"GOOD REGULATION": ORGANIZATIONAL AND PROCEDURAL TOOLS

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Abstract

The article argues that administrative procedures and organization can affect the quality of regulation. This premise creates the necessity to consider the matter starting from the point of view of enforcing regulation. The mentioned approach also implies the need for maintenance of rules, with systematic and periodic monitoring and evaluation of regulatory provisions, in particular in order to ensure the continuous connection between the objectives of regulation and the effects which regulation produces. Furthermore, procedural steps of a regulatory decision are analyzed, as well as the hard question of the relationship between politics and administration in procedures and in organization. Finally, good organization principles for regulators are described, with specific reference to parliament, administrations and independent authorities.

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I. "Good" regulation, procedures and organization

The aim of this article is to illustrate how procedures and organization can affect the problem of quality of regulation, and – in so doing – to show that they could be considered as regulatory tools.

If we remember that regulation has its roots in political economics[1], it is clear that the legal concept of regulation has been influenced by the economic one, which requires a strong link between rules and their consequences[2]. From a legal point of view regulation is law structurally built to achieve its objectives, to solve effectively various kinds of problems[3] and to avoid (as far as possible) regulatory failures[4].

During the last twenty years, the biggest driver in circulating the idea that regulation should be "good" has been the OECD which has stated that "better regulation means to adopt

[1] See A. Ogus, *Regulation. Legal Form and Economic Theory*, (2004), 1.

[2] See C. Coglianese and R.A. Kagan (ed. by), *Regulation and Regulatory Process* (2007), xi.

[3] See S.G. Breyer and R.B. Stewart, *Administrative Law and Regulatory Policy*, (1992), 5-6.

[4] See R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation. Theory, Strategy and Practice*, (2012), 68. On this point see also European Commission, Communication "*Strenghtening the foundations of Smart regulation – improving evaluation*", COM(2013) 686 final, p. 3: "Thorough evaluation also identifies unintended and unexpected consequences".

regulations that meet concrete quality standards, avoids unnecessary regulatory burdens and effectively meets clear objectives"[5].

"Good" regulation has been described several times and in several ways, in literature as well as by national, European and international organizations. While highlighting each time specific aspects, it has been indicated as "better regulation" by the OECD[6] and, more recently, by the EU, as "smart regulation"[7] as well as regulation "fit for purpose"[8].

Furthermore, institutions and scholars have looked for principles and criteria of good regulation. In this way, any regulation should be: transparent, accountable, proportionate, consistent and targeted only at cases where action is needed"[9] and needs legislative mandate, accountability, due process, expertise and efficiency[10].

Starting from a more general point of view, the problem of a "good" regulatory regime[11] is often indicated in terms of enforcement (and compliance)[12], to the extent that "the problem of enforcement is an acute one in regulation for reasons that are

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[5] OECD, *Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers*, (2009), 44.

[6] OECD, *Reccomendation on Improving the Quality of Government Regulation*, Paris, 9 March 1995 and *The OECD Report on Regulatory Reform; Synthesis*, (1997), 8.

[7] European Commission, Communication "*Smart Regulation in the European Union*", COM/2010/0543 final, p. 3: Smart Regulation means a regulation "[...] about the whole policy cycle – from the design of a piece of legislation to implementation, enforcement, evaluation and revision", a regulation which "must remain a shared responsibility of the European institutions and of the member States", a regulation in which "the views of those most affected by regulation have a key role to play". On this point, see R. Baldwin, *Is better regulation smarter regulation?*, in Public Law, 2005, p. 485.

[8] See European Commission, Communication "*EU Regulatory fitness*", COM(2012) 746 final and European Commission, Communication "*Strenghtening the foundations of Smart regulation – improving evaluation*", p. 3.

[9] Legislative and Regulatory Reform Act, 2006, art. 21, sec. (2). The principles of good regulation have been established by BRTF (Better Regulation Task Force), Principles of Good Regulation, 2003.

[10] See Baldwin, Cave and Lodge, *Understanding Regulation. Theory, Strategy and Practice*, cit. at 4. 26-27.

[11] Ibid., p. 38.

[12] OECD, *Reducing the Risk of Policy Failure: Challanges for Regulatory Compliance*, (2000). See also W. Voermans, *Motive-based enforcement*, Working Paper Leiden University, March 23, 2013.

intrinsic to the nature and the task of regulatory control"[13]. In this regard, the quality of legislation has been considered as a problem of making legislation clear and accessible but also of making it as "easy to comply with as possible"[14].

However, this approach to enforcement reveals an administrative stance which prioritizes compliance: "regulatory unreasonableness makes regulatory compliance much more inefficient and costly than it needs to be"[15].

If enforcement aims "to solve problems"[16] and to pursue "behaviour modification"[17], "good regulation" should even be measured as "performance of regulatory improvements tools, institutions and policy"[18]. In this sense, I would argue, it is strictly connected to procedures and organization because "the ultimate impact of any regulatory policy depends not only on how that policy has been drafted and designed, but also on how enforcement officials take actions to implement those policies at the 'street level'"[19].

In other words, there is a "symbiotic relationship between the formulation of regulatory rules and their application"[20].

Let us look, for example, at (administrative) procedures in regulatory processes. Administrative procedures, in fact, have been considered "another mechanism for inducing compliance"[21].

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[13] K. Hawkins and J.M. Thomas, *Enforcing Regulation*, (1984), 7.

[14] European Commission, Communication "*EU Regulatory fitness*", p. 9. See also OECD, *Better Regulation in Europe: Italy 2012 – Revised Edition*, June 2013, OECD Publishing, p. 101 (Compliance, enforcement and appeals).

[15] E. Bardach and R.A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, 2010, originally published in 1982 by Temple University Press, x.

[16] Ivi, xxi.

