

**HOW CONTEXT MATTERS:
REGULATORY QUALITY IN THE EUROPEAN UNION**

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Abstract

Regulatory reforms in Europe have focused on 'good regulation', 'better law-making', and most recently 'regulatory quality'. This article deals with the main instrument used by governments to achieve regulatory quality in the law-making process, that is, regulatory impact assessment (RIA). The article argues that quality means different things to different stakeholders. Thus the approach to quality cannot be monolithic. Different stakeholders bring different logics in the RIA policy process. Logics are shaped by context. Yet the notions of quality that circulate in policy-makers' circles are essentially insensitive to context. The result is that policy-makers who have tried to import RIA in European contexts (especially continental contexts) have found it difficult to scratch below the surface of new public management rhetoric and implement successful programmes. The argument here is not the trivial one that 'context matters' in the diffusion of RIA, but that we need to understand how it matters in terms of dimensions and mechanisms. Hence the article breaks down 'context' into four dimensions, that is, institutions, territory, theories of the policy process, and legitimacy. The conclusions balance efficiency and legitimacy, and formulate policy recommendations.

Keywords: Regulation, Regulatory Impact Analysis, Convergence, European Union.

1. BACKGROUND

This article starts from five simple observations.

- (1) All European Union (EU) countries and the European Commission have launched programmes for better law-making and regulatory quality. Regulatory impact assessment (RIA) is the main tool used by governments to achieve quality in the stage of formulation of legislation.
- (2) Although the concepts of quality and better law-making are somewhat elusive, and the blend of normative and empirical dimensions typical of new public management concepts does not help, it is possible to come to terms with some meaningful dimensions and levels. One can break down the elusive concept of quality, and even measure it.
- (3) There are several limitations in this exercise, however. Quality does not mean the same thing to different RIA stakeholders. Shortly, the approach to quality cannot be monolithic. Different stakeholders bring different logics in the RIA policy process.
- (4) The problem is compounded by the fact that context has shaped the diffusion of RIA from its North-American and Australian origins to Europe – a point that is

often neglected by the (so far hegemonic) ‘one-size-fits-all’ approach. The notions of quality that circulate in policy-makers’ circles are essentially insensitive to context.

- (5) The result is that policy-makers who have tried to import RIA from its original Anglo-Saxon context to other European contexts have found it difficult to scratch below the surface of new public management rhetoric and implement successful RIA programmes.

This article argues that quality is not a monolith. Indeed, quality is intrinsically linked to four dimensions of context. The argument here is not the trivial one that ‘context matters’ in the diffusion of RIA, but that we need to understand how it matters in terms of dimensions and mechanisms.

To put this article in the context of the issues raised by Knill and Holzinger in their introduction, RIA provides an example of the well-known syndrome of diffusion and convergence of discourse (all OECD countries support regulatory impact assessment) but very different practice (see the evidence provided by Radaelli 2001). Diffusion at the level of ‘talk’ has not yielded convergence in ‘actions’ and ‘results’ – to use the classic terms suggested by Brunsson (1989) and, more recently, Pollitt (2001). This article tries to explain why.

I first discuss RIA quality and present some approaches to its measurement. I then move on to argue that quality is different for different stakeholders, and show how contexts vary in terms of stakeholders and logics. Specifically, I focus on four dimensions of context that affect the process of transfer of RIA from its North-American birthplace to Europe. The four dimensions are ‘institutions’, ‘territory’, ‘policy process’ and ‘legitimacy’. The emphasis is on EU member states, although in some cases I will emphasise the peculiarities of EU continental member states.

2. REGULATORY QUALITY

Let us start with the somewhat elusive notion of quality. The convergence around this notion is striking. Both the OECD (1995;1997; 2002) and the EU (Mandelkern 2001;

Commission 2002a) have turned to regulatory quality as the cornerstone of regulatory governance. Indeed, a community of discourse has emerged around this term. In the EU, convergence around the discourse on quality has been supported by Council's working groups, the initiatives of DG Enterprise of the Commission, and the regular meetings of the Directors and Experts of Better Regulation programmes (DEBR). These meetings provide a venue for benchmarking exercises, discussion of best practice, and presentation of reports. DEBR is an example of diffusion of ideas by facilitated coordination (Bulmer and Radaelli 2004). DEBR does not aim to produce convergence by Community legislation or any other form of governance by hierarchy, but to facilitate convergence via learning. Ideational convergence in the EU is in turn supported by OECD activity. Actually, most of the ideas about regulatory quality arise out of OECD discussions, and DEBR provides a more EU-focused platform for the diffusion of the same ideas.

