Institutional Stimulation of Deliberative Decision-Making: Technical Regulation in the European Union

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Abstract

Institutions based upon the systematic separation of different decision functions may stimulate deliberative decision-making, if they hinder negotiators from introducing their bargaining power into the negotiation process. Such arrangements exist for the regulation of requirements for health and safety of products within the Single Market. The article explores the underlying causal mechanism and examines the cases of machines and toys.

Introduction

Well-designed decision procedures can induce stakeholders to substitute bargaining over the distribution of co-operation gains with the discursive search for best solutions. In the present article, we develop a theoretical concept of functionally differentiated decision-making and derive from it an arrangement which provides strong incentives for actors to shift from power-based bargaining to reason-based arguing. We find such an arrangement in the so-called "New Approach" to European governance in the Single Market, which separates the elaboration of basic health and safety requirements from their application to numerous products and groups of products. Whereas the former task is retained by the joint European legislator, i.e. Commission, Council and Parliament, the latter is delegated to private standardisation bodies and comitology committees (Pelkmans, 1987).

In recent years, scholars of European Integration have increasingly brought together deliberation and committee decision-making as two important aspects of European governance. Based upon discursive participation of the broader public in political decision-making (Elster, 1998b, Murphy, 2005), the concept of deliberation promises to provide a mechanism to democratise the European polity short of its transformation into a regular democratic state (Erikson and Fossum, 2002, De la Porte and Nanz, 2004). Surprisingly, deliberation has increasingly been associated with governance by committees, which is characteristic for supranational policy-making and distinguishes the European polity from international negotiation systems. Joerges and Neyer (1997) claimed that the so-called comitology committees transform "intergovernmental bargaining to deliberative problem solving".

However, it is far from clear under which conditions committees are empirically capable of systematically transforming European governance, and how they might do so. Authors supporting the claim argue, for example, that committee deliberation is based upon scientific consensus and the socialisation of committee members (Wolf, 2000, Joerges and Neyer, 1997), but empirical studies demonstrate the allegiance of committee members in the first place to their state administrations and only in the second place to the European common interest (Egeberg *et al.*, 2003, pp. 31, 36; Rhinhard, 2002, Elgström and Jönsson, 2000). Whereas committee decisions are usually taken by consensus (Falke, 1996, pp. 138-143), the absence of formalised disagreement does not necessarily indicate deliberative decision-making, because it can also be reached by fierce bargaining and is rather wide-spread in international and EU decision-making (Heisenberg, 2005). While the role of law (Joerges, 1999, p. 317) and the complex institutional environment are emphasised (Eriksen and Fossum, 2002, p. 409), neither the conditions under which these factors might induce deliberation nor the precise causal mechanisms are specified. Moreover, negotiation analysis emphasises the theoretical difficulty of clearly separating deliberation from bargaining because negotiators may change between the two interaction modes of discursive arguing and power-based bargaining within a single negotiation round (Elgström and Jönsson, 2000, Holzinger, 2001).

This paper is intended to contribute to this debate by identifying an institutionally based causal mechanism, which promises to systematically produce deliberative interaction. A causal mechanism is a set of statements that are logically connected and provide a plausible account of how a given cause creates an observed effect (Schelling, 1998, see also George and Bennett, 2005, 135-145). Jon Elster has begun to explore causal mechanisms with his conception of arguing not as a consequence of individual predisposition, but as a rational response to an institutionalised opportunity structure (Elster, 1998b, pp. 100-105, also Neyer,

2003, and Niemann, 2004). We suggest that this path of reasoning is most promising, while it should focus more carefully on the precise causal mechanisms and the conditions under which they become operative.

The argument is developed in four steps. In the first section, we argue that deliberative decision-making does not only have major advantages over bargaining, but that institutional arrangements can, under certain circumstances, create systematic incentives even for rational utility maximisers to change from power-based bargaining to reason-based arguing. The second section explores the "New Approach" and demonstrates that this institutional arrangement closely reflects the theoretically constructed mechanism. The third section shows how the legislative process of, and standardisation process under, the Machinery Directive are systematically pushed toward preventing nation-states and other stakeholders from the pursuit of parochial interests. The fourth section explores the 'hard case' of toy regulation, where regulatory problems have occurred in recent years.

Theoretical Framework

Bargaining and Arguing

Bargaining is well-known from rational choice theory and reflects strategic action by rational utility maximisers within a communicative process. If the actors know their preferences and act accordingly, they cannot be expected to abandon the pursuit of their interests merely because they enter a negotiation round. Typically, they have competing interests as to the distribution of co-operation gains, but they also pursue a common interest in reaching agreement without which these gains could not be reaped (Scharpf, 1997: 118-124). They resort to power resources available to them outside the negotiation forum in the form of promises or threats, in particular the threat to abandon the co-operation project and thus

choose 'exit'. The better his 'best available alternative to agreement' is, the less is an actor in need of co-operation and the more powerful will he be within the negotiations. The distribution of gains from a bargaining process can be expected to reflect, by and large, the distribution of power between the actors involved outside the negotiation forum (Elster, 1989, pp. 74-82).