[17] Baldwin, Cave and Lodge, *Understanding Regulation*, cit. at 4, 227.

[18] Ibid., p. 34.

[19] Coglianese and Kagan (ed. by), *Regulation and Regulatory Process*, cit. at 2, xvi. The concept of "street-level bureaucracy" is due to M. Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services*, (2010), original edition published in 1980.

[20] Ogus, *Regulation. Legal Form and Economic Theory*, cit. at 1, 90. See also Hawkins and Thomas, *Enforcing Regulation*, cit. at 13, 173: "Enforcement activities are facilitated and constrained by the form, stringency and coverage of the law".

[21] M.D. McCubbins, R.G. Noll and B.R. Weingast, *Administrative Procedures as Instruments of Political Control*, in J.L. Econ. & Org., 1987, 244.

Their importance is due to "transparency and public participation [which] can help produce better, more informed policy decisions"[22]. But the use of economic evaluation techniques, such as cost-benefit analysis, has increased and has been itself defined, in the context of the so-called "analytic management of regulation", as "a method for taking into account the interests of all affected citizens and selecting regulatory measures that will enhance societal welfare"[23].

Let us look at (administrative) organizations which are in charge of regulatory tasks: "enforcement practice is heavily influenced by the role that organizations play in regulation"[24]. In fact, there are important "institutional factors that affect the decision of regulatory officers"[25].

"Good" regulation, finally, seems to regard both elements of (what we are going to define) formal quality and substantial quality, as we will see later (par. II). In other words, "good" regulation depends on (or is strictly connected with): the way in which regulation is adopted; the way in which it is enforced; the way in which it is evaluated (and, if necessary, revised or reformed) in order to ensure the continuous adequacy of regulatory provisions.

We could say that – alongside classic regulatory tools[26] – there are relevant administrative tools (procedures and organization) which can affect regulation as being capable of achieving its proper objectives.

II. Quality of regulation: formal and substantial aspects

The problem of the quality of regulation (how to design a good regulatory regime) could be usefully analysed as the problem of the quality of rules (how to make a good rule)[27]. In

[22] C. Coglianese, H. Kilmartin and E. Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, in Geo. Wash. L. Rev., 2009, vol. 77, 927.

[23] R.B. Stewart, *Administrative Law in the Twenty-First Century*, in N.Y.U. L. Rev., vol. 78, 2003, 445

[24] Hawkins and Thomas, *Enforcing Regulation*, cit. at 13, 18.

[25] Coglianese and Kagan (ed. by), *Regulation and Regulatory Process*, cit. at 2, xiii.

[26] See Breyer and Stewart, *Administrative Law and Regulatory Policy*, cit. at 3, 11.

[27] The relationship between quality of legislation and quality of regulation has been analysed by W .Voermans, *Concern about the quality of EU legislation: what*

fact, only legal rules are specifically enforced and only a single legal rule imposes consequences on its targets, altering their behaviour. The legal rule is, in other words, the basic element in the context of wider regulation[28].

The quality of regulation/rules, as we have seen, has been considered both from a formal point of view and from a substantive one.

Firstly, the formal quality of the rule is the objective of drafting (also called *legistique formelle*, in French speaking countries). To achieve formal quality of rules, rules must be consistent, clear and understandable. Therefore, manuals of drafting style have been adopted all over the world by several legislative assemblies (*e.g.*, by the U.S. House of Representatives), by governmental institutions (*e.g.*, in Italy there is a "*Guida alla redazione degli atti normativi*", adopted in 2001; in Spain there are "*Directrices de técnica normativa*", adopted in 2005), but also by supranational bodies, such as at European level (since 1993, the EU institutions has issued a lot of official documents regarding the question of quality of drafting) and at international level (*e.g.* the ILO – International Labour Office Manual for drafting, adopted in 2006).

But this concept of formal quality is nowadays more extensive. In 2010 the U.S. Office of information and regulatory affairs adopted "Disclosure and Simplification as Regulatory Tools", which gives directives to ensure fair communication: not only should each rule be consistent, clear and understandable, but should also be transmitted "clearly and at the time when it is needed", information must be "salient and easy to find and to understand"; "as usable as possible" and accessible in an electronic format "that does not require specialized software".

Secondly, the substantive quality of the rule refers to the effect of the whole regulation and, in this sense, is the object of

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kind of problem, by what kind of standards?, in Erasmus L. Rev., vol. 2, 2009, 59. See also H. Xantachi, *Quality of legislation: an achievable universal concept or a utopian pursuit?*, in *Quality of legislation. Principles and instruments*: Proceedings of the Ninth Congress of the International Association of Legislation (IAL), (2011), 75.

[28] See M. De Benedetto, M. Martelli and N. Rangone, *La qualità delle regole*, (2011), 12-13, where the problem in general has been developed and where wider references are provided.

"better" and "smart" regulation policies. In fact, since the beginning of the Nineteen Nineties the OECD has given impetus to the need to rationalise the regulatory system, with the goal of reducing quantitative regulations and improving their quality. Furthermore, the question of evaluating the effects of regulations has presented itself in an institutional dimension at the EU level[29] and has also become ever more important[30] in many national legal systems.

In the life-cycle of regulation rules are considered as being capable of producing effects. The horizon is wider than in the legislative process, which has the different perspective of the mere adoption of the rule/regulation. The life-cycle of regulation includes all institutional activities oriented towards monitoring and evaluating the effects of rules in order (ultimately) to make possible review or regulation reform: this is what I have elsewhere defined as "maintenance of rules"[31].

This approach to the problem of quality of regulation has important consequences for procedures and organization, as we are going to explain specifically.

III. Procedures

When we adopt the logic of the cycle of regulation many things in administrative processes need to be reinterpreted. Procedures must be created with a "developing logic" in mind: a planning phase comes before a regulatory procedure, which is followed by evaluation in a sort of "rolling"[32] sequence.

