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The Notions of Regulation and Self-Regulation in Political Science

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Abstract

While political scientists concur about the increasing importance of regulation, the extant literature features a notable diversity of contemporary definitions of regulation. The various understandings of regulation put different emphasis on the role of the state and regulation as an instrument or a process, respectively. This article scrutinizes and clarifies the notions of regulation and self-regulation in the Political Science literature. Along three analytic questions – what is regulated, who regulates, and how is it being regulated? –, the essay illustrates developments from regulation as government intervention to regulation as governance and finally, regulation as various mechanisms of social control. The latter includes hybrid, private, transnational, voluntary and self-regulation. The article discusses the usefulness of modern notions of regulation, as well as potential future research trajectories. It concludes that there is a need for a conceptual consolidation that integrates different regulatory processes, actors and instruments and enables comparative, explanatory empirical assessments of regulatory impacts.

Keywords

Regulation; regulatory state; self-regulation; steering

The Notions of Regulation and Self-Regulation in Political Science

Eva Thomann¹

1 Introduction

„Regulation is hard to define, not least because it means different things to different people.“ (Levi-Faur 2011a: 3).

This essay clarifies the notions of regulation and self-regulation in Political Science. Since the 1970s, the regulatory state has emerged not least as a response to increasingly complex and transboundary policy problems in the vein of international competition and economic and monetary integration (Majone 1994, 1997, 1999a, b). The rich extant literature concurs regarding the extraordinary and increasing importance of regulation (Braithwaite et al. 2007; Jordana/Levi-Faur 2004). Concurrently, a notable diversity of understandings of what regulation means has emerged (Baldwin et al. 2012; Döhler/Wegrich 2010). This diversity is not least a result of the proliferation of modes of regulation and governance in the vein of economic modernization, globalization and the move beyond traditional forms of state intervention. The spread of regulation and self-regulation leads to an increased relevance of this research for policy analysis as well as the study of international relations whenever such studies put strategies of problem-solving at the forefront. Simultaneously, however, these strands of literature have developed rather separately, and the term “regulation” still evokes a bureaucratic connotation that no longer seems justified. Against this background, this article reviews the literature on regulation and self-regulation along three main analytic questions (Levi-Faur 2011a): First, what is being regulated? Second, who regulates? Thirds, how does regulation take place?

On this basis three understandings of regulation can be identified, which put different emphasis on the role of the state and the fact that regulation denotes both a set of instruments and a process. The focus on regulatory instruments defines regulation narrowly as a mode of state intervention and focuses on the intersection of regulation with administrative actors as well as its instrumental forms. More process-oriented perspectives tend to view regulation more broadly as a specific way of structuring and resolving political and economic conflicts in order to shape decision-making processes and their results and involve both political and non-political actors. They have been extended to include private, sometimes voluntary, modes of (self-)regulation beyond, yet “in the shadow of” the state.

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The next section outlines different understandings of regulation. On this basis, a short overview of the emergence and different types of regulation and their objects – the “what” – follows. Subsequently, actor-centered definitions focusing on “who” regulates will be presented. This enables an identification of different regulatory techniques as well as modes of self-regulation – the “how”. The concluding section discusses complementarities between different notions of regulation, as well as research gaps resulting from modern understandings of regulation.

2 Three meanings of regulation

Political Science generally understands regulation as a way of steering behavior. Originally, regulation primarily meant the setting of rules (Levi-Faur 2011a). Contemporary understandings view regulation as a way of addressing the question of „who gets what, when, and how“ (Lasswell 2012). This entails activities concerning the processes of a) agenda-setting and decision-making, b) adoption and implementation, c) monitoring compliance, d) enforcement and a) evaluation and review (Abbott/Snidal 2009: 44; Hood et al. 2001; Levi-Faur 2011a; Verbruggen/Havinga 2017). Although regulation is often presented as a clearly confined governmental activity, at least three meanings of regulation can be distinguished according to Baldwin et al. (2012) and Jordana/Levi-Faur (2004). They differ notably in the breadth with which they define the “what“, “who” and “how”, while often not being clearly demarcated themselves. The discussion of the involved actors here is confined to the regulating actors in a more narrow sense (phases a, c and d).

2.1 Regulation as state intervention

In the Weberian sense regulation is understood as a the promulgation of an authoritative set of rules, accompanied by some mechanism for monitoring and promoting compliance, typically through a public agency specifically assigned to this task (Jordana/Levi-Faur 2004; Töller 2011). Lowi (1972), for example, defines regulation as a specific way how the state controls society. Regulation aims at influencing human behavior and oppressing undesired behavior, by setting out conditions and restrictions of individual and collective behavior. Thus, regulation is primarily an instrument. As such it is distinct from distributional and redistributive policy aimed at extracting and allocating resources between societal actors. In this vein, Selznick (1985) defines regulation as the sustained and focused control exercised by a public authority over activities that are valued by the community.

2.2 Regulation as governance

In a broader, more process-oriented sense, regulation generally denotes governance as the ensemble of the targeted – both restricting and enabling – aggregated efforts through which state agencies exercise influence in order to steer social and economic behavior. This includes binding rules as well as other, less compulsory forms on influence, based on economic incentives, contractually assigned tasks and competences, public ownership or the use of resources. This understanding partly underlies Majone’s (1994, 1999a, b) notion of the “regulatory state”. The regulatory state corrects market

failures by steering (that is, rules), but delegating the “rowing” – that is, the concretization and implementation of these rules (phases b-d) – to a range of state and non-state actors at various levels: national, regional, local, individual (Yeung 2010).² It succeeds the positive, interventionist welfare state of the postwar era and increasingly manifests itself also in the international arena beyond the traditional nation state (Braithwaite/Drahos 2000; Jordana/Levi-Faur 2004; Kerwer 2005; Koppell 2010; Majone 1997; Tosun 2012b). Yet the delegating regulatory state eventually retains the responsibility to safeguard the public interest (Bendor et al. 2001). It does so by means of formalized and rigid as well as less binding, negotiation-based control mechanisms (Yeung 2010). Levi-Faur (2011a: 6), however, distinguishes regulation from other binding norms, including legislative and judicial rule-making, when defining regulation as the “ex ante bureaucratic legalization of prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors”.

