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Claudio M. Radaelli

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Whither better regulation for the Lisbon agenda?

Claudio M. Radaelli

ABSTRACT The initiatives for regulatory reform known as 'better regulation' have become a priority in the recently reformulated 'growth and jobs' Lisbon agenda of the European Union. But what is better regulation and what can it deliver? In this article, better regulation is identified as a new type of meta-regulation, with its structural and discursive properties. Better regulation discourse has enabled policy-makers to address different objectives in their shifting regulatory reform agendas. The better regulation pendulum has swung between regulatory quantity (or deregulation) and quality across time and space. In terms of structural properties, there is diversity across Europe in terms of actors, contents, and processes, although an embryonic open method of co-ordination is emerging at the EU level. The Barroso Commission and a number of member states have redefined discourse and structure of better regulation to adapt it to the 'growth and jobs' priorities of Lisbon. This redefinition, however, has narrowed the scope, the range of stakeholders, and the ambitions in terms of governance. Diversity, task expansion and better regulation rhetoric make the relationship between this type of meta-regulation, the Lisbon agenda, and, looking at the long-term impact, the dynamics of the regulatory state problematic.

KEY WORDS Competitiveness; European Union; governance; meta-regulation; regulation; regulatory impact assessment.

INTRODUCTION

With the mid-term revision of the Lisbon agenda of the European Union (EU) for competitiveness, the programmes known as 'better regulation' have become a priority for the EU and its member states. The term 'better regulation' covers a large set of policy instruments and programmes to enhance the capacity of institutions to provide high-quality regulation. The reformulation of the Lisbon agenda in terms of 'growth and jobs' has spawned a debate among EU policy-makers around the question as to whether better regulation is fit for Lisbon. This is an important question for policy-makers. For social

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scientists, however, it raises three preliminary (and arguably more fundamental) questions: specifically, how has better regulation emerged in Europe, what are its discursive and structural properties, and what is its relationship with the regulatory state?

Consequently, this article situates better regulation in its historical and political background in the first section. Next, it identifies better regulation as a type of meta-regulation. Better regulation is a type of meta-regulation because of its emphasis on standards and rules which, instead of governing specific sectors or economic actors, steer the process of rule formulation, adoption, enforcement, and evaluation. The term meta-regulation – I will argue – captures this element of 'rules on regulatory processes' rather well.

Meta-regulation has both discursive (Black 2002; Morgan 2003) and structural properties. As a discourse, better regulation enables political leaders to address changing priorities in their regulatory reform agendas. Discourse can generate task expansion – hence, the rise of better regulation in the league of Lisbon priorities is not surprising. Task expansion has also led to the proliferation of objectives, with the result that it is unclear what the EU and its member states want from their better regulation activities. This creates the risk of ending up with 'worse' politics as a result of 'better' regulation. Discourse is only one part of the story, however. For the other part, we must look at the structural properties, that is, contents and processes. There is diversity (across time and countries) as regards the dominant stakeholders and the tools of better regulation. Regulatory impact assessment (RIA) has been presented as the pivotal tool by the promoters of the better regulation agenda – to the point that some academics have criticized the excessive emphasis on RIA (Baldwin 2005). However, recent evidence shows that its diffusion in Europe is uneven and other tools are gaining popularity among policy-makers.

Having demarcated the analytical territory covered by better regulation, we will move on to another section and discuss delivery by considering three intervening variables, that is, the models of governance implicit in better regulation programmes, the range of stakeholders, and the coherence of the tool-kits for regulatory quality. Taken together, these variables affect the overall credibility and social legitimacy of better regulation. In this connection, the recent redefinition of better regulation in the EU and most member states has increased the compatibility with the growth and jobs agenda – primarily thanks to the focus on economic competitiveness and the reduction of administrative burdens. However, this may come at the cost of narrowing down the range of stakeholders involved in better regulation, with problems of credibility and regulatory legitimacy down the road. This will bring us to a section on the macro-political implications of better regulation: what is the impact of this type of meta-regulation on the dynamics of the regulatory state? Depending on the intervening variables mentioned above, better regulation can lead to different political outcomes, specifically (drawing on the images of the regulatory state coined by Moran 2003) an evidence-based state, a smart state, a new audit

explosion, or a hyper-regulatory and hyper-rationalistic state. Finally, the conclusions will show the implications of the analysis presented here for comparative research on better regulation.

