EUI Working Paper LAW No. 96/2

# The Market Without the State? States Without a Market?

## Two Essays on the Law of the European Economy

CHRISTIAN JOERGES

EUI WORKING PAPERS



EUROPEAN UNIVERSITY INSTITUTE

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW


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BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in April 1996
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

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## - Two Essays on the Law of the European Economy -

The first of the two essays was published in German in 1991 ('Markt ohne Staat? - Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik', in: Rudolf Wildenmann, (ed.), *Staatswerdung Europas? Optionen für eine politische Union*, Baden-Baden: Nomos 1991, 225-267); the second is a revised version of 'Das Recht im Prozeß der europäischen Integration. Ein Plädoyer für die Beachtung des Rechts durch die Politikwissenschaft und ihre Beteiligung and rechtlichen Diskursen', in: Markus Jachtenfuchs and Beate Kohler-Koch (eds.), *Europäische Integration*, Opladen: Leske + Budrich 1996, 73-108. Both are concerned with the same problem. The first reacted to the 1985 programme on the completion of the internal market, arguing that the implementation of that programme was bound to lead to a *renaissance* of regulatory policies. The second reacted to the German Constitutional Court's judgement on the Maastricht Treaty, arguing that the Court's defence of the nation-state is bound to erode the social commitments of constitutional states. The interrelations between these arguments may warrant a joint publication. As the question marks in both titles indicate, the present state of affairs is, in the author's view, factually unstable and normatively unsatisfactory; i.e. the analyses submitted here are to be developed further.

# The Market without the State?

## 'The Economic Constitution' of the European Community and the Rebirth of Regulatory Politics*

CONTENTS:



* Translated from the German by Ian Fraser.

# Preliminary

"The European Economic Community is a phenomenon of law in three respects: It is a creation of law, it is a source of law, and it is a legal order"[1]. German commercial lawyers, both theoreticians and practitioners, have always asserted that law ought to take primacy in the integration process. They have kept to this leadership claim even in times when integration was flagging and only jurists still took any serious interest in it. The very successes of the Community, by reviving the interest of the public and of social scientists in the integration process, are highlighting an unaccustomed volume of uncertainties in the law, and must, as this paper argues, arouse a willingness among jurists to take a varied and even experimental approach to institutional arrangements, decisional competences and the organization of decision-making processes. This position will be developed here on the basis of examples, specifically an analysis of the legal difficulties in coping with regulatory tasks in the Community. The term 'regulatory politics' is not a legal concept, nor does it fit in with the usual descriptions of economic policy actions in economic law based on distinctions between market and plan, competition and interventionism (see section I). The alienation effect this may give rise to is intentional, for the Community is in any case no longer moving within conventional thought patterns in handling its 'regulatory' tasks. This will be shown in more detail herein with the example of two 'classical' policy areas, namely competition policy on the one hand, and the new harmonization policy in the removal of technical barriers to trade (section II below). In the current debate on the institutional and legal strategies to accomplish the Community's internal market project, differing concepts of integration policy are competing. They all operate with partly unclarified premises. They should therefore for the moment be treated as options with no claims to exclusivity (section III below).

1. Hallstein 1974, 33.

# I. Legal Structures and Integration Policy

"Legally considered", the Community is nothing but an aggregation of nation-states that have to a limited extent transferred powers to it. This (traditional perception of the) legal structure is a result of the history of the foundation of the Community. This original structure has put its stamp on the behaviour of actors in Community policy and has also determined the way in which the Community gradually gave itself a supranational legal constitution.

## 1. Starting Points and Approaches

There is no title for 'regulatory policy' in the text of the EEC Treaty adopted in 1957. The real issues it denotes were at the time partly not debated at all, and partly in different forms. There was a vacuum in all the activities that appear as 'social regulation' in American heuristics of the regulatory debate. In 1957, the environment was not even a subject of interest in national policy; certainly, there was consumer protection policy[2], but it was not taken into account as a European task; the sole exception, though admittedly of minor importance, was safety at work[3]. The Treaty provisions on control of the economy kept terminologically and factually to the state of the economic policy debate of the 1950s, with its twofold disjunction – between law and policy, economic sectors and exceptional areas: the Treaty proposed to implement the well-known 'four freedoms' (Articles 48 *et seq.*, 52 *et seq.*, 59 *et seq.*, 67 *et seq.* EEC). For economic policy, however, it was in principle the Member States that were competent. Their macroeconomic policies were defined in Articles 103 *et seq.* EEC as "a matter of common concern", and were kept together solely by agreements on coordination and cooperation. The Community was given genuine regulatory powers in competition policy. Yet the accepted areas known in domestic law remained untouched. Thus, transport policy was explicitly singled out as a Community task (Article 74 *et seq.* EEC), and a special regime was laid down for agriculture (Article 38 *et seq.* EEC).

2. Egner 1956.

3. Schulte 1990, 389 *et seq.*

The context of the freedoms aimed at bringing about the Common Market includes the legislative powers assigned to the Community pursuant to Art. 100, 1st paragraph, EEC, wherever divergent legal and administrative provisions hinder market integration. But how are such powers to be handled in legislatively responsible fashion if competences for environmental, consumer and other regulatory policies are missing? How is Community competence for competition policy to reconciled with Member State competence for economic policy? How are the macroeconomic effects of the four freedoms, namely a liberalization of capital movements, to be coped with? What type of 'rationality' can be expected to emerge from such decision-making rules, and how can parliamentary democracies accept a "*législation des gouvernements*"? With all these questions the Community got along astonishingly well for astonishingly long. It used its legislative powers under Articles 100 and 235 EEC extensively, developed ambitious programmes for environmental and consumer policy, kept conflicts between the achievement of the freedoms and extension of its competition policy and Member State economic policy powers from coming to the surface, and successfully solved the problems of currency policy cooperation[4].

The complex conditions for the legal stability, economic success and political acceptance of European integration must be left on one side here. It seems foreseeable at present that the new dynamics unleashed by the Commission's internal market programme will affect and intensify all the conflicts so far kept latent: the more decisively the Community checks national consumer and environmental provisions for their effect of restraining trade, the less can it do so purely in the name of a merely 'negative' policy directed towards achieving the internal market, and the more pressing will the question of the 'positive' legislative policy quality of this sort of influence become. The more decisively it proceeds against the dense network of national economic regulations, the more it will have to expect resistance based on the Member States' residual economic policy powers. And this is true irrespective of whether national regulations are replaced by a competitive arrangement or by a European reregulation. Finally, the example of the liberalization of capital movements shows most clearly that the achievement of freedoms without a Europeanization of regulatory instruments

4. McDonald/Zis 1989.

is not conceivable and creates pressure for the creation of macroeconomic policy powers[5].