Both Levi-Faur’s and Majone’s definitions correspond to the second meaning of regulation regarding the questions of who regulates and what is being regulated. Yet they conceive of regulatory techniques (the “how”) more narrowly, since they demarcate regulation from redistributive and, in the case of Levi-Faur, non-binding rules (Braithwaite et al. 2007).

2.3 Regulation as mechanisms of social control

The most recent and broadest meaning of regulation moves beyond the idea that it is the state who regulates. In this sense, regulation encompasses all mechanisms of social control that aim at social or economic influence (phases a-e) – independently of whether they come from the state or other sources, such as the market. Rooted in the theory of smart regulation (Gunningham et al. 1998), this understanding of regulation emerges, on the one hand, from the insight that steering can equally have its origin in non-state institutions, including businesses and self-regulating, professional, voluntary and trade organizations. On the other hand, this understanding of regulation no longer presumes that the effects of regulation are intended. They can equally be a side effect of pursuing other goals. As a consequence, regulation also includes mechanisms that are neither the product of state activities nor part of an institutional arrangement, for instance, the development of social norms and the effects of markets in modifying behavior (Levi-Faur 2011a). This de-centered view of regulation paved the way for the discovery of a plethora of non-state regulatory actors (e.g. Büthe 2010; Graz/Nölke 2008; Vogel 2008) and alternative, for instance voluntary, cooperative or network-based, modes of regulation (e.g. Ayres/Braithwaite 1994; Coen/Thatcher 2005; Héritier/Eckert 2008, 2009; Levi-Faur 2011b; Töller 2011; Tosun et al. 2016) – including self-regulation characterized by

2 Jordana and Levi-Faur (2004) attribute Majone’s regulatory state to the most narrow meaning of regulation. This aptly illustrates the fuzziness of the conceptual distinction of different notions of regulation (see Black 2002 and Knill/Tosun 2012). Majone (1994, 1996) indeed describes the regulatory state as a reaction to and shift away from redistributive welfare and macroeconomic policy and public ownership toward behavioral steering. Yet the trends toward delegation, privatization, third-party government, promotion of competition and not directly binding rules he depicts are much more characteristic of the second, rather than the first meaning of regulation, and certainly greatly exceed traditional command and control approaches.

an (almost) complete retreat of the state (Knill/Lehmkuhl 2002; Knill/Tosun 2012). It also foresees the possibility that the state is being regulated by civil society, rather than vice versa. This meaning mostly resonates with Scott’s (2001: 283) definition of regulation as “any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within the acceptable limits of the regime”.

Table 1 resumes the three notions of regulation, illustrating that these only partially overlap. The more society-centered understandings of regulation, for instance, represent efforts to overcome traditional modes of state regulation in order to respond to changed power structures, new policy problems and societal changes (Majone 1997). The discussions surrounding regulation and deregulation, in turn, often refer to the question of what the state should or should not prescribe to businesses and civil society (Levi-Faur 2011a). Clearly, the discussions of analytic and normative aspects of regulation in the literature can only be understood against the background of the underlying understanding of regulation (Döhler/Wegrich 2010).

Table 1: Three meanings of regulation

<i>Under-standing</i>	<i>What is being regula-ted?</i>	<i>Who regulates?</i>	<i>How are things being reg-ulated?</i>
Regulation as state in-tervention	Individual and collec-tive behavior	Phases a, c and d: State	Intentional, prescriptive conditions and constraints Excludes (re)distribution of resources
Regulation as gover-nance	Individual and collec-tive behavior; market and state failure	Phase a: State und state-like actors (national and transnational) Phases b – d: delega-tion	Intentional, prescriptive and non-binding, con-straining and enabling Includes (re)distribution of resources
Regulation as mecha-nisms of so-cial control	Individual and collec-tive, social and eco-nomic behavior	Phases a-d: State and non-state actors (business, civil society)	Intentional and uninten-tional, prescriptive and non-binding, constraining and enabling Includes (re)distribution of resources and soft norms

Source: Own illustration based on Jordana/Levi-Faur 2004 and Baldwin et al. 2012.

In what follows, varieties of regulation are discussed more in depth according to three guiding questions: what is being regulated, who regulates, and how is it being regulated?

3 What is being regulated?

The transition toward the regulatory state was first highlighted in the Anglo-Saxon (Moran 2003; Seidman/Gilmour 1986; Wilson 1980) and later in the West European context (Majone 1994, 1997, 1999a, b). After the restoration of the national economies in the

aftermath of World War II, the positive, Keynesian welfare state acted as a planner, direct producer of goods and services, and employer whose priorities were income redistribution and macroeconomic stabilization by means of taxes and public spending. Yet reinforced international competition, the economic and monetary integration within the European Union (EU), rising levels of unemployment and inflation rates raised doubts about this social democratic model. Nearly unlimited public expenditures as well as generous welfare policies were increasingly perceived as an important cause of the weak economy (Yeung 2010).

