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Understanding Regulatory Growth in the European Community

GIANDOMENICO MAJONE

European University Institute, Florence

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES

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GIANDOMENICO MAJONE

BADIA FIESOLANA, SAN DOMENICO (FI)

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European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

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Giandomenico Majone
European University Institute

1. *Introduction*

The prominent place given to the principle of subsidiarity in the Maastricht Treaty reveals widespread concerns about the accumulation of regulatory powers in Brussels, but also raises several theoretically interesting questions. First, how is over-regulation at the European level possible, given that national governments are strongly represented at every stage of the policy-making process? Again, Member States strive to preserve the greatest possible degree of sovereignty and policy-making autonomy, as shown for example by their stubborn resistance to Community intervention in areas such as macroeconomic policy and indirect taxation. Why, then, have they accepted many regulatory measures not foreseen by the founding treaty and not strictly necessary for the proper functioning of the common market? Finally, concerning the quality rather than the quantity of Community regulations: how is innovation at all possible in a system where the formal rights of initiative of the Commission, as well as its executive functions, seem to be so tightly controlled?

There can be little doubt about the determination of the Member States to limit the Commission's discretion at every stage of policy making. Political

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* Following the terminology of the Maastricht Treaty, I use the expression European Community (EC) to denote the economic and social "pillar" of the European Union. This paper does not deal with the other two pillars -- the common foreign and security policy, and cooperation in the fields of justice and home affairs. "European Union" is used here only to refer to the collectivity of the Member States.

initiative comes from the heads of state or government (European Council); political mediation takes place in the framework of the Committee of Permanent Representatives of the Member States (COREPER); formal adoption is the prerogative of the Council of Ministers; implementation is in the hands of the national administrations. Before final adoption by the Council, a Commission proposal will typically have been discussed in a working group comprising for the most part national officials; submitted to an advisory committee which includes outside experts; transmitted to COREPER to be discussed in the working group of national officials it sets up; reviewed by COREPER once more, and finally placed before the Council for approval.

The Commission's discretion in the execution of Council directives has been tightly regulated by Council Decision 87/373/EEC of 13 July 1987 on the "comitology" system. The system consists of a large number of committees associated with the Commission in the exercise of its executive functions. Over the years, the system has become increasingly complex, including both advisory and oversight (so called "management" and "regulatory") committees. Regulatory and to some extent also management committees can block a Commission measure and transmit the case to the Council which can overrule the Commission.

Not surprisingly, many students of European integration have concluded that policy innovation in the EC is only possible when national preferences converge toward some new approach. Intergovernmentalist writers, in particular, rely on a model of least- common-denominator bargaining, a sort of Ricardian theory of Community policy making. As in Ricardo's theory of economic rent the price of a good is determined by the unit cost of the output produced by the marginal firm so, according to intergovernmentalists, the quality of policy decisions in the EC is determined by the preferences of the least forthcoming

(or marginal) government. Hence, barring special circumstances, the outcome will converge toward a least-common-denominator position.

Also writers not belonging to the intergovernmentalist school have denied the possibility of genuine policy innovation. According to these writers, the Community can hope, at best, "to generalize and diffuse solutions adopted in one or more Member States by introducing them throughout the Community. The solutions of these Member States normally set the framework for the Community solution" (Rehbinder and Stewart 1985:213).

Not even neo-functionalists thought it necessary to offer a theory of policy innovation. Ernst Haas explained the growth of European competences in terms of the "expansive logic of sectoral integration" (Haas 1958). He assumed a process of functional "spillovers" in which the initial decision of governments to delegate policy-making powers in a certain sector to a supranational institution inevitably creates pressures to expand the authority of that institution into neighbouring policy areas. Economics and technology, rather than political demands or policy entrepreneurship, would drive the result. Recent versions of neofunctionalism show greater awareness of the growing importance of innovation in the EC policy making system. Thus, the notion of "political spillover" (George 1993) emphasizes the role of supranational institutions and subnational actors in the process of functional spillover. Such empirical observations are not developed, however, into an explanation grounded in general theories of institutional behaviour.

In attempting to provide theoretical, rather than ad hoc, explanations for the apparently unstoppable growth of European regulations, I have found useful to distinguish different dimensions of policy growth: quantitative growth; technical complexity; task expansion; policy innovation. The usefulness of this

analytic distinction is due to the fact that rather different causal factors operate along the various dimensions.

The paper is organized as follows. Section 2 presents some examples and selected empirical evidence concerning the quantitative and qualitative growth of EC regulation in recent years. The crucial importance of regulation in EC policy making is explained in Section 3 by means of a model which has among its main variables the limited size of the Community budget and the low credibility of purely intergovernmental agreements in the field of regulation. Section 4 discusses the dynamics of delegation and control, while Section 5 reviews some recent theories of policy entrepreneurship. Section 6 derives a number of positive and normative implications from the analysis developed in the previous sections. The paper concludes with some remarks on institutional reform.

2. *Some Examples*

Each of the three questions raised at the beginning of the introduction rests on a body of empirical evidence which is too extensive to be reviewed here; only a few suggestive examples will be presented. Concerning the phenomenon of over-regulation, one can mention the almost exponential growth of the number of directives and regulations produced, on average, each year: 25 directives and 600 regulations by 1970; 50 directives and 1000 regulations by 1975; 80 directives and 1500 regulations per year since 1985.

To compare: in 1991 Brussels issued 1564 directives and regulations as against 1417 pieces of legislation (laws, ordinances, decrees) issued by Paris, so that by now the Community introduces into the corpus of French law more rules than the national authorities. Moreover, according to some estimates, today only 20 to 25 percent of the legal texts applicable in France are produced by the

parliament or the government in complete autonomy, that is, without any previous consultation in Brussels (Conseil d'Etat, 1992). It seems that Jacques Delors's often quoted prediction that by 1998, 80 per cent of economic and social legislation will be of Community origin, while perhaps politically imprudent, did not lack solid empirical support.