None of this is meant to assert some sort of inevitable logic of development. But when it comes to approaches which are normatively convincing and practically at least plausible[6], then the question of the possibility of developing regulatory policies in the framework of the Community's legal structures becomes relevant[7]. However, everything depends on acknowledging that this query presents in fact a problem that needs to be addressed. The term 'regulatory policy' is not intended for the moment to denote anything more than the efforts to guarantee the social acceptability of the use of rights to act – the justification of these attempts at intervention and guidance. But also, and above all, the appropriateness and possibility of juridification of regulatory policy are not threatened thereby. Accordingly, the question of the Europeanization of regulatory policy is not aimed at making Europe into a State, in the sense of replacing national regulations by European ones; instead, the point is rather to consider the Community's possibilities of successfully coping with the tasks that are in part accruing to it and in part have been taken over by it.

## 2. Legal Theories of Integration

The present debate in legal science about the future of the integration process displays all the features of a transitional state. In view of the downright inflationary growth of European law, the legal policy debate on all regulatory projects is intensifying, but so too is the endeavour to deal with the

5. Padoa-Schioppa 1988, 53 *et seq.*; Horn 1989; Steinherr 1989.

6. For corresponding questions in economic integration theory see Pelkmans 1982, and the report of the Netherlands Scientific Council for Government Policy (1986) evidently inspired by Pelkmans' thesis; for political sciences see Scharpf 1990.

7. Nor is it solved in legal terms by the Treaty amendments put into force by the SEA. The SEA formulated tasks for the Community in environmental, research, technology, regional and social policy that had already been taken up previously. The alterations in decisional rules through the majority principle of Art. 100 a EEC and the extended rights of involvement by parliament pursuant to Art. 149 (2) EEC did not in principle alter the legislative prerogatives of Council and Commission (for more details see Dehousse 1989). The fact that the SEA's institutional pragmatism has merely favoured the new dynamics of integration but cannot lastingly consolidate it is confirmed also by the renewed debate on the 'limits to EC powers' (Steindorff 1990).

constitutional anomalies in the Community system. In such a stage of reorientation, it makes sense to start by recalling the traditional perspectives of legal theory of integration[8]. Reconstructively, it is easier to see what limits these theories came up against, to what extent they have already incorporated the move on from them in their own thinking, and the ways in which in current debates on how to handle the integration process from the legal viewpoint traditional thought patterns continue to operate.

### *a) The Neoliberal Economic Order (Ordnungspolitik) as European Economic Constitutional Law*

It is among the achievements of German theory of the Community's economic constitution that it has never been content with merely positivist and pragmatic interpretations of the EEC Treaty, but has always striven for a functional understanding of European law and a normatively consistent overall perspective on the integration process. The integration of the Member States and the consequential renunciation of sovereignty set the scene for the creation of a 'Law' which would dictate the substantive process and the substantive results of integration. This 'Law' is at its core '*economic*' constitutional law since integration should be based on open markets and should aim for the creation of one common market; at the same time, this 'Law' is economic '*constitutional*' law as it envisages that the opening up of markets should follow through the competitive process and that this common market should constitute a system of undistorted competition. The foundations of this interpretation were laid during the construction phase of the EEC and were further refined during the debates of the late 1970s[9]. That this theory did not accurately portray the construction phase of the EEC, nor the historical 'will' of the Member States that can be deduced from it, was well known by its promoters[10]. But nevertheless the fact that the agreement made among the founder states resulted in the development of a Treaty dominated by very strong anti-interventionist policies, and thus

8. The choice presented here is necessarily selective. In particular, it neglects the controversies of the early period between constitutionalist-federalist and internationalist-international law approaches. For a more comprehensive survey see Behrens 1981, 19 *et seq.*, 37 *et seq.*

9. See Scherer 1970; Rahmsdorf 1980/1982.

10. v.d. Groeben 1981, 217 *et seq.*

favoured the establishment of a liberal economic regime, has been interpreted as "the cunning of reason" (*List der Vernunft*) – a term borrowed from Müller-Armack[11]. The interpretation of the EEC Treaty as an economic constitution committed to the advancement of market integration and the achievement of the principles of a market economy then gave a theoretical evaluation of this cunning of reason. This brought two results: on the one hand, the Community, through its interpretation as an order constituted by law and committed to economic freedoms, acquires a legitimacy that protects it against all attacks motivated by democracy theory or constitutional policy[12]. On the other, the restriction of Community powers provokes an effect of blocking social policy moves considered illegitimate from the point of view of neoliberal order theory[13].

This argument is not disconcerted by references to the contingencies of the unification process and the indeterminacies of the Treaty text[14], since the very intention it pursues is to transcend the unclear or even contradictory compromise formulas of the text in a theoretically consistent conception. Accordingly, a critique that can satisfy the demands of European economic constitution theory needs to deal with its sociological, economic and integrational theoretical premises. The objections have been put forward often enough: there has been no success in establishing a dignity in the organizational principles of a market economy that sets them above the democratic process of constitutionally structured societies[15]; but then the development of European economic policy too could not be legally immunized against the competition of other economic concepts[16]; this was said to be the case specifically because competition policy alone was not in a position to deal with the economic and social problems consequent upon market integration[17].

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11. Müller-Armack 1964, 405.
12. Mestmäcker 1973, 23 *et seq.*
13. Mestmäcker 1972.
14. See VerLoren van Themaat 1987.
15. Homann 1988, 134 *et seq.*
16. Rahmsdorf 1982, 103 *et seq.*
17. Krugmann 1988.

## b) *The Communities as 'Special Purpose Associations (Zweckverbände) of Functional Integration'*

Just as neoliberal theory explicitly referred to non-positive assumptions in its interpretation of the Community as a market economic legal constitution, so too does Ipsen in terming the Communities "special purpose associations of functional integration"[18]. But by contrast with neoliberal theory, Ipsen does not envisage the law as the centre of a concept that envelops both an economic and a legal order. Ipsen's 'key concepts', while intended to take political and economic analysis into account, nonetheless presume an irreducible difference between the cognitive interests and statements of legal and non-legal disciplines[19].

The originality and productiveness of Ipsen's concept lay in the fact that by comparison with constitutionalist-federalist perspectives of integration on the one hand, and the reduction of the Community to an organizational form in international law on the other, he defined their specific feature as the assignment of competences for specific areas which are correspondingly to develop the functionalist logic of the integration process and to be handled in a technocratic-bureaucratic fashion. In this view there can be no *a priori* rule-exception relationship between the specific task areas relying on the four freedoms and market principles on the one side, and the policy areas where the Community itself acts in 'regulatory' fashion on the other. Ipsen therefore uses the expression, the 'economic constitution' of the Community merely for the relevant elements of primary law, a customs union committed to principles of competition, the four freedoms, the ban on discrimination in Art. 7 EEC, as well as for planning that respects competitive and economic freedoms[20]. All this is certainly compatible with a neoliberal programme but does not require it as an unshakeable commitment. The social functions of law in the integration process and its detailed formulation instead remain contingent[21].

