The politics of conflict management in EU regulation

Guest editors:
Deborah Mabbett* and Waltraud Schelkle**

Introduction: The politics of conflict management in EU regulation
Policy-making in the EU proceeds largely through the means of regulation; so much so, that the EU has been called a ‘regulatory state’ (Majone 1993a). Whereas the management of conflict via redistribution plays a central role in national politics in Europe, the EU has emerged as a political architecture pursuing allocative efficiency (‘positive sum games’). The logic of decision-making in Brussels is about reasoned argumentation, evidence-based policy, and positive-sum games, instead of a logic of conflict management.

Or so it seemed in the 1990s, when the Internal Market Programme unleashed an unprecedented level of regulatory activity. But EU regulation now extends beyond the conduct of firms in markets to include welfare provisions, and, since monetary union, includes the creation of policy rules that regulate governments. Thus the range of regulatory activities undertaken in the EU now reaches well beyond those that drew the attention of commentators in the early 1990s (Majone 2005). In particular, somewhat paradoxically for Majone’s original emphasis on regulatory in contrast to budgetary policies, coordination extends into member states’ fiscal stances and tax policies. Strong conflicts of interest have emerged. The Services Directive led to mass demonstrations against an EU market-liberalising measure for the first time ever. The distributional salience of regulation in areas such as the control of state aid and cross-border access to health care seems evident, although the method of intervention is regulatory.

This issue is about the political nature of regulatory processes in the EU, but also about the paradox that it is essential for regulation that politics is suppressed. Regulatory decision-making aims for consensus rather than controversy; regulatory policy issues are framed as functional problems; regulatory venues exclude party-political representation and contestation. The political nature of regulatory processes comes from the inevitable distributive consequences of regulatory decisions. This means that there are conflicts of interest in almost any regulatory decision, but the art of regulatory policy-making is to manage these, and the height of success is to render them invisible. The first part of this introduction outlines how contrived and strategic

* School of Politics and Sociology (Birkbeck, University of London), email: d.mabbett@bbk.ac.uk
** European Institute (London School of Economics), email: w.schelkle@lse.ac.uk. Her research has been supported by the European Union under the 6th Framework Programme (Contract No CT1-CT-2004-506392) which is gratefully acknowledged.

We thank Claudio Radaelli (Exeter) and Adrienne Héritier (EUI) for discussions that led to this special issue, and all the referees of the individual contributions as well as the overall referee for their constructive criticisms. Susanne Schmidt (Bremen) gave us helpful comments on a first draft of this introduction.

1 Apart from pure ‘coordination problems’, discussed below.
the use of regulatory techniques for managing conflicts can be: how policy issues are
framed as positive-sum games, party-political arenas avoided and consensual
problem-solving methods of policy-making promoted.

The second part addresses the puzzle of the robustness of regulatory conflict-
management. We do not claim any special depth of insight in our claim that
regulation has distributive consequences (Scharpf 2002, Ganghoff and Genschel
2006). But this makes it surprising that regulatory processes thrive, and indeed
expand. As commentators such as Sbragia (2000) and Moran (2003) have highlighted,
a feature of the last two decades is that the scaling back of governments’
interventionist ambitions has seen the proliferation of regulation. The agenda of ‘less
government’ has paradoxically led to much more government of a regulatory kind.
Processes of market integration, which once seemed potentially de-
regulatory, turn out to involve ongoing re-regulation. Economic sociologists have seen this as a
functional requirement of market integration, summed up in Vogel’s (1996) phrase as
‘freer markets, more rules’. We argue instead that the forward march of regulation is a
result of political contestation over regulatory strategies of market integration. It is a
political rather than a functional tendency, carried forward by the dynamics of conflict
management in regulatory processes. If challenged in its regulatory endeavour, the
EU tends to respond with more regulation. In part two below we suggest that the
member states, the European Court of Justice and the participants in regulatory
processes themselves all contribute to this own-dynamic of regulation.

Finally, we outline the limitations of regulatory conflict management. Our case
studies provide some examples of deadlock over regulatory initiatives, and other
examples where the Commission has watered down its proposals to establish a
foothold in the regulatory domain. The case studies also show that the techniques of
regulatory conflict-management can have perverse consequences. Framing problems
to avoid conflict can mean that important issues in the policy area are set aside;
reliance on generating consensus based on information and expertise can mean that a
superabundance of statistics is generated and reports proliferate. Thus the limitations
of regulatory politics are less to be found in outright deadlock than in attenuation of
processes, loss of focus, information overload and a tendency to solve small problems
while neglecting large ones.