Reporting such statistics, the French Conseil d'Etat speaks of normative drift ("dérive normative") and luxuriating legislation ("droit naturellement foisonnant"), doubting that any government could have foreseen, let alone wished, such a development. It also points out, however, that the same Member States that deplore the "furie réglementaire" of the Brussels authorities, are among the major causes of over-regulation -- a point we shall examine more closely below.

Concerning the continuously expanding agenda of the Community, a suggestive indicator is the number of specialized councils of ministers, which went from 14 in 1984 to 21 in 1993. In addition to the traditional councils of the ministers of economics, finance, agriculture, trade and industry, we have now regular meetings of the ministers of the environment (since 1974), education (since 1974), research (since 1975), consumer affairs (since 1983), culture (since 1984), tourism (since 1988), civil protection (since 1988), telecommunications (since 1988).

Of seven important areas of current policy development -- regional policy, research and technological development, environment, consumer protection, education, cultural and audiovisual policy, and health and safety at work -- only the latter was mentioned in the Treaty of Rome, and then only as an area where the Commission should promote close cooperation among the Member States (Art.118, EEC). In the case of environmental protection, for example, three Action Programmes were approved before the Single European Act (SEA)

explicitly recognized the competence of the Community in this area. If the first Action Programme (1973-6) lacked definite proposals, concentrating instead on general principles, subsequent documents became increasingly specific. The second programme (1977-81) indicated four main areas of intervention, while the third (1982-6) stressed the importance of environmental impact assessments and of economic instruments for implementing the "polluter pays" principle. Concrete actions followed. The number of environmental directives/decisions grew from 10 in 1975, to 13 in 1980, 20 in 1984, 25 in 1985, and 17 in the six months immediately preceding the passage of the SEA.

Consider, finally, genuine policy innovation as distinct from mere quantitative growth or task expansion. As already mentioned, many (perhaps most) students of EC policy making hold that Community policies cannot move beyond least-common-denominator solutions, unless the interests of the most important Member States favour some new approach. Thus, according to intergovernmentalist accounts of the internal market programme, the emphasis of the 1985 White Paper (COM(85)310, final) on mutual recognition reflects a change in the preferences of the Member States in the direction of less interventionist economic policies and a corollary shift toward deregulatory programmes (Keohane and Hoffman 1990: 288). Starting from the same assumption that the decisions of supranational institutions mirror the policy preferences of the most powerful political and economic actors in Europe, other authors have argued that the *Cassis de Dijon* ruling, which gave prominence to the principle of mutual recognition, was based on the reading of the European Court of Justice (ECJ) of the interest of the most influential Member States (Garrett 1992; Garrett and Weingast 1993).

A more careful analysis of the evidence reveals a rather different picture. First, there is no indication that in justifying the *Cassis* decision the ECJ was

following anything but its own convictions. There is no mention of the idea of mutual recognition either in the argument of the plaintiffs' lawyers or in the observations of the Commissions and the conclusions of the Advocate General (Dehousse 1994). Moreover, countries with a high level of health and safety standards such as France and Germany, realized that mutual recognition of such standards would entail competition among national regulators. Regulatory competition, it was feared, creates the conditions for "social dumping" as each country attempts to gain advantages for its own industry and to attract foreign investments by lowering the level of regulatory constraints which firms must meet. Hence countries with advanced systems of social regulation tended to support the traditional method of harmonizing national standards rather than their mutual recognition (Alter and Meunier-Aitsahalia 1993).

In fact, the Commission, rather than the Member States, had a strong reason for favouring reform of the traditional approach to harmonization. By the early 1980s, if not earlier, it had become clear that the attempt to achieve an integrated market by harmonizing thousands of laws and regulations of six, nine, and finally twelve countries at various levels of economic development and with vastly different legal, administrative and cultural traditions, was bound to fail. A new approach was clearly needed. Already in the autumn 1979, the Internal Market Commissioner suggested in front of the European Parliament that the harmonization policy should take a new direction, based on the *Cassis* judgement. In July 1980, the Commission sent an "interpretative Communication" to the Member States, the European Parliament, and the Council, boldly stating that *Cassis* would serve as the foundation for a new approach to harmonization. The Member States reacted with concern to the broad policy implications drawn by the Commission, in particular to the prospect of direct competition among national regulators. The Legal Services of

the Council delivered a counter-interpretation of the case, arguing that the Commission's generalization of the Court's argument was excessive, and concluding that the *Cassis* ruling changed virtually nothing (Alter and Meunier-Aitsahalia 1993). In the event, the Commission's broad interpretation prevailed. At the Milan meeting in June 1985, the Member States endorsed the White Paper and its mutual recognition strategy.

Even in the case of day-to-day policy making, the prevailing view seems to be that the Commission can at best diffuse throughout the Community solutions adopted in the most advanced Member States, see above. There are, it is admitted, some examples of genuine policy innovation. Thus, the Polychlorinated Biphenyl (PBC) Directive (76/769/EEC) "had no parallel in existing Member State regulations", while the Directive on sulphur dioxide limit values (80/779/EEC) established, on a Community-wide basis, ambient quality standards, which most Member States did not previously employ as a control strategy (Rehbinder and Stewart 1985: 214). However, lacking adequate theoretical explanations, such examples tend to be dismissed as special cases of no general significance.

