THE TRUSTWORTHINESS TEST FOR REGULATORY IMPACT ASSESSMENT AND JUDICIAL REVIEW[1]

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THE CRISIS OF CONFIDENCE IN LEGISLATION

HART

1. The argument in a nutshell

The motivation for this volume arises out of concerns about the crisis of confidence in legislation and how this crisis can be addressed. In this chapter we explore the potential of regulatory impact assessment (RIA) and judicial review in raising confidence in legislation in the EU Member States. This is a complex topic covering two broad procedural instruments, thus we will unpack it into manageable arguments. We consider them separately, building an argument that goes for RIA as instrument affecting policy formulation to the review of law and regulations in courts[2].

Thus, we begin with a definition of RIA and unpack it as instrument and process. We will then enter the dimension of confidence and identify the dimensions of trust that matter to RIA. When dealing with confidence in legislation, we will use the concept of trustworthiness – which means something or someone we trust in relation to a given property or set of properties. Trust is something general, trustworthiness refers to a finite number of well-identifiable properties. Whilst surveys measure generic trust in legislation, governments, institutions and the like (see chapter 1), we reason on how RIA can make legislation more trustworthy because it adds specific dimensions to rule-making - or law-making: we will use the two terms interchangeably because RIA in the EU

[1] Research for this chapter was funded by the European Research Council's Project *Procedural Tools for Effective Governance*, Protego, grant number 694632. http://www.protego-erc.eu/

[2] RIA can be applied to different stages of the life-cycle of regulations and laws, for example it can be an effectiveness and efficiency test in the retrospective review of legislation. Here, however, we consider its predominant empirical use by governments and regulators, that is, during the formulation of new policies.

is applied to both primary and secondary legislation, see chapter 1 for the broad definition of 'legislation'.

We will argue that it is possible to build a robust claim about RIA and confidence in legislation via the concept of trustworthiness as defined by Onora O'Neill[3]. We will develop the claim in the remainder of the chapter. But basically, the claim follows from the theoretical framework presented by Maria De Benedetto in chapter 1. Citizens develop trust in legislation as a function of expertise, benevolence and integrity. An argument often rehearsed among the advocates of better regulation[4] is that RIA facilitates the take up of science, risk analysis, economics and more generally evidence in the stage of policy formulation (this is the dimension of expertise). RIA assures citizens and stakeholders that whenever their individual preferences are violated there are valid and explicit reasons (this is a manifestation of benevolence). It follows fair, transparent and consistent procedures (the integrity dimension). Indeed, RIA is first of all a procedure, more precisely an administrative procedure. Especially in the US literature, RIA is framed as a system of controls, a fire-alarm that can be triggered by affected interests[5]. Since confidence depends on both trust and control (one more time we follow Maria De Benedetto), RIA seems to have potential when matched with our standards for confidence in legislation.

However, this claim needs to be qualified by considering the empirical manifestations of impact assessment across countries. We cannot generalize to 'one' type of RIA tool and process. Even within the same country, there are different types of RIA depending on the sectors, the capacity in government and regulatory agencies, and the issue. Across the EU, a number of studies have measured heterogeneity of RIA systems, purposes and implementation[6].

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[3] Onora O'Neill, 'Linking trust to trustworthiness' (2018) *International Journal of Philosophical Studies*, 26(2).

[4] OECD, *Regulatory Impact Analysis: A Tool for Policy Coherence*, (2009) OECD Publications. OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012), OECD Publications. European Commission, *Better Regulation: Taking Stock and Sustaining our Commitment*, (2019), https://ec.europa.eu/info/sites/info/files/better-regulation-taking-stock_en.pdf . European Commission, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions* (2020) https://eur-lex.europa.eu/resource.html?uri=cellar%3A7ae642ea-4340-11ea-b81b-01aa75ed71a1.0002.02/DOC_1&format=PDF

[5]Terry Moe and S.A. Wilson, 'Presidents and the Politics of Structure', (1994) *Law and Contemporary Problems*, 57(2) Spring: 1-44.