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THE BETTER REGULATION AGENDA

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

True, member states and business groups focused on the issue of simplification and overall improvement of legislation across Europe, as evidenced by the Molitor (Commission 1995) and Unice (1995) reports. The European Commission made some early attempts to scrutinize the impact of legislation ex-ante by introducing a *fiche d'impact* on proposed legislation (Pelkmans *et al.* 2000). Most of these early initiatives came from the then DG XXIII, certainly not the strongest Directorate General in Brussels. The Commission was particularly active in launching several projects for simplification, business impact analysis, and the quality of the regulatory environment. But this flurry of initiatives did not bed in.

There has been a change of gear in the late 1990s and the early 2000s, with a widespread adoption of the better regulation agenda, which has been dominated by RIA (Baldwin 2005; Formez 2004: 5). Whilst RIA has been adopted widely across the EU, its contents vary markedly across the member states. The RIA label or 'bottle' is less important than the 'wine' inside (Radaelli 2005). In this context, RIA has exhibited a high degree of political malleability. But in countries as diverse as Italy, the Netherlands, and the UK one common feature of the better regulation programmes introduced in the late 1990s was the anchorage to open models of governance. Indeed, in countries like the Netherlands, the assessment of proposed regulation (based on a three-pronged checklist) was used to open up the regulatory process. When Labour returned to office in the UK after the Conservative era, one of the first changes in the cabinet office was the reorganization of better regulation bodies and their mission, with an explicit emphasis on consultation, transparency, and regulatory quality (as opposed to the deregulation agenda, based on 'quantity'). The old compliance cost assessment turned gradually into a more comprehensive appraisal of proposed legislation, based on the analysis of a wide range of benefits and costs affecting different stakeholders – not just the business community, but also citizens, civil society organizations, and public

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administration. Thus, not only has RIA become the main tool of the better regulation agenda, it has also provided the clearest manifestation of the political motivations behind regulatory reform – two facts that account for the recent explosion of academic interest in RIA.

But in 2004–2006 there was yet another change of direction, at least for some member states and to some extent for the EU. A new focus on competitiveness, simplification targets, and the reduction of administrative burdens has emerged across Europe. Arguably, this may swing the political pendulum back to the origins of better regulation, towards the pole of simplification, war on 'red tape Europe', and the reduction of compliance costs faced by firms operating in the single market. In the UK, we may see a return of some of the themes originally championed by Conservative leaders such as Michael Heseltine in the 1980s. Consider that on 28 March 1999, Stephen Byers, then Secretary of State for Trade and Industry, was asked by a BBC journalist the question: 'There are those who say for every new regulation we introduce you should get rid of two old ones; have you got some sort of target like that?' Byers replied: 'No, I don't want to repeat the mistakes of the previous government which was (sic) Michael Heseltine talked about a bonfire of regulations and then we saw fourteen thousand new regulations introduced over two years.'[1] Yet in 2005 the British government introduced the controversial proposal 'one new regulation in, one out' (BRTF 2005) and the business think-tank Open Europe congratulated the President of the Commission Barroso on his 'promise to build a bonfire of regulations' (Open Europe 2005: 5). With a *déjà vu* reminiscent of the 1992 British EU Presidency campaign, the financial press has explained to its readers that the problem with competitiveness is the sheer quantity of rules, or 'the tide of regulation, particularly of the labour market, generated by both the government and the European Union, working in dismal tandem' (Wolf 2006).