Such a cavalier attitude can no longer be maintained. The SEA, by introducing qualified majority voting not only for internal-market legislation but also for important areas of social regulation, has created suitable conditions for the development of striking regulatory innovations. For example, the framework Directive 89/391 on Health and Safety at Work goes beyond the regulatory philosophy and practice even of a country like Germany (Feldhoff 1992). Among the notable features of the directive are its scope (it applies to all sectors of activity, both public and private, including service, educational, cultural and leisure activities), the general obligations imposed on employers, the

requirements concerning worker information, and the emphasis on participation and training.

Equally innovative are the Machinery Directive (89/392/EEC) and, in a more limited sphere, Directive 90/270 on health and safety for work with display screen equipment. Both directives rely on the concept of "working environment", which opens up the possibility of regulatory interventions in areas traditionally considered to be outside the field of occupational safety, and consider psychological factors like stress and fatigue important factors to be considered in a modern regulatory approach. It is difficult to find equally advanced principles in the legislation of any major industrialized country, inside or outside the EU.

In order to explain such policy outputs we need new, more analytical theories of the policy process in the Community. Such theories should be capable of explaining the qualitative deepening of EC regulation as well as its apparently unstoppable growth.

3. *A Model of Regulatory Policy Making*

To understand policy making in the EC one must start from the basic fact that the budget of the EC is quite small, even after the significant increases of recent years. It represents less than 4 per cent of all the central government spending of the Member States and less than 1.3 per cent of the gross domestic product (GDP) of the Union. By comparison, between 45 and 50 per cent of the wealth produced in the Member States is spent by the national governments. The Community budget is not only small, but also rigid: almost 70 per cent of total appropriations consists of compulsory expenditures for programmes such as the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF).

Second, it is important to distinguish between regulatory policies and policies involving the direct expenditure of public funds. Examples of the latter type are redistributive policies, which transfer resources from one group of individuals, regions or countries to another group, and distributive policies, such as public works or financial support for research and technological development, which allocate public resources among different activities. Now, an important characteristic of regulatory policy making is the limited influence of budgetary limitations on the activities of regulators. The size of direct-expenditure programmes is constrained by budgetary appropriations and, ultimately, by the size of government tax revenues. In contrast, the real costs of most regulatory programmes are borne directly by the firms and individuals that have to comply with them. Compared with these costs, the resources needed to produce the regulations are trivial. It is difficult to overstate the significance of this structural difference between regulatory and direct-expenditure policies. The distinction is especially important for the analysis of Community policy making since not only the economic but also the political and administrative costs of implementing EC regulations and directives are borne, directly or indirectly, by the Member States.

Third, I assume that the European Commission, like any other bureaucratic organization, attempts to maximize its influence, subject to budgetary, political, and legal constraints. The present discussion focuses on the budgetary constraints. As already noted, the financial resources of the Community go, for the most part, to the Common Agricultural Policy and to a handful of distributive and redistributive programmes. The remaining resources are insufficient to support large scale initiatives in areas like industrial policy, energy, research, or technological innovation. Hence, the only way for the

Commission to increase its role is to expand the scope of regulatory activities, even beyond the functional requirements of the common market.

As we saw in the preceding section, this strategy has been remarkably, some would say too successful, but the reasons for the success cannot be found only in the preferences of the Commission. The EC policy-making system includes many actors: industrialists, trade unions, public-interest groups, national and subnational politicians and bureaucrats, independent experts, and so on. The Commission plays a key role in the *supply* of Community regulation; we must now consider the *demand side*. In order to simplify the exposition, I shall only consider the most important actors on the demand side, the national governments (for a more detailed analysis, see Majone 1992, 1994a).

It may seem illogical, if not plainly wrong, to discuss the role of the Member States in the development of Community regulation under the heading of demand. After all, most legally binding acts have to be approved by the Council which represents the interests of the national governments and is supposed to be the real legislator in the EC system. Why not place the Member States and the Commission on the same side of the demand-and-supply equation, as "co-producers" of the regulatory outputs? Although this is the formally correct view, several factors suggest that from a policy-making point of view it is more useful to consider that national governments demand, rather than supply, EC regulation.

To begin with, there is considerable evidence that many Commission proposals are introduced at the suggestion of Member States (as well as of other actors such as the European Parliament, the Council of Ministers, the Economic and Social Committee, and private interests). For example, the German and Dutch governments played a key role in the initiation and drafting of EC directives concerning vehicle emission control, while the British government

exerted considerable pressure on the Commission to liberalize the market for life and non-life insurance where British insurers enjoy a comparative advantage over their competitors on the continent. According to the report of the French Conseil d'Etat cited above, of the last 500 proposals of regulations and directives presented by the Commission as of 1991, only 6% appear to be "spontaneous initiatives", so that the overwhelming majority of proposals would actually be produced on the demand of Member States or other actors.

A second and theoretically more important factor has to do with the issue of policy credibility. As noted in the introduction, it is not *a priori* obvious why Member States would be willing to delegate regulatory powers extending well beyond the level required by the founding treaty or by the logic of functional spillovers in an increasingly integrated market. As Ronald Coase (1960) has shown in a famous article, the presence of negative externalities does not in itself prevent effective coordination among independent actors.

A significant implication of Coase's theorem is that the rationale for supranational regulation is *regulatory failure* rather than market failure. Market failures with international impacts, such as transboundary pollution, could be managed in a cooperative (intergovernmental) fashion without the necessity of delegating regulatory powers to a supranational body, *provided* that national regulators were willing and able to take into account the international repercussions of their choices; that they had sufficient knowledge of one another's intentions; that the (transaction) costs of organizing and monitoring policy cooperation were not too high; and especially that they could trust each other to implement in good faith their joint decisions.

