

General comments

- *Definition of regulatory policy:* The recommendation should start with a definition clarifying what regulatory policy actually is (and what it is not). This should settle (substantial) ambiguities and unclear issues, such as: (1) Addressees: Is regulatory policy limited to areas where firms belong to the addressees of regulation (or does it include, for example, regulations being addressed exclusively to households)? (2) Instruments: Does regulatory policy primarily refer to regulatory instruments in the narrow sense (in particular “command and control”), or does it consider incentive measures (taxes and subsidies) and other “alternatives to regulation” in the same measure? (3) Objectives: Is regulatory policy now (also) geared toward promoting “good” regulation wherever it is good for society, or is it primarily still geared toward eliminating “bad” regulation for firms? In other words: Is the primary objective of regulatory policy to monitor, control and limit regulators and regulations, or is it to contribute to a regulatory framework maximizing utility for society (by either limiting, expanding or altering regulation)? Is regulatory policy a sum of individual policies (defining how firms should be regulated) or a “meta policy” (defining how the regulation of firms itself should be regulated)?
Example for a short definition that could clarify some of the mentioned issues: “*Regulatory policy includes all policies aimed at improving the development and application of rules and other instruments public authorities use to influence the behavior of (private or public) actors in the public interest.*”

Draft recommendation (page 5)

- Insert short titles for individual recommendations. To communicate the individual recommendations more effectively, it might be advisable to attribute to each recommendation the same short title as it is used later in the paper for the individual recommendations (see titles of corresponding sections and boxes).

Recommendation 1 (Explicit policy on regulatory quality)

- *Box 1, paragraph 1.1, second bullet point:* The new Recommendation should be self-explaining and include all the necessary information. Therefore, it would be preferable if box 1 does not refer to the 1995 OECD Recommendation.
- *Box 1, paragraph 1.4:* Instead of mentioning “a preference for performance based regulation”, the paragraph should mention “a preference for flexible regulatory approaches”. Performance based regulation is such a flexible approach, but there are other examples, such as management based regulation or economic incentives.

Recommendation 2 (Users of regulation)

- *Question for discussion: should regulation be provided free of charge ?* Yes, regulation should be accessible via a website, free of charge. Those who wish paper copies can pay a fee to cover government expenses.
- *Question for discussion / Definition of “users of regulation”/ Paragraph 29:* The term “users of regulation” is not fully satisfactory. It excludes, for example, addressees that refuse to comply and hence do not “use” the regulation in the first place. The term selected should include actors that are addressed directly by the regulation, but also other actors that are significantly affected by it. The German term “Betroffene” (“those affected”) expresses this meaning but cannot be easily translated. We would suggest to examine whether the expressions “addressees and beneficiaries of regulations” or “actors addressed and/or affected by regulation” would be more suitable terms (although they are also longer). As a compromise, such terms could be used in a complementary way: “users (addressees and beneficiaries) of regulation”. To use the term “stakeholders”, which is already used synonymously in Box 2,

would be another possibility (though it tends to be an overused and hence somewhat vague concept).

