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What Does Regulatory Impact Assessment Mean in Europe?

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Executive Summary

Regulatory Impact Analysis (RIA) has emerged on the European political agenda. It is an idea whose time has come. Both the member states and the institutions of the European Union (EU) are presently investing in programmes for ‘better regulation’ and ‘good regulatory governance’. RIA is the cornerstone of these programmes. This paper explains how RIA is being diffused in Europe. Is the introduction of RIA in Europe simply the diffusion of an idea, the content of which remains very different in the various national contexts? Or, alternatively, has the diffusion of ideas brought about convergence at the level of how RIA is performed? As shown by Hahn and Litan (2004), European impact assessments are often different from North-American RIAs. This paper shows that the adoption of a common RIA ‘bottle’ has not produced similar European ‘wines’. The language of RIA has produced a community of discourse for policy-makers and has stimulated the introduction of some instruments that are similarly labelled ‘impact assessment’. But RIA practice may exist only on paper, and in some cases the ‘RIA label’ may reveal basic assessments of administrative burdens. The paper explains how ideas can be diffused without convergence of results. The argument here is not the trivial one that ‘context matters’, but *how* it matters. Hence the paper breaks down ‘context’ into four dimensions, that is, institutions, models of the policy process, actors, and legitimacy. Institutional design, the capacity to deal with distributional problems, heterogeneity in multi-level governance systems, policy styles, and the ‘weights’ given to the preferences of different RIA actors explain the lack of convergence.

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1. Introduction

With the switch in Europe from economic interventionism to ‘the regulatory state’ and the emergence of a regulatory political system in the European Union (EU) (Majone 1996), regulatory governance has become a fundamental issue for governments, citizens, and firms. Consequently, all EU countries are investing political determination, resources, and institutional efforts in programmes and government-wide policy initiatives for ‘better regulation’ and ‘good regulatory governance’ (OECD 2002; Mandelkern Report 2001; DG Enterprise 2005). Regulatory Impact Assessment (RIA) is the cornerstone of these programmes, often in combination with other tools, such as consultation, simplification, codes of conduct on legislative drafting, and initiatives to improve on the access to regulation. It is one of the focal points of the EU’s Lisbon-strategy to make Europe the most competitive knowledge-based society of the world by 2010. On 26 January 2004, four finance ministers from Ireland, the Netherlands, Luxembourg, and the UK committed four successive EU Presidencies to ‘further enhance the quality of impact assessments’ at the EU level and introduce ‘effective systems of impact assessment for new legislation and simplification programmes’ at member states level.¹ On 7 December 2004, a joint statement of six EU Presidencies confirmed the priorities of regulatory reform and quality of impact assessment, asking the Commission to measure the quality of regulatory tools like impact assessment.²

The pivotal position of RIA stems from the fact that it provides standards for the whole process of policy formulation, by showing how consultation, the socio-economic costs and benefits, and the major trade-offs in policy choice have been taken into account in the assessment of regulatory proposals or in the analysis of existing legislation.³

The question is: what does the popularity of RIA in Europe really mean? Certainly, impact assessment is now an item in the agenda of the EU and its member states. RIA is an

¹ http://www.hm-treasury.gov.uk/media/47C54/jirf_0104.pdf .

² See the six Presidencies’ statement at http://www.hm-treasury.gov.uk/media/B39/14/advancing_regulatory_reform_in_europe.pdf .

instrument with its own specific characteristics. But in international discourse, the concept of better regulation has different meanings. Within this discourse with multiple meanings, RIA is an idea whose time has come. The fact that ideas and policy fads travel across the world is well known. However, to adopt the same idea does not mean convergence in actual action. A new ‘bottle’ may contain either old or new wine, or, in cases of symbolic politics even no wine at all. As shown by Hahn and Litan (2004) the diffusion of RIA across the two sides of the Atlantic has not brought about similarities in the process of policy formulation and the very content of RIA still differs markedly. This paper opens up the European box. It shows that although the language of impact assessment has produced a community of discourse for policy-makers and has stimulated the introduction of some instruments that are labelled ‘impact assessment’ in some cases these only exist on paper, and in others disguise different practices under the same label. This stands in contrast to the dominant discourse in policy-maker circles – examined in detail by Radaelli (2004) - that RIA can be designed (and its quality measured) in a de-contextualised manner by using checklists and benchmarking tools.

How does one explain both the diffusion of the RIA ‘idea’ and lack of convergence of the content of impact assessment? The lack of convergence is explained by contextual variables. The argument here is not the ‘context matters’ mantra, but how context matters. Hence, ‘context’ is broken down into four dimensions, that is, institutions, models of the policy process, actors, and legitimacy. By doing so, the paper seeks to provide a bridge between de-contextualised and idiosyncratic approaches, by looking at scope conditions under which a constellation of contextual variables impact on the content and quality of RIA.

The next Section makes the point about diffusion and lack of convergence, showing that – somewhat paradoxically – it is easier to adopt new policy frameworks than to converge on the implementation of policy instruments. The following Section – informed by institutional analysis - explains the lack of convergence in terms of context. The other Sections explore the specific dimensions of context, namely institutions, policy processes, the constellation of actors’ preferences, and the role played by legitimacy. The final two sections link these dimensions and explain why legitimacy and the embeddedness of RIA in the wider process of policy formulation

³ Impact assessment is mostly used ex ante, at the stage of policy formulation, but it can also assist simplification programmes and thus can be used ex post.

are more important than the quality of economic analysis in impact assessment. This leads to a new perspective on the concept of quality of impact assessment.

