

Transatlantic perspectives on risk, regulation and TTIP

Policy Briefing – 19 June 2014

Summary

The negotiations on the Transatlantic Trade and Investment Partnership – a proposed free trade agreement between the EU and the US – are well under way. One of the key issues at the negotiating table will be the divergence of precautionary measures between the US and the EU. Is it true that the American legal system leaves more room for risk taking, while Europe is more prone to take precautionary measures? Can we make a distinction between a ‘culture of risk taking’ in the US and a ‘culture of risk aversion’ in the EU? And if so, will Europe have to lower its standards on risk regulation? Jonathan Wiener, Professor of Law at Duke University, tried to shed some light on these issues in his study on relative precautionary regulation in the US and the EU, offering a transatlantic perspective on risk and regulation and exploring the possible implications for the TTIP negotiations.

Full Report

Jonathan B. Wiener, William R. and Thomas L. Perkins Professor of Law at Duke Law School and Director, JD-LLM Program in International and Comparative Law, kicked-off the briefing by presenting the findings of a research project on risk regulation in both the US and the EU. The study gives us a comparative analysis of US and EU regulation on risk, and offers some insights as to how TTIP could address this issue.

The project, which started 12 years ago, was not originally focused on TTIP but originated from a debate on the Precautionary Principle, a general regulatory principle that called for earlier prevention and anticipation of emerging risks in the face of uncertainty. The argument was being made that while the EU had adopted the Precautionary Principle in the Maastricht Treaty in 1992, and was therefore part of EU law, the US had not adopted such a provision, sparking a discussion about the merits of the Precautionary Principle as an abstract principle of law and regulation.

The debate was also carried out in the context of specific regulatory differences between the US and the EU, some of which were quite controversial, like the US allowing hormones in beef or the production of Genetically Modified Organisms (GMO). This initiated a claim that Europe was more cautious than the US, even going so far as to insist that there was a ‘culture of risk taking’ in the US and a ‘culture of risk aversion’ in the EU. This has implications for TTIP, because it is the premise for the concern that if TTIP were to be signed, harmonisation of regulation would mean that Europe would have to lower its standards on protection to US levels.

So the goals of the project were to investigate if these claims were true and to find out what the concrete reality of regulatory policy, on both sides of the Atlantic, was. Several transatlantic dialogues and debates were organized, which resulted in the publishing of the book ‘The Reality of Precaution’ in 2011.

Wiener then proceeded to give an overview of the highlights of the research project:

First, he said, he and his team wanted to study a wide variety of risk regulation, across a much wider area of risk than had previously been undertaken, going beyond the issues that were being discussed in newspaper headlines. The study focused first on the federal levels in both the EU and the US, but it soon became clear that there was also variation among EU and US Member States. This point already

illustrated a weakness in the claim of risk taking vs. risk aversion cultures producing consistent policies across all states. The research project also included a wide time frame, going back to 1970.

Another claim that was being analysed was the theory of David Vogel, set out in his book 'Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States'. Vogel claimed that since the 1990's, the EU had introduced more and stricter precaution measures than the US had, but that before this time, it was the US that was more risk averse and more stringent and proactive in risk regulation.

The research team attempted to improve the methodology in two ways:

1. On the one hand, the aim was to have a broad picture of risk regulation, because singular examples, however contentious they may be, are not representative for the way the EU and the US regulate risk. So they collected a data set of all the risks identified in government official and academic literature from 1970 to the present, from which they took a random sample, scoring each relative precaution measure for each risk and for each year (1970-2005). Although this method offered a broad perspective on relative precaution, it did not go very deep. The results were that, on average, there was little to no difference between risk regulation in the EU and in the US. There was only a slight increase in precaution measures in the EU after 1990 (less than 6%). Wiener noted however that the results of the quantitative data set did not take into account the differences in implementation and enforceability of risk regulation in Europe and the US.
2. Another part of the research project focused on qualitative parameters: for this, the team looked at specific case studies that were highly visible in the media, but not necessarily representative of either party's policy on risk. Due to the amount of media attention for some highly controversial examples in the case studies – hormones in beef, genetically modified foods, toxic chemicals, climate policy and antibiotics – one might get the impression that the EU is more risk averse. But there are also instances of greater American precaution, like the standards for particulate matter air pollution. Other examples from the past include the phasing out of the use of CFC's (or chlorofluorocarbons, an organic compound that was widely used in refrigerants, propellants and solvents and contributed to the ozone depletion) the phasing out of lead used in petrol and gasoline, more stringent measures regarding choking hazards, and the ban on the import of mad cow infected beef from the UK (which still holds today).

The implication of these case studies is that although the quantitative data indicates that there is parity between EU and US precautionary measures, there are some divergences in specific cases. But these divergences go in both directions, with both the US and the EU being equally risk averse/taking. Moreover, there was evidence to support the claim that US and EU precautionary regulations have been converging; this is the case for tobacco regulation and the approval procedures for new drugs.

