

# Development trajectories of Regulatory Quality

## The experiences of OECD, European Union and the case of Italy

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## Introduction

In this master thesis, I develop my discourse by answering an apparently basic question: *What is regulatory quality?* While common sense would promptly deliver clear and understandable assumptions on the issue, the academic tradition and the regulatory governance experiences that characterized approximately the last fifty years demonstrate that *doing it good* is not as simple as it may seem. To be fair, the subtext of the question, in relation to the contemporary institutional scenario at national and supranational level, is: *why has it taken so long for regulatory quality to become salient in the most important political agendas?*

One of the first assumptions that emerges from this research is the importance of contextual elements in shaping the way in which quality is conceived. As we will see, different institutional models have shown different attitudes about the need to integrate a focus on quality in decision-making processes. In general terms, the emergence of regulatory quality framework has often been a response to modern challenges that states have to deal with, with the European Union being an emblematic example of how to take advantage of regulatory reform to carry out the broader challenges of the integration process. By presenting this first example, I make clear that my interest in regulatory quality largely depends upon the desire to investigate how much such an instrument can improve the quality of citizens, the economic results of firms and the efficiency of public administrations. To do so, I firstly focus on structuring a conceptual framework, based on possible definitions of quality, actors involved and macro trends at institutional level.

In **Chapter 1** I define regulatory quality by reporting the hypothesis of Radaelli and De Francesco that we should appraise it as an autonomous policy field. Because of its cross-cutting nature, quality is strongly sensitive to political, social, economic and cultural transformations: for this reason, it is very important to reach a deeper understanding of the conceptual drivers that should guide policy-making activities, conceived as an *ongoing process*. Thus, I shortly introduce the current EU Better Regulation guidelines to provide an effective and comprehensive synthesis of what is necessary to make good laws and to maintain good regulatory frameworks.

I also explore the multidimensionality of the quality principle by reviewing the features of all the actors involved in the decision-making process: the dominance of certain categories over others in specific contexts is one of the main causes of the differences between institutional models. For a general conceptualization of better regulation, I propose to define this policy as *meta-regulation* and analyze the interesting features of meta-regulatory frameworks both in terms of *responsiveness* of regulation and in terms of *nonjudicial legality*. Then we can find a reference to the *Regulatory State*, as it was conceptualized by Giandomenico Majone, suggesting that the role of the Government changed over the last decades and tried to provide new – regulatory – answer to the failures of the interventionist states of the 20<sup>th</sup> century. Ultimately, I analyze some policy trends like *transfer*, *diffusion* and *convergence* to understand if and how much experiences of regulatory policy may have moved from one system to another and whether this phenomenon has a positive or negative impact on the overall achievement of quality.

Starting from these premises, I try to use this network of references to understand the trajectories of those actors that strived to spread the regulatory quality culture wherever it was possible, and I provide a specific focus on Regulatory Impact Assessment, an instrument that plays a key role in relation to the whole policy review mechanism.

In **Chapter 2** I review the case of OECD, from which we derive the most structured and ongoing effort in making quality of regulation a cornerstone of good governance. Since the early 1990s, the institution has been publishing studies, analyses, guidelines and suggestions to improve the way in which policies are made and kept under control. The chapter goes through the main contributions to the subjects, with a special focus on the ten questions included in the 1995 checklist for the quality of regulation. One aspect that emerges from this review and it is confirmed by the following chapter, is that regulatory activity has become increasingly intertwined with democratic legitimacy and that creating the best possible mechanisms to *activate* citizens and stakeholders is a core objective for the future.

In **Chapter 3** the research tries to apply a similar approach to the evolution of regulatory policy at EU level. While the challenges of policy integration and regulatory harmonization already existed before the 1990s, because of the peculiar nature of European Community, systematic commitment to the development of a system to ensure quality started as a response to the challenges brought about by the creation of the Single Market. A comprehensive Better Regulation policy, though, made its appearance only at the beginning of the 21<sup>st</sup> century. From that moment on, the rise of the European engagement on this topic was impressive and it is by far one of the

most striking examples of how much apparently formal instruments are able to create growth and benefit for all.

In **Chapter 4** the thesis focuses on the Italian experience, starting from negative premises and moving optimistic conclusions about the current developments of regulatory quality frameworks. Here I outline the historical limits of law-making in Italy and all the negative effects of poorly-designed policies on the economy and – even more seriously – on the rule of law. Then, I provide a diachronic map of the innovations that were introduced to achieve substantial improvements on the way in which decisions are taken: the first significant steps were taken in a broader context of administrative reform in 1997 and took advantage of a huge restructuring of government that had been done in 1988. First provisions on experimental Regulatory Impact Assessment were limited in scope and effectiveness, but the wall of resistance to regulatory review was broken. After a series of obstacles in the early 2000s, I provide a detailed analysis of the 2005 law on the subject, and then I focus on a comparative analysis of two important decrees that regulate the way in which AIR (Analisi d’Impatto della Regolamentazione) should be performed to support policy-making.

At the end of each chapter I try to draw some conclusions about the future of better regulation, by identifying core challenges, resilient structural limits and important achievements. To conclude, I stress the importance of regulatory quality as a fundamental issue on which the future of democracies will depend, also considering the most recent transformations of society caused by a pervasive digitalization of citizenship. Supported by the collected evidence, I state that there is no other way for the future than that of a systematic reliance on methodologies for good

regulation. Decisions must be evidence-based, Governments cannot but invest an adequate amount of resources to foster data collection and make effective use of indicators, since poorly-designed policies produce huge damages, especially in a context of more-than-scarce economic resources.

The objective is that of guaranteeing responsiveness, transparency and accountability, not only to make sure that rules are well implemented, but also to gain a deep and durable legitimacy for the benefit of public administrations and, even more importantly, of the whole political system.

*“Laws and institutions are constantly tending to gravitate.*

*Like clocks, they must be occasionally cleansed,*

*and wound up, and set to true time.”*

*(Henry Ward Beecher)*

## 1. What is regulatory quality?

Over the last three decades, the broad principle of *regulatory quality* was acknowledged by almost all the globally relevant political institutions as a core element of every governance activity. Since then, policymakers, scholars and politicians have had the puzzling task of finding a comprehensive definition of *quality*, either to build sharper policy tools or simply to understand how regulatory complexity evolves together with social complexity, keeping in mind that regulatory quality can be considered in all effects “a public policy, [thus] it can be appraised with the same conceptual methodological tools used for other public policies.”<sup>1</sup>

The starting point and the key assumption around which this analysis will move is that “quality is not a monolith”<sup>2</sup>, as it can be observed from different perspectives, measured by numerous

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<sup>1</sup> Radaelli, C. M., De Francesco, F. (2011), *Regulatory quality in Europe. Concept, measures and policy processes*, Manchester, Manchester University Press

<sup>2</sup> Radaelli, C. M. (2009), ‘How context matters: regulatory quality in the European Union’, Paper prepared for the special issue of Journal of European Public Policy on Policy Convergence



indicators and, most importantly, it is continuously affected by social, economic and political change. Context matters: hence, the following paragraphs will try to highlight the main features of regulatory quality through an overview of regulatory governance – principles, legislations, tools and strategies that take place at every stage of the circular process of policy making – without forgetting to take into account the necessary analysis of the involvement of internal and external actors.

Both in the academic and institutional contexts, *quality* has typically been code-named *better regulation*, with a valuable linguistic effort that gives a good idea of the nature of the subject. The idea of quality is closer to an absolute, something that a legislation has or has not according to the height of the bar. As I already stated above and will see later on, quality is seen differently according to the point of view and any hierarchy among these preferences is nothing but a political choice. In this view, *better regulation* becomes a commitment that institutions and governments take vis-à-vis citizens, stakeholders and, broadly speaking, the democratic process itself.

A widely shared definition of better regulation is that it is “an ongoing process”<sup>3</sup>, with a pervasive nature with regard to the whole policy-making process. This brought, among other

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<sup>3</sup> European Commission (2006), *Better regulation – simply explained*. Luxembourg: Office for Official Publications of the European Communities

examples, to the adoption by the European Commission in 2015 of the so-called *Better Regulation Agenda* – recall here the etymologic meaning of *agenda* as “a set of things to do”.

The masthead of the EC webpage on Better Regulation states that this agenda

is about designing and evaluating EU policies and laws transparently, with evidence, and backed up by the views of citizens and stakeholders. It covers all policy areas and aims for targeted regulation that goes no further than required, in order to achieve objectives and bring benefits at minimum cost.<sup>4</sup>

In a relatively short sentence, all the most relevant issues and challenges are mentioned. I will take advantage of this good to identify them before moving to the following paragraphs. The Commission states that Better Regulation practices:

- are valuable both for *design* (ex-ante) and *evaluation* (ex post);
- *apply to policies and laws*, where the former is usually more focused on the substantial and political dimension, while the latter comes from a tradition of formal and technical review, each of which couldn't produce effects on its own;
- must be *transparent, evidence-based* and *backed up by the views of citizens and stakeholders*; these are all different aspects of the same trend towards openness, since

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<sup>4</sup> European Commission website, link: <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how>

policy-makers should always show the background of their decisions and be open to confrontation with all the relevant subjects;

- *covers all policy areas*, firstly because it is a very flexible set of social, economic and juridical tools, secondly as a response to complexity, since almost every policy action produces effects in more than one field, with positive and negative (intended or unintended) consequences;
- *aims for targeted regulation*, where the need for intervention can derive from previous evaluation on the results of existing provisions or from the natural transformation/innovation of socioeconomic dynamics;
- *must not go further than required*, once again identifying the proper size and scope of intervention, together with considerations about multi-level governance and the subsequent share of responsibilities;
- aims at *achieving objectives* and *bringing benefit at minimum cost*, making explicit the economic rationale of policy action, here in the sense of *economical*, that is to say “marked by careful, efficient, and prudent use of resources”<sup>5</sup>. Objectives are measured through indicators, accurately defined and timely reviewed, since every policy intervention start from a good monitoring activity of existing legal framework.

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<sup>5</sup> Definition of “economical” in the Merriam–Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/economical>

If we look at the introductory toolbox of EC guidelines, a summarizing table<sup>6</sup> with the main goals of Better Regulation practices includes all the previous bullet points. Given the more operational nature of the guidelines, I find two other requirements of good practice that I didn't find above: *unbiasedness* and *appropriateness of resources*. About the former, the document states that “[e]vidence should inform political decisions - not the other way around”<sup>7</sup>, while the latter is a reminder that good and effective evaluation can't do without the adequate amount of human and financial resources. Extensive analysis will be dedicated later to the dialectic between political and technical priorities, as well as to the institutional arrangements through which different interests are compared. Before doing that, it will be necessary to understand how and why interests differ, in order to point out the multidimensionality of the idea of *quality*.

### 1.1 Quality for whom?

At first glance, key concepts in regulatory analysis show a high degree of convergence both in the academic and in the institutional frameworks. The 1993 OECD paper<sup>8</sup> on regulatory checklists

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<sup>6</sup> European Commission, *Better Regulation toolbox – Tool #1. Principles, procedures and exceptions*, available at [https://ec.europa.eu/info/sites/info/files/file\\_import/better-regulation-toolbox-1\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-1_en_0.pdf)

<sup>7</sup> Ibidem, p. 7

<sup>8</sup> OECD (1993), *The design and use of regulatory checklists in OECD countries*, Regulatory Management and Reform series no. 4

contained most of the concerns and suggestions still at the top of current policy agenda. Moreover, it demonstrates that the *regulating the regulators* is an issue for OECD countries at least since the beginning of the 1980s, when the first checklists, regardless of their size and scope, were adopted.

The evolutionary nature of this policy area and a general convergence towards more effective decision-making models are undoubted and will be object of further analysis. For the moment, I want to stress the importance of the underlying idea that this need for regulation stems from complexity, either in a diachronic perspective or because of cross-national variability.

I use here the conceptualization of Radaelli<sup>9</sup>, who starts from the classic distinction of decision-making approaches made by Graham Allison in 1971<sup>10</sup> to state that typically there are *at least* three stakeholders involved in a regulatory assessment, each of which reflects totally or partially the features of the three ideal-types of Allison:

- the *rational actor model*, which corresponds to the technical arm of policy making, implies that the decision maker, well aware of his goals, his choices and expected outcomes, has nothing to do but choosing the option that maximizes his payoff function;
- the *organizational behavior model*, associated with the bureaucratic dimension of governments, is based upon the assumption that a well-structured organization should provide reliable decisions by means of standardized operating procedures. The author states that “learning and change is influenced by existing organizational capabilities and

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<sup>9</sup> Radaelli, C. M. (2009), *op. cit.*

<sup>10</sup> Allison, G.T. (1971) *Essence of Decision: Explaining the Cuban Missile Crisis*, Boston, Little, Brown and Co.

procedures”<sup>11</sup>, so that reliability as a strength has its weakness in a slow response to new challenges and a high degree of predictability;

- the *governmental politics model* does nothing but reflecting the continuous struggle of politicians and their sphere of interest, as much as the centrality of bargaining as the generative moment of choice. Even more than in the previous case, one’s position in the system has a great influence on the definition of priorities, beneficiaries and, when it is the case, opponents and damaged categories.

Much criticism surrounded each of the models, but their ideal-typical nature has the advantage, Bernstein says, of providing “alternative ways of analyzing events [,] emphasizing different facts because different assumptions [are] operating.”<sup>12</sup> For the purpose of this research, I move back to the perspective of Radaelli, who states that

the major limitation of the ideational convergence around a ‘one-size-fits-all’ notion of regulatory quality is that it does not acknowledge the presence of different constellations of stakeholders in different countries.<sup>13</sup>

Different institutional models imply different balances of power: it is enough to underline the uniqueness of European Commission as compared to executive-administrative bodies of single states; the same occurs for political actors, whose position is often influenced by political systems, and private stakeholders (e.g. size and importance of sector-specific firms, degree of inclusion and

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<sup>11</sup> Ibidem, p. 144

<sup>12</sup> Bernstein, B. J. (2000), ‘Understanding Decisionmaking, U.S. Foreign Policy, and the Cuban Missile Crisis: A Review Essay’, *International Security*, vol. 25, No. 1, Summer 2000, p. 139

<sup>13</sup> Radaelli, C. M. (2009), *op. cit.*, p. 8

representativeness of citizenship in consultations and panels). Several steps forward have been made over the last years to improve and clarify the *rules of engagement*: extensive guidance and control is performed by governments and parliaments, as much as by the OECD and the EU.

To answer the question that gives name to the paragraph, I have at least five actors different ideas of quality, corresponding to the categories of *technicians, bureaucrats, politicians, citizens* and *firms*.

The role and weight of *experts* in regulatory impact assessment activities depends very much on the share of responsibilities in the evaluation process. This depends very much on institutional frameworks, since different traditions imply the existence of independent agencies or the embedding of control functions inside wider administrative bodies.

An example of the first case is that of the United States, where quality assessment is performed by the Office of Information and Regulatory Affairs (OIRA), a branch of the Office of Management and Budget: its main goal is to review government collections of information from the public, draft proposed and final regulations; moreover, it develops and oversees the implementation of government-wide policies in the areas of information policy, privacy, and statistical policy. In our analysis, I highlight that the main feature of such independent technical bodies is that they firstly pursue *efficiency*, providing sector-level specialized review to policy networks. In this case, regulatory assessment is no longer instrumental to the dialectics among branches of government, since it finds its credibility precisely in its technical approach and specialized composition.

The European tradition belongs to the second category of institutional frameworks, which assigns to *civil servants* of ministerial bodies the analysis and evaluation of regulations. While much has been done recently to include people with different skills in these teams, one of the features of this model was a more formal approach to regulatory control, focused on procedural dimensions and diachronic/contextual consistency like the conformity with existing legal frameworks. In such conditions, evaluators are obviously accountable to their ministers: assessment reports become a tool for negotiation, the scope of which can be highly different according to decision-making processes of each state adopting the procedures.

The priority of *political actors* is, broadly speaking, that of achieving economic and legislative targets as closer as possible to the government policy that they are pursuing. Their action may or may not start from a well-structured analysis of the relevant phenomena, but it will with any probability be aimed at maintaining consensus. As Redaelli states, for politicians “quality may well mean responsiveness to pressure groups, or the median voter, or even responsiveness to external pressure.”<sup>14</sup> Whether governmental orientations have an influence on the activity and performance of quality assessments deserves further attention, considering the argument that quality is neutral to the size and scope of government action and the transformations of the last decades from deregulatory to re-regulatory policy programs.

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<sup>14</sup> Ibidem, p. 10



As to those who are typically mentioned as *stakeholders*, I distinguish between *firms* and *citizens*. Both are increasingly entering the arena with variable degrees of involvement and their contributions can be useful for the legitimacy of the whole policy-making process: the first ones adopt, roughly speaking, a cost-minimizing/profit-maximizing evaluation of potential legislation; the second ones, see them as organized groups, working unions or even statistical samples, see the minimization of risk (e.g. social, environmental, etc.) as main target. In real-life, net separation of the two categories is inevitably artificial and current models of risk-based regulatory activity try to consider and weight all the relevant dimensions. A good example of this approach is the SME Test, part of the Better Regulation Toolbox of the European Commission: it is composed by a set of methodologies to estimate the potential impact of provisions on small firms, responding to the *Think Small Principle* by enhancing their presence on the market and minimizing the social and economic risks caused by regulatory burdens.

Following this short review, I can conclude that finding an equilibrium among such differentiated interests is one of the most challenging objectives of contemporary democracy: formal and substantial regulatory assessment will find stronger legitimacy through the inclusion of interested actors and will then support decision-makers with substantiated analysis of every policy option on the table.

Far from being comprehensive, this introduction attempted to isolate some key assumptions about regulatory quality that will be the starting point of this thesis project:

- its nature of public policy requires us to analyze it with the right instruments;
- its salience on key institutional agendas is steadily increasing, showing relevant patterns of improvement;
- at the same time, an element of complexity is introduced by its long-term nature, its widespread range of action in policy making and the multidimensionality of power relationships, interests and targets;

Regulatory policy acquires decisive power with the emergence of the so-called *regulatory state*, since it provides the methodology upon which to base policy making, regardless of the peculiar institutional and political process. Before introducing the main features of the regulatory states, the analysis will focus on the nature of regulatory quality policy and its relationship with the actual legal frameworks of countries and institutions.

## 1.2 Better Regulation as “meta-regulation”<sup>15</sup>

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<sup>15</sup> Radaelli, C.M. (2007), ‘Whither better regulation for the Lisbon agenda’, *Journal of European Public Policy*, 14:2, 190-207

A possible framing of Better Regulation is “to examine it as an instance of meta-regulation.”<sup>16</sup>

Radaelli presents two alternative interpretations of the principle, respectively represented by the works of John Braithwaite<sup>17</sup> and Bronwen Morgan.<sup>18</sup>

The first interpretations associate it with reflexive law and enforced self-regulation, hypothesizing that “meta-regulation is responsive to the motivational postures of the regulated”<sup>19</sup>: his research locates meta-regulation in the broader scenario of *responsive regulation*<sup>20</sup>, where regulatory policy is seen as “restorative and responsive justice for the whole of law”<sup>21</sup>. The core principles of responsiveness are drawn from Philip Selznick social theories, according to which responsiveness is basically about “maintain[ing] institutional integrity while taking into account new problems, new forces in the environment, new demands and expectations.”<sup>22</sup> By closely associating meta-regulation to *justice*, he also highlights the link between injustice and

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<sup>16</sup> Ibidem, p. 195

<sup>17</sup> Braithwaite, J. (2003), ‘Meta-regulation for access to justice’. Paper delivered to the General Aspects of Law Seminar Series, University of California, Berkeley, 13 November 2003

<sup>18</sup> Morgan, B. (2003), ‘The economization of politics: meta-regulation as a form of nonjudicial legality’, *Social and Legal Studies* 12(4): 489–523

<sup>19</sup> Radaelli, C.M. (2007), *op. cit.*, p. 195

<sup>20</sup> For the complete theory of responsive regulation see Ayres I. and Braithwaite J. (1992) *Responsive Regulation. Transcending the Deregulation Debate*, Oxford: Oxford University Press

<sup>21</sup> Braithwaite, J. (2003), *op. cit.*, p. 7

<sup>22</sup> Selznick, P. (1992). *The Moral Commonwealth: Social Theory and the Promise of Community*. Berkeley: University of California Press, p. 336, quoted in Braithwaite J. (2003), *op. cit.*, p. 8

inefficiency: the linkage between meta-regulation and self-regulation is precisely aimed at creating the conditions for fairer sectorial arrangements and access to justice.

A second set of interpretations is represented, among others, by the studies of Bronwen Morgan on the *economization of politics*. Here there is no direct relation between meta-regulation and the connotational positive features of responsiveness. Definitions are more technical and “stick to the basic idea of rules disciplining regulatory processes.”<sup>23</sup> To be fair, the incipit of Morgan’s research is so straightforward to have an almost humorous – likely intended – effect, since meta-regulation

is in some ways an *ugly word*, a dry, impersonal term redolent of bureaucratic jargon. That is appropriate. For meta-regulation is mostly an affair of technical bureaucratic minutiae, the thrust and parry of setting agendas, framing issues, and deciding priorities.<sup>24</sup>

Despite its nature, she attributes to meta-regulation an important role in everyday decision making and in structural policy processes:

in essence, meta-regulation manages the tensions between the ‘social’ and ‘economic’ goals of regulatory politics, tensions that enflame passionate and highly wrought political conflict over the ethical limits of global capitalism.<sup>25</sup>

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<sup>23</sup> Radaelli, C.M. (2007), *op. cit.*, p. 196

<sup>24</sup> Morgan, B. (2003), *op. cit.*, p. 490 (emphasis added)

<sup>25</sup> *Ibidem*

This theoretical approach adopts a perspective more in touch with the discipline of regulatory policy, introducing the concept of *nonjudicial legality*. Morgan places it

at the intersection of two trends observed from different disciplinary standpoints, converging from opposite directions [...]: increasingly legalized politics without courts or judges [while] the legal domain [...] has become a world of institutions other than courts or judges, both public and private.<sup>26</sup>

These tendencies produce three main effects *judicialization*, *nonjudicial review* and *legalization*.