The current definitions of regulatory quality are not difficult to understand. Efficient, effective, coherent, and simple (that is, easy to understand) regulation is high quality regulation – the Commission argues in its official publications (Commission 2001) and even in its own tenders¹. In the UK, the 'better regulation task force' (an advisory body with an arm's-length relationship with the government) has recently re-defined its principles of 'good regulation'. The principles currently in use are proportionality, accountability, consistency, transparency, and targeting (that is, regulation focused on problems, with minimum side effects)².

Turning to a more systematic approach, one can look at regulatory quality in terms of its dimensions and tools. The main dimensions are the design of the process, activities and output, and real-world impact. The specific tools are the following:

- (a) Impact assessment (RIA)
- (b) Consultation, typically although not exclusively in the context of RIA
- (c) Simplification, often supported by impact assessment of the process to be simplified and of alternative options for simplification
- (d) Access to legislation and regulatory transparency
- (e) Ex-post evaluation of regulatory tools and institutions (for example, evaluation of how RIA units are performing).

¹ See for example the tender on indicators for regulatory quality, no.53-2003, DG ENTR.

RIA is the main tool used to achieve regulatory quality. Here the convergence across Europe is striking - at least at face value because RIA programmes are implemented quite differently, as will be shown later. All EU member states are committed to some form of RIA³. Simply, there is no government arguing for a different approach. Hence the convergence on the notion of regulatory quality (ideational convergence) is accompanied by convergence in the choice of tools.

Economists would look somewhat suspiciously to the concept of 'quality' and argue that the only meaningful benchmark is the efficiency of regulation. But there is some mileage in going beyond efficiency. Indeed, this notion of regulatory quality covers both process (consultation, transparency, accountability) and outcome, whereas efficiency is somewhat limited to outcome, and specifically to the impact of regulation on how economic resources are used in a given system. 'Quality' taps into the (still not entirely clear and normatively loaded, but certainly relevant for politicians and electors) world of 'good governance'. As such, it has more potential for political science analysis than regulatory efficiency. Finally, quality is neutral to the scope and size of government's activity – a point that the OECD has made in reply to the argument that regulatory quality is a pro-business, neo-liberal agenda. De-regulation has disappeared from the agenda of regulatory reform, at least in the EU. There are structural reasons that make the 'bonfire of regulations' (to paraphrase Michael Heseltine) conceptually and politically wrong (Majone 1990). Re-regulation has followed the liberalisation of several policy sectors in the 1980s and 1990s. Now the agenda is how to deliver high quality regulation, not to suppress regulation.

3. MEASURING QUALITY: INDICATORS AND TESTS

Let us turn from the debate in institutional circles to what academics say. There is scholarly work on how to measure the quality of economic analysis and risk analysis in impact assessment (Farrow and Copeland 2003; Hahn et al. 2000, Harrington, Morgenstern, and Nelson 2000, Harrington and Morgenstern 2003; Mihlar 1997. For

² See the website of the Better Regulation Task Force at <http://www.brtf.gov.uk/>.

a critical discussion of US indicators of risk regulation see Sunstein 2003). This type of work goes one step beyond, from definitions and broad dimensions of RIA quality to the actual systematic measurement of quality. It is to this body of work that we now turn, in order to examine the issues raised by measurement.

Roughly speaking, there are two approaches to the measurement of quality⁴. One is based on indicators targeting the dimensions and levels of quality illustrated above. Indicators have to be checked in terms of validity, reliability, and other properties: one has to make sure that an indicator is really a valid and reliable measure of the phenomenon we are trying to capture⁵. A possible second approach is based on tests.

