

*Regulation Information and New Information Technology*

*Do "wiki-based instruments" play an influent role in regulatory procedures  
at the global level?*

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**Abstract**

The A. illustrates briefly that regulatory institutions are often different from the government not only in the "global space" but also in the frame of the state-centred regulation. In this paper the A. will contribute to analyze whether and how regulatory global actors can be made accountable. The lack of accountability is a shortcoming generally revealed with regard to the regulatory bodies. In time traditional mechanisms of accountability have been replaced by a different approach, the "opening" of regulatory procedures by improving transparency and participation. Implementing these principles and making regulatory institutions more accountable is an activity based on "information". In our society, information (entering or leaving the regulatory systems) is spread using applications based on Internet and World Wide Web predominantly. The new Information Technologies offer the opportunity to overcome shortcomings of traditional mechanisms of gathering and sharing information and make it possible to develop "meaningful collaboration" across levels of government and between regulatory bodies and the public.

*"Ordinary citizens have more to offer than voting or answering polls. People can work together to gather and analyze information, and even make decisions. The official no longer needs to be the sole decision-maker. This is a radical idea, but one whose time has come"* (BETH SIMONE NOVECK)

### *1.Regulation beyond the State*

Since the early 1990s a new "great transformation" has been going on. The removal of the national boundaries for manufacturing and trading goods and services, along with the liberalization of capital circulation, causes worldwide effects. Such a landscape challenges the traditional assumption that regulation is state-centric. The explosion of interest in, and literature about, globalization in the last decades reflects the changing regulatory contexts.

Thus, regulatory regimes in many relevant fields are increasingly shaped at both supranational and transnational level (or, as often said, at "global" level). Essentially regulations are sectional (financial market, international trade, environment, technical standards, food safety, etc.). The organizational models are deeply influenced by the different regulatory functions and featured by the emergence of regulatory networks mainly composed of both public and private bodies. In turn networks represent a different step in the process of the disaggregating of the states into their components, i.e. regulatory agencies, administrations, courts, legislators, where they are taking their places alongside non-governmental organizations and other international structures (Slaughter, 2002). More generally such diverse regulatory actors interact in transnational spaces, i.

e. in a "global regulatory space" (Kingsbury, 2009) and the different elements of their activity and cooperation might be summarized in the notion of "global governance" (Kingsbury and Stewart, 2004; Nicolaidis and Shaffer, 2005).

As observed above, regulation is no longer centred on the state and the result is the crisis of the traditional notion of the "regulatory state" (Majone, 1994). What some scholars call "decentred" regulation hints not only at a opposite notion of "regulatory society" but also at a range of different actors such as communities, associations, organizations and networks (Black, 2002). Thus, the main characteristic of such a pluralistic system and of global regulatory processes is the complexity of interactions and interdependencies between the different and numerous actors.

Given these premises, this paper will contribute to analyze whether and how regulatory global actors can be made accountable.

The lack of accountability is a shortcoming generally revealed with regard to the regulatory bodies even in the state-centred regimes. In time traditional mechanisms of accountability have been replaced by a different approach, namely the "opening" of regulatory procedures by improving the principles of transparency and participation. Implementing these principles and making regulatory institutions more accountable is an activity based on "information". In our society information (entering or leaving the regulatory systems) is spread using applications based on Internet and World Wide Web predominantly.

Therefore the paper will analyze what impact "wiki-based instruments" for government could have on regulatory studies and whether they are fit to make global regulatory organizations accountable and legitimate.

## *2. A different way to accountability*

A brief overview of the elements that form the foundation of our reasoning can take into consideration that the institutions entitled to produce regulations are often different from the government and the traditional administration even in the frame of the regulatory state. Regulatory agencies or authorities are nearly always independent (or partially independent) from directly elected political representatives. On the base of this constitutive element, especially the European literature has been debating the lack of regulators' political accountability and the need to improve and extend their legal accountability.

As well described, accountability is "the duty to give account for one's actions to some other persons or body" (Scott, 2000). Therefore the concept has traditionally been drawn to encompass the formal duties of public bodies to account for their actions to governments, Parliaments and courts.

Since regulatory issues require an increasing rate of recognized expertise in particular domains, political institutions such as governments, parliaments and local authorities have withdrawn from these activities and 'delegated' competences to independent regulatory agencies. This change has led to a short-circuit in the accountability structures. Hence debates about legitimacy and accountability in a regulatory regime have extended the traditional view, particularly beyond the choice between political mechanisms (accountability to ministers or Parliament), on the one hand, and legal paths to the courts through judicial review, on the other hand.