**What do we mean by regulatory processes and the regulatory state in the EU?**
The meaning of regulation in general, and of the term ‘regulatory state’ in particular,
has evolved and expanded so much over time that any further contribution to the
debate must engage in a delineation and positioning exercise.² It is possible to take an
expansive view of the EU regulatory state in which most EU policy-making is
regulatory because it is initiated by the Commission, which exercises powers
delegated to it by the member states in the Treaties. Because it exercises delegated
powers and is not directly subject to majoritarian democratic control, the Commission
is a uniquely powerful regulatory agency. On this approach, EU policy-making in the
‘supranationalist-hierarchical’ mode (Scharpf 2006: 851-854) is the regulatory state in
action.

² For excellent recent overviews, see Moran (2002) and Lodge (2008); their aim is to survey
the literature on the rise and expansion of the regulatory state at the national level (Moran) and in
European studies (Lodge).
At the other end of the definitional spectrum, we find a narrower view of the EU regulatory state taken by those whose focus is on the creation of independent regulatory agencies with specific policy functions, such as the European Environmental Agency or the European Central Bank. On this definition, regulatory agencies are a ‘fourth branch of government’ (Majone 1993b, Everson 1995: 182) at both the national and the EU level, distinct from Parliaments, Executives and Courts. This definition of the EU regulatory state is closely connected to accounts of regulatory policy-making centred on national polities, which emphasise the creation of independent regulatory agencies which succeed in depoliticising issues by establishing reputations for effective technocratic problem-solving (Stern 1997). On this approach, directorates of the Commission may act as regulatory agencies, but the Commission itself is a political actor.

A number of accounts of regulatory policy-making at the national level take the field of study beyond independent regulatory agencies and analyse the use of regulatory techniques in a wider range of policy settings. For example, there has been an expansion of ‘regulation within government’ (Hood et al 1999) where agencies are given specific technical tasks and operate outside the hierarchical control of ministers, without necessarily being constituted as independent agencies. This characterisation of the regulatory state dwells more on approaches to problem-definition and solution than on the institutional location of the regulator, although some degree of institutional immunisation from topical political pressures and concerns is necessary to support these characteristic techniques of regulatory policy-making.

Our approach to defining the nature of the regulatory state seeks to integrate accounts focused on institutional form (agencies) and analyses of regulatory techniques. We can divide the defining characteristics of regulatory processes into three aspects: (1) the formulation of the regulatory problem; (2) patterns of authority and delegation in the institutionalisation of regulation; and (3) the techniques used to develop regulatory solutions, which revolve around specialised knowledge and competence. In the following discussion, we consider each of these aspects in turn from the perspective of conflict management in the EU regulatory state.

Formulation of the regulatory problem
Majone’s (1996) original account of the regulatory state in Europe drew heavily on the US experience of regulating markets to combat market failure and promote allocative efficiency. This account fitted well with developments at the time in Europe, as nationalised industries were being privatised and made subject to new regulatory regimes. Previous practices which had burdened nationalised industries with numerous public policy goals (for example around employment promotion and regional development) were criticised and the new regimes conscientiously differentiated by specifying that industries should be enabled to operate efficiently and maximise profits, albeit within a framework of regulation which remained necessary to combat lack of competition and other market failures. Standard examples for market failure are externalities of polluting production processes that may call for environmental regulation and asymmetric information and uncertainty about the quality of services that can be dealt with by establishing minimum professional standards.
Many commentators on regulation at the national level accept this account of the nature of the regulatory endeavour (see e.g. Baldwin and Cave 1999: ch 2), but there are some dissenting voices. Moran (2003: 14-15) gives an account of the American regulatory state which challenges the idea that regulation always revolves around the pursuit of allocative efficiency. Although the rise of regulation under the New Deal centred on economic regulation and the correction of market failures, more recent decades have seen a widening of the field, with new regulations in areas relating to civil rights and anti-discrimination policy in particular. This suggests that the scope of regulation might not be defined solely by the range of issues addressed by economic analysis, but also by the application of legal norms such as nondiscrimination. In the examples of pensions portability (Mabbett) and cross-border provision of health services (Martinsen) discussed in this issue, legal norms supporting the rights of mobile workers and patients have shaped the regulatory problem independent of the analysis of their effects on allocative efficiency.

Another question mark over the dominance of economic analysis concerns the part played by social policy considerations in driving forward regulatory initiatives. It is striking that Majone (1993a) saw ‘social regulation’ as conforming to the regulatory ideal of market failure correction, with the implication that the arguments of economists might be strengthened by the possibility of identifying desirable social policy outcomes that would accompany the promotion of market efficiency. This would seem to admit distributional effects as legitimate considerations in regulatory policy design. Other commentators have argued, however, that the use of regulatory instruments for social purposes undermines consensual regulatory problem-solving. For example, Eberlein and Grande (2005) have argued that economic regulation allowed for problem-solving by small groups of interested parties who developed into closed communities of expertise, whereas social regulation had a broad impact across sectors and thereby created a more open process where conflict was less easily suppressed. Moran (2003: 15-16) puts forward a similar interpretation, arguing that the wide reach and uniform application of social regulations gave rise to contestation by regulated firms, manifested in numerous legal challenges to regulatory measures.

