Embargoed until October 2016

Chapter 1. The Politics and Economics of Regulatory Impact Assessment

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Introduction

This *Edward Elgar Handbook of Regulatory Impact Assessment* provides a balanced account of what it is to design, make and implement regulatory impact assessment (RIA) across a range of major policy sectors, countries and regions. The notion of RIA comes from the North-American experience where regulators have to carry out an economic analysis of regulatory proposals, send it to oversight regulatory units in the executive, and publish it for notice and comment. In the USA and Canada for example, RIA applies to draft regulations generated by agencies with delegated regulatory power. It does not cover primary legislation, only secondary legislation, that is, the regulations of agencies like the Environmental Protection Agency in the USA or Health Canada.

When other countries adopted RIA, it was often extended to different types of policies. Today in most countries (but, for example, not in the USA), impact assessment is an instrument of policy formulation. Since across countries government departments and agencies draw on impact assessment to develop both regulatory and

non-regulatory policies, in this volume we will use the abbreviation IA instead of RIA. Another qualification is that we deal with instruments for the appraisal of public policies, thus we do look at impact assessment as business tool and elsewhere in the public sector. In short, we are inside the broader field of government, governance, and comparative public policy, and consider both regulations issued by agencies and draft legislation originating in central government departments.

In this volume, international academic and practitioner experts guide us through the state of the art of IA in five parts: i) the analytical approaches that underpin IA, ii) the pre-eminent tools, actors and dimensions, iii) major policy sectors where IA is featured, iv) the regional diffusion of IA, and v) its implementation analytically, pedagogically and in the field. This introduction fulfils the function of a scene-setting chapter. We do not offer a systematic account of IA (assuming that is possible), nor is it a summary of the chapters that follow. Rather, we define what IA is and review what we know in the literature about the core dimensions of IA – its politics and economics.

Regulatory impact assessment (RIA) or simply IA is a systematic and mandatory appraisal of how proposed primary and/or secondary legislation will affect certain categories of stakeholders and other dimensions. These 'other dimensions' vary across countries. They may include economic sectors, the economy as a whole, trade, gender, health, employment, income distribution, poverty, the environment and climate. For example, in the European Union (EU) (see chapter 20. of this volume), IA is eminently concerned with three dimensions: economic, social, and environmental – although the level of analysis differs across years and EU policy domains (Fritsch et al. 2013). Indeed, sophistication and analytic breadth vary across countries, as evidenced by OECD indicators (OECD 2009; 2015). Techniques such as

cost-benefit analysis (CBA) are prominent in some countries like the USA (see chapters 3. and 21. of this volume), and less prominent in different contexts, like Europe.

We say 'systematic' because we consider countries or sectors where IA is not used as episodic or random fashion. 'Mandatory' means that it is not a voluntary activity of regulators and government departments. IA belongs to the family of administrative procedures – for example in the USA its origins lie in provisions within the 1946 Administrative Procedure Act later developed by Presidents and Courts. IA can also be used to appraise the effects of proposed policies on public administration (e.g., other departments, schools, hospitals, prisons, universities) and sub-national governments. Although IA is mostly deployed at the policy formulation stage (Jordan and Turnpenny 2015), it can be used to examine the effects of regulations that are currently in force, for example with the aim of eliminating some burdensome features of existing regulations or to choose the most effective way to simplify regulation.

IA is not just a *product* which documents economic analysis. It is also a *process*. In fact, IAs also report information on how the problem was defined, who was consulted and with what effects, the range of feasible options, including the option of keeping the status quo, and the criteria employed to choose between an option and others. Thus, while economic analysis is the backbone of IA, there are other steps that cannot be reduced to economic analysis. Analytical depth varies according to jurisdictions and the regulatory issue analyzed. In some countries IA is limited to the analysis of administrative burdens or compliance costs for business firms. When the appraisal is limited to regulations, governments prefer to use 'RIA' (like in the USA).