*Judicialization* is characterized by the increasing intervention of courts in “establishing limits on law-making behaviour, reconfiguring policy-making environments, even drafting the precise terms of legislation”<sup>27</sup>. However, its significance lies in providing legal expertise to find a balance among fragmented and often diverging interests and values. I, judicialization is not so different from the above-mentioned principles of *responsive regulation*, since they are both ultimately aimed at eliminating potential distortions caused by structural imbalances associated with economic policies.

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<sup>26</sup> Ibidem, p. 492

<sup>27</sup> Stone Sweet, A. (2000) *Governing with Judges: Constitutional Politics in Europe*, Oxford: Oxford University Press, quoted in Morgan B. (2003), *op. cit.*, p. 492

At the same time, *nonjudicial review* is the edge lettering of the coin, showing increasing scope for “oversight of bureaucracies [performed] by other public agencies operating at arm’s length from the direct line of command, the overseers being endowed with some sort of official authority over their charges.”<sup>28</sup> This is the case of many independent agencies which were created and empowered exactly on the wave of regulatory reform that characterized the last decades. The reason for the spread of these bodies and practices is grounded in the nature of what I call *regulatory state* and will receive proper attention in the following paragraphs. As I said, this approach is on the edge between the legal and political dimensions, since it stems from administrative mechanisms of horizontal control, but “actors carrying it out possess incentives that push them in the direction of offering interpretations that are not substantially less disinterested than the interpretations offered by judges.”<sup>29</sup>

To conclude, *legalization* is another piece of the puzzle, explaining how institutions are becoming increasingly hybrid. While contemporary consequences of legalization unravel as society gets more fragmented, with the subsequent need of highly formalized power relations, Martin Shapiro provides an elementary example to assume the intertwined nature of judicial and

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<sup>28</sup> Hood, C., James, O. and Scott, C. (2000) ‘Regulation of Government: Has It Increased, Is It Increasing, Should It be Diminished?’, *Public Administration* 78: 283–304

<sup>29</sup> Morgan B. (2003), *op. cit.*, with reference to Tushnet M. (2001) *Nonjudicial Review*, Georgetown Public Law Research Paper No. 298007

political action<sup>30</sup>: in the simplest social scenario, a dyadic opposition between two subjects is typically solved by a third external actor. To this purpose, basic requirements are (1) the neutrality of the judge and (2) the reliance on a pre-existent decision rule. Apart from a basic lesson of dispute-settling, what I learn here is the underlying “political nature of legal institutions, their governance function as conflict resolvers.”<sup>31</sup>

Though recognizing some degree of distinctiveness in the role of courts and judges, “[o]ther institutions and personnel within the modern state may, from this perspective, carry out analogous functions if they display the same social logic.”<sup>32</sup> Legalization is based precisely upon this principle and affects a wide spectrum of phenomena:

highly legalised institutions are those in which rules are obligatory on parties [...], in which rules are precise (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules.<sup>33</sup>

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<sup>30</sup> see Shapiro, M. and A. Stone Sweet (2002) *On Law, Politics and Judicialisation*. Oxford: Oxford University Press

<sup>31</sup> Morgan B. (2003), *op. cit.*, p. 496

<sup>32</sup> *Ibidem*, p. 497

<sup>33</sup> Goldstein, J. et al. (eds) (2001), *Legalisation and World Politics*. Cambridge, MA: MIT Press.

Subsequently, the more precisely are defined the rules, the more likely I will observe a positive outcome of the institutional arrangement. Meta-regulation is functional to the achievement of policy goals: that's why Better Regulation can be enumerated as a case of meta-regulation.

The first example that Radaelli provides to support this assumption is the reference to Regulatory Impact Assessment – RIA is basically a set of *rules* that guides the formulation and evaluation of *all other rules* – which is why he claims it to be the most evident case of meta-regulatory framework. A structured review of RIA both as a conceptual framework and as a concrete policy instrument deserves a specific section of this research, that will come after a necessary review of the best contributors to the issue of regulatory quality, the evolution of the discipline over the last decades, academic/institutional contributions and political actions in support of its concrete realization. What I need to highlight for the moment is the potential link between RIA and the long-term legitimacy of the *regulatory state*, as Radaelli and De Francesco<sup>34</sup> argue. Their work associates the instrument with the institutional model, mainly in terms of political control in the broader constitutional framework. Nonetheless, they identify different purposes for the adoption of impact assessment, according to the underlying rationale of state governance: in other words, the outcomes that I can expect from RIA are strongly related to the logics by which states adopted it.

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<sup>34</sup> Radaelli, C. M., De Francesco, F. (2011), *op. cit.*



But what is the *Regulatory State*? As this research is mainly focused on regulatory policy tools and strategies, it would be naïve to neglect that the institutional preconditions for the development of the subject are relatively recent, with their first experiments coming right after the great nationalization wave of the 1970s. The extensive academic work of Giandomenico Majone on the transformations of the state and of policy-making will provide us with a general understanding of the topic, looking at the broader picture in which regulatory quality, and more specifically RIA, are enshrined.

### **1.3 The rise of the Regulatory State**

Since the late 1970s, governments were forced to rethink their approach to governance to respond to “increasing international competition and deepening economic and monetary integration.”<sup>35</sup> Until that time, typical instruments for government action were those of the so-called *positive state*, where the traditional Welfare State was “planner, direct producer of goods and services, and employer of last resort.”<sup>36</sup> Traditional Keynesian models and interventionist policy tools were at the basis of a series of *government failures*, where nationalization programs didn’t get to achieve any substantive improvement of the economy. A new governance model was

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<sup>35</sup> Majone, G. (1997), ‘From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance’, *Journal of Public Policy*, Vol. 17, No. 2, May - August 1997, p. 139

<sup>36</sup> *Ibidem*, p. 141

required to face economic challenges, and the one that succeeded in becoming a conceptual paradigm was characterized by “privatisation, liberalisation, welfare reform, and also deregulation.”<sup>37</sup>

Though deregulation is often mentioned as the key measure that distinguished the new phase, the simplification strategy of legal apparatus never was a true path towards *laissez faire*. Along with the gradual review and – when it was consistent with broader policy objectives – removal of existing regulation, “the same period [saw] an impressive growth of regulatory policy-making both at national and European levels.”<sup>38</sup> Thus, for most of the time deregulation has gone hand in hand with re-regulation. To systematize the reasons behind the growth of policy choices typical of the Regulatory State mode of governance, three core elements can be isolated:

- the failure of public ownership experiences, after which utilities were left to private initiatives in a new framework of rules developed and enforced by agencies with varying degree of autonomy from central governments;
- the increasing interdependence of policy-making, with Majone referring to the most prominent example of European integration. Indeed, reticular processes of knowledge

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<sup>37</sup> Ibidem, p. 143

<sup>38</sup> Ibidem

transfer at local level and beyond continental boundaries generated several dynamics of *policy sharing* that we will later review;

- the shift from direct to indirect government, with the establishment of new *ad hoc* bodies in charge of performing much more structured regulatory policy activities, which produced new responsibilities, as well as “new forms of control and accountability.”<sup>39</sup>

In another piece of research focused on the European dimension of the Regulatory State, Martin Lodge conceives this model as the result of

two key trends, one being an overall shift towards the use of legal authority or regulation over the other tools of stabilization and redistribution, the other the European Commission’s expansionist role through the use of influence over policy content in the absence of other, especially budgetary tools.<sup>40</sup>

Majone, as well as other commentators of the time, pays attention to the tendency towards delegation of policy-making powers to non-majoritarian bodies, independent authorities and agencies that were very infrequent at least until the last four decades. He identifies two *common sense* reasons that may have been behind the appearance of such bodies. The first one belongs to what he refers to as “older theories”, arguing that “politicians have neither the expertise to design

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<sup>39</sup> Ibidem, p. 147

<sup>40</sup> Lodge, M. (2008), ‘Regulation, the Regulatory State and European Politics’, *West European Politics*, 31:1-2, p.280

policies in detail nor the capacity to adapt them to changing conditions or to particular circumstances<sup>41</sup> or, in a more technical fashion,

delegation to specialized agencies reduces decision-making costs by allowing legislators and government executives to economise on the time and effort required to identify desirable refinements to legislation, and to reach agreement on these requirements. Decision-making costs increase [...] when the costs and benefits of the proposed measures are spelled out in detail.<sup>42</sup>

The second path is more of a political kind, where delegation may partly be aimed at *blame-avoidance*. Here Majone refers to some models proposed in the early 1980s by Morris P. Fiorina to study the decision-making rationale of US Congress, quoting that “legislators not only avoid the time and trouble of making specific decisions, they avoid or at best disguise their responsibility for the consequences of the decisions ultimately made”<sup>43</sup>. He does not discard both contributions, since they catch a part of the reality, but states that “both approaches miss what is probably the main reason today for delegating policy-making powers to such institutions: the need to achieve credible policy commitments.”<sup>44</sup> While Majone moves on with the analysis of the *short-termism*

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<sup>41</sup> Majone, G. (1999), ‘The regulatory state and its legitimacy problems’, *West European Politics*, 22:1, p.3

<sup>42</sup> *Ibidem*, p. 3-4

<sup>43</sup> Fiorina, M.P. (1982), ‘Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?’, *Public Choice* 39/1 pp.33-66, p.47

<sup>44</sup> Majone G. (1999), *op. cit.*, p. 4

of democratic governance, providing some broad reflections and some examples particularly related to the integration challenges of the time regarding the European market and specific policy areas which could have required strong legitimacy and a high level of negotiation, as in fact they still do.

To integrate this general discourse, some attention should be paid to the analysis performed by Lodge, who assumes that “the conditions for the [...] rise of a regulatory state can be summarised by three factors: disappointment, strategic choice given structural constraints, and habitat change.”<sup>45</sup> Disappointment affects macro-level, whenever regulators and administrators are not able to achieve broad policy outcomes, but at the same time it grows at micro-level, because of the inefficiency of state-owned companies and the lack of accountability and control.

The whole discourse over the strategic dimension touches the evolutionary nature of institutional framework. Delegation, as well as direct regulatory activity, can be easily identified as consequences of contextual economic or organizational needs: Lodge reports the massive recourse to regulatory agencies in the UK, suggesting the existence of a “blame-shifting strategy [that] failed spectacularly”<sup>46</sup>; at the same time, he states that strategic choices within structural constraints are a crucial point in the European scenario, because of the peculiar role of the

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<sup>45</sup> Lodge M. (2008), *op. cit.*, p.283

<sup>46</sup> *Ibidem*

European Commission, together with the economic transformations caused by the transition towards the Single Market: to summarize, “the emergence of rule systems at the supranational level was one source for the growing interest in regulation, the interaction between the EU and national levels provided for another.”<sup>47</sup>

Among the three points, the underlying pattern of *habitat change* may result particularly valuable, especially in relation to more contemporary transformations of the regulatory discipline. While internationalization and complexity of economic systems can be considered as causing factors of this change, the lack of credible commitment by the state towards policy implementation and medium- and long-term objectives is a true source of uncertainty on the inside (citizens, private firms, etc.) and on the outside (commercial partners, member states of supranational organizations). On this issue, Lodge agrees with Majone in seeing regulatory agencies as non-majoritarian responses to this commitment problem. At the same time, he outlines the societal risks of such an approach, assuming that

a link can be drawn between the rise of an interest in regulation and the ‘risk society’ in which a society that anticipates and witnesses humanly created risks produces as a response a ‘regulatory society’ – with potentially disastrous consequences as rhetorical attempts of ‘control’ raise social expectations of control exactly at the same time in which social heterogenisation reduces collective identities and therefore problem-solving possibilities: we

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<sup>47</sup> Ibidem

demand more hierarchical intervention exactly when the conditions for hierarchical intervention are no longer present.<sup>48</sup>

Without the presumption of leapfrogging the whole academic tradition on risk society with few simple steps, we will have the chance to observe how regulatory policy evolved over time: intense lesson-learning and debate took place at national and supranational levels, transforming general commitments to quality into more and more inclusive methodologies aimed at supporting all phases of the policy cycle and guaranteeing good levels of participation, openness and accountability.

For these reasons, I will now shortly analyze some mechanisms of *policy interdependence*. The study of these dynamics can be very profitable in assessing trajectories of convergence and divergence across policy areas and territorial institutions, adopting either quantitative or qualitative methods. Each one looks at the world of policy-making by a slightly different point of view, allowing us to catch underlying rationales, procedural choices and targets by which policy-makers are guided in the research of the optimal choice – though we will see that this may not always be the case.

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<sup>48</sup> Ibidem, p. 284-5

## 1.4 Policy Interdependence

The role of the State in modern and contemporary society has been steadily changing, sometimes adapting to external pressures, sometimes steering the behavior of social and economic actors by means of disruptive regulation. While in the past this led to significant enlargement or narrowing of size and scope of state action, we are now experiencing the pre-eminence of *interdependence*.

According to Fabrizio Gilardi, the impact of interdependence on policy making is “uncontroversial [but] seldom taken into account systematically”<sup>49</sup>. Thus, he isolates three different *vectors* through which interdependence can emerge and suggests possible methodologies to better understand them. I take here as relevant his distinction between *policy diffusion*, *policy transfer* and *policy convergence*. Since all these dimensions mainly describe interdependence between decision-makers, for the purpose of this research I add a fourth element, that is interdependence of involved actors, seen as leading principle of the transformation of the policy making process itself.

### Policy diffusion

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<sup>49</sup> Gilardi F. (2014), *Methods for the analysis of policy interdependence*, in Engeli I., Rothmayr Allison C. (eds), *Comparative Policy Studies Conceptual and Methodological Challenges*, Palgrave Macmillan



Starting from the first dimension, *policy diffusion* occurs “when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries.”<sup>50</sup> One interesting point is that “when studying diffusion, we are interested more in the process than in the outcome.”<sup>51</sup> The adoption of a given provision by a state may be influenced by the adoption of that same provision in another country and the specific series of logics that brought to that choice is all that matters. In another of his studies<sup>52</sup>, Gilardi makes it even clearer, breaking up different rationales for such a behavior:

- the first is related to potential success, measured in terms of goals, implementation or electoral convenience;
- the second logic is much less related to outcomes, because on some themes the adoption of certain provisions depends much on the “symbolic and socially constructed characteristics of policies”<sup>53</sup>, included the dominant political storytelling of the moment;

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<sup>50</sup> Simmons B., Dobbin F., Garrett G. (2006), *Introduction: The International Diffusion of Liberalism*, *International Organization* 60(4):781–810

<sup>51</sup> Gilardi F. (2016), *Four ways we can improve policy diffusion research*, *State Politics & Policy Quarterly* Vol. 16(1), p.9

<sup>52</sup> *Ibidem*, p.10

<sup>53</sup> *Ibidem*

- the third one concerns the competitive dimension of policy making, which applies particularly to economic policy and is maybe one of the longest-lived fields of analysis of interdependence.

Though the purpose of this last approach falls partly beyond the scope of our analysis, I derive from that field of study the useful definition of *competitive federalism*, conceived as a model in which “state and local officials determine their own policies in part based on competition with surrounding communities.”<sup>54</sup> This analysis introduces interesting considerations on horizontal and vertical relationships and patterns of influence in policy decisions that will be useful, together with key features of *policy transfer* and *convergence*, to clarify both the EU and the OECD approach to regulatory policy and more in general to policy making discipline.

### **Policy transfer**

A common definition of policy transfer is that of a situation in which

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<sup>54</sup> Volden C. (2016), *The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?*, American Journal of Political Science 46(2), 2002, p.352 in Gilardi F., *op. cit.*, p.10

knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) is used in development of policies, administrative arrangements, institutions and ideas in another political setting.<sup>55</sup>

Dolowitz and Marsh try to understand and explain which factors were at the basis of the substantial increase in the number of policy transfer since the beginning of the 1990s. The easy answer is globalization, but they draw attention to the multidimensionality of the process, suggesting that the market rationale was – and is – complemented by the increase in the opportunities of exchange of knowledge and by the increasingly important role of non-political actors in the transformation of policy making environment.

Policy transfer has much in common with policy diffusion. According to Gilardi, “the two concepts refer essentially to the same phenomenon”<sup>56</sup>and what changes is the methodological approach to research: while policy diffusion adopts quantitative techniques to evaluate interdependence, policy transfer follows typically qualitative methods to provide a case-by-case in-depth explanation of specific choices. For instance, the model proposed by Dolowitz and Marsh suggests systematizing a research by answering a series of questions concerning, among others, the reasons, origin and dimension of a transfer and the actors involved.

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<sup>55</sup> Dolowitz D.P., Marsh D. (2000), *Learning from abroad: the role of policy transfer in contemporary policy-making*, Governance, 13 (January), 2000, p.5

<sup>56</sup> Gilardi F (2014). *op. cit.*

## Policy Convergence

While the two previous phenomena observed how interdependence affects policy processes, policy convergence tells us something about the outcomes of those processes. Convergence is a way to measure whether and how much “policies become increasingly similar over time”<sup>57</sup>. At the very basis of this concept there are many factors<sup>58</sup>, each of which is relevant to the purposes of our analysis. I here highlight three of them: firstly, convergence of policies stems from the similarity of the problems to which countries are reacting; secondly, the participation to supranational organizations often leads to the adoption of similar provisions by member states; thirdly, with a direct link to the previous point, “emphasis is placed on the harmonization of national policies through international or supranational law”<sup>59</sup>, introducing an element of compliance with binding agreements and treaties.

While we can assume that these features apply to every contemporary state, because of the complex network of regulations and political and economic actors, we recognize that convergence

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<sup>57</sup> Ibidem, p. 4

<sup>58</sup> See Knill C. (October 2005), *Cross-national policy convergence: concepts, approaches and explanatory factors*, *Journal of European Public Policy* 12(5), 764–774

<sup>59</sup> Ibidem, p. 770

is even stronger in cases like that of the European Union, where harmonization and convergence are explicitly stated as targets to achieve a deeper integration.

Regulatory quality policies are no exception, since they provide policy makers with a set of methodologies to achieve and evaluate efficiency, effectiveness and all relevant dimensions of regulatory frameworks. Different actors may have different goals, but every decision-making process that involves a plurality of actors – be that two ministries in national lawmaking or many countries in supranational negotiations – inevitably benefits the quality of analysis and confrontation (e.g. units of measure, indicators). Moreover, this policy area is clearly less affected by the logics of policy competition, which is usually listed as another causing factor of interdependence mostly related to economic and fiscal choices.

The introduction of these mechanisms of interaction is a fundamental step to understand on what grounds did Better Regulation join the most relevant political agendas and shape the way in which regulation is produced and kept under control. Some of the most significant steps to this objective were moved by OECD, whose efforts towards better regulation started during the 1990s and provided more and more support to promote high quality laws and policies. This activity “contributed to the broad recognition that good governance principles and effective regulatory frameworks are fundamental elements for modern decision-making, strongly

contributing to economic growth.”<sup>60</sup> For this reason, I will now move on with an overview of the most relevant contributions that came from the OECD on the issue of regulatory quality. Later on, our focus will be shifted to the EU level, from which I will try to derive not only a better understanding of regulatory policy in itself, but also how better regulation is a priority in the key issue of the European integration process. To conclude, I will introduce the Italian case, which will provide us the necessary contextual elements to get to the final destination of this journey, which is the focus on Regulatory Impact Assessment, whose features will be broadly discussed afterwards.

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<sup>60</sup> Allio L. (2009), *The emergence of better regulation in the European Union*, PhD Thesis, King’s College London, p.37

## 2. The contribution of OECD

### 2.1 Early stages and the 1993 Occasional Paper

As it was highlighted in the previous passages, the OECD played an important role in collecting and evaluating local experiences of regulatory policy, providing a systematization of knowledge and practices that cannot be but one of the most relevant sources of this research. While the first *regulatory checklists* made their appearance in OECD countries at the beginning of 1980s, the first OECD document on the issue, briefly mentioned above, was issued as occasional paper in 1993<sup>61</sup>. It came as fourth in a series of releases on regulatory management, which had already provided extensive analysis on regulatory compliance and organizational strategies for management consultancy.

The paper adopts the definition of *regulatory checklist* to synthesize the wide variety of different arrangements that existed at the time to support the adoption or continuation of a policy. In that view, regulatory checklists are

management tools intended to transmit cross-cutting policy or administrative concerns directly to officials responsible for regulation. They create a framework in which specific concerns are targeted, options are identified, information is provided to decision-makers, and

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<sup>61</sup> OECD (1993), *op. cit.*

the legal instrument of regulation is drafted. They also provide [...] quality standards to assess how well regulators are doing.<sup>62</sup>

While this passage does not add much on the key dimensions of regulatory policy, it introduces two interesting elements: on the one hand, it states the *cross-cutting* nature of the process, implying the need for the whole regulatory system to respond to some basic *quality* requirements in a more integrated view; on the other hand, these tools should make regulators aware of *administrative concerns*, stating *de facto* the need to take into account the technical and bureaucratic rationales during regulatory activity.

