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### Regulating Risks in the EU

*The Co-production of Expert and Executive Power*

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# Regulating Risks in the EU – The Co-production of Expert and Executive Power

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Maria Weimer & Anniek De Ruijter

## I Introduction

This edited volume has come to completion in the end of 2016 – the year, in which Donald Trump has been elected as the 45th President of the United States and the citizens of the United Kingdom voted to leave the European Union. Following these events the Oxford Dictionary declared the word ‘post-truth’ to be the international word of the year. Post-truth denotes ‘circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief,’<sup>1</sup> and refers to a general perception that we live in a time where ‘the truth has become so devalued that what was once the gold standard of political debate is a worthless currency.’<sup>2</sup>

In the public debate, experts and expertise have come under attack. One of the most striking remarks in this regard, in the pre-referendum Brexit public debate, was made by Michael Gove, the conservative politician and Brexit campaigner, who stated: ‘I think people in this country have had enough of experts.’<sup>3</sup> Gove responded to arguments made by economic experts that the UK leaving the EU would have negative economic consequences. His remark, unwittingly, hints at what in this volume we refer to as co-production, the idea that expertise – generally referring to an authoritative claim to know better than others – when it is used in the context of law or policymaking, is not apolitical, but entangled with the exercise of political power.<sup>4</sup> Hence, rejecting expert views in favor of the EU in the pre-referendum Brexit debate was essentially about rejecting EU political rule including its elite use of expertise as an instrument of (political) authority; as ‘power over’ people.<sup>5</sup>

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<sup>1</sup> N. Midgley, ‘Word of the Year 2016 is...’ (English Oxford living dictionaries) <<https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>>.

<sup>2</sup> *ibid*, citing a newspaper commentator.

<sup>3</sup> M. Deacon, ‘EU Referendum: Who Needs Experts When We’ve Got Michael Gove?’ (The Telegraph, 6 June 2016) <<http://www.telegraph.co.uk/news/2016/06/06/eu-referendum-who-needs-experts-when-weve-got-michael-gove/>>.

<sup>4</sup> We do not claim that the experts Gove was referring to were EU experts, but his remark did not distinguish independently produced expert claims from those produced within EU institutions.

<sup>5</sup> S Quack, *Expertise and Authority in Transnational Governance*, in R Cotterell and M Del Mar (eds), *Authority in Transnational Legal Theory* (Cheltenham, Edward Elgar, 2016) with further references.

This collective volume focuses on a specific form of co-production, namely the co-production of EU expert and executive power. In this way, we aim to contribute to the discussion about the legitimacy of the exercise of EU executive power in an ever growing policy field, namely in EU regulation of health and environmental risks.<sup>6</sup> In other words, we focus on the relationship between EU executive power and regulatory science in decision-making on risk and technology. The term regulatory science, as coined by Sheila Jasanoff,<sup>7</sup> refers to the particular use of scientific advice in regulation, and should be differentiated from broader notions of research science.<sup>8</sup> Furthermore, we are not putting forward a particular ontological agenda regarding science or knowledge in general – rather, we focus on the political use of the ‘claim to know’ in the context of EU risk regulation.

Co-production has been an important guiding theme for all contributors to this edited volume. As such we are heavily indebted to Sheila Jasanoff’s pioneering work on law, science and technology, which is why we have given her thoughts on the relevance of studying co-production in the EU a prominent place in this volume.<sup>9</sup> And yet this volume goes beyond paying a tribute to a remarkable scholar. It aims, first, to gather a critical mass of EU scholars who are able to approach the study of EU risk regulation with the same breathtaking birds-eye view as Jasanoff. And second, the ultimate goal is to explicitly re-connect the seemingly narrow discussions about the role of expertise in EU risk regulation with the broader conversation about EU executive power and its legitimacy.

In this chapter we introduce the general pinpoints of this conversation. First, we revisit the relationship between risk, regulation and executive power in the EU. Second we focus on policy-relevant expertise in the EU, its scope and relevance. Third, we link the previous two sections by introducing the notion of co-production, and fourth we present our findings on the way in which expert and executive power are being co-

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<sup>6</sup> A. de Ruijter, *The Expansion of EU Power in the Field of Human Health* (Oxford, Oxford University Press, 2017 forthcoming); M Weimer, *Risk regulation in the internal market and its limits - lessons from agricultural biotechnology* (Oxford, Oxford University Press, 2017 forthcoming).

<sup>7</sup> See Jasanoff in this volume.

<sup>8</sup> See further on the differences between regulatory science and research science, S Jasanoff, *Science at the Bar* (Cambridge, MA, Harvard University Press, 1995) and S Jasanoff, ‘Quality control and peer review in advisory science’ in: J Lentsch and P Weingart (Hg.): *The Politics of Scientific Advice. Institutional Design for Quality Assurance* (Cambridge, Cambridge University Press, 2011) p. 19-35;

<sup>9</sup> See Jasanoff in this volume.

produced in EU risk regulation. Finally, we conclude by outlining a future research agenda that re-connects the study of EU risk regulation, expertise and executive power with the broader debates on the future of the EU constitutional order.

