

The Regulation of Risks and the Power of the People: Lessons from the BSE Crisis

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Keywords

risk regulation, public opinion, BSE crisis, implementation, law, political science

Abstract

The implementation of European law is widely regarded as a technical matter – primarily dealt with in intra-administrative procedures and removed from the impact of public opinion. In European risk regulation, however, public concern can easily become very important, to the point of dominating administrative logic. The BSE crisis is a case in point: it emphasises the need to regard policy implementation as a political process which develops through the tension between supranational legal norms, governmental interests and public concerns. It furthermore underlines that effectiveness and the social acceptance of rules must be viewed as two sides of one coin. If public concerns shall not become the Achilles' heel of effective European risk regulation, the EC is well advised to attach increasing importance to the insight that effective law is inherently political law.

Kurzfassung

Die Implementation europäischen Rechts wird oftmals als technische Materie verstanden, die in intraadministrativen Verfahren behandelt wird und der öffentlichen Wahrnehmung entzogen ist. In der europäischen Risikoregulierung können öffentliche Bedenken jedoch sehr schnell hohe Bedeutung erlangen und administrative Logiken überlagern. Die BSE-Krise ist hierfür exemplarisch: sie betont die Notwendigkeit, Implementation als einen politischen Prozeß zu betrachten, der sich in der Spannung zwischen supranationalen Rechtsnormen, gouvernementalen Interessen und den Anliegen innerstaatlicher Interessengruppen vollzieht. Sie unterstreicht weiterhin, daß die Effektivität und die soziale Akzeptanz von Regeln als zwei Seiten einer Medaille verstanden werden müssen. Sollen öffentliche Bedenken nicht zur Achillesferse effektiver europäischer Risikoregulierung werden, ist die EG gut beraten, der Einsicht Rechnung zu tragen, daß effektives Recht immer auch politisches Recht ist.

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The Regulation of Risks and the Power of the People: Lessons from the BSE Crisis(*)

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I. Compliance and Integration Research

With the completion of the Single Market in 1992, the question of the effectiveness of European law has achieved primary importance for integration research. In the view of the European Commission, deficiencies in compliance on the part of member state governments are one of the greatest challenges to the proper functioning of the Single Market. Member states increasingly react to the deepening of integration with a strategy of selective implementation of European regulations. Snyder (1993, p. 22) terms this process a "new challenge of compliance" which threatens to undermine the normative foundations of the European Union (EU) as a legal community as well as the credibility of the European Court of Justice (ECJ). Especially in matters of risk regulation which catch the eye and the feelings of broad publics, compliance is often difficult to realize. Ethical concerns, unclear scientific evidence and public health issues easily mobilize domestic publics and put pressure on governments to privilege public opinion over legal integrity. It is not the aim of this contribution to draw up a systematic inventory of the extent and reasons of compliance deficiencies in European risk regulation. Instead, the article is confined to pointing out the specific strengths and weaknesses of the EU in promoting compliance with an inconvenient obligation. The BSE case is most interesting for this purpose. Since the eradication of BSE was not only a technical matter, but a highly politicised issue in which all parties involved, the Commission, the British government and later the French and German governments, were motivated by strong pressure from their constituencies, it represents a hard case for the problem-solving capacity of the EU. Its study therefore promises to provide valuable insights into the strengths and weaknesses of the EU's political structure in dealing with openly antagonistic interests. The article is divided in three sections. [Section II](#) reflects on the state of the literature on implementation and introduces the term "political administration". The main part of the article ([section III](#)) is devoted to the implementation process itself and focusses on the political struggles

between the Commission and its member states addressees. In its concluding remarks, some general lessons for the analysis of policy implementation and the problem solving capacity of the EU are drawn. The findings should be of value for both students who want to understand the regulation of risks in the internal market and practitioners who reflect about future institutional reforms.

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II. The Political Administration of the Community [↑]

Generally speaking, the term compliance refers to the extent to which the member states of the European Union implement supranational regulations, i.e. the extent to which these regulations are incorporated into national law and are applied and enforced by member state administrations. Implementation deficiencies can thus take the form of deficient incorporation, deficient application or deficient enforcement. Further analytical differentiation asks whether deficiencies of implementation are intentional or unintentional, whether they take place before or after a reasoned opinion or a judgement delivered by the ECJ, and whether legislation, execution or jurisdiction are responsible (cf. Krislov *et al.*, 1986, pp. 61-85). Compliance must be distinguished from notions of effectiveness which denote the degree to which the implementation of a rule leads to the realisation of its intentions (Victor, Raustiala and Skolnikoff, 1998). Compliance and effectiveness therefore can, but need not necessarily correspond. A situation in which both sharply fall apart exists, for example, when a rule intended to solve a problem of collective action is perfectly complied with, but is only to a limited degree adequate for reaching mutually acceptable solutions.

