

Regulation

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INTRODUCTION

At first sight, regulation appears to be a fairly simple concept of authoritative rules, imposed on businesses to correct market failures of various kinds (Mitnick, 1980). More generally, it could be regarded as an alternative to public ownership. Both were true for its early incarnation in the late nineteenth-century United States, when the Interstate Commerce Commission was founded to regulate commercial trade between the states. Ever since, regulation has expanded into new economic and social domains, travelled even into countries with a more activist state (ownership) tradition, and gone beyond its command-and-control image into a mixture of government-enforced rules, and economic and social self-regulation. It has also evolved from a purely national into a transnational activity, involving large numbers of public and private actors. Nowadays, regulation is part of a complex web of transnational governance in which nation-states, international organizations, and private actors – ranging from multinational firms to non-governmental organizations (NGOs) – participate to set standards and enforce rules to regulate markets, as well as technical or product-related risks. Despite its spread,

the concept has never been exempt from criticism. Since scientific interest in regulation gained momentum in the 1950s, political scientists, and economists on a broader scale, have pointed out shortcomings, unintended consequences, and inefficiencies. This debate came to full force with the rise of the 'Reagan revolution' that promised to cut down big government and to achieve regulatory 'relief'. However, instead of reducing or even eliminating regulation, additional layers of cost-benefit analysis and external scrutiny were imposed on agencies, thus giving rise to a new debate. The goal is no longer restricted to scaling-down the size of regulation, but rather has expanded to making it more efficient. 'Regulatory reform' has itself evolved into a new intellectual growth industry, including lobby groups, international organizations – the European Union (EU), Organization for Economic Co-operation and Development (OECD), International Monetary Fund (IMF), and the World Bank – independent and partisan think-tanks, as well as the economics press. The story to be unfolded in this chapter is therefore about the evolution of regulation, not necessarily to domination, but from a simple policy tool to a complex public-private affair, from a national to a transnational policy, and from

straightforward criticism to more complicated economic and political pay-offs.

REGULATION AS A CONCEPT

For almost a century, regulation was associated with politics in the United States. Regulation appeared as a form of state intervention, enforced by specialized agencies, situated 'at arm's length' from direct political control. The special relevance assigned to regulatory agencies stems from their broad discretionary mandate, including a rule-making competence (Kerwin, 1999) which in the European model of separation of powers would be reserved for parliament (Pünder, 2009). Typical examples are the Securities and Exchange Commission (SEC), created in 1934 to control the conduct of traders, especially to prevent insider trading, or the Food and Drug Administration (FDA), created in 1938 and charged with authorizing pharmaceutical drugs and controlling drug risks. No wonder that most scholars doing research on this subject were Americans and, therefore, reinforced the 'born in the USA' image of regulation. Eminent political scientists such as Pendleton Herring (1936), Samuel P. Huntington (1952), or Marver H. Bernstein (1955) contributed to the first wave of research. Huntington and Bernstein, in particular, offered rather critical views. Bernstein introduced a highly influential theorem known as the 'life cycle' of regulatory agencies. As 'a general pattern of evolution' (Bernstein, 1955: 74), four stages in the historical development of regulatory agencies are identified: gestation, youth, maturity, and old age. During this life cycle an agency is transformed from hopeful expectations of serving the public interest into a passive underperforming bureaucracy that is losing political support and thus triggering a new drive for regulation. The life cycle concept gave birth to several 'capture' theories, according to which regulators are pressured by external groups until they move away

from their original role and please the industry they were supposed to regulate in the first place.

This rather disappointing perception was based on sketchy empirical data (cf. Sabatier, 1975), but also reflects the fact that regulation is often regarded as a less-than-ideal solution for correcting market failures. Regulatory measures are under constant pressure to justify their very existence, and therefore generate political conflict in the United States. There is a different attitude in Europe concerning the level of conflict as well as the role of administrative law. This is reflected in the US Administrative Procedure Act (APA) of 1946 which provides the basic information, participation, and accountability rules all agencies have to comply with. The APA resulted from the political struggle between Democratic New Deal proponents and Republican opponents, both of whom tried to hardwire their contradictory preferences into law (McCubbins, Noll and Weingast 1999). More generally, administrative procedures, especially if stipulating participation and hearing rights for external groups, evolved as equivalents to the more detailed European style of legislative programming. This also explains why administrative law in Europe is perceived as a set of purely legal provisions securing judicial protection for individuals, and remains at a clear distance from politics.

Whereas the early contributions on agency capture remained influential, Theodore Lowi's famous typology of policies became equally important for a grasp of the meaning of regulation. According to Lowi there are three types of public policies: distributive, redistributive, and regulatory (1964: 713).¹ Among the distinguishing features are the degree of conflict between political actors and the likelihood of coercion being necessary to enforce a policy. In political science the legacy of this typology was to compare regulation with distributive and redistributive policies, i.e. to focus on rule enforcement aiming at controlling the behavior of business firms and other private actors.

As opposed to other scientific accounts, this typology contained no criticism per se. Regulation could be perceived as a 'business as usual' category of public policy. But the continuing distrust of the results brought in a more powerful group of analysts whose impact went far beyond academics.