2. Diffusion Or Convergence?

The diffusion of RIA has been remarkable. So much so that the major agents of diffusion (the OECD at the international level, and, for the EU, the informal group of directors of better regulation programmes⁴ and the ‘High-Level Group on Competitiveness’ within the Competitiveness Council)⁵ are promoting papers on ‘RIA core aspects (Formez 2004), benchmarking exercises, checklists, and indicators based on the assumption that RIA has now become a fairly common tool of regulatory governance, the question being one of getting the most out of this tool. Thus, the first question to address is about the nature of the process we are talking about. In political science, it is common to distinguish between ‘policy diffusion’ (in which the analytical focus is on the process of international diffusion of policy ideas and the dependent variable is the pattern of adoption of the same policy across countries) and ‘policy convergence’ (focused on the effects of diffusion and with similarity or lack of as the dependent variable)⁶. RIA has gained an important status in the agenda of European governments and the EU institutions. It is a case of diffusion. The process of RIA adoption has been supported by the diffusion of principles of good regulation. Principles guide the choice of one instrument instead of another.

Let us turn to empirical evidence on diffusion. According to a recent report prepared for the Italian, Dutch, and Irish Presidencies of the EU, before 2001 RIA existed only in a few EU member states: ‘RIA was almost unknown not only to laymen, but also to most the people directly involved in policy formulation and adoption’ (Formez 2004:5). By contrast, in 2004 RIA was officially recognised in the large majority of the EU-15, and even in new member states like Hungary and Poland (Formez 2004:5). In 2003, a study for the Hellenic Presidency of the EU on 13 of the then 15 member states (France and Portugal were not included in the sample) reported

⁴ A better regulation programme (sometimes referred to in the literature as ‘better regulation policy’ or ‘horizontal regulatory reform policy’) is a coherent set of tools and initiatives to increase the capacity of governments to deliver on high quality regulation.

⁵ The apparently simple question on who does what in the EU institutions on better regulation opens up the Pandora’s box of several units, task forces, committees, high-level groups, and complex organisation charts. The Secretariat General of the European Commission (2004) has produced a detailed map.

on the existence of RIA in 7 member states, whilst the other 6 member states had at least pilot projects (Hellenic Presidency 2003:8). Thus, all the countries surveyed by the Hellenic Presidency's report claim some experience of RIA.⁷ A questionnaire sent in May 2004 to 14 'old' EU member states⁸ plus the Czech Republic, Estonia, Latvia, Hungary, Poland, Bulgaria, and Norway (in the context of a project on indicators of regulatory quality funded by DG Enterprise of the Commission) produced the following result: 100 per cent of the 16 respondents to a question on the importance of impact assessment in better regulation programmes noted that 'the importance of RIA has increased' (DG Enterprise 2005).

As mentioned, the adoption of RIA is a component of a wider discourse on better regulation. Over the last five years or so, the member states of the EU have engaged in the definition of their own principles of better regulation, often drawing on the OECD and North-American experiences. Principles of better regulation provide the normative basis of discourse. The Mandelkern Report (2001) prepared for the EU Laeken Summit of the European Council⁹ presented seven principles of regulatory quality, namely necessity, proportionality, subsidiarity, transparency, accountability, accessibility, and simplicity. Three years later, the project on indicators of regulatory quality found a pattern of diffusion of these principles (graph1). Remarkably, in 2004 all 'new' EU member states included in this sample had already established principles of regulatory quality.

Having established that there is a process of diffusion, let us now turn from the dependent variable of 'adoption pattern' to the very different dependent variable (typical of convergence studies) of 'similarity of effects'. Here the evidence tells another story. RIA pursues different goals across the EU. Similarity at the level of discourse (on principles of regulatory governance and 'better regulation' rhetoric) and the adoption of some commitments to some type of assessment of impacts (variously defined) of proposed regulation should not be confused with convergence at the level of use of instruments, not to mention convergence of results (achieved via the use of instruments). This is somewhat paradoxical if one considers Peter Hall's argument that major policy ideas and policy paradigms represent the most sophisticated (and most difficult

⁶ See Knill (2005) for a review of diffusion and convergence. This paper follows his terminology.

⁷ France (not included in the sample) adopted RIA on bills and decrees of the Conseil D'Etat in 1998 ([circulaire 26](#) January 1998). Portugal has a limited form of fiscal analysis.

⁸ Portugal not included in the sample.

to achieve) type of policy change – instruments and levels of policy instruments being less problematic types (Hall 1993). According to Hall, if the whole paradigm upon which policy is built has changed, this will produce wide-ranging changes at the level of policy.

However, in our case, ideas have travelled quite lightly. The fact that a country has a formal description of the role of RIA does not necessarily mean that Ministers use RIA in the preparation of new legislation. It does not even mean that – when they use it – Ministers broadly follow the steps described in box 1 above. Let us look at some more evidence. Firstly, there are four clusters of member states in the EU. For some governments impact assessment does not go much further than compliance cost assessment; in other member states it does not stretch beyond a handful of pilot RIAs; in a third cluster, RIA is merely a check-list process; finally, in a few cases (the UK, and the new Commission’s system of integrated impact assessment – see European Commission 2002) there appears to be a consistent effort to assess a wide range of costs and benefits in an integrated process (source: DG Enterprise 2005, Chapter 7).

Secondly, only in a minority of EU member states do impact assessments demonstrate that the benefit of a proposed regulatory option justify the costs. The UK and Italy fall in this category. However, to continue with this example, although the ‘net benefit principle’ features both in the UK guide to better regulation and in the Italian law on impact assessment (introduced in 1999), rarely does RIA accompany proposals for legislation in the Italian Council of Ministers. By contrast, in the UK impact assessment is used routinely in the formulation of legislation proposed by the government.