Let us commence with indicators. Both the European Commission and the OECD are currently designing indicators of regulatory quality. One can follow the three dimensions of ‘design of the process’, ‘activities and output’, and ‘real-world outcome’ and develop an approach to the construction of indicators. ‘Real-world’ impact of RIA is difficult to measure, as impact assessment is only one component of the regulatory environment. In turn, the regulatory environment is only one of the variables affecting the overall dynamic efficiency of an economy. Alternatively, one can use indicators of real-world impact that measure change in the behaviour of RIA stakeholders. Indicators can be either subjective (i.e., perceptions of business) or objective (i.e., changes in the regulatory environment).

Turning to tests, Harrington and Morgenstern (2003) have recently looked at the quality of impact assessment by making a distinction among three different tests, that is, ‘content tests’, ‘outcome tests’, and ‘function tests’. A content test is performed on the data available at the time RIA was produced. One can also look at the presence or absence of economic analysis, for example whether assessments contain the discount rate, the baseline for costs and benefits, sensitivity analysis, and so on. Content tests

³ Hellenic Presidency (2003:8). Note however that there is no information on Portugal and France, and that some countries (Greece, Ireland, Italy, Luxembourg, and Spain) have not gone further than pilot projects of RIA.

⁴ The approaches are not mutually exclusive, as will become clear from the discussion in the remainder of this paper.

⁵ There is an interesting discussion of the properties of indicators in the literature on policy evaluation. See Shadish, Cook, and Leviton (1991).

can consider samples of RIAs (Hahn et al. 2000). Further, content tests can control for transparency, consultation, due process, and respect of bureaucratic procedures.

Outcome tests – Harrington and Morgenstern (2003:6-7) explain – are ex-post evaluations of quality of RIAs. Typically, an outcome test will measure the difference between ex-ante estimation of costs and benefits (of proposed regulations) and the actual costs and benefits (measured ex-post). Costs and benefits are not the only categories of data to consider in an outcome test. ‘Outcome’ can also be measured by collecting data on dynamic efficiency, distributional effects of regulation, the impact on innovation, and whether regulations have been fully implemented or not (Harrington and Morgenstern 2003:8-9). Finally, ‘function tests’ raise the question ‘does RIA make a difference’? Does impact assessment result in a better regulatory environment? One can make the questions even more complicated. For example, does RIA ‘educate’ the actors in the regulatory process? Does it raise awareness of regulatory innovations?

To sum up then, there is convergence of regulatory policy agendas around the idea of quality. In order to achieve it, EU governments are making use of RIA. Academic studies suggest how quality can be measured. Although the experience with tests and indicators of EU governments and the Commission is still in the early days, one can see how governments’ efforts towards measurement could in the future make the whole exercise more concrete. However, there is one important issue that breaks down this deceptively simple and linear logic. The issue is that there are different measures and notions of quality for different RIA stakeholders.

4. BREAKING DOWN THE CONCEPT OF QUALITY: DIFFERENT LOGICS IN THE RIA PROCESS

Drawing on a classic study of decision-making in international politics, Graham Allison’s Essence of Decision (1971), Farrow and Copeland (2003) argue that ‘quality’ can be interpreted in three different (yet not mutually exclusive) ways. There are at least three stakeholders in the RIA policy process, i.e., the ‘expert’, the ‘bureaucrat’, and the ‘politician’. One may want to add a fourth important

stakeholder, the ‘citizen’, and model her preferences. And finally, a fifth important ideal-typical stakeholder is the ‘corporate actor’ (the firm or business organisations).

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. Neither does the conventional wisdom try to model stakeholders in terms of preferences. Different stakeholders bring into the discussion diverse logics and criteria of quality and quality assurance mechanisms. More fundamentally, it is not clear what is the model of stakeholders implicit in the EU member states programmes on RIA. Are these programmes based on the assumption that politicians are rent-seeking, hence quality assurance mechanisms should target this problem? Or does ‘quality of RIA’ mean that a government is trying to curb bureaucratic power? Is RIA a tool to limit the power of business in the policy process or an instrument to provide more systematic access of corporate actors to the regulatory process? What do corporate actors want in a regulatory process? Efficiency or protection? Are they a unitary actor or in competition among themselves⁶? As shown by James (2002), the choice of a model of actor makes a whole difference in how governments regulate their own activity, and RIA is no exception.