In this chapter, we review the literature on the economic and political dimensions of IA. These two disciplines have often operated one alongside the other, as shown by the rise of the field of 'political economy'. Other studies have reviewed the whole field of IA (Adelle et al. 2012). Here we divide the literature into four important areas: rationale, diffusion, economic effects, and utilization. The 'rationale' is the logic that would lead elected politicians (think of a government or a President) to introduce IA. Here is where political economy models of delegation dominate the scene, although empirically they may be more accurate for Presidential systems like the US than for parliamentary systems.

Under 'diffusion' we include studies on the adoption, implementation and more generally spatial interdependence (for more specifics see chapter 18. of this volume dedicated to diffusion mechanisms). 'Economic effects' covers studies that capture the causal relationship between regulatory analysis and final economic variables, such as productivity and growth. 'Utilization' is our general category to discuss political science studies on how governments use IA, and more generally the effects of IA on the political system – for example the effects on the relationship between elected politicians and bureaucracies. We do not review studies on the economic accuracy of benefit-cost estimates and how individual regulatory analyses comply with governmental guidance (or other benchmarks such as OECD and European Union's instructions on impact assessment) because we have two chapters entirely dedicated to this topic (chapters 26. and 27.).

Before we proceed, a caveat is in order. When we talk about 'economic and political effects' we have to acknowledge that the causal relationships between IA and final outcomes are complex. Imagine we want to explain a certain rate of growth (or, turning to political variables, a certain level of perceptions of fairness in the

regulatory system) with the presence of IA in a given country. Let us work back along the chain of causation, starting from a given economic outcome like growth or productivity. The first element of the chain is that observed growth depends on how regulations are enforced and implemented – assuming all the other non-regulatory variables are the same.

Let us go backwards one more step. Now we have to demonstrate that these economic effects of regulation depend on how the rules were designed – whilst in practice the economic effect of a rule depends less on how it is designed than on how inspectors, courts, individual firms and pressure groups interact in regulatory enforcement and implementation. Next in this backward-mapping exercise we must demonstrate the causal link between how rules are designed and RIA guidance. Put differently, we must be sure that the regulations are designed in a certain way because of the presence of IA and not of other variables. In the end, the presence of an economic effect of IA (the same can be said for political effects) depends on a long chain of causation with mechanisms that may be interrupted or not existing in one point or the other (of the chain).

These conceptual difficulties explain why most of the literature has focused on limited, selected points on the chain of causation, recognizing the empirical difficulties of estimating correctly the net effect of IA on final economic or political outcomes (Radaelli and De Francesco 2007). The counterfactual is a daunting problem for causal analysis (Coglianese 2002) because we do not know how to model the state of the economy had IA been absent in a given country.

1. **The rationale: the logic of delegation**

The first fundamental step is to provide a theoretically justified reason for IA. Put differently, the question is what is IA a case of? In political economy, the answer is provided by theories of delegation concerned with administrative procedures. These theories have been developed for Presidential systems, notably the USA. In this country, Congress has delegated broad regulatory power to agencies. Agencies define the substance of this power in their rule-making activity over time. To control rule-making, the President can exercise oversight. This applies to Federal Executive Agencies whose IAs are submitted for analysis and review to the Office for Information and Regulatory Affairs (OIRA), a body operating within the Office for Management and Budget (OMB). Since doctrine and practice acknowledge that the US executive is unitary, this Presidential control on Federal Executive Agencies is legitimate – the thorny issue being whether OIRA exercises political control on the regulatory trajectory of the agencies (for example, pro or de-regulation) or analytical control on the quality of benefit-cost estimates provided in the IAs (Kagan 2001).

Let us now read this chain of delegation and control with a theoretical lens. Delegation generates the problem of regulatory drift. Once power has been delegated, information asymmetries work in favor of regulatory agencies. And yet, the principal can still control the regulators via administrative procedures duly enforced by Courts (McCubbins, Noll, and Weingast 1989). Administrative procedure can force the agencies to release information to pressure groups (via consultation) and elected politicians (via OIRA scrutiny of the draft analyses produced by Federal Executive Agencies). IA as procedure reduces the principal-agent slack and 'enfranchise[s] important constituents in the agency's decision-making, assuring that agencies are responsive to their interest' (McCubbins, Noll, and Weingast 1987, p. 244). Thus, the

'most interesting aspect of procedural controls is that they enable political leaders to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest' (McCubbins, Noll, and Weingast 1987, p. 244).