What kind of rules are to be adopted in order to achieve good quality rules? What is the way in which regulation could meet its objectives? We can approach these questions in two different ways.

The first way looks at procedures formally, with regard to the rules of the procedure. The competition between public and

[29] In general, on this point, see L. Mader, *Evaluating the effects: a contribution to the quality of legislation*, in Statute L. Rev., 2001, 119.

[30] See, recently, European Commission, Communication "*EU Regulatory fitness*".

[31] See De Benedetto, Martelli and Rangone, *La qualità delle regole*, cit. at 28, 98.

[32] See European Commission, Communication "*Regulatory Fitness and Performance (REFIT): Results and Next Steps*", COM(2013) 685 final, p. 13, where REFIT has been defined as "a rolling programme".

private interests is regulated by the procedure itself, because participation in procedures "involves competition amongst competing ends and values"[33]. Furthermore, the U.S. Administrative Procedure Act and other general regulations of rulemaking all over the world, impose procedural obligations, such as prior notice to the targets of the rule, participation (or consultation), information and transparency.

The second way looks at procedures substantively, with regard to the content of the final decision and to the choices during the procedure. The problem is to develop an adequate procedure and to control the cost of the whole rulemaking process. How deep has a rulemaking process to be in order to assure a well-reasoned decision? If we consider the cost of gathering information in procedures[34], we have to define a proportionate level of analysis (as this concept is called in EU vocabulary[35]) for each procedure. But, in order to arrive at an appropriate definition of this level, further activities would need to be carried out, in other words, to incur further costs.

It is necessary to accept a suboptimal solution[36]. The procedural choice is, in fact, based on a "bounded rationality"[37], a rationality which is constrained by limited information, by cognitive limitation and by a finite amount of time to make a decision. The choice could also be conditioned by the requirements which come from the various kinds of regulatory

[33] D.J. Galligan, *Due process and fair procedures. A study of administrative procedures*, (1996), 123.

[34] See, in general, on this topic G.J. Stigler, *The Economics of Information*, in J. Pol. Ec., 1961, 69, 3, 213.

[35] The concept of "proportionate level of analysis" has been used in the contex of Impact Assessment, see European Commission, "*Impact Assessment Guidelines*", SEC(2009) 92, p. 13-14, where it is considered that it "relates to the appropriate level of detail of analysis which is necessary for the different steps of IA". See also, European Commission, Communication "*Strenghtening the foundations of Smart regulation – improving evaluation*", p. 7 where a good evaluation report is described: "the appropriate level of (proportionate) analysis is defined based on the policy importance, the complexity of the EU action and its stage in the policy cycle".

[36] See A. Albert, *Traktat über kritische Vernunft*, (1969), Italian edition *Per un razionalismo critico*, (1973), 20. See also N. Luhmann, *Legitimation durch Verfahren*, Italian edition *Procedimenti giuridici e legittimazione sociale*, (1995), 213.

[37] See H. Simon, *Administrative Behaviour*, (1947).

oversight (judicial review, oversight bodies, and non-governmental oversight bodies).

On the basis of this double approach, in several legal systems rulemaking is commonly articulated in a "series of step"[38], a decision route constituted by a "highly complicated set of activities"[39].

U.S. Executive Order n. 12866/1993 describes the principles of regulation, while the OMB Circular A-4, Regulatory analysis (2003), indicates key elements of a regulatory analysis. In Europe there has been a strong tradition of adopting check-lists since the Nineteen Seventies. This has been accepted by the OECD, which adopted the most famous check list in 1995. Also in France, la *Guide de legistique* – reviewed in 2007 – has considered the "*trame*" of the "*étude d'impact*" to be absolutely necessary, independently of the degree of in-depth study of the analysis. In Italy, the content of impact regulatory analysis is described as a step of the Government rulemaking process. In UK, the Impact Assessment Guidance[40] has identified stages in the process of impact assessment. Finally, at the European level, the European Impact Assessment Guidelines have prescribed analytical steps in the process and evaluation has, more recently, become crucial in the REFIT Programme[41].

This, of course, leads to the logical conclusion that "an assortment of analytical requirements have been imposed on the simple rulemaking model" and that "the rulemaking process has become increasingly rigid and burdensome"[42]. This is the phenomenon called "ossification" of the rulemaking process.

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[38] C.M. Radaelli, *What do governments get out of regulatory reform? The case of regulatory impact assessment*, paper, XV Conference of the Nordic political science association, Trømso, Norway, 6-9 agosto 2008, p. 5

[39] J. Wroblewski, *The rational law-maker. General theory and socialist experience*, in *L'educazione giuridica, V – Modelli di legislatore e scienza della legislazione*, tomo III – *la discussione contemporanea*, ed. by A. Giuliani and N. Picardi, (1987), 59.

[40] Department for Business, Innovation and Skills, *Impact Assessement Guidance. When to do an Impact Assessement*, August 2011.

[41] In particular, see European Commission, Communication "*Strengthening the foundations of Smart Regulations – improving evaluation*". See also footnote n. 32.

[42] About the "ossification" of the rulemaking process, see McGarity, T.O., *Some thoughts on 'deossifying' the rulemaking process*, in Duke L. J., 1992, vol. 41, p. 1385.

a. Regulatory "steps"

Let us begin with an examination of the possible nine steps which must be found in the process and which must be transparent, accessible and documented.

