

TOWARDS BETTER RESEARCH ON BETTER REGULATION

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Abstract

Academic research on better regulation carried out in Europe tends to be narrow in scope and to neglect the political properties of this emerging policy. This state of affairs chimes with the technical, de-contextualised and politically aseptic style in which the discussion at the level of policy makers is cast. This paper examines better regulation as an experiment in regulatory governance by shedding light on the political aspects of discourse and the changes in the opportunity structure. The governance perspective on better regulation suggests a re-direction towards research grounded in theories of regulation, explicit causal links between dependent and independent variables, and more sophisticated research questions.

Key words: European Union, better regulation, discourse, political opportunity structure, regulation

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1. Introduction: identifying better regulation

Can the European regulatory state be governed? Over the last ten years or so, the European Union (EU), its Member States and the countries on the waiting list for accession to the Union have looked at better regulation as a possible answer to this difficult question. The potential of better regulation is considerable. It identifies specific problems, the actors that should take care of these problems, the tool-kit to use, the institutional design of ‘who does what and when’, and a set of rules to follow in order to achieve the aims.

Thus, in several (although not in all) European countries constellations of better regulation actors have emerged. Their interaction is governed by rules on the administrative process. These constellations of actors revolve around pivotal central government structures (typically the cabinet office, the Finance department or the department for trade and industry, in some cases supported by a Minister who champions better regulation). Depending on the countries we are considering, the constellation of actors includes some components of the business community, independent regulators, and, less frequently, communities of experts with statutory consultation rights in the policy formulation process, environmental policy organisations, civil society groups, and independent research institutes. International organisations such as the OECD and the

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European Commission (but also special-purpose agencies like Sigma) are important actors in domestic better regulation programmes, either as agents of policy transfer, or, simply, in the case of the European Commission, because of the importance of regulations produced in Brussels for the quality of the domestic regulatory environment.

The tool-kit varies country by country, but generally speaking consists of simplification programmes, the reduction of administrative burdens, regulatory impact assessment (RIA), market-friendly alternatives to command and control regulation, consolidation, codification, and new approaches to implementation and enforcement of regulation. As mentioned, the various national tool-kits operate in the context of a precise institutional design and rules on the process of rule formulation, adoption, implementation, and review. Actors, therefore, are constrained by the presence of institutional rules that discipline the life-cycle of regulation. As such, better regulation is not a policy like other sector-level regulatory policies (e.g., media regulation, environmental regulation, etc.). It is a meta-policy, namely a type of meta-regulation. Given that better regulation has led to the adoption of new rules (to illustrate, rules on the consultation process, on how regulatory proposals are formulated and assessed, on sun-setting, on how administrative burdens are to identified and eliminated, and so on), it is a manifestation of the growth of regulation within government described by Hood, James and Scott (2000) – a point that leads to the apparent paradox that if a country wants a leaner regulatory environment, it has to increase the number of meta-rules.

The focus on how rules are governed, rather than on specific sectors, explains the rise of better regulation within the priorities for policy change in Europe, most pertinently perhaps, the Lisbon agenda for competitiveness. This paper is eminently concerned with

the quality and scope of academic research in Europe. It is not a review paper, however². Having briefly described better regulation in terms of constellations of actors, problems, tools and meta-rules (in this introductory Section), Section 2 exposes the limitations of conventional research on this topic, and how practitioners seem to follow the similarly narrow tracks when they discuss their initiatives (Section 2). Section 3 presents a different perspective, based on the analysis of better regulation as an experiment in politics. Specifically, we discuss the political properties of discourse and how better regulation changes the opportunity structure of the main actors of regulatory governance. Section 4 provides suggestions for the future of academic research in Europe. Section 5 concludes.

2. The characteristics of conventional research on better regulation

Most of the academic publications on better regulation produced in Europe deal with the quality of economic analysis used in RIA, how organisations live up to their better regulation goals (this is done by measuring compliance with written guidance on consultation or RIA), measures of simplification efforts (often in relation to the targets set by the government), the scope of burden reduction exercises, and the total costs introduced each year by the government (as measured by compilations of RIAs)³.

