Delegation beyond the state:

The New Approach standardization as a case of efficient delegation?

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I. The EU as a delegation exercise

The European Union can be considered as a complex network of delegation systems and as such has given rise to extensive scientific literature.

By the term "delegation" we solely refer to the act of delegation whereby a principal selects an agent and entrust him with a task to be performed on his behalf.

The primary act of delegation is from sovereign Member States to the EU and its institutions. A secondary type of delegation occurs within the EU between the constitutional institutions: the Council, the European Parliament and the Commission, which occurs while carefully respecting the power balance between the different institutions. Finally, during the executive phase of EU policy making, new delegable tasks are introduced: delegation to the Commission and committees, European Agencies and various public-private cooperation schemes. This category of delegation, where public institutions represent the principals and private actors act as their agents, will be the focus of this chapter.

The terminology of principals and agents is derived from the Principal Agent theory: originally developed within the literature of new institutional economics, which focused on transaction costs. Delegation theory developed out of interest in the relationship between shareholders and managers in businesses (Egan, 1998: 487).

In the field of political science, the Principal Agent theory has been extensively applied to delegation mechanisms in the context of the US where it was used to study the autonomy of the US bureaucracy vis-à-vis the US Congress and the president (Gilardi, 2001: 5). It was only in the nineties that the approach was transposed to the EU, where it has been used to analyze EU comitology.

Based on the American Principal Agent literature, many different reasons for delegation, or allocation of discretion, can be found. Pollack (2002) summarized the finding of these studies as three fundamental facets of the political environment.

The first, and most widespread, feature is the need for information and policy relevant *expertise,* which results from a state of imperfect information[1]. For example, information and expertise were key reasons behind delegation between the US Congress and its regulatory agencies. If information is indeed a major incentive for delegation, it is to be expected that future political issues, in need of expertise and information, will generate an increase in delegation.

Related to the need for expertise and information is the lack of *capacity* to perform a certain task. It is not primarily the expertise that is sought, but rather a way of fulfilling different tasks under the constraints of limited resources e.g. time (Strøm, 2003: 57).

The second point raised by Pollack (2002) is the need for *credible commitment* and the demand for an independent, credible regulator. At the heart of this argument lies the presumption that delegation to independent agents provides credible commitment when politicians themselves are unable to commit due to electoral or political pressure. An independent agent, free of political pressure, would be able to commit to optimal

[1] See Majone (2001) for further details

solutions even though these might be unpopular. Such a mechanism may be observed with the setup of central banks who avoid ad hoc changes of interest rates to boost the economy, increase economic stability, and thus increase credibility of government policy vis-à-vis market players.

In addition to these motives, delegation can be a means to 'shift the blame'. This *blame shifting* can be used by the principal to hide from unpopular decisions or to 'dump' politically risky issues which result in little or no political gain (Epstein and O'Halloran, 1999: 22-23).

Besides the motives enumerated above, delegation research points to causes which fall outside the scope of a rational-choice-based Principal Agent theory. Based on the study of independent national banks, McNamara (2002) highlights the importance of socially constructed opinions rather than rational efficiency criteria as a decisive element for delegation to this type of bank. Her conclusions point to the need for additional theoretical explanations to complement the Principal Agent theory. The failure of the Principal Agent theory to explain differences in type and timing of delegation, further supports the need for additional theoretical explanations. To complement the theory, other insights can be used: 'historical' and 'sociological' institutionalism can help explain the spread of some forms of delegation by identifying non-functional motivations. Sociological institutionalism uses, amongst others, normative pressure to explain some acts of delegation and points to the influence of the environment in which delegation takes place (Thatcher and Sweet Stone, 2002: 9-13).

The spread of certain types of delegation can also be explained by policy learning and institutional isomorphism. In these cases, existing delegation systems are borrowed from successful experiences at national or international level. Private interest groups actively involved in delegated tasks form communities of professionals (e.g. banking, competition policy), which can support the spread of this type of governance.

Isomorphism can also be induced: in the case of European integration, for example, non-majoritarian institutions were generated when the adoption of independent central banks became a basic condition of admission to the European Monetary Union (Thatcher and Sweet Stone, 2002: 12-13).

It is clear that the American norm cannot simply be transposed to European cases, however, the basic aspects that have been pinpointed by Pollack and others can be used to shed light on delegation mechanisms in the context of the EU: helping to analyze the motives as well as the risks of the current evolution in delegation.

II. Problematic features of delegation

Delegation towards private bodies, which have varying levels of independence, raises particular problems of control. Unlike public administrations, these private entities cannot be controlled by traditional methods as they fall outside the traditional democratic chain of accountability.

The act of delegation to an agent entails the risk of *agency shirking* or *loss*, and *agency slippage*. Agency loss is defined as 'any form of non-compliance by the agent and results from a conflict of goals' (McCubbins and Page, 1987: 410). Agency slippage

occurs when 'the structure of delegation itself provides perverse incentives for the agent to behave in ways inimical to the preferences of the principals' (Pollack, 1997: 108).

Agency loss is closely linked to two major characteristics of the relationship between principals and their agents. The first element is the possible discrepancy between the principal's preferences and the preferences of its agent. This can be shown as a difference of opinion about desired outcome, objectives to be reached, or concerning mode of operation and division of labor (Lupia, 2003: 37). Discrepancies on these topics have a determining influence on the manner and the outcome of delegation.

