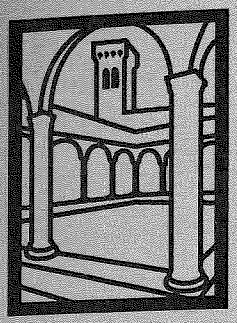

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Integration v. Regulation?
Social Regulation in the European Community

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Integration v. Regulation? Social Regulation in the European Community*

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A couple of years ago, an influential French newspaper ran a series of articles denouncing the 'ultra-liberal' ideology of the 1992 programme. The emphasis laid on market integration, it was feared, would gradually compel Member States to lower of their regulatory protection in a growing number of areas, ranging from consumer protection to social policy.[1] At about the same time, in a much noted speech in Bruges, Mrs. Thatcher argued forcefully against some over-regulatory tendencies she saw developing in the Community, and warned:

> We have not succesfully rolled back the frontiers of the state in Britain only to see them re-imposed at a European level, with a European super-state exercising a new dominance from Brussels.[2]

If anything, the contradiction between these two statements well illustrates the point that the interaction between market integration and regulation is still largely unclear.

Divided-power systems such as the European Community are characterized by a complex web of relationships between the component units and the center. The analysis of these relationships, and of

* This paper has been greatly influenced by lengthy discussions with Christian Joerges and Giandomenico Majone, whose contribution is gratefully acknowledged. A first draft was presented at a conference on 'Regulatory Federalism' organized in November 1990 by the European University Institute and the National Academy for Public Administration (Washington). I am indebted to the conference participants for a number of comments and suggestions.

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1 See for instance 'Dans la jungle du grand marché', *Le Monde Diplomatique*, September 1988. Edmond Maire, a former union leader, saw a similar danger in the field of social policy. See 'Le social, faille de l'Europe', *Le Monde*, August 23, 1988.

2 *The Guardian*, September 21, 1988.

the tensions between uniformity and diversity which they generate, is one of the principle subjects of modern literature on federalism, which lays stress upon the growth of intergovernmental relations (Beer, 1974, Elazar, 1984). There is in comparison a relative shortage of this kind of study as far as the Community is concerned. Whereas legal analyses of the Community's institutions and competences abound, only a few works attempt to analyze in a systematic way the dynamics of the relationship between the Community and its Member States.[3] One probable reason for this gap is that the human mind generally finds it easier to comprehend static structures than to make sense of moving realities and complex power games. Another reason is that this kind of study is by definition interdisciplinary, since it entails a combination of law, administrative science and policy analysis.

The purpose of this article is to illustrate the potential of this mode of analysis by sketching the patterns of relationships that have emerged in a field which can be defined broadly as *social regulation*. Social regulation is meant here as a set of policies which aim at preserving health, safety at work, the environment, or the interests of consumers by correcting collateral effects of economic activities or information asymmetries. Social regulation is thus quite distinct from traditional social *policy*, the aims of which are primarily redistributive (Majone and La Spina, 1991, 31).

This sector has been chosen for a variety of reasons. Social regulation is an area in which government intervention has developed considerably in industrialized societies over the last twenty years. The phenomenon is even more striking when compared to the general crisis of welfare policies. The European Community was not exempt from this general trend. Created as an economic organization, it gradually expanded its activities in areas like environmental and consumer protection or, more recently, in health policy – a transition which, as will be shown later, was not devoid of problems. Scientific literature reflected this movement with some delay: while relations between the Community and its Member States in the sphere of economic regulation have been the object of some systematic studies which tried to identify the basic principles underlying the 'economic constitution' of the Community, (Constantinesco, 1977; IEJE, 1970; Mertens de Wilmars, 1988), social regulation as a

3 The studies published as part of the 'Integration through Law' project of the European University Institute are a notable exception to this trend. See in particular Rehbinder and Stewart (1985) and Bourgoignie and Trubek (1987).

whole has so far received less attention, even if some of its branches have been analysed in detail.

It is worth stressing at the outset that the ambition of this paper is not to present a complete overview of social regulation in the European Community (EC), but rather to outline the manner in which the division of competences between the Community and its Member States affects the way social regulation has developed and is carried out in Europe. In doing so, special importance will be attached to consumer and environmental protection policies, which have seen considerable change since the creation of the Community.

The problems can be sub-divided in two general categories. First, what is the scope of Community intervention in the field of social regulation and how does Membership of the EC affect the Member States' capacity to conduct their own regulatory policy? Secondly, how are regulatory interventions organized, in particular at Community level? Of course the distinction between these two themes should not be over-emphasised, for problems of competence can have (and indeed have had) a decisive influence on patterns of action. However, these two categories provide a good basis for an initial exploration of the maze of relationships that exist between the Community and its Member States in this area.

I. The Scope of EC Intervention

The gradual widening of Community policies to the sector of social regulation is a well-known story which need not be repeated here.[4] However, a number of remarks can usefully be made to illustrate the specific features of Community intervention in this field.