1) **Input of regulation**. At this step the problem is defined, in particular by highlighting the criticisms of the regulation in force, often facing the pressure of the users and their representative organizations[43]. Here the need for intervention is defined[44].
2) **Grounds of regulation**. Here the gathering of evidence is provided[45] as well as the development of a baseline in order to measure the benefits and the costs of a rule[46].
3) **Purposes**. At this step, policy objectives must be identified[47]. They have to be clear and directly related to solving the problems[48]. Furthermore, they have to be divided into general, specific and operational objectives. Finally, it is necessary to make the objectives of the proposed regulation SMART objectives (Specific; Measurable; Achievable; Realistic; Time-dependent)[49].
4) **Consultations**. In order "to be effective" consultations must "start as early as possible"[50] and must respect minimum standards[51]. Moreover, a specific consultation stage allows the regulatory options to be refined, also

[43] Department of Business, Innovation and Skills, *Code of practice on Guidance on regulation*, October 2009, p. 6

[44] European Commission, *Impact assessment Guidelines*, (2009), p. 21

[45] Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 10

[46] Office og Management and Budget, *Circular A (Regulatory Analysis)*, September 17, 2003, p. 15

[47] Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 10

[48] European Commission, *Impact assessment Guidelines*, p. 25

[49] Ibid., p. 28

[50] European Commission, Communication"*Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*", COM(2002) 704 final, p. 18. On this point, Executive Order 13,563, *Improving Regulation and Regulatory Review*, January 18, 2011, sec.2.

[51] Ibid., p 19. Here minimum standards for consultations have been indicated: clear content of the consultation process, consultation target groups, publication, time limits for participation, acknowledgement and feedback.

with a publication for public consultation and comments[52]. The Minister or other regulator – exercising largely discretionary powers - can consult "all relevant interests in society"[53] as well as the representative organizations of interests which are substantially affected by the proposed regulation[54], or statutory bodies, where the proposed regulation relates to its own functions.

5) **Alternatives**. At this step regulators "shall identify and assess available alternatives to direct regulation"[55], "including the alternative of not regulating". In other words, it is necessary to define which options are most likely to achieve the objectives "in the light of constraints such as compliance costs or considerations of proportionality"[56].
6) **Evaluation**. The comparison and the evaluation of the options allow the regulator to "focus on costs and benefits of preferred option"[57].
7) **Justification**. As Executive Order n. 12866/1993 stipulates, cost-benefit analysis and other measuring techniques provide a framework for evaluating the alternative regulatory choices[58] and for showing the reasons for choosing one alternative over another.
8) **Enforcement**. Also called the implementation step, at this stage it is obligatory for implementation to be "'on track' and the extent to which the policy is achieving its objectives"[59].
9) **Review stage**. After the implementation of the regulation, the regulation should be reviewed to

[52] Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 9

[53] European Commission, Communication "*Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*", p. 5.

[54] Art. 13, *Legislative and regulatory reform Act*, 2006.

[55] Executive Order n. 12866/1993, *Regulatory Planning and Review*, sec. 1, b, n. 3.

[56] European Commission, *Impact assessment Guidelines*, p. 28

[57] Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 22.

[58] Office of Management and Budget, *Circular A (Regulatory Analysis)*, p. 9.

[59] European Commission, *Impact assessment Guidelines*, p. 48.

confirm the actual costs and benefits and to verify whether it is achieving its desired effects[60]. When regulation contains a review clause evaluation is made compulsory [61].

Thanks to the review stage we can talk about a real regulatory "chain", characterized by a systematic and periodic evaluation of regulation, according to the regulatory provisions. The described nine steps of the regulatory decision route are not always compulsory but they should be traceable if we want to ensure quality of regulation. If the steps are not traceable, regulators can omit consultations or not evaluate the options, without fear of consequences even when some form of oversight (by a Regulatory Oversight Body or by judicial review) has been established.

Transparency in the process relating to these steps "means that agency decisions are clearly articulated, the rationale for these decisions are fully explained and the evidence on which the decisions are based is publicly accessible"[62]. So, by following the steps it is possible to achieve two different goals: legitimacy of regulatory decisions and good quality regulation.

Three questions remain to be analysed: political decisions and technical (or bureaucratic) decisions; participation; giving reasons.

b. Political decisions and technical decisions.

The general problem of the normative criteria for the allocation of tasks to bureaucrats or politicians[63] aims to find a solution also in procedures. Therefore, almost all of the steps described above should be performed by technical bodies, by bureaucrats, by professionals operating in institutions

[60] Department of Business, Innovation and Skills, *Impact Assessment Guidance*, p. 22.

[61] European Commission, *Impact assessment Guidelines*, p. 50.

[62] Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, cit. at 22, 926.

[63] See on this point, A. Alesina, and G. Tabellini, *Bureaucrats or politicians? Part I: a single policy task*, in Am. Ec. Rev., 2007, 97, p. 169 and *Bureaucrats or politicians? Part II: multiple policy tasks*, in J. publ. ec., 2008, 92, p. 426.

characterized by expertise and impartiality, in legislative assemblies, in ministries or in independent regulators. The administrative stage (in which impact assessment is produced and decisions are taken) is "an aid to decision-making, not a substitute, for political judgement"[64]. The reason is that politics and administration function in quite different ways, for example, let us consider the system of incentives. The administrative decision, on one side, should be extended to every step of the process, until the formulation of alternatives to regulation and until choosing the preferred "proposal". The political stage of decision, on the other side, should be limited to the input of regulation (for example, by a regulatory agenda, directives and so on) and to the final decision, even if it is different from the preferred "proposal". If we must face facts, very often the decision is adopted in advance, without a transparent process and with a "post-hoc rationalization"[65].

c. Participation and transparency.

We have seen that participation and transparency in rulemaking are considered rules of quality. There is a remarkable difference between consultation in a regulatory process and lobbying. In fact, lobbying (regulated only in some legal systems, such as US, Canada, Australia and EU) is a process starting from the representatives of interest groups and directed at regulators in order to gain favourable rules[66], while consultations are conditioned by the input of regulators themselves and are directed towards achieving the point of view of the targets of the regulatory process[67].

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[64] European Commission, Communication on "*Impact assessment*", COM (2002) 276 final

[65] Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, p. 933.