The issue of the extent and conditions of compliance with European law has lately resulted in a number of contributions emphasising the procedural character of implementation. It has been pointed out that the implementation of policies has to be regarded as a "recursive and circular" process (Snyder, 1993, p. 26) which also comprises the discovery of restrictions and corresponding modifications of objectives (Majone, 1996). Particularly in the multi-level system of the European Union with its division of political competencies between supranational, governmental and sub-national levels (Jachtenfuchs/Kohler-Koch, 1996), recurring bargaining processes about the specific implications of a legal norm must be considered structural elements of the implementation process (Héritier, 1996, Knill/Lenschow, 1999). Contrary to the technocratic assumption that policy implementation merely means the application of a legal norm on the basis of such criteria as appropriateness or justifiability, empirical studies point out that implementation is an intrinsically political business: its main objective is reconciliation of divergent interests, perceptions of problems and problem-solving philosophies (Héritier/Knill/Mingers, 1996) against the background of – often coexisting – majoritarian and deliberative procedures (cf. Joerges and Neyer, 1997). It has also been pointed out that the Commission's central function is to create a framework for the continuous discourse on questions of implementation and enforcement, be it through "soft law" (Snyder, 1994), through the promotion of interadministrative networks (Wessels, 1997) or through an intensive exchange of information with member state administrations (Mendrinou, 1996). Neither hierarchical enforcement nor centralised decision-making is its regulatory philosophy. On the contrary, its essential cornerstones are the belief in the binding force of legalised interaction (Stone Sweet and Sandholtz, 1997), its legitimation by means of scientific expertise (Joerges, 1997) and the facilitation of interadministrative discourses for developing a commonly shared understanding about how to define, identify and solve problems (Everson, 1998).

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When it comes to the regulation of risks, policy implementation is not only an administrative task but also a matter of domestic public discourse: due to their democratic nature, member state governments need to be responsive to domestic concerns and the interests of affected parties. Whilst this inherent responsiveness of democratic governments was long-time not more than a sleeping beauty, the deepening impact of European politics on its member states' societies has ended the sleep. In contrast to the technocratic assumption of risk regulation as an apolitical issue merely concerned with scientific evidence and technical standards, an increasing number of issues such as genetically modified organisms, the embargo against American hormone beef or environmental concerns have found their way to the front pages of the newspapers in the recent past. The analysis of compliance with inconvenient rules in the regulation of risks therefore is well advised to take into account the degree to which the concerns and interests of both affected parties and the broad public are reflected in supranational law.

The factors mentioned are not only theoretical reflections of singular empirical findings. Taken together they can be condensed into a picture of the implementation process which deviates significantly from the traditional perception of a hierarchically structured administration, far removed from the sphere of politics. Policy implementation in the Community has to be understood as a mixture of majoritarian and deliberative elements which together form a peculiar European combination that can be conceived of as "horizontal enforcement ". The description of its functioning, and thus its specific strengths and weaknesses, is an important issue on the current agenda of European integration.

III. Risk Regulation at Work: Mad Cows and Panicking Consumers ↑

In many respects, the BSE crisis is an excellent example for the investigation of the EC's regulatory structures. Its origin shows the susceptibility of the Community's risk regulation to political interests and emphasises the need to ensure independent scientific expertise (European Parliament, 1997; Joerges, 1997). At the same time, it shows that the Community's institutional structure is open for innovation and that the European Parliament (EP) is capable of constructively meeting the challenge of responding to deficiencies in regulatory performance on the part of the Commission (Neyer, 2000; Chambers, 1999). The BSE crisis, however, can also be used to exemplify the strengths and weaknesses of the Community in dealing with explicitly antagonistic interests and ensuring both compliance and effectiveness. Such an approach to the BSE crisis starts with the ban on British beef in 1996, focuses on the negotiations between the Commission and the British government about how to eradicate BSE, highlights the struggle between the two about adequate measures and the Commission's acknowledgement of their successful implementation in July 1999, proceeds with the rejection of the partial lifting of the embargo by France and Germany in Winter 1999/2000(1) and ends with the lifting of the embargo in March 2000.

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1. The ban on British beef ↑

In March 1996, following the publication of new scientific evidence, a ban was finally placed on the export of British beef – a decision that had long been overdue. The first case of BSE had become known in 1985 in the British county of Kent, but had immediately been placed under a news ban by the British government. The number of known BSE cases had risen to 15,000 by the time the Commission, in April 1990, proclaimed a ban on the export of live cattle from Great Britain and introduced compulsory registration for BSE. Shortly afterwards, in June 1990, the EU decreed that

only such beef could be exported from Great Britain which the British authorities had officially certified to be from herds that had been BSE-free for at least two years. In spite of this measure, British beef exports kept increasing, reaching 277,000 tons in 1995. Tensions between the EC and Britain were growing, the more so since the British authorities' problem consciousness with regard to the disease was extremely low. The head of the competent Veterinary Office, Keith Meldrum, declared in June 1990, during the final meeting of a Commission inspection, that BSE had become a political, not a technical issue, and that the Commission inspectors had no authority to make these investigations in the first place.(2) His reaction to the inspectors' criticism was described as "furious", "arrogant" and "aggressive".(3) The Commission, on the other hand, was by no means insensitive to British pressures. An investigation conducted by the European Parliament in 1996(4) showed that in fact it had allowed itself to be blackmailed by Britain and had failed to exercise due diligence. It had even adopted an active cover-up policy, for fear of the BSE problem becoming a matter of public concern, thus endangering the stability of the European beef market. The German journal *Die Zeit* quoted a Commission memo of 12.10.1990 suggesting "to keep the BSE affair as low-key as possible" by pursuing a policy of active misinformation.(5) On 8 March 1996, the Scientific Committee on Foodstuffs (SCF) pointed out for the first time that BSE-contaminated tissue could possibly infect humans, too, and urgently requested the Commission "to take all necessary action"(6), without, however, provoking a response. Obviously the Commission was still not prepared to enter into open conflict with Britain. One of the scientists involved informed the French newspaper *Le Monde* that the Commission had initially refused to publicise the SCF statement with the flimsy argument that this would only give rise to "unnecessary concern among the population."(7)