The implication is that regulatory conflict management can operate effectively with certain formulations of policy problems, but will be defeated by other formulations. The paradigmatic regulatory problem is a coordination problem. A pure coordination problem, such as deciding which side of the road to drive on, characteristically means that agreement on a rule has net benefits for all participants. More usual coordination problems have the parties needing to agree on a common approach but facing divergent interests that could lead to free riding (Héritier 1999: 53-57). When problems have this structure, the parties may be able to agree on the general principles that should govern a solution but face conflicts over their case-by-case application. By separating the problem into these two parts or phases of negotiation and implementation, the ‘productive’ dimension of the problem becomes the focus of negotiation, while the ‘distributional’ dimension may be delegated (Scharpf 1997: 124; Blauberge, this issue).

One condition for reaching a principled agreement is that the expected distribution of case-by-case gains and losses is reasonably even or ‘symmetrical’ across the participants in the process (Kemmerling and Seils, this issue). One of the roles of ‘policy entrepreneurs’ such as the Commission is to frame and define the policy
problem or negotiation agenda so that it has the necessary symmetry. In some of the high-level political bargains struck in Europe, ‘package deals’ and ‘side payments’ have fulfilled this function. In the regulatory processes discussed in this special issue, we more often see that conflicts are managed by narrowing and ‘partitioning’ the policy area, so that the participants in the regulatory part of the process see their task as one of addressing the need to coordinate firms or governments, while the resolution of issues with asymmetric distributional effects is implicitly or explicitly assigned to another policy process with different participants. For example, in fiscal policy coordination, the regulatory process may focus on the so-called ‘fiscal envelope’, i.e. the aggregate level of spending and taxation, while the distribution of tax burdens and assignment of expenditures remains under the control of national governments. In pensions, the idea that provision should be made up of distinct ‘pillars’ provides the basis for partitioning the policy area between redistributive objectives (assigned to public pay-as-you-go schemes) and developing pension markets to promote intertemporal allocative efficiency (assigned to the ‘third pillar’ of private funded provision). The third pillar is the focus for a market-liberalising regulatory programme in the EU (Mabbett, this issue).

Partitioning implies an institutional structure: a clearly-defined part of the policy problem is ‘hived off’. As Sbragia (2000: 248) puts it: ‘Non-majoritarian institutions compartmentalize and insulate the power to make policy..’. That is, regulatory institutionalisations depend on the appropriate construction of the policy problem: if distributional conflicts are apparent and salient, then political escalation may occur and the issue will not be contained within the regulatory arena. The next section explores this further.

The institutionalisation of regulation: Authority and delegation

For Majone (1996), regulatory policies have two key features. First, the goal of regulatory policies is to regulate markets to promote allocative efficiency. Second, independent regulatory agencies provide an institutional arrangement which facilitates pursuit of this goal. An independent agency stands at one remove from the imperatives of majoritarian democracy, and is therefore able to formulate efficiency-enhancing proposals under relative immunity from distributional pressures.

This account is consistent with both practical and formalised versions of independence. Practical independence simply means that the regulatory policy domain is not subject to popular political interest and scrutiny. This is as much a matter of problem definition as it is of formal delegation. So long as conflicts of interest are not salient, regulatory problem-solving in the policy area can be maintained. Overt political contestation between groups which have conflicting interests is a threat to regulatory authority, as the political salience of the issue may escalate, bringing political actors into the arena. It follows that, if participants are committed to the maintenance of regulatory autonomy, they will restrain their disagreements and avoid escalation. In this sense, consensus-seeking is fundamental to regulatory processes.

Formalised regulatory independence entails some institutional arrangement which is meant to make it irreversible. The independence of the agency should resolve commitment problems, such as ensuring that governments do not unfairly reduce the value of privatised assets through price controls (Levy and Spiller 1994). In the study of regulatory arrangements at the national level, a central issue is how regulatory
authority is maintained, and what stops elected political actors reasserting control over the policy area (Lohmann 2003). In our view, the same issue arises in the EU, at least in the policy areas that are the subject of study here. It may appear that the treaties have committed the member states to economic integration, and the Commission and the Court have irrevocable delegated authority to hold member states to this commitment. However, the extent of this commitment is evidently negotiable, as we see in the policy processes reported on in this volume. We therefore regard the institutionalisation of commitment at the EU level as something which is contestable and has to be continually renegotiated and maintained, much as it has to be at the national level.

