

BETTER REGULATION AND THE LISBON AGENDA

CLAUDIO M. RADAELLI

Professor of Political Science

Director, Centre for Regulatory Governance

Amory Building-Politics, Rennes Drive

University of Exeter

Exeter, EX4 4RJ, UK

Tel: +441392 263176

Email: c.radaelli@ex.ac.uk

PAPER DELIVERED TO EUROPEAN EVALUATION SOCIETY CONFERENCE
“EVALUATION IN SOCIETY: CRITICAL CONNECTIONS”

London

October 4th-6th 2006

BETTER REGULATION AND THE LISBON AGENDA

C.M. Radaelli

Abstract

This paper assesses the congruence between the initiatives for regulatory reform known as ‘better regulation’ and the recently re-formulated ‘growth and jobs’ Lisbon agenda of the European Union. To do that, better regulation is re-conceptualised as meta-regulation - sets of rules on the process of rule-formulation, adoption, implementation, and evaluation. Meta-regulation has both structural and discursive properties. Better regulation discourse has been re-defined over the years. Its malleability has enabled policy-makers to address different objectives and to push for their shifting regulatory reform agendas. This explains how the better regulation pendulum has been able to swing between regulatory quantity (or de-regulation) and quality across time and even across the same country. In terms of structural properties, there is diversity across time and countries on fundamental issues such as the dominant stakeholders and the contents of regulatory impact assessment. ‘Better regulation’ has been re-defined by the Barroso Commission to fit in with the ‘growth and jobs’ priorities of Lisbon. This re-definition, however, has also narrowed the scope, the range of stakeholders, and the ambitions in terms of governance and regulatory legitimacy. Diversity, proliferation of objectives and better regulation rhetoric make the relationship between meta-regulation, the Lisbon agenda, and, looking at the long-term impact, the dynamics of the regulatory state problematic. The quality-quantity divide and the role played by credibility and regulatory legitimacy are critical for the development of meta-regulation and its impact on the regulatory state.

Introduction

I suspect that ‘better regulation’ is still a relatively unknown object for the community of evaluators gathering at the annual conference of the European Evaluation Society. There are some obvious links between the tools of this emerging reform agenda and the tradition of policy evaluation. Suffice it to mention that a large part of ‘better regulation’ is indeed concerned with evaluation – specifically the ex-ante analysis of the effects of proposed legislation, the evaluation activities implied in simplification exercises, and the ex-post evaluation of regulatory tools and institutions (think of the evaluation of the performance of a central unit like the OMB in the USA or the Better Regulation Executive in the UK). Some studies have even argued that resources are moving away from ex-post policy evaluation towards ex-ante ‘better regulation’ activities

such as regulatory impact assessment and that we need to balance the two throughout the life-cycle of policies (SQW 2005).

So there are both prima facie evidence and policy concerns for involving the community of evaluators in a debate that so far has been confined to experts in cost-benefit analysis, regulatory analysts, and lawyers concerned with the quality of the law-making process. What this paper offers to the evaluators is, firstly, the classic ‘defining the nature of the beast’ exercise and, secondly, an appraisal of what this emerging agenda can offer to the Lisbon agenda for competitiveness in Europe and to our understanding of the regulatory state.

With these clarifications in mind, let me start introducing the topic of this paper. With the mid-term revision of the Lisbon agenda of the European Union (EU) for competitiveness, the programmes known as ‘better regulation’ have become a priority for the EU and its member states. The term ‘better regulation’ covers a large set of policy instruments and programmes to enhance the capacity of institutions to provide high-quality regulation. The re-formulation of the Lisbon agenda in terms of ‘growth and jobs’ has spawned a debate among EU policy-makers around the question whether better regulation is fit for Lisbon. This is an important question for policy-makers, but in order to assess the Lisbon congruence with the instruments of the social sciences, one has to first clarify what better regulation is and what it can deliver, both in terms of regulatory reforms and in relation to the dynamics of the regulatory state (at the EU level and in the member states).

Consequently, this article presents a succinct historical background (Section 1) and tackles the question ‘what is better regulation?’ (in Section 2). Better regulation – it will be argued – can be conceptualised as meta-regulation, to be analysed both in its structural and, following Julia Black (2002), discursive properties. One argument presented here is that better regulation is meta-regulation. As a discourse, better regulation enables political leaders to address

changing priorities in their regulatory reform agendas. Discourse generates task expansion – hence, the rise of better regulation in the league of Lisbon priorities is not surprising. Task expansion has also led to the proliferation of objectives, with the result that it is unclear what the EU and its member states want from their better regulation activities. This creates the risk of ending up with ‘worse’ politics as a result of ‘better’ regulation. Discourse is only one part of the story, however. For the other part, we must look at the structural properties of meta-regulation, that is, contents and processes. There is diversity (across time and countries) about who the dominant stakeholders are and the contents of instruments such as regulatory impact assessment (RIA).

Section 3 deals with the question of whether better regulation can deliver, and if so what? This question invites a careful consideration of the models of governance implicit in regulatory reform programmes, the dominant stakeholders, the degree of convergence in the tool-kits for regulatory quality used by the member states and the EU, and the clarity on the ultimate goals pursued by the ‘better regulators’. Section 4 moves on to discuss the relationship between better regulation and the Lisbon agenda. Better regulation was developed at the EU level in the context of the White Paper on Governance (Commission 2001). In 2005, it was re-tuned to focus on economic competitiveness, the reduction of administrative burdens, and the business environment. Several member states have embraced this re-definition of better regulation enthusiastically. The fit between better regulation and Lisbon is high, but it may come at the cost of narrowing down the range of stakeholders involved in better regulation, with potential problems of credibility and regulatory legitimacy down the road. One issue to consider is whether better regulation – originally defined in terms of de-regulation, and then re-formulated around the concept of regulatory quality – may switch back to a notion based on quantity. The political pendulum would have swung from quantity to quality - and then quantity again.

This leads to the macro-political implications of better regulation: what is the impact of this policy on the dynamics of the regulatory state? It is not clear whether better regulation is leading to an evidence-based state, a smart state, a new audit explosion, or a form of hyper-regulatory and hyper-rationalistic state. The critical variables (Section 6 submits) are credibility, regulatory legitimacy, the networks of stakeholders around better regulation, and, last but certainly not least, the models of governance pursued by the better regulators.

