

Legitimising Risk Regulation

New innovations create new risks. States frequently adopt rules to protect the environment and health from these risks. Disparities between national rules act as obstacles to trade because producers must satisfy the rules of each state to which they wish to export. To promote free trade the EU and WTO only allow their member's to adopt such rules on the basis of a rational scientific justification. Likewise, when the EU harmonises national rules, it follows its own free trade and scientific rational and is itself limited by WTO scientific justification requirements. These scientific restrictions and the limited influence of the public in the harmonisation program of the EU call into question the EU's democratic legitimacy.

There is a normative-political dimension to the decision where to locate the trade-off between free trade and risk protection. This preference will often vary from one state to the next, as can technical capabilities, and any public habits or environment circumstances that affect a risk. Complexity is further compounded when a risk is scientifically uncertain, or involves strong ethical dimensions.¹ Habermas argues that law can only be legitimised when the formal, institutionalised deliberation and law making, which goes on in the political system, is open to inputs from the informal deliberation, which goes on in the public sphere.² Whilst risk regulation cannot be performed meaningfully without scientific expertise, science has no 'autonomy of truth',³ which entitles it to be used as the basis of risk decisions without public involvement. Behind the protests in Seattle, Prague, Nice and Quebec lies a mainstream public disquiet about their exclusion from the process.

The precautionary principle and comitology have been mooted as possible means of ensuring greater EU-level responsiveness to public concerns about risk. I propose to test whether this optimism is warranted - firstly, by researching the use that Member States and the EU have made of the precautionary principle in the Court to broaden their regulatory discretion. And secondly, to review existing research on the comitology system to assess to what extent delegates serving on EU committees respond to public concerns.

The legal framework

EU Member States must generally allow a product that has been legally produced in one Member State onto their own market, even if it does not comply with the rules that similar domestic products must.⁴ Only if a Member State can demonstrate that a product poses a risk to the environment, or the health and life of humans, animals and plants, may it adopt rules that potentially hinder trade.⁵ Such rules must be necessary, proportionate to their aim and be the least trade restrictive alternative.⁶ A rule prohibiting a product, authorized in the Member State of production, is not considered necessary if, taking into account the habits or conditions prevailing in the importing Member State, it is not considered harmful by international scientific research and in particular the findings of any relevant EC and UN scientific committees.⁷ When these bodies indicate that there is scientific uncertainty their findings are not binding.⁸ Likewise, when they set threshold safety levels the Member State is entitled to take into account local habits and conditions when setting its own rules. But, in all cases, a Member State must take account of the scientific findings of these bodies and the onus is on

¹ E.g. GMOs, hormones in beef, mobile-phone radiation emissions and food additives.

² J. Habermas, *Between Facts and Norms*

³ Ezrahi, *The Descent of Icarus: Science and the Transformation of Contemporary Democracy*

⁴ Article 28 EC Treaty prohibits 'quantitative restrictions on imports and all measures having equivalent effect'. See also the doctrine of 'mutual recognition', case 120/78, *Cassis de Dijon* [1979] ECR 649

⁵ Case 302/86 *Commission v. Denmark* [1988] ECR 4607 and Article 30 EC Treaty

⁶ Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961, paragraph 12 and case 104/75 *Adriaan de Peijper, Centrafarm BV* [1976] ECR 613, paragraph 16 and 17

⁷ Case 178/1984 *Reinheitsgebot* [1987] ECR 1227, paragraph 44

⁸ Case 247/1984 *Motte* [1985] ECR 3887 and case 174/1982 *Sandoz BV* [1983] ECR 2445, paragraphs 10, 16, and 17

them ‘to show in each case, in the light of national [conditions and] habits and with due regard to the results of international research, that the rules are necessary to give effective protection’.⁹

Although the EU restricts a Member State’s rule-making autonomy there is still sufficient freedom within these limitations for significant disparities to develop between national rules designed to protect the environment or health. The EU has been granted the power to harmonize national rules to avoid this market fragmentation, or a possible race-to-the-bottom in which Member States compete with each other to offer the most attractive rules to potential investors.¹⁰ The EU can simultaneously pursue a free trade as well as a risk protection agenda. Harmonised measures must ‘take as a base a high level of protection, taking account in particular of any new development based on scientific facts.’¹¹ In the context of scientific uncertainty, the EU’s approach is informed by the precautionary principle. The Commission considers it to be triggered when there are ‘indications through preliminary objective scientific evaluation that there are reasonable grounds for concern’.¹² In these cases the ‘appropriate response’ is not purely a scientific decision, but also ‘the result of a political decision, a function of the risk level that is ‘acceptable’ to the society on which the risk is imposed.’¹³ There is therefore certainly some concession towards public responsiveness – an attempt at striking a balance between scientific rigour and public concerns. Even when the EU has harmonised national rules, Member States may still introduce or maintain stricter rules,¹⁴ but their competence is subject to a scientific justification test.¹⁵

The WTO places further scientific constraints on the EU. Measures to protect the health and life of humans, animals and plants must be based on scientific evidence and not maintained without sufficient evidence. International standards, guidelines or recommendations should be followed unless there is a scientific justification for a more stringent measure, in which case it should be based upon a risk assessment, which applied recognised scientific techniques.¹⁶ This has been interpreted by the Appellate Body as a ‘substantive requirement that there be a rational relationship between the measure and the risk assessment’.¹⁷