Since the early 1970s liberal-market economists have become highly influential, especially in explaining the origins and shortcomings of regulation. In contrast to Bernstein, who focused on the internal sphere of agencies, scholars linked to the law and economics school of thought at the University of Chicago put economic self-interest at the heart of a new theory of regulation. Nobel Prize winner George J. Stigler rejected the idea that regulation could serve the public interest, because 'as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefits' (Stigler, 1971: 3). Whereas Bernstein's life cycle attributes an effective regulatory mandate to agencies at least during their 'youth', the Chicago School regards the lawmaking process as already being captured by industry interests. Regulation is wrongly programmed from the outset. Richard A. Posner, another eminent Chicago scholar who later became a judge in the US court of appeals, continued this line of thought by applying the economic theory of cartels to explain regulatory origin (Posner, 1974). Examples are the motor carrier industry or licensed occupations, who both manage to control market entry, resulting in protection from competitors. Suffice it here to mention that this family of theories is still popular among economists, although nowadays based on more sophisticated assumptions and modeling.² The mixture of economic reasoning and – if only implicit – distrust of government intervention in business produced the intellectual context for debating regulation as 'a system of public, bureaucratic coercion deliberately sought by firms to consolidate cartelization and market power' (Schneiberg and Bartley, 2008: 34). This shaped its image even outside the United States.

During the 1970s, regulatory policies took a new direction that did not fit easily into the previous wisdom. Contrary to theoretical expectations, many agencies and commissions reversed their policies and injected heavy doses of competition into economic sectors such as air travel, telephony, and electricity, and even more surprisingly, they enforced consumer-friendly regulations against the resistance of industry. In a widely-quoted book, edited by James Q. Wilson, the central message was 'that there is a politics of regulation' (Wilson, 1980: 357). This may sound trivial, but in fact was a rejection of a then-prevailing view of regulation as a predetermined government activity that inevitably ends with business or industry dominance. The case studies in the book showed a much more varied picture, and supported the assumption that there is no single path into which regulation is locked, but rather a variety of political contests with different results. Instead of imposing new rules and restrictions on industry, some agencies even started to 'deregulate' formerly uncompetitive sectors. Among the prominent cases was the deregulation of air travel, leading to more competition and lower air fares. This was probably one of the triggering events adding a 'regulation *for* competition' to the already existing 'regulation *of* competition'; the former not only became a central idea in creating a single European market (Young, 2006) but also made pro-activism an attribute of regulation. The turn to deregulation was not a death blow to capture theories, mainly because contrary cases persisted, but it demonstrated that regulation is not simply motivated by one category of interests and beneficiaries. It still has various tasks and is open to various interests, and thus to fluctuating fortunes.

Aside from these rather historical traits of the concept, a peculiarity of the American regulatory style was aptly described as 'adversarial legalism' (Kagan, 2001). Robert Kagan, who coined this phrase, stresses four distinct characteristics: (1) due to complicated and thus contestable rules,

regulation in the United States is heavily legalistic; (2) it is strongly based on formal sanctions for enforcement; (3) it is adversarial, as both regulators and the regulated strive for judicial dispute settlement; and (4) each step of regulatory politics (lawmaking, appointing regulators, monitoring, etc.) is vulnerable to political conflict, because all participants try to hardwire their political preferences (cf. Kagan, 2001: 187). It is still common for US regulators to measure their success in numbers of legal actions taken or the amount of fines. Kagan's observation supports previous research on policy styles, pointing to clear differences between the old and the new world. The adversarial and litigious style of enforcement stood in contrast to the European style, which relies much more on cooperation and negotiation during implementation – a term preferred in Europe over the adversarial-sounding 'enforcement'.

For a long time, regulation was seen as a rival concept to antitrust policy. Stigler even regarded them as 'deadly enemies' (Stigler, 1975: 183). Both concepts are designed to deal with market failures, but in different ways. Antitrust policy aims at competition across economic sectors, and tends to use universal rules to prevent anti-competitive behavior, thus preventing the favoring of special interests or particular sectors of the economy over others. Regulation, by contrast, aims at specific industries or products, uses more fine-grained rules such as rate-setting, licensing, and technical or safety norms, and thereby tends to be selective in allocating costs and benefits. Whether this leads to rivalry or to complementarity is still debated (Petit, 2005; Carlton and Picker, 2006). In the early stage of market regulation in Europe it was a popular idea that regulatory agencies could be phased out as soon as their mission was fulfilled and that antitrust authorities would take over – which did not happen anywhere. Nonetheless, economists are still predisposed towards antitrust policy, not least because its more general and thus clientele-resistant goals are considered

to be a more reliable protection against capture. However, as will be shown in the next section, regulation is by no means restricted to moderating or even subverting competition.

EXPANDING THE REALM OF REGULATION

The above-mentioned policy change among established regulatory agencies was accompanied by the creation of new agencies that ventured into formerly underdeveloped regulatory fields in the late 1960s and early 1970s. In a nutshell, whereas the beneficiaries of the old regulation tended to be corporations, the new regulation was aptly described as 'compensating for capitalism' (Eisner, 1993: 118). Three elements distinguish the 'old' economic regulation from the 'new' social regulation (Vogel, 1981).

First, the focus expanded from rules addressed at firms in a single sector of the economy to problems cutting across sectors such as environmental protection, occupational health and safety, toxic substances and waste, consumer product safety, etc. Whether this transition in policy could be attributed to the rise of the New Left or the ascendance of the consumer movement is not entirely clear. In any case, it could be argued that 'concerns about the power of the corporate state; visions of a participatory democracy consisting of multiple grass-roots organizations, and the salience of so-called quality-of-life issues motivated individuals to create, join, and support advocacy groups' (Eisner, 1993: 125).

Secondly, these new public interest groups became political actors in their own right, and gained influence not only in the legislative process but also in agency rule-making. Thanks to a series of court rulings, standing requirements were eased, thus allowing greater access to judicial review; a fair representation of interests during agency rule-making was required, and much more emphasis was put on justifying decisions by

disclosing that alternatives, pros and cons, had been thoroughly examined. This increased the amount of judicial review of agency decisions. However, not only courts gained influence; interest groups also, especially those excluded under the old regime, achieved influence through a whole new array of litigation-based strategies. The rise of public interest groups as new constituencies could be interpreted as the deliberate result of political decision-makers nurturing supportive groups – a strategy that fits with Lowi's (1972: 300) constituent policy. Certainly, this became another source of the adversarial legalism described above.

Thirdly, the new regulation tended to be more science-based than its predecessor. In part this was caused by new regulatory objects such as the environment, toxic substances or product safety, all of which require expert knowledge to define health or environmental risks, measure limits or conduct impact assessments (Eisner, 1993: 129; Merrill, 2003). The increasing role of science did not remain restricted to natural sciences or engineering. Economics, especially the pro-market schools, gained perceptible influence in regulatory thinking. Emission trading has to be mentioned as one of the influential innovations in environmental regulation. Furthermore, the 'hard look' doctrine, developed by US courts during the 1970s, created strong incentives for agencies to rely on scientific standards, because they proved to be a decisive prerequisite for judicial deference (Merrill, 2003: 2). To be sure, science-based strategies for influencing regulation also emerged in relations between agencies and interest groups, the latter generating an expertise of their own. Through the rise of the 'counter-expert', formerly almost sacrosanct scientific authority became contestable. All in all, at the end of the 1970s, regulation had become more wide-ranging, more inclined towards underprivileged groups, and more scientific.

The type of market and risk regulation described above would probably have been restricted to the United States, if another

transformation under the banners 'deregulation' and 'regulatory reform' were not taking place. The APA was the first systematic effort to control regulation, especially with procedures and control mechanisms imposed on agencies (McCubbins, Noll and Weingast, 1999: 186), and could be perceived as a harbinger for future political struggles. As cross-sectoral regulation increased during the 1970s, so did the political incentives to take a broader look instead of examining sector by sector. The first steps to centralize political control over agencies were taken during the Carter presidency, but to coordinate rather than to suppress regulatory activities. It was the Reagan era that unleashed a much more vigorous and overtly critical approach. The new philosophy is reflected in a famous executive order from 1981 stipulating that 'regulatory action shall not be taken unless the potential benefits to society for the regulation outweigh the potential costs to society' (quoted in Eisner, 1993: 189). What might sound like a balanced approach at first sight, in fact was bowing in one direction, which soon became the trademark of the Reagan presidency: deregulation. This policy was realized through new requirements imposed on agencies, often expressed in cost-benefit terms, as well as tough centralized control. An institutional legacy of the Reagan era is the Office of Information and Regulatory Affairs (OIRA), launched in 1980 inside the White House to review agencies. Most recently, President Obama appointed Cass Sunstein, an eminent law scholar, as OIRA administrator. Despite his liberal reputation, Sunstein is also well-known as an ardent critic of risk regulation (Sunstein, 2005), especially if it is instructed by the precautionary principle which, in his opinion, inflates public expectations beyond rational reasoning (see also Vogel, 2003: 566). The 'clash of culture' undertones, typical of US regulatory politics, are one of the few aspects of the concept that stayed at home.

In the 1980s regulation started to travel across the world. This policy diffusion probably had the greatest impact in Europe,

not only in single member states but also at the European Union level. Regulation, of course, had been practised in Europe long before, even though under a different designation. The long-dominant German equivalent, for example, is 'Aufsicht' (oversight). Despite a good dose of legalism, oversight remains more distanced, less contested,³ and less pro-active than regulation. It is based on a rather paternalistic approach towards business and society, aiming at the prevention of hazards ('Gefahrenabwehr') and creating an institutional order ('Ordnungsrahmen') prior to the existence of markets (Dyson, 1980: 222, 270). Oversight aims at controlling market *behavior* and not at *creating* markets. Another fundamental difference is the broad acceptance of the state as an 'architect of political order' in Germany, and in continental Europe as well. For the most part, therefore, state intervention can draw on a pre-existing legitimacy that is not challenged case by case. Whereas it is only a small step from regulation to over-regulation, oversight was rarely discussed in terms of doing too much. No wonder that it took until 1996 for the term regulation to be introduced into German legal language, through the – then almost revolutionary – Telecommunications Act (Coen, Héretier and Böllhoff, 2002: 7). Other sectors such as rail or financial services remained more hesitant (Coen, Héretier and Böllhoff, 2002: 18), obviously because the pro-active, pro-competition template did not fit with established policy patterns. In a legalized culture like Germany, it is not without relevance that legal scholars still argue about regulation as a generic concept or a subcategory of administrative law (Schorkopf, 2008: 27–9). The later interpretation would allow regulation to be subordinated under a set of tried and tested legal doctrines, thus not only avoiding uncertainty but also reducing the costs of adaptation.

