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ET DE DÉVELOPPEMENT ÉCONOMIQUES

Comments on "Draft Report: Regulatory Policy and the Road to Sustainable Growth" (GOV/RPC(2010)16)

Written contribution to the OECD Regulatory Policy Committee
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1. TUAC welcomes the opportunity to submit written comments on the draft report "Regulatory Policy and the Road to Sustainable Growth" (GOV/RPC(2010)16) following the 3rd session of the OECD Regulatory Policy Committee (RPC), 29 October 2010. The draft report takes stock of past OECD work on regulatory policy (chapters 1 & 2) and from there elaborates on future challenges (chapter 3) and more specifically on the need to move toward "regulatory governance" (chapter 4). The report ends with a brief discussion of a "road map" to address these challenges and in the short-term, to review the OECD 2005 Guiding Principles for Regulatory Quality and Performance (chapter 5).

The objectives of regulatory policy and the lessons drawn from the crisis

2. Regulatory policy has in the past been closely associated with market liberalisation and de-regulation policy objectives as noted in the report (#5, 10, 26 & 57[i]). The 2005 Principles make it clear that regulatory policy should be subordinated to competition and market-openness objectives[ii]. However the draft report suggests a wider application of the concept in the aftermath of the crisis. Governments "need to put their economies back on the path to sustainable growth, find ways to handle complex and interrelated policy areas, anticipate and manage risks more effectively, and regain the trust of their citizens" (#6). Regulatory policy is called upon to serve the "public interest" (#15[iii]), while the crisis itself is a "wake up call" on the "fragility of some aspects of current regulatory management", the "failure to grasp fully the complexity of the institutional structure" and the "importance of anticipating systemic risks and risk management" (#51). Public trust in the government and its "legitimacy" has been "badly shaken" (#66[iv]), as have "assumptions about the merits of self regulation" (#125[v]) – hence the need "to rebuild confidence" and government "capacity to steer the economy" (#103[vi]).

3. And yet the paper as a whole says little about the very causes of the crisis and the implications for public interest. In fact the report warns against the "hasty adoption of inappropriate regulation in reaction to events" which "could add unnecessary burdens, inhibit innovation and harm competitiveness and open markets" (#22). Regulatory policy for "governments post crisis", it seems, should replicate the past de-regulation agenda (#76-77[vii]). Financial regulatory failures, which played a central role in triggering the crisis, are mentioned in passing only (#98[viii]).

4. These contradictory statements about the crisis lead to uncertainty about the goals of regulatory policy. This is problematic in its own terms, but also has implications for the post-crisis challenges faced by governments – achieving "sustained growth" (#72-86), policy coherence (#87-91) and regulatory governance (chapter 4) – and because the sort of policy coherence that is desirable will depend on the overall objectives of regulatory policy.

5. For TUAC, a key lesson of the current crisis is that achieving "sustained growth" depends on solvent household domestic demand not market openness and liberalisation. By contrast, policy coherence that is designed specifically for a given competition and market liberalisation agenda would surely transform into policy alignment of sector ministries (health, employment, environment, public administration, etc.) with competition authorities. Similarly "regulatory governance", which is central to the conclusions of the report (#12-13[ix]) would become of concern if the "central oversight bodies" on regulatory quality that the OECD has been calling for (#118 & 131[x]) were to be driven by a particular policy agenda (be it de-regulation, administrative burden, market liberalisation, etc.) and not by a holistic approach to sustainable growth and the public interest.

Rule of law and re-distributive justice

6. The report's discussion on the "rule of law" (#65-66 & Box 2.4) portrays a partial understanding of philosophy that is biased in favour of a simplistic form of Hayekian free-market liberalism. While the rule of law (which emerged with the Greeks, not with social contract theories) represents an institutional constraint on the arbitrariness of personal power, it does not carry the multiple qualities the draft report so generously assigns to it. In particular, the concept certainly is not identical to the democratic principle, contrary to what the text would like us to believe. So much so that the two are often antagonistic, both theoretically and empirically: what to do if a popular (democratic) vote contravenes constitutional provisions? Should primacy be granted to the constitution or to the popular decision?