3.1 The regulatory state: response to market failure

Contrary to this state-centric view of regulation, the regulatory state tended to retreat from these tasks and focus more strongly on market regulation instead. The rule-setting regulatory state, acting both as external and market regulator as well as an internal regulator of a decentralized bureaucracy, is a development to be observed all over the globe since the 1970s (Jordana/Levi-Faur 2004). Majone (1997) names three reasons in the West European context. The privatization of public ownership required new possibilities for control. Europeanization induced a transfer of regulatory competences away from the nation state to the EU, which acts itself as a regulatory state delegating tasks to member states. The new regulatory state manifests itself at the national, regional and global level (Jordana/Levi-Faur 2004; Yeung 2010). Finally, the transition from state government to indirect or third party government occurred through four mechanisms: the decentralization and regionalization of bureaucracy; the formation of specialized administrative units acting under their own budget; the delegation of responsibility for services to private, non-profit or for-profit organizations operating outside the realm of the executive; and the tendering of tasks and services on a contractual basis.

Thus, the regulatory state operates through market liberalization, competition, supply-side economics, far-reaching welfare reforms, New Public Management – oriented administrative reforms, and deregulation by means of more efficient, less control-oriented and interventionist methods (Mayntz 2010). As a consequence, the state no longer provides welfare and other services directly, but delegates them to a network of commercial and non-profit providers instead (Yeung 2010).

It is a central task of the regulatory state to correct market failures (as well as the failure of the positive state to effectively respond to these) through directives and the promotion of competition (Senn 2010). Market failures have several causes. First, market transactions create externalities that can cause costs or an insufficient provision of public goods. Second, some participants in market transactions may have insufficient information at their disposal (information asymmetries). Third, distortions of competition result from a lack of alternatives on the demand or offer side (monopolies). The first two variants of market failure lead to social regulation, for instance in the areas of health, safety, environmental or consumer protection regulation. In this context, Scharpf (1997) distinguishes between product regulations and process regulations. “Risk regulation” refers more narrowly to regulatory activities to minimize risks (Hood et al. 2001; Tosun 2012b). Conversely, distortions of competition lead to economic regulation, for instance through price controls. Furthermore, regulation can serve to correct for the costs of transactions or coordination, or for the shortcomings of private law (Jordana/Levi-Faur 2004: 32).

3.2 Types of regulatory policies

Jordana and Levi-Faur (2004: 6–8) identify four kinds of regulation relating to competition. *Deregulation* refers to scenarios in which the state retreats from regulatory activities and reduces public expenditures. Thereby, economic, political and social constraints of the behavior of social and economic actors are removed. Hence, deregulation is an economic-political instrument that refers to the those measures, decided upon by law or through agreements between organizations, economic associations and the state, which aim at reducing barriers to entering and exiting markets (Schmidt 2004: 153). Deregulated competition eventually leads to self-regulating markets. From a neoliberal viewpoint, regulation is a threat to economic growth and the functioning of markets. Yet market mechanisms do not always produce the desired results. They are influenced by non-economic factors. Furthermore, even privatization programs depend on public steering. Thus, whereas deregulation is sometimes deemed a necessary condition for competition (Stigler 1974), the regulation literature emphasizes the necessity for reregulation alongside liberalization. Competition is steered through regulation and administrative controls.

Regulation-of-competition occurs via national or supranational competition authorities that take on broad responsibility for overseeing the economy, for instance in order to prevent monopolies or cross-ownerships. *Regulation-for-competition* intervenes more strongly in specific sectors of the economy. Sector-specific specialized regulatory authorities proactively participate in shaping and controlling the market (for instance, network regimes in the telecommunication sector). Finally, meta-regulated competition refers to regulating the process of regulation itself. This induces an *enforced self-regulation of competition rules*. Both sector-specific and national public competition authorities oversee the procedures through which corporations and other organizations set rules upon themselves and self-monitor the compliance and enforcement of these rules (Morgan 2003; Parker 2007).

Today, regulation pervades a broad variety of policy fields. It can serve the prevention of social or ecological risks relating to contemporary developments such as environmental pollution or new technologies (genetic engineering, nuclear energy, data privacy in the internet, etc.), cost control, the protection of market competition or private interests (Döhler/Wegrich 2010). Levi-Faur (2011a: 9–10) identifies eight aspects that are regulated independently of the policy sector under question. *Entry regulation* determines who is able to offer services, supply products or offer information (e.g. licenses). *Regulation on behavior* deals with issues of proper action, speech, or expression (e.g. prohibitions). *Regulation of costs* targets the acceptable costs of services and products, for instance by means of price caps or rates of return. The *regulation of content* deals with the integrity of contents that are communicated through various platforms, such as advertisement rules or antiracism norms for the internet, radio and print media. The *regulation of preferences* is manifested via socialization, professionalization, and educational processes. *Regulation of technology* refers to prescribing specific technologies of production or process. Finally, the *regulation of performance* targets the achievements of results (for example: output goals).

4 Who regulates?

Political scientists mostly answer the question of how regulation takes place by looking at the actors involved in these processes. In what follows, the role of the bureaucracy in regulation, the delegation of regulatory tasks, and global and private regulating actors are discussed. This sets the ground for actor-centered definitions of regulation, and illustrates the latter's inherent hybridity.

4.1 The regulating bureaucracy

State-centered conceptions of regulation focus on bureaucratic and administrative rule making and implementation (Levi-Faur 2011a; Selznick 1985). Döhler (2006) highlights the particularities of the regulating bureaucracy. While the legislative retains a design mandate, the bureaucratic legislator – essentially, the executive – sets its own regulatory standards by means of administrative measures and negotiated rulemaking. Institutionally speaking, the regulating bureaucracy steers “at distance” from democratic principals. It is typically disaggregated to different actors at various horizontal and vertical levels. Its procedural legitimacy stems from its subordination to indirectly elected ministers responsible for its portfolio, its staffing with specialized experts, and autonomous action. Oftentimes, the addressees are involved in consultative processes when regulations are set. Acting in sectors with a strong economic or technical momentum, regulatory administrative agencies strongly base their decisions on scientific and technical expertise (Döhler 2006: 208). As a consequence, their attachment to primary law decreases, while their discretion increases.