As regulation has diffused to Europe, different political contexts have to be considered. Prior to the 1990s, the term had no specific meaning in Europe. Basically, regulation was equated with state intervention

in general (Jordana and Levi-Faur, 2004: 4). The narrower meaning was adopted in the late 1990s, but remains more challenged by rival types of policy, especially the stronger European welfare state policy, with its redistributive focus, as well as the stronger tradition of public ownership. Another important difference is the political decision to delegate regulatory competencies, which has received much more attention in the United States than in Europe (Epstein and O'Halloran, 1999). This could be explained by the broader mandate of US agencies, which goes beyond the regular European separation-of-power model. Regulatory agencies and commissions in the United States are not only charged with broad executive discretion but also perform court-like functions and have a rule-making authority, based on an open-ended mandate, which makes 'agencies act like legislatures' (Kerwin, 1999: 51).

The policy transfer was characterized by two peculiarities. The first is that regulation traveled to Europe in its deregulation incarnation. But things differed in one important aspect. In most European countries, key sectors of the economy were locked in public or quasi-public ownership. Thus, privatization was a logical requirement prior to any deregulation, although both terms are often used interchangeably. The first EU member state to adopt this idea was the United Kingdom during the Thatcher government. Even if the hyperactivism of British liberalization (Moran, 2003) was not exactly emulated by other EU member states, it evolved into a benchmark, not least for the European Commission, that could not simply be argued away by referring to national traditions or other peculiarities. Since the early 1990s, the European Commission's increasingly stringent privatization policy has forced member states to deregulate their public utility monopolies in telecommunications, energy, and rail (Coen, Héretier and Böllhoff, 2002). This was not only the decisive opening for US style of regulation in Europe but also opened the door for market

creation as a completely new field of state intervention: confusingly enough, enabled only through a preceding privatization.

The second peculiarity is a growing concern with the quality and performance of regulation, not so different from in the United States, but with a different focus: namely, privatized industries. To prevent former monopolists from undermining competition, facilitated through continuing grid ownership, special agencies were created and charged with a regulation *for* competition mandate. This 're-regulation' policy (Majone, 1990) has to cope with a new set of problems, such as constructing regulatory agencies and insuring their credibility, coordination with antitrust policy, or establishing 'level playing fields', i.e. creating equal conditions for all competitors. Simultaneous with EU liberalization, the OECD (2002, 2005) promoted a more general debate about regulatory quality. The targets were the problems arising from an uncoordinated and fragmented regulation of privatized sectors. The notion of 'regulatory governance', used in OECD documents since the 1990s, thus refers to policy initiatives aimed at optimizing the institutional and procedural framework that could affect the performance of regulation (OECD, 2005)⁴. According to OECD-speak, regulatory reform is the process which should lead to high-quality regulatory governance. In addition to numerous 'how-to-regulate' books, the OECD also publishes country reports in which the OECD-defined 'progress' of national regulatory systems is reported. The reasons why even notoriously reluctant countries like France and Germany eventually considered taking part in these benchmark activities are twofold: one is the growing reputation of international organizations for ranking countries according to economic or quality-of-life indicators, which almost automatically are used to judge the performance of incumbent governments; the second reason is the growing awareness that poorly performing national regulations might discourage foreign investment or create other

comparative disadvantages. No wonder therefore, that most OECD countries have adopted some sort of quality-of-regulation policy (Wegrich, 2009: 58).

The EU is an active participant in this debate. Based on the 'Mandelkern report' of 2001, the EU has developed its own reform program called 'Better Regulation' (EU, 2006; Radaelli and Meuwese, 2009). The motivation is to increase international competitiveness. The means to achieve this goal are often expressed in the formula 'less red tape = more growth' (quoted in Hardacre, 2008: 7). The EU initiative stresses three instruments to improve regulatory performance: ex ante impact assessments, simplification of rules, and 'consultation with all interested parties' (Hardacre, 2008: 7). The third instrument, especially, reflects a typical European policy style which could be labeled as a multi-stakeholder approach. The aim is not only to reconcile government-business relations but also to include consumer/citizen interests in the regulatory process. From a comparative perspective, the Better Regulation concept of – and inside⁵ – the EU tries to moderate the most obvious conflicts, which in the United States are carried out openly via legislative struggles over agency competencies and design, or inside the courtroom.

If the scientific community is inclined to emphasize the shift from government to governance (van Kersbergen and van Waarden, 2004: 152), this is of course triggered by the denationalization of regulatory policies, giving birth to more non-state actors, as well as the public (think tank) demand for a 'multi-tasking' upgrade of regulation by imposing a reform layer on an already complicated policy tool. Both developments tend to reduce governmental control over regulatory policies. Whether this justifies the – normatively inspired – widespread replacement of government with governance is an open question. From an analytical point of view, this is one reason why it is difficult to exactly reconstruct the fusion between regulation and governance into a new concept.

