The Global Context: How Politics, Investment, and Institutions Impact European Businesses

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Editors
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Regulatory Agencies and Regulatory Networks in the European Union

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THE BOOM OF REGULATORY ACTIVITY IN THE EU

Throughout the last decades, the EU has significantly increased its regulatory capacity, a development that has run parallel to the more traditional trend of delegation of powers from European member states to EU institutions. As a result, the European regulatory landscape is plagued with agencies and networks with regulatory responsibilities in a wide array of policy domains (Levi-Faur 2011a). Almost all aspects of human social and economic activity fall under the influence and control of these regulatory devices which characterize EU meta-governance.

The use of autonomous regulatory mechanisms to foster market integration and market correction policies in the EU reveals a complex picture both of governance mechanisms, as well as of tasks (ranging from the mere exchange of information to the power of sanctioning or even autonomously enacting new rules and norms), resources (in terms of staff, decision-making structures, and professionalization), and levels of autonomy and discretion in the pursuit of their objectives. The aim of this chapter is to provide an overview of the current state of regulatory networks and agencies in Europe, through an analysis of 40 European regulatory agencies and networks and their main characteristics.

The data used in this chapter was drawn from a data-set built by the authors that contains information about structural characteristics in terms of governance (membership, characteristics of boards, and voting mechanisms), age, staff, budget, and tasks of a total of 40 European regulatory agencies and networks. The data covers all regulatory regimes in Europe including utilities (energy and telecommunication), health, medicine, chemicals, food, aviation, fisheries, postal services, transportation, security, judicial cooperation, and environmental issues, among others.

Our results are consistent with previous findings, which show that regulatory agencies and networks actually do co-exist in Europe. In fact, the analysis of the structural characteristics shows that, beyond labels, regulation in Europe is undergoing a process of hybridization and orchestration that must be acknowledged by all economic, social, administrative, and political players both within and outside the EU.

This process is critical to our times and must be studied and recognized for many reasons. First, as regulation becomes determinant in the exercise of economic and...
social activities of any kind, practitioners need to know who is regulating a certain sector or industry. More importantly, they need to delve more deeply and increase awareness of how and through which mechanisms a certain agency or network decides which exact regulatory tasks are to be performed at the European level and, therefore, which regulations should be performed on a national basis. This, in turn, holds consequences for the degree of professionalization of a certain agency or network. In addition, many regulatory devices at the European level were established by mandate, in contrast to voluntary devices encompassing national regulatory agencies, whose creation has been much more bottom-up. This contrast poses a challenge in understanding the complexity of regulation.

Second, it is widely recognized that non-market strategies – defined as the coordinated actions firms undertake in public policy arenas – are becoming increasingly relevant (Baron 1995; Bonardi, Holburg, and Vanden Bergh 2006). The current governance framework (Emerson, Nabatchi, and Balogh 2012) assumes a more cooperative relationship between private and public actors. In this exchange, regulation and information flows are pivotal. Regulatory decisions and activities affect and have important consequences for firms and companies. Economic, corporate, and social agents must consider that beyond the state’s traditional redistributive role (Lowi 1964; Majone 1997), where the flow of resources is identifiable, regulation defines arenas in which interests are confronted and costs and benefits are much more difficult to track (Levi-Faur 2011a). Thus, actively managing the regulatory environment requires an in-depth knowledge of the regulatory activities performed by players at various European administrative and political levels.

The paper flows as follows. First, we briefly summarize the developments and trends in the widespread use of regulatory agencies and networks all over the world. Afterwards, we specifically refer to the case of the EU and reflect on the existence of both regulatory agencies and regulatory networks in the European regulatory landscape. Finally, we consider the tasks these regulatory agencies and networks are performing.

PRESENT-DAY SHIFTS IN GOVERNANCE AND REGULATION

Our world is a networked one (Castells 2001). The dynamics of business, social, and economic interactions revolve around interdependences, which determine the nature of exchanges and the mechanisms needed to govern them (Hillman, Withers, and Collins 2009). In parallel, modern organizations of all kinds are becoming more complex, challenging traditional responses to firm, social, and policy issues (Farazmand 2002).

Two intertwined features define today’s reality. On the one hand, the trends of regionalization, internationalization, and globalization are unstoppable. On the other hand, regardless of whether you are a firm manager, politician, social activist, or common citizen, the problems you encounter and tackle will be complex (Rittel and Webber 1973), and not easily bounded by regional or national borders.

