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The promise of bureaucratic reputation approaches for the EU regulatory state

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ABSTRACT

Reputation literature has provided crucial insights about the evolution of the US regulatory state. Daniel Carpenter's influential account painstakingly demonstrates the relevance of reputation to bureaucratic 'power' and to early institutional state-building in the US context. We argue that adopting a reputational lens provides important insights for the EU regulatory state, the evolution of its regulatory agents, and their efforts at legitimisation. This contribution proposes a novel research agenda by applying core bureaucratic reputation concepts and arguments to the scholarship on the EU regulatory state and its core actors to explore the following questions: To what extent does the theory 'travel well' in an EU context? Does it have purchase power, and what can it contribute to our understanding of the evolution of the EU regulatory state and the behaviour and legitimacy of supranational regulators?

KEYWORDS Bureaucratic reputation; EU agencies; EU regulatory state; legitimacy

Introduction

Reputation literature has provided crucial insights about the evolution of the US regulatory state. Daniel Carpenter's influential account (2010) painstakingly demonstrates the relevance of reputation to regulatory power (or authority) and to early institutional state-building in the US context. The successful cultivation of a strong reputation, as Carpenter's work on the Food and Drug Administration (FDA) shows, is foundational to securing regulatory authority beyond formal fiat. Over the past two decades, the lens has become highly influential in the study of regulation. Its relevance has been demonstrated empirically with respect to a broad range of agency behaviours, in different national regulatory contexts (e.g., Gilad 2008, 2009; Maor 2011; Maor et al. 2013). Despite its influence, and considerable explanatory power—also over and above classic theories of regulation, its proponent argue (Carpenter 2010)—the lens

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remains largely neglected in EU scholarship. To what extent does the theory ‘travel well’ in an EU context? Does it have purchase power and what can it contribute to our understanding of the EU regulatory state? We argue that adopting a reputation lens can provide important insights for the evolution of the EU regulatory state, the behaviour of its regulatory agents, and their efforts at legitimisation.

The literature on the EU regulatory state and its institutional agents—EU agencies—has seen an outpouring of theoretical and/or empirical contributions (e.g., Busuioc 2013; Egeberg and Trondal 2011; Groenleer 2009), as well as essays on the state of play (e.g., Lodge 2008; Rittberger and Wonka 2015). The theoretical approaches deployed range from a focus on rational choice (i.e., the Principal-Agent (P-A) model) to organisational accounts. P-A-based explanations have offered relevant insights into the institutional design (e.g., Kelemen and Tarrant 2011), the *de jure* independence (e.g., Wonka and Rittberger 2010), and the control mechanisms used to oversee EU agencies’ day-to-day activities (e.g., Busuioc 2013; Curtin 2007; Font and Pérez-Durán 2016). More recent empirical work has also increasingly examined agencies’ ties with interest groups and other stakeholders (e.g., Arras and Braun 2018; Pérez-Durán 2017). In a similar vein, organisational scholars have contributed much to our knowledge of agencies’ legitimacy imperatives, their *de facto* organisational autonomy, and socialisation practices (e.g., Egeberg and Trondal 2011; Groenleer 2009; Wood 2018).

At the same time, even with the richness of this literature, the promise of reputation literature for the EU regulatory state has been largely neglected despite its potential to shine a new light on important research gaps. First, while existing literature provides insight into EU regulators’ mandates, relationships with their principals, and formal authority, it has to a large extent overlooked the relevance of multi-faceted and shifting constellations of formal but also, crucially, of informal audiences that—reputation literature intimates—jointly shape (or erode at) regulators’ power and authority, beyond formal fiat. More specifically, we know little about: To what extent does the multiplicity of conflicting audiences shape regulators’ outputs, processes, and behaviour? To which constellations of external pressures are supranational regulators responsive, how, and why? Importantly, a reputational lens points at the necessity of analysing the role of these ‘networks of audiences’ (e.g., political principals, national regulators, expert bodies, mobilised groups) in shaping regulatory power jointly, rather than in isolation.

Second, existing literature has overlooked the importance of the multiplicity of EU regulators’ goals and the need to cultivate their reputation vis-à-vis relevant audiences that pay attention to different aspects of agencies’ activities, e.g., technical conduct, performative capacity, procedural appropriateness, or moral image (Carpenter and Krause 2012). Rather than in agreement on a common vision of desirable agency outcomes and outputs—as ‘fossilised’ in legal mandates and heralded in policy documents—audiences

embed diverse expectations. We know little of how supranational regulators manage their multi-faceted organisational profiles, what type of reputation-management strategies they embrace, and how (or whether) these strategies translate into increased regulatory authority and legitimacy. In other words, beyond 'blanket' legitimising 'recipes' (i.e., output legitimacy), we know less about how supranational regulators actively—and in an organisationally-differentiated fashion—cultivate their reputation to build the 'coalitions of support' crucial to sustaining regulatory power.

Against this backdrop, we make the case that adopting a reputational focus allows for: a more differentiated understanding of legitimisation processes in EU multi-level governance, allowing us to move beyond one-size-fits-all prescriptive norms; identifying/diagnosing clashes in expectations at different levels of governance, among different institutional audiences; and how this impacts upon organisational attempts at legitimisation and varied organisational 'success' in this regard. Furthermore, it provides promising, and so far underexplored, theoretical propositions regarding agency behaviour, ranging from co-operation patterns and regulation practices to accountability. In other words, a reputational perspective is particularly relevant in enriching our understanding of how EU agencies work to advance their legitimacy (as well as how they fail in doing so in some cases) and how this shapes regulatory behaviour in fundamental ways. In our discussion, we zoom in on EU agencies while simultaneously incorporating and reflecting on the relevance of broader actors ranging from the EU institutional actors, national regulators to other stakeholders, in their roles as audiences in the EU regulatory state.

Reputation and regulatory authority

Bureaucratic reputation is an influential perspective on public organisations that builds on insights from classic scholarship: organisational literature focusing on legitimacy as a basis for organisational survival (Brunsson 1989; Meyer and Rowan 1991), bureaucratic autonomy and co-optation (Wilson 1989), as well as work on blame avoidance and strategies to tackle attacks originating from one's environments (Hood 2011). However, the reputational account has a distinct focus compared to this literature, i.e., it pays particular attention to public organisations' *audiences*.

Reputation scholarship argues that to understand organisational behaviour, one should start with the examination of the environment in which it is embedded: 'when trying to account for a regulator's behaviour, *look at the audience, and look at the threats*' (Carpenter 2010: 832). Reputation is thus a *perception* of unique capacity of an organisation, *embedded in (networks of multiple) audiences* (Carpenter 2010). Defined as 'any individual or collective that observes a regulatory organization and can judge it' (Carpenter 2010: 33), 'audiences' are both formal and informal in nature. In the EU context, such

regulatory audiences would include the EU institutions, national authorities but also more informal audiences, such as, NGOs, media, citizens, or interest groups. Such audiences sustain or erode regulatory authority—for instance, peer professional organisations can erode regulatory power by challenging a regulator’s scientific methods or conclusions (Carpenter 2010).

In this perspective, regulatory authority has both a *formal* (in the act of delegation) as well as an *informal* basis. Regulators expand their formal authority by successfully cultivating, among relevant audiences, a perception of unique capacity to deliver on core tasks. By virtue of this audience-recognised capacity manifest in ‘lasting esteem and durable links to social, political and economic organizations (...) that rival and surpass those of politicians’, reputed agencies can shift the terms of the formal contract (Carpenter 2001: 354). Audiences can constrain, or even shift principals’ preferences, through the political costs that audiences can extract of principals (Bertelli and Busuioc 2018). A reputed agency enjoys deference beyond its formal powers. Correspondingly, failing to successfully cultivate one’s reputation can erode the formal (mandated) authority of a regulator.

Not all audiences are equally consequential for an organisation’s reputation. Reputation-management requires political astuteness of regulators in selectively responding to, and actively shaping, expectations of audiences ‘that matter’—on whose support they depend. Successfully doing so has been shown to have fundamental implications for *de facto* authority and the ability to secure compliance and deference (Carpenter 2010).

What is more, reputations are characterised by multi-dimensionality: agencies may strive to obtain good reputations for *technical conduct*, *performative capacities*, *procedural appropriateness*, and *moral image* (Carpenter 2010). Thus, like P-A accounts, a reputational lens recognises *expertise* (i.e., technical, methodological, and analytical capacity) as an important source of bureaucratic power; it is however, one of the four bases of reputation.

A good organisational reputation can also be a matter of an agency’s *performative capacity*: its ability to effectively execute core responsibilities and achieve declared goals (Carpenter and Krause 2012). Furthermore, agencies may also focus on *procedural appropriateness*, i.e., demonstrating their adherence to fair and just procedures. Finally, agencies may build (or lose) reputations on the *moral dimension*—the boarder ethical implications of agency activities. Conversely, moral scandals can chip away at, or even obliterate, the authority of an otherwise well-performing organisation.

Reputational considerations in the EU regulatory state: A research agenda

Reputation is an institutional resource for public organisations to achieve authority and legitimacy in governance. EU agencies are especially reliant

on other actors to adopt their opinions into binding law (e.g., European Commission) or to implement their decisions (national authorities), often lacking the tools or resources for ('policing') implementation. Short of being able to coerce other actors to adopt and implement their decisions, EU agencies necessarily draw on informal authority to secure deference and compliance. In this context, the normative power of EU agencies' outputs—how authoritative and legitimate these are perceived by audiences (including principals, national authorities, and non-state actors, such as industry)—is crucial to their *de facto* authority and legitimacy.

The reputational perspective proposes a promising research agenda surrounding EU legitimacy-related debates covering both the legitimacy of the EU as a regulatory system and the organisation-level legitimisation efforts of its agents—namely the ways in which supranational regulators seek to develop strong reputations to legitimise their roles, activities, or even their right to exist towards audiences in the EU regulatory state.

EU regulatory state: fixed technocratic legitimisation criteria?

In the EU regulatory state, the institutional discourse would suggest that the legitimacy criteria are *fixed* and *pre-determined*. Technocratic expertise and relatedly, the delivery of effective solutions to shared problems, rather than political considerations, are said to be the *raison d'être* behind the creation of non-majoritarian institutions. Independent *expertise* is 'the be-all-and-end-all' criterion for legitimacy in the EU regulatory state: it is agencies' technocratic, non-majoritarian nature that sets them apart and equips them to 'deliver' credible regulatory policy. This logic is reflected in both institutional and academic discourses (Majone 1997).

As Majone has influentially argued, democratically-accountable institutions can delegate far-reaching regulatory powers to supranational non-majoritarian institutions (EU agencies) making them responsible for regulatory outcomes that influence and affect a wide audience. However, 'they cannot transfer their own legitimacy' (Majone 1999: 4). Majone (2006) notes that the legitimacy aspirations of EU non-majoritarian institutions are doomed to fail when assessed against democratic standards, i.e., democratic rule criterion emphasising input legitimisation sources. Debating the legitimacy of the EU regulatory state referring to (the presence or absence of) democratic qualities is, according to Majone, a 'category mistake' (2006: 618). Given EU's predominantly *regulatory* nature, Majone argues for the relevance of an alternative benchmark. Non-majoritarian institutions follow *technocratic* principles, normatively justifiable given their focus on market 'efficiency' rather than 're-distributive' issues. More specifically, the growing role of EU regulators and processes of 'agencification' can be sustained by 'the need to achieve credible policy commitments' (Majone 1999: 2).

The EU regulatory state is deemed to follow the consequentialist perspective political rule, legitimised with reference to the efficacy and effectiveness of attained goals and ends (Scharpf 1999). In this output-oriented form of legitimacy, organisations legitimise themselves through an emphasis on the delivery of solutions to societal problems, rather than on unevenly distributed preferences of the most powerful actors: 'Regulation depends so heavily on scientific, engineering and economic knowledge (...) expertise has always been an important source of legitimisation of regulatory agencies' (Majone 1997: 157). On the contrary, the EU regulatory state is deemed to focus to a lesser extent on input-oriented legitimacy—i.e., political or administrative procedures that are regarded as inclusive and receptive to constituency preferences (Scharpf 1999).

This logic has directly percolated the institutional discourse surrounding EU agency creation, recurrently justified by the Commission in core policy documents with reference to technical, and relatedly, performative criteria: 'The *independence* of their *technical and/or scientific assessments* is, in fact, *their real raison d'être*. The main advantage of using the agencies is that their decisions are based on *purely technical evaluations* of *very high quality* and *are not influenced by political or contingent considerations*' (European Commission 2002: 5, emphasis added). The Commission has re-iterated throughout the years that for agency decisions to acquire 'extra credibility and authority' requires 'agencies helping to demonstrate that decisions are based on technical/scientific grounds' (European Commission 2008: 5). A similar emphasis on the technical rationale is also visible in agencies' founding acts, with explicit and repeated references to agency independence in the exercise of tasks not only for scientific committees but also of other core agency structures (Groenleer 2009).

From a reputational perspective, however, organisational legitimisation is regarded as a product of successful reputation-management for *technical conduct*, *performative capacities*, *procedural appropriateness*, and *moral image*. The discourse on the EU regulatory state has prioritised regulators' independent *expertise*—the *technical dimension*, in the language of reputation—as a source of legitimisation. In other words, it has emphasised technocratic expertise as *the key criterion for legitimisation* above all others. Expertise then provides the means through which EU agencies deliver (e.g., protect us from risks or prevent crises), crucial to their superior performative capacities—the *performative dimension* in the language of reputation.

The *procedural dimension* comes in as well—agencies need to follow clear procedures and due process—but often as a means to safeguard, through process, their primary criterion for legitimisation, i.e., independent expert-based policy-making. When it comes to the *moral dimension*, however, EU agencies are to be explicitly unresponsive to political expectations and attempts at influence. Re-distributive considerations, risk management,

stakeholder compassion—a key element of the ‘moral dimension’ (‘does the organization protect the interests of its clients, constituencies, and members (...) does the organization exhibit compassion for those adversely effected by its decisions (...)?’ (Carpenter 2010: 46))—are explicitly and prohibitively outside the purview of EU agencies.

In contrast, reputation literature proposes a more differentiated understanding: it suggests that agencies are exposed to audiences with often *competing expectations* of agency behaviour, outputs, and outcomes. Reputation literature intimates that the standards are in the eyes of the beholder(s)—extending *beyond* formal institutional actors and their expectations, to a variety of different *informal* stakeholders, operating at different levels of governance. Expectations of different groups co-exist and can conflict. Rather than fixed and pre-determined, the standards by which regulators are assessed are contested, and assessments vary, depending on audience preferences (‘where you stand is where you sit’, as the adage goes). As discussed above, what legitimates an organisation is a *perception of competence* among multiple audiences ‘that matter’. A reputational lens suggests that *rather than a static prescriptive recipe*, regulatory *legitimacy* is much more of *a moving target* as agencies dynamically interact with, respond to, and attempt to shape audience expectations, and as coalitions of audiences ‘that matter’ shift, thereby also expectations of regulatory behaviour. This suggests that rather than examining audiences and their expectations as static, we need to explicitly acknowledge the shifting nature of such coalitions. That dependent on the issue area, salience, and politicisation, agency activities will galvanise different audiences and varied degrees of mobilisation, thus constituting more or less prominent reputational threats to regulatory authorities.

Moreover, such threats originate *not only from formal but also informal audiences*. A pertinent example of the powerful role of an informal audience can play—in the absence of any formal powers towards the agency—is well-illustrated by the example of the International Agency for Research on Cancer (IARC), an arm of the World Health Organisation (WHO), in the case of glyphosate. By openly contradicting the European Food Safety Authority’s (EFSA) conclusions on the glyphosate’s carcinogenic nature, IARC’s challenge amounted to a textbook example of a reputational threat against a regulator. Regardless that EFSA’s conclusions were subsequently upheld by a string of national regulators (e.g., US Environmental Protection Agency), the highly-publicised divergence with another scientific body (IARC) brought on challenges (and lent credibility to existing attacks) against EFSA from a string of formal and informal audiences ranging from the European Parliament (EP), NGOs, concerned citizens, split camps of supporting and dissenting national regulators. It resulted in extensive media coverage, accusations of undue influence, an EP investigation (EPRS 2018), and the need for recurrent EFSA

public statements and explanations justifying the discrepancy. Reputations are thus forged among networks of formal and informal audiences and their perception of agency capacity, in the 'battles' between different 'camps' mobilised by specific regulatory issues.

This is further compounded in the case of EU agencies by the fact that they operate *not only in a multi-audience but also in a multi-level context*. Regulatory expectations are not defined at one level of governance, but rather are generated at different levels of governance; perceptions of 'public interest' vary accordingly. The EU is an 'unsettled polity' where the core institutions are embedded in co-existing orders often with no consistent visions of how accountability should be arranged and legitimised (Olsen 2017). There are competing logics at play as to what constitutes desirable and legitimate regulatory behaviour, and these will not necessarily align with the formal institutional discourse.

Whether an agency is perceived as delivering (i.e., performative dimension) will depend on the coalitions of interests behind a certain regulatory outcome *and* their ideological preferences. Policy areas do not become de-politicised at will, through the creation of a non-majoritarian regulator. Audience assessments of regulatory performance, procedural fairness, and expertise will often necessarily be coloured by political/ideological expectations of what constitute good or desirable outcomes, particularly so in contested arenas. To illustrate, Rimkutė (2018) has shown that different audience constellations encourage regulatory agencies to manage their reputations in different ways, resulting in conflicting scientific conclusions. In a similar way, Bunea and Ibenskas (2017) have found that disagreements about Better Regulation reforms in the EU originate from what stakeholders favour as a regulatory system of governance in general, i.e., it is informed by different *preferences* for the general direction of a regulatory regime.

From a reputational perspective, legitimisation will come down to the *politics of reputation*: to how organisations legitimise themselves and how these attempts are received by relevant audiences, at different levels of governance. Reputation literature suggests that this requires a careful balancing act among conflicting formal and informal audiences' expectations, the deployment of ambiguity, and the strategic use of communications to shape regulatory image and actively manage expectations. Failure to adjust to expectations of audiences that are pertinent—also beyond formal mandates—can render agencies controversial, disempowered, and delegitimised.

A reputational perspective thus raises interesting research questions that deserve consideration and are for a large part overlooked within extant literature: how do agencies respond to the expectations placed upon them? On which dimensions do EU agencies base their claims to legitimisation? Are these claims consistent with—or do they depart from—the EU regulatory state discourse? Why are some organisations more successful in their

legitimation attempts than others? Wood (2018) observed that EU agencies engage in ‘political entrepreneurship’. In a similar vein, Busuioc and Rimkutė (2019) found that EU agencies become more reputationally-astute over time, i.e., they draw on wider legitimation sources, beyond an emphasis on technical considerations. Furthermore, reputational considerations have been found to explain differences across EU agencies in how they engage in diverse strategies to legitimise themselves (Rimkutė 2019). Against this backdrop, we argue that a reputation-based understanding of EU regulators offers a more *organisationally-differentiated* understanding of legitimation processes in EU governance.

Another important strand for future research refers to the conflicting nature of audience expectations, raising important and ‘wicked’ organisational dilemmas for EU regulators. Given that (informal) regulatory authority is a function of *audience support*, how do EU agencies attempt to manage contradictory expectations? Authors in different administrative contexts have provided various clues as to possible strategies: Carpenter (2010) and Carpenter and Krause (2012) have argued that agencies deploy ambiguity in this regard; Moffitt (2010) found that public stakeholder engagement is an important strategy to reputation-management—the FDA *learns in public* as a way to manage its legitimacy; Maor *et al.* (2013) and Gilad *et al.* (2013) found that agencies communicate strategically; Black (2008) has argued that while faced with legitimacy dilemmas, agencies are not passive recipients, but attempt to shape expectations and their ‘parameters of responsibility’ and blameworthiness. Such questions, and their implications for regulators’ informal authority, however, remain largely unanswered in an EU context. Yet, as we argue above, answering these questions is fundamental to understanding EU regulatory authority: by virtue of their institutional nature, EU agencies necessarily ‘rule’ to a great extent by informal authority, through deference and acquiescence of a whole range of audiences (such as national authorities) they are dependent on.

Supranational regulators’ behaviour

Secondly, a reputational lens allows us to study bureaucratic behaviour. A reputational understanding focuses on *audience-induced organisational behaviour*, i.e., the focus is on the external manifestations of audience management (Carpenter 2010). Reputational scholars regard the constellation of relevant stakeholders, the expectations and threats that they pose as a *crucial explanatory factor of regulatory behaviour*. Consequently, to explain diverging patterns of regulatory behaviour one should start by examining the environment an agency is embedded in: To what extent do reputational considerations drive EU agencies’ behaviour? Which types of threats do specific agencies face and which threats are prioritised to mobilise against?