For a long time, social regulation was not a primary concern for Community institutions. The Community was set up (and is still often referred to) as a 'common market'. Quite logically, the emphasis has been laid on the removal of obstacles to the free movement of goods, capital, persons and services rather than on the control of the side-effects of economic activity. True, the Community was endowed with some competences in the field of workers' health and safety,[5] but

4 For a recent treatment of the question, see for instance Weiler (1991).

5 Article 118 of the EEC Treaty.

policy areas like consumer or environmental protection had not gained political prominence at the time the Treaty of Rome was drafted. The method of sectorial integration which was chosen thus focussed on the economic field, as exemplified by the important powers granted to the Community in agricultural and competition policies. The generous wording of article 36 of the Treaty of Rome clearly suggests large sectors of social regulation were regarded as a matter remaining in the hands of the Member States.[6]

Some 35 years later, the picture looks quite different. A mere glance at the Community's 'constitution', the EEC Treaty, suffices to portray how wide-ranging the evolution has been. Environmental policy, consumer protection and health policy have been added to the list of Community competences, the first by the Single European Act, the other two by the recent Maastricht agreement.

The reasons for this change are manifold. As government intervention in these areas grew, it became apparent that divergence in national approaches could create regulatory barriers to trade, no matter whether they were inspired by protectionist motives or not. This is especially true as regards product norms (Siebert, 1989, 55). To take one example, it is unlikely, in the absence of any coordination, that a given good would meet the standards set by twelve distinct sets of product safety rules. The Community's response to this danger was essentially a judicial one. The broad interpretation given by the Court of Justice to Article 30 of the EEC Treaty, which prohibits 'measures having equivalent effect' to quantitative restrictions in intra-Community trade, has had a strong impact on the Member States room for manoeuvre. In a somewhat sweeping statement, the Court ruled that

> all trading rules enacted by the Member States which are capable of hindering, actually or potentially, directly or indirectly, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions.[7]

This amounts to saying that even rules that are not designed to restrict cross-border transactions can hamper the free movement of goods. As such, they will come under the Court's scrutiny *ex* Article 30 (Gormley, 1985). Thus, even in fields which, as we saw remain

6 Article 36 allows 'prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; ... or the protection of industrial and commercial property', provided these do not constitute 'a means of arbitrary discrimination or a disguised restriction on trade among the Member States.'

7 In case 8/74, *Procureur du Roi* v. *Dassonville*, [1974] ECR 837.

primarily in the domestic sphere of competence, the Member States must pay regard to the need not to erect legislative barriers to trade. As a result, their regulatory capacity can sometimes be severely constrained by their Community membership.[8]

It has therefore gradually emerged that tensions between market integration and regulatory objectives can only be reconciled at Community level. Even before the EC was endowed with clear competences in the field of social regulation, Community action developed in a somewhat interstitial fashion. A strong impetus for the broadening of EC powers was given in 1972 at the Paris Summit, where the Heads of State and of Government recognized the need for a more systematic approach to social regulation.

One of the main avenues for Community intervention was Article 100 of the EEC Treaty, which provides for the harmonization of national provisions that 'directly affect the establishment or the functioning of the common market'. Although the exact scope of this provision and its relationship to other Treaty provisions is the subject of legal controversy,[9] the requirement of a direct link with the common market makes it clear that it could not serve as a basis for any activity in the field of social regulation. Likewise, the very concept of 'harmonisation of national provisions' seems to indicate that complete uniformity of national legislation was not being sought. Resort to the 'necessary and proper' clause of the EEC Treaty, Article 235, thus proved necessary on a number of occasions.[10]

From the 1970s, EC intervention gradually evolved on this dual basis, at first covering fields where it was clear that national legislation created obstacles to trade -notably product regulation-, later expanding to pave the way towards fully-fledged consumer and environmental protection policies. Yet, the concept of a common market does not provide any guidelines as to how regulatory policies ought to be conducted, or what level of protection ought to be reached: all that market integration seems to require is a measure of uniformity. The contrasts between diverging regulatory traditions and the lack of

8 See e.g. case 178/84 (the 'German beer' case), *Commission* v. *Germany*, ECR [1987] 1262, and the comments in Sedemund (1988).

9 It is now generally accepted that it can cover product related requirements as well as producer related requirements such as emission standards, that impinge on competitive conditions (Rehbinder and Stewart, 1985 at 21-26). See also Ehlermann (1987) for a post-SEA discussion of the question.

10 A *prima facie* reading of this provision would also suggest that it is not boundless. Yet its extensive use from the 1970s seems to defy any attempt at circumscribing these limits in a precise manner. (Weiler 1991).

a consensus on the substantive values to be pursued by Community policies clearly hampered their development (Rehbinder and Stewart, 1985, Joerges, 1991).