Let us illustrate this with a simple three-stakeholder approach to indicators and quality, assuming that there are only the expert, who sees quality as efficiency, the bureaucrat, who sees quality as a matter of following proper and legitimate procedures in the regulatory process, and the politician. For the latter, quality may well mean responsiveness to pressure groups, the median voter, or even responsiveness to external pressure created by the EU, the International Monetary Fund, and so on.

The result is that one has to clarify the issue ‘quality for whom’ before one can measure it. In table 1, the logic of rational economic actors lends itself quite naturally to real-world indicators and function tests. In the end, a ‘pure’ economic test has to be a function test on whether the presence or absence of impact assessment stimulates

⁶ See Bernauer and Caduff (2004) on the complexities of modelling corporate actors.

growth, dynamic efficiency and other key macro-economic variables (controlling for other factors, of course). But the logic of economic analysis also makes room for checks on the predictive abilities of RIA. Given that systems of impact assessment cost money and institutional fatigue (people have to be persuaded, and regulators have to spend time in collecting data) there is an economic logic in asking the question whether ex-ante estimates are accurate - or just a waste of time. Content tests on the quality of economic analysis contained (whether RIA controls for competition and trade, for example) are also fully compatible with the logic of rational economic action.

Turning to bureaucratic logic, table 1 shows that this is most likely to be accompanied by indicators on activities-output, and content tests on whether all procedures were followed in the process. The political logic, instead, would most likely require indicators on specific activities affecting key groups providing support to politicians, such as consultation of small firms (assuming SMEs represent a support constituency for the politician), and indicators on administrative systems (a consultative body representing NGOs, if the politician draws support from them). Content tests following this political logic can be easily devised. Function tests would deal with economic variables that affect the popularity of the incumbent. One can submit that a politician willing to be re-elected will look at RIA as a means to increase competitiveness, growth, and in turn her own popularity. But as soon as our model of political actors varies, for example by moving from public choice models to public finance models (Frey and Eichenberger 1996), tests of quality for the politician will also vary.

Overall, the notion of 'good regulation' means different things to different RIA stakeholders. Moreover, the criteria used to evaluate success differ markedly (table 2). The politician uses consensus as main criterion, the bureaucrat conformity to rules, and the 'expert' efficiency. For the politician, success is evaluated in terms of the outcome of negotiations. The bureaucrat will define success in terms of following all legitimate processes and procedures. For the expert, the evaluation of success is based on whether the 'goals' have been achieved (effectiveness) and whether resources have been used optimally (efficiency). The logic of action is also different (table 2). The

bureaucrat follows the logic of standard operating procedures, the politician uses negotiation, and the expert draws on the logic of the social sciences.

Now, it is fair to say that RIA provides more leverage to efficiency and empirical social sciences than to other criteria and logics. Yet in real-world regulatory policy processes, the three criteria and logics interact continuously. The expert, the politician, the bureaucrat, the citizen, and the corporate actor are ideal-types. Real-world RIA shows women and men who share some of the characteristics of the expert, some features of the classic Weberian public officer, and also take into account political considerations. Take the case of the European Commission. Its political role in the EU policy process is clearly stated in the Treaties. The logic of the Commission cannot be confined to the classic Weberian logic. It is the logic of a political body with its own political agenda –a body which also shares some of the characteristics of the ‘expert’ and, of course, the ‘classic civil servant’. Ideal types are useful because they show how criteria and logics interact all the time, and how different constellation of ideal-typical stakeholders provide radically different contexts for RIA diffusion.

5. FOUR DIMENSIONS OF CONTEXT

To sum up then, quality is not a monolith. It is a discursive domain where different logics and criteria interact. This explains the variability of results in the diffusion of RIA in Europe. Depending on the constellation of logics and criteria, ideational convergence produces divergence in terms of how RIA is carried out throughout the EU. We need to enter context to account for divergence then. Context matters in processes of transfer and trans-national policy learning: the ‘other conditions’ are not ‘equal’ (Rose 2002; on RIA see Radaelli 2001). In this Section I will show how context matters by breaking it down into four dimensions. I define them by using the simple labels of ‘institutions’, ‘territory’, ‘policy process’, and ‘legitimacy’.

