

Communication 01/2011

**Contribution to the OECD invitation for public comments on the
*Draft Recommendation on Regulatory Policy and Governance
and explanatory text*
(www.oecd.org/regreform)**

1. Background

alliorodrigoconsulting welcomes the OECD Regulatory Policy Committee (RPC) decision to endorse the launch of a public consultation on the [Draft Recommendation on Regulatory Policy and Governance and explanatory text](#) (from now on: “OECD Recommendation”), and takes on the opportunity to contribute to further enhancing the debate on framing the reform agenda for the next decade. **alliorodrigoconsulting** considers that such consultation rounds should become regular practice by the OECD Secretariat in the future.

This note offers a feedback on the draft text and seeks to provide additional elements for refining the envisaged recommendations. The comments address the current twelve OECD recommendations and sub-recommendations, only, in the understanding that those parts – and not necessarily the accompanying explanatory texts – will constitute the final official document to be considered by the RPC in November 2011.

alliorodrigoconsulting believes that, in the framework of this consultation round, concrete formulation proposals are beneficial to the OECD Secretariat for a speedy verification and revision process. Accordingly, while Point 2 below makes some general remarks, direct wording amendments are suggested in Point 3 of the note. To this end, the original draft text of the recommendations (see document GOV/RPC(2011)3/REV1) is reported, and amendments are highlighted in “track changes” mode. Specific comments are added to the amendments, where this is deemed useful.

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2. General comment

The OECD Draft Recommendation is an important and timely document that constructively shapes the debate about the features of the regulatory reform agenda for the next decade. If implemented, the recommendations will certainly enhance governments' capacity to ensure high quality decision-making. The text robustly draws from the established knowledge in the field, as consolidated by the OECD in the *1995 Recommendation for Improving the Quality of Government Regulation* and in the *2005 Guiding Principles for Regulatory Quality and Performance*. It also takes into account the know-how further developed in OECD countries in the most recent years. As such, the Draft Recommendation is to be welcome.

Specifically, a number of aspects presented in the Draft Recommendation constitute innovative approaches and contribute to a more accurate conceptualisation of regulatory reform. The section on "Reviewing the performance of regulatory programmes" (Recommendation 6.), for instance, treasures the experiences with more than two decades of reform initiatives and pleads for a more conscious and rationale reform design and management. The recommendation on the appointment of a political leader prompting reform progress is another point in case. Greater emphasis is moreover put on the *regulators* than on the regulatory outcomes. All this is part and parcel of the shift towards a structured "regulatory governance" – a notion that informs the whole Recommendation and marks its evolution compared to the 1995 and 2005 documents.

Despite these fundamental improvements, the Recommendation could gain even further relevance and impact if some general issues are addressed. In particular, [alliorodrigoconsulting](http://alliorodrigoconsulting.com) wishes to draw attention to the following issues:

Rationale for the Recommendation

- The Draft Recommendation does not seem to be sufficiently embedded and reflect the thrust and the objectives set out in the *OECD Green Growth Strategy*. On the contrary, in a number of instances, it seems to be still informed by the (previous) paradigm of market liberalisation and economic efficiency, exclusively – whereas social welfare, sustainable development, economic prosperity, innovation, protection of public health, safety and the environment are not spelled out as core objectives of public policies. In this respect, one of the main goals of "regulatory policy" should be policy integration.
- Ensuring high quality regulations (of primary and secondary status) is of outmost importance. This Recommendation is nonetheless about "regulatory policy" – i.e. the way the process of formulating, adopting, implementing and enforcing public policy decisions is organised and performs. Accordingly, the Recommendation could dwell some more on the importance of considering other instruments besides regulation, since the latter is but one among various possible instruments. Seeking the optimal type and intensity of public intervention – notably following the "responsive (smart) regulation approach"¹ – should be part of the "regulatory governance" approach, as the OECD considers it, and be promoted more actively in this Recommendation.

¹ See Gunningham, N. and P. Grabosky (1998), *Smart Regulation: Designing Environmental Policy*, Oxford University Press, Oxford (UK); and Ayres, I. and J. Braithwaite (1992), *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, Oxford (UK).