[6] Fabrizio De Francesco, Claudio M. Radaelli and Vera Tröger, 'Implementing regulatory innovations in Europe: The case of impact assessment' (2012), *Journal of European Public Policy*, 19(4): 491-511. OECD, *Better Regulation Practices Across the European Union*, (2019), OECD Publications. Claudio M. Radaelli, 'Diffusion without convergence: How political context shapes the adoption of regulatory impact assessment' (2005) *Journal of European Public Policy*, 12(5): 924-943. Jonathan B. Wiener, 'Better regulation in Europe' (2007) *Current Legal Problems*, 59: 447-518.

Granted that we have to acknowledge this heterogeneity, the potential of RIA in terms of making legislation trustworthy depends on how it connects with other fundamental dimensions of the law-making process. Here is where we enter judicial review. The rationale for this choice is simple. RIA intervenes when a rule is made, that is, in the arena of rule-making. Confidence in legislation, however, depends on how affected and diffuse interests can make their voice heard and their interests taken into consideration both when a rule is being made and when the rule enters into force. Judicial review of regulation provides another crucial arena where legislation faces questions about trustworthiness: what are the properties of judicial review that would lead an individual to deem this second arena worth of her trust?

Maria De Benedetto explains in chapter 1 that confidence in legislation (or lack thereof) depends on the full legislative cycle. Accordingly, we consider policy formulation and the review in courts jointly. Procedures and actors are of course different, like in a play where the actors and what is displayed on stage change from one scene to the next. Policy formulation revolves around the production of evidence and reasons for regulatory intervention, often with evidence-based input provided by affected interests via consultation. Judicial review sees the affected interests acting in courts. The two arenas involved in RIA and judicial review are different in timing, actors and the binding effects of the final decisions – RIA supports but not substitute the political decisions to carry forward a policy proposal, a court's decision is binding. Yet conceptually the connection is strong. Think about the life-cycle of a policy. The assessment of impacts and judicial review are two fundamentals 'scenes' in which policy-makers have to explain and accept responsibility for their actions in special designed fora – with consequences for the actions that are not appropriate or not legal.

We explore how the two scenes interact by exploiting new evidence provided by the ERC project Procedural Tools for Effective Governance (Protego). In particular, we focus on whether RIA can be reviewed in court and the degree of deference of courts among the judicial review systems of the Member States. We find that RIA and judicial review have strong potential in enhancing trustworthiness in legislation thanks to their transparency and control dimensions. This is even more significant when the two arenas interact. Empirically we discuss about the notable different implementations of the two instruments as well as the almost absence of interaction and common approach within EU countries. We acknowledge the existence of different legal traditions and

inherent diversities among EU administrative cultures. However, we maintain that when reasoning on control mechanisms and trustworthiness in legislation the two arenas should be considered together.

The chapter proceeds with the following steps. We will set the first scene framing the discussion about control and trust and disclosing RIA's potential in building trustworthiness in legislation. We will then turn to the second scene of control, that of judicial review. We will focus on two aspects: the encounter between RIA and judicial review and the degree of deference of courts. Finally, we will reason on the importance of interplay between the two arenas and their relevance for quality of legislation.

2. Scene one: Regulatory Impact Assessment

At the outset, we consider RIA as mandatory requirement to examine proposals for primary and secondary legislation. In the EU, RIA covers both the executive-initiated legislation that is then examined by parliaments and secondary legislation, such as statutory instruments or agency-initiated regulation (see chapter 1 in this volume on the broad definition of legislation and the peculiarities of independent agency-level rules). In a sense, in the EU it is more precise to talk about IA rather than RIA, but since the RIA terminology is ubiquitous we will adopt it.

