

HOW DECISION-MAKING PROCEDURES CREATE GOOD GOVERNANCE: TECHNICAL REGULATION IN THE EUROPEAN UNION

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Abstract

It has been widely recognised that reason-based arguing is an influential second mode of interaction in EU decision-making besides power-based bargaining. This article identifies institutional conditions which are systematically capable to stimulate deliberative interaction. It is argued that functionally differentiated decision-making systems alter the logic of negotiations and create incentives which enhance arguing and are capable to produce problem-adequate results. Such an arrangement is identified in technical regulation subjected to the 'new approach'-procedure. The 'new approach' splits the workload on at least two levels. On the upper level, legislative actors define general safety requirements, but are unaware of particular cases. In this position of uncertainty they will identify norms in a deliberative way. On the lower level, standardisation actors are aware of particular cases, but are bound to criteria and institutional rules which restrict their bargaining ranges. We find empirical evidence for this concept in the regulation of machinery and toys. In the case of machinery, an elaborated institutional framework guarantees problem-adequate results. In the case of toys, a less elaborated framework leaves a door to bargaining.

1. Introduction

In recent years, scholars of European Integration have discovered Single Market Regulation as a particularly successful area of European Politics. Research has especially concentrated on some specific actors in the process, e.g. comitology committees (e.g. Joerges/Falke 2000, Joerges/Vos 1999). This article seeks to explore Single Market Regulation in a more comprehensive perspective. It is argued that not single, isolated actors, but the design of the whole decision-making process which determines the interaction of the actors is responsible for successful results. The reason is that the procedure is capable to prevent nation states to

pursue their national interests by changing the mode of interaction from power-based bargaining to reason-based arguing.

Scholars have repeatedly observed that states rely in negotiations not only on power-resources, but also exchange arguments (Hasenclever/Mayer/Rittberger 1997). Arguing proves to be especially relevant in situations where topics are complex, where possible options for co-ordinated action are unknown, where consequences of co-ordinated behaviour are blurred and thus, where uncertainty about one's own preferences prevails (Müller 1994, 28; Keisuke 1993, 432-437). Rational actors may in this case apply arguing in negotiations to define windows of opportunity how co-ordinated behaviour can improve their utility (Gehring 1996). Generally, scholars begin to consider arguing to be a superior mode of action in certain situations. As it implies a public discourse without being distorted by power-resources, it is supposed to hold the potential of democratising international and European relations (e.g. Joerges/ Neyer 1998, 207). Other benefits are identified, if it is reflected that arguing is a process, where participants agree on those proposal out of many which can be justified best by common criteria (Habermas 1973). With regard to this perspective, arguing has the potential to affect the quality of the output by producing 'reasonable', i.e. problem-adequate results (Gehring et al. 2005; Gehring 2002).

The empirical relevance of arguing has been demonstrated with regard to the European committee system (Joerges/ Falke 2000, Joerges/ Vos 2000). Authors of deliberative supranationalism highlight the potential of comitology to stimulate deliberative interaction (Neyer 2000, Wessels 1998). It is argued, that due to given scientific consensus and then socialization by everyday's work, members enter in a deliberative discourse which is capable of enhancing outputs, especially if further interest groups are included (Wolf 2000, Joerges/Neyer 1997). Recent studies have more systematically explored the preconditions of communicative action, e.g. the existence of a common shared lifeworld, uncertainty or persuasive individuals (Niemann 2004).

Nonetheless, communicative action appears to be an arbitrary phenomenon, depending on certain idealistic preconditions. The reason has to be seen in the fact, that most scholars according to Habermas (1981) regard communicative action to be fundamentally different from strategic action, i.e. utility-orientated, rational behaviour. In a recent attempt to reconcile the dichotomy between arguing and bargaining, Harald Müller has pointed out, that negotiations take place in a very simple framework of rudimentary norms. Referring to these norms participants judge whether in a certain circumstance bargaining or arguing is more "appropriate". But despite some conjectures that arguing will be more appropriate the more institutionalized a negotiation environment and the denser the norms in a specific field of policy (Müller 2004, 414-417), institutional settings which foster arguing have hardly been identified. In the following, the article wants to contribute to this question. To avoid idealization and to address the fact the European Politics is taking place in the shadow of strong national interests, the study is based on the assumption of rational actors. The question to be answered is under which conditions rational actors are likely to interact in the mode of arguing.

Some fruitful insights have been delivered by rational institutionalism. It has been argued that not single actors like the Council, but the relationship between Council, Parliament and Commission is relevant for the distribution of power and influences in European policy making (Tsebelis/ Garrett 2001, Garrett/ Tsebelis 1996). Thus, the behaviour of actors appears no longer dependant on idealistic, pre-politic conditions, but subject to formal decision-making procedures. Similar insights are provided by principal-agent theory, where it is stated that delegation alters the problem-solving capacity (Pollack 2003, Majone 2001). However, both approaches fall short in analysing the changes of the mode of interaction.

This article argues that certain procedure found in European Single Market Regulation themselves have incentives which are able to change interaction from bargaining to arguing. The argument will be based on the insight of system theory. The hypotheses states that functionally differentiated decision-making systems are systematically capable to prevent actors from the pursuit of their parochial interests by using power resources. Instead, deliberative interaction will be stimulated. Based on the insight that discourses are especially effective for problem-solving, we conclude that the differentiated procedure can systematically produce “better”, i.e. more problem-adequate result. We argue that an adequate arrangement is found in the Single Market regulation of technical goods. Since 1985, technical regulation on the European level is managed by the ‘New Approach’ being based on the idea that only basic health and safety requirements are defined on Council level. The task to define detailed technical requirements is delegated to private standardization bodies (Pelkmans 1987). This rather simple concept is considered by the Commission to be a great success as the integration of the Single Market speeded up; thus, the Commission recommends it for other policy areas (COM 2001/428).

The argument of this article is constructed in four steps. In the 1st section the theoretical framework is presented. The shortcomings of simple negotiation systems are described and it is discussed, how complex systems can overcome them. Thereby, it is argued, that complex decision-making systems contain mechanisms which can alter the behaviour of actors from power-based towards reason-based interaction. The 2nd section argues that the decision-making procedure of Single Market Regulation in Europe possesses features which are close to those theoretically constructed mechanisms. It is showed that as a consequence actors are forced to change from bargaining to arguing on both levels of decision making – on the level of legislation as well as on the level of standardisation. The 3rd section provides empirical evidence for our concept. The concept is tested on legislation and standardization of the machinery directive. It is demonstrated, how complex decision-making systems are systematically capable to prevent nation-states from the pursuit of their national interests. In the 4th section, the model is tested on a ‘hard case’ of toy regulation, where several regulation deficits have been discussed in public.

2. Theoretical Framework

It is the hypotheses of this article that institutional procedures are capable to force rational actors to change their mode of interaction from bargaining to arguing. The argument will be developed in the following within two steps: First, the behaviour of rational actors in simple,

undifferentiated decision-making systems is explored (2.1). And second, the incentives of complex decision-making systems are discussed (2.2).

2.1 Simple negotiation systems

The simple undifferentiated decision-making system may be considered as the archetype of international decision-making. Nonetheless, it suffers of severe imperfections.