18. Ipsen 1972, 176 *et seq.*

19. Ipsen 1972, 976 *et seq.*, 983.

20. Ipsen 1972.

21. Ipsen 1972, 995 *et seq.*, 1054-55.

Seeing the Community as a technocratic arrangement to solve specific economic and social policy tasks also points, however, to the dependence of this conception on the circumstances it was designed to address legally. Specifically, if the boundaries between comprehensive competence for the States and the partial Community competences become blurred, if the distinction can no longer be drawn, in deciding upon questions that arise, between "organized creation of knowledge (*Wissensbildung*)" as a neutral consensus area and "organized creation of aims (*Willensbildung*)" which is in need of legitimacy, then "representation, legitimacy and consensus formation" must, Ipsen admits, be rethought[22]. There was every occasion to do so, even in the 1970s[23]. But there is all the more reason to do so with the present dynamics of internal market policy: certainly, the Community is continuing to act on the basis of formally limited powers, only marginally expanded even by the SEA. But even in the classical areas related to market integration, its powers are so intermeshed horizontally with neighbouring and competing policy areas that the limits to competences can scarcely be used any more to derive substantive limitations on action[24], still less can rationality guarantees be employed for the content of policies. At the same time, the transfer of partial powers in no way means that they are now to be dealt with, or could be dealt with, autonomously and entirely at Community level. This is not some sort of 'deconcentration' process in which the Community would become dependent only on 'administrative aid' from the Member States[25], but the inevitable establishment of mutual dependencies, if only because the steps towards integration usually cover only partial areas of a policy sphere and the Community, for all the steps towards completion and approximation, remains dependent on the Member States.

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22. Ipsen 1972, 1045.

23. Everling 1977.

24. Steindorff is explicitly against this (1990). I feel, though, that Steindorff is not just seeing the competence question in traditional, formalistic terms, but more in the sense of a new form of division of tasks between the Community and the Member States. Steindorff envisages that regulations relating to the 'economy' must inevitably "extend beyond the economic area" (37, 87), that the Community, where it has instruments of action at its disposal, "must develop an impetus for policies of its own" (48, 51, 63). This is why the debate on Community competences should shift from construing vague provisions to analyses of the Community's policy capacities and its possibilities for action.

25. So Ipsen 1972, 1052.

### c) *Legal Structures and Decision-making Processes*

The question that can no longer be answered in Ipsen's approach – how the transference (out and) of powers can be kept reconcilable with Member States' political interests – lies at the centre of Weiler's approach to integration theories. Weiler developed his theory ten years after Ipsen, and thus against a different background of experience. The starting point for his analysis is an apparent paradox: while European law, in a continuing process of evolution, erected two constitutional structures, the Community went through one political crisis after another. This paradox between legal evolution and political erosion was resolved by Weiler in his discovery of mutual dependencies between the presumably divergent legal and political processes. He saw the decisive step to the establishment of these dependency relationships in the thesis set forth by the ECJ as early as the 1960s on the direct effect[26] and the supremacy[27] of European primary and secondary law[28]. These claims to validity were accepted by the courts of Member States, even if in part hesitantly and unwillingly. But the ECJ's leading decisions of the 1960s were followed by de Gaulle's empty chair policy, which in 1966 led to the Luxembourg compromise. The veto right of Member States claimed therein brought a radical reshaping of Community decision-making processes. At all levels – from the formulation of political objectives through the preparation, the adoption and then to the implementation of Community law – the Member States were able to secure extensive rights of participation[29]. It is precisely this development, which from the viewpoint of an interest in advancing integration looks merely like a phenomenon of decay, that Weiler interprets as a recipe for success. He views the influence of Member States on Community decision-making processes as legitimate, in accordance with its overall structure as a combination of sovereign states; in practical political terms, it amounts to a counterweight to the building up of the supranational structure of constitutional law considered indispensable for the stability of the European system.

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26. ECR [1963] 1 - van Gend en Loos/Nederlandse Administratie der Belastingen.

27. ECR [1964] 585 - Costa/Enel.

28. Weiler 1982, 69 *et seq.*

29. For details Weiler 1982, 117 *et seq.*, 409 *et seq.*

Just as in Ipsen's theorem of "special purpose associations of functional integration", Weiler's theory of the supranational and intergovernmental dual structure of the Community is concerned with a normative programme founded upon analytical observations of the real world. Weiler's analytical statements have proven to be a great aid to interpretation[30]. The normative message is admittedly 'conservative': it states that the involvement of national political actors in the Community's political decision-making process is indispensable for the stabilization and expansion of supranational legal structures; the Community's precarious 'dual structure' would be endangered either by ignoring political interests of Member States or if the Member States ignored Community legal principles.

A defence of the status quo attained is not convincing once the equilibrium presupposed in this model of integration policy gets disturbed. Is the legislative policy activism of the new internal market policy indeed still controlled by the Member States? Has the Community, with its new harmonization concepts, set in motion developments in which legislative policy responsibilities can no longer be called for? Is it still plausible to treat the integration process as merely or primarily affecting sovereign nation-states and the institutionalized actors of the Community, and systematically neglect the formation of 'private systems of governments', of new politcal arenas, in the European context?

## 3. First Interim Observation

Academic legal theories do not represent the actual law. Nor are they, however, just arbitrary normative constructs. All academic legal theories of integration are similar in that, in their interpretation of the EEC Treaty, they refer to assumptions that are partly extralegal, partly empirical, and partly theoretical. They reflect what is possible and desirable under specific historical conditions. This explains the wide range in positions referred to, but also their convergence in relation to regulatory policy: neoliberal theory holds no legitimate place for economic (non-competition) or social regulation. In Ipsen's functionalist perspective, regulatory policy is assigned to a European expert technocracy. In

30. See esp. Krislov *et al.* 1986; Weiler 1987.

Weiler's construction it remains attached to the Member States and is at the mercy of their bargaining processes. If, then, the conclusion may be drawn from the dynamics of the integration process that there is a new need to structure it, this goes beyond the perspectives of integration theory to date.