Our case studies cover a range of examples from formal institutionalisation of commitment to practical administrative autonomy of a regulatory network. For example, the member states eventually agreed in the Services Directive to facilitate certain forms of mobility but avoided delegating enforcement powers in some areas to the Commission (Schmidt, this issue). Instead, the effect of weak commitments in the Directive was to delegate regulatory authority to bilateral exchanges between member states. Despite exchanges at the administrative level, it is too early to say that the issues have been successfully consigned to regulatory problem-solving, as the processes are not far removed from ministerial control. The regulators in this case are ‘state powers organised within the bureaucracy’ under the control of ministers rather than non-majoritarian institutions that are not under the direct supervision of elected officials (Thatcher and Stone Sweet 2002: 2). Nonetheless, we regard the case as demonstrating the regulatory state in action because the parties have, so far, demonstrated considerable problem-solving capacity and avoided political intervention.

What characterises regulatory venues, if it is not irreversible independence from political supervision? Specialisation would seem to be a key feature. Some regulatory processes are limited by construction to specialists and experts who share a common set of ideas about the definition of the problem and the nature of possible solutions. Others may be formally open and consultative, but attract a limited set of interested participants, again because of problem definition and method. A principal-agent account of delegation to such bodies suggests that there are savings in transaction costs: delegation may reduce the time taken and other costs of decision-making for the principals.

However, not all our cases fit a principal-agent account. If decision-making among the principals is blocked, then delegation can take place ‘passively’ by principals adopting vague and ambiguous guidelines which leave a lot of issues to be resolved at the implementation stage. Natali (this issue) shows that this was a feature of the Pensions OMC, where conflicting positions in the European Council were absorbed into partially-contradictory objectives and guidelines. Resolution of these tensions was shifted to a technical level, in debates in the Indicators Sub-Committee of the Social Protection Committee.

Finally, we consider the relationship between judicial and regulatory processes. Both can be seen as having authority to apply and develop the incomplete agreements of the principals. For instance, Stone Sweet (2004: 24-5) has interpreted the Treaty as an ‘incomplete contract’ which it falls to the ECJ to apply. There are affinities between
judicial and regulatory processes, notably in the norm of rational, interest-free deliberation producing decisions which are supported by reasoned explanations. However, compared with regulatory authorities the courts are inevitably reactive: they await the arrival of cases and cannot act in anticipation of emerging problems. Regulators can, therefore, be seen as reducing legal uncertainty. However, if there is a high level of underlying conflict, the regulatory endeavour may produce repeated recourse to the courts. In such situations, we can infer that consensual regulation has been displaced by ‘adversarial legalism’, marked by explicit conflicts of interest played out in lengthy judicial processes (Kagan and Axelrad 2000). Conversely, the contributions from Blauberger and Martinsen in this issue show that judicial decisions may contribute to the eventual development of regulatory solutions, by ruling on conflicts and setting the parameters of regulation.

**Regulatory techniques: formalisation, standardisation and control over information**

We have said that regulatory processes are characterised by ‘positive-sum’ problem-definition and by an orientation towards consensual methods for finding solutions, which insulate regulatory venues from political intervention. However, these two features characterise a wide range of policy processes, including long-standing practices of ‘inner circle’ negotiation between civil servants and ‘insiders’ representing private interests: what Moran (2003: 6-7) characterises as ‘club government’. The modern regulatory state, by contrast, is distinguished by its emphasis on openness, transparency and accountability. In Europe, regulatory processes are accessible to a wide range of interested parties and there is a striking emphasis on consultation and the provision of information. ‘Transparency’ is a key norm, which calls for simplifying policy goals to render the policy problem tractable, and then presenting structured information relevant to those goals.

These features can be seen as addressing the problem of legitimising regulatory authority. Thus Everson (1995: 183) suggests that the issue of democratic accountability calls for ‘some mechanism whereby the public at large might assure itself that the independent agency in question [is] a fit and competent organisation, ultimately capable of fulfilling the task set it.’ Elements may include the provision of a clear statement of agency tasks by the principal(s), the recruitment of professional staff who the public can trust are committed to the agency’s goals, audit and review of agency activities in public fora such as parliamentary committees, and openness to interest group scrutiny (Everson 1995: sec.8). Accountability can mean giving reasons for decisions, specifying indicators which measure the performance of the agency, or undertaking extensive consultative processes.

However, there is some doubt about whether ‘the public at large’ is really the focus for regulatory accountability. Arguably, what matters most is that expert audiences scrutinise the agency’s performance and evaluate it favourably. This ambiguity about the audience for information is paralleled by disagreement about the nature and importance of ‘transparency’. For Runciman (2007), ‘no politician would mistake this process of increasing transparency as a source of increasing legitimacy. If anything, it makes it more difficult for governments to keep people’s attention, and persuade them that politics still matters.’ Transparency also carries with it an idea of ‘complete’ information which is potentially a pathology of regulatory accountability, leading to an overwhelming proliferation of data which is tractable to only a few technical experts. Furthermore, the ideal of solving regulatory problems through rational review
of information and consideration of alternatives also lends itself to technical supremacy. Problems are rendered technical and analysed in technical ways.