The issue of preferences is closely linked to a second element determining agency loss: lack of knowledge and information. The principal as well as the agent can experience an information deficit, each having a specific impact on the delegation process. In the principal's position, knowledge concerning the preferences, capabilities and actions of its agent is of the utmost importance. For the agent, knowledge of the task at hand is critical.

A principal's information deficit can cause two serious problems: adverse selection and moral hazard. *Adverse selection* occurs when a principal is not able to select the right agent due to a lack of knowledge about the agent's preferences or skills. *Moral hazard* occurs after the selection of the agent, when the principal is unable to ensure the agent's honesty and diligence; often linked to a lack of control over the agent's actions. Any concealment of actions from the principal by the agent ultimately results in the occurrence of *hidden actions* (Müller et al., 2003: 22-26).

Different mechanisms can be used to control the different forms of agency loss. The success of delegation is, therefore, heavily linked to the control instruments that are at the principal's disposal. These control instruments can intervene either in the run up to the delegation (*ex ante*) or after delegation has been initiated (*ex post*).

The Principal Agent theory proposes several control mechanisms. The first is *oversight*. McCubbins and Schwartz (1984) identified two forms of oversight: 'police patrol' and 'fire alarm'. The first is a permanent control and entails serious costs. The 'fire alarm' control is an ex post control mechanism, which has the advantage of involving third parties as control agents. Third parties offer extra information and reduce the control cost by triggering political actions on problematic issues. Besides these broad categories of control types more specific control instruments can be found.

Administrative control, for example, directly affects the process by laying down the procedures to be followed. This allows the principal to define the 'rules of the game' and even the balance between the different players, ultimately influencing the 'fire alarm' potential. The important essence of this instrument as a key ex ante control strategy is the contract, between principal and agent: a good contract can sharply define the delegation procedure and objectives, impose ex post controls and can even establish a shared interest between the principal and the agent (grant the agent a fixed percentage of the outcome or regulatory relief).

The strategic *appointment* of top officials within the agent's structure is yet another way to influence the agent's function. Along with the strategic appointment of top officials, the principal might try to control the agent's organizational structure to secure

its loyalty. This control strategy is based on the importance of the selection and the screening of potential agents in order to select those who are the most skilled and loyal.

The budget can be another way to control the agent. By controlling the *budget* the principals can restrict or broaden the agent's activities and eventually sanction or reward particular behavior. However, this form of control is less efficient when the agents can rely on alternative sources of income.

Institutional checks can be introduced by using multiple agents and dividing a particular competence between them, hereby creating additional checks and balances.

As a last resort, the principal can depart from the governance approach and choose to use its legislative prerogative. By doing this he can change the nature of the agent or simply overrule its actions. If this option is credible enough, the mere existence of such a threat could serve as an incentive for the agent to comply with the principal's wishes. Detailed legislation can also serve as an ex ante control over the agent: limiting its discretionary powers. More detailed legislation can also mean more detailed description of the status of the agent. (Gilardi, 2001: 13-14).

The type and extent of control that is at the disposal of the principal is partly determined by the objective of the delegation process. When credible commitment is the objective, the possibilities for ex post control are fairly restricted: extended control over the agent would undermine his ability to achieve credible commitment. On the other hand, ex post control is far more relevant when expertise is the main objective: extensive control would not affect the information or expertise that is gained by delegation (Thatcher and Stone Sweet, 2002: 15). Nevertheless, it is important to note that if efficiency and reduction of the government workload is pursued as well, the control cost must be entered into the equation. If the control activities take up too many resources, the point of the entire exercise could be questioned.

Finally, the decision to delegate and its outcome is influenced by the balance between three elements: the status quo (SQ) which is the situation before any delegation has been done, the preferred position or outcome of the principal (P) and finally the agent's preferred position (A). If the gap between the status quo and the principal's preferred outcome is wide, the principal will be more inclined to compromise with the agent. Indeed, a large gap between the status quo and the principal generates an important loss for the principal, if no delegation in undertaken. In such a situation, the potential loss (gap between P and A) is more likely to be smaller than the loss when no delegation occurs (gap between SQ and P). Therefore delegation becomes more likely and will provide a more positive outcome (Lupia, 2003: 36-40).

The control problems raised by delegation discussed above are closely related to a third issue: legitimacy and accountability. If we take into consideration the fact that most delegation tasks are performed to fulfill the objectives of credible commitment, expertise and efficiency, we can conclude that the achievement of these objectives earns the agent some form of 'output legitimacy'. However, as the agents fall outside the traditional democratic chain, legitimacy might be lost if a deficient control system leads to agency loss and the output no longer attains the objectives. Procedural legitimacy helps strengthen overall legitimacy through increased transparency, openness and accessibility of the agent's activity compared to those of the principal's. This procedural legitimacy

can be considered a substitute to the principals' traditional democratic accountability (Thatcher and Stone Sweet, 2002: 18-20). However the transparency, the openness and the accessibility of the agent's activity should always be carefully monitored by the principal.

