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REGULATORY GOVERNANCE IN THE EU

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Introduction

The European Union (EU) represents an excellent case to examine the practice and test the explanatory leverage of Regulatory Governance (RG). Regulation is a set of "rules issued for the purpose of controlling the manner in which private and public enterprises conduct their operations" (Majone, 1989, p. 9). More precisely, in public policy this control is assumed to be exerted by public agencies (Selznick, 1985, pp. 363–364) mandated by legislative or executive branches, but relatively independent from both of them (Majone, 2002). Regulation first appeared in the United States at the end of the nineteenth century, and is widespread in European countries as well as in EU governance. The term "governance" is more recent: in the European context, governance is increasingly a function of intensified cooperation of EU member states with non-state actors, international or supranational organizations (particularly, the EU) taking place under the aegis of informality, complementarity or shared sovereignty (thus, outside the traditional executive-legislative government scheme) (Rosenau, 1992).

While both "regulation" and "governance" have become mainstream terms in political science, in the last 10 years new conceptual models of regulation and governance have emerged. For Egan (2009, p. 176), RG denotes "the shift from hierarchy to cooperation, with an increased range of functions delegated to semi-autonomous public or private institutions. The international and domestic effects are interrelated, as governing institutions have been transformed, resulting in a system of multilevel governance in Europe." As such, RG reflects the emergence of decentralized and mutually adaptive policy regimes which rest on regulation rather than service provision, taxing and spending (Levi-Faur, 2011b). The term captures the tendency of policy regimes to create a delegated system of rules in order to deal with the reduced steering capacity of governments under conditions of increased complexity and fragmentation. The observation by Braithwaite, Coglianese and Levi-Faur (2007) in which RG is likely to appear in global, contested and democratic arenas, seems to apply particularly well in the EU case.

In order to explain RG in the context of EU governance, this chapter begins with an examination of the historical development of RG in the EU. The next section provides the principal conceptual and theoretical contributions made on RG in the EU. The third section posits critiques and highlights future research directions, followed by the chapter’s conclusions.
Historical development of EU regulatory governance

EU regulatory governance is carried out through a complex interplay and an evolving balance of power between domestic and supranational factors. Three key questions arise in a study of RG in the EU. First, how have EU policies developed as a consequence of RG? Second, how has the European polity changed as a consequence of EU RG? And, third, what has been the role of political entrepreneurship in the empowerment of European institutions?

Starting with policy, the EU features a variety of different, evolving and overlapping regulatory approaches within and across different sectors in which the power of EU institutions varies considerably (see Tömmel and Verdun, 2009; Eckert, 2011). For example, since 2015, as a result of the refugee crisis, discussion has focused on conferral of more regulatory power to EU institutions on asylum policy. The EU’s formal ability to exercise RG is conferred by the Treaties. The Treaty on the Functioning of the European Union (TFEU) formally clarifies the division of competences between the EU and EU members. These competences are divided into three main categories as follows:

- Exclusive competences (Article 3 of the TFEU) apply in areas in which the EU is legally legitimized to regulate, i.e., legislate and adopt binding acts. These supranational policies are those most Europeanized or federalized.
- In the case of shared competences (Article 4 of the TFEU), the EU and member states are both able to legislate and adopt legally binding acts. EU countries exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence. Sharing competences denotes a balance of power between the EU and its members, in which the EU acts as a subsidiary regulator.
- Competences not conferred upon the EU in the Treaties remain with the member states. As such, EU institutions can only intervene to support, coordinate or complement the action of member states (Article 6 of the TFEU).

Table 3.1 matches these three levels of competences with major policies. So, for example, the EU enjoys exclusive competence in the Common Commercial Policy (CCP), shared competence on environmental policy and limited powers in the protection health policy.

From a polity perspective, European RG features a constellation of actors (Groenleer, 2011). A crucial role is played by EU institutions – the European Council, the Council of the European Union, the European Commission, European Parliament (EP), and Court of Justice of the European Union (CJEU), the EU’s specialized agencies (mainly under the supervision of the Commission), as well as a wide range of business interests, trade unions, civil society organizations and regionally based interests.