The interaction mode of arguing is diametrically opposed to bargaining. Whereas Habermas (2001, pp. [384-385*]) and several authors drawing on the theory of communicative action (Risse, 2000, Müller, 2004) assume that communicative action requires actors not to behave as strategic utility maximisers, Jon Elster (1998b) was among the first to point out that even rational utility maximisers may, under certain circumstances, resort to an exchange and common appraisal of rational arguments. An argument is a validity claim accompanied by reasons, which may be disputed by another validity claim accompanied by other reasons. Competing validity claims are appraised and judged in a discursive process against commonly accepted criteria (Habermas, 1973, 1999, pp. 113-116, Gehring, 2003), so that the outcome is better reasoned, and thus more convincing, than any of the original claims. Hence, while power is the main resource in bargaining processes, discourses rely upon the provision of convincing reasons – a resource, which may be available to otherwise weak actors such as small states or non-state actors.

Co-ordination through arguing is more demanding than co-ordination in the mode of bargaining. Whereas bargaining is based upon power and directed at the best possible pursuit of one's own preferences, arguing requires that the participants of a discourse are prepared to question, and possibly revise, their perspectives on the disputed subjects. If nobody is prepared to be convinced, and to adjust preferences accordingly, reasons will not matter. Accordingly, arguing presupposes an 'ideal speech situation' (Risse, 2000, p. 10). The participants must

abstain from introducing power available outside the negotiations into the discourse and they must be prepared to accept that the power resources associated with a speaker do not invalidate the arguments submitted by him. Moreover, the participants will not be able to settle a dispute discursively, unless they have available, or develop during the discourse, commonly accepted criteria, against which to appraise conflicting validity claims. Hence, discourse will be facilitated by a common 'life-world' or a common set of knowledge and expertise, or commonly accepted rules and norms.

Collective decisions reached by arguing may be considered as reasonable solutions to given problems, because they are based upon convincing reasons and not distorted by the struggle over the allocation of individual costs and benefits and by the prevailing distribution of power among the participants. If the demanding conditions for the discursive settlement of disputes are fulfilled, the emerging agreement will reflect the solution of a given problem, which is most convincing according to the commonly accepted criteria. It will not be distorted by parochial interests and the distribution of power outside the negotiation forum. In this regard, the quality of deliberatively produced decisions is 'better' than that of decisions emerging from bargaining processes and approaches the ideal of 'good governance' (Joerges 1999).

Unfortunately, the interaction mode of arguing does not elucidate the conditions under which a discourse may become operative among real-world actors. To many observers of political decision processes, arguing is still largely an idealistic, if not entirely utopian, concept. It seems heroic to assume that powerful actors might voluntarily refrain from introducing their power resources into a negotiation, if this would imply to sacrifice benefits otherwise achievable. Hence, bargaining permanently threatens to supersede a discourse among real-world actors. This raises the question of how institutions can provide the necessary

incentives for the powerful participants of a negotiation round to abandon bargaining and thereby enhance the opportunities for arguing and reason-based problem-solving.

Institutional Incentives for Arguing and Deliberative Problem-Solving

Simple negotiations provide limited room, and no institutional incentives at all, for arguing and deliberative problem-solving. Careful analysis of the conditions under which actors might be prepared to be convinced by well-reasoned arguments reveals, that room for arguing exists even in a simple negotiation round in which all decisions are taken by the negotiators themselves Risse 2000). Discursive interaction may contribute to elucidating the circumstances upon which preferences are founded. However, once circumstances have been clarified, and preferences adjusted accordingly, we cannot expect that the powerful actors will be inclined to refrain from influencing the choice of regulatory decisions by their power resources, because this would be all too altruistic (Elgström and Jönsson, 2000). Moreover, a simple negotiation round does not create any institutional incentive whatsoever to modify interaction in favour of arguing. Whether or not arguing matters depends exclusive on the actors involved as well as on the nature and complexity of the problem at stake.

Establishment of a scientific or technological advisory committee creates an institutional incentive for arguing by introducing functional differentiation into the decision- process. If the negotiating parties desire to foster the discursive exploration of the foundations of their preferences, they will establish a separate forum elaborating advise on these issues (Gehring, 1999). Whereas all decision-making power is formally still concentrated at the negotiation forum, both forums are functionally specialised on different aspects of relevance for the decision

process, while being relieved from others (Krapohl, 2003). The advisory committee cannot fulfil its mandate and influence the entire decision process unless it struggles to elaborate the most convincing assessment possible, so that there is a good chance that its members resort to arguing (Gehring, 2002, pp. 166-170). The negotiation forum, in turn, is specialised on balancing and accommodating preferences, so that we can expect that bargaining ensues. Hence, functional differentiation may create institutionalised protection for that part of the decision process, which is suitable for arguing.

Functional differentiation of the decision process can also separate the two necessary components of discursive dispute resolution, namely the elaboration of criteria and the settlement of disputes in light of these criteria. In contrast to bargaining, discourse is a triadic process. At least two disputants put forward arguments which refer to commonly accepted criteria. If criteria are not obvious or can be taken directly from the common 'life world' of the actors involved, they will have to be identified or elaborated. Hence, a discourse amounts to a two-step process. Criteria must be identified, before they are applied to the concrete dispute at stake. These separate tasks may be assigned to different forums, each of which would concentrate on a subset of the entire decision load to be processed, whereas being relieved, and deprived, of the other part.