III. Delegation within the EU

Students of the European Union gradually borrowed the Principal Agent Theory from US scholars to help describe the delegation mechanism from Member States to the EU as well as within the EU institutions. The first full-fledged attempts to adapt and implement the theory to the European arena were undertaken by Mark Pollack (1997, 2003). His study focused on the EU as a supranational agent to which member states would delegate various tasks. The European Commission (CEC), the European Court of Justice (ECJ) and European Parliament (EP) were analyzed from a Principal Agent's perspective, which described their responsibilities and the different mechanisms to monitor their actions. The theory was effective in clarifying the motives and mechanisms of delegating tasks to the Commission (see below) and the European Court of Justice. The ECJ has been delegated functions related to monitoring and enforcing compliance of EU law and filling in the details of incomplete contracts. Delegation of these functions was primarily motivated by the need for credible commitments. In accordance with this motive, the ECJ enjoys extensive statutory discretion. In addition, control mechanisms available to the member States are fairly weak and the ECJ's prerogatives haven proven to be quite resistant. Delegation to the European Parliament, on the contrary, did not fit the rational choice arguments of the Principal Agent theory and seemed to reflect normative desirability and democratic legitimacy motives rather than cost effectiveness.

Pollack's analysis of the European Commission reflects the way he applied the Principal Agent Theory to the EU context. In his analysis, he details the different tasks delegated to the Commission, the motives behind their delegation and the control instruments available to the principal.

Pollack labels the Commission's 'right of initiative', which enables it to shape the European agenda, as a delegated task motivated by the need of credible commitment. The credibility of the Member States' commitment is further strengthened by charging the Commission with the task to monitor compliance with the Treaty and by giving it the means to enforce the Treaty through infringement procedures. The selection of cases and the approach used to handle them is left to the discretion of the Commission. This situation strengthens the independence and credibility of the Commission as guardian of the Treaty, but could lead to agent shirking.

Besides this, the Commission was given the task to implement EU policies through the adoption of implementing regulation, the management of EC spending programs and the direct application of EC law (e.g. in competition policy). According to Pollack delegations of these tasks occur to ensure credible commitment and efficiency

Pollack further analyses the different control mechanisms developed to monitor activities of the Commission using the Principal Agent theory. First of all, control is exercised through the procedure defining the composition of the Commission. In

addition, Member States' committees perform a 'police patrol' oversight known as comitology.

The use of comitology is in fact a form of delegation in its own right, which involves non-elected representatives from the Member States, be it scientific experts or representatives from the Member States' administrations. The control function assigned to comitology is evident by the high importance the actors involved devote to rules and procedures, and their perception that only the most restrictive forms of committees and delegation systems would be suitable (Pollack, 2003: 128-129).

The strength of comitology, as a control instrument, is highly dependent on the type of committee chosen in the legislation: advisory, management or regulatory committees. The weakest form is the *advisory committee*: attributed an advisory function with which the Commission has no obligation to comply. The *management committees*, in contrast, have the power to oppose any of the Commission's proposals by Qualified Majority Voting (QMV) after which they are referred to the Council. The *regulatory committees* are the most powerful: the Commission can only enact its measures after a positive vote (QMV required) by the committee.

Another control instrument within the comitology practice is the 'safe guard procedure'. This procedure allows the Council the possibility to examine, at the explicit request of a Member State, the decisions of the Commission related to temporary safeguard measures.

Alternatively, if comitology does not secure a satisfactory implementation, the Council can choose to deal with the implementation directly (Pollack, 2003: 117-118). By doing this the Council forsakes the possible advantages of delegation and steps in to secure the desired outcome.

The control function of comitology is clearly reflected in the choice of procedures made during the legislative process. Regulatory procedures are generally preferred by the Council, for maximum control. The Commission tries to avoid the most restrictive procedures, but often anticipates the reaction of its principals and is prepared to make concessions in order to reach its goals (Pollack, 2003: 137-139). The same anticipation technique can be found when implementation measures are proposed under the comitology procedure: the Commission prefers to adapt a draft proposal, in function of the Council's, and the committee's preferences, in order to secure a smooth adoption (Ballmann et al., 2002: 571).

The European Court of Justice and the Court of First Instance provide judicial review of the decisions by the Commission or other EU institutions. These Courts act as 'fire alarms' when EU law has been violated. They also introduce extra participants into the control system by giving public and private actors the opportunity to signal potential contraventions. In addition to the judicial review, financial pressure can be put on the Commission through the revision of its budget. This control instrument is an option, but it is weakened by Commission's involvement in the setup of the EU annual budget and by the impact this type of instrument has on the overall activity of the agent. Finally, the Commission is monitored by two non-treaty based institutions: the Court of Auditors controls the budget and the Ombudsman controls its administration. The Ombudsman offers private actors an extra opportunity to act as a 'fire alarm' (Pollack, 2003: 75-90).

Conclusion

The scope of the delegation is affected by the objectives to be reached (expertise, efficiency, credible commitment) and by to the control mechanisms available to the Principal. Hence, the Commission's important role as guardian of the Treaty and its extensive discretion are a consequence of the need for credible commitment.

The same objective of credible commitment can be found in the extensive agenda setting-prerogative of the Commission in the first pillar of the EU, which demonstrates the Member States' commitment to a strong supranational policy.

Finally, the implementation and regulatory power delegated to the Commission presents features which point both to credible commitment and to the need for efficiency. The areas delegated by the treaties are principally areas in need of credible commitment because of the high cost and diffused benefits they bring about or because they combine regulatory and monitoring features. Delegation mechanism in the secondary legislation, on the contrary, incorporates the need for efficient and rapid implementation, which is a serious argument when one considers the complexity of the traditional legislative procedures within the European Union (Pollack, 2003: 105-106).