## II. Practice as a Discovery Process

The practice of law cannot await the further development of theory and the outcome of academic controversies as to the appropriateness of theoretical models of integration. It has to reach decisions even where there are no existing substantive criteria to justify the transformation of competing theoretical approaches into legally binding validity claims. This academic and theoretical legal agnosticism of practice does not simply condemn 'jurisgenerative politics' to arbitrariness, but forces it to do some production of its own. Certainly, non-theoretical validity can be ascribed to its processes of cognition and decision. But the reality images in legal theories can be measured against the problem content of legal conflict situations, legal conflicts reconstructed as forms of the debate on competing interpretative patterns, and decisions understood as institutionalized learning processes. Taking this approach, legal practice will be portrayed below in two classic policy fields of the Community. The first is concerned essentially with economic regulation, and the second essentially with social regulation.

### 1. Competition Policy: Deregulation Strategy or Economic Regulation?

Competition policy is rooted in Community primary law, and the Commission has its own administrative instruments and resources to implement it. This special position of competition policy in no way means that its present state was established as soon as the EEC Treaty came into force. It was only after a laborious process that the conditions for implementing competition policy could be created, and the principles of Articles 85 and 86 EEC could be successfully converted into legal rules and extended into what has since become a

comprehensive system of European competition law. This growth process was bound up with reorientations of central categories and decisional criteria, through which competition policy responded to changing conflict patterns and took up new tasks. It is therefore not merely a quantitative but also qualitative growth.

### *a) Jurisdiction and Supremacy*

Pursuant to Articles 85 and 86 EEC, Community law is to check anti-competitive practices likely to "affect trade between Member States". This so-called inter-state clause establishes the Community's jurisdiction and is intended to delimit it in relation to the area of validity of domestic antitrust law.

Supported by consensus on all sides, the Commission and the Court of Justice have in the course of time interpreted the criterion of jurisdiction, the restriction of trade, so extensively that it may even be termed functionless today[31]. The logic of this interpretation is ultimately a consequence of integration itself. To the extent that the breaking down of barriers to trade is successful and Community internal trade becomes free, the question of restrictions on it loses its original meaning[32]. The potential general competence of European competition law has practical and administrative consequential problems simply arising out of the notoriously slight endowment of the competent Directorate General, DG IV. From the point of view of legal systematics, it means that Community competition law overlays the antitrust systems of Member States, making their harmonization superfluous. Such a radical formulation of this consequence is usually avoided[33]. But on the logic of the case-law on direct applicability and supremacy of Community law, it is undeniable[34], even if the Court of Justice itself did not put it quite so drastically in its decision of principle over 20 years ago[35].

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31. Steindorff 1988a, 32-33.; Reich 1990.

32. Faull 1989.

33. Zuleeg 1990.

34. Steindorff 1988a, 34-35; Klaue 1990.

35. ECR [1969] 1 - Walt Wilhelm/Bundeskartellamt.

## b) *Competition Policy as Economic Policy*

The Community is competent for competition policy as a whole, but only to a limited extent for economic policy. This division of powers leads to a complex dispute at Community level and in relation to the Member States[36]. At Community level, the point is first of all the conceptual approach of competition policy itself. Nothing can be derived from the text of the EEC Treaty for the scholastic disputes among competition theoreticians about freedom of competition as an end in itself, the possibility and justification of instrumentalization of competition law for economic and social policy, or the value of efficiency or distribution criteria. In particular, the underlying Art. 85 EEC, in the prohibitory rules of paragraph 1 and the discretionary elements of paragraph 3, displays an indeterminacy typical of codifications. But the interpretation of the competition rules concerns not only competition policy as such; it is at the same time of importance for the Community's possibilities of economic policy action as a whole. For the more comprehensively the list of goals of competition policy is understood, the sooner the Community can make use of its competence for far-reaching regulatory purposes. The legal-technical machinery for this was created by the Court of Justice and the Commission through their handling of the prohibitory norms of Art. 85 (1) EEC and the exemption possibilities of Art. 85 (3) EEC. A formalistic, extensive application of Art. 85 (1) EEC allows the prohibition of practices on which no definitive negative value judgement is to be pronounced. Instead, the definitive valuation comes about only in connection with the application of Art. 85 (3) EEC – and this happens in the Commission's exclusive competency[37]. Its exclusive competence for exemption decisions and the broad catalogue of aims in Art. 85 (3) EEC, including "promoting technical or economic progress" and giving "consumers a fair share of the resulting benefit", offer the Commission the possibility of combining exemptions from antitrust prohibitions with regulatory objectives which must then in turn be respected by the Member States.

This technique has been tested in inconspicuous steps and in striking examples[38]. A genuine dispute as to principle came out only in connection with

36. There is an instructive survey in Monopolkommission 1990, 387 *et seq.*

37. Art. 9 of Regulation 17/62.

38. See c below.

European merger control. The prehistory of the present debates is instructive in this connection. In 1973 the Commission had already, following the ECJ decision in *Continental Can*[39], presented a first draft regulation[40]. The draft fell into a sort of sleeping beauty slumber until a new ECJ judgement[41] disclosed possibilities for merger control by using the EEC Treaty competition rules in force. The Europeanization of merger control then emerged as a development that could not be stopped. This situation was used by the Commission for a new initiative. The draft it submitted[42] was based on the competence for competition regulations under Art. 87 EEC, and additionally on the residual powers clause of Art. 235 EEC, for the criteria named in Art. 2 (4) of the draft for allowing mergers contained material for regulatory policy conflicts. The draft took off from the exemption regulations of Art. 85 (3) EEC, extended them by further criteria (improvement of competitive structures and the taking of international competitiveness into account) and by a reference to the Community's general goals. By 1988 these already included the SEA title on social coherence (Art. 130a EEC) and technology policy (Art. 130f EEC). The regulatory policy criticism of the catalogue of objectives of merger control thus enriched was obvious. If the freedom of "competition as a discovery process" counts as an end in itself, then there can be no industrial or social policy requirements of higher rank[43], and the constructivist interventionism of technology policy in any case counts as a classical example of what Friedrich von Hayek would call a presumption of knowledge[44]. Translated into the language of economic constitutional law, this means that the competition competency norm of Art. 87 EEC is sufficient to bring merger control in conformity with the competition rules of Articles 85, 86 EEC. If and because this competency norm is enough, reference to Art. 235 EEC was misplaced[45].

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39. ECR [1973] 215 - Euro Emballage Corp. and Continental Can/Commission.

40. OJ C 92/1973, 1.

41. ECR [1987] 4487 - Philip Morris/Rothmans.

42. OJ C 130/1988, 4.

43. Monopolkommission 1989, 67, 69-70, 77 *et seq.*

44. Cf. Mestmäcker 1988, 357.

45. Mestmäcker 1988, 365 *et seq.*; Steindorff 1990, 70-71, 114 *et seq.*; as against this, Monopolkommission 1989, 90.

Moreover, a regulation could not in any case amend Articles 85 and 86 EEC as primary Community law[46].