1. The development of the better regulation agenda: the member states and the EU

The origins of better regulation as an item on the agenda of the EU and its member states lie in the 1990s, when the Edinburgh summit under the British Presidency (1992) expressed concern about the quality of legislation. The 1990s, however, were disappointing years. Proposals, ideas, pilot projects failed to produce a coherent set of actions around specific problems at the EU level and in most member states – with the exception of the UK, which embarked (since the 1980s) on a process of de-regulation, ‘bonfire of regulations’, and compliance cost assessment (Froud et al. 1998). Other member states had a first go at regulatory quality, but did not achieve much.

True, member states and business groups focused on the issue of simplification and overall improvement of legislation across Europe, as evidenced by the Molitor (Commission 1995) and Unice (1995) reports, and the institutions of the EU made some early attempts to scrutinize the impact of legislation ex-ante by introducing a *fiche d’impact* on proposed legislation (Pelkmans, Labory, Majone 2000). The Commission was particularly active in launching several projects for simplification, business impact analysis, and the quality of the regulatory environment (business impact analysis started in 1986, under another British Presidency). Pressure on the member states came also from outside the EU,

with the OECD 1996 ministerial decision to stick to principles of good regulation – a reverberation of what was going on in Canada and the USA under the labels of ‘smart regulation’ and ‘regulatory reform’. But this flurry of initiatives did not bed in.

Over the last five years or so, there has been a change of gear. At the level of member states, there has been a widespread adoption of the better regulation agenda. RIA has taken a large share of the agenda (Baldwin 2005). What about the other member states? A report for the Italian, Dutch, and Irish Presidencies of the EU has documented the development of RIA in the EU-15 and some of the new member states between 2001 and 2004 (Formez 2004:5). Some studies, however, show that the contents of RIA vary markedly across the member states and that the RIA label or ‘bottle’ is less important than the ‘wine’ inside (Radaelli 2005). In this context, RIA has exhibited a high degree of political malleability. In the second part of the 1990s, RIA in Europe has moved from the measurement of business compliance cost to the assessment of proposed rules in terms of benefits and costs affecting different stakeholders– not just the business community, but also citizens, civil society organisations, and public administration. The OECD documents produced in this period stress the link between RIA and open models of governance, notably via open consultation (as opposed to consultation with few powerful actors such as large unions and business confederations) and decision-making criteria based on the aim to produce net benefits to the community when a new rule is introduced or revised.

Indeed, in countries like the Netherlands, RIA (in its Dutch incarnation of a three-pronged checklist on the quality of rules) was used in the 1990s to open up the regulatory process. Tripartite commissions with unions and employers were terminated contextually to the introduction of impact assessment. When Labour returned to office in the UK after the Conservative era, one of the first changes in the cabinet office was the re-organisation of better regulation bodies and their mission, with an explicit emphasis on open governance and multiple

stakeholders. Contrast this with the origins of RIA in Britain, when the tool was used to check compliance costs. Thus, RIA follows the broad movements of the political pendulum. In turn, the pendulum swings because of changing governmental agendas, different pressures from the business community, and economic conditions in Europe (specifically, the pressure arising from a more competitive world economy) and in specific countries.

A new focus on competitiveness (clearly a product of the re-definition of the Lisbon strategy) and the reduction of administrative burdens are steadily making progress across the member states. Arguably, this may switch the political pendulum back to the origins of better regulation, towards the pole of simplification, war on 'red tape Europe', and the reduction of compliance costs faced by firms operating in the single market. We may see a return of some of the themes, like de-regulation, originally championed by UK Conservative leaders such as Michael Heseltine in the 1980s.

The bonfire of regulations – i.e., Heseltine's slogan- was fiercely attacked by Labour. For example, on 28 March 1999, Stephen Byers, secretary of state for trade and industry, was asked by BBC journalist John Humphrys the question 'there are those who say for every new regulation we introduce you should get rid of two old ones, have you got some sort of target like that?' Byers replied: 'No, I don't want to repeat the mistakes of the previous government which was Michael Heseltine talked about a bonfire of regulations and then we saw fourteen thousand new regulations introduced over two years'.¹ But in 2005 the British government introduced the controversial proposal 'one new regulation in, one out' (BRTF 2005) and the business think tank Open Europe congratulated the President of the Commission Barroso on his 'promise to build a bonfire of regulations' (Open Europe, 2005:5).

What about the EU level? In 2001, a group of wise persons instructed by the EU

¹ http://www.bbc.co.uk/otr/intext/STEPHEN_BYERS.3.28.3.99.html.

Ministers for Public Administration produced a blueprint for better regulation, known as the Mandelkern report (2001). Interestingly, this document was produced at the time of the discussions on democratic governance and new approaches to consultation, accountability, and responsiveness of the Commission spawned by the White Paper on governance of the European Commission (Commission 2001). Interviews with the members of the Mandelkern group suggest that the group was very much aware of the challenges in terms of governance that were being discussed in the White Paper. They were also aware of the discourse surrounding Lisbon – indeed the Mandelkern group was created by the Ministers of Public Administration to implement the Lisbon 2000 Council request to set out a strategy for the improvement of the regulatory environment. But the discourse surrounding Lisbon 2000 was much broader, and arguably vaguer, than the one arising out of the mid-term revision and re-launch of Lisbon.

The result was a final report of the Mandelkern group rooted in the context of governance standards and wide consultation. Further to Mandelkern, the Presidencies of the EU have made several joint statements about the need to prioritise better regulation, with the aim of joining-up the steering potential of successive Presidencies and make better regulation a key feature across the crucial years of the Lisbon strategy.