Recently, there has been a lively technical debate on indicators of regulatory quality and scorecards of RIA⁴. Empirically, researchers have used either self-assessed questionnaires compiled by the governments for the OECD and the European

² For concise reviews of academic research on better regulation in Europe and elsewhere see Baldwin (2006), Helm (2006), and Radaelli and De Francesco (2007).

³ See Ambler et al. (2004) on RIA and WIFO-CEPS (2006) on the reduction of administrative burdens.

⁴ On indicators: De Panizza and Visaggio (2006), De Francesco and Radaelli (2007). On scorecards, see Renda (2006) and Vibert (2004; 2005), Lee and Kirckpatrick (2004).

Commission, or analysis of individual RIAs, simplification programmes, and burden reduction initiatives. There has been also some methodological effort trying to get to grips with complex concepts, such as the notion of cumulative burdens (SQW 2005). Rarely have researchers used their own original surveys of regulators and better regulation stakeholders, with the result that the European academic community has not generated useful data-sets. There is also a dearth of econometric studies on the political-institutional determinants of better regulation (considered as dependent variable)⁵.

Turning to better regulation as independent variable, although Robert Hahn from the AEI-Brookings Join Center on Regulation warned at a conference in London (2006) that there is no hard and fully convincing evidence that better regulation has a positive economic effect on final economic indicators of competitiveness and growth (and therefore the choice for better regulation tools should be made in terms of their governance properties rather than for their economic effect), the European scholars have already engaged in yet another technical discussion on how many points of GDP or what increase in competitiveness a country can gain by engaging in RIA and the reduction of administrative burdens⁶.

Governments and the European Commission have started to make political use of these studies – and rightly so: from their point of view, if there are academics willing to demonstrate that there is a causal economic link between better regulation and growth, why should this information not be used to persuade governments to step up their regulatory reform efforts? Yet the causal link between better regulation and final economic indicators is often difficult to track down and measure (Helm 2006).

⁵ For an exception, see the exploratory paper by Troeger et al. (2006).

⁶ The reference is to the studies quoted in European Commission (2006).

Of course, there are exceptions. Yet the overall style in which research on better regulation has emerged so far is technical and tends to bracket politics away. Issues such as governance, political control of the regulators, implicit normative benchmarks used in better regulation have been addressed (for example by Froud et al. 1998), but not systematically.

This is in striking contrast with the debate on the other side of the Atlantic, where better regulation has spurred a discussion in economics, socio-legal studies, philosophy of economics, political science, and regulatory theory that goes well beyond the classic research questions in the European debate, that is, ‘how good are the technical components of a given better regulation tool?’.

Incidentally, the suggestions arising out of the European discussion have also been limited to simple recommendations like ‘improve on the quality of economic analysis’ or ‘improve on the measurement of the benefits’. When the European discussion flies a little bit higher, the policy recommendations revolve around basic institutional design, such as ‘create a central governmental unit in charge of better regulation’ (Allio et al. 2004). Small wonder that the OECD list of principles on better regulation is still one of the best places to look for practical policy advice and recommendations.

The academic landscape mirrors the situation at the level of practitioners. In 2006, Jeroen Nijland from the Ministry of Finance in the Netherlands addressed the Directors of Better Regulation⁷ with a provocative presentation on the type of issues that are aired at directors’ meetings. He argued that the language is always ‘yellow’, meaning

⁷ This is an informal but influential bodies of policy-makers in charge of better regulation programmes in the member states of the EU. The technical analysis provided by DBR feeds into the agenda of the Competitiveness Council of the EU.

technical, aseptic, driven by the idea that given a certain problem, there is always an algorithm that leads to the solution. However, the context in which directors of better regulation is ‘red’. Law-making is not a de-contextualised exercise in rational policy analysis, and tools like the standard cost model or cost benefit analysis are operated in a process that is contingent on specific institutional settings, history, and purposeful political action.

To sum up then, the current state of the art is not encouraging: the policy-makers rely on a ‘yellow’ language that obfuscates and often hides the governance dimension of their activities. With some exceptions, the researchers tend to portray better regulation with very few shades of ‘red’ an abundant doses of ‘yellow’.