Thirdly, when asked about the importance of regulatory quality tools in the policy-making process on a scale from 1 (lowest importance) to 5 (highest importance), RIA was given scores of 1 or 2 by no less than three EU member states. Only three of the ‘old’ EU member states came up with a 5 score for impact assessment (DG Enterprise 2005). Accordingly, the enthusiasm for RIA showed by the EU Presidencies’ statements mentioned above should be qualified.

Fourthly, in a garbage-can fashion, RIA is a solution to different problems. In Germany, Sweden, and Italy RIA is perceived as a possible solution to the problem of simplification, in the Netherlands it is associated with the issue of competitiveness, in Denmark and Belgium the link

⁹ The Mandelkern Group was formed by a Resolution of the Ministers of Public Administration at Strasbourg, which gave it the ‘mandate to develop a coherent approach to this topic and to submit proposals to the Ministers, including

is between RIA and the quality of the business environment. In the EU, RIA is perceived as a response to the problem of legitimacy deficit of the Community's regulatory system (Radaelli 2004).

So, having established that the bottle of 'better regulation discourse' and RIA is new, what type of wine is inside? For the UK and the Commission, we can talk of relatively new wine (the UK has been experimenting with RIA since the 1980s) in new bottles. For Belgium, the Netherlands, and Sweden the wine is the old 'compliance cost assessment' and 'reduction of the administrative burdens of enterprises' re-branded as 'RIA'. These member states do not place major emphasis on the assessment of benefits, especially wide societal benefits. Finally, in some member states there is no real use of RIA, no matter what the formal rules for the formulation of legislation may say. Italy, France, and Austria – to mention three examples - fall in this category of 'new bottles with no wine inside'.¹⁰ Interestingly, both France and Italy have detailed laws on how impact assessment should be done.

To sum up then, the language of RIA has produced a community of discourse for policy-makers and has stimulated the introduction of some instruments that are labelled 'impact assessment' but in some cases exist only on paper, and in other cases disguise different practice under the same label. Diffusion at the level of 'talk' has not yielded convergence in 'actions' and 'results' – to use the classic terms suggested by Brunsson (1989) and, more recently, Pollitt (2001). Interestingly, no EU government has opposed RIA, for example by arguing that Ministers should not be constrained by economic calculations when they make law. In this sense, RIA is a hegemonic discourse – everyone wants to have a bottle of this wine at home. But this discourse is empirically flawed when it argues (as it often does) that there is a one-size-fits-all RIA 'wine'. It is also conceptually flawed when it tries to make the point that the quality of RIA can be measured in a de-contextualised manner – a point we will explore later. Let us now examine the role of context in the diffusion process.

the definition of a common method of evaluating the quality of regulation'.

3. The Role Of Context

Institutional analysis of various types (Weaver and Rockman 1993, Hall and Taylor 1996) has persuasively demonstrated that context matters – especially in the historical-institutionalist version (Steinmo, Thelen, and Longstreth 1992). Context matters in processes of diffusion and policy transfer because ‘the other conditions are not equal’ (Rose 2002). However, this does not mean that only individual explanations can be provided. Rather, it is useful to explore scope conditions and avoid the ‘black and white’ tension between idiosyncratic explanations and covering laws.¹¹ If one decides to go beyond the historical institutionalist consideration that ‘context matters’, one has to show how it matters.

Drawing on different theories and models of the policy process, one can formulate the following hypotheses. Specifically,

- Institutional theories (Weaver and Rockman 1993, Hall and Taylor 1996) predict that institutional design will shape the behaviour of actors and the use of policy tools. The key variables here are institutional complexity and government’s capacity to handle distributional conflict. Multi-level regulatory governance (in our case, the fact that different levels of governance are involved in RIA) exacerbates distributional conflicts and makes it difficult to coordinate ‘better regulation’ across levels. Schmidt (2002) has convincingly argued that there are different types of political systems and policy processes in the EU. Her distinction about simple and compound polities has implications both in terms of how institutions handle conflict and the inclusiveness of processes of policy formulation.
- In its original approach (OECD 1997), RIA is supposed to work in a rational, orderly policy process where problems are defined, alternative solutions are probed, and decisions are finally taken by unitary actors. However, theories of the policy process (Sabatier 1999) provide a continuum from rational synoptic models to garbage cans where solutions, actors, and problems are somewhat independent and constantly modified. Richardson (1996) makes the point that EU public policy is closer to garbage

¹⁰ With the exception of Italian regional governments. Some Italian regions have successfully experimented with RIA in 2002-2004, in the context of a process of devolution under way in this country.

cans than to rational-synoptic policy processes. In between the two extremes, one can find cases of limited structuration of the policy process - as shown by Lindblom's partisan mutual adjustment (Lindblom 1959; Lindblom and Woodhouse 1963), Sabatier's advocacy coalitions framework (Sabatier 1999: chapter 6), and Kingdon-Zahariadis' multiple streams model (Kingdon 1984; Zahariadis 1999; 2003).