[66] European Parliament, Directorate-General for Research, Working Paper, *Lobbying in the European Union: current rules and practices*, 2003, p. iii, where the objective of lobbying is described as "to maintain a favourable regulatory environment for their organizations, members or clients".

[67] See European Commission, Communication "*Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*".

Not all legal systems regulate participation and transparency in rulemaking. The most important regulation is without any doubt the US Administrative Procedure Act, adopted in 1946, also based on notice and comment procedures. But in some legal systems – like in Italy – there are no general provisions in order to guarantee participation in rulemaking even though specific provisions in regulatory sectors (such as communications or financial markets) have started being adopted.

But, also thanks to the pressure of European regulations – informed by the right to be heard and to promote consultations - participation in rulemaking processes is destined to become more robust, because it "allows agencies to obtain information that helps them (1) improve the quality of new regulations, (2) increase the probability of compliance, and (3) create a more complete record for judicial review"[68].

d. Giving reasons.

It was noted that "the standard of fair treatment is […] not only that there be good reasons, but also that the reasons be given"[69]. In fact, giving reasons is the formalization of the justification process and is also the object of the various kinds of review by oversight bodies and by judges.

The requirement to give reasons is prescribed in several legal system, such as in Europe, or in the UK, and in Spain (*exposiciòn de motivos*), but is absent – in the legislative process - in Italy and France even if it has here recently been made obligatory for legislative initiatives to be accompanied by specific *analisi d'impatto della regolazione* and *études d'impact*.

So, we can reasonably expect that in a short time general provisions adopted by every kind of regulator will be not only justified but also provided with a related explanation.

[68] Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, cit. at 22, 946.

[69] Galligan, *Due process and fair procedures. A study of administrative procedures*, cit. at 33, 433.

IV. Organization

In order to improve the quality of regulation it is necessary to build efficient institutions, which are coherent with the procedural framework[70]. Furthermore, to make good rules we need not only a change in traditional institutions but also the creation of new kinds of institutions to be in charge of such matters. Regulation is "*la forme moderne de l'action administrative*"[71], i.e., it imposes new ways for traditional functions to be performed and to carry out new functions.

This has been confirmed by pressure from the OECD to promote simultaneous regulatory reforms and institutional reforms.

On the other hand, the organizational problems of public bodies have been studied less, at least in Italy[72], even if they are priority problems[73] and even if they are possible obstacles to implementing reforms.

The relevance of this question concerns institutional design: design – as a general process - consists in "inventing physical things which display new physical order, organization, form, in response to function"[74]. As a consequence, starting with functions good quality regulation imposes new skills, a greater workload and an adjustment of the organizational framework in ministerial and independent bodies one of whose aims is to reconfigure and probably even to reduce the public sphere[75].

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[70] D. Rodrigo, L. Allio and P. Andres-Amo, *Multi-level regulatory governance. Policy institutions and tools for regulatory quality and policy coherence*, OECD Working Papers on Public Governance No. 13, 2009, p. 25: "Regulatory institutions are fundamental to ensure regulatory implementation and the appropriate use of regulatory instruments".

[71] Y. Gaudemet, *Introduction* in *La concurrence del modes et des niveaux de régulation*, in Revue francaise d'administration publique, 2004, n. 109, 13.

[72] The question of administrative organization was extensively analyzed by M.S. Giannini, *Le organizzazioni elementi degli ordinamenti giuridici*, in *Scritti in onore di Pietro Virga*, Tomo I, (1994), 929.

[73] M.S. Giannini, *La priorità dei problemi di organizzazione*, in *Il motore immobile. Crisi e riforma della pubblica amministrazione*, (1980), 45, now in *Scritti*, vol. VII, 1977-1983, (2005), 503.

[74] C. Alexander, *Notes on the Synthesis of Form*, (1964), 1. See also M.S. Giannini, *In principio sono le funzioni*, in Amministrazione civile, 1959, 11, now in *Scritti*, Vol. IV, 1955-1962, cit. at 73, 719.

[75] About the "minimal State", see R. Nozick, *Anarchy, State and Utopia*, (1974).

But, how must we consider the relationship between regulation and organization? How must a good regulator evaluate organization?

A good regulator is, in fact, involved in making a consistent procedural and organizational framework with the need for good regulation and, in so doing, aims at giving regulation concrete opportunities to become effective.

If we take a look at organization from the point of view of the quality of regulation we can observe three ways in which it could be relevant.

Firstly, organization is one of the *variables* in Impact assessment. Organization, indeed, can represent a criticism in order to implement a regulation and the impact of each regulatory option on administrative institutions has to be individually evaluated.

Secondly, organization is one of the possible *objects* of regulation itself, for example, when institutional reforms are carried out. In these cases, organization is analysed from an empirical and managerial point of view.

Thirdly, organization is probably one of the most relevant *conditions* for the success of regulation, because it also consists of enforcement and monitoring rules, as we have previously affirmed. The organizational dimension of law has been also considered the key-variable in order to understand effectiveness (efficacy) of legislation. In other words, efficacy problems have to be evaluated as organizational problems[76].

In recent years, several countries have been interested by institutional reforms, very often related to better regulation policies[77]. A look at the possible kinds of organizational interventions reveals six different typologies.

The first kind is the reduction (or suppression) of public bodies. This is the case for Italian "*enti pubblici*" and the French "*suppression de services ou organismes*", in the framework of the "*Révision general des politiques publiques*", started in 2007.

[76] See, on this point, Wroblewski, *The rational law-maker. General theory and socialist experience*, cit. at 39, 65.

[77] C. Radaelli, F. De Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*, (2011).

The second kind is the reduction in the size of public bodies. This is the case for the "reinventing government" programs and for the "cutting red tape" programs.

The third kind is the fusion (or merging) of public bodies. This is the case for the UK single regulator of financial markets, born in 2000 (Financial Services and Markets Act).