It was not until 20 March 1996, when the British Bovine Spongiforme Encephalopathy Advisory Committee (SEAC) informed the British government that ten cases of a new variant of Creutzfeldt Jacob Disease had been discovered and a connection with BSE could no longer be ruled out, that finally the wall of silence began to crumble. Two days later the Scientific Veterinary Committee (SVC) held a meeting which nevertheless came to the conclusion that additional measures for the protection of European consumers were not required since there was no evidence of a direct connection between BSE and Creutzfeldt Jacob Disease. On 24 March the SEAC confirmed its statement of 20 March: that protective measures were indeed urgently required, but that its assessment must not be misinterpreted as proof of a causal connection between the two diseases; the possible likelihood of such a conclusion would have to be examined in further investigations.(8)

On 25 March 1996 the SVC, despite lack of scientific evidence, adopted with a 14 to 1 majority the Commission's proposal to impose a ban on British beef. After fierce protests by the British government the Committee convened again to repeat the vote, with exactly the same result as before. Backed by this clear decision of the member state delegates and by an EP Resolution to the same effect, but also in the face of increasing unilateral member state action against the import of British beef, the Commission finally took action: on 27 March it imposed for an indefinite period a ban on British beef and beef products(9) – fully aware of the lack of conclusive scientific evidence of a connection between BSE and the recent cases of Creutzfeldt Jacob Disease, and in total reversal of its cover-up policy of the previous ten years. Moreover, the British government was placed under obligation to submit to the Commission a fortnightly report on the implementation of the measures it was taking to fight BSE.

Only two days later, the Turin European Council meeting was discussing the first British proposals for a programme to destroy British cattle. In a meeting of the Agrarian Council on 1 to 3 April, these negotiations were continued by the ministries of agriculture, but even a forty-hour marathon meeting produced no agreement between the Community and the British government. The next day John

Major, speaking before the House of Commons, criticised the conclusions as totally inadequate and threatened to bring the case before the ECJ.⁽¹⁰⁾ When the Commission, backed by expert opinions of the WHO⁽¹¹⁾ and SVC⁽¹²⁾ proposed a partial lifting of the ban by exempting at least certain beef derivatives (gelatine and cattle sperm) which had been classified as harmless, this did nothing to ease the tension. On the contrary: the rejection of the proposal by the competent SVC (9 to 6 votes; for the partial lifting of the ban a qualified majority would have been necessary) produced an angry response by the British government. The following day it announced that as long as the EC did not take a more accommodating stance in the BSE affair, Britain would veto all legislative Community acts. "Without progress towards lifting the ban", John Major stated in the House of Commons in May 1996, "we cannot be expected to co-operate normally on other Community business ... the European Union operates through good will. If we do not benefit from good will of the partners, clearly we cannot reciprocate. Progress will not be possible in the intergovernmental conference or elsewhere until we have agreement on lifting the ban on beef derivatives and a clear framework in place leading to lifting of the wider ban." (Agence France 25.5.96). Agrarian Commissioner Fischler was also conscious of the open contradiction between political decision-making and scientific expertise available; he criticised the Committee's decision as "purely political" (Agence Europe, 22.5.1996, p. 4). British circles became increasingly convinced that the central issue was no longer concern for public health, but acquiescence to exaggerated consumer concerns. It particularly incensed the British government that the opinions of SVC and WHO were practically disregarded. The entire process of negotiations between the British government, the other EU member states and the Commission was influenced by this experience: from now on Britain not only vehemently refuted the legitimacy of the embargo, but also the fairness of the European decision-making procedures.

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Meanwhile, administrative efforts to solve the crisis through compromise were continued, and both sides moved towards each other. While Britain had already shown its good will by submitting on 14 June a catalogue of intended measures, it was now up to the member states to refrain from their demand to eradicate the BSE disease in Great Britain and settle for a procedural solution. Thus on 22.6. the European Council in Florence "gave favourable consideration" to the Commission paper based on the British proposals, refrained from the demand for total eradication and declared that the measures proposed as well as the procedure for progress assessment met with broad member state consent. Statements made after the summit by the British Prime Minister and other European heads of state reflect the general acceptance of the compromise. John Major said that in Florence "a satisfactory solution for the BSE conflict" had been found and that the road had been paved for a gradual lifting of the ban. When the final conclusions drawn by the Council were put to the vote, Britain was the only member state that did not explicitly agree to them, but abstained from voting. At the same time, however, the British Foreign Minister Rifkind declared the end of the policy of obstruction and announced that the consented measures would be implemented.

An important element of this final acceptance were redistributive payments. As early as 29 March 1996 there had been bilateral talks between the Commissioner for Agriculture Fischler and the British Minister for Agriculture Hogg concerning the financial implications of "Community-wide solidarity"⁽¹³⁾ with the UK. During the special session of the Council for Agriculture on 2 to 3 April 1996 the member states had developed a plan for the eradication of BSE, which in its first point stressed the need for Community solidarity and also declared the fundamental willingness of the member states to financially assist Great Britain in eradicating BSE. Therefore, alongside the measures for eradicating BSE the Council agreed in the same sitting to make available 650 million ECU (plus a reserve of 200 million ECU) in support of European cattle owners seriously hit by the BSE crisis. Formally these funds represented compensation payments for individual economic damages incurred in connection with the implementation of Community measures to eradicate BSE

and were not territorially specified. It has to be taken into account, however, that at the time when these payments were agreed upon, 99 percent of all known BSE cases had occurred in British herds.(14)

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2. Public Concerns and Governmental Interests

The British government had always made it perfectly clear to the Community that the ban on British beef, decided on by the competent StVC on 25.3.1996 and shortly afterwards confirmed by the Council, as well as the Community measures to eradicate BSE (within the next five to seven years, slaughtering of all cattle over 30 months old and destruction of the carcasses) were running contrary to its national interest. In particular, the British government fiercely criticised the fact that the measures agreed did not contain any binding commitments or a time schedule regarding the lifting of the ban.(15) Britain's disapproval became most evident in the obstructionist policy which the British government announced on 21.5.1996, one day after the StVC had refused to lift the ban even partially.