The implementation and enforcement of regulation (phased b to d), in turn, is the task of executive agents, such as member state authorities, inspectorates and public servants (Carter 2017; Lipsky 1980/2010; Lytton/McAllister 2014; May/Wood 2003; Thomann 2015b). The high diversity of executive bureaucracy is not least due to different degrees of institutional separation of regulatory and enforcement competences, which can be more or less centralized. Next to generic and specialized enforcement agencies, constellations in which several implementing agencies with different specializations and expertise share tasks within an organizational network are also increasingly common (Fischer et al. 2012; Knill/Tosun 2012; Levi-Faur 2011b).

4.2 Delegation of regulatory tasks

Through the rise of the regulatory state, the landscape of actors has changed with an increased delegation of regulatory tasks to specialized, autonomous agencies and commissions. These actors both have a strong expertise in their respective regulatory area, and they operate at arm's length from government (Pollitt/Talbot 2004). In this context, Coen and Thatcher (2005) speak of *Non-Majoritarian Regulators*. These are actors who are neither elected nor belong to a governmental organization. They were given the power to regulate the market, either through formal delegation under public law or a *de jure* or *de facto* recognition by public authorities. This development is a direct response to the particular demands of steering, which independent central banks, regulatory agencies or supranational authorities like the European Commission can arguably better meet than the traditional centralized bureaucracy. The so-called agency model is especially suited for social and economic regulation and other administrative activities

where technical expertise, reputation and the ability for credible political commitments are decisive for effective regulation (Majone 1997, 1999b).

A typical example of this are independent regulatory agencies (IRAs) such as the German Federal Network Agency, the European Environment Agency or the U.S. Food and Drug Administration, all founded on a legal basis. IRAs have legislative competences, but they are not subject to ministerial directions or oversight (Burton 1997; Gilardi 2008; Maggetti 2012). *Quasi-Autonomous Non-Governmental Organizations* (Quangos) are more generally quasi-autonomous commissioned agencies under private law, publicly funded, partially privatized and outsourced organizations or voluntary associations. They spend public money, fulfill public tasks (services, counselling, regulation) and have some autonomy (Bertelli 2006). Finally, judicial law has gained a more central role and with it, courts such as the European Court of Justice. The same is true for pluralistic expert associations such as employer associations and unions (Majone 1994, 1997; Yeung 2010).

4.3 Global regulation

The rise of the regulatory state is not least a consequence of economic modernization and globalization (Majone 1999b). Increasingly worldwide interdependencies between economies and financial markets led to intensified global interaction that created the need for more regulation at the international level. The need for coordination typically does not stop at national borders and often urges for prompt solutions (Büthe 2010). Within this development toward *global, transnational regulation*, nation states switched their role from a regulating actor to an addressee of regulation. This has led to an erosion of the power of nation states and their democratic institutions in favor of an increased power of global business actors. Besides the state, a host of new regulatory actors enter the stage. These actors are, on the one hand, international organization such as the EU, the World Bank or the Organization for Economic Co-operation and Development (OECD). On the other hand, economic associations (e.g. chambers of commerce), corporations (e.g. Monsanto), international and national non-governmental organizations (e.g. Consumers International), the public (e.g. media) and epistemic communities (e.g. scientific expert groups) play an increasingly central role (Braithwaite/Drahos 2000). Hale and Held (2011: 12–17) identify five types of transnational regulation. In *transgovernmental networks*, national proponents of politics and public administration gather and coordinate their actions. *Arbitration bodies* arbitrate transboundary conflicts between businesses, investors and states. *Multi-stakeholder initiatives* are partnerships between different groups of stakeholders that seek to resolve concrete problems or provide a service. *Voluntary regulations* define voluntary conducts and practices, whose application is often promoted through persuasive instruments. Finally, *finance mechanisms* aim at generating or redistributing resources. International cooperation has different degrees of formalization, target groups and geographical scopes (Knill/Tosun 2012). It emerges in a broad range of policy areas – for example, the regulation of financial markets, labor standards, nuclear energy, telecommunication, narcotics, food safety, maritime and road traffic, air transportation, security, trade, competition and environmental policy (Braithwaite/Drahos 2000).

4.4 Private regulation

Economic globalization has led to an increase in the number of businesses acting across borders, their practical significance and influence. State mechanisms often proved ineffective to govern global corporations and markets and resolve the resulting problems (Knill/Lehmkuhl 2002). Market liberalization and product innovation call for regulation, yet national governments often lack the necessary expertise (Büthe 2010). Concurrently, non-state actors are increasingly involved (Vogel 2008). This included firms and industrial associations regulating themselves through codes of conducts; non-governmental organizations that propose voluntary standards (e.g. fair trade) for businesses; and organizations that include a variety of interest groups from the economic, non-governmental and public spheres in the drafting and enforcement of business codes (Abbott/Snidal 2009).

Private regulation denotes binding and non-binding codes, rules and standards that are neither decided nor enforced by the state (Börzel/Risse 2010; Senn 2010). It is often mentioned alongside inter-, transnational and global regulation, but it is not conceptually equivalent (Graz/Nölke 2008; Vogel 2008). At the international level, private regulation is to be demarcated from regulation within international treaties and organizations, intergovernmental cooperation or national or regional public institutions. Private regulation emerges either within a transnational standard-setting institution, or it results from often competing standards of selected businesses and consortiums (Büthe/Mattli 2011).