Co-ordination can happen spontaneously 'behind the back of the actors' by mere physical behaviour (Taylor 1987). But if actors are no longer satisfied with spontaneously originated outcomes but envisage pareto-superior options, active co-ordination is required. Actors have to enter negotiations where they interact in a communicative way. Different to spontaneous behaviour, parties have to agree on common decisions to reach co-ordinated behaviour. Simple negotiations provide a minimal institutional platform for communicative decision-making which is not embedded in a wider institutional context. Rational actors can pursue their motivations freely without being restricted by a more elaborated framework which defines procedural and substantial rules.

Assuming rational, i.e. utility-maximizing actors, it is sensible for the participants of negotiations to operate in the mode of 'bargaining'. The concept of bargaining draws on the concept of strategic action. For Habermas, strategic action is applied by individuals to maximize their own utility (Habermas 1991, 129-130). Bargaining can be characterized as a certain kind of interaction where negotiators search convergence of their positions by exchanging demands and concessions (Gehring 1996). The success of a bargaining process depends on the approximation of initial positions of the negotiators. The participants have to find one solution which is acceptable for both. In a bargaining process the participants seek to reach concessions of their antagonist; if they have been successful, own concessions must be granted. Thus, bargaining is best put into effort by applying a 'tit-for-tat' strategy (Axelrod 1984).

Generally, demands must be capable to alter the position of antagonistic actors. Therefore, demands must be accompanied by threats or by incentives. Demands are generally supposed to reach concessions, if threats (or incentives) are credible. Credibility is generated by means which are located outside the negotiation forum. Thus, individual success depends on the power-resources, a negotiator can mobilize. Normally, negotiators use their exit-option as main power-resource: The better their alternatives outside the co-operation project, the greater is their bargaining-power (Gehring et al. 2005, 40). Bargaining has proven to be a rather effective technique, if pareto-superior results can be obtained, preferences are clear-cut and complexity is low. In this case, simple negotiation systems provide an adequate framework for co-ordination. However, there are reasons for actors to change to complex decision-making systems.

First, simple negotiation systems are less efficient when situations are complex because the number of issues or the number of participants is high (Gehring 2002, 120, 157f.). In this case, the 'tit-for-tat' logic of bargaining will work less smoothly. As a consequence, excessively enduring negotiations emerge, like the negotiation rounds of the WTO (Hoekman/Kostecki 1995).

Second, negotiations in simple systems can prove to be rather difficult because two dimensions have to be managed. At the beginning, the possibilities of cooperation have to be identified. Later, the gains of cooperation have to be distributed (Gehring 2002, Scharpf 1992).

The first, analytic dimension helps the actors to identify possible gains of cooperation; thus, uncertainty is diminished and the actors become aware of their preferences. Therefore, a rather neutral discussion about facts and circumstances is required. Such a discourse can theoretically only be led in an argumentative way, as it is not possible to decide upon the rightness or falseness of hypotheses by bargaining resources (Gehring et al. 2005). Thus, negotiations about co-operation possibilities normally should be led in the mode of arguing. Concerning the second, distributive dimension of negotiations, this holds no longer true: Here, gains and losses of co-operation are directly assigned to the actors and thus, states will no longer rely on arguments, but on power-resources to maximize their own utility. Actors here interact in a mode of bargaining.

In real negotiation between nation states, the analytic and the distributive dimension of negotiations overlap. Consequently, arguing and bargaining will appear at the same time, as has already been demonstrated (Holzinger 2001), e.g. for international conferences (Risse 2000). However, the connection of bargaining and arguing raises some difficulties. The reason is that arguments and power-resources are not compatible. A bargaining process in which actors search convergence of their distributive positions by relying on power-resources will be blurred if additional arguments are provided. Vice versa, arguing processes which are constituted to distinguish between right and wrong are spoiled by the use of power-resources. As a consequence, a separation of both spheres (e.g. by delegation of analytic issues to expert committees) will be more problem-adequate (Gehring 2002, 159; Krapohl 2003).

Additionally the bargaining procedure suffers itself of severe disadvantages. While from a higher perspective successful bargaining is dependant on concessions being made by each actor, from view of each individual, every concession is a disadvantage, If negotiators apply this logic and formulate offensive demands from the beginning without making sufficiently concessions, negotiations will fail. Thus, negotiators may find themselves trapped in a 'negotiators dilemma' (Scharpf 1992, 79f).

If negotiations endure too long or if they fail at all, benefits of envisaged pareto-superior outcomes are diminished. The loss due to the mere negotiation process consisting of the costs of co-ordination and eventually the lost benefits if negotiations fail can be summoned up as transaction costs. Buchanan and Tullock have pointed out, that actors will change to other ways of decision-making when transaction costs exceed a certain level. One way is majority-voting (Buchanan/Tullock 1965), another delegation. This way, complex decision-making procedures emerge.

2.2 Complex Decision-Making Systems

Complex decision-making systems change the logic of interaction. These systems are not neutral to the behaviour of the actors. Generally, complex decision-making systems have the potential to alter the logic of interaction from power-based bargaining to reason-based

arguing. As a consequence, assuming the rationalizing power of deliberative interaction, complex decision-making processes can produce more problem-adequate results than simple negotiation-systems.

A decision-making system can be called complex, if it is functionally differentiated, i.e. when the workload of the system is distributed to several sub-systems which fulfil certain well-defined functions; as every function is constitutive for the decision-making process as a whole, no sub-system can be forgone. Economics know this principle as division of labour. It is the increase of efficiency through division of labour which is applied in a decision-making process by functional differentiation.

It is familiar from economics, that functional-differentiation has some consequences on the constituency of the sub-systems. Most evident is the fact of specialization. In a chain of production in a car-factory, a specialized worker only fixes some parts and then passes the platform to another specialized worker. The same logic applies to decision-making processes. A famous example for specialized actors is scientific committees which have the function to clarify causal relationships, but not to reconcile nation-state interests. However, to accomplish its function, the committee needs independence from other actors. If it would have no discretion, decisions of other sub-systems would be repeated; the sub-system would create in this case no additional value. As a consequence, by introducing new actors like scientific-committees into decision-making, existing actors loose some control over the result of the process.

To ensure that the co-operation project will still be beneficial, actors tend to introduce institutional precautions. Actors will accept a lack of control due to functional differentiation if it can be ensured that at least the decisions altogether are acceptable with regard to their preferences. This task can be performed by the introduction of adequate 'oversight' and control mechanisms and the serial connection of certain steps of decision-making in 'decision-making chains' (Gehring et al. 2005, 49). The loss of control also rises the question how it can be assured that outputs of sub-systems are accepted by other units: Differentiation enables a system to cope with complexity, but these efficiency-increasing results are missed, if the sub-systems do not co-ordinate. To cope with the task of integration, a complex decision-making system will create common criteria which ensure the compatibility of action: Decisions of a sub-system will be considered earnestly by following systems, if they fulfil those criteria which have been defined before (Gehring et al. 2005, 45ff; Krapohl 2003). The analysis of international institutions on the basis of system theory reveals how on the one hand common criteria and on the other hand decision-chains are introduced in the decision-making system. This way, the system gets hold of prerequisites which imply a change of interaction from bargaining to arguing.