However, since the EU has gained a prominent role in regulatory affairs, it makes sense to treat both as being interconnected. Even if some authors regard regulation 'as a mode of governance' (Jordana and Levi-Faur, 2004: 1) from the outset, at least two additional arguments deserve mention. At a more general level, policymaking in the EU is often characterized as 'network governance', mainly because of the 'comitology' system. In this arcane arrangement for policy formation, which brings together government bureaucrats and experts from various non-state backgrounds, 'expertise and persuasion are the currencies of influence' (Young, 2006: 385), not simply power and resources. Thus, neither pluralism nor corporatism can be applied as descriptive or even explanatory categories to European policymaking. A second and more specific justification for using the governance concept is the rise of European – and increasingly – 'transnational regulatory networks' (Eberlein and Grande, 2005: 101; Coen and Thatcher, 2008), consisting of national experts, not necessarily government officials, who develop regulatory standards which are transformed into national law in a second step. As opposed to comitology, they are not part of an international organization but form international organizations of their own. The Florence Forum for Electricity and the Independent Regulators' Group (for telecommunications) are two European examples (Eberlein and Grande, 2005: 99); at the transnational level the Basel Committee on Banking Supervision (still not 'on Regulation') is the most prominent case. According to the criteria developed by Coen and Thatcher (2008: 50) – i.e. linking different institutional levels, shifting power to actors who coordinate others, and consultation instead of hierarchical decision-making – all the above-mentioned committees could be regarded as prototypes of network governance. The implications for regulation are severe: it is no longer a purely national affair, it is no longer exclusively state-driven, and it is no longer mainly hierarchical.

Quite similar to in the United States, regulatory policy in the EU started with market regulation first and embraced 'risk regulation', the equivalent of social regulation, later. Risk regulation gained ground first, and most prominently, in environmental policy (Héritier, Knill and Mingers, 1996). A driving force behind making this policy domain the most Europeanized was the integration of the precautionary principle into the EU treaty in 1993 (Vogel, 2003: 566). Even without the inherent expansionary tendency of this principle, the EU enlarged their risk regulation activity throughout the 1990s, for example in occupational safety and health, genetically modified organisms (GMOs), often linked to food safety, or pharmaceuticals, the latter supported by its own agency (Young, 2006: 379). This was mainly perceived as a step towards positive integration, i.e. creating common rules and standards instead of only removing trade barriers. Thus, risk regulation was already on track when the bovine spongiform encephalopathy (BSE) crisis, culminating in the early 2000s, served as a catalyst for a far-reaching overhaul of food safety competencies and institutions. The subsequent creation of the European Food Safety Agency and the reform of national food safety arrangements injected a new degree of conflict into European regulatory policies, described as 'contested governance', i.e. when 'day-to-day battles are displaced by more widespread public debate about the fundamentals of governance' (Ansell and Vogel, 2006: 11). Ansell and Vogel mention several controversial issues in food safety regulation, two of which seem to carry special weight for other sectors as well. One issue is the question of at which level regulatory power should be located. So far, EU agencies have no or only very limited enforcement functions. But there is perceptible pressure to upgrade their mandate (e.g. Majone, 2003: 31). The second issue is to what extent regulatory action should rest upon precaution, or to be more precise: upon the aim of preventing *potential* hazards. If an aggressive reading of the

precautionary principle – which has more than lukewarm support – would prevail, risk regulation, if anything, could become infinite.

REGULATORS AND REGULATORY INSTITUTIONS

So far, regulation has been reviewed on the policy dimension. In addition, there are two important institutional dimensions, both of which have their own dynamic: the regulatory state and regulatory agencies which enforce the law. The term ‘regulatory state’ is ambiguous as it is applied to different things. A wider definition refers to the rise and growth of regulation as a central state function (Glaeser and Shleifer, 2003), often linked with an anti-state undertone. One problem with this label is the bias toward an understanding of regulation as the dominant type of public policy. The idea of ‘the regulatory state as *the* major aspect in transformation of the governance of capitalist economies since the 1980s’ (Jordana and Levi-Faur, 2004: 9) is contestable, because it tends to confuse a heuristic perspective with a description of an empirical phenomenon. A second more restricted definition, therefore, tries to fill out the blanks. Majone, for example, contrasts the regulatory state with the postwar ‘positive’ or ‘Keynesian welfare state’ (Majone, 1997: 141), the main functions of which were public spending, state-owned enterprises, and welfare provision.⁶ By contrast, the regulatory state, regarded as a response to the deficiencies of the welfare state, focuses on rule-making (Majone, 1997: 143). The welfare state was the producer of a wide range of social services; the regulatory state provides and enforces standards for private service producers. In this perspective, the regulatory state almost supersedes the postwar welfare state.

However solid the empirical evidence for this observation may be, the contrast between the welfare and the regulatory state refers to

another important aspect. Even if there is a growth of regulatory norms, the attribute ‘regulatory’ is not referring to *expanding* state functions; rather, it denotes a *change* of policy instrumentation, associated with the idea of a ‘disaggregated’ state at the institutional level.⁷ Slaughter, who stressed this term most prominently, defines the disaggregated state as an extension of the unitary state. Disaggregation takes place because of ‘the rising need and capacity of different government institutions to engage in activities beyond their borders’ (Slaughter, 2004: 12). Of course, the result is not a new (regulatory) state at the transnational level. The new creature is called ‘horizontal government networks’ (Slaughter, 2004: 13), populated – depending on their function – by legislators, judges or regulators. Majone has a stronger focus on the Europeanization of policymaking, which, in turn, is supposed to have a disaggregating impact on national politics. Instead of stressing the ‘going transnational’ of regulators, he regards governmental decentralization as ‘the breakdown of formerly monolithic entities into single-purpose units with their own budgets [...] operating outside the normal executive branch framework’ (Majone, 1997: 146; see also Jayasuriya, 2001) as being of prime importance. Both views suggest that the institutional dimension of the regulatory state should be analyzed at the national as well as at the transnational levels, the latter being discussed further below.