What happened at the EU level? In 2001, a group of wise individuals instructed by the EU Ministers for Public Administration produced a blueprint for better regulation, known as the Mandelkern report (2001). Interestingly, this document was produced at the time of the discussions on democratic governance and new approaches to consultation, accountability, and responsiveness of the Commission spawned by the White Paper on governance of the European Commission (Commission 2001). Interviews with the members of the Mandelkern group suggest that the group was very much aware of the challenges in terms of governance that were being discussed in the White Paper. They were also on the Lisbon wave-length – indeed the Mandelkern group was created by the Ministers of Public Administration to implement the Lisbon 2000 Council request to set out a strategy for the improvement of the regulatory environment.

Further to Mandelkern, the Presidencies of the EU have made several joint statements about the need to prioritize better regulation, with the aim of joining up the steering potential of successive Presidencies, and make better regulation a key feature across the crucial years of the Lisbon strategy.

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In 2004, the Finance Ministers of four successive Presidencies suggested that regulatory quality indicators be activated within an open method of co-ordination (OMC). In 2004, the Competitiveness Council called on the Commission and the member states to evaluate 'the cumulative impact of existing legislation on the competitiveness of industry and of specific industry sectors' and to develop 'a method for measuring administrative burden on business' (Council 2004: 3).

In the context of the 'new start for the Lisbon strategy', the Council published a note on the broad economic policy guidelines including a specific guideline (no. 14) on the quality of regulation, the systematic assessment of regulatory costs and benefits, and the reduction of administrative burdens on enterprises (Council 2005a: 23–4). The integrated guidelines for growth and jobs agreed by the Spring Council in March 2005 finalized guideline no. 14. The guideline's goal is 'to create a more competitive business environment and encourage private initiative through better regulation'. The first point of guideline no. 14 is 'to reduce the administrative burden that bears upon enterprises'. Four years before, the Mandelkern report had stated in the executive summary that 'improving the quality of regulation is a public good in itself, enhancing the credibility of the governance process and contributing to the welfare of citizens'. Language and priorities seem to have changed: from governance to economic growth, and from quality to quantity.

For its part, in 2002 the Commission, drawing on the analysis of regulatory governance contained in the White Paper on governance, launched a major action plan on better regulation (Commission 2002a), supported by standards on consultation and a new approach to RIA – the pivotal instrument of the whole better regulation action plan. RIA soon evolved into a major tool for the scrutiny of all the items included in the annual work programme of the Commission. The Commission's RIA model does not emphasize cost–benefit analysis, given that most proposals included in the annual work programme do not lend themselves easily to this type of analysis. Rather, the emphasis is on systematic consultation, the analysis of different options (regulatory and not), and the identification of the trade-offs that decision-makers have to face. RIA – the Commission has argued – should give fair treatment to all the three original cornerstones of the Lisbon strategy, that is, economic competitiveness, sustainable development, and social cohesion (Commission 2002b).

Since then, the redefinition of the Lisbon agenda has emphasized the economic dimension. And a new Commission is operating in Brussels, arguably with more business-friendly attitudes than the previous one. In its 2005 communication to the Spring European Council on the 'new start for Lisbon', the Commission highlighted the assessment of the impact of new legislation on competitiveness (mainly but not exclusively in the context of RIA), new initiatives on cumulative burdens (a controversial concept in its own right, as explained in the SQW report 2005), and the need to draw on external expertise to improve on methods for impact assessment (Commission 2005a: 19–20). The Commission decided to attach great importance to progress in the area

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of better regulation in its annual report on the Lisbon strategy. In March 2005 Brussels released a communication on the contribution of better regulation to the growth and jobs goals of the Lisbon agenda (Commission 2005b). One interviewee at the Commission said that during the preparation of the 'better regulation for growth and jobs communication' the message sent to those involved in better regulation activities was 'everything that cannot be Lisbonized will be terminated'.

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

The three main institutions of the EU are also committed to an inter-institutional agreement on better law-making, signed in 2003. Among other things, the agreement stipulates that substantive amendments introduced by the Parliament and the Council will be subject to impact assessment.[2] The inter-institutional agreement on better law-making is being implemented by a high-level technical group for inter-institutional co-operation. Some principles for the implementation of the agreement (the so-called common approach to impact assessment; Council 2005b) are emerging. In 2006, the Council secretariat finalized a text on how to handle RIA in the Council's working parties (Council 2006).