The mechanism, how procedural pre-requisites of complex decision-making systems are capable to change the mode of interaction from bargaining to arguing appears in the case of vertically differentiated systems: Decision making systems being vertically differentiated split the workload on at least two levels. Normally, on the first level general criteria are defined which are applied to specific cases on the second level.

On the first level of decision making the actors are unaware of the cases to which the norms they develop are later applied to. As a consequence they cannot identify particular interests they otherwise would bring into the decision making process. They find themselves in a situation which resembles the 'veil of ignorance' identified by John Rawls (1971). Although the actors are unsure about their individual preferences, they still will insure that the whole co-operation project is in their very interest. Thus they will aim to identify norms which promise to produce acceptable results concerning the further decisions on the second level. But as communication about sensible norms cannot occur in a bargaining mode, the actors will automatically change their interaction to arguing. It is rational for them to deliberate about sensible norms (Gehring 2002, 257f.).

On the norm application level, case-by-case decisions are being taken. Here, the interests are well known to the actors. As a consequence, it would be expected that states pursue their interests through bargaining, using their resources of power and trying to influence the result in their favour. Interestingly, complex decision-making systems have mechanisms which prevent the actors from their pursuit of parochial interests.

First, the room for bargaining is limited, if decisions taken on the first level shall not be ignored on the second level of decision-making, if norm moulding is followed by norm-application. This is not a matter of course. Actors involved in the norm-application procedures are faced with two options: They may respect or disregard the norms given to them. Disregarding the norm may be a sensible mean for a single actor if decisions offend his own interest. If the costs implied by the decision would be higher than the benefits, it would be rational to block the process. This calculus is changed if the norm-application procedure is repeated several times. If the benefits expected by the whole co-operation project are big enough, the actors will make concessions in a particular case. A long shadow of the future (Axelrod 1984) induces norm-compatible behaviour. If the actors subject themselves under the norms developed before, their room for the application of their power resources will be limited and bargaining should be rare.

Second, if norm application involves several actors with certain functions, a staged decision-making process is established. Each actor can be considered as a subsystem processing certain information and producing certain signals for following systems. Decisions will only be taken if the decision-making process is not interrupted and all signals sent by the systems are familiar and understandable to the following systems. Given the condition that all systems share the interest in producing decisions it is sensible for them not to block the process, but to produce understandable signals. In this process common criteria are needed which are provided by the first level of decision-making. These general criteria are a focal point to the actors. Communication referring to general criteria can hardly be mixed with the use of power. Thus, arguing is a rational mode of interaction for the involved subsystems.

Third, arguing may be enhanced by giving-reason requirements. If actors want to influence a decision-making process, but are forced to give reasons for their arguments, it is sensible for them to draw on norms and criteria shared by all other actors. These norms do not have to be pre-existent, but are developed on the first level of decision-making. On the other hand, the actor will avoid arguments that are difficult to justify as he will risk that his considerations are

misunderstood or even disregarded. As a consequence arguing referring to general norms is reinforced.

Certain mechanisms incorporated in a decision making system for reasons of control or transparency may thus have an additional, unintended implication. They are able to drive rational actors from bargaining to arguing. Especially in the context of the European Union, institutional arrangements can be found, which show some of the features described above. One arrangement that fits rather well is technical regulation in the area of the New Approach.

3. Regulation in the New Approach Area: Deliberation by Differentiation

In 1985, the European Union changed its approach to technical harmonisation. For years, the Union tried to harmonize technical regulation of the member states by the definition of detailed directives in a undifferentiated decision-making process. Since this concept failed, a 'New Approach' was introduced which splits the workload on two levels of decision making; the undifferentiated procedure was replaced by a differentiated one. This way, the problem of blockage of harmonization has been solved (Joerges et al. 1988). In the following it will be argued that the introduction of the New Approach has additional consequences on the interaction of the actors involved. The differentiated decision-making process has the potential to suppress the use of power-resources and stimulate deliberative interaction instead. First it will be explored why harmonisation before 1985 has been blocked and how this could be solved by the introduction of the New Approach (3.1). Thereafter it will be analysed how the differentiated decision-making process can stimulate arguing on the level of norm-moulding (3.2) and norm-application (3.3).

3.1 From the old concept to the 'New Approach' – the end of harmonization-blockage

The European Union systematically started harmonisation of technical trade barriers in the 1960s. In 1969, the Council adopted the programme for the elimination of technical barriers to trade in industrial products. The program aimed at abolishing technical barriers to trade by the detailed definition of common safety requirements. The safety requirements were supposed to be fixed in directives, which are passed in the common legislative process on Council level. Thus, harmonization was subjected to an undifferentiated legislative process.

The success of this first harmonisation program was low. The 1969 program included a strict timetable for the harmonisation of certain product groups. In a two years period, 114 directives should have been successfully passed. In reality it soon got evident, that this ambitious program could not be fulfilled. The legislative process was much slower than expected. Concerning some directives, between the first proposal and the final vote in the Council ten years and more passed (Joerges et al. 1988, 274). With the enlargement of the European Union the procedure additionally slackened (Sedemund 1987, 39). Often, directives were already outdated by technical progress when they finally came into force (Falke 1989, 220). There are two reasons for the shortcomings of the old approach.

First, as common safety requirements had to be defined on Council level, the legislators had to cope with the details of technical regulation. The program of 1969 scheduled harmonisation for small product groups or only certain products; no further specifying regulation should be

required. As a consequence, the legislators had to cope with technically very elaborated directives which were accordingly long. The result was a jam of the legislative process. The drafting and the legislation itself required much more time than expected (Vos 1999).

And second, the undifferentiated decision-making procedure was hardly able to cope with emerging national conflicts that are implied in harmonization problems. As a consequence, harmonisation was sometimes completely blocked. Problematic have not been the technical details of regulation, but the national interests attached to them. Technical harmonisation normally resembles a coordination game with distributional conflict. Free trade is beneficial for all actors, but it is also rational for each country to impose its own safety concept on the community level (Scharpf 1996). As any advantage for one state turns automatically into disadvantages for the others, the European states used their power resources to pursue their national interests. In these situations the actors risk to end up in the negotiators dilemma. As a consequence, certain scheduled directives of the 1969 program did not pass legislation and remained mere drafts.

In 1985, the European Union replaced its concept of total harmonization when the Council adopted the New Approach. This new strategy to harmonization combines compulsory directives and facultative standards. Before 1985 it was only applied in the field of electro-technical goods (Reich 1996). The basic concept of the New Approach is a strict separation of general health and safety requirements on the one hand and detailed technical specifications on the other hand. Only the basic requirements are defined in the legislative procedure. The work of technical specification is delegated to the private standardization institutes CEN, CENELEC and ETSI which operate on European level but consist of national standardization organisations (Pelkmans 1987). With regard to our concept, the introduction of the New Approach has to be seen as a further step of differentiation of European decision-making. The old, undifferentiated procedure has been replaced by a two-step, differentiated decision-making process.