The fierceness of the British reaction reflected not only the concern that the Community measures agreed would result in estimated costs of 500 million £ per year; it must also be seen against the background of the upcoming general election in Britain, of the disunity within the Tory Party, and of the hope to be able to use the conflict with the EU as a means to strengthen party unity and to increase their chances for re-election. The government was extremely susceptible to these pressures because at the time of the decision against a partial lifting of the ban its majority in the House of Commons was reduced to one vote, and a number of backbenchers seemed ready to bring down the Major government if it failed to take a hard stand against the Community. Furthermore, in its attempt to use the EU conflict for its domestic purposes, the government was pushed forward by the conservative tabloids. Newspapers such as the Sun, the Telegraph, the Daily Express or the Daily Mirror gave the impression that the conduct of the other member states was only partly to do with public health concerns; that they were at least equally motivated by the intention to rid themselves of an unwanted competitor.(16) Headlines of the Daily Mail and other conservative mass-circulation papers(17) portrayed the conflict with the EU as a question of national pride, not as the search for adequate measures to reduce public health risks, and they were not above using military terminology to describe the conflict.(18)

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The British government's lack of willingness to acknowledge the potential danger of BSE-infected cattle for consumers was reinforced by the statements and behaviour of the British government between 1990 and early 1996. In May 1990 John Gummer, then Minister of Agriculture, said about the quality of British beef: "It is delicious. I have no worries about eating beefburgers. There is no cause for concern."(19) In 1994 the British chief veterinarian Keith Meldrum declared in the same vein: "To hint or suggest that BSE could enter the human food chain is totally and completely irresponsible."(20) And as late as October 1995 John Major announced: "I should make it clear that humans do not get mad cow disease."(21) With such statements the British government had manoeuvred itself into a position that it could not back down from without risking a major loss of face and a subsequent setback in popularity with the electorate. It was not until the Tory government was voted out in May 1997 that this knot, resulting from a mixture of internal pressures and a powerful "shadow of the past", could be untied. Unlike its predecessor, the new British government under Tony

Blair had enough domestic room for manoeuvre to leave the course of open confrontation followed by Major's cabinet.

On the continent, the British resistance against a swift implementation of the measures to eradicate BSE often met with utter incomprehension and was taken as a sign that Britain was recklessly pursuing a policy of single-minded interests. Without trying to defend the British behaviour, it has to be pointed out, however, that in 1996 no clear proof existed of any causal relation between BSE and Creutzfeldt Jacob Disease. Furthermore, a more conciliatory stance of the British government would have met with broad public opposition in the United Kingdom: As late as November 1998, government inspectors were faced with strong resentment in the slaughterhouses they had to inspect: 75% of all inspectors reported attempts of intimidation or even physical assault by slaughterhouse operators, and 10 % had been threatened with weapons.⁽²²⁾ Not surprisingly, the measures for eradicating BSE were only consented after massive political pressure from the other member states and the Commission, and their implementation promised to be anything but smooth.

3. Horizontal Enforcement [↑]

The implementation of inconvenient rules is necessarily a challenge to the problem-solving capacity of the EU. The EU is a non-hierarchical system of governance, which cannot rely on police force to sanction non-compliant behaviour on the part of a member state; it is basically a legal community which has to rely on means of horizontal enforcement and functions only to the degree that its law is accepted by its constituent units, the member states. Besides, its formal competence to sanction non-compliant behaviour has to be seen against the conflicting background of the powers it derives from Art. 226 (recourse to the ECJ by the Commission) and Art. 228 (effectiveness and enforcement of judgements, administrative fines) on the one hand, and the political regard it is required to pay to overriding member state concerns on the other hand. Consequently we can assume that in cases of conflict the formal sanctioning powers held by supranational institutions do not automatically fully translate into the discharge of these powers; particularly in politically sensitive matters the integrity of European legal norms has to be weighed against possible political damage (cf. Garrett, 1995).

In dealing with the BSE crisis, the Community was, however, in the favourable position to be able to counter the firm stand that Britain took with an equally firm coalition of all remaining 14 member states, the Commission and the vast majority of the members of the EP. Here, member states, EP and Commission joined forces, with the result that the gap between the formal powers of the European institutions and the de facto use of the powers was relatively small. Thus, the agreement that was reached during the Florence European Council closely reflected the problem-consciousness within the Community without having to show too much consideration for the British opposition to effective Community measures.

However, the agreement only meant that a satisfactory solution for the BSE problem had been found on the level of intergovernmental politics. The next step to be taken was to implement the measures to eradicate BSE, in which the British government was in charge of the implementation, supervised by the Commission. This division of tasks reflected the Community's general philosophy of regulation, according to which the supranational level legislates and the member states administrate and enforce. Basically, this division of tasks is built on the assumption that the competent member state administrative body will do everything possible to see to a *mutadis mutandis* implementation. However, the Community also has a number of instruments at its disposal with which to respond to inadequate compliance. In particular this includes the Commission's power to function as the guardian of the treaties, i. e. "to ensure that the provisions of this Treaty and the measures taken by the

institutions pursuant thereto are applied " (Art. 211). In order to assert these powers the Commission has been given a wide range of instruments aimed at promoting adequate implementation of Community law by member states. Three of these instruments are particularly relevant with regard to the implementation of the anti-BSE measures: the control of member state controllers, the initiation of the treaty violation procedure and the use of direct sanctions.

