade. Most OECD countries have neither the appropriate strategy nor governance structure, and fail to fully leverage international co-operation for public policy objectives. Without a more systematic application across sectors and policy fields, policy makers lack incentives, mandate and capacity to look beyond the borders.

IRC helps governments build a comprehensive approach across policy areas to leverage international co-operation to achieve public policy objectives. International organisations (IOs) serve, first and foremost, as institutional fora for governments to exchange experiences, expertise, and build common approaches – in other words, to engage in IRC. This function of IOs as "data hubs" is instrumental in the COVID-19 crisis. IOs themselves, though, also need to redouble their efforts to ensure transparency, coherence and impact of their work to support governments effectively. The Compendium of IO Practices: Working Towards Better International Instruments is a first step in this direction.

The OECD has developed Best Practice Principles for International Regulatory Co-operation, which provide practical guidance on adapting regulatory frameworks to our interconnected reality. They set out the main elements of a dedicated whole-of-government strategy and governance structure, discuss how to embed international considerations throughout the domestic regulatory design, development and delivery process, and look at how to undertake bilateral, regional and multilateral international co-operation on regulatory matters to support national policy objectives.

Want to know more?

- The *2021 Regulatory Policy Outlook*, the third in the series, maps and compares country efforts to improve regulatory quality in line with the 2012 OECD Recommendation on Regulatory Policy and Governance. It provides unique insights into how countries approach the design, enforcement and revision of regulations, and suggests best practices for countries to focus their efforts to ensure that laws and regulations work as intended. Finally, it discusses some agile and innovative approaches to rule making such as regulatory sandboxes, behavioural insights, and outcome-based, data-driven and risk-based regulation. Factsheets provide an overview and information on recent developments in regulatory policy for each country covered by the *Outlook*. OECD Regulatory Policy Outlook 2021

- For more on OECD work on regulatory policy, see www.oecd.org/regreform

Related links

- OECD Regulatory Policy Outlook 2021
- OECD 2012 Recommendation on Regulatory Policy and Governance
- Indicators of Regulatory Policy and Governance
- OECD regulatory policy website

For further information, please contact the Measuring Regulatory Performance programme at mrp@oecd.org

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