Book Review

Risk and EU Law
Hans-W Micklitz and Takis Tridimas (eds)
Cheltenham: Edward Elgar, 2015, 272pp.

I. Risk and EU law

For several decades, risk has been a dominant topic in EU governance, policymaking and law. To a certain extent, the academic debate primarily focuses on the efficacious and legitimate regulation of risks, ie it centres around the question what can EU law do about risks? This volume aims to add an extra dimension to that debate by also addressing the question how risks are influencing the legal regulatory framework, ie what can risk do about EU law? How do the legal and policy reactions to risks in several policy domains, such as finance, terrorism and food, influence and give shape to the competence, nature and scope of EU law? How and why is risk a trigger for new developments in the law? And is the reaction to risk problematic for EU law itself? If so, why? The analysis of how risk is shaping the law in the end enables one to examine to what extent the legal and political reaction to risks itself might become a threat to the legal system.

The volume deals with the mutual interaction between risk and the law in relation to, according to the authors, the four most important pillars of risk regulation: (1) how risk is understood; (2) the objectives of risk regulation; (3) the parameters of decision-making in relation to risks; and (4) the mechanisms that trigger new or changes in risk regulation. The several contributions address the developments in relation to these pillars from several scholarly disciplines on risks such as law and economics, economics, legal theory, sociology and risk science, or with regard to developments in specific policy domains, such as finance, terrorism, life-style risks and food.

II. Knowledge claims and risks

With regard to the first pillar of risk regulation, knowledge about risks, the volume provides a prime example of the mutual interaction between law and risks. On the one hand, the law determines what aspects are relevant in defining and assessing risks, thereby ultimately conferring legal authority on certain knowledge claims about risks and the actors that make such claims. On the other, however, knowledge claims that meet these legal conditions also serve as a fundament and scientific legitimisation for the ensuing legal and policy decisions. Maria Lee also referred in this journal to this mutually constitutive legitimisation of science and the law in the context of tort law.[1] In

[1] M Lee, 'The Sources and Challenges of Norm Generation in Tort Law' (2018) 9(1) EJRR 34.

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Chapter 6 of the volume, Van Asselt and Vos point out the troubling aspects of this mutual constitutive legitimisation of risks and law in the field of food regulation by addressing the uncertainty paradox.[2] In short, this paradox means that in order to cope with scientific uncertainties, institutions and agencies tend to over-rely on expert evidence and scientific evidence, while this knowledge is uncertain in itself. According to Van Asselt and Vos, in the domain of food the EU Commission over-relies on the advice of specialised agencies, thereby ignoring the fact that knowledge about risks is itself a legal and political matter, depending on the choice for experts, their scope of mandate, the process of collecting evidence, and their role in executive decision-making. A way to tackle this paradox is to have a more stringent judicial review. However, when assessing the validity of science in the court an "expert paradox" arises: how can courts assess the validity of expert evidence without the use of experts? Similar issues arise in the context of lifestyle risk regulation. According to Alemanno and Garde, in Chapter 7, the EU policy focus is primarily on regulating consumer behaviour, instead of regulating undesirable products as such. Human behaviour is, however, difficult to understand, to predict and, hence, to influence. Consequently, scientific uncertainties make it difficult to prove the necessity for and suitability of policy measures, their proportionality and the availability of alternatives. As a solution, the authors *inter alia* plea for an evidence-based judicial review that includes a wide-range of disciplines dealing with behaviour and lifestyle risks, such as statistics, economic analysis and psychology. The question then, however, becomes to what extent the abovementioned uncertainty and expert paradox will raise challenges.

III. Actors and mechanisms for responsibility attribution

Another recurring theme and insight of the volume relates to the changing distinctions and categories in relation to risks, such as the systems and mechanisms for defining risks, the attribution of responsibilities for risks and the objectives of risk regulating. Two insights are particularly noteworthy. First, in our globalising network society and in light of the globalisation (or even better: trans-nationalisation) of risks, the editors to the volume observe an increase in the role and significance of the EU in specific policy domains such as finance, terrorism and lifestyle risks. Secondly, traditional categories, such as public/private divide are under change and new types of risk regulation are entering onto the stage, which is particularly illustrated by the rise of transnational risk regulation through supply chain management, as noted by Caffagi in Chapter 8. This contract-law driven risk regulatory mechanism gives, particularly in the area of food, several actors in the supply chain, third party certifiers and quality assurance parties and auditors a more central role in risk regulation, while the role of public authorities is slipping into the background. Although such mechanisms could prove to be effective risk regulatory mechanism, it also raises questions about the legitimacy and adequacy of these actors, and the interests they represent, as risk regulators.

[2] See MBA van Asselt and E Vos, 'The Precautionary Principle and the Uncertainty Paradox' (2006) 9(4) Journal of Risk Research 313.

IV. Triggers for risk regulation

According to the editors, some of the major law and regulatory reforms are driven by scandal and crises. Consequently, the development of EU law and its substantive provisions on risk is rather backward-looking instead of forward-looking. Particularly in the financial sector, this backward-looking nature of new rules on, inter alia, the competence and structure of supervision by EU institutions, such as the ECB, on the financial market is problematic as it leads to out-of-date solutions. Another problem of crisis driven regulation is that the EU is better at law reform than crisis management. Law reform is a stable, prolonged and reflective exercise, whereas crisis management requires specific competence and a wide executive discretion. Consequently, in handling crises through the law, the line between crisis management and law reform becomes blurred, thereby ultimately strengthening the EU as such, but in time of vigilance towards further European integration also posing a threat to its acceptability.

V. Other domains

The volume's combination of academic perspectives on risks on the one hand, and developments related to specific policy domains on the other, allows for a cross-fertilisation of insights which provides a broader view on the relevant developments in EU law under the influence of risks. It is this fact that make the volume worth reading. Nonetheless, an analysis of developments in other areas of law and policy domains could have shed a different light on the developments in relation to the four identified pillars of risk regulation. Think particularly about developments in relation to product liability and new technologies and, more importantly, environmental risks and the rise of public interest litigation both at a Member State and an EU level. One sees the rise of public interest litigation on inter alia climate change and air quality standards, both on the basis of EU law and national tort law.[3] Particularly an analysis of the developments in the environmental domain could provide different perspectives on the triggers for risk regulation (eg NGO and citizens-based initiatives), the levels of risk regulation (eg national and not necessarily only international), and the actors involved in risk regulation (eg the judiciary in a new risk regulatory role). Together with the (slow) revival of the idea of private enforcement, this development could be an important game changer in the risk regulatory landscape.

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[3] This tort law dimension was the subject of the recent special issue of the EJRR on judge-made risk regulation (2018) vol 9(1).