Specialisation on the elaboration of abstract decision criteria facilitates arguing because it tends to deprive actors from pursuing case-specific parochial interests. Elaboration of decision criteria is the more general task, which political actors will usually retain for themselves. Compared to a simple negotiation round, their decision situation changes in two aspects. Actors are forced to produce abstract and coherent standards which can be implemented by other actors, rather than simply packing together compromises on the individual disputes, as is possible in undifferentiated negotiations. Even if parties attempt to calculate their overall

interest, they are forced to formulate a 'median preference' which can be transformed into coherent principles. If criteria are over time applied to yet unknown cases, actors may even have to decide without knowing their case-specific preferences at all, so that they operate under a Rawlsian 'veil of ignorance' (Rawls, 1980, pp. 136-142). In this situation, even rational utility maximisers controlling power resources will struggle for criteria, which promise to produce acceptable decisions. The common search for such criteria and the evaluation of the consequences of different options is a matter for discourse rather than bargaining (Vanberg and Buchanan 1989).

Specialisation on the decision of single cases in light of existing decision criteria facilitates arguing because criteria limit discretion, and decisions can be appraised against the criteria. Since implementation decisions are in European governance rarely fully assigned to some impartial third party (Majone, 2001), decision-makers will once again be inclined to bargain over outcomes, if possible. However, their room for manoeuvre will be limited, if the externally created criteria cannot be ignored at will. Moreover, decisions will frequently be so limited in scope that mutually beneficial (co-operative) solutions are difficult to identify. In this case, the solution most appropriately fitting the externally given criteria provides a natural 'focal point', around which actors' expectations may converge (Schelling, 1960, p. 100). Finally, decisions may be appraised by yet other actors against the criteria, so that non-convincing decisions are identified, and possibly cancelled. Hence, if the decision-makers operating at this level can be effectively motivated to found their decisions on the relevant decision criteria, and if their decisions are later on appraised against these criteria, their ability to bargain will diminish so that they can engage in a discourse on the best possible application of the criteria to the particular dispute.

In the following empirical analysis, we will seek to identify opportunities for, or instances of, bargaining, instead of attempting to attribute decisions to particular speech acts. For empirical and theoretical reasons, it is difficult to attribute political decisions to particular speech acts because both bargaining and arguing are usually present in negotiations (Holzinger 2001). Even if predominantly bargaining, negotiators tend to provide reasons for their threats and promises. And even if extensively deliberating, they might terminate a negotiation round by a final phase of bargaining (Elgström and Jönsson, 2000). Assuming that power-based bargaining constitutes the main obstacle for deliberative problem-solving, diminished opportunities for bargaining will automatically increase the room for reason-based arguing and deliberative problem-solving. Accordingly, we explore our hypothesis by seeking to identify such opportunities as well as instances of bargaining and decisions which are difficult to explain in the absence of bargaining.

The 'New Approach': Functional Differentiation and the Promise of Deliberation

In the context of the Single Market Programme, the European Union changed its approach to technical harmonisation. The concept of total harmonisation was replaced with the New Approach combining legally binding directives and non-binding European standards (Pelkmans, 1987). For many years, the Union tried to harmonise technical regulation of the member states by way of detailed directives spelling out the safety standards deemed necessary (Vos, 1999a, pp. 54-56). Legislation had been cumbersome and time consuming, if not entirely blocked, partly because it had to cope with an enormous amount of technical details, but also because the member states pursued parochial interests and seeked to transfer their domestic safety concepts to the European level. Adoption of directives under the New Approach was dramatically accelerated (Vos, 1999a, pp.: 272-273) when

the process was "depoliticized" (Nicolaidis and Egan, 2001, p. 463). Today 23 directives are in force, which cover wide product areas like machinery, toys, elevators or medical products, including sectors, in which decision-making had been blocked under the old approach. Directives are complemented by several hundred European standards.

The New Approach strictly separates the elaboration of general health and safety requirements from their detailed technical specification. Henceforth, only the basic requirements were to be defined in the legislative process, while the elaboration of technical specifications was delegated to three privately organised European standardisation organisations, namely CEN, CENELEC and ETSI, composed of the standardisation organisations of the member states. While the European standards elaborated by these privately organised bodies are not legally binding, they cannot be ignored at will. Member states must assume that products conforming with their requirements are also in conformity with the legally binding general health and safety standards of the relevant directives, and accept marketing of such products within their jurisdictions. Accordingly, member states must ensure that the requirements of the directive really ensure an appropriate level of health and safety protection and that the European standards actually conform to these requirements (Pelkmans, 1987).