The fourth kind is the transformation of public bodies. This is the case where there is a change in the juridical nature of bodies which were in origin public and which were later privatised (such as in the privatization of public enterprises).

The fifth kind is the establishment of independent institutions. This is the case, for example, with the antitrust authorities in many European countries.

Finally, there is the reform of public bodies. This is the case for real reform, in which the functions are reorganized, like in the Italian reform of Government (1999) and in the Belgian reform (*Plan Copernic*), implemented in 2000.

A good regulator should choose between these different kinds of intervention in order to make consistent (as much as possible) regulation and organization. The choice depends in part on possible regulatory constraints (i.e. EU regulations which require independence of regulator, financial constraints, and so on) and in part on regulatory contents (i.e. liberalization accompanied by a privatization process).

More importantly, a good regulator should also take into account the zero-option also when designing institutions in charge of regulatory enforcement. This means that regulators should always keep in mind the possibility not to carry out any organizational reform. In fact, often (at least in Italy) a public body reform could be a pretext for a creative compliance strategy to pursue objectives other than good regulation (for example, to change completely the managerial positions in a Ministry or to serve symbolic politics). Furthermore, every change in organization carries costs and creates side-effects which should be considered before starting the process: "changes are costly and take time to implement – so they need to be justified and greater attention need to be paid to looking back before moving

forward"[78]. Even "stakeholders prefer regulatory stability over frequent legislative revision"[79], so it may sometimes be sufficient to look for informal agreement and solutions[80].

Another two questions require our attention.

Firstly, we have to take into account the general relevance of informatization over organizational matters. Informatization, indeed, implies a different allocation of the tasks, of the relationship between administrations and citizens or users and a change in workloads.

Secondly, we have to take into account the increasing relevance of the financial point of view, which seems to be the principal criterion of institutional reform "in an age of permanent fiscal crisis"[81].

What is needed to qualify the professional role of experts regarding the quality of regulation? There is large agreement about the idea that a good regulator should have a high level of technical expertise and a certain degree of independence.

In a number of studies and research projects we have seen that regulatory functions (and specifically those functions related to the use of regulation analysis techniques) have been inserted into the organization of institutions all over the world, and have also been organized in several ways[82]. On the other hand, this "diffusion" of regulatory functions and the operating capacity are "without convergence"[83]. It is, in fact, possible to find different models, different contexts, different flexibility and different oversight systems.

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[78] See European Commission, Communication "*Strengthening the foundations of Smart Regulations – improving evaluation*", p. 5.

[79] See European Commission, Communication "*Regulatory Fitness and Performance (REFIT): Results and Next Steps*", p. 9.

[80] See, on this point, J. Black, *Talking about Regulation*, in "Public Law", 1998, p. 77.

[81] On the specific issue of administrative costs, D. Osborne, and P. Hutchinson, *The Price of Government: Getting the Results We Need in an Age of Permanent Fiscal Crisis*, (2004).

[82] See A. Kasemets, *Impact Assessment of Legislation for Parliament and Civil Society: a Comparative Study*, in ECPRD Seminar on Legal and Regulatory Impact Assessment of Legislation, 2001, Riigikogu, Tallinn.

[83] C.M. Radaelli, *Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment*, in J. Eur. Publ. Pol., 2005, p. 924.

a. Principles of Good Organization

In this non-uniform overview, it is useful to search for uniform principles of "good" organization, principles capable of giving directives over the allocation of tasks in the matter of good quality regulation.

The first principle concerns the relationship between politics and administration. As we have explained in the matter of procedures, good quality regulation is placed at the boundary between politics and administration[84]. When regulator designs an institutional framework[85] it is necessary to distinguish between two different regulatory bodies: one is responsible for political tasks and placed at the top of the institution; the other is responsible for technical tasks and closely linked to the executive director of the agency or the permanent/general secretary of the Ministry and related to the line structures[86].

The second principle regards transparency and responsibility, which are strictly connected. Transparency is the key to achieving democratic goals and also to producing "better, more informed policy decisions"[87]. Moreover, all political and administrative decision-makers (even if with different methods of

[84] On the relationship between political decision and technical decision see the already mentioned Alesina, and Tabellini, footnote n. 63.

[85] See, in general, R. E. Goodin (ed. by), *The Theory of Institutional Design*, (1996), in particular p. 32-33.

[86] On this point see J. Chevallier, *L'évaluation législative: un enjeu politique*, in *Contrôle parlementaire et évaluation*, ed. by A. Delcamp, J.L. Bergel and A. Dupas, (1995), 20. See, on this point, Department for Business, Innovation and Skills, *Impact Assessement Guidance*, in particular p. 15, where there is a description of the approval necessary to publish an Impact Assessment. This is an interesting example which expresses a good distintion between politics and administration in IA process: "The minister responsible for the policy (or the Chief Executive of non departmental public bodies or other agencies) is required to sign off published Impact Assessment [...]", and specifically he has to declare that he has read and he is satisfied about the consultation stage, the final proposal and the review stage, while "Chief Economist should sign off Impact Assessment for the robusteness and accuracy of the costs, benefits and impact analysis at the different stages of policy development".

[87] Coglianese, Kilmartin and Mendelson, *Transparency and public participation in the federal rulemaking process: recommendations for the new administration*, cit. at 22, 927.

oversight) should be held to absolute standards of individual responsibility[88].

The third principle is multicompetence in regulation. Regulation presupposes multicompetent expertise, such as economic, legal, statistical, political and, ultimately, technical skills. Furthermore, regulation needs a specific competence in managing multicompetent expertise.

Finally, we should look for an oversight principle in regulation[89]. Regulatory decisions must be reviewed by an oversight body in order to guarantee their adequacy to attain regulatory objectives. The "plethora of oversight mechanisms"[90], such as parliamentary, governmental or judicial ones, imposes the need for models in line with technical reviews of regulatory decisions.