Contrary to harmonization before 1985, the New Approach is considered today to be a success story. Today 23 directives are in forces which cover wide product areas like machinery, toys, elevators or medical products. It is noteworthy that in sectors, where decision-making was blocked under the old approach for years, comprehensive directives have been passed rather easily, for example in the field of toys or simple pressure vessels. Additionally, also the speed of decision-making was enhanced: In 21 out of 23 New Approach directives, the legislative process lasted less than three years, in 15 cases less than two years (Gehring et al. 2005, 217). Also the fear that the application of the New Approach would delegate conflicts from legislation to standardisation did not turn true. In most product fields standardisation is quite successful; several hundred norms have already been developed and are in force.

Harmonisation after 1985 was obviously not blocked by particular national interests as it was before. With the New Approach, life was brought back to European harmonization. There are

two main reasons for this development.¹ The first reason is based on the fact that detailed requirements are excluded from decision-making. Before, member states often found no agreement on very specific technical details because they constitute the difference of national standards. Since details were excluded, consensus could be reached easier and the decision-making procedure fastened up (Vos 1999, 272ff.). The second reason is that the procedure creates own incentives which force the states to refrain from their power-resources. We will deal with this argument in the following sections.

3.2 Deliberative Norm-Moulding in the Legislative Process

New Approach directives are passed in the common European legislative process where the procedure of co-operation or the procedure of co-decision is applied. Thus, European Integration scholars would expect the Member States in the Council to pursue their national interests, i.e. to try to impose their national standard on the Community by using power-resources, and the supra-national actors Commission and Parliament would be recognised as intervening factors which can insert parochial interests into legislation. This would reflect the logic of a simple negotiation system. Given this background, the New Approach appears as a more sophisticated procedure which is capable to hinder states to pursue their parochial interests. The reason therefore is, that states act in this situation under a ‘veil of ignorance’ because they face uncertainty about their preferences.

The reason for the situation of uncertainty has to be seen in the design of the New Approach directives. The New Approach is based on the concept that only basic health and safety requirements should be defined in EU directives. These norms are later applied to numerous technical standards which focus on a certain product each (Pelkmans 1987, Joerges et al. 1988). The design creates uncertainty for the member states in two ways: First, states are normally unaware to which cases the directive will be applied later on. And second, states have to formulate a coherent negotiation position although if they are aware of particular interests concerning a certain product. As the directive must fit for a great number of standards, it is not rational for member states to tailor their position with regard to only one product. Instead, they will orientate on the “median” standard and thus formulate a “median interest”. When member states act during the legislative procedure under a ‘veil of ignorance’, it is no longer rational for them to negotiate in the modus of bargaining. Instead, a deliberative interaction can be expected.

3.3 Deliberative Norm-Application in the Standardization-Process

Standardization is subjected to a rather complex decision making process which involves official and private actors. Thereby, the single actors perform certain particular and complementary functions for the whole procedure. Thus, a horizontally differentiated

¹ Some authors argue, that a third reason for the success of harmonization after 1985 was the change of Council voting from unanimity to majority (Vos 1999). Although positive incentives have been identified, European member states obviously did not consider the change of voting procedure sufficient to re-vitalize harmonisation. Instead, the New Approach was introduced.

decision-making process is created. This concept and procedure itself provides incentives for the actors to enter a discourse based on norms.

Standardization is taking place in a multi-step procedure with four stages. In the first step a mandate for the development of a certain standard has to be developed. The mandate is developed by the European Commission in consultation with the Committee for Standards and Technical Regulations; additionally also the sector specific committees are supposed to give in comments.² Mandates are also formulated in close consultation with the standardisation bodies itself³, which is sensible because CEN has to accept the mandate officially⁴. CEN itself solicits comments on the mandate from the national standardisation organisations.⁵ If an agreement concerning the design of the mandate has been reached between CEN and the Commission, CEN drafts a working program and subjects it to the Commission. In some cases, a contract⁶ between the Commission and CEN is being signed. Via the mandate, political actors could have the possibility to steer standardization by defining additional requirements, but in reality they seldom do. Instead, CEN most of the time proposes the design of a mandate on its own (Becker 1996, 449; Gehring et al. 2005, 254)

In a second step, standardization itself takes places within the relevant standardization body in a highly differentiated process: The main work is done by a Technical Committee. The task to draft an initial version of the standard is normally delegated to a Working Group, which should be limited in size and have a ‘right balance’ between different interests of manufactures, users, consumers and standardization bodies. Working Groups consists of experts which should stay in contact with their national standardization bodies to minimize the risk of having a draft standard rejected at later stages⁷. During drafting, contact to the Technical Committee is sought by communicating preliminary drafts⁸; this way, early feedbacks can be obtained. Working Groups are supposed to come to a consensus. Only in exceptions, discussions in the Technical Committee can take place⁹.

After the draft is judged ‘technically and editorally fit’¹⁰, it is sent to the CEN Secretary which accepts it as preliminary standard, attaches a prEN number and distributes it to all national standardisation organisations. During the “CEN enquiry”, the national members of CEN can express their view upon the standard and offer comments. Comments are analysed by the ‘comments resolution meeting’ which is a sub-committee of the Technical Committee concerned¹¹. The Comments Resolution Meeting shall decide on every comment and make a formal written proposal¹².

² CEN, Guidance on Mandates, pt. 2.2

³ CEN, Guidance on Mandates, pt. 2.2

⁴ CEN, Guidance on Mandates, pt. 2.3

⁵ CEN, Guidance on Mandates, pt. 2.3

⁶ CEN, Guidance on Mandates, pt. 2.4

⁷ CEN, Guidance for the Work of Working Groups, pt. 2.3

⁸ CEN, Guidance for the Work of Working Groups, pt. 3.2.3

⁹ CEN, Guidance for the Work of Working Groups, pt. 3.2.7

¹⁰ CEN, Guidance for the Work of Working Groups, pt. 3.2.6

¹¹ CEN, Guidance on the Reporting and Handling of Comments after CEN Enquiry, pt. 3.1

¹² CEN, Guidance on the Reporting and Handling of Comments after CEN Enquiry, pt. 3.1

After revision, the prEN standard is subjected to final voting in the General Assembly where only a majority can reject it. Additionally, negative votes must be accompanied by justifications¹³. Every national standardisation organization can appeal against decisions of CEN bodies. But appeals will only be earnestly considered, if “questions of principle” are concerned, e.g. violations of CEN Internal Regulations.¹⁴

If a standard has passed the standardization-process, it has to be accepted in a third step by the European Commission. The Commission, lacking expertise, normally controls only, if procedural and mandate-requirements are obeyed.

If member states doubt the safety of standards, they can, in a fourth step, trigger a safeguard procedure. During the safeguard procedure, the content of a standard is subjected to extensive scrutinizing of two comitology committees, the Committee for Standards and Technical Regulations and an additional directive-specific expert committee. However, the committees cannot work on a standard on their own, but only recommend the Commission to send it back to CEN for revision.

The analysis of the standardisation procedure reveals three mechanisms which are capable to stimulate arguing: First, decision-making is subject to well-defined criteria; second, standards are treated independently, and third, standardization comprehends a multi-step procedure. Concerning the first topic, New Approach standardization is subjected to well-defined, substantive requirements. New Approach directives are supposed to define only basic health and safety requirements. Therefore, they address well-known risks which are connected to the use of a certain technical product and define how the risks should be managed. Standardization bodies have to respect these definitions of the directive. Thus, their room for bargaining is restricted: They can hardly pass solutions which would undermine the directives’ safety-level.