Control of the Controllers. One of the Commission's main instruments, which is frequently used especially in the veterinary field, is to carry out on-the-spot checks in order to verify the application of Community measures. Such checks were carried out by Commission experts and members of the newly founded Food and Veterinary Office in April and July 1996, between September and October 1996, in June 1997 and in June 1998.(23) During these inspections, the Commission experts are to be given access to all concerned persons, information and documentation.(24) If the Commission discovers deficiencies, the respective member state has to thoroughly investigate the general situation in the area concerned and to notify the Commission within the time set by the latter of the results of the checks and of the measures taken to remedy the situation. If the corrective measures are found to be insufficient, the Commission may take all the measures which it deems necessary. This is, however, subject to the Comitology procedure, i.e. it requires a qualified member state majority in the committee, or, in the case of recourse to the Council (if the Commission cannot secure a majority for its proposals) the measures must at least not be rejected by the Council.(25)

Treaty Violation Procedure. Because the comitology procedure involves the risk of a renewed politicisation of the BSE affair (possible involvement of the Council regarding the decision on appropriate measures) it is not the Commission's most favoured option. Fortunately, it has a second option for counteracting non-compliant behaviour of a member state: the initiation of a formal treaty violation procedure according to Art. 226. This is a three-stage procedure; in the first stage the Commission sends a „letter of formal notice“ and demands a statement from the member state, in the second stage a „reasoned opinion“ by the Commission has to be submitted, and only the third and final stage entails reference before the ECJ. Thus the treaty violation procedure is not primarily concerned with determining the difference between the specific implications of a certain legal norm and the actual behaviour of the respective addressee. Instead its central characteristic is that it provides a formalised framework aimed at solving interpretational disputes and accomplishing co-operation between Commission and member state (cf. Mendrinou, 1996).(26) When inspection missions carried out in September/October 1996 and June 1997 brought to light serious deficiencies in the border control system(27), the Commission initiated the first stage of the treaty violation procedure on 8 July 1997 by demanding a statement from the British government. The British authorities concerned (Minister of Agriculture, Fisheries and Food) reacted by adopting new administrative regulations for a stricter control of the enforcement of the embargo (introduction of border controls for lorries) three weeks after the Commission's letter. This induced the Commission to declare a postponement of the treaty violation procedure and to arrange for a further inspection (29.9.-3.10.97) in order to verify the effectiveness of the British measures. In their subsequent report the inspectors stated that the new border controls, although no doubt an extended, flexible and useful measure, could only be expected to yield limited results, since only a small number of lorries were actually checked on crossing the border.(28) Furthermore the Commission found inspections of meat-processing factories in Great Britain to be still inadequate. As a result, it initiated a new treaty violation procedure against Great Britain on 22 September 1997.(29) On 12.11.97 it sent a reasoned opinion to the British government (stage II of the procedure), declaring that the veterinary checks in British meat cutting and cooling facilities did not meet the standard demanded by EU legislation. Besides, so it continued, the British government had in its reply to the Commission's first letter declared its intention to co-operate with the Commission, but its answer had also revealed that because of a distinct shortage of veterinary

surgeons Britain was unable to meet the requirements set by EU legislation regarding the frequency of inspections by public veterinary surgeons. The Commission pointed out in its reasoned opinion that such shortages did not relieve Great Britain of its responsibilities deriving from the relevant legislation. This reasoning of the Commission seems appropriate considering that the normative point of reference of the Commission's letter is a directive which is more than 30 years old.

Direct Sanctions. A third option of sanctioning insufficient compliance lies in the conditional linking of discernible progress in the implementation of the measures and the (partial) lifting of the ban. With the drafting of its proposal of 14.1.1998 regarding the lifting of the ban for beef and beef products from Northern Ireland(30) – not, however, from the rest of Great Britain – the Commission made it clear that it was ready to reward compliance by being accommodating itself, but that it had no qualms about being selective and upholding the embargo for a longer period of time in case of insufficient implementation ("carrot and stick policy"). The financial sanctioning power of the Community is further increased by the fact that it may make compensation payments to British farmers, although already consented, subject to discernible progress in the implementation of the measures. In its report to the EP of October 1997 the Commission openly threatened "to draw financial consequences from its findings on these BSE-eradication measures as it does for all other schemes, should this be justified by any failures by the UK authorities to respect the Community regulations."(31)

4. The Second BSE-Crisis: Public Concerns and Governmental Interests Revisited



After the competent scientific committee had certified in May 1999 that the protective measures in Britain were adequate and that a consumer risk could be ruled out, the Commission decided in July 1999 to lift the ban on the export of beef from Great Britain with effect from 1 August. France, Austria and Germany objected to the Commission's decision, but were unable to reverse it. The Commission acknowledged that BSE had indeed not yet been eradicated, but argued that this was in fact not the benchmark for its decision. Instead the decisive criteria were the full implementation by the British government of the measures consented in Florence and the confirmation of the relevant scientific bodies that beef from Great Britain represented no health risk. France, Austria and Germany pointed out that contrary to the Florence agreement the Commission had not carried out a final inspection although the inspection of April 1999 had found some remaining problems. The Commission replied that the last inspection report had not talked of deficiencies, but merely of measures which still needed implementation, and Britain had confirmed that this would be done by 1 August 1999.