5.1 INSTITUTIONS

The first (obvious) dimension deals with the role played by the institutional and administrative context in the diffusion of RIA. In its original institutional context –

that is the US context – impact assessment is produced by independent regulatory agencies monitored by the Office of Management and Budget via the Office of Information and Regulatory Affairs (OIRA). This is a regulatory context characterised by delegation of regulatory powers to non-majoritarian institutions. The institutional context is based on sector-level, specialised policy-making. RIA is an instrument for discussions at the level of sectoral policy networks (environment, health and safety, food regulation, etc.). The legitimacy of the regulatory process is not based on parliamentary control over the government but on the credibility of executive agencies (Majone 1996). The bureaucratic context is one in which agencies and OIRA are well-staffed in terms of professional economists. The dominant criterion is efficiency and the main logic is technical. Negotiation and standard operating procedures are not absent, but they are not overwhelming. Indeed, when negotiation among agencies, regulated firms, and committees in Congress has historically become the dominant logic, this has been seen as a pathology of the system – and referred to as ‘agency capture’.

In the EU, the institutional and bureaucratic contexts are quite different. RIA is still a document for technical discussions at the level of sectoral policy networks, but, most importantly, it is a communication tool between the government and the parliament, and between government and citizens. The ‘regulator’ performing RIA is not an independent agency, but a Minister reporting to the cabinet. Surprisingly enough, most independent regulators in Europe have not even been requested to perform impact assessment. Only very recently did countries like the UK and Italy introduce RIA as a duty of independent economic regulators.

The EU bureaucratic context is one characterised by generalist civil servants or bureaucrats trained in public law. Efficiency still comes second to formal respect of legitimate procedures in the list of criteria used by bureaucracies in countries like France, Germany, and Italy. Almost invariably, they ‘read’ RIA in terms of formal (as opposed to substantial) legal logic and conformity to other rules and processes. Not only does the logic of negotiation dominate the behaviour of Ministers engaged in impact assessment, it also characterises the interactions between public administration and pressure groups, and between civil servants and politicians (with the Minister, for example, and her-his cabinets).

This means that hybrids, creative adaptations, and metamorphoses abound in the diffusion of RIA to Europe (especially continental Europe). Countries with corporatist institutional patterns (like Denmark) have re-interpreted impact assessment as yet another instrument of negotiation and social ‘concertation’ (Radaelli 2004 for details). This is why in some countries RIA does not produce a final set of figures showing if the benefits justify the cost of the proposed regulation, but rather a set of partial estimates that are then used by policy-makers in a ‘mode’ that is more ‘negotiation’ than ‘technical analysis of options’.

5.2 TERRITORY

The second dimension is territorial. In the European Union, the territorial dimension of RIA is associated to multi-level governance. Quality in this context is the challenge of coordination (and, when useful, competition) of RIA systems that operate at two (domestic and EU) and often three (sub-national, national, and EU) levels-jurisdictions.

In itself, lack of coordination across levels of governance is not a problem. It depends on whether it stimulates healthy competition or dull emulation. The major problems, however, are at a more specific level of analysis. They are well illustrated in a paper by Sarpi (2003).

Here is a simple illustration of dilemmas that have not been addressed so far. To begin with, we know that impact assessment does not perform well when distribution of costs and benefits is a serious issue. At the EU level, distributional conflicts are bound to arise quite frequently. Most EU proposals for regulations penalise some sectors, or some types of firms, and advantage others. Certain sectors or certain types of firms are statistically more represented in some EU member states than in others. This is why some governments like the UK have specific guidelines on how a government should monitor the evolution of proposals (and thus monitor EU RIA) via domestic assessments⁷.

⁷ See the ‘European regulation’ checklist on the website of the cabinet office (<http://www.cabinet-office.gov.uk/regulation/Europe/eurodocs/EuroChecklist.pdf>).