BETTER REGULATION AS META-REGULATION

There is no doubt that there is a better regulation movement 'out there', but what are its contents? In some countries, there is evidence that better regulation has now become a policy, with its own set of actors, range of problems, tool-kit, and decision-making processes (Radaelli and De Francesco 2007). But what sort of policy is this? The normative bias inherent in the language of 'better' regulation does not help at all. What is the 'good' regulatory system that better regulation is supposed to deliver? Interestingly, a survey on the 'ideal regulatory system' carried out on different groups of experts in the USA has shown variability of what this concept means, including 'adaptive', 'democratic', 'efficient', 'equitable', 'scientifically sound' – with an obvious preference, considering the sample, for the last item (Brown *et al.* 2004). There is no systematic survey for the EU, although data on regulatory quality collected on an EU-25 sample of directors of better regulation show that efficiency and market-friendly regulations are more important than scientifically sound analysis (Radaelli and De Francesco 2007).

One way of identifying better regulation is to examine it as an instance of meta-regulation. Meta-regulation, however, is a broad concept. Braithwaite (2003) relates meta-regulation to reflexive law and enforced self-regulation. Thus, for him meta-regulation is responsive to the motivational postures of the regulated. It fosters the participation of the citizens in 'crafting contextually

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attuned solutions to problems and parsimony in recourse to coercion' (Braithwaite 2003: 6; for the full presentation of the theory of responsive regulation, see Ayres and Braithwaite 1992). Other authors, notably Bronwen Morgan (2003), do not make the normative connection between meta-regulation and the virtues of responsive regulation. They simply stick to the basic idea of rules disciplining regulatory processes. In this article, I follow Morgan and consider the type of meta-regulation embodied in the better regulation programmes as a set of centrally imposed rules designed to structure the key stages of the regulatory process (from rule formulation, via RIA, to the simplification of existing rules and the removal of administrative burdens) with the aim of achieving certain improvements in regulatory performance (e.g. targets of burdens reduction, cost-effective regulation, increased reliance on market-friendly alternatives to regulation, etc.).

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

Having established that better regulation is a type of meta-regulation, we can examine its structural and discursive properties. An important structural dimension of policy is the process in which it is handled. Up until now, there have been several EU venues (both formal and informal) in which meta-regulation has been processed (Commission 2004). However, the co-ordinates of an OMC are emerging and have been mentioned in official Council documents (details in Radaelli and De Francesco 2007). There is no need to enter the discussion on the efficiency and legitimacy of the OMC in this article (Citi and Rhodes 2007; Borrás and Jacobsson 2004). Suffice it to observe that this emerging 'better regulation OMC' contains some classic components of facilitated co-ordination (or its functional equivalents) such as guidelines, benchmarking, multi-lateral surveillance, and indicators.

The Mandelkern report, the Commission's action plans on better regulation, and the inter-institutional agreement on better regulation are not the same as the guidelines used in fully developed open co-ordination processes. But they provide a framework functionally similar to the OMC guidelines. On benchmarking and best practice, there have been several initiatives promoted by the Commission in the 1990s – and, since the publication of the Mandelkern report, by the meetings of the directors of better regulation (DBR), an informal body connected to the high-level group on competitiveness within the Council on Competitiveness. A set of criteria for best practice in impact assessment has been produced by the DBR. Discussion within this body has intensified, with sessions on best practice, indicators of regulatory quality, communication with the stakeholders, one-stop shops, simplification, and pan-European training events.