The rationale for IA is twofold. First, IA as administrative procedure allows pressure groups affected by regulation to monitor the agency when regulations are being developed. Consultation, notification of the steps leading to new proposals, publication of the analysis underlying new regulations in draft allow these pressure groups to respond when their interests are challenged by emerging regulations. This mechanism of enfranchising interests is like a 'fire-alarm' that can be pulled if and when rule-making prospects costs (see Damonte, Dunlop and Radaelli 2014). Secondly, the obligation to consult and carry out benefit-cost analysis expands the variable of time in favor of regulatory oversight of agencies. More precisely, the administrative procedure enshrined in IA 'imposes delay, affording ample time for politicians to intervene before an agency can present them with a *fait accompli'* (McCubbins, Noll, and Weingast 1989, p. 481). In the end, IA is an effective way of 'stacking the deck'. It reduces regulatory drift. It benefits the political interests represented in the coalition supporting the principal (McCubbins, Noll, and Weingast 1987, p. 273-4). Now we can see why the literature considers benefit-cost analysis to be 'a method by which the President, Congress, or the judiciary controls agency behavior' (Posner 2001, p. 1140). It minimises error costs under conditions of information asymmetry. In conclusion IA is an administrative procedure that, theoretically, solves the problem of controlling or limiting bureaucratic drift. Other instruments operate *ex ante* (e.g., statutes and appointments) or *ex post* (e.g., judicial

review of agency's rulemaking), whilst IA provides on-going control. It operates whilst rules are being formulated and regulatory options are assessed.

This theoretical rationale is not without limitations. Internal critiques concern the fact that there may be more than one principal, such as Congress and the President. Further, it is difficult to establish 'who wants what' at an early stage of regulation, also but not exclusively because of scientific uncertainty, and the mechanism of stacking the deck may not work properly absent clear, well-defined preferences about regulatory outcomes. Preferences constellations across principals and clients within large coalitions are complex (Waterman and Meier 1998). It has also been argued that Congress and the White House may just not want to exercise regulatory oversight all the time – there are situations where elected politicians find it efficient to let the regulator do the work of establishing what the diverse preferences are, trying to compromise among these preferences, and taking the blame if the compromise fails (Kerwin 2003, p. 275-276). Finally, agencies may respond strategically to IA, and carry on with the post-delegation game of drift and control (McGarity 1981; Radaelli and De Francesco 2010).

Another set of critiques comes from the simple empirical observation that what we have seen at work in the US may not operate in Parliamentary systems. In Europe the tools of IA are used in different institutional contexts (Nilsson et al. 2008), and with mechanisms that cannot be captured by the logic of political control of the bureaucracy (Renda 2006; Wiener 2007; Weatherill 2007). Consequently, we need to zoom-in on cross-national diffusion, and enter another field of research.

2. Diffusion

At the outset, what is this field eminently interested in? This domain of the literature is interested in spatial interdependence or, basically, the fact that decisions about IA in country A depend on what other countries have already done. The first research question is to explain the diffusion in the adoption of regulatory analysis, whilst variability in implementation is the second main research question. By looking at the answers provided by different projects we will have the opportunity to re-consider the political control rationale in a different, and more critical, light.

For sure, there has been widespread diffusion, first among a small number of early starters, then more consistently across countries, finally reaching the classic S-shaped curve of diffusion studies. Evidence on adoption shows that over the last twenty years IA has become a standard in OECD and also across developing countries (Adelle, McRae, Marusic, Naru 2015; Kirkpatrick et al. 2004; see also chapter 17. of this handbook). How do we account for adoption? By using event history analysis, De Francesco explains adoption among OECD countries in terms of transnational networks, legal origin, and the size of government. One important result of his analysis is that the probability of a country adopting RIA depends on the existence of other regulatory innovations, such as Freedom of Information Acts (FOIA).

This means that regulatory innovations strengthen each other, that is, they are produced in 'ecologies' or bundles of policy instruments. This argument was further developed by Damonte, Dunlop and Radaelli (2014) in their analysis of cross-country patterns of seven policy instruments in Europe. Their patterns suggest that IA adoption and implementation depend on the logic of 'access' (to regulation) and 'answerability' (that is, obligations on the regulators to produce information and

address stakeholders) across a variety of regulatory policy instruments. Essentially, Damonte and colleagues extend the logic of delegation. Rather than consider the dyadic relation between an elected politician and the regulator, they reason that policy instruments like IA trigger mechanisms of accountability towards more than one stakeholders. The 'enfranchised interest' may be the interest of the elected politician, but with IA the regulators are also made accountable to the ordinary citizen, the courts (see chapter 9. of this volume on Courts and IA), different segments of the business community, and perhaps even the next generation of citizens (depending on the use of discount rates in benefit-cost analysis). Thus, what matters for IA is the pluralist logic of vectors of accountability: the regulator is under control when the agency is accountable to different types of stakeholders.

Turning to implementation, Radaelli (2005) draws on qualitative methods to explain how the political and economic context shape the post-adoption processes. His study shows similarity in adoption but profound differences in implementation outcomes across Europe, challenging the validity of the logic of political control found in the USA. Across Europe, there are symbolic reasons to adopt IA, such as showing compliance with OECD policy on regulation (OECD 2008, 2012) – rather than the desire to really control the regulator. This explains the paradox of adoption not followed by real implementation – documented by Radaelli, at least in the period considered by his study, with reference to Denmark and Sweden (2010b).

The constitutional position of regulatory agencies in Europe is very different from that of the Federal Executive Agencies in the USA – with the corollary that IA gets into some European agencies within waves of public management reforms (see Radaelli and Meuwese [2009] on the connections between public management reforms and 'better regulation' in Europe). In some transition economies, IA belongs

to the family of tools that support the emergence of more democratic styles of policy-making, strengthening the public sphere and reducing patronage (Warghade 2015).

With econometric models, De Francesco, Radaelli and Tröeger (2011) test different sets of variables (political, economic, and administrative) at the various stages of implementation, from IA adoption to the creation of oversight units and, finally, the publication of the analysis. Interestingly, bureaucratic efficiency does not predict the choice of adopting IA. This suggests that some countries may adopt it for symbolic reason: they may not have the analytical capacity in government to carry out the analysis of proposed regulations and integrate different dimensions of costs and benefits (Turnpenny et al. 2008), but this does not matter since they plan to adopt these innovations 'on paper', without serious implementation efforts. In fact, the variable of bureaucratic efficiency turns into statistical significance in specifications of their model with the dependent variable 'publication of IA' rather than the mere adoption of IA.

3. Economic Effects

A limited number of papers tried to capture the overall economic effect of IA on final economic variables. Crafts (2006) looks at the impact of regulation on productivity. The IAs are in principle a source of information on regulatory costs – following the post-delegation rationale. Crafts reasons that administrative costs (if measured accurately in the IA) can affect productivity, but he adds that the main impacts on productivity operate via 'the distorting effects on investment and innovation' (Crafts 2006, p.192). Thus, the competition assessment – a step of IA concerned with estimating the dynamic effects of regulation on competition and

markets – is likely to be more important that the accuracy of administrative cost estimates (see also Helm 2006).

Jalilian et al. (2007) examine the determinants of growth in developing countries by using a classic Cobb-Douglas production function. Their variable of 'regulatory quality' (based on the World Bank survey of Good Governance) has a statistical effect on economic performance – these authors reason that other measures of regulatory quality may have changed the size of the effect but not its sign. This study shows how difficult it is to infer from these econometric models the specific economic effects of the presence or absence of a IA system – or, even more difficult, the economic effects of having a certain level of performance of the IA system.

To date, the best review of these studies is an expert paper by Parker and Kirkpatrick (2012) for the OECD – the authors, however, do not distinguish between papers published in peer-reviewed scientific journals and other papers, hence for example they cite papers on the economic effects of RIA produced by government departments in Vietnam and Australia. Among the US studies, it is worth-mentioning Hahn and Tetlock (2008) who consider the many different ways in which regulatory analysis may have an economic effect, but they do not find any robust finding. They conclude that the case for IA should be done in terms of governance (the positive effects on regulatory transparency, fairness and access to regulation) rather than on economic grounds (with interesting connections with what Warghade 2015 says about the public sphere in developing countries). This leads us to the next section on the political effects.