Moving on with the OECD work, it is stated that

checklists [...] do not necessarily give an accurate picture of the full range of factors that influence regulatory decision-making [and that, similarly] countries without formal checklists do not necessarily lack information, analysis, criteria, etc. for regulatory decision-making.<sup>63</sup>

In other words, there could be many different sources that contribute to the definition of regulatory methodologies, both at supranational level and at subnational or administrative level, not to mention the systems where control activities are performed or advised by independent agencies. Indeed, this passage provides evidence that, by that time, there was little or nothing of a systematic theory of regulatory governance. Though we have seen that many countries embarked

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<sup>62</sup> Ibidem, p. 11

<sup>63</sup> Ibidem, p. 12



upon ambitious projects on this matter since the 1970s, regulatory *quality* was not yet conceived as an autonomous policy area – as I stated in the introduction to this research – which was the strongest motivation for a comprehensive analysis performed by the OECD. In fact, while adding some theoretical lenses to the concrete development of regulatory policy, the document is basically the review of 15 national checklists and is aimed at finding commonalities and differences.

The paper identifies 7 key areas where regulatory checklists can produce positive effects, that can be synthesized as it follows: (1) value communication and political accountability; (2) public sector responsiveness to political action; (3) standardization and efficiency of regulatory process; (4) “improving the quality of regulation”<sup>64</sup>; (5) support to policy design and implementation; (6) education of officials and politicians to methodologies; (7) support to managerial policy overviews. At least on a textual basis, we can observe that no country had a regulatory mechanism able to encompass all the areas, and that the lack of a comprehensive system to allow an effective performance of such activities could be a threat to the profound sense of adopting checklists. In fact,

simply establishing procedures and administrative arrangements to support a list may not be sufficient to ensure its successful implementation [...] Implementation requires that the government seek broad commitment to the values and principles in the list and educate the bureaucracy in their application. [Governments] must carefully articulate the policy and

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<sup>64</sup> Ibidem, p.14

procedural requirements of the checklist, tailoring (where necessary) the content to specific users and stages in the regulatory process.<sup>65</sup>

While quality is not explicitly defined, it is assumed to be about the *form* and *content* of regulation. The model includes the widening of consultation mechanisms, a possible reshaping of the process itself and, most importantly, the support to concrete legislative action in terms of quality standards, formal requirements and, when it is the case, mandatory requirements like – as reported by the paper – a positive cost-benefit analysis. Many of these principles already existed at that time and we will see how their application and effectiveness is still topical for contemporary analysis.

While a detailed review of the state of the art of the countries analyzed by OECD falls beyond the scope of this review, we observe that “[a]lthough the legal and institutional frameworks, form, application, details and focus of the checklists differ, there is common concern about the need for regulation and a questioning of its costs, effects, and effectiveness.”<sup>66</sup> In other words, while the avoidance of useless regulatory proliferation already found broad consensus among the states – zero options are still relevant in current evaluation systems, as I will examine later –, differences

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<sup>65</sup> Ibidem, p. 39

<sup>66</sup> Ibidem, p.15

emerge when it comes to measurement of effects and evaluation and structure of implementation processes.

## **2.2 1995: Recommendation on Improving the Quality of Government Regulation<sup>67</sup>**

The Council of the OECD issued the first recommendation on regulatory quality with the explicit aim of setting “the first international standard on regulatory quality”, based upon the activities of the Public Management Committee on Regulatory Management and Reform. The main references are the 1993 Occasional Paper and a 1994 draft of regulatory checklist, which became the *OECD reference checklist for regulatory decision-making*, an appendix intended to be the conceptual framework for future regulatory assessment. The actual recommendation shortly highlights basic elements of regulatory quality discipline, namely the need for (1) analysis at all stages of the policy cycle, (2) development of adequate administrative bodies to fulfil the activity, (3) integration of key principles of good regulation and (4) consideration of the global economic scenario to evaluate the cross-boundary impact of decisions.

The checklist isolates ten questions, answering to which should provide regulators with a good level of confidence about the adequacy of the potential policy choice. Table 2.1 highlights questions, focuses and objectives related to each of them. Every question addresses a wide area of

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<sup>67</sup> OECD (1995), *Recommendation of the Council of the OECD on improving the quality of government regulation*, OCDE/GD(95)95

analysis, such that we can recognize most of the current instruments and concerns of policy making activity, moving from more formal and technical aspects to wider patterns of harmonization and integration, including the adoption of a comparative methodology of analysis of policy scenarios, in order to estimate the complex array of direct or indirect effects of the decision making process.

*Table 2.1: Ten questions for the OECD reference checklist for regulatory decision-making*

<b>QUESTIONS</b>	<b>FOCUS</b>	<b>OBJECTIVES</b>
1. Is the problem correctly defined?	Nature and magnitude Diachronic evolution Multidimensionality of the effects on target population Identification of sensitive areas for government action	Evidence-based approach Systematic review of existing regulations
2. Is government action justified?	Clear sources of legitimacy Evaluation of alternative options (including market option) Effects on the international scenario	Multi-option policy formulation Systematic review of existing regulations
3. Is regulation the best form of government action?	Evaluation of the variety of non-traditional policy instruments Analysis of the quality of policy information in regulatory bodies	Use of non-standard/non-regulatory policy options Openness of decision-making activity

4. Is there a legal basis for regulation?	Analysis of the relationship between specific provisions and the “rule of law”	<p>Compliance with general “rule of law” criteria</p> <p>Compliance with national basic laws and with existing legislation</p> <p>Compliance with supranational laws and treaties</p>
5. What is the appropriate level (or levels) of government to take action?	<p>Analysis of the share of competencies across governmental bodies</p> <p>Analysis of tendencies towards fragmentation to the bottom (subsidiarity) vs. delegation to the top (supranational)</p>	<p>Multilevel governance</p> <p>Consultation/coordination in formulation and implementation</p>
6. Do the benefits of regulation justify the costs?	Direct and indirect elements producing positive or negative economic effects on the policy option	<p>Cost-benefit analysis</p> <p>Adequacy of external review for high-impact policies</p>
7. Is the distribution of effects across society transparent?	Analysis of the distribution of regulatory costs and benefits	Equity and transparency
8. Is the regulation clear, consistent, comprehensible, and accessible to users?	<p>Review of law drafting rules</p> <p>Analysis of comprehension by likely users</p>	Clarity and consistency with formal requirements and similar regulations
9. Have all interested parties had the opportunity to present their views?	Analysis of degree and quality of contribution coming from non-governmental actors	<p>Openness and transparency</p> <p>Development of public consultation mechanisms</p>

10. How will compliance be achieved?	Evaluation of the feasibility of implementation processes	Responsiveness of bodies in charge of implementing provisions
	Weaknesses of implementation models	

The document explicitly mentions the importance of global economic developments, as well as the tendencies of national government towards both local fragmentation of power and international limitation of sovereignty. While the issue of decentralization did not follow a straightforward path because of political developments, there is much less doubt about the increasing integration at supranational level. The implications of this model will be clearer afterwards through the analysis of the EU model and its effects on national policies, both in the content and in the methodology. Leaving a more detailed review to the next chapter, I now move on with further review of OECD regulatory policy materials. While this paragraph was more focused on understanding guiding principles, the attempt for the most recent recommendations and studies will be that of emphasizing the evolutionary nature of such principles as well as their adaptation to economic, technological and cultural transformations of the last two decades.

### **2.3 1997: The OECD Report on Regulatory Reform**

One of the elements that one should keep in mind when trying to understand the point of view of policy-makers and policy experts during the 1990s is the unprecedented transformation of markets and, more specifically, the need to manage “new” markets for those services that had

always been under state control. The full version of the Report is based upon several studies dedicated to specific sectors of the economy and/or to peculiar organizational strategies in member states. Its synthesis<sup>68</sup> includes the seven recommendations for regulatory reform and offers some examples of how successful a good regulation can be in addressing not only economic goals, but also social, health and environmental ones. The document states that “regulatory reform is more urgent than ever [and that a] fundamental objective of regulatory reform is to improve the efficiency of national economies and their ability to adapt to change and to remain competitive”<sup>69</sup>, moving along the three main directives of global market orientation, technological progress and enhancement of small and medium enterprises (SMEs) as the starting point of economic growth and innovation. More interestingly, we observe how the evolutionary nature of regulatory reform itself is recognized and emphasized that

modern reform involves a mix of regulation, deregulation, and re-regulation across the entire economy, backed up by institutional reform where necessary. In general, deregulation strategies are applied to economic regulation, while various means of improving regulatory quality and reducing burdens are used for social and administrative regulation.<sup>70</sup>

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<sup>68</sup> OECD (1997), *The OECD Report on Regulatory Reform: Synthesis*, Paris.

<sup>69</sup> *Ibidem*, p. 5

<sup>70</sup> *Ibidem*, p.8

Complexity requires a wide array of solutions, which may in turn be contradictory or call for each other: “deregulation of one area of the economy may itself produce the need for more regulation someplace else.”<sup>71</sup>

The recommendations are precisely intended to prevent one-shot reactions to transformations, providing governments with a set of basic steps to take in order to achieve regulatory improvements and allow timely reform processes. The structure of these key points was maintained, with some adjustments, for the 2005 OECD publication on the topic, so that we will observe whether and how did the organization change its view on specific issues.

For a brief introduction, the recommendations concerns (1) regulatory reform with clear objectives and implementation plans, (2) systematic review of regulations, (3) transparency, non-discrimination and efficient application, (4) review and strengthening of competition policy, (5) reform or elimination of norms affecting the concrete realization of competition, (6) elimination of unnecessary trade barriers in favour of international agreements and principles and (7) consistency of existing and new policy objectives with the broader purpose of regulatory reform.

A wider analysis of these points will be provided in the following paragraph, since the conceptual framework of the 1997 Report derives its key elements from the already analyzed 1995

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<sup>71</sup> Rose–Ackerman S. (1990), *Deregulation and Reregulation: Rhetoric and Reality*, Yale Faculty Scholarship Series. Paper 597, p. 297



Recommendations, while the 2005 document attempts to catch structural implications of regulatory policy that were pushed aside by single initiatives.

#### **2.4. 2005: OECD Guiding principles for regulatory quality and performance**

Isolated efforts cannot take the place of a coherent, whole-of-government approach to create a regulatory environment favourable to the creation and growth of firms, productivity gains, competition, investment and international trade. Removing unneeded regulations, notably in sectors that meet public needs, is still important, but does not tell the whole story. When governments turn elsewhere for provision of services, regulation is necessary to shape market conditions and meet the public interest.<sup>72</sup>

Almost a decade after the first official commitments of OECD and its member states to the purposes of regulatory reform and governance, the conceptual framework of regulatory policy remained almost identical. The issue was not abandoned at all: many studies were performed at country level concerning implementation and outcomes of the first experiments; at the same time, from the outside, an increasing participation of non-OECD countries to regulatory reform models confirmed the durability of the instruments. In fact, the *new* guiding principles are to be seen more as an adaptation of the regulatory governance model to the challenges of the 21<sup>st</sup> century, with crucial integrations to enhance horizontal and vertical integration of policy making, as well as more procedural tools that will be outlined afterwards.

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<sup>72</sup> OECD (2005), *OECD Guiding principles for regulatory quality and performance*

Without being too formalistic in the comparison, we must observe that the 1995 principles are mentioned in both documents as a starting point, but the previously mentioned affect the way in which priorities are communicated. In 1997 a crucial role is played by organizational coordination and step-by-step implementation control, with minor focus on the challenges of policies affecting multiple areas, ultimately seeing cross-sectoral and cross-national confrontation as useful tools rather than structural constraints. The 2005 development pays more attention to a systematic institutional overview, to the adequacy of provisions to a continuously evolving scenario and to a concrete involvement of external actors, be that advisory bodies or stakeholders. Quality has to be guaranteed at every level of government with a dynamic approach to “ensure that reforms are carried out in a logical order”<sup>73</sup>, with a specific reference to the need of coordinating market liberalization for sectors that are related to each other.

Moving on with the analysis, I touch here for the first time the instrument of Regulatory Impact Assessment, which will be of topical importance for the development of the research. We can observe how the cautious approach to RIA of 1997 was substituted by a strong commitment to its methodologies in 2005. Apart from the conceptual dimension, significant evolution can be recognized in the introduction of a paragraph for *ex-ante* policy evaluation, making clear that new

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<sup>73</sup> Ibidem, p. 3

projects should always be complemented with a structured analysis of compliance with quality standards, “preferably overseen by a body created for that purpose.”<sup>74</sup>

When it comes to the points related to markets and competitive dynamics, the orientation stays the same, especially on the issues of transparency and non-discrimination – with a reasonable update regarding the adoption of internet-based instruments for public accountability. On the other hand, the 1997 enthusiasm made explicit by the aim “to create vigorous competition as quickly as possible”<sup>75</sup> was mitigated by the following experiences: state involvement and non-fully competitive arrangements are to be kept under periodical review.

What emerges from a comparative reading is not a disruptive transformation of the way in which regulatory policy is conceived, while there is clearly an increasingly stronger belief in the ability of such instruments to produce positive effects on economies and societies by becoming a structural element of the policy-making process. This pattern of continuity, with slight shifts to adapt conceptual frameworks to societal evolution itself, brings us to the analysis of what we could define the *contemporary* regulatory policy theory, with further innovation in purposes and instruments to steer and improve regulatory governance.

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<sup>74</sup> Ibidem, p. 4

<sup>75</sup> OECD (1997), *op. cit.*, p.34

## 2.5 The OECD regulatory policy framework *today*

Though the latest recommendation of the OECD on regulatory policy dates back to 2012, there is no doubt that contemporary states are still going through the evolutionary phase that the efforts of those years intended to highlight and deal with. If it was true that global market transformations were a key event at the basis of the differences between the 1997 and 2005 OECD guidelines, the *real world* reference that justifies a renewed interest towards improving regulations is explicitly mentioned in the foreword of the 2010 Draft Report on Regulatory Policy and the Road to Sustainable Growth<sup>76</sup>, since “the effectiveness of regulatory policy has been put to a severe test with the financial crisis and recent environmental disasters.”<sup>77</sup>

Good regulatory governance is perceived as an instrument through which three core objectives can satisfy three core needs: “the need for economic recovery and sustained growth [,] the need to manage increasingly complex policy goals [and] the need to regain the trust of citizens.”<sup>78</sup> Growth is still conceived as an imperative, since good economic performance increases state revenues, partly to sustain public debts and partly to support the maintenance of good levels of services. Particular attention is devoted to productivity, the increase of which is functional to the

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<sup>76</sup> OECD (2010), *Regulatory Policy and the Road to Sustainable Growth*, Draft Report

<sup>77</sup> *Ibidem*, p. 1

<sup>78</sup> *Ibidem*, p. 35

achievement of economic targets in a context of scarce resources, but at the same time it is seen as an effective way to tackle urgent environmental concerns, since innovation-based gains in productivity generally depend upon technological developments with lower impact on pollution. As for complexity of policy goals, it is basically produced by four dimensions: unpredictability of events, influence of political scenarios over capacities and organizational structures, lack of coordination between formulation and implementation and the emergence of trade-offs that limit policy coherence.<sup>79</sup>

The issue of trust is not new to our analysis, as I had already chance to see when analyzing the political and organizational rationale behind the rise of the regulatory state. The creation of regulatory and advisory boards to formulate or evaluate policies aimed at providing a response to disappointment, structural constraints and habitat change, as Lodge pointed out.<sup>80</sup> These three dimensions are all relevant to shape many government choices about how to regulate and they can be linked to each other:

- structural constraints call for a complete review of the way governments and states work, typically by means of the so-called structural reforms, whose salience significantly increased over the last decade;

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<sup>79</sup> Ibidem, p.36–7

<sup>80</sup> See note 32

- regulators require a high level of credibility and trust to formulate structural reforms, since they have a strong impact on economic and social systems, especially on a medium- and long-term perspective;
- to rebuild this linkage between government and citizens, the former must adapt to *habitat changes* and provide user-oriented instruments in order to detect direct feedbacks and enhance participation.

We cannot do but highlight that digitalization created a totally new habitat, providing its inhabitants with the *power of disintermediation*: a power that must not be feared by the institutions, whose goal should be that of strengthening the relationship with the citizen, while taking the opportunity to collect relevant material for dynamic adaptation of policies.

These elements, along with more typical aspects of rule-making and policy-making, constitutes the Regulatory Governance Cycle, that largely resembles a traditional policy cycle in its attempt to check the various stages from which new or revisited legislation derives. The adoption of a cyclical structured procedure is very helpful also in identifying key actors of a certain policy area and clarify above whom does a certain responsibility fall and how do different actors communicate and cooperate with each other.

In conclusion, there is a constellation of actors and logics around contemporary regulatory policy: successful reform must consider multi-level governance as well as overlapping and conflicting responsibilities in the case of complex policy areas, in a system that becomes *de facto*

centered on *openness*. Decision-making must be open towards citizens and stakeholders, among levels of government and among bodies with responsibilities in different areas of the governance cycle. Regulation is no longer seen as a sheer instrument to steer economic processes, because the realization of the public interest can no longer be measured only by indicators of economic success. The preservation of core principles of the rule of law, as well as the fundamental issue of environmental sustainability are two of the most relevant contemporary challenges. A systematic inclusion of these dimensions in regulatory policy trajectories will be an important step towards the achievement of trust and credibility in the relationship with citizens who have the opportunity and the will to be more active than ever. Along with the general trend, involving OECD countries as well as non-member states, strong relevance is given to the role of the European Union, where large scale integration challenges brought to the development of regulatory policy frameworks, aimed at fostering regulatory quality all along the policy cycle. Moreover, the multi-level governance structure deserves continuous analysis, to ensure coherence between supranational and national regulations and efficiency of implementation mechanisms that typically occur at local level. To do so, I will observe the diachronic path of European institutions towards the so-called *Better Regulation*, whose features have been briefly discussed in the introductory reflection on the definition of *quality*.

### 3. The emergence of Better Regulation in the European Union

If it's true that regulatory policy had an increasing influence on the development of national programs over the last four decades, "the nature and status of the European integration process constitutes a final, specifically EU-related factor accounting for the emergence of regulatory quality reforms at the EU level."<sup>81</sup> Allio identifies two structural issues that gave rise to regulatory policy structures: the *joint-decision trap* and the *blame avoidance* logic. As to the former, he observes that decisions "were more likely to be sub-optimal because of the need to obtain agreement between at least two levels of government"<sup>82</sup>, attributing some share of responsibility to the voting mechanisms, which required unanimity or highly qualified majority, creating a *de facto* fragmented regulatory outcome. The original reference to the joint decision trap was made by Scharpf<sup>83</sup> in a comparative analysis of German federalist system with the *Europeanist* project, aimed at a "deepening and widening functional integration"<sup>84</sup>. In such systems, he observes the tendency of national government to find agreements. In his view, optimization of decision-making processes is a direct consequence of the traditional assumptions of political philosophy regarding

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<sup>81</sup> Allio L. (2009), *op. cit.*, p. 41

<sup>82</sup> *Ibidem*, p. 41

<sup>83</sup> Scharpf F.W. (1988), *The joint decision trap: Lessons from German Federalism and European integration*, in *Public Administration*, Vol. 66/3, p.239-278.

<sup>84</sup> *Ibidem*, p. 241



the benefits of collective decision making against individuals' capacity to go beyond their specific interest. Moreover, the research of the right scale of government was at the basis of most institutional transformations of modern and contemporary states. As for the European Community, its status seems to be that of a "stable middle ground between the cooperation of existing nations and the breaking in of a new one."<sup>85</sup> The reference to Stanley Hoffman and to his reflections about the future of the nation-state and to the after-war experiences of supranational integration proves us that some of the concerns of the time – it was published in 1966 – are still relevant today, but the expected collapse of that model never took place: on the contrary, its apparent instability became its distinctive feature. As Scharpf himself noted in its 2006 revisiting of the original joint-decision theory, the progressive enlargement of European membership provides even more scope for what he calls a "joint-decision mode"<sup>86</sup>: based on the intuition that increasing complexity and fragmentation of interests may theoretically find a viable solution in a central body – namely the European Commission – in charge of analyzing local impacts and propose a common policy that would reduce or eliminate transaction cost, both in terms of time and of bargaining losses. In a more concrete view, "transaction costs still rise with the number of Member States and the diversity of their preferences [and] the good services of the Commission

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<sup>85</sup> Hoffman S. (1966). *Obstinate or obsolete? the fate of the nation-state and the case of Western Europe*, Daedalus Summer 1966, 862-915

<sup>86</sup> Scharpf F.W. (2006), *The joint decision trap revisited*, in *Journal of Common Market Studies*, 44(4), p. 850

will not help if the solution space is empty”<sup>87</sup>, that is to say that neither member states can always expect win-win solutions, nor budgetary constraints allow for a generous commitment to side compensations, here seen as an instrument to foster asymmetric agreements as a response to different state-level priorities.

As an integration to the joint-decision mode, which applies only to decisions that are taken by political actors, Scharpf cannot do but highlight the increasing salience of non-political decisions that directly affect legal systems and ultimately the lives of European citizens. The Commission itself is in charge of a series of activities that produce direct effects out of the regulatory pathways in which the Council and the Parliament are involved, while the European Court of Justice and the European Central Bank have autonomous powers that are not distant from the concept of policy-making in their respective fields. Without going deeper in the analysis of the concrete implications of these mechanisms, we must observe how their use can potentially undermine political systems, at European level as well as in member states where judgments or policy decision may produce effects that are very distant from the political will.

In conclusion, the fragmentation of the outcomes after complex decision-making processes and the excess of non-political interventions are the main threats to the overall legitimacy of the system that Allio highlighted as a causing factor for Better Regulation commitment. Along the same lines,

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<sup>87</sup> Ibidem, p. 851

blame avoidance can be seen as the other side of the coin when accountability schemes are cheaply defined. The conceptual basis of how and why political actors *shift the blame* of policy decisions has been already reviewed during the analysis of the regulatory state, following Fiorina's argument that benefits of blame-shifting typically outweigh the political and electoral damages. More than thirty years after, instruments for direct accountability of political and non-political actors have become pervasive, keeping up with the pace of institutional interdependence and multi-lateral policy dynamics.