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

Looking at the future, one can envisage an intensification of this embryonic open co-ordination in a way that would include national action plans nested in the Lisbon national reform programmes for growth and jobs. Indeed, the intention is to connect progress on better regulation to the assessment of the Lisbon plans (Commission 2005b). Plans would sound more realistic if common indicators were adopted (see the suggestions in the Commission's communication on better regulation and Lisbon; Commission 2005b: 10). In order to develop open co-ordination, there should be an iterative process to review guidelines and indicators periodically on the basis of the experience cumulated and the results achieved. The Secretariat General and DG Enterprise have taken the lead in proposing indicators to the member states, although the current state of play is that some governments, according to Commission officers interviewed in Spring 2006, are 'reluctant although not opposed' to making the step of adopting common indicators.

Finally, we turn briefly to the discursive properties of better regulation. Better regulation is a fluid and rapidly changing discourse that enables political leaders to address changing priorities in their regulatory reform agenda (Baldwin 2005; Black 2005; Radaelli 2005). A well-known property of discourse in the policy-making process is that it can generate task expansion and redefine policy problems (Majone 1989). The malleability of better regulation discourse explains how the political pendulum can swing in different directions across countries and, in the case of the UK and the EU, even within an individual political system. The gap between a shared discourse and different practice (examined in Radaelli 2005) hinders the potential of better regulation and ambiguity in the interaction between Brussels and the member states. The proliferation of goals generated by better regulation discourse is also leading to unrealistic expectations about delivery.

WHAT CAN BETTER REGULATION DELIVER?

This section deals with the issue of delivery by presenting additional empirical evidence on the most recent stage of better regulation campaigns (2004–2006), the diversity of approaches pursued in different countries, the conflicting views at the EU level, and the problems that better regulation is supposed to address.

Previous research on the topic of delivery has identified three intervening variables, namely the anchorage of better regulation to models of governance,

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the dominant stakeholders, and the coherence of design, tool-kit, and quality assurance systems (Radaelli 2005; Radaelli and De Francesco 2007). These variables affect the credibility of better regulation. Credibility is fundamental in establishing regulatory legitimacy. If public opinion and the affected interests think that better regulation is not handled in a fair and balanced way, meta-regulation cannot deliver (McGarity 1991). Across Europe, the anchorage to more or less inclusive models of governance varies in time and space, and so does the definition of the dominant stakeholders. Further, there is no consensus on whether better regulation should revolve around (deceivingly) simple tools and goals that can easily hit the media[3] or more sophisticated tools and multi-dimensional notions of regulatory quality.

In countries such as the UK, the recent changes seem to point to a narrower focus on administrative burdens. One can interpret this recent shift as a sign of frustration of the British policy-makers with sophisticated approaches, and their perception that the only way to make a real impact on the regulators (and, perhaps, the media) is to set simple, draconian measures – no matter what their intellectual merit might be.

As mentioned, the campaign on administrative burdens is quite popular at the moment – and not only in the UK. In order to measure administrative burdens and set targets, a number of EU member states and Norway are networking. In the UK, the initiative on burdens covers business, charities and the voluntary sector. In the Netherlands, the major campaigns have targeted enterprises. In France, the early stages seem to prioritize the relationship between citizens and administration.

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

The recent UK switch towards the 'burdens' agenda was presented to public opinion as an attempt to imitate the example of the Netherlands. An influential report on regulatory enforcement (the so-called *Hampton Review*; HM Treasury 2005) has been flagged up by the British executive as an example of how to step up the initiatives for simplification and a better business environment. A report of the Better Regulation Task Force (2005), *Less is More*, was requested in October 2004 by the Prime Minister. It was endorsed publicly by Tony Blair – with a letter sent to the BRTF chair in July 2005 – and the Chancellor of the Exchequer. The report draws explicitly on the SCM (one chapter of *Less is More* is entirely dedicated to the Dutch methodology). It makes the recommendation to identify and set quantitative targets for the reduction of administrative

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burdens via the SCM. The recalibration of bodies such as the Regulatory Impact Unit (now the Better Regulation Executive) and the BRTF (now the Better Regulation Commission) is a consequence of the new targets for simplification and the reduction of administrative burdens. Paradoxically perhaps, the UK is moving from a broad and multi-stakeholder paradigm to a policy confined to burdens and business. In doing so, it is joining countries that have always found it hard to achieve sophisticated objectives of regulatory quality[5] and are quite happy to settle for a narrow agenda set in terms of war on red tape and targets for the reduction of administrative burdens.