Nature of the recommendations

- The various recommendations swing between re-stating core regulatory principles (“*what should be done*”) and being more operational (“*how it should be done*”). As a result, not all of them keep the word of offering “solutions”, as claimed in the first lines of the consultation document. To a certain extent, they do not help overcome some of the main challenges faced by governments in the past few years – i.e. the significant capacity disparities among and within OECD countries and the gap between setting legal requirements for reform and translating them into administrative re-organisation and action. The OECD might consider making the recommendations more concrete and action-oriented.
- There seems also to be a certain discrepancy in the level of reform effort implied by the recommendations. The OECD might better clarify who the main addressees of the Recommendation are, and tailor the various recommendations so as to better target the needs of various countries. For some OECD members, for instance, the Recommendation does not seem to set the reform standards higher enough to prompt them to “move up a gear”, compared to what they have launched and/or established thus far. The Recommendation could be more ambitious, while it should reveal implementation issues and constraints that are relevant for most non-OECD members.
- Besides the suggested amendments to the individual recommendations (see Point 3 below), the Draft Recommendation seems missing explicit reference to a number of crucial elements supporting successful reforms. Such elements, which the OECD might consider integrating in the current text or developing separately, include:
 - re-affirming the imperative of legal predictability and certainty;
 - insisting on “high quality standard” for (scientific) evidence and data supporting decision-making;
 - acknowledging the multiplier effects that the RIA process has on improving decision-making;
 - reinforcing the relevance of consultation processes to improve (regulatory) decision-making;
 - promoting with more emphasis the importance of ensuring compliance with regulation, and timely reporting on compliance with regulation ;
 - spelling out more explicitly the criteria and design for effective *ex post* evaluation of regulation; and
 - addressing the increasing relevance of regulation inside government (“soft law”) in support of (regulatory) decision-making, and in particular of guidelines covering risk assessment, management and communication.

Format of the Recommendation

- A *Preamble* to the Recommendation could be an effective way of framing the context and rationale for the new document, together with acknowledging the benefits of regulatory policy (which stretch beyond limiting the risk of failures) and of the need to establish clear linkages between the various elements raised in the Recommendation.

- The OECD might consider adding a *Glossary* to the Recommendation, providing clear definitions of the key concepts used in the text.

3. Suggested amendments

(The boxes are reported from document GOV/RPC(2011)3/REV1.)

Box 1. Draft recommendation on explicit policy on regulatory quality

1. Commit at the highest political level to an explicit whole-of-government policy for regulatory quality, with clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, distributional effects are considered and that the net benefits are maximised. (SEE COMMENT 1.1.)

1.1 Regulatory policy defines the process by which government, when identifying a policy objective, decides whether to use regulation as a policy instrument, and proceeds to draft and adopt a regulation through evidence-based decision-making consistent with good governance practices. (SEE COMMENT 1.2.) An explicit policy to ensure that regulations and regulatory frameworks serve the public interest should commit governments to:

- Adopt a continuous policy cycle for regulatory decision-making, from identifying policy objectives to regulatory design to evaluation;
- Use regulation when appropriate to achieve policy objectives, applying the *1995 OECD Recommendation on Improving the Quality of Government Regulation*;
- Maintain a regulatory management system, including both *ex ante* impact assessment and *ex post* evaluation as key parts of evidence-based decision-making;
- Articulate regulatory policy goals, strategies and benefits clearly;
- **Systematically review the stock of regulations periodically to identify and eliminate or replace those which are obsolete or inefficient; (SEE COMMENT 1.3.)**
- Develop, implement and evaluate a communications strategy to secure ongoing support for the goals of regulatory quality.

1.2 To achieve results, governments should:

- Consider policies, institutions and tools as a whole, at all levels of government; (SEE COMMENT 1.4.)
- Adopt a balanced approach, recognising that specific components such as impact assessment and administrative simplification are not a substitute for a comprehensive programme;
- ~~Systematically review the stock of regulations periodically to identify and eliminate or replace those which are obsolete or inefficient;~~
- Commit to apply regulatory policy principles when preparing regulations that implement sectoral policies, to ensure that regulations serve the public interest in promoting and benefiting from trade, competition and innovation while reducing system risk;
- Monitor the impact of regulations and regulatory processes.

1.3 Governments should develop and maintain a strategic **capacity-vision** to ensure that regulatory policy remains relevant **and effective** and can adjust and respond to emerging challenges. **Governments should issue a formal and binding policy statement underpinning regulatory reform. (SEE COMMENT 1.5.)** The design of institutional frameworks and resources necessary to implement regulatory policy and discharge enforcement responsibilities (SEE COMMENT 1.6.) should be assessed to ensure that they are adequate.

1.4 Regulatory policy should include a preference for performance based regulation and the efficient functioning of markets. (SEE COMMENT 1.7.)

1.5 The regulatory policy should clearly identify the responsibilities of Ministers for putting regulatory policy

into effect within their respective portfolios. **Related accountability mechanisms should be designed. (SEE COMMENT 1.8.)**

1.6 In addition, governments should assign a specific Minister (or equivalent), close to the centre of government, with political responsibility for maintaining and improving the operation of the whole of government policy on regulatory quality and to provide leadership and oversight of the regulatory governance process. The role of the Minister for Regulatory Policy (or equivalent) should include:

- Monitoring and reporting on the co-ordination of regulatory reform activities across portfolios;
- Reporting on the performance of the regulatory management system against the intended outcomes;
- Identifying opportunities for system wide improvements to regulatory policy settings and regulatory management practices.

~~1.6 Clearly identify the responsibilities of Ministers for putting regulatory policy into effect within their respective portfolios (SEE COMMENT 1.9.)~~

SPECIFIC COMMENTS

COMMENT 1.1.: The OECD might consider reflecting more robustly on the increased relevance attached to the notion of “regulatory governance” (as opposed to mere regulatory “management”) in this first, programmatic recommendation. A definition of both concepts, and of the term “whole-of-government” approach, should be included in the recommended Glossary.