A useful way to frame the discussion about confidence, trust and trustworthiness is to consider RIA as document and as process. As a document, an impact assessment of proposed legislation covers the identification of a problem, a range of feasible alternatives, the comparison of these alternatives, and an analysis that shows which option is preferred against a set of explicit criteria. Consultation is a key component of RIA in the EU – see also chapter xx by yy in this volume.

Across the EU, impact assessment documents (and in some countries their analytical appendixes too) are published and sent together with draft legislation that to parliament. These are the documents we find on the official websites of the parliaments and/or governmental departments. But every impact assessment is also a process in which governments and regulators have to search and present evidence, collect information via consultation, appraise the likely effects of the proposals across a large number of stakeholders, the economy and the environment. These tests (and many more others, including gender impact assessment and tests of the costs of complying

with administrative procedures) are not just numbers put in a file that is then published. They are also search processes in the real world, where the public manager or regulator encounters or has to listen to the voice of stakeholders, civil society organizations, economists and lawyers. Often regulations with a risk component involve specialist bodies of scientists that have mandatory rights to be consulted.

What is the connection with confidence in legislation, then? The connection comes from different functions performed by RIA. As mentioned, RIA has the potential to make legislation trustworthy. The concept of trustworthiness is not a general characteristic that an entity (such as legislation in our case) possesses or not. It means that something or someone is deemed by someone else worth of trust in particular functions. This is where the potential of impact assessment, instrument and process, lies.

Indeed, the creation of empirical evidence that is placed in the public domain makes legislation more trustworthy. This matters in an age dominated by the distrust in or, according to someone, death of expertise[7] – the corona virus pandemic has shown how important evidence-based and science-informed risk trustworthy regulations can be. The potential benefits in terms of trustworthiness do not stop here. RIA creates capacity in public administration, such as capacity to listen, to analyze and to take into account concerns and issues raised by society and business operators[8]. This makes legislation trustworthy because based on a well-functioning, 'listening' bureaucracy.

Trustworthiness is greater when we have instruments that correct heuristics, that is the tendency of human beings, regulators included of course, to make choices that are not correct – RIA slows down the mind, limiting the mistakes of thinking fast[9]. In terms of managing complexity, a good impact assessment process creates robust flows of information across departments, encourages joined-up government, and allows the examination of the same issue from different perspectives,

[7] Tom Nichols, *The Death of Expertise: The Campaign Against Established Knowledge and Why It Matters* (Oxford University Press, 2017).
[8] The argument is developed by Claire A. Dunlop and Claudio M. Radaelli, 'Policy Learning and Organizational Capacity' in: Edoardo Ongaro and Sandra van Thiel (eds.), *The Palgrave Handbook of Public Administration and Public Management in Europe* (Palgrave, 2016).
[9] Daniel Kahneman, *Thinking Fast and Slow*, (Penguin, 2012). OECD, *Regulatory Impact Assessment*, OECD Best Practice Principles for Regulatory Policy, OECD Publications, 2020).

such as economic impacts, social effects, distributional consequences, and sustainability. The experience of the Commission in creating interdepartmental RIA groups is instructive[10]. Croatia allows departments to produce different impact assessments, making their different perspectives on the same issue transparent and measurable (source: Protego project).

Is this sufficient to create confidence in legislation? It may well be necessary, but it is not sufficient. For sure we know that what we have described is the ideal RIA template. An ideal RIA process includes steps that are necessary for a citizen to have confidence in legislation. But in reality RIA comes in different types. The EU is a laboratory of diversity in this respect.

Cross-national studies have shown that RIA processes can deviate from the ideal template, sometimes even within a country (e.g. by sector). There are symbolic or perfunctory impact assessments without real substance in terms of analysis and consultation[11]. This is not necessarily because public managers do not want to engage with the instrument and process of impact assessment, but because there is scarce capacity inside government to collect and analyze the data indispensable for an accurate appraisal of the likely effects of proposed legislation (source: Protego project). There can be a document with some data and analysis, but nothing like the search process we described above. The document and the process can then be de-coupled, making an important dimension of the exercise symbolic.