In this scenario, the old hierarchical mode of top-down governing with state authorities and civil society does not fit (Mayntz 1998). Previously, policy formulation and implementation fell into the exclusive realm of governments, now non-state actors have an active and central role in these activities (Rhodes 1997). In addition, the state is no longer considered omnipotent and capable of unilaterally resolving societal problems; it has to establish a more balanced relationship with corporate and social actors (Mendoza and Vernis 2008).

Regulation and regulatory activities have not been immune to these changes and challenges. Nowadays, the regulatory role of the state, in its relation to the private sectors of society, is diverse and ranges from creating rules, on its own or by delegation, to holding more of a monitoring function (including investigation and sanctions), with a tipping point at the role of courts in resolving conflicts or offences (Freiberg 2010).

However, regulatory activities are no longer solely performed by the state. In this vein, Hancher and Moran (1989) signal the existence of the so-called “regulatory space.” This image of the regulatory space allows one to illustrate the interplay of traditional norms and legal rules with other frameworks in the design, implementation, or even enforcement of regulation in which private and autonomous actors have an active role. The contribution of private actors to governance and regulation is analyzed from the perspective of de-centering1 (Black 2001; Scott 2004; Parker and Braithwaite 2003; Gunningham 2009). As Wolf (2006) signals, private actors provide issue-specific contributions to governance (problem identification, provision of information, articulation of rules or implementation, conduct monitoring, arbitration, and sanctioning) as well as more general contributions, such as when they promote the avoidance of negative externalities or support common societal goals. As mentioned, some of these activities are identifiable with regulation (as is the case with authoritative decision-making or accreditations), a capacity that not long ago was an exclusive property and prerogative of the sovereign state (Cutler, Haufler, and Porter 1999).

1 As Black poses (2001, 103), de-centering is “used to express the observation that governments do not (...) have a monopoly on regulation and that regulation is occurring within and between other social actors: there is regulation in many rooms.”
Following Freiberg (2010), we argue that regulation is a pervasive activity inherently related to power, influence, and control – or, in other words, that power, influence, and control are used to achieve compliance with agreed upon behaviors that otherwise would not be followed. This comprehensive view of regulation assumes that regulatory activities can be exerted using, individually or complementarily, diverse mechanisms in all social and economic policy arenas as well as in all human activities and relationships. As an illustration, Gunningham and Grabosky (1998) propose the following categories for regulatory activities: “command and control,” self-regulation, voluntarism, education and information, economic methods, and markets. Others, such as Parker and Braithwaite (2003), consider co-regulation, corporate compliance systems, incentive-based systems, authorizations, and third party accreditations to standards, among other categories.

Some of the activities related to this broad concept of regulation (e.g., rule-making, accreditation, research activities to inform policy, information diffusion, sanctioning, authorizations, standard setting, cross-border interactions management, etc.) have, over the last decade, become increasingly delegated to autonomous regulatory agencies. Jordana, Levi-Faur, and Fernández-i-Marin (2010) show the global diffusion of these agencies over recent decades (from fewer than five created per year up until the 80s, to more than 20 per year between 1996 and 2002). Thus, the authors argue that regulation through autonomous regulatory agencies has become the prominent model of governance, at least in the advanced capitalist economies, over a majority of social and economic sectors.

The increasing number of regulatory agencies is somehow related to the emergence of the paradigm of New Public Management, which demands that public services be restructured both vertically and horizontally and government be scaled back (Christensen and Laegreid 2011). In fact, for decades, regulatory activities in Europe have been ideologically linked to an active government role in shaping the economy (Levi-Faur 2011a). Establishing regulatory agencies with strong autonomy and professional values represents a paradigmatic shift. However, as counterintuitive as it may appear, the initial attempt to deregulate to devolve autonomy and control to other economic and social agents, underlying the New Public Management reforms, has in fact resulted in new hyper-regulation, fragmentation, and turf-wars among public organizations (Christensen and Laegreid 2011).

At the same time, at the international level, globalization has prompted a need for multilateral provision of goods and services, requiring transnational and global regulatory agreements (Levi-Faur 2011b; Mattli and Woods 2009). Nowadays, special purpose organizations coordinate regulatory activities superseding national or regional boundaries in an increasing variety of domains. These organizations constitute not only a political challenge, since they are to harmonize regulatory practices among countries whose interests and constituencies may collide, but also represent a novelty in public management, as the OECD has pointed out.