The question is what criteria and logic should be used in this process? If a country like, say, France, predicts (via a French RIA) concentrated losses for key French sectors arising out of a proposed EU regulation still at the stage of impact assessment, what is the best way to insert this aspect into the design of EU-level RIA? What happens to be boundaries between technical and political logic in this situation? Shouldn't political-negotiation issues be left for discussion in the Council? Or do we expect the Commission to become a broker of political positions disguised under the technical language of RIA?

Textbook cost-benefit analysis would suggest the use of distributional weights. EU legal scholars would look at the principle of proportionality. However, this simply moves the problem one step forward without solving it. What kind of political process can best measure and assign weights and assess proportionality? In a sense, it is the same dilemma one encounters when national RIAs affect regional interests. Some forms of compulsory 'distributional accounting' can be used to make explicit the range of regional interests affected by higher-level RIAs (see Sarpi 2003). The Scottish executive envisages some forms of interaction with the UK government to make sure that concentrated losses and other distributional problems are visible and explicit in the formulation of UK regulations. This is of course easier at the level of institutional relations in the UK than in the context of an enlarging EU.

Anyway, once distributional problems have been made explicit, they have to be brokered. This may bring the technical and political logic to a clash. The conventional wisdom of RIA as technical exercise based exclusively on efficiency does not provide any useful answer.

Another tricky issue is about techniques and methods. Sarpi (2003) notes that different levels of governance may use different approaches to assessment. Indeed, some EU member states rely on compliance cost assessment, others on checklists, and a few on full cost-benefit analysis. What happens when different governments participate (through their own analysis of EU proposals) in an exercise like the formulation of EU impact assessments with different methodological voices? Is this a recipe for cacophony? Do we need minimum standards for the analysis of impacts? Or harmonisation of techniques?

Different methods may also result from different values – Sarpi (2003) concludes. Look at the discount rate. One can guess that the Estonian or German discount rate on environmental ‘EU public goods’ can be very different from the British rate. This is due to the well-known fact that Estonian and German citizens have different preferences regarding the environment than the British citizens. How does one take this into account in the formulation of a EU RIA? What is the average discount rate? Shall one look at medium EU values and their variance instead of considering only one indicator? The problem applies to several hedonic prices and to the other issues, such as the value of life (Viscusi and Aldi 2003).

5.3 THE THEORY OF THE POLICY PROCESS AND BAYESIAN LEARNING

After ‘institutions’ and ‘territory’, ‘policy process’ is the third component of context I wish to discuss here. I have already made the point that although there is ideational convergence around RIA and regulatory quality, the conventional wisdom on quality does not deal explicitly with the logics and criteria of different stakeholders – let alone model them in terms of preferences, unitary vs. non-unitary actors, etc. Let us move from this observation to the more general question what type of policy process is implicit in the current discussion of RIA?

Often RIA is imported in EU member states by technocrats and epistemic communities close to Ministers (see La Spina 2002 on the Italian case). Importing RIA without a model of the policy process or with an implicit model of technocratic rationality in mind is a common cause of disappointment later, on the road to implementation of impact assessment. A technocratic model wherein impact assessment is a completely technical exercise is simply wrong and incomplete. There are several points of contact between technical logic and political-bureaucratic logics in the RIA process. Think of the step of setting the goals of regulation – an initial step in most EU member states’ guides to better regulation. Who does this? The expert, the bureaucrat, or the politician? The reality is that, especially in continental Europe, the regulatory process is highly fragmented, with multiple points of contact between politics and administration, and between different logics and criteria.

Yet one cannot run the risk of simply throwing the baby away with the bath water and concluding that RIA is useless because politics always trumps technical criteria. RIA can improve, indeed, by endogeneising bounded rationality and the politics-administration continuum (as opposed to a model of radical separation of politics and administration). One possible way to re-frame impact assessment within a better theory of the policy process is to cast RIA in terms of Bayesian learning. Let me spend a few words on this. The starting point is that all policies are collection of hypotheses about causal relationships: if the government does X, the economy and society will react by doing Y and we will reach the goal Z. RIA is an ex-ante exercise, hence based on hypotheses formulated under conditions of uncertainty. In turn, uncertainty is of a subjective nature rather than being the frequency of observed events. In most cases of impact assessment, regulators would formulate subjective probabilities, as the events they are dealing with cannot be observed several times under the same experimental conditions.