The emphasis on technical expertise in regulation implies that the regulatory policy community will be populated by experts who share similar epistemic orientations. Kassim and Wright (this issue) emphasise how the development of an international competition policy community, dominated by economists, facilitated a shift from ‘power politics’ to regulatory politics. However, we also find in the EU, specifically in the OMC, an alternative approach to non-majoritarian decision-making based on participation in deliberative processes. This may appear to be a departure from the standard operating procedures of the regulatory state, and Natali (this issue) discusses whether the OMC could be characterised as ‘post-regulatory’. As noted above, commentators have questioned the application of regulatory methods to social policy, arguing that such policies are not suited to resolution by closed communities of expertise. Consistently with this, the social policy OMCs have sought legitimation by invoking principles of deliberative democracy rather than regulatory problem-solving. However, Natali shows that the informational techniques associated with ‘common knowledge production’ in the Pensions OMC created a rather closed and specialised process.

An important part of EU regulatory processes is the collection of comparable data from all the member states. The organisation of data for comparison gives the EU data-collection authorities, notably Eurostat, a major role in structuring the presentation of information (Savage 2005). Information which is specific to particular national institutional arrangements has to be discarded and new data generated along new lines. One result is that national-level actors may lack the expertise to analyse and challenge the data under discussion. The effect may be that policy actors who are powerful at the national level are less influential in EU-level regulatory processes. At the same time, however, the detachment of EU-level information from its national origins may reduce the relevance of regulatory deliberations at the EU level and leave considerable ambiguity about how targets and indicators are to be constructed and applied (Mabbett 2007).

**Why are regulatory processes sustained despite conflicts?**

There is nothing novel in our observation that there are conflicts of interest in EU regulation. However, the analysis of conflicting interests has tended to focus on the normative implications for the legitimacy of EU measures, rather than on the question of how regulatory decision-making processes forge consensus and avoid becoming overtly political despite these conflicts. A particular puzzle in the European context is why member states in the Council do not take back competencies when regulation becomes highly intrusive and apparently divisive, i.e. ‘political’. For instance, EU member states constrained their room for manoeuvre in industrial policy to a politically uncomfortable extent when they embarked on the Single Market Programme, by endorsing a supranational competition policy that is even less tolerant of national champions than the US approach and by instituting a system of state aid control that greatly limits favouritism towards nationals even if it does not completely prevent it.

---

3 Exceptions include Héritier (1999) and Young and Wallace (2000: 11) who suggest that ‘the dynamics of EU regulatory politics’ is driven by the balancing of diverse producer and civic interests and cannot be understood as a ‘product of intentional structural arrangements in the EU’.
The mystery deepens when we note the member states’ reluctance to delegate to the Commission fiscal powers that, arguably, would enable it to implement some policies more effectively, for example by compensating prospective losers through transfers or subsidies. This could rein in the expansion of competences by European agencies because having a budget also creates a budget constraint. The standard answer to the question of why the EU does not get a budget of a size and scope comparable to national budgets is that member state governments are unwilling to give up sovereignty over resources. But this answer begs the question of why member state governments are less concerned about their sovereignty in regulating competition within their borders, and thereby giving up or sharing political resources, than they are with respect to handing out subsidies and social transfers and giving up or sharing fiscal resources.

One answer to this puzzle was provided by Scharpf (1999) who argued that the Commission and the Court are able to create the regulatory foundations for market integration based on expansive interpretations of the Treaty. Several of the contributions in this issue show how decisions by the Court are taken up and developed by the Commission, and this ‘symbiosis’ between judicial integration and regulation is one explanation for the regulatory bias in EU policymaking.

Our studies also point towards two other explanations. One is simply that policymaking at the national level has also come to demonstrate a regulatory bias, complementing the growth of EU regulation. We do not claim that one is the cause of the other, but rather that there are reinforcing relationships between them. Going along with this is the second explanation, highlighting the dense institutionalisation of regulatory networks in which the audiences of policy initiatives themselves contribute to the regulatory momentum, a process we describe as ‘regulatory capture in reverse’.

Symbiosis between judicial intervention and regulation
We noted above that cases tend to come before the ECJ when the regulatory framework is unsettled and contested. Furthermore, the adversarial structure of court cases reveals conflicts very clearly. However, we also find that court decisions give impetus and resources to regulatory processes. Court decisions may provide the outline or framework of a regulatory solution, offering up formulations which can be defined, measured and monitored in regulatory processes. Martinsen (this issue) shows that Court rulings concerning patient mobility in health care have presented the Commission with an opportunity to propose a directive in this area. Furthermore, the Commission has used the rulings to lay the foundations of the regulatory structure it proposes. However, the regulatory arrangements are also proposed as a corrective to the judicially-led process, the argument being that they are needed to deal with the ‘legal uncertainty’ created by the judicial application of the Treaty.