It it is only with the Single European Act that the protection of the environment has been given unambiguous recognition in the EEC treaty and that its main objectives have been specified.[11] At the same time, Community intervention in the field of workers' health and safety was made easier by a shift to majority voting.[12] Even so, the wording of the relevant provisions makes it clear that their objective is not to pre-empt Member States' action, which suggests that this change was not accepted easily. Article 130R, for instance, specifies that 'the Community shall take action relating to the environment to the extent to which the objectives [of environment policy] can be attained better at Community level than at the level of the individual Member States.' Although the exact status of this provision – mere political guideline or enforceable legal restraint – is still debated, its restrictive intent is quite clear. Community legislative competence appeared to be even weaker with regard to consumer protection, which was merely presented as a concern to be taken into account in harmonization directives.[13] One had to wait until the Maastricht agreement to see the insertion into the Treaty of a comprehensive consumer protection policy.

Turning to practice, one is struck by the fact that, despite such institutional restraints, activities in the field of environmental protection has reached a remarkable intensity even before the adoption of the Single Act. Even though the reluctance to approve regulatory interventions in the field of consumer protection was not overcome by the SEA, the Community's free trade objective, forcefully restated by the 1992 programme, has led the. Community to engage in the creation of comprehensive European regulatory frameworks for pharmaceuticals, foodstuffs and technical consumer goods. It even increasingly intrudes into areas such as product liability or consumer credit, where what is at stake are essentially the economic interests of consumers. In spite of their ambivalence, one may therefore look at the new Treaty provisions as a legitimization of a practice that had already largely been accepted.

11 Article 130R.

12 Article 118A.

13 Article 100A (3). True, if it is to be meaningful, this reference suggests that some sort of Community action is necessary (Joerges, 1990); yet it seems difficult to ground in such an elliptic reference the foundation of a proper Community competence for the protection of consumers, a competence which could go beyond the objective of furthering the harmonization process (VerLoren van Themaat, 1990).

It seems difficult to avoid the conclusion that the long term trend has been towards an increase in Community competences. Yet, the movement is less one-sided than a superficial examination might suggest. Prompted by market integration, Community action in the area of social regulation remains largely conditioned by the Community's emphasis on the removal of barriers to trade. One could summarize the situation by speaking of the 'dual subsidiarity' of social regulation in the structure of the Treaty of Rome: subsidiarity with respect to the Community's main *raison d'être*, namely market integration, and subsidiarity with respect to national regulatory policies. For those who would regard the above developments as symptomatic of lawyers' formalist mode of reasoning, it might be useful to recall that in contrast to the power dynamics in 'classical' federal systems, Member States retain a crucial role in the Community decision-making process (Scharpf, 1988). Not only will problems of competence surface each time a Community measure is deemed to be too intrusive by some of them but, equally importantly, patterns of Community intervention are likely to bear the mark of these institutional restraints.

II. Patterns of EC Intervention

One of the striking features of the American way of approaching regulatory issues is a clear reluctance to accept outright federal intervention. Even in fields where legislation might be legitimate, Congress has often preferred to rely on a carrot and stick approach by setting up large grants-in-aid programmes, which aim at inciting states to adopt the standards worked out at the federal level (Stein, 1985). Likewise, federal intervention has often taken the form of the establishment of specialized agencies, to which some rule-making, fact-finding and enforcement powers in a specific field were given. The functional arguments that have been used to justify the creation of such agencies are particularly interesting since they could easily be transposed to the Community. It is often argued, for instance, that the delegation of powers to administrative agencies represents a

means whereby specific problems might be entrusted to experts who possess a deep knowledge of the industry which they regulate, and to insulate decisions from the pressures of party politics (Majone, 1989).

Yet, turning to the European Community, one fails to discern similar developments: harmonisation of national legislation has remained the primary form of action. Moreover, the Community has often resorted to what Rehbinder and Stewart have described as *command and control* regulation, i.e. legislation through which government authorities specify the conduct required of firms and individuals subject to control (Rehbinder and Stewart, 1985). The EC has occasionally provided substantive guidelines for Member States' action, by requiring them to collect specific data, or to mutually inform each other of decisions adopted in a given field.[14] Yet, it has never really departed from its traditional mode of decentralised administration.

Why this difference? In theory, two answers seem possible: either the functional needs I alluded to were not felt as strongly in Europe as in the United States, or they were addressed with different techniques. The correct answer probably lies in a cocktail of these two elements.

In the first place, it ought to be noted that few alternatives to a legislative approach were available at the Community level. The Community has limited financial resources, and a large part of them are devoted to a voracious agricultural policy, leaving only a limited room for manoeuvre in other policies. It seems clear, in any event, that the principle of attributed powers makes it impossible for the Community to use its spending powers beyond its sphere of legislative competence (Lenaerts, 1990, 233). As early as 1958, the European Court of Justice also indicated that delegation of powers to *ad hoc* bodies not envisaged by the ECSC Treaty were only possible subject to strict conditions and that, in any event, the delegation of broad discretionary powers was not permitted.[15] The difficulties which surrounded the creation in 1990 of the European Environment

14 See for instance the common position adopted in October 1991 by the Council of Ministers as regards the proposed directive on general product safety, or directive 83/189 establishing a system of mutual information on technical regulations adopted at national level (OJ L 109/8 of 26 March 1983).