To carry on and turning to the dimension of control (see chapter 1 on the interplay between trust and control): Not all EU Member States provide a robust scrutiny of the RIA produced by the regulators. It is hard to imagine a stakeholder affected by a rule considering the rule worth-of-trust when the impact assessment is only a number of pages produced by a department, without anyone having checked on the quality of the document as well as process. Our Protego data on the (then) EU-28[12] show that scrutiny of RIA varies markedly in terms of what is done, when and by which oversight body (when it exists).

[10] Claudio M. Radaelli and Anne A.C.M. Meuwese, 'Hard questions, hard solutions: Proceduralization through impact assessment in the EU' (2010), *West European Politics*, 33(1): 136-153.
[11] Claudio M. Radaelli, 'Rationality, Power, Management and Symbols: Four Images of Regulatory Impact Assessment' (2010) *Scandinavian Political Studies* 33(2): 164-188.
[12] The data were collected in the period 2018-2019 when the UK was still part of the EU. Hence the Protego dataset and more generally the evidence gathered for this project covers 28 countries plus the EU as stand-alone case.

At the opposite, too many controls may trump expertise, benevolence and integrity – the three determinants of trust. Indeed, there is literature on cost-benefit analysis as instrument of political control of the regulators rather than instrument geared towards giving reasons, transparency and involvement of the stakeholders in the preparation of legislation[13]. In Europe the emphasis on 'political control' is less pronounced than in the US but present in some countries such as the UK[14]. Further, citizens may not have confidence in legislation because the laws and regulations are implemented by a corrupt bureaucracy[15]. Here we follow Maria De Benedetto on legislation as fact, not only words. A legislative act is often a promise or a theory. It is an abstract description of the reality that will follow its own rules, not necessarily what is expected in the act.

And finally consider this: even 'the' perfect analytical document, 'the' high quality process of search supporting the identification of the best legislative choice may be ignored by the government, preoccupied with coalition stability or under pressure by certain interests, so that the final piece of legislation deviates in fundamental ways from the analytical assessments. This phenomenon is likely to happen if parliament is not vigilant, if the business community does not complain, if non-governmental organizations representing civil society do not track down the discrepancy between RIA and the legislative act, this phenomenon may happen without being detected.

There are two key variables that matter, then. One is the quality of RIA as document and process. The other is whether RIA is used to make a decision about legislation, and if so how[16]. Even more fundamentally, recall what we said about context. In some countries, a tight procedure for impact assessment may create frictions in the web of informal, cooperative interactions among departments. It is not surprising that countries where the early stages of law-making are based on fluidity and informality of communications across departments are the ones with few or no

[13] Eric A. Posner, Controlling agencies with cost-benefit analysis: A positive political theory perspective, (2001), *University of Chicago Law Review*, 68: 1137.
[14] Claudio M. Radaelli, 'Regulating rule-making via impact assessment' (2010) *Governance*, 23(1):89-108.
[15] On the link between regulatory procedures and perceptions of corruption see Claire A. Dunlop, Jonathan C. Kamkhaji, Claudio M. Radaelli, Gaia Taffoni and Claudius Wagemann, 'Does consultation count for corruption? The causal relations in the EU-28' (2020) *Journal of European Public Policy*, in press.
[16] Claire A. Dunlop, O. Fritsch and Claudio M. Radaelli, 'Étudier l'étude d'impact', (2014) *Revue Française d'Administration Publique*, 149, no.1, 163-178.

procedural requirements for impact assessment and consultation, and even where these requirements exist on paper, they are not implemented[17].

3. Scene two: Judicial Review

Imagine that a legal norm has gone through the formulation process where information has been gathered, the economic impact and social effects have been considered, and stakeholders were consulted. This piece of legislation comes now into force and its content is critical in some way. This can be the case for example because of the outcome of the decision, such as the proposal for a new system of roads that affects a local authority or community, or a private hire licenses decree that is negatively affecting a specific firm. The policy game implied by this norm is not finished yet. Those who believe they are negatively affected can still make their preferences heard. But there is a fundamental shift in arena, from policy formulation to courts.