How does this shape regulatory conduct and ‘talk’, and how does this vary across the population of EU agencies?

Initial empirical insights indicate that reputational considerations drive aspects of agency behaviour in important ways. Reputational considerations have been found to shape co-operation practices of EU agencies with national authorities (Busuioc 2015): they feature into turf-protective tendencies of national regulators or to the contrary, their willingness to co-operate with EU regulators. Better understanding of the conditions under which this occurs and how reputational forces can be harnessed to achieve desired co-operation outcomes can be crucial to the functioning of multi-level regulatory systems.

A promising avenue for future research, which strikes at the core of regulators’ substantive work, is investigating the link between organisational reputation and scientific outputs. For instance, risk assessments of different regulators can vary significantly (Rimkutė 2018). Similar scientific divergencies—that eventually lead to substantial variation in risk measures proposed to protect consumers from risks—have been reported in fields as diverse as chemicals, pharmaceuticals, environmental protection, financial regulation. Reputational literature proposes a promising research agenda: it suggests that regulators manage not only risks to society and the environment but also engage in organisational risk management efforts in order to establish, maintain, and enhance their organisational legitimacy (Rimkutė 2018). However, research on this topic is in embryonic stage: how do reputational (organisational) considerations feature into regulatory decisions? Which reputational concerns lead to more/less stringent (risk) regulation?

On accountability too, both mandated and voluntary practices, we have only begun to scratch the surface from a reputational perspective. While reputational considerations have been theorised to act as a driver for voluntary (pro-active) accountability as well as to shape the intensity of accountability of agencies by accountability forums (Busuioc and Lodge 2016, 2017), these patterns and their implications remain understudied in the EU context. Bertelli and Busuioc (2018) further argue that strong reputations can ‘blunt’ the use of formal controls: agencies’ successful coalition-building with audiences can displace the ability of political superiors to enact formal controls. Empirical work in other jurisdictional contexts provides tantalising results in this respect: it has, for instance, been shown that stakeholder engagement practices are strategically deployed by regulators to frustrate legislative oversight (Potter 2019). Seen from this perspective, the flurry of stakeholder engagement practices EU agencies are documented to have increasingly established (Arras and Braun 2018; Wood 2018), can be a legitimising influence serving to underpin their informal authority or to the contrary, a delegitimising force that offsets formal controls. The conditions under which one or the other occurs is an open empirical question and a pressing

one at that, as such practices are becoming widely prevalent among regulators keen to secure a firmer legitimacy foothold.

Conclusion

We argue that a bureaucratic reputation lens can provide the EU agency scholarship with a promising research agenda by offering novel, so far unexplored, explanations about EU agencies' efforts to legitimise their regulatory roles in the EU political system, casting a new light on the evolution of the EU regulatory state.

First, reputational explanations can enrich future research by providing a more nuanced understanding of the *processes* through which EU agencies strive for legitimacy within the EU multi-level system, marked by a multiplicity of competing audiences. While the regulatory state discourse suggests that the legitimacy criteria of EU regulators are fixed and pre-set, reputation scholars would argue that these are multi-dimensional and 'in the eye of the beholder', dependent on agency success in coalition-building and engendering support from its environment. A reputation lens allows us to move beyond across-the-board normative standards to study the *multi-faceted* legitimisation profile of regulatory institutions in their *dynamic* interactions with audiences. By allowing us to study legitimisation processes, a reputational lens can help disentangle what the regulatory 'fights' are about, what type of stakeholder expectations underlie them, on which specific dimensions different agencies build their claim to authority, and how regulatory reputations are gained or lost in this context.

Second, a reputational lens offers a rich research agenda to study *agency behaviour*. A reputation-based understanding places a strong emphasis on *audience-induced organisational behaviour*. It argues that the configuration of influential stakeholders, their expectations, and the threats they pose are fundamental explanatory factors driving micro-level agency behaviour. Promising avenues for research range from exploring the link between organisational reputation and the core tasks of EU agencies—i.e., their scientific regulatory outputs—to studying the implications of stakeholder engagement practices and such (informal) coalition-building practices of legitimisation for political control.

In helping us tackle these questions, a reputational lens holds promise to an enhanced understanding of the evolution of the EU regulatory state by allowing us to unpack the thus far 'black-box' of regulatory efforts at legitimisation.

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