## **II Risk regulation and executive power in the EU**

A fundamental principle of Western democratic societies is that essential political questions need to be decided by democratic constituencies represented through parliaments. In late-modern risk societies<sup>10</sup> of the 21<sup>st</sup> century such essential political questions often relate to the distribution of economic, environmental, and social risks; in other words to the distribution of the negative effects (the “bads” rather than the “goods”) of globalization, economic interdependence, and technological progress. Yet, it is precisely in the face of these complex questions that parliaments and democratically elected politicians today seem to be losing their decision-making authority. Instead, technocrats and experts are increasingly called upon to solve pressing societal problems. For instance, the management of the economic and financial risks in post-crisis Europe has taken place through the empowerment of non-majoritarian institutions such as the European Central Bank and new EU regulatory agencies.<sup>11</sup> Such massive delegation of powers is legitimated by reference to the complexity of the societal questions at stake, as well as the need for specific professional and technical expertise to resolve them.<sup>12</sup>

Part and parcel of these developments is the rise of risk regulation. The latter is here understood as the body of EU rules and practices dedicated to the assessment, management and communication of potential risks arising from technological and economic developments. These rules and practices interfere with market and social processes in order to control and avert possible adverse consequences to publicly protected interests. Health and environmental protection is a key policy field in which the rise of risk regulation in the EU can be observed.<sup>13</sup> Protecting EU citizens from health

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<sup>10</sup> U Beck, *Risk Society: Towards a new modernity* (London, SAGE, 1992).

<sup>11</sup> See e.g. C Joerges and M Weimer, A Crisis of Executive Managerialism in the European Union – No Alternative?’ in J Scott, G De Burca and C Kilpatrick (eds) *Critical Legal Perspectives on Global Governance* (Oxford, Hart Publishing, 2013) p. 295.

<sup>12</sup> See e.g. Case C-270/12 Short Selling at para 105.

<sup>13</sup> G Majone, ‘The European Community between Social Policy and Social Regulation’ (1993) 31 *Journal of Common Market Studies* 153; G Majone, ‘The Credibility Crisis of Community Regulation’ (2000) 38 *Journal of Common Market Studies* 273; E Vos, ‘EU Food Safety Regulation in the Aftermath of the BSE Crisis’ (2000) 23 *Journal of Consumer Policy* 227; M van Asselt, M Everson and E

and environmental risks has been one of the main arguments, together with the need to ensure the functioning of the EU internal market, used to justify the expansion of the EU regulatory state.<sup>14</sup> Moreover, the legitimacy of massive re-regulation of the internal market at EU level relied since the very beginning on the claim to epistemic (output) legitimacy. In other words, it relied on the promise of scientifically sound and non-majoritarian expert-based regulation to tackle transboundary health and environmental problems so as to increase the welfare of EU citizens; and thereby to compensate for the shortcomings of a European welfare state and (input) democracy.<sup>15</sup> Hence, as Hood *et al* point out:

‘the two ideas of “risk society” and “regulatory state” could, indeed, be linked insofar as risk and safety is often held to be one of the major drivers of contemporary regulatory growth, for example in the development of EU regulation.’<sup>16</sup>

Even more importantly, the expansion of the EU risk regulatory state has gone hand in hand with an empowerment of the EU executive<sup>17</sup>, as the contributions to this volume vividly illustrate.<sup>18</sup> The assessment and management of risks has been largely delegated to the executive institutions in the EU, particularly the European Commission<sup>19</sup> - a process intensified in the course of the 1990’s through the rise of comitology committees and quasi-regulatory EU agencies.<sup>20</sup> While the Commission was origi-

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Vos, *Trade, Health and the Environment: The European Union Put to the Test* (London/New York, Routledge/Earthscan, 2013).

<sup>14</sup> E.g. Art. 114 (3) TFEU. G Majone, *The Rise of Statutory Regulation in Europe* (London, Routledge, 1996); G Majone, ‘The Regulatory State and Its Legitimacy Problems’ (1999) 22 *West European Politics* 1.

<sup>15</sup> Initiated by the Commission’s Single Market programme and the transfer to qualified majority voting in EU legislation in the Single European Act. J Weiler, ‘The Transformation of Europe’ (1991) 100 *The Yale Law Journal* 2403.

<sup>16</sup> C Hood, H Rothstein and R Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford, Oxford University Press, 2001) 4.

<sup>17</sup> According to Curtin, the executive refers to individuals, ministers and civil servants that ‘control, from day to day, the state’s instruments of coercion, wealth and information.’ D Curtin, *Executive Power of the European Union, Law, Practices and the Living Constitution* (Oxford, Oxford University Press, 2009) 19. In this contribution we understand the EU executive as encompassing both the political and the administrative executive, but see both as being inherently interlocked, see also Curtin *ibid* at p. 66. We focus on the executive functions of the Commission and its satellite institutions while neglecting the executive role of the Council due to the special relevance of the former in the field of EU regulation of public health and environmental risks.

<sup>18</sup> See Weimer and Pisani, Stokes, Ehnert, Greer, De Ruijter and Lee in this volume.

<sup>19</sup> H Hofmann, ‘A European Regulatory Union - The Role of Agencies and Standards’ in P Koutrakos and J Snell (eds), *Research Handbook on the EU’s Internal Market* (Cheltenham, Edgar Elgar, 2016); M Egeberg, M Martens and J Trondal, ‘The EU’s Subordinated Agency Administration and the Rise of Executive Power at European Level’ in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Basingstoke, Palgrave Macmillan, 2015).

<sup>20</sup> E Vos, ‘The Role of Comitology in European Governance’ in D Curtin and R Wessel (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Antwerp,

nally conceived of as a technocratic body, it has gradually become ‘normalized’ as the EU’s political executive.<sup>21</sup> As such, it tends to outsource specialized tasks to outside bodies and an elaborate network of agencies. These ‘satellite’ institutions and their actors - policy advisors, evidence gatherers, risk assessors, deliberation networks - play a crucial role in the adoption of risk regulation.<sup>22</sup> It is in this underbelly of EU regulation that the distinction between the executive and expertise becomes blurred,<sup>23</sup> and where we can find the ‘expert executive’ amalgam exercising power, albeit not always in a transparent way.<sup>24</sup>

### **III Policy-relevant expertise in the EU, between epistemic and political authority**

The term expertise generally refers to ‘a widely acknowledged source of reliable knowledge, skill, or technique that is accorded status and authority by the peers of a person who holds it and accepted by members of the larger public.’<sup>25</sup> As outlined earlier, in this edited volume we focus on a particular type of expertise, namely regulatory or policy-relevant expertise, which is specialized (often scientific) knowledge that is used for regulatory purposes. We consider policy-relevant expertise to be a special type of ‘epistemic authority.’<sup>26</sup> Claims to epistemic authority are raised by virtue of, on the one hand, possessing specialized knowledge (i.e. expertise) that is different from other more commonly shared forms of knowledge and, on the other hand, being a reliable source of information (i.e. possessing credibility).<sup>27</sup> Policy-relevant expertise, however, stands out from other types of epistemic authorities (e.g. research sci-

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Intersentia, 2005); D Curtin, ‘Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability’ in D Geradin and N Petit, *Regulation through Agencies in the EU: A new paradigm of European Governance* (Cheltenham, Edward Elgar, 2005); M Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford, Oxford University Press, 2013).

<sup>21</sup> D Curtin, *Executive Power of the European Union, Law, Practices and the Living Constitution* (Oxford, Oxford University Press, 2009) 91-100.

<sup>22</sup> Busuioc, above n 20.

<sup>23</sup> Vos above n 20; E. Vos, ‘The Rise of the Committees’ (1997) 3 *European Law Journal* 210.

<sup>24</sup> Curtin, above n 20; Curtin and Egeberg, ‘Tradition and Innovation: Europe’s Accumulated Executive Order’ (2008) 31 *West European Politics*; Egeberg, Martens and Trondal, above n 19; A Gornitzka and C Holst, ‘The Expert-Executive Nexus in the EU: An Introduction’ (2015) 3 *Politics and Governance* 1.

<sup>25</sup> F Fisher, *Democracy & Expertise. Reorienting Policy Inquiry* (Oxford, Oxford University Press, 2009) 17.

<sup>26</sup> Hence we use the term ‘regulatory science’ as the tool for providing policy-relevant expertise.

<sup>27</sup> R Guess, *History and Illusion in Politics* (Cambridge, Cambridge University Press, 2001) 38; Quack, above n 5; M Zürn, ‘Autorität und Legitimität in der postnationalen Konstellation’ (2012) 27 *Leviathan, Sonderheft*, 41-62, at 51.

ence, epistemic communities, NGOs) in that it is being assigned authority by political institutions.<sup>28</sup> In that way, it gains *political* authority as its interpretations and factual assessments are validated by political decisions.

Hence, as Holger Strassheim discusses in this volume,<sup>29</sup> policy-relevant expertise is conceptualized as a nexus between political and epistemic authority. It is imbued with political authority. An important consequence of the rise of the EU risk regulatory state as described in the previous section has been an unprecedented transformation of EU's authority to validate policy-relevant knowledge claims, or what Strassheim refers to as the European 'ecosystem of expertise.'<sup>30</sup> To support its expanding governance structures, the EU has been continuously developing new EU-level institutions and procedures for the generation of policy-relevant expertise. This evolution is exemplified by mainly four trends.

First, since the 1990s the EU has been establishing ever more EU regulatory agencies (i.e. agencification) to which certain tasks of information gathering, coordination and expert advice were outsourced.<sup>31</sup> Second, the European Commission has institutionalized an expansive system of expert groups advising it on a variety of policy issues.<sup>32</sup> Third, the Better Regulation program has been dominating the Commission's institutional policy since the beginning of 2000s. As part of this program the Commission's main instrument of 'knowing' in policymaking has become the Regulatory Impact Assessment (RIA) and the accompanying consultation of stakeholders.<sup>33</sup> More recently, the Commission has also introduced a new EU Science Advice Mechanism,<sup>34</sup> which is supposed to provide the Commission with independent scientific advice on specific policy issues.

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<sup>28</sup> Zürn *ibid.*, who calls it epistemic authority with assigned political authority (translation from German).

<sup>29</sup> Strassheim in this volume. The term has originally been coined by J Wilsdon, R Doubleday, and J Hynard, 'Future Directions for Scientific Advice in Europe' in R Doubleday and J Wilsdon (eds), *Future Directions for Scientific Advice in Europe* (Cambridge, Centre for Science and Policy, 2015) 8-22.

<sup>30</sup> *ibid.*

<sup>31</sup> S Krapohl, 'Risk Regulation in the EU between Interests and Expertise: The Case of BSE' (2003) 10 *Journal of European Public Policy* 189; Busuioc, above n 20; Curtin, above n 20.

<sup>32</sup> Vos, above n 23; Vos, above n 20; G Chambers, 'The BSE Crisis and the European Parliament' in C Joerges and E Vos (eds), *EU Committees: Social regulation, law and politics* (Oxford, Hart Publishing, 1999).

<sup>33</sup> A Meuwese, *Impact Assessment in EU Lawmaking* (The Hague, Kluwer Law International, 2008).

<sup>34</sup> Thereby replacing the post of the Chief Scientific Advisor previously held by Anne Glover.

Fourth, the general trend towards more centralized and institutionalized production of policy-relevant knowledge was augmented by the trend towards regulatory cooperation with third countries and hence the transnationalization of expertise. Transatlantic trade and cooperation agreements, such as CETA and TTIP, require cooperation in the field of knowledge production, and to some extent the harmonization of procedures in this respect.<sup>35</sup> The commitment of TTIP, for example, to RIAs and stakeholder consultations certainly fosters the consolidation of these procedures at EU level (and thereby also the consolidation of EU-level expert structures).<sup>36</sup>

The increase of EU regulatory powers led to the emergence of knowledge infrastructures intended to secure EU's claims to governance authority via claims to EU epistemic authority.<sup>37</sup> The language of *risk* has been a crucial driver of this transformation: The building of the EU regulatory state – able to secure a free internal market while protecting citizens from market risks – necessitated an ever-complex institutional machinery of EU knowledge production. This transformation of EU expert authority has significant ramifications for both the vertical and the horizontal distribution of power in the Union. And yet it has gone almost unnoticed in EU constitutional debates. To be sure, the rise of EU executive power – the broad delegation of rule-making power to executive institutions at EU level – has been the subject of many constitutional preoccupations and critical analysis.<sup>38</sup> Yet the epistemic underpinnings of EU executive power remain largely in the shadows, and a niche subject in mainstream EU law scholarship.<sup>39</sup>

In contrast, the above-described evolution of EU-level infrastructures of expertise has not gone unnoticed in policy and regulatory studies.<sup>40</sup> Yet here we often encounter

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<sup>35</sup> J Wiener and A Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Regulatory Laboratory' (2016) *Law and contemporary problems*.

<sup>36</sup> Commission, 'Better Regulation for Better Results – An EU Agenda' (Communication) COM (2015) 215 final; Commission, 'Better Regulation – Delivering Better Results for a stronger Union' (Communication) COM (2016) 615 final; See commentary in the Special Issue on the Better Regulation Package – How much better is Better Regulation? (2015) 6 (3) *European Journal of Risk Regulation* 344-381

<sup>37</sup> See on the relationship between epistemic and governance authority in the transnational context see Quack, above n 5.

<sup>38</sup> D Curtin, *Executive Power of the European Union, Law, Practices and the Living Constitution* (Oxford, Oxford University Press, 2009).

<sup>39</sup> With some notable exceptions, see for example C Joerges, 'The Law's Problems with the Governance of the Internal Market' in C Joerges and R Dehousse (eds) *Good Governance in Europe's Integrated Market* (Oxford, Oxford University Press, 2002), 3.

<sup>40</sup> This is reflected in the 'knowledge turn' in EU studies, see C Radaelli, The role of knowledge in the policy process (1995) 2 (2) *Journal of European Public Policy* 159-83.

arguments pertaining to so-called ‘objectivist epistemologies.’<sup>41</sup> The policy analysis movement, and as its more recent manifestation, the evidence-based policy movement are guided by the belief that sound science can provide regulation with certain evidence, which will lead to a more rational problem-solving process.<sup>42</sup> This rational-instrumental model of evidence-based regulation<sup>43</sup> is rooted in the modernist paradigm, and understands science as culture-neutral, universalistic and objective. The underlying understanding of scientific expertise presupposes a linear separation between the processes of risk assessment and that of risk management, and between facts and values. In the words of Sheila Jasanoff

“On this traditional view, the task of evaluating the probability and severity of harm properly belongs with experts, who should work in settings as far removed from politics as possible in order to arrive at technical assessments unaffected by parochial interests or values. Only then can the door into political horse-trading open and political authority come into its play to determine which levels of risk are acceptable to concerned interest groups.”<sup>44</sup>

According to this model, epistemic authority and governance authority are not only neatly separated, but rely on fundamentally different legitimization resources. Scientific and expert claims are legitimized by scientific methodology and peer-review,<sup>45</sup> while political claims to authority are legitimized by political (democratic) and legal accountability.

A substantial body of interdisciplinary research into the practices of expert-based regulation, however, questions the traditional model, including the feasibility of the underlying separation between expertise and politics.<sup>46</sup> Recent empirical research shows that EU institutions (above all the Commission) use expertise not only for technocrat-

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<sup>41</sup> See H Strassheim, ‘Politics and policy expertise: towards a political epistemology’ in F Fischer et al (eds), *Handbook of critical policy studies* (Cheltenham, Edward Elgar, 2015) 319 at 322 who traces this term back to Majone.

<sup>42</sup> See S Nutley et al, ‘Evidence and policy in six European countries: Diverse approaches and common challenges’ (2010) 6 (2) *Evidence & Policy*, 131-144; see for a discussion Strassheim, *ibid* 322.

<sup>43</sup> Others have referred to this model as technocratic, linear or deterministic model of risk regulation, see C Waterton and B Wynne, ‘Knowledge and political order in the European Environmental Agency’ in S Jasanoff (ed) *States of Knowledge The Co-production of Science and social order* (London, Routledge, 2004) 87; see also L Fisher in this volume.

<sup>44</sup> See Jasanoff in this volume.

<sup>45</sup> M Hesselink, ‘A European Legal Method? On European Private Law and Scientific Method’ (2009) 15 *European Law Journal* 20.

<sup>46</sup> M van Asselt and E Vos, ‘The Precautionary Principle and the Uncertainty Paradox’ (2006) 9 *Journal of Risk Research* 313; E Vos and M Everson (eds), *Uncertain Risks Regulated* 1 edition (London, Routledge-Cavendish, 2012).

ic-instrumental, but also for political purposes.<sup>47</sup> It shows, for example, that next to technocratic problem-solving, the Commission also uses expert groups to politically substantiate its pre-defined positions vis-à-vis other actors. Moreover, it uses them for political consensus-building to support negotiations among Member States.<sup>48</sup> Technocratic and political concerns are therefore intricately entwined in the formation of EU rules and standards.

This volume has emerged as a collective effort to de-construct the objectivist-instrumental model of expertise by critically studying the practices of evidence-based policy making, and thereby to support the call for political epistemologies. In the words of Strassheim

“from the perspective of political epistemologies (...) evidence-based policy rests on political objectivity as a plausible fiction that tends to obscure many preliminary decisions that influence the production of numbers, indicators and standards. By uncovering the process of politicization and de-politicization entrenched in evidence-based practices, political epistemologies in contrast contribute to the capability of political communities to critically re-examing normative issues and to redefine problems that have been framed in ways so far unquestioned in public debates.”<sup>49</sup>

#### **IV Co-production as an analytical lens**

Studying EU risk regulation through the lens of co-production allows us to uncover those entrenched practices as well as hidden exercises of political power in the EU expert-executive space. But, first, we need to further clarify the meaning of the term co-production as used in this volume. To use Jasanoff’s words, co-production as an analytical frame for research holds “the proposition that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it.”<sup>50</sup> Humans create science and technology in the context of inherently biased and socially constructed institutions. Co-production can help explaining stabilized understandings of the natural world (‘how we now what we know’) but it can also help us seeing the dynamics of how science begets meaning in

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<sup>47</sup> e.g. C Boswell, ‘The political functions of expert knowledge: knowledge and legitimation in European Union immigration policy’ (2008) 15 (4) *Journal of European Public Policy*; J Moodie, ‘Resistant to Change? The European Commission and Expert Group Reform’ (2016) 39 (2) *West European Politics*; J Metz, *The European Commission, Expert Groups and The Policy Process, Demystifying Technocratic Governance* (Basingstoke, Palgrave Macmillan, 2015).

<sup>48</sup> Metz, *ibid.*

<sup>49</sup> Strassheim, above n 41 at 323.

<sup>50</sup> Jasanoff in this volume p. XXX.

the social, political or legal world and vice versa.<sup>51</sup> In the context of the EU, the social and political construction of its political system hinges on the task to govern not only political subjects – Member States and EU citizens – but also subject matter itself. Risk regulation, as one of the core tasks of the EU, is there to benefit EU citizens. However, risk is often taken to be a self-standing natural occurrence and the determination of an existing risk as a matter of science unaffected by politics and values.<sup>52</sup> The idiom of co-production challenges these neat divisions. It acknowledges that risks themselves are ‘framed’ and depend on ‘social acceptance’ for their recognition. Further, risk has become a determinant of social order. As Jasanoff rightly observes, risk does not merely ‘act upon’ society exogenously, but it arises from ‘within social arrangements’:

‘The portrayal of risk governance as merely a technocratic exercise designed to perfect the market overlooks the deeply political character of controlling risks. That political dimension comes clearly into view through the lens of co-production.’<sup>53</sup>

## **V The co-production of EU expert and executive power**

What does co-production tell us about the role of expertise in shaping the exercise of EU executive power and vice versa? Expertise in the EU is intrinsically linked to EU executive power by providing the latter with legitimacy and justification. This is an important finding of this volume: in the field of risk regulation, the EU seeks to transform claims to EU expertise (made within the institutionalized structures of EU expert advice, e.g. EU expert groups or agencies) into claims to EU executive authority (i.e. the claim that the EU executive, above all the Commission, should have the power to decide on certain issues potentially at the expense of other institutions or levels of governance). To refer once more to Jasanoff, ‘centralization and presumed completeness of knowledge supply a firmer basis for credible displays of public reason and regulatory control.’<sup>54</sup>

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<sup>51</sup> S Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (London, Routledge, 2004); S Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton, Princeton University Press, 2005).

<sup>52</sup> See Jasanoff (p. 2) in this volume.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

The use of expertise including the ubiquitous reliance on science-based and evidence-based regulation is therefore not just an attempt to strengthen the rationality of EU risk regulation, but also and above all a way of justifying decisions on risk and technology including their legal and political consequences.<sup>55</sup> Given that a vast body of EU regulatory power is executive in nature,<sup>56</sup> the need for a technocratic expert-based justification is amplified. This can also be linked back to characterizations of the EU as an apolitical, non-majoritarian ‘regulatory state.’<sup>57</sup> In other words, the call for expert-based regulation is deeply connected with the existential need to justify the exercise of executive power at EU level. In her contribution, Elizabeth Fisher states that: ‘It is not just the expertise of knowing about risks that is required in risk regulation, but what is also needed is expertise in how to govern those risks.’<sup>58</sup> In that sense, expertise is never just instrumental in the way that the EU Better Regulation discourse would like us to believe. ‘It is embedded in executive spaces and transforms executive power.’<sup>59</sup>

At the same time, the contributions to this volume produce ample examples of transformations in both directions: not only expertise as transforming EU executive power, but also the latter transforming the nature of policy-relevant expertise. What they show are the non-linear relationships between, on the one hand the production of science when it is embedded in the EU executive sphere, and on the other hand the production of executive power through the embedding of knowledge as a policy-instrument in the socio-legal practices of the EU executive. As a result, experts ‘advisors’ and the EU executive inevitably merge into an amalgam of governing power.

Elen Stokes’ contribution offers a vivid example. Using EU regulation of synthetic biology as a case study, Stokes considers the ways in which expertise both contributes to and is determined by exercises of EU executive authority. The EU is currently contemplating what regulatory framework would be adequate to regulate this new techno-

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<sup>55</sup> See Weimer and Pisani, in this volume.

<sup>56</sup> Curtin, above n 21. From the actor perspective: EU governance is dominated by the involvement of executive actors (even in instances in which legislative acts are being enacted), such as the Commission, the Council, and the European Council, comitology committees and EU agencies; From the perspective of acts: EU legislation usually only provides for broad framework norms, which require substantial implementation by executive actors. In EU risk regulation, the majority of legal acts are executive in nature (individual decisions, implementing and delegated acts or other forms of executive soft-law).

<sup>57</sup> Majone, ‘The Rise of Statutory Regulation in Europe’ above n 14.

<sup>58</sup> See Fisher in this volume.

<sup>59</sup> See Fisher in this volume.

logical development. Does the current EU regulatory regime on ‘conventional’ genetic modification cover synthetic biology, or is the latter so novel that it requires specially designed regulatory strategies and measures? This calls for attempts to define the very subject matter of EU regulation including the conceptualization of synthetic biology as either novel or conventional genetic modification. Stokes reveals the phenomenon of ‘recombinant regulation’, whereby existing legislative measures recombine with newly emerging applications of technology. By defining synthetic biology as a conventional process that should fall under the existent regulation, the Commission, reliant on a technical expert group, de-politicizes the technology. Neither legislative intervention nor a broader debate about the distribution of potential risks and benefits is needed. Moreover, the Commission is able to assert control over a new technology.

‘Treating synthetic biology as equivalent to genetic modification helps to maintain regulatory continuity and “normalize” its novelty. (...) But it also means that democratic deliberation on the broader ethical, legal and social impacts of synthetic biology is sidelined. (...) Hence, regulatory stability in the present can come at a cost, in this case to the incorporation of multiple viewpoints and collective decisions about the future. (...) Overall, then, the recombination of synthetic biology with legislation on “conventional” GMOs provides an example of how new, emerging technological opportunities interact with existent legal and policy institutions and practices at EU level, and of how technical expertise and executive power are constituted and reaffirmed along the way.’<sup>60</sup>

The case study by Tanja Ehnert makes similar observations. Ehnert analyses the definition of the term ‘nanomaterial’ for the purposes of its regulation. Particularly it shows how, in order to address the uncertainty as regards to the actual knowledge of what can be described as ‘nanomaterial,’ the executive took deliberate steps to shift the issue from the European Parliament to the European Commission. As a result the definition of nanomaterials became depoliticized and reframed as a mere technical, soft law issue. Following this, the definition of nanomaterials as carved out by the EU executive became the basis for hard law.

The role of the EU executive in defining the world of science and technology and its political uses is not limited to new and emerging fields of research. Policies that are

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<sup>60</sup> See Stokes in this volume.

highly interwoven with science – and represent a deep involvement of both political actors and scientific assessments – are shaped by the dominant strain of knowledge entrepreneurs within them. Experts engaged in executive rule-making are able to exert public authority. In the words of Strassheim:

‘To recognize the expertise of an individual or collective actor means to attribute to that actor both the competence to validate and justify knowledge claims (‘epistemic authority’) and the capability to make these knowledge claims relevant for collectively ordering and evaluating society (‘political authority’).’<sup>61</sup>

The case studies by Scott Greer and Holger Strassheim both make this point. Strassheim’s case study on behavioral expertise analyses how European public health policy is recast as a science that can ‘nudge’ people into the right behavior. ‘Smart-regulation’ through behavioral insights in EU public health and the environment is a key example of the ‘epistemic authority’ that is assigned political authority. The behavioral economic insights are particularly attractive in the context of the EU executive. These insights are presented by its proponents as a solution for the lack of science-policy coordination. Indeed, Strassheim in his chapter shows how ‘the behavioural movement manages to be perceived as both scientifically reputable and politically attractive, capable of filling the institutional void in European policy making.’<sup>62</sup> In the case of behavioural expertise, rather than using either science or the political and legal basis as a manner to persuade the public of the legitimacy of a policy, behavioural insights persuade on both those counts.

Another field of policy where the experts themselves have a key role in carving out the role for the EU executive is in the field of public health surveillance. As explained by Greer public health surveillance in itself has been developed as an “order-making concept that carves out an important space for the executive to exercise public authority:

‘Public health surveillance, the collection of public health data for public purposes, is at the core of public health and the modern state. It is invasive, expensive, sometimes coercive, justifies all sorts of public actions, and is fraught with all manner of conflicts about personal data, privacy, state power and public action. It is therefore political. Its political nature, however, is easier to deduce than to see in the everyday work, publications, and statements of people

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<sup>61</sup> See Strassheim in this volume.

<sup>62</sup> *ibid.*

involved in an apparently low-profile, scientific, and cumulative public enterprise. In the center of a vortex of concerns about technology, privacy, disease, power, and liberty, we find an oddly calm world of writing about epidemiological best practice that has shaped, among other institutions, the developing European Union engagement in public health.’

Greer shows how the EU’s adoption of a particular understanding of public health surveillance as both a science and a political tool legitimizes far-reaching efforts of personal data gathering, and shapes public health as a EU policy field. The *de*-politicization of health surveillance as a source of executive power in the field of public health, is amplified by the *re*-politicization of public health when its expertise is merged with security expertise, particularly also when it comes to strengthening the role of the EU executive in public health emergencies, as analyzed by de Ruijter.

Where Greer focuses on the concept of public health surveillance, the chapter by de Ruijter focuses on the empowerment of the EU executive through the securitization of responses to public health emergencies. As Greer described, with regard to the field of public health surveillance, EU executive power was co-produced through the assumption of a scientific need for a harmonized understanding of public health surveillance. In contrast, De Ruijter shows that before the last decade the role of the EU executive for managing public health threats remained relatively minor. Yet in tandem with the rise of the risk society,<sup>63</sup> and especially after 9/11, the scientific understanding of the nature of health risks arising in emergency (public health) situations has changed. Other types of experts became involved, particularly those working in the area of security. As a result, current EU public health regulation in the field of communicable disease outbreaks, bioterrorism and chemical attacks has merged the scientific input of two very distinct types of expertise – public health experts on the one hand and security experts and economists on the other hand. While the former believe that public health risks are manageable and statistically foreseeable, the latter view such risks as unforeseeable disasters or catastrophes that should be addressed, not only in terms of health and life of humans, but also in terms of security, critical infrastructures and defense.

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<sup>63</sup> U Beck, *Risk Society: Towards a New Modernity* 1 edition (London, Sage Publications Ltd 1992); U Beck, ‘The Terrorist Threat World Risk Society Revisited’ (2002) 19 *Theory, Culture & Society* 39.

## VI Broadening the debate – rethinking EU constitutionalism

As Elizabeth Fisher observes in this volume,<sup>64</sup> in recent years there has been a trend in both scholarly and policy discussions to downplay the broader political issues underlying EU risk regulation with the latter becoming ‘kettled’ into a separate discourse from the mainstream debates about the EU.” As stated in the beginning, with this volume we aim to overcome this trend and to re-connect the risk regulatory discussion with the broader discussion on EU executive power and its legitimacy. The salience of expertise for EU’s democratic governance more generally is well demonstrated by this quote from the chapter by Jasanoff:

‘The European Union emerges [...] as an inversion of the standard paradigm of modern democratic governance. [...] Supranational governing bodies such as the EU are less subject to elections or other forms of direct democratic control. For such bodies, the relationship of legitimation is reversed: instead of knowledge and experience serving purposes that the governed have placed on the political agenda, the EU governs by setting the policy agenda on the basis of claimed superior knowledge and expertise. Under these circumstances, the epistemic and social authority of science provide the strongest justification for acting on others’ behalf. Thus, in the context of EU risk governance, the perceived rightfulness of regulatory policies derives from advisory committee claims to know for the entire European polity. Risk governance is a site in which European institutions assert their right to govern all European lives—thereby constructing an imaginary of a united Europe—by generating persuasive technical rationales for centralized policy action.’