Second, the creation of standards is normally treated separately by the European Standardization bodies. Normally, different Working Groups are endowed with the task to draft first versions of the standards. After this initial step, every draft standard is treated in an own procedure of decision-making. Thus, the risk of bargaining-relevant package-deals is minimized.

And third, standardization takes place in a multi-step procedure which connects several independent actors. This way, it can be ascertained that the regulations of the New Approach directive are obeyed. Thus, the procedure creates own incentives to change the mode of interaction from bargaining to arguing. Closer inspection reveals that the success of potential incentives depends on the quality of the directive concerned. If the directives have loopholes, no criteria are available for standardization and room for bargaining exists. Contrary, arguing is most likely when directives are carefully elaborated and address most risks. In this case, states can hardly influence the process by using power-resources; instead, they have to defend their national interest by arguments.

¹³ CEN, Internal Regulations, Part 2: Common Rules for Standardization Work, pt. 11.2.4.2

¹⁴ CEN, Internal Regulations, Part 2: Common Rules for Standardization Work, pt. 7

4. Technical Regulation in the Field of Machinery

Technical regulation in the field of machinery is covered in the European Union by one single directive – the machinery directive¹⁵, adopted in 1989. Drawing on legislation and standardisation in the field of machinery, we tested our hypotheses that New Approach procedures systematically prevent nations from the pursuit of their parochial interests. The machinery directive provides an ideal case study. It covers a wide product sector which is important for the effectiveness of a ‘veil of ignorance’ during norm-moulding, and it led to several hundred standards which satisfies our condition of a great number of norm-application cases. In the following, we discuss first, if legislation was influenced by parochial interests (4.1), before it is analysed if the provisions of the directive are obeyed during standardization (4.2). Finally we examine whether the procedure is also capable to prevent the influence of national interests in highly controversial cases (4.3). The result is, that technical regulation in the field of machinery is indeed seldom influenced by national interests. The hypotheses that thus problem-adequate results are created are reflected in a high safety level and a high performance of machinery regulation.

4.1 Legislation and a High Safety Level

We expect actors in the New Approach area to act under a veil of ignorance which hinders them to pursue their national interests. As a result, they should alter their mode of interaction from bargaining to arguing and should refrain from the use of power resources. To examine the concept, a content analysis of the documents and protocols¹⁶ of the legislative process was carried out. Theoretically, rational actors are not supposed to refrain from the use of power resources if it will serve their interests. Therefore, they have to be aware of their preferences. Thus, if under a ‘veil of ignorance’ no conflicts emerge which are aligned to definitely national interests, bargaining should not have taken place.

However, not all conflicts are relevant for this study, as some have taken place between European institutions, not between member states. We expect the ‘veil of ignorance’ to erase national interests, not institutional ones. Nation states are under the condition of uncertainty unable to identify certain safety rules which would serve their interests best, as they do not know the cases, these rules will be applied to. Political institution can even under uncertainty identify clear preferences; for example, it is always rational for them to maximize their future influence. Conflicts based on such considerations cannot be avoided even under the conditions of the New Approach.

The empirical analyses of the legislation process taking part between 1987 and 1989 revealed five relevant conflicts. However, two of them were mere institutional ones.¹⁷ Two national conflicts arouse because Southern countries sought exceptions from the high safety level, and

¹⁵ Council Directive 89/392/EEC of 14 June 1989 on the approximation of the laws of the Member States relating to machinery. In: *Official Journal L 183*, 29.06.1989, p. 9 – 32.

¹⁶ Except the protocols of the relevant Council meetings which were not available.

¹⁷ One conflict concerned the introduction of an additional committee for machinery safety which was without exceptions successfully demanded by the member states against the opposition of the Commission; another conflict concerned the inclusion of social partner into machinery comitology, it was launched by the European Parliaments against opposition of the Council.

Denmark aimed for clauses which allow higher national regulations. Both demands would have violated the harmonisation logic of the New Approach and failed during legislation. A third conflict concerned the safety of woodworking machines. Here, France favoured sophisticated protection devices, while Germany relied on the education of workers and wanted a lower safety level. The conflicts were decided after jurisdiction of the European Court of Justice in favour of the French concept (Alter/Meunier-A. 1994). This conflict reveals some limits of the identified mechanisms: Evidently in those cases, where the safety concept of homogenous product groups is ex-ante controversial, national interests can be identified and the causal mechanisms generated by uncertainty and the need of consistency are overridden. Despite these conflicts, most of the clauses of the machinery directive have been undisputed. This is especially true for the relatively exact regulation in the annexes. Thus, we found first evidence that generally norm-moulding under conditions of uncertainty created by the differentiated decision-making procedure prevents nation-states from the pursuit of national interests.

As our approach is interested in the normative implications of arguing, we also find additional evidence for the validity of our concept, if the output of decision-making is compatible with common welfare (*'gemeinwohlverträglich'*), i.e. the machinery directive implicates a high level of safety. Our interviews with technical experts gave us indeed indication therefore. The high safety implied by the directive is especially due to two central clauses.

First, the directive 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). Regarding this clause, every accident which is not a clear misuse is already regarded as a violation of the directive (Gehring et al. 2005, 227f).

Despite this strict regulation, it is respected among engineers that absolute safety cannot be attained by technical means. Out of the perspective of political science this would open significant bargaining-range. This risk is regarded by a second clause which today is evaluated to breed the high safety level. It commits producers to take into account “the state of the art” when designing and constructing machinery with the purpose of approaching the objectives of the directive (ann. I, 2). The state of the art is a high hurdle for producers because it is not only sufficient to fulfil the acknowledged rules for accident prevention, they must also take new finding into account which are found in scientific publication or new patents (Egan 2001, 186). The rest of the directive defines in a third step more specific safety requirements which are addressing certain risks like technical hazards (ann. I, 1.3), fire (ann. I, 1.5.6) or explosion (ann. I, 1.5.7).

All in all, the machinery directive is recognized as the most sophisticated regulation of common safety requirements concerning New Approach directives (Berghaus/L. 1998). Early criticism of the directive concerned the compatibility with other New Approach directives or the application of the new certification procedures by producers (Egan 2001, 185), but did not refer to the safeguard level of the directive or its content. That the output of legislation seems to be compatible with common welfare provides evidence for the rationalizing power of differentiated decision-making systems.

4.2 Standardization in the field of machinery

Standardization concerning machinery follows itself a vertically differentiated decision-making. First, comprehensive standards with general requirements are elaborated which are later on précised by very specific ones. This way, the logic of differentiation of the New Approach is repeated in the area of standardization. As a result, standardization in the area of machinery proves to be very successful.

