Effective Law from a Regulatory and Administrative Law Perspective

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The question of effective law has been studied in many fields of research, such as philosophy and sociology of law, law and economics, public policy and behavioural sciences. This article aims to treat it as a genuine administrative law issue which is currently having a significant impact on administrative procedures, especially affecting the way in which rules are adopted and implemented. Furthermore, the article attempts to reconcile conflicting views in existing literature on the meaning of effective law and on which factors lead to effectiveness by proposing an integrated approach: starting from a regulatory perspective it considers both traditional determinants of effectiveness, ie compliance and enforcement, as well as the emerging aspect of outcomes, focused on the idea that a rule can be defined as effective when its desired effects have been achieved and the public interest which justifies the rule has been safeguarded without producing unwanted or disfunctional consequences.

Far from being simply a decisional problem for institutions (arising in legislative, regulatory and administrative procedures), effectiveness calls for a "steering administration" and represents a criterion for decision-making, since expected effectiveness can be used in the logic of "whether" and "how" institutions should arrive at decisions.

I. Introduction

This article argues that fresh attention must be paid to the effectiveness of law where effectiveness refers to a "fact" (the application of rules) as well as to an "effect", ie the real consequences of rules on social behaviour.[1]

Even though there are conflicting views in the existing literature on the meaning of effective law and on what generates effectiveness, the article will contend that a number of factors demand such an increase in attention: not only does effectiveness express social and economic relevance by influencing the *securité juridique*[2] for citizens (when rules are effective their certainty and predictability are reinforced), transaction costs[3] and the regulatory environment for business,[4] but it also plays an important role for

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[1] F Rangeon, "Réflexions sur l'effectivité du droit" in Curapp, *Les usages sociaux du droit* (Colloque, Amiens, 12 May 1989, Presses Universitaire de France) Vol 1, 126.

[2] Which consists of clarity, accessibility and predictability of rules, see Conseil d'Etat, *Rapport public 2006 – Sécurité juridique et complexité du droit* (La Documentation française 2006).

[3] On this point, see OE Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" (1979) 22(2) Journal of Law and Economics 233 at 242: "Governance structures which attenuate opportunism and otherwise infuse confidence are evidently needed".

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institutions, in the logic of "better results with fewer resources", especially for the sustainability of public finances and other public interests (environmental protection, health, competition, etc).

The question of how law can contribute to the realisation of desidered effects without producing unwanted or disfunctional consequences has been studied in many fields of research, such as philosophy and sociology of law, law and economics, public policy and behavioural sciences. This article aims to set the question as a genuine administrative law issue, which is currently having a significant impact on administrative procedures, and consequently on administrative organisation and reform affecting the way in which rules are adopted and implemented.

The discussion below is broken down as follows: section II looks at the need for effective law (in this article, the idea is synonymous with effective rules) as a classic theme in legal theory which has recently started to be considered from an administrative law perspective; in section III effectiveness is analysed as a question of degree in different types of rules, arguing that no legal system can be defined as fully effective, and that effectiveness cannot be considered as a value in itself; section IV reviews traditional determinants of the effectiveness of rules, ie compliance and enforcement, but also the emerging aspect of outcomes, by analysing their interrelations with specific administrative law topics (simplification, communications, inspections, sanctions, "street-level" enforcement, information, evaluation, steering); section V considers effectiveness as an institutional decisional problem but also as a criterion for decision-making, since expected effectiveness can be used in the logic of "whether" and "how" institutions should decide; finally, section VI draws conclusions and argues that the search for effective law requires a "steering administration", which aims to change the way in which rules and decisions are adopted and implemented, as well as an updating of the administrative law "toolbox".

II. The need for effective law: a problem of administrative law

Even though the idea of "effective law" is far from uncontroversial, over time legal and non-legal scholars have contributed to a highlighting of a variety of completely relevant features of effectiveness, from studies on legal normativity, to theories of compliance and to more recent "impact studies" which consider the outcomes of rules. Administrative law has a part to play in integrating traditional and emerging approaches, even because in recent years several provisions affecting administrative and regulatory procedures have been adopted with the purpose of increasing the effectiveness of rules.

[4] On this aspect, see World Bank, *Doing Business 2018, Reforming to Create Jobs* (2018) 11: "economic activity benefits from clear and coherent rules: rules that set out and clarify property rights and facilitate the resolution of disputes [...]. Such rules are much more effective in shaping the incentives of economic agents in ways that promote growth and development where they are reasonably efficient in design, are transparent and accessible to those for whom they are intended and can be implemented at a reasonable cost".

1. Effectiveness of what? Rules at the crossroads between effective legislation and effective regulation

Current academic debate is often focused on the question of effective legislation[5] rather than on the wider question of effective law. This is understandable because legislation is, in modern times, the iconic way to produce rules. However, as a first step, the more comprehensive expression "effective law" seems to be more appropriate in order to develop an introductory analysis: in fact, law is more than legislation[6] and may even take the form of customary law as well as that of soft regulation.[7] Moreover, social norms can combine with legal provisions to influence behaviours. In other words, legislation is a very significant element in the discourse on effective law but not the only one.

As a second step, in this article effective law will be considered as synonymous with the idea of effective rules: rules are frequently part of legislation but they are also regulation,[8] in the sense that they can express a regulatory content in any other formal "box"[9] (government regulation, guidelines, manuals of instructions, regulation adopted by independent agencies and so on). A rule is such when it imposes obligations (ie a command) affecting the activities and the organisation of its addressees;[10] a rule is such because it is linked to its consequences[11] (independently from its possible "box") expressing a regulatory content.

Taking this idea as a starting point, effective law calls into question the way in which it is possible to make rules work well.[12] In this framework, it can be useful to remember that the effectiveness of a single rule regards the legal system as a whole at a given time: as in language, where the use of a word implies the entire grammatical system, it is impossible to approach the question of effectiveness of one single rule as a separate problem. Moreover, the effectiveness of a rule regards the legal system at a certain time but affects the legal system diachronically, because the force of existing law[13] is capable of influencing compliance in the future, operating in a sort of "prediction effect".[14] All this is definitely important for administrative law and concretely relevant for administration. Let us consider, for example, deprived urban areas characterised by a certain number of non-effective rules, such as in the field of separate collection of waste,

[5] On this point see RBM Cotterell, *The Sociology of Law* (Butterworths 1992) 59 onwards, where "prerequisites for effective legislation" are mentioned. On effective legislation, see M Mousmouti, "Operationalising Quality of Legislation through the Effectiveness Test" (2014) Legisprudence 191.

[6] On this point see A Alcott, "The effectiveness of law" (1981) 15(2) Valparaiso University Law Review 229, especially at 230 where he mentions the relevance of customary law for developing countries.

[7] See, on this point, the French Conseil d'État, *Le droit souple* (Le rapports de le Conseil d'État, Rapport 2013).

[8] See C Coglianese, *Measuring Regulatory Performance. Evaluating the impact of regulation and regulatory policy* (OECD Expert Paper No 1, 2012) 8: "Regulation can refer either to individual rules or collections of rules".

[9] OECD, *Report on Regulatory Reform* (1997).

[10] See M De Benedetto, M Martelli and N Rangone, *La qualità delle regole* (Il Mulino 2011) 12–13.

[11] See C Coglianese and R Kagan (eds), *Regulation and Regulatory Processes* (Ashgate 2007) xi; on this point, see J Black, "Enrolling Actors in Regulatory Systems: Examples from Uk Financial Service Regulation" (2003) 1 Public Law 63, 69.

[12] See R Baldwin, *Rules and Government* (Clarendon Press 1995) especially at 142 ("making rules work").

[13] On this point, see N Bobbio, "Law and force" (1965) 49(3) The Monist 321.

[14] A Ross, *On Law and Justice* (University of California Press 1959) 75: the assertion that a law is valid at the present time is "a prediction to the effect that D under certain conditions will be taken as the basis for decisions in future legal disputes".

parking, building regulations and so on. Literature and institutional experiences of urban regeneration look to adopt integrated administrative strategies, conceived as "area-based" initiatives with the aim of "finding effective policy solutions to the problem of deprived communities".[15]

2. Disagreement on effectiveness: legal normativity, compliance or outcomes?

Effectiveness is not an accidental or superfluous character of law. In fact, law is deeply ingrained in society (*ubi societas, ibi ius*) and society expresses a real need for this instrument which is indispensable to the organisation of social life and to the limitation of social conflicts:[16] while it is clear that effective law is needed, there does not seem to be complete agreement on the meaning of effective law, nor on the way in which effectiveness can be achieved.

A first academic approach considers effective law from a theoretical *legal normative perspective*, as law characterised by validity and binding force.[17] General theory and the philosophy of law have focused on this question, both in studies on the effectiveness of legal systems (especially international ones[18]) and in studies and research into different kinds of effectiveness related to various typologies of rules, by proposing classifications based on their content or their structure.[19] Effectiveness, in this context, is related to organised *force.*[20]

A second approach has been developed, mainly in fields of research such as sociology of law,[21] public policy,[22] neoclassical and behavioural economics, which focuses on

[15] S Weck, "Local Economic Development in Area-Based Urban Regeneration in Germany" (2009) 24(6–7) Local Economy 523, 533. See also RP Hohmann, *Regenerating Deprived Urban Areas. A Cross National analysis of area-based initiatives* (Policy Press 2013) 138.

[16] See LM Friedman, *The Legal System. A Social Science Perspective* (Russel Sage 1975) 18: "a basic legal function is to offer machinery and a place where people can go to resolve their conflicts and settle their disputes".

[17] On this point see Ross, supra, note 14, 38: "[...] valid law means both an order which is in fact effective and an order which possesses 'binding force' derived from *a priori* principles; law is at the same time something factual in the world of reality and something valid in the world of ideas".