3. Changing lenses and colours: Discourse and opportunity structure

At the outset, it must be acknowledged that the problem is not simply one of colours. It is also a problem of accuracy. We should not take the previous ideal-typical description of better regulation (see Section 1) as a template to which all countries conform. There is considerable variation across space and time – not only in relation to the political-governance dimensions of better regulation, but also in terms of its empirical contents (Radaelli 2007). Thus, if we take the puzzle of explaining better regulation seriously, we should acknowledge that not only we can choose between ‘yellow’ or ‘red’ in our approach, but first and foremost that the picture on the box is not the same across countries. Consequently, it would be a mistake to re-compose the puzzle of RIA in say, the Netherlands or Denmark, by collecting empirical evidence with the Anglo-Saxon template in mind, and look for evidence of long, detailed RIAs, formal processes of

economic analysis of proposals, the inclusion of consultation in RIA, and so on. To conclude on this point, the double challenge for new approaches is to make politics endogenous and to avoid static ethno-centric assumption on what better regulation is.

Equipped with these understandings, we can start changing colours in our accounts of what is going on in the world of better regulation. The first element to consider is that better regulation should be examined both in terms of its structural components (actors, problems, tools, decision-making rules, and impacts) and as discourse. Better regulation is a set of activities and also a discourse through which different governments and the EU institutions address their reform priorities.

The following paradox sheds light on the importance of discourse. We know that some Member States have sophisticated better regulation policies, whilst others have not gone further than pilot projects (Radaelli and De Francesco 2007). However, all the EU leaders (prime ministers and ministers of finance) talk enthusiastically about better regulation and publicly endorse it. We have seen initially four, then six Presidencies of the EU including better regulation in the list of priorities for the semester. The question is why is better regulation *discourse* so popular, when better regulation *structures and activities* do not even exist in some Member States?

Discourse creates legitimacy and communities of discourse. Specifically, better regulation discourse is the channel through which regulatory reform gains legitimacy in EU circles. Being normatively biased (who is against better regulation and therefore prepared to fight for 'worse' regulation?) and empirically quite diverse across time and space, better regulation is a convenient language in which very different reform priorities can all sit together. One can 'dress' both programmes that increase the political power of

the business community and initiatives that reduce the power of special interest groups in the same language of better regulation.

More analytically, as shown by Radaelli and Schmidt (2004), discourse has both an ideational dimension and an interactive dimension. It is a set of ideas about what good regulation is, as shown by the Mandelkern report (2001) on regulatory reform.

Ideationally, better regulation discourse enables the policy makers to make sense of their reality – a cognitive activity. For the first time, policy makers have a relatively coherent language in which a myriad of initiatives starts to make sense. But ideas also involve a more normative activity of assessing and judging reality. This brings us into the world of norms, values, and principles. Normative discourse draws a line between what is ‘good’ and what is ‘wrong’ in regulatory activities and governance.

As mentioned, better regulation discourse is not just an activity that goes on in the minds of people via the cognitive and evaluative tracks. Language is spoken by people who interact in social contexts. Hence the better regulators turn to discourse (a) to coordinate their action and agree upon priorities, indicators and targets and (b) to communicate to the ‘world out there’ and seek wider social and political legitimacy for their reform agendas. They reach agreement and shared understanding via a common language, and then they use discourse to explain why better regulation should be supported by the various constituencies and the public opinion. Put differently, as shown by Vivien Schmidt (2002) discourse is both coordinative and communicative. Hence the focus on discourse starts from language but ends in the more concrete world of policy change and legitimacy.

The second element is the horizontal characteristic of better regulation – a point we have already mentioned, but briefly. At least in terms of its ambitions (implementation may well tell us a completely different story), templates for consultation, RIA, programmes for the reduction of burdens across departments, obligations to inform the cabinet office of new regulatory agendas, monitoring activities via indicators and reporting are not simply yet another reform that tackles one regulatory sector or another. We are not speaking of reforms in the telecommunication sector or in environmental regulation.