Although the shifts towards a globalized governance are evident, the still dominant role of national governments, and national sovereignty have positioned networks of regulatory authorities to be a feasible means for inter-organizational transnational co-ordination (Kahler and Lake 2009). Networked forms of regulation perform three basic functions (Slaughter 2004): information-sharing, rule harmonization, and cross-national enforcement of regulatory policies. As presented in the next section, the functions of EU regulatory agencies and networks seem to be affected by the field in which they operate, and have direct implications for their governance structures.

EU REGULATORY AGENCIES AND NETWORKS

Throughout the last decades there has been an impressive spread of regulatory agencies in Europe (Gilardi 2005). The emergence of the “regulatory state” (Majone 1997) also named “regulatory capitalism” (Levi-Faur 2005), has led to the foundation of national regulatory agencies across countries and sectors. According to Majone (1997), since the 1970s, there has been a shift from the positive, interventionist state to a regulatory state. This shift is explained by increasing international competition and economic and monetary integration within the EU, but also by governments’ strategic choices since the 1970s, which led to new styles of policy-making, and “more complex standards of legitimacy and methods of accountability” (Majone 1997, 163).

While the 1970s, 80s, and 90s were characterized by the creation of independent or semi-independent regulatory agencies at the national level, the Europeanization process of the 1990s and 2000s favored the establishment of EU agencies and networks (Levi-Faur 2011b). These EU networks and agencies, created in the sectors of energy, transport, environment, finance, health, and justice, aim to deal with regulatory issues at the EU level.

These regulatory agencies are responsible for implementing EU legislation at the national level. As noted by Coen and Thatcher (2008), the many difficulties that national regulatory agencies face when implementing EU regulation has led to the
establishment of formal and informal networks of regulators. Hence, in this study we take into account two important institutions that have appeared recently: agencies and networks (Levi-Faur 2011a; Coen and Thatcher 2008; Majone 1997).

The foundation of EU agencies implies, first of all, that national governments delegate part of their sovereignty to EU institutions, and secondly, that the European Commission delegates responsibility to independent, professional institutions (i.e., EU agencies). Thus, national governments delegate part of their sovereignty to these supranational regulatory bodies. EU agencies are comparable to mandated public networks, where a legislative superordinate actor – in this case the EU – may impose coordination and collaboration among various actors who have the obligation to participate (Rodríguez et al. 2007; Isset and Provan 2005; Moynihan 2009). EU agencies are established through EU law, which also determines their functions and tasks. In this vein, they are “hybrid bodies that link the EU and national national levels [...] namely the Commission and national regulatory agencies” (Coen and Tatcher 2008, 52). Following Levi-Faur’s characterization (2011b, 813), in this study an agency is defined as “an administrative organization with a distinct, formal identity, an internal hierarchy, functional capacities, and, most important, at least one principal.”

In contrast to EU agencies, voluntary networks are an effort to “harmonize the fragmented institutional landscape” (Levi-Faur 2011b, 811). A voluntary network is defined as a set of stable relationships of “a non-hierarchical and interdependent nature which link a variety of actors” (Levi-Faur 2011b, 813). The main feature that distinguishes EU agencies from EU networks is the mandated party (i.e., the European Commission), which is not present in the EU networks.

This study takes into account 40 regulatory agencies and networks. Our sample is based on Levi-Faur’s 36 regulatory regimes (Levi-Faur 2011b) and on the European Union’s official decentralized agencies list. More specifically, we take into account 29 out of the 34 EU decentralized agencies and 11 out of the 51 networks included in Levi-Faur’s study. In this chapter, we analyze the governance structure characteristics of these organizations. Although regulatory networks and regulatory agencies could be expected to have different governance mechanisms, in our approach we analyze the top decision-making structures of each organization without taking into account the label which identifies them (i.e., authority, agency, or network).

In our enquiry we use one of the ideal types for network governance devised by Provan and Kenis (2008), the “network administrative organization”, which identifies the unit deliberately created to govern the organization. Thus, only those networks with a network administrative organization were included in the sample. We do not include those organizations that are under direct control of EU level institutions.

The following figure illustrates the emergence of agencies and networks. Even though one regulatory agency was founded in 1975, it was not until the 1990s, and particularly since the beginning of the 2000s, that the establishment of agencies and networks boomed.

Graph 1: Number of EU Agencies and Networks

Source: Authors’ own compilation based on original dataset

Research into the organizations captured in this study reveals how EU agencies and networks are organized in order to accomplish their goals. First of all, all the agencies

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2 A Principal-Agent relationship implies that one entity appoints another to act on its behalf (i.e., the agent acts on behalf of the principal). In the case of European regulatory agencies and networks, there is a double delegation: from national governments to the European Commission, and from the Commission to European agencies or networks (Coen and Thatcher 2008). Therefore, there are three types of principals: national governments, national regulatory agencies, and the European Commission.