The regulation finally adopted in December 1989[47] keeps the reference to Art. 235 EEC, but is more reticent in its catalogue of objectives than the April 1988 draft. According to the 13th recital, the Commission is committed to the "basic objectives of the Treaty pursuant to Art. 2 thereof, including the objective of strengthening economic and social cohesion"; in the evaluative criteria of Art. 2 (1) (b) of the regulation, "promoting technical or economic progress" retained but an insignificant position. This is just the way legislation usually deals with conceptual difficulties, leaving the parties at dispute to their controversies[48].

### c) *Integration Policy as Deregulation Strategy?*

The dispute over the conceptual orientation of European competition policy and the legitimacy of regulatory objectives not only concerns the Community's own possibilities of action but at the same time contains considerable material for dispute in relation to the Member States. Two scenarios are relevant here: Community exemptions pursuant to Art. 85 (3) EEC, broad interpretations of competition policy objectives, and industrial policy enrichments of merger control may clash with regulatory policy concepts in Member States – and in view of the supremacy principle, a Europe-legislated regulation should prevail over stricter domestic antitrust law. But the contrary is also true: in so far as Community law competition principles apply, their 'unitary application' and 'full effectiveness' is endangered not just by laxer antitrust practice, but equally and even more so by regulations systematically located outside antitrust law – and Community law must then oblige Member States to take deregulation measures.

The first conflict pattern – the loosening up of national antitrust law by European competition law – has been well known since the Walt Wilhelm

46. Steindorff 1988, 64-65.

47. OJ L 395/1989, 1.

48. The Monopolies Commission (1990, 15) took note of the regulation's compromise formulas, but expressed the expectation "that the EC officials entrusted with applying the law have a clear competition approach to European merger control". Whether this expectation will be fulfilled remains to be seen.

decision[49],[50]. There was less clear awareness that the sequence of steps from a ban under Art. 85 (1) to exemption under Art. 85 (3) could amount to centralist reregulation of national regulations[51]; and with remarkable nonchalance regulatory elements of European exemption regulations, such as regulations to protect the weaker contractual party or consumers, are taken over into national contract law[52]. The archetypal situation, that is, the conflict between Community competition principles and national regulations, has recently moved into the centre of interest, thereby taking on the importance of a crucial question for European competition law[53].

The starting point for this development is a judgement of 1977[54] in which the ECJ declared a Belgian regulation on the taxation of tobacco products, whereby taxes were to be calculated on the basis of the retail prices indicated on the products, to be ineffective: the taxation system was guaranteeing the cigarette manufacturers' and importers' price policy more perfectly than could a market-dominating firm (or vertical mandatory price system). By introducing this system, Belgium was held to have infringed its loyalty obligations laid down in Art. 5 (2) EEC. It was not until 1985 that the ECJ came back to this precedent. It questioned French book price maintenance, based on the '*loi Lang*'[55], though

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49. Fn. 36 *supra*.

50. Again, it was only European measure control that compelled an intensification of debate. The resolution of the conflict in the regulation is diplomatic: only in cases of "importance to the Community legislator" does the regulation claim absolute primacy (Art. 21 (2)). If Member States wish to impose their national antitrust law in minor cases, they may do so. The 'German clause' of Art. 9 also provides for reference of merger cases to national authorities where "a market in this Member State includes all the characteristics of a separate market" (for more details see Niederleithinger 1990).

51. Without causing much fuss in this connection at the time, the ECJ, in its Haecht II Judgement (ECR [1967] 543 - Haecht/Wilkin-Janssen) declared a regulation of beer sales based on a Belgian royal decree to be in breach of competition. The exemption regulation adopted following this decision (OJ L 173/1983, 5) corresponds in its basic lines to the Belgian decree declared ineffective (and to selling practices tolerated in antitrust law elsewhere, particularly in the Federal Republic).

52. See esp. the Group Exemption Regulation 123/85 on motor vehicle sales and customer service agreements, OJ L 15/1985, 16, and the comments on it in Bunte/Sauer 1988, Regulation no. 123/85, no. 76 *et seq.*

53. Although the conflict situation is in no way new; cf. the example of franchising - liberal European competition law/national binding contract law - Joerges 1987, 218 *et seq.*

54. ECR [1977] 2115 - GB-Inno-BM/ATAB.

55. ECR [1985] 1 - Leclerc/Au blé vert.

admittedly without concluding by declaring it ineffective. It thereby exclusively confirmed French price regulations for petrol that were administered directly by government officials[56]. There are only two sets of cases where the ECJ has shown itself to be more open: national permission for cartel agreements that made it easier for them to come about or that strengthened their effect[57] was held to breach the loyalty obligation, as was a delegation of price-setting powers to professional organizations or economic associations whose price policy was given the blessing of government offices[58].

The German Monopolies Commission attaches far-reaching hopes to this case-law: for the prohibition on delegation of government regulatory powers to corporatist self-regulatory associations could be interpretable as an approach to a "general control of government action on the basis of its effects on the competition system"; a consequence of this approach would be an opening up of the possibility of "assessing government measures in general on the criterion of compatibility with competition provisions"[59]. Wishful thinking? The Monopolies Commission[60] itself admits that the ECJ case-law leaves many questions open. Not even its results are unambiguous. In the case of French book price maintenance, no infringement of the duties under Art. 5 (2) EEC was found, and even a European confirmation of the special treatment of the book market was declared possible[61]; the importance of the '*Nouvelles Frontières*' decision becomes relative in the overall context of the rather cautious endeavours towards liberalizing European air transport[62]; the *Cullet/Leclerc* and *Van Eycke/ASPA* decisions can also be interpreted as explicit confirmation of the economic policy powers of Member States; the dislike for corporatist-self-regulatory practices revealed in these judgements, but also the *BNIC/Aubert*

56. ECR [1985] 315 - Cullet/Leclerc.

57. ECR [1986] 1457 -- Ministère public/Asjes (Novelles Frontières); cf. ECR [1987] 3801 - VZW Vereniging van Vlaamse Reisbureaus/VZW Sociale Dienst van der Platselijke en Gewestelijke Overheidsdiensten.

58. ECR [1987] 4789 - BNIC/Aubert; cf. ECR [1988] - Van Eycke/ASPA.

59. Monopolkommission 1990, 401, 389.

60. Monopolkommission 1990, 401.

61. *Supra* (fn. 56); confirmed by ECJ, ECR [1988] 4468 - L'Aigle distribution.

62. See Monopolkommission 1990, 300 *et seq.*, 308 *et seq.*

decisions, contrasts strikingly with the approval of such arrangements both inside and outside[63] European competition law. Even in the case of decisions that seem to point towards an instrumentalization of European competition law for a deregulation strategy, those very countervailing tendencies become effective that in the conflict between a 'weak' European and a 'stronger' national competition policy make the supremacy principle seem so problematic from a regulatory policy viewpoint.