[18] On this aspect see, S Romano, *The Legal Order* (translated by Mariano Croce, Routledge 2017). See also H Kelsen, *Principles of International Law* (third printing 1959), especially 212 ("the boundaries of the State: the principle of effectiveness") and 414: "The principle of legitimacy is restricted by the principle of effectiveness".

[19] On this point, see H Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 60 onwards, where he analysed the "secondary norm": "[…] the legal norm is split into two separate norms, two 'ought' statements: one to the effect that a certain individual 'ought' to observe certain conduct, and one to the effect that another individual ought to execute a sanction in case the first norm is violated". See also K Olivecrona, *Law as Fact* (Oxford University Press 1939) especially 130 onwards where he distinguished between primary and secondary rules ("the primary rules are those which lay down rights and duties for citizens […] The secondary rules are those concerning sanctions to be applied when the primary rules are violated"). See, finally, HLA Hart, *The Concept of Law* (Oxford University Press 2012) 97–98: secondary rules "confer the power to make them 'rules of adjudication' [...] They provide the centralized official 'sanctions' of the system".

[20] See Olivecrona, supra, note 19, especially 136 ("the necessity of organized force").

[21] P Lascoumes and E Serverin, "Théories et pratiques de l'effectivité du droit" (1986) 2 Droit et société 101, 102: "La séparation du juridique et du social a produit en même temps la nécessité de 'penser' l'écart par l'intermédiaire de la philosophie du droit, puis de la sociologie juridique".

[22] On this point, see JL Pressman and A Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland; Or, Why It's Amazing that Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation* (3rd edn, University of California Press 1984) xxiii: "Implementation, then, is the ability to forge subsequent links in the causal chain so as to obtain the desired results".

compliance and on *behaviour* as a response to rules. In this framework, an additional subdivision is necessary between the perspective which considers behaviour as rational and influenced by economic incentives, such as sanctions[23] as well as far more complex explanations "beyond compliance"[24] in which enforcement is ever more oriented towards cooperative solutions,[25] and is also sensitive to non-economic incentives. Many questions have been developed along these lines: the "enforcement style",[26] the choice between "carrots and sticks"[27] (is it preferable to punish or to persuade?), the problem of limiting costs of enforcement,[28] and the increasing use of behavioural and cognitive insights as a way to strengthen voluntary compliance.[29]

A third and last approach (strictly related to some of the more recent "compliance studies") also develops an *outcomes*-based perspective, being an "amelioration in an underlying problem or other (hopefully positive) changes in conditions in the world".[30] This is a new field of research, and is characterised by a huge number of contributions from different academic disciplines (the already mentioned sociology of law, public policy, behavioural and cognitive sciences, law and economics, and even psychology and neurosciences, as well as legislative studies and administrative law). It has recently been referred to as "impact studies"[31] and stresses the outcomes of rules, because "impact deserves to be looked as a whole".[32] The idea is that a rule can be considered effective when desired results are effectively achieved and the public interest which

[23] See GS Becker, "Crime and Punishment: An Economic Approach" (1968) 76 The Journal of Political Economy 169.

[24] N Gunningham, "Compliance, Deterrence and Beyond" in L Paddock (ed), *Compliance and Enforcement in Environmental Law* (Edward Elgar 2015).

[25] See TR Tyler, *Why People Obey the Law* (Yale University Press 1990) and JT Scholz, "Enforcement policy and corporate misconduct: the changing perspective of deterrence theory" (1997) 60(3) Law and Contemporary Problems 253. On this point, see also R Johnstone and R Sarre (eds), *Regulation: Enforcement and Compliance* (Australian Institute of Criminology, Research and Public Policy Series No 57 2004). See, finally, AG Heyes, "Making things stick: enforcement and compliance" (1998) 14(4) Oxford Review of Economic Policy 50. See E Kirchler et al, "Combining Psychology and Economics in the Analysis of Compliance: From Enforcement to Cooperation" (2012) Tulane Economics Working Paper Series No 1212.

[26] RA Kagan, "Understanding Regulatory Enforcement" (1989) 11 Law and Policy 89, 91.

[27] On this point see G Dari-Mattiacci and G De Geest, "The rise of carrots and the decline of sticks" (2013) 80(1) University of Chicago Law Review 341, 346; regarding corruption, see S Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge University Press 1999) 78.

[28] See JT Scholz, "Voluntary compliance and regulatory enforcement" (1984) 6 Law and Policy 385: "enforcement strategy that potentially can reduce both enforcement and compliance costs by encouraging cooperation rather than confrontation between agencies and regulated firms".

[29] See C Hodges, "Corporate Behaviour: Enforcement, Support or Ethical Culture?" (28 April 2015) Oxford Legal Studies Research Paper No 19/2015 and C Hodges and R Steinholtz, *Ethical Business Practice and Regulation. A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart 2017). See, among others, RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press 2008); R Baldwin, "From Regulation to Behaviour Change: Giving Nudge the Third Degree" (2014) 77(6) The Modern Law Review 831; A Alemanno and A-L Sibony (eds), *Nudge and the Law: A European Perspective* (Hart 2015); C Jolls, CR Sunstein and R Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stanford Law Review 1471.

[30] C Coglianese, supra, note 8, 8: "Regulation is designed to work according to three main steps: 1. Regulation [...] 2. The behaviour of individuals or entities targeted or affected by regulation [...] 3. Outcomes […]".

[31] On this point, see LM Friedman, *Impact. How Law Affects Behaviour* (Harvard University Press 2016) 2: "True, not too many studies explicitly label themselves 'impact studies' And there are only a few general discussion of impact, in one context or another".

[32] ibid, 249.

justifies the rule has been safeguarded.[33] The outcomes of rules should be monitored and evaluated in order to avoid, as far as possible, "perverse effects" ("*effets pervers*")[34] and in order to catalyse effects which are compatible with the objectives of regulation.[35] Let us consider, for example, anti-corruption regulation: the best response to illicit behaviour and corruption seems to be an increase in sanctions. However, if the risk of incurring fines remains the same, then there could paradoxically be the effect that the increased fine will produce unwanted side-effects, such as an increase in the size of the bribe necessary to corrupt.[36]

Effectiveness has long been considered a task of government[37] or a task of economists.[38] Even though traditional legal scholarship used to "say what laws require, not to predict their effects",[39] effectiveness is currently a real legal issue which works as a "background principle"[40] but also in operational terms (as we will see later, section V.1 and V.2).

3. From competing approaches towards integration: questioning administrative law

Effective law consists not only of rules which are valid, enforceble and possibly applied (legal normativity); not only of rules characterised by high rates of compliance and few costs of enforcement (theories of compliance); nor only of the results of rules which are consistent with regulatory objectives (outcomes). Effective law is all of these things together and implies complex and integrated administrative management in order to be achieved (the "steering administration", see section IV.3.b).

In other words, each one of the aforementioned different approaches to effectiveness has played its part in developing a more powerful understanding of the problem. Some authors have recently advocated an integrated theory of steering[41] with the purpose of posing, from an administrative law perspective, the question of how rules can contribute to achieve desidered effects without producing side effects – unwanted or disfunctional consequences – because "effects matter".[42]

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[33] N Rangone, "Making Law Effective Behavioural Insights into Compliance", in this issue, defines the first type "formal" effectiveness and the second "substantial" effectiveness. On the "importance of rules and rule designs in producing desired results", see Baldwin, supra, note 12, 142.

[34] R Boudon, *Effets pervers et ordre social* (Puf 1977).

[35] On this aspect, Y Leroy, "La notion d'effectivité du droit" (2011) 79(3) Droit et societé 715, 731.

[36] See A Ogus, "Corruption and regulatory structures" (2004) 26 Law & Policy 329, 336.

[37] J Carbonnier, "Effectivité et ineffectivité de la règle de droit" (2007) 57(2) L'année sociologique: "Le droit dogmatique considère qu'il y a règle de droit véritable dès qu'un texte émanant de l'organe constitutionellement compétent a été régulièrement promulgué. Peu importe que ce texte ne soit pas effectivement appliqué; l'appliquer est une tâche de gouvernants".

[38] If oriented to predict the effect of law "without analysing what the law requires people to do", R Cooter, *The Two Enterprises of Law and Economics: An Introduction to Its History and Philosophy* (2015) 3: "doctrinal studies concern the content of law, not the consequences".

[39] ibid.

[40] P Craig, *EU Administrative Law* (Oxford University Press 2012) 256: "Administrative law principles have also been shaped by a principle of effectiveness. This background principle has been influential in many areas of EU law".

[41] See, in the context of the German "New Administrative Law Science" (*NeueVerwaltungrechtswissenschaft*), W Hoffmann-Riem, "The potential impact of social sciences on administrative law" in M Ruffert (ed), *The Transformation of Administrative Law in Europe/La mutation du droit administratif en Europe* (Sellier 2007) 214.

[42] ibid, 213.

In recent decades, at national, European and international level, provisions have multiplied, establishing impact assessment in law-making as well as other forms of evaluation in administrative procedures with the purpose of strengthening the effectiveness of rules and administrative decisions. Effectiveness of law is increasingly playing a pivotal role in the legal debate and questions administrative law[43] more and more often. When we talk about quality of regulation,[44] responsive regulation,[45] a behavioural approach to regulation[46] or risk-based regulation[47] we are talking about several possibilities considered by legal scholars as ways to make rules more effective.

III. Effectiveness of law as a question of degree

1. Different rules are effective in different ways

Whatever their denomination in the context of different theories,[48] there are distinct categories of rules. Starting first from a legal normative point of view, they work (and are effective) in quite different ways.