This is where the power of courts to review legislation plays a role in delivering on control. Recall that, following the introduction, confidence depends on trust and control. Whilst impact assessment opens up the process to evidence, consultation and cost-benefit analysis, this procedure alone is not a sufficient condition to make legislation and the authorities (governments and regulatory agencies) worth of their trust. Courts add an ultimate step in the chain, grounded in their control function. In fact, courts are called upon to review that the outcome of an administrative process is fair and to determine whether the decision was taken in a reasonable manner and to check on the constitutionality, rationality and respect of rule of law. Judges have the power to annul in total and in part an act. In this way the possible detrimental impact (for confidence) of a decision is mitigated through the procedural, substantial and legislative control that the judicial administration does on the work of the executive and administrative branch. In practice this means that courts, and not the legislature itself, have the final say whether an act is or is not within power[18].

[17] Claire A. Dunlop, Jonathan C. Kamkhaji, Claudio M. Radaelli, Gaia Taffoni and Claudius Wagemann, 'Does consultation count for corruption? The causal relations in the EU-28' (2020) *Journal of European Public Policy*, in press. Claudio M. Radaelli, 'Desperately seeking regulatory impact assessments: Diary of a reflective researcher' (2009) *Evaluation* 15(1): 31-48.

[18] Alan Freckelton, *Administrative Decision-Making in Australian Migration Law* (ANU 2015)

Judicial review is essentially a tool for transparency through reason-giving obligations articulated in court. Review counters the political control over administrative decisions.[19] In this sense the metaphor of 'fire alarm' we have seen in RIA applies to administrative justice too, perhaps even more given the essential feature of control of judicial review. A fire alarm is after all a control device. Indeed, by standing in courts, litigants make use of the adjudication of a judge to decide whether the executive or administrative power has acted in a reasonable way or not.
As fire alarm, judicial review must operate with other instruments[20]. Let us then start with the relationship between RIA and judicial review.

4. The encounter between RIA and judicial review

There are few but important variables to take into account when considering RIA and judicial review as a mix of control tools to foster trustworthiness in legislation. To begin with, how can RIA and judicial review come together? We have to distinguish between the encounter as logically possible and the reality on the ground. Hence our question is: how does this encounter unfold, and is this the norm or the exception in the administrative life of the EU? Following Alemanno, in principle the encounter may be 'direct' when what is challenged in the court is the RIA itself, for instance for breaching the procedural requirements of the assessment process. The 'indirect' encounter may occur when RIA documentation is invoked to challenge the validity of an act, in this case the RIA provides evidence that informs the broader review process, especially the preparation of an act.

Thus, considering of RIA within the adjudication process in court allows for a more specific scrutiny of the input phase of the policy process. As reported by Alemanno, the use in courts of RIA increases the attention on the robustness of inputs to policy formulation and provides for a larger amount of evidence and data.[21] The courts, in fact, can in principle look at the quality of RIA or rely on the amount of evidence generated by the impact assessment to come to a conclusion. If any or

[19] Peter Lindseth, 'Judicial Review in Administrative Governance: a theoretical framework for comparative analysis' in Ernst Hirsch Ballin, Saskia Lavrijssen, and Jurgen de Poorter (eds.) *Judicial Review in Administrative State* (T.M.C Asser/Springer 2019).
[20] Ibid 191. Judicial review can be seen as a mechanism to reduce the problem associated to what has been called the 'asymmetric information risks' of rule-making. As Lindseth rightly argues judicial review of administrative actions can be read as a way to reduce the information asymmetry that exists between the legislature and the administrative agent or the executive. The adjudication of a judge, triggered by the litigants, thus reduces the information asymmetry that is a consequence of the power delegated from the legislative to the executive.
[21] Alberto Alemanno, 'Courts and regulatory impact assessments' in Claire A Dunlop and Claudio M. Radaelli *Handbook of Regulatory Impact Assessment* eds. (Edward Elgar Publishing 2016) 129.