COMMENT 1.2.: This does not seem to fully reflect the OECD definition of “regulatory policy”, as developed in previous OECD documents. Such a definition should be included in the recommended Glossary.

COMMENT 1.3.: This is copied and past from the third bullet of sub-recommendation 1.2.

COMMENT 1.4.: This sentence appears to be excessively general. The OECD might consider better linking it to the next bullet, specifying that regulatory reform should be considered as a “package” of mutually dependent elements, whereby the different tools and instruments are to be introduced in a coherent manner. Accordingly, governments should be invited to integrate initiatives aiming at – at least – more structured planning and programming; systematic *ex ante* impact assessment as well as public consultation; and a robust implementation, enforcement and evaluation system. Designing these elements altogether is critical to ensure a strategic and coherent vision of the reform.

COMMENT 1.5.: Such a statement is instrumental for facilitating the development of a new regulatory climate. It should indicate the plans and strategies pursued by the government as a whole and formulate guidelines for the use of the regulatory policy tools and procedures.

COMMENT 1.6.: The wording “discharge enforcement responsibilities” is not fully clear in this context.

COMMENT 1.7.: Because it mixes a tool (“performance-based regulation”) and a goal (“efficient functioning of markets”), this sub-recommendation should be re-phrased, as it implies that one cannot be achieved without the other. It is furthermore questionable whether “efficient markets” are (still) the only goal of regulatory policy.

COMMENT 1.8.: The OECD might consider linking this point to Recommendation 3. below (on regulatory oversight).

COMMENT 1.9.: This sub-recommendation repeats the first sentence in sub-recommendation 1.5.

Box 2. Draft recommendation on users of regulation

2. Orient regulatory policy around the needs of users ([SEE COMMENT 2.1.](#)) and adhere to principles of open government, including transparency and participation. This includes providing timely and meaningful opportunities (including online) for the public to be consulted in the process of preparing draft regulatory proposals and the supporting analysis. ([SEE COMMENT 2.2.](#))

2.1 Governments should establish a clear policy for open public consultation on the development of rules.

2.2 All regulations should be easily accessible by all users. ~~A The~~ complete and up to date legislative and regulatory database should be available to the public in a searchable format through a user-friendly interface over the internet.

2.3 Governments should have a policy that requires regulatory texts to be drafted in plain language. They should also provide clear guidance on compliance with regulations, making sure that users understand their rights and obligations.

2.4 Co-operate with stakeholders on developing new and reviewing existing regulations by:

- Continuously consulting all relevant stakeholders during the whole regulation-making process through ~~all available~~ the most adequate channels; ([SEE COMMENT 2.3.](#))
- Consulting with small business and planning for clear communication of regulatory requirements to small business;
- Publishing whole regulatory dossiers including the impact assessment and reasons for regulatory decisions as well as all relevant data;
- Structuring reviews of regulations around users' needs, co-operating with them through the whole process including prioritisation, assessment of regulations and drafting simplification proposals;
- **Ensuring timely and adequate feedback to the parties inputting the consultation process and reporting on the consultation practice.**

2.5 Introduce regular performance assessment of **the regulatory activity and its outcomes as well as of ~~regulations and~~** regulatory systems, taking account of the impacts as perceived by users. ([SEE COMMENT 2.4.](#))

2.6. Ensure good and timely communication of such performance assessments.

~~2.6 Eliminate unnecessary regulatory costs imposed on users of regulation.~~ ([SEE COMMENT 2.5.](#))

2.7 Make sure that the policies on inspections and enforcement respect the needs of those subject to the enforcement, causing no unnecessary burdens to those inspected.

2.8 Governments should promote the use of risk based approaches in the design and enforcement of regulatory compliance strategies to increase the likelihood of achieving compliance goals and to minimise the imposition of costs on businesses and citizens through compliance and enforcement procedures. ([SEE COMMENT 2.6.](#))

SPECIFIC COMMENTS

COMMENT 2.1.: The OECD might reconsider the idea of “users” of regulation in this and other contexts, as this notion is conceptually misleading and it may lack practical implications. Regulation is not to be “used”. Regulatory policy, moreover, is by definition “horizontal” (cross-sectoral) in nature, and it focuses on the way the legislative and administrative processes are organised and managed. Accordingly, it should not / cannot be “oriented around the needs of users”, for these form different constituencies that vary from one policy initiative to the other.

COMMENT 2.2.: The important issue of ensuring high quality standards for the information and data inputted through the consultation process is missing in this recommendation. That is relevant, especially when referred to any scientific evidence and analysis provided by consulted parties.

COMMENT 2.3.: As it reads, the sentence implies that all the consultation channels must be activated in the consultation process, whereas what matters is that that process be managed as effectively as possible – i.e. by selecting the most adequate channels.

COMMENT 2.4.: Care should be used in mentioning the notion of perception, only.

COMMENT 2.5.: It is not fully clear whether this sub-recommendation is necessary, and whether it is to be put here.

