

Accountability and Expertise in the European Union

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INTRODUCTION

Expertise is an indispensable asset in European policy-making while at the same time it is hotly contested. The European Union (EU) relies on expert knowledge to anticipate and identify the nature of problems and uncertainties faced by the European Community. In multiple scientific committees, experts provide guidance to regulators and decision-makers about issues of potential hazard to the health, safety and welfare of European citizens and the environment. Yet, recent history of food crises, such as BSE (Mad Cow Disease), and ongoing debates surrounding biotechnology and genetically modified organisms (GMOs), experiments with stem cell research, and the control of dangerous substances in the European market, has demonstrated the potential problem with expert-based decision-making. When decisions must be made on contentious policy issues, where a high degree of uncertainty exists, and in the face of significant disagreement even within the scientific community, then the legitimacy of expertise can be questioned. For instance, the massive failure of prevention surrounding food safety scandals created a credibility crisis of supranational regulation (Majone 2000).

The strong role of expertise in EU policy-making is currently being challenged from two perspectives. Proponents of a 'technocratic' approach claim that the credibility problem of supranational regulation is caused by an extensive politicisation of the EU's regulatory bodies. Only by providing an even more far-reaching delegation of powers to independent experts can regulatory policies regain their credibility (Majone 1996). Representatives of a 'democratic' approach, on the other hand, argue for a more socially inclusive use of expertise. The best way to reach legitimate supranational regulations is by the provision of stronger participatory mechanisms that give the European citizenry and stakeholders more influence on regulatory policies (Jasanoff 1990).

This chapter will bring the chain of delegation and accountability between scientists and policy-makers to the forefront of public policy analysis. The text is based on an analysis of EU policy documents relating to the obtaining and utilisation of expert knowledge for regulatory purposes. What solutions to the problems caused by the extensive use of expert-based decision-making has the Commission proposed? The stance taken by the Commission on this matter will be compared with two influential approaches found in the policy literature, i.e. the ‘technocratic’ and the ‘democratic’ approaches. Can the Commission’s prescription, concerning the role of expertise, be considered more in line with either of the two positions? What are the implications of the Commission’s conception of the place of expertise in supranational decision-making? Insights from one influential area – the recent review of the way chemicals are approved in Europe – will shed light on the strengths and weaknesses of both approaches.

In this chapter, the central argument will be that the EU has attempted to combine these two conflicting ideas in the way its regulatory bodies utilise expertise. On the one hand, the Commission complies with the ‘technocratic approach’ by considering experts as reputable and reliable decision-makers in policy areas with high technical content. An indication of this is the extensive delegation of powers to independent regulatory agencies (Keleman 2002; Thatcher 2005). On the other hand, the Commission agrees with the ‘democratic approach’ that accessibility and broad public participation is the antidote to abuses of expert authority. In order to encourage participation, the Commission has invited the public and interested parties to public consultations on many recent policy proposals, e.g. on life sciences and biotechnology, and the regulation of chemicals. It also encourages the public and interested parties to monitor the activities of the Union’s independent agencies.

The chapter is structured in five sections. Section one formulates the problem of expert-based decision-making at a supranational level. Section two outlines the two positions that characterise the contemporary debate on the role of expertise. Section three will analyse the Commission’s policy

documents on this issue. Section four will look closer into the area of chemicals regulation in the EU, and the extent to which expertise are being used. Finally, section five contains a brief conclusion.

EXPERTISE IN SUPRANATIONAL POLICY-MAKING

From a theoretical point of view the democratic quality of governance in the EU raise matters of great concern. Modern political democracy is often considered as a system of delegated powers in which citizens are capable of holding rulers accountable for their actions. One basic principle thus is that public policies should be under the control of persons directly accountable to the electorate. To hold policy makers responsible for actions and in-actions seem fundamental to any notion of democracy (Caporaso 2003).

In many cases, however, policy-making still needs to be delegated to other actors than those who have to face the judgement directly from the electorate, e.g. bureaucratic agencies, courts, markets etc. Hence, expert advisors are generally considered as an indispensable aid to policy-makers across a wide range of technical decisions. They give government officials an opportunity to consult with knowledgeable practitioners in relevant scientific and technical fields at almost all stages of the policy-making process. In most programs of health, consumer safety, and environmental regulation, consultation between expert advisors and decision-makers is a frequent occurrence.

Due to the character of the European political system this is even more apparent on supranational level than on national level. The emphasis of the EU's public policy is on regulation to increase the allocative efficiency of the internal market, whilst taxation and redistribution of resources through social policy programmes associated with the welfare state are associated with Member States. For the time being, redistributive policy is impossible at the EU-level due to the limited dimension of the Community budget. By contrast, regulatory policy is not constrained by a limited budget.