both activities occur, the effects are not trivial. They can move the logic of courts towards evidence as primary consideration in legal reasoning, so much as that some authors have talked of a possible 'evidence-based judicial reflex'[22] . This is not necessarily an indicator of bias or skewed legal reasoning. Indeed the 'evidence-based judicial reflex' provides for a type of legal reasoning in courts. This tendency enhances the attention of the courts to the procedural requirements of the whole lawmaking process. Crucially, it can increase the trustworthiness of legislation. We can indeed imagine a court looking at procedural requirements in RIA such as the scope and breadth of analysis and consultation – a set of judicial controls on the RIA procedure that should increase trustworthiness.

But moving to what happens on the ground, according to our Protego data seldom do courts review impact assessment. In most of the EU-28 it is the Constitutional Court that undertakes an evidence-based review while deciding on the constitutionality of an act. In the Czech Republic it is the Constitutional court that draws on RIA when adjudicating on the statutes, therefore judges are only checking on the constitutionality of an act with more empirical evidence. This notwithstanding, we found only one case in Czech Republic on a statute that has been quashed because the RIA was not performed at all during the law-making process. Also, In Slovenia the Constitutional Court has drawn on RIA reports when reviewing the constitutionality of an act. This reminds us of an important point debated already twenty years ago – whether RIA is constitutive of a normative act, that is, absent the RIA the legal norm does not exist.[23]

In Italy RIA is an administrative procedure that does not create rights and duties protected in court. This means that the RIA report *per se* does not constitute a legal obligation to be reviewed in courts. However, courts can sanction the failure to comply with the obligation to carry out a RIA[24]. Therefore, in Italy judicial courts can only check on the obligation to carry out RIA while the quality of the process has no effect. In Portugal RIA has no effects *per se* but a statute can be challenged if RIA was not done. Following Protego data the same holds for other EU countries like Lithuania and Luxemburg. All these cases tell of a quasi-null use of the RIA- created evidence in judicial review. There are indeed few cases where RIA evidence has enhanced the whole process

[22] Ibid 132.
[23] Maria De Benedetto, 'Un quasi procedimento' in N. Greco (eds.) *Introduzione all'analisi d'impatto della regolamentazione (*Edizioni Scuola Superiore della Pubblica Amministrazione 2003) 225-244.
[24] Art. 14 Law 246/2005

of control that courts do. The case of Spain is telling of an option of indirect use of RIA. The Supreme Court, in fact, has quashed a number of articles of a royal decree on private hire licenses because the reasons expressed in the report where not 'convincing'[25], therefore the evidence produced in this case assisted the adjudication process.

5. Judicial deference

Apart from the interaction between RIA and judicial review, the deference of courts is the second dimension to consider that is fundamental in relation to confidence in legislation. When considering judicial deference, we specifically intend deference of courts to administration and governments over regulatory matters. That is the extent to which courts, while reviewing an act or regulation, waive to the evidence and experience of administrative agencies or the executive[26]. Thinking of confidence via control, it matters what exactly do courts review and what are the possible remedies against an unlawful act. In this domain, the key concept is the *Green and Red-Light theories* of administrative law[27]. While the *Green light theory* sees judicial review as based on trust in the executive, and thus the approach to judicial review is that of a complementary action to that of the government and regulators, the *Red Light theory* suggests that the judiciary should perform an active check against the abuses of the executive power, therefore justifying a more intense scrutiny of the courts.