A new concept of 'extended accountability' has been deployed and innovative strategies have been shaped on the base of the new dimension

of transparency (more transparent regulatory procedures; motivated decisions) and participation (mechanisms of consultation with stakeholders).

The same and often greater difficulties in implementing accountability strategies concern also the updated model of regulatory bodies, i.e. the networks acting at supranational or transnational level. Here the problem of accountability is enhanced and reaches its zenith in regulatory regimes which are characterized by a strong, but not necessarily exclusive, presence of non-state regulators.

How to make such regulatory regimes legitimate and accountable is one of the central questions discussed by many scholars, especially lawyers. Within such regulatory regimes the state and public institutions are not the sole actors, and they often play a minor role or no role at all. They are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both the regulators and the regulated, and their boundaries are marked by the issues or problems which they are concerned with (Black, 2008:2).

In particular, focusing on transnational and non-state regulators brings us to the critical issues regarding how legitimacy and accountability are constructed and the complex interrelationship of legitimacy, accountability and the acts of governance.

Take, for example, financial regulators such as the International Accounting Standards Committee Foundation (IASC), the International Accounting Standards Board (IASB), or the International Organization of Securities Commission (IOSCO) and further the Financial Stability Board or the Basel Committee on Banking Supervision (BCBS); or the social and environmental

bodies, such as the Fair Trade Labelling Organization (FTLO) or the Forest Stewardship Council (FSC).

Each of these bodies or networks reveals a different degree of governmental involvement. There are no governmental bodies represented in the IASC, the IASB or the FTLO, but the Basel Committee includes banking supervisors of the "G10 countries". However, they share the characteristic that their activities are not based on either national or supranational or international law. Furthermore there are no institutions to which they can be made accountable in particular since they have no certain jurisdictional boundaries.

Taking these phenomena into account from the point of view of "global administrative law"<sup>1</sup>, the main approach refers to the latter as legal mechanisms, principles and practices, that promote or otherwise affect the accountability of global governance entities, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review ("judicial-type review") of the rules and decisions these bodies make

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<sup>1</sup> "The idea of the emerging global administrative law is animated in part by the view that much of global governance (particularly global regulatory governance) can usefully be analysed as administration. Instead of neatly separated levels of regulation (private, local, national, inter-state), a congeries of different actors and different layers together form a variegated 'global administrative space' that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects" (Kingsbury et al., 2005) .

(Kingsbury, 2009:34). Thus supranational entities can be made legitimate and accountable by specific means, namely principles and requirements, more generally procedural norms, featuring regulatory procedures (see, for example, protection rules such as *audi alteram partem*, publicity/transparency, i.e. notice-and-comment in rule making or negotiating transparency, reason-giving) (Stewart, 2006, 2008; Von Bogdandy, 2003).

The role of the “procedural norms” and the principles concerned can be seen as a significant system of guarantees that can replace the traditional and narrower concept of accountability.

### *3. Information as a regulatory tool*

Independently of the different kinds of the acts and decisions of regulatory Agencies or networks (take, for example, on the one side, standards in some cases directly implemented as in the case of IOSCO and, on the other, guidelines, codes of good practices or advice, in general ‘soft law’), information represents a strategic element of the decision-making procedures as well as for the effectiveness of the regulatory strategies.

Imperfect or asymmetric information between parties involved in a transaction is generally recognized as one of the economic rationale for regulation. Nonetheless asymmetric information features somehow the relationships between regulators and market actors and the potentially regulated. Further, regulatory regimes are influenced by the rules governing the flow of information entering or leaving the system (Wagner, 2010) .

Elaborating on these premises, the twofold nature of information with regard to activities and procedures of the global regulatory networks is

highlighted. Information is requested, received and elaborated by global networks and bodies for rule-making, standard-setting or for taking decisions. Information is transmitted to the participants to the networks which use information to regulate and shape economic activities and social behaviours. The rules governing the in-take and the external use of information are key aspects of administrative systems in our Information Society.

Considering one face of the phenomenon, it is uncontroversial that collecting and assessing information establishes the base on which regulatory decisions are taken. Mechanisms by which regulators attract and gain information are different and basically depend on whether private actors are obliged by law to produce and communicate significant information. Traditionally, although the duty to gather and assess information has been on regulators who elaborate the data in order to make regulation more effective and responsive, private actors and in particular industry have often been a relevant source of information.

Considering the other face, it is compelling that in the contemporary society, as stated in the constitutional theory, the citizen's "right" to information has assumed considerable importance. Moreover information-based regulatory strategies represent an alternative to the more interventionist command-and-control approaches and are seen as more responsive to market tendencies.