Regulatory policies aim at efficiency, meaning for example, the finding of Pareto-efficient moves where nobody is worse off, rather than redistributive moves where resources are re-allocated between groups in society (Harcourt & Radaelli 1999; Radaelli 1999). Accordingly, regulatory policy is not constrained, to any large extent, by the amount of resources available, as is the case for re-distributive policy. Instead expertise and knowledge are regarded as indispensable assets for the Union's regulatory bodies. This enables regulatory policies to be discussed and negotiated in expert circles, whereas any policy that implies controversies on distributive issues is inevitably a topic for political discussions.

In addition, regulatory institutions at supranational level, such as the Commission and the independent regulatory agencies under it, are not directly accountable to the European electorate. This can be viewed as an asset for the production of regulations, since regulators are not sensitive to electoral cycles and can therefore take decisions which national governments and elected officials would find too costly politically. When regulation is politically expensive for governments, and credibility of national regimes is low, delegation of regulatory powers to supranational institutions, not under the immediate control of the electorate, represents a tempting solution (Majone 1996).

But even when dealing with purely technical matters, regulatory experts can become accused of permitting political considerations that distort the integrity of their scientific analyses. Scientific examination of facts does not guarantee a unanimous consensus on policy solutions. In the absence of conclusive evidence, decisions have to be made on the available facts, supplemented by a large measure of judgement. Science in the policy setting thus runs the risk of being coloured by values and norms. When dealing with risks, regulatory experts consider not only the likelihood of harm, but also who is likely to be affected, as well as who will benefit from different regulatory actions. Uncertainty is accordingly a resource that can be exploited by different actors to promote their own interests. Many regulatory decisions also require an explicit trade-off between the risks, for example

to human health and the environment, and the economic costs of regulation. These decisions are by their nature political.

The point to stress is that the asset of the regulators' independence can turn into a liability when issues of democratic controls are taken into account. Regulatory experts can possess enormous power and yet they are not directly responsible to the electorate. The whole idea behind delegation of rule-making powers to European institutions is that independent experts make better judgements in areas of technical complexity and uncertainty. But if anything goes wrong, the legitimacy of the European political system can quickly erode, as has been demonstrated by the recent food safety scandals. This is the dilemma of 'technocratic governance' (Radaelli 1999).

Consequently, delegation – both at the national and international level – can give credibility to policies, bring expertise to problem solving, provide flexibility and enhance efficiency. The legitimacy of policies can be improved when transferred to supranational as well as subnational institutions, even if the stretched out chain of delegation raises difficulties with respect to accountability (Keohane & Nye 2003). This is a cost to democracy that must be weighed against benefits from more efficient governance. One of the leading political theorists even conclude that "international organizations are not and are not likely to be democratic" (Dahl 1999, 32). In international organisations, such as the EU, the chain of delegation is often considered too long for voters to take decisions on agency actions. So what are the suggested solutions to this dilemma?

THE 'TECHNOCRATIC' AND THE 'DEMOCRATIC' APPROACHES TO EXPERTISE

According to the 'classic' conception of the place of scientific expertise in uncertain policy settings, the role of the expert is to advise on the science and produce a risk assessment of any potential hazards arising from the policy. The decision-maker has to weigh the experts' risk assessment against other societal concerns, in order to reach a workable policy solution that reflects the

appropriate degree of caution. This separation between the roles of experts and those of decision-makers helps to produce informed and legitimate regulatory decisions.

However, this 'classic' ideal has been challenged in the contemporary debate from two different points of view, each of which proposes opposing solutions to the problems that the European political system faces. The 'technocratic' approach proposes a further expansion of the role of experts in public policy-making and removes important decisions from the control of elected officials; putting them in the hands of specialised technocrats and scientific experts. Since experts are not subject to the detrimental pressures of public opinion, and do not have to consider upcoming elections, they are better suited for dealing with technical regulations than politicians. That is the only way to reach efficient decisions and regain credibility to supranational institutions (Majone 1996).

Thus, instead of judging the European political system from the criteria of electoral accountability derived from parliamentary models of democracy (Dehousse 1998), the EU can be viewed as an emerging regulatory state (Majone 1996). Giandomenico Majone, a leading proponent of this idea, argues that the ongoing integration process in Europe is based mainly on statutory regulation to increase the allocative efficiency of the market by correcting various types of market failure. A far-reaching delegation of powers to independent European agencies embedded in transnational networks of national regulators and international organisations will therefore restore legitimacy of European policy-making. Accordingly, regulatory powers should be in the hands of technocratic experts rather than elected politicians in order to promote the long-term general interest of the Community.