These far-reaching shifts of power in EU’s multi-level polity require a re-thinking of the legal and constitutional foundations of EU (risk) regulation. The main challenge of EU democratic governance (and transnational governance more generally) today is to ensure that the use (including the production) of expert knowledge in policymaking is able to safeguard the public interest. Debates on EU constitutionalism, however, have so far neglected this challenge. Epistemic authority largely remains a blind spot in EU constitutionalism debates.<sup>65</sup>

There is currently no (EU) constitutional theory that can account for epistemic authority and expert power in our pluralist knowledge-based society. This volume supports the claim that expertise serves as ‘an alternate reservoir of power, not subject to the modes of legitimation that govern the legislative, executive, or judicial branches of a

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<sup>64</sup> See Chapter XXX.

<sup>65</sup> But see S Smismans, ‘Constitutionalising Expertise in the EU: Anchoring Knowledge in Democracy’ in J Priban *The Self-Constitution of Europe* (Farnham, Ashgate, 2016).

classic, tripartite national government.’<sup>66</sup> We do not claim to deliver such a new constitutional theory, but we do hope to provide for some of its important building blocks. Recognizing expertise as ‘an alternate reservoir of power’ means that we need to re-think traditional modes of legitimation of EU executive authority in order to be able to normatively evaluate, and perhaps even control this hidden exercise of power. This means re-thinking EU constitutionalism to ensure the expert-executive amalgam is oriented towards the public good. We need to develop concepts allowing holding EU executive power to account for its use of policy-relevant expertise including for how it collects and ensures the quality of that expertise. Law and the study of expertise from a legal-constitutional perspective are relevant here in two respects.

Firstly, the EU has been developing soft and hard meta-norms governing the use of expertise by EU institutions, and thereby implicitly acknowledging the significance (and perhaps even the politics) of epistemic authority. We can only briefly refer here to Commission guidelines, communications, and white papers on expert consultation, founding regulations for EU agencies, EU legislation on access to documents, Commission Decisions establishing new bodies, such as the Regulatory Scrutiny Board overseeing the Commission’s work on RIAs. Moreover, EU courts are confronted on a daily basis with the legal review of science- and expert-based decision-making. While this presents an enormous challenge for the courts, they have been gradually developing procedural requirements and principles, which shall govern the exercise of epistemic authority in the EU.<sup>67</sup> Lastly, as illustrated by Maria Lee’s contribution, recently the European Ombudsman has produced a number of decisions directly relevant to co-production of epistemic and governance authority.<sup>68</sup> Can these developments be seen as beginning counter-movements to the traditional rational-instrumental understandings of the role of expertise in EU risk regulation? We believe that the ways in which law enhances or reduces the possibility of democratic destabilization of regulatory knowledge demands further scrutiny. Law has the capacity to reveal or to further obscure both the contingency of regulatory choices about technological innovations and the possibility of societal change. This edited volume sheds light on the many ways, in which EU law could contribute to either entrenching the

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<sup>66</sup> Jasanoff in this volume.

<sup>67</sup> See Weimer & Pisani, Anderson, and Lee in this volume.

<sup>68</sup> See Lee in this volume.

technocratic model of risk regulation or to destabilizing it thereby facilitating incremental legal and regulatory change.

Secondly, these developments are not in the spotlight of legal academic interest as they take place in the technical underworld of EU executive governance. Yet, as this volume shows, EU constitutional discourse on co-production provides for a critical lens through which to evaluate the quality of the above-described EU meta-norms on the use of expertise in policy making. How shall we judge the quality of such meta-norms in constitutional terms? In the absence of a constitutional theory as benchmark, the risk is that they simply create a legitimating discourse for functional governance captured by special interests.<sup>69</sup>

Finally, the dominant EU discourse on multi-level (pluralist) constitutionalism has focused on the interaction between the EU and national legal orders, as well as on issues of subsidiarity and national diversity defined along territorial lines. At the same time, the centralization of epistemic authority (and hence the lack of *epistemic* subsidiarity)<sup>70</sup> in the EU has been neglected. Yet legal and political multi-level conflicts in the EU are increasingly resolved by recourse to expert claims. Hence, what is won in terms of (de-centralised) governance authority can again be lost in terms of (centralized) epistemic authority. The task ahead is to advance a research agenda for studying EU rules and practices of co-production from a constitutional perspective. This would allow us to ‘theorize more completely the role of science in relation to other institutional means of legitimating governmental power.’<sup>71</sup> Pursuing this research agenda will help re-imagining EU constitutionalism taking into account the co-production of EU epistemic and governance authority; and thereby help preserving the core function of constitutionalism, namely to shape the domain of politics in the public interest.<sup>72</sup>

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<sup>69</sup> Above n 65.

<sup>70</sup> See on this term S Jasanoff ‘Epistemic Subsidiarity – Co-existence, Cosmopolitanism, Constitutionalism European Journal of Risk Regulation’ (2013) 4 (2) 133-141.

<sup>71</sup> See Jasanoff in this volume.

<sup>72</sup> Above n 65.