The most traditional instrument is performed by the mechanism of "mandatory disclosure" that is designed to operate in two directions. From the users' and consumers' perspective, the mandatory disclosure of product information (quality, price, origin, composition, etc., i.e. "labelling") enables

people to make more informed choices; from the suppliers' side, they may be expected to manage their production decisions and to discourage the production of non-acceptable and desirable goods and services (Ogus, 1994; Yeung, 2005).

The disclosure-based techniques, cited above, rely on the disclosure of information by the regulated. However there is a different way of giving information: the communication of specific messages by the regulatory bodies or authorities which seek "to inform and educate the community, or specifically targeted sectors of the community, in an attempt to influence producer and/or consumer behaviour" ( Yeung, 2005: 370). As often affirmed by many scholars recently, instead of using techniques based on the "imperium" (command of law; creation of legal rights and duties) or on the "dominium" (use of wealth and economic incentives), the technique referred to "suasion" provides information to persuade citizens that their best interest will be served by compliance (information has to be disclosed/communicated by government and regulatory authority to ensure compliance with policy objectives) (Daintith, 1994). "Public communication management" as a tool of regulation promotes individual choice, on the one hand, and on the other hand, as a tool of government, may be seen as a mechanism for enhancing transparency in the administrative activity.

Summarizing, the attraction for these techniques lies both in their flexibility and versatility and in their possibility to represent a middle way between heavy command-and-control strategies featured by obligations to do or not to do and an approach of non-intervention so that citizens should be enabled to make more informed choices. However there are some

arguments against the idea that the use of such techniques really empowers citizens.

#### 4. "Shared information" and "collaborative practices"

In the light of the two different ways of giving information, illustrated above, the rise of Internet and World Wide Web has played an essential role in supporting circulation and further dissemination of information. Governmental use of Information and Communication Technologies enables both the collection of dispersed information from the public and the transmission of information to the public directly on an almost instantaneous basis, yet at a relatively low cost. Public administration has not remained immune from these developments and the communication of government information to the general public has become increasingly prominent.

The new technologies make it possible to develop "meaningful collaboration" across levels of governments and between government and citizens. The project of an "open government" aims at increasing "*transparency, participation, and collaboration in every agency*"<sup>2</sup>.

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<sup>2</sup> This project resulted from an initiative carried out in the period between election day and inauguration day of Obama's presidency involving, in addition to Energy, Health Care, Education, Immigration, Foreign Policy, and Economy sectors, also Technology, Innovation, and Government Reform ("Tech & Government"). President-elect Obama's mandate for government reform was to create unprecedented openness and innovation in government. Rethinking governance for the twenty-first century was not incidental to the president's agenda. On his first day in office, President Obama issued a "Memorandum for the Heads of Executive Departments and

On the premise that “information maintained by the Federal Government is a national asset”, the “Memorandum for the Heads of Executive Departments and Agencies” issued by President Obama suggested carrying out an action, supported by law and policies, in the perspective “to disclose information rapidly in forms that the public can readily find and use” (cited in Noveck, 2009).

The first step in implementing the directive lays in providing the appropriate technology to put information about activities of departments and agencies online and to make it available for the public easily. The emergence of information-sharing technologies makes it possible, at this step, to improve transparency of governments and to hold it more accountable, as public receives and can readily comment data.

Moreover the “Memorandum” calls for more “public engagement” in order to improve the quality of government decisions. “Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policy-making and to provide their government with the benefits of their collective expertise and information”.

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Agencies” calling for the chief technology officer and the Office of Management and Budget to craft an Open Government Directive. This is the story that Beth Noveck recalls in the Introduction of her book “Wiki-Government”. In the book Beth Noveck, who is a law professor at NYU Law School, tells us about her experience in the government where she served for two years as the United States Deputy Chief Technology Officer for Open Government and led the White House Open Government Initiative.

The second, and more innovative, step of this kind of “public communication management” is based on the goal of gathering information from “self-selected peers” working together via the Internet whose expertise can even increase the know-how of full time professionals (Noveck, 2009).

Going back, at this point, to the project of “open government” and its main goal, to improve and enhance transparency and participation, the quotations from the Memorandum reported above lead us to rethink the meaning and the content of the two concepts.

The “open government” project brings forward and fosters a culture of government characterized by transparency and openness. However “open government goes far beyond transparency” (Noveck, 2011), in so far as the opening up of institutions is not an end in itself, namely not only a tool aimed at making governmental activities (legislation, regulation, policies, contracts, etc) known, but it is also the base to request innovative solutions and to connect bureaucracies and administrative organizations to the public networked by new technologies. Instead of focusing on transparency for its own sake, government should formulate problems that need to be solved, make information available and create the platforms and the mechanisms to encourage collaboration.

