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The comments are divided in two parts. The first part addresses general questions and makes general remarks. The second part is specifically tailored to individual recommendations.

General comments

The Draft recommendations on regulatory policy and governance constitute an important step forward in the definition of common principles of regulation. They provide a solid basis for coordinating the institutional framework, which regulatory entities should be in place, and the regulatory process, when and how to regulate.

In these comments we would like to address the role of private regulation and in particular that of transnational private regulation (TPR) in international regulatory cooperation. This question which is explicitly addressed in Recommendation 12 is mentioned in many other draft recommendations in reference to the impact of global standards on domestic regulatory governance and management. Different forms of private regimes have developed in various areas from electronic commerce to data protection, from corporate social responsibility to food safety, from technical standardization to environment and biodiversity, from intellectual property rights to financial market. These regimes operate often in collaboration, sometimes in competition, with public regimes, giving rise to different combinations in standard setting, monitoring and enforcement. The existence of these regimes has forced us to rethink the role of international organizations and their standard setting function. The examples of FAO and WHO, in relation to the Codex Alimentarius Commission, (CAC) or that of ILO in relation to CSR , show that private standard setting constitutes a fast growing phenomenon posing daunting challenges to regulatory governance and management. But the manifold activities of OECD itself ever more frequently referred directly to private actors as the case of Multinational Corporations Guidelines demonstrate. The link between UN Protect, respect and remedy, The UN Global Compact, OECD Guidelines and ISO 26000 shows the complexity of transnational regulation which also has a significant impact on domestic regimes. The duties of States to respect human rights and comply with CSR obligations implies a better coordination with the duty to respect by MNCs and the instruments like codes of conducts or guidelines deployed by the latter.

Global regulatory governance presents specific features compared to domestic ones. International organizations both public and private are proliferating. They often occupy neighbouring regulatory spaces where conflicts arise. These conflicts require new governance instruments and we observe the increasing use of agreements and memoranda of understanding. They serve coordination between public, private and public and private and private organizations. They operate within standard setting or between standard setting and compliance monitoring organizations.

We therefore suggest that TPR should be integrated in the Draft recommendations especially when, as it is often the case, it interacts with regulatory regimes originating from international organizations or from international treaties. The implementation of TPR at domestic level by governments, either with independent regulatory agencies or by domestic Courts, pose new challenges for domestic regulatory governance and management worth considering in a policy document.

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In particular integration of TPR should concern the link between private regulators and regulatory governance, the definition of users (box 2 see specific suggestions below), the oversight mechanisms, the regulatory impact assessment

Four main additional points are perhaps worth mentioning:

The underlying premise of the Draft Recommendation is that regulation imposes costs and the burdens should be reduced when unnecessary. Perhaps a specific reference to the principle of proportionality would be appropriate beyond regulatory impact assessment. Proportionality concerns both the "if" question (whether to regulate) and the "how" question (which regulatory instruments are more appropriate). It can help defining the metric of regulatory governance and its relationship with performance and effectiveness.

The distinction between regulatory governance and management is introduced but not sufficiently spelled out. It would be useful on the one hand to specify the scope of the distinction and on the other hand the link between the two. The features of compliance depend upon the choice of management tools and vice versa.

The third dimension is related to compliance and enforcement. This question concerns domestic and transnational regulation. Often transnational regulation is enforced at domestic level. This multilevel structure addressed in recommendation 10 without references to the functional separation between standard setting and enforcement may require particular regulatory governance design. The focus of the Draft is primarily on standard setting even if a specific recommendation is devoted to regulatory oversight (4). Oversight however is only one dimension of compliance and it would be probably useful to consider the interaction of different instruments, legal and non legal, to ensure high level of regulatory compliance. We suggest the introduction of a recommendation on the enforcement dimension looking both at the domestic and transnational regulation.

Conflicts among policy objectives is the fourth issue. In the introductory part of the Draft recommendations the conflicts among policy objectives are mentioned as one of the key issue for regulatory governance. In the recommendations however often the focus is on single policies. Neither in the oversight nor in the regulatory impact assessment the governance of conflicting regulatory policies is addressed. We suggest integrating these recommendations with specific indications concerning identification and solutions of conflicting regulatory policies.

Specific comments

1) **Users Box 2.**

The focus of the recommendations is primarily on the regulated while lesser attention is devoted to the final beneficiaries of the regulatory process. Sometimes these coincide with the public at large sometimes with specific categories like investors, consumers, indigenous peoples etc.