4. Utilization

At the cost of over-simplification, it is fair to say that political economists interested in the governance effects of regulatory analysis work on research questions about how governments utilize IA. There is a large literature that starts exactly where we left with the post-delegation theory of political control of the bureaucracy – a literature that sets out to check on the empirical implication of the theory (see the literature review section in Radaelli 2010a and Radaelli and De Francesco 2010).

Who controls whom, and for what purposes? In the literature on the US, the two most important research themes are the controversies surrounding the utilization of cost-benefit analysis (Sechooler 2015) and the extent of authority of OIRA (Radin 2015). Croley (2003) does not find evidence of 'political bias' in US regulatory oversight – actually he finds a beneficial influence of OIRA on the quality of rules. Hahn and Muething report that benefit-cost analysis is fully monetized only in about half of the IAs – they reason that this is a deviation from the intended rationale for the economic analysis of regulation as identifies by a series of Executive Orders across administrations (2003). Morgenstern (1997) considers beneficial the economic effects of IA at the Environmental Protection Agency (EPA), whilst Kysar (2010) by contrast is an example of the philosophical and moral arguments against the kind of economic analysis that the EPA has to stick to in making the case for regulation. For Kysar, IA has profoundly and negative altered the mission of EPA – on the implications for sustainable development in the UK see Russel and Jordan (2009). It has made it more difficult to reach the goals enshrined in the statute of EPA without providing a justification for policy grounded in robust philosophical and moral arguments. In fact, for Kysar benefit-cost calculations could demonstrate that, after proper discounting, the elimination of the human race from the planet produces a net benefit. Absent

moral arguments, we should simply proceed as suggested by benefit-cost analysis. This stands in contrast to Revesz and Livermore's passionate argument for progressive utilizations of economic analysis and regulatory oversight. In their *Retaking Rationality* (2008) they show how OIRA and cost-benefit analysis can increase health protection and deliver on environmental policy goals.

Farrow (2000), using cost-effectiveness data, concludes that the Executive in the US rejects proposed rules that would have been economically inefficient, but overall OIRA review does not have an efficiency improving impact on the difference between proposed and final regulations or on the cost-effectiveness of accepted rules. Essentially, in Farrow's data analysis, the type of regulation and the budget of trade-groups opposing the regulation predict the probability of rejection of ineffective regulations better than the cost-per-life-saved.

On the sceptical side, Shapiro (2005) explains the lack of economic effects of regulatory oversight with the argument that the Executive bureaus like OIRA are interested in aligning regulatory policy of federal executive agencies with the Presidential priorities (not with objective standards of economic analysis). In another paper, Shapiro (2008) concludes that the increasing stringency of regulatory oversight over the years has no economic rationale, but politically it increases the control of the Presidential Administration on the federal executive agencies. With his original case studies, McGarity (1991) concedes that in the early years at least, regulatory analysis has in some cases allowed agencies to look at rules in new, creative ways. But this has come with the danger of promoting the regulatory economists' agenda – and this is not the only legitimate agenda in regulatory policy-making (as Kysar 2010 would emphatically argue).

On the theme of authority, Kagan (2001) has defended the Presidential prerogative to intervene with regulatory oversight to govern agencies' policy: the US agencies subject to oversight belong to the Presidential Administration, they are not independent agencies, hence there is practically a duty to oversee these regulators. Presidential authority can push 'ossified' agency and stimulate regulatory action, as shown by the Clinton experience. But as Radin notes in her historical account of OIRA across different administrations 'evidence-based policy development pits rational processes against the attributes of the real world of political decision-making (bargaining, entrenched commitments, and diverse stakeholder values and interests). The US experience also suggests that use of CBA raises special problems for the advocates of evidence-based policy development' (Radin 2015, p. 21). Arguably some of these problems are alleviated outside the US, where the anchorage of IA to CBA is less decisive – for example the EU has not accepted this as the preferred method of analysis. Yet Radin's sober conclusion applies to all jurisdictions – the experience 'challenges us to be modest about our expectations of overcoming that conflict' (between the 'political' and the 'rational'). Some years ago Owens et al. indeed suggested that one important research question is what IA 'does' to individual and organizations over the long term: appraisal after appraisal, officers and their organizations may come to appreciate some values more than others, change their priorities about costs and values, and, perhaps, end up thinking differently about public policy and regulation (Owens et al., 2004; see also chapter 4. of this volume).