Collaboration is, at the same time, the keynote to rethink also participation that had until recently two main meanings. On the one side, the political participation attained by means of the elections whereby citizens choose their representatives. On the other side, a different form of participation in administrative procedures that involves, generally speaking, the stakeholders’ right to be heard and to be addressed with motivated decisions.

The last decades have been characterized by a sort of ‘proceduralized participation’, but the new experience should be better defined by the concept of “collaboration”. Hence the underlying idea is that the new technologies allow government to introduce a problem and then work with the public to solve it among government institutions and with non-governmental or private organizations, economic actors and individuals. Beside improving citizen participation, “collaboration catalyzes new problem-solving strategies, in which public and private sector organizations and individuals solve social problems collectively” (Noveck, 2009:xiii).

An interesting lesson for testing such principles and perspectives is given by the project “*Peer-To-Patent*” (an experiment at the U.S. Patent and Trademark Office –USPTO<sup>3</sup> – carried out as a joint project between the New York Law School and the U.S. Patent and Trademark Office). It is expected also to represent a reform of the patent system, but in our reasoning it is rather more important as a specific case study of emerging Web 2.0 governmental applications. The practical experience has resulted from a proposal presented in Noveck’s blog in 2005 (“*Peer-to-Patent: A Modest Proposal*”), immediately taken up in specialized magazines and reviews and endorsed by institutions, experts and top managers of several companies concerned.

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<sup>3</sup> The USPTO is a two-centuries old government agency that is “responsible for the granting and issuing of patents and the registration of trademarks”. The agency has 5,500 patent examiners, who analyze applications for patents in order to verify whether they are useful, novel, and non-obvious, and therefore deserving of a 20-year monopoly.

The relevance of patents is quite commonly acknowledged, since creating barriers to competitive access increases expectations of return on investment in innovation (although support for patents is not universal). Therefore the annual number of patent application submissions is very high and the USPTO has a massive backlog. Moreover the Patent Office is plagued with a relevant information deficit and with a lack of access to adequate information. As Noveck states , “examiners [...] have the increasingly difficult job of making legally enforceable decisions in the public interest without [...] adequate informational resources” (2009, 50). Implementing the project, the Peer-Patent Web Site was set up as part of the process by which the examiners determine whether a patent application meets the legal standards established in the Patent Act. The Web Site solicited the participation of experienced and self-selecting volunteers who are required to work in collaborative teams<sup>4</sup>.

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<sup>4</sup> Peer-to-Patent lays the foundation of collaborative democracy in a concrete strategy to remedy the problem of information deficit in an agency. Indeed collaborating by software implies the use of technologies targeted at organizing the groups of volunteers and designing how they have to work. The available technology cannot be illustrated here but the two key insights, which it is based on, can be cited. First, designing granular and group-based participation ensures a process where decentralized volunteers have a clear idea of what is expected from them. Secondly, designing a reputation-based system provides participants with a sense of belonging to a group and enhancing collaboration (Noveck, 2009: 70-103).

As a case study, Peer-to-Patent may have succeeded only partially. Nonetheless, moving beyond this case study, the basic question is whether and how "*Wiki Government*" can improve the agencies' performance and what domains it can be applied to.

Generally speaking, some commentators and experts consider that we are at "a very uncertain moment in public administration history" and the idea of "*Wiki Government*" is a "wake-up call" for public administrators and practitioners, who do not want to run "the risk of becoming dinosaurs" (Kosar, 2010).

Summing up, the innovation in creating more sophisticated mechanisms and more consensual solutions aimed at involving stakeholders and the public in decision-making often resulted in expensive and time-consuming procedures. After some decades (depending on the national legislation) of "participated" rule-making, in agencies or other branches of public administration the practices of public participation are not well developed and are sometimes felt as a burden for officials who are supposed to act in the public interest.

Consequently the crucial question is about whether the current paradigm for regulatory decision-making matches the increasing complexity of the decisions provided for people beyond the traditional territorial boundaries.

##### *5. Global regulatory regimes and "wiki-based instruments"*

"Can global governance be democratic?" That is the question that has been debated in these last two decades and a variety of proposals have been suggested to enhance "transparency" and "access" to the global decision-making procedures (Slaughter, 2001).

In other words the same question can be asked about whether trans-governmental regulatory networks, or, more generally, transnational networks (networks of national governments and other bodies exchanging information, coordinating national policies, and working together to address common problems) can act in an accountable way<sup>5</sup>.