### *d) Second Interim Observation*

The prospective theories of the integration process each have specific problems with the picture of competition law presented here. (1) There is clearly not a merely technical and bureaucratic administration of 'technical tasks' in Ipsen's sense. Particularly in the present debates on the re-employment of competition policy for industrial policy, on the applicability of innovative deregulation strategies against regulatory protected zones and the replacement of national regulations by European ones, these are politically highly sensitive questions that are recognized and treated as such. (2) Can the Europeanization of competition policy be understood as expansion of a supranational legal order carried by the assent of the Member States? (3) Weiler has always tended to concede a special status to competition policy. But his analysis may prove to be more illuminating than he suggested. The influence of states seems considerably more massive than suggested by the genuine policy and administrative competencies of the Commission, and the mutual disputes over deregulation in the Member States and reregulation at European level confirm the Community's dependence on Member States' interests and competition policy conceptions.[64]

The practice of competition policy is hardest to fit into the interpretative framework of the neoliberal theory. The difficulties do not just stem from the

63. See 2 *infra*.

64. More detailed case studies would probably confirm what Schneider and Wehrle (1988) diagnosed on the example of their analysis of telecommunications policy: that the EC has grown into a corporate actor. This would mean that the balance assumed by Weiler between supranational constitutional structures and the Member States' possibilites of influence has shifted at the expense of the latter. Legal and institutional consequences of this finding are not discussed by Schneider and Wehrle.

effective power of legal practice over normative prescriptions. They rather concern the theoretical-normative premises of this conception. Obviously, the problems which European competition law and European competition policy are responding to by the integration of non-competition criteria are in principle, and rightly so, object of positively creative integration policy[65]. Policy 'may' understand the labour market and distribution policy effects of economic integration in the Member States and the divergent drifting of living standards in the Community as a mandate for action. Nor can the Community simply proceed in the name of an economic rationality allegedly built into the Treaty against national regulations that prove to be an obstacle to the achievement of a common competitive market – not just because jurists are accustomed and obliged to respect economically irrational regulations and/or ones that favour the interests of a particular clientele, but because diagnoses of market or government failure are as a rule theoretically controversial, and the question of whether or to what extent the market's control effects are socially acceptable must in principle be askable. The objection that the Community is not legitimated for a positive, shaping of economic and integration policy[66] is certainly to be taken seriously. But this also applies to the EEC Treaty's claim of a replacement inspired by neoliberal theory of the plurality of national governmental policies. Niederleithinger, in his critique of the extensive interpretation of the supremacy claims of European law over the competition policy of Member States, called for conflict solutions in which "all legitimately competing objectives and viewpoints" are to be weighed up and "competition restrictions as a part of Community policy" must be justified by the general Treaty objectives of Art. 2 EEC[67]. This sort of comprehensive weighing up of clashing regulatory claims of the Community and the Member States might indeed act to settle disputes. But for the integration policy it would presuppose a readiness to 'mutual

65. Krugmann, 1968/1988. The formulations in the text have been kept deliberately cautious. They do not opt for the normative-legal adoption of recommendations from the camp of strategic commercial policy (on this tendency cf. the survey and critique in Stegemann 1988). It is however being suggested that strategic motives in negotiating processes at EC level are effective and that the Community can be given a disciplining function in controlling beggar-my-neighbour attitudes. What is particularly being asserted, though, is that controversies between economic schools are not to be decided without mediation in the name of the law.

66. Mestmäcker 1987, 16 *et seq.*; cf. Steindorff 1990, 18.

67. Niederleithinger 1989, 87.

recognition' of differing regulatory policy concepts, and legally it would assume a conflict of law's reinterpretation of the supremacy principle.

## 2. New Harmonization Policy: Market Integration or Social Regulation?

The Community's powers to harmonize the laws of Member States are enormously broad, and yet limited in a specific sense. According to the formulation in Art. 100 EEC, the power for approximation of laws relates to "such provisions as laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the Common Market". This applies to the whole sphere of social regulatory law – consumer, labour and environmental law. The need for a 'positive' legislative policy by the Community in all these areas is confirmed by Art. 36 EEC. According to it, the freedom of movement mentioned in Art. 30 EEC has it limits in the case of provisions "justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants...". But the powers and requirements of harmonization are in no way covered by corresponding political and administrative competencies. The 1957 Treaty transferred very limited powers of action to the Community in the title on social policy. These have been expanded by the SEA (Art. 118a EEC) and systematically augmented by the new environment policy powers. The changes in the approximation of laws provisions of Art. 100a EEC, generally relating to the achievement of the internal market, do not however contain any explicit extensions of powers[68]. They merely combine the new majority decision procedure (Art. 100a (1) EEC) with the obligation on the Commission "in its proposals envisaged in paragraph 1 concerning health, safety, environment protection and consumer protection" to "take as a base a high level of protection", while Member States retain powers of action even after a decision on harmonization measures (Art. 100a (4) and (5) EEC). This leaves the dilemma that marked even 'traditional' harmonization policy unchanged: In order to implement its internal market policy, the Community must become involved in the same way about social regulations, but its powers to develop an

68. Cf. Steindorff 1990, 94-95.

independent regulatory policy remain limited and its possibilities of implementing such policies have not improved.

### *a) Old and New Harmonization Policy*

The intrinsically irresoluble tension between European legal approximation and national social regulation has not overly preoccupied practice and theory[69]. Since the 'General Programme to Eliminate Technical Barriers to Trade' of 1969[70], approximation of laws has been entirely dominated by unification (approximation) of all provisions restricting intra-EC trade. Alongside this – and independently of it – the Community in the 1970s presented consumer and environmental policy programmes. The objectives of product regulation also certainly aimed at in these programmes remained unrealized. In particular, efforts at a separate European product safety policy have remained stuck at initial approaches (the setting up of accident information systems; mutual information by government authorities on product hazards)[71].

Admittedly, the 'traditional' harmonization policy has also failed. Characteristically, the reasons held responsible for its failure have nothing to do with the regulatory one-sidedness of internal market policy. The decisive weaknesses were instead seen exclusively in the notorious bottlenecks in the European legislative process: the hurdles of the unanimity rule of Art. 100 EEC and the difficulty of using a harmonization of 'legal and administrative provisions' to achieve the practically so important transformation of private sets of norms in a way that would conform with integration[72]. This diagnosis then led to the treatment whereby harmonization policy was renewed step by step:

– As early as 1983 the existing restriction of the approximation of laws to the legal and administrative provisions mentioned in Art. 100 EEC was overcome, and its non-governmental appendage, namely technical

69. But see Hailbronner 1990.

70. OJ C 76/1969, 1.

71. Joerges *et al.* 1988, 282 *et seq.*

72. For details see Joerges *et al.* 1988, 272 *et seq.*, 346 *et seq.*

standards, included. The so-called Information Directive of 28.3.1983[73] obliged Member States to provide early mutual information on legislative and standard-setting intentions. Since then, the Commission has been able to respond early to threatened market splitting by developing European solutions; in particular, it can guarantee the primacy of Community law anticipatorily by standstill orders.