IV. Delegation to private actors

Delegation within the EU system is not limited to delegation between public actors like the Commission or to EU agencies, which remain under tight scrutiny of the EU institution and Member States. Within the EU, public-private delegation is also used. The European New Approach Directives, for example, is based on the delegation of technical tasks from the European Commission to private European Standardization Bodies (CEN, CENELEC and ETSI).

The New Approach system of delegation was developed in 1985 to fulfill a double purpose: the completion of the Single Market and the guarantee of a high level of protection for public interest objectives: security, public health and environmental soundness of products.

The New Approach was launched after the failure of an ambitious program of regulatory harmonization which was in place since 1958. This policy covered almost three decades, but only managed to tackle a few trade barriers, as it had to cope with both regulatory complexity and conflicting political preferences of the Member States.

The EC Treaty itself has several provisions concerning the free movement of goods: custom duties, common external tariff, quantitative restrictions, restrictions on imports and quotas. However, the Treaty also provide an important derogation from these provisions through article 36: permitting restriction based on the protection of public morality, policy or security, the health of human, animal and plant, the protection of national treasures, and the protection of industrial or commercial property. These restrictions are permitted, provided that these restrictions are not arbitrary or discriminating. This derogation was balanced with article 100 introducing the harmonization of laws and regulations. Art. 100 provides the possibility to replace

contested national rules by European regulations and thus prevent the undermining of the common market through the use of the derogations in art. 36. Still, the art. 100 itself was held back because of implementation problems, the use of unanimity rule, and because Members States reluctance to harmonization (Egan, 2001: 61-82).

Harmonization efforts were made, but in the absence of a legally binding standstill agreement, the Commission had difficulties to keep up with continuous national regulation efforts. The economic crisis of the 1970's slowed the harmonization process further down. The creation of harmonization directive was burdened by technical complexity: technical experts of the different Member States had to be consulted, preliminary studies were undertaken by working committees within the Commission and the issues at hand often required the coordination of several national departments. As a result the negotiation of draft directives took four years on average before reaching the Council. Moreover, national governments did not consider harmonization a priority issue, so little political impetus was provided. The harmonization had to keep pace with a rapidly evolving technology, which could make regulation obsolete even before its adoption. Finally, the harmonization was not flexible enough to provide for the changing economic production (e.g. the shift to services and the introduction of greater product diversity at lower cost). Increasingly harmonization was perceived as a barrier for technological innovations and a burden for producers dealing with various products and shorter product cycles in a competitive environment (Egan, 2001: 61-82). In the absence of legislative harmonization ECJ rulings filled in the blanks. The Cassis de Dijon case validated the principal of mutual recognition, which meant that harmonization was only necessary in cases where national regulations could not be considered as equivalents. The Cassis case also added the criteria of causality, proportionality and substitution to evaluate possible exceptions on art. 30. The negative integration the ECJ carried through by invalidating discriminatory national regulations paved the way for subsequent positive integration at the EU level through harmonization. (Egan, 2001: 108).

In 1985 the market integration program was given an extra impulse by the publication of a White Paper: Completing the Internal Market. The White paper was build on the case law developed in the preceding years (e.g. mutual recognition principle) and on an assessment of the remaining trade barriers, and was focused on the removal of technical barriers to trade. To deal with the continuous national regulatory efforts and the growing number of standards a Mutual Information Directive was introduced in 1983. This obliged Member States and national standardization bodies to inform the Commission of their activities and allowed the Commission to intervene at an early stage and anticipate trade barriers. To deal with existing technical barriers other techniques were put forward based on the Low Voltage Directive, which used a method of reference to standards provided by standardization bodies in its directive (Egan, 2001: 109-121). This simplified form of technical harmonization provided a significant relief of the regulatory task of the EU and would form the basis of the New Approach to Technical Harmonization launched in 1985.

This New Approach to Technical Harmonization combines traditional legislation with voluntarily applied standards.

The legislative part of the scheme consists of a Directive, which benefits from the democratic checks and balances provided for in EU lawmaking. The harmonization in the

Directive is limited to essential requirements concerning safety, health, consumer protection and environmental protection. The complex and labor-intensive translation of these essential requirements into harmonized European standards is delegated to the three European standardization bodies: CEN, CENELEC and ETSI. A mandate from the European Commission to the appropriate bodies forms the bridge between traditional legislation and the delegated standardization. The mandate is created by the Commission, based on the requirements of the Directive, and is submitted to Committee 98/34 on Standards and Technical Regulations for its opinion. The use of a mandate procedure in combination with comitology, reflects the double delegation exercise present in the New Approach Directives. On the one hand, it depicts the Commission as the principal delegating to private actors, using the mandate as a tool. On the other hand, it represents the Commission as an agent of the Member States controlled through comitology.

The standards produced by the CEN, CENELEC and ETSI are published in the Official Journal; as a consequence compliance with the standards provide a presumption of conformity to the requirements of the Directive. From this moment on producers can proof their compliance with the essential requirement through the use of the corresponding standard.