The Commission may also be able to use the threat of court cases to concentrate the minds of national negotiators on finding a regulatory solution. Kemmerling and Seils show that the threat of litigation using state aid law was instrumental in obtaining member state agreement to rein in preferential tax treatment of foreign direct

---

4 Majone (1996: ch.4) anticipated the expansion of the EU regulatory state and explained it by the political entrepreneurship of the Commission which does not bear the cost of its regulatory activity.
investors. Blauberger describes a more complex process whereby the Court strengthens the position of the Commission. On one hand, the propensity of member states to challenge negative state aid decisions could be taken as an indicator of an unsettled and contentious regulatory framework. On the other hand, the Court tends to test the Commission’s decisions against its own guidelines, which in the end gives more authority to the Commission as regulator.

**Reinforcing relationships between national and EU-level regulation**

Moravcsik (2002) has argued that the expansion of the EU’s regulatory state should be understood in the context of a wider tendency for governments to delegate authority to nonmajoritarian institutions. As Majone (1996: 3-5) argued, delegation to the EU is a particularly effective commitment device due to the high costs of reversing the delegation. There are other explanations from rational institutional choice theory for why member states delegate regulation to the EU. Saving transaction costs of decision-making or uploading national preferences to the EU level are important reasons.

We see the significance of these arguments in the dual face of the Council. From one side, Councils appear to be the most political part of the European machinery. They are a domain of explicit bargaining between conflicting national interests, with representatives present who do not participate in the epistemic processes of developing the basis for consensus through common expertise, but instead descend on Brussels from very different national environments, carrying with them the baggage of topical political concerns. However, there is another, less visible side. What we now know from repeated studies of Councils in action is that consensus is actually the dominant mode of interaction, and that the bases for decisions on most issues are resolved by the permanent representations before the ministers arrive (Hayes-Renshaw and Wallace 2006: 259-320). The process by which a Directive is drafted and debated is itself a regulatory process dominated by the search for common ground and, with few exceptions, the avoidance of political escalation.

There are also examples of politicians adopting a problem-solving mode in the face of conflicts of interest. In the example of tax policy, these conflicts could readily be translated into the institutional defence of national sovereignty, so the option of delegating to experts was not available. It fell to the Primarolo Group to formulate the basis for a political agreement. The Group produced a Code of Conduct which was eventually agreed and has proved to have some authority (Kemmerling and Seils, this issue).

The Council’s propensity to agree is one thing, but commentators have pointed out that there are strong incentives for states to renege on market liberalising agreements, and that this will be reflected in implementation and compliance problems (Falkner et al 2005). However, to the extent that regulatory methods promote the exchange of information and practice between regulators at national and supranational levels, compliance problems will be reduced. In competition policy, Kassim and Wright (this issue) argue that tendencies within member states to deviate from the rules and promote their own ‘national champions’ have come to be balanced by the development of national competition authorities which are part of an international expert community. This argument fits with the findings in Zürn and Joerges (2005), that compliance within both national and supranational systems is dependent on the
‘depth’ of regulation, reflected in the development of precise norms and secondary rules and in their ‘internalization’ by those to whom they are addressed (Zürn 2005: 24-26).

Regulatory capture in reverse
The idea of regulatory capture is that the regulator is dependent on information supplied by the regulatee. The regulator may therefore come to adopt measures which are (excessively) favourable to those who are meant to be controlled, who are also the ones most inclined to invest resources in the regulatory process. Regulatory capture in reverse arises when those most engaged in the process become institutionally supportive of the regulators, and offer suggestions for the innovative development of controls. For example, in competition policy the Commission is subject to the close scrutiny of an expert community; it responds to this critical audience by trying to address its concerns, with the result that the audience thus tends to become a stakeholder and part of the institutional infrastructure of regulation. Similarly in fiscal surveillance, when expert audiences criticized the arbitrariness of the 3% deficit criterion in the Stability Pact, most proposed that there should be a more sophisticated and less arbitrary rule, not that the rule should be scrapped altogether.

We can also see how the regulatory process screens and selects its audiences in the workings of the OMC in pensions (Natali, this issue). The process was initiated by actors who sought to draw attention to the budgetary implications of aging populations. Critics with social policy concerns tried to take issue with the initial emphasis on ‘financial soundness’, and succeeded in adding indicators about pension adequacy and pensioner poverty. However, the proliferation of indicators, benchmarks and projections established a style or norm of policy-making based on quantifiable and comparable evidence which was more amenable to those participants with a technical orientation. This is an example of how regulation creates and thereby selects audiences. In this case, selection comes in the guise of numerical transparency that amounts to ‘blinding with science’. This conflict-managing technique of the regulatory state is one of the reasons why political representatives at the national level, particularly in parliaments, show so little presence as audiences of regulatory processes at the EU level.