In 2004, the Finance Ministers of four successive Presidencies suggested that regulatory quality indicators be activated within an open method of coordination for regulatory reform. In 2004, the Competitiveness Council called on the Commission and the Member States to evaluate ‘the cumulative impact of existing legislation on the competitiveness of industry and of specific industry sectors’ and to develop ‘a method for measuring administrative burden on business’ (Council, 2004: 3). In the context of the ‘new start for the Lisbon strategy’, the Council published a note on the broad economic policy guidelines including a specific guideline (no.14) on the quality of regulation, the systematic assessment of regulatory costs and benefits, and the reduction of administrative

burdens on enterprises (Council, 2005a: 23-24). The integrated guidelines for growth and jobs agreed by the Spring Council in March 2005 finalised guideline 14. The guideline has to goal 'to create a more competitive business environment and encourage private initiative through better regulation'. The first point of guideline no. 14 is 'to reduce the administrative burden that bears upon enterprises'. Four years before, the Mandelkern report had stated in the executive summary 'improving the quality of regulation is a public good in itself, enhancing the credibility of the governance process and contributing to the welfare of citizens'. Language and priorities seem to have changed: from governance to economic growth, and from quality to quantity.

For its part, in 2002 the Commission, drawing on the analysis of regulatory governance contained in the White Paper on Governance, launched a major action plan on better regulation (Commission 2002a), supported by standards on consultation and a new approach to regulatory impact assessment - the pivotal instrument of the whole better regulation action plan. It was based on the aim to scrutinise the impact on stakeholders of all the items included in the annual work programme of the Commission, by drawing on systematic consultation, the analysis of different options (regulatory and not), and the assessment of a wide range of costs and benefits. Regulatory impact assessment – the Commission argued – would be based on what at that time were the cornerstones of the Lisbon strategy, that is, economic competitiveness, sustainable development, and social cohesion (Commission 2002b).

Since then, the Lisbon agenda has prioritised the economic dimension. At the same time, a new Commission was installed, arguably with more business-friendly attitudes than the previous one. In its 2005 communication to the Spring European Council on the 'new start for Lisbon', the Commission highlighted the assessment of the impact of new legislation on competitiveness (mainly but not exclusively in the context of RIA), new initiatives on cumulative burdens, and the need to draw on external expertise to improve on methods for impact

assessment (Commission, 2005a: 19-20). The Commission decided to attach 'great importance to progress' in the area of better regulation in its annual report on the Lisbon strategy (Commission 2005b: 8).

A few months later, the initiative on burdens materialised in a communication on the EU common methodology for assessing administrative costs imposed by legislation (Commission, 2005c and Annex published as SEC document, Commission 2005d). The RIA guidelines were modified in March 2006 to take the administrative burdens dimension into account.

The three main institutions of the EU are also committed to an important inter-institutional agreement on better regulation, signed in 2003. Among other things, the agreement stipulates that substantive amendments introduced by the Parliament and the Council to draft legislation will be subject to impact assessment.² The inter-institutional agreement on better law-making is being implemented by a high-level technical group for inter-institutional cooperation. Some principles for the implementation of the agreement (the so-called common approach to impact assessment, Council 2005b) are emerging. In March 2006, the Council secretariat finalised a draft text on how the chairs of the Council's working parties should handle impact assessments (Council 2006). This 'handbook' for Council's working parties puts emphasis on the three drivers of better regulation (economic, social, and sustainable development goals). This is a voice slightly out of tune with the current chorus of 'growth and jobs', 'competitiveness first', and 'war on red tape Europe' that seems more concerned with the economic dimension than with the other two.

2. Better regulation as meta-regulation

² Par. 30 of the agreement states that 'where the codecision procedure applies, the European Parliament and the Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage'.

There is no doubt that there is a better regulation movement 'out there', but it is not clear how one can grasp its contents at the conceptual level. In some countries, there is evidence that better regulation has now become a policy, with its own set of actors, range of problems, tool-kit, and decision-making processes. But what sort of policy is this? The normative bias inherent in the language of 'better' regulation does not help at all. What is the 'good' regulatory system that better regulation is supposed to deliver? Interestingly, a survey on the 'ideal regulatory system' carried out on different group of experts in the USA has shown variability of what this concept means, including 'adaptive', 'democratic', 'efficient', 'equitable', 'scientifically sound' – with an obvious preference, considering the sample, for the last item (Brown, Morgan, and Farrow, 2004). Turning to stakeholders other than regulators and experts, other studies have shown that the question 'better regulation for whom' is not a trivial one (Radaelli 2005). There is no systematic survey for the EU, although data on regulatory quality collected on a EU-25 sample of directors of better regulation show that efficiency and market-friendly regulations are more important than scientifically sound analysis (Radaelli and De Francesco 2006).

Bearing in mind these limitations, let us turn to the structural and discursive properties of this enigmatic policy domain. One way out of the confusion is to look at better regulation as meta-regulation or rules on how rules should be formulated, implemented, and evaluated. Meta-regulation is a broad concept. Braithwaite (2003:16) argues that 'the core idea of the regulatory state is regulated self-regulation (meta-regulation)'. But there are two slightly different conceptual approaches to meta-regulation. Braithwaite relates meta-regulation to concepts such as reflexive law and enforced self-regulation because they share the core notion of responsive regulation – a type of regulation that is responsive to the motivational postures of the regulated, values flexibility, and the participation of the citizens in 'crafting contextually attuned solutions to problems and parsimony in recourse to coercion' (Braithwaite 2003:6; for the full

presentation of the theory of responsive regulation see Ayres and Braithwaite 1992).

Other authors, notably Brown Morgan (2003), do not make the normative connection between meta-regulation and the virtues of responsive regulation. They simply stick to the basic idea of rules disciplining regulatory processes. In this article, I follow Morgan and consider meta-regulation (as embodied in the better regulation programmes) a set of rules covering the regulatory process, from rule formulation to enforcement, implementation, and ex-post evaluation of regulations. One important characteristic of meta-regulation is that it targets regulation from a government-wide perspective, whilst other types of regulatory reform proceed sector by sector. Additionally, Morgan's use of the term meta-regulation does not suffer from normative bias. In the context I am examining here, there is effective and ineffective meta-regulation, responsive and non-responsive regulation. This is an empirical question and for this reason I do not connect better regulation programmes and responsive regulation.