In this perspective “the umbrella of accountability” (Slaughter, 2001) captures a central role since networks and participants in these networks cannot make binding rules or adopt policies. They can disseminate information and bring back recommendations, advice and even proposals for the national legislative process or agency rule-making. But this result is certainly not the only one. In the “information age” a different dimension of exercising power has arisen on the base of ongoing information exchanges within networks. Collections of best practices, codes of conduct, and guidelines for every domain from financial market and banking to environmental protection are very often generated. Due to this innovative element the dissemination of information has played a greater role in

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<sup>5</sup> In the previous paragraph the term accountability was used in its narrow meaning (political/legal accountability). However accountability is such a complex concept, with many different definitions in different contexts, and it stands for democracy, legitimacy, control, responsiveness, and other attributes. Any way the key element is making procedures transparent and providing the public with information about decision-making and about the interests involved as well as collecting information about specific or general issues from the public in some way involved and giving reason for the final decisions.

developing policy convergence in various issue areas than more deliberate and coercive attempts (Ammannati, 2008).

As affirmed above, the emergence of new forms of global governance whose "power" relies on information can contribute towards redefining the concept of accountability that must grow and change.

Until recently most studies concerning networks and in particular supranational or global networks focused, on the one hand, on the relationship between the network, as a complex organization, and each participant as well as among the participants themselves, and on the other hand, on the aim at making information useful for harmonizing, improving and monitoring competences and practices of the institutions involved in networks. Therefore information circulation and exchange within networks ("regulation by network") was mainly seen as a tool for better government (Dehousse, 1997).

More generally, already in the mid 90s, Majone affirmed that the role of information in contemporary policy-making is not only "instrumental" but also "constitutive". In other words, "information is not only a necessary input into the policy process; under some conditions, information constitutes policy". In this sense "regulation by information" means that providing information and evidence may be usefully seen as a "mode of regulation" rather than merely as a prerequisite for regulatory decisions (Majone, 1996:5). Such a twofold nature of information is relevant since it refers not only to the network organization but also to the public (not only citizens but also private actors such as undertakings, non-governmental organizations, etc.).

Summarizing, the different meanings pointed out in the previous parts, information represents, firstly, a tool aiming at improving the quality of the regulation; secondly at allowing the public to access the decision-making and the regulatory procedures; thirdly at recognizing the citizens' right to receive information about relevant fields to regulate their social, political and economic life. More recently information can be seen also as a regulatory tool targeted at persuading and influencing behaviours (the so called "nudge regulation" – Thaler and Sunstein, 2008).

Apart from this more recent meaning which is marginal in our reasoning, the new Information Technologies offer the opportunity to overcome shortcomings and weaknesses of traditional mechanisms of gathering and sharing information. The different experiences carried out by consultations of stakeholders or interest groups, public hearings and inquiries, negotiated rule-making (Coglianese, 2001), and notice-and-comment afford no significant opportunity for useful exchange of information especially because such practices of participation are neither widespread in the administration nor well developed. Moreover, as often revealed, such participation methodologies have not given satisfactory results: the quality of participation is not high, offered information is sometimes not really useful, comments arrive generally only from interested parties so that the risk of regulatory capture cannot be controlled, and the organization is often uncertain and time-consuming.

How could Information Technologies reduce defects and critical aspects of the traditional practices? At first glance, the use of technology and online mechanisms offer the opportunity to aggregate private information, to

connect specific expertise of individuals and administration, to coordinate actions using networks in order to respond to public priorities.

The second question could be the following: how can institutions filter information and avoid uncontrolled and/or excessive information? The "Peer-to-Patent" case suggests some considerations although not conclusive. Opening up an agency process to "self-selection" does not allow just anyone to submit comments to the agency. Potentially low-value participants are generally excluded "by requiring contributors to respond to well-articulated questions through structured processes". Moreover such particular participation "demands joining an ongoing group whose members are responsive and responsible to one other" (Noveck, 2009:174).

On these premises, the following question is about whether and how the new Information Technologies can connect citizens and supranational/global bodies. The financial crisis surely highlighted, at the highest level, the interferences and interdependencies among different institutions independently of traditional political national boundaries and how international and global institutions and networks can affect economic and social life of the individuals more deeply than the national.

What emerged from the crisis is the urgent need for strategies addressed to solve complex problems. The goal of effective governance can be achieved through "collaboration" mechanisms. Even if no one would risk affirming that technology works miracles, technology could enable the solving of problems with different strategies and connect the general public or citizens to not-legitimate but extremely influential regulatory institutions.

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