COMMENT 2.6.: This is copied and pasted from sub-recommendation 9.5 below.

Box 3. Draft recommendation on regulatory oversight

3. Establish institutions and mechanisms to actively pursue oversight of regulatory policy procedures and goals, support and implement regulatory policy, and foster regulatory quality. (SEE COMMENT 3.1.)

3.1 The body charged with regulatory oversight should be politically accountable, such as to the centre of government, to ensure that regulation serves government policy.

3.2 The authority of the regulatory oversight body should be set forth in mandate, such as statute or executive order.

3.3 The regulatory oversight body^{ies} should be tasked with a variety of functions or tasks in order to promote **high quality** evidence-based decision making. These tasks include:

- Quality control through the review of the quality of impact assessments and returning proposed rules for which impact assessments are inadequate;
- Examining the potential for regulation to be more effective including promoting the consideration of regulatory measures in areas of policy where regulation is likely to be necessary; (SEE COMMENT 3.2.)
- Strategic planning of future regulatory policies; (SEE COMMENT 3.2.)
- Co-ordinating *ex post* evaluation for policy revision and for refinement of *ex ante* methods.

3.4 A regulatory oversight body^{ies} may be located in a variety of institutions, with the choice based on which institution is best equipped and best placed to perform oversight in each system of governance.

SPECIFIC COMMENTS

COMMENT 3.1.: Contrary to the heading and text of this recommendation, the focus in all the following sub-recommendations is limited on oversight “bodies”, whereas what matters most is to ensure the existence and effectiveness of a pluralistic oversight “function”. The latter can result from a number of channels / mechanisms, including inter-departmental consultation, (informal) networks, oversight bodies, external pressure, etc. A further accountability mechanism worthwhile exploring is political as well as professional certification – for instance through the scrutiny and validation of a Chief Scientific Advisor; Chief Economists, etc.

COMMENT 3.2.: This sentence is not fully clear, and the OECD might reconsider its wording.

COMMENT 3.3.: The OECD might consider the relationship between this responsibility and the portfolio of the “Minister for Regulatory Policy”, as outlined in recommendation 1.5 above.

As to the suggested amendment: The OECD normally uses the term in its singular form to refer to governments’ efforts to launch and implement regulatory reforms. “Regulatory policies” might be

misunderstood as sectoral approaches, which would contradict both the OECD approach and the role of an oversight body.

Box 4. Draft recommendation on regulatory impact assessment

4. Integrate Regulatory Impact Assessment (RIA) early into the policy process for the formulation of new regulatory proposals. Clearly identify policy goals and options and evaluate if regulation is necessary and how it can be most effective in achieving those goals in a proportionate manner. (SEE COMMENT 4.1.)
 - 4.1 With reference to the scope of application of RIA and the depth of the analysis, adopt *ex ante* impact assessment practices that are proportional to the significance of the initiative ~~regulation and include benefit cost analyses that considers the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects.~~ (SEE COMMENT 4.2.)
 - 4.2 *Ex ante* assessment policies should identify a specific policy need, ~~such as a market failure,~~ that justifies the use of policy intervention and, in case, of regulation, and explore and outline thoroughly causal linkages triggering the problem / mischief. (SEE COMMENT 4.3.)
 - 4.3 *Ex ante* assessment policies should include a consideration of alternatives to regulation, including non regulatory alternatives to identify and select the most appropriate instrument, or mix of instruments to achieve policy goals. The “no action” option (baseline scenario) should always be considered. *Ex ante* assessment should identify approaches likely to deliver the greatest net benefit to society.
 - 4.4. Assess economic impacts (notably those on Small and Medium-sized Enterprises), social and environmental impacts including the distributional effects, as well as cross-jurisdictional impacts. Apply the most appropriate methodologies to measure and compare benefits and costs. For the purpose of the analyses, establish clear quality standards for the collection, validation and use of data.
 - 4.54 When regulatory proposals would have significant impacts, *ex ante* assessment of costs, benefits and risks should be quantitative whenever possible, drawing from the best available scientific evidence.
 - 4.65 ~~Regulatory Impact Analysis-RIA~~ should be provided transparently and made publicly available along with regulatory proposals in a suitable form and within adequate time to assist decision making. (SEE COMMENT 4.4.)
 - 4.6. ~~Competition should only be restricted if it is necessary to achieve the public interest and that the benefits cannot be achieved by other less restrictive means.~~ (SEE COMMENT 4.5.)
 - 4.7 ~~When carrying out an assessment, officials should:~~
 - ~~Assess economic, social and environmental impacts;~~
 - ~~Evaluate if the adoption of common international practices will efficiently address the identified policy issues with minimal disruption to national and international markets;~~
 - ~~Evaluate the impact on small business and demonstrate how compliance costs are minimized.~~ (SEE COMMENT 4.6.)
 - 4.78 RIA should be supported with clear policies, training programmes, guidance and quality control mechanisms for data collection and use. It should be integrated early in the processes for the development of policy and supported within agencies and at the centre of government.