Let us see why better regulation is meta-regulation. RIA is a set of rules on the process of rule-formulation, and so are the standards on consultation used in the UK and the EU. Simplification programmes include specific rules to be followed in the process of revision and repeal of legislation. Sunset clauses, that is, rules that stipulate an automatic repeal of legislation unless explicitly reconsidered at the end of the period, are another example of better regulation that sits comfortably in the meta-regulation category.

Let us now illustrate the structural components of better regulation. An important structural dimension of policy is the process in which it is handled. Up until now, there has been a plethora of EU venues (both formal and informal) in which meta-regulation has been processed (Commission 2004). However, the coordinates of an open method of coordination (OMC) are emerging and have been mentioned in official Council's documents (detailed in AUTHOR 2006).

There is no need to enter the discussion on the efficiency and legitimacy of the OMC in this article (Citi and Rhodes 2006, Borrás 2004). It is sufficient to observe that this emerging OMC provides some order to the process. The open method includes the following components:

- Guidelines;
- Benchmarking and sharing of best practices;
- Multi-lateral surveillance;
- Indicators;
- Iterative process, and
- Implementation through domestic policy and legislation.

But where is the evidence that better regulation is being developed within the framework of an embryonic open coordination process? The Mandelkern Report, the Commission's action plans on better regulation, and the inter-institutional agreement on better regulation are not the same as the guidelines used in fully developed open coordination processes, such as the European Employment Strategy. But they provide a master-plan functionally similar to the OMC guidelines. On benchmarking and best practice, there have been several initiatives promoted by the Commission in the 1990s – and, since the publication of the Mandelkern report, by the meetings of the directors of better regulation (DBR), an informal body somewhat connected to the high-level group on competitiveness within the Council on Competitiveness - to discuss the progress made by individual Member States and debate how the Mandelkern principles can be specified in national programmes. A set of criteria for best practice in impact assessment has been produced by DBR. Discussion within DBR has intensified, with regular sessions on best practice, indicators of regulatory quality, communication of better regulation to the stakeholders, one-stop-shops, simplification, and pan-European training events.

Both the Commission and DBR have engaged in multi-lateral surveillance of the progress made. This has happened in a soft form, typically by convening meetings and workshops in which data provided by Member States on specific projects are circulated and discussed. On 2 March 2006, the Commission finalised a list of 'high-level experts' to provide an interface between Brussels and the member states, contribute to the diffusion of best practice, and 'assist the Commission in improving the regulatory environment for enterprises, industry, consumers, the social partners and citizens at large' (press release IP/06/254)

Looking at the future, one can envisage an intensification of this embryonic open coordination in a way that would include national action plans nested in the Lisbon national reform programmes for growth and jobs. Indeed, as mentioned the idea is to connect progress on better regulation to the assessment of the Lisbon plans (Commission 2005b). Plans would sound more realistic if common indicators were adopted (see the suggestions in Commission 2005b:10). And, in order to develop open coordination, there should be an iterative process to review guidelines and indicators periodically on the basis of the experience cumulated and the results achieved. Indicators of regulatory quality have been produced by a study funded by DG Enterprise in 2004. The Secretariat General has taken the lead in proposing indicators to the member states, although the current state of play is that some governments, according to Commission's officers involved in better regulation, are 'reluctant although not opposed' to make the step of adopting common indicators.

Finally, we turn to the discursive properties of better regulation. Drawing on what has been published so far (Baldwin 2005; Black 2005; Radaelli 2005), it is fair to say that better regulation is a fluid and rapidly changing discourse that enables political leaders to address changing priorities in their regulatory reform agenda. A well-known property of discourse in the policy-making process is that it can generate task expansion and re-define policy problems (Majone 1989). The malleability of better regulation discourse explains how the pendulum mentioned

above can swing in different directions across countries and, in the case of the UK and the EU, even within an individual political system. This leads to the issue of a common better regulation discourse and different practice.

3. What can better regulation deliver?

The potential of better regulation is hindered by the gap between discourse and practice and by the proliferation of goals attached to the better regulation agenda. The gap between discourse and practice is the result of diffusion of better regulation ideas but lack of convergence on who is the dominant stakeholder in better regulation policy (Radaelli 2005). Neither is there consensus on whether better regulation should revolve around (deceivingly) simple tools and goals that can easily hit the media ³ or more sophisticated tools and multi-dimensional notions of regulatory quality.

Countries such as the UK have evolved from de-regulation and rudimentary tools (that is, compliance cost assessment) to a policy aiming to the net benefit for the community and a broad set of meta-regulation instruments, although the recent changes seem to point to a narrower focus on administrative burdens. One can interpret this recent shift as a sign of frustration of the British policy makers with sophisticated approaches, and their perception that the only way to make a real impact on the regulators (and, perhaps, the media) is to set simple, draconian measures – no matter what their intellectual merit can be.

Indeed, the war on administrative burdens is quite popular at the moment. In order to measure administrative burdens and set targets, a number of EU member states and Norway are networking. In the UK, the initiative on burdens covers business, charities and the voluntary sector. In the Netherlands, there is a

³ Think of the campaigns against red tape, that have eventually arisen the political attention for better regulation even in countries (such as France) traditionally reluctant to embrace better regulation discourse.

focus on enterprises. In France, the early stages seem to focus on citizens. These countries are also exchanging ideas on a tool, called the standard cost model (SCM), originally developed in the Netherlands.⁴ Tools like the SCM are *deceptively* simple. Consider the following questions. What is a burden? Where is the evidence showing that red tape is the major regulatory problem for business? How can it be defined? What is the relationship between administrative burdens, regulatory costs, and the idea that regulation should provide net benefits to the community? How can one remove burdens (think of information requirements) without removing the benefits of regulation? How does one prioritise the reduction of burdens to make sure that the exercise does not contravene the simplest principles of cost-effectiveness in administrative action?