The European debate differs from that in the United States in general because regulation in the United States has been a fact of political life for more than a century. No wonder, therefore, that the arrival of regulation in Europe has been perceived as a critical juncture. Again, it is not always clear whether the notion of the regulatory state serves heuristic purposes or should describe an empirical phenomenon. Obviously, the latter perspective is used when terms like ‘revolutionary’ (Sturm, et al., 2002: 3) are attached to it. Beyond queries about the proper classification, there can be no doubt

that the EU has arrived in the real world of regulatory politics as an actor in its own right. This was demonstrated, for example, through a directive issued by the European Commission in 2003 which obliged all member states to set up a separate agency for energy regulation (Eberlein, 2008: 81). Although targeted to drive France and Germany into a liberalized energy market, this move has not only endorsed the EU as an actor in regulatory politics⁸ but also has shown that the European Commission is able to influence domestic administrative structures.

Whatever perspective the regulatory state is analyzed under, one element can be found in almost every account: the rise and diffusion of regulatory agencies. This type of state bureaucracy is seen as both an innovation and as a contradiction to the parliamentary model of most European governments. Whereas in the positive state, functions were hierarchically integrated into centralized ministerial departments, the regulatory state 'is characterized by pluralism, diffusion of power, and extensive delegation of tasks to non-majoritarian institutions like agencies or commissions' (Majone, 1997: 159). The underlying motive for promoting agencies, which is also valid in public management reform (Pollitt and Talbot, 2004), is to separate policies from operations, or – more bluntly – to keep politics away from law enforcement. By creating single-purpose organizations, detached from party politics, and staffed with experts, the expectation is that the performance of policy implementation will be improved (Schick, 2002: 36). Within the context of regulation, agency autonomy, also referred to as *non-majoritarian*, has attracted special attention. One reason is that 'the diffusion of the regulatory agency model has challenged the structure of power in many countries, often reducing centralization in the governance of many policy sectors' (Jordana and Sancho, 2004: 307; Jayasuriya, 2001). The other reason is that agency independence is seen as a protection against capture by politicians,

who are suspected of letting short-term considerations dominate over long-term administrative expertise. This idea has gained ground throughout Europe, even if the degree of autonomy granted to agencies still varies (Gilardi, 2005; Petit, 2005; Christensen and Lægreid, 2006).

Agency independence raises the problem of accountability. How can elected politicians be accountable to their voters if vital state functions are delegated to agencies outside their reach? Majone gives a straightforward answer. The question itself rests on doubtful normative assumptions, because politicians are inclined to interfere in agency decisions. Even policy guidance based on constitutional doctrines such as ministerial responsibility is assumed to have 'perverse effects on public accountability. Because such interventions were usually exercised through informal and even secret processes, rather than by official directions, accountability was almost eliminated' (Majone, 2005: 128; Majone, 1997: 161). Agencies, by contrast, draw their credibility from neutral expertise and political independence. Their legitimacy rests on their regulatory output and not – as in the positive state – on the input side, i.e. a chain of accountability from voters, to legislators, and finally, to a hierarchically controlled executive. By and large this could be seen as a contest between hierarchy and transparency as competing techniques for governing agencies. To be sure, public administration will never be de-hierarchized across the board. However, in important domains of public policy, regulatory agencies have served to facilitate a more transparent approach to administrative action. Relying on public reporting, benchmarking, and an open, participative decision-making process, rather than on hierarchical guidance, seems to be the most important contribution of regulatory agencies to modern governance.

The concurrent switch from input- to output-legitimacy has another important implication for the way agencies enforce rules and standards. Agencies within the EU

in particular are increasingly obliged to follow US-like hearing and consultation procedures: for example, in drug licensing or the authorization of GMOs (Cananea, 2004: 205). On balance, a positive interpretation dominates according to which these procedures will lead to greater 'procedural legitimacy' (Majone, 1997: 160) or will help regulators learn how to cope with clients (Coen, 2005). But some doubts remain, in particular when considering that regulation is designed to force private actors to comply with rules which, in the absence of regulation, would not be observed (Alford and Speed, 2006: 314). The suspicion that consultative or cooperative regulation only works if regulators are willing to cede concessions is reinforced when the issue of global regulatory competition is taken into account (see below). In any case, it is getting more difficult to properly ascribe the costs and benefits of regulation to a particular constituency.

FROM NATIONAL TO TRANSNATIONAL GOVERNANCE

Since the 1990s, globalization, its origins, nature, and consequences have become the major theme of social science. In their seminal book on the subject, Braithwaite and Drahos make a distinction between the globalization of firms, of markets, and of regulation (Braithwaite and Drahos, 2000: 8). Despite regulation is conceived as 'the norms, standards, principles and rules that govern commerce' (Braithwaite and Drahos, 2000: 10), the authors also include objects such as labor standards, the environment or food safety in their list of case studies which, in the present context, would be subsumed under the narrower label of risk regulation. This lack of differentiation is worth mentioning because it indicates that Braithwaite and Drahos consider regulation to be a transnational contest about regulatory standards driven by the process of globalization.