A more general proposition that comes out of the studies in this issue is that regulatory conflict management tends to transform distributive or ideological conflicts, between but also within member states, into institutional conflicts over competencies and mandates. As Scharpf (1988: pp.254-255) noted in explaining the ‘joint decision trap’ in federal systems, the institutional self interest for autonomy and influence becomes an independent determinant of the position on a policy of each governance level, independent of the substance of this policy. For instance, members of the European Parliament (EP) are generally favourably inclined towards measures which advance integration, while the same parliamentarians might be indifferent or opposed if they were members of a national parliament. Similarly, Mabbett (this issue) shows that the European Trade Union Confederation (ETUC) supported

---

5 As well as political support: those who are regulated may constitute a political force in favour of maintaining regulatory independence (Horn 1995).
6 Porter (1995: 74) alludes to the ‘hint of paradox in this alliance of clarity and arcaneness’ that the language of numbers entails.
proposals for enhancing the portability of supplementary pensions even while union confederations in several member states were opposed. In fiscal surveillance, the European Parliament and the Economic and Social Council with respect to fiscal surveillance supported the regulatory initiatives of the Commission, which they saw as strengthening the European institutions relative to the national level. In the case of the revisions to the Stability Pact, the committees of the European Parliament defended the original fiscal rules even more strongly than the Commission, and they endorsed more detailed and extensive reporting requirements for national administrations (European Parliament 2005; Schelkle, this issue).

These are stark manifestations of how an ‘own logic’ of regulation works, ie how regulatory conflict management makes regulation more resilient and may even lead to its expansion. This transformation driven by institutional self-interest serves to depoliticise conflicts, shifting the argument away from distributive and ideological contests to the question of which governance level would be more effective at dealing with the policy problem.

What are the limitations of regulatory conflict management?
Our account has suggested that regulatory processes are quite effective in overcoming the stalemate, deadlock and stagnation that might be expected from the number of veto points and joint decision traps in the institutional structure of the EU. However, our case studies also show that regulation has limitations which exactly mirror its distinctive techniques. While EU regulatory processes solve policy problems formulated in terms of efficiency, they neglect problems that cannot be framed in this way. The monitoring of these processes is delegated to agencies like the Commission or authorised networks that are not directly subject to majoritarian legitimation, but the delegation of authority may be unclear or contested. Finally, the processes are formalized and standardized, in particular as regards their information requirements, but this endeavour to achieve legitimacy through transparency brings its own pathologies of information overload.

The construction of a regulatory problem
The converse of constructing policy problems to fit regulatory solutions is that problems that do not fit remain unresolved, and possibly expand. A clear example is provided by Kemmerling and Seils, who argue forcefully that defining the problem of tax competition as one of preventing preferential regimes is a serious limitation to the achievements of coordination in this area. By focusing efforts on the relatively tractable problem, the EU left the more serious but also less soluble problem of general tax competition aside and may even have given additional incentives to small member states to compete on general corporate tax rates.

Another limitation in the context of problem definition is revealed by Blauberger’s case study of state aid control. The initial thrust of state aid control to create a single market and fair competition in public procurement has been diluted by the need to acknowledge that this must not come at the expense of cohesion. This paved the way to the subsequent ‘Lisbonification’ of state aid regulation, adding development and industrial policy goals to the equity-efficiency balance that the Treaty had already asked the regulators to strike. While the Commission has responded with an ever more sophisticated regulatory agenda and a plethora of instruments to differentiate between admissible and inadmissible restrictions of competition, this multiplication of
objectives and distributive concerns creates opportunities for governments or other interested parties to challenge the Commission’s regulatory decisions in this area.

Schelkle argues that the policy problem has also been redefined in fiscal surveillance. The problem is no longer the prevention of negative spillovers from profligate fiscal policy on other members of the union, but rather the prevention of government failure as regards the long-term sustainability of public finances. Thus, a coordination problem has been reformulated into a problem of national government or democracy, based on the supposition that representative democracies do not represent future generations, and that the deficit bias of public finances in democracies is a symptom of this flaw. However, even those who accept this analysis of the limitations of democracy may not accept that EU regulation should be its remedy. The reformulation of the regulatory problem under the revised Pact is vulnerable to the criticism that solving this policy problem is none of the EU’s business. A similar criticism of a vague and excessively wide-reaching definition of the policy problem can be levied against the pensions OMC, as Natali shows.

National authorities may dispute the construction of the efficiency problem as stated by the EU and put forward their own version. In the case of state aid (Blauberger), ‘infant industry’ arguments can be invoked to claim that some protection is necessary in order to ensure dynamic efficiency while insisting on strict state aid control safeguards only static efficiency protecting incumbents in old member states. A similar dispute about the formulation of the policy problem can be found in Mabbett’s case of occupational pensions where the employers argued that privileges for stayers enhance human capital formation and thus increase productivity. This illustrates both a strength and a weakness of the regulatory state: a strength in that it forces the critics of regulation to make their case in terms of efficiency, a weakness in that it shows that rational problem-solving is contentious even among experts that accept the norm of efficiency.