Better regulators are trying to change the very fabric of governance, to include economics in the assessment of new legislation, to change the way institutions think and to alter the opportunity structure for business and political actors. Other papers have already referred to better regulation as an emerging type of meta-regulation (Morgan 2003; Radaelli 2007). In this paper, the argument is that this type of meta-regulation is an experiment in politics in that its major aim is to change governance and institutional behaviour by altering the political opportunity structure⁸ for three important categories of actors: the civil servant, the politician, and the business community. Each of them is *constrained* and at the same time *enabled* by better regulation.

Better regulation ‘meta-rules’ are rigid: think of notice and comment, statutory right to consultation for whoever is affected by regulatory proposals, the obligation to filter new ideas for legislation coming from departments via central regulatory oversight, the publication of RIAs on the web, and so on. Rigidity constrains bureaucratic choice, limits political action, and disciplines some forms of lobbying. At the same time,

⁸ The concept of political opportunity structure was originally developed to describe the openness of a political system to the goals and tactics of social movements (Kitschelt 1986).

programmes for the reduction of burdens move resources from one activity to another within departments, endowing the top officers who lead the programme with political and economic resources that did not exist before. The core executive can tweak better regulation to increase its power in cabinet decision-making and its control over departments. The business community gains in terms of channels through which regulators can be ‘captured’. Thus the language of ‘better’ regulation and ‘regulatory quality’ obfuscates a complex reality in which competition for political power takes place.

4. The implications of a governance agenda for better regulation research

If better regulators are architects of governance⁹, what are the implications for academic research in Europe? There are some obvious places to look at for inspiration. The first is theories of regulation. What are the expectations that one can originate by using different theories of regulation? And which theory is falsified by better regulation (that is, how can we use better regulation to test alternative theoretical propositions about regulation)? Although the North-American literature has discussed these aspects in great detail, with reference to the administrative process (Croley 1988), only recently have European academics started to think along these lines (Helm 2006). Another partially different but equally promising avenue is the use of the law-and-economics paradigm: the paper by Ogus (1988) has not been followed by equally rigorous studies in which a theoretical paradigm is used consistently to address better regulation.

⁹ I borrow this term from a conversation with Jeroen Nijland that took place in December 2006 at the Ministry of Finance, The Hague.

In this connection, more rigour should be expected on the causal propositions surrounding better regulation and, more generally, on research design (specifically, which cases we need to consider to answer a well-specified research question). Let me illustrate with some examples chosen from research on RIA conducted in Europe.

Most of the research on tools like RIA is eminently descriptive and normative. It describes RIA rather than explaining it. It is also normative in that the main purpose is to evaluate whether RIA scores well in terms of a set of indicators or benchmarks. By contrast, there is no systematic knowledge on the explanatory factors that can tell us why RIA differs across countries and over time (with RIA as dependent variable). An example is the neglect of party politics. How does party politics affect better regulation? Does the colour of the party in government affect the timing (of adoption) and contents of better regulation? If so, how does the causal argument run? It well may be that better regulation is a by-partisan issue, and there is no ideological or party-political anchorage to neo-liberal ideas or right-of-centre parties. This would be an important conclusion, and would clarify the discussion on whether European better regulation policies have abandoned the broad governance agenda of the Mandelkern Report (2001) and the 2002 Communication on better regulation (European Commission 2002) to become more narrowly focused on improving the regulatory environment in the interest of the business community (a point made by Wilkinson et al. 2005).

More recently, there has been a shift from descriptive and evaluative analysis to research on better regulation as independent variable. This chimes with the obvious political interest in trying to show that programmes for the reduction of burdens pay economic dividends in that some effects on final economic indicators can be measured.

However, before we jump into conclusions about the impact of better regulation, we should have a clear idea of how to explain it. It is equally important to investigate the political and administrative impact, and not just the economic outcomes.

Scope conditions are particularly important in the construction and empirical control of causal arguments concerning administrative and political effects. However, we still do not know much about the scope conditions under which better regulation produces a more open opportunity structure for groups that do not have privileged access to the regulators, and how these conditions can be derived from a theory rather than another. Further, we still do not know how the integration of sustainable development and economic goals is affected by, say, the macro-political characteristics of a political system, the institutional design of better regulation, participatory traditions in consultation, the presence or absence of tools for the quantification of benefits and which of these four conditions is more important.