The recent switch of the UK towards the 'burdens' agenda was presented to the public opinion as an attempt to imitate the example of the Netherlands. An influential report on regulatory enforcement (the so-called *Hampton Review*, HM Treasury, 2005) has been flagged up by the British executive as an example of how to step up the initiatives for simplification and better business environment. A report of the Better Regulation Task Force (2005), *Less is More*, was requested in October 2004 by the Prime Minister. It was endorsed publicly by the Prime Minister – with a letter sent to the BRTF chair in July 2005 - and the Chancellor of the Exchequer. The report draws explicitly on the SCM (one chapter of *Less is More* is entirely dedicated to the Dutch methodology). It makes the recommendation to identify and set quantitative targets for the reduction of administrative burdens via the SCM. It also makes the controversial proposal to adopt a drastic 'one in – one out' approach to the management of regulatory burdens. The recalibration of bodies such as the Regulatory Impact Unit (now Better Regulation Executive) and the BRTF (now Better Regulation Commission) is a consequence of the new focus on targets for simplification and burdens. Paradoxically perhaps, the UK is moving from a broad and multi-stakeholder

⁴ On the network of users of the standard cost model see <http://www.administrative-burdens.com/>.

paradigm to a policy confined to burdens and business. In doing so, it is joining countries that have always found it hard to achieve sophisticated objectives of regulatory quality ⁵ and are quite happy to settle for a narrow agenda set in terms of war on red tape and targets for the reduction of administrative burdens.

Other countries, such as Ireland, seem more interested in a broad, multi-stakeholder and multi-instrument approach to meta-regulation, and have introduced comprehensive RIA guidelines accordingly. And there are member states, old and new, who, simply put, have done very little so far, apart from expressing their intention to prioritise better regulation in their national Lisbon reform plans.

What about the EU-level, then? The EU fiddled with the issue of 'better regulation for whom' throughout the 1990s, when a plethora of approaches to better law-making were introduced, and, contextually, alternative templates for impact assessment were used on an experimental basis – from business impact assessment to sustainability impact assessment, gender assessment, trade assessment, and health assessment. However, the 2002 action plan on regulation provides a single template for assessment and a strong anchorage to the model of governance presented by the Prodi Commission in 2001.

Recently, however, the Barroso Commission has provided a re-definition of the Lisbon agenda based on simplification, the removal of administrative burdens, and economic competitiveness. It is too early to say whether this re-orientation is affecting the content of the better regulation tools, and to argue, for example, that RIA, consultation, simplification and so on are being managed in the interests of the business community. The written guidance of the Commission is still based on a finely balanced approach to the triangle of competitiveness, sustainable development, and social cohesion. And the template for the chairs of Council's

⁵ In a survey, Radaelli and De Francesco (2006) note that the goal of providing the net benefits to the community (a goal that informs better regulation policy in countries like Canada and the USA) is not at all popular in the EU.

working parties (Council 2006) does not deviate from this triangle. Of course, this does not mean that the EU institutions are actually following this template in their daily work. But it does not prove the opposite either.

The jury is still out. Arguably, the EU (both in terms of its institutions and of the relationships between the Commission and the most active member states) is at the moment a political system in which there are different ideas about the nature of lawmaking.⁶ There are also different pressures at work, with some working in the direction of quantity (thus pushing for slogans such as ‘Less is more’, ‘reduction of burdens’, and withdrawal of ‘obsolete’ legislative proposals) and others pushing for quality (the idea being that ‘less’ sometimes is ‘more’ and sometimes is simply ‘less’ and that in any case good regulation is not synonymous of less regulation).⁷ Indeed, the current confrontation between those who argue for a comprehensive approach to RIA, systematic monitoring of regulatory quality, and better regulation as a component of a governance agenda, on the one hand, and the advocates of a focus on administrative burdens, on the other, is a battle between quality and quantity as alternatives focal points for better regulation. Add to this that even when there seems to be consensus, such as in the widespread adoption of RIA, the contents of this tool vary markedly.

Proliferation and, eventually, confusion about what the EU wants from better regulation, are, ironically, the result of the success of discourse in generating task expansion. But what are the problems that better regulation is supposed to fix? To begin with, there is the issue of competitiveness. Better regulation can deliver on competitiveness, but for a start one should not confuse economic efficiency, competitiveness, and growth. Then, there is no simple chain of

⁶ Anne Meuwese argues that these contrasting ideas re-surface camouflaged under ‘technical discussions’ on impact assessment. See Meuwese (2006).

⁷ In contrast, Open Europe argues that ‘The Commission’s current approach – to promote “better” regulation rather than less regulation – is a distraction and will have no real impact on business. The flow of costly regulations coming out of the EU every year needs to be curbed, and existing legislation cut back’ (Open Europe 2005:16).

causation between meta-regulation as a policy choice, the selection of specific tools (i.e., impact assessment, consultation, simplification, access to regulation, etc.), the production of rules, their efficiency, and final outcomes such as economic growth. Correlation can be spurious and causal chains interrupted at several points. Arguably, the most direct impact of better regulation on competitiveness is via the changes in the regulatory culture. By changing the way in which actors produce regulation, it can lead to an efficient regulatory environment for citizens and firms. This is a pre-condition for competitiveness.

Secondly, there is a set of goals attached to governance dynamics. Regulation as mode of governance is criticised for its opaque procedures, lack of transparency, and limited access to diffuse interests. Better regulation is valuable if it opens up the policy process and breaks down the intimacy of regulator-regulatees interactions in close policy communities. This requires a drastic re-modulation and continuous readjustment of regulatory policy processes. With its emphasis on open and transparent processes, disciplined consultation, fair treatment of the empirical evidence, replicability of the analysis produced by the regulators, and peer review, better regulation has its role to play.

Then there is the completion of the single market. There is a clear trend towards politicisation of some key single market issues. Even policies that were originally presented as technical complements to the design of an integrated market for capital and labour are now at the centre of heated political controversies. There is frustration both on the side of those who want to stop the excesses of liberalisation and on the other side of single market champions. The political sensitivity of single market regulation has become difficult to handle.