If problems of efficacy are mainly problems of organization (as we have seen)[91], what is necessary to make a regulator a "good" regulator, from an organizational point of view?

Given that the regulator is part of the traditional administration (such as a ministry), it would be necessary for the office in charge of regulatory tasks to have a sufficiently high level in the organization, in order to coordinate line structures (where expertise is found) and to manage external relations with a sufficient degree of autonomy. Furthermore it would be well-resourced[92].

Since the regulator is supposed to be independent (for example, when imposed by a European regulation), the various measures of independence (appointments, incompatibilities,

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[88] See H. Jonas, *The imperative of responsibility: in Search of an Ethics for the Technological Age*, (1984), in particular the "responsibility principle". See also F.A. Von Hayek, *The Constitution of Liberty*, (1960); Italian edition, (1999), 123.

[89] See OECD, Regulatory institutional framework and oversight, in "Government at a glance" 2011, p. 158.

[90] M. Seidenfeld, *A table of requirements for federal administrative rulemaking*, in Fla. St. U. L. Rev., 2000, p. 533.

[91] See Wroblewski, *The rational law-maker. General theory and socialist experience*, cit. at 39, 65.

[92] At this regard, see Evia (Evaluated Integrated Impact Assessment), *Improving the practice of Impact Assessment*, in particular p. 10-11, where institutions for Impact Assessment are described.

powers, autonomy, etc.) should create a coherent and non-contradictory system[93].

If we are to set up an oversight body, then expertise and adequate resources must be accompanied by a placement "at the centre of Government"[94].

Some different considerations should be mentioned about the different kinds of institution: Parliaments (or legislative assemblies); Administrations; Independent Authorities.

b. Parliaments (or legislative assemblies).

Sometimes Parliaments adopt rules which are proposed by members of the assembly but more frequently rules are proposed by Governments. If we consider that the economic analysis of regulation must be used as early as possible in the regulatory process, then in reality we can only develop an oversight of the proposed legislation at the parliamentary stage. How have Parliaments organized offices, teams or professionals in charge of regulatory support? Impact assessments, for example, are usually performed outside parliament, by governments as well as research centres and universities or other private entities[95]. Nevertheless, parliaments have appointed structures to support the legislative process and to review the proposed legislation, from the general point of view of the quality of regulation. Such structures include: the US Congressional Budget Office; the German *Büro*, which supports the *Bundestag* in matters of technological innovation; the *Office parlamentaire d'évaluation des choix scientifiques et technologiques*, which advises French Parliament about the consequences of scientific and technological choices. In Italy there are two different organisms, the *Commissione parlamentare per la semplificazione* (which has advisory powers in the process of

[93] See Alexander, *Notes on the Synthesis of Form*, cit. at 74, 15, where – talking about "design" in general – he says that "every design problem begins with an effort to achieve fitness between two entities: the form in question and its context"; see also, p. 17: "the rightness of the form depends […] on the degree to which it fits the rest of the ensemble".

[94] OECD, *Oversight bodies for regulatory reform*, 2007.

[95] The European Centre for Parliamentary Research and Documentation in 2001 carried out (and later updated) a comparative study on Impact assessment in 22 countries, see Kasemets, *Impact Assessment of Legislation for Parliament and Civil Society: a Comparative Study*.

cutting legislation) and the *Comitato per la legislazione* which (in the Italian Chamber of Deputies) has advisory powers on the formal quality of legislative proposals. Regional assemblies too have structures responsible for the quality of legislation, such as in Italian regions (inside the Conference of the Presidents of Regional Legislative Assemblies) and in the German Länder (inside the Conference of the Länder Presidents).

c. Administrations.

In the Ministries (and in regional and local administrations), the functions regarding quality of regulation are, normally, organized into three different levels, which are (generally) present at the same time.

The first way in which to organize regulatory functions is inside each regulator, in order to decentralize (as much as possible) the functions[96]. Different kinds of professionals operate here: the US agency regulatory policy officer; the UK impact assessment officer; the Australian regulatory impact officer; the French *fonctionnaires responsables de la qualité de la réglementation*; the Italian *responsabili dell'analisi degli impatti della regolazione*. The most frequent problems are, at this level, the proper allocation of tasks and the clear definition of the functions in the regulatory process, in order to correctly distinguish technical evaluation from political evaluation.

The second way to organize regulatory functions is near the centre of Government, in order to centralize the functions. The central unit can take several forms. For example, there is – in the US – the Office of Information and Regulatory Affairs, inside the Office of Management and Budget of the Presidential Executive Office; the UK Better Regulation Executive based in the Department of Business, Innovation and Skills (BIS), which has general responsibility over governmental activities; in France there is a *Direction des études legislatives* and an interministerial group at the *Secrétariat general du gouvernment*; in Italy, there is a Central Unit for Simplification and for Quality of regulation and

[96] We can find *ad hoc* offices near the permanent/general secretary; offices specifically dedicated to the mission of good quality regulation; other organisms in the ministry, characterized by a certain degree of autonomy; specific units in those offices which are responsible for the normative process.

an office in charge of analysis and evaluation of regulatory impact inside the Department for Legal and Legislative Affairs (at the Presidency of the Council of Ministers); in Spain, there is a national Agency (*Agencia de evaluacìon y calidad*) in charge of evaluation, inside the Ministry of public administration.

Three different kinds of tasks are performed: *coordination* of regulatory activities of the Government, in order to pursue what the OECD has called the "whole of Government approach"; *support and advice* to ministerial regulators (such as the State of New York Governor's Office of Regulatory reform); *regulatory oversight*, such as for the US Office of Information and Regulatory Affairs.