What is or what should be the purpose of judicial administration, the depth and intensity of the review done by courts is a compelling question in legal scholarship. Should in fact the scope of the review be expanded in various domains – for instance should courts be able to review secondary legislation like regulations? Poorter points to the right question when reflecting on judicial deference, in fact if the general explanation for administrative deference is that courts lack expertise when compared to administrations, then this claim of expertise – or lack of expertise – brings in the inherent idea that there is an objectively correct conclusion[28]. What Poorter suggests is that courts should be 'on guard' against all objective claims of expertise and should do more in

[25] ECLI: ES:TS [2018] 1913, Judgement N. 921/2018
[26] For a comprehensive definition on the concept of 'Deference' and administrative judicial review see: G. Zhu, *Deference to the Administration in Judicial Review: Comparative perspectives* (Springer International Publishing 2019)
[27] Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press 2009).
[28] Jurgen de Poorter, Ernst Hirsch Ballin and Saskia Lavrijssen eds., *Judicial Review of Administrative Discretion in the Administrative State* (T.M.C Asser Press 2019)

order to prevent an arbitrary exercise of administrative and executive power. Finally, and also in connection to what we said about the 'evidence-based judicial reflex', courts can enter the domain of expertise (beyond the consideration of RIA discussed above) as creators of standards, for instance on who should be considered an expert or what guiding principles a regulation ought to be grounded on. In this sense the case of the Spanish ruling against the private hire licenses decree because of not 'convincing' reasons seems a good example of a guiding principle embraced by a court[29]. The degree of deference depends on a number of variables: the characteristic of the dispute, the gravity of the issue but most importantly the level of technicality of a dispute. This means that there are limits to the technical competences of courts and deference is appropriate when a public authority more than a judge has better experience and knowledge about a relevant matter[30]. Deference is nonetheless an important proxy of the intensity of the scrutiny of courts and of the control that courts can exercise on the legislative process.

The Protego data on the EU-28 point to a striking similarity: in all EU-28 Member States judicial review is considered a general principle of administrative law that has the objective of protecting fundamental rights and uphold the rule of law. Beyond these general shared goals, judicial review differs across countries on the deference and the remedies that courts can take.
In some countries like Greece the degree of deference to the administration is set by the law and covers specific categories of acts that are not subject to judicial review. Those are in particular government acts regulating the relationship between the executive and the parliament such as the dissolution of the parliament and the acts connected to foreign policy. Slovenia is an example of courts that have very limited powers to annul a general administrative act. Where deference is strong the acts where the courts can rule are those where the Constitutional court decides that a certain act or regulation is not regulating on a specific issue which it should instead regulate.
The Netherlands exhibits a high degree of deference but contrarily to other EU countries the remedies that court can take are few. In fact, the intensity of judicial review is activated in function of the type of power of the administrative authority. Indeed, the technical complexity of the administrative decision is a factor in the assessment of the intensity of judicial review. However, the Dutch strong deference is counterbalanced by the remedies that courts can take. An administrative judge, in fact, has the power to annul an administrative order deemed illegal.

[29] ECLI: ES:TS:2018:1913, Sentencia núm. 921/2018
[30] Trevor Robert Seaward Allan, *Judicial deference and judicial review: legal doctrine and legal theory* (University of Warwick 2011)

Moreover, the judge can determine that the judgment itself replaces the annulled order or a part that is annulled. The judge directs the administrative authority to make a new order in respect of its instructions. The administrative Dutch judge can also determine a penalty if the administrative authority does not comply with the judgment and the payment can be directed to the affected part[31]. The Dutch deference to the expertise of the administration is high, but within its space of maneuver the judge can take a strong action and a number of remedies.

Variation across EU Member States affects the role of courts vis-à-vis decision makers. This is shown by deference to the administration in judicial review as well as the remedies courts can take. In Protego we found that is not common for courts to oblige administrative authorities to issue a new act. Moreover, courts differ to the extent and the kind of remedies they can take as for instance quashing an act or declare an act null or invalid as well as to order an injunction.