Private regulation can either follow a logic of control based on compulsory rules, enforcement of compliance and incentives. Alternatively, it follows a logic of empowerment, which yields the support of marginalized and disadvantaged actors and improves their market position by means of cooperation, persuasion and networked advocacy (Auld et al. 2015). Private regulation often focuses on a specific industry or product, process, performance or working conditions. Areas of application include child labor, coffee production or environmental protection in forestry, the energy industry or mineral extraction (Vogel 2008). Some private regulatory regimes operate outside of public scrutiny, others, for example international rating agencies, have a high visibility and influence (Büthe 2010). Private regulation is attractive whenever state sovereignty is an obstacle for decision-making or subsequent processes. It often complements, rather than replaces, public regulation. It is especially pronounced in areas that cannot adequately be regulated within national borders and whose complexity – technical, or in terms of actors – transcends the competences of national authorities. The regulation of food safety is a well-researched example (Verbruggen 2013).

Even in private regulation, however, the state can play an advisory or supporting role – or even be its target (Verbruggen 2013). Multi-stakeholder initiatives that link the global certification of products and producers with requirements for an independent supervision of suppliers, for instance, have a quasi-public character as they emerge in negotiations between corporations, national governments, nongovernmental organizations or labor unions (Bartley 2007; Cashore et al. 2004). The demand for private regulation can come from participants of market transactions as well as states. For instance, the delegation of tasks to private actors, who are sometimes supported with public funds, is a core strategy of the EU in the area of technical harmonization and standards (Büthe 2010). The World Trade Organization requires governments to comply with

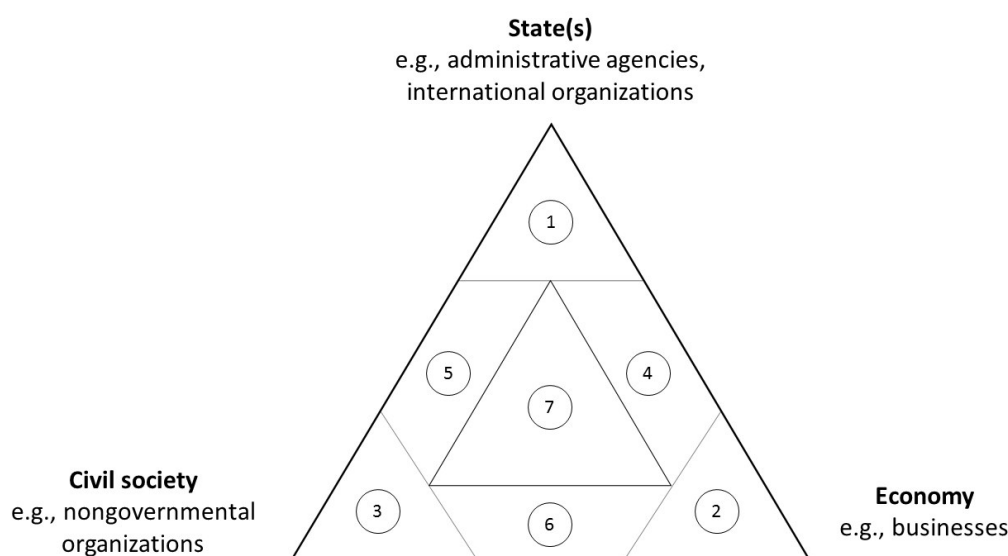
standards that were developed by private standards developing organizations: the International Organization for Standardization and the International Electrotechnical Commission. Additionally, private regulatory actors often rely on public support for monitoring and enforcement (Büthe 2010; Graz/Nölke 2008; Verbruggen 2013).

Private regulations differ in how they include stakeholders and compete with other regulations (Fransen/Kolk 2007). In multi-stakeholder standards, the interests of all concerned actors are represented, membership and participation is open to all actors, and several parties engage in their implementation. In contrast, business-centered standards represent only businesses, the stakeholders cannot be a member or participate, and the companies themselves carry out and review the standards. Market-based private regulation establishes itself through a competition of rival rules, whereas nonmarket-based private regulation is set by a private institution whose primacy is already accepted by the addressees (Büthe/Mattli 2011).

4.5 Actor-centered definitions

Abbott and Snidal (2009: 44) highlight alternative modes of regulation „above” and “below” the state. This results in a triangle of state actors, civil society and business actors who jointly or alone take over regulatory tasks in phases a c and d, see Figure 1 (Börzel/Risse 2010).

Figure 1: The Governance Triangle



Source: Adapted from Abbott/Snidal (2009).

The vertex triangles (zones 1-3) refer to situations in which one or several of these actors adopt and implement regulatory standards largely on their own, with only modest participation, if any, from actors of other types. In zones 4-6, actors of two groups share substantial regulatory responsibilities. Zone 7 involves actors from all three spheres.

Although the governance triangle offers a useful heuristic, it does not consider the object of regulation. Levi-Faur (2011a) fills this gap when asking who regulates *whom*. This leads him to distinguish three forms of regulation. Under *first-party regulation*, the

regulating actor is also the addressee: the main mode of regulatory control is self-regulation. This happens in zones 1, 2 and 3, but it is especially common in zone 2 when business actors regulate themselves. So-called *self-regulatory associations* combine regulatory functions with the institutional and legal structure and interests of a private actor (Black 1996). *Second-party regulation* foresees a social, political, economic and administrative division of labor where the regulating actor is independent of and distinct from the regulatee. Examples include the state regulation of business (zone 1), but also the business regulation of business (zone 2); for instance, when supermarkets set standards of food production, processing and marketing to producers. In *third-party regulation*, the relations between the regulator and the addressee are mediated by a third party, for example, an independent or semi-independent regulatory-auditor (e.g. Lytton/McAllister 2014; zones 1-7).