From a democratic point of view it still seems unsatisfying to legitimise the independence and lack of accountability of the regulatory state by arguments of its efficiency. However, proponents of a

European regulatory state are more sophisticated than that. They argue – contrary to advocates of a parliamentary supstate – that it is possible to reconcile the independence of supranational institutions at the European level with the notion of accountability:

“Independence and accountability can be reconciled by a combination of control mechanisms rather than by oversight exercised from any fixed place in the political spectrum: clear and limited statutory objectives to provide unambiguous performance standards; reason-giving and transparency requirements to facilitate judicial review and public participation; due process provisions to ensure fairness among the inevitable winners and losers from regulatory decisions; and professionalism to withstand external interference and reduce the risk of an arbitrary use of agency discretion.” (Majone 1996, 300)

By stretching the concept of accountability to cover other meanings than electoral accountability – such as hierarchical accountability, legal accountability, reputational accountability and market accountability – the regulatory approach try to alleviate the problem of democracy in the EU (Keohane & Nye 2003). In its true sense this means that the idea of democracy is redefined (Gustavsson 2003). The criteria for democratic governance is no longer that citizens must be able to hold policy-makers responsible by voting them out of office, but instead that the policy-making process must follow legal procedures and be open and transparent to the public.

In contrast, the ‘democratic’ approach proposes to enhance public access to deliberations and assessment procedures. This alternative rests on the assumption that the knowledge gap between experts and citizens has diminished. When knowledge becomes socially distributed, the group of experts can be expanded. Proponents of this point of view require mechanisms that will broaden participation in the activities of regulatory agencies. By encouraging citizens’ participation in supranational policy-making, the regulatory bodies of the EU can regain its credibility (Jasanoff 2003).

Some advocates of the 'democratic' approach would even argue that science in the policy setting is impossible to separate from its social context. Expert knowledge is no longer generated by independent research institutions with autonomous measures for quality control. Expertise is spread throughout society and thus regulations need to be built on 'socially robust knowledge', i.e. tested not only inside the laboratory, but also in a manner that social, economic, cultural and political factors shape innovations from science (Nowotny 2003).

Accordingly, the 'democratic' critique holds that scientific input into regulatory decisions should no longer be developed independently of political influences. Supranational decision-making must take other types of knowledge into consideration, other kinds of experience and expertise than the hard evidence provided by independent researchers. The 'classic' ideal of having scientists 'speaking truth to power' is rejected both as a proper description of the role of expertise in policy-making, and as a normatively acceptable formula for using specialised knowledge within democratic political systems. The 'technocratic' position, on the other hand, implies that the sphere of political decision-making on public matters is restricted to areas of distributive concern, while expert-based decision-making has expanded to all other areas. Contrary to the 'democratic' standpoint they claim that experts should act independently of societal influences and not take political concerns into consideration when making decisions on regulations.

Neither approach, in my view, is adequate when considering the association between science and politics. The 'technocratic' view contributes to the erosion of democratic controls over policy-making, while the 'democratic' view neglects the specific role that experts have in risk-based decision-making. Proponents of the 'technocratic' approach give maximum priority to efficiency issues, while neglecting the growing demand for greater transparency and accountability. Advocates of the 'democratic' approach want to improve accountability of supranational institutions, but underestimate the importance of specialised knowledge in risk-based decision-making.

Given the challenges from the ‘technocratic’ and the ‘democratic’ approaches to the ‘classic’ ideal, the legitimate role of scientific experts in supranational decision-making seems to be unclear. So what is the official view of the EU on the proper role of scientific expertise in EU policy-making?

THE EUROPEAN COMMISSION AND THE ROLE OF EXPERTISE

The growth of scientific advice has taken place against growing public concern about technological hazards, accompanied by a diminished trust in the European political system. Taking these issues into account, the White Paper on European Governance, published in 2001, marked an important step by the EU to improve the policy-making process and overcome its legitimacy crises. In particular, the lack of transparency in the way expertise is selected and used, and its potential to undermine the legitimacy of the whole policy-making process, was recognised by the working group that carried out preparatory work for the White Paper. Problems arise when expertise is used as a legitimating device for decisions already made by politicians, or when experts replace political deliberation on contested matters while at the same time remaining unaccountable to the public (European Commission 2002a). Consequently, one of the most important conclusions drawn in the White Paper is that the policy-making process has to be opened up to increase the level of involvement by citizens and organisations. The Commission summarises:

”It is often unclear who is actually deciding – experts or those with political authority. At the same time, a better-informed public increasingly questions the content and independence of the expert advice that is given. These issues become more acute whenever the Union is required to apply the precautionary principle and play its role in risk assessment and risk management” (European Commission 2001a, p. 19).