- *Asymmetry between “users”*: The draft recommendation on “users of regulation” does not yet acknowledge and take into account the fundamental asymmetry that often exists between different groups with equally important and legitimate interests, but vastly differing possibilities and resources to organize and make themselves heard (e.g. diffuse interests of large groups vs. concentrated interests of small groups).
- *Recommendation 2 (on users of regulation)*: We would suggest to add the following elements (underlined): “Orient regulatory policy around the needs of users (addressees and beneficiaries) and adhere to principles of open government, including transparency and participation. This includes providing meaningful and balanced opportunities (including online) for the public to be consulted in the process of preparing draft regulatory proposals and the supporting analysis.”
- *Recommendation 2 (on users of regulation), concept of “the public”*: It appears not yet fully clear to what extent the term “the public” refers to (1) organized special interests, (2) unorganized special interests, (3) (often unorganized) general interests (clean air, rule of law, external security, etc.) or (4) any other citizen or group of citizens. In this context, the terms “users” and “the public” should be more clearly distinguished.
- *Box 2, point 2.1*. A list of the major stakeholders (citizens, businesses, employees, consumers, NGOs...) should be included in this box in order to ensure that they always take part in the consultation process.
- *Box 2, Point 2.1*: Replace “open public consultation” by “open and balanced public consultation”.
- *Box 2, point 2.4. “Consulting with small business and planning...”*. Replace with: “Consulting with small and micro-business and planning...”. Micro-businesses have the same problems as small businesses, only worse. Special attention should be devoted to them.
- *Box 2, Point 2.7*: Replace “the needs” by “the legitimate needs”.
- *Box 2, Point 2.8 (new)*: “Ensure that, in the process of stakeholder involvement, regulatory capture is avoided and all legitimate interests are taken into account in a fair and balanced manner.”
- *Paragraph 23*: Replace “consumers, ...” by “consumers, employees, ...”.
- *Paragraph 23*: Replace „regulators should also bear in mind that it is not always possible to define public interests as the sum of interests of individual users” by “regulators should also bear in mind that it is not always possible to define public interests as the sum of interests of individual users, and that different legitimate interests do not always have the same possibilities and resources to make themselves heard.”

Recommendation 3 (Regulatory oversight)

- *Question for discussion: what is the core role of an oversight body?* In our view, an oversight body is a center of expertise (“centre de competences”) with 3 main tasks: (1) Ensuring the quality of the stock of regulations, through the use of appropriate instruments, tools and programmes, (2) Ensuring the quality of the flow of (new or revised) regulations, through the use of IA and other appropriate policies, and (3) Keeping an eye on the whole regulatory system, in order to keep it up-to-date and to improve it according to new developments and advances in knowledge.
- *Box 3, points 3.1 to 3.4*. It is not clear if there has to be one oversight body (as in 3.1 and 3.2) or several bodies (as in 3.3 and 3.4). In Switzerland there are several such bodies responsible for different aspects (especially legal quality, economic impact, financial impact).

Recommendation 4 (RIA)

- *Recommendation 4:* Replace „and how it can be most effective in achieving those goals” by “and how it can be most effective and efficient in achieving those goals”.
- *Box 4, point 4.2.* “*Ex ante* policies should identify a specific policy need...”. Yes; in addition, the policies should also identify the precise objective of the regulation. This is not always the case; in our experience, bad regulations are often caused by the lack of a precise goal for government intervention. Therefore, the objective of the regulation should be added in this sentence.
- *Box 4, point 4.7.* Evaluate the impact on small business and demonstrate how compliance costs are minimized. You may complete this sentence with “administrative and compliance costs”.
- Consumers could also be mentioned in *Box 4 (in point 4.6 or 4.7)*, since they are often the “losers” of a bad regulatory policy.
- *Paragraph 37 / First sentence:* Replace “However, the effective use of impact assessment is often hampered through poor application or political and bureaucratic resistance.” by “However, the effective use of impact assessment is demanding in terms of resources and know-how, and it is often hampered through poor application or political and bureaucratic resistance.”
- *Paragraph 37 / Final sentence:* It is not quite clear what „strong and coherent focal point” means. Could this be clarified, e.g. by using a different expression?
- *Paragraph 39 / Final sentence:* Replace „to ensure that regulatory quality is maintained” by “to ensure that regulation remains effective and efficient”. Justification: The formulation should be more concrete. It should be spelled out what „quality” primarily means in this concrete case.

Recommendation 5 (Reviews of the regulatory stock)

1. In our view there are 2 main possibilities to have a review of the regulatory stock:

- a. An horizontal review across all regulations, but centered on only one dimension. A review can be centered for example on a reduction of administrative burdens (SCM approach), on improvements of controls or licensing procedures, or on a review of risk across all regulations, or on a simplification program.
- b. A detailed review of a regulatory area or a legislation, such as food safety or fire regulation. In this case instruments such as ex-post evaluation may be used (but they are too complex to be used across all regulations). Review clauses are also useful mainly in this context.