15 Case 10/56, *Meroni*, [1957-58] ECR 157. It is generally accepted that although this ruling dealt with the fairly detailed provisions of the ECSC treaty, its conclusions are *mutatis mutandis* applicable in the broader context of the EEC Treaty (Kapteyn and VerLoren van Themaat, Gormley ed., 1990, 121-122).

Agency have confirmed that the US agency model is far from being commonly accepted in the Community.[16]

However, to state that the Community's institutional framework did not provide the same variety of tools as we find in the United States somewhat begs the question: why then, did the framers of the Community treaties choose to limit the Community to interventions of a legislative type in the field of social regulation? There is no clearcut answer to such a broad question: the legislative history of the EEC Treaty is not yet open to study, and it is far from certain that the issue was addressed at the time the treaty was negotiated. Notwithstanding, several factors can be identified which might explain the current situation.

The first factor is the limited Community competence in the field of social regulation. As indicated above, the Community was supposed to act only if, and to the extent that, national regulatory policies had an adverse effect on the establishment of a unified market. It was therefore proper to limit its intervention to a mere harmonization of national provisions, rather than endowing it with more substantial means of action. The emphasis on the harmonisation of national provisions can thus be seen as an institutional reflection of the peripheral importance of social regulation in the Community context. Indeed, Community lawyers tend to insist that the use by the Community of its competences should be such that it will not completely pre-empt Member States's competence in the area of social regulation.[17] Hence, *inter alia*, a strong insistence the resort to directives, which need to be transposed by national authorities in their legal order, and thus leave them in theory a certain leeway as to the methods by which their objectives are to be achieved.[18]

16 See the Council Regulation on the establishment of the European Environment Agency, OJ L 120/1 of 11 May 1990. The Commission has recently advocated the establishment of an agency to regulate the market of medicinal drugs, but the powers of the proposed body have been adapted to meet the concerns expressed by the Court in the *Meroni* case. See *Future System for the Free Movement of Medicinal Products in the European Community*, OJ C 310/7 of 30 November 91.

17 See for instance the debate in Fallon and Maniet (1990) regarding product safety.

18 Article 189 of the EEC Treaty. Member States' sensitivity on this issue was confirmed by the adjunction to the Single Act of a declaration inviting the Commission to make use of directives in its proposals pursuant to Article 100A whenever harmonization involves the amendment of legislative provisions in one or more Member States.

A second factor is the central role of the Member States in the Community system. Joseph Weiler has convincingly argued that the expansion of Community competences in the 1970s and the early 1980s can only be understood in the light of this. The Community is a far less autonomous body than any federal government. Member States still largely control the legislative process; they are responsible for the implementation of most Community acts. By virtue of their near total control over the policy-making and implementation process, the Community appeared much more as a mere additional instrument in their hands, rather than as a usurping power. In other words, a mutation which in any federal system would have been at the expense of the component units was readily accepted by the Member States of the Community (Weiler, 1991).

However, the expansion of Community powers will retain this neutral character only if Community intrusion into spheres which have been traditionally part of the Member States' competence is compensated for by the representation of the Member States at all stages of the decision-making process. This concern has led to the establishment of expert committees, composed of Member States and Commission representatives, to assist the Commission in its executive functions (preparation and implementation of Community legislative acts). Although the working of such committees has so far been the object of little systematic attention, it seems that the Commission's role in these procedures is primarily one of coordination (Cassese, 1988). Thus, the functional need for expertise to which I refered earlier has been accommodated, but in a manner that clearly reflects the specific features of the Community's institutional setting. In contrast, the delegation to an autonomous body of wide-ranging law-making and enforcement powers, similar to those enjoyed by US regulatory agencies, is likely to be resented by the Member States as more intrusive, since it would alter the delicate balance of power which has presided over the growth of Community competences. Undoubdtedly, concerns of this kind have played an important part in the functions granted to the newly established European Environment Agency, which is more concerned with research and data collection than with regulation *per se*.

Lastly, mention should also be made of elements of European administrative culture which also played a role, albeit an indirect one, in the developments under review. The creation of specialized agencies endowed with extensive powers is far from a traditional feature throughout Europe. On the contrary: regulatory functions

are often assigned to ministries, or to the cabinet as a whole (Majone, 1989). Even in the realm of monetary policy, where the need for expertise is widely accepted, the recent debates over the creation of a European system of central banks have clearly shown that most central banks do not enjoy the same autonomy as the *Deutsche Bundesbank*. Many of them are still largely dependent on decisions made by the Treasury. Governmental supervision and, indirectly, Parliamentary monitoring of administrative action are often regarded as necessary in a democratic society. All this makes it rather unlikely that national governments will be willing to concede to Community bodies powers that they are not always prepared to delegate to domestic bodies.