Whereas the member states are directly involved in the elaboration of the directives, the New Approach includes a sophisticated procedure to ensure that European standards do not undermine domestic health and safety levels (Council Resolution on a New Approach to Technical Harmonization and Standards; OJ C 136, 04/06/1985, 1-9). The procedure assigns different functions to the European standardisation bodies, a comitology committee in which the member states are represented, the Commission, the member states individually, and, implicitly, the European Courts. First, a standardisation project under the New

Approach has to be approved by the Commission after consultation of the Committee on Standards and Technical Regulations. This body constitutes an advisory committee in which the member states are represented; its opinions are not formally binding upon the Commission, but shall be adhered to as far as possible (Vos, 1999b, pp. 24). Second, standardisation itself takes places within the relevant standardisation body without intervention of the public actors. Third, a European standard adopted under the New Approach must be registered by the European Commission after consultation of the Committee on Standards and Technical Regulations. The conformity presumption limiting the room for domestic regulation is triggered by the publication of its source in the EU Official Journal. Fourth, a member state doubting that a standard adopted under the New Approach ensures the health and safety requirements of the relevant directive can trigger a safeguard procedure. It must provide reasons, which will be discussed in the Committee on Standards and finally decided upon by the Commission. This decision is legally binding and may be brought before the European Court of Justice.

Altogether, the New Approach very closely reflects the institutional arrangement expected to preclude bargaining, and thereby foster arguing, which has been developed in the preceding section. The legislative process is not only relieved from discussing many technical details, it also deprives the member states of much of their original room for preference-based bargaining, because it forces them to concentrate on the elaboration of general health and safety requirements applicable to large product groups such as machinery or toys. The implementation process is designed to ensure that the privately organised standardisation bodies do not abuse their discretion, but employ their technical expertise to identify suitable solutions in conformity with the legally binding health and safety requirements of the relevant directive. Likewise, the procedure hinders the member states from abusing their oversight rights and their prerogative to ensure health and safety

under their jurisdictions. The Committee on Standards is limited to discussion, while decisions are made by the Commission, so as to preclude inter-governmental bargaining. Hence, member states desiring to influence the decision on a mandate or on the registration of a standard must convince the Commission. And the safeguard procedure allows a member state to challenge an existing standard, but it must convince the Commission and the other member states that the standard does not ensure health and safety of the regulated products. Finally, the Commission is not free to decide at will, because it might, in the end, have to convince the European Courts of the reasons for its decisions. In short, the procedure is designed to bind all actors involved firmly to the legally binding criteria enshrined in the relevant directive.

The Success Case: Technical Regulation in the Field of Machinery

Drawing on legislation and standardisation in the field of machinery, we now explore whether the New Approach procedures actually prevent the member states systematically from pursuing their parochial interests and thus put our hypothesis to a test. Assuming that the absence of opportunities for bargaining will induce even powerful stakeholders to engage in deliberative decision-making, we seek to find evidence disproving our hypothesis by identifying such opportunities and instances of bargaining.

The Machinery Directive

The Machinery Directive (Council Directive 89/392/EEC on the Approximation of the Laws of the Member States Relating to Machinery; OJ L 183 , 29/06/1989, pp. 9-32) provides a reliable set of criteria for the subsequent elaboration of European standards. Due to two general clauses, it envisages a high

safety level. First, it requires machinery to be "placed on the market and put into service only if it does not endanger the health or safety of persons and, where appropriate, domestic animals or property, when properly installed and maintained and used for its intended purpose" (art. 2.1). Accordingly, every accident which is not a clear misuse indicates a possible violation of the Directive. Whereas absolute safety cannot be attained by technical means, because some machines are inherently dangerous, emerging room for discrete, and thus preference-based, interpretation by interested actors is limited by the automatic development of the required safety measures. Producers are committed to take "the state of the art" into account when designing and constructing machinery with the purpose of approaching the objectives of the Directive (annex I, 2). The state of the art is a high hurdle for producers because it includes, beside the acknowledged rules for accident prevention, also new findings reflected in scientific publications or new patents (Egan, 2001, p. 186). In addition, the Directive defines more specific safety requirements addressing certain risks like technical hazards (annex I, 1.3), fire (annex I, 1.5.6) or explosion (annex I, 1.5.7). Altogether, the Machinery Directive is recognised as the most sophisticated regulation of common safety requirements under the New Approach (Berghaus and Langner, 1998).

Surprisingly few conflicts arose during the elaboration of the Directive. Most aspects of the safety approach, including the general clauses just mentioned and the relatively precise regulation contained within the annexes, have been easily agreed upon. This confirms our expectation that the moulding of general norms under conditions of uncertainty prevents the member-states from pursuing their national interests.

Yet, the analysis of the documents of the legislative process reveals certain conflicts (Kerler, 2005a, pp. 232-240). Southern countries sought exceptions from the high safety level and Denmark aimed for clauses allowing more stringent

national regulation (Opinion of the Economic and Social Committee, OJ C 1988, 31/12/1988, p. 32; EP Report of Proceedings 24/5/1989, pp. 2-378). Moreover, particularly dangerous woodworking machines and other extremely dangerous machines were only included in the Directive after the European Court of Justice had decided in a French-German conflict that member states like France are allowed to apply safety concepts relying upon sophisticated technical protection devices, even if other member states like Germany rely on lower technical standards accompanied by a better education of workers (Alter and Meunier-Aitsahalia, 1994). All three conflicts are rooted in particular national interests. Economically less developed states will always advocate lower (and thus less costly) protection standards than more developed ones. High standard countries will always want to reserve the right to enact more stringent regulation domestically. Germany and France relied on different national safety approaches. These conflicts reveal some limits of the identified causal mechanism. Where the safety concept of a homogenous group of products is ex-ante controversial, national interests can be identified, and the causal mechanism developed above is not activated. However, all three conflicts were solved in line with the rules and the general logic of the Single Market, and the power resources allocated by this logic. If market integration is to be achieved, domestic regulation must be excluded, in particular if it is more stringent than the European standards. If the high-standard countries retain the right of domestic regulation in the absence of harmonisation, their agreement presupposes a comparatively high European level of technical safety.