Some rules consist of commands, prohibitions but also permissions.[49] Their effectiveness works as obedience (*compliance*[50]), such as in cases of obligations to pay taxes, prohibitions of competition-restricting agreements or when an application for building permission is required.

Some others rules establish sanctions (or any other consequence with the purpose of producing compliance)[51] or confer powers on administrations. Their effectiveness can be evaluated as *legis-executio*[52] (*enforcement*).[53] Normally these rules are strictly linked

[43] M Herweijer, "Inquiries into the quality of administrative decision-making" in KJ de Graaf et al (eds), *Quality of Decision-Making in Public Law. Studies in Administrative Decision-Making in the Netherlands* (Europa Law Publishing 2007) 15.

[44] On this point see extensive references below, in section IV.3.a.

[45] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 5: "Responsive regulation is not a clearly defined program or a set of prescriptions concerning the best way to regulate. On the contrary, the best strategy is shown to depend on context, regulatory culture, and history". See also R Baldwin and J Black, "Really responsive regulation" (2008) 71(1) The Modern Law Review 59.

[46] On this point, see the references in note 29.

[47] On this point see C Hood, H Rothstein and R Baldwin, *The Government of Risk. Understanding Risk Regulation Regimes* (Oxford University Press 2001); MK Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (The Brookings Institution 2000); J Black and R Baldwin, "Really responsive risk-based regulation" (2010) 32(2) Law and Policy 181; J Black, "The Role of Risk in Regulatory Processes" in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 302.

[48] "Primary" and "secondary" rules (or norms) do not have the same content in different theories and it could be possible to generate risks of ambiguity, see note 19.

[49] On the relationship between commands, prohibitions and permissions see J Bentham, *Collected Works, Vol 2, Principles of Legislation* (ed by HLA Hart, Athlone Press 1945) in particular 111.

[50] On *compliance*, see R Baldwin, M Cave and M Lodge, *Understanding Regulation. Theories, Strategies and Practice* (2nd edn, Oxford University Press 2012) 236 ff. See also Tyler, supra, note 25. See Scholz, supra, note 28, 385 and G Teubner, "After Legal Instrumentalism? Strategic Model of Post-Regulatory Law" in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1988) 311: "the law is ineffective because it creates no change in behavior".

[51] M Nuijten and G Anders (eds), *Corruption and the Secret of law. A Legal Anthropological Perspective* (Ashgate Publishing 2007) 12: "the possibility of its trangression or perversion is always already inscribed into the law as hidden possibility. This, then, is the secret of law".

[52] See Kelsen, supra, note 19, 255.

[53] On enforcement, GJ Stigler, "The optimum enforcement of law" in GS Becker and WM Landes (eds), *Essays in the Economics of Crime and Punishment* (NBER 1974) 55: "All prescriptions of behaviour for individuals require

to the first ones, eg by establishing criminal or administrative penalties for fiscal evasion, competition infringments or building violations.

Moreover, there are rules which recognise freedoms and rights for individuals and whose effectiveness can be measured according to the extent of utilisation (rates of use).[54] In these cases, freedom means possibility to "act" as well as the possibility "not to act".[55] For instance, legal provisions recognise the right to strike, which is effective even when not used, because its effectiveness consists in the fact that it is available for use.

Finally, there are rules which consist in persuasive measures (*incentives*), whose effectiveness has been considered dependent on the attention by potential beneficiaries,[56] as in the case of a successful subsidy programme.

However, if we adopt an integrated approach oriented to effectiveness (by also considering the outcomes of rules), rules can be observed, enforced, used (depending on their type) but – at the same time – conformity with rules might not necessarily ensure results which are consistent with regulatory objectives. For instance, rules which establish (apparently successful) subsidy programmes may produce distortions, eg "production for the subsidies", failing to achieve their objectives; application of penalties does not always ensure the expected increase in compliance; rules on transparency (in financial or banking regulation) can be formally applied but to "give users information they need, when they need it, and in the form they need"[57] information should be selected (to avoid informative overload) and adequately presented (framing of information).[58] For these reasons, full effectiveness also depends on the attaining of regulatory objectives and on the concrete protection of the public interest served by the rule.

2. Rules tell us what to do, not what we will do (a structural gap)

The gap between rules and reality is structural because the law tells us "what to do" and does not tell us "what we will do".[59] Despite its imperative form and its binding character, a law is "essentially a kind of persuasion".[60] There is no legal system which can be defined as always and fully effective: a certain degree of ineffectiveness might be

(F'note continued)
enforcement". See also K Hawkins and JM Thomas, *Enforcing Regulation* (Kluwer-Nijhoff 1984); W Voermans, *Motive-based Enforcement* (Working Paper Leiden University 2013), now in L Mader and S Kabyshev (eds), *Regulatory Reform. Implementation and Compliance* (Nomos 2014) 41. See also OECD *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (Paris 2000) and Scholz, supra, note 25, 254; A Eisenberg, "Expressive Enforcement" (2014) *UCLA Law Review* 858. See, finally, GP Miller, *An Economic Analysis of Effective Compliance Programs* (2014 New York University Law and Economics Working Papers, Paper 396).

[54] A Flückiger, "Le droit administratif en mutation: l'émergence d'un principe d'efficacité" (2001) Revue de droit administratif et fiscal 93, 95.

[55] Carbonnier, supra, note 37, 6–7: "L'effectivité de la loi qui consacre une liberté d'agir se situe non dans l'action, mais dans la liberté même, c'est-à-dire dans le pouvoir de choisir l'inaction aussi bien que l'action".

[56] Flückiger, supra, note 54, 95.

[57] D Weil et al, "Targeted Transparency" (2009) 38 Public Manager 22, 23.

[58] On this point, see Nicoletta Rangone, "A behavioural approach to administrative corruption prevention" in A Cerillo-I-Martìnez and J Sole Ponce (eds), *Preventing Corruption and Promoting Good Government and Public Integrity* (Bruylant 2017) 85–87.

[59] G Vedel, "Le hasard et la nécessité" (1989) 50 Pouvoirs 15, 27: "[…] si le droit dit 'ce qu'il faut faire' il ne peut pas dire 'ce qu'on en fera'".

[60] Alcott, supra, note 6, 235.

considered unavoidable, a risk which should be ever more internalised in decision-making processes. Failures in governing may occur because "the executive authorities are unable to enforce the norms", or because "the target groups are not willing to comply" or because "unwanted side-effects appear".[61] Partial effectiveness (or ineffectiveness, depending on the point of view) is the prevailing reality.[62] Effectiveness, in other words, is a question of degree, and degree should be included (as an essential feature) in the definition of effectiveness.[63]

From this perspective, it would be important to consider the fact that there is a maximum rate of ineffectiveness compatible with the existence of a rule[64] and also the extent to which a rule is influencing the effectiveness of the legal system because "without a generally respected and effective legal system, a society will tend to its own disintegration".[65] This is the reason why not only public policies but also legal theory should take care of the ineffectiveness of rules in various fields of regulation, also resorting to aggregate analysis or reviews which may help in understanding, giving reasons and steering the process towards more effective administrative regulation.

Let us consider the smoking ban in indoor workplaces, public transport and other public places. A report on the implementation of the 2009 Council Recommendation on smoke-free environments[66] highlighted that "there has been good progress in transposing the Recommendation [...] into national law".[67] However, even though "all Member States report that they have adopted measures to protect citizens from exposure to tobacco smoke",[68] a new Directive[69] established further provisions aiming specifically at making tobacco products less appealing and attractive to young people.

3. Effectiveness is not a value in itself

Even though important, effectiveness does not say anything about the content of law and cannot be considered as a value in itself.[70] A mere effectiveness perspective may raise the idea that any rule that is effectively enforced would be legitimate independently from

[61] R Mayntz, "Governing Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm" in J Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage 1993) 13.

[62] Carbonnier, supra, note 37, 15–16.

[63] See Leroy, supra, note 35, 718; see also P Lascoumes, "Effectivité" in A-J Arnaud (ed), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (LGDJ 1993) 217.

[64] Carbonnier, supra, note 37, 13–14: "quel est le taux maximum d'ineffectivité qui est compatible avec l'existence d'une règle de droit".

[65] Alcott, supra, note 6, 229.

[66] Council Recommendation 2009/C 296/02 on Smoke-free Environments (2009).

[67] Commission Staff Working Report, Document SWD 56 final/2 on the implementation of the Council Recommendation of 30 November 2009 on Smoke-free Environments (2013).

[68] ibid.

[69] European Parliament and the Council Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC Text with EEA relevance (2014).

[70] On the dissociation between "legal validity [and] mere enactment" see G Pino, "The place of legal positivism in contemporary constitutional states" (1999) 18(5) Law and Philosophy – Special Issue: Neil MacCormick (ed), Law, Facts, and Values 513, 535.

its content and any kind of legal system would be legitimate, as a fact, independently from its character.

Let us take, for instance, the case of totalitarian institutions:[71] their (even though contested) legitimacy,[72] a possible certain degree of consensus and a huge use of force by their officials could even ensure at least a certain rate of formal effectiveness, in the sense of their rules being effectively applied. Let us also take the case of extra-legal institutions,[73] for instance criminal associations and various kinds of *mafia*, whose lack of legitimacy[74] does not impede their effective functioning, sometimes more effective than formal institutions.

On the other hand, it is important to remember cases in which legitimate institutions and their administrative officers tend not to apply certain rules or not to sanction their violation:[75] this special kind of ineffectiveness is also known as "administrative tolerance", which on some occasions is considered by the administration as preferable to the risk of a conflict with citizens or enterprises. In cases such as these, ineffectiveness should be considered as voluntary, a way in which pursuing the public interest, sometimes in the presence of changes in regulation, disproportionate or no longer adequate regulation,[76] or in sensitive social contexts.