The third way in which to organize regulatory functions is to create a network of regulators, in order to connect functions. This kind of organization allows regulators to create an integrated system, between centralized structures and decentralized ones, aimed at "network building and administrative cooperation"[97].

d. Independent authorities.

Independent authorities are generally not obliged to observe the same procedural constraints imposed on the executive agencies or Ministries, because they have a direct relation with the Parliament/Congress (as is the case of Italy, for example). The cost-benefit analysis constraints in the US have been established only for the executive agencies, which are subject to review by the Office of Information and Regulatory Affairs. In the US it has been suggested, indeed, that even independent agencies might be subject to some of the procedurals constraints of executive agencies. Executive Order 13,578 (Regulation and Independent Regulatory Agencies, July 11, 2011) has stated that "independent regulatory agencies should consider how best to promote retrospective analysis of rules" (Sec. 2). Nevertheless, it is clear that there are some risks (to their independence) if presidential control over independent agencies would become too pervasive.

[97] C.M. Radaelli, *The diffusion of regulatory impact analysis. Best practice or lesson-drawing*, in Eur. J. Pol. Res., 2004, p. 739. This is the case, for example, of the Standard Cost Model Steering Group, established in 2003.

IV. Conclusions

Legislative inflation (due to interest groups, symbolic politics and to the speed of technological innovation) is an obstacle to the certainty and the consistency of regulatory frameworks. It is becoming ever more difficult to maintain rules and to continuously make rules consistent with their consequences[98]. The need for (legal) certainty is, indeed, indispensable to exercising freedom[99] and regulators work towards the goal of guaranteeing the so-called *securité juridique*[100], which consists both in the quality of rules and in their predictability.

The problem is not limited to the single procedural obligation or to a specific regulatory process. It involves the normative power itself, which must be controlled[101]: this is the reason why wide programs for controlling regulations are carried out in many OECD legal systems.

What rules of quality must be adopted in order to ensure good regulation?

The first (and more general) rule of quality is – as we have seen – to distinguish between politics and administration both in regulatory procedures and in organization[102]. It is not a simple question: the two aspects of institutional decisions (political and administrative) have frequently been linked and influence each other.

Furthermore, a powerful tool to achieve better quality regulation is transparency, which must be understood as the main rule in the life-cycle of regulation. Transparency is required by the diverse stakeholders in the regulatory process and implies not

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[98] See Coglianese and Kagan (ed. by), *Regulation and Regulatory Process*, cit. at 2, xi.

[99] On the need of certainty, see Z. Bauman, *Liquid life*, (2005); Italian edition *Vita liquida*, (2008), 29.

[100] Conseil d'Etat, *Rapport public 2006 – Sécurité juridique et complexité du droit*, La documentation française, 2006.

[101] Concerning the "control" of normative power, see B. Leoni, *Freedom and the law*, (1961); Italian edition, *La libertà e la legge*, (2000), 108 ss. and; see also, N. MacCormick, *Questioning sovereignty. Law, State and Nation in the European Commonwealth*, (1999); Italian edition *La sovranità in discussione. Diritto, stato, nazione nel <commonwealth> europeo*, (2003), 95, and, finally, B. Du Marais, *L'Etat a l'epreuve du principe de concurrence: analyse et prospective juridique*, in Revue politiques et management public, 2002, p. 121.

[102] Chevallier, *L'évaluation législative: un enjeu politique*, cit. at 86, 20-21.

only information but also communication activities because "to be effective regulations need to be well designed, communicated and enforced"[103]. Furthermore, it is necessary for such communication to be "as fair and accurate as possible"[104].

On the other hand regulators should consider the problem of the side effects of regulations, now accompanied by the more pernicious creative compliance[105], which aims to use rules as instruments to pursue prohibited results. In this framework evaluation "identifies unintended and unexpected consequences"[106] and can help discover opportunistic use of available legal schemes.

How is it possible to take into account these several elements, in order to adopt and to maintain rules properly? Some conditions must be satisfied.

Firstly, regulations must be built and adopted to be maintained. Rules should not only be clear, coherent and accessible (formal quality of rules), but should also be built on an informative basis, which is available to the stakeholders and to the citizens to allow monitoring and evaluation of the impacts, because there "should be a continuous loop: a good evaluation should be influenced by the quality of the preparation which went into an intervention"[107].

Secondly, good quality regulation should be strengthened as a political task, in the sense that it should become an important part of legislative work at every level of Government. This is the case for the Interinstitutional Agreement on better law-making[108] at the EU level. This is also the case for the constitutional reform issued in 2008 in France, which made it obligatory to dedicate

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[103] HM Government, *The Government's Forward Regulatory Programme*, 2010. See also European Commission, Communication "*Strenghtening the foundations of Smart regulation – improving evaluation*", p. 9.

[104] Office of Information and Regulatory Affairs,"*Disclosure and simplification as Regulatory Tools*", 2010

[105] See Baldwin, Cave and Lodge, *Understanding Regulation. Theory, Strategy and Practice*, cit. at 4, 70.

[106] European Commission, Communication "*Strenghtening the foundations of Smart regulation – improving evaluation*", p. 3.

[107] Ibid., p. 5.

[108] European Parliament-Council-Commission, *Interinstitutional Agreement on better law-making*, 2003/C 321/01: see in particular the section dedicated to "Improving the quality of legislation".

specific moments of Parliamentary activities to public policy evaluation. This is the case for Italian Regions or German Länder which have promoted good quality regulation in the activities of their assemblies.

Thirdly, good quality regulation should be an administrative (or technical) task. Good quality regulation should be organized as a real administrative function, regulated by law and performed by professionals operating in dedicated offices, inside every kind of regulator (legislative assemblies, administrations, independent agencies).

Finally, in maintaining rules, it is necessary to consult the targets of regulations, in order to improve the informative basis of the regulatory process and in order to achieve compliance and prevent litigation.