- Politico-economic models and pressure group theory (Bernauer and Caduff 2004) suggest that different actors (one can dub them 'RIA stakeholders') will try to use impact assessment for their own goals. Actors have different preferences regarding RIA. For the politician, RIA has to deliver in terms of consensus and political rents. For bureaucrats, high-quality RIA means respect of formal procedures that define the legitimate activities of the civil service. For the citizen, the test of good RIA is its real-world outcome (whether it produces regulation that delivers a high level of protection and enables the citizen to carry on with socio-economic activities without dissipating the economic and environmental resources of the community). For the firm, different approaches alternatively stipulate that companies try to secure regulation that protects them from new entrants and guarantees rents, or regulation fostering a better business environment.
- Finally, the literature on regulatory legitimacy (Majone 1996: chapter 13) suggests that the Achilles' heel of RIA may be legitimacy. When policy tools lack credibility, they become at best bureaucratic tick-the-box routines, and at worst they are highly contested. RIA legitimacy may also be connected to risk cultures. In some countries, the legitimacy of science and rationality makes cost-benefit analysis more acceptable than in countries where the culture of risk regulation is not grounded in evidence-based policy.

In consequence, in the remainder of the paper I show how context matters by breaking it down into four dimensions. I define them by using the simple labels of 'institutions', 'policy process', actors, and 'legitimacy'.

¹¹ See Olsen (2001) on the role of scope conditions in contemporary political analysis.

4. Institutions And Policy Processes

In its original institutional context – that is the US context – impact assessment is produced by independent regulatory agencies monitored by the Office of Management and Budget via the Office of Information and Regulatory Affairs (OIRA).¹² This is a regulatory context characterised by delegation of regulatory powers to non-majoritarian institutions. The institutional context is based on sector-level, specialised policy-making. RIA is an instrument for discussions at the level of sectoral policy networks (environment, health and safety, food regulation, etc.). The legitimacy of the regulatory process is not based on parliamentary control over the government but on the credibility of executive agencies. The bureaucratic context is one in which agencies and OIRA are well-staffed in terms of professional economists. The dominant criterion is efficiency and the main logic is technical. Negotiation and standard operating procedures are not absent, but they are not overwhelming. Indeed, when negotiation among agencies, regulated firms, and committees in Congress has historically become the dominant logic, this has been seen as pathology of the system – and referred to as ‘agency capture’.

In the EU’s member states, the institutional and bureaucratic contexts are quite different. RIA is still a document for technical discussions at the level of sectoral policy networks, but, most importantly, it is a communication tool between the government and the parliament, and between governments and affected citizens and firms. The ‘regulator’ performing RIA is not an independent agency, but a Minister reporting to the executive or the Prime Minister. Most independent regulators in Europe have not even been requested to perform impact assessment. Only very recently did countries like the UK introduce RIA as a duty of independent economic regulators.

The European bureaucratic context is one characterised by generalist civil servants or bureaucrats trained in public law. Efficiency still comes second to formal respect of legitimate procedures in the list of criteria used by bureaucracies in countries like France, Germany, and Italy. Almost invariably, they ‘read’ RIA in terms of formal (as opposed to substantial) legal logic and conformity to other rules and processes. Not only does the logic of negotiation dominate the behaviour of Ministers engaged in impact assessment, it also characterises the

¹² Hahn and Litan (2004) and Radaelli (2004) provide more information and data on the differences between the US and European contexts in which RIA operates.

interactions between public administration and pressure groups, and between civil servants and politicians (with the Minister, for example, and her-his cabinets).

The territorial organisation of institutions is also decisive. In the European Union, the territorial dimension of RIA is associated to multi-level governance (Sarpi 2003). The more distributional problems play an important role, the more RIA becomes political because it goes beyond Pareto-efficiency. True, distributional weights can be used to address distributional problems in a transparent manner. But the political problems simply shifts to the issue of who sets the weights, how, and why should the process be considered legitimate by all stakeholders.

This is evident at the domestic level. EU member states have different capacities to deal with distributional problems, depending on whether they are majoritarian or consociational political systems, or, to use Schmidt's typology, simple or compound democracies (Schmidt 2002). In simple democracies like the UK, RIA is used by the core executive to coordinate policy. As such, it becomes a component of the coordinative discourse on policy choices – to follow Schmidt's terminology. Schmidt has shown that this discourse is relatively 'thin' in terms of actors and negotiations - hence there are not many distributional problems. The Minister draws on RIA to show that the policy choice is being made in the common interest and that the benefits justify the costs. Distributional conflicts kick in when RIA enters the communicative discourse, that is, the overall broad argumentation used by the government to persuade the parliament, the affected interests, and the public opinion.

In compound democracies like Denmark, coordinate discourse is multi-actor and 'thick'. By contrast, the communicative discourse is 'thin'. Accordingly, RIA is eminently a tool used by socio-economic and governmental elites to define the content of policy. Distributional problems are addressed directly at the stage of policy formulation. It is at this stage that the various checklists and partial estimates of costs and benefits are used (by civil servants, Ministers, economic elites, and unions) to articulate a discourse leading to the formulation of regulatory proposals. This is where most of the conflicts arising out of the distributional impact of regulation are settled. Accordingly, RIA in compound democracies may not lead to a final estimate of costs and benefits for a single preferred option. Instead, different partial estimates are available to the stakeholders for the coordination of discourse and negotiation before proposed rules are adopted by the government (Radaelli 2004). There is not much evidence of large debates on RIA and its distributional effects at the level of communicative discourse. Indeed, the

very visibility of impact assessment in the public opinion (for example in the context of debates in the quality press on policy reforms under way) is scarce.