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

At the EU level, the Barroso Commission has provided a redefinition of the Lisbon agenda based on simplification, the removal of administrative burdens, and economic competitiveness (Commission 2005b). It is too early to say whether this reorientation is affecting the content of the better regulation tools, and to argue, for example, that RIA, consultation, simplification and so on are being managed in the exclusive interest of the business community. The written guidance of the Commission is still based on a finely balanced approach to the trinity of competitiveness, sustainable development, and social cohesion. And the template for the chairs of Council's working parties (Council 2006) does not deviate from this triangle. Of course, this does not mean that the EU institutions are actually following this template in their daily work. But it does not prove the opposite either.

Arguably, the EU (both in terms of its institutions and of the relationships between the Commission and the most active member states) is at the moment a political system in which there are different ideas about the nature of law-making.[6] There are also different pressures at work, with some working in the direction of quantity (thus pushing for slogans such as 'less is more', 'reduction of burdens', and 'one regulation in, one out') and others pushing for quality (the idea being that 'less' sometimes is 'more' and sometimes is simply 'less' and that in any case good regulation is not synonymous with less regulation).[7] Indeed, the current confrontation between those who argue for a comprehensive approach to RIA, systematic monitoring of regulatory quality, and better regulation as a component of a governance agenda, on the one hand, and the advocates of targets for the reduction of administrative burdens, on the other, is a battle between quality and quantity as alternative focal points for regulatory reform.

But what are the problems that better regulation is supposed to fix? To begin with, there is the issue of competitiveness. For a start, there is no simple chain of causation between meta-regulation, the selection of specific tools (i.e. impact assessment, consultation, simplification, access to regulation, etc.), the production of rules, and final outcomes such as economic growth. A possible

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impact on competitiveness may occur through changes in the regulatory culture. By changing the way in which actors produce regulation, better regulation can lead to improvements that are a precondition for competitiveness.

The single market poses its own challenges, given the politicization of the discussion in EU institutions and public opinion. At the moment, better regulation has to deliver in a politically charged environment. Under these conditions, the political role of better regulation in the single market is less about establishing 'the facts' than about making the stakeholders aware of the major trade-offs involved in alternative options. In turn, awareness of the trade-offs between economic, environmental, and social goals, balanced and extensive consultation, systematic analysis of alternative options, and the inclusion of a wide range of stakeholders are essential prerequisites for the legitimacy of single market rules.

This is where governance enters the scene. Regulation as a mode of governance has been criticized for its opaque procedures, lack of transparency, and limited access to diffuse interests. Better regulation is valuable if it opens up the policy process and breaks down the intimacy of regulator–regulatees interactions in close policy communities. This requires a drastic recasting and continuous readjustment of regulatory policy processes. With its emphasis on open and transparent processes, disciplined consultation, fair treatment of the empirical evidence, and robust and pluralistic peer review, better regulation has its role to play.

The wars on the 'tide of regulation', the limited progress made with peer review of the economic analysis on which RIAs are based, and the notion that better regulation is eminently a policy for the business environment raise concerns. At the EU level, these problems are compounded by the lack of trust of the member states in the Commission. Lack of trust may lead the Commission to be silent on the limitations of its own RIAs and to oversell in-house empirical analysis. The business community and the member states may respond with advocacy papers camouflaged as impact assessments. The European Parliament and the Council may end up confusing their political and technical roles. In short, the risk of getting 'worse' politics as a result of 'better' regulation should not be underestimated.

Another delicate issue concerns the legitimacy implications of different swings of the political pendulum. Systematic studies of compliance cost assessment and 'regulation of the regulatory process' (Froud *et al.* 1998; Morgan 2003) and, at a more general level, the vicissitudes of the EU regulatory system (Majone 2005) show that the Achilles heel of regulatory quality initiatives is legitimacy. In this connection, more clarity on the specific goals of this new type of meta-regulation in the EU and the member states is needed. To look at better regulation as a panacea to an increasingly political discussion on the single market does not help the cause of credibility and legitimacy of meta-regulation.