With the introduction of the New Approach it was feared, that conflicts might be delegated from the legislative level to standardization. In this case, rapidly directives would be passed, but standardization would be hampered again by distribution conflicts. For the machinery directive, this must definitely be denied. In 2004, more than 400 harmonized standards have been in force which were exclusively developed by the European standardization bodies or adopted from ISO (Gehring et al. 2005, Wolf 2000). The distinctive feature of standardisation concerning the machinery directive is the introduction of a system of hierarchical ordered standards. After the adoption of the machinery directive, a huge standardization program had to be fulfilled in a rather short time. To speed standardization up, a three-staged system of standards was introduced: A-standards define basic requirements concerning certain risks, B-standards define specific safety-requirements for a certain sector of machinery, and C-standards define specific safety-requirements for one type of machines.

The concept of hierarchical ordered standards proofed to be very successful. It enabled the actors to pass the general A- and B-standards quite fast (Egan 2001, 187). Later on, existing A- and B-standards served as yardsticks for the development of concrete and detailed C-standards (Dey 1993, Puppel 2000). The division of the standardisation work on three kinds of standards which differ in precision reflects the principle of functional differentiation of the New Approach. Standards of the type A and B contain more general health and safety requirements which have to be rendered precise; therefore standards of the type C are written. In this differentiated standardization process the strategic situation for the actors is different than in an undifferentiated one: Concerning standards of the type A and to a lesser extent type B, national standardization bodies can hardly pursue very specific interests of certain national producers or consumer organizations. Instead, they must have a general position which serves their interests in all cases. Additionally, it may even be hard for them to identify every relevant interest of producers and consumers, so that they find themselves under a veil of ignorance again. But the more the actors are unsure about their individual preferences, the less are they able to use their power resources sensibly.

Concerning standards of the type C, it must be assumed that the standardization bodies are aware of national interest. But now, their discretion is very restricted. The actors have to restrain to the yardsticks provided by A- and B- norms. Thus, it can be assumed, that the influence of national interests is not high, but rather low. As it is more likely that individual interests disturb the decision making of C-standards than of A- and B- standards, the procedure should last longer. These hypotheses can be validated by empirical data: Concerning A- and B- standards did the procedure on the average last only 40, 7 months, while it were 44, 8 months concerning C-standards (Gehring et al. 2005).

4.3 Critical Cases

We argued in section 3.3 that standardization in the New Approach area is able to stimulate deliberative interaction. In this section we examine, if the expected mechanisms are also active in the case of controversial cases. It might be, that standardization in the New Approach area only functions well as long as no severe conflicts appear. But as soon as national interests diverge, standardization could be blocked, or only continued after bargaining processes. An ideal mean for the member states to influence standardization could be the safeguard-procedure. By submitting formal objections the member states can trigger revisions of certain standards. Thus, the question arises, if member states abuse the safeguard procedure to pursue their parochial interests.

To address this question, three recent, controversial cases concerning machinery standards have been studied. The first cases concerned the safety of silage cutters (standard EN 703), the second one the safety of portable chain-saws (standard EN ISO 11681-2), and the third one the safety of soil working machines (standard EN 708). All three cases were subjected to a formal objection.

In the case of silage-cutters, Italy triggered a safeguard-procedure against a shortly published standard of CEN. Silage cutters are machines which pick up, hack and prepare animal feed. In some cases, users have been roped in the machine when they came into contact with mechanical elements; they were seriously injured or killed. Italy argued that the relevant CEN standard did not provide adequate safety-requirements to prevent accidents. In the Standing Committee on Technical Standards and Regulation, Italy could mobilize nearly consensus against the standard. After recommendation of the Commission, the standard was withdrawn and a mandate for its revision sent to CEN. Concerning silage-cutters, the safe-guard procedure served as an instrument to monitor the work of CEN. It was not the interest of one single member state to impose its own safety concept on its European neighbours. Instead, the safeguard procedure was a mean to discipline the standardization body and was employed as an instrument of control, a 'fire-alarm' triggered by the principals (Pollack 1997). In this case, all member states shared a common interest.

Of similar effect was the case of soil working machines. These machines plough the soil with rotating blades to deploy seeds. Contacts with parts of the machinery can cause sever 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. Although the standard was yet not published, the United Kingdom triggered a safeguard-procedure. It argued that the protection-shields are not thick enough to offer protection when people climb on the them. The safeguard procedure in this case was the reaction of Great Britain after its objections have been ignored during standardisation. After initiating the procedure, Great Britain could draw attention on its concerns via the Standing Committee on Machinery Safety. In an informal consultation between the Committee and CEN, the British arguments were respected in the standard.

Contrary, in the case of chain saws, the safeguard procedure did not lead to a completely different evaluation of a new standard by political actors. The safeguard procedure was triggered by Denmark already before publication of the new standards concerning portable

chain saws for one-hand use. The Danish state argued, that the risks of severe accidents was not abolished by technical means. Instead, the standard defined only precaution measures for the user, like gloves, boots, safety glasses and ear protection. The effectiveness of these measures depends on the responsibility of the user, not the producer of then chain-saw. As a consequence, Denmark demanded the withdrawal of the standards and its complete revision. However, the Nordic country could not gain a majority in the relevant comitology committees, also the Commission rejected the Danish point of view. It became evident, that the remaining risks of the chain-saws could not be abolished without changing the complete function of the machines, by e.g. requiring two-hand use. At the end, the standard was accepted, although CEN was pleaded to review it whether additional safety measures could be introduced. The conflict reveals that the safeguard-procedure is capable to prevent nation-states to impose their national interests. In the case of chain-saws, Denmark was not able to proof the supposed deficit of the standard with regard to the requirements of the machinery directive; as a consequence, the standard was not withdrawn.

Although in all three cases the member states which initiated the formal objection could reach a revision of the relevant directive, it must be denied that they have been successful to impose their parochial interests on the community. Instead, they only succeeded if they managed to draw attention to severe safety problems – independently from the fact whether the member states had a common position or whether they were divided by cleavages. Appeals were only earnestly considered if the member states were able to deliver extensive data for their complaints. If, like in the case of chain saws, no sufficient arguments with regard to the machinery directive can be provided, safeguard procedures seem to be deemed a failure (Stefanova in Gehring et al. 2005).

5. Deficits of Toy Regulation

Toys are the first sector of consumer products the New Approach procedure was applied to. Thus, the project of the toy safety directive was considered as a litmus test for the new harmonization procedure. First, it was regarded as a success: Before the introduction of the New Approach, harmonization of toys was blocked for years; two drafted directives of the Commission failed during legislation. Under the New Approach, the toy market could be harmonized astonishingly fast; legislation took only 20 months. However, the toy safety directive today appears to be problematic. Not only the implementation of the directive proofed to be difficult (Weatherill 1995), also dangerous toys appeared on the market, as legislation could not cope with certain risks.

Some of the problems arise from deficits of the design of the directive. First, the safety level of the directive remains rather low and offers ample discretion. Thus, the benefits of a differentiated decision-making process are spoilt (5.1). As a consequence, emerging problem will be addressed in the safeguard procedure which faces certain difficulties (5.2).

5.1 Lower safety because of missing differentiation

The European toy safety regulation has several shortcomings. First, the safety-level of the directive proofed to be lower than those of the machinery directive as no obligation to reach

“the state of the art” exists. Second, the directive has certain loopholes in its safety requirements as certain risks are not addressed in the directive. And third, no mechanism exists, in which missing criteria could be defined subsequently, like it is e.g. common in the machinery sector concerning A- und B-standards.

