TRADE UNION ADVISORY COMMITTEE
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AUPRÈS DE L'ORGANISATION DE COOPÉRATION
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Initial comments on the OECD Draft Recommendation on Regulatory Policy and Governance (GOV/RPC(2011)3)

Paris, 13 April 2011

1. The 2005 OECD Guiding Principles for Regulatory Quality and Performance[1] and OECD-APEC Checklist[2] that were prepared by the then Working Party on Regulatory Management and Reform (WPRMR) make it clear that regulatory policy should be subordinated to competition and market-openness objectives. Recently – and perhaps in response to the current global economic crisis and the creation of the RPC – there has been a noticeable effort to broaden the scope beyond corporate interests, as seen in the OECD draft synthesis report on regulatory policy and sustainable growth circulated in October 2010[3]. In this regard, the draft recommendations includes some references to the crisis and to new "issues" such as climate change (#13) and the need to balance the reduction of the administrative burden on businesses with re-regulation objectives, where regulatory gaps have been exposed (#31).

2. Unfortunately the lessons of the crisis and the above concerns about regulatory gaps are not, in our view adequately reflected in the Draft. The main, and in some parts almost exclusive, focus of the Draft is on reducing the administrative burden on businesses – small businesses in particular – and boosting market competition. More specifically, and as outlined in the following paragraphs, our concerns are as follows:

- *Public interest*: the draft does not provide sufficient assurance that the public interest should always prevail over the interests of businesses and market competition;

- *Political leadership and "central oversight bodies"*: political leadership can easily result in the politicisation of regulatory policy, while trade union experience with the existing central oversight bodies points to the risk of ideological and regulatory capture;

- *Users of regulation*: the draft suggests a binary view of society and the economy, which consists of businesses and "citizens" only. In so doing the draft omits, and hence diminishes, the role of collective organisations including trade unions and other social movements;

- *Risk management*: the absence of reference to the precautionary approach is of concern, particularly when considering the issue of the burden of proof..

- *Regulatory Impact Assessment (RIA) and cost-benefit analysis*: the Draft gives insufficient weight to social, environmental and distributional impacts, compared to its focus on reducing the administrative burden on businesses.

[1] http://www.oecd.org/dataoecd/24/6/34976533.pdf
[2] http://www.oecd.org/dataoecd/41/9/34989455.pdf
[3] See also TUAC comments on the draft http://www.tuac.org/en/public/e-docs/00/00/07/FA/document_doc.phtml

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Public interest versus corporate interests

3. The Draft includes several references to the "public interest", which are welcome. But the term itself is not defined and is accompanied by matching business and market competition interests. Draft Recommendation 1.2 is particularly telling: governments are called upon "to ensure that regulations serve the public interest in promoting and benefiting from trade, competition and innovation while reducing system risk". In practice public interest concerns do not automatically match those of trade, business or competition.[4]. The same concerns apply to the call for systematic review of the "stock of regulation" (1.1 and 5) – the possibility that such a review could actually lead to enhancing regulation or identifying regulatory gaps is not seen as an option in the text.

4. The suggestion made in the Draft to increase international cooperation and ensure that regulatory policy takes into account "international regulatory settings" (draft recommendation 1.4) is also welcome. It would, however, be of concern if these "settings" are limited to trade and investment agreements only, such those of the WTO, and exclude other international conventions and treaties covering the ILO Core Labour Standards and including the Kyoto Protocol, United Nations charters, etc.

5. For TUAC, the Draft should define the term "public interest" to include basic rights such as occupational health and safety conditions. It should also be placed in the context of the current global economic crisis and rising inequality and the need for redistributive justice and equitable growth that benefits the least favoured within our societies.

Regulatory and ideological capture of the regulatory agencies

6. Draft recommendation 3.1 calls for the creation of a central regulatory policy agency, and for such a body to be "politically accountable" to "the centre of government" and to serve "government policy" via – and as suggested by draft recommendation 12 – the appointment of a "Minister for Regulatory Policy". In the introduction it is also suggested that such an oversight body be hosted by a "finance or economics-oriented ministry" (#36).