International regulatory failure occurs when one or more of these conditions are not satisfied. For example, it is usually difficult to observe whether intergovernmental regulatory agreements are kept or not. This is

because much economic and social regulation is discretionary. Because regulators lack information that only regulated firms have, and because governments for political reasons are reluctant to impose excessive cost on industry, bargaining is an essential feature of the process of regulatory enforcement. Regardless of what the law says, the process of regulation is not simply one where the regulators command and the regulated obey. A "market" is created over the precise obligations of the latter (Peacok 1984). Since bargaining is so pervasive, it may be impossible for an outside observer to determine whether or not an international regulation has been, in fact, violated.

When it is difficult to observe whether governments are making an honest effort to enforce a cooperative agreement, the agreement is not credible. One solution is to delegate regulatory tasks to a supranational authority with powers of monitoring and of imposing sanctions. Sometimes governments have problems of credibility not just in the eyes of each other, but in the eyes of third parties such as regulated firms. Thus, where pollution has international effects and fines impose significant competitive disadvantages on firms that compete internationally, firms are likely to believe that national regulators will be unwilling to prosecute them as rigorously if they determine the level of enforcement unilaterally rather than under supranational supervision. Hence the transfer of regulatory powers to a supranational authority like the European Commission, by making more stringent regulation credible, may improve the behaviour of regulated firms (Gatsios and Seabright 1989). Also, because the Commission is involved in the regulation of a large number of firms throughout the European Union, it has much more to gain by being tough in any individual case than a national regulator: weak enforcement would destroy its credibility in the eyes of more firms. Thus it may be more willing to enforce sanctions than a Member State would be, even if its direct costs and benefits of doing so are

no different (ib.: 50). The fact that the Commission is involved in the regulation of a large number of firms throughout Europe also explains why it is less vulnerable to the risk of "regulatory capture" than national regulators.

Perhaps the greatest advantage of EC membership in a period of far-reaching policy changes, is the possibility of delegating politically difficult decisions (such as the elimination of state aid to industry, the enforcement of competition rules, trade liberalization and strict implementation of environmental regulations during economic recession) to supranational non-majoritarian institutions (Majone 1994b). By showing that their hands are tied by European rules, Member States can increase the international credibility of their policy commitments and, at the same time, reduce the power of redistributive coalitions at home. In sum, the low credibility of purely intergovernmental agreements, together with the advantage of shifting politically difficult decisions to a non-majoritarian institution, explains the willingness of the Member States to delegate important regulatory powers to the Commission. In the next section we explore the consequences of this delegation.

4. *The Dynamics of Delegation and Control*

The delegation of extensive powers of adjudication and policy making to supranational institutions is what distinguishes the EC from more traditional international regimes. Its implications are still poorly understood, however. Neither neofunctionalists nor intergovernmentalists have seriously considered the dynamics of delegation and control; the former because of their faith in the automatism of functional spillovers, the latter because of their assumption that supranational institutions simply provide a smooth, faithful translation of national interests into policy. To analyze the consequences of the delegation of policy making powers, and the possibilities of political control one must turn to

the literature on political-bureaucratic and principal-agent relations rather than to traditional theories of European integration.

The thrust of much recent research on political-bureaucratic relations is that bureaucracy has a substantial degree of autonomy, and that direct political control is rather weak (Wilson 1980; Moe 1987, 1990; Majone 1994c). Oversight for purposes of serious policy control is time-consuming, costly, and difficult to do well under conditions of uncertainty and complexity. At any rate, legislators are concerned more with satisfying voters to increase the probability of re-election than with overseeing the bureaucracy. As a result, they do not typically invest their scarce resources in general policy control. Instead, they prefer to intervene quickly, inexpensively and in ad hoc ways to protect particular clients in particular matters (Mayhew 1974). Hence legislative oversight is un-coordinated and fragmented. Similarly, the literature on the budgetary process has cast doubts on the budget as an effective tool of control. As Wildavsky (1964) discovered, budgeting is decentralized and incremental, resulting in automatic increases that further insulate the bureaucracy from political control.

New theories based on the principal-agent model give a somewhat more positive assessment of the possibility of political control of the bureaucracy. According to agency theory political control is possible because elected politicians create bureaucracies. They design administrative institutions with incentive structures to facilitate control, and they monitor bureaucratic activities to offset information asymmetries. Thus, agency theory, like recent versions of intergovernmentalism (Moravcsik 1993), posits well-informed central decision makers who systematically mold the preferences of bureaucratic agents and are capable of exercising rational political control (Wood and Waterman 1991: 803).

However, the process is considerably more complex than envisaged by these theories. In the delegation phase, political principals do have the freedom to select their agents and impose an incentive structure on their behaviour. Over time, however, bureaucrats accumulate job-specific expertise, and this "asset specificity" (Williamson 1985) alters the original relationship. Now politicians must deal with agents they once selected, and in these dealings the bureaucrats have an advantage in technical and operational expertise. As a result, they are increasingly able to pursue their objective of greater autonomy. As Terry Moe (1990: 143) writes:

> Once an agency is created, the political world becomes a different place. Agency bureaucrats are now political actors in their own right: they have career and institutional interests that may not be entirely congruent with their formal missions, and they have powerful resources -- expertise and delegated authority -- that might be employed toward these "selfish" ends. They are now players whose interests and resources alter the political game.

This recent research on political-bureaucratic relations throws considerable light on the dynamics of delegation and control in the EC context. Also for the representatives of the Member States in the Council of Ministers oversight for purposes of serious policy control is costly, time-consuming, and difficult to do well. Hence their unwillingness to invest scarce resources in such activities. As was mentioned in Section 2, the "comitology" system is an attempt to control the Commission's discretion in the execution of Council directives. Regulatory and management committees created under this system can block a Commission measure and transmit the case to the Council, which can overrule the Commission. Even in the case of such committees, however, the Commission is not only in the chair, but has a strong presumption in its favour (Ludlow

1991: 107). According to the most detailed empirical study of the comitology system to-date "Commission officials generally do not think that their committee significantly reduced the Commission's freedom and even less that it has been set up to assure the Member States's control" (Institut für Europäische Politik 1989: 9). According to the same study, the Council acts only rarely on the complex technical matters dealt with by the comitology committees, but when it does, its decisions mostly support the Commission's original proposals (ib.:123). In fact, the Commission has reported overwhelming (98 per cent) acceptance of its proposals by the various regulatory committees (Eichener 1992).

Also in the case of policy initiation, the formal procedure according to which Commission proposals are discussed in a working group comprising national experts, submitted to an advisory committee, and reviewed by COREPER, gives an impression of tight control that does not correspond to reality. What is known about the *modus operandi* of the advisory committees and working groups suggests that debates there follow substantive rather than national lines. A good deal of *copinage technocratique* develops between Commission officials and national experts interested in discovering pragmatic solutions rather than defending political positions (Eichener 1992). By the time a Commission proposal reaches the Council of Ministers all the technical details have been worked out and modifications usually leave the essentials untouched.

In part, this is because although the Council with its working groups can monitor the activities of the Commission, it cannot compete with the expertise at the disposal of the Commission and its Directorates (Peters 1992: 119). The offices of the Commission responsible for a particular policy area form the central node of a vast "issue network" that includes, in addition to the experts from the national administrations, independent experts, academics,

environmental, consumer and other public-interest advocates, representatives of economic interests, professional organizations and sub-national governments.

Commission officials engage in extensive discussions with all these actors but remain free to choose whose ideas and proposals to adopt. The variety of policy positions, which is typically much greater than at the national level, increases the freedom of choice of European officials. It may even happen that national experts find the Commission a more receptive forum for new ideas than their own administration. The important Machinery Directive (89/392/EEC) mentioned in section 2, offers a striking example of this. The crucially important technical annex of the directive was drafted by a British labour expert who originally had sought to reform the British approach to safety at the workplace. Having failed to persuade the policy makers of his own country, he brought his innovative ideas to Brussels, where they were welcomed by Commission officials and eventually become European law (Eichener 1992: 52).

5. *Policy Entrepreneurship*

The existence of large margins of regulatory discretion is a necessary but not a sufficient condition for genuine policy innovation. We must also consider the capacity of Commission officials to play the role of policy entrepreneurs. Kingdon (1984) describes policy entrepreneurs as constantly on the look out for windows of opportunity through which to push their preferred ideas. Policy windows open on those relatively infrequent occasions when three usually separate process streams -- problems, politics, and policy ideas -- come together. Policy entrepreneurs concerned about a particular problem search for solutions in the stream of policy ideas to couple to their problem, then try to take advantage of political receptivity at certain points in time to push the package of problem and solution.

A successful policy entrepreneur possesses three basic qualities: first, he must be taken seriously either as an expert, as a leader of a powerful interest group, or as an authoritative decision maker; second, he must be known for his political connections or negotiating skills; third, and probably most important, successful entrepreneurs are persistent (Kingdon 1984: 189-90). Because of the way they are recruited, the structure of their career incentives, and the crucial role of the Commission in policy initiation, Commission officials often display the qualities of a successful policy entrepreneur to a degree unmatched by national civil servants.

In particular, the Commission exhibits the virtue of persistence to an extraordinary degree. Most important policy innovations in the EC have been achieved after many years during which the Commission persisted in its attempts to "soften up" the opposition of the Member States, while waiting for a window of opportunity to open. A textbook example is the case of the Merger Control Regulation approved by the Council on December 21, 1989, after more than 20 years of political wrangling.

As far back as 1965, the Commission argued that the Treaty of Rome was seriously deficient without the power to control mergers. The following year it asked a group of experts to study the problem of concentrations in the Common Market. The majority of the group held that article 85 of the Rome Treaty could be applied to "monopolizing" mergers, but the Commission chose to follow the contrary opinion of the minority. It did, however, accept the majority view concerning the applicability of article 86 to mergers involving one company already in a dominant position in the Common Market. The European Court of Justice followed the Commission's interpretation in the *Continental Can* case (1973).

At the beginning of 1974 the European Parliament and the Economic and Social Committee approved by large majorities a proposal for a merger control regulation, but the Member States were not yet prepared to grant the Commission the powers it requested. A long period of inaction followed. The process was again set in motion by the path -- breaking *Philip Morris* Judgement of 17 November 1987 in which the Court of Justice held, against the then prevalent legal opinion, that article 85 does apply to the acquisition by one company of an equity interest in a competitor where the effect is to restrict or distort competition. The Commission warmly endorsed the Court's decision. It was clear that another important step, after *Continental Can*, had been taken on the road toward the control of merger activities with a "Community dimension". In the meanwhile, the "Europe 1992" programme for the completion of the internal market had stimulated waves of mergers. This development opened the window of opportunity the Commission had been waiting for so long. Centralized merger control of Community-wide mergers could now be presented as essential for success in completing the internal market. Finally, the convergence of Kingdon's three streams of problems, politics, and policy ideas produced the 1989 Merger Control Regulation.

This episode in the history of EC policy making provides a clear illustration of the persistence and entrepreneurial skills of the Commission, but also supports a more general point, namely that an adequate explanation of policy development in the EC must be rooted in the dynamics of the entire system, and must pay serious attention to the relationships of mutual dependence among European institutions. Thus, in section 2 we mentioned the strategic significance of mutual recognition for the Commission, rather than for the Member States. Only through this new approach to harmonization could the objectives of the internal market programme be achieved in time. In turn, the

new approach was made possible by the actions and decisions of both the Commission and the Court of Justice. The relationship of mutual dependence of these two institutions has been expressed very well by Alter and Meunier-Aitsahalia (1994: 19): "The *Cassis* decision advanced the idea of mutual recognition, and the entrepreneurship of the Commission put the issue on the table and forced a debate. Both the decision itself and the Commission's response were necessary to produce the new harmonization policy. The legal decision was needed to encourage the Commission to issue its bold Communication ... The Commission's Communication, however, was also necessary in order to bring the legal decision into the political arena."

Combining concepts from public choice theory with historical case studies, William Riker (1986) provides additional insights into the strategies used by policy entrepreneurs to change existing political coalitions. He argues that through agenda setting, strategic behaviour, and especially through the introduction of new policy dimensions to political debate, the entrepreneur can break up existing equilibria in order to create new and more profitable political outcomes. The successful entrepreneur "probes until he finds some new alternative, some new dimension that strikes a spark in the preferences of others" (ib.:64).

A good example of this strategy is the introduction by the Commission of the concept of working environment into the Europe -- wide debate on health and safety at work. As was mentioned in section 2, this concept opens up the possibility of regulatory interventions in areas such as ergonomics traditionally considered to be outside the field of occupational safety. In view of the claims by intergovernmentalists that Community policy making is under the control of the most powerful Member States, it should be pointed out that the important Machinery Directive and other equally innovative directives in the area of

occupational safety (see Section 2) were inspired by the regulatory philosophy of two small countries -- the Netherlands and Denmark which first introduced the concept of working environment into their legislation -- and opposed by Germany in order to preserve the power and traditional approach of its own regulatory bodies (Feldhoff 1992; Eichener 1992).

6. *Positive and Normative Implications*

As was suggested in the introduction, in order to understand the development and growth of regulatory policies in the EC it is important to distinguish between different manifestations of the phenomenon: quantitative growth, regulatory complexity, task expansion, and "deepening", that is, genuine policy innovation. The theories discussed in the preceding pages suggest a number of observations concerning these various dimensions of development and growth.

The model of demand and supply of EC regulation sketched in Section 3 seeks to explain regulatory origin rather than the ongoing regulatory process. Nevertheless, the model has significant implications for the issues raised in this paper. It will be recalled that the main explanatory variables, in addition to the Commission's desire to increase its influence, are the budget constraint and the low credibility of intergovernmental regulatory agreements,.

Paradoxically, the attempt of the Member States to limit the scope of supranational policies by imposing a tight and rigid budget constraint on the Commission, has favoured the development of a mode of policy making that is largely immune from budgetary discipline. As an American student and practitioner of regulation writes:

> Budget and revenue figures are good summaries of what is happening in welfare, defense, or tax policy, and can be used to communicate efficiently with the general public over the fray of program-by-program

> interest-group contention ... In the world of regulation, however, where the government commands but nearly all the rest takes place in the private economy, we generally lack good aggregate numbers to describe what is being "taxed" and "spent" in pursuit of public policies. Instead we have lists -- endless lists of projects the government would like others to undertake (De Muth 1984:25).

Thus, continuous expansion is a structural feature of regulatory policy making, and not only or even primarily the result of functional spillovers and the "expansive logic of sectoral integration" as neo-functionalists argued. Two additional factors contribute to the seemingly unstoppable growth of European regulation. First it has already been mentioned that the great majority of recent EC regulations and directives are not the result of "spontaneous initiatives" of the Commission, but rather of demands coming especially from individual Member States and the Council, but also from the European Parliament, the Economic and Social Committee, regional governments, and various private and public interest groups. The possibility granted by the Maastricht Treaty to the European Parliament to ask the Commission to submit legislative proposals can only strengthen this trend.

While the responsiveness of the Commission to such requests may increase its political legitimacy, uncontrolled and un-coordinated demands can produce a number of negative consequences, of which legislative inflation is the most obvious one. These consequences are aggravated by institutional factors. Because the European Commission is a collegial body, central coordination of the regulatory programmes of the different Directorates General (DGs) is quite difficult. Lack of central coordination leads to serious inconsistencies across and within regulatory programmes, lack of rational procedures for selecting policy priorities, and insufficient attention to the cost-effectiveness of individual rules.

One method of reducing over-regulation would be to create an institution with the power to oversee the entire regulatory process and to discipline the activity of the DGs by comparing the social benefits of proposed regulations with the costs imposed on the European economy by the regulatory requirements. Such an institution or "regulatory clearing house" should be established at the highest level of the Commission. DGs would be asked to submit to it annually draft regulatory programmes for review. When disagreements or serious inconsistencies arise, the President of the Commission or a "Working Committee on Regulation" would be asked to intervene. This review process would help the Commission to screen demands for EC regulations and to shape a consistent set of regulatory measures to submit to the Council and the European Parliament. The usefulness of the procedure could be enhanced by coordinating the regulatory review with the normal budgetary review, thus linking the level of budgetary appropriations to the cost-effectiveness of the different regulatory programmes (Majone 1992).

Let us now consider the issue of regulatory complexity. Many students of EC policy making have observed that EC directives exhibit a much greater level of technical detail than comparable national legislation. The widespread opinion that this level of complexity is due to the technical perfectionism of the Commission lacks plausibility: the Commission is very small relative to its tasks, has limited resources, and is largely composed of generalists, not of technical experts. Rather, it is the distrust of the Member States which is largely responsible for regulatory complexity. Doubting the commitment of other governments to honest implementation of European rules, and being generally unfamiliar with different national styles of administration, national representatives insist on spelling out mutual obligations in the greatest possible detail, including at times chemical, statistical or mathematical formulas.

Member States not only mistrust each other; they also mistrust the Commission. As noted in Section 4, in order to limit the discretion of the Commission they have created a complex system of working groups and advisory committees largely staffed by national experts. For the reasons given above, the system is not very effective in reducing the freedom of choice of the Commission, but it introduces a strong technical bias into the regulatory process. This is because most national experts are narrow technical specialists more interested in process and technical details than in cost-effective and easy-to-implement solutions. This technical bias, combined with the reluctance of the Council to engage in serious policy control and the lack of central oversight at the Commission level, is probably another factor contributing to regulatory complexity.

This hypothesis is supported by more general theoretical considerations. Some economists have argued that an explanation of regulatory complexity does not need to rest on peculiar interests of the regulators but on economic interests of third parties, namely specialists in various aspects of regulation such as lawyers, accountants, engineers or safety experts. Unlike other interest groups, these experts care more about the process than the product of regulation. They have an interest in regulatory complexity because complexity increases the value of their expertise. Thus, "red tape" may not simply be evidence of bureaucratic inefficiency or ineptness. Rather, in part, "red tape" is a private interest that arises because a complex regulatory environment allows for specialization in rule making and "rule intermediation" (Kearl 1983; Quandt 1983).

In 1985 the Commission has introduced a new approach to technical regulation with the explicit objective of reducing regulatory complexity (COM(85), 310 final). In essence, the new approach proposes a conceptual distinction between matters where harmonization of national regulations is

essential, and those that can be left to the sphere of voluntary technical norms (the principle of "reference to standards"), or where it is sufficient that there be mutual recognition of the requirements laid down by national laws. In practice, the new approach replaces the multitude of *specification* standards (also called process or engineering standards) by a few *performance* standards which a product must satisfy in order to secure the right of free movement throughout the single European market.

The technical specifications formulated by European standardization bodies (such as the European Standardization Committee, CEN, and the European Standardization Committee for Electrical Products, CENELEC) are not binding and retain their character of voluntary standards. However, governments are obliged to presume that products manufactured in accordance with European standards (or, temporarily, with national standards when no European ones are yet available) comply with the "fundamental requirements" or performance standards stipulated in the directive (Pelkmans 1987). The system is completed by the mutual recognition of testing and certification procedures.

The new methodology is a highly innovative approach to supranational regulation in general, and to the problem of regulatory complexity in particular, but its success depends crucially on the level of mutual trust among the Member States. Absent mutual trust, national regulators may upset the delicate balance between different and potentially conflicting objectives -- satisfying essential requirements of health and safety and preventing the creation of non-tariff barriers through regulation -- on which mutual recognition rests. The experience with the mutual recognition of approvals of new medical drugs, provides a graphic illustration of this point.

For more than two decades the Commission has attempted to harmonize national regulations for new medical drugs by means of a set of harmonized

criteria for testing new products, and the mutual recognition of toxicological and clinical trials conducted according to EC rules. Under the "multi-state drug application procedure" (MSAP) introduced in 1975, a company that has received a marketing authorization from the regulatory agency of a Member State may ask for the mutual recognition of that approval by at least five other countries. The agencies of the countries nominated by the company must approve or raise objections within 120 days. In case of objections, the Committee for Proprietary Medicinal Products (CPMP) -- which includes national experts and Commission representatives -- has to be notified. The CPMP must express its opinion within 60 days; within another 30 days it may be overruled by the national agency that has raised objections.

Unfortunately, the procedure has not worked well: national regulators did not appear to be bound either by decisions of other regulatory bodies, or by the opinions of the CPMP. Even a new, simplified procedure introduced in 1983 did not succeed in streamlining the approval process, since national regulators continued to raise objections against each other almost routinely (Kaufer 1990). These difficulties finally convinced the Commission to proposed the establishment of a European Agency for the Evaluation of Medicinal Products and the creation of a new centralized Community procedure -- compulsory for biotechnology products and certain types of veterinary medicines, and available on an optional basis for other products -- leading to a Community authorization (Commission of the European Communities 1990).

As this example shows, a good deal of decentralization would be possible if only national regulators would trust each other more. Often mistrust reflects insufficient appreciation of different regulatory philosophies and national styles of policy making. However, in some cases regulators have low international credibility because they lack, or are perceived as lacking, the scientific and

technical expertise, financial resources and policy infrastructure needed to deal effectively with complex regulatory issues. In such cases, Community assistance may be needed to ensure that all Member States achieve a level of competence sufficient to support mutual trust and to make mutual recognition, possible.

The gist of the argument presented so far is that national governments and regulatory authorities bear a considerable share of the responsibility for the volume and complexity of EC regulation. Hence, remedies should first be sought at the level of the Member States, although more centralized control of regulatory programmes within the Commission would be helpful too. Where the policy entrepreneurship of the Commission becomes important is in explaining the progressive "deepening" of EC regulations.

In Sections 4 and 5 I have discussed in general terms the conditions which make policy entrepreneurship possible, and the most important strategies followed by successful entrepreneurs. Here I consider a particular, but significant, aspect of "deepening": the fact that some of the most striking examples of policy innovation in the EC are in the are of social regulation (see Section 2). There is, of course, a straightforward explanation for this. Clearly, there is limited scope for innovation when policies are either prescribed by treaty -- the case of competition, agriculture or trade policies -- or represent a necessary response to the functional needs of an increasingly integrated market -- rules concerning the free movement of goods, services, capitals and people. At least since the Single European Act, social regulation does not have to be justified in functional terms, and thus offers greater scope for entrepreneurship and innovation than traditional EC policies.