7. The concept of "rule of law" is a morally neutral term. It enables the law to fulfil its function, whatever it might be, and however unjust the law might be. As such the rule of law might very well be used to advance unjust causes or promote immoral ends, fuel or maintain unequal distribution of economic power and income. When one sees how Hayek lauds the rule of law in upholding free market and the lack of intervention of public authorities in anything resembling re-distribution, this no longer comes as a surprise. On John Rawls too, the draft report is based on a misconception of his work. Some of the more innovative elements in Rawls' approach to justice were to affirm the need for principles of justice to go much beyond the mere assertion of the rule of law. In particular, he demonstrated the importance of re-distributive justice, and the requirement that economic and social policies would benefit the least favoured.

Employment and labour market regulation

8. The report poorly addresses the link between regulatory policy and employment. It is argued that the main contribution that regulatory policy can deliver for employment creation is through greater market openness and competition (#57[xi]). The discussion on "sustained growth" (#72-75) stresses the importance of higher GDP rates and underlines the transition to green growth but it makes no mention of social cohesion matters and rising inequalities in particular, despite parallel work by the OECD in this domain[xii]. At best it is argued that the role of regulatory policy would pass by "structural reforms" (#78-80) including "balancing flexibility with essential social protection" (#80).

9. Looking at the need for “balancing public and private regulation” (#125 et. al.), “governments”, we are told, “may be responsible for regulatory policy, but they cannot do their job alone” (#125[xiii]). However the text is silent on the role of labour market institutions (including trade unions and collective bargaining). This is disturbing because collective bargaining clearly belongs to the forms of “public-private cooperation” that are otherwise praised by the report.. The only reference to the role that trade unions can play is in a stand-alone sentence (#127[xiv]) and is limited to the European context only. Similarly the need to address “high social welfare and environmental performance standards” is portrayed as a European cultural feature, not a global concern (#104).

Social cohesion and public consultations

10. The report suggests a rather unusual understanding of the problems of social cohesion arising from the crisis. It is suggested that social cohesion issues can be best addressed through better public communication and consultations with citizens directly (#63[xv]). The report highlights the importance of “a user friendly environment” and that “regulatory policy’s economic dimension” be “complemented by a social dimension”, drawing “inspiration from the widest possible range of stakeholders” (#101). By contrast, the possibility for regulatory policy to be designed for the purpose of redistributive justice and equitable growth is not seen as an option.

11. Workers and their representative institutions simply do not appear in the landscape. And when they are, it is through the prism of “public administration workers” only (#105[xvi]). In contrast, the report pictures a rather idealised form of direct relationship between governments and their citizens. Accordingly, the paper ends with a rather optimistic tone on tackling social cohesion and public trust problems through “networked communication modes of web 2.0” which “create new opportunities” to redesign “relations between regulators and the regulated”, “facilitate interactive information sharing, interoperability, user-centred design”, etc (#107).

The Roadmap

12. The report concludes with a proposal of a “roadmap” for the future, including the upcoming review of the 2005 Principles (#138-146). In light of the above comments on the report, the TUAC would like to share the following observations:

- *“Anchoring effective institutional leadership and oversight”, “Strengthening the focus on regulatory governance”, “Capturing the institutional breadth and diversity of the players” and “Including the user/citizen dimension.”*
  As we note in our comments above, the report fails to capture “the diversity of players” and appears to be confused about the overarching objectives of regulatory policy. The text seems to endorse a top-down approach to regulatory quality and governance in which enlightened government officials and business leaders communicate directly with each individual citizen via the web. Organised representations of the key constituencies within the economy, including social partners, do not appear on landscape.

- *“Risk aspects.”*
  The lessons of the crisis are not drawn as they should be in the report. This is particularly true of the distribution and sharing of risks within the economy and between workers, employers, government and the financial sector. The causes of the global crisis lie, we believe, in the continual weakening of workers’ bargaining power and the transfer of market risks from government and employers on to working families with corresponding knock-on effects on household solvent demand (through various channels: increased job

insecurity, individualisation of pension schemes, health care privatisation, lightly regulated mortgage financing, etc). OECD work on financial risk management is barely mentioned in the paper[xvii].

- *"Developing policy coherence and interconnectedness."*
  Policy coherence is only a means to an end and, as we argue above, there remains uncertainty about the objectives of regulatory policy (which is meant to guide policy coherence): is it for the purpose of market liberalisation and business competitiveness? If so, would policy coherence lead to policy alignment of all government regulations with a given competition and market openness agenda? By contrast, if regulatory policy is aimed at the public interest as the report seems to suggest, then the latter needs to be clearly defined and aligned with current economic policy priorities. The fact that the draft contains serious misconceptions about the "rule of law" concept and at the same time neglects to address key democratic principles and redistributive justice is not reassuring in this regard.

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[i] #5 of the executive summary reads: "Regulatory policy has already made a significant contribution to economic development and societal well being […] through […] contribution to structural reforms, liberalisation of product markets, international market openness, and a less constricted business environment for innovation and entrepreneurship." #. 10 reads: "Regulatory policy has already proved its relevance for meeting public policy objectives, such as structural reforms, entrepreneurship, and market openness, as well as supporting the rule of law." The link between the regulatory policy and structural reforms is made explicit in chapter 1 where it reads that, with the years "regulatory reform became an essential adjunct to structural reforms" (#26) and in chapter 2 which includes a long section on the "relationship between product market policies and regulatory reform" (#57, box 2.1).

[ii] Guiding Principle N°5 reads "Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests."; N° 6. "Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness."; N°7. "Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.". Source: 2005 Guiding Principles for Regulatory Quality and Performance http://www.oecd.org/dataoecd/19/51/37318586.pdf

[iii] #15: "The objective of regulatory policy is to ensure that regulations are in the public interest".

[iv] #66: "Regulations provide a transparent framework for making the transition to open, democratically accountable societies. The next step is to develop regulations that make sense (…). For all countries, sustaining the legitimacy of government actions (the "social contract") post crisis, when trust in government has been badly shaken, is important".

[v] #125: "There is debate about the right balance, especially in the wake of the financial crisis, which shook assumptions about the merits of self regulation. The debate raises important issues of accountability, regulatory capture and the need to avoid regulatory gaps as well as overlaps".

[vi] #103: "Post crisis, and especially in some countries, there is a need to rebuild confidence in government and its capacity to steer the economy and society effectively, not least through the lever of regulation. Support for regulatory policy itself is at stake. Without the support of their citizens, governments will find it increasingly hard to justify the investment in regulatory policy".

[vii] "As in the past ten years, better regulation can improve economic growth through deregulation and structural reforms, which have generally not been carried far enough in most countries" (#76), and ensure "removal of red tape" for businesses go hand in hand with de-regulation (#77).

[viii] #98: "*The financial sector is the most obvious example of a sector subject to systemic risk, but there are others*", etc.

[ix] The executive summary defines regulatory governance in broad terms, listing inter alia "institutional leadership and oversight; reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation with a view to securing accountability and avoiding capture; a renewed emphasis on consultation, communication, cooperation and coordination across all levels of government".

[x] Bodies which can be "powerful advocates for further and more effective reforms, and are closer to the issues which concern users than ministries".

[xi] Under the title "The link with higher employment rate" (#57) it is argued that regulatory policy contribution to "product market competition can also play an important role in lowering structural unemployment rates, mainly because competitive pressures eliminate rents and make it possible to expand potential output".

[xii] Growing Unequal 2009.

[xiii] #125: further reads: “Regulatory governance involves addressing public-private cooperation more effectively, and taking a closer look at the place of self regulation in the mix. Governments need to assign (and review) responsibilities which they have or intend to delegate to the private sector, international organizations (such as private standard setting bodies), the charitable (or voluntary) sector, and even citizens”.

[xiv] #127: “Another difference is that many European countries have traditionally assigned an important role to the social partners (the unions and employers’ representatives) in regulatory management.”

[xv] #63 begins with a plea for “growing transparency in the application of regulatory powers, and the engagement of the public (the regulated) through its emphasis on the importance of public consultation and communication”. The means to achieve direct access to citizens are those of “open societies in which user views are heard (…) and by harnessing ICT and e Government” and by “reducing red tape for citizens”.

[xvi] Figure 3.3 “Shaping regulation” is meant to identify the key constituencies of regulatory policy. The list includes: “officials”, “elected politicians”, “citizens”, “consumers”, “businesses”, and “public sector workers”.

[xvii] See for example, paper of the OECD Committee on Financial Markets “Financing mechanisms for systemic crisis resolution - A discussion note on systemic risk levies and insurance-like solutions”, DAF/CMF(2010)4, OECD, April 2010.