The draft Recommendation does not separate clearly these 2 approaches. Doing so would greatly improve the clarity of the recommendation on the regulatory stock, in the text as well as in Box 5.

2. About sunset clauses (*Box 5, point 5.2*):

Systematic sunset clauses should not be promoted. They are problematic because of the insufficient capacity of the public sector and the legislative to treat all the new and revised regulations, and also because constant regulatory changes impose additional costs to businesses and reduce legal security:

Les Parlements nationaux sont déjà submergés par le nombre toujours plus importants de dossiers à traiter et n’ont, dans certains cas, plus assez de temps pour traiter consciencieusement les différents objets. Limiter la validité des lois et des ordonnances dans le temps rendrait la situation encore plus difficile. Des problèmes de sécurité juridique se poseraient en outre au cas où les organes législatifs n’arriveraient pas à remplacer les réglementations concernées à leur échéance ou à les proroger. A noter encore que chaque modification juridique induit une charge administrative pour les entreprises concernées (coûts d’adaptation, d’information, etc.) ; l’activisme réglementaire peut donc également se révéler contre-productif à ce niveau.

3. Box 5 could also mention another kind of reviews, centered on regulations impeding innovation and the use of new technologies (one currently important example are regulations hindering the transition to renewable energy).

Recommendation 6 (Reviewing performance)

- *Question for discussion: what should be included in performance criteria and reporting?* Performance reporting can be based on national indicators (like the quality of RIAs or surveys about admin. burdens) or international indicators (like some sub-indicators of the OECD PMR, World Bank DB, WEF or IMD). Ideally both sets of indicators should be used by national governments, since they are complementary.
- *Question for discussion: which agencies are best placed to report this performance information?* In Switzerland for example, the State Secretariat for Economic Affairs publishes a report on administrative burdens and simplification every 4 years. Which agency is best placed ? this depends on the focus of the report.
- *Box 6, point 6. Regularly publish reports... including compliance with... RIA and reviews of existing regulations.* If the performance of the RIA system is mentioned, then the performance of the consultation system should also be mentioned in the recommendation. RIA and consultation are 2 core elements of a regulatory policy.
- *Box 6, point 6.3.* This point related to the use of IT and one stop shops should be included in Box 5, since it is closely related to the administrative simplification programs which are – rightly – mentioned in Box 5.

Recommendation 7 (Organization of regulators)

- *Paragraph 48. “Principle based legislation is likely to be the most appropriate way of meeting policy objectives in complex or rapidly changing policy environments”.* This sentence should be completed as follows: “However, it is adequate only if the regulator has the necessary expertise and capacity; in addition, it poses some additional communication challenges for the regulator”.

Recommendation 9 (Risk and regulation)

- Section 9 could better distinguish risk (which is measurable, the probability and the potential damage are known) from uncertainty (which is not measurable).
- In Box 9, both point 9.2 and point 9.5 are about regulatory compliance strategies; they should follow each other. In the same way, both point 9.4 and point 9.6 are about catastrophic risks and they should also be placed together.
- Point 9.4: “systemic risks” concern mainly the financial sector; it should be replaced by “catastrophic or systemic risks”.

Recommendation 11 (sub-national level)

- *Recommendation 11: “...governments should implement regulatory policy and programmes at the sub-national level....”.* Replace with “governments should promote the implementation of regulatory policy and programmes at the sub-national level”. In federal countries, the central government does not always have the power to implement such programmes directly.

Recommendation 12 (International regulatory co-operation)

- *Question for discussion: What steps can be taken to ensure that international standards are developed according to best practice regulatory procedures?* The “OECD Recommendation on Regulatory Policy and Governance” should not only apply to national governments, but should also be used by international regulatory organizations. The OECD could promote the

use of the Recommendation inside other international organizations, as part of its communication efforts around these principles.

- *Box 12.* A problem related to the lack of international regulatory cooperation can be regulatory arbitrage, leading in some cases to an increased level of risks, a race to the bottom in the standards or inefficient economic structures. This could be mentioned in box 12.