These considerations suggest a re-orientation of the research questions towards classic issues in political science, such as ‘winners and losers’ and ‘who gets what’. The question, however, cannot be put bluntly in terms of who gains what from better regulation. A better research question is how different combinations of the tools used in different countries (that is, national varieties of better regulation) produce effects in (a) the relationship between the core executive and the rest of the executive; (b) cabinet-decision making; (c) how ministers control their department; (d) the different professional communities within departments (say, lawyers vs. economists), and (e) the relationship between government and pressure groups.

This research question would also help us in understanding how the conceptual links between better regulation and regulation within government work. One characteristic of regulation within government (James 2000: 328; Hood, James, and Scott 2000) is separation - between a regulator that sets standards and the regulated bodies. This creates authority and triggers a mechanism of accountability. If we think of standards set by the government for hospitals and prisons we understand immediately how this could work. However, better regulation brings regulation within government to another level: here we have standards set by a central unit (in the cabinet office, department for trade and industry, and-or the Ministry of Finance), and the 'regulated bodies' are departments. The effects of creating this type of separation right inside central government can be different from the ones described by Hood, James and Scott – and are most likely to vary depending on the type of government (coalition governments should resist the attempt to create new forms of prime ministerial authority more than governments based on a single party). In short, research along these lines could tell us more on who is controlled and why.

Finally, better regulation research has potential for our analysis of trends in regulatory governance. Given that better regulation works within the very fabric of governance, does it steer regulatory governance towards one direction or another? There is a lively debate on where regulatory governance is going. Some authors are quite pessimistic, and see it as either a manifestation of rituals (of accountability) or the political triumph of hyper-modernism and the attempts to colonise social life (Power 1999; Moran 2002, 2003). Others (Majone 1996, Vibert 2007) have drawn attention to the positive implications of governance based on sound social sciences and evidence,

reasoned argumentation, and the quality of decisions taken by policy makers insulated from the electoral cycles (for example via the creation of independent regulatory authorities). It would be interesting to ascertain (first conceptually and then empirically) if and how better regulation contributes to a specific trend in regulatory governance.

5. Conclusions

This paper has started from the argument that current research on better regulation conducted in Europe tends to be descriptive. This research is also obsessed with the notion of ‘analysis *for* policy’ (that is, a body of recommendations) rather than building sound ‘analysis *of* policy’¹⁰. The truth is that usable knowledge (for policy makers and society as a whole, Lindblom and Cohen 1979) requires a lot of sophisticated, theory-grounded analysis of policy (Weiss 1979; 1990, Lindblom 1990). If we want more relevant analysis for policy, we need to dig deeper into theories, concepts, and research questions.

If one changes the lenses and introduces politics and governance in the research questions, better regulation can be usefully examined in its discursive properties and its effect on the political opportunity structure. In this connection, a perspective anchored to the concept of governance can clarify the links between the political, institutional and administrative context and better regulation as dependent variable. History and context cannot be bracketed away in comparative public policy – especially when the object of analysis is the transformation of core governance structures¹¹. A governance, context-sensitive perspective can also explain better regulation as independent variable, and

¹⁰ This distinction is quite common in public policy analysis, see Hill (2004)

¹¹ On context and history in comparative public policy see Ashford (1992).

investigate how this new experiment in meta-regulation and regulation within government affects the core mechanisms of collective decision-making and macro-trends in regulatory governance.

Finally, although this paper has insisted on the political importance of better regulation, one should never forget the null-hypothesis, that is, 'no impact'. Politicians often experiment with innovations that do not achieve much. Many policies have 'little impact' (Weiss 1979, 1990). The history of regulatory failures (James 2000) reminds us that one should consider both positive and negative effects. Perhaps the current 'yellow' enthusiasm for better regulation should be counter-balanced by a modicum of 'red' scepticism on the part of the researchers. All in all, scepticism is supposed to be a vital ingredient of the troubled attempt to understand and explain public policy.

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