4.6 Hybrid regulation

Modern modes of regulation are almost inherently hybrid because all three groups of actors – the regulator, the third party and the regulatee – can be state, market, civil society actors or combinations thereof (Levi-Faur 2011a: 9; Ewert/Maggetti 2016). Hybridity has several dimensions (Verbruggen/Havinga 2017): first, it means that actors from distinct societal spheres are involved into regulation, with diverging rationalities and problem definitions. Second, these actors can simultaneously take on several roles in the above mentioned regulatory processes (Sager et al. 2014). Third, hybridity sometimes refers to the combination of several regulatory approaches – both first-, second- and third-party regulation (Sidney 2008). Hence, even private regulation, typically being embedded in existing state institutions and rules, often displays a high degree of hybridity (e.g. multi-stakeholder standards; Cauld et al. 2015).

Levi-Faur (2011a: 10) identifies for types of hybrid regulation. In *co-regulation*, the regulator and the regulatee share the responsibility for the design (phases a and b) and the enforcement (phases c and d) of regulation. Cooperative techniques, like public-private partnerships, are often used. Second, in enforced self-regulation the regulator compels the regulatee to write a set of rules which the regulator would then either approve or send back for revision (Ayres/Braithwaite 1992). Here, the regulatee internalizes the costs and duties associated with rule enforcement. Conversely, in *meta-regulation* the addressee sets the rules himself; the regulator contends himself with institutionalizing and supervising the integrity of the institutions designed for these processes (Parker 2007). Finally, *multilevel regulation* distributes regulatory authority to different territorial levels (global, regional, national, sub-national and local) on a functional, hierarchical or path-dependent basis. Multilevel regulatory systems frequently induce an expansion and advancement of regulatory capacities at various levels (Thatcher/Coen 2008). They differ in the number of organizations involved, the degree of coordination between regulatory actors, the influence of individual regulatory actors on regulation, and the concentration of influence to specific actors (Mathieu et al. 2016). The EU is a paradigmatic example of international multilevel regulation.

5 How does regulation take place?

Black (2002) exemplifies how regulatory techniques evolved as the understanding of regulation widened. These developments were paralleled by a critique of the state-centered variant of regulation, especially its high costs, the lacking expertise of the state, and the danger of regulatory capture, when regulatory pursue their own rather than of public interests (Boddewyn 1985; Black 2002; Knill/Tosun 2012). The notions of responsive, better or smart regulation all aim at a variety of improvements, such as regulatory impact assessments, simplification programs, methods to foster market-based alternatives to traditional regulation, techniques for the choice of regulatory instruments, consultation standards, risk-based approaches to enforcement and inspections, and an ex-post evaluation of regulations (Radaelli/Meuweuse 2009). At least in theory, new methods of regulation should be more evidence-based, transparent, efficient, flexible, cost-saving and involve open consultations (Ayres/Braithwaite 1992; Gunningham et al. 1998; Kerwer 2005).

5.1 Regulatory styles, instruments, and practices

In the state-centered understanding, regulation directly achieves a behavioral change of regulatees by means of legally binding measures (Knill/Tosun 2012). Regulation is based on legal / bureaucratic rules and monitoring and enforcement measures such as inspections, performance and technical requirements, and sanctions (Black 2002). As this understanding views regulation as a continuous act or monitoring, enacting, evaluating and improving rules, the “how”, in the sense of “the art of governing” is given special attention (Coen/Thatcher 2005; Gilardi 2008).

For example, different *regulatory styles* can be identified (Dunlop 2000). Vogel (1986) distinguishes relations between regulatory actors that can be consensual or conflictual, pragmatic or legalistic, and more or less transparent. Löfstedt and Vogel (2001) identify four national styles of risk regulation (see also Renn 2001). With a confrontational style, regulatory proposals are evaluated by scientists and the public, and the most scientifically sound proposal is chosen. The fiduciary approach roots in trust in a system of decision-making that is in the hands of elites, where procedural rules are largely absent. A consensual style is marked by flexible decision-making behind closed doors. Finally, a corporatist style relies on strengthening trust in the decision-making process by involving interest groups and experts in the drafting and selection of regulatory proposals (Knill/Tosun 2012). Knill and Lenschow (2003) further distinguish four modes of regulation in the context of the EU. Forms of intervention can grant more or less discretion and rely on binding or voluntary measures. Furthermore, steering mechanisms can be based on coercion, incentives or learning processes.

Regulatory instruments vary along several dimensions that enable the systematic comparative study of regulatory change and effectiveness (Bauer/Knill 2014; Knill et al. 2009, 2012; Schaffrin et al. 2015; Thomann 2015a). The formal dimension of *regulatory density* depicts the amount, degree of detail and differentiation of regulation. The content of regulations then displays differing degrees of *substantial and formal intensity*. Substantial intensity refers to regulatory restrictiveness in terms of temporal, personal and substantive scope. Formal intensity denotes factors influencing the consequentiality of non-compliant behavior; monitoring, control and enforcement mechanisms. Along

these lines, Adam et al. (2015) sketch four styles of regulation. A style of lenient authority entails narrow behavioral boundaries, but a low consequentiality of non-compliant behavior, while the latter is high with a style of authority. In turn, a permissive style of regulation prevails when the behavioral boundaries are wide and non-compliance has few consequences; whereas a style of punitive permissiveness entails more severe consequences of non-compliance.

There is considerably less systematic knowledge about the *processes in which implementing and enforcing actors put regulation into (typically discretionary) practice* (Knill/Tosun 2012; Lipsky 1980/2010; Thomann 2015a; Tosun 2012). Deviations from the regulations “on paper”, while typically unavoidable, are a function of clear and unambiguous rules and organizational arrangements, but also of the personal perceptions, attitudes and enforcement styles of implementing actors, such as inspectors (May/Wood 2003; Thomann 2015b). In this respect, the literature on relational or responsive regulation emphasizes how regulation in practice is characterized by social interactions, ambiguity and human factors (Ayres/Braithwaite 1992; Carter 2017; Etienne 2013; Huising/Silbey 2011; Pires 2011; Rutz et al. 2015). This points to the usefulness of a widened procedural understanding of regulation, encompassing norms and mechanisms of social control, even if the focus remains on state actors.