The idea underpinning better regulation is to strengthen the empirical base for political decisions. However, empirical information has different impacts on policy decisions depending on the level of conflict and the degree of innovation (and, consequently, uncertainty). High conflict and radical innovations represent the

toughest conditions for the institutionalisation of tools such as impact assessment. At the moment, better regulation has to deliver in a politically charged environment. Should a network of stakeholders (including business, civil society organisations, the regions, and the media) emerge around better regulation, this would bring consensus at an early stage of the policy process, and reduce conflict at a later stage. Consequently, the political role of better regulation in the single market is less about establishing 'the facts' than about making the stakeholders aware of the major trade offs involved in alternative options. In turn, awareness of the trade offs between economic, environmental, and social goals, balanced and extensive consultation, systematic analysis of alternative options, and a focus on a wide range of stakeholders are essential pre-requisites for the legitimacy of single market rules.

But this is not what is happening now, given the enthusiasm for the war on burdens and the prioritisation of goals connected to the business environment. The problem is compounded by the lack of trust of the Member States in the Commission. Lack of trust may lead the Commission to be silent on the limitations of its own RIAs and to oversell in-house empirical analysis. The business community and the member states may respond with advocacy papers camouflaged as impact assessments. The European Parliament and the Council may end up confusing their role as fora for the treatment of values and interests with the newer role (prefigured by the inter-institutional agreement on better regulation) of venues for the technical analysis of amendments to proposals. In short, the risk of getting 'worse' politics as a result of 'better' regulation should not be underestimated.

The enthusiasm for burdens may well be a populist way to downgrade the aims of meta-regulation. But it can also enable the member states and the EU institutions, after years of better regulation rhetoric, to focus on one specific type of meta-regulation, speak the same language, and monitor progress in a

common framework.⁸ In turn, administrative burdens can evolve towards less crude forms of analysis of regulatory costs, and, arguably, regulatory budgets (although one would have to clarify what type of costs should be included in these budgets). One condition for this is to supplement rudimentary tools such as the standard cost model with other tools (SQW 2005). Put differently, the SCM can produce development only if it is a point of departure, not a point of arrival. Another important condition for integrated regulatory management is the gradual consideration of benefits, for example by removing regulatory costs that produce the worst net deficit, and not just removing administrative rules *per se*.

Another delicate issue concerns the legitimacy implications of different swings of the meta-regulation pendulum. Systematic studies of compliance cost assessment and 'regulation of the regulatory process' (Froud et al. 1998; Morgan 2003) and, at a more general level, the vicissitudes of the EU regulatory system (Majone 2005) show that the Achilles' heel of regulatory quality initiatives is legitimacy. In this connection, more clarity on the specific goals of meta-regulation in the EU and the member states is needed. To look at better regulation as panacea to an increasingly political discussion on the single market does not help the cause of credibility and legitimacy of meta-regulation. Moreover, the discussion on the stakeholders of RIA and other tools should be more open. Better regulation has been up until now a fluid discourse. This has enabled political leaders to pursue shifting priorities in their regulatory reform agendas. But this has come at the cost of obfuscating the important questions of models of governance and 'better regulation for whom' – questions that cannot be neglected for too long without encountering legitimacy problems down the road. Thus, a more focused discussion on what type of governance policy-makers have in mind when they speak about better regulation would help. A robust set of stakeholders and actors involved in meta-regulation has a positive impact on the credibility of tools such as RIA and on the legitimacy of the whole policy. A focus on a single stakeholder, even a very encompassing one like the

⁸ I am grateful to Ed Humpherson for this observation.

firm, implies a re-definition of meta-regulation as yet another type of industrial policy. The expectations in terms of legitimacy and models of governance have to be re-adjusted accordingly.

Regulatory legitimacy, however, is not automatically delivered by the presence of robust networks of stakeholders. The key issue is credibility (Majone 1996: chapter 13). The lack of sound peer review and ex-post evaluation of meta-regulation tools and institutions in the majority of OECD countries⁹ is problematic in this respect. One wonders why 'better regulators' should not be subject to external scrutiny and face hard questions about the opportunity cost of investing significant amounts of public money in their activities.

4. The Lisbon congruence

There are two ways to assess the relationship between better regulation and the Lisbon agenda. Firstly, one can raise the question whether the current definition of better regulation is 'fit for' or, simply, 'compatible with' the growth and jobs re-definition of the Lisbon agenda. This is a question about the Lisbon congruence of better regulation programmes across Europe and at the EU level. Secondly, one can tackle the more difficult question of whether better regulation can deliver in the long-term beyond discourse and 'high-level commitments' and have an impact on the 'regulatory state'. We will deal with this issue in the next Section. Now, let us focus on the question of Lisbon congruence.

There is no doubt that over the last two years or so, broadly speaking from the Dutch Presidency (2004) onwards, issues such as the competitiveness dimension of RIA, 'red tape' and administrative burdens have increased their role within the better regulation agenda. This process has developed in synchrony

⁹ According to OECD data, only 8 countries have an explicit strategy on ex-post evaluation of regulatory tools and institutions (n=22). Disaggregate data for the EU member states are not available.

with the political discussion surrounding the mid-term review of Lisbon. The result is that better regulation has been recognised as one of the priorities of the Lisbon agenda, but at the cost of being narrowly defined. The balanced approach to sustainable development, social cohesion, and competitiveness may be endangered, although the jury, in terms of empirical evidence is still out.

Studies on the sustainable development dimension of EU RIA have been published (Lee and Kirkpatrick 2004, IEEP 2004, Opoku and Jordan 2004), but they cover the period in which the Commission was still experimenting with temporary written guidance and pilot impact assessments. The current written guidance on the Commission's RIA has not been criticised for its neglect of important dimensions such as the environment - so the real test is how it is going to hit the road of implementation over the next few years. At the same time, the Commission launched in 2006 an independent evaluation of its RIA system, but the results are not yet available.

Overall, better regulation may have increased its saliency within Lisbon at the cost of dropping some potential as an ambitious agenda for open governance. Again, this proposition will have to be tested against systematic evidence on consultation, transparency, and access to regulation. At the moment, it is a conjecture, not a verdict.

5. Legitimacy and images of the regulatory state

A more transparent and explicit discussion would also dissipate some ambiguities surrounding the image of the regulatory state implicit in better regulation. In his book on regulatory politics in Britain, Moran (2003) has identified four images of the regulatory state. Drawing on his work, better regulation can be seen as a move towards a smart post-Keynesian state (OECD 2002), increasing regulation within government (Hood et al, 1999), a modernistic

hyper-regulatory state that colonises social life (Moran 2003), or a ritualistic obsession for audit and form over substance (Power 1999).