Owing to this perspective, their interest in the national causation and specification of regulation is low. In the globalized world, described by Braithwaite and Drahos (2000: 551, 553, 557), regulation occurs in transnational 'webs of influence', 'webs of dialogue', and "webs of reward and coercion'. Slaughter makes a quite similar distinction between three types of 'executive transgovernmentalism' (Slaughter, 2004: 41): information networks, enforcement networks, and harmonization networks (Slaughter, 2004: 51–2), all of which are mainly populated with 'regulocrats' (Levi-Faur, Gilardi and Jordana, 2005), whose technocratic expertise dominates over the 'democratic policy outcome' (Slaughter, 2004: 63) of government officials. These writings depict a new way of thinking about regulation: power and enforcement are still out there, but are almost softened away by expertise, dialogue, and negotiation.

Although at first sight, the global governance debate has not changed the meaning of regulation dramatically, as is shown in the definition by the editors of the new *Regulation & Governance* journal. Regulation is seen 'as a large subset of governance that is about steering the flow of events and behavior, as opposed to providing and distributing' (Braithwaite, Coglianese and Levi-Faur, 2007: 3). The upshot is that regulation is not swept away, but rather is conceptualized as part of a more encompassing 'regulatory governance' in which regulation is one of several ingredients. Interestingly, the authors nonetheless regard regulation as 'the expanding part of governance' (Braithwaite, Coglianese and Levi-Faur, 2007: 1). What does this mean for regulation? On a very abstract level, governance could be regarded as a great softener for the erstwhile clear-cut concept. The softening takes places at three levels.

The first concerns the role of the state. Global governance rules out an all-dominating state that is able to impose its prerogatives on business and other non-state actors. There are two consequences. The first is that

persuasion and voluntary action, rather than hierarchy, becomes the new currency of regulatory success (Abbott and Snidal, 2008: 506). The second consequence is the growing relevance of 'regulatory coordination' (Drezner, 2007: 11), which presumably becomes as important as regulatory enforcement. This also means that national regulations will continue to exist, probably not even subordinated to transnational regimes. The main challenge is to make national regulations interact at the transnational level. The near meltdown of the global financial system in late 2008 is likely to lead to an upgrade of already existing transnational agreements. But they will be based on 'soft power' (Slaughter, 2004: 169) and not on coercion. It is in this context in which the shift from government to governance is often emphasized, based on the assumption that governments are no longer able to act unilaterally.

This leads to the second point. Transnational 'webs' and 'networks' become the new location for manufacturing regulatory rules and standards. Agencies no longer form the center of action; rather, they serve as suppliers of personnel. National interests are thereby not crowded out. Often enough, regulatory networks are initiated, promoted, and/or orchestrated by national governments (Slaughter, 2004: 171; Drezner, 2007; Abbott and Snidal, 2008: 521). Nonetheless, their grip is loosening to the extent to which the interactive dynamics inside transnational networks are getting stronger.⁹ Even if national representatives feel loyalty to their home country, the fact of becoming a member of a transnational epistemic community, upgraded by group dynamics and temporary detachment from domestic influence, is likely to switch national interest defenders into 'double-hatted' (Egeberg, 2004: 17) regulators.

Thirdly, globalization not only creates new market opportunities but also a growing demand to cope with the negative externalities of trade liberalization. Thus, the number of constituencies in the regulatory process grows.

In an optimistic version, this increases the relevance of civil society and its representatives in NGOs, and consumer and labor organizations. In a pessimist version, non-state actors are equated with business interests who capture regulatory networks, making them 'instruments of private interests rather than of public good' (Underhill and Zhang, 2008: 542). Leaving aside the question, 'Which of the two is the more appropriate perspective to characterize globalization?', it seems to be clear that globally organized regulation is demanded by business as well as by public interest groups to a similar extent (Braithwaite and Drahos, 2000; Slaughter, 2004; Abbott and Snidal, 2008). Having more constituencies inevitably leads to more complicated regulatory goals and, as a consequence, to more 'please-all' policies.

Globalization, however, not only softens regulation but also creates a new dimension of political competition and probably of conflict. Two of the most debated consequences for regulation are the contradictory concepts of the 'race to the bottom' and the 'race to the top' (Vogel, 2003; Schnaiberg and Bartley, 2008: 36). The first is the more prominent, because it was frequently used to corroborate a pessimistic view of globalization. The basic idea is that liberalized trade will force one country after another to comply with less regulation in trade-sensitive domains such as labor standards, environmental protection or financial services. A similar apprehension was expressed in the early days of the EU single market. However, on balance, there is only scant empirical evidence for races to the bottom (Schnaiberg and Bartley, 2008: 37). Rather, the opposite can be observed. Even though the evidence for the 'California effect' as the main factor determining the intensity of regulation is contestable as well (Drezner, 2007: 17), the bulk of research sides with the race to the top concept (Radaelli, 2004: 7). Again, an optimistic version, trusting in more public interest-based regulations, can be distinguished from a pessimistic version, arguing that multinational firms like

Monsanto exploit patent laws or GMO regulations to support their business model (Braithwaite and Drahos, 2000: 526).

Whereas both concepts could be interpreted as rather passive acquiescence to external pressure, the notion of regulatory competition has a clearly proactive undertone. The focus is not primarily on more or less stringent regulations, but rather on the question of who is able to dominate over global regulatory standards. Not surprisingly, the sources of regulatory competition, in other words the major beneficiaries, are seen to be either business interests (Murphy, 2004) or national governments engaging in 'regulatory export' (Slaughter, 2004: 172–7). Few observers would dispute that this is a typical American strategy to get a competitive advantage. A third hypothesis is provided by Jonathan Macey, who argues that the driving forces are regulators themselves. If political conditions at home make them feel 'the threat of irrelevance', regulators 'respond by banding together with their international colleagues to increase their regulatory reach' (Macey, 2003: 1354). Each of the three concepts has some empirical evidence on its side. More generally, this demonstrates that regulation is no longer a bilateral political game between governments and business firms, but, in fact, has become a multidimensional phenomenon.