Whether these evolutions had a positive or negative impact on the levels of trust and accountability may fall beyond the scope of this research, but the contribution of these factors to the development of the debate around possible pathways for regulatory reform is out of discussion. As Allio notes,

the aspect that was probably most relevant for changing the general mindset in relation to Better Regulation was the greater awareness that Europe is increasingly pervasive in people's live[s], and that more care had to be taken to bear the consequences of any intervention at the EU level.<sup>88</sup>

In light of what I have observed about the evolution of the OECD rationale on regulatory policy, the eminently technical and procedural nature of regulatory governance principles has been gradually complemented by the recognition of its potentially disruptive democratic value. Keeping

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<sup>88</sup> Allio L., *op. cit.*, p. 43

in mind this aspect could help regulators and administrators in doing their job while allowing them to keep in touch with the real-world effects of their choices:

the new mindset acknowledged much more the complexity of the world that public authorities had to manage as well as the need to fully respect the diversity of an enlarged Europe while committing to increasingly complex policy goals.<sup>89</sup>

The following paragraphs will be dedicated to the main steps of European institutions towards the current configuration of Better Regulation.

### 3.1 Early developments of regulatory policy

The issue of *regulatory reform* became part of the community agenda since the early 1980s in relation to the action program for the Single Market implementation. Nonetheless, “after an initial approach aimed at complete harmonization of national regulations through detailed European legislation”<sup>90</sup>, the Commission’s approach became that of “[moving] away from the concept of harmonisation towards that of mutual recognition and equivalence.”<sup>91</sup> The focus was mainly that of creating the best possible conditions for market mechanisms to work, complementing them with principles and strategies to cut regulatory costs and burdens.

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<sup>89</sup> Ibidem, p. 44

<sup>90</sup> Cavatorto S. (2001), *Unione Europea: Molto rumore per nulla*, in C.M. Radaelli (ed.), *L'Analisi di Impatto della Regolazione in Prospettiva Comparata*, Il Rubbettino editore, p.278 (personal translation)

<sup>91</sup> Commission of the European Community (1985), *Completing the internal market*, COM(85) 310 Final

The first acknowledgements of the need for structured effort to *regulate better* emerged at the times of the Maastricht Treaty with the so-called Sutherland Report<sup>92</sup>: the standpoint was still that of a regulatory activity that was mainly functional to Internal Market implementation on the wave of the 1985 programme. Subsequently, the report stays cautious about possible developments of policy strategy, explicitly stating that when case analysis does not produce evidence of direct links between national provisions and internal market operationality “the Community should not insist on legislation.”<sup>93</sup> Nonetheless, even mutual recognition activities should be complemented with adequate impact analysis, comparative options evaluation and consistency with basic criteria of “need, effectiveness, proportionality, consistency and communication.”<sup>94</sup>

While one-shot interinstitutional agreements provided some conceptual development in specific fields such as subsidiarity<sup>95</sup> or quality of drafting<sup>96</sup>, less attention was dedicated to the definition of a shared set of regulatory quality principles and standards. It must be said that the

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<sup>92</sup> European Commission (1992), *The Internal Market after 1992: Meeting the challenge*, SEC(92) 2044 of 28 October 1992 (“Sutherland Report”) [published as Supplement to the European Report, Nr. 1808 of 31 October 1992]

<sup>93</sup> *Ibidem*, p. 2

<sup>94</sup> *Ibidem*, p. 4

<sup>95</sup> *Interinstitutional Agreement on procedures for implementing the principle of subsidiarity*, OJ C 329 of 16 December 1993

<sup>96</sup> *Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation*, OJ C 73 of 17 March 1999,

so-called Molitor Report<sup>97</sup>, with its 18 proposals for regulatory policy review, touched most of the issues that are still relevant in current decision-making processes: “nonetheless, because of the lack of specific analysis on those issues, the report was considered too politically unrealistic, with a subsequent reduction of its effectiveness.”<sup>98</sup> Without going in depth with case-by-case review of the regulatory governance instruments introduced inside of each European institution, we shortly observe that the SLIM project (“Simpler Legislation for the Internal Market”) and the BEST (“Business Environment Simplification Task Force”) provided policy-makers with the first chance to introduce elements of *ex ante* assessment and *ex post* evaluation of policy programs, “considering the unnecessary obstacles and burden that hinder the development and entrepreneurship of European business.”<sup>99</sup>

If, on the one hand, we cannot deny that publications and provisions of those years highlighted many relevant issues and isolated fields of analysis that gradually complemented the basic principle of *enhancing the market*, on the other hand we note that

throughout the decade, nonetheless, the Commission’s approach to regulatory reform remained dominated by a legalistic approach, with great emphasis on legal drafting,

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<sup>97</sup> Molitor et al. (1995), *Report of the Group of independent experts on legislative and administrative simplification*, COM(1995)288

<sup>98</sup> Cavatorto S. (2001), *op. cit.*, p.281

<sup>99</sup> Allio L. (2009), *op. cit.*, p. 48

consolidation and codification of the *acquis* [...] Regulatory *quality* was not explicitly addressed and pursued.<sup>100</sup>

Some important steps were made after the beginning of the new millennium, when the Lisbon Agenda played an important role in defining a “strategy for further coordinated action to simplify the regulatory environment, including the performance of public administration, at both national and Community level.”<sup>101</sup> The concrete consequences of this commitment, together with the review of the so-called Mandelkern Report will help us in understanding how did the European approach to regulatory policy switch towards a mentality that is much closer to what may be defined, in the Commission’s words, “the establishment of a new legislative culture.”<sup>102</sup>

### **3.2 The emergence of a Better Regulation Agenda and the Prodi Commission**

One fascinating definition of Better Regulation is that of “a type of meta-policy targeting the governance of the regulatory process.”<sup>103</sup> On the wave of the 2000 Lisbon Council, a resolution was taken regarding “a mandate for the European Commission to propose a strategy for further

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<sup>100</sup> Ibidem, p. 50

<sup>101</sup> European Council, *Presidency Conclusions*, Lisbon European Council, 23-24 March 2000, Point 17

<sup>102</sup> European Commission (1997), *Better Lawmaking 1997*, Brussels, COM(97) 626 final

<sup>103</sup> Radaelli C.M., Meuwese A. (2008), *Better Regulation in the European Union. The political economy of impact assessment*, EVIA policy paper, p. 1

coordinated action on regulatory reform”<sup>104</sup>, which resulted in the 2001 White Paper on Governance. At the same time, member states created a group of experts, chaired by Dieudonné Mandelkern, in charge of producing a report on regulatory practice reform. Despite the report was not intended to be binding upon governments, since it was not an initiative of the Council, the effect on the cultural perception of regulatory quality was that of

a turning point in terms of solidifying the momentum for Better Regulation across the EU at the level of the member states, that had already been building up against the dual background of concerns about competitiveness and governance.<sup>105</sup>

Though the underlying spirit of these initiative looks quite similar, the Mandelkern report succeeds in sketching

an encompassing and systematic agenda for regulatory reform [that] covered both new and existing legislation, including rules for their implementation, as well as the organisational structure ensuring effective and accountable processes. [...] In the Mandelkern Report, core principles of Better Regulation were consistently converted into recommended action for EU Member States and the EU institutions.<sup>106</sup>

In the introduction to this research I emphasized the importance of a comprehensive definition of quality, to provide a consistent rationale for regulatory review and to foster a broader

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<sup>104</sup> Ibidem, p. 6

<sup>105</sup> Ibidem

<sup>106</sup> Allio, *op. cit.*, p. 54



communication of the positive effects of such activities. The merit of the Mandelkern Report is that of being unequivocal about the reasons that give legitimacy to the performance of structured regulatory review, making explicit the size and scope of these activities and providing detailed instructions for a possible regulatory review plan.

The executive summary of the Report states that BR “is a drive to improve the policymaking process through the integrated use of effective tools, not an attempt to impose further bureaucratic burdens on it”<sup>107</sup> and immediately blows away any potential doubt about the economic appropriateness of such activities, explaining that “its effective use will deliver welfare gains far in excess of any costs of governing in such an efficient way.”

As a consequence of the commitments the Lisbon process, cooperation among European institutions was a key objective that had to be enhanced by means of general provisions, such as annual reports on Better Regulation developments, joint training programs, establishment of quality indicators, involvement of national parliaments and institutions. As for the specific instruments that are typically associated with regulatory policy, the Report aims at compulsory impact assessment, effective consultation of citizens, the adoption of univocal simplification criteria at European and National levels, the enhancement of accessibility of regulations and, ultimately, the creation or improvement of structures to adequately perform Better Regulation

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<sup>107</sup> *Mandelkern Group on Better Regulation, Final Report, 13 November 2001, p. i*

policy activities. The document is very comprehensive and contains the review of a wide range of methodological tools, with a broad reflection on its peculiarities and to potential practical implications. Moreover, a whole section is dedicated to the EU-related recommendations, with peculiar attention to the implications of a supranational *acquis* and to the integration and transposition criticalities. The 1995 OECD Reference Checklist for Regulatory Reform, whose analysis was provided in the previous chapter, is also one of the Annexes of the Mandelkern Report and the *ten questions* are directly mentioned more than once in the text: apart from providing a useful conceptual framework, the checklist is considered a good basis for policy evaluation, be that an *ex ante* or an *ex post* procedure; at the same time, the extensiveness of the guidelines allows regulators to formulate comprehensive schemes for effective Regulatory Impact Assessment.

Though many reflections were made in the early 2000s, showing the definitive stabilization of Better Regulation in European agendas<sup>108</sup>, a serious and structural regulatory reform required – and still requires – “strong and continued political commitment”.<sup>109</sup> To this purpose, a key role was played by the Inter-Institutional Agreement on Better Law-making<sup>110</sup>, in which the Commission, the Council and the Parliament jointly recognized most of the priorities of the Better

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<sup>108</sup> A broad overview of the sectorial communications and publications mostly prepared by the European Commission can be found in Allio (2008), *op. cit.*

<sup>109</sup> *Ibidem*, p. 57

<sup>110</sup> *Inter-Institutional agreement on better law-making*, OJ C 321 of 31st December 2003

Regulation agenda, creating a potentially solid basis for shared procedures and practices. The agreement aimed at fostering transparency and increasing accountability of the actors in the decision-making process, while a set of article recognized and stimulated the achievement of regulatory quality as a priority, stating that “improvement of the pre-legislative consultation process and more frequent use of impact assessments (both ex ante and ex post) will help towards this objective.”<sup>111</sup>

On this point the document, although *fundamental*, “did not go beyond the existing status quo on several, topical aspects.”<sup>112</sup> Some could argue that the content itself of this Inter-Institutional Agreement, as well as the 2005 “Common approach to Impact Assessment”<sup>113</sup>, suffered the negative implications of the previously mentioned *joint-decision trap*. As it occurs for the negotiations between Member States when setting policy priorities and provisions, European institutions negotiate their respective roles and may claim some form of procedural veto power: from this point of view, some issues that were left vague on paper<sup>114</sup> *de facto* allowed the creation

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<sup>111</sup> Ibidem, Article 25

<sup>112</sup> Allio, L. (2008), *op. cit.*, p. 58

<sup>113</sup> *Inter-Institutional Common Approach to Impact Assessment* (2005)

<sup>114</sup> Allio refers to the concept of “substantive amendments”, which justifies and requires impact assessment, but it’s not properly defined in the 2003 agreement on better lawmaking

– or the preservation – of some discretionary power at various stages of the decision-making process.

In spite of this evidence, the coexistence of positive and negative effects of the overall process was undoubted<sup>115</sup>:

Better Regulation had been given not only greater political visibility than ever before, but also dedicated strategies, instruments and, to a certain extent, resources. Nonetheless, there was no clear and formal description of how the mechanisms for Better Regulation were organised. Roles and responsibilities were not clearly defined, and many initiatives and processes still overlapped.<sup>116</sup>

The attitude of the Commission in steering the process had proven “to be particularly open to new ideas on regulatory reforms generated in international organisations, academia, and think tanks”<sup>117</sup> and, as we will see, efforts towards openness and confrontation continued during the subsequent years of the Barroso Commission.

### **3.3 *Living in the material world*: Better Regulation and the Barroso Commission**

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<sup>115</sup> Good results of regulatory reform in the EU were advocated by the Commission in the 2005 Communication on Better Regulation for Growth and Jobs in the European Union

<sup>116</sup> Allio, L. (2008), *op. cit.*, p. 62

<sup>117</sup> *Ibidem*

For the first years of José Barroso's Presidency of the European Commission, the Better Regulation agenda undergone a partial conceptual reframing, aimed at transforming such policy tools into more concrete instruments to steer and support the decision-making process. Lofstedt<sup>118</sup> provided a very deep analysis of the transitional period, whose value is also that of showing us how an eminently technical instrument can change its nature according to the underlying political will. While he includes some references to the actors involved in the process, along with some political considerations concerning specific chairs and responsibilities that fall beyond the scope of our analysis, the lesson that we draw is that, as a response to the criticalities of the first comprehensive approaches to policy analysis, Better Regulation was "streamlined."<sup>119</sup>

A strikingly clear explanation was provided by Verheugen, Commissioner for the DG Enterprise during the first Barroso Commission:

Cutting red tape will be my trademark. Reducing red tape, removing unnecessary restrictions, screening the existing legislation – whether or not we still need it, whether we can simplify it [...]. We should not bring forward legislation without proper impact assessment.<sup>120</sup>

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<sup>118</sup> Lofstedt, R.E. (2007), 'The 'Plateau-ing' of the European Better Regulation Agenda: An Analysis of Activities Carried out by the Barroso Commission', *Journal of Risk Research*, Vol. 10, No. 4, 2007, pp. 423-447

<sup>119</sup> Ibidem, p. 426

<sup>120</sup> Verheugen, G. (2004) Press release: Enterprise Commissioner makes pledge to cut red tape, Brussels, 10th December

To give a systematic structure to all the activities related to Better Regulation, the overall strategy was divided into three *pillars*, whose features were defined by means of a series of top-down, policy-driven Communications<sup>121</sup>. We can briefly synthesize these pillars with three objectives: (1) improvement and extension in the use of impact assessment, (2) measurement and assessment of administrative costs and burdens and (3) screening of legislative proposals.

The most important commitment to the achievement of meaningful Better Regulation objectives is the 2005 Communication on *Implementing the Community Lisbon programme*. The document was aimed at launching a *rolling programme* to achieve the core objective of simplification. Curiously enough, the Commission felt the need to make explicit in the introduction to the document that

Better regulation is however not de-regulation. Simplification at Community and national level means making things easier for citizens and operators. In turn, this should lead to a more effective legislative framework which is better suited to delivering the policy objectives of the Community.<sup>122</sup>

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<sup>121</sup> On the specific implications of this point see the bibliography for the 2005 European Commission communications and guidelines

<sup>122</sup> European Commission (2005e) Communication: Implementing the Community Lisbon Programme: A policy framework to strengthen EU manufacturing-towards a more integrated approach for industrial policy, Brussels: European Commission (COM 2005 474 Final)

There is a common trait in most of the academic and institutional analyses of regulatory reform, especially since the beginning of the 1990s, which is the complex mix of feelings about what was called the *bonfire of the regulations*.<sup>123</sup> The concept is still tremendously salient in the British political and bureaucratic debate on regulatory policy, likely because of its evocative – for Ray Bradbury’s readers slightly dystopic – glamour. After the first public declarations coming from the *new* Commission about the intended objectives of 2005 plans, for instance, “the business think-tank Open Europe congratulated the President of the Commission Barroso on his ‘promise to build a bonfire of regulations’”<sup>124</sup> Although it may fall widely beyond the purposes of our research, the same definition came back more than once over the following years and gained a prominent role in the debate over the regulatory implications of Brexit.<sup>125126</sup>

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<sup>123</sup> This concept is traditionally attributed to Michael Heseltine, English politician who was actively involved since the 1980s in the harsh political debate on the size and scope of government, on the wave of the 1980s deregulatory policies of US and UK governments

<sup>124</sup> Radaelli, C.M. (2007), *op. cit.*, p. 193

<sup>125</sup> Without pretending to give a strong academic weight to this assumption, the metaphor was repeatedly used by independent agencies and groups of experts to express the risks of an incautious regulatory strategy to come out of European frameworks.

<sup>126</sup> About the tragic effects of a poor deregulation strategy, attention should be given to Applebaum, A. (2017), ‘The Grenfell Tower disaster gives Britain’s ‘bonfire of regulations’ a whole new meaning’, *The Washington Post*, Washington, 20<sup>th</sup> of June 2017

To conclude, a key issue generated by the 2005 evolutions of Better Regulation doctrine is the added reference to the key policy objectives of “growth and jobs”<sup>127</sup>, closely relating the supervision and updating of regulations based on predominantly economic criteria. The extended version of the commitment of the Commission states that

[the] policy objectives that we pursue need a comprehensive legal framework to foster growth and jobs by ensuring free movement in an integrated internal market while taking fully into account environmental and social concerns<sup>128</sup>

*De facto*, the most evident effect of the Barroso Commission on better regulation was that of “moving its emphasis from it being a constitutive element of good governance towards it being a support for policies boosting competitiveness”<sup>129</sup>. Moreover, Commissioner Verhuegen claimed that another important transformation of Better Regulation occurred with their new orientation, that is the switch from “administrative initiatives [to a new] *political* undertaking”<sup>130</sup>:

[r]ather than putting their faith in the slow and mostly invisible learning effects of impact assessment in its most integrated form, elected politicians opted for the possibility to make ‘concrete’ claims about the positive impacts on the GDP by drawing on the arsenal of tools

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<sup>127</sup> European Commission (2005a) Communication: Better regulation for growth and jobs in the European Union (Brussels: 16th March, (COM 2002 97 Final))

<sup>128</sup> *Ibidem*, p. 4

<sup>129</sup> Allio, L. (2008), *op. cit.*, p. 64

<sup>130</sup> *Ibidem*



that targets red tape, bureaucratic Europe, and hindrances to entrepreneurship. The scene for the war on administrative burdens was set.<sup>131</sup>

As the impetus of cutting the red tape spread across European Institutions, Radaelli reports one of the commitments of the EU Council in March 2012 to reduce administrative burdens by 25 per cent in five years. What is criticized by commentators is that the dominant approach of the time, based on a precise – but very narrow – estimate of the costs that were directly caused by administrative burdens, with very little consideration of the overall check of regulatory costs.<sup>132</sup>

As Allio argues in his review of the first steps of the Barroso Commission, “excessive emphasis on competitiveness and administrative burden might push the pendulum back from an issue of quality of regulatory activity.”<sup>133</sup>

As we will see, the popularity of administrative burdens reduction did not make impact assessment disappear. On the contrary, the importance of RIA was made explicit by the creation, in 2006, of the Impact Assessment Board, whose goal was to supervise and provide opinions on every impact assessment performed by the Commission. The creation of this control body guarantees the procedural and conceptual adequacy, helping to prevent disputes among different

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<sup>131</sup> Radaelli, C.M., Meuwese, A. (2008), *op. cit.*, p. 9

<sup>132</sup> *Ibidem*

<sup>133</sup> Allio, L. (2008), *op. cit.*, p. 69

DGs when decisions were to be taken<sup>134</sup>. Successive reconceptualization of Better Regulation and specific interventions will guide us to the current framework and to the main influences and challenges that regulatory quality is facing these days.

### 3.4 From Better Regulation to Smart Regulation and... back

The role of regulatory activity in the midst of a huge economic crisis could not be but crucial and its nature would be strongly related to the reasons underlying the eruption of critical structural conditions for states and markets. Since 2008, European institutions were embarked upon the initiative of understanding and strategically rethinking many fields including regulatory policy. The 2010 Communication on Smart Regulation was the response of the European Community to the events, providing a paradigm shift that starts from the acknowledgement that

markets do not exist in isolation. They exist to serve a purpose which is to deliver sustainable prosperity for all, and they will not always do this on their own. Regulation has a positive and necessary role to play. The crisis has highlighted the need to address incomplete, ineffective, and underperforming regulatory measures and, in many cases, to do so urgently.<sup>135</sup>

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<sup>134</sup> Please note here how this relational dynamic recalls the patterns of *nonjudicial legality* that we highlighted in Chapter 1 as meta-regulatory instruments.

<sup>135</sup> European Commission (2010), *Communication: Smart Regulation in the European Union, Brussels: European Commission*, COM (2010) 543 final

The framework of Smart Regulation had the main goal of “responding to the economic imperative”<sup>136</sup> and the Commission did so by consistently cutting administrative burdens<sup>137</sup> and by introducing further simplification instruments associated with a Multi-Annual Financial Framework. Since the largest of the economy is represented by and built upon SMEs, some instruments were introduced also to reduce the burden on microenterprises to its minimum possible size, following the *Think small principle*, also mentioned in Chapter 1 of this research.

Though the overall content of the Communication and the Commission orientation is not – and couldn’t have been – revolutionary<sup>138</sup>, awareness of specific issues related to regulatory quality seemed to have gained consideration in setting priorities. A taste of this change can be detected in the quotation above: apart from the implicit recognition of a market failure, the most interesting point is that regulations are no longer placed in the duality of effectiveness and ineffectiveness: a provision may be *underperforming* or even *incomplete*. These two dimensions opened up again a potential area for wide-ranging regulatory review and reform: while Lofstedt had revealed skepticism about the compatibility of hard administrative burden review and systematic “*softer* or

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<sup>136</sup> See for instance the title of the first section of European Commission, Communication on EU Regulatory Fitness, COM(2012) 746 Luxembourg, Publications Office of the EU

<sup>137</sup> The target of a 25% cut was met and exceeded.