More precisely, we can examine the impact of better regulation on the dynamics of the regulatory state by considering positive and negative assessments of its political role and by making a distinction between the impact within government and on the external socio-economic environment (table 1).

Table 1 – Better regulation and the regulatory state

	Impact on government	Impact on the socio-economic environment
Optimistic view	Better regulation as new mode of administrative process	Smart state
Pessimistic view	Audit state	Hyper-regulatory state

In the first instance, meta-regulation can be seen as a tool of political control rooted in administrative procedures. By controlling the administrative process, the core executive (the President in the USA) controls regulators in the departments (federal executive agencies in the American case). Instruments such as mandatory consultation (notice and comment) are fire-alarm mechanisms that enable business constituencies to alert the political principal (McCubbins and Schwarz 1984). RIA re-assures the principal that there is no agency loss due to asymmetric information (McCubbins, Noll, Weingast 1987). In this context, the impact of meta-regulation is essentially within government. The political picture of the EU is complicated by the fact that meta-regulation can also be used by Member States and the European Parliament (the principals) to control the Commission at the stage of policy formulation.

If one looks with equally optimistic eyes at the impact on the socio-economic environment, the changes introduced by RIA and other tools contribute to the emergence of the smart state – a state that moves with intelligence ‘between different regulatory modes according to circumstance’ (Moran, 2003: 24). This is how better regulation is presented in policy-makers circles, for example in the OECD meetings and DBR events.

Meta-regulation arises out of the shift from the classic instruments of stabilisation and redistribution to regulation. However, it does not necessarily produce a smart state. If, as argued by Gunningham and Grabosky (1998) and Baldwin (2005), smart regulation consists of the flexible use of different regulatory modes to suit changing circumstances, instruments such as impact assessment are not fit for the purpose. It is very difficult to use impact assessment to test mixed regulatory regimes - for example a regime that includes an enforcement pyramid (of the type suggested by Ayres and Braithwaite, 1992) with self-enforced rules at the base and command law at the top. The standard approach in RIA is to test options that are neatly separated one from another. In addition, once a complex regulatory regime has been impact assessed, there is an in-built bias against flexibility, unless one is prepared to re-perform impact assessments of the regulatory changes, and this may be politically and bureaucratically unwise – a point made by Baldwin (2005).

The reason behind this lack of flexibility and the less than optimal fit with the image of the smart state lies in the intrinsic properties of meta-regulation. It brings more formality and, inevitably, rigidity in the regulatory process. It can be used intelligently, of course, but it is not a form of creative regulatory craft. There are advantages in terms of accountability and, perhaps, control in the regulation of the regulatory process (in which case we are back to the first cell of the table), and one can be prepared to give up some flexibility and regulatory innovation in exchange for predictability and monitorability of how rules are formulated, consultation is carried out, and enforcement delivered.

Overall, meta-regulation may have a better ‘fit’ with a third, pessimistic, image. In a sense, RIA, the ex-post evaluation of regulatory tools and institutions, procedures such as the standard cost model may well be a symptom of the audit explosion described by Power. The fourth image goes straight into the territory of politics. One cannot answer the question whether meta-regulation is intrusive and hyper-modernist – and anyway Moran has developed his own image with a particular context in mind, that is, Britain.

In terms of comparative analysis, the impact on the regulatory state may well vary across time and across space, and in relation to the variables identified above (models of governance, stakeholders, legitimacy and credibility). Comparative politics suggest other obvious variables, such as the type of political system, administrative law traditions, the role of pressure groups, and the organisation of the state. In conclusion, ‘who gets what from better regulation’ and with what consequences for the regulatory state is a fascinating question that will have to be addressed by comparative research in the future.

Conclusions

The nature of ‘better regulation’ is elusive, but it becomes clearer once one makes the analytical step of re-conceptualising it as meta-regulation. This article has examined the structural and discursive properties of this type of meta-regulation. Evidence points to diversity, both across nations and across time. The malleability of better regulation discourse is an important political characteristic because it enables policy-makers to address different objectives over time and to push for their shifting regulatory reform agendas. This has happened at the EU level and in some member states – the UK being a particularly dynamic case.

However, discursive dynamism has resulted in a proliferation of objectives attached to the better regulation agenda. Both Lisbon and better regulation policy have changed over the last five years or so. At the time of the Mandelkern report (2001) and the first coherent action plan of the Commission on better regulation (2002), the reference points of the EU better regulators were the three pillars of the early Lisbon strategy (competitiveness, social cohesion, and sustainable development) and the White Paper on governance. Since then, Lisbon has changed, the Commission has changed, and the 'Future of EU Governance' described in the White Paper has not materialised in a new constitution for Europe. Competitive pressures on Europe have increased in the meantime. Unsurprisingly then, with the Barroso Commission, there has been a re-definition of better regulation. One interviewee at the Commission said that between 2004 and early 2005 the message sent to those involved in better regulation activities was 'everything that cannot be Lisbonised will be terminated'. The re-modulation of better regulation has increased its synergy with the 'growth and jobs' priorities of Lisbon and perhaps will contain the proliferation of objectives by focusing on specific goals, such as the reduction of administrative burdens.

However, this re-definition has also narrowed the scope, the range of stakeholders, and the ambitions in terms of governance. The long-term impact of better regulation is difficult to appraise. Contrasting images of the regulatory state provide useful points of reference for the analysis, but there is uncertainty on the model of governance underlying better regulation.

References

- Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation. Transcending the Deregulation Debate*, Oxford, Oxford University Press.
- Baldwin, R. (2005) 'Is better regulation smarter regulation?', *Public Law*, Autumn, 485-511.