SUMMARY

Compared to previous decades, regulation today undoubtedly has become a more complex technique for problem-solving. Starting as an authoritative policy instrument to correct market failures in single sectors of the economy, regulation has gradually expanded into environmental and consumer affairs. As social consciousness of risks reaches into a wider universe of technologies, substances, and products, there can be few doubts that political demand for risk regulation will continue, probably even at a

faster pace. Something similar could be said about market regulation. The seeming paradox that freer markets need more rules to prevent economic and social distortions (Vogel, 1996) is a driving force not only behind new regulations but also behind regulatory reform. The current state of the art could be summarized as follows. Market and risk regulation, regulatory reform (better regulation), and regulatory governance are the four pillars on which the concept rests today. Each has several dimensions but can be distinguished through focal points. Market and risk regulation have their focus on particular subjects: the former deals with market imperfections in general; the latter with all types of hazards emanating from production processes and modern lifestyles. Regulatory reform, by contrast, has no substantial or sectoral focus, but is concerned with regulation itself. Spawned by criticism from different constituencies about regulatory 'burden' as well as the fear of comparative disadvantages, regulatory reform today is differentiated into a family of concepts such as deregulation, better regulation, higher-quality regulation, red tape reduction, etc. Finally, the focal point of regulatory governance is most difficult to discern because its definition(s) tend to broaden rather than to circumscribe the concept. It has a threefold focus: first, the shift from national to transnational regulation and regulatory institutions; second, the increasing integration of non-state actors; and third, the multiplication of stakeholders and thus of interest-based demands addressed at regulatory outcomes.

This is reflected in the range of regulatory issues, which vary from rain forest conservation, product labeling in order to ban child labor on the one side, to accounting rules or capital-to-lending ratios on the other side of the spectrum. The consequences for regulation as a concept and as a policy instrument are profound. By expanding through a wide range of policies, from the new to the old world, and from national to transnational levels, not least due to the rise of regulation as an attribute of state functions and

structures, the concept has been loaded up with numerous new obligations and expectations, both in the real world of politics and in the analytic world of scientific observers. This has decreased the erstwhile sharp contours and easy-to-observe interests and constituencies. In addition, the intersection between regulation and governance has shifted research interest away from nation-state-rooted institutions towards deliberation-based transnational networks. This requires more research to explain the driving forces, the aims, and the impact of regulation. However, at the core, regulation remains a concept and a tool to change the behavior of private actors by means of authoritative state action. Even in an age of governance this should be kept in mind, to save regulation from conceptual overstretch.

NOTES

1 Lowi later added 'constituent' policy as a fourth type. It was somewhat vaguely described as 'reapportionment' (Lowi, 1972: 300). What Lowi had in mind was a sort of policy that accommodated constituencies with more power or influence in the political process.

2 A good overview of recent research is provided by Holburn and Vanden Bergh (2008). The two main strategies for influencing regulation are either lobbying legislators or influencing regulators, both of which may be used over time, depending on the perceived 'hostility' of the regulator towards business preferences.

3 In German banking oversight, 'soft regulation' (Sturm et al., 2002: 35) was practised long before the term was introduced into the debate on regulation.

4 Another term is 'meta-regulation', denoting 'the process of regulation itself becomes regulated' (Jordana and Levi-Faur, 2004: 6). See also Wegrich (2009: 37–42).

5 At the national level, not only governments but also a growing private think tank and consulting industry have embraced the Better Regulation initiative. In Germany, for example, the Bertelsmann Foundation, belonging to the homonymous multinational media corporation, has succeeded in establishing itself as an authority inside the reducing-red-tape community. Despite a plethora of 'improving regulation' rhetoric, the border to anti-regulation

is pervious. Thus, it could be not excluded that business firms exploit this sort of policy initiatives to get rid of undesired rules and obligations. A good discussion of the tensions inherent in the Better Regulation ideology can be found in Radaelli and Meuwese (2009: 649).

6 One should admit that Majone adds a good dose of advocacy to most of his publications. His perspective is not primarily that there *is* a regulatory state, but that there *should* be one or, at least, what could be achieved if a fully-fledged regulatory state did exist in Europe.

7 'Regulatory capitalism' is a close but nonetheless rival concept. Proponents claim that, due to the growth of non-state regulation, it is more appropriate to talk about regulatory capitalism than about the regulatory state (cf. Braithwaite, 2005).

8 And, of course, as an additional level of politics, which could be exploited by national governments and interest groups. The ensuing 'multilevel governance' in the EU must be regarded as a two-way street of influence and policymaking.

9 Schnaiberg and Bartley (2008: 40) emphasize that the network image as a 'fragmented, neomedieval patchwork of authority' is increasingly replaced by the idea of a more coherent, organized and rational mode of governance. This is consistent with the observation that inside the EU networks of regulators are flourishing as a governance technique. But they are still a good way away from being equivalent to regulatory agencies at the domestic level (Coen and Thatcher, 2008: 67).

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