SPECIFIC COMMENTS

COMMENT 4.1.: One of the key features of RIA is that it should help minimise the risk of taking the adoption of new regulation for granted. The OECD might consider putting more evidence on the importance of identifying, elaborating and assessing various policy options, among which the “no action” one.

To reinforce other recommendations, and to highlight the pivotal role that RIA can play in the overall regulatory policy, it is suggested that this Recommendation makes explicit reference to other reform elements such as, at least, “forward planning and programming” and “public consultation”.

COMMENT 4.2.: The OECD might consider differentiating between the capacity and appropriateness to perform RIAs in terms of process and of tool. With regard to the RIA process, the recommendation should focus on the proportionate approach that government should follow when selecting the policy initiatives to be impact assessed, and the desirable depth of the analysis. It might also consider highlighting more explicitly the relevance of RIA to improve the decision-making process, and support regulatory reform efforts. In particular, RIA helps regulators rigorously follow procedural and analytical steps; enhance the transparency of policy formulation; improve data collection techniques; design various consultation channels, etc.

It is suggested that the second aspect, related to the tool – i.e. the type of impacts to be assessed and the methodologies to be applied – be addressed in a separate sub-recommendation (see new sub-recommendation 4.4.) The term “benefit cost analyses” has been replaced there by the more general “most appropriate methodologies” to avoid implying that the Benefit-Cost Analysis is the only technique recommended by the OECD.

COMMENT 4.3.: The critical aspect of this sub-recommendation should be to urge governments to devote adequate time and resources to the problem definition stage, which is one of the fundamental stages of the RIA process. Mentioning the example of just one possible cause – i.e. a “market failure” – might divert the focus of the sub-recommendation.

As to the amendment to the wording “use of regulation”, see COMMENT 4.1. above.

COMMENT 4.4.: The OECD might consider substantiating this sub-recommendation, as it reads excessively vague to be effective. For instance, there might be internal repetition between “provided transparently” and “made publicly available”, unless these procedural steps are better clarified.

COMMENT 4.5.: The reference to competition is important, but it does not have to be necessarily linked to RIA systems, only. The OECD might consider deleting it, unless it defines better its linkages to RIA, and unless it complements the sub-recommendation with reference to equally important policy goals, such as sustainable development, social welfare and competitiveness, for which specific assessment considerations are justified.

COMMENT 4.6.: The OECD might consider deleting this sub-recommendation, as most of the issues raised here merely repeat the previous text, especially in the proposed new sub-recommendation 4.4.

Box 5. Draft recommendation on reviews of the regulatory stock

- 5. Conduct systematic programme reviews of the stock of regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective, consistent with each other and fit for purpose. (SEE COMMENT 5.1.)**
 - 5.1 The methods of regulatory impact analysis should be integrated in programmes for the review and revision of existing regulations. These programmes should include an explicit objective to improve the efficiency and effectiveness of the regulations, including better design of regulatory instruments and to lessen regulatory costs for businesses and citizens as part of a policy to promote economic efficiency. (SEE COMMENT 5.2.)
 - 5.2 Reviews should be scheduled to assess all regulation systematically over time, **ensure consistency and coherence of the regulatory stock**, and reduce regulatory burdens. Priority should be given to regulation with significant **welfare economic** impacts and/or causing highest irritation among users and/or impact on risk management. (SEE COMMENT 5.3.) The use of a permanent review mechanism should be included in rules (SEE COMMENT 5.4.), such as through sun setting and review clauses in regulation.

- 5.3 **Roles and responsibilities for reviews should be clearly defined.** Systems for reviews should assess progress toward achieving regulatory policy coherence.
- 5.4 Procedures should be developed at the sub-national level to assess areas for which simplification is most urgent, **with the view to avoid legal vacuum, inconsistencies, duplications and overlap.**
- ~~5.5 Programmes of administrative simplification should include measurements of the aggregate burdens of regulation and consider the use of explicit targets as a means to lessen administrative costs for citizens and businesses. Qualitative methods should complement the quantitative methods to better target the efforts.~~
- ~~5.6 Administrative simplification programmes should be evaluated for their “value-for-money”. Evaluation should not only focus on the quantification of administrative burdens reduced but also on other outcomes and effects for society. (SEE COMMENT 5.5.)~~

SPECIFIC COMMENTS

COMMENT 5.1.: The OECD might consider better defining this section conceptually. It may prove instrumental to distinguish the review of the regulatory stock between a process and a content approach. The first consists essentially of the legal scrutiny and it focuses on the clarity of legal texts (plain drafting); legal consistency; redundancy, etc. The latter approach focuses more on the substance of the regulations, and refers rather to administrative burden reduction and ex-post evaluation.

COMMENT 5.2.: The OECD might consider complementing the promotion of “economic efficiency” with reference to other goals, as set out by the *OECD Green Growth Strategy*. Regulatory activities should seek also objectives such as prosperity, sustainable development and innovation.