Let us now move from the domestic level to the EU - a highly compound political system. Here distributional conflicts are bound to arise quite frequently. True, distributional issues are conceptually the same when one controls for the impact of proposals across England (imagine a proposal that penalises a sector concentrated in a county)¹³ or the EU. But it is the scale of the problem – associated to the existence of various layers of government - which makes the EU level peculiar. Most EU proposals for regulation penalise some sectors, or some types of firms, and advantage others. Certain sectors or certain types of firms are statistically more represented in some member states than in others. This is why some governments like the UK have specific guidelines on how a government should monitor the evolution of EU proposals (and thus monitor EU RIA) via domestic assessments.¹⁴

The question is what criteria and logic should be used in this process? If a country like, say, France, predicts (via a French RIA) concentrated losses for key French sectors arising out of a proposed EU regulation still at the stage of impact assessment, what is the best way to insert this aspect into the design of EU-level RIA? What happens to be boundaries between technical and political logic in this situation?

The EU coordinative discourse on policy formulation goes beyond the Commission. It involves the European Parliament and the Council as well. Accordingly, the Council, the European Parliament and the Commission have agreed on an institutional agreement on better law-making to make RIA a common priority across institutions (EP- Council-Commission 2003). Yet the question of how to manage distributional conflict in the EU-level RIA is there to stay. As shown by Majone (1996), the whole EU political system (not just its regulatory process) is ill equipped to handle distributional problems. The early experience with the new integrated impact assessment introduced in 2002 by the Commission shows that RIA can be, unfortunately, an ideal tool to disguise political-distributional problems under the veil of pseudo-methodological problems.¹⁵

¹³ Scottish draft legislation is checked via Scottish RIAs.

¹⁴ See the 'European regulation' checklist on the website of the cabinet office <http://www.cabinet-office.gov.uk/regulation/Europe/eurodocs/EuroChecklist.pdf>.

¹⁵ This argument draws on meetings with policy officers at the Commission and in member states in the context of the preparation of the first pan-European conference on impact assessment, Brussels, 3 December 2003, see

When methodological issues are genuine, they present their own hurdles. Look at the discount rate. One can guess that the Estonian or German discount rate on environmental ‘EU public goods’ can be very different from the British rate. This is due to the well-known fact that Estonian and German citizens have different preferences regarding the environment than the British citizens. How does one take this into account in the formulation of a EU RIA? What is the average discount rate? Shall one look at medium EU values weighted by population? The problem applies to several hedonic prices and to the other important issues, such as the value of life (Viscusi and Aldi 2003).

Institutions provide the riverbeds for policy processes – our second dimension of context.¹⁶ What type of policy process is implicit in RIA programmes around the EU? As originally formulated (OECD 1997), impact assessment is contingent on an orderly policy process with unitary actor and limited information gaps – a model close to the pole of rational-synoptic policy-making mentioned above. In this model, policy decisions are based on the systematic use of empirical evidence. The quality of RIA is measured in terms of the quality of the economic analysis contained therein.

The rational-synoptic model breaks down under conditions of bounded rationality and policy controversies where actors conflict over problem definition and filter the same evidence by using radically different cognitive ‘frames’. Additionally, to draw systematically on empirical evidence provided by impact assessment may be almost impossible in garbage-can policy processes where problems are constantly re-formulated by different political actors, solutions are changed frequently, and the competences of different departments are re-shuffled or unclear. Especially in compound democracies, the regulatory process is highly fragmented, with multiple points of contact between politics and administration, and between different logics and criteria.

Yet one cannot run the risk of simply throwing the baby away with the bath water and concluding that RIA is useless because politics always trumps technical criteria. RIA can be useful even in processes that do not come closer to the rational-synoptic ideal. RIA can be used by endogeneising bounded rationality and the politics-administration continuum (as opposed to a model of radical separation of politics and administration). One possible way to re-frame impact assessment within a more realistic theory of the European policy process is to cast RIA in terms

http://europa.eu.int/comm/enterprise/regulation/better_regulation/impact_assessment/ia_conference.htm. On the early experience with EU-level RIA see Vibert (2003).

of Bayesian learning. Let me spend a few words on this. The starting point is that all policies are collection of hypotheses about causal relationships: if the government does X, the economy and society will react by doing Y and we will reach the goal Z. RIA is an ex-ante exercise, hence based on hypotheses formulated under conditions of uncertainty. In turn, uncertainty is of a subjective nature rather than being the frequency of observed events. In most cases of impact assessment, regulators would formulate subjective probabilities, as the events they are dealing with cannot be observed several times under the same experimental conditions.

One obvious way to reduce errors contained in hypotheses about reality is to make use of experience. Bayesian learning provides a methodology to learn from experience under conditions of uncertainty by using simple rules of coherence (Parmigiani 2002). Policy makers attribute subjective prior probabilities to events and then use experience to up-date their probabilities in a coherent way. Posterior probabilities are therefore informed by experience. A fundamental theorem in Bayesian statistics states that when experience becomes considerable - and provided that actors use coherence in adapting their prior probabilities - the value of initial attributions of probability to events (that is, prior probabilities) does not matter much - except in extreme cases when an individual attributes either zero or one probability to an event. Posterior probabilities converge when experience grows. RIA can therefore be seen as a tool providing evidence and rules through which regulators learn coherently. Bayesian learning can supply a model in which different subjective opinions about uncertain events can be accommodated, provided that all actors (the expert, the bureaucrat, and the politician) accept to learn from evidence - by following certain rules of the game. Needless to say, there is no explicit consideration of the policy process in current discussion, and no approach along Bayesian lines has been presented so far.