<sup>138</sup> A convincing analysis of the dynamics of European Better Regulation can be found in Alemanno, A. (2015), ‘How Much Better Is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda’, *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015, pp. 344-356

*more qualitative* approach to Better Regulation”<sup>139</sup>, the European process seems to have moved precisely along that path, validating the hypothesis presented by Commissioner Verheugen that ultimately there was a chance to develop new pathways without significant *trade-offs*.<sup>140</sup> The understanding of how much the context shaped or triggered specific political responses would require a very different – yet still interesting – analysis. In any case, Smart Regulation principles recognized the value of the activities performed by the Impact Assessment Board as “ambitious and contrast[ing] with the narrower focus on costs or administrative burdens”<sup>141</sup>. Moreover, the President “reinforced its role further so that in principle a positive opinion from the IAB is needed before a proposal can be put forward for Commission decision.”<sup>142</sup> The ability of the IAB to be cross-cutting and provide integrated evaluations of all the key dimensions of policy formulation and impact assessment was proven by the significant amount of opinions provided to all policy areas.

Along with the commitment to systematic *ex-ante* assessment to support the adoption of well-designed policies, the Smart Regulation framework also attaches great importance to the key tool

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<sup>139</sup> Radaelli, C.M., Meuwese, A. (2008), *op. cit.*

<sup>140</sup> McLauchlin, A. (2006) Verheugen puts faith in Lisbon, *European Voice*, 16 March, p. 20, quoted in Lofstedt, R.E. (2007), *op. cit.*, p. 433

<sup>141</sup> European Commission (2010), *op. cit.*, p. 6

<sup>142</sup> *Ibidem*

of *ex post* evaluation, where *ex post* “covers all evaluation activities carried out following the approval of a measure.”<sup>143</sup> If we look at evaluation with a more concrete interpretation than pure analysis<sup>144</sup>, we observe that it could be aimed both at improving policy-making and at actually reducing regulatory burdens on citizens and firms. To achieve these goals, narrow one-shot evaluations may not be enough, while more strategic view could be effective in identifying urgent and highly *profitable*<sup>145</sup> policy areas. To do so, the Commission introduced some initial reference to the use of *fitness checks*, aimed at providing systematic review of whole policy areas. This function later gave birth to the REFIT Programme<sup>146</sup>, a project designed to reinforce the *smart regulation* tools and to realize a complete mapping of the European legal stock to identify unnecessary administrative costs. Special focus was given to the importance of a multilevel analysis, which entails a good understanding of the EU regulation as well as its application in Member States, with a quantitative estimate of burdens, costs/benefits and potential targets for reduction. As the Commission advocated at the beginning of Barroso’s second term, the concept was “to match its huge investment in *ex-ante* assessment with an equivalent effort in *ex-post*

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<sup>143</sup> *Ibidem*, p. 4

<sup>144</sup> La Spina A., Espa, E. (2011) *Analisi e valutazione delle politiche pubbliche*, Bologna, Il Mulino

<sup>145</sup> In terms of potential reduction of administrative and economic burden

<sup>146</sup> European Commission (2012), Communication on EU Regulatory Fitness, COM(2012) 746 Luxembourg, Publications Office of the EU

evaluation”<sup>147</sup>. Another important aspect that in order to guarantee a substantive implementation of the programme, the Commission also introduced the “evaluate first” policy, according to which, “in principle, the Commission will not examine proposals in areas of existing legislation until the regulatory mapping and appropriate subsequent evaluation work has been conducted.”<sup>148</sup> The adoption of such a methodology is, moreover, a strong endorsement to a circular reading of the policy cycle, where ex post evaluation tools could increasingly become the first step of new proposals, since they help in setting priorities and in providing an adequate contextual analysis in which new alternative proposals can rely on extensive reviews. As the Commission highlighted more than once, the most relevant aspect of the new package is that all the specific tools are interdependent and mutually reinforcing. Subsequently, they all contribute to build up a well-informed network to support an *evidence-based* decision-making.

With the advent of the Juncker Commission in 2015, a new comprehensive framework named ‘Better Regulation for better results’<sup>149</sup> was adopted. Curiously enough, we see a step-back to the use of the word “better”, while we don’t find a single use of the word “smart” in the whole

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<sup>147</sup> European Commission (2010), Communication on Smart Regulation in the European Union (COM(2010) 543 8 October 2010), Luxembourg, Publications Office of the EU

<sup>149</sup> European Commission (2015), *Better regulation for better results - An EU agenda*, Communication from the Commission to the European Parliament and Social Committee of the Regions, Strasbourg, 19<sup>th</sup> of May 2015 COM(2015) 215 final

Communication and it is used only once – with reference to the adoption of technologies – in 91 pages of Better Regulation Guidelines.<sup>150</sup>

The position of this Commission on the point is clear:

Better regulation is not about favouring certain policies or objectives over others. It is about being clear on the objectives, whatever they are. It is about ensuring that the policy solution is the best and least burdensome way to reach those objectives and it is about being honest about how well solutions are working. All significant impacts – whether positive or negative, quantifiable or not – should be analysed and considered<sup>151</sup>

This ambitious agenda intends to provide new or updated guidelines on a series of phases of the policy cycle: above all, a review of impact assessment, new provisions on *ex post evaluation* and an upgrade of consultation practices<sup>152</sup>. The introduction of three new consultation mechanisms in the decision-making process is one of the potentially innovative measures. The little and late involvement of stakeholders and citizens was one of the historical limits of policy making, to which the Commission decided to respond by introducing (1) consultations on roadmaps and (2) consultations on Inception Impact Assessment<sup>153</sup>. Given the preliminary nature

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<sup>150</sup> European Commission (2017), Better Regulation Guidelines, Commission Staff Working Document

<sup>151</sup> European Commission (2015), *op. cit.*, p. 6

<sup>152</sup> See Renda, A. (2015), 'Too good to be true? A quick assessment of the European Commission's new Better Regulation Package', CEPS Special Report No. 108, May 2015

<sup>153</sup> This instrument looks very promising, since it allows the stakeholders to know which indicators and options are being adopted for the impact assessment and to provide valuable contributions to a better definition.

of these two moments, we observe a sort of unbundling of the initial stage of policy formulation, allowing interested actors to provide their feedback on the very early conceptualization of policy issues, more than expressing opinions of an already-consolidated draft.

A report by Andrea Renda collects the first reactions of NGOs and stakeholders to the Work Programme of the Commission for 2015. If, on the one hand, many concerns were raised because of the large number of withdrawal and amendment proposals of existing regulations, the set of provisions that the Agenda envisaged to achieve its goal of being “big on big things, small and small things”<sup>154</sup> seems empowering not only because of the improvements of consultation and other procedures, as stated above, but also on a broader perspective. Just to mention, the efforts of First Vice President Frans Timmermans were focused on the approval of structural reforms like the review of the ‘Inter-Institutional Agreement on Better Law Making’, the creation of the REFIT Platform and the reform of the Impact Assessment Board.

Starting from the third, IAB was finally replaced by a new Regulatory Scrutiny Board (RSB). The main innovation is that the new organizational model requires membership to be a full-time work and that, also importantly, three of these members (out of six, plus one chair) must be fixed-

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<sup>154</sup> The first attribution of this motto is to President Barroso in 2013; afterwards, the same concept was repeatedly expressed by Jean-Claude Juncker in public speeches. Very interestingly, the latest reference can be found in the State of the Union 2018, where President Juncker sets the restitution of *clock-changing* powers to the national level as an extremely urgent priority.



term experts recruited from outside the Commission.<sup>155</sup> Moreover, the new Board is in charge of analyzing fitness checks in addition to the draft impact assessments that were already in the duties of IAB, “in accordance with the Commission’s policy on Better Regulation”<sup>156</sup>. The nature of this body, whose scope was significantly enlarged in comparison to the roles of its predecessor, has been seen as the outcome of a mediation between the claims for agency independency, coming from a number of countries<sup>157</sup>, and the traditional will of the Commission to keep regulatory review “within the perimeter of its treaty-defined right to initiate legislation.”<sup>158</sup>

This restructuring of the Board has been seen as an attempt to close the policy cycle<sup>159</sup>, putting the work of RSB at the basis of any new proposal, following the “evaluate first” approach that was introduced by the Barroso Commission and mentioned above in the review of the first REFIT provisions. Given the influence that such instruments inevitably have on the law-making process, the policy and political dimensions become increasingly intertwined, also raising some questions

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<sup>155</sup> An extremely innovative choice, in light of the historical attitude of the European Institution to leave all the responsibility in the hands of civil servants (see Chapter 1)

<sup>156</sup> European Commission (2015), Decision of the President of the European Commission on the establishment of an independent Regulatory Scrutiny Board, Strasbourg, 19.5.2015 C(2015) 3263 final

<sup>157</sup> Radaelli (see note below) mainly identifies Germany, the Netherlands and the UK as leading countries of this political trend

<sup>158</sup> Radaelli, C.M. (2018), ‘Halfway Through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say?’, JCMS 2018 Volume 56. Annual Review, p. 86

<sup>159</sup> Ibidem

about the legitimacy of the tendency to apply a political lens based on the degree of compliance of new policies with the approach of this Commission on subsidiarity and proportionality, as well as an ex ante evaluation on the – political, more than administrative – opportunity of bringing the provision through the articulated law-making process.<sup>160</sup> We appraise the ambitiousness of this mindset through the commitment of the Commission “to embark on both systematic ex-post evaluation and making evaluation the first step in the planning of new legislation”<sup>161</sup>, also applying all along the policy process “massive doses of consultation across the board, new platforms for stakeholders, fitness checks”<sup>162</sup> to seek also a direct and continuous relationships with all interested actors. On a more structural point of view, the step-by-step application of these criteria strongly asserts the pervasiveness of the Better Regulation Agenda in the formulation and approval of provisions from the annual work programme:

Today, more than ever, there is a need for sound preparations, evaluations and evidence-based policy-making. Any decision, any proposal must take into account all available facts and evidence in a structured and comprehensive way. The stakes are too high, the challenges too complex, to take any other approach. This is why Better Regulation underpins all the

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<sup>160</sup> Ibidem, p. 88

<sup>161</sup> Ibidem, p. 86

<sup>162</sup> Ibidem

Commission's work and continues to ensure that our proposals are based on the best available information.<sup>163</sup>

In light of the recent reviews that the Commission issued about the realization of the current Better Regulation Agenda, we recognize a series of innovative elements, as well as the persistence of a number of structural limits that curb the full realization of Better Regulation programs. To enhance and improve the linkage between the ex post evaluation and impact assessment, more and more effective tools are required, with a prominent role for evidence-based ones like REFIT. The importance of REFIT in this scenario is that the conjunction of evaluation and structural rethinking of pieces of the *acquis* is basically its founding principle, making its full implementation a core objective of Better Regulation strategies. As shortly mentioned above, the REFIT framework was reviewed with the new Agenda, which de facto divided the programme in two key areas: one dedicated to stakeholders and the other focused on keeping in touch with governments in order to effectively tackle administrative, legal and economic burdens.

To conclude, one last reference should be made to the inter-institutional issues that shape the European decision-making process. This review left aside the development of better regulation practices in other bodies of the EU, in light of the prominent role of the Commission in formulating proposals and of the peculiar balance among powers. As we outlined very shortly

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<sup>163</sup> European Commission (2017), *An Agenda for a More United, Stronger and More Democratic Europe*, Commission work programme 2018, COM (2017) 650 final, Brussels, 24 October

above, there had already been attempts at systematizing better lawmaking practices at inter-institutional level, but little progress was made in its initial stages. While control and review activities slowly consolidated also in Parliament and Council, different trends were observed: at Parliamentary level, the European Parliament Research Service (ESRB) produces analyses on the issues that are usually under the assessment of the Commission, applying some different lenses to follow the requirements of MEPs, that may deem relevant some specific indicators that the Commission had considered less<sup>164</sup>; on the other hand, the Council does not substantially provide a unambiguous response to the challenges of better law-making<sup>165</sup>. All in all, while the latest Inter-Institutional Agreement created a good conceptual framework and a bunch of good principles and commitments, creating sort of a *diplomatic* dialectic to create mutual accountability and reliability, little progress was made to obtain substantive procedural improvement of better lawmaking practices. As Radaelli points out, a series of political considerations and needs come out in day-by-day work, which causes friction among different views of Better Regulation and political stances of actors that were more interested in curbing powers of other bodies – especially the Council towards the Commission – than in actually implementing evidence-based dialogues

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<sup>164</sup> Radaelli (2018) also highlights some elements that show us how the degree of integration between the Commission and the Parliament is also low because of the lack of substantive information flows and the difficulty to get access to comprehensive reports of the regulatory review activities performed by the Commission

<sup>165</sup> This largely depends upon the “silos mentality” that characterizes the decision-making processes that take place in the Council, where different degrees of commitment depend on the policy field and on the actors involved in each specific configuration of the body

to find common pathways to the development of shared policies able to achieve concrete quality targets. With an eye to the future, we do recognize the recent progress of Better Regulation on many fields and in the collective perception. However, much effort is still required to reach the adequate level of intervention and – more importantly – a good balance between policy and political priorities, especially on the fields of *subsidiarity* and *proportionality*. The future of Better Regulation will strongly depend upon the conceptual and also organizational evolutions that will take place in the next years, starting from the role and autonomy of RSB and moving to the very puzzling issues of how to concretely enhance and possibly improve the Inter-Institutional Agreement and the subsequent policy-making equilibria.

## 4. Regulatory quality in Italy

### 4.1. Contextual remarks on the Italian legal and administrative framework

As we had the chance to observe in the chapter dedicated to the role of the OECD in the definition of the main criteria for regulatory quality, one of the most important contributions that this international institution had is that of performing continuous and detailed analysis on the processes taking place from time to time in member states. Without such contributions, it may be difficult to frame and synthesize complex transformations as institutional reforms, especially when they produce effects on such a wide array of policy areas and legal instruments. The 2001 work on “Regulatory Reform in Italy”<sup>166</sup> will thus be a cornerstone and a privileged point of view to catch the transformations of regulatory policy in the broader scenario of institutional reform.

As is often the case, existing institutions and their functioning is strongly related to historical patterns and cultural tendencies. If we exclude for a moment the most recent phase of our history, characterized by the explosion of convergence trends as a direct response to globalization, countries had always been largely influenced by their own experiences, with a lower propensity to adopt systemic changes. This was the case for key policy areas, for instance social security and

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<sup>166</sup> OECD (2001), *Regulatory Reform in Italy*, OECD Reviews of Regulatory Reform

health, and structural changes were extremely less frequent. By adopting this approach, we derive that many policy instruments, as well as the overall attitude of political systems and public administrators are inevitably affected by previous experiences, which in turn produce effects on legal instruments, political checks and balances and indirectly in the relationship between the state and the citizens. By the 1990s, when the first concrete attempts to reform the system took place, Italy was affected by “legal hypertrophy”<sup>167</sup>, caused by the

steadily increasing intervention [of the state] into economic activity from the 1950s through the 1990s, combined with a legalistic and overlegislated approach to public policy, resulted in a maze of detailed rules and rigid procedures, many of which were anti-competitive in effect, and could not be fully implemented by the public administration nor complied with by the public.<sup>168</sup>

Among the causing factors of this “excess of regulation”<sup>169</sup>, some key authors mentioned:

- a distorted use of the regulatory instrument “adopted for a day-to-day management more than for determining general criteria on a subject”<sup>170</sup>;

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<sup>167</sup> Ibidem, p. 145

<sup>168</sup> Ibidem

<sup>169</sup> For a detailed analysis, key sources are Sandulli, A. (1998), “La razionalizzazione normativa” in Vesperini G. (ed), *I governi del maggioritario: obiettivi e risultati*, Donzelli, Rome, and Cassese S., Mattarella B. (1998) “L’eccesso di regolazione e i remedi”, in Cassese, S. and Galli, G. (eds), in *L’Italia da semplificare*, vol. 1, Il Mulino

<sup>170</sup> Sandulli A. (1998), *op. cit.*, p. 32

- “the tendency to use new regulation as the only problem-solving tool”<sup>171</sup>;
- “the attitude to solve temporary issues with definitive regulations”<sup>172</sup>
- “the use of regulation as a way to protect specific interests of public administrations and private stakeholders”<sup>173</sup>

This tendency was inevitably amplified by the constitutional principle of the so-called *riserva di legge*, constitutional rooted in the fears of parliamentary representatives to experience again the effects of an authoritarian regime. Furthermore, poor mechanisms of accountability had been leading to high levels of corruption, and systems of overall control of regulatory frameworks were almost inexistent:

The rule making system has been controlled and managed on purely legalistic and procedural grounds. Except for overlapping legality controls by different bodies, regulations have had few preventive restraints on their possible impacts. [...] The practice of not eliminating previous laws and articles and the misuse of cross-references to other laws made it particularly difficult to understand the legal system.<sup>174</sup>

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<sup>171</sup> Ibidem, p. 33

<sup>172</sup> Ibidem

<sup>173</sup> Ibidem

<sup>174</sup> Ibidem, p. 149



All in all, legal hypertrophy had a negative effect “on the performance of governments, hampering the achievement of policies and causing indirect economic costs to the state”<sup>175</sup>.

If we look closely at the regulatory quality framework, setting aside all the other important fields in which the reforms of the late 1990s intervened, we observe that an Italian regulatory quality policy slowly emerged from the administrative simplification policies, where we saw “gradual transformation from a technical legal perspective concerning regulation into an overall approach to regulatory management and quality of regulations in terms of results.”<sup>176</sup>

#### **4.2 Getting on the Agenda: some isolated attempts**

We observed in Chapter 2 how the first concrete experiences of regulatory policy frameworks assigned to *ad hoc* bodies took place between the end of the 1970s and the first years of the 1980s. In Italy, apart from the cultural and political trend already mentioned above, the raising issue of regulatory control was not neglected at all. In 1978, the Superior Council of Public Administration addressed its concerns to the Presidency of the Council of Ministers to propose the introduction of a preventive instrument of broad regulatory analysis. Little or no attention was provided to

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<sup>175</sup> Sandulli, A. (1998), *op. cit.*, p. 33

<sup>176</sup> *Ibidem*, p. 31

technical coherence on issues such as reference to previous norms and cross-reference with regulations coming from other levels of government. Moreover, some authors raised the question of “ensuring administrative coverage of the laws.”<sup>177</sup> By coverage here the reference is to issues related to what we would define as *enforceability*, both in terms of organizational needs and of concrete possibility to enact the provisions. In a more modern fashion, the first point relates to the clause, which we can find in most documents issued by regulatory boards, regarding the adequacy of the instruments to achieve the objectives, while the second is more of a reflection on how a certain rule should integrate into the existing framework.

The so-called Giannini Report of 1979 – by the name of the Minister of Public Administration of the time – provided a detailed analysis of the structural problems of the Italian PA, among which he identified also the importance of verifying the enforceability of law:

Relating to administrative techniques a problem exists about the analysis of administrative enforceability of laws, which is particularly relevant here because of the abundance of Parliament and Regions yelling in form of regulation. Elsewhere, the problem is solved either by a non-written law which forces preventive analysis of the viability of each regulatory plan, or by the existence of a governmental office in charge of this control. [...] After finding or

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<sup>177</sup> Bettini, R., *Il circolo vizioso legislativo. Efficacia del diritto ed efficienza degli apparati pubblici in Italia*, Bologna, Franco Angeli, personal translation

training adequate staff, a good perspective would be that of establishing a specialized office under the Presidency of the Council of Ministers, or under other existing bodies.<sup>178</sup>

Together with the subsequent contributions of the Barettoni Arleri Commission<sup>179</sup>, these works created a strong conceptual framework for the development of the discipline of *legal drafting*, given the peculiar legal and technical dimension of the studies. However, we are already able to find some observations that may move the attention towards concepts resembling our conception of regulatory quality. In the assessment of the main causes of missing law enforcement, one of the points states that “some dysfunctional elements [...] are imputable to the legislative function and can be reconducted more to the field of regulatory effectiveness than to that of administrative efficiency”<sup>180</sup>. As a consequence, the commission called for a standardization of procedures “to prevent distortions caused by current singularities in decisional processes [...] even when the same subjects are involved.”<sup>181</sup> One last reference was even made about the difficulties, at the time, to assess “technical-economic feasibility”<sup>182</sup> of provisions, highlighting a substantial lack of

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<sup>178</sup> Giannini, M.S. (1979), *Rapporto sui principali problemi della amministrazione dello stato*, sent to Parliament by the Minister of the Public Function on 16th of November 1979, personal translation

<sup>179</sup> Commissione Barettoni Arleri, *Relazione della Commissione di studio per la semplificazione delle procedure e la fattibilità e l'applicabilità delle leggi nonché l'approntamento dei conseguenti schemi normativi*, sent to Camera dei Deputati on 17th of June 1981, personal translation

<sup>180</sup> *Ibidem*, p. 4

<sup>181</sup> *Ibidem*, p. 5

<sup>182</sup> *Ibidem*, p. 6

integration among economic accounting, preventive budget planning and specific expenditures related to each law. In the margin,

I highlight one interesting point that appears in the report, which is the analysis of organizational options for the establishment of the control body, whose name was intended to be Regulatory Feasibility Verification Office. This research guiltily overlooked the American approach to regulatory review, enshrined in a system in which these functions have always been performed by independent agencies. A good understanding of the process of *agencification* and on the historical patterns leading to that strategy would be a good starting point for further comparative analysis. As for the Italian case, the Barettoni Arleri report explicitly stated that the option of an independent body in charge of those *verifications* shouldn't have been completely off the table. However, "the option wasn't privileged [...] coherently with the objective of providing smoother solutions"<sup>183</sup>, recognizing that the definition of the legal status and the construction of the institutional relationship towards existing actors would have required a very complex regulatory effort: a control body structured in that way might have fallen under the blows of the mechanisms that itself was intended to supervise.