We must add that the standards are voluntary instruments which act as a proxy to demonstrate compliance with the directive. Producers are not obliged to use them and can refer directly to the essential requirements in the Directive. Nevertheless, the presumption of conformity attributed to producers using the European standards seems to provide the standards with a de facto monopoly. Products not adhering to the recognized standard are often rejected by distributors because alternative methods of proof are considered too burdensome (Hunter and Molyneux, 2000). Moreover, the presumption of conformity reverses the burden of proof between the producers and Member States: if a Member States denies market access to a product which complies with the standard, it is up to the Member State to prove that the product does not comply with the essential requirements of the Directive.

The type of tasks delegated through the New Approach Directives and the complex process of market integration in which these Directives were developed, all point to issues of technical *expertise*, *efficiency* and *capacity* as being the main motives for delegation. The technical harmonization required by the EU market integration could not be achieved through traditional legislative procedures The use of essential requirements in legislation combined with standardization has facilitated a smooth adaptation to rapidly evolving techniques. Delegation to private standardization bodies, in which industrial actors and producers play a significant part, has reduced the risk of contestation of the implemented policy while providing the required technical expertise.

Under the New Approach scheme, credible commitment does not seem to be the main motive, delegation rather stems from the need of expertise, efficiency, and capacity concerns. As the fulfillment of expertise, efficiency and capacity goals requires less autonomy from the principal, tight control might be expected. However, despite this, European standardization bodies enjoy an exceptionally independent status and control over their activities is limited.

In the New Approach scheme, most of control is performed *ex post* through the use of a 'safeguard clause'. This clause is a 'fire alarm' type of control mechanism, which can be invoked by Member States or by the European Commission when a standard fails to meet the essential requirements setout in the Directive. The use of this clause can prevent or revoke publication of the standard in the Official Journal thereby denying presumption of conformity. In practice the safeguard procedure is started by the introduction of formal objection against a particular standard. This formal objection is than transferred to the Committee on Technical Standards and Regulation (Committee 98/34) for its opinion. The Committee 98/34 was created by the 'Directive 98/34/EEC[2] laying down a procedure for the provision of information in the field of technical standards and regulations'. It is composed of Member State's representatives and is chaired by a Commission representative. Directive 98/34/EEC as well as its committee provides a general framework to deal with technical standards and regulation within a European integrated market, but does not deal with specific topics. Therefore, New Approach Directives developed for specific topics (e.g. Packaging) have to possibility to create their own committee or group of experts. Because of their expertise; most formal objection will be dealt with first by the Directive's own committee before the opinion of the Committee 98/34 is sought. The DG of the Commission responsible will then write a proposal based on the assessment of the directive's own committee, the opinions of other Commission services, and the information obtained from Member States, European Standardization bodies and other stakeholders. This proposal shall be transmitted to the Committee 98/34 for an urgent opinion (CEC, 2003). The final decision, in the safeguard procedure, is taken by the European Commission upon advice of the Committee on Technical Standards and Regulation (Committee 98/34) and the directive's own committee. The use of committees, composed of Member States' representatives, as instruments to both defend national positions and control the Commission's actions points to the Member States as being the primary principals of the entire delegation exercise. However, the Member States' position as principal is weakened by the advisory character of the comitology committee. Apart from this 'safe guard clause', no systematic, 'police patrolling' is performed by the Commission on the standards. This situation generates an information deficit concerning the agents' action leaving the door open for agency loss under the form of *moral hazard*.

Even though the Commission can participate as an observer to the European standardization bodies it does not do so on a regular base. The Commission has repeatedly insisted on active participation by public interest groups, which has improved over the years, but is still deemed insufficient. This insistence in interest group participation might reflect a tactic to introduce extra 'fire alarm' control opportunities: where public interest groups address potential contraventions of essential requirements. McCubbins and Schwartz (1984) described similar tactics concerning Congressional control over US agencies: informal networks of public interest groups acted as 'fire alarms', reporting possible infractions of legislative goals to their representatives in Congress.

[2] Directive 98/34/EEC is a codification of Directive 83/189/EEC, which already provided for the creation of the Committee.

In addition, consultants are hired by the European standardization bodies to ensure that the actors involved in the actual drafting of the standard understand and respect the essential requirements.

Overall control over the standardization process can be tightened by well defined mandates and procedural clauses in the guidelines for cooperation between the EU and the European standardization bodies. These mandates often leave room for manoeuvre while the cooperation guidelines do not provide strict procedural codes.

Finally, budgetary sanctions can be imposed when contracts between the Commission and the European standardization bodies are not respected (Egan, 2001: 124). However, the standardization bodies are financially independent because of the income generated by membership fees and the sales of European standards.

Despite this bleak analysis, New Approach standardization has proved very successful when applied to safety issues: more than 20 directives and 2165 standards have been published (CEC, 2004: 7).Yet, when the same method is applied to environmental matters, control issues seem to be highlighted. The Packaging and Packaging Waste Directive (94/62/EC) illustrates this concern and points out the difficulties involved.

