

Local, National, European: The multi-level regulation

Conference report

Inaugural conference of the Chair Governance & Regulation

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Is the EU always a union of law? How 'priority' political considerations can influence or even overrule the existing regulatory order.

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Regulations can be complicated, because they take account of diverse considerations. They can be unsatisfactory, because they usually result from multiple compromises at local, national and international level. They are complex, because they incorporate historical, technical, political, economic and legal traditions. They must be technologically progressive, socially inclusive, and meet the needs of consumers, investors and society. They are limited because they try to be all things to all people.

Regulations have led to remarkable improvements in European and international integration, although that is offset by the growth in violent anti-globalisation and anti-European sentiment and the potential for vaguely-worded directives and regulatory texts to be wilfully misinterpreted. Although the powers of legislators and regulators are limited by constitution and legal frameworks, it is possible for priority political considerations to stretch texts in multiple directions.

Priority political considerations have completely changed the regulatory landscape. A striking example is the German decision to shut down eight nuclear power stations after the Fukushima disaster, without any assessment of its impact on safety, national power security, dependent neighbours, or national priorities such as emissions targets. The creation of the European Energy Union is another example of legislation that was developed without due attention to competing objectives. Fortunately, the European Court of Justice has a record of interpreting competing legislative requirements with tact. Their judgement on the extensive use of quantitative easing will heavily influence the European political and financial landscape and again highlight the need for thought and care in developing, but also in interpreting and implementing, the regulatory landscape.

Regulatory stacking: policy integration by ownership or contract?

William E. Kovacic

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'Regulatory stacking' is an allusion to the situation in intellectual property whereby a new product requires the use of so many patents from different sources that the final cost becomes prohibitive. Regulatory stacks in the US, like that currently ruling on the Time Warner/Comcast merger, involve reviews by multiple independent bodies at federal and state levels, with no common standards or ceiling conditions, and the additional risk of 'private rights of action' subsequently upsetting any approved public regulatory stance. To navigate this highly complex system, an expensive 'parasite economy' of lawyers, consultants, advisers, lobbyists and specialists has developed. A less competitive regime can barely be imagined, but change will only be possible if elected officials can be persuaded to surrender economic regulatory powers and oversight.

The industries that are subject to this regulatory system have changed dramatically in recent years. A framework that ignores this transformation and the extraordinary interdependence that exists across industries can inflict significant costs on all parties. A framework that recognises them and improves the quality of regulation could provide a tremendous source of economic advantage for that jurisdiction and adjoining regions. Reducing the size and costs of the complex US regulatory system would provide great social and economic benefits.

Change could be achieved by addressing a number of major issues, namely decisions regarding: the trade-off between autonomy and accountability; the establishment of the regulator at a separate institution or as part of a larger framework; governance through a board, a college or a single individual; the number of enforcement agents; the number of regulatory functions; the level of integration of decision making, investigation, enforcement and sanctioning; and the use of policy tools such as injunctions, civil sanctions and criminal proceedings.

Diversification of regulatory approaches can improve understanding and benchmark the effectiveness of different solutions, but can impose unnecessary costs due to a lack of coherence in an interdependent system. Branding and credibility must be maintained due to its importance to investors, with a rational, predictable, transparent mechanism likely to prove most attractive. Finally, sufficient human capital must be available to deliver the regulations effectively.

Implementing a coherent, rationalised framework and deeper policy integration can be achieved through ownership or contract. Ownership involves consolidating the regulatory tasks in a single institution. This is difficult but can be achieved, for example by providing institutions with financial incentives to relinquish control over certain tasks. Integration by contract requires good levels of network governance that bring public decision-makers together on a regular basis to discuss and coordinate plans to avoid obvious inconsistencies, agree on best practices and achieve good operability between systems.

Jurisdictions can improve their performance by constantly reviewing their progress and actions, underlying assumptions, and current political situations. They must also seek to draw links between actual economic performance and their regulatory approach. It is important to ask the right questions, refine what has been learned and make appropriate adjustments.

Is it worth it to be a member? The consequences and implications of European Regulatory Networks

Martino Maggetti

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Networks are increasingly seen as the answer to every problem, especially the multi-level problems that are common in European regulatory governance. It is argued that networks empower their members, but it is possible that these returns do not offset the cost of investing resources, time and energy in membership or negative impacts such as selectivity, group thinking and a lack of transparency. My research focuses on networked organisations that are managed by an administrative entity and are active in policy-making, whether by setting the agenda, drafting decisions, offering advice or making soft rules.

European regulatory networks are federations of independent regulatory agencies from member states. They promote cooperation, interaction, the exchange of information and system harmonisation. They develop non-binding soft rules, such as guidelines, principles and best practices, that are applied at the domestic level and within the community. It is hypothesised that membership of this type of network increases the probability that regulatory agencies expand over time, and increases the delegation of new powers by governments to regulatory agencies.

The results of a panel analysis of the four main regulatory networks in energy, finance, competition and communication from 2001 to 2011 indicated that there was a small, non-significant and non-robust effect of network membership on organisational growth, but that there was a large, significant and robust effect of networks on the attribution of new regulatory powers. Overall, for any given regulator, when an agency joins a network the likelihood that it will receive new powers increases threefold. This is because weaker regulators lobby governments for additional powers that will enable them to cooperate more efficiently with their network peers. Reputational mechanisms also encourage regulators to seek new powers that give them parity with their peers.

These findings have three key implications. First, governance networks empower their members by providing regulators with an avenue to develop collaboration, exchange information and gain allies and powers. Second, European networks influence domestic politics by empowering domestic regulators relative to local governments and institutions. Third, the development and institutionalisation of the regulatory state in Europe is a self-perpetuating process that enables relatively weak regulators to gain and reinforce power, influence and efficacy through network membership.

OECD insights on multi-level regulatory governance

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The 2012 Recommendations of the Council on Regulatory Policy and Governance sets out the OECD's aspirations regarding regulatory policy. Three of its principles are particularly relevant to this discussion: the promotion of regulatory coherence between different levels of governance and different fields of regulation; the development of regulatory management capacity and performance; and the need to consider all relevant national standards and frameworks for cooperation during the development of regulatory measures.

Local regulatory systems are important: regions and cities can have larger populations than some countries and local and regional governments are often the first port of call for citizens. However, many sub-national governments have made relatively little progress on regulatory issues and there is a negative trend in terms of trust in government in OECD countries. Citizens are interested in regulatory outcomes rather than regulatory processes and poor regulation at local level can undermine good work that is carried out at other levels of government.

Inconsistent and weak regulations also cause international friction by hindering trade, create barriers to market entry and limit regulators' capacity to respond effectively to global issues. Complex regulatory systems create an incentive for informality and corruption and have a disproportionately negative impact on small and medium enterprises, which lack the resources to navigate complex systems or pay high costs for compliance. Coordinated, coherent policies enhance the quality of the response to challenges, reduce the cost of doing business and are easier to evaluate. They also support the development of synergies, promote innovation and attract investment.

The OECD's framework for multi-level regulatory governance recommends the clear attribution of power and responsibilities at each level of government and the implementation of coherent, coordinated mechanisms that promote dialogue and accountability. Regulatory policy should be formalised through clear processes and formal mechanisms to ensure continuity even as political agendas and priorities change. Different levels of government should have an institutional regime for regulatory reform and a body responsible for its implementation. This body should oversee the coordination and monitoring of compliance, challenge draft regulations, drive consultation, train personnel, and advocate for reform. Institutional mechanisms should also encourage participation by citizens. Regulatory tools should be designed to promote simplification strategies, leverage information and communication technologies, advance regulatory transparency to facilitate compliance, cover all points in the regulatory cycle, and adapt tools to capacities. Multi-level institutional mechanisms should be established to promote dialogue, identify shared agendas of action, and monitor compliance.

EU regulators - good for the single market and policies

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The 1957 Rome Treaty and the 1958 Meroni ruling have generally been interpreted as prohibiting independent EU agencies. The Sacchi doctrine states that network industries are a public utility and domestic concern. As a result, despite nearly thirty years of liberalisation and regulation, there are no EU regulators for the network industries. This is particularly problematic for industries with huge sunk costs: electricity, gas, rail freight and telecoms.

Since the early 1990s, there has been a movement to resolve this situation. However, while EU rules have been used to liberalise national markets, scant powers and funds have been dedicated to joining them up. The decision to liberalise domestic network industries by applying EU directives is legally ambivalent. National regulatory authorities (NRAs) were established early on in the process but an EU regulator was not. All of these factors have significantly hindered the development of a functional single market in network industries.

The economic case for a single network industries market remains strong. Extremely large price disparities, some as high as 4,000%, exist between key telecoms services in different countries. Similar disparities exist in the energy and rail freight markets. These differences are primarily driven by national pricing and taxation decisions and have resulted in fragmented situation that could never survive in a single market. Not only does the EU lack a common regulator, it is obliged to wrestle with 28 NRAs who do not have an overriding internal market mandate.

Nevertheless, the need for cross-border infrastructure is being recognised and starting to receive funding. Explicit attempts are being made to link the single network industries market with related policies, as the example of the Energy Union shows. The EU is beginning to soften its stance on centralisation and is moving from networks of NRAs to quasi-EU agencies. The EU safety agencies are being upgraded and there is talk of genuine independent regulatory agencies being established. Following the 2014 ESMA, Meroni now focuses on protecting member states via non-delegation, or through a functional subsidiarity test to improve the conditions for the internal market when there is a trade-off.

The EU would benefit from a well-established, functional single market for network industries. The economic case is strong and the legal and institutional requirements are within reach. This will require the EU to implement infrastructure powers, integrate the internal market, and define a coherent, multi-level EU system with European independent regulators and NRAs sharing an internal market focus.



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