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<sup>183</sup> Ibidem, p. 22

### 4.3 On the highway to... Regulatory Quality: introduction and development of AIR

During the 1990s, Italy undertook a serious and comprehensive program of regulatory simplification based on a structured series of interventions on specific fields of administration and public policy. Isolated efforts during the 1980s showed how interventions on regulation wouldn't have proven successful without a comprehensive scheme of reform, encompassing specific and cross-referenced simplification for many policies related to each other. Most of administrative simplification was based upon the idea of providing a substantive *procedural* reordering, with some previous incomplete experiences showing how "it wasn't enough to achieve the (intermediate) target of a law authorizing government to deregulate and simplify [...] the concrete elaboration of procedural simplification rules was required, after which the real target of simplification could have been achieved."<sup>184</sup>

It must be noted also that

until very recently [the end of the 1990s, A/N], the Italian government carried out little justification of its proposed laws and regulations. The only *ex ante* control, in addition to the requirement of legality, consisted of a budgetary impact assessment imposed by the Constitution (Article 81).<sup>185</sup>

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<sup>184</sup> Cartabia, M. (2000), 'Semplificazione amministrativa, riordino normativo e delegificazione nella *legge annuale di semplificazione*', in *Diritto Pubblico*, 2, 2000, p. 387, personal translation

<sup>185</sup> OECD (2001), *op. cit.*, p. 166

The adoption in 1997 of a comprehensive set of provisions aimed at systematic reform of administrative activities<sup>186</sup>, also known as the Bassanini reforms, included the obligation for the Government to present to the Parliament an annual regulatory plan of deregulation and simplification, followed by the adoption of a set of measures in 1999<sup>187</sup> aimed at providing an operational framing to such purposes. Along with the annual review, further important measures were introduced, among which

- the creation of a *Nucleo* inside the Presidency of the Council of Ministers for simplification of norms, following Law n. 400 of 23<sup>rd</sup> of August 1988;
- provisions aimed at the adoption of the so-called *testi unici*, pursuing an objective of rationalization of the legal framework;
- the analysis of best choices to enhance stakeholders' participation in the simplification process – including economic, environmental, workers' and consumers' representatives – and, most importantly;
- the experimental introduction of AIR (Analisi d'Impatto della Regolamentazione).

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<sup>186</sup> Legge n.59, 15<sup>th</sup> of March 1997, *Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della pubblica amministrazione e per la semplificazione amministrativa*, (G.U. n.63 del 17-3-1997 - Suppl. Ordinario n. 56 )

<sup>187</sup> Legge n.50, 8<sup>th</sup> of March 1999, *Delegificazione e testi unici di norme concernenti procedimenti amministrativi - Legge di semplificazione 1998*, (G.U. n.56 del 9-3-1999)

This first document refers to AIR as an instrument to assess impacts “on the organization of public administrations, on the activities of citizens and firms in relation to schemes of regulation adopted by Government and by ministerial or inter-ministerial rules of procedure.”<sup>188</sup> The way in which impact assessment was intended to be adopted inside the regulatory process was later defined in 2000 by a directive of the President of the Council of Ministers<sup>189</sup>, along with the discipline of another regulatory review instrument, which is ATN (Analisi Tecnico-Normativa). Both the methodologies were to be produced as reports that had to be attached to regulatory proposals, either regarding ordinary law or ministerial level interventions, and were performed by DAGL, the Department for juridical and legal affairs of the Presidency of the Council of Ministers, whose scope was defined by the previously mentioned law n.400 of 1988<sup>190</sup>.

Although the research will mostly be focused on the features of AIR, I stress here the importance of ATN as an effective tool to guarantee high quality in the formal aspects of regulation, which in turn is a key dimension of a good piece of legislation. As we had the chance to see in the historical background of Italy, *legal hypertrophy*<sup>191</sup> had always been a key source of legal uncertainty,

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<sup>188</sup> Ibidem, art. 5, comma 1

<sup>189</sup> Direttiva del Presidente del Consiglio dei Ministri, *Analisi tecnico-normativa e analisi dell'impatto e della regolamentazione*, 27<sup>th</sup> of March 2000 (G.U. n. 118 del 23-5-2000)

<sup>190</sup> This law basically enhanced a huge rationalization process regarding bodies of Government and the organization of the Presidency of the Council of Ministers

<sup>191</sup> See *infra*

regarding horizontal, vertical and diachronic integration of regulations which hardly ever were taken into account by legislators. On the other hand, the analysis performed in Chapter 3 about the evolutionary nature of regulatory quality at EU level also showed us that the existence of a systematic approach of this kind – we may synthesize it as focused on legal drafting – is more functional to a consolidation strategy<sup>192</sup> of legal systems. When we move out of a purely legal context, the role of AIR acquires increasing relevance since more actors are involved in the policy process from time to time, and a comprehensive review of impacts is fundamental in guaranteeing transparency, efficiency and equity<sup>193</sup>.

The directive provides broad definitions and general guidance for the regulators that had to perform the analysis. First of all, AIR is conceived as an instrument to assess whether regulatory action is necessary and which options are available while its impact is assessed on administrations, citizens and enterprises, along with the principles stated in 1999. The key elements of this concept of AIR were (1) the objectives of the policy, (2) the alternative options on the table and (3) the analysis of expected benefits and costs.

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<sup>192</sup> See note 100

<sup>193</sup> Siclari D., L'analisi di impatto della regolamentazione (Air) nel diritto pubblico: premesse introduttive, in *Il Foro Italiano*, Vol. 125, No. 2 (February 2002), pp. 51-52



In a preliminary phase of the AIR process, proponent administrations had to send a preliminary report to DAGL, containing broad information about objectives and beneficiaries, a hypothesis of short-, medium- and long-term objectives, the presentation of alternative options – among which the *null* – and the suggested technical-legal tool.

After a dialogue between the *Nucleo* of DAGL and the proponents, the actual AIR document was to be prepared, containing a review of the previous phases, a simulation of the expected outcomes and a statement containing:

- the scope of the intervention, with directly or indirectly involved actors;
- the identified social, economic or legal needs, associated with the objective of the regulation;
- the analytical methodology for the analysis;
- the estimate of direct and indirect impact on administrations and firms;
- impacts on directly affected actors;
- impacts on indirectly affected actors.

In Annex C of the regulation, there is also a more detailed explanation of the various phases. In particular, we see that the operational guidelines required the adoption of specific sets of indicators to conduct a proper assessment of impacts and outcomes. The existence of quite focused guidelines and the potential dialogic nature of the decision-making progress made some authors define the

AIR methodology a *quasi-procedure*<sup>194</sup>: to validate this point, concerns were raised about the weakness of the provisions, the fragility of the overall design of the regulation, as well as the uncertainty and conceptual overload, caused by the fact that two directives were released on the same subject in less than two years.<sup>195</sup> To be fair, the second directive was intended to provide a partial reframing after the first experimental phase of AIR: moreover, the contents seem to address most of the structural concerns that were highlighted in the same year by the OECD Review on the Regulatory Reform in Italy. The aim of the new intervention was to

redefine and improve the testing of regulatory impact assessment on citizens, firms and public administrations, towards a gradual application to the whole regulatory activity of the Government, by significant enlarging the number of the *pilot cases* and the amount of training activities for civil servants regarding their future use of AIR.<sup>196</sup>

Subsequently, the main points were related to the definition of incremental steps to achieve a sustainable integration process of the policy tool. Moreover, the document introduced for the first time the concept of VIR (Valutazione d'Impatto della Regolamentazione), which was intended to be the natural *ex-post* phase of an integrated procedure of policy review. Some authors argued that

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<sup>194</sup> De Benedetto, M. (2004) 'Il quasi-procedimento per l'analisi d'impatto della regolamentazione', in *Studi parlamentari e di politica costituzionale*, p. 145

<sup>195</sup> On 21st of September 2001 the Presidency of the Council of ministers issued a new directive to address some structural and organizational limits that possibly emerged during the experimental first year.

<sup>196</sup> Direttiva del Presidente del Consiglio dei Ministri, *Direttiva sulla sperimentazione dell'analisi di impatto della regolamentazione sui cittadini, imprese e pubbliche amministrazioni*, (G.U. n. 249 del 21-09-2001)

this new directive was “more cautious than the previous one but, maybe, more accurate”<sup>197</sup> and highlighted that, also for organizational factors, the implementation of AIR had to be based more on a “learning by doing approach, with a prominent role for the Committee [steering group, A/N], which will provide *strategic guidance*”<sup>198199</sup>. Elsewhere, an *ex-post* review of the overall AIR policy framework concluded that these first provisions could have been located on the field of the so-called *symbolic politics*<sup>200</sup>, given their limited impact and the even lower degree of commitment showed by many interested actors.<sup>201</sup>

To summarize, critical views about these first innovations were not groundless: the optimistic comments provided by the OECD, especially in the context of broader administrative transformation, confirm that the introduction of the policy instrument was a good start for an

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<sup>197</sup> Speranza, M.F. (2010), ‘L’AIR nell’ordinamento italiano: una normative in evoluzione’, in *Diritto ed economia dei mezzi di comunicazione*, Anno X, numero 1/2010, p. 71

<sup>198</sup> Savini, G., ‘L’analisi di impatto della regolamentazione nella nuova direttiva del Presidente del Consiglio dei Ministri del 21 settembre 2001’, available at: [http://amministrazioneincammino.luiss.it/app/uploads/2010/04/14885\\_dpcm\\_savini.pdf](http://amministrazioneincammino.luiss.it/app/uploads/2010/04/14885_dpcm_savini.pdf)

<sup>199</sup> According to the 2001 Directive, the Committee was presided by the Minister of the Public Function and composed by the heads of (1) DAGL, (2) offices of Presidency of the Council of Ministers, (3) *Nucleo* and (4) Scuola Superiore della Pubblica Amministrazione

<sup>200</sup> As defined by Radaelli, C.M. (2008), ‘What do governments get out of regulatory reform? The case of regulatory impact assessment’, paper for the XV Conference of the Nordic Political Science Association, Tromso, Norway, 6-9 August 2008

<sup>201</sup> De Benedetto, M. (2010), ‘Tecniche di analisi della regolazione nell’istruttoria degli atti normativi del Governo: “niente (o assai poco) di nuovo sotto il sole”’, in Osservatorio sull’Analisi di Impatto della Regolazione, settembre 2010, available at: [http://www.osservatorioair.it/wp-content/uploads/2010/09/Paper\\_DeBenedetto\\_VIR\\_sett2010.pdf](http://www.osservatorioair.it/wp-content/uploads/2010/09/Paper_DeBenedetto_VIR_sett2010.pdf)

incremental development<sup>202</sup>; on the other hand, the potential success of regulatory assessment was undermined by a series of organizational changes, enacted by the Government in the following years.<sup>203</sup> As former minister Bassanini extensively observed, though there was no explicit repeal of AIR, the failure of implementation was caused mainly by lack of attention and fragmentation – or even suppression, in the case of *Nucleo per la semplificazione* – of almost every relevant institution or office that was involved in the process. In this phase, AIR was de facto “reduced to a series of generic *self-assessment* exercises performed by regulatory offices in charge of drafting the laws”<sup>204</sup>.

### **The S-curve of impact assessment: institutional impatience?**

An interesting theory of the evolutional trend of the implementation of RIAs in European countries was proposed by Bruce Ballantine in 2001<sup>205</sup>: the idea is basically that of an *S-curve* to argue that the growth of the benefits of RIA is not linear over time: on the contrary, some steps will show a clear increase while others are more useful to standardize a certain level of integration.

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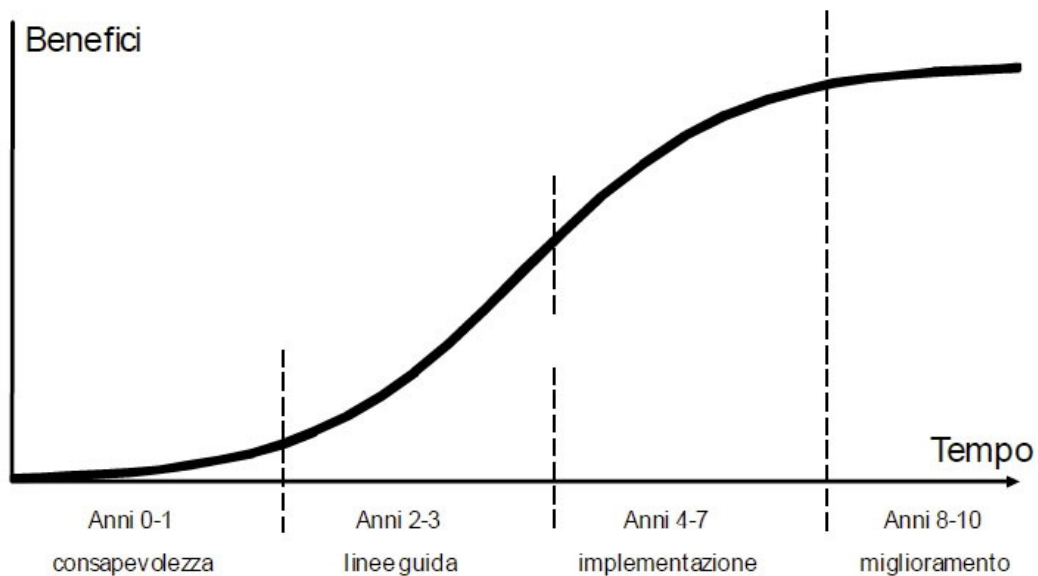
<sup>202</sup> OECD (2001), *op. cit.*

<sup>203</sup> For a detailed review of causes and consequences of this mindset change see Bassanini, F., Paparo, S. and Tiberi, G. (2005), ‘Qualità della regolazione: una risorsa per competere’, published in *Astrid-Rassegna*, n.11, June 2005

<sup>204</sup> *Ibidem*, p. 24

<sup>205</sup> Ballantine, B. (2001), ‘The Future of RIA in the European Union: Suggestions for the Institutional Design’, Seminario Internazionale sull’analisi di impatto della regolamentazione, Rome, Scuola Superiore della Pubblica Amministrazione, 15<sup>th</sup> June 2001

Moreover, he states that a fully implemented RIA system would not take less than 8-10 years to achieve its targets.



Fonte: B. Ballantine The Future of RIA in the European Union: Suggestions for the Institutional Design

The effectiveness of this model is strikingly clear and up to date, if we look at the timing of the reforms that took place in more recent times. The strength of this approach is that it constitutes a real-world model, able to include the natural – even inevitable – inertial trend of public administration as a core element, instead of just setting implausible training programs aimed at quick solutions.

Without any pretense of locking the whole RIA movement up in a single chart, it is useful to remember that this kind of process inevitably takes time and that those times are often incompatible with the political game. As Bassanini noted in the above-mentioned contribution,

the adoption and implementation of regulatory quality tools “cannot but have a *bipartisan* nature”<sup>206</sup> to guarantee a durable commitment. If we look back at the issues that we analyzed in this chapter and in the previous one, the main decelerations that we observe in the path towards better regulation took place when decision-makers didn’t show the will – or they didn’t have *political* time – to implement and gradually collect the results of the existing rule.<sup>207</sup> In the case of Italian regulation of AIR, we may shortly assess that the institutional path followed the first two steps outlined by Ballantine: the acknowledgment that regulatory impact assessment had to be included in the legal framework came shortly after the key contributions of OECD on regulatory reform, while the adoption of the directives with the guidelines took almost three years. Apart from the already-mentioned organizational constraints, we were never able to see the progress of that model: in 2005 a new regulation was adopted<sup>208</sup>, bringing the first phase of AIR to an end. The short comma of the 1999 law that defined the experimental nature of the subsequent directives was repealed and a new set of provisions that, according to Natalini and Sarpi<sup>209</sup>, intervened on the

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<sup>206</sup> Bassanini, F. et al. (2005), *op. cit.*, p. 13

<sup>207</sup> Here the reference is to the partial slowdown in the implementation of impact assessment at EU level after the new presidency in 2005; similarly, the lack of compliance with the 2000 and 2001 directives on AIR resulted *de facto* in a reboot of the framework based on the law n.246/2005 and the subsequent decrees.

<sup>208</sup> Legge n. 246, 28<sup>th</sup> of November 2005, *Semplificazione e riassetto normativo per l’anno 2005*

<sup>209</sup> Natalini, A., Sarpi, F. (2009), ‘L’insostenibile leggerezza dell’AIR’, in *Giornale di diritto amministrativo*, n. 3/2009, p. 229-239

issue in a “more incisive and prescriptive way.”<sup>210</sup> The review of the, along with a comparative perspective over the two most recent D.P.C.M., will allow us to outline strengths, weaknesses, while trying to understand possible opportunities for future improvement.

#### **4.4 The *State of the AIR***

As we had the chance to see in paragraph 4.3, the limits of the experimental regime of AIR were mostly identified as related to its *quasi-procedural* nature<sup>211</sup>, to the fact that some important elements were left vague on the paper – e.g. the reasons to concede the exemption of specific laws from the assessment –, and to the fact that a two-phased process as it was originally conceived was costly and complex. The Law n.246 of 2005 dedicates its Article 14 to the “simplification of the legislation”, introducing the new discipline of AIR and the official introduction of VIR, conceived as an instrument of periodical evaluation of the existing stock of regulation, aimed at verifying the achievement of targets as well as the *ex post* calculation of costs and benefits of a given provision. The Law demands to a subsequent Decree, adopted by the Presidency of the Council of Ministers, the definition of

- a) general criteria and procedures of AIR, including the consultation phase;

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<sup>210</sup> Ibidem, p. 293

<sup>211</sup> See note 176

- b) the substantial typologies, the cases and the procedures for the exclusion from AIR;
- c) general criteria and procedures, as well as the definition of the cases to which VIR is performed;
- d) criteria and general contents of the Report to Parliament<sup>212</sup>

The Report, following the prescriptions of the comma 10 of the same article, introduces a valuable element of accountability by stating that the DAGL, after collecting the data from all the interested administrations, sends to the Parliament a synthesis of the most significant elements related to the performance of AIR and VIR activities. Other important provisions that were introduced concern the attribution to the DAGL of a coordination role to support the administrations and, on the side of the latter, the task of identifying an office responsible for the internal coordination of assessments and evaluations. Though we can already see clear improvements, the largest part of the concrete effects of the instrument depends on the Decree of the Presidency of the Council in which most of the principles stated in the law find a concrete methodology and further explanatory arguments.

It took three years since the adoption of the law to see the first D.P.C.M. with the implementing provisions for AIR.<sup>213</sup> The punctual analysis of the text, performed by Natalini and Sarpi, provides

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<sup>212</sup> Legge n. 246, 28<sup>th</sup> of November 2005, Article 14, comma 5

<sup>213</sup> D.P.C.M. n. 170, 11<sup>th</sup> September 2008, Regolamento recante disciplina attuativa dell'analisi dell'impatto della regolamentazione (AIR), ai sensi dell'articolo 14, comma 5, della legge 28 novembre 2005, n. 246, (G.U. n. 257, 03-



fundamental contribution to the understanding and the critical review of the decree.<sup>214</sup> Among the most interesting innovations, the document establishes:

- for the analyses in which more than one administration is involved, the possibility to *share* some steps of the inquiry, assuring at the same time that every institution has to draw specific conclusions according to its objectives (Art. 3);
- the definition of the AIR model and its periodical review every three years as a maximum (Art. 4);
- the establishment of the criteria for the so-called *istruttoria*, including a phase of consultation with interested actors, based on proportionality, flexibility of tools and transparency of the procedures (Art. 5);
- the impossibility to include on the agenda of the Council of Ministers a proposal in which the AIR report is absent (Art. 7), apart from the cases of exclusion (Art.8) and exemption (Art. 9)
- Again, in Article 9, the exemption of a proposal from AIR in cases of necessity and urgency, but also in the hypothesis of an extremely high complexity of the provision; on the other hand, AIR is made always compulsory when Parliamentary Committees, the

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11-2008); The same provision for VIR came even after, with the D.P.C.M n. 212, 19<sup>th</sup> of November 2009 (G.U. n.24, 30-01-2010)

<sup>214</sup> Natalini, A., Sarpi, P. (2009), *op. cit.*

Council of Ministers or the *Inter-ministerial Committee of address and strategic guidance for simplification and quality of regulation*;

- a more specific guidance regarding the key contents – i.e. the number of AIR and VIR performed, the number of exclusions/exemptions, a focus on local authorities, independent authorities and of the European level –, to be included in the Annual Report to the Parliament (Art. 11)

In retrospective terms, also considering the Annual Reports of the following years<sup>215</sup>, many administrations took advantage of some vague statements to perform more-than-minimal impact assessments. The uncertainty of Natalini and Sarpi on the subject was not groundless<sup>216</sup>: in fact, they argued that *simplified* AIR would have required very specific criteria to achieve its target. On the contrary, the principle of proportionality stated in Article 5 – inspired to the European trends of more RIA resources for policies with a stronger economic impact – was at risk of being reversed and mixed with the budgetary and organizational constraints of the offices in charge of the assessment function. Likewise, they criticize Article 9 because it included the possibility to require an exemption from AIR for very complex and wide-ranging provisions: “in this way, the operational field of AIR would be limited, following opposite criteria than those of all the

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<sup>215</sup> A good example of critical review of the limits is, for instance, *Relazione sullo stato di attuazione dell’analisi di impatto della regolamentazione, anno 2012*, presented to Parliament on 26th July 2013

<sup>216</sup> Natalini, A., Sarpi, P. (2009), *op. cit.*, p. 234

developed countries, where the most relevant acts are evaluated in a more *intense* way.”<sup>217</sup>

Moreover, the new criteria for the presentation of alternative options in the AIR Report did not make significant steps ahead from the same provision in the 2000 directive. The lack of – even generic – quantitative comparison of options creates a potentially big confirmation bias, since regulators are considered already able to find evidence to support their preferred option. To have a good reference of the starting point, it is useful to mention the Annual Report on the implementation of AIR for 2006 – thus, it was before the adoption of the implementing act –, where it was stated that AIR reports were quite synthetic, “focused on the descriptive phase [while] much less developed is the proper evaluation, where the effects on citizens, firms and administrations should be assessed [...] hardly ever it’s possible to find a precise and motivated analysis of the alternative options.”<sup>218</sup> Natalini and Sarpi conclude their review of the 2008 regulation by recalling that all the first attempts of reform for regulatory quality in Italy failed because they were always adopted in times when OECD was reviewing the status of the discipline in Member Countries. Beyond the symbolic nature of having a regulation on impact assessment, political and administrative actors showed very little interest in the implementation of credible criteria of good regulation. On this basis they refer to AIR as *unbearable* and yet *light*. By

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<sup>217</sup> Ibidem, p. 235

<sup>218</sup> Relazione sullo stato di attuazione dell’Analisi d’Impatto della Regolamentazione, anno 2006, presented to Parliament on 13<sup>th</sup> July 2007, p. 11

paraphrasing Kundera's iconic novel, they simply argue that a non-fully implemented impact assessment system is light in the effects – recalling the formalistic nature of many AIR reports – while being heavy on public administration, that would have to perform this duty without having the necessary abilities.