At the same time the Commission wants to emphasise its confidence in expertise: “Apart from a new, more inclusive approach to policy shaping, the Union needs to boost confidence in the expert advice that informs policy” (European Commission 2001a, p. 19). Consequently, the Commission has a double-edged solution to its legitimacy problem. This commitment to combine broad participation with a strong reliance on expertise was reiterated in the Commission’s Science and Society Action Plan, published in 2001 (European Commission 2001b).

Furthermore, the Commission has provided a set of principles and guidelines concerning the development and use of expertise. In this document it is stressed that the Commission should always seek appropriate, high quality advice, be open in the seeking of, and acting on advice from experts, and ensure that methods for collecting and using expert advice are effective and proportionate (European Commission 2002b). However, the principles and guidelines provide little support when it comes to determining the proper role of expertise. Apparently, the Commission wants to combine its extensive use of expert-based decision-making with more openness and transparency. The solution proposed by the Commission can therefore be described as an attempt at ‘democratising expertise’, i.e. making the process of developing and using expertise more accountable. It builds on a combination of the above-mentioned ‘technocratic’ and ‘democratic’ approaches, without any substantial consideration of potential conflicts between the two lines of thinking.

But can the legitimacy crises of Community regulation be abolished simply by enhancing the accessibility and transparency of policy-making, while at the same time the independence of experts are being preserved or even widened? In the concluding section, the implications of the Commission’s mixed approach will be discussed. First, however, we will have a look at one important area of regulatory policies: the review of the way chemicals are approved in Europe.

THE REGULATION OF CHEMICALS

The chemicals area is one such area where important regulatory powers have been delegated to the European level. The current EU chemicals policy dates back to the late 1960s and consists of several legal instruments on the governance of chemicals in the Community. However, increasing concern that the current policy does not provide sufficient protection of human health and the environment led the European Commission to bring forward a strategy for a future chemicals policy. In November 2003 the Commission presented the draft legislation of a new policy, the so-called Reach system for registration, evaluation and authorisation of chemicals, after lengthy discussion with experts, stakeholders and interested parties. It consists of a single system in which existing and new substances will be subject to the same procedures (European Commission 2001c; 2003). More substances are embraced by the Reach system and requirements on registration, evaluation and authorisation of chemicals are in general more demanding than under the current system. Moreover, a new European Chemicals Agency will be established in order to manage technical, scientific and administrative aspects of the chemicals control at Community level.

This final version of the Reach proposal launched a flood of reactions from the chemicals industry and environment NGOs alike. After marathon talks, however, the EU's three lawmaking bodies – the European Parliament, the Council and the Commission - came to a compromise agreement on the draft Reach regulation on 30 November 2006. The compromise package was adopted by the Plenary of the European Parliament on 13 December 2006 and by the Council by unanimity on 18 December 2006. The Reach regulation will enter into force on 1 June 2007.

The challenge from regulatory theorists brings the draft legislation for a new chemicals strategy in new light. Many regulated areas in the Community, such as the chemicals area, are complex and do not lend themselves to ex ante legislation. Instead specialised agencies are granted broad mandates to make and implement rules. Delegation also implies independence so as to avoid political

pressures and capture by interests, thus giving policies more credibility. In this same manner, the Commission proposes to create an independent central agency – the European Chemicals Agency. The establishment of independent regulatory agencies, with significant impact on regulation in the Community, is one of the most notable recent developments in EU regulatory policy (Kelemen 2002). The agency will manage the registration process, play a key role in ensuring consistency of evaluation and provide criteria to guide Member States' selection of substances for evaluation and take decisions requiring further information on substances. It will also provide opinions and recommendations in the authorisation and restriction procedures. The Commission argues that an independent central agency can improve the way rules are applied and enforced across the Union, increase the visibility for the sector concerned, have an advantage in drawing on highly technical sectoral know-how, offer cost savings to business, and allow the Commission to focus on its core tasks (European Commission 2003).