Some other conflicts are not directly relevant in the present context. Disputes arose on how to ensure the safety of machinery in the interim period until European standards could specify the general requirements of the Directive. The member states demanded successfully a specific comitology committee for the safety of machinery, aside of the already existing Committee on Standards; and

interest groups, in particular consumers, demanded unsuccessfully participation in the standardisation and appraisal process. However important these aspects were for particular actors, they did not jeopardise the operation of the causal mechanism identified in the theoretical section. We expect the mechanism to blur case-specific national interests, not the general preference of the actors involved to increase their own ability to ensure the reasonable operation of the arrangement.

Standardisation in the Field of Machinery

The success of standardisation in the field of machinery disproves the original fear that the New Approach would merely transfer conflicts from the legislative level to the implementation level, so that the rapid adoption of the Directive would be compensated by sluggish standardisation. For the Machinery Directive, this must definitely be denied. In 2004, more than 600 harmonised standards have been in force which were developed by the European standardisation bodies or adapted from the International Standardization Organization (ISO) (Commission Communication, OJ C 95, 20/4/2004, pp. 2-31; see Wolf, 2000). The level of conflict between the standardisation organisations and the public oversight actors is low. Until 2002, only ten safeguard procedures against a standard had been initiated by interested countries (Stefanova, 2005a, p. 271).

The standardisation process is vertically differentiated and mobilises itself the causal mechanism identified in the theoretical section. To ensure rapid coverage of all products by European standards, a three-staged system of standards was introduced: A-standards define basic requirements concerning certain risks, B-standards spell out specific safety-requirements for a certain sector of machinery, and C-standards determine specific safety-requirements for one type of machines. This approach enabled the actors to pass the general A- and B-standards quite fast (Egan, 2001, p. 187). Subsequently, these standards served as yardsticks for the

development of concrete and detailed C-standards (Puplett, 2000), which are the most contentious ones. Concerning the general type-A-standards, and to a lesser extent also type-B-standards, national standardisation bodies could hardly pursue very specific interests of certain national producers or consumer organisations, because they were forced to promote very general preferences across sectors They might even have had difficulty to identify every relevant interest of producers and consumers. Upon their adoption, these standards further decrease the discretion available during elaboration of the specific C-standards, which directly affect particular products and are prone to preference-based bargaining. Indeed, the general standards were adopted, on average, more rapidly than C-standards. Moreover, member states invoked the safeguard clause exclusively in regard to C-standards (Stefanova, 2005a, p. 271).

Standards are elaborated in a highly differentiated decision process based upon expertise and involvement of major stakeholders among the national standardisation organisations, as well as institutionalised self-restraint. Within the Comité Européen de Normalisation (CEN), i.e. the most relevant body for machinery, a Technical Committee supervises the decision process. The initial draft of the standard is normally elaborated by a Working Group, which should be limited in size and have a 'right balance' between different interests of manufactures, users, consumers and standardisation bodies. Working Groups are supposed to come to a consensus and consist of experts which should stay in contact with their national standardisation bodies to minimise the risk of having a draft standard rejected at later stages (CEN, Guidance for the Work of Working Groups). Draft standards are distributed to all national standardisation organisations, and comments are analysed by a sub-committee of the Technical Committee concerned. Eventually, the draft as amended in response to the comments is submitted to the General Assembly for a final vote where it can be rejected by a majority of votes. Negative votes must be accompanied by reasons

(CEN, Internal Regulations, Part 2: Common Rules for Standardization Work, pt. 11.2.4.2). National standardisation organisations can appeal against decisions of CEN bodies, if "questions of principle", e.g. violations of CEN Internal Regulations, are concerned (ibid., pt. 7). To avoid conflict with the public oversight actors, drafts are cross-checked by a consultant paid by the Commission as to their compatibility with the legally binding requirements of the Directive. Altogether, this arrangement is designed to foster a deliberative exchange of arguments and to limit the discretion of the decision-makers, although it does not totally exclude bargaining among national standardisation organisations.

The public oversight system is latent and inactive except in case of 'fire alarm' (McCubbins and Schwartz, 1987). Mandates for the drafting of new standards are usually elaborated by the standardisation bodies and merely approved by the Commission after consultation of the Committee on Standards and Technical Regulations, but precise mandates may be issued in case of difficulties reflected in safeguard procedures. Likewise, elaborated standards are usually registered by the Commission after consultation of the Committee on Standards merely upon formal control of their conformity with procedural and mandate-requirements. Hence, there is no systematic 'police-patrol' oversight of every single standard. However, if a member state alerts the oversight system by invoking the safeguard clause against a standard, public actors examine in detail whether the standard violates the requirements of the Directive and decide how the difficulty should be remedied, e.g. through withdrawal of the standard or incriminated clauses, its amendment, or limitation of its scope (see next sub-section). This occurs in particular in the specialised Standing Committee on Machinery (henceforth Machinery Committee) established under the Directive. Accordingly, standardisation bodies always operate in the shadow of ex post appraisal by the public actors, and of possible rejection of their output, if the demanding requirements of the Directive are not fulfilled.