The fact that some structural criticalities were not solved for the time in which the 2008 regulation was applied is confirmed by the comments that introduce the Dossier of the Senate on the new AIR and VIR regulation adopted in 2017<sup>219</sup>. We report them here:

- AIR wasn't used as an instrument to steer and support decision-making; on the contrary, the report was a mere justification of the basic reasons behind a predetermined choice;
- analyses and Evaluations were performed by regulatory offices, with little or no degree of involvement of high-level expertise coming from specific offices or departments;
- the concept of impact, as a consequence, remained on the legal field, with no use of quantitative methods of evaluation;
- AIR was performed on a too high number of provisions, making a detailed review of the most important ones impossible;

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<sup>219</sup> Senato della Repubblica. Servizio per la qualità degli atti normativi, Il nuovo regolamento in materia di AIR, VIR e consultazioni, a cura di Stefano Marci, dicembre 2017

- quantification of interested beneficiaries, introduction of credible alternative options and evaluation of impact on the markets were often performed in a very poor way;
- the use and spread of VIR activities were very low and mostly unrelated with the regulatory policy priorities.

As for the conceptual framework, the 2017 reform was inevitably inspired by the trends that were shown at international level. Already in 2012-2013, the DAGL reported to Parliament the will to reformulate the rules of AIR and VIR looking for the support of experts and academics.<sup>220</sup> While in the case of AIR five priority areas were identified, the poor development of VIR made the legislators think that a good solution could have been that of *imitating* the Regulatory Fitness Framework at EU Level, especially for what concerns the selection of the cases and the integration of the instrument in the wide process of regulatory review.

Almost five years later, the new regulation was adopted<sup>221</sup>, including in the same document both AIR and VIR with the respective consultation processes.<sup>222</sup>

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<sup>220</sup> Information contained in Relazione sullo stato di attuazione dell'analisi di impatto della regolamentazione, anno 2012, presented to Parliament on 26th July 2013

<sup>221</sup> D.P.C.M. 15<sup>th</sup> September 2017, n. 169, 'Regolamento recante la disciplina sull'analisi dell'impatto della regolamentazione, la verifica dell'impatto della regolamentazione e la consultazione' (G.U. n. 280 del 30 novembre 2017)

<sup>222</sup> The regulation of consultation procedures, only mentioned in the 2008 regulation, was never adopted

The key points of this new regulation are:

- a circular approach to policy-making, *de facto* linking the use of VIR with any subsequent AIR on the same subject and vice versa (Art. 2);
- six-month regulatory planning activities that administration must submit to the Government – urgent provisions are obviously excluded –, including objectives, planned consultations, requests for AIR exemption, the involved administrations, the required opinions, the timespan of the provision (Art. 4). Coherently with what we observed at European level, the Council of State suggested also the adoption of a preliminary report, stating that “AIR should be the first fulfilment right after the recognition, on the side of regulators, that a regulatory problem exists.”<sup>223</sup>
- the focus of AIR on regulations that have a significant impact on citizens, firms and administrations. To do this, the cases of exclusion were enlarged, including ratification of treaties, adoption of *testi unici*, reorganizational provisions concerning government and ministries (Art. 6);
- radically opposing the 2008 principle, exemption from AIR can be requested now when impact is particularly small in terms of (1) number of beneficiaries, (2) low compliance costs, (3) low level of public resources and (4) low impact on market dynamics (Art. 7);

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<sup>223</sup> Consiglio di Stato, Sezione consultiva per gli atti normativi, 19 giugno 2017, n. 1458

- with a similar mindset, the original orientation of 2008 to guarantee exemption from AIR to all decree laws – considering their supposedly urgent nature – gradually changed in the following years, also in light of the repeated requests from the Parliament to receive an impact assessment for those types of law. The new regulation introduces a shorter version of AIR for decree-laws, in which we should find the evaluation of the intervention in general and the main expected outcomes and impact – this modality is the only one exempted from the presentation of alternative hypotheses, now compulsory everywhere else (Art. 10).
- a two-year plan orients the VIR procedures, that should work on relevant policy areas: furthermore, VIR has to be performed also under request of Parliamentary Committees or the Council of Ministers
- initiatives to enhance transparency are based on the publication of most of the reports and documents related to the performance of AIR and VIR (Art. 12);
- for the instrument of consultation, the regulation states that they will be used in support of both AIR and VIR, to collect respectively critical aspects that may require regulatory intervention and, in the second case, evaluations and opinions on the effects of an existing regulation (Artt. 16-18). According to the specific needs, the regulation introduces open consultation and restricted consultation, where the first is accessible to interested subjects while the second involves people and stakeholders related to the policy area

- a renewed relational scheme towards the Parliament, made up of a more comprehensive scheme for the annual report, but also of some instruments to increase accountability (Art. 19). In this sense, all the provisions that are exempted from AIR will anyhow require a short reference to expected impact and alternative options.

As we can see, the overall structure does not significantly diverge from the emerging trends at EU level, while we saw a realignment to the *common path* of some specific choices that were made in the 2008 reform – namely the redefinition of the key criteria that a new regulation requires to obtain an exemption or an exclusion from impact assessment – while the most recent initiatives in terms of consultation, medium- and long-term evaluation planning and circularity of the policy cycle were integrated in the existing discipline. Lastly, a more explicit reference to the supranational multilevel strategy of regulatory review and governance was made in Article 11 – for AIR – and Article 15 – for VIR, in accordance with the 2012 law<sup>224</sup> on Italian participation to EU law-making.

In the background, we do not forget that some commitments result from EU principles and are included in the premises to the decree. While a comprehensive review of each of these principles

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<sup>224</sup> Legge n. 234, 24 dicembre 2012, Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea, (GU Serie Generale n.3 del 04-01-2013)



would deserve a specific analysis beyond the purpose of the review, we collect them to give an idea of some convergence trends regarding structural goals of regulatory activity.

Among these, the first and most salient is the so-called *test PMI*, which is nothing but the translation of those European principles, already mentioned above, for the application of the *Think Small Principle* aimed at the reduction to the minimum administrative burden for SMEs. Other measures encompass the strategies for the minimization of administrative burden, impact on competitive markets and, ultimately, the principle of the *minimum level of regulation*, also known as *gold-plating*. This is a key principle against regulatory proliferation and to avoid the distortions that typically come out of too rigid regulatory frameworks. The European Directive on specific issues states the adequate level of intervention following precise criteria: subsequently, this rule has a strong impact on AIR and VIR because, on the former, the AIR report has to justify potential violations of the minimum level; at the same time, on the latter, the recognition of a too high regulatory burden may be in itself a good reason to perform the analysis, since regulators may find an advantage in adopting less restrictive legal frameworks.

As it was stated in Article 3, a dedicated Directive would have regulated techniques and methodologies for both AIR and VIR. This Directive was adopted in 2018<sup>225</sup> and contains a

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<sup>225</sup> d.P.C.M., 16<sup>th</sup> February 2018, Approvazione della Guida all'analisi e alla verifica dell'impatto della regolamentazione, in attuazione del decreto del Presidente del Consiglio dei ministri 15 settembre 2017, n. 169, (G.U. Serie Generale n.83 del 10-04-2018)

comprehensive review of the subject and of possible ways to enhance quality of regulation by means of good practices. The *Guida all'Analisi e Verifica dell'Impatto della regolamentazione* (*Guida* from now on) is as explanatory as possible on the broader concepts of regulatory quality and policy cycle. Every technical and procedural step is enclosed into the circular representation of the latter, explaining the precise role of every report in the wider perspective of policy formulation and evaluation.

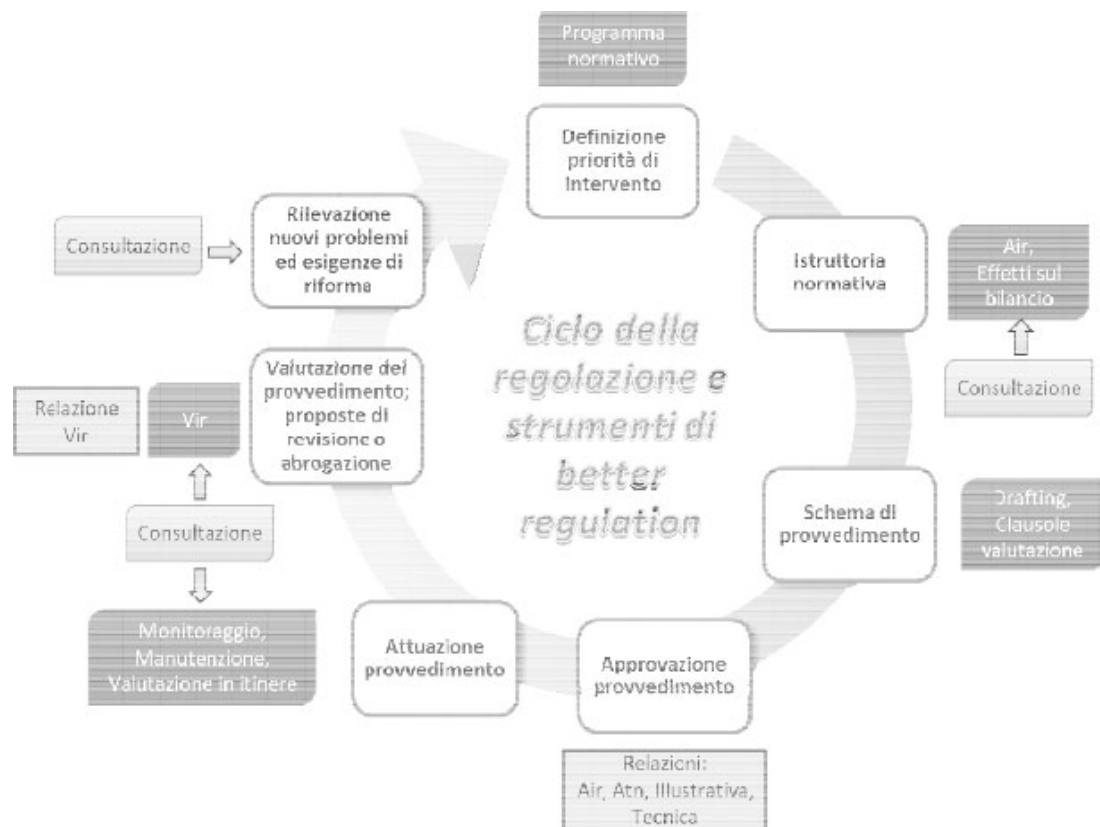


Figure 1: “Regulatory cycle and instruments for the quality of regulation”

While the structure and the logic of the *Guida* traces – inevitably – the structure of the regulation, some key points receive further analysis, both for conceptual and operational reasons,

since this document is intended to be the main instrument for public administrations to achieve a well-structured organization of regulatory analyses. As Antonio La Spina pointed out in a brief review of the key features of the 2017 regulation<sup>226</sup>, one of the potentially strongest innovations would be the acknowledgement, on the side of Ministries, that the offices in charge of assessing impacts should be in touch with ministerial experts able to provide an in-depth explanation of the profound meaning of the provisions, which may not be self-evident to technicians in charge of more “formal” evaluations. As the *Guida* points out, a good equilibrium between technical offices, relevant experts and, if required, external competencies are fundamental to carry out a comprehensive AIR and VIR.<sup>227</sup>

Another point in which the *Guida* provides clarification on a previously ambiguous definition is that of the *proportionality* principle: as outlined also above, this aspect was strongly associated with the idea that, since there were constrained resources, the quality and adequacy of the analysis would have been proportioned to the availability of personnel and money. On the contrary, the new guidelines look for a convergence with the European model, stressing the importance to devolve high quality analysis to those policies in which the expected impact is substantially higher.

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<sup>226</sup> La Spina, A. (2018), ‘La valutazione *ex ante* e il ruolo dell’esecutivo’, in *Rivista giuridica del Mezzogiorno*, Fascicolo 2, Giugno 2018

<sup>227</sup> See *Guida all’Analisi e Verifica dell’Impatto della regolamentazione*, paragraph 3, in G.U. Serie Generale n.83 del 10-04-2018, p. 9-10

In general terms, all along the *Guida* we can see how the rhetoric of circular policy-making has entered the public discourse and become a key to the interpretation of the administrative and political orientation to Better Regulation. Among other things, we see that VIR has explicitly become the last stage of AIR (Paragraph 5.1), that indicators – concretely measurable – are conceived as the intersection point between *ex ante* and *ex post* analysis (Paragraph 5.2), that consultation of stakeholders is acknowledged as providing fundamental support to all stages of policy formulation and control and that comparative analysis of alternative policy options should be a key step of every policy process, also in light of the longstanding negative attitude that transformed AIR in a mere justification of an *ex ante* preferred option, both at national and at supranational level. As for VIR, the most important aspect that is highlighted is that evaluation can be effective at the only condition of reconstructing the logic of the previous intervention, since only a complete understanding of which social, economic or regulatory aspects were targeted can allow administrations to assess whether a rule is obsolete, ineffective or incomplete. To support the discourse of interconnection of policy tools, the *Guida* focuses on the fact that, in theory, a good VIR comes out of a good AIR, because targets, logics and indicators should have been already written down. Subsequently, a parallel implementation and improvement of the methodologies should create a virtuous circle of best practices and an exponential improvement of overall quality of regulation.

## Concluding remarks

Our lives, our society and our decisions took place in a context of unprecedented openness. Culture, in its broadest possible meaning, is made up of reciprocal influences, shaped by the events and by the social storytelling that big social actors provide through more and more pervasive means of communication, influencing our paths and our future choices. Politics and policies do not make an exception: on the contrary, they play a prominent role in raising social issues, addressing social transformation and, ultimately, managing complexity.

This research, though explicitly expressing its interest towards quality of regulation in the European Union and in Italy, required to start far away from the precise issue and time of the analysis. As we had the chance to see in the previous chapters, the underlying principle of regulatory quality is strongly related to our idea of the state and of the rule of law: its features can be shaped by political views, as well as by economic concerns and constraints. Even specific instruments can be used to serve different purposes according to political and administrative orientations. First of all, I needed to outline a general reflection on what is quality and how does this principle work in the realm of regulation and policy-making. Reviewing the most relevant contributions to the theoretical understanding of the topic, I highlighted two useful conceptualizations: a methodological one and a cultural one. Firstly, quality can be appraised as a

*public policy*<sup>228</sup>, requiring the use of specific sets of tools and strategies; secondly, quality is a commitment<sup>229</sup> that regulators must make, in order to deliver effective regulation to citizens.

The following steps of the research encompassed an overview of the works of the OECD and of European institutions – primarily the Commission – to *look at the broader picture* of the framework in which regulatory policy is enshrined. To this purpose, I reviewed some key steps in the evolution of the discipline, as well as historical and institutional transformations that affected the role of regulatory policy in some ways. If I were asked to synthesize the historical pathway of good regulation from the initial stages of the *regulatory state*<sup>230</sup> to a systematized approach to regulatory governance all along the policy cycle, I would suggest that it basically needed to achieve two types of *legitimacy*: a *political* one and a *social* one.

Since the two concepts may sound overlapping, slippery and somehow deceiving, I add that political legitimacy is here presented in its *normative* and institutional interpretation, as proposed by John Rawls.<sup>231</sup> In the specific case, legitimacy would not be measured in the degree of authority exerted on citizens, but among institutions during the regulatory process. On the other hand,

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<sup>228</sup> Radaelli, C. M., De Francesco, F. (2011), *op. cit.*

<sup>229</sup> Increasing attention on the cultural mindset of good regulation entered the debate and the official statements of regulatory institutions

<sup>230</sup> Majone, G. (1997), *op. cit.*

<sup>231</sup> Rawls, J. (1995) 'Reply to Habermas', *The Journal of Philosophy* Vol. 92, No. 3 (Mar. 1995), pp. 132-180

social legitimacy relies basically on social acceptance, being closer to both the traditional Weberian concept of legitimacy and to the much more recent principles of *responsiveness* of regulation.

In Chapter 3, I reported a brief reference to some declarations of Commissioner Verheugen in the margins of the 2005 initiatives of the Barroso Commission on Better Regulation: he essentially defined the political nature of the instrument, in contrast with a pure administrative – in his view ineffective – approach. Leaving aside some political considerations of that agenda, predominantly focused on the fight to administrative burdens, he was not wrong on the specific issue. To produce significant effects, Better Regulation activities need to have a political dimension, in the sense that their prerogatives must take a precise place in the process and be in a continuous interaction with all interested actors. Thus, *political legitimacy* exists when the authority and autonomy of control bodies is recognized as that of an active and positive contributor to the improvement of policies. Among others, the experience of the Impact Assessment Board at European level provides a good example of how fruitful a consolidated and legitimate dialogue between regulators and evaluators can be<sup>232</sup>.

On the other hand, if *social legitimacy* depends upon *social acceptance*, most – if not all – of the relationship between regulators and citizens is built upon outcomes. The more regulatory

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<sup>232</sup> The effectiveness of the activities IAB was explicitly mentioned in the EC Communication on Smart Regulation (European Commission (2010), *op. cit.*) and is proven by the aggregate figures that can be found in the Annual Reports of the Board (now named Regulatory Scrutiny Board)

governance will be able to make sure that regulations are *fit for purpose*, the more citizens will be supportive of its methodologies and to medium- and long-term regulatory programs.

As we had the chance to see while analyzing the issue of regulatory quality in Italy, strong efforts were made only in recent times, increasingly recognizing the importance of formulating a regulatory policy framework over the last twenty years. I reconstructed the emergence and the evolution of regulatory quality mechanisms. The most important driver of the analysis will be the review of the recently adopted RIA framework, which substituted a previous 2008 text with more ambitious reform objectives. We will see how these provisions are going to integrate in the whole regulatory process.

One of the most relevant findings of this research is that national and supranational institutions are increasingly taking the road of evidence-based policy-making, which requires not only a strong commitment, but also an adequate level of resources and well-prepared staff, given the importance and the increasing resort to quantitative instruments to build solid indicators of regulatory performance; moreover, an investment in continuous and consistent data collection to support decision makers is largely outweighed by the benefits that it can produce.

The objective is that of guaranteeing responsiveness, transparency and accountability, not only to make sure that rules are well implemented, but also to gain a deep and durable legitimacy for the benefit of public administrations and, even more importantly, of the whole political system.



To recall the European Commission Work Programme for 2018,

[t]oday, more than ever, there is a need for sound preparations, evaluations and evidence-based policy-making. Any decision, any proposal must take into account all available facts and evidence in a structured and comprehensive way. The stakes are too high, the challenges too complex, to take any other approach.<sup>233</sup>

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<sup>233</sup> European Commission (2017), *An Agenda for a More United, Stronger and More Democratic Europe*, Commission work programme 2018, COM (2017) 650 final, Brussels, 24 October

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## Executive Summary

### Development trajectories of Regulatory Quality

Over the last three decades, the broad principle of *regulatory quality* was acknowledged by almost all the globally relevant political institutions as a core element of every governance activity. Since then, policymakers, scholars and politicians have had the puzzling task of finding a comprehensive definition of *quality*, either to build sharper policy tools or simply to understand how regulatory complexity evolves together with social complexity, keeping in mind that regulatory quality can be considered in all effects “a public policy, [thus] it can be appraised with the same conceptual methodological tools used for other public policies.”<sup>234</sup>

The starting point and the key assumption around which this analysis will move is that quality is not a monolith<sup>235</sup>: it can be observed from different perspectives, measured by numerous indicators and, most importantly, it is continuously affected by social, economic and political change. A widely shared definition of better regulation is that it is “an ongoing process”<sup>236</sup>, with a pervasive nature with regard to the whole policy-making process. On the basis of these premises, this master thesis aims at representing the development path of regulatory quality frameworks, starting from the more general contributions to the

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<sup>234</sup> Radaelli, C. M., De Francesco, F. (2011), *Regulatory quality in Europe. Concept, measures and policy processes*, Manchester, Manchester University Press

<sup>235</sup> Radaelli, C. M. (2009), ‘How context matters: regulatory quality in the European Union’, Paper prepared for the special issue of *Journal of European Public Policy* on Policy Convergence

<sup>236</sup> European Commission (2006), *Better regulation – simply explained*. Luxembourg: Office for Official Publications of the European Communities

discipline and then moving to a more specific review of the European and Italian levels, firstly introducing the current key objectives of the Better Regulation policy.