As mentioned above, the prototype of Community intervention has been to harmonize national laws. As a result, most reviews of Community policies are essentially lengthy catalogues of legislative provisions. However, a problem-oriented approach reveals a number of flaws, the origins of which can be traced to this particular profile of Community intervention.

The difficulties which surround the harmonization process are well-known. Decision making is slow and cumbersome because of the ever-growing complexity of the subjects covered and of the necessity of consensus. The adjustment to technical progress is difficult (Dashwood, 1983). Moreover, harmonization is made by resorting to an instrument – the directive – which has to be transposed by Member States in their domestic legal order. This often results in huge bottlenecks at the implementation level; it may also explain the attention given by Community bodies to formal compliance, namely the adoption by national legislatures of the measures prescribed by directives, rather than to actual observance of their provisions.[19] Although the Commission has repeatedly stated its intention to go beyond transposition, and to monitor more systematically administrative application, it is not clear whether it is well equipped to do so. Lastly, this two tier legislative process means that the Community is deprived of any direct power over firms and other private actors, which are the real subjects of social regulation, since it does not have the power to attach sanctions to the violation of Community norms and to enforce them.

19 The yearly reports on the implementation of Community law provide a good example for the issue in point. See for instance the Eighth Report, COM (91)321 final, 16 October 1991.

All these elements clearly curtail the overall efficiency of Community norms. Moreover, as indicated above, the harmonization process was primarily dominated by market integration concerns, with a corollary emphasis on uniformity. This tendency was further aggravated by the fact that the Community, being deprived of an administrative body of its own, has often made resort to very detailed directives in order to ensure their uniform application. It is not altogether clear that such a process is capable of fully addressing the variety of situations existing within the Community. True, it has been demonstrated that, even in its current stage of development, Community law possesses a wide range of techniques providing an important measure of flexibility (Ehlermann, 1984). Yet, for a variety of reasons, not all difficulties may be anticipated nor accommodated in a complex and fairly unflexible legislative phase (Scharpf, 1988). Very often, it is only when applying a norm to a concrete problem that the various interests involved can be properly assessed and balanced. The regulation of pharmaceutical products offers an example of such situation: although national rules pursue similar objectives, their application differs widely from country to country because of existing divergences between medical and regulatory cultures (Kaufer, 1989).

Naturally, this plea for flexibility should not be seen as invitation to grant greater discretionary powers to the Member States, if market integration is not to be put at risk. But the issue will have to be addressed eventually: otherwise, there is a real risk that Community regulation will aggravate an already serious implementation problem by being insufficiently sensitive to the variety of situations with which national regulators have to deal.[20]

Awareness of these problems has clearly grown in Community circles over the last few years. Several features of the internal market programme were aimed at providing a remedy to the shortcomings of the earlier approach. The emphasis on the mutual recognition of national regulations and standards, and the delegation of quasi-legislative powers to private standardization bodies were conceived as alternatives to a cumbersome rule-making process. As a result, the White Paper suggested restricting harmonization to the laying down of basic health and safety requirements (Commission, 1985, 18). It

20 In this respect, it is worth noting that the southern Member States of the Community, in which there is no strong tradition of regulatory intervention, are among those countries which have experienced great difficulties in transposing EC directives.

was also envisaged that this new approach would increase the range of choices available to consumers, thereby creating proper competition between national rules. The assumption is that this process will facilitate technical and regulatory adjustment and eventually lead to convergence around one or a few basic models. Thus, *ex-ante* harmonisation would be, in part at least, replaced by a market-driven process resulting ultimately in spontaneous adaptation (Prosi, 1990). Yet, in spite of its many advantages, mutual recognition cannot be seen as a panacea. It is not adapted to all kinds of goods, nor can it deal with all regulatory problems (Siebert, 1990, Majone, 1991). In fact, rather than as a regulatory technique, mutual recognition can be seen as an integration instrument, which creates pressures in favour of the removal of trade barriers. Thus, how exactly regulatory interventions should be conducted at Community level largely remains an open question.

III. The Dynamics of Regulation in the European Community

The above elements may be of use in order to understand some basic differences between the dynamics of regulation in the United States and the EC. In the American context, the federal government has very often played a pioneering role in the field of regulation (Beer, 1974). In part at least, this was linked to the fact that the states are more exposed to pressure from industry, which may easily increase the political costs of regulation by threatening to site itself outside the state borders. To many interest groups, federal action therefore appeared to be the only available way to strengthen government intervention in specific fields: the only alternative to federal action was no intervention at all, rather than action at state level (Stenberg, 1990). The 'New Federalism' policies of the 1970s and the 1980s, because of their joint emphasis on de-regulation and swing in favour of the states, confirmed *a contrario* the basic equation between regulation and federal intervention. Federal regulation was also useful for industry, as it avoided the risk of inconsistent regulations at state level, with consequent market fragmentation.

A similar constellation has not yet emerged in the European Community. Like their American counterparts, export-oriented industries clearly have an interest in the removal of legislative barriers to trade – hence their strong support for the 1992 programme. In contrast, representatives of diffuse interests, like consumer or environmental protection organisations, have shown more ambivalent feelings towards the Community, in particular in Member States where high standards of protection already exist.[21]

Why this has been so can be understood only with reference to the structural elements mentioned earlier. The emphasis on free movement in the Treaty of Rome and the generous way in which relevant provisions of the Treaty have been read by the European Court of Justice have to a large extent limited the Member States' capacity to regulate their own economies – not because of a congenital objection to any kind of government intervention, but rather because it was felt that such intervention should not hamper free movement or distort competition.[22] This appears very clearly in the Court's case-law on free movement of goods: in case of conflict, free movement prevails as a rule over regulation. There are of course several important exceptions to this rule, some of which are explicitly mentioned in Article 36 of the Treaty of Rome. The Court of Justice has also admitted that consumer and environmental protection can, in given circumstances, justify the maintenance of obstacles to free movement.[23] But these are only exceptions, which are construed narrowly.[24] The Court has stressed that Article 36 should in no way be seen as reserving given powers to the Member States.[25]

At the same time, the Community has been relatively slow to establish its own regulatory activities. Not only was its legal title to intervene in the field of social regulation rather in a first phase, but

21 See for instance Bourgoignie (1987, at 121-23 and 215-16) who deplores the absence of a strong European consumer movement.

22 A similar reasoning was defended by Pescatore (1979) as regards economic regulation.

23 See cases 120/78, *REWE* v. *Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), [1979] ECR 649 and 302/86, *Commission* v. *Denmark*, [1988] ECR.

24 To assess the admissibility of a national rule that falls under Article 30, the Court has resorted to a principle of *proportionality*: the rule will be regarded as compatible with the treaty only if its regulatory objective could not be achieved by other means, less detrimental to free movement. Hence, *inter alia*, a strong insistence on 'informative labelling' (von Heydebrand u.d. Lasa, 1991). Moreover, the onus is on the Member State concerned to demonstrate that its regulation was necessary.

25 Case 5/77, *Simmenthal*, ECR [1977] 1555, at 1557.

the nature of Community decision-making processes is such that Community regulatory intervention is often difficult to achieve, since the Community is far less immune from Member States' influence than the US Federal Government. In such a context, a political consensus on the necessity of acting at the European level will be a pre-requisite to any kind of Community intervention. This tends to give a bargaining advantage to Member States which oppose high levels of protection, who can trade their acceptance of Community intervention against a number of substantive concessions. The problem was further complicated by the fact that some countries in which a regulatory tradition existed, such as Denmark or the United Kingdom, did not favour large transfers of power to the Community.

Adopting a comprehensive view of social regulation, encompassing both the national and the EC level, some have argued that the division of competences between the EC and its Member States created a true 'regulatory gap': whereas in theory Community competences remained limited and difficult to use, Member States' Treaty obligations made it more difficult for them to exercise fully the regulatory competences they still retain (Bourgoignie and Trubek, 1987). This de-regulatory bias was implicitly acknowledged by Member States representatives at the time of drafting the Single Act: in direct contradiction to the case-law of the European Court of Justice,[26] it was felt necessary to provide for escape clauses enabling Member States which enjoyed high levels of protection to retain their national rules even in the presence of harmonisation measures.[27] Interestingly, no corresponding mechanism was provided for those Member States which favour a lower level of protection, which may be seen as a confirmation that the system as it stood was not seen to involve real dangers for them.[28]

The 1992 programme has given rise to increased fears of de-regulatory pressures. As is known, this programme essentially aims at a complete elimination of non-tariff barriers to trade in the EC, many of which arise because of differences between the regulatory policies of the Member States. Thus, the thrust of the programme consists of increased emphasis on what is often defined as *negative* integration,

26 Case 251/78, *Denkavit*, [1979] ECR 3369.

27 Articles 100 A, para. 4, and 130 R, para. Safeguard clauses inspired by the 'Model Directive' of 4 may 1985 (OJ C136, 4 June 1985) have been inserted in many consumer protection directives (Joerges and Micklitz, 1991).

28 However, this proved to be a short-sighted view, as the shift to majority voting made it possible to ignore isolated opposition to regulation (Weiler, 1991).

rather than on a complete take-over of given policy areas by the Community. The central technique proposed by the Commission's White Paper to achieve this objective was mutual recognition between national norms – a concept stemming from the idea that the main regulatory policies pursued by the Member States attempt, as a rule, to achieve similar objectives.