In spite of the Commission's clear decision, the French government declared on 1.10.99 that it would not lift the ban on British beef, justifying its measure with a report by the French AFSSA which gave reason to seriously doubt the appropriateness of the Commission decision. On 30.9.99 the AFSSA had published a statement, based on the findings of a government-appointed expert group, in which it set down a number of reasons why the import embargo for British beef ought not to be lifted.(32) According to the statement, the test methods available to identify infected meat were much better now than they had been at the time when the Commission decided on the criteria to be applied; the number of new BSE cases was declining at a remarkably slow pace, thus giving rise to new concern; and the findings of the on-the-spot checks by Commission inspectors gave reasons to doubt the proper implementation of the measures consented in Florence.

On 29.10.99, after two days of deliberation, the Scientific Steering Committee (SSC) unanimously rejected the French arguments in favour of maintaining the import ban on British beef. According to the SSC, the examination of all relevant data and of the recent SSC assessments had clearly shown that there was no reason to alter the conclusions drawn in the SSC statements which had served as the basis for the Council decision. In view of the fact that the safety conditions were being met and the safety standard of beef and beef products from Great Britain was comparable to that of foodstuff produced in the rest of the European Union.(33) Unimpressed by the SSC decision, France has so far refused to lift its import ban (as per March 2000).

Germany, too, openly refused to comply with the Commission decision. Federal Minister of Health Fischer declared that she would not allow the import of British beef and beef products without additional guarantees regarding their safety.(34) Only after the Commission initiated the second step of the Treaty violation procedure, the German government hesitantly gave in and lifted its embargo. In both these instances the interests of the respective governments reflected closely the concerns of domestic consumers. Particularly in Germany the press coverage on BSE had resulted in a dramatic decline in beef sales, by up to 50%.(35) A spokesman for the Federal Association of Central Abattoirs in Bonn described the beef market situation as "utterly desolate": Abattoirs had drastically reduced their output, had filed applications for short-time work and sent their personnel on holiday. According to the Guild of the Land Thuringia, many of the Land's 1000 cattle breeding farms would face ruin if the situation prevailed. Similarly, the Federal Association of Food Retailers noted that in the self-service sections with pre-packed beef the market had "collapsed completely". In their opinion, this was largely the fault of the German media for giving the impression that Britain, and possibly the European continent, too, was faced with an epidemic of gigantic proportions. For example, the statement of the British government commission that the 55 deaths which were known by 1996 were "probably" connected with a BSE infection, was turned, on the pages of the German weekly *Der Spiegel*, into the assumption that "the island beyond the Channel is possibly about to experience a worst-case-scenario epidemic of hitherto unknown dimensions." Scientists were quoted who forecast a "galloping spongiforme epidemic" with up to ten million deaths (!). "Horror news from London" about "that horrific BSE disease" became a cheap method of increasing circulation figures, while the more cautious opinions of WHO, SCF and other scientists were largely ignored.(36)

Thus between March and June 1996 public opinion in Germany was dominated by the self-interest of farmers and the fears of consumers rather than by scientific evidence, and the same thing happened again in 1999. Nothing had been forgotten. Once again emotions were running high on all sides. At the end of October, the headline of the British newspaper Sun read "We don't want War but France is Wrong", while *l'Humanité* took up an image from the previous day's Daily Mirror which had compared the BSE controversy with the Battle of Waterloo. But what was probably more significant than the wild exaggerations of the yellow press was the fact that even respected observers in France and Germany regarded the Commission decision to lift the ban with extreme scepticism. German and French scientists declared in the major papers that the lifting came too early and that it ought to be postponed until more reliable testing methods were available. The French scientist Brugère-Picoux pointed out in an interview with *l'Humanité* that BSE was by no means eradicated: there were still thousands of new BSE cases each year, inspections in Great Britain were patchy and therefore consumers had no guarantee that British beef was safe for consumption.(37) In Germany, Hans Kretzschmar, head of the Institute for Neuropathology at the University of Goettingen and a member of the SSC, argued in a couple of interviews that the ban should under no circumstances be lifted before the year 2001, i.e., before the end of the estimated incubation time of 5 years, as only then would it be possible to establish whether the protective measures in force since 1996 had actually been effective. These expert opinions were widely reviewed in the respective national media, and both governments found it hard to ignore them, the more so since they had always stressed that their prime criterion for any foodstuff was that it was absolutely free from health risks. So now that the respective

national experts were publicly declaring that the emphasis on health protection required the continuation of the ban, the governments could hardly argue for the re-admission of products which constituted a health risk. It is hard to establish whether or not the French and German scientists were justified in their concern. But one thing is certain: throughout the entire controversy there has been "too much gut reaction and not enough reason", as Roth Behrendt, former chairwoman of the EP Committee of Inquiry into BSE, remarked in November 1999.(38)

IV. Implications for the Analysis of Compliance in the EU [↑]

The BSE case points to a number of factors which are relevant for the analysis of compliance and the problem-solving capacity of the EU in the regulation of risks: First and foremost, the BSE case must be seen as a warning against over-simplifying approaches which restrict the analysis of European integration to the level of the creation of legal acts, equating these with factual co-operation. Instead, what is needed is an understanding which differentiates between the adoption of a legal act at the supranational level and its implementation by the member states. In the BSE case, intergovernmental co-operation and supranational adoption was achieved, at the latest, after the Florence summit in June 1996 when the measures for eradicating BSE were consented. In the meantime, the implementation of this agreement and thus its factual realisation has progressed considerably, but the present level of implementation is the result of an arduous and time-consuming bargaining process between the Commission and the competent British authorities.(39)