One obvious way to reduce errors contained in hypotheses about reality is to make use of experience. Bayesian learning provides a methodology to learn from experience under conditions of uncertainty by using simple rules of coherence (Parmigiani 2002). Policy makers attribute subjective prior probabilities to events and then use experience to up-date their probabilities in a coherent way. Posterior probabilities are therefore informed by experience. A fundamental theorem in Bayesian statistics states that when experience becomes considerable - and provided that actors use coherence in adapting their prior probabilities - the value of initial attributions of probability to events (that is, prior probabilities) does not matter much - except in extreme cases when an individual attributes either zero or one probability to an event. Posterior probabilities converge when experience grows. RIA can therefore be seen as a tool providing evidence and rules through which regulators learn coherently. Bayesian learning can supply a model in which different subjective opinions about uncertain events can be accommodated, provided that all actors (the expert, the bureaucrat, and the politician) accept to learn from evidence - by following certain rules of the game. Needless to say, there is no explicit consideration of the policy process in current discussion, and no approach along Bayesian lines has been presented so far.

5.4 LEGITIMACY

The final dimension of context is legitimacy. As mentioned above, there are different criteria used by different actors to evaluate success. This is acknowledged by the Communication of the European Commission on impact assessment (2002b), where it is argued that the main goal of RIA is to describe and measure the great trade-offs behind a regulatory choice. Accurate analysis is obviously a cornerstone for the credibility of RIA, but it should present the decision-makers with some important issues they have to address – rather than pretending that impact analysis ‘silences’ the debate by providing a ‘scientific’ solution to political problems.

If questions are at least as important as answers, then legitimacy is the best criterion to evaluate quality and success. Cross-national experience (early UK experience of compliance cost assessment, France and Germany in the 1990s; see Radaelli 2001) shows that when RIA is built around only one support constituency (such as the business community) the problems of legitimacy become insurmountable. The Italian case (La Spina 2002) is another example of legitimacy problems. As mentioned, RIA was introduced in this country under pressure from the OECD by a small group of policy advisors and a motivated Minister. But neither the business community, nor the civil society and the academics were really interested in this new tool. The result was the momentum for RIA was lost.

New policy instruments necessitate a robust network of actors. A network of stakeholders does not necessarily produce legitimacy, but it is a necessary condition. Different actors may have different views on the quality of RIA performed by institutions, but the sheer fact that they raise issues, make points, push for higher standards is a fundamental catalyst of policy improvement. By contrast, tools that interest only policy officers tend to float in a sort of limbo and eventually become useless. In this connection, one should look favourably at the development of networks of academics and private sector think-tanks that challenge the government’s numbers. By doing so, they perform a sort of extended peer review and quality control of what institutions do. There is plenty of work to be done in this direction. Randall Lutter, currently chief economist at the FDA, observed that ‘independent review seems ubiquitous expect for the case of regulatory analysis’ (Lutter 1999:43).

A more general point: in terms of legitimacy, the presence of different RIAs performed with different weights assigned to different values may be a good thing. NGOs may provide their own trade-social impact analysis of regulations, women's groups could deliver gender assessments, and other types of assessment could well exist in a political community. All this would increase the number of stakeholders making use of RIA in the policy process. It would also increase political attention for instruments based on empirical policy analysis and steer the political debate towards the discussion of costs and benefits of proposed regulations – a good antidote to ideological discussions with no content. In this scenario, different actors would still conflict, of course. They would hold different views about how impact assessment should be used in the policy process. But they would accept RIA as a main resource for the policy process. This would boost the institutionalisation of impact assessment.

On this issue, both in the EU and its member states, RIA is still a largely under-exploited opportunity. No 'pluralistic' approach to RIA has emerged in Europe. Academics, think tanks, non-profit organisations are usually at the 'periphery' of RIA. At best NGOs are consulted. But they do not produce their own impact assessments, they do not challenge the government's numbers, they do not release 'gender assessments' of proposed regulation. There is some unexploited potential out there.