**Chapter 1** serves as an introductory reflection over the main articulations of the quality principle. I stress the importance of the underlying idea that regulation stems from complexity, either in a diachronic perspective or because of cross-national variability, stating that institutional models, as well as different constellations of interests, create unique balances of power. I review, following Radaelli, five different stakeholders, three of which correspond to the figures of *expert*, *bureaucrat* and *politician*, in their traditional ideal-typical conceptualization as proposed in 1971 by Graham Allison<sup>237</sup>. I also highlight how these three decision-making approaches are in a continuous interconnection and find specific configurations in institutional frameworks, introducing the European Commission and the independent agency models (i.e. OIRA in the United States) as examples. Moreover, the analysis points out that at least two other stakeholders take part to the regulatory process, which are the *citizens* and the *firms*, with priorities that can be different and occasionally at odds. Finding an equilibrium among such differentiated interests is one of the most challenging objectives of contemporary democracy: formal and substantial regulatory assessment will find stronger legitimacy through the inclusion of interested actors and will then support decision-makers with substantiated analysis of every policy option on the table.

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<sup>237</sup> Allison, G.T. (1971) *Essence of Decision: Explaining the Cuban Missile Crisis*, Boston, Little, Brown and Co.

I dedicate a paragraph to the hypothesis that Better Regulation can be conceived as “an instance of meta-regulation”<sup>238</sup>, presenting two theories that contribute to understand the possible rationales for regulatory policy. On the one hand, meta-regulation may follow the principles of *responsive regulation*<sup>239</sup>, while, on the other regulatory management process is a way to “manage the tensions between the ‘social’ and ‘economic’ goals of regulatory politics”<sup>240</sup> in the broader scenario of the so-called *nonjudicial legality*. Radaelli argues that Regulatory Impact Assessment, which is basically a set of *rules* that guides the formulation and evaluation of *all other rules*, is the most evident case of meta-regulatory framework.

Thus, I highlight is the potential link between RIA and the long-term legitimacy of the *regulatory state* and I move on with a review of the rise of the regulatory state and its main features, as it was extensively explained by Giandomenico Majone.

Regulatory State was basically a response to “increasing international competition and deepening economic and monetary integration.”<sup>241</sup> After a series of *government failures*, where nationalization programs didn’t get to achieve any substantive improvement of the economy. A new governance model was required to face economic challenges, and the one that succeeded in becoming a conceptual paradigm

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<sup>238</sup> Radaelli, C.M. (2007), ‘Whither better regulation for the Lisbon agenda’, *Journal of European Public Policy*, 14:2, 190-207

<sup>239</sup> Ayres I. and Braithwaite J. (1992) *Responsive Regulation. Transcending the Deregulation Debate*, Oxford: Oxford University Press

<sup>240</sup> Morgan, B. (2003), ‘The economization of politics: meta-regulation as a form of nonjudicial legality’, *Social and Legal Studies* 12(4): 489–523

<sup>241</sup> Majone, G. (1997), ‘From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance’, *Journal of Public Policy*, Vol. 17, No. 2, May - August 1997, p. 139

was characterized by “privatisation, liberalisation, welfare reform, and also deregulation.”<sup>242</sup> Three core reasons for the emergence of this new model can be isolated: (1) the failure of public ownership experiences, (2) the increasing interdependence of policy-making, with Majone referring to the most prominent example of European integration and (3) the shift from direct to indirect government, with the establishment of bodies in charge of performing structured regulatory policy activities. This delegation of authority can be seen as a response to the lack of expertise on the side of politicians, but also as a *blame-avoidance* strategy.

To complement this broad conceptualization, we also refer to the idea, proposed by Lodge, that “the rise of a regulatory state can be summarised by three factors: disappointment, strategic choice given structural constraints, and habitat change.”<sup>243</sup> While the first point depends on the difficulty that administrators and politicians have in achieving policy goals, the second point touches the issue of European integration and of the strategic choices needed to support the growth of the Single Market and the subsequent challenges. To conclude, the third point has a strong explanatory power: the lack of credible commitment by the state towards policy implementation and medium- and long-term objectives is a true source of uncertainty, to which governments react by creating non-majoritarian institutions, *de facto* creating a link between the risk society and the regulatory society, where integrated regulatory frameworks are created “at the same time in which social heterogenisation reduces collective identities and therefore problem-solving possibilities.”<sup>244</sup>

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<sup>242</sup> Ibidem, p. 143

<sup>243</sup> Lodge, M. (2008), ‘Regulation, the Regulatory State and European Politics’, *West European Politics*, 31:1-2

<sup>244</sup> Ibidem

I also try to observe, by introducing the trajectories of *policy interdependence*, the way in which regulatory policy evolved over time: intense lesson-learning and debate took place at national and supranational levels, transforming general commitments to quality into more and more inclusive methodologies aimed at supporting all phases of the policy cycle and guaranteeing good levels of participation, openness and accountability. Following the work of Fabrizio Gilardi, I isolate three different *vectors* through which interdependence can emerge: *policy diffusion*, *policy transfer* and *policy convergence*.

*Policy diffusion* occurs when “when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries”<sup>245</sup>, based on quantitative methodologies; *Policy transfer* looks at almost the same phenomenon in its qualitative dimension, since it refers to the case-by-case in-depth explanation of specific transfer choices.

*Policy convergence* tells us something about the outcomes of policy processes, since it is a way to measure whether and how much “policies become increasingly similar over time.”<sup>246</sup> This phenomenon stems from the evidence that countries are experiencing similar problems at social and economic level, and that this process occurs in a context of increasing internationalization of economies and legal systems.

In **Chapter 2** I look at the development of the OECD doctrine on regulatory quality, starting from the 1993 Occasional Paper in which we find a systematic review of existing regulatory checklists in member

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<sup>245</sup> Simmons B., Dobbin F., Garrett G. (2006), *Introduction: The International Diffusion of Liberalism*, International Organization 60(4):781–810

<sup>246</sup> Gilardi F. (2014), *Methods for the analysis of policy interdependence*, in Engeli I., Rothmayr Allison C. (eds), *Comparative Policy Studies Conceptual and Methodological Challenges*, Palgrave Macmillan

countries. The paper identified 7 key areas where regulatory checklists can produce positive effects and demonstrates that no country had a regulatory mechanism able to encompass all the areas: the lack of a comprehensive system to allow an effective implementation of such methods was identified a threat to the profound sense of adopting checklists. In 1995, the Council of the OECD issued the first recommendation on regulatory quality with the explicit aim of setting “the first international standard on regulatory quality”, based upon the activities of the Public Management Committee on Regulatory Management and Reform. The recommendation shortly highlights basic elements of regulatory quality discipline and presents the ten questions, included in the OECD checklist, that should provide regulators with a good level of confidence about the adequacy of the potential policy choice.

One of the elements that one should keep in mind when trying to understand the point of view of policy-makers and policy experts during the 1990s is the unprecedented transformation of markets and, more specifically, the need to manage “new” markets for those services that had always been under state control. The 1997 OECD Report on Regulatory Reform stated that “regulatory reform is more urgent than ever [and that a] fundamental objective of regulatory reform is to improve the efficiency of national economies and their ability to adapt to change and to remain competitive.”<sup>247</sup> Complexity requires a wide array of solutions, which may in turn be contradictory or call for each other: “deregulation of one area of the economy may itself produce the need for more regulation someplace else.”<sup>248</sup>

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<sup>247</sup> OECD (1997), *The OECD Report on Regulatory Reform: Synthesis*, Paris

<sup>248</sup> Rose–Ackerman S. (1990), *Deregulation and Reregulation: Rhetoric and Reality*, Yale Faculty Scholarship Series. Paper 597, p. 297

Almost a decade after, the conceptual framework of regulatory policy remained almost identical. Obviously, the issue was not abandoned: many studies were performed at country level concerning implementation and outcomes of the first experiments; at the same time, from the outside, an increasing participation of non-OECD countries to regulatory reform models confirmed the durability of the instruments. The 2005 developments paid more attention to a systematic institutional overview, to the adequacy of provisions to a continuously evolving scenario and to a concrete involvement of external actors, be that advisory bodies or stakeholders. Quality must be guaranteed at every level of government with a dynamic approach to “ensure that reforms are carried out in a logical order”<sup>249</sup>, with a specific reference to the need of coordinating market liberalization for sectors that are related to each other. With regard to Regulatory Impact Assessment, we can observe how the cautious approach to RIA of 1997 was substituted by a strong commitment to its methodologies in 2005. What emerges from a comparative reading is not a disruptive transformation of the way in which regulatory policy is conceived, since we identify a pattern of continuity, with slight shifts to adapt conceptual frameworks to societal evolution.

After the economic crisis of the last decade, good regulatory governance started being perceived as an instrument through which three core objectives satisfy three core needs: “the need for economic recovery and sustained growth [,] the need to manage increasingly complex policy goals [and] the need to regain the trust of citizens.”<sup>250</sup>

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<sup>249</sup> OECD (2005), *OECD Guiding principles for regulatory quality and performance*

<sup>250</sup> OECD (2010), *Regulatory Policy and the Road to Sustainable Growth*, Draft Report



Successful reform must consider multi-level governance as well as overlapping and conflicting responsibilities in the case of complex policy areas, in a system that becomes *de facto* centered on *openness*. Decision-making must be open towards citizens and stakeholders, among levels of government and among bodies with responsibilities in different areas of the governance cycle. Regulation is no longer seen as a sheer instrument to steer economic processes, because the realization of the public interest can no longer be measured only by indicators of economic success. The preservation of core principles of the rule of law, as well as the fundamental issue of environmental sustainability are two of the most relevant contemporary challenges. A systematic inclusion of these dimensions in regulatory policy trajectories will be an important step towards the achievement of trust and credibility in the relationship with citizens who have the opportunity and the will to be more active than ever.

In **Chapter 3** the focus is on the European path to the enshrinement and application of regulatory quality principles. If it's true that regulatory policy had an increasing influence on the development of national programs over the last four decades, "the nature and status of the European integration process constitutes a final, specifically EU-related factor accounting for the emergence of regulatory quality reforms at the EU level."<sup>251</sup> Here I introduce the reference to the *joint decision trap*, as theorized by Scharpf<sup>252</sup>, which brings us to the understanding that integration among different interests and systems has to be managed to prevent the systematic adoption of sub-optimal solutions, and that the progressive enlargement of the Union, along with the rising economic constraints, create further difficulties. The role of institutions like

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<sup>251</sup> Allio L. (2009), *op. cit.*, p. 41

<sup>252</sup> Scharpf F.W. (1988), *The joint decision trap: Lessons from German Federalism and European integration*, in *Public Administration*, Vol. 66/3, p.239-278

the European Commission in this context could be that of minimizing transaction costs for decisions that affect multiple actors. On a historical perspective, I move back to the early experiences of regulatory integration, observing the trends of the 1980s, where harmonization was more difficult and countries relied mostly on mutual recognition, while the first acknowledgements of the need for structured effort to *regulate better* emerged at the times of the Maastricht Treaty with the so-called Sutherland Report<sup>253</sup>. Few years later, the Molitor Report tried to set a comprehensive review of the most relevant issues related to regulatory policy review, but it was generally overlooked because it was considered politically unrealistic. Some important steps were made after the beginning of the new millennium, when the Lisbon Agenda played an important role in defining a “strategy for further coordinated action to simplify the regulatory environment, including the performance of public administration, at both national and Community level.”<sup>254</sup> In 2001, the Mandelkern report succeeded in sketching an encompassing and systematic agenda for regulatory reform [that] covered both new and existing legislation, including rules for their implementation, as well as the organisational structure ensuring effective and accountable processes. During these first years, the attitude of the Prodi Commission in steering the process had proven to be particularly open to new ideas on regulatory reforms generated in international organisations, academia, and think tanks, with positive effects on the conceptual development of the discipline; on the other hand, the realization of a well-structured approach required a stronger commitment especially on the political side of the regulatory process. Attempts in this direction were made during the years of the Barroso

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<sup>253</sup> European Commission (1992), *The Internal Market after 1992: Meeting the challenge*, SEC(92) 2044 of 28 October 1992 (“Sutherland Report”) [published as Supplement to the European Report, Nr. 1808 of 31 October 1992]

<sup>254</sup> European Council, *Presidency Conclusions*, Lisbon European Council, 23-24 March 2000, Point 17

Commission. If, on the one hand, the strong commitment of the European Commission to the mission of *cutting the red tape* resulted in more attention on administrative burdens and measures for competitiveness more than on quality of provisions, Better Regulation activities were structured on three pillars: (1) improvement and extension in the use of impact assessment, (2) measurement and assessment of administrative costs and burdens and (3) screening of legislative proposals. In 2006, an Impact Assessment Board was created to supervise and provide opinions on every impact assessment performed by the Commission.

Since 2008, European institutions were embarked upon the initiative of understanding and strategically rethinking many fields including regulatory policy. The 2010 Communication on Smart Regulation was the response of the European Community to the critical economic events of the time, introducing the issue that markets had to be managed in a sustainable way. The framework of Smart Regulation had the main goal of “responding to the economic imperative”<sup>255</sup>, for instance by introducing instruments of multiannual planning and burden reduction for SMEs. The role of the IAB was strengthened by the Commission because of its ability to be cross-cutting and provide integrated evaluations of all the key dimensions of policy formulation and impact assessment. Along with the commitment to systematic *ex-ante* assessment to support the adoption of well-designed policies, the Smart Regulation framework also attached great importance to the key tool of *ex post* evaluation, where *ex post* covered all evaluation activities carried out following the approval of a measure. As we can see, the framework has been

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<sup>255</sup> See for instance the title of the first section of European Commission, Communication on EU Regulatory Fitness, COM(2012) 746 Luxembourg, Publications Office of the EU

increasingly moving towards a circular approach to policy making, where *fitness checks* on existing regulations and impact assessments on new proposals must be cross-referenced and provide mutual support for the selected policy option.

The ambitious projects of the Commission continued with the current Better Regulation Agenda adopted by the Juncker Commission: we see this commitment both in the improvement and integration of the REFIT Platform and in the transformation of the IAB in a Regulatory Scrutiny Board with interconnected functions of supervision over *ex ante* and *ex post* regulatory review: all the specific tools are interdependent and mutually reinforcing. Subsequently, they all contribute to build up a well-informed network to support an *evidence-based* decision-making.

In light of the recent reviews that the Commission issued about the realization of the current Better Regulation Agenda, we recognize a series of innovative elements, as well as the persistence of a number of structural limits that curb the full realization of Better Regulation programs. To enhance and improve the linkage between the *ex post* evaluation and impact assessment, more and more effective tools are required, with a prominent role for evidence-based ones like REFIT. As for the Inter-institutional dimension, the latest Agreement between Commission, Parliament and Council created a good and well-structured conceptual framework, a bunch of good principles and commitments, creating sort of a *diplomatic* dialectic to create mutual accountability and reliability: on the other hand, little progress was made to obtain substantive procedural improvement of better lawmaking practices. Much effort is still required to reach the adequate level of intervention and – more importantly – a good balance between policy and political priorities, especially on the fields of *subsidiarity* and *proportionality*. The future of Better Regulation will strongly depend upon the conceptual and organizational evolutions that will take place in the next years,

starting from the role and autonomy of RSB and moving to the very puzzling issues of how to concretely enhance and possibly improve the Inter-Institutional Agreement and the subsequent policy-making equilibria.

In **Chapter 4** I propose a review of the Italian path towards the adoption of regulatory quality measures. By the early 1990s, legal hypertrophy was the biggest obstacle to economic growth and policy success in the Italian framework. The 2001 Country Report of the OECD highlighted the longstanding disregard of any form of regulatory control and review, with consistent damages on the economy and, more importantly, on the rule of law itself. Then I look for potential structural limits that impeded the adoption of such mechanisms and I moved to the analysis of the first concrete steps in the direction of regulatory quality policy. A paragraph is dedicated to the first studies, in the late 1970s and early 1980s, that highlighted the existence of a problem in the formulation, adoption and implementation of laws. Most of them were inevitably influenced by the experiences that were taking place at the time, especially in the United States, but recognized that the application of the agency model to a country like Italy was a difficult option. Anyhow, there was already the awareness that poor implementation had to be fought and that policy proposals had to be complemented with an adequate reflection over the economic and organizational feasibility of policy programs.

During the 1990s, Italy undertook a serious and comprehensive program of regulatory simplification based on a structured series of interventions on specific fields of administration and public policy. Most of administrative simplification was based upon the idea of providing a substantive *procedural* reordering, with some previous incomplete experiences showing how “it wasn’t enough to achieve the (intermediate) target of a law authorizing government to deregulate and simplify [...] the concrete elaboration of

procedural simplification rules was required, after which the real target of simplification could have been achieved.”<sup>256</sup>

The adoption in 1997 of a comprehensive set of provisions aimed at systematic reform of administrative activities<sup>257</sup>, also known as the Bassanini reforms, included the obligation for the Government to present to the Parliament an annual regulatory plan of deregulation and simplification, followed by the adoption of a set of measures in 1999<sup>258</sup> aimed at providing an operational framing to such purposes. Important innovations of this period were the creation of *Nucleo per la semplificazione*, the procedural guide for the adoption of *testi unici*, the evaluation of measures for stakeholders consultation, the introduction of ATN (Analisi Tecnico-Normativa) and, most importantly, the establishment of AIR (Analisi d’Impatto della Regolamentazione) as an instrument to assess impacts “on the organization of public administrations, on the activities of citizens and firms in relation to schemes of regulation adopted by Government and by ministerial or inter-ministerial rules of procedure.”<sup>259</sup> The first directive that regulated the performance of AIR conceived it as an instrument to assess whether regulatory action is necessary and which options are available while its impact is assessed on administrations, citizens and enterprises, along with the principles

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<sup>256</sup> Cartabia, M. (2000), ‘Semplificazione amministrativa, riordino normativo e delegificazione nella *legge annuale di semplificazione*’, in *Diritto Pubblico*, 2, 2000, p. 387, personal translation

<sup>257</sup> Legge n.59, 15<sup>th</sup> of March 1997, *Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della pubblica amministrazione e per la semplificazione amministrativa*, (G.U. n.63 del 17-3-1997 - Suppl. Ordinario n. 56 )

<sup>258</sup> Legge n.50, 8<sup>th</sup> of March 1999, *Delegificazione e testi unici di norme concernenti procedimenti amministrativi - Legge di semplificazione 1998*, (G.U. n.56 del 9-3-1999)

<sup>259</sup> *Ibidem*, art. 5, comma 1

stated in 1999. The key elements of this concept of AIR were (1) the objectives of the policy, (2) the alternative options on the table and (3) the analysis of expected benefits and costs.

The first structure included a two-phased analysis, in which administrations had to present to DAGL a preliminary review and then, after a dialogue with *Nucleo*, the final AIR report was to be prepared in accordance with a basic checklist of the issues that required specifications. Some authors defined the AIR methodology a *quasi-procedure*<sup>260</sup>, because of a series of limits in the coherence and effectiveness of provisions. The use and development of AIR procedures – and VIR as well, introduced in a second directive – stayed in an experimental phase because of a temporary step-back in the political commitment. Here I present an interesting model, proposed by Bruce Ballantine in 2001, which basically proposes that the benefits of RIA frameworks don't show a linear development because of the adaptation time of the administrations. Then I move to the most recent innovations on the field of regulatory review with a specific focus on AIR. The new AIR regime was established by a 2005 law and then two decrees regulated the way in which this procedure entered the law-making process. The first decree was issued in 2008 and introduced some important innovations, but also a series of serious conceptual limits because of which Natalini and Sarpi defined this provision *unbearable* and yet *light*, because high administrative costs did not bring significant improvements on the side of good regulations or administrative simplification. On the other hand, VIR was completely disregarded and the sporadic attempts were mostly unrelated to policy priorities.

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<sup>260</sup> De Benedetto, M. (2004) 'Il quasi-procedimento per l'analisi d'impatto della regolamentazione', in *Studi parlamentari e di politica costituzionale*, p. 145

The new regulation, released in 2017, aimed at tackling the inefficiencies that characterized the previous experiences, by providing more precise and consolidated procedures and setting a series of compulsory requirements to avoid formalistic regulatory assessments that do not contribute to the understanding and improvement of legal framework. Similarly, VIR was restructured to resemble the innovations that were introduced at the EU level by the REFIT programme and platform. As we can see, the overall structure does not significantly diverge from the emerging trends at EU level, while we saw a realignment to the *common path* of some specific choices that were made in the 2008 reform, while the most recent initiatives in terms of consultation, medium- and long-term evaluation planning and circularity of the policy cycle were integrated in the existing discipline. Through the introduction of *Guida all'Analisi e Verifica dell'Impatto della regolamentazione*, Government tried to provide a comprehensive document able to support the activity of administrations and finally consolidating the idea of regulatory quality as a constitutive element of the policy-making process.

The most important objective for the years to come will be that of guaranteeing a constant administrative and political commitment to these guidelines, with special reference to the need that quantitative analysis and, more generally, an evidence-based approach to policy review and policy formulations are fundamental not only in terms of fitness of regulation and effectiveness of measures, but also in terms of democratic legitimacy. Citizens and enterprises are waiting for more and more opportunities to express opinions and contribute to understand the complexity that modern policy-making must face. Only by means of responsiveness, transparency and accountability governments will have a chance to re-gain a deep and durable legitimacy for the benefit of public administrations and, even more importantly, of the whole political system.