

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

Working Party on Regulatory Management and Reform

**Draft Competition Assessment Recommendation:
The context of regulatory management systems**

**Working Party 21-22 October 2008
OECD Headquarters, Paris**

This note introduces the note DAF/COMP/WP2(2008)5/REV1 of the Working Party on Competition and Regulation of the Competition Committee which proposes a draft competition assessment recommendation. The note is intended to provide delegates to the Working Party with the necessary elements for their discussion and comments.

Written comments will be received until 3 November.

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JT03252203



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NOTE BY THE SECRETARIAT

1. Following from the February 2008 discussion of a Competition Assessment Toolkit by the *Working Party N°2 on Competition and Regulation* and in the continuation of recent OECD work on the Competition Assessment Toolkit, the Working Party on Competition and Regulation has initiated discussion of a draft Council Competition Assessment Recommendation (DAF/COMP/WP2(2008)5/REV1). This draft recommendation has been considered and revised by the June and October 2008 meetings of that Working Party. The text of the recommendation is being sent for comments to other OECD bodies including the Working Party on Regulatory Management and Reform and the GRP, prior to being returned to the Competition Committee for further consideration.

2. This draft recommendation is therefore submitted for discussion by the Working Party on Regulatory Management and Reform of the Public Governance Committee for its 21-22 October meeting. The rationale for this recommendation is that increased competition leads to higher economic productivity and growth. However, in many jurisdictions competition is limited by laws and regulations. Therefore, this recommendation suggests that it is worthwhile to identify when laws, regulations¹ and other government-instruments may unduly limit competition and, in such cases where these undue limitations are present, to prefer alternatives that would achieve the regulatory objectives with minimum harm to competition.

3. The draft recommendation refers to and is consistent with the *OECD Guiding Principles for Regulatory Quality and Performance* [C(2005)52] which state that regulations should be reviewed for their effect in competition. The recommendation acknowledges that competition assessment should be developed in a way that works efficiently within existing structures of governments, and that bodies with expertise in competition policy should be “associated to the process.” It also recommends that “Governments should introduce an appropriate process to identify existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for performing competition assessment.” This approach is also proposed to be applied to the revision of public policies that unduly restrict competition.

4. The recommendation is expected to be of interest to delegates in their roles of responsibility for the quality of proposed draft laws and regulations and for promoting the principles of regulatory management. This note is intended to provide Delegates with background information to discuss the recommendation. The note also focuses on the main objectives of Regulatory Impact Analysis (RIA) to illustrate its clear links to competition analysis. Finally, it also provides an overview of the extent of the adoption of RIA and competition analysis in member countries over the past ten years using the 2005 OECD Indicators of Regulatory Management Systems.

5. Delegates to the Working Party are invited to:

- DISCUSS the proposed Council Recommendation.

6. Delegates will be invited to submit written comments before 3 November 2008 so that they can be taken into account in the next version of the recommendation to be prepared for the meeting of the Group on Regulatory Policy on 1 and 2 December 2008.

1. In this note, the term of “regulation” is used generically to refer to all kinds of instruments, including both primary and subordinate legislation.

REGULATORY IMPACT ANALYSIS AND ITS IMPLEMENTATION

7. Regulatory impact analysis is a mechanism for systematically identifying and assessing the benefits and costs of a regulatory proposal. RIA represents an essential core tool for ensuring the quality of new regulations through a rigorous, evidence-based process for decision making. It is now used by almost all OECD countries, by the European Commission and in many non-OECD countries.

8. The history of regulatory impact analysis as a formal regulatory quality tool, and its integration into public policy² with the adoption of a clear political commitment, extends over more than 25 years. Within the OECD context, the 10 point checklist accompanying the 1995 *Recommendation on Improving the Quality of Government Regulation* highlighted the need to undertake an assessment to ensure that the benefits of regulations justified the costs. In 1997, the OECD formulated a set of RIA best practices in its *Policy Recommendations on Regulatory Reform* and the 2005 *Guiding Principles for Regulatory Quality and Performance* reiterated the essential requirement that regulations should be systematically assessed to ensure that they meet their intended objectives efficiently and effectively in a changing and complex world.

9. Countries aim to promote effectiveness and efficiency in their regulatory systems. *Effectiveness* in this context refers to the extent to which regulations achieve their stated objectives. *Efficiency* refers to the balance between costs and benefits from with their use. Efficient regulation in the narrowest sense confers a net benefit from the perspective of society as a whole *i.e.* the benefits it brings are greater than the costs of employing it. In the broader sense, efficiency implies a comparative judgment: a regulation should achieve an identified objective at minimum cost or, alternatively, confer greater net benefits than any other policy tool available to government to achieve the same objective.

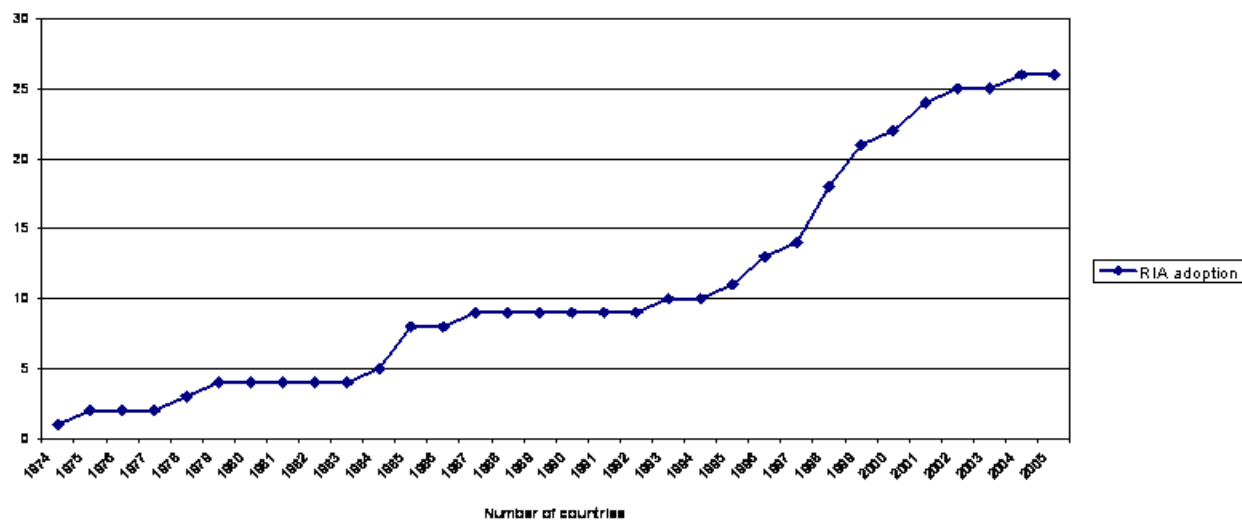
10. The systematic conduct of Regulatory Impact Analysis (RIA) underpins the capacity of governments to ensure that regulations are both efficient and effective, including impacts on competition. High quality RIA is intended to produce more efficient regulation and consequently better regulatory outcomes.

11. The general trends show that RIA is being more widely applied across OECD with a continuous adoption by OECD members since 1974 (Figure 1). There are now more countries applying RIA to primary legislation³ and, more generally, a wider range of regulatory instruments being subject to RIA. OECD member countries are investing in their RIA processes, trying to reap greater returns for investment while maximising the contribution of regulation to economic welfare.

2. Public policy refers to regulations, rules or legislations enacted at any level of government.

3. Indeed, previous OECD work has emphasized that the most important benefits of RIA are likely to be obtained from its application to primary legislation, since it is here that the farthest reaching regulatory impacts are generally found. At the same time, the application of RIA to significant delegated legislation is also likely to be productive.

Figure 1. Trends in RIA adoption across OECD countries



Source: OECD (2007), *Indicators of Regulatory Management Systems*, Working Paper No. 4, p. 36.

12. In the 2005 survey, seventeen members reported that RIA is always required for new regulation: Austria, Belgium, Canada, Denmark, Finland, Germany, Korea, Mexico, the Netherlands, New Zealand, Poland, Spain, Slovakia, Sweden, Czech Republic and the EU. Thirteen members reported that RIA is sometimes carried out and only Turkey reported not applying RIA to new regulation.

13. The existence of a body outside the ministry responsible for preparing the regulation and charged with the responsibility for reviewing the quality of the RIA is important but less widespread. Seventeen members reported a positive response to this question: Austria, Belgium, Canada, the Czech Republic, Germany, Iceland, Ireland, Italy, Japan, Korea, Mexico, New Zealand, Poland, Switzerland, the UK, the USA and the EU. The role of these bodies could be particularly important in the future in the context of the proposed recommendation for competition impact assessment.

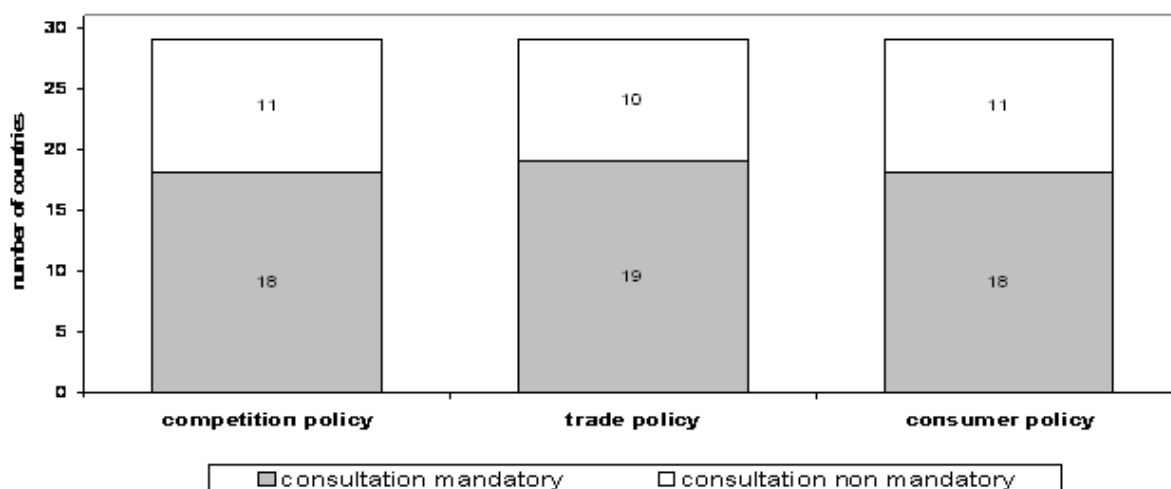
14. In 2005, RIA was formally required by law for all regulations in eighteen member countries: Austria, Belgium, Canada, Denmark, Germany, Greece, Hungary, Iceland, Italy, Korea, Luxembourg, Mexico, the Netherlands, Norway, Poland, Spain, Slovakia, and Switzerland. Six members reported that RIA was not required by law: Australia, Finland, France, Ireland, New Zealand, and the EU. In Portugal and the USA, it is only required by law for major regulation. The Czech Republic, Sweden and the UK reported that it is not required by law.⁴

4. Japan and Turkey did not respond to this question.

INTEGRATING A COMPETITION PERSPECTIVE WITH THE DEVELOPMENT OF NEW REGULATIONS

15. Fostering policy coherence development and implementation of broad regulatory policies is essential to achieve key regulatory objectives and the goal of boosting economic development and social welfare by encouraging market entry, market openness, innovation and competition. To do this requires links to be made across across policy areas.

Figure 2. Linking regulatory policy with other policy areas, 2005



Source: OECD (2007), *Indicators of Regulatory Management Systems*, Working Paper No. 4, p. 20.

16. In terms of broader policy coherence and linking regulatory policy with other policy areas, regulatory management systems of most member countries have increasingly required consultation with bodies responsible for trade, competition and consumer policy when developing new regulations. Consultation with all such bodies was fully integrated in about half of the OECD member countries in 2005 according to available indicators. For the other countries, the results appear intermediate due to the fact that consultation is not mandatory and in some smaller countries, consultation was restricted to one policy area such as consumer policy in Iceland or market openness in Luxembourg. But for competition and trade the practice of consultation was nearly universal in 2005, except in Luxembourg. This demonstrates a marked increase in this function compared with the earlier survey in 1998.

17. As RIA has expanded, the scope of competition policy and general competition analysis has broadened. This trend arises from an increasing recognition that maximizing the degree of effective competition throughout the economy is fundamental to the achievements of the broad objectives of maximizing economic growth and, consequently, of social welfare.

18. Very strong links exist between competition policy analysis and RIA, and the objectives of the two policy instruments reflect a high degree of congruence. The *2005 OECD Guiding Principles for*

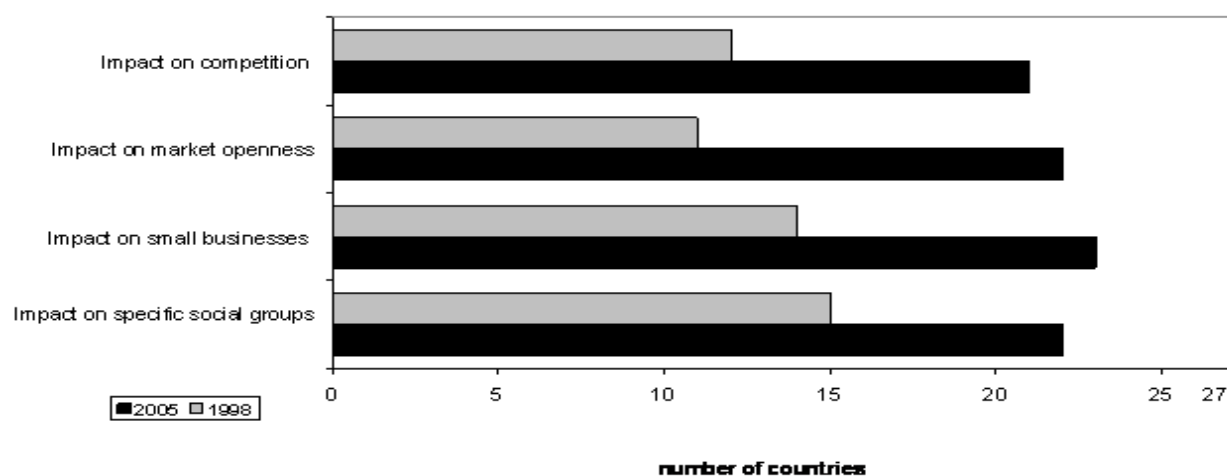
*Regulatory Quality and Performance*⁵ state that consideration of the impacts on competition should be incorporated within the process of reviewing new and existing regulations, in order to ensure that they meet their intended objectives efficiently and effectively.

19. Competition assessment is all the more useful as an element of overall regulatory assessment in the focus of dynamic market efficiency⁶, since it can help to avoid regulations that unduly restrict market activity. A further benefit of competition assessment is that it assists in the identification of all parties likely to be affected by regulatory proposals, especially those that will be affected indirectly. This can assist in ensuring that RIA based consultation is inclusive and therefore more effective.

20. It has been demonstrated that public policies intended to serve a specific commercial, social, health, safety, security or environmental objective, sometimes inadvertently unduly restrict competition. As detailed in the *OECD Competition Assessment Toolkit* (OECD 2007, p. 30), this may be because policies limit the number or range of suppliers, limit the actions that suppliers can take to compete, limit the incentives of suppliers to compete vigorously, or limit the choices and information to customers. \

21. Unnecessary restrictions on competition may arise even when public policies are not focused on economic regulation and are not intended to affect competition in any way. Economic welfare will be enhanced if the public policy objectives are able to be met in a way that also ensures market competition and these restrictions on competition are minimised.

Figure 3. Regulatory Impact Analysis: Requirement for policy impacts
Recent trends: 1998-2005



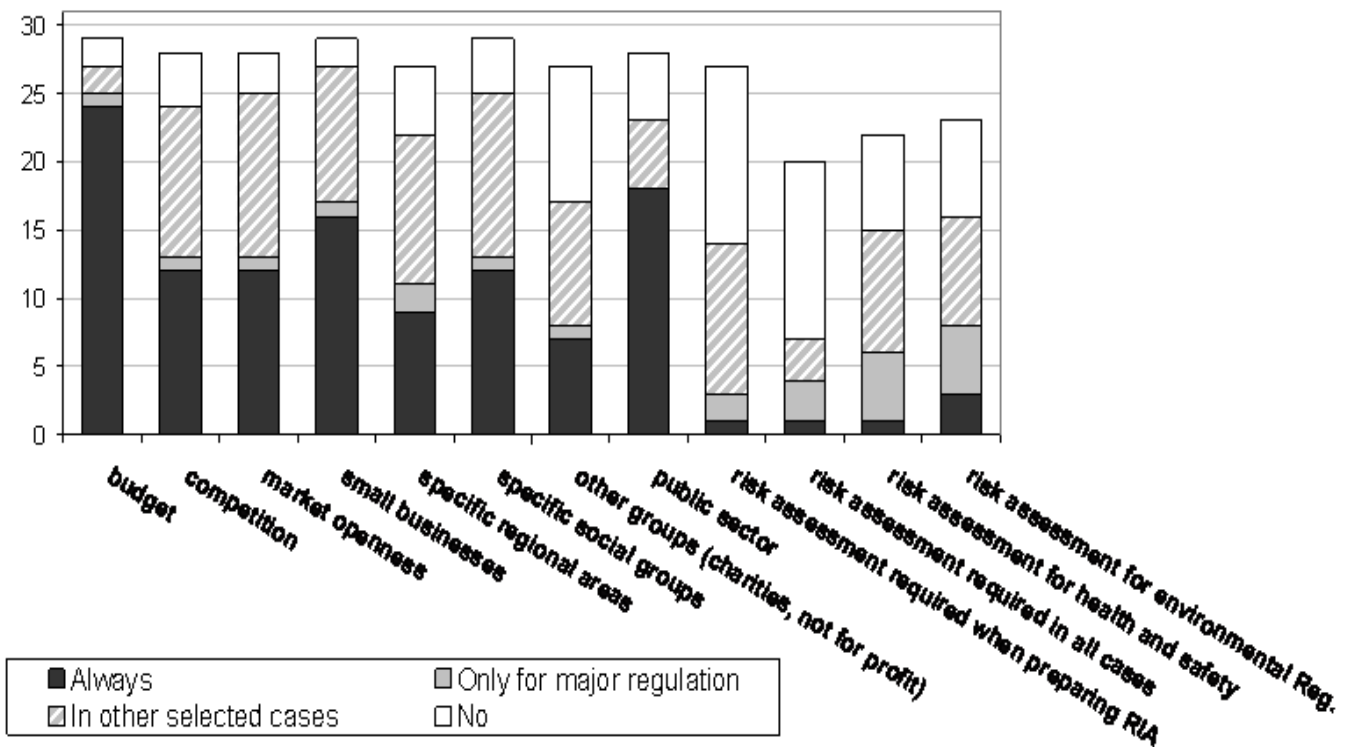
Source: OECD (2007), *Indicators of Regulatory Management Systems*, Working Paper No. 4, p. 39.

5. More particularly Principle n°2 “Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment” (OECD, 2005, p. 4).
6. As recorded in OECD 2007 Competition Assessment Toolkit, “Dynamic efficiency focuses on efficiency over time, with changes in efficiency resulting potentially from innovation, technological developments, the ability of firms to respond flexibly to new market conditions and of successful suppliers growing”. (OECD, 2007, p. 31).

22. An increasing number of countries require an explicit consideration of the competition impacts of regulatory proposals to be incorporated in RIA (see Figure 3 above). Between 1998 and 2005, the number of countries assessing the impact on competition and market openness nearly doubled to two thirds. Given the general tendency for competition analysis to focus on market dynamics and general welfare considerations, this trend is likely to increase the degree of attention given to the analysis of dynamic factors in the RIA over time.

23. Figure 4 below provides an overview of requirements to measure specific impacts when preparing RIA in 2005. The requirements for assessing impacts on competition are relatively strong, besides those related to the budget, market openness or to small businesses.

Figure 4. Requirements to measure specific impacts when preparing RIA, 2005



Source: OECD (2007), *Indicators of Regulatory Management Systems*, Working Paper No. 4, p. 40.

Guidance for RIA and the issue of integrating competition analysis

24. Recent OECD work has focussed on improving the integration of competition policy analysis in RIA by providing appropriate guidance for RIA authors. This is one of the main purposes of the OECD Competition Assessment Toolkit⁷ and reflects recent initiatives in a number of Member countries.

25. For example, the United Kingdom has recently issued revised guidance on this issue and has adopted a specific competition impact test for use in the RIA context, which has been mandatory since 2002. In the European Commission, competition assessment has been part of the RIA process since 2005. In the United States, RIA guidance documents explicitly require consideration of market impacts. Similarly, the Australian National Competition Policy requires that all RIA documents state whether the proposed regulation complies with the terms of the National competition Policy agreements, and include analysis to support this conclusion. Mechanisms such as these can help to ensure that competition policy principles are considered at early stages of the broader policy development process. In addition, the Dutch *Business Impact Test* (BIT) includes questions on competition related impacts of regulatory proposals, some of which are formulated in a benchmarking context. In New Zealand, impacts on competition, market openness and small businesses are all expected to be included in the RIA itself. Finally, the BIT also contains a “market mechanisms” test, which must be answered in terms of a range of standard competition related tests.

26. The increasing tendency to require these impacts to be assessed explicitly reflects increased acceptance of the concept of well-functioning competitive markets as the key guarantor of economic well-being and the importance of analysing all regulatory interventions in terms of their impacts on this fundamental economic organising principle.

7. Draft guidance documents on integrating competition policy analysis into RIA were considered at a meeting of the OECD Competition Policy Working Party No.2 in June 2006. See DAF/COMP/WP2(2006)4 and DAF/COMP/WP2(2006)5.

ANNEX A. THE OECD REFERENCE CHECKLIST FOR REGULATORY DECISION-MAKING

1. Is the problem correctly defined?
2. Is government action justified?
3. Is regulation the best form of government action?
4. Is there a legal basis for regulation?
5. What is the appropriate level (or levels) of government for this action?
6. Do the benefits of regulation justify the costs?
7. Is the distribution of effects across society transparent?
8. Is the regulation clear, consistent, comprehensible and accessible to users?
9. Have all interested parties had the opportunity to present their views?
10. How will compliance be achieved?

Source: OECD (1995), *The 1995 Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*, Paris.

ANNEX B. THE 1997 RIA BEST PRACTICES

1. Maximise political commitment to RIA.
2. Allocate responsibilities for RIA programme elements carefully.
3. Train the regulators.
4. Use a consistent but flexible analytical method.
5. Develop and implement data collection strategies.
6. Target RIA efforts.
7. Integrate RIA with the policy-making process, beginning as early as possible.
8. Communicate the results.
9. Involve the public extensively.
10. Apply RIA to existing as well as new regulation.

Source: OECD (1997), *Regulatory Impact Analysis: Best Practice in OECD Countries*, Paris.

ANNEX C. THE 2005 GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE

Key principles

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
2. Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.
3. Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non discriminatory.
4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
5. 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.
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.
7. Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

ANNEX D. REGULATORY POLICY AND OTHER POLICY AREAS, 2005

	Linking Regulatory policy and other policy areas						Forward planning			
	Body for Competition policy		Body for Trade Policy		Body for Consumer Policy		Primary Laws	Subordinate Regulations		
	Usually consulted	Consultation mandatory	Usually consulted	Consultation mandatory	Usually consulted	Consultation mandatory	Periodical publication of the list of laws to be prepared, modified or reformed in the next six months or more	Publication easily available to the public (i.e. via the Internet)	Periodical publication of list list of regulations to be prepared, modified or reformed in the next six months or more	Publication easily available to the public (i.e. via the Internet)
Australia	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Austria	Y	N	Y	N	Y	N	Y	Y	N	N
Belgium	Y	Y	Y	Y	Y	Y	N	N	N	N
Canada	Y	N	Y	Y	Y	N	Y	Y	Y	Y
Czech Rep.	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Denmark	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Finland	Y	N	Y	N	Y	N	Y	Y	Y	Y
France	Y	...	Y	...	Y	...	N	N	N	N
Germany	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Greece	Y	...	Y	Y	N	N	N	N	N	N
Hungary	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Iceland	N	N	N	N	N	N	Y	Y	N	N
Ireland	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Italy	Y	...	Y	...	Y	N	Y	Y	Y	Y
Japan	Y	N	Y	N	Y	N	N	N	N	N
Korea	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Luxembourg	N	...	N	N	Y	N	N	N	N	N
Mexico	Y	N	Y	...	Y	N	N	N	Y	Y
Netherlands	Y	N	Y	N	Y	N	N	N	N	N
New Zealand	Y	Y	Y	Y	Y	Y	N	N	N	N
Norway	Y	Y	Y	Y	Y	N	Y	Y	N	N
Poland	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Portugal	Y	...	Y	...	Y	Y	N	N	N	N
Slovak Rep.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Spain	Y	Y	Y	Y	Y	Y	N	N	N	N
Sweden	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Switzerland	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Turkey	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
UK	Y	Y	Y	N	Y	Y	Y	Y	Y	Y
USA	Y	N	Y	N	Y	N	Y	Y	Y	Y
EU	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

Notes: Y, Yes. N, No "...": Not available. For more details on the questions, See Q2 a),b),b(i) / 2005 OECD regulatory indicators questionnaire / GOV/PGC/REG(2005)12/ANN1.