But what will be the consequences of transferring regulatory powers to technocratic and scientific experts in a new chemicals agency at the European level? It is obvious that the line of argument from the Commission resembles the one presented by proponents of a European regulatory state. "The Agency will be the public face of the new REACH system and will be a key player in ensuring that the system has credibility with all stakeholders and the public", writes the Commission (European Commission 2003, 18). Accordingly, as long as the agency is given clear statutory objectives, are set under judicial review, transparent to the public, and most importantly, its activities are monitored by interest groups, then independence can be reconciled with accountability.

But even if we would accept the costs to democracy built in a system of independent regulatory agencies at the European level, there are contradictions hiding in this regulatory model. On the one hand, advocates of the model argue that when regulatory powers are delegated to independent

supranational institutions, the credibility of regulatory policies is enhanced. Independence of these institutions is a means by which governments can commit themselves to regulatory strategies that would not be credible otherwise. Regulators operating at the European level are obliged not to take instructions from any government or from any other body in the performance of their duties. Their unresponsiveness to public opinions and interested parties is crucial for the credibility of regulatory policies. On the other hand, it is argued that one cornerstone of the regulatory state model is that activities by independent agencies must be monitored by interest groups. Transparency and openness of supranational institutions guarantee issue networks the possibility of monitoring what is happening in their sector. Thus, at the same time the regulatory agencies are expected to be independent of opinions and yet responsive to them.

An even more serious problem, however, is the assumption that regulatory policies are not of redistributive character, i.e. they do not involve transfers of resources from one social group to another. Giandomenico Majone, for instance, argues that delegation to independent experts is legitimate only if issues deal with allocative efficiency of the market and not redistribution of resources between social groups. Everybody has to be gained by the regulatory efforts, not only some groups in society at the expense of others (Majone 1996). But is it accurate to claim that chemicals control is not of redistributive character? It seems obvious, for instance, that the economic interests of industry do not always resemble the interests of workers and consumers. Strong measures of chemicals control might, for instance, be in the interest of consumers but can bring a heavy burden on the industry. Consumers are, on the one hand, concerned with consumer prices and the quality of the products they buy while, on the other hand, they are also concerned with the environmental and health risks consuming these products. Workers are concerned with not losing jobs in Europe. At the same time, however, they might be concerned with the dangers connected with the handling of chemical substances in the everyday working environments for many workers in European manufacturer industries. What is good for our present generation might also be bad for coming generations. Hence, the issue is not only about increasing the efficiency of

the market, but also of weighing conflicting interests against each other. If chemicals control is as important for citizens in Europe as one could expect, it would operate far from our ideals of democratic governance if it simply was handed over to technocrats and scientific experts, beyond the reach of voters.

CONCLUSION

In modern societies, political decision-makers seek expert advice on many matters. Knowledge is a highly valued resource in policy-making. Yet, it is hard to know who these advisors are, and how much they influence policy. In the European Community there is a strong tendency that the independent scientific community should play a more vigorous role in policy-making. The idea is that regulatory bodies can cure their deficiencies simply through greater reliance on expert consultation. At the same time, greater transparency and openness is thought to enhance the legitimacy of Community regulation.

The strong reliance on expertise in the European regulatory system, together with efforts to enhance the role of public participation, correspond to opposing arguments in the theoretical literature. In short, the 'technocratic' approach advocates extending the use of independent experts, while the 'democratic' approach proposes instead increasing public participation in regulatory decision-making.

I have argued that neither approach is adequate when considering the relation between science and politics. The 'technocratic' view contributes to the erosion of democratic controls of policy-makers, while the 'democratic' view neglects the specialised role of expertise. Do we really want to choose between either giving more powers to the experts, beyond the control of elected assemblies, or having experts produce 'truths' that are only acceptable if they pass the test of current public opinions and the views of stakeholders involved?

The European Commission tries to combine both approaches in its conception of the role of expertise in supranational decision-making. However, this has been done without considering the possible conflicts between the two approaches. This combination method could lead to the possibility of the EU bringing together the worst traits of both models, and creating an ambiguous relation between science and policy. A policy process based on expertise in combination with a more politicised context could be an explosive combination.

I would instead suggest a more clear-cut approach to enhance the legitimacy of Community regulation. Scientific experts need independence so that they are willing to be 'speaking truth to power'. At the same time, they should be withheld from decision-making powers and used only as providers of input to regulatory decision-making. It is essential to distinguish the role of the expert from the role of the decision-maker.

Consequently, contentious issues regarding the health, safety and welfare of European citizens and the environment need to be informed by science, but settled by decision-makers who must face the scrutiny of the people. This 'classic' ideal – characterised as old-fashioned by contemporary scholars – seems to be more questioned than previously, and at the same time, more desirable than ever before.

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