6. Conclusions

In this chapter we put RIA and judicial review through the trustworthiness test. How do they fare? How do they perform together in an ecology of policy instruments affecting the life-cycle of laws and regulations, from policy formulation to decisions taken in courts? We argued that trustworthiness depends on how the two arenas or scenes of the life-cycle interact with each other. The two arenas are, in fact, conceptually connected when we think about whether citizens and affected interests should or should not trust laws, regulation and the public authorities that produce and implement them.

If we look at the potential of RIA and judicial review, they pass the trustworthiness test. RIA has potential for increasing trustworthiness via transparency, the provision of a broad range of evidence including information provided by the affected interests, and the explicit articulation of the empirical reasons behind public intervention. Judicial review has a transparency dimension too, and a stronger control property.

However, the proof of the pudding is empirical. And empirically we cannot point to a single direction or pass-fail mark for the two instruments. This is first of all because the interaction

[31] Art 8 of the General Administrative Act, GALA

between RIA and judicial review is rare. We looked at different ways in which this interaction may take place, and did not find much evidence across the EU Member States. The two scenes are not connected in compelling plots: the story is still fragmented.

The second variable concerns diversity. Notwithstanding the process of European integration, there is still diversity across the EU Member States. Specifically, we found that on top of the heterogeneity of RIA systems there is also heterogeneity of judicial review. These two levels of differentiation and diversity provide a picture of the EU legislation without a single organizing architecture. Consider that the same regulations and directives produced by the EU are implemented in the (now 27) Member States. Legislation with an EU-impulse falls into national systems with a double degree of heterogeneity – in the policy formulation arena as well as in the arena of judicial review. Add that the EU itself has not as yet adopted its own administrative procedure act as organizing principle for regulatory policy and legislation. The scene is then set for a lack of common approach.

And yet – we conclude – the implications for trustworthiness are not straightforward. One argument is that the lack of convergence across the EU is detrimental (to trustworthiness). Imagine a multi-national company or a citizen with presence in different Member States that has to face this patchwork. How can the experience of passing through so many different systems of appraisal and court's review enhance trustworthiness? However, another argument is that diversity respects the political, legal and administrative contexts of the EU Member States. Exactly because these contexts are different and incorporate different legal traditions and administrative legacies, RIA and judicial review have to adapt and wrap-up around 'context' in different yet meaningful ways. After all, diversity is a core property of the EU as laboratory federalism[32]. As a federalizing political system, the EU incorporates diversity that allows governments, stakeholders and citizens to discover the 'best solution' in time, by experimenting with heterogeneity. The argument is similar to the one made for regulatory competition by authors such as Roberta Romano for the US as federal system[33].

[32] For an application of the concept of laboratory federalism to the EU see: Wolfgang Kerber and Martina Eckart "Policy learning in Europe: the open method of co-ordination and laboratory federalism" (2007) *Journal of European Public Policy*, 14(2), 227-247.

[33] Roberta Romano, Is regulatory competition a problem or irrelevant for corporate governance?', (2005) *Oxford Review of Economic Policy*, 212-231. On the EU see Claudio M. Radaelli, 'The puzzle of regulatory competition' (2004) *Journal of Public Policy*, 24(1): 1-23. On federalism and diversity the most compelling argument has been made by

Be that as it may, if we look at the implications for the study of legislation, the conclusions are clearer. As scholars of legislation, we have to consider jointly RIA and judicial review when we approach the topic of quality of legislation. This analytical step has not been made by the European Commission and the EU more generally. The strategy for better regulation of the European Commission includes RIA but does not extend to judicial review. The 27 Member States have embarked in regulatory reforms under the aegis of the better regulation agenda in the last twenty years – but yet again without connecting better regulation to judicial review. Our approach to identifying the connections and missing links between the two arenas thus contributes to the critique of current policies and suggest remedies.

Vincent Ostrom, *The Meaning of American Federalism: Constituting a Self-Governing Society*, (ICS Press, San Francisco, 1991)