7. Trade union experience with centralised "regulatory quality" oversight bodies is not always positive. In the case of the Australian Productivity Commission (PC), officials of the Australian Council of Trade Unions (ACTU) have expressed concerns about the risk of ideological bias in favour of corporate interests. This is problematic, first, in its own terms, but also because over the years the PC has obtained a sort of a 'monopoly' over government policy thinking that has proven to be very unhelpful to ensuring a balanced and diverse policy debate. Similar criticism has been made of the Canadian Cabinet Directive on Streamlining Regulation (CDSR), which is said to be "hostile to regulation" and "slants the regulatory process in favour of corporate interests"[5].

8. The "top-down" approach of the Draft and its implicit call for the politicisation of regulatory quality and governance is of concern. The risk is that regulatory policy would serve a "government agenda" – or that of the finance ministry or the Treasury – rather than contributing to a bi-partisan or whole-of-government approach to regulation.

[4] For example, according to a poll conducted in 2010, when asked what the main consideration should be when governments develop regulations, three-quarters of Canadians chose "protecting Canadians' health and safety, working conditions and the environment" compared to 20% who chose "protecting international competitiveness of Canadian business by keeping costs associated with regulations low".

[5] "Canada's Regulatory Obstacle Course – The Cabinet Directive on Streamlining Regulation and the Public Interest", Marc Lee, Canadian Centre for Policy Alternatives, April 2010.
http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Regulatory%20Obstacle%20Course.pdf

A restrictive understanding of the "users" of regulation

9. There is risk of regulatory capture in the way that the Draft considers "users of regulation", which draft recommendation 2 calls upon to be more involved in the regulatory development process. It is suggested that users include: "citizens, businesses and consumers and public sector organisations" (#28) or just "citizens" and "businesses", with a particular attention to small businesses (draft recommendations 2.2 and 2.4).

10. Such binary view of the economy and of society at large – citizens and business – would appear inappropriate. With the exception of authoritarian regimes, citizens rarely engage with government on an individual basis. They are most likely to engage on a collective basis through political parties, independent and representative trade unions, consumer groups and other social movements. The omission of trade unions in the draft is particularly disturbing because collective bargaining clearly belongs to the forms of "co-regulation" that are otherwise praised by the OECD.

11. Given the pro-business bias of the text when considering "users" of regulation it is then not reassuring that draft recommendation 2.4 calls for "*continuously* consulting all relevant stakeholders during the *whole* regulation-making process through *all available channels*" and to prioritise among others "consulting with small business". Nor is it reassuring that so much emphasis is put on reducing "unnecessary regulatory costs" (2.6) but also reducing cost of "inspections and enforcement" of regulation (2.7).

Risk management versus precautionary approach

12. Two aspects are missing in draft recommendation 9. First reducing the administrative burden is not, or should not be, the unique objective of risk-based approaches (as suggested by 9.5). The Draft should stress the positive role of regulation as a risk avoidance and risk reduction function (compared to insurance schemes whereby risks are pooled or transferred). Second, the lack reference to the precautionary approach (or principle) is problematic.. This is an important issue because in many instances the precautionary approach places the burden of proof on businesses – or on the party that advocates for de-regulation or that wishes to issue a new product on the market – while risk management often places the burden on the regulator.

RIA and cost-benefit analysis

13. The inclusion of economic, social, environmental and distributional impacts in regulatory impact assessments (RIAs) as suggested in draft recommendation 4.1 is welcome, as is the reference to the "public interest". However, this inclusion is accompanied by more detailed wording in favour of competition objectives and the reduction of the administrative burden on businesses. Draft recommendation 4.7, for example, gives priority to domestic and international market competition above all other objectives. Also, cost-benefit analysis is problematic from a social and environmental point of view when performed in quantitative terms as suggested by draft recommendation 4.4. While the net costs of compliance for businesses are usually easy to quantify, the long term benefits of regulation, particularly when these are socially or environmentally oriented and spread over several decades, are not.