In the second meaning of regulation as governance, the “how” question is asked with a focus on binding or hybrid steering instruments, called *regulation by directives*, as also practiced above the state within, for example, the EU or the World Trade Organization (Braithwaite/Drahos 2000; Ewert/Maggetti 2016; Genschel/Plumper 1997; Zürn 1998). This meant an extension with quasi- and non-legal, procedural and meta-regulating rules as well as financial, market- or information-based instruments. Examples include incentive structures, international tradeable permit systems, disclosure requirements, taxes, subsidies, public procurement policies, competitive tendering for licenses, franchises or other benefits, as well as persuasive techniques such as information or education (Black 2002).

5.2 Voluntary regulation

With the transition to the third, broad meaning of regulation, the regulatory toolkit was widened to further include unilateral rules, trust, social interactions, structuring, enabling, coordinating, ordering, communication and even technology (Black 2002). Here and especially at the transnational, global level, *voluntary mechanisms of regulation* are often employed. This can entail soft law, such as recommendations of good practice, voluntary agreements, transparency standards and certification schemes (*regulation by standards*; Bütte 2010; Gunningham et al. 1998; Levi-Faur 2011b; Prakash/Potoski 2007). The often surprisingly high effectiveness of such techniques is not least due to the lacking political acceptance of centralized regulatory authority at the global level (Bütte 2010).

Voluntary modes of regulation are characterized by the absence of binding rules, enforcement mechanisms (e.g. courts) and – often, but not always – state actors. Independently of who regulates, the development and application of rules takes place on a voluntary, non-binding basis (Prakash/Potoski 2007). Compliance with soft law hence depends on the voluntary participation, resource allocation and consensus of governments and / or corporations (Vogel 2008). Such approaches can not only be found at the

international level, and they are not even necessarily a new phenomenon. Typically, their evolution and functioning depends on a shadow of either hierarchy or the market (Börzel/Risse 2010; Töller 2011). The shadow of the state refers to the threat of state intervention by means of legislation, controls, positive incentives or enforcement if voluntary regulation fails to take place. It can also mean that governments issue voluntary programs or play the role of a “midwife” (Héritier/Eckert 2008, 2009).

Kerwer (2005) mentions four forms of voluntary standards. *Private standardization* means that non-state actors (firms, watchdogs) relatively unilaterally set standards that address all the concerned regulatees. Whether or not the standard is ultimately adopted by the later depends on its usage and hence, on the market, information intermediaries and legal processes. One instance of this are the non-smoking standards of the International Air Transport Association. *Committee standardizing* occurs via transnational, technocratic committees composed of government actors, private lobbyists and consultants. These standards are primarily directed toward the public administration in order to coordinate international standardization. They are enforced by means of peer review and market pressure (Slaughter 2009). The International Standard Banking Practices of the banking commission of the international chamber of commerce are an illustrative example. *Transnational network standardizing* changes the logic of rulemaking: here, standards are set jointly by public and private local actors in a process of self-regulation. Transnational networks coordinate and supervise this process using certain criteria. Finally, *organizational standardizing* happens, for instance, in the OECD, whose members first negotiate standards that are compulsory for its members and then enforce these standards at the national level.

5.3 Self-regulation

Last but not least, *self-regulation* refers to a subset of regulation that is intended as an alternative to both state and market (Kerwer 2005; Sinclair 1997; Töller 2011). Porter and Ronit (2006: 43) define as self-regulation “an arrangement, involving formal or informal procedures, rules and norms, that is widely recognized as having the purpose of constraining the conduct of a set of private actors, where the procedures, rules and norms are shaped to a significant degree by some or all of these actors”. Self-regulation is often wrongly equated with private, hybrid or voluntary regulation (Kerwer 2005; Sinclair 1997; Töller 2011). While self-regulation is typically private, not all modes of private regulation constitute self-regulation. Whereas self-regulation has pronouncedly hybrid aspects as concerns overlapping regulatory roles and the involvement of diverse actors (Black 2002; Töller 2009), clearly, not all forms of hybrid regulation refer to self-regulation (Parker 2002, 2007). Also, not all forms of self-regulation are truly voluntary. The defining element of self-regulation is not that it is non-binding, but *that the regulator and the regulatee are largely identical* – which is also the case, for example, for the highly binding codes of medical ethics (Black 1996, 2002).

Self-regulation often requires a shadow of hierarchy: effective self-regulation implies that it is in the industry’s self-interest. This in turn can be influenced by the state. However, the state either plays a subordinate, supporting or parallel role (Boddewyn 1985; Héritier/Eckert 2008, 2009). The fight against doping, for instance, unfolds in coexistence of the private International Olympic Committee and the World Anti-Doping

Agency, an independent regulatory agency. Newman and Bach (2004) differentiate between legalistic self-regulation in the United States, based on the threat of formal regulation, and the coordinated self-regulation in Europe, where public and industry proponents meet as partners and reach an agreement.