However, a more interesting explanation is suggested by James Q.Wilson's well known taxonomy of regulatory policies according to the pattern of distribution of benefits and costs (Wilson 1980: 366-72). In this taxonomy,

entrepreneurial politics correspond to policies that confer general (though perhaps small) benefits at a cost to be borne by a small segment of society. Most social regulation falls into this category. The costs of cleaner air and water, safer products, and better working conditions are borne, at least initially, by particular segments of industry. Since the incentive to organize is strong for the opponents of the policy but weak for the beneficiaries, social regulatory measures can be passed only if there is a policy entrepreneur who can mobilize public sentiment, put the opponents of the measures on the defensive, and associate the proposed regulation with widely shared values.

According to Wilson, the entrepreneur is the vicarious representative of groups not directly part of the legislative process. This observation helps understanding the growing importance of social regulation, and hence of entrepreneurial politics, in the EC. Historically, diffuse interests have been poorly represented in Europe because traditional forms of state intervention tended to favour producers -- capitalists and unionized workers -- at the expense of consumer interests. Also, political systems characterized by strong party control of both the executive and the legislature, and highly centralized public bureaucracies impeded the emergence of independent political entrepreneur.

On the other hand, the insulation of the Commission, a non-majoritarian institution, from partisan politics, the activism of the European Court of Justice, and the efforts of the European Parliament to define its own distinctive role, are all factors that explain why diffuse interests are often more effectively protected at the European than at the national level. Critics of regulatory growth in the EC should not forget than in most Member States consumer-protection legislation and even environmental policies were poorly developed, when not entirely lacking, before national governments were forced to implement European directives in these areas.

7. Conclusion: Toward Institutional Reform

There is general agreement that a Community of 16, 20, or more members could not function under present rules: institutional reform is urgently needed. Although this paper is not specifically concerned with this vast topic, some of its findings may be relevant to the broader issue.

A first point of methodological interest is that one should not overemphasize the *sui generis* nature of the Community, but rather attempt to distinguish between idiosyncratic problems and those that can be more generally ascribed to a mode of policy making or method of governance. Thus, over-regulation is a general problem, though it may be aggravated by the particular institutional arrangements and peculiar politics of the Community. It follows that reform proposals should not be devised on an ad hoc basis, but should be inspired by general principles.

This applies also to fundamental political issues like the "democratic deficit" of Community institutions, in particular the Commission. As I have argued elsewhere, a problem of democratic accountability arises whenever important policy-making powers are delegated to non-majoritarian institutions such as politically independent central banks and regulatory commissions. To discuss the problem exclusively in the context of EC institutions is to run the risk of neglecting relevant national experiences in favour of ad hoc and possibly flawed solutions.

Second, our discussion of over-regulation and regulatory complexity suggests that it is unhelpful, as well as unfair, to blame the Commission for all the dysfunctions of policy making at the European level. If it is true that the Member States have their share of responsibility then institutional reform should begin at home. One of the central themes of this paper is the overwhelming importance of trust among the Member States. We saw that mutual recognition

cannot succeed when national regulators do not trust each other. But similar problems will arise also in the practical applications of the principle of subsidiarity. This is because national and subnational governments may be more attuned to individual tastes, but they are unlikely to make a clean separation between providing public goods for their citizens and engaging in policies designed to advantage the country or region at the expense of its neighbours. For example, local authorities have sometimes controlled air pollution by requiring extremely tall smokestacks on industrial facilities. With tall stacks, by the time the emissions descend to ground level they are usually in the next city, region or country, and so of no concern to the jurisdiction where they were emitted. Until regulators can trust each other to avoid such selfish strategies, centralization of regulatory authority is the only practical way of correcting transboundary externalities, or to prevent that the local regulation of a local market failure may become a trade barrier.

One final point about decision-making procedures. As already mentioned, the regulatory activities of the Commission are supported by a dense network of consultative, regulatory, and management committees. Moreover, at the end of October, 1993, decisions were taken by the Member States concerning the establishment and location of ten new administrative bodies. These include, in addition to the forerunner of the European Central Bank, the European Monetary Institute located in Frankfurt, the European Environmental Agency, the Office of Veterinary and Phytosanitary Inspection and Control; the European Centre for the Control of Drugs and Drug Addition; the European Agency for the Evaluation of Medicinal Products, and the Agency for Health and Safety at Work.

This proliferation of technical committees and specialized agencies further aggravates one of the most serious defects of Community institutions: the lack

of transparency of their decision-making processes. Because of the opacity of the procedures, it is difficult for the citizens of the Union to identify the body which is responsible for decisions that apply to them, and the legal remedies that are available to them.

A similar situation arose in the United States at the time of the New Deal, which saw a dramatic growth in government intervention. The establishment of new specialized agencies, the functions of which were extremely complex and varied, created a need for rules to ensure that they did not act arbitrarily or unlawfully. In the absence of a true administrative law tradition, the rules governing the federal administration had developed in a piecemeal fashion as they had been worked out in response to ad hoc needs. However, such an approach was deemed insufficient to cope with the changes under way. The Administrative Procedures Act (APA) adopted by Congress in 1946, aimed to legitimize the growth of federal bureaucracy by providing a single set of rules explaining the procedures to be followed by federal agencies and providing for judicial review of many of their decisions.

I submit that the Community could usefully draw on such a precedent. The enactment of an EC Administrative Procedures Act would provide the Community with a unique opportunity to decide what kind of rules are more likely to rationalize decision making, to what extent interest groups should be given access to the regulatory process, or when judicial review is necessary. Even if it were to limit itself to the writing of existing practices into the law, as the APA largely did, the adoption of a single set of administrative rules would at least provide for a hard core of provisions applicable to the developing regulatory process. Such a move would bear witness to the unwillingness of the EC and its Member States to allow an unregulated growth of the Community's administrative functions.

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