The conclusion of the research project was that there is no great divide between the US and the EU when it comes to risk regulation – both before and after 1990 – but rather, a combination of parity in general and particularity or selective application of precautions to particular risks in both the US and the EU. The highly particularized character of relative precaution legislation in the US and the EU suggests that the reality of policy making does not reflect a cultural distinction of European risk aversion vs. American risk taking. The second implication is that the image of the EU and the US as being two separate, monolithic, regulatory spheres does not concur with reality. In fact, both parties are highly interconnected, constantly exchanging views and ideas on risk regulation, a process that has been dubbed 'hybridisation'.

Wiener then turned his attention to TTIP and to what all of this could mean for the trade negotiations: if we imagined instant harmonisation, that would not necessarily mean that risk regulation would either become solely more stringent (or 'European') or more flexible (or 'American'). Instead, due to the general parity and selective divergence, we probably would get a mixture of increases and decreases in standards on both sides. But instant harmonisation will not be the core objective of TTIP; the negotiations will rather focus on mutual recognition, procedural harmonisation, information sharing, regulatory coherence and longer term cooperation, resulting in an ongoing process of cooperation and mutual learning. In areas where there are differences, Wiener hoped that comprehensive analyses would be made in order to better understand why certain differences in regulation correspond to certain different outcomes. That way, we can learn and make better informed judgements on policy.

Wiener then commented on the issue of methods of implementing and enforcing precautionary legislation, although that was not the focus of the research project. He admitted that the US does have a more significant system of litigation and civil liability, which plays a role in providing compensation to victims and, as some critics argue, possibly deterring business activities and even inhibiting innovation. Moreover, health and environmental standards in the US are enforced at the federal level, in some ways more robustly than in Europe, where the implementation of regulation is the responsibility of the Member States. The US legal system also has provisions (like the citizens suit provision) that allow citizens and civil society organisations to bring lawsuits against private business and state and federal government agencies to force them to carry out their responsibilities under the law, provisions that do not yet exist on a European level.

Discussion

The first question **Jonathan B. Wiener** commented on was whether his study had looked at the influence of Level 2 Regulation and EU Comitology, which is more complex, detailed and technical and how the differences in administrative and legal procedures on the one hand and the differences in tools that consumers and citizens could use to seek redress on the other could lead to diverging rights for citizens in the EU and the US. He stated that the study had compared differences in EU and US legal and administrative procedures, such as Comitology, or Congress delegating further rulemaking and implementation to federal administrative agencies, and found that they did not explain differences in precautionary policies. It does seem like consumers and citizens in the US have more tools to their disposal to seek compensation or redress, such as the class action suit (collective lawsuits) or civil tort proceedings. But in the last 10 years, the US Supreme Court has issued some important decisions that limit the possibilities for personal injury litigation, while in Europe, efforts are being made to authorize group litigation in some Member States. Wiener concluded that it was possible that both the EU and the US legal systems were evolving on this issue. He also refuted the claim that the presence of tort liability in America led to fewer precautionary measures.

Wiener then turned to a question on the role of campaigning and lobbying in creating precautionary measures. When looking at the history of risk regulation, he said, campaigners and lobbyists, from all sectors of society – business, environmental organisations and consumer groups – had played an important role, and a lot of differences in precautionary legislations had seemed to arise from crisis events or highly visible accidents that mobilized public concern and political action.

When being asked if he thought the TTIP trade negotiations were antidemocratic, he responded that although he understood citizens being suspicious of over-technical impact assessments and analyses, there is an effort, both in the EU and the US, to have a healthy combination of technocracy and democracy. He also added that in the end, mechanisms of review and impact assessment always had to answer to elected officials.

The following question challenged Wiener's extrapolation from the absence of risk averse and risk taking cultures to the TTIP negotiations not leaning either way. It was noted that his study had not taken into account the underlying interests of both parties. He responded by saying that even if there was a more risk taking culture in America and a risk averse one in Europe, the policy making just did not reflect that. The reality is that there is much more variation within the US and the EU than between them and that understanding the reasons for these differences is a very complex matter.

On the issue of compatibility of the US and EU legal systems and standards and the distribution of precautionary measures in various areas, Wiener explained that the research team had tried to clarify the important differences in specific areas, but even within those areas where there was divergence, the differences went in different directions. On the area of food safety for instance, the US was more cautious when it came to choking hazards and mad cow disease, while it was far less risk averse on GMO's and antibiotics in beef. Asked whether there was an area in which the US and EU could move forward relatively easily with standard harmonisation, Wiener answered that this was the case for the criteria for labelling organic food and the testing requirements for automobile safety.

Wiener concluded the briefing by reasserting that the value of the study was in the discovery of general parity in US and EU risk regulation, which suggests that examples of divergence are unusual and thus lead to a disproportional amount of media attention. For a whole array of policy areas that are not in the news, the US and the EU may find common ground. The TTIP trade negotiations will not lean towards a single direction (risk averse vs. risk taking), because the directions themselves, and their variations, are too complex.