– A second possible therapy was supplied by the *Cassis-de-Dijon* judgement of 1979[74], with a statement that only those legal provisions that took into account actually 'mandatory requirements' justified restrictions on the free movement of goods guaranteed by Art. 30 EEC, but that otherwise positive harmonization measures could be done without. The "new approach to technical harmonization and standards"[75] drew a twofold conclusion from this: since only 'mandatory requirements' legitimated restrictions on freedom of trade by national law, harmonization must in future concentrate on the unification of 'essential safety requirements'. Other 'positive' measures not belonging to this legislative policy core area could be left to the standardization organizations, and the Community could content itself with procedural measures to guarantee the compatibility of the outcome of standardization with the basic safety requirements[76].

– The taking of decisions on the new type of directive was facilitated by Art. 100a (1) EEC, introduced by the SEA. The sphere of application of this provision is, insofar as product regulations are concerned, very wide: in particular, it also covers environment policy provisions[77]. Admittedly, Art. 100a (3) EEC obliges the Community to a "high level of protection", and in accordance with Art. 100a (4) and (5) EEC the Member States retain considerable possibilities of action.

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73. OJ L 109/1983 extended by the Directive of 22.3.1988, OJ L 81/1988, 75.

74. ECR [1979] 649.

75. Council Resolution of 7.5.1985, Oj C 136/1985, along with the "conclusions on standardization" of 16.7.1984 (annex I) and the so-called Model Directive (annex II).

76. For more details see Joerges *et al.* 1988, 345 *et seq.*

77. As Ehlermann already noted, 1987, 383.

## b) *Successes and Difficulties*

The stagnation of harmonization policy was overcome by the 'new approach' and the European standardization organizations have energetically taken up their new task. Admittedly, the expectation that the new harmonization policy would be a deregulation strategy was not fulfilled[78]. There has been deregulation purely in a sense of a 'denationalization' and 'degovernmentalization' of product safety law. The European standardization organizations that are supposed to secure the harmonization of standards in the place of the previously competent government representatives are plainly doing the job quicker than was possible under an arrangement of national and Community law. But they are in turn likely to meet with difficulties in reaching agreement. At any rate, standardization practice has rejected the idea of a 'mutual recognition' of national standards.

At the moment the Commission is endeavouring to perfect its standardization policy at two levels. In a new Green Paper[79], standardization policy is explicitly committed to the objective of a technological conversion of Europe, and a shift of standardization activity to European level is called for: European standardization organizations are no longer to see themselves as assemblies of national delegations, but are themselves to organize the process of clarifying economic interests and technical possibilities.

In a complementary programme on standardization, the building up of a European certification system is being pushed ahead. The practical importance of this programme can scarcely be overestimated. Neither government offices nor 'the market' could just accept the conformity to standards of products. Conformity to standards must instead be positively established – that is, certified. But the special feature of the certification question lies in the fact that it cannot be handled along the lines of legislative or standardization acts at European level. The certificates must necessarily be issued in decentralized fashion – with

78. I shall merely refer to the available theoretical explanations: an instructive sociological and political analysis can be found in Bolenz 1987; from the economic literature, see Pfeiffer 1989; see also Falke 1989; Joerges 1990.

79. Kommission 1990b.

the consequence that the equivalence of national practices must, in the interest of the recognition of such certificates by administrative offices in the Member States and by demanders of products, be guaranteed. Accordingly, the new directives contain detailed provisions on the issuing and recognition of certificates; but for that reason, too, the success of the new approach remains dependent on the success of the Commission's efforts to solve the certification question: legally binding requirements on the 'quality' of certification offices, the encouragement of their cooperation and the building up of a European agency to organize all this[80]. Here a strategy can be seen emerging in which the Community hopes, by using cooperative arrangements, to overcome not only its dependency on political assent by the Member States but also its administrative weakness.

### *c) Internal Market Policy and Social Regulation*

The successes in the new harmonization policy are impressive even now, and the conceptual imaginativeness with which the practical and legal difficulties are being approached is admirable. Precisely because of these successes, however, the problem of the relation between internal market-oriented approximation policy and social regulation, so long kept latent, now seems to be becoming acute. For environmentally motivated product regulation, this is emerging first in the fact that there is in principle no trust in the technique of reference to standards in this area[81]. But even with directly health-related product regulation, the differentiations known from national law continue to be retained. In law on medicines, the 'new approach' plays no part, and in foodstuffs law the regulatory structures have scarcely changed[82].

It is noteworthy that not only is the extension in regulations on health protection advancing in these areas well known for their consumer policy sensitivity, but the Commission has now also systematically supplemented the

80. For more details see Joerges/Falke 1991, section II 3; Micklitz 1990b.

81. Pernice 1990, 210 *et seq.*; by contrast, on the national law, see Voelzkow *et al.* 1987; Denninger 1990, 18 *et seq.*

82. What is instead to be noted is the attempt to coordinate national foodstuffs checks embarked on by Directive 89/397 (OJ L 186/1989, 23).

whole new harmonization programme with a draft directive on general product safety[83]. The complicated technical details can be left to one side here. The new directive is to apply to all products not already covered by special regulations which are "industrially manufactured, processed or agricultural, ... new, used and reprocessed". Member States are called on for legislative activities that go well beyond the existing state of product safety law. It provides for coordination of product safety policy priorities and activities at Community level. In 'emergency cases' the Commission obtains powers of action of its own. One should hesitate with predictions on the fate of this draft. But there can be no doubt that the very logic of the matter requires the establishment of the second policy level to systematically supplement the existing one-dimensional harmonization policy with its internal market policy orientation.

### *d) Third Intermediate Observation*

The finding seems paradoxical: the new harmonization policy, announced as a deregulation strategy, at first produces cooperative arrangements between the Community and standardization organizations, then forces cooperation among the national administrations, and finally leads to intensification of product safety law and to the establishment of a new policy area for the Community. These results seem less surprising, however, if the functions of standardization are borne in mind. The cooperative relationships known particularly in German law between state and standardization organizations in product regulation are to be explained on the basis of the market-constituting function of standardization, and at the same time are a response to the fact that the Sate, in an apparently irreversible development, is forced to take on increasingly wider protective tasks, yet cannot handle these tasks itself without coming to an agreement with economic interests[84]. These cooperative regulatory patterns have so far proved resistant to every critique on regulatory policy grounds[85].

