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"THE RISE OF THE EUROPEAN REGULATORY STATE …. HOW TO FIGHT IT (BETTER)?"

(Executive Summary)

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EXECUTIVE SUMMARY

In this concise study we explore the rise of the regulatory state at the European level, its true causes and, last but not least, the ways how to fight this (better). This study has no intent to start a 'holy war' against regulation per se, nor does it want to attack the European Union for reasons of national sovereignty. But there is a clear intention to warn against a European regulatory system that seems to get out of control in producing ever increasing flows of regulations, resulting in rising pressures on our daily lives. 'Europe' cannot make the same mistakes as many Member States did during the rise of their welfare states, especially when the democratic control on government is more difficult in the EU than in its Member States.

So indeed, his study considers the – apparent but difficult to measure – continuous and seemingly uncontested rise of regulatory pressures coming from the EU (thus the concept of the 'European regulatory state') as worrisome for society. The reasons why are explained in chapter I.A. by zooming in on the (sometimes hidden) costs of the (European) regulatory state. The costs are not only economic, but also moral in nature. Well known are the compliance costs for companies and the 'dead weight' or efficiency losses for the economy as a whole, but less acknowledged are the moral hazards and (risks of) political favouritism that impede entrepreneurship, market exchanges, productivity growth, innovation, and therefore economic growth, more welfare and sustainable employment.

Next, we look for the main causes of this unfortunate rise. The second chapter (I.B) first deals with the 'usual suspects' which are explained in the literature of welfare economics: the four 'market failures', namely the existence of monopolies, the lack of production of public goods, the disturbing effects of (negative) externalities and the problem of information asymmetries. But these market failures, though to some extent correct in theory, are in reality and in the longer run, not so harmful as they might seem and therefore do not need repair by regulations. These theories of market failures also obscure the real main drivers of regulatory action: the zero-sum oriented political actors and their actions, as described in the 'Public Choice' theory. If these 'government failures' are not kept under control, Mancur Olson will be right that nations will indeed decline, as many European countries are now experiencing.

In the following chapter (I.C), we deal with the question how to fight this fundamental trend of the ever growing regulatory state due to political forces. The first promising way to do this was the introduction of the Impact Assessment in the EU in the early 2000s. But on closer look, its application now seems to hit an invisible ceiling, and its usefulness in making 'better regulation' is put more and more in doubt. The reason for this 'plateau-ing' of RIA can, on the one hand, be found in the political environment and its public choice forces, in which the RIA has to operate. RIA will not stop the political elephant, one world expert in regulatory reform once stated. On the other hand, the intrinsic complexity of the required analysis to measure all the benefits and costs of a regulation for society, leads to an almost unavoidable vagueness of its results, leaving politicians too much room to manoeuvre in making their political deals.

Another, more classical, approach to mitigate these regulatory flows, as explained in chapter I.D, is the judicial review of the quality of regulations, where (higher) courts question the necessity, suitability, inevitability and proportionality of legislation for society. But the required analyses prove again to be very complex by nature. Therefore their results are not so clear and undisputed to rely on. Courts also fear that they have to perform the same political balancing of benefits and costs of regulation for society, as the parliaments and governments did when designing the regulation, and therefore being accused as a non-elected and therefore undemocratic 'gouvernement des juges'. So, courts are quite reluctant to walk this line and will only in very clear cases of power abuse annul legislation, leading to judicial deference.

Still, some kind of judicial review is needed to balance the public choice drivers behind the rising flows of regulation. Who else is legally able to stop or put a final check on the destructive public choice forces? How to strengthen the necessary 'checks and balances' and safeguarding the 'rule of law' in our democratic system? In order to provide the judiciary the tools to mitigate the complexity of the regulatory analysis, and a way of not falling in the trap of a judge-made government, the still valuable IA methodology needs to be refocused. Two proposals, behavioural law and economics and the legal theory of structuralism are discussed in chapter I.E. but (partly) dismissed as insufficient.

For this reason the second part of this study suggests another judicial review of regulations by focusing on the protection of the 'nomocratic' or classical individual basic rights of, for example, property or free contracting, against the 'telocratic' or policy-driven regulations. We first explain in chapter II.A the fundamental differences between the 'nomocratic' laws or rights, like property and free entrepreneurship, and the 'telocratic' regulations in order to realize all kinds of 'social goals', as described by Oakeshott and Hayek. We also explore why, combined with the drivers of the public choice theory, the inflation of 'telocratic' regulations will inevitably lead to an undermining of individual liberties and of the 'nomocratic' legal stability within society.

In the next chapter II.B, we provide a short analysis and appraisal of the EU experience on 'regulatory takings' and compare it with the (more extensive and developed) case law of the US Supreme Court. We (regrettably) notice that in both cases the judicial protection or safeguarding of property rights seems to be weak. Though more thoroughly than the judicial review of regulatory quality, the rulings of courts show a substantial deference towards policy-made breaches of property rights, especially in socio-economic matters. It seems to illustrate again the discomfort of courts and judges with the economic analysis on the one hand, and their fear of having to make political judgements on the other.

In order to strengthen this judicial protection of individual (economic) rights, we design in chapter II.C an analysis framework for a better judicial review, based on the crucial difference between the nomocratic law and the telocratic legislation. We begin by explaining some fundamental insights from the New Institutional Economics that provide an answer to the defaults in the classical welfare economics. Next, we integrate these views in a 'nomocratic RIA' which is a RIA that checks the impact of telocratic regulations on the nomocratic rights and legal order. We show how this nomocratic RIA will not only protect individual rights but can also stop the growing flow of regulations, so improving the general regulatory quality.

In chapter II.D, we illustrate the possibilities of the 'nomocratic' RIA with a short specific case study of a particular EU legislation: the protection of consumers in the financial sector. We first describe the IA that accompanied the legislation, analyse its defaults, and then illustrate how a 'nomocratic' RIA would perform the analysis.

But a nomocratic RIA can only work in reality if courts dare to do their job when reviewing EU legislation: analysing the legislation more profoundly in a 'nomocratic' way, thereby protecting our constitutional liberties. First, the ECJ and their rulings need to acknowledge the damages telocratic regulations cause for the proper functioning of our economic and societal life. They have to understand how precarious institutions are for entrepreneurship and risk-taking. Next, the ECJ must accept its crucial role in upholding the fundamental legal order, even against the will of European legislators. Only when courts accept their constitutional duty to uphold the rule of law, even against the will of a political majority, the expanding European regulatory state can be stopped and their political drivers kept in check…