The institutionalisation of regulation
Another limitation of regulatory conflict management is that the delegation of authority may be ineffective or contentious. The Services Directive is a case in point (Schmidt, this issue). Given the salient distributive nature of the conflicts involved, the Commission and consenting member states in the Council left the resolution and accommodation of conflicts of interest to the implementation stage, with the Court as the adjudicator. But shifting conflict management to bilateral agreements between administrations, delegitimizes the delegated authority of the supranational regulator. Worse, if the bilateral agreement is not in line with principles of EU membership, such as nondiscrimination, the EU Commission will have to step in and intervene, even though it has no solution of its own to offer.

In the antitrust, merger control and state aid case studies, reforms to the delegation structure have entailed an increased role for regulators within the member states, alleviating the burden of work upon the Commission. Kassim and Wright see this as an effective solution, supported by the creation of a regulatory expert community. Blauberger is more doubtful, reflecting the compromises that have been made over permissible state aid. A further issue is signalled by the critical reception that the competition reforms have received in some quarters, where the Commission is viewed
suspiciously as seeking to enhance its own power, rather than as an impartial authority.

**Regulatory techniques**
The formalisation of measures and the proliferation of statistics can restrict the regulatory audience and can easily lead to overload. Natali’s case study of the OMC on pensions is revealing in this regard. It has become more and more a quasi-regulatory process with the intention of increasing peer pressure on decision-makers by letting the comparative data speak. But this comparative data processing and interpretation has a tendency to become an exercise among specialised, numerically-minded experts. It may de facto exclude the audiences, like social policy NGOs or interested politicians in national parliaments, that are necessary to translate the OMC process into politically salient pressures on governments. The regulatory process risks becoming an exercise in measurement and accounting without achieving its goals. The Commission has implicitly conceded this with respect to the Employment Strategy, where it has reduced the number of guidelines and indicators.

The case study of the revised Pact also illustrates the problem of information overload. Fiscal surveillance in the EU forces governments now to provide data with a degree of detail and comparability, according to a schedule and over a time horizon, that none of them cared to produce before EMU was formed. This step amounts to establishing a ‘police patrol’ control process, in place of the defunct ‘fire alarm’ of the Excessive Deficit Procedure (McCubbin and Schwartz 1984). Police patrol may be more appropriate given the enforcement technology at the regulator’s disposal, which centres on naming and shaming. But the EU reporting requirements will come up against the administrative ‘cognitive limits’ that McCubbin and Schwartz (1984: 175) mention as favouring fire alarm systems. Moreover, with the proliferation of indicators it becomes ever more likely that they will give conflicting signals, with one set of indicators showing a violation of obligations while another set exonerates the regulatee. Ambiguity opens a window of opportunity for politicizing the regulatory process, in particular if the regulatee is a government. Sovereign discretion and strategic bargaining, rather than previously agreed rules and procedures, will then determine the outcome.

**Conclusions**
We conclude that, while resort to regulatory processes is fuelled by conflict, the techniques by which conflict is managed in EU regulation can be overstrained and produce some recognisable signs of malaise. This leaves us with a final question. Can we identify boundaries for the regulatory state, such that we could say that regulation is effective within appropriate boundaries but starts to exhibit the pathologies we have outlined when those boundaries are crossed? Majone’s original (1993a) analysis implied that the explicit and salient distributional contestation of budgetary policies set a boundary, and we can see in the Services Directive and in cross-border access to health care that this boundary may block regulatory initiatives or lead to their dilution. But supplementary pensions regulation has been blocked despite being off-budget, low in salience and having an uncertain distributional impact, while state aid regulation has been largely successful despite manifest distributional implications and a clear budgetary dimension. Whether conflicts of interest block a regulatory initiative seems, therefore, to be highly contingent, reflecting the effectiveness of the techniques we have outlined.
Our analysis has shown that functional ineffectiveness, rather than outright blockage, is the more pervasive limitation of EU regulatory processes. The signs of malaise we have identified are too diverse to relate to the crossing of some implicit boundary for the regulatory domain. We have shown that regulatory processes run into problems when the construction of the policy problem as one of allocative efficiency becomes fragile and contested; when the delegated authority of the EU shows its weakness as a meta-regulator of national administrations or self-regulatory bodies; and when the regulatory technique of control through information is undermined by an overload of information thus generated. These limitations to regulatory effectiveness do not seem to be clearly correlated with distributional impact. However, what they suggest to us is that the rise of the regulatory state is not relentless and unbounded, although it has proceeded beyond the boundaries envisaged in the 1990s.

References:


