

WHAT IS REGULATION?

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WHAT IS REGULATION?

- Selznick: *„regulation as sustained and focused control exercised by a public agency over activities that are valued by a community“*
- Three different senses of regulation:
 - **as a specific set of commands**
 - **as deliberate state influence**
 - **as all forms of social or economic influence**
- **a ‘red light’ concept vs. a ‘green light’ concept**

ISSUES ON THE REGULATORY AGENDA

- **During the 20th century**, a steady growth in regulation took place from the 1930th onwards. e.g. licensing of goods and passage carryings by roads.
- **In the post-war period**, marketing boards followed in the cotton, crofting, sugar and iron and steel industries, and the first US-style independent regulatory agency was established in Britain in 1954 with the Independent Television Authority (ITA).
- **During the 80ties and 90ties**, much stress was placed by governments and commentators, on the problems and costs of regulation and the case of deregulating of economy.
- **By the mid-1990s** regulation and deregulation had moved to positions high on the political agenda.
- **By the turn of the millennium**, the appropriateness of regulatory strategies and structures had become a significant public concern, and this led to a set of responses and debates over the first decade following 2000.
- **Main topics:**
 - **governance of regulatory bodies**
 - **effects and biases of regulatory regimes**
 - **emergence of new technologies and products.**

WHAT IS 'GOOD REGULATION'?

- To decide whether a system of regulation is good, acceptable, or in need of reform it is necessary to be clear about the **benchmarks** that are relevant in such an evaluation.
- **But how to decide what is 'good regulation'?**
- Five key tests:
 - Is the action or regime supported by legislative authority?
 - Is there an appropriate scheme of accountability?
 - Are procedures fair, accessible, and open?
 - Is the regulator acting with sufficient expertise?
 - Is the action or regime efficient?

FIVE CRITERIA FOR 'GOOD REGULATION'

- **The Legislative mandate**
- **Accountability**
- **Due process**
- **Expertise**
- **Efficiency**

Baldwin; Cave & Lodge 2012

THE LEGISLATIVE MANDATE

Claim to legacy	Essence of claim	Problems
Legislative mandate	Authorization from elected legislature	<ul style="list-style-type: none">• Parliament's intention may be vague.• Stated objectives for regulation may exist in tension or conflict• Parliament may have delegated the power to flesh-out objectives.• Large discretions may be given to regulators.

ACCOUNTABILITY

Claim to legacy	Essence of claim	Problems
Accountability or control	Regulator is properly accountable and controlled and so is democratically responsive	<ul style="list-style-type: none">• Is the body holding to account properly representative?• Is the trade-off of accountability and efficiency acceptable?

DUE PROCESS

Claim to legacy	Essence of claim	Problems
Due process	Support is merited because procedures are sufficiently fair, accessible, and open, to expose to democratic influence	<ul style="list-style-type: none">• Who should be allowed to participate?• What is the acceptable trade-off between openness or accessibility and efficiency?• Is the mode of participation appropriate?

EXPERTISE

Claim to legacy	Essence of claim	Problems
Expertise	Trust to my expertise because a judgement has to be made on the basis of a number of factors and variables and specialized knowledge skills and experience have to be applied	<ul style="list-style-type: none">• Public is poorly positioned to evaluate expertise• Difficult to expert to explain reasoning of judgement to lay persons.• General distrust of experts and arcane language• Public desire for openness and accountability.• Conflicts between experts undermine public confidence.• Public may see experts as self-interested or captured.• Public skeptical of neutrality of regulatory decisions where certain parties gain advantages.

EFFICIENCY

Claim to legacy	Essence of claim	Problems
Efficiency	Legislative mandate is being implemented efficiently. Efficient results are produced.	<ul style="list-style-type: none">• See problems of legislative mandate claims.• Conflicts with legislative mandate may arise.• Distributional questions may be begged or left out of account.• Measuring efficiency is difficult.

MEASURING REGULATORY QUALITY

- The cumulations of these benchmarks is very useful in the case of understanding how the ‘good regulation’ should be structured.
- On the other hand, the disadvantages of the cumulations of benchmarks is that divergent and inconsistent approaches to the pursuit of regulatory quality can be encountered not merely between different jurisdictions, but within individual governmental programmes.
- The way forward is probably to deal more rigorously with trade-offs between objectives and values.

REGULATION AND THE EUROPEAN UNION

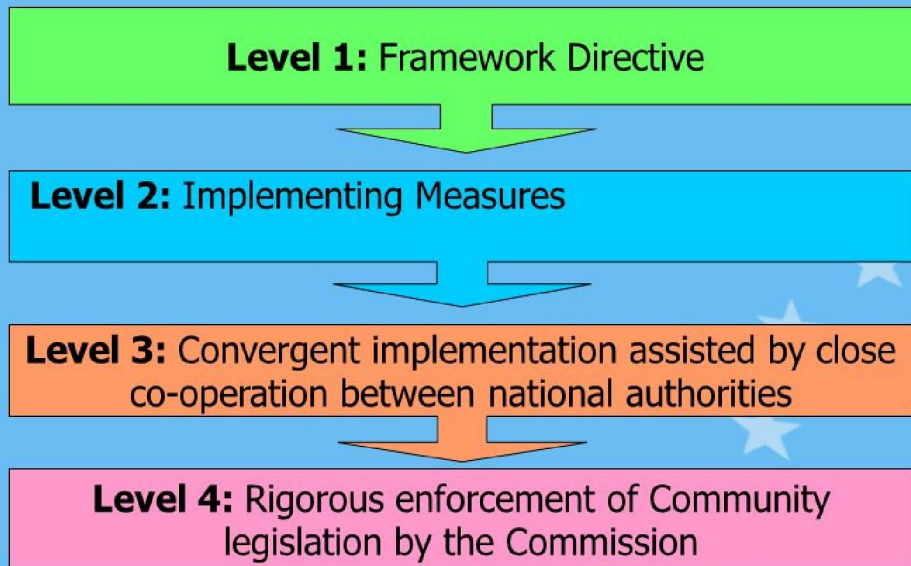
- The two basic trends could be recognized inside the EU:
 - growing EU-level involvement in regulatory activities
 - separating regulatory activities from other executive functions
- How to describe the EU regulatory state?
- The three dynamics could be recognized here:
 - the rise of EU agencies
 - the evolving character of regulatory decision making in the cases of competition and the 'Lamfalussy process'
 - the conflicts between expertise and politics

THE RISE OF EU AGENCIES

- The idea of agencification has become increasingly prominent in the EU regulatory landscape since the 1990s
- The agencies became a particularly prominent feature of the EU governance agenda post 2000.
- Giandomenico Majone: *„the authority of these EU-level regulatory agencies is not based on formal legal sources, but on their ability to provide credible information“*
- The rise of agencies could be seen as a solution to the European Commission's credible commitment problem as identified by the member states.

LAMFALUSSY PROCESS

Legislative Process - Lamfalussy



European Commission 
Internal Market & Services DG

LEVEL 1

Framework acts of the Parliament and Council
(Art. 294 ff. TFEU)

LEVEL 2

Delegated acts (Art. 290 TFEU)
(Specification of content of framework acts)

Delegated acts by the Commission

- Commission requests ESMA's technical advice
- Regulation or directive

Regulatory technical standards
(Art. 10 ESMA-Reg.)

- ESMA leading the process
- Endorsement by the Commission by regulation or resolution

Implementing acts (Art. 291 TFEU)
(Specification of procedures set forth in framework acts)

Implementing acts by the Commission

- Commission requests ESMA's technical advice
- Regulation or directive

Implementing technical standards
(Art. 15 ESMA-Reg.)

- ESMA leading the process
- Endorsement by the Commission by regulation or resolution

LEVEL 3

ESMA guidelines and recommendations
(Art. 16 ESMA-Reg.)

LEVEL 4

Supervision of the member states by ESMA
(Art. 17 ESMA-Reg.)

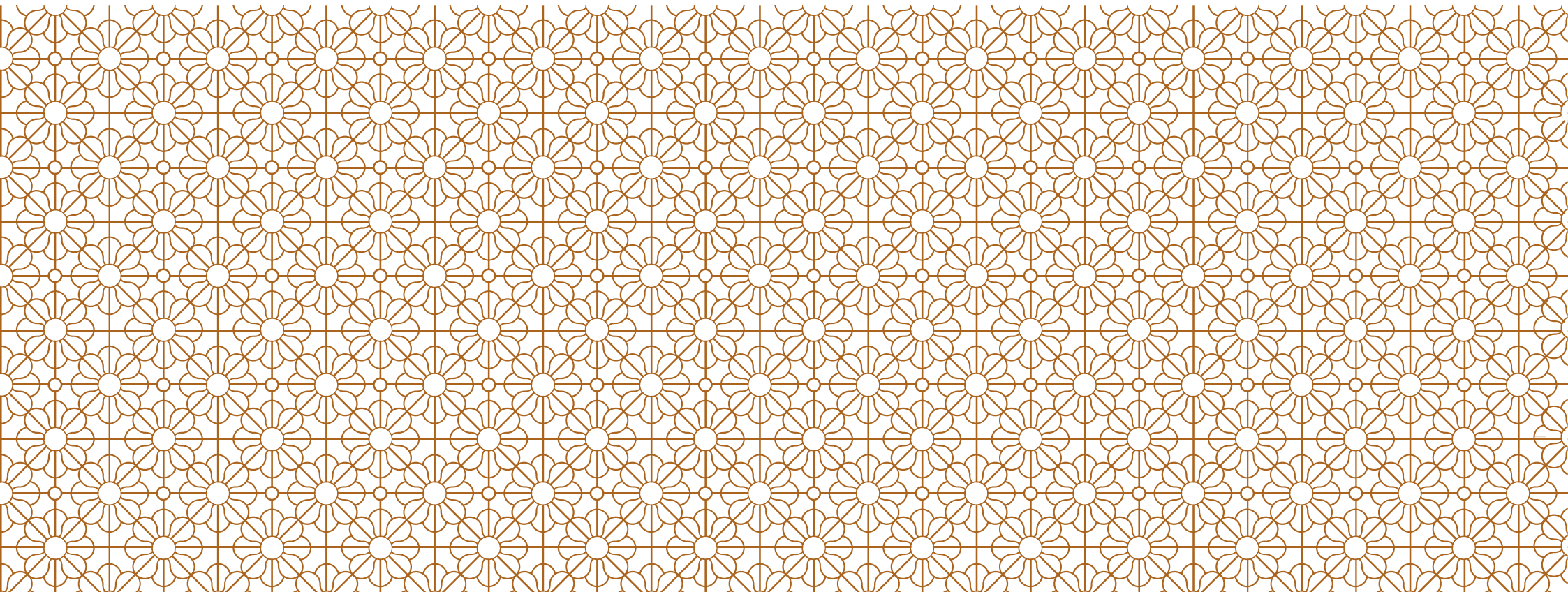
THE CONFLICTS BETWEEN EXPERTISE AND POLITICS

- Connected to the tensions that regulatory regimes face when there is uncertainty about the interpretations of the **precautionary principle**.
- **Precautionary principle** to risk management states that if an action or policy has a suspected risk of causing harm to the public, or to the environment, in the absence of scientific consensus (that the action or policy is not harmful), the burden of proof that it is not harmful falls on those taking that action.
- E.g. Pfizer case from 2002

REGULATION AND DEVELOPMENT

Three key lines of argumentation focus on:

- the dominance of economic interaction and interdependence in shaping domestic regulation
- the claim 'nothing new under the sun' - in the world of development, some states and firms are more autonomous and dominant than others and the remainder are merely at the receiving end of regulatory changes
- the transformative character of contemporary globalization and the processes whereby technological and social changes encourage complex interaction effects with the 'old' world of established economic and social power.



THANK YOU FOR ATTENTION!

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