Many expected this emphasis on negative integration to further reinforce de-regulatory pressures. Not only would Member States' regulatory activities be exposed to increased competition from other States' rules but, in addition, they would be more closely monitored than in the past. In theory, in a system of complete mobility for all factors of production, firms could even decide how to best allocate their resources in order to avoid being exposed to heavy regulatory burdens. This might in turn trigger the 'race to the bottom' denounced by some American specialists: in order to avoid losing their competitive position in the Community markets, national governments might would be tempted to lower their regulatory requirements. The competition between rules that mutual recognition entails would thus lead to a retreat of government in a number of areas (McGee and Weatherhill, 1990).

It is fair to say that neither of these two trends has yet materialized to any substantial degree. In spite of the indisputable success of the 1992 programme, there is no evidence that it has generated any significant reallocation of resources on the part of industry. Neither has a real race to the bottom in terms of regulatory protection been noted. True, a measure of government retreat has been noticeable in some countries, but this evolution was linked to a general re-discovery of the virtues of the market economy, rather than being a mere by-product of the integration process.[29]

Certainly, the situation was perhaps less one-sided than a glance at institutional structures might suggest, be it only because the situation was not uniform throughout the Community. Most southern Member States, for example, lacked adequate frameworks for environmental and consumer protection. Community policies have been important for these countries, both as a source of national legislation and as a means of strengthening the position of environmental ministries and

29 If anything, the opposite was true: adoption of the internal market programme and its institutional corollary, the Single European Act, was greatly facilitated by the fact that they were in syntony with this evolution (Dehousse, 1989, Pelkmans, 1990).

public interest groups with respect to the agricultural and industrial lobbies, and their political representatives.

The advocates of the 'race to the bottom' theory also appear to have over-estimated the risks inherent in the mutual recognition strategy. What they failed to understand is that mutual recognition cannot operate in a vacuum: for the system to be operational, its basic premise (the equivalence of national provisions) must reflect reality. Where the objectives pursued by the Member States or their methods diverge, mutual recognition is of no help.[30] Thus, as anticipated in the Commission's White Paper on the completion of the internal market, mutual recognition is a viable avenue, only if accompanied by a harmonization of basic requirements contained in national provisions. In this sense, harmonization and mutual recognition are not mutually exclusive, but rather complementary approaches. Basic regulations and standards, if adopted throughout the Community, should both prevent an unlimited 'race to the bottom' and provide a target for regulatory convergence. Moreover, a number of elements will act as a brake on the downwards spiral: a country lowering its level of protection, for instance, would put at risk the health of its own citizens, which might have some incidence on their electoral choices (Siebert, 1990).

Another element which was ill-perceived was the impact of the institutional reforms contained in the Single European Act. The Community's competence to intervene in the field of social regulation was strengthened, even though somewhat ambiguously. A majority vote was made possible in a number of areas, in particular for the adoption of product legislation, which occupies a central place in Community activities. This change proved to be more important than many initially expected (Dehousse, 1989). Even if majority voting in the Council of Ministers remains to a large extent an exception, the possibility that a vote will be taken has had a decisive impact on decision-making. Instead of negotiating in the shadow of a veto, Member States very often have to negotiate while keeping in mind the possibility of being outvoted, should a vote be taken. In many fields where for many years no decision had been possible, compromise has now been reached within months (Ehlermann, 1990). In other words, the most radical critique of the White Paper strategy proved to be excessive at both levels: regulatory competition among

30 This appeared clearly in case 188/84, *Commission* v. *France* (woodworking machines), [1986] ECR 419. Another example is offered by the situation in the sector of pharmaceutical products (Kaufer, 1989).

Member States has not dramatically increased, and the possibility of an intervention at the EC level has proved more concrete than it was initially thought.

This notwithstanding, a number of bottlenecks remain. By and large, social regulation is still largely regarded as a secondary field of activity for the Community – a field in which the EC should in theory intervene only to prevent national regulatory policies from hampering free movement. And the fact that unanimity is still required in certain sectors, even after Maastricht,[31] slows down decision-making, sometimes to a considerable extent. It also reinforces the part played by jurisdictional concerns in any decision as to the necessity for Community action in a given field.

Yet, the de-regulatory pressures linked to the Community emphasis on free movement seem now to be more clearly perceived than they were some years ago. The dynamics familiar to the observers of the US scene, where advocates of high protection levels generally favour federal intervention, is gradually emerging.

Such a change may be prompted by a variety of reasons. Community environmental policy relies increasingly on the active involvement of environmental groups (Sands, 1990), which may have generated new expectations. As indicated above, even national governments appear to be more clearly aware of the de-regulatory impact inherent in the current division of labour between the Community and its Member States. Ten years ago, it could be asserted that in a field such as consumer protection, 'there is no situation wherein the national policy option is not a... viable alternative in the absence of agreement at the Community level' (Weiler, 1982, 49). This no longer seems to be the case: the increasing reach of Community law makes it ever more difficult for Member States to separately conduct their own regulatory policies. Those Member States that favour high protection levels increasingly prefer to press for a decision at Community level, rather than seeking an escape clause which might harm the interests of their own producers.[32]

31 This is the case for certain measures adopted in the framework of environmental policy (New Article 130 S). However, unanimity is not required for internal market legislation adopted on the basis of Article 100 A. Case 300/89, *Commission* v. *Council* of 11 June 1991 (Titanium dioxide, not yet reported) has opened the door to a more systematic use of this provision in the field of environmental policy.