Critical Cases

The analysis of critical cases demonstrates that national preferences exist, but do not re-introduce bargaining into the standardisation process. Whereas the standardisation process can be expected to operate smoothly in easy cases, it might be dominated by domestic interests in contentious ones. Member states could invoke the safeguard procedure and attempt to revise undesired standards according to their national interests. Therefore, we evaluated documentation of the relevant comitology committees regarding three such cases as to the nature of the underlying conflict and the responses of the system (Stefanova, 2005b). We selected procedures that had been concluded recently and stayed on the agendas of the committees for several sessions. Although the initiating member states achieved decisions to revise the relevant standards in all three cases, they were not successful in imposing parochial interests on the community. Generally, their interventions were successful only if they managed to draw attention to severe safety problems – and success did not depend on whether the member states had a common position or were divided by cleavages. It appears, and is corroborated by interviews with committee members, that a successful intervention must be supported by extensive documentation of accidents and an indication of how the problem might be remedied.

In the case of silage-cutters (standard EN 703), the safeguard procedure was invoked as a means to discipline the standardisation body and accelerate an already on-going revision process. Silage cutters pick up, hack and prepare animal feed. In some cases, farmers had been seriously injured or killed when being drawn into the machine upon contact with mechanical components. Italy informed the responsible CEN Technical Committee and triggered simultaneously the safeguard-procedure. It submitted documentation of the accidents and argued that it proved the inadequate safety level provided by the standard. In the Machinery

Committee and the Committee on Standards, Italy could mobilise near-consensus against the standard (Report of the 84th session of the Committee on Standards and Technical Regulations of 12/10/2000). Registration was withdrawn and a mandate for its revision by CEN adopted (OJ L 286 of 11/11/2000, p. 40). Concerning silage-cutters, the safeguard procedure thus served as an instrument to monitor the work of CEN. It was not the interest of a single member state to impose its own safety concept on its European neighbours.

In the case of soil working machines (standard EN 708), the safeguard procedure was initiated by an interested country after its objections had been ignored during the standardisation process. The United Kingdom drew the attention of other member states and the Commission to its safety concerns. Soil working machines plough the soil with rotating blades to deploy seeds. Contacts with parts of the machinery can cause severe injuries. As a consequence, the relevant standard required the installation of shields between tractor and plough to protect users from coming into contact with dangerous parts. The United Kingdom argued that the protection-shields were not thick enough to offer protection for people stepping on them. The claim was extensively documented in a printed booklet, which illustrates the effort undertaken to convince the Committee members (see Formal Objection under Art 6 of the Machinery Directive 89/392/EEC [as Amended] EN 708 Agricultural Machinery: Soil Working Machines with Powered Tools Safety). Upon informal consultations between the Machinery Committee, the United Kingdom and CEN, the standardisation body initiated the revision of the standard.

The conflict about the safety of portable chainsaws for one-hand use (standard EN ISO 11681-2) demonstrates, that the institutionalised decision-making system is capable of filtering out parochial interests. Denmark triggered the safeguard procedure against the new standard, because the risks of severe accidents were not

sufficiently abolished by technical means, while the standard defined precautionary measures for the user, like gloves, boots, safety glasses and ear protection. While it was admitted by the Committee, that the standard addressed an extremely dangerous type of portable chain saws for tree service, Denmark was not able to prove that the risk of accidents inherent in these machines could be mitigated by additional technical requirements, so that its demand to withdraw and completely revise the standard was not substantiated even after the Machinery Committee had requested Denmark to submit additional information. Moreover, none of the countries, including Denmark, desired a total ban of the saws. After about 18 months and repeated discussions within the two committees involved and with CEN, the conflict was ended by a vote. Ten countries present and voting supported the Commission proposal to keep the norm and request CEN to examine additional precautionary measures, while Denmark and the UK voted against it (Report of the 82nd Session of the Committee on Standards and Technical Regulations of March 15, 2000). Hence, while the conflict was not solved by an exchange of convincing arguments alone, the Committee decision reflected the state of the discussion. Denmark had not succeeded to convince the other Committee members that a technical solution to the problem could be identified.

The Difficult Regulation of Toys

The Toy Safety Directive constitutes a hard case for the hypothesis of institutionally induced deliberation under the New Approach, because toy safety has been subject to several publicly recognised conflicts. Legislation of the Directive (Council Directive 88/378/EEC on the Approximation of the Laws of the Member States Relating to the Safety of Toys; OJ L 187, 16/07/1988, pp. 1-13) took only 20 months, while harmonisation of toy safety had been blocked for

many years prior to the New Approach. However, the effectiveness of toy safety regulation is not only reduced by implementation deficits (Weatherill, 1995), regulation could also not cope with all risks equally well. Safety requirements of toy pistols had been extremely contentious during standardisation and created difficulties during the safeguard procedure (see below), and conflict about baby teething rings containing softeners (phthalates) escaped regulation under the New Approach altogether. It was later regulated outside the Toy Safety Directive in the framework of the Directive on Dangerous Substances and Preparations (Commission Decision 815/EC, OJ L 315, 7/12/1999, pp. 46-49). In the following, we explore whether these difficulties, which were not observed in the sector of machines, may be attributed to systematic differences of the two regulatory approaches.