5. RIA For Whom?

The presence of different actors, logics, and criteria has been already mentioned in the previous Sections. This Section looks at RIA actors more closely. Drawing on a classic study of decision-making in international politics, Graham Allison's Essence of Decision (1971), Farrow and Copeland (2003) argue that 'RIA quality' can be interpreted in three different (yet not mutually exclusive) ways. They argue that there are at least three RIA 'stakeholders' (political

¹⁶ The metaphor of institutions as riverbeds appears in Mucciaroni (1992:466).

scientists would prefer to stick to ‘actors’), i.e., the ‘expert’, the ‘civil servant’, and the ‘politician’. It is useful to add a fourth important actor, the ‘citizen’. And, finally, a fifth important ideal-typical actor is the ‘corporate actor’ (the firm at the micro level and business organisations at a more aggregate level).

Different actors bring into RIA diverse logics, criteria, and quality assurance mechanisms. More fundamentally, better regulation programmes around the EU ‘weigh’ actors’ preferences differently. The weighing is implicit, as there is no discussion of the key assumptions about actors in the ‘better regulation discourse’ throughout Europe. Yet one may legitimately ask the question whether these programmes are based on the assumption that politicians are rent-seeking - hence RIA should target this problem and empower Weberian civil servants? Or do they make the assumption that policy-makers regulate in the public interest, for example because they want to be re-elected and good quality regulation may increase their popularity? To what extent do the preferences of independent agencies differ from the preferences of elected officials and with what impact on the efficiency and credibility of impact assessment?

The literature on the political economy of regulation is vast. One result is that although elected regulators respond to pressure groups and re-election incentives, they are also driven by their own ideological preferences (Kalt and Zupan 1984). Turning to agencies, in an analysis of Environmental Protection Agency (EPA) decisions, Cropper et al. (1992) show that regulators take into account both private interests and diffuse interests (such as the general welfare of the community) when they set environmental standards.

These results come with several qualifications, but the empirical and theoretical literature on how to model actors’ preferences should be the starting point of any meaningful RIA system. Without a model that specifies the preferences of policy-makers (be they politicians or civil servants) it is impossible to say what RIA should do. A ‘good RIA design’ means different things depending on whether one makes the assumption that civil servants have a preference for regulatory expansion, or are captured by powerful pressure groups, or regulate in the public interest.

Other questions arise from the firms’ models in regulatory policy. What do corporate actors want from regulation? Do they seek efficiency or protection? Indeed, the literature suggests very different approaches to the preferences of firms:

- In the public interest theory of regulation, regulators provide rules for the common good and therefore firms should not be necessarily hostile to regulation. One may expect that regulators acting for the common good care about quality and that regulatory efficiency is a component of this.
- In private interest theory (or positive political economy), however, firms seek regulation as a shelter from competition and new entrants. They try to capture regulators and secure protection. The implication is that dominant companies in a sector would prefer ‘low quality’, inefficient regulation. A classic paper by Buchanan and Tullock (1975) shows that companies prefer inefficient direct regulation to cost-effective instruments such as environmental taxes because quotas that restrict entry to a market originate scarcity rents.
- In some modern forms of regulatory theories, high levels of environmental and health and safety protection can be a comparative advantage in open markets. Firms may form coalitions with green groups and advocate for high levels of protection (Vogel 1995; Genschel and Plümper 1997). Using different arguments, Porter (1990) argues that regulation can stimulate innovation and produce competitiveness. One should therefore expect that competitive firms support this type of regulation, whereas marginal firms object to it.
- Finally, another strand of regulatory analysis, this time more focused on empirical studies, has reached the conclusion that regulation has no major influence on the competitiveness of a country, and in any case the locational choices of companies are not systematically influenced by the presence or absence of high labour and environmental standards (Jaffe et al. 1995). This conclusion has been attacked by those who claim that ‘good regulatory governance matters’ in terms of productivity, better regulatory environment, and ultimately growth (Kaufmann et al. 2003).

The problem is compounded by the fact that firms differ in size, sector, and exposure to international trade. Recent models of the firm in regulatory policy break down the notion of the corporate sector as unitary actor and show how different companies join different coalitions in the regulatory game (Bernauer and Caduff 2004).

The choice of one model of actor or another makes a large difference. The discussion is not exclusively academic. It has clear policy implications. The early RIA approach of the UK (a

programme for compliance cost assessment introduced by the Conservative governments in the 1980s) was based on the assumptions that regulatory reform is the solution to the problem of excessive bureaucratic power, that firms are too often excluded from the regulatory process and do not seek protectionist rules, and that policy-makers do not regulate in the public interest, but in the interest of bureaucratic expansion. By contrast, in the 1990s, RIA in the Netherlands was the solution to the problem of a regulatory process dominated by ‘corporatist triangles’ (of policy-makers, employers’ organisations, and unions). The assumptions were that the regulatory process was not open enough to diffuse interests, that policy-makers tended to coalesce with powerful pressure groups to the detriment of the public interest, and that without a deliberate effort to open up the process (via consultation and impact assessment) the formulation of regulations would become an opaque, unaccountable process.

The result is that one has to clarify the issue ‘RIA for whom’ before one can design RIA and measure its quality with indicators and benchmarking tools. Overall, the notion of ‘good RIA’ means different things to different stakeholders. Moreover, the criteria used to evaluate success differ markedly (Table 1). Let us illustrate this with a simple five-actor approach. Imagine that one can settle the issue of the models of actors by deciding that experts are neutral and rational actors, bureaucrats are all Weberian civil servants, politicians are best-described by public choice theory, citizens are attentive and want to participate, and the firm’s utility function does not deviate too much from the neo-classical model (this means that profit maximisation is the overriding goal, but we do not say whether firms want to reach it via protectionist regulation or via the reduction of red tape).