In the "integration through law" approach (Krislov, Ehlermann and Weiler, 1986) it has been pointed out that the European integration process must be understood as a process of harmonising national legal provisions which relies heavily on judge-made case law (Mattli and Slaughter, 1998; Weiler, 1991). The BSE case supports this approach insofar as it shows that the discourse about the setting and application of law is not simply the result of intergovernmental bargaining but takes place within the framework of law itself. In spite of greatly differing interests and the British refusal to accept the legitimacy of the ban, the British government's basic disposition was not to question the supranational legal order: It tried to fight the ban not only by diplomatic pressure, but also by taking legal action at the ECJ against the EU's alleged lack of competence to place a global ban. With this approach, the British government acknowledged that the ECJ (and thereby: the EU) was in fact competent to decide on the validity of the British accusations. This move therefore can also be interpreted as a peace offer to the Community in that respect that Britain refrained from extra-legal pressures to achieve a lifting of the ban. It is important to note that, although the British government rejected the embargo and considered the measures proposed by the Commission as unfounded and exaggerated, it always made a point of refraining from illegal actions and keeping within the frame of what was laid down in the European Treaties. Immediately after the announcement that the Standing Veterinary Committee had rejected a partial lifting of the ban, the British Foreign Minister Malcolm Rifkind, in preparation of the policy of obstruction to be announced the next morning, laid down the options that were now available to Great Britain. The idea was, according to Rifkind, "to give our EU partners a jolt without bringing the whole European house down."(40) Thus the British government pursued the strategy of making full use of all available legal means to lift the ban, without, however, risking the head-on collision with the Community that was openly demanded by some backbenchers. Similarly, the German government finally acknowledged the inappropriateness of its openly illegal embargo and promised to comply with the Commission's decision. The parallelism of open political opposition on the one hand and adherence to legal procedures on the other indicates that even in cases of antagonistic interests the legitimacy of the European legal system as the basis of member state co-operation is ultimately undisputed. The example of BSE can therefore be interpreted as indicating that effective governance can be achieved through means of horizontal enforcement and legally

binding procedural regulations even in cases in which governmental actors have strong incentives not to comply.

However, the BSE case also emphasises the limitations of horizontal enforcement: The isolation of the European discourse on risk regulation (Veterinary Committee, Agrarian Council, European Council) from nearly all affected parties in the member states was an important factor for provoking the fierce resistance first of the British government and later of the French and German governments. All three of them had little room for manoeuvre but were forced by their constituencies to take a firm – and clearly illegal – stand. Therefore, in both cases the EU finally had to settle for solutions which were clearly suboptimal: neither is BSE eradicated today nor is the free flow of beef restored. For both normative and analytical reasons, a uniting Europe cannot restrict itself to the harmonisation of member state legal systems and the co-ordination of member state preferences. And for reasons of democracy as well as for practical reasons, European integration has to strive for a stronger transnational integration of diverging public opinions in its member states if it wants to be able to deal with similar problems in a more appropriate manner in the future.

This leads one to question the optimism of institutional and legal approaches which claim that all problems of intergovernmental co-operation in the area of the implementation of agreements can be solved by devising an intelligent institutional and/or legal design. As the BSE crisis clearly shows, even the most intelligent and best devised institutional design threatens to fail or at least provokes fierce resistance in cases where the member state domestic political discourses leave limited scope for a co-operative governmental attitude. It finally shows that European institutions (same as legal norms) neither determine nor programme government action, but merely restrict it by imposing additional costs on certain options, thereby making them improbable but by no means impossible.

Furthermore, the BSE case reveals the necessity of analysing the process of implementing law with regard to aspects of co-operation and conflict within national and European political processes. The behaviour of the British government can be conceived as a balancing act between the aim to accommodate national public opinion and the realisation that Britain must not antagonise the other member states too much and must not risk an open breach of the law. Similarly, the policy outcome of the second BSE-crisis must be seen as a compromise between the German public and the Commission's insistence on the integrity of European administrative practices. Thus, the BSE case can also be understood as a warning against analytical approaches which either conceive foreign policy in Europe as a mere extension of domestic politics or which completely disregard the dimension of domestic politics and public discourse. The BSE affair emphasises the need to regard compliance as a process which is shaped by political as well as legal means and develops through the tension between supranational legal norms, governmental interests and sub-national interest groups and public concerns. All this points to the theoretical as well as practical necessity to find a form of European governance that is at the same time effective and tied to public discourse.

The Commission's recent emphasis on the precautionary principle (COM 2000 (1)) is a step in the right direction. The principle basically holds that the justification of protective measures does not necessarily need to rely on the scientific proof of a danger to public health. Even if no clear proof can be produced, protective measures may be used if scientific evidence gives reasonable hints to believe that such danger exists. To be sure, the precautionary principle is not always easy to apply because any reduced insistence on the burden of proof on part of the consumer carries the risk of arbitrary restrictions of free trade. It needs to be emphasized, however, that any judgement about acceptable risks for society is an eminently political business. As such, the assessment and management of risks cannot be handled only by the "objective" methods of science but must be sensitive to concerns which

lack the scientific language. Risk regulation therefore may not be limited to the discourse of the experts but strive for a stronger integration of consumers organizations and thereby make public concerns become part of European risk regulation.