Results from regulation which are acceptable for common welfare can be expected if the relevant directive defines a high safety level to which standardisation is subjected to, like in the case of the machinery directive. In the toy sector, such a high safety level is missing. The toy safety directive states that toys shall not “jeopardize 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). Only with regard to this clause, the safety level appears to be rather high, especially as producers must respect the incalculable behaviour of children. However, like it is the case with machinery, no absolute safety can be attained. The toy safety directive addresses this fact by defining that “[t]he degree of risk present in the use of a toy must be commensurate with the ability of the user (...) to cope with” (ann. II, sec. I, 2a). Interestingly, no further requirements or specifications are being defined, like they exist in the machinery directive. There, it is also respected that no absolute safety exists, but producers are obliged to design machinery “in the purpose of approaching these objections” and to respect “the state of the art”. Such requirements are missing here. This has to be considered as a first, major shortcoming of European toy regulation. According to the directive, toys must be designed in a way to protect from hazards, but there is no obligation to maximum safety. Instead, it is the task of following actors to interpret, which risks are still “commensurate to the ability of the users”. Thus, ample discretion for following subsystems exists.

Shortcomings in the general safety requirements theoretically could be compensated by a dense network of requirements addressing specific risks. In comparison with the machinery directive the toy safety directive contains several loopholes. Certain hazards are not being regulated. Noise is a first sector that has not been addressed. Although the problem has been well-known during legislation¹⁸, no specific requirements have been defined in the directive. At the end of the nineties, the missing regulations have evoked major safety-deficits concerning toy pistols. We will discuss this case in 5.2. A second sector which faces this problem is organic-chemical substances. Here also several conflicts during legislation popped up¹⁹, but remained unsolved. While for some unorganic substances like lead or cadmium exact limits have been defined, in the case of organic substances no toy-specific regulations have been passed but only references to some other directives. As a consequence of missing specifications and loopholes, the regulation workload is delegated to further subsystems. These subsystems are only bound to the general requirements of the directive, no further criteria exist. Hence, following systems have ample discretion and therewith incentives to try putting through their national interests.

¹⁸ Stellungnahme [des Wirtschafts- und Sozialausschusses] an den Rat, A 2-87/87 v. 4.6.1987, 18; Sitzungsprotokolle des Europäischen Parlamentes 2-363, 28.

¹⁹ Stellungnahme [des Wirtschafts- und Sozialausschusses] an den Rat, Abl. C 323 v. 31.8.1987, 26; Sitzungsprotokolle des Europäischen Parlamentes 2-363, 28.

In a well-designed decision-making system, missing decision-criteria could be defined on following levels of decision-making. Such a mechanism is used in the sector of machinery: First very general A-standards are defined, they provide benchmarks for the developments of more specific B- and C-standards; thus, the workload is split on several hundred standards. Such a concept is missing in the toy sector. Here, 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 (see table 1); four address specific and especially dangerous toys (experimental sets for chemistry, other chemical toy sets, finger paints and swings for family domestic use) while the rest addresses unspecific risks (mechanical and physical properties, flammability, migration of certain elements [heavy metals], graphical symbols for age warning labelling) and is valid for all kinds of toys. This standardisation structure has two logical consequences. On the one hand very large standards have to be developed as they have to cover a wide sector of toy properties. On the other hand, the standards have to be detailed to perform their function of providing technical specifications of safety requirements. Thus, very broad and very detailed standards are created.

Table 1: The system of toy standardisation related to the EU toy directive

| <i>number of standard</i> | <i>Title</i> |
|---------------------------|--|
| EN 71- 1 | Mechanical and physical properties |
| EN 71- 2 | Flammability |
| EN 71- 3 | Migration of certain elements |
| EN 71- 4 | Experimental sets for chemistry and related activities |
| EN 71- 5 | Chemical toys (sets) other than experimental sets |
| EN 71- 6 | Graphical symbol for age warning labelling |
| EN 71- 7 | Finger Paints – requirements and test methods |
| EN 71- 8 | Swings, slides and similar activity toys for indoor and outdoor family use |
| EN 50088 | Safety of electric toys |

Compared to standardisation in the machinery sector, this specific structure of toy standardisation will influence decision-making in a negative way: First, the rationalizing power of a hierarchically ordered standardisation system is missing, because several hazards are not addressed in the directive, because no differentiated standardisation system exists and because toy standards address broad topics of regulation. Thus, the workload which should be split on several levels, is re-bundled. Second, especially in the case of the product-specific standards member states will be aware of their national interests; they do not have to formulate a coherent national position for a group of products but can try to tailor the standard with regard to their national concept. It is likely that much of the delay of toy standardization in the chemical sector (Egan 2001, 176) can be explained by these unsolved conflicts. As a consequence, some highly politicized issues reappear in the political process as the case of softeners (phthalates) in teething rings demonstrates (Schieble 2003).²⁰ And third, the broad

²⁰ In 1999, the Commission put forward a proposal to ban the use of phthalates in toys. The draft directive was currently discussed and approved by the European Parliament, see 'Proposal for a directive of the European Parliament and of the Council amending for the 22nd time Directive 76/769/EEC on the approximation of the

character of the product-unspecific standards offers possibilities for package deals. As a consequence, regulation in the sector of toys resembles an undifferentiated decision-making system which is susceptible for power-based interaction in the mode of bargaining.

5.2 Conflicts concerning Toy Pistols: Dispute about the Safety Level

In the case of regulation of toy pistols, the shortcomings of the toy safety directive became evident. The actor's positions concerning safe noise limits dramatically diverged and a safeguard-procedure has been triggered. Due to missing specifications in the toy safety directives which address noise hazards, actors have not been able to solve the dispute by arguing, but relayed on their bargaining power.

The object of the dispute was a revised CEN standard concerning the mechanical and physical properties of toys (EN 71-1). It has passed CEN in July 1998 and included for the first time noise limits for toy pistols. According to the new standards, the maximum noise level of toy pistols shall not exceed 140dB peak; after a transitional period of three years, the level should be reduced to 125dB peak. The noise should be measured in a distance of 50cm from the ear, assuming that children fire pistols on their outstretched arm.

Already before publication in the Official Journal, Germany triggered a safeguard-procedure against the new standard. Based on studies of the University of Gießen (Fleischer et al. 1998) it was argued that the limit of 140dB is too high for protecting the ears of children. Several accidents where children's ears have been hurt seriously were brought up. Additionally, it was stated that children often do not use toys intentionally but e.g. fire pistols near their own or other children's ear.²¹

Germany's complaint was discussed in both relevant comitology committees in a rather extensive way. Astonishingly, both committees, the Expert Group on Toy Safety and the Standing Committee on Technical Standards and Regulations welcomed the issue and principally supported it. As a consequence, the committees recommended in March 1999 not to publish the parts of the new standard which concern toy pistols. By deleting partly the assumption of conformity of the new standard, the member states together with the Commission prevented unsafe regulations to come into force. Interestingly, they did not rely exclusively on the toy safety directive, but also on other directives. Here it becomes for the first time evident, that the criteria of the directive enable states to become active, but do not make it necessary. The safeguard procedure had additionally be justified by other directives, i.e. outside sources.