A complementary dimension worth considering is that of enabling regulation: the ability of regulation to enhance choices by the regulated and the beneficiaries. Regulation can enable parties to choose among different processes and/or products, as the example of information regulation suggests. An integrated approach that looks simultaneously at costs and benefits could highlight the trade-offs between conflicting objectives protecting various interests.

The perspective about users deployed in the Draft may be integrated in two different ways

a) in relation to the public regulation by distinguishing, where appropriate, between regulated and beneficiaries. In a regulatory relationship the regulator regulates conducts of regulated to increase the welfare of society and/or that of specific groups representing different interests like consumer, environmental and human rights organizations. The distinction can be extremely helpful in relation to points 2.4. and 2.5

In relation to point 2.4 the forms of cooperation should be differentiated where stakeholders have conflicting interests. Consultation should be designed to incorporate in the process potential conflicting interests. Both content and staging should be defined in order to maximize the quality of information and its effectiveness

In relation to point 2.5 the identification of the beneficiaries of the regulatory process can help assessing the effectiveness of regulatory performance by distinguishing between rate of compliance by the regulated and effective increase of welfare of the beneficiaries. It might happen that a high rate of compliance with rules does not translate into the expected benefits for the beneficiaries because the design of the rules rather than its implementation is flawed. Symmetrically it might happen that low degree of compliance does not cause high level of costs because the objectives of the regulation are achieved through different means. By disentangling the two categories, regulated and beneficiaries, it is possible to evaluate the relationship between the costs of regulation on the regulated and its expected benefits for interested constituencies.

b) If transnational private regulation is integrated in the framework of international regulatory cooperation the distinction between regulated and beneficiaries can contribute to a better definition of the regulatory process when different functions of the regulatory process are performed by different bodies. It happens for example that while standard setting is performed by an international organization compliance monitoring is performed by private actors while enforcement by domestic courts. Those who monitor compliance for example by way of certification may be the final beneficiaries of the regulatory process (when certification is carried by representative of NGOs) who have stronger incentives to monitor strictly and effectively. Here again the distinction among ‘users’ between regulated and beneficiaries could be helpful.

Box 3 Regulatory oversight

> Regulatory oversight is part of a broader set of tools directed at ensuring compliance. We suggest including additional tools and to integrate public oversight with the use of private instruments increasingly deployed at the global level as the example of certification shows. Certification is an area where clearly the role of private organizations should be considered. In the global regulatory practice the role of private organizations as compliance monitors is exponentially increasing. Different forms of certification are progressively complementing and, at times, substituting public oversight. These changes, driven by the clear inefficiencies of public oversight and the difficulties of coordinating States' oversight at the global level, have modified the regulatory process and its governance. In addition market and social accountability mechanisms of private actors, are promoted by States, individually or jointly, to replace or to complement more traditional command and control mechanisms. In the private sector there is an increasing degree of professionalization and specialization which is also the consequence of a rebalancing between advocacy and the use of ex post litigation versus ex ante control. NGOs have modified their strategies and combined litigation with compliance monitoring.
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> We suggest integrating States' promotion of complementary mechanisms of regulatory mechanisms, partly shifting the burdens of compliance costs on private parties. The costs of compliance, including that of oversight should be distributed along the regulatory chain. In the case of certification, for example, the costs of compliance are born by the certified not by the tax payers.

Links between transnational and national certification schemes and domestic regulation have been acknowledged and addressed by (supra-)national regulators. Examples where those schemes are explicitly addressed are, *e.g.* Regulation No. 995/2010 of the European Parliament and of the Council, 20 October 2010, which puts a due diligence obligation on persons placing timber products on the market (operator) (Article 4.2). The fulfilment of the due diligence obligations has to be evaluated regularly, and monitoring organizations (private certifier) can be used for this purpose. The regulation furthermore sets out criteria that have to be fulfilled by the private certifier (Article 8 and 9)Another example is the EU Certification Guidelines, which address to voluntary certification schemes in the food safety sector. They were drafted as an answer to the numerous certification schemes arising in this sector and were intended to "describe the existing legal framework and to help improving the transparency, credibility and effectiveness" of these schemes. Particular goals are the avoidance of consumer confusion, reduction of financial and administrative burdens of producers, and the assurance of compliance with EU internal market rules and certification principles. With regard to food safety the interplay between domestic liability schemes and private regulation must be noted as well. Certain national food safety regulation such as Directive 95/2001/EC on the general product safety, Directive 178/2002/EC which lays down the general principles and requirements of food law, or the British Food Safety Act 1990 have increased liability for retailers with regard to food safety and influenced the creation of private standards ensuring safety throughout the supply chain. Article 7 of Directive 95/2001/EC, for example, states that "Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented".