COMMENT 5.3.: The OECD might consider setting the reference to users’ “irritation” in a better defined context. As the sub-recommendation currently reads, it implies that the screening, simplification, and possible repeal of regulations may be justified on the basis of perceptions by specific “users”. While it may actually be a legitimate call for regulatory rationalisation, if taken alone “irritation” by selected stakeholders may trigger regulatory capture and/or inefficiencies.

The OECD might consider clarifying the wording “impact on risk management” as a priority condition for regulatory stock reviews.

COMMENT 5.4.: The OECD might consider better defining the term “rules”.

COMMENT 5.5.: The OECD might consider whether it is appropriate to address “administrative simplification” under the heading of “reviews of the regulatory stock”. While programmes aimed at measuring and reducing administrative burdens imply regulatory screening and may lead to simplified regulations, the notion of “administrative simplification” *per se* is conceptually and practically different from regulatory simplification.

Issues raised in the sub-recommendations 5.5 and 5.6 could be moved under the heading section devoted to “Regulatory Impact Assessment” (Recommendation 4.).

Box 6. Draft recommendation on reviewing performance of regulatory programmes

6. Regularly publish reports on the performance of regulatory programmes and the public authorities applying the regulations, including compliance with regulatory quality measures such as the performance of Regulatory Impact Assessment (RIA) and reviews of existing regulations.

6.1 Review the means of interaction with business and citizens to satisfy regulatory requirements ([SEE COMMENT 6.1.](#)) and **put-in-place programmes** to reduce the transaction costs. ([SEE COMMENT 6.2.](#))

6.2 Review the form and delivery of regulation inside government to ensure that it is effective and efficient and meets clearly identified objectives for public service delivery.

6.3 Employ the opportunities of information technology and one stop shops for licences, permits and procedural requirements to make service delivery more streamlined and user focused.

6.4 Design and assess data collection strategies to ensure that the necessary **high quality** information is available for the preparation of reports while avoiding the imposition of unnecessary administrative burdens.

6.5. Promote an external review, scrutiny, and oversight function, notably by stakeholders and civil society. (SEE COMMENT 6.3.)

SPECIFIC COMMENTS

COMMENT 6.1.: The OECD might reconsider the first part of this sub-recommendation, as it is not fully clear.

COMMENT 6.2.: It is not granted that programmes must be introduced in order to have transaction costs reduced.

COMMENT 6.3.: The OECD might consider addressing the importance of ensuring the multiplicity and comprehensive review function, which should be both internal to the executive and external (e.g. by parliamentary assemblies/committees, stakeholders, think tanks, research institutes, etc.). Enhanced external accountability, in particular, contributes to achieving and maintaining high quality regulatory standards.

Box 7. Draft recommendation on the organisation of regulatory agencies

7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, and avoid the risks of conflict of interest, bias or improper influence. (SEE COMMENT 7.1.)

7.1 In developing legislation that provides regulatory power, governments should clarify the objectives of making the legislation. **(SEE COMMENT 7.2.)**

7.2 Independent regulatory agencies should be considered in situations where: **(SEE COMMENT 7.3.)**

- There is a need for the regulatory agency to be seen as independent in order to maintain public confidence;
- Both the government and private entities are regulated under the same framework and questions of competitive neutrality need to be addressed; and
- The decisions of regulatory agencies can have significant economic impacts on regulated parties and there is a need to protect the agency's impartiality.
- Agency performance should be regularly evaluated.

7.3 A system of public accountability is required that clearly defines how a regulatory agency is to discharge its responsibility with integrity, honesty and objectivity.

SPECIFIC COMMENTS

COMMENT 7.1.: One of the key rationales for establishing regulatory agencies is that they ensure greater (sectoral) expertise compared to parent ministries. The OECD might consider stressing this aspect in the recommendation, which, on the other hand, could better express the need for proper systems of oversight of the agencies by democratically legitimated institutions (as hinted in sub-recommendation 7.3). If the recommendation is meant to deal only with the "organisation" of regulatory agencies, it should further develop the main governance features of their structure.

The OECD might consider clearly defining what is meant by “regulatory agencies”, possibly in the recommended Glossary.

COMMENT 7.2.: The OECD might consider reformulating this sub-recommendation, which presumably deals with the delegation of regulatory powers, as it is unclear and potentially incomplete. The definition of the objectives to be pursued is intrinsic to the act of delegating powers, as much as other fundamental elements of the delegation, such as the conditions under which such powers are revoked. Moreover, the sub-recommendation should be more clearly linked to the “organisation” of the agency system, as implied by the heading of this section.

COMMENT 7.3.: The rationale of the various conditions presented below for the establishment of “independent” agencies does not seem to be straightforward and it is difficult to establish general rules for each of them. The OECD might consider revisiting this sub-recommendation.

Box 8. Draft recommendation on administrative appeals

8. Establish systems for the review of the legality and procedural fairness of regulations, and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that businesses and citizens have access to these systems at reasonable cost and receive decisions in a timely manner. (SEE COMMENT 8.1.)

8.1 Citizens and business that are subject to the discretionary authority of public officials should have ready access to forums for challenging the exercise of that authority.