The general safety standards of the Directive are lower than those of the Machinery Directive and provide more discretion. Toys shall not "jeopardise the safety and/or health of users when they are used as intended in a foreseeable way, bearing in mind the normal behaviour of children" (art. 2.1). While this clause might appear to exclude all risks, especially as producers must respect the incalculable behaviour of children, it is implied that absolute safety cannot be attained. Therefore, the Toy Safety Directive requires that "the degree of risk present in the use of a toy must be commensurate with the ability of the user … to cope with" (annex II, sec. I, 2a). Toys must be designed so as to protect from hazards, but there is no obligation to maximum safety. While machines must conform to the 'state of the art', so that substantive requirements develop over time, toys do not. Instead, the actors of the standardisation process must determine the risks that are 'commensurate to the ability of the users'.

Certain well-known risks are not addressed by the more specific safety requirements of the Directive because agreement could not be achieved during

legislation. Documentation of the legislative process reveals a number of disputes about the inclusion of more specific requirements concerning particular risks, such as those originating from electrical toys, from noise, or from certain chemicals (e.g. Legislative Resolution of the European Parliament, OJ C 246, 9/7/1987; Opinion of the Economic and Social Committee, OJ C 323, 31/8/1987). It appears that both the Commission and countries with toy industries struggled to avoid all too detailed regulation. As a consequence, the workload related to these risks is almost entirely, i.e. without further guidance, transferred to the standardisation process so that functional differentiation between the levels of legislation and implementation is partly missing. Hence, actors operating at the implementation level do not only enjoy ample discretion, they are also faced with conflicts that were deliberately side-stepped by the legislators.

Standardisation in the field of toy safety did not mobilise the power of functional differentiation between norms of different degrees of specificity. In principle, missing decision-criteria can be defined within the standardisation process. In the field of machinery, general A-and B-standards provide guidance for the development of specific C-standards so that the most difficult standards are elaborated with the most narrowly delimited margins of discretion. In the toy sector, standardisation is rather undifferentiated. The standards are not hierarchically ordered and their number is very small. In 2005, only nine toy standards have been in force (Commission Communication, OJ C 188, 02/08/2005, pp. 2-4). Four of them address specific and especially dangerous toys (experimental sets for chemistry, other chemical toy sets, finger paints and swings for domestic use). The rest is devoted to unspecific risks (mechanical and physical properties, flammability, migration of certain components like heavy metals, graphical symbols for age warning labelling) and is valid for all kinds of toys. Compared to standardisation in the machinery sector, the elaboration of very detailed standards with a broad scope can be expected to influence decision-

making negatively. Not only are the benefits of a hierarchically ordered standardisation system sacrificed, the broad scope of the standards may also allow the national standardisation bodies to conclude package deals, and to struggle for the incorporation of national safety approaches into the European standard (Egan, 2001, p. 176). As a consequence, some highly politicised issues reappear in the standardisation process which is threatened to come close to an undifferentiated decision-making system susceptible for power-based interaction in the mode of bargaining.

The difficulties arising from the approach to the regulation of toys enshrined in the Directive is demonstrated by the lasting conflict about noise from toy pistols. The object of the dispute was a revised CEN standard concerning the mechanical and physical properties of toys (EN 71-1). It had passed CEN in July 1998 and included for the first time noise limits for toy pistols. According to the new standard, the maximum noise level of toy pistols should not exceed 140dB peak; after a transitional period of three years, the level should be reduced to 125dB peak. The noise should be measured at a distance of 50cm from the ear, assuming that children fire pistols on their outstretched arm. Apparently, these values reflected more a bargaining compromise than agreement achieved by deliberation, because the health and safety of children could hardly justify the difference between these two values.

Alerted by Germany, the relevant comitology committees intervened and requested CEN to reconsider the standard. Germany had triggered a safeguard-procedure against the new standard and argued, based upon studies of the University of Gießen (Fleischer *et al.*, 1998) that the limit of 140dB is too high for protecting the ears of children. Documentation showed that children's ears had repeatedly been seriously hurt, possibly because children occasionally fire pistols close to their own or other children's ears. A toy pistol, which just conformed to

the standard, created a noise of as much as 160dB, if fired at a distance of 5cm from a child's ear. Remarkably, another EU directive did not tolerate more than 140dB at the ear (Council Directive 86/188/EEC of 12 May 1986 on the Protection of Workers from the Risks Related to Exposure to Noise at Work; OJ L 137, 24/05/1986, pp. 28-34). The Expert Group on Toy Safety established by the Commission as well as the Committee on Standards and Technical Regulations and the Commission rejected the conformity assumption for the disputed part of the new standard and thus prevented the unsafe regulation from acquiring de facto binding force on the member states.