Further strong links between transnational and (supra) national regulation can be found in the context of accounting standards and advertising. Concerning the former, Regulation (EC) No. 1606/2002 of the European Parliament and the Council, 19 July 2002, prescribes for the adoption and use of accounting standards set by the International Accounting Standards Board (IASB). The European Commission together with the Accounting Regulatory Committee decides on the applicability of the individual accounting standards (see Commission Regulation (EC) No 1725/2003 of 29 September 2003 Adopting Certain International Accounting Standards in Accordance with Regulation (EC) No 1606/2002 of

the European Parliament and of the Council). Publically traded companies are then obliged to base their annual reports on those standards. The correctness of these reports will again, similar to certification systems, be verified by private actors (public accounting firms).)

Box 4 Regulatory impact assessment

References are made to the adoption of international standards and their impact on national standards (4.7). A stronger link should be made with p. 12.1 on international regulatory cooperation. The inclusion of TPR would imply an extended impact evaluation in order to capture the effects of transnational private standards on domestic regulatory management and governance. This is the case for example in food safety where private international standards are adopted within supply chains and have a major impact on import control made by States. Seemingly the adoption of CSR standards at the global supply chain level plays an important role in domestic regulation of labour standards. Private international standards are adopted in the field of financial markets and they have an impact on domestic regulation as the example of accounting shows.

References are made to alternative to regulation in the impact assessment (p. 4.3). This point could be further elaborated. If it is meant alternative to **public** regulation, then specific mention to private regulation should be made so that reference to alternatives becomes more concrete and explicit. However the relationship between public and private regulation is more complex. Private regulation often operates as a complement rather than as a substitute of public regulation. At the transnational level complementarity takes different forms depending on the choice between hard and soft law and the available enforcement mechanisms at transnational and domestic level. It would then be important to rephrase the recommendation in order to consider both possibilities: that private regulation operates as a complement or as a substitute of public regulation. When it operates as a complement the choice between different governance devices should be addressed in the RIA looking at different forms of memorandum of understanding or agreement. We suggest that both criteria to decide when private regulation is a good substitute and when a good complement should be identified and included in the RIA

References are made to the distributional effects of regulation (p. 4.1) and the necessity to incorporate them into the impact assessment. A link between the 'users' box and this one could be made more explicit. In particular the distinction between regulated and beneficiaries and within the latter among different classes of potential beneficiaries should be deployed in RIA in order to assess who bears the costs and who will gain benefits if regulation is complied with. Since often distributional conflicts arise among beneficiaries, regulatory impact analysis can contribute to define them and make the trade-offs transparent.

We suggest that TPR should be explicitly included in the recommendations concerning RIA encompassing both the use of TPR as a complement and as a substitute of public regulation. It is very important that RIA considers the impact of TPR on domestic implementation, indicating how different branches should be involved and how horizontal coordination among implementing States can be improved. Furthermore we suggest that it would be useful to identify more specifically the different categories involved in regulatory management so that a clearer picture of the impact on regulated and beneficiaries can emerge both in the ex ante and ex post impact assessment.

Box 12 International regulatory cooperation

The recommendation invites governments to consider international regulatory settings when formulating domestic practices but no specific references to TPR are made. In the current text of recommendations the issue of extra jurisdictional effects is considered in order to incorporate interests of constituencies affected by domestic regulation of countries different from those where the regulation is adopted. The perspective adopted in the recommendation is premised on the necessity to take into account international frameworks for cooperation and extra jurisdictional interests that may be affected. This effect based approach is certainly commendable but more specific reference to governance tools and in particular to the regulatory chain that translate international agreement into domestic regulatory policies should be made

In particular the explicit reference to TPR would permit to consider cooperation between international organizations and transnational private regulators taking place either through bilateral or, less often, through multilateral agreements or memoranda of understanding. These agreements and memoranda of understanding, have impacts on the domestic level as well. Governments should better define means to implement international soft agreements among IO or between IO and private international standard setting bodies. TPR and forms of cooperative agreements between international public organizations and private entities challenge the traditional multilevel structure and the toolbox deployed to integrate the effects at the domestic level.

We suggest that the recommendation could usefully refer to forms and tools concerning international regulatory cooperation. The recommendation on international regulatory cooperation could usefully refer to different forms and tools of cooperation currently deployed and indicate how they should be implemented at domestic level, especially when they have effects on jurisdictions and constituencies which did not have much say in setting the international standard.