1. The Packaging and Packaging Waste Directive

This directive is the first New Approach directive explicitly developed to achieve environmental goals. While the actual directive was developed in 1994, and the first mandates to CEN were delivered in 1996, it took until February 2005 for all the mandates to be turned into publishable harmonized standards. Standards can take several years to develop, however extra difficulties seemed to burden the procedure in this particular case. The packaging directive was developed to reduce the quantity of packaging, increase reuse and recycling, and reduce the amount of harmful substances used in packaging. For these reasons a mandate was given to CEN (mandate 200 Rev. 3). The mandate asked for five standards to be prepared. The first standard concerned packaging requirements specific to manufacturing and composition, and dealt with waste prevention. The second standard had to cover the reuse of packaging. The following three standards respectively dealt with packaging and material recycling, energy recovery, and organic recovery. The mandate was accepted by CEN, who developed six standards based on this mandate, despite the fact that only five standards were directly mandated by the Commission.

In addition to the explicitly mandated standards, CEN delivered an “umbrella” standard (EN 13427:2000 Packaging-Requirements for the use of European Standards in the field of packaging) which was designed to serve as a guide to the use of the other standards.

In 2000, these standards were adopted by the CEN members and submitted to the European Commission for publication of its references in the Official Journal. Such a publication would grant a “presumption of conformity” to the products applying the standards. At that time, the so-called “safeguard clause“ was put into action. On the basis of article 9(4) of the Packaging directive (94/62/EC) Belgium and Denmark filed a formal objection with the Standing Committee on Standards and Technical Regulations

(98/34 Committee). The objections contained general remarks which applied to all standards, and more specific remarks related to technical specifications in the individual standards. For example, Belgium raised objections against the formulation and status of the non-mandated umbrella standard, which could affect the essential requirements in the mandated standards by directing their uses. Other objections regarding the lack of participation of environmental and consumer NGOs in standardization activities were also voiced. Participation by public interest groups was especially important, since the need for it was explicitly stated in the mandate. Concerns were raised as to the efficiency of ISO 9000 and EN ISO 14000 series management control systems to guarantee essential requirements and to realize a harmonized internal market. Finally, the lack of technical specifications was addressed, as a requirement appeared to be literally copied from the mandate without further elaboration. In addition, new terms and definitions were used in the standards instead of specific legal terminology.[3] These official objections were matched by the criticisms of public interest groups defending consumer and environmental issues. The European Association for the Co-ordination of Consumer Representation in Standardization (ANEC) highlighted the lack of consideration for non-industrial stakeholders in CEN's Packaging Committee and the predominance of industry on this committee. ANEC also condemned the lack of substantive and verifiable requirements (number of trips for reusable packaging), and the ignorance of the mandates provisions of the CEN standards. In their critique of the individual standards they condemned, for instance, the predominance of marketing and presentation criteria on source reduction for packaging.(ANEC, 2000) Similar criticisms were found in the position paper of the European Environmental Bureau (EEB), which particularly stressed the fact that the management system that had been opted for in the standards would not be able to guarantee essential requirements. The EEB even felt that the publication of these standards as they were, would "encourage CEN and hence industry, to ignore and bypass environmental legislation and write out its own in the future".

According to the instructions of the safeguard clause, the objections of the Member States were considered in the Committee for the Adaptation to Scientific and Technical Progress (created by Directive 94/62/EC on Packaging and Packaging Waste), better known as the Article 21 Committee. Compliance with the essential requirements was discussed during their meetings, but diverging opinions remained. Austria, Belgium and Denmark were clearly against the publication, while France and the UK defended the standardization effort.

After consulting the Article 21 Committee, the Commission turned to the Standing Committee on Standards and Technical Regulations (98/34 Committee) with a draft Decision, but no consensus could be reached. After a vote, the Commission deemed it had sufficient support to proceed. It consulted the 98/34 committee again on the 27th of June before publishing its decision. In its decision of 28 June 2001, the Commission published the references of standard EN 13432 concerning recovery by composting and bio-degradation, and EN 13428 concerning prevention by source reduction, although the

[3] Ministerie,van Sociale Zaken, Volksgezondheid en Leefmilieu, *Clausule van formele tegenkanting ingediend door België bij het Permanente Comité ingesteld overeenkomstig artikel 5 van Richtlijn 98/34/EG betreffende de CEN-normen voor de invulling van de essentiële eisen van de Verpakkingsrichtlijn 94/62/EG in het kader van Mandaat 200 Rev.3 overeenkomstig artikel 9, §4 van deze Richtlijn*, Brussels.

latter was published noting that it did not fully cover the essential requirements (EEB, 2000).[4] The remaining standards were not published, and consequently did not receive the "presumption of conformity" but still kept the status of CEN standards. In this way they can be used as an instrument by Member States on a voluntary basis, this was the case in The United Kingdom and France.

In coordination with the different committees and the Member States, a new mandate was developed to revise the remaining standards and to incorporate the so-called "umbrella" standards proposed by CEN. Drafts of the revised mandate were distributed among the Member States for comments. In November 2001, the final version of the revised, or second, mandate M317 EN was finalized and reached the relevant CEN technical Committee by March 2002. Although the Commission opted for this second standard, it must be noted that the Commission recognized the need for a fundamental review of the New Approach elements of the Packaging Directive in order to achieve a complete solution (CEC, 2001a). Moreover, during the preceding committee meeting some Member States expressed their skepticism towards a revised mandate and asked for a broad review of the New Approach elements of the directive, while others believed the revised mandate could provide a swift solution. Concerns were also expressed regarding the effective separation of political issues and technical issues to ensure that only technical issues were addressed by CEN (CEC, 2001b). By December 2004, CEN entered a request for publication of the revised standards. No official objection was raised against the revised standards, although an informal objection was raised by Austria and discussed during the Article 21 Committee meeting on February 2, 2005. During this meeting, CEN had the opportunity to present the standards and to answer delegates' questions. Some Member States were concerned about the capacity of the standards to establish clear boundaries between acceptable and non acceptable packaging. The Commission's opinion was asked concerning the minimum criteria for rotation of reusable packaging and the presence of hazardous substances. In its response, the chair qualified the management approach as the "best feasible" and explained that it was difficult for the Commission to request fixed values. A new attempt to refine the standards was not expected to make any substantial difference (CEC, 2005).