Drawing on models of actors in the policy process (Sabatier 1999) and bearing in mind we are speaking of ideal-types, one can reason that:

- The economist (the classic ‘expert’ in RIA programmes) is concerned about efficiency.
- Civil servants approach RIA by following proper and legitimate procedures in the regulatory process. This actor will use conformity to rules as the main criterion.
- For the politician, RIA may well mean responsiveness to pressure groups, or the median voter, or even responsiveness to external pressure created by the EU, the International Monetary Fund, and so on. Let us assume that the politician uses consensus as the main criterion and success is evaluated in terms of the outcome of negotiations.

- The firm perceives the opportunities of RIA in terms of minimisation of costs and defines success in terms of profit.
- The citizens use yet another criterion, the effective protection from risk.

The criteria to establish whether RIA is good or bad vary considerably. They are not necessarily mutually exclusive, though. Regulation produced via proper and legitimate procedures can result in efficient and fair regulation. But one cannot establish a sort of mechanical equivalence of every criterion used by different stakeholders. The idea that RIA should be approached and evaluated only in terms of the quality of its economic analysis is based on institutions and policy processes that give a weight of 100 per cent to one actor, that is, the expert. This looks more like a technocratic dystopia than a realistic description of how actors' preferences are weighted by real-world better regulation programmes.

The logic of action is also different. The civil servant follows the logic of standard operating procedures, the politician uses negotiation, and the expert draws on the logic of the social sciences. The citizen's behaviour, instead, is informed by the logic of participation. Finally, the firm draws on the logic of influence.

In real-world regulatory policy processes, the diverse criteria and logics interact continuously. The expert, the politician, the civil servant, the citizen, and the corporate actor are ideal-types. Real-world RIA programmes show women and men who share some of the characteristics of the expert, some features of the classic Weberian public officer, and also take into account political considerations. Take the case of the European Commission. Its political role in the EU policy process is clearly stated in the Treaties. The Commission's logic cannot be confined to that of the classic Weberian officer. It is the logic of a political body with its own political agenda – a body which also shares some of the characteristics of the 'expert' and, of course, the 'classic civil servant'. Ideal types are useful because they show how criteria and logics interact all the time, and how different groups of ideal-typical actors provide radically different contexts for impact assessment. They also show that the issue of measuring RIA quality is more problematic than the EU Presidencies think, and that indicators of quality should be designed carefully.

Depending on the constellation of logics and criteria, and on the stakeholders in charge of the policy process, RIA programmes go in different directions and pursue different goals. In a

context where the logic of formal respect of procedures predominates, RIA is performed by governmental departments to show how the various steps in policy formulation were handled. If the context is also one of administrative cooperation, RIA is also shaped by inter-administrative cooperation. It is a tool that enables different departments to manage cooperation (this is to some extent the case of Denmark, the Netherlands, and, with variable success so far, the European Commission). Contrast this with the UK, where the cabinet office is in charge of RIA and communicates directly with departments about the content of impact assessment. In this case the logic is more ‘vertical’ than ‘horizontal’.

Beyond public administration, the real issue is about policy styles and their persistence (Unger and van Waarden 1995). As mentioned, a prevailing corporatist style has shaped RIA in countries, where RIA is used by policy-makers in a ‘governance mode’ that is more ‘negotiation’ than ‘technical analysis of options’.

6. Regulatory Legitimacy

The final dimension of context is legitimacy. As averred, there are different criteria used by different actors to approach and evaluate RIA. This is acknowledged by the Communication of the Commission on impact assessment (2002). The Commission argues that the main goal of RIA is to describe and measure the great trade-offs behind a regulatory choice.¹⁷ Accurate analysis is obviously a cornerstone for the credibility of RIA, but it should present the decision-makers with some important issues they have to address – rather than pretending that impact analysis ‘silences’ the debate by providing a ‘scientific’ solution to political problems.

If questions are at least as important as answers, then legitimacy is a strong criterion to evaluate RIA. Cross-national experience (early UK experience of compliance cost assessment, France and Germany in the 1990s) shows that when RIA is built around only one support constituency (such as the business community) the problems of legitimacy become insurmountable. The Italian case (La Spina 2002) is another example of legitimacy problems. RIA was introduced in this country under pressure from the OECD by a small group of policy advisors and a motivated Minister. This looks like a case of RIA construction around an

¹⁷ The project funded by DG Enterprise (2004) came to the conclusion that the identification via RIA of ‘one option that is clearly justified as superior to other options’ is not necessarily a manifestation of quality.

embryonic epistemic community supported by an entrepreneurial Minister. But neither the Italian business community, nor the civil society were really interested in this new tool. The result was the momentum for RIA was lost. Currently, the EU Council is discussing the option of focusing better regulation initiatives by using targets of reduction of administrative burdens of firms. This would be yet another case of a narrow answer to the question ‘RIA for whom?’ and would provide little legitimacy to EU-level impact assessment.

New policy instruments necessitate a robust network of actors. The latter does not necessarily produce legitimacy, but it is a necessary condition. Different actors may have different views on the quality of RIA performed by institutions, but the sheer fact that they raise issues, make points, push for higher standards is a fundamental catalyst of policy improvement. By contrast, tools that interest only policy officers tend to float in a sort of limbo and eventually become useless. In this connection, one should look favourably at the development of networks of academics and private sector think-tanks that challenge the government’s numbers. By doing so, they perform a sort of ‘extended peer review’ and quality control of what institutions do.