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83. A first draft (OJ C 193/1989, 1) has since been amended by the Commission (KOM (90) 259 final, 11.6.1990); see Joerges/Falke 1991, section IV.

84. Bolenz 1987, 5 *et seq.*, 94 *et seq.*, 160 *et seq.*; on the constitutional policy dimension see Micklitz 1990a.

85. See Streeck/Schmitter 1985 on the one hand and Streit 1987 on the other.

However, the Europeanization of these national models remains in need of analysis and explanation. As long as the EC is an aggregate of States, interest representation can in principle not be given a new 'supranational' function[86]. If, as Weiler has shown, the Member States essentially determine the Community's decision-making processes, then this is not reconcilable with the (functional) delegation of legislative powers to supranational systems of 'private government'. These constitutional positions find support in political science analysis of the role of economic associations in Community policy[87]. Certainly, Ipsen already predicted that a shift of administrative competences to Community level would be bound to have effects on the organization of interest representation[88]. In accordance with this prognosis, Kohler-Koch notes that reorganizations of associational cooperation aimed at "increased efficiency ... with the greatest possible control by the Member Associations"[89]. The procedure of the new harmonization policy in fact suggests a dual strategy. For the Member States remain present not only in the adoption of new directives but also in all Commission decisions affecting standardization policy in advisory or even regulatory committees (by representatives "who may be supported by experts or advisors"[90]). The European standardization organizations are in turn combinations of national organizations[91]. Accordingly, at both national and European level there are indications of possibilities of the representation of interests that continue to be defined in primarily national terms. But for all this, decisions at Community level are taking on increasing importance, and this suggests legal and institutional consequences: to the extent that the functions of self-regulation are shifted to European standardization organizations, functional equivalents for the mechanisms for regulating-self-regulation, found in national frameworks, must also be devised. Among these are measures to secure

86. Ipsen 1972, 1005.

87. Kohler-Koch 1990, 225 *et seq.*

88. Ipsen 1972, 1005.

89. Kohler-Koch 1990, 226.

90. Section 9 of the Model Directive (fn. 76 *supra*).

91. Joerges *et al.* 1988, 360 *et seq.*

'balanced' representation at European level[92], and also governmental administrative control which must in turn be coordinated at Community level.

## III. Programmes and Options

The observations on the development of competition and standardization policy confirm the thesis that the new dynamics of internal market policy points beyond the perspectives of academic legal theories of integration. This thesis admittedly remains destructive as long as it merely declares the analytical reference frameworks for those theories, and therefore also their normative claims, to be inadequate. Constructive counterconceptions must satisfy further-reaching argumentational requirements. They must replace the integration policy models of legal science by more complex analytical assumptions, develop corresponding normative approaches and explain their relationship to the legal and institutional provisions of the EEC Treaty. Such justification claims do not merely overstrain the jurist as such. At a stage when the far-reaching changes in the framework conditions for the integration process must be dealt with, and new changes can be expected which could literally throw out of date from one day to the next the calculations and strategies of political actors, the effects of legal and institutional innovations can scarcely be predicted. In any case, the risk of speculative misassessments can be limited. If at the moment it cannot definitively be foreseen how and whether the economic policy threshold towards a European currency will be crossed, it is nonetheless certain that the new debates on the legitimacy of economic and social regulations and the delimitation of central and decentralized powers sparked off by the internal market policy programme will not come to a halt. If the efforts towards a specifically European federalism in a future European union still seem all too vague, it is nonetheless certain that particular framework conditions for a Europeanization of regulatory policies will not change[93]. And it is also certain that all considerations on the Europeanization of regulatory policy will have to deal with the debates on the crisis of regulatory law[94].

92. Joerges *et al.* 1988, 44 *et seq.*

93. See 1 below, at end.

94. Cf. the documentation (and continuation) of this debate in Teubner 1990b.

These preliminary observations should adequately establish the limited claim of, but also the justification for the considerations below. These considerations do not presuppose any further-developed new guiding image of integration policy, and relate purely to the area of regulatory policy already covered by the integration process. They are not intended to set up any abstract models against the developments observable in this area, but instead aim to show what innovative strategies have already formed, or at least can be discerned in this development.

## 1. Achievement of the Internal Market and Regulatory Policy

The conceptions so emphatically and successfully advocated in the Commission White Paper on completion of the internal market from 1985 can be termed a specifically economic integration strategy: the internal market is to be aimed at because of its economic advantages and is to be accomplished above all by guaranteeing rights of market access. This programme now, however, seems to be developing a peculiar dialectics that can be typified as a change in form of regulatory policy in Europe. Majone, in his studies on American and European regulatory policy, has worked out the traditional differences and drawn attention to more recent convergencies that can be observed[95]. The European forms of 'intervention' in the economy were and are much more comprehensive and ambitious than the controls of a 'regulatory state'. This is particularly true of the nationalization of branches of industry, but tends to be so also for municipal and socialized enterprises, and corporatist interwinings between government offices and private organizations. By contrast, the American regulatory programmes are less comprehensive, though also more targeted: 'economic regulation' is no substitute for socialization, but is intended merely to compensate for specific forms of market failure. 'Social regulation' is concerned with external effects, the protection of health and environmental interests, and the protection of workers and consumers[96]. The characteristic of this form of control is found by

95. Majone 1989/1990/1991.

96. For more details see e.g. Reagan 1987, 45 *et seq.*, 85 *et seq.*

Majone[97] in "sustained and focused control exercised by a public agency over activities that are socially valued".

The regulatory semantics of the EEC Treaty – including the remnant of socialization in Art. 222 EEC – is clearly marked by the European traditions of influencing the economy. Not least because of the strength of these traditions and the differences between them, the object of a 'Common Market' for long seemed vague and utopian. The Community's integration prospect has, however, taken on clearer outlines through the internal market initiative and the SEA. It is in line with the logic of this programme for European policy to scarcely dream any longer of a 'harmonization' of national traditions, but instead to be in principle questioning everywhere the continued existence of all regulatory forms where they seem incompatible with the creation of a unitary economic area[98]. But it correspondingly seems to fit the logic of consistent market integration for new forms to be sought to achieve regulatory goals, the justification for which is in principle not disputed. The 'regulatory state' is acquiring new topicality[99], deriving precisely from the fact that its activities are not replacing market economy processes but are intended to 'accompany' them.

Certainly, the American conditions of regulatory policy differ considerably from the position in the EEC:

– By contrast