Finally, in the absence of any formal objections, the references of the revised standards on reuse (EN 13429: 2004), material recycling (EN 13430:2004), energy recovery (EN 13431:2004) and a new version of the partially accepted standard on prevention by source reduction (EN 13428: 2004) were published on 19 February 2005. This publication was completed by the inclusion of the umbrella standard in the second mandate (CEC, 2005b).

When we look at the opinions of the public interest groups such as ANEC and ECOS on the matter, we still see a strong rejection of the revised standards. In their joint position paper, they considered that the standards did not satisfy the essential requirements, or the provisions of the second mandate M317, that most of the changes are purely editorial, and that only a few substantial changes were made (ANEC and ECOS, 2005). Regarding the individual standards, the public interest groups criticized the use of

[4] Commission Decision 2001/524/EC of 28 June 2001 relating to the publication of references for standards on packaging and packaging waste - OJ L 190 of 2001-07-12

management systems instead of clear–cut specifications, the supremacy of marketing criteria above packaging reduction, the inclusion of hybrid systems in the reuse standard and the minimum caloric value that was prescribed.

The example of the Packaging and Packaging Waste directive, demonstrates quite well the difficulties of using New Approach legislation for environmental purposes. The whole process took more than a decade while multiple objections and a variety of issues were raised by the Member States, public interest groups and even the Commission. In this case, a revision of the New Approach elements of the directive was proposed by the different actors, but time restrictions influenced the choice of a second mandate. Not only did the delays encountered by the procedure ran counter the objective of efficient policy making, it also restricted the option that could be taken by the principal: revision of the directive itself or second rejection of the standards would have caused further delays.

With regard to the standardization process itself, concerns were expressed regarding the division of political and technical decisions. When using New Approach legislation, utmost attention must be devoted to the definition of the essential requirements to prevent the migration of political decision to standardization bodies and industry. Clearly defined essential requirements and mandates, as the equivalent of a well tied contract, is the key to a successful delegation. It does not only function as general control instrument, but should also have prevented the shifting of political decision to private agents.

The advocacy of the public interest and the control of the public authorities on the matter must be evaluated in the context of "real life". As we have seen in the packaging case, lack of meaningful involvement has been raised, both by the Member States (cfr. Formal objection Belgium and during article 21 committee meetings) and the public interest groups (position papers ECOS and EEB). The lack of meaningful involvement jeopardizes the role of public interest groups as third party control agents and as a consequence the control potential of the principal. As to the public authorities, we can note that the "safeguard clause" was successfully applied to object to the first standards. However, the European Commission still opted for the formulation of a new mandate instead of a thorough revision of the directive. Furthermore, the revised standards were accepted even though important doubts still arose as to the fulfillment of the essential requirement. This turn of events points out that even though the principal is aware of the actions of its agents he is not always able to rectify the situation: time pressure, restricted capacity and information deficit can seriously hinder such an effort.

Finally, the role of the European Commission seems to be more important than that of the Member States. The Commission has to acknowledge the formal objections and consult the relevant committees cited above, but the output of these committees is non-binding (CEC, 2001c). As a consequence, the final decision is reserved for the European Commission.

Regarding the "safeguard procedure", we must note that its outcome is influenced by the characteristics of the different committees. The Article 21 Committee of the Packaging directive, for example, is composed of different types of delegates: members of the Permanent Representations to the EU and members of national agencies, or national administrations. As a consequence, the knowledge of the issues at hand can vary substantially and delegates can be restricted by the mandates they receive. Even though

perfect information is not needed to make delegation work, a significant level of expertise and a follow up of the matter by all members involved in the committee are key to perform an efficient control.

When we consider the public interest viewpoint, we can conclude that control by public authorities is rather limited. This is the case within the European standardization bodies, as we have stated before, but also within EU institutions in the case of the safeguard procedure. In this procedure, the final decision is in the hands of the European Commission, as the opinions of the committee (composed of national delegations) are non-binding. Moreover, contextual factors can work in favor of the agent, as ex-post control systems can cause serious delays.

Despite the efforts to include public interest groups in the process, their position does not seem strong enough, at the moment, to guarantee the systematic advancement of public interests. They often lack the means to defend these interests sufficiently and as it was the case in the packaging case, feel their views are not adequately taken into consideration within the standardization committees.

Finally, the case study described above underlines the importance of a consensus on preferences between principal and agent. If such a consensus is present, control mechanisms and information deficits become less relevant: the agent's actions are more likely to be in line with their shared objectives. But, if such a consensus cannot be found control costs will rise and the delegation exercise itself can become compromised.