For sure, IA is institutionalized in the sense that in many countries it has gained a permanent position in the set of policy tools for policy formulation (Jordan and Turnpenny 2015). It is not going to be disposed of when different political parties control the executive although it can certainly mutate with changing interpretations of

'better regulation' (Lodge and Wegrich 2009). West (2005) has documented the historical process of institutionalization of regulatory oversight over the various US administrations and Executive Orders. Essentially, IA has been endorsed by both Republican and Democratic Presidents: regulatory oversight is not a partisan decision, although the approach to the exact content of oversight has changed between Republicans and Democrats (Kagan 2001; President Obama issued his own Executive Order instructing OIRA and agencies to 'humanize' benefit-cost analysis, see Sunstein 2011).

The comparative political science literature suggests that the theme of 'controlling the regulators' is certainly less dominant outside the US. For example, European governments may well use IA to control the regulators, but, when they are not in symbolic modes, they also use it to learn. A content analysis of eight IAs of the European Commission shows that the bureaucracy can learn how to identify the precise meaning of values and norms by analysing technical policy issues. The IAs become narrative resources in the hand of the bureaucracy, and can assist organizations like the European Commission in making the case for task expansion, by leveraging the narrative structure of the assessment (Radaelli, Dunlop, Fritsch, 2013).

Dunlop et al. (2012) draw on set-theoretic models to re-code case studies of IA usage in the European Union and the UK: their study shows that learning theories perform relatively well. They add that there are different pathways to learning which involve various forms of oversight and enfranchisement of interests – which in turns links with the Damonte et al (2014) argument about vectors of accountability discussed earlier.

There are other studies in support of policy learning theories as lenses to observe these phenomena. Radaelli (2009 on European-North American cases) and Schrefler (2010 on the UK) draw on knowledge utilization models to study the political effects of IA. Their findings point to different types of learning. Interestingly, Schrefler finds variability within a single regulator, suggesting that the usages of economic analysis of regulations depend less on the regulator (or government) and more on the nature of the policy issues and the underlying structure of conflict and uncertainty.

Finally, Turnpenny et al. (2009) review comprehensively the European literature on policy appraisals, including IA – see also the colossal review of policy formulation tools provided by Jordan and Turnpenny (2015). So far, we have seen mostly four types of research projects, (a) on the design of appraisal systems (b) on the performance of the systems, (c) on evidence utilization and (d) on the underlying motivation to appraise. Turnpenny et al. conclude that more critical research should be done on points (c) and (d) – given that extant literature has focused on (a) and (b).

Conclusions

The studies reviewed in this chapter show that IA has gained a fairly stable position on the agenda of regulatory reform of OECD and developed countries, and has become over the years the most important tool for policy formulation. This however should not lead us to think that IA is more or less the same everywhere. Quite the opposite, it has mutated in its journey from early pioneers countries to newcomers, and even within countries it varies by sector and level of governance. One strong theoretical conclusion provided by the literature is that IA is an instrument

to tame bureaucratic drift and re-establish political control of the bureaucracy post-delegation. The comparative empirical literature, however, qualifies this conclusion and points to other theoretical rationales, like policy learning and symbolic politics. Implementation analysis has indeed opened new ways to look at IA. IA today is a fascinating point to observe how evidence-based policy and 'political' decision-making interact. The idea of separating the 'rational' from the 'political' and the 'expert' from the 'politician' is rejected by the experience on the ground, in both developed and developing countries. The future challenge is how to integrate these dimensions and create more accountability, not to separate them artificially.

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