Politically, progress in EU RG has been made possible through the political entrepreneurship of EU institutions which seek to identify new areas where regulation can be extended (Maes, 2006). Since the 1960s the European Commission has ascended as a political actor in the process of transferring more regulatory prerogatives to EU institutions in economic and monetary affairs (Maes, 2006). So, for example, from the 1970s, the European Commission and its committees, and an epistemic community of EC/EU technocrats and civil servants, acted as independent political entrepreneurs to further centralize RG with the establishment of the European Monetary System (1979) and the Single Market (1992).
The idea of an independent regulatory agency (that is, with independence from the executive bureaucracy) was a phenomenon pioneered by the US at the end of the nineteenth century as a substitute for state-ownership, a path in marked contrast to the path taken by European countries. In the US, the independent regulatory agency substituted for state control or ownership of key sectors of the economy such as steel manufacturing, energy products and transport, and especially in cases of market failure (safe food and drugs – the Food and Drug Administration); competitive markets (the Federal Trade Commission); clean environment (Environmental Protection Agency); fair equity and bond markets (the Security and Exchange Commission); and fair prices in transport (Interstate Commerce Commission). The “heyday” of the creation of America’s administrative state took place during the Franklin D. Roosevelt Administration between 1936 and 1945 and was closely associated with a belief in the superiority of technocrats in tackling the problems brought about by the modern state.

The technocratic principle inspired neo-functionalists, the earliest scholars of European integration who studied the EEC in its formative years. In fact, according to two of the foremost neo-functionalists – Ernest Haas (1958) and Leon Lindberg (1963) – the role of supranational...
actors and the nature of technocratic decision-making was crucial in promoting incremental integration and subsequent centralized regulation.

But the real breakthrough in understanding the role of RG in the EU is associated with the work of Giandomenico Majone (1994). Majone saw direct parallels between the US federal government as a “regulatory state” and that of Brussels. Majone identified two key trends in EU governance. The first was the rise of innovative regulation to govern the EU’s internal market, and, the second was the European Commission’s expansionist role (similar to that of the US executive bureaucracy) over policy content (to compensate its inability to use budgetary tools), the growth of specialized agencies with quasi-legislative powers and the increasing importance of EU legislation in shaping the policy of EU member states (see also Majone, 1996; 1997).

Procedurally, scholars situate regulation within a broad governance framework, in which policy combinations, multiple instruments, third-party actors and implementation schemes complement traditional government regulation through formal powers and authority. As a result, RG taxonomy includes various conceptualizations. According to Scharpf (1996), RG can be undertaken by the removal of existing barriers (“negative integration”), but RG can also take place through an incremental construction of common rules, laws and standards to be shared among EU member states (“positive integration”).

Following Majone, a number of EU scholars see the EU as a type of regulatory federal organization that dictates the actions of its members in several policy areas. For Sbragia (1992), the rising power of the EU in the economic policy-making process of its members makes the EU a quasi-federal system because the internal market is balanced with regional diversity in other policies. Kelemen (2004), focusing on environmental policy and food and drug safety, suggests the applicability of a federalist framework, with the EU acting as a regulatory polity that ensures members’ compliance with its directives. Kelemen further noted that similar to federal systems, most EU policy regulation is promulgated in the executive bureaucracy (the Commission), while EU member states are principally responsible for transposing and implementing EU legislation.

Regulatory governance in the EU: critiques and future directions

Regulation and governance are contested concepts – and EU RG is no exception. In the EU, RG practices evolved through a variety of dissimilar approaches (Knill and Lenschow, 2004), sometimes through informal practices still not codified by law. Instead, one finds a patchwork of styles, instruments and institutions that is reflected by theoretical fragmentation in research (Jachtenfuchs, 2001) weakening the explanatory leverage of RG. In addition, RG has pluralized and dispersed the conception of power. This presents inevitable problems from democratic, legal and constitutional perspectives, since RG challenges formal polities and jurisdictional configurations. Indeed, Majone (1996, 2000) predicted a “credibility crisis” because RG is characterized by non-majoritarian politics not directly accountable to voters or elected politicians. These issues also have wider implications for the nature of European liberal democracy. Because EU institutions operate outside the hierarchical control-and-command approach typical of traditional institutional frameworks, the delegation of regulatory powers to the EU generates the dilemma of democratic accountability. As such, RG frequently figures as a variable in “EU democratic deficit” debates (Follesdal and Hix, 2006). Majone’s predictions seem eerily prescient in light of the EU’s recent crises, particularly Brexit.