- Black, J. (2002) 'Regulatory conversations' *Journal of Law and Society*, 29(1) March: 163-196.
- Black, J. (2005) 'The emergence of risk-based regulation and the new public risk management in the United Kingdom', *Public Law*, Autumn, 512-48.
- Borrás, S. (2004) 'The open method of coordination and new governance patterns in the EU', *Journal of European Public Policy*, 11(2), 185-208.
- Braithwaite, J. (2003) 'Meta-regulation for access to justice', *Paper delivered to the General Aspects of Law Seminar Series*, University of California, Berkeley, 13 November 2003.
- Brown, M. G. Morgan, and S. Farrow (2004) 'Expert assessment of the performance of the US system for environmental regulation', *Journal of Risk Research*, 7(5) July: 507-521.
- BRTF – Better Regulation Task Force (2005) *Less is More. Reducing Burdens, Improving Outcomes*, London: Better Regulation Task Force, London.
- Citi, M. and M. Rhodes (2006, forthcoming) 'New modes of governance in the EU: A critical survey and analysis' to appear in K. Jorgensen, M. Pollack, and B. Rosamond, *Handbook of European Union Politics*, Sage, London.
- Commission (1995) Report of the Group of Independent Experts on Legislative and Administrative Simplification, COM(5) 288 final, Brussels, 21 June (Molitor Report).
- Commission (2001) European governance – a white paper, COM(2001) 428 final, Brussels, 25 July.
- Commission (2002a) Action plan: simplifying and improving the regulatory environment, Communication from the Commission, COM(2002) 278 final, Brussels, 5 June 2002.
- Commission (2002b) Communication on impact assessment, COM(276) Final, 5 June 2002.
- Commission (2004) Who Is Doing What on Better Regulation at EU Level – Organization Charts, Commission Working document compiled by the Secretariat General, Brussels, 1 June 2004.
- Commission (2005a) Working together for growth and jobs: A new start for the Lisbon strategy, Communication to the Spring European Council, COM(2005) 24, 2 February 2005.

- Commission (2005b) Better regulation for growth and jobs in the European Union, Communication to the Council and the EP, COM(2005) 175, Brussels, 16 March 2005.
- Commission (2005c) Communication on an EU common methodology for assessing administrative costs imposed by legislation, COM (2005) 518 Final, Brussels, 21 October 2005.
- Commission (2005d) Outline of the proposed EU common methodology and report on the pilot phase, SEC (2005) 1329, Brussels, 21 October 2005.
- Council of the European Union (2005b) Better regulation – Inter-institutional common approach to impact assessment – Adoption, JUR 486, COMPET 263, Brussels, 24 November 2005.
- Council of the European Union (2006) Better regulation – Handling of impact assessments, note from the Council secretariat to the Working party of competitiveness and growth, COMPET DS 150/06, Brussels, 1 March 2006
- Formez (2004) A comparative analysis of RIA in ten EU countries, Report prepared for the Directors of Better Regulation, Dublin, May 2004, <http://www.betterregulation.ie> .
- Froud, J., R. Boden, A. Ogus, and P. Stubbs (1998) *Controlling the Regulators*, London: Macmillan.
- Gunningham, N. and P. Grabosky (1998) *Smart Regulation: Designing Environmental Policy*, Clarendon: Oxford.
- HM Treasury (2005) *Reducing administrative burdens - effective inspections and enforcement*, London: HM Treasury, March, www.hm-treasury.gov.uk
- Hood, C., C. Scott, O. James, G. Jones and T. Travers (1999) *Regulation inside Government; Waste-Watchers, Quality Police and Sleaze-Busters*, Oxford: Oxford University Press.
- IEEP- Institute for European Environmental Policy (2004) 'Sustainable development in the European Commission's integrated impact assessment for 2003', Final report, April.
- Lee, N. and C. Kirkpatrick, (2004) 'A pilot Study on the Quality of European Commission Extended Impact Assessment', Impact Assessment Research Centre, Institute for Development Policy and Management, University of Manchester, 21 June.
- Majone, G.D. (1989) *Evidence, Argument, and Persuasion in the Policy Process*,

New Haven, Yale University Press.

Majone, G.D. (2005) *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth*, Oxford, Oxford University Press.

McCubbins, M.D and T. Schwartz (1984) 'Congressional oversight overlooked: Police patrol versus fire alarms', *American Journal of Political Science*, 28(1): 165-179.

McCubbins, M.D. Noll, R. and B. Weingast (1987) 'Administrative procedures as instruments of political control', *Journal of Law, Economics, and Organization* 3(2): 243-277.

Meuwese, A. (2006) DETAILS TO FOLLOW

Moran, M. (2003) *The British Regulatory State: High Modernism and Hyper Innovation*, Oxford: Oxford University Press.

Morgan, B. (2003) 'The economization of politics: Meta-regulation as a form of nonjudicial legality', *Social and Legal Studies*, 12:4, 489-523.

OECD (2002) *Regulatory Policies in OECD Countries; From Interventionism to Regulatory Governance*, OECD publications, Paris.

Open Europe (2005) Less regulation. 4 ways to cut the burden of EU red tape, London, Open Europe, paper available at www.openeurope.org.uk.

Opoku, C. and A. Jordan (2004) 'Impact assessment in the EU: a global sustainable development perspective', Paper presented at the conference on the Human Dimension of Global Environmental Change, Berlin 3-4 December.

Pelkmans, J., S. Labory, and G. Majone (2000) 'Better EU Regulatory Quality: Assessing Current Initiatives and New Proposals' in G.Galli and J. Pelkmans (eds.), *Regulatory Reform And Competitiveness In Europe*, Volume 1: Horizontal Issues, Cheltenham, UK : Elgar.

Power, M. (1999) *The Audit Society: Rituals of Verification*, Oxford: Clarendon Press.

Radaelli, C.M. (2005) 'Diffusion without convergence: How political context shapes the adoption of regulatory impact assessment' *Journal of European Public Policy*, 12(5) October: 924-943.

Radaelli, C.M. and F. De Francesco (2006) *Regulatory Quality in Europe*, Manchester, Manchester University Press.

SQW (2005) 'Evaluating the impact of regulation: Developing a methodology', Report for the Department of Trade and Industry, London: SQW Limited, www.dti.gov.uk/about/evaluation/Evaluating_Regulation_Impact.pdf.

UNICE (1995), *Releasing Europe's Potential Through Targeted Regulatory Reform. The Unice Regulatory Report*, Bruxelles, Unice.