After the non-publication of parts of the norm, CEN had to review its work. But the decision-making process proofed to be difficult through all stages. The reason therefore was a deep division between the national standardisation organisations. The Nordic and the Austrian organisations preferred low limits about 120dB, the other organisations high limits about

laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (phthalates) and amending Council Directive 88/378/EEC on the approximation of the laws of the Member States concerning the safety of toys' *COM (1999) 577*.

²¹ Mitteilung der Regierung der Bundesrepublik Deutschland an die Kommission der Europäischen Gemeinschaft v. 23. September 1998.

140dB. Already the first proposal of a staged system of limits (first 140, later 125) seems to be a compromise solution. After the safeguard procedure was triggered, first attempts of a CEN Working Group in the year 1998 to tighten the noise limit to 120dB failed completely when the member organisations voted the proposal down in the CEN inquiry (Gehring et al. 2005, 340f.). After the non-publication of the relevant parts, in the year 2000 a new CEN Working Group proposed a compromise of 134dB (Fiala 2000, 26). However, no consensus between the actors was reached. The proposal was the result of final voting. It has to be regarded as that value that was just able to gain a 'minimum winning coalition'. Several scientific studies that have been presented by both sides did not serve for argumentative considerations, but for justifying bargaining positions.

After CEN presented its new proposal of 134dB to the Commission, the member states immediately signalled that this level will not be acceptable for them. It became evident that on the one hand the European governments preferred low limits, but on the other hand these low limits would not find a majority among the CEN members. Thus, decision-making would have been blocked. As a consequence, the Commission proposed a pragmatic solution: If the member states would now agree to publish the initial proposed standard of CEN, the rather low limit of 125dB would become active as the transitional period would be already passed. Although some member states still preferred lower limits, the proposal was accepted because the 125-dB limit was at least lower as the new 134-dB proposal of CEN.

The conflict shows that the safeguard procedure is a strong institutional tool to prevent unsafe regulations coming into force. Therefore, it is necessary that the procedure is triggered by one member state and well-founded arguments are provided. The case of toy pistols also reveals the deficits of the toy safety directive: The vague requirements on the one hand enable actors to argue against low quality of standards, on the other hand this is not necessary. Instead, Germany's complaint was backed and probably had been motivated by external regulations, namely the directive on the protection of workers.²² Considering these issues, political oversight over standardisation appears to be an arbitrary phenomenon rooted in insufficient precision of the directive.

The case also revealed problems in the area of standardisation where conflicts upon optimal regulation of noise emitted by pistols could not be settled. Two fractions opposed each other vehemently, decisions were only taken after strong bargaining processes. Problem-solving based on deliberation was hampered because no common criteria were available. The toy safety directive made no provisions concerning noise and the general requirements were rather vague. Thus, the actors used their discretion for power-based interaction.

All in all, the toy pistol conflict reveals the importance of common criteria in functionally differentiated decision-making systems. Only if these criteria are available, the rationalizing effect of differentiation will be activated.

²² Council Directive 86/188/EEC of 12 May 1986 on the protection of workers from the risks related to exposure to noise at work, Official Journal L 137, 24/05/1986, 28-34.

6. Conclusion

This article demonstrated that the complex decision-making system of technical regulation in the European Union is systematically able to stimulate deliberative decision-making. The key mechanism towards the change of interaction from bargaining to arguing is vertical differentiation.

In the theoretical section of the article, it was demonstrated which consequences are implied in a differentiation of decision-making systems. In simple decision-making systems, bargaining has to be regarded as the common mode of interaction, as every decision has implications for the distribution of benefits. If states change to more elaborated decision-making systems, this picture changes. Principals normally define criteria for further decision-making and subject their agents to certain oversight measures and therewith (unintentionally) create incentives for deliberative interaction on both levels of decision-making.

The consequences of differentiation become already evident in the general performance of the New Approach. Before its introduction 1985, harmonization was sought by legislation in an undifferentiated decision-making procedure. During this time, decision-making was increasingly blocked by national interests. After the undifferentiated system was replaced by the differentiated New Approach, harmonization began to flourish.

On the level of legislation, large product sectors have been regulated in relatively short directives. The change of behaviour can be explained by a 'veil of ignorance': As member states only should define basic health and safety requirements, they should either be unaware of parochial interests or be forced to develop a 'median-interest' which they can attend during negotiations. Thus, the procedure itself creates a situation of uncertainty; in this situation, arguing has proved to be a more rational mode of interaction than bargaining. We expect output of deliberative interaction to be more problem-adequate than those being the result of bargaining. We find evidence for this thesis with regard to the machinery directive. Here, the safety-level of the directive is generally high. With regard to the toy safety directive, the picture is more differentiated. Here, the general safety level is lower, and although some topics like mechanical requirements are well elaborated, the directive falls short with regard to chemical and acoustic requirements. A closer look reveals that in these areas bargaining during legislation prevailed (Gehring et al. 2005).

On the level of standardisation, most New Approach directives have been successfully specified by a great number of standards. The reason therefore lies in the procedure which has the potential to restrict the influence of national interests. Three reasons can be distinguished: First, the standardisation process – which is initiated by a mandate-procedure and may be followed by safeguard-procedures – establishes a system of 'checks and balances'. Second, the room for bargaining is limited as standardisation is subjected to the New Approach directives. And third, giving-reason requirements stimulate arguing.

The incentives provided by the procedure are especially relevant in the case of machinery. Here, several hundred standards have been passed. Additionally, the concept of differentiation is successfully repeated in the standardisation work by the introduction of the hierarchical system of A-, B- and C-standards. The capability of the procedure to sort out national interests proves to be valid also in 'critical cases' which were subjected to the safeguard-procedure. In

all three cases, the high safety-level of the directive was transferred to the standard. The case of soil-working machines and silage-cutters demonstrated that the safeguard-procedure is an effective instrument to subject standardisation to the criteria of the New Approach directives. The case of chain-saws demonstrated, that single states hardly can push through national interests when arguments are lacking.

The picture is different with regard to the toy safety directive. Although the same formal standardisation procedure is applied, standardisation is taking place under different conditions: Here, the general safety-level of the directive is lower. Due to loopholes in the directive, criteria for standardisation are missing, and a differentiated system of hierarchical standards is lacking. Instead, only a few numbers of broad standards are created which offer ample discretion. As a consequence, the incentives provided by differentiation are partly spoiled and more bargaining can be expected than in the case of machinery. An example therefore is provided by the case of toy pistols, where compromises concerning the dB-limits were sought and decision-making was partly blocked between CEN and the political actors. Despite these findings, the final noise limit of 125 dB seems to be justifiable with regard to the provisions of the toy safety directive.

Generally, differentiated decision-making procedures seem to be capable to provide incentives for deliberative interaction. If differentiation is applied strictly like in the case of the machinery directive, problem-adequate results can be expected. If differentiation is applied less strictly, the workload is concentrated on some actors and new rooms for bargaining pop up, like the toy safety directive and its critical case of toy pistols demonstrates. The analysis reveals the importance of the design of directives for the well-functioning of the New Approach. If the safety-level of directives is high and most risks are being addressed, also standardisation will function smoothly.

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