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Endnotes

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(1) For detailed chronologies of the BSE crisis see the webpage on the BSE Inquiry (<http://www.bse.org.uk>) and the Final Consolidated Report to the Temporary Committee of the European Parliament on the Follow-Up of Recommendations on BSE, 21.10.97, http://europa.eu.int/comm/dg24/health/bse/bse03-fin_en.pdf.

(2) Ibid.

(3) Testimonies of two participants of the meeting during the hearings of the EP on the investigation of the alleged violation of Community law in connection with BSE (PE 220.544/part A/final/en, 32).

(4) PE 220.544/Part A/final.

(5) Die Zeit, 12.7.1996.

(6) Die Zeit, 21.6.1996.

(7) Ibid.

(8) Case C-180/96 R, para. 18.

(9) Decision 96/239/EC prohibited the export from Great Britain of live cattle, beef and beef products, tallow, gelatine, meat meal and bone meal deriving from mammals.

(10) In the same vein Douglas Hogg, after a meeting of the Agrarian Council on 3.4.96 spoke of an "unjustified, scientifically unfounded and disproportionate" reaction. Agence Europe of 4.4.96.

(11) WHO Consultation on Public Health Issues Related to BSE and the Emergence of a New Variant of Creutzfeldt Jacob Disease, 2-3 April 1996, conclusions summarized in Weekly Epidemiological Record, 1996, No. 15 (12 April 1996). Shown under <http://www.airtime.co.uk/bse/who.htm>.

(12) The Scientific Veterinary Committee declared on 9.4. that gelatine constituted a low risk, on 18.4. that cattle sperm was to be classified as harmless.

(13) Afterwards Hogg said: "I think I have discerned the willingness to show true solidarity on a certain number of financial consequences." (Agence Europe 30.3.96). Commissioner of Agriculture Fischler on 3.4.96: "What was needed here was solidarity of the member states in the EU, and we have shown it, and will also try to show it in future. We have never intended to exclude the United Kingdom; basically our decisions amount to the EU extending a hand." (Agence Europe 4.4.96).

(14) Commissioner for Agriculture Franz Fischler before the European Parliament in Strasbourg, cf. Agence Europe 20.6.1996.

(15) Cf. Minister of Agriculture Hogg on 3.4.96 in Luxembourg (Agence Europe 4.4.96).

(16) For a detailed survey of the British media reaction to the BSE affair see <http://www.airtime.co.uk/bse/news2.htm>.

(17) The Sun of 21.5.: "Humiliation of Britain"; in comparison see the Financial Times of 4.9.1996: "BSE not only makes cows mad. It is causing an epidemic of irrational behaviour across Europe".

(18) Headlines in the Telegraph of 20.6.96 read: "How Britain capitulated on BSE" and "Surrender by Britain over beef ban"; in the Daily Express of 22.5.96: "Major goes to war at last"; in the Observer of 23.6.96: "How the beef war was lost".

(19) The Guardian, 21.3.96.

(20) Night and Day / Mail on Sunday Review, 12.5.96.

(21) Daily Mirror, 21.3.96.

(22) The Independent 30.11.98, 5.

(23) Cf. Final Consolidated Report, 10-11, CM (1998) 598 final.

(24) Commission Decision of 4.2.1998 laying down certain detailed rules concerning on-the-spot-checks in the veterinary field by Commission experts in the Member States (98/139/EC), OJ L 38 of 12.2.98, 10-13, Art. 6.

(25) In this context, 98/139/EC, Art. 7 para 4, refers to the procedure laid down in 89/395/EC, Art. 17, which is identical with procedure IIIa of the Comitology Decision (87/373/EC). For a detailed discussion of Comitology, see Neyer 1999 and the contributions in Joerges/Vos 1999.

(26) Only a small percentage of all treaty violation procedures instituted are brought before the ECJ (third stage of the procedure). The vast majority of disputes are settled through negotiations between Commission and member state. In 1997 the Commission instituted a total of 1422 (1996: 1142) procedures, submitted 331 reasoned opinions and involved the Court in only 121 cases (1996: 92) (See General Report on the Activities of the European Union 1997, Luxembourg 1998, chapter X). For a survey detailing the different stages of the treaty violation procedure see Mendrionou (1996: 3).

(27) Final Consolidated Report, 11.

(28) Cf. Special Report to the European Parliament Concerning Recommendations on BSE (http://europa.eu.int/comm/dg24/health/bse/bse01_en.html, 6).

(29) Final Consolidated Report, 72.

(30) Commission Proposal for a partial lifting of the export ban for beef from the United Kingdom, to authorise the export of beef and beef products under the Export Certified Herds Scheme (ECHS) in Northern Ireland (http://europa.eu.int/en/comm/spc/cp4pleb_de.html).

(31) Final Consolidated Report, 65.

(32) Summarised in http://europa.eu.int/comm/dg24/health/sc/ssc/out62_en.pdf.

(33) Agence Europe 30.10.99, p. 6. The SSC report can be found at http://europa.eu.int/comm/dg24/health/sc/ssc/out62_en.pdf.

(34) Press release by the Federal Ministry of Health of 29.10.99.

(35) Die Welt, 11.4.1996.

(36) By the end of 1998 only 41 cases of the new variant of Creutzfeldt Jacob Disease had become known in the EU, 39 of them in Great Britain (European Parliament/European Commission 1999, 109).

(37) Jeanne Brugère-Picoux in l'Humanité of 4.11.99.

(38) Der Spiegel 45/1999, p. 213.

(39) COM (1998)598 final, Second Bi-Annual BSE Follow-up Report, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.

(40) Daily Telegraph 22.5.96.

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