3 http://europa.eu/about-eu/agencies/
and networks have a plenary meeting where representatives from the national regulatory agencies come together in order to discuss the main guidelines of the agency or network. Secondly, most of them have a management or executive committee - elected in the plenary meeting - that monitors the implementation of the plenary guidelines. Thirdly, most of the organizations have an office or secretariat responsible for daily management. In addition, almost half of the agencies or networks have working groups or expert committees dealing with specific issues or policies. Finally, most of these organizations have a chairperson and an executive director, regardless of whether they are agencies or networks.

Graph 2: Governance Structure of EU Agencies and Networks (%)

<table>
<thead>
<tr>
<th>Description</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>The EU agency / network has a chairperson</td>
<td>95</td>
</tr>
<tr>
<td>The EU agency / network has an executive director</td>
<td>82.50</td>
</tr>
<tr>
<td>The EU agency / network has an executive board</td>
<td>50</td>
</tr>
<tr>
<td>The EU agency / network has expert committees</td>
<td>42.50</td>
</tr>
<tr>
<td>The EU agency / network has a board of appeal</td>
<td>20</td>
</tr>
</tbody>
</table>

Source: Authors’ own compilation

Even though Levi-Faur (2011b) notes that the modes of governance used by EU networks are less hierarchical and more open and collegial when compared to EU agencies, our empirical data show that the most relevant feature differentiating voluntary and mandated networks is the existence of a board of appeal and expert committees – which are only present in EU agencies.

The presence or absence of a board of appeal is not only related to the nature of the organization (i.e., whether it is an agency or network), it is also associated with the sector in which it operates and, as presented below, with the functions of the network. A high level of market integration seems to correlate with the establishment of a board of appeal. In this vein, we found that agencies within the economy and finance sector (i.e., banking, insurance, and harmonization of internal market) are the ones with a higher percentage of boards of appeal.

In fact, the creation of the EU internal market has increasingly generated a new agenda. Upwards delegation to the EU, weak as it may be, lessens the capacity of national governments to shape policies and their implementation, thus constraining the capacity of national authorities to directly influence economic, social, or environmental activities. At the same time, businesses and social actors are obliged to play in a larger, and far more distant market, in which European-wide regulatory activities performed by regulatory agencies and networks play a crucial role as they foster harmonization of rules, standards and norms, and economic liberalization. However, market integration needs to be balanced with market correction initiatives that tackle, at the European level, urgent demands, crises, or complex social, economic, or environmental issues requiring a supranational response. Regulation also serves as a vehicle in this aim. Although consensus regarding market correction initiatives is not as easily achievable as it is for market integration policies, regulatory networks and agencies play a role in both.

We also found variation in the decision-making systems established, which has clear implications for how agencies and networks function. More specifically, it is expected that those agencies and networks that make decisions using simple or reinforced majority will be more efficient and effective, being able to rapidly react to uncertain environments, produce the necessary advice, and propose required regulations and sanctions. Thus, when governance boards need consensus instead of simple or reinforced majority, the risk of stasis increases (Greenwood and Webster 2000). In this vein, most of the governance boards of agencies and networks included in the sample make their decisions based on simple or reinforced majority, and only 7.5% of the networks use unanimity procedures (see Figure 3).

Graph 3: Decision-making System in the Governance Boards

Source: Authors’ own compilation
The picture changes significantly when we look at the decision-making system established in the executive boards. As Figure 4 shows, most of these bodies make their decisions by unanimity of the representatives. Though this may hamper effective decision-making, it can also produce stronger positions which are more easily defendable in EU institutions and across the member states.

In addition, it is worth noting that agencies and networks coexist within the same sectors. Thus, when a more formalized agency is established under the mandate of the European Commission, voluntary networks do not dissolve. Therefore, voluntary networks keep gathering NRAs and/or IRAs in order to share information and, in some instances, provide information to EU institutions. The coexistence of both mandated and voluntary regulatory devices raises interesting questions: are they substitutable (and therefore, in the long run, will one eventually disappear?) or are they meant to perform different roles as to allow regulatory authorities to interact freely without constraints?

EU agencies and networks’ tasks differ depending on their nature and the sector in which they work. Slaughter (2004) identifies three basic functions of agencies and networks: information-sharing, rule harmonization, and cross-national enforcement of regulatory policies. In a similar vein, and particularly focusing on EU regulatory networks, Coen and Thatcher (2008) distinguish regulatory networks along a “soft” - “hard” continuum, which goes from coordination to drafting secondary legislation at the EU level.

Our empirical analysis of 40 regulatory agencies and networks shows that all of them at least share information. However, as presented in Figure 5, there is more variation when it comes to performing tasks such as providing advice, conducting research, proposing rules and regulations, offering training, imposing authorizations to NRAs, conducting joint operations, sanctioning members if these do not comply with previously agreed upon commitments, and carrying out campaigns.

Following Coen and Thatcher’s (2008) continuum, we can state that “proposing sanctions on national regulators” and “being able to determine authorizations with direct implications on EU businesses” are at the end of the continuum and can be labeled as “hard” functions. None of the voluntary regulatory networks have the capacity to carry out these functions. More importantly, only ten out of the 29 EU agencies have the capacity to impose authorizations.

As noted above, the tasks and functions of EU agencies are related to their organizational structure. With the exception of two cases, those EU agencies with a board of appeal
are also able to produce authorizations. Even more importantly, the three EU agencies that have the capacity to propose sanctions on national regulators also have a board of appeal.

Similar to the organizational structure, the sector of an EU agency influences its capacities and functions. On the one hand, those agencies operating in the economy and finance sector, in addition to ACER (the Agency for the Cooperation of Energy Regulators), are the ones that have “hard” functions: the capacity to propose sanctions on national regulators. This list is expanded when we take authorizations into account: agencies within the medicine, aviation, and chemical sectors that also have this capacity. On the other hand, 13 out of the 29 agencies do not have any “hard” functions (i.e., they do not propose rules and regulations, authorizations, and sanctions), and their tasks are focused on providing advice, scientific research, training, and, in some instances, coordinating joint operations (this is particularly the case for those agencies dealing with security and policing issues). The same is true for the 11 networks included in the sample: their functions cannot be considered as “hard,” as they are mainly focused on sharing information, providing advice, and externally lobbying the EU.

From our analysis, the tasks and functions regulatory agencies and networks perform vary and may be related to the level and need for market integration, or the salience and sensitivity of different economic and/or social sectors. In fact, while some think that regulation is linked to neo-liberalist views which undermine the welfare state (Majone 1994), others propose a social engineering role of regulation (Zedner 2006). The EU case illustrates this tension, as shown by the number of regulatory devices and the tasks they perform in all areas of European policy. Moreover, as mentioned, when delegating regulatory tasks to European-wide networks and agencies – a shift which is initially triggered by the need to harmonize and coordinate in order to ensure the free movement of people and goods in Europe (market creation and integration) – it is important to guarantee, at the same European level, regulatory devices and practices that avoid negative externalities and execute the market correction activities that society demands.

CONCLUSION

The EU regulatory system is not fixed, as noted by Levi-Faur (2011b, 826): it is “constantly changing and reinventing itself in order to keep pace with Europeanization, liberalization, and market integration.” In addition, economic, social, and environmental crises can shape the universe of agencies and networks in the EU. EU regulation, a pervasive activity nowadays, is partly executed by regulatory agencies and networks. This was apparent in the last economic crisis, which fostered the establishment of new agencies in the economic and finance sector and strengthened the capacities of the old ones. Regulatory activities in the EU cultivate the creation of an integrated market while at the same time aiming to preserve and safeguard the common good. In other words, regulatory activities shape markets, but also correct them.

As upwards delegation to the EU institutions continues, the role of European-wide regulatory agencies and networks is crucial. Social and economic activities of all kinds depend to some extent on the activities performed by regulatory agencies and networks. Whether these activities merely share information or actually establish norms, authorize activities, and/or sanction non-compliances, private actors must enrich their knowledge not only about what is being regulated, but also about how it is done and by whom. To this end, this chapter offers a brief overview of the tasks that agencies and networks are nowadays taking on at the European level when it comes to regulatory activities. Even more importantly, we offer a brief depiction of the characteristics of these organizations in terms of governance structure and decision-making mechanisms.

In the governance framework, the horizontal interaction between public and private actors is pivotal. Exchanging information and resources between social and economic agents requires a high-quality and in-depth analysis of the nature and characteristics of the public and private organizations, in order to determine how economic and social activities are to be performed in our societies.

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5 The three EU financial and economic regulatory authorities (i.e., European Banking Authority, European Insurance and Occupational Pensions Authority, and European Securities and Markets Authority) were established after the economic crisis of 2008.
BIBLIOGRAPHY