Of course, any lack of correspondence between legitimacy and effectiveness may cause problems in terms of the consistency of the rule of law:[77] it would be preferable to scrap the rules than to ignore them.

IV. Deconstructing effective law

As already mentioned in section III.1, different rules are effective in different ways: some of them must be obeyed, others applied, and yet others used. Scholars and academics have long indicated compliance and enforcement as determinants of effective law, as these are the elements which mostly contribute to defining the degree of effectiveness of the greater part of rules and of the legal system as a whole. Recent developments in literature and empirical evidence suggest integrating the traditional

[71] On this point see also CE Clark, "The function of law in a democratic society" (1942) 9 University of Chicago Law Review 393, 400: "The *function* of law in a democracy is not greatly different from its function in an autocracy or a dictatorship. Of course the *content* of law is as different as are the diverse social ideas of the two systems".

[72] On this point see Tyler, supra, note 25, 4: "normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior" and TR Tyler, "The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities" (1997) 1(4) Personality and Social Psychology Review 323.

[73] See N Leff, "Economic Development Through Bureaucratic Corruption" (1964) November, The American Behavioral Scientist 8, where corruption itself is described as an "extra-legal institution used by individuals or groups to gain influence over the action of the bureaucracy". Criminal organisations and mafia groups have been defined as "extra-legal protectors or quasi-law enforcers": P Wang, "Organised crime in a transitional economy: the resurgence of the criminal underworld in contemporary China" in G Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge 2015) 404.

[74] RE Barnett, "Constitutional Legitimacy" (2003) Columbia Law Review 103, 111.

[75] Rangeon, supra, note 1, 142.

[76] See Ogus, supra, note 36, 330–331.

[77] On this point, see TR Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003) 30 Crime and Justice 283, 311: "Legitimacy has an important role in shaping compliance with the law. Those members of the public who feel that the law is legitimate and ought to be obeyed, and who have institutional trust in legal authorities, are more likely to follow the law".

legal normative and the neoclassical economic approaches to compliance and enforcement: on one side, by enriching analyses of compliance and enforcement with behavioural and cognitive insights; on the other side, by also taking into account literature on regulation and impact studies (focused on the outcomes of rules). Of course, compliance, enforcement and outcomes do not work in parallel but are characterised by mutual influence and are very closely connected.

1. Compliance

As already mentioned, rules which consist of commands, prohibitions and permissions must be obeyed: when declaring tax, not smoking in a restaurant, when separately collecting waste or when applying for a building permit, citizens and firms cooperate with government in making law effective. On the other hand, compliance with rules is in the interest of governments which are supposed to be strongly concerned with increasing their effectiveness:[78] this interest corresponds, in fact, to the strengthening of institutional legitimacy and to the need to limit the costs of enforcement.[79]

a. Reasons for compliance

Regulators and public officials should always take into account the different factors which influence compliance. When regulating as well as when enforcing regulation, they should keep in mind reasons "why people obey to law".[80] Motivations for compliance have long been studied and were initially divided into two groups.

A first kind of motivation works as an external force and is based on the fear of sanctions (eg monetary fines but also suspension of operations or some kind of disqualification) in order to induce compliance through deterrence and, in this sense, is strictly linked to enforcement, as in the traditional neoclassical economic vision.

A second kind of motivation stems from the internal and is connected to personal values and ethical reasons[81] which operate in the absence of external coercion.[82]

Scholars have also studied other motivations at the intersection of "internal" and "external". For instance, procedural justice and the interaction with authorities are neither purely internal nor do they operate through deterrence; nonetheless, they are relevant to the decision to comply.[83] Moreover, social imitation factors are not entirely external motivations[84] but they cannot be defined as internal force alone and contribute

[78] Scholz, supra, note 28. See also K Hawkins, "Bargain and bluff: compliance strategy and deterrence in the enforcement of regulation" (1983) 5(1) Law and Policy Quarterly 35.

[79] See Williamson, supra, note 3, 242: "Governance structures which attenuate opportunism and otherwise infuse confidence are evidently needed". See also A Mitchell Polinsky and S Shavell, "Enforcement Costs and the Optimal Magnitude and Probability of Fines" (1992) 35(1) The Journal of Law & Economics 133.

[80] Tyler, supra, note 25.

[81] Hart, supra, note 19, especially at 258, where he mentions the conformity of laws "with substantive moral values or principles"; see also P Koslowski, *Principles of Ethical Economy* (Kluwer Academic 2001).

[82] On this point see Hodges, supra, note 29, and Hodges and Steinholtz, supra, note 29.

[83] On "procedural injustice" as a source of non compliance see J Braithwaite, *Improving Compliance: Strategies and Practical Applications in OECD Countries* (OECD 1993) 9. See also Tyler, supra, note 77, 283.

[84] Tyler, supra, note 72. See also R Cooter, "Expressive Law and Economics" (1998) 27 Journal of Legal Studies 585 and CR Sunstein, "On the expressive function of law" (1996) 144 University of Pennsylvania Law Review 2021.

decisively to the choice about compliance, also depending on determinants such as group size.[85]

The traditional rational economic approach has made an important contribution by placing individual decisions about compliance at centre stage.[86] This decision would be the result of an economic evaluation which connects the cost of compliance, the size of the penalty but also the risk of incurring the penalty:[87] when citizens or firms take decisions on compliance they are supposed to base them on a rational and informed choice, in matters of urban parking as well as when they decide to pay or evade taxes.

This idea has been criticised more recently, in particular on the basis of behavioural sciences and cognitive arguments[88] by highlighting frequent biases in real people, for instance when evaluating risks or in calculating their own benefits or even in choosing on the basis of mere economic reasons.[89]

In reality, far from being opposed, these approaches can mutually cooperate for the purpose of more effective rules: a rational incentive-disincentive approach can, in fact, be strengthened by behavioural and cognitive insights.[90] Furthermore, factors which influence compliance (external, internal, social norms) concern "the human side of regulation"[91] and should operate in "harmony", because when they conflict "it is hard to predict the result".[92]

b. To comply or not to comply, or perhaps to comply creatively?

Let us now summarise people's choices and possible institutional responses: each of them raises a number of administrative law issues.

Some people may simply *comply with rules* because they are, for different reasons, motivated to do so. Governments should always be interested in understanding motivations for compliance, even in trends which do not seem to pose problems: this understanding can in fact strengthen administrative knowledge and information, which is indispensable to improving the quality of further institutional actions, both when regulating and when enforcing. Governments could also take into consideration compliance as a possible basis for rewarding cooperative behaviour, eg by establishing a more favourable regime for compliant groups by reducing the number of periodic inspections.[93]

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[85] On this aspect see JM Buchanan, "Ethical rules, expected values and large numbers" (1965) LXXVI(1) Ethics 1.

[86] See Becker, supra, note 23, 169. For further aspects see Ogus, supra, note 36, 329; see also JG Lambsdorff, "Corruption and rent-seeking" (2002) 113 Public Choice 97. See finally Hawkins and Thomas, supra, note 53.

[87] Becker, supra, note 23, 169.

[88] On this topic, see N Rangone, "Making Law Effective: Behavioural Insigths into Compliance", in this issue. See also F Gino, "Why the US Government Is Embracing Behavioural Sciences" (2015) Harvard Business Review September 18.

[89] On this point see Jolls, Sunstein and Thaler, supra, note 29; see also GA Akerlof and RJ Shille, *Animal Spirits. How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism* (Princeton University Press 2009).

[90] On this point see N Rangone, "Tools for effective law: a focus on nudge and empowerment" (2017) 24 Concorrenza e Mercato 195. See also M De Benedetto, "Understanding and preventing corruption: a regulatory approach" in Cerillo-I-Martìnez and Ponce, supra, note 58, 63 et sqq.

[91] The idea has been mentioned in E Allan Lind and C Arndt, "Perceived Fairness and Regulatory Policy" *OECD Regulatory Policy Working Papers No 6* (OECD 2016) 3.

[92] Friedman, supra, note 31, 240.

Conversely, *others may not comply*, because non-compliance allows, in different ways, an extra income, but also because compliance can be difficult and costly, because they do not know the rules or because they see the rule or the regulator as illegitimate. Regulators and public officers should distinguish between different motivations for non-compliance too. As we will see later (section IV.2), when enforcing powers to inspect and to impose sanctions requires a prudent and responsive "enforcement style",[94] in some cases it could be better to impose penalties severely, in others to mitigate them, because "regulation would not be enforced in situations where they do not make sense".[95]

Finally, there is the increasing relevance of *creative compliance*:[96] in creative compliance people circumvent the scope of a rule and breach its spirit in order to achieve their own desired results, without breaking the formal terms of the rule. In this last regard, it is very difficult to follow the traditional logic to induce compliance operating in a binary mode (compliance/non compliance; reward/sanction). Creative compliance requires new combat techniques and new kinds of enforcement means, such as anti-avoidance rules,[97] by invalidating abusive avoidance results with the purpose of ensuring effectiveness of law, as in the case of tax regulation.[98]

c. Strategies for compliance: simplification and communication

Some administrative strategies can contribute in an integrated way to make compliance more likely and attractive than non-compliance.[99]

A first point considered by regulators is reducing the costs of compliance via *simplification* policies. Regulators have started to reduce the number of rules, their complexity, costs and time necessary to comply and in this way they expect both to increase compliance and improve effectiveness. Simplification has become progressively more relevant as a tool for better regulation, eg recommended by OECD Regulatory Reform programs.[100] Many countries are involved in simplification processes, both of rules and of administrative procedures, with the purpose of limiting

[93] As in the case of the 2011 Dutch Government programme "Inspection Holiday" which "aimed at strongly reducing the burden of inspections for (a) low-risk and (b) higher-risk but consistently compliant businesses (the equivalent of what is called in the UK 'earned recognition')", see F Blanc, *Inspection Reforms: Why, How and with what Results* (Oecd 2012) 41.

[94] Kagan, supra, note 26, 91.

[95] On this point see E Bardach and RA Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Transaction Publishers 2010) 124.

[96] Baldwin, Cave and Lodge, supra, note 50, 232.

[97] See HM Revenue & Customs, *General Anti-Abuse Rule Guidance* (28 March 2018) B3.1: "The primary policy objective of the GAAR is to deter taxpayers from entering into abusive arrangements, and to deter would-be promoters from promoting such arrangements".

[98] In general, see C Hodges, *Ethical Business Regulation: Understanding the Evidence* (Department for Business Innovation & Skills, Better Regulation Delivery Office February 2016) 9: "Where actions are immoral, or accountability as described above has not been observed, a proportionate response should be made. Enforcement policies should generally avoid the concept of deterrence, since it has limited effect on behaviour, conflicts with a learning-based performance culture, and is undemocratic".

[99] The idea is referred to corruption, see JA Gardiner and TR Lyman, "The logic of corruption control" in AJ Heidenheimer, M Johnston and VT LeVine (eds), *Political Corruption. A Handbook* (Transaction Publishers 1993) 833.

[100] OECD, *Cutting Red Tape – National Strategies for Administrative Simplification* (2006).

costs for administrations and with the aim of "reducing administrative burdens"[101] for businesses and citizens[102] by "easing and simplifying people's choices"[103] and eliminating "unnecessary complexity".[104] Of course, when simplifying, regulators should take into account that simplification is difficult to achieve and implies complex and ad hoc evaluations "to eliminate unnecessary discretionary power in government, not to eliminate all discretionary power".[105] In other words, it is necessary to avoid the risk that discretionary power "can be either too broad or too narrow".[106]

Among strategies for compliance a major role is played by *communication* between institutions (on one side) and citizens and firms (on the other side). Communication supports effective rules and effective administration[107] because it "is a vital prerequisite to impact".[108] When rules are clear, consistent and characterised by appropriate publicity, their application is facilitated; moreover when rules have been adopted through consultation processes their legitimacy will be stronger and compliance is more likely to occur. However, there is a problem of consistency in communication, because communication consists not only of good quality verbal messages nor is it only a one-way process:[109] it implies non-verbal elements and feedback. Enforcement works, more or less, as a form of non-verbal communication.[110] If it is true that "law sends messages",[111] it is nonetheless true that there are two messages:[112] the first comes from the formulation of the rule[113] (which establishes consequences for specific non-compliant behaviours); the second comes from enforcement, and can be consistent or not with the first (for instance, because established penalties have/have not been imposed)[114] influencing the credibility of government.[115]

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[101] On this point, HM Treasury, Hampton Report, *Reducing administrative burdens: effective inspection and enforcement* (March 2005).

[102] See D Osborne and T Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison Wesley 1992) and the Report *From Red Tape to Results: Creating a Government that Works Better and Costs Less. Report of the National Performance Review* (1993).

[103] OMB, Memorandum to the Heads of Executive Departments and Agencies, *Disclosure and Simplification as Regulatory Tools* (2010) 9. On this point see the Paperwork Reduction Act 1980, US Code 44, ch 35.

[104] ibid, 12.

[105] KC Davis, *Discretionary Justice. A Preliminary Inquiry* (Greenwood Press 1980) 217.

[106] ibid, 52.

[107] L Wittberg, "Can Communication Activities Improve Compliance?" in H Elffers, W Huisman and P Verboon (eds), *Managing and Maintaining Compliance. Closing the gap between science and practice* (Boom Legal Publishers 2006) 25.

[108] Friedman, supra, note 31, 33.

[109] On feedback see P Watzlawick, J Beavin Bavelas and DD Jackson, *Pragmatics of Human Communication. A Study of Interactional Patterns, Pathologies and Paradoxes* (Paperback 2011) 12.

[110] On this point see A Mehrabian, *Nonverbal Communication* (Aldine Transaction 1972).

[111] See Eisenberg, supra, note 53, 860. See also L Lessig, "The Regulation of Social Meaning" (1995) 62 University of Chicago Law Review 943.

[112] See R Pound, "Law in books and law in action" (1910) 44 American Law Review 12.

[113] See W Twining and D Miers, *How to Do Things with Rules* (Cambridge University Press 2010) 90.

[114] See AJ Meltsner, *Policy Analysts in the Bureaucracy* (University of California Press 1976) 255: "Effective communication can lead to promotion or demotion, to acceptance or rejection of one's ideas, to success or failure".

[115] On this point see R Nozick, "Coercion" in S Morgenbesser, P Suppes and M White (eds), *Philosophy, Science, and Method. Essays in Honor of Ernest Nagel* (St Martin's Press 1969) 440.

2. Enforcement

In general terms, "the goal of enforcement [...] is to achieve that degree of compliance with the rule of prescribed (or proscribed) behavior that the society believes it can afford".[116] Starting from the traditional neoclassical vision (which considered enforcement influenced by economic incentives), enforcement has become an ever more complex, cooperative and articulated strategy to achieve effectiveness and regulatory success.[117]

a. Coercion and beyond

There is no doubt that enforcement presupposes coercive means[118] given to public bodies, police, courts, administrative agencies with the purpose of enforcing the observance of rules. Literature on enforcement has traditionally stressed this point, because organised force influences behaviour thanks to the role of fear,[119] putting the deterrent effect into operation.[120]

Even though coercion remains a significant element of enforcement (and through it, of effectiveness), the integrated approach to effectiveness, based also on the outcomes of rules, has made it evident that it should be used only when necessary and should be well calibrated because fear of sanctions does not produce compliance in all cases. Sometimes, disproportionate coercion could even be counterproductive for long-term compliance.[121]

This expresses a *paradox of quantity*: in enforcement there is always the risk of too much, just as there is a risk of too little. If the definition of optimal enforcement is dependent "upon the amount of resources devoted to the task",[122] nonetheless it is clear that enforcement is also a question of quality, of good rules and good practices "about the *use of force*"[123] and implies a really responsive regulation.[124] At the end of the day, "to

[116] Stigler, supra, note 53, 56.

[117] OECD, *Regulatory Enforcement and Inspections* (OECD 2014) 12: "enforcement will be taken in its broad meaning, covering all activities of state structures (or structures delegated by the state) aimed at promoting compliance and reaching regulations' outcomes […]. These activities may include: information, guidance and prevention; data collection and analysis; inspections; enforcement actions in the narrower sense, ie warnings, improvement notices, fines, prosecutions etc. To distinguish the two meanings of enforcement, 'regulatory enforcement' will refer to the broad understanding, and 'enforcement actions' to the narrower sense".

[118] On this point see Nozick, supra, note 115.

[119] Olivecrona, supra, note 19, 140 onwards.

[120] On this point, see FE Zimring and GJ Hawkins, *Deterrence. The Legal Threat in Crime Control* (University of Chicago Press 1973); see also R Paternoster, "The deterrent effect of the perceived certainty and severity of punishment: a review of the evidence and issues" (1987) Justice Quarterly 173.

[121] On this point see Tyler, supra, note 77, in particular 290, where long-term compliance is described as "more strongly voluntary in character"

[122] Stigler, supra, note 53, 56.

[123] Olivecrona, supra, note 19, 123 et sqq.

[124] J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 29: "responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed". See also Baldwin and Black, supra, note 45, 62: "The essence of 'responsive regulation' is a 'tit for tat' approach in which regulators enforce in the first instance by compliance strategies, such as persuasion and education, but apply more punitive deterrent responses (escalating up a pyramid of such responses) when the regulated firm fails to behave as desired".

be authoritative, legal rules and decisions must affect the actions of those toward whom they are directed".[125]

b. Inspections, sanctions, "street level" enforcement: fine tuning of traditional administrative tools

It is possible to distinguish three different instruments of enforcement, all relevant for effective law. They operate as drivers of effectiveness and should be managed from a single and strategic administrative law perspective.

The first instrument is detection of non-compliance and infringments, which requires *inspections* (or controls, more in general). Checks on compliance are needed because "non-compliance is seen as a risk per se"[126] and because controls are a powerful tool to influence behaviour: as a first approximation, it has been proved that "human behaviour changes when subject to controls".[127] On the other hand, controls and inspections do not automatically produce more compliance and effectiveness and it is not always true that during inspections "people under observation tend to behave in a more cooperative way".[128] Literature on the topic has highlighted that administrative officers should avoid excessively intrusive controls because they may produce resistance and evasion and because compliance depends also on the way in which controls are carried out[129] and on perceived procedural justice.[130] Moreover, controls are strictly connected to regulatory enforcement[131] and they may turn out to be too expensive and non effective, incapable of detecting infringments.[132] It has recently been made evident that in carrying out controls, public officers should be aware that such controls can produce occasions for illicit transactions and corruption.[133] In order to increase their effectiveness – so that they can contribute to effectiveness of rules – controls should be properly regulated, well planned[134] and carefully executed,[135] thanks also to contributions coming from behavioural insights[136] and empirical evidence.[137]

The second and related aspect of enforcement is *sanction* of detected non-compliance and infringments. Administrative bodies are in charge of powers, such as powers to

[125] Tyler, supra, note 25, 19.

[126] Blanc, supra, note 93, 72.

[127] On this point, see M Ernest-Jones, D Nettle and M Bateson, "Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment" (2011) 32 Evolution and Human Behavior 172, 173.

[128] ibid: "there have been many demonstrations that the physical presence of other people in the room, or other non-verbal cues of proximity or visibility, produces more cooperative behaviour".

[129] See *Hampton Report*, supra, note 101.

[130] See J Braithwaite, *Improving Compliance: Strategies and Practical Applications in OECD Countries* (OECD 1993) 9. See also Tyler, supra, note 77, 283.

[131] On this point see Bardach and Kagan, supra, note 95, 123.

[132] See Blanc, supra, note 93. See also OECD, *Regulatory Enforcement and Inspections*, supra, note 117, 11.

[133] On this point see M De Benedetto, "Corruption and controls" (2015) 17(4) European Journal of Law Reform 479, 488: "Controls have a hybrid nature: not only are they a way to combat or prevent corruption but also they are real occasions for corrupt transactions".

[134] See Baldwin, Cave and Lodge, supra, note 50, 281.

[135] See OECD, *Regulatory Enforcement and Inspections*, supra, note 117.

[136] On this point, see Rangone, supra, note 58, 69.

[137] On this point see C Coglianese, "Empirical Analysis and Administrative Law" (2002) University of Illinois Law Review 1111, 1113.

investigate and inspect, the power of authorisation, the power to grant subsidies and so on. When establishing these powers, the rules frequently include the possibility to impose penalties and fines, because the fear of sanctions plays its role in the game of effective law. Sanctions are economic tools through which law creates an interest in complying with rules. In the light of the integrated approach to effectiveness, based also on the outcomes of rules, the size of sanctions risks having very little impact, whereas the risk with excessive sanctions is that they might backfire. In order to be effective (and to help in making rules effective) sanctions should be well designed by regulation (for example, according to their optimal amount[138]), adjusted on elasticity of behavior,[139] properly calibrated when in the form of *monetary sanctions* (because they otherwise operate as a "price"[140] for non-compliance); sometimes *non-monetary sanctions* can prove more effective;[141] on the other hand, there are cases in which it would be better to operate via *incentives*, rewarding enforcement[142] and compliant groups.[143]

The third and last aspect concerns *enforcement in practice*. This step involves enforcement officials at "street level",[144] when it is necessary (for instance) to implement a demolition order, to carry out a sentence, to collect taxes, and so on. All too often effectiveness fails at the administrative "street level". Only here is it possible to say that regulation is concrete and real, that results of public policies have been achieved and that rules are effective. Enforcement can, in practice, make the difference for effectiveness and for the success of public policy, and should always be monitored because it expresses a meaningful understanding about the real impact of rules.

3. Outcomes

Compliance and enforcement focus on conformity with rules, not necessarily on results. Defects in rules, their insufficient application, side-effects and the more general problem of regulatory failures[145] are so frequent that over recent decades there has been pressure at international as well as European level to increase the quality of regulation orienting rules to ensure not only ease of compliance and application, but also outcomes.

The institutional debate has been characterised by the idea that quality of regulation regards "[...] the whole policy cycle – from the design of a piece of legislation to implementation, enforcement, evaluation and revision"[146] and the idea that better regulation has to "meet concrete quality standards, avoids unnecessary regulatory

[138] WM Landes, "Optimal Sanctions for Antitrust Violations" (1983) 50 University of Chicago Law Review 652.

[139] Friedman, supra, note 16, 71–72.

[140] See U Gneezy and A Rustichini, "A Fine Is a Price" (2000) 29(1) The Journal of Legal Studies 1.

[141] See N Garoupa and D Klerman, "Corruption and the Optimal Use of Nonmonetary Sanctions" (2004) 24 International Review of Law and Economics 219, 220.

[142] See GS Becker and GJ Stigler, "Law enforcement, malfeasance, and compensation of enforcers" (1974) 3(1) The Journal of Legal Studies 1, 13.

[143] On this point see Gardiner and Lyman, supra, note 99, 837; Ogus, supra, note 36, 337.

[144] M Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Foundation 1980).

[145] JE Stiglitz, "Regulation and Failure" in D Moss and J Cisternino (eds), *New Perspectives on Regulation* (The Tobin Project, 2009) 11: "Policy interventions should be designed to make less likely the occurrence of actions that generate significant negative spillovers, or externalities".

[146] European Commission, Communication COM/2010/0543 final on Smart Regulation in the European Union (2010) 3. See also R Baldwin, "Is better regulation smarter regulation?" (2015) Public Law 485.

burdens and effectively meets clear objectives".[147] The academic debate in the field of regulation (and on quality of regulation) too, has long confirmed that there is a "symbiotic relationship between the formulation of regulatory rules and their application";[148] that the "good" regulatory regime[149] is strictly connected to enforcement of rules (and compliance);[150] that regulation "seeks to change behaviour in order to produce desired outcomes".[151]

a. Rules (and institutions) fit for purpose

There is broad agreement on the idea that rules should be good, in the sense that they should be not only clear, understandable and consistent or easy to comply with and to apply but also conducive to their desired outcomes. Even in legislative studies "a good law is simply a law that is capable of achieving the regulatory reform that it was released to effectuate or support".[152] This idea requires rules that are "fit for purpose",[153] which should be "managed in a manner that ensures [they] continue to efficiently achieve [their] public policy objectives",[154] in other words, rules which need to be maintained.[155] National experiences have been provided with *ex-ante* as well as *ex post* evaluation of legislation such as in the EU,[156] in the UK or the United States,[157] in Australia, Canada, The Netherlands,[158] in Eastern Europe[159] and elsewhere.

A 2008 constitutional reform in France stated that the French Parliament is obliged to carry out public policy evaluation sessions, dedicating one week per month to this kind of activity,[160] not only law-making but also a sort of law-maintenance. There are also requirements for institutions to be "fit for purpose": international conventions, European

147 OECD, *Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers* (2009) 44. See also OECD, *Reccomendation on Improving the Quality of Government Regulation* (1995) and *The OECD Report on Regulatory Reform; Synthesis* (1997) 8.

148 A Ogus, *Regulation. Legal Form and Economic Theory* (Clarendon Press 1994) 90. See also Hawkins and Thomas, supra, note 53, 173.

149 Baldwin, Cave and Lodge, supra, note 50, 38.

150 OECD, *Reducing the Risk of Policy Failure*, supra, note 53. See also Voermans, supra, note 53, 41.

151 Coglianese, supra, note 8, 9.

152 H Xantaki, "Quality of legislation: an achievable universal concept or a utopian pursuit?" in M Tavares Almeida (ed), *Quality of Legislation* (Nomos 2011) 81. See also S Weatherill, "The challenge of better regulation" in S Weatherill (ed), *Better Regulation* (Hart 2007) 19.

153 See European Commission, Communication COM(2012) 746 final on EU Regulatory fitness (2012) 3.

154 ibid, 11.

155 M De Benedetto, "Maintenance of Rules" in U Karpen and H Xantaki (eds), *Legislation and Legisprudence in Europe. A Comprehensive Guide* (Hart 2017) 215.

156 On this point, see C Radaelli and F De Francesco, *Regulatory Quality in Europe, Concepts, Measures, and Policy Processes* (Manchester University Press 2007). See also E Donelan, "Progress and Challenges in Selected OECD and EU Countries in Developing and Using Regulatory Impact Assessement (RIA)" in J-B Auby and T Perroud, *Regulatory Impact Assessment* (Global Law Press 2013) 125.

157 See C Radaelli et al, "Comparing the content of regulatory impact assessments in the UK and the EU" (2013) 33(6) Public Money & Management 445.

158 An interesting comparison is available in the Australian Government, Productivity Commission Research Report, *Identifying and Evaluating Regulation Reforms*, Appendix K, How do different countries manage regulation? (December 2011).

159 See K Staronova, "Regulatory Impact Assessment: Formal Institutionalization and Practice" (2010) 30(1) Journal of Public Policy 117.

160 The *loi constitutionelle* 23 Juillet 2008, art 24 established that: "Le Parlement vote les lois, contrôle l'action du Gouvernement et évalue les politiques publiques".

directives and national legislation are ever more interested in establishing that certain kinds of institutions must be characterised by autonomy (or independence, where appropriate), expertise and adequate resources, in order to make them effective, as far as possible. This is the case, for example, with National regulatory authorities,[161] anti-corruption institutions,[162] regulatory oversight bodies[163] and so on.

b. Information, evaluation, steering: the administrative toolbox dealing with uncertainty

Achieving outcomes is not a simple task. If rules are to be legitimate, observed, enforced as well as capable of achieving their objectives, the administrative law toolbox needs to be improved and to address risk and uncertainty.[164] This implies, on one side, internalising the (general) risk of rules' ineffectiveness alongside any possible kind of (specific) risk[165] within decision-making processes; and on the other side, the strengthening of three drivers for results.

The first is *information*, relevant both when adopting rules and when applying them: administration needs information[166] and administrative powers presuppose ever more activities of collecting and managing complex information via databases in order to adopt evidence-based, risk-based and well-reasoned rules and administrative decisions, capable of attaining objectives and of responding adequately to the public interest.[167] Even though administrative knowledge is a cost, it must be paid both to legitimate administrative decisions[168] and to make them effective, as far as possible.

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[161] See, for example, Directive 2009/72/EC concerning common rules for the internal market in electricity, art 35 (Designation and independence of regulatory authorities), "5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that: (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties".

[162] The United Nations and the Council of Europe anti-corruption conventions established "criteria for effective specialised anti-corruption bodies": they should be characterised by independence, specialisation, adequate training and resources. On this point see also OECD, *Specialised Anti-Corruption Institutions. Review of Models* (OECD 2008) 5.

[163] OECD, *Backgroud Document on Oversight Bodies for Regulatory Reform* (OECD 2007) 2: the "whole-of-government approach for regulatory policy […] requires coordination of different institutions involved at different levels of government and the commitment to assign adequate resources to them".

[164] See FH Knight, *Risk, Uncertainty, and Profit* (Beard Books 2002) 20, where he distinguished between uncertainty and risk by defining risk "proper" as "*measurable* uncertainty".

[165] In the more general framework of the present article, on this point it would also be important to refer to the huge literature on risk regulation. Among other titles, see U Beck, *Risk Society. Towards a New Modernity* (Sage 1986). A health perspective characterises JD Graham, LC Green and MJ Roberts, *In Search of Safety. Chemicals and Cancer Risk* (Harvard University Press 1991). See also S Breyer, *Breaking the Vicious Circle: Towards Effective Risk Regulation* (Harvard University Press 1993); Hood, Rothstein and Baldwin, supra, note 47; CR Sunstein, *Risk and Reason: Safety, Law, and the Environment* (Cambridge University Press 2002); J Black, "The emergence of risk-based regulation and the new public management in the United Kingdom" (2005) Public Law 512. See, finally OECD, *Risk and Regulation: Improving the Governance of Risk* (Oecd Publishing 2010).

[166] See M De Benedetto, "Competition enforcement: a look at inspections" in P Nihoul and T Skoczny (eds), *Procedural Fairness in Competition Proceedings* (Edward Elgar 2015) 145; see also J-B Auby, "Le pouvoirs d'inspections de l'Union européenne" (2006) 42(1) Revue Trimestrielle de Droit Européen 131 and JW Bagby, "Administrative investigations: preserving a reasonable balance between agency powers and target rights" (1985) 23(3) American Business Law Journal 319.

[167] See, in general, on this topic, GJ Stigler, "The Economics of Information" (1961) 69(3) Journal of Political Economy 213.

[168] See N Luhmann, *Legitimation durch Verfahren* (Suhrkamp 1983).

The second driver is *evaluation*, considered not only as a tool for administrative efficiency and productivity but also in the logic of public policy, rule-making and decision-making.[169] Starting from 2014, the European Commission has ruled a principle of "evaluation first" by establishing that "the Commission will not examine proposals in areas of existing legislation until the regulatory mapping and appropriate subsequent evaluation work has been conducted".[170] Evaluation is very difficult to carry out[171] but it should be considered as an indispensable instrument to achieve effectiveness: it implies "the analysis of outcomes, what they are, why they are what they are, and who decides this".[172]

The third and last driver of effectiveness (from an outcomes perspective) is *steering*, which is nowadays affirming[173] itself as a set of institutional activities oriented to achieving results and delivering effects consistent with policy and regulatory objectives and (possibly) to limit, as far as possible, costs of enforcement. The problem of steering has been viewed in the context of public policies[174] and public management.[175] From a regulatory and administrative law point of view, steering concerns the whole regulatory cycle, from design of a rule to its enforcement, including specific monitoring and evaluation. It is often regulated by legislation and supported by guidances and checklists (ie in matters of impact assessment); it concerns regulators (parliaments, governments and independent bodies) and regulatory oversight bodies (all in charge of the "whole-of Government approach" for regulatory policy[176]), enforcement agencies and inspectors (supported by guidelines and manuals of inspections[177]) as well as coordination units and evaluation bodies (especially concerned with outcomes).

Administrative law scholars start to focus the need for steering by arguing "for increased use of empirical analysis to evaluate how well institutional procedures and design achieve public goals"[178] and also for an "advanced theory of steering, ie of

[169] H Wollmann, "Utilization of Evaluation Results in Policy-Making and Administration: A Challenge to Political Science Research" (2016) 16(3) Croatian and Comparative Public Administration 433.

[170] Supra, note 153, 4.

[171] See P Craig, *Administrative Law* (Sweet & Maxwell 2008) 111: "measuring institutional effectiveness is always difficult".

[172] S Groeneveld and S Van de Walle, "New steering instruments: trend in public sector practice and scholarship" in S Groeneveld and S Van de Walle (eds), *New Steering Concepts in Public Management* (Emerald 2011) 212.

[173] See N Luhmann, "Limits of steering" (1997) 14(1) Theory, Culture & Society 41: "In the politics of society the term 'steering' is still much discussed. Uncertainty about the capability to influence the future leads to appeals for something to be done".

[174] J Pierre and B Guy Peters, *Governance, Politics and the State* (Macmillan 2000) 1: "the capacity of government to make and implement policy".

[175] P Bogason, "Postmodernism and American Public Administration in the 1990s" (2001) 33(2) Administration & Society 165, 167: "how to make the public sector work better". See also RAW Rhodes, "The New Governance: Governing without Government" (1996) 44 Political Studies 652.

[176] OECD, *Guiding Principles for Regulatory Quality and Performance* (2005) 1: "Isolated efforts cannot take the place of a coherent, whole-of-government approach [...] 'Regulatory quality and performance' captures the dynamic, ongoing whole-of-government approach to implementation".

[177] On the problem of "lack of consistency, coordination and coherence between agencies – lack of uniform guidelines and approaches between inspectors", see Blanc, supra, note 93, 2.

[178] On this point see Coglianese, supra, note 137, 1113. See also S Cassese, "New paths for administrative law: A manifesto" (2012) 10(3) International Journal of Constitutional Law 603: "a new administrative law is developing, due to a process of change, modernization, and reform […] This new administrative law is – in this view – the product of the new role of the state as a promoter, as a facilitator, as a risk regulator, and as the helmsman of economy and society".

systematic understanding about the conditions under which what legal instruments or legally imposed structures would cause which effects".[179] Furthermore, administrative law itself is ever more frequently considered "as regulation and steering"[180]; a feature of the "new, or postmodern, administrative law" is just to be more opened and focused "on 'steering' rather than on ordering".[181]

V. Effective law: a decisional problem or a criterion for decision-making?

Whenever administrations adopt decisions these decisions should be considered in the framework of the wider administrative function they express. In fact, rules govern administration mainly by designing schemes for decisions so that it is possibile to distinguish "between decisions made about particular cases and decisions about how to deal with classes of case".[182] For instance, in many administrative systems municipalities have the power to demolish illegal, unauthorised buildings: rules establish (in general) requirements, principles, procedures which must be observed when adopting and implementing (particular) demolition orders. Each of these orders can be reviewed on the basis of its conformity with prescribed requirements. This makes it possible to discuss the effectiveness of a specific demolition order and that of the demolition administrative function, in general.

In any case, the problem arises both when general and individual decisions are adopted because effective law is (first of all) a decisional problem which should be considered when drafting rules (schemes for individual decisions, the "regulatory design"[183]) as well as when rules are applied (by adopting each individual decision).

Designing optimal rules is an arduous task.[184] However, effectiveness represents not only the problem but also the possible solution, like a vaccine which is produced from its virus. As already mentioned, the effectiveness of rules can be firstly considered a risk to be internalised in decision-making processes, but also as a criterion for decision-making, affecting the "whether" and the "how" of decisions.

1. The "whether" of decisions

In the "whether" perspective, expected effectiveness can operate as a real selector in the institutional decision-making process, contributing to deciding whether to regulate, as well as whether to implement and enforce.

Regarding rules, this is illustrated by the plethora of prescriptions and guidelines which require ex ante assessment (and, in this context, of the expected effectiveness of

[179] See Hoffmann-Riem, supra, note 41, 214.

[180] See also A Voßkuhle and T Wischmeyer, "The NeueVerwaltungrechtswissenschaft against the backdrop of traditional administrative law scholarship in Germany", in S Rose-Ackerman, PL Lindseth and B Emerson (eds), *Comparative Administrative Law* (2nd edn, Edwar Elgar 2017) 93.

[181] See Cassese, supra, note 178, 603.

[182] K Hawkins, *Law as Last Resort: Prosecution Decision-making in a Regulatory Agency* (Oxford University Press, 2001) 39.

[183] Ayres and Braithwaite, supra, note 45, 101: "a requirement for breaking out of the sterile contest between deregulation and stronger regulation is innovation in the regulatory design".

[184] On this point see CS Diver, "The optimal precision of administrative rules" (1983) 93(1) Yale Law Jornal 65 and R Baldwin, "Why rules don't work" (1990) 53(3) The Modern Law Review 321.

rules) before their adoption: regulatory impact analysis must first assess the so-called zero option (or baseline or status quo),[185] which should be identified, evaluated and definitely preferred if during the process it does not emerge that a different regulatory option would credibly be able to achieve a more desirable distribution of advantages and disadvantages.[186] In other words, sometimes expectancy of effectiveness could suggest simply doing "nothing".

Regarding single administrative decisions, we should distiguish between cases in which expected effectiveness affects administrative activities when enforcing rules, from cases in which it affects the regulatory design of the administrative function itself.

In the first kind of case, the previously mentioned administrative tolerance works more or less by suggesting that a given rule not be enforced at the "street level" (eg in case of economic activities without required licences) for reasons related to the opportunity of avoiding some form of conflict: when a regulation has changed and substantive compliance costs are very high, enforcement officers could decide (in the absence of any formal decision) to postpone the application, behaving as real "policy makers".[187]

In many other cases, however, administrative procedures – from their regulatory design – are structured in order to be able to predictively evaluate elements which might be relevant for the decision whether to act or not to act. Let us consider the planning of inspections, which is ever more frequently adopted through risk based targeting by evaluating elements such as probability of non-compliance, or the potential level of harm, or other more qualitative insights.[188]

2. The "how" of decisions

From the "how" perspective, effectiveness contributes to defining the way in which to better regulate, implement or enforce. In other words, effectiveness changes the path of decisions as well as their content.

Accuracy of administrative procedures has been traditionally linked to the purpose of making public decisions certain and adequate, characterised by clarity and consistency, according to principles such as the right to be heard,[189] participation and transparency.

However, although administrative procedures have long been considered "another mechanism for inducing compliance"[190] they could also contribute to achieving policy and regulatory objectives and to limiting undesired side effects.[191] In this context, transparency and public participation "can help produce better, more informed policy decisions"[192] and

[185] See De Benedetto, Martelli and Rangone, supra, note 10, p 28. On this point see other references in notes 156–159.

[186] ibid, 72.

[187] Lipsky, supra, note 144, 13.

[188] Blanc, supra, note 93, 72.

[189] On this point, see G della Cananea, *Due Process of Law beyond the State. Requirements of administrative procedure* (Oxford University Press 2017).

[190] See MD McCubbins, RG Noll and BR Weingast, "Administrative procedures as instruments of political control" (1987) 3(2) Journal of Law, Economics & Organization 243, 244.

[191] On the "analytic management of regulation" see RB Stewart, "Administrative Law in the Twenty-First Century" (2003) 78(2) New York University Law Review 437, 445.

[192] C Coglianese, H Kilmartin and E Mendelson, "Transparency and public participation in the rulemaking process: recommendations for the new administration" (2009) 77(4) George Washington Law Review 924, 927.

to increase perceived legitimacy and procedural justice[193] by supporting good administration. Furthermore, even economic evaluation techniques, such as cost-benefit analysis, have to be considered as "a method for taking into account the interests of all affected citizens and selecting regulatory measures that will enhance societal welfare".[194]

Effectiveness of decisions must therefore be prepared starting from the same decision-making process: when rules are adopted it is important to gather evidence in order to evaluate their possible impacts;[195] statistical evidence and data allows decisions to be steered towards effectiveness;[196] in all kinds of decisions it is necessary to increase "good" consultation processes;[197] different decision options should be evaluated with a consideration of the effectiveness perspective.[198]

On the other hand, effectiveness is under threat from all sides, because collecting and evaluating interests (via consultation and participation) could not only bring about positive effects on legislative, regulatory and administrative procedures, but also dysfunctions, and even corruption,[199] as when some interests are underrepresented in the procedure[200] while other interests – which might be particularly aggressive – could prevail (by licit or illicit means, such as bribery).[201]

VI. Concluding remarks

In his article "Administrative Law in the Twenty-First Century", Richard Stewart wrote:

> "today we face an acute problem of growing regulatory fatigue. The public demands higher and higher levels of regulatory protection, yet regulatory administrative government seems less and less capable of providing such protection in an efficient and effective manner […]. Regulatory results often fall short of expectations at the same time that regulatory requirements grow ever more burdensome".[202]

Effective law is becoming a recurring and pressing issue, ever more relevant for governments as well as for scholars and academics because "the crisis of regulatory law is to be cured by increasing its instrumental effectiveness".[203]

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193 See Scholz, supra, note 25, 264: "*Improve Procedural Fairness.* […] The perception of fair treatment and due process enhanced compliance even when orders imposed considerable costs".

194 Stewart, supra, note 191, 445.

195 Supra, note 153.

196 Herweijer, supra, note 43, 15: "to determine whether decisions are effective we need to compare. We might, for example, compare the average speed of cars before and after the introduction of the speed limit".

197 European Commission, Communication COM(2002) 704 final on Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, 5: consultation "serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large".

198 Coglianese, supra, note 137, 1113.

199 See De Benedetto, supra, note 90, 55.

200 See JL Mashaw, "Structuring a 'dense complexity': accountability and the project of administrative law" (2005) Issues in Legal Scholarship 1.

201 CR Sunstein, *After the Rights Revolution. Reconceiving the Regulatory State* (Harvard University Press 1990) 103. On this point see also RB Stewart, "The Reformation of American Administrative Law" (1975) 88(8) Harvard Law Review 1669, 1713: "[...] comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favour of these interests". See also Ogus, supra, note 36, 341 where he argues that the same consultations are occasions to "increase the opportunity for corrupt transactions".

202 Stewart, supra, note 191, 446.

203 Teubner, supra, note 50, 306.

On the side of governments, reduced resources for public policies and high tax burdens impose a shift in attention from funding[204] to effectiveness,[205] in the already-mentioned logic of "better results with fewer resources".

On the side of scholars and academics, disfunctionalities of legislation (and regulation) are analysed and discussed; unintentional consequences are monitored;[206] regulatory failures are frequent, full compliance is difficult to achieve, enforcement is expensive and unpredictable.[207] Over all, rules are produced "under conditions of high complexity and limited knowledge"[208] in a context of a serious "crisis of confidence" in regulation.[209]

Administrative law scholars have a special commitment in this context because administrative law is, at the same time, concerned and challenged by effectiveness.

It is concerned because in recent decades several regulations affecting administrative activities have established provisions and have formalised in different ways the search for effective administration and administrative decisions, in rule-making (eg by requiring impact assessment and consultation) as well as in decision-making (eg by providing risk-based planning of inspections, optimal amount of sanctions, environmental impact evaluation and so on). Alongside its *executive* and more traditional character, administrative law has developed a *preventive* feature:[210] managing risks and protecting interests requires effective results and imposes an integrated approach to effectiveness that incorporates not only compliance with rules and enforcement but also the outcomes of rules.

Furthermore, administrative law is challenged by effectiveness because it should focus on legal aspects of an integrated set of institutional activities oriented to achieve results and deliver effects which are consistent with policy and regulatory objectives and (possibly) to limit, as far as possible, costs of enforcement. In other words, administrative law has to deal with steering (section IV.3.b) which points at a sort of comprehensive administrative meta-level[211] and affects the regulatory design of administrative

[204] On this point see Osborne and Gaebler, supra, note 102. See also *From Red Tape to Results: Creating a Government that Works Better and Costs Less*, supra, note 102. See finally D Osborne and P Hutchinson, *The Price of Government: Getting the Results We Need in an Age of Permanent Fiscal Crisis* (Basic Books 2004).

[205] See OECD, *Reducing the Risk of Policy Failure*, supra, note 53. See also Hawkins and Thomas, supra, note 53, 7

[206] See Hoffmann-Riem, supra, note 41, 241: "the approach to reality and thus to diagnostic and knowledge and above all dealing with the uncertain also has to be 'learnt'".

[207] In this sense, Beck, supra, note 165, 180: "criteria must be discovered for how the unpredictability of consequences is produced and can be avoided". See also J Esteve Pardo, *Técnica, riesgo y derecho: tratamiento del riesgo tecnológico en el derecho ambiental* (Ariel 1999).

[208] Hoffmann-Riem, supra, note 41, 214.

[209] C Coglianese (ed), *Regulatory Breakdown: The Crisis of Confidence in US Regulation* (University of Pennsylvania Press 2012).

[210] Beck, supra, note 165, 34: "Therefore, even as conjectures, as threaths to the future, as prognoses, they have and develop a practical relevance to preventive actions […] In the risk society the past loses the power to determine the present. Its place is taken by the future, thus, something non-existent, invented, fictive as the 'cause' of current experience and action. We become active today in order to prevent, allievate or take precautions against the problems and crises of tomorrow".

[211] WJM Kickert, E-H Klijn and J Koppenjan, *Managing Complex Networks – Strategies for the Public Sector* (Sage 1997) 10 and 44 where "coordinating strategies of actors with different goals and preferences" are mentioned. On this aspect see C Coglianese and E Mendelson, "Meta-regulation and self-regulation" in Baldwin, Cave and Lodge, supra, note 47.

procedures and organisation, the administrative law tool-box, the administrative officers' expertise.[212]

However, when legislators and regulators do not declare their real objectives, do not carry out adequate gathering of evidence, do not want to achieve declared results because they have simply engaged in symbolic politics,[213] the regulatory and administrative process is distorted[214] making it definitely more difficult to lead towards effective rules. In these cases, only a steering administration has the capability as well as the interest to show up "symbolic" rules.[215] In fact, a steering administration is in charge of "concretising",[216] is *legis-executio* related but no longer ancillary to *legis-latio*, as it was in the past.[217] It protects the long-term institutional interest for effectiveness because "effective administration" is and definitely remains "[…] the great problem of the future".[218]

[212] RAW Rhodes, "Recovering the Craft of Public Administration" (2016) 76(4) Public Administration Review 638: "it is a question of what works, of what skills fit in a particular context".

[213] MJ Edelman, *The Symbolic Uses of Politics* (University of Illinois Press 1985) 181: "The testing of works and its results remains a testing against tangible results not satisfaction with pipedreams"; see also BA Stolz, "The Foreign Intelligence Surveillance Act of 1978: The Role of Symbolic Politics" (2002) 24(3) Law & Policy 269, 270: "The symbolic perspective also assumes that the substance of an act is less important than the audience's perception or reaction to it. Moreover, at times, whether or not legislation is enacted is less important than the fact that legislation has been introduced".

[214] JP Dwyer, "The Pathology of Symbolic Legislation" (1990) 17 Ecology Law Quarterly 233, 234: "The most significant problem with symbolic legislation, however, is not delay; it is the resulting distortions in the regulatory process. Symbolic legislation hobbles the regulatory process by polarizing public discussion in agency proceedings and legislative hearings".

[215] ibid: "By making promises that cannot be kept, and by leaving no middle ground for accommodation, the legislature makes it more difficult to reach a political compromise (either in the agency or the legislature) that would produce a functional regulatory program".

[216] On this aspect see Rose-Ackerman, Lindseth and Emerson, supra, note 180, 1: "The Germans speak of administrative law as 'concretized' constitutional law".

[217] Kelsen, supra, note 19, 255.

[218] Pound, supra, note 112, 35.