Moreover, the discussion on the stakeholders of RIA and other tools should be more open. Better regulation has been up until now a fluid discourse. This

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has enabled political leaders to pursue shifting priorities in their regulatory reform agendas. But this has come at the cost of obfuscating the important questions of models of governance and 'better regulation for whom' – questions that cannot be neglected for too long without causing legitimacy problems later on. Thus, a more focused discussion on what type of governance policy-makers have in mind when they speak about better regulation would help. A robust set of stakeholders and actors involved is a prerequisite for the legitimacy of better regulation and its tools. To target a single stakeholder, even a very encompassing one like the firm, implies a redefinition of better regulation as yet another type of industrial policy. The expectations in terms of legitimacy and models of governance should be readjusted accordingly.

Regulatory legitimacy, however, is not automatically delivered by the presence of robust networks of stakeholders – a necessary but not sufficient condition. Following Majone, credibility is the sufficient condition for legitimacy (Majone 1996: ch. 13). The lack of sound peer review and ex-post evaluation of meta-regulation tools and institutions in the majority of OECD countries[8] is problematic in this respect. One wonders why 'better regulators' should not be subject to external scrutiny and face hard questions about the opportunity cost of investing significant amounts of public money in their activities.

If delivery in terms of regulatory legitimacy is at the moment problematic, is better regulation at least fit for the growth and jobs agenda? There is no doubt that over the last two years or so, broadly speaking from the Dutch Presidency (2004) onwards, issues such as the competitiveness dimension of RIA, 'red tape' and administrative burdens have become increasingly important. This process has developed in synchrony with the political discussion surrounding the mid-term review of Lisbon. The result is that better regulation has been recognized as one of the priorities of the Lisbon agenda, but at the cost of losing some of the initial ambitions in terms of inclusiveness and open governance. The balanced approach to sustainable development, social cohesion, and competitiveness may be endangered, although the jury, in terms of empirical evidence, is still out.

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

LEGITIMACY AND IMAGES OF THE REGULATORY STATE

A more transparent and explicit discussion would also dissipate some ambiguities surrounding the image of the regulatory state implicit in better regulation. In his

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book on regulatory politics in Britain, Moran (2003) has identified four images of the regulatory state. Drawing on his work, better regulation can be seen as leading to different outcomes, and specifically: as a move towards a smart post-Keynesian state (OECD 2002), increasing regulation within government (Hood *et al.* 1999), a modernistic hyper-regulatory state that colonizes social life (Moran 2003), or a ritualistic obsession for audit and form over substance (Power 1999).

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

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

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

However, better regulation does not necessarily produce a smart state. If, as argued by Gunningham and Grabosky (1998) and Baldwin (2005), smart regulation consists of the flexible use of different regulatory modes to suit changing circumstances, instruments such as impact assessment are not fit for the purpose. It is very difficult to use impact assessment to test mixed regulatory regimes – for example, a regime that includes an enforcement pyramid (of the type suggested by Ayres and Braithwaite 1992) with self-enforced rules at the base and

Table 1 Better regulation and the regulatory state

	Impact on government	*Impact on the socio-economic environment*
Positive assessment	New mode of administrative process	Smart state
Negative assessment	Audit state	Hyper-regulatory state

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command law at the top. The standard approach in RIA is to test options that are neatly separated one from another. Moreover, once a complex regulatory regime has been assessed with regard to its impacts, there is an in-built bias against flexibility, unless one is prepared to perform additional impact assessments for the proposed regulatory changes, and this may be politically and bureaucratically unwise – a point made by Baldwin (2005).