The precautionary principle

The precautionary principle could potentially be used to defend regulatory autonomy from the encroachment of strong scientific justification requirements and, in so doing, could open up a sphere of political action in which there is genuine dialogue, which involves both scientific and broader public perspectives. The regulator’s task is thereby recovered from a de-politicised realm, in which the efficacy of scientific methodology and the importance of free trade cannot be challenged. They are liberated to handle risk in a manner that commands public confidence. This optimistic appraisal of the potential of the precautionary principle to promote democratic legitimacy within the EU depends upon its reception by the Court. I propose to research the way in which individuals, Member States and European institutions have attempted to use the precautionary principle and the reception they have received from the Court.

Comitology

⁹ Case 304/1984 *Claude Muller* [1986] ECR 1511, paragraph 26

¹⁰ Articles 94 and 95 EC Treaty

¹¹ Article 95(3) EC Treaty

¹² Commission Communication, COM (2000)1, 2 February 2000, p10

¹³ *ibid.*, p16

¹⁴ Articles 95(4) and 176 EC Treaty

¹⁵ Article 95(5) EC Treaty and e.g. case 178/84 *Reinheitsgebot* [1987] ECR 1227, paragraph 44

¹⁶ Articles 3.1 and 3.3 read together with Articles 5.1 and 5.2 Sanitary and Phytosanitary (SPS) Agreement

¹⁷ *Hormones in Beef*, WT/DS/26&48/AB/R, <http://www.wto.org/wto/dispute/distab.htm>, at para. 193

Comitology has been mooted as the ideal institutional response to the continual process of adapting regulatory policies to cope with new risks. It is an institution suited to mediating between expert opinion and public responsiveness (and therefore legitimacy), as well as the often-conflicting requirements of free trade, risk protection and Member State diversity.¹⁸ It 'rejects the idea of supranational central implementation machinery headed by the Commission, and thus directly forces national governments into a co-operative venture'.¹⁹ It thereby allows a Community-wide co-ordination of policies without pre-empting special national considerations. In addition, committees are heralded as non-hierarchical organisations in which debate is deliberative and co-operative, rather than strategic. National, supranational and special interests can be combined with expert opinion in a forum that promotes mutual learning and responsiveness to special concerns. In order to persuade others to agree a delegate must enlarge his position so that it becomes compatible with something that others hold to be true. He has to speak from the position of the 'generalized other'.²⁰ The EU legal framework channels debate by circumscribing the legitimate modes and objectives of regulatory policy and thereby creates an arena in which agreement is easier to achieve.

Others have argued that comitology is incapable of rescuing the EU from its legitimacy crisis because it too is insufficiently responsive to public opinion. Some go even further in claiming that the comitology system has in fact *contributed* to the technocratization of EU-level politics. Wessels argues that comitology has widened 'the gap between normal citizens and policy matters' due to the unequal chances of participation and its concentration on expert knowledge.²¹ The Institute for Europäische Politik observes that 'Commission officials generally do not think that their committee significantly reduced the Commission's freedom, and even less that it has been set up to assure the Member States' control'.²² If these opinions are right, then either comitology is unable to establish the necessary link between the public and the political sphere, or, even if it can, committees are largely powerless. Neither conclusion rescues the EU from its democratic deficit.

It is therefore necessary to review the extensive empirical research that has already been done on the workings of the EU's committee system. A preliminary search reveals that various research projects have focused on different aspects of the system. One report indicates that the style of deliberation within the committee depends upon whether it is an expert committee under the Commission, a working party under the Council, or a comitology committee proper.²³ Another report shows that agency personnel who serve on technical committees are apparently more likely to maintain a functional orientation, with loyal to their technical discipline, whereas officials employed at the ministry level are more likely to adopt a national representative role.²⁴ Trondal observes that the more time an official spends embedded in EU level structures; separated in time and space from his national affiliations, the more likely it is that he will transfer loyalty and allegiance to the European level.²⁵ I intend to review all available reports on committee workings and then assess their implications for the claims made about the comitology system's potential to rescue the EU from its legitimacy problems.

¹⁸ e.g. C. Joerges & J. Neyer, *From Intergovernmental Bargaining to deliberative Political Processes: The constitutionalisation of Comitology*. See also more generally, R. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, *Political Science Quarterly*, Vol.109, p23

¹⁹ C. Joerges & J. Neyer, p 277

²⁰ G.H. Mead, *Mind, Self and Society from the Standpoint of a Social Behaviourist*

²¹ W. Wessels, *Comitology: fusion in action. Politico-administrative trends in the EU system*, 1998 *Journal of European Public Policy*, 5(2), 209-34, at p228

²² Quoted from G. Majone, *Regulating Europe*, p73

²³ e.g. M. Egeberg & J. Trondal, *Differentiated integration in Europe: The case of the EEA country Norway*, 1999 *Journal of Common Market Studies* 37

²⁴ M. Egeberg, *Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-Making*, http://www.arena.uio.no/publications/wp98_24.htm

²⁵ J. Trondal, *Integration Through Participation*, <http://www.wu-wien.ac.at/eiop/texte/1999-004.htm>