After the non-publication of parts of the norm, bargaining continued within CEN. The necessary revision process proved to be difficult through all stages (the following is based upon confidential information and internal documents). The national standardisation organisations were deeply divided on the issue (see details in Kerler, 2005b, pp. 340-341). While the Nordic and the Austrian (but not the German) organisations preferred low limits of about 120dB, the other organisations advocated limits as high as 140dB. A first attempt by the responsible CEN Working Group to fix the limit at 120dB failed completely when the member organisations voted against the proposal in the CEN inquiry in 1998. In 2000, a new CEN Working Group proposed a compromise of 134dB (Fiala, 2000, p. 26). The proposal was the result of final voting. It reflected the value that just gained support by a minimum winning coalition. Several scientific studies presented by both sides did apparently not serve for argumentative considerations, but for justifying bargaining positions.

The conflict between CEN and the public oversight actors was ended at last with an ad hoc compromise. Several member states immediately signalled that the new level of 134dB was not acceptable to them, and one country threatened to invoke the safeguard clause anew (Expert Group on Toys; ENTR/TOYS/2001/027,

March 9, 2001) – a threat which is rarely resorted to. Hence, the European governments preferred low limits, while the majority of CEN members rejected these low limits. To avoid complete breakdown of the decision process, the Commission proposed to accept the standard initially proposed by CEN, so that the comparatively low limit of 125dB would become effective upon the close expiry of the transitional period. Although some member states still preferred lower limits, the proposal was eventually accepted and the standard as published by the Commission created the conformity assumption after the transitional period had been passed (see OJ L 205 of 31/07/2001, pp. 39-40).

The lasting conflict demonstrates that delegation of decision-making competencies to non-state experts gathered in CEN, or to technical experts of member states administrations, does not per se ensure deliberative problem-solving. If decision-makers enjoy discretion, and if preferences can be identified, bargaining threatens to ensue. The conflict thus draws attention to the deficient regulatory approach enshrined in the Toy Safety Directive, which provides little guidance on some issues and thus assigns too much discretion to the actors involved in the standardisation process. Even though the member states and the Commission eventually thwarted the standardisation body's intention to enact a high noise limit, their decision is also not firmly based upon the general requirements of the Directive.

Conclusion

Complex decision-making arrangements can stimulate deliberative decision-making if they successfully push the powerful parties of a negotiation from bargaining towards the sincere exchange of reason-based arguments. Deliberation is widely believed to be the 'better' co-ordination mechanism because it promises to produce results that are not predominantly affected by the distribution of power among actors and their parochial interests. However, it cannot usefully be *assumed* that the powerful actors voluntarily sacrifice benefits from the deliberate resort to their power resources just in order to allow problem-adequate results to emerge. An institutional arrangement will systematically stimulate deliberative decision-making, if it hinders the powerful actors from introducing their bargaining resources into the negotiation process. If an arrangement separates the function of developing abstract decision criteria from the function of deciding specific disputes in light of these criteria, it may systematically deprive stakeholders, partially or entirely, from their ability to bargain. This arrangement is reflected in the New Approach to technical harmonisation within the Single Market, which assigns the function of determining general health and safety requirements to the legislator and the function of specifying these requirements for products and groups of products to a multi-step standardisation process.

The regulation of the health and safety requirements of machinery in the Single Market demonstrates that an appropriately designed institutional arrangement can actually hinder stakeholders from bargaining. In stark contrast to the difficulties experienced with the original approach of full harmonisation of much more limited sectors of machinery before the New Approach, legislation was almost free of conflict over specific health and safety requirements. The few conflicts between low-standard and high-standard countries as well as between member states with

different safety approaches could be solved quite easily based upon the commonly accepted general rules and logic of the Single Market. The elaborate safety concept of the Directive provides firm guidance for the standardisation process and sharply delimits their discretion. The standardisation bodies reinforced this effect by creating a hierarchical system of general and specific standards. The analysis of some critical cases that had been subject to safeguard procedures invoked by member states shows that the public actors involved in the process are also disciplined and cannot easily resort to bargaining.

In contrast, regulation of toy safety appears to be more problematic. The health and safety concept of the Toy Safety Directive is less elaborate than that of the Machinery Directive. Some pertinent conflicts have been side-stepped by the legislators so that the standardisation process lacks guidance. The discretion of the private and public actors operating at the implementation level is not as clearly delimited as necessary, and the mechanism of functional differentiation does not become as effective as in the field of machinery. Moreover, standardisation actors did not seek to systematically remedy the situation through a system of hierarchically ordered standards. In line with our theoretical expectation, bargaining is thus more easily reintroduced into the decision process, because stake-holders are able to define their parochial interests *and* dispose of the necessary discretion to choose regulation largely unguided by criteria.

The functionally differentiated decision-making system of the New Approach to Single Market regulation appears to be generally capable of providing incentives for deliberative interaction. While the dramatic dispute about noise limits for toy pistols demonstrates that deliberative decision-making is not per se ensured by the New Approach, nor by the delegation of decisions to experts, it does not provide evidence against the theoretically derived hypothesis developed and tested in the present article. Rather, it points to the conditions under which the underlying

causal mechanism will be activated. An institutional arrangement cannot deprive the stake-holders involved from opportunities to resort to their power resources unless the functions at both levels are properly fulfilled. This had been the case in the field of machinery, but only partially in the field of toys.

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