These points on legitimacy shed a different light on what is a ‘good RIA’. The current hegemonic discourse in RIA policy circles has emphasised the importance of good economic analysis. But legitimacy is even more important. It leads to a definition of ‘good RIA’ (and consequently to a benchmark for its evaluation) based on embeddedness. A ‘good RIA’ is above all embedded in the wider regulatory policy process. As argued by DG Enterprise’s project:

‘In a sense, even if impact assessment is impeccable in terms of economic analysis, this is not a sufficient condition for quality. The latter is achieved when better regulation tools change the way regulators think about public policy, inform ministerial decisions, and conversely, when they change the way organized interests, firms and citizens engage in the policy-making process, understand and accept the regulatory framework’ (DG Enterprise 2005: 5)

7. Concluding Remarks

Although a community of discourse has emerged around better regulation programmes and RIA, impact assessment differs markedly throughout the EU. The problem is how to explain the rise of a common discourse and principles of better regulation, the spread of RIA across

Europe, and divergence of content. One common argument in the historical institutionalist literature is that context matters. This paper has made an effort to show how it matters. Four elements of context are decisive in the diffusion of RIA. The contextual elements to control for are institutions, policy process, actors, and legitimacy.

For a start, there are multiple approaches to RIA. Different definitions, criteria, and logics can be related one to another, but they often differ. The balance of different actors' preferences, the persistence of policy styles, and implicit models of the policy process steer better regulation and RIA in various directions. The result is lack of convergence.

Institutions are the riverbeds in which regulatory processes flow. US and European riverbeds are quite different. Within the EU there are several institutional models. EU multi-level governance and EU institutional heterogeneity bring their own sets of challenges. Further, RIA is not a tool operating in vacuum. It is situated in an often-implicit theory of the policy process. In some cases RIA has been imported in EU countries with largely unrealistic models of the policy process. The result has been 'new bottles with bad wine, or no wine at all'.

The point about legitimacy brings us to argue that the plurality of voices and actors in RIA is a pre-condition for regulatory legitimacy. Arguably, the lesson to learn about the diffusion of impact assessment is that legitimacy is much more important than efficiency. The two are intertwined, of course, as an efficient RIA is more credible than wrong economic analysis of regulatory proposals. But the point is that credibility is the Achilles' heel of impact assessment. RIA actors are interested in how their views are incorporated in the regulatory process, how science is validated and by whom, and how the government produces its own numbers. When they are not persuaded and think that RIA is tilted towards one actor's preferences to the detriment of others, there is no economic analysis that can compensate for the credibility deficit. If RIA is there to 'make institutions think'¹⁸ (and not to make only some experts think) contextual variables should be taken seriously.

¹⁸ This is a slogan used by the OECD in its publications on RIA on several occasions.

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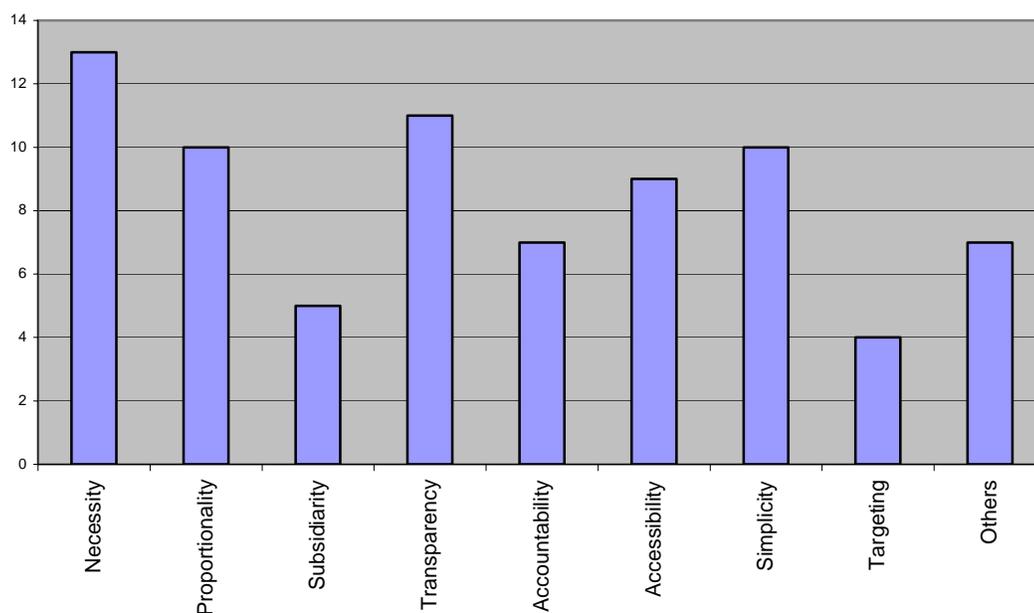
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Table 1 - How different stakeholders look at RIA

	<i>ECONOMIST</i>	<i>CIVIL SERVANT</i>	<i>POLITICIAN</i>	<i>FIRM</i>	<i>CITIZEN</i>
<i>CRITERIA</i>	<i>Efficiency</i>	<i>Conformity to rules</i>	<i>Consensus</i>	<i>Cost-minimisation</i>	<i>Cost-effective protection from risk</i>
<i>SUCCESS of RIA</i>	<i>Achieving goals in terms of real-world impact</i>	<i>Following legitimate procedures</i>	<i>Outcome of negotiation</i>	<i>Profit</i>	<i>Enabling regulation</i>
<i>LOGIC OF ACTION</i>	<i>Social sciences</i>	<i>Standard operating procedures</i>	<i>Negotiation</i>	<i>Logic of influence</i>	<i>Participation</i>

Graph 1: Principles of regulatory quality
(multiple answers were possible).



Source: DG Enterprise, Indicators of Regulatory Quality, 2005. Data collected in May 2004.