V. Conclusions

The review above presents us with two different types of delegation – from Member States to Commission and from the Commission to private Standardization bodies - as well as two different applications of the Pincipal Agent theory. In both examples the theory helped describe the motives for delegation, types of tasks delegated and the particular discretion the agents were attributed.

Delegation to the Commission is the more comprehensive, as the Commission has been delegated agenda setting, control, executive and implementation tasks. As an agent, the Commission is expected to provide efficient policies, as well as, credible commitment. In spite of the latter objective and with regard to extensive delegation, important control mechanisms have been put in place. Judicial review provides 'fire alarm' types of control, while the comitology system makes 'police patrolling' possible. These powerful control tactics complemented by financial control provide a strong toolbox for the principals to use in order to prevent agency loss.

The second type of delegation steps outside the inner circle of public actors to delegate tasks to private actors. A public-private partnership is set up between the Commission and the European standardization bodies to translate essential requirements into technical provisions. The European standardization bodies are private bodies, which are situated outside the EU institutions, yet they are delegated tasks of major public interest. The outcome of their activities is incorporated in the EU legal framework through publication of standards in the Official Journal, which provides a presumption of

conformity. Such a standards have a de facto legislative status. In return, the European standardization bodies offer a significant level of expertise and information, and assist in the operation of an efficient system of technical harmonization, which cannot be realized through traditional legislation.

Besides the primary delegation between public and private actors, the New Approach procedure incorporates the basic element of 'delegation from Member States to the Commission' and the comitology oversight instrument that goes with it. Hence, the New Approach is a double delegation exercise (public-public and public-private) and in this regard it provides a double control.

At first sight New Approach delegation only concerns technical activities and no political decisions are made. Nonetheless, in some cases mandates and essential requirements are too vague and as a result some politically sensitive decisions are shifted to the standardization bodies. The risk of such a shift was one of the main concerns in the Packaging case we examined: the mandates remained fairly vague and it was left to the standardization bodies to define clear-cut thresholds. Vague mandates eventually resulted in equally vague standard: some specifications were poorly developed and flexible management control systems were used rather than clear thresholds.

Vague mandates can be the result of deliberate blame or burden shifting tactics by the principal or it can be a reflection of the principal's inability to achieve a political consensus. In the packaging case, the Directive itself was heavily discussed and some participants even suggested a fundamental review of the New Approach elements of the directive to achieve a satisfactory solution. However, this option was not withheld by the Committee as they choose to create a second mandate.

In addition to this, control over the standardization procedure is fairly weak and mostly ex post. This was obvious in the Packaging case: the first standards that were delivered lacked technical specification, an extra non-mandated umbrella standard was added on initiative of the standardization bodies and the specific legal terminology was not respected. The ex post safeguard procedure had some effect, but the second set of standards were published despite the persistent Member States concerns.

The combination of all the above factors leaves this type of delegation prone to agency loss, which may easily occur when the agent's interests do not correspond with the public interests defended by its principal. In the Packaging case, the agents have put marketing and presentation as priority criteria for packaging reduction and favored flexible management control system above fixed thresholds.

We can consider delegation in the New Approach in terms of accountability.[5] Accountability, as the means to control the agent, is rather weak: low level involvement of the principal, information deficit, poor involvement of public interest groups which could serve as third party control agents and strong reliance on ex post control mechanisms with mixed results. However, if we interpret accountability as an outcome which reflects the principal's interest we must conclude that accountability is present in 'consumer safety related areas'. In these areas the agent's preferences and the principal's preferences are more likely to overlap as consumer safety is not only of public

[5] For a thorough discussion on the different types of accountability in delegation see Lupia, 2003: 35-36

importance but also of economic importance. As a result health and safety issues delegated under the New Approach procedure, did not reveal any major agency loss. Furthermore, delegation could be considered a success as it resulted in an efficient and flexible policy adapted to modern technologies.

Unfortunately, this kind of match is much less self-evident in the area of environmental policy, as environmental issues are often considered by producers and consumers, as a financial burden in the short term. Standardization for environmental purposes is burdened by both information deficit and preference heterogeneity, but no extra control instruments are introduced. This makes the delegation exercise prone to agency loss and underpins the importance of a thorough cost-benefit calculation before transferring delegation from one area to the other, as this might alter the outcome. High levels of independence, concentration of information within the European standardization bodies, and low levels of control provide ideal circumstances for agency loss.

Nevertheless, delegation to private actors fits nicely into the governance approach the EU pursues. New Approach standardization reflects the call for increased involvement and participation of stakeholders in each step of the policy (expressed in the White paper on Governance). The New Approach has even been cited as an example of co-regulation to be used to create better policies and regulation. This adds an institutional argument to the rational choice arguments mentioned above.

However, this should not distract us from the real complexity of the delegation exercise at work in the New Approach directives. The New approach may well fit in the new governance approach promulgated by the European Commission, but it also reflects the potential downsides of governance-like tactics: loss of control, agency loss and dependency on private initiatives. It also underlines the importance of clear agreements between agents and principals, and of at least a minimal alignment of their respective preferences. These elements should be put into the cost-benefit equation before even starting delegation, as both control instruments and preferences could negatively affect the balance.

Although delegation can be seen as the only practical means to achieve the governance objective, which was the central reason for the development of the New Approach, it is important to make a full assessment of costs, benefits and outcome before expanding its use to other policy areas.

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