32 It is worth noting in this respect that the much criticized derogation clause contained in art. 100 A (4) has so far never been used. This, however, does not amount to saying that it is meaningless: the mere fact that one Member State might have sought a derogation on this basis, and thus isolate its own market, may have played a role in some negotiations.

Significantly, a country like Denmark, which has always shown great reluctance to delegate new powers to the Community, has been pressing for a generalization of majority voting in the areas of social and environmental protection. Thus, even for national governments, jurisdictional concerns can give way to regulatory concerns. Assuredly, this shift has played an important part in the further extension of Community competences enacted by the Maastricht agreements.

IV. Conclusion: Regulatory Gaps Revisited

In divided power systems, regulation is the result of conflicting pressures, for the traditional questions – what to regulate and how – are complicated by a further problem: at which level should regulatory activities be pursued? These issues cannot be debated separately. On the American scene, for instance, the advocates of high standards of protection tend to favour federal intervention because it is more effective; conversely the States' Rights issue is often used as a fig leaf by those who oppose regulatory interventions.

I have argued that regulatory and institutional issues are also closely intertwined in the European Community. The emphasis on market integration in the EEC Treaty, with the uniformity pressure it generates, and the difficulties linked to decision-making by consensus, have affected both the scope and the form of Community regulatory intervention. The focus on product regulation and the emphasis on a purely economic objective, the removal of trade barriers, can be related to these structural elements. Clearly, regulation in the 'American way' is not a viable option in the today's Community.

The 'classical' regulatory gap theory argues that the overall effect of Community intervention has been de-regulatory. Whereas Member States have seen their regulatory capacity constrained by their EC membership, the Community has not clearly emerged as a dominant regulator like the US Federal Government. As a result, Member States with high levels of protection, often unable to secure

the development of far-reaching policies at Community level, have traditionally insisted on retaining a margin of discretion.

To some extent at least, this kind of de-regulatory bias was foreseeable. All divided power systems, precisely because they fragment power, tend to make government intervention more difficult – whatever its level or its form. This is why the champions of government intervention have never been fond of federal systems. The fierce critique of federalism put forward by Harold Laski in the 1930s finds an echo in many of the criticisms addressed today to the Community:

> Federalism ... is unsufficiently positive in character; it does not provide for sufficient rapidity of action; it inhibits the emergence of necessary standards of uniformity; it relies upon compacts and compromises which take insufficient account of the urgent category of time; ... its psychological results, especially in an age of crisis, are depressing to a democracy that needs the drama of positive achievement to retain its faith. (Laski, 1939)

Of course Laski was writing on the forces that hindered the emergence of a welfare state, which he supported, while we are now addressing the development of some sort of regulatory state. Yet his analysis of the logic inherent in any divided power system remains largely correct.

It has been suggested that the EEC Treaty may be regarded as economically ambivalent, in that many provisions are broad enough to allow the development of economic policies that range from neoliberalism to *Soziale-Marktwirtschaft* (Mertens de Wilmars, 1988, 26). Yet it is difficult to avoid the conclusion that the combined effect of market integration and power fragmentation is to make government intervention more difficult.

The point seems worth making, as a contribution to the developing ideological debate on the integration process (Snyder, 1990). But it is not decisive, for policies are more than the mechanical product of an institutional machinery. Ideologies, interests, or the strategies of decision-makers all play an equally important part in the final decision.

In this respect, we may have reached a turning point in the wake of the internal market programme. The constraints that impinge on national regulatory policies have accrued but, in contrast, decision-making has become easier at the Community level. As the Community is by no means immune from pressures for a more active intervention in fields like environment or consumer protection which have been gaining strength throughout the industrialized world over the past decades, there are reasons to believe that in future years regulatory policies will further develop at Community level (Majone, 1989). Issues of risk control are likely to become central once a single market will be achieved, and a large number of Member States seem to accept that tensions between market integration and regulation can only be resolved at Community level.

This notwithstanding, it is important to understand that, short of a major change, these pressures will have to be processed by the institutional system of the Community. Whatever reforms they lead to the concerns – substantive, of course, but also institutional – of the Member States, will have to be met, as they remain the primary actors in the Community politico-legal system. We might therefore be faced in the near future with a new type of regulatory gap, with a Community that would be present in an increasing number of areas, but forced by institutional considerations to stick to a sub-optimal mode of intervention – the harmonization of laws. If this were the case, the contradiction between the two statements referred to in the introduction to this paper might prove more apparent than real.

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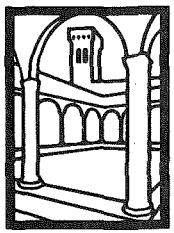

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