But in order to play a game like RIA, one has to accept the rules of procedural legitimacy. This means that NGOs and employers' organisations, for example, would have no reason to expect preferential treatment in consultation or in the analysis of costs and benefits, as one aim of RIA is to assess the impact of proposed regulations in terms of benefits and costs for the whole community. It also means that all actors should present empirical evidence at specific stages of the policy process and with detailed information on what kind of empirical evidence was gathered, how scientific opinions were collected and assessed, and how scientific and policy advice were created (and sponsored).

It is too early to say whether these characteristics apply also to the nascent EU system (Commission 2002b). For sure, the EU approach to impact assessment is potentially more pluralistic than the approach of several member states because it draws

explicitly on notions of participatory governance and on the idea of democratising expertise. But this aspect would require another article.

To conclude on legitimacy, the successful implementation of instruments of regulatory governance such as RIA can work both ways. It provides an opportunity for structured and non-episodic participation to NGOs and societal stakeholders, but it can also make social actors and the business community ‘better citizens’.

6. CONCLUDING REMARKS

Although there is a community of discourse emerging around regulatory quality and RIA, impact assessment differs markedly throughout the EU. The problem is how to explain ideational convergence and divergence of results. One common argument in the literature is that context matters. This article makes an effort to show how it matters. In these concluding remarks, I formulate some policy recommendations.

For a start, there are multiple definitions of ‘quality of RIA’. This article has shown how different definitions, criteria, and logics can be related one to another, and where and how they differ. Real-world policy processes are based on bounded rationality and multiple points of interaction among experts, bureaucrats, and politicians (to use the three ideal-types introduced above). Hence the design of RIA systems should take this feature into account, instead of assuming that one can bracket politics and administration and design a technical system oriented solely towards efficiency.

‘One-size-fits-all’ best practices for RIA do not work well (Radaelli 2004). Four elements of context should be taken seriously into consideration by policy-makers importing impact assessment in their own countries. The contextual elements to control for are institutions, territory, policy process, and legitimacy. Institutions are the riverbeds in which regulatory processes flow. US and European riverbeds are quite different, and RIA systems should be adjusted accordingly. The presence of multi-level governance brings its own set of challenges, and the newborn integrated system of impact assessment introduced by the European Commission in 2002 should

face them explicitly. Bounded rationality and Bayesian learning provide foundations that can be extremely useful in situating RIA in the right context.

The point about legitimacy brings us to a definition of success that is not rooted exclusively in efficiency, but in robust networks of public and private actors. Indeed, the plurality of voices and stakeholders in RIA is a component of regulatory legitimacy. One can look at what happened to policy evaluation, where different approaches and methodologies (from economic to ethno- methodological approaches; from 'realistic evaluation' to 'empowering' assessment) have delivered some non-trivial improvement and credibility of this tool. Success may be more difficult to achieve than it seems at first glance, but a realistic assessment of context improves the chances of getting results.

Table 1 – Approaches to quality (indicators and tests) according to different logics

| | Rational economic logic | Bureaucratic logic | Political logic |
|-------------------|--|---|---|
| Indicators | Real-world indicators | Indicators on activities and output | Indicators on activities; indicators on administrative systems (for example presence of ‘task forces’ and consultative bodies with the mandate to check compliance costs for business) |
| Tests | Function tests Outcome tests on the predictive ability of RIAs Content tests on the quality of economic analysis | Content tests on whether all procedures and steps in the RIA process were followed by the regulator (tests on presence-absence) | Content tests on consultation of key groups providing support to the incumbent Function tests on whether RIA makes an impact on economic variables statistically significant for the popularity of the incumbent |

Compiled by the author, 2004.

Table 2 - How different stakeholders look at RIA

| | EXPERT | CIVIL SERVANT | POLITICIAN |
|------------------------|---|---------------------------------|------------------------|
| CRITERIA | Efficiency | Conformity to rules | Consensus |
| SUCCESS | Achieving goals in terms of real-world impact | Following legitimate procedures | Outcome of negotiation |
| LOGIC OF ACTION | Social sciences | Standard operating procedures | Negotiation |

Source: Compiled by the author, 2004

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