Due to the abovementioned shortcomings of EU RG, current research trends focus on its transformations with respect to scope, form, functions and consequences. Across this wide array of disciplines, scholars are focusing their attention on various RG dimensions related
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to the EU. They include: conceptualization of RG applied to the EU (Eckert, 2011; Finger, 2011; Cardwell, 2011); the classification of policies, and how they are affected by EU regulatory governance (Levi-Faur, 2011a); from a multi-layered polity perspective, the interplay of RG vis-à-vis local, regional, domestic, supranational, transnational and global settings (Genschel and Jachtenfuchs, 2013); from a policy-making perspective, the role of EU actors, networks and institutions involved in RG (Groenleer, 2011; Maggetti and Gilardi, 2011); methodologically, the identification of techniques and databases to assess the impact of RG in the EU (Radaelli and De Francesco, 2007; Dunlop and Radaelli, 2016); measures to test the monitoring, evaluation, enforcement and compliance of RG within EU members (Falkner et al., 2005; De Francesco, 2012); how EU regulatory governance changed democracy, legitimacy and credibility (Wonka and Rittberger, 2010), effectiveness, accountability (Font, 2015), responsiveness, delegation, transparency (Dudley and Wegrich, 2015) and innovation by emerging technologies (De Francesco, Radaelli, and Troeger, 2012).

Other confirmation of the importance of regulation theorizing applied to EU studies has been the publication of textbooks and edited volumes (Ogus, 1994; Marks et al., 1996; Baldwin and Cave, 1999; Jordana and Levi-Faur, 2004; Black, Lodge, and Thatcher, 2005; Coen and Heritier, 2005; Tömmel and Verdun, 2009), the establishment of postgraduate programs, funded grants and research centers, as well as the creation in 2007 of “Regulation & Governance,” a leading outlet for research on the development, enforcement and consequences of regulatory rules within and across national settings. Finally, panels specialized on RG in the EU are organized regularly within the major political science international conferences.

Conclusion
Irrespective of the fact that EU member states should legally share equal rights and obligations, the EU is far from being a model of unitary RG. With rare exceptions (EMU, the internal market), the EU is not capable of prescribing "one-size-fits-all" regulations, standardized implementation procedures and enforcement mechanisms, leaving significant room for accommodation of domestic diversities and important regulatory discrepancies within and across economic, social and cultural policies. This is due to the history of diverging interests and preferences among EU members and, perhaps, to the intrinsic nature of RG practices and approaches, and is simply a characteristic of federal and quasi-federal systems. This being said, it is undeniable that post-1945 EU regulatory governance has become more uniform, centralized, post-sovereigntist and supranationalized, impacting on the preferences, strategies, identities and interests of its members. EU regulatory authority has increased in nearly all policy areas, including in improved monitoring and supervising powers of member states.

It seems that Majone’s (2005) observation according to which crises lead to a stronger European regulatory regime still holds true not only following the great financial crisis of 2008 – thereafter consensus emerged on a more stringent enhancement of macroeconomic, budgetary and fiscal surveillance, and a banking union – but also with respect to asylum policy (Dublin III’s proposed “fairness mechanism”) and border security (with the transformation in 2015 of Frontex into the European Border and Coastguard). But with the EU taking on more regulatory responsibility, it risks an anti-Brussels backlash (akin to running against Berlin or Washington) – this has been particularly noted with the austerity measures agreed at the EU level to manage the sovereign debt crisis in troubled EU members, which have brought about welfare state retrenchment and precipitated social unrest. So, too, the Brexit vote and increasing requests for a “multi-speed” Europe can be understood as partially a result of dissatisfaction among the European polity with the extent to which regulatory policy is made in Brussels.
RG is a necessary component of European integration, but the pace, timing and extent of economic prosperity or austerity crucially affect attitudes of the European polity toward the EU. National politicians take credit for policies during good times, but tend to blame Brussels (and other member states) during bleak economic times and in linking Schengen’s open internal borders to the post-9/11 era of terrorist attacks. Thus, Majone’s observation about the tendency of crises to enhance the EU’s regulatory power should be tempered by the recognition that RG is predicated on continued support for the integration project.

References


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