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Better regulation by new governance hybrids? Governance models and the reform of European chemicals policy ☆

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Abstract

The EU is presently in a transition phase from environmental policy-making by law towards other governance approaches based upon networking, voluntary commitments, benchmarking and other forms of ''soft law''. Those new governance approaches often claim to lead to ''better regulation'', while adopting a more consensus-oriented and participatory style, taking economic aspects more seriously into account, allowing for more flexibility and autonomy for the private sector and Member States alike, mobilising a broader knowledge base or adopting more integrated and holistic approaches than previous sectoralised and compartmentalised policies.

While the limitations of traditional regulatory approaches are widely accepted and cited, it is far from evident, that ''new modes of governance'' have greater capacity to solve problems than the old ones. There is an argument, that ''better regulation'' might by synonymous to a withdrawal and weakening of the regulatory state and hence effectively of the aspirations and objectives of environmental policies.

An interesting case for an approach, combining the strengths of the old and the new approaches is the ongoing reform of chemicals policies. While some observers claim, that the proposed directive, ''REACH'' might belong to the outdated category of overcomplex and bureaucratic regulation, a closer look shows that there are many new forms of governance in REACH. This mixture or old and new may open a more realistic and promising perspective on the reform of European policy-making.

In our paper we assess the effects and the interplay of the combination of different modes of governance using the example of REACH. We are particularly concerned with the question in how far the representation of interests may change when new modes of governance are introduced.
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1. Introduction

Present regulatory decision-making at the European level is characterised by a growing diversification of regulatory approaches. This diversification is reflected in a similar broadening of modes of decision-making. Especially in environmental policy, the traditional sectoralised approach of law making on the basis of the community method has been supplemented and sometimes substituted by new governance approaches, including "soft-law" approaches, reflexive assessments, devolution, co-regulation or integrative approaches of decision-making [61,24,70].

These governance approaches are intended to improve the quality and efficiency of European regulation and often claim to lead to "better regulation" [8], while adopting a more consensus-oriented and participatory style. Expectations are great: economic aspects should be taken more seriously into account, Member States and the private sector should be granted more flexibility and autonomy alike, and knowledge should be adopted on a much broader basis.

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However, while the limitations of traditional regulatory approaches are widely accepted and cited, it is far from evident whether or not the ''new modes of governance'' have a greater problem-solving capacity than the old ones, which is often taken for granted. Conceptualising the differences between old and new governance approaches is quite a prominent topic at the moment. However, as we argue, this discussion needs to be refocused to a certain extent: new regulation is also often a combination of most of the new forms and more traditional forms of governance (hybrid regulation). Approaches of such hybrid regulatory governance increase the challenge of understanding present decision-making at EU level. And they raise the question of the performance of the interlinkages and effective combination and constellation of the different governance modes.

The ongoing reform of the European Chemicals Policy (Registration, Evaluation and Authorisation of Chemicals, REACH) is a very good example in this regard. Chemicals control is currently a field for substantial and procedural innovations of European governance, spurred by the alleged policy failure of the existing regulatory approach. Despite the fact that chemicals play an important part in nearly every aspect of our daily lives and despite the fact that there are stringent testing requirements for new chemicals, our knowledge about the effects of most chemicals on human health and the environment is uneven, sometimes even poor.

The reason is that the testing and registration of chemicals within a cooperative assessment process [47] so far has been cumbersome. Whereas obligations for producers to deliver data were weak, authorities had to prove negative impacts on human health and environment in a detailed risk assessment process — often described as ''paralysis by analysis''. Capacity overloads, however, have led to severe delays. REACH intends far-reaching changes in the regulatory framework of chemical control. The European Commission tries to shift the burden of responsibility from public authorities to a system of shared responsibilities between public authorities and chemicals industry. Finding the right balance between regulatory control and private self-regulation is the key challenge in this regard.

In this context, the REACH process is interesting in several ways. The European Commission tries to combine different governance approaches, i.e. governance by information, obligatory self-regulation, command-and-control, cooperative devolution and proceduralisation, which alone makes the reform an interesting topic to study. However, the institutional design to arrive at a regulation inhibits also many institutional innovations, i.e. depillarization, mainstreaming or internet consultation. REACH is of high relevance for competitiveness, consumer protection, health and environmental protection concerns. The lobbying pressure by EU Member States, industry associations and environmental NGOs has been and is immense. The mixture of governance mechanisms is the attempt to satisfy the large number of involved interests in order to increase decision-making capacity.

For policy evaluation, it is interesting to assess the effects of such rather unorthodox combinations: can REACH serve

(a) as a model for a creative new combination of governance modes that may open a more realistic and promising perspective for the design of governance options in other policy areas and (b) as a model for the organisation of interest mediation in highly contested policies?

Our argument is that hybrid models of governance have the potential to strengthen decision-making capacity and to improve legitimacy, effectiveness and implementation especially in very contentious and high profile cases. However, the analysis of the reform of the European Chemicals Policy indicates that a careful design of the interlinkages between the governance modes is of crucial importance, and was not given sufficient attention in this instance. Both the decision-making process and the regulation itself offer multiple arenas for conflict-oriented and cooperative stakeholder strategies. Stakeholders antagonistic to the REACH system may use those arenas for ''venue shopping'' [83] in order to undermine the functioning of the system. Industry and environmental advocacy coalitions alike operated with different strategies for ''venue-shopping'' within the decision-making process. The European Chemicals Industry, for example, engaged several Member States in the debate after it had become obvious that the European Commission would jointly defend its proposal.

This paper is organised as follows: in the next section we briefly reflect the discussion on old and new forms of governance in EU environmental policy and scrutinize their respective strengths and weaknesses. Section 3 briefly introduces the proposed REACH reform. We analyse to what extent different governance approaches interact within the institutional and regulatory design of REACH and how they match with the interests of involved actors. A main concern of interest relates to the analysis of strategies of venue-shopping by different actors and their impact on the policy process. The paper ends with a preliminary overall assessment of the potentials of new hybrid regulation to improve the problem-solving capacity of European environmental governance.

2. Old and new forms of governance in EU environmental policies

The analysis of the different modes of European regulatory governance has received much attention among scholars throughout the last years (see Refs. [84,85,97,24,45,6]). Already the diversity of terminology used by different authors indicates the complexity of the issue. In a way, the attempts to conceptualise different modes of governance have even led to more confusion than clarification. Partly, this is due to the fact that modes of regulation and decision-making strongly overlap and thus are quite difficult to distinguish.

In a nutshell the governance discussion deals with changes in content and process of European decision-making, one could argue:

- *Changes in regulatory instruments*: i.e. the concrete choice of instruments which reflect different levels of obligation and discretion both for Member States and target groups,