8.2 This should include rights to appeal the decisions of regulators on legal grounds and principles of procedural fairness and due process.

8.3 Final administrative review should be undertaken by a separate authority to the body responsible for making the original regulatory decision.

~~8.4 The legality of rules should be open to challenge and review by the courts. (SEE COMMENT 8.2.)~~

SPECIFIC COMMENTS

COMMENT 8.1.: This recommendation and all the sub-recommendations below pertain to the feature of the Rule of Law, which is commonly agreed and well established among all OECD countries. The functions of legal checking and legal remedies are therefore less to be “established” than to be “enhanced” / “streamlined” / “made more effective” in OECD countries. Accordingly, the OECD might consider clarifying and expanding on the scope of this recommendation, possibly by tailoring it to developing and transition countries if deemed opportune.

COMMENT 8.2.: This repeats sub-recommendation 8.1 above.

Box 9. Draft recommendation on risk and regulation

9. Based on the best scientific evidence available, Apply risk assessment, risk management, and risk communication strategies to the design and implementation of regulations to ensure that regulation is targeted and effective. (SEE COMMENT 9.1.) Regulators should assess how regulations will be given effect and should design responsive implementation and enforcement strategies. **(SEE COMMENT 9.2.)**

9.1 Governments should explicitly include their strategy on risk and regulation in their public statement underpinning regulatory reform. They should develop, and regularly update, clear and extensive guidance on the methodologies for risk assessment, management and communication

concerning the use of regulation to achieve public and environmental protection.

~~9.2 Regulators should develop, implement and review regulatory compliance strategies against risk based criteria. (SEE COMMENT 9.3.)~~

9.23 Regulators should seek **independent to build an accountable system for** review of risk assessments and cost-benefit analyses accompanying major regulatory proposals. **(SEE COMMENT 9.4.)**

9.34 Evaluate the likely effectiveness of risk strategies against their capacity to identify and inform regulatory actions that will help to avoid or **ameliorate-mitigate** systemic risks **(SEE COMMENT 9.5.)**, and **minimise unintended consequences and “risk-risk trade-offs”**. **(SEE COMMENT 9.6.)** Ensure that risk systems incorporate lessons from past events, including failures and close calls.

~~9.5 Governments should promote the use of risk based approaches in the design and enforcement of regulatory compliance strategies to increase the likelihood of achieving compliance goals and to minimise the imposition of costs on businesses and citizens through compliance and enforcement procedures. (SEE COMMENT 9.7.)~~

9.46 Where the precautionary principle is adopted, guidance should be provided as to how it can be applied to assist in the evaluation of regulatory alternatives, **while ensuring legal certainty. (SEE COMMENT 9.8.)**

SPECIFIC COMMENTS

COMMENT 9.1.: The goals of assessing, managing and communicating risks are only partly to ensure “targeted and effective” regulations. The OECD might revisit and complete this sentence.

COMMENT 9.2.: The notion of “responsive implementation and design” should be included in the recommended Glossary. This second part of the recommendation seems to rather refer to risk-based approaches to enforcement, and might be moved elsewhere in the document (see COMMENT 9.7. below).

COMMENT 9.3.: This repeats sub-recommendation 9.5 and should therefore be deleted. It seems in any event oddly placed under this section (see COMMENT 9.7. below).

COMMENT 9.4.: The OECD rightly stresses that reviews should be independent. Their primary feature should nonetheless be to be based on high quality evidence (facts); to be comprehensive, systematic, systemic (pluralistic), and public. More than independent, the evaluator must rather be inserted in an accountable system.

COMMENT 9.5.: The OECD might define what is meant by “systemic risks” in the recommended Glossary. Adequate risk assessment, management and communication strategies should in any case address various types of risks, including technological and life-style risks.

COMMENT 9.6.: A critical aspect when addressing one targeted risk is to avoid – or at least take into account the fact – that such management decision may create ancillary risks (the so-called “risk-risk” paradigm) and to minimise the risk of adverse unintended consequences.

COMMENT 9.7.: This rather refers to which type and how many inspections and compliance controls should be performed to ensure the correct and timely application of regulation. In other words, it refers to enforcement aspects, not risk analysis in the formulation of policy interventions aimed at managing risks. Hence, the OECD might consider placing this sub-recommendation under Recommendation 2. (“users of regulation”).

COMMENT 9.8.: The OECD might consider making this sub-recommendation more explicit. A possible way of substantiating it may be to call upon governments to apply a number of decision criteria when invoking the precautionary principle, including at least the following: that the precautionary measure be supported by the best available scientific evidence; that it be proportionate and be subject to benefit cost analysis; and that it be temporary in nature (subject to mandatory review).