Self-regulation can be observed along all the regulatory processes ranging from agenda setting to evaluation. Often, state actors are consciously left out from the discourse of agenda-setting and problem definition. New problems are tackled by modifying or diffusing existing rules. The implementation and enforcement of self-regulation often relies on persuasion, social interaction of appeals to self-interest, which come into effect through either peer pressure or market pressure. Examples range from the online publication of recommendations over naming and shaming to complex certification processes. Such measures are complemented with incentives and sanctions that increase compliance. A first means to this end consists of increasing the value to regulated actors of being members in good standing in the self-regulatory arrangement (reputation, access to crucial information). Second, the leverage that can be applied against non-complying actors by private-sector actors outside the self-regulatory arrangement can be increased: the costs of non-membership and non-compliance can be raised, for example, when appliance manufacturers only accept parts that have a certain certificate. Third self-regulation can be backed up with public-sector enforcement. For example, a country may allow only those firms to operate on its territory that are members of a certain self-regulatory arrangement. Here, consumer organizations can play an important role. The evaluation of such arrangements typically takes place in an unsystematic, descriptive and ad hoc manner (e.g. annual reports), if at all (Porter/Ronit 2006).

Boddewyn (1985: 135) pinpoints four main types of self-regulation. In *pure self-regulation*, norms are developed, used, and enforced by the industry itself. Informal consultations with outside actors are possible, but not their formal involvement into decision-making. *Co-opted self-regulation* entails that the industry, on its own volition, involves non-industry people (e.g. consumer and government representatives, independent members of the public, experts) in the development, application, and enforcement of norms, hence internalizing these outsiders. In *negotiated self-regulation*, the industry voluntarily negotiates the development, use, and enforcement of norms with some outside body (e.g. a government department or a consumer association); outsiders remain outside. Finally, *mandated self-regulation* is equivalent to Levi-Faur's (2011) enforced self-regulation: An industry is ordered or designated by the government to develop, use and enforce norms – either alone, or in concert with other bodies. In its most extreme form, non-state actors are merely asked for their consent to predefined rules (Porter/Ronit 2006). Black (1996) adds *sanctioned self-regulation* to this list, in which the collective group itself formulates the regulation, which is then subjected to government approval. Additionally, in *coerced self-regulation*, the industry itself formulates and imposes regulation in response to threats by the government to impose statutory regulation. Next to their degree of obligation, self-regulatory regimes differ in terms of industry structure, costs and benefits, technological solutions, prevailing business culture, and assimilative capacities (Sinclair 1997).

6 Discussion

This essay has highlighted the divergent notions of regulation in Political Science, differing in their state-centeredness and their relative emphasis on regulation as an instrument or a process, respectively. On the one hand, varieties of regulation and self-regulation are central for understanding new modes of governance beyond the borders of the traditional nation state, whose relevance has long exceeded the realm of administrative sciences (Koppell 2010). Simultaneously, it captures the eye that amidst the plethora of existing taxonomies, a more integrative approach is still lacking (see however Knill/Lehmkuhl 2002). Eventually, different typologies of regulation should be assessed according to their analytic and empirical usefulness.

On the one hand, the state-centered focus on instruments offers a tangible, measurable concept of regulation that enables concrete analyses of the change and effectiveness of regulations. However, this understanding arguably becomes increasingly obsolete because it tends to focus on public regulators and problem definitions that are confined to national territories (Koppell 2010). As a consequence, this notion of regulation is unnecessarily self-limiting and neglects more arbitrary forms of control, economic and civil regulation and voluntary mechanisms (Levi-Faur 2011a: 5–6). On the other hand, the newer, less state-centered notions do understand regulation as a response to increasingly complex and transboundary policy problems that integrate a multiplicity of actors into decision-making processes of varying legitimacy. However, by focusing on power relations and accountability mechanisms, they also tend to neglect the actual regulatory instruments and implementation processes both conceptually and empirically. The enormous range of existing notions of regulation comes at the cost of the possibility to grasp the phenomenon conceptually and get to a clear operationalization that could form the basis for cumulative research.

From a policy-analytical perspective, if we understand regulation as a response to new policy problems, then political scientists arguably have the duty to identify the actual problem-solving capacity of different regulatory regimes (Scharpf 1997). Overall, however, the practical implementation of regulation and its effectiveness remain notably under-researched, especially in its global, private, and voluntary variants (Dunlop et al. 2012; Radaelli/Meuweuse 2009; Vogel 2008). The question of regulatory effectiveness and impact is particularly burning when it comes to private and self-regulation. Very little is known about the conditions under which regulatees stick to rules that are not set and enforced by the state (Büthe 2010). Hybridized regulatory arrangements can entail systematically conflicting interests and accountabilities, with observable negative consequences for goal achievement (Lytton/McAllister 2014; Sager et al. 2014; Thomann/Sager 2017). The current state of research suggests that the delegation of regulatory tasks often does not live up to its promise. To the contrary: as the involvement of state actors decreases, delegation yields worse outcomes than public regulation (Overman 2016). In other words, it is still unclear how the regulatory state can fulfil its responsibility to safeguard the public interest. For a better understanding of the mechanisms underlying these findings, both formal regulatory instruments and arrangements and social processes deserve attention.

The literature overview presented here has also illustrated that it is often difficult to clearly differentiate the various notions of regulation. The question arises how productive such a demarcation actually is. Most often, it arguably makes more sense to speak

of a differentiation and diversification of public and non-state forms of regulation, rather than their substitution. What is more, different steering mechanisms often necessitate each other. The relative importance of alternative steering modes also varies depending on the specific policy sector and the regulatory demands it imposes (Knill/Tosun 2012). Hence, policy analysis needs more analytic approaches that set the different regulatory processes – from agenda-setting to evaluation – in relation and integrate both the involved actors and the instruments at disposal. Thereby, it is important to consider the implications of the subject matter for the technical, political and institutional context in which regulation occurs (Lowi 1972). To this end, the regulation literature could not only benefit from moving beyond continued attempts at classification and conceptual clarification, but also from making more use of insights from neighboring fields along all stages of the regulatory cycle.

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