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

Overall, meta-regulation may have a better 'fit' with a third, pessimistic, image. In a sense, RIA, the ex-post evaluation of regulatory tools and institutions, and procedures such as the standard cost model may well be a symptom of the audit explosion described by Power. The fourth image goes straight into the territory of politics. One can hypothesize that better regulation can be appropriated by regulators and used to justify more regulation (especially if the evidence supporting decisions is not peer reviewed). The rationalist idea of assessing ex-ante costs and benefits that are extremely difficult to measure can lead to a false sense of certainty and regulatory fiascos of the type described by Moran.

In terms of comparative analysis, the impact on the regulatory state may well vary across time and across space, and in relation to the variables identified above. Hence we would expect different countries to fall in different cells of Table 1. Comparative politics suggest other obvious control variables, such as the type of political system, administrative law traditions, the role of pressure groups, and the organization of the state, as determinants of the quality of regulation. In conclusion, 'who gets what from better regulation' and with what consequences for the regulatory state is a fascinating question that will have to be addressed by comparative research in the future.

CONCLUSIONS

This article has examined the structural and discursive properties of a new type of meta-regulation. Evidence points to diversity, both across nations and across time. The malleability of better regulation discourse has enabled policy-makers to address different objectives over time and to push for their shifting regulatory reform agendas. This has happened at the EU level and in some member states – the UK being a particularly dynamic case.

Both the Lisbon and the better regulation initiatives have changed. At the time of the Mandelkern report (2001) and the Commission's first coherent action plan (Commission 2002a), the reference points were the three pillars

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of the early Lisbon strategy (competitiveness, social cohesion, and sustainable development) and the White Paper on governance. Since then, Lisbon has changed, the Commission has changed, and the 'future of EU governance' described in the White Paper has not materialized in a new constitution for Europe. Competitive pressures on Europe have increased in the meantime. Unsurprisingly then, with the Barroso Commission, there has been a redefinition of better regulation. This recasting exercise has aligned better regulation with the 'growth and jobs' priorities of Lisbon and may as a result possibly succeed in containing the proliferation of objectives by drawing political attention to specific goals, such as the reduction of administrative burdens.

However, this redefinition has also narrowed the scope, the range of stakeholders, and the ambitions in terms of governance. The long-term impact of better regulation is difficult to appraise. Contrasting images of the regulatory state provide useful points of reference for the analysis. Future research on better regulation and the regulatory state could usefully consider a long-term perspective and control for different variables.

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Biographical note: Claudio M. Radaelli is Professor of Political Science and Jean Monnet Chair in the Department of Politics, University of Exeter, where he directs the Centre for Regulatory Governance.

Address for correspondence: Claudio M. Radaelli, Centre for Regulatory Governance, Amory-Politics, Rennes Drive, University of Exeter, Exeter EX4 4RJ, UK. email: c.radaelli@ex.ac.uk

NOTES

1 http://www.bbc.co.uk/otr/intext/STEPHEN_BYERS.3.28.3.99.html.
2 Para. 30 of the agreement states that 'where the codecision procedure applies, the European Parliament and the Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage'.
3 Think of the campaigns against red tape, which have eventually arisen from the political attention to better regulation even in countries (such as France) traditionally reluctant to embrace better regulation discourse.

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4 On the network of users of the standard cost model, see http://www.administrative-burdens.com/.
5 In a survey, Radaelli and De Francesco 2007 notes that the goal of providing the net benefits to the community (a goal that informs better regulation policy in countries like Canada and the USA) is not at all popular in the EU.
6 Anne Meuwese argues that these contrasting ideas resurface camouflaged under 'technical discussions' on impact assessment. See Meuwese (2006).
7 In contrast, Open Europe argues that 'The Commission's current approach – to promote "better" regulation rather than less regulation – is a distraction and will have no real impact on business. The flow of costly regulations coming out of the EU every year needs to be curbed, and existing legislation cut back' (Open Europe 2005: 16).
8 According to Organization for Economic Co-operation and Development (OECD) data, only eight countries have an explicit strategy on ex-post evaluation of regulatory tools and institutions (n = 22). Disaggregate data for the EU member states are not available.

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