Box 10. Draft recommendation on regulatory coherence across levels of government

10. ~~Identify cross cutting regulatory issues and P~~promote regulatory coherence through appropriate co-ordination mechanisms between ~~the national and sub-national~~ all levels of government, with a view to avoid duplication or conflict. ~~Identify cross cutting regulatory issues at all levels of government, including the supra-national level, to promote coherence between regulatory approaches and avoid duplication or conflict. (SEE COMMENT 10.1.)~~

~~10.1 Design appropriate co-ordination mechanisms to develop regulatory policies and practices that for all levels of government;~~

~~10.2 Develop effective tools to diagnose regulatory issues that cut across levels of government (including supra-national organisations) to identify and reform overlapping regulations; (SEE COMMENT 10.2.)~~

10.13 Capitalise on the proximity of sub-national governments to local firms and citizens to develop effective consultation procedures in the design of regulation and better reflect local needs in overall regulatory policy, at all levels of government;

10.24 Promote information sharing and transparency mechanisms between levels of government to overcome asymmetries of information and promote complementarities across regulations;

10.35 Disseminate innovative regulatory practices that take place at the local level, in particular for climate change and innovation policies; [\(SEE COMMENT 10.3.\)](#)

10.46 Facilitate local variations and experimentation in regulatory approaches when it is **nationally** beneficial.

SPECIFIC COMMENTS

[COMMENT 10.1.](#): The OECD might consider the proposed wording, which consolidates the two original sentences, and includes consideration of coordination with the supra-national level.

[COMMENT 10.2.](#): The OECD might reconsider (or delete) these sub-recommendations, as they seem to repeat the same concepts expressed in the main text.

[COMMENT 10.3.](#): The OECD might consider making explicit reference to the notion of “benchmarking”, which is quite a powerful leverage to achieve the mentioned goals.

Box 11. Draft recommendation on regulatory management capacity at sub-national level

11. Foster the development of regulatory management capacity **and performance** at sub-national levels of government.

To enhance the efficiency and effectiveness of regulation at sub-national level to achieve policy goals including on innovation, green growth and public services **delivery** when these involve local responsibilities; to promote risk management and compliance, to reduce regulatory costs and barriers at the local or regional level which limit competition and impede investment, business growth and job creation, governments should implement regulatory policy and programmes at the sub-national level. In particular, they should:

11.1 Implement programmes to assess and reduce the cost of the compliance of regulation at the sub-national level;

11.2 Set regulatory charges according to cost recovery, not revenue raising motivations;

11.3 Support capacity-building for regulatory management at sub-national level through the promotion of e-government and administrative simplification when appropriate, and relevant human resources management policies;

11.4 Foster the use of Regulatory Impact Assessments (RIAs) by sub-national governments through appropriate incentives, especially in areas with greatest needs (risk management); [\(SEE COMMENT 11.1.\)](#)

11.5 Develop incentives to foster horizontal co-ordination across jurisdictions to eliminate barriers to the seamless operation of internal markets and limit the risk of race-to-the bottom practices, develop adequate mechanisms for resolving disputes across local jurisdictions;

11.6 Prevent conflicts of interests through clear separation of the roles of Sub National Governments as regulators and service providers.

SPECIFIC COMMENTS

COMMENT 11.1.: The OECD might consider expanding on their reference to risk management in the context of sub-national regulatory interventions.

Box 12. Draft recommendation on International Regulatory Cooperation

12. . Ensure that regulatory measures ~~contemplated in all fields~~ take into account any international frameworks for cooperation and, through the RIA process, their possible cross-jurisdictional effects in the same field and, are also designed to take into account their possible effects on parties outside the jurisdiction where they are to be applied. Consultation should include any external interests with the aim of avoiding unnecessary international frictions. (SEE COMMENT 12.1.)

12.1 Governments ~~should take into account international regulatory settings when formulating domestic regulatory proposals and~~ (SEE COMMENT 12.2.) should co-operate with other countries to promote the development and diffusion of good practices and innovations in regulatory policy and governance.

SPECIFIC COMMENTS

COMMENT 12.1.: The OECD might consider revisiting the formulation of this recommendation with a view to make it more direct and sharper.

COMMENT 12.2.: This part of the sentence repeats the main recommendation text.

4. About **allio|rodrigo**consulting

Recently established under Swiss law, **allio|rodrigo**consulting is a dynamic and rapidly growing international consulting firm specialised in regulatory and administrative reform and public policy evaluations in both developed and developing countries.

Its Founding Directors, Delia Rodrigo, PhD, and Lorenzo Allio, PhD, produce strategic advice and recommendations and provide training to governments, legislative assemblies as well as stakeholders. They draw from more than 18 years of cumulated work experience in international organisations (the OECD and the World Bank Group), think tanks, and academia.

Recent assignments (2010-2011) include projects with the Brazilian and Swiss governments, OECD (SIGMA, Directorate for Public Governance and Territorial Development), the World Bank Group, UNDP, the University of Exeter and others, on countries such as Brazil, Chile, Croatia, Georgia, India, Bangladesh, Italy, Montenegro, Romania, Serbia, Switzerland and Turkey.

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² The website is under construction in July-August 2011. For direct information, please consult <http://www.linkedin.com/pub/delia-rodrigo/0/7bb/401> and <http://www.linkedin.com/in/lorenzoallio>.