

Do EU committees responsible for regulating risk sufficiently link public and political spheres to satisfy the requirements of deliberative democracy?

States frequently adopt regulations to protect the environment and health from risks caused by new innovations. If disparities develop between national regulations these 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 only allow its member's to adopt these regulations 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.

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.¹ Applying this theory of legitimate governance, the scientific restrictions and the limited influence of the public in the harmonisation program of the EU call into question the EU's democratic legitimacy.

Some writers² argue that the regulatory task can be reduced to an efficiency criterion. On that basis it requires no democratic legitimization because it does not involve the redistribution of wealth, but merely the maximization of efficiency and this is something that can be done legitimately by experts. In the case of risk regulation this argument is not compelling. 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. There is a political dimension to the decision where to locate the trade-off between free trade and risk protection that is incapable of being resolved legitimately by experts. 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.⁴ Behind the anti-globalisation protests lies a mainstream public disquiet about their exclusion from the process of governance.

Comitology has 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. Joerges and Neyer⁵ claim that the comitology system of the EU, and more particularly the quality of the debate within it, is capable of legitimising the production of risk regulation at Community level. This they say is because it satisfies the requirements of deliberative democratic theory. They have analysed discussions

¹ J. Habermas, *Between Facts and Norms*

² E.g. G. Majone, *Regulating Europe*

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

⁴ E.g. GMOs, hormones in beef, mobile-phone radiation emissions and food additives.

⁵ C. Joerges & J. Neyer, *From Intergovernmental Bargaining to deliberative Political Processes: The constitutionalisation of Comitology.*

within the committees to show that it is deliberative, rather than strategic - one of the main requirements of deliberative democracy, but the other main requirement is that the deliberation within the political sphere (in this case the committee) must be linked to deliberation in the wider public sphere. This would only be the case if committee delegates air public concerns about risk in the committee deliberation. I will review a large amount of existing research on the comitology system to assess to what extent delegates serving on EU committees respond to public concerns.

The EU is granted the power to harmonize national rules to avoid 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.⁶ 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.'⁷ 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'.⁸ 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.'⁹ 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,¹⁰ but their competence is subject to a scientific justification test.¹¹

Comitology is an institution that could be 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.¹² It 'rejects the idea of supranational central implementation machinery headed by the Commission, and thus directly forces national governments into a co-operative venture'.¹³ 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'.¹⁴ 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.

⁶ Articles 94 and 95 EC Treaty

⁷ Article 95(3) EC Treaty

⁸ Commission Communication, COM (2000)1, 2 February 2000, p10

⁹ *ibid.*, p16

¹⁰ Articles 95(4) and 176 EC Treaty

¹¹ Article 95(5) EC Treaty and e.g. case 178/84 *Reinheitsgebot* [1987] ECR 1227, paragraph 44

¹² 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

¹³ C. Joerges & J. Neyer, p 277

¹⁴ G.H. Mead, *Mind, Self and Society from the Standpoint of a Social Behaviourist*

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.¹⁵ 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’.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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.

¹⁵ 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

¹⁶ Quoted from G. Majone, *Regulating Europe*, p73

¹⁷ e.g. M. Egeberg & J. Trondal, *Differentiated integration in Europe: The case of the EEA country Norway*, 1999 *Journal of Common Market Studies* 37

¹⁸ M. Egeberg, *Transcending Intergovernmentalism? Identity and Role Perceptions of National Officials in EU Decision-Making*, http://www.arena.uio.no/publications/wp98_24.htm

¹⁹ J. Trondal, *Integration Through Participation*, <http://www.wu-wien.ac.at/eiop/texte/1999-004.htm>