

Unpacking the OECD Recommendation on Agile Regulatory Governance

By: Dylan Desjardins | October 27, 2021

In brief...

On October 6, the OECD Council adopted a Recommendation at the ministerial level related to agile regulatory governance. The Recommendation is designed to help governments consider regulatory structures that best bolster innovation in their countries. Overall, this Recommendation signals that the OECD sees regulation focused on promoting innovation as valuable—particularly in light of the rapidly-evolving nature of emerging technologies.

On October 6, the [OECD Council](#) adopted a [Recommendation](#) at the ministerial level related to agile regulatory governance. This Recommendation is the result of an extensive effort by delegates from OECD’s [Regulatory Policy Committee](#) and its [Network of Economic Regulators](#). The Recommendation is designed to help governments, even outside of the OECD, consider regulatory structures that best bolster innovation in their countries, or in the OECD’s words, “aims to help governments develop and implement agile and resilient regulatory approaches and facilitate institutional co-operation in response to and to further stimulate innovation.” Agile regulation, in the OECD’s words “involves more holistic, open, inclusive, adaptive and better coordinated governance models to enhance systemic resilience by enabling the development of agile, technology neutral and adaptive regulation that upholds fundamental rights, democratic values and the rule of law.” The full text of the Recommendation, as well as background information and related documents (including a practical guidance document), can be found [here](#).

While neither the Recommendation nor accompanying documents introduce entirely new concepts in agile regulation, it notes strategies to apply longstanding tools (such as regulatory impact analysis and public comment) to newly-emerging challenges and includes examples of innovative strategies regulators might consider (like regulatory sandboxes). And while many regulators may recognize or agree with many provisions in the Recommendation, that does not mean they have put these provisions into effect. The OECD’s [G20 Survey on Agile Approaches to the Regulatory Governance of Innovation](#) notes that “innovators often face difficulties in identifying and interpreting applicable rules, in particular when innovation is straddling or blurring the boundaries of traditional market definitions.” The OECD recommendation can be thought of as a call for regulators to move quickly and effectively to minimize these obstructions to innovation.

Authors of the Recommendation may also have in mind regulatory regimes that seem to be actively moving away from agile governance. China’s [crackdown](#) on different markets (including for-profit education and gaming) has prompted debate on whether they are appropriately curtailing overreaching industries or smothering investment and innovation. And in the United States, there is little conversation about promoting an innovation-centered regulatory regime. The Trump Administration was largely characterized by a focus on [cost-cutting](#) as a central objective rather than enabling innovation for market participants. The Biden Administration, by contrast, has communicated the importance in equitable regulation to agencies, releasing a [memorandum](#) emphasizing this focus on his first day. It does not exhibit any concern for unintended consequences, nor that a more aggressive regulatory approach might inhibit innovation. With agile regulation appearing marginalized or secondary under large economies such as these, the OECD’s Recommendation represents a call to re-focus on it as a guiding principle.

A closer look at language in the OECD’s specific recommendations raises some interesting questions. Section II advises “that adherents adjust regulatory management tools to ensure regulations are fit for the future... developing more adaptive, iterative, and flexible regulatory assessment cycles.” This essentially urges regulators to find agile ways of using tools that historically have not been particularly agile. Regulatory impact analysis and public comment by agencies often occur [well in advance](#) of actual regulation, and they are [rarely used to evaluate regulatory outcomes retrospectively](#). Redesigning these tools could allow them to be more than “point-in-time” methods of evaluation, but any overhaul of how they are used may involve substantial amounts of political and financial capital, as would the creation of new regulatory management tools.

Section 3 recommends “that adherents lay institutional foundations to enable cooperation and joined-up approaches within and across jurisdictions.” As they explain in the accompanying practical guidance document, Committee stakeholders hope to break down silos between regulatory regimes. In a world where businesses are often transnational, particularly in the technology sector, ensuring coherence between regulatory edicts is laudable. December 2020 even saw the creation of the [‘Agile Nations’](#) group, an alliance of seven countries allied in promoting agile and flexible regulatory practices.

However, cooperation among regulators across jurisdictions can have effects detrimental to innovation. If enough jurisdictions employ similar regulatory measures, they may systematically eliminate certain types of innovation that that might have occurred absent a homogenous regulatory regime. This would be especially likely if particularly stringent or inflexible regulatory standards are exported to other regions.

Overall, this Recommendation signals that the OECD sees regulation focused on promoting innovation as valuable—particularly in light of the rapidly-evolving nature of emerging technologies. Regulators relying on inflexible approaches may be caught flat-footed by emerging technology and would do well to keep the OECD’s guidance in mind. In a time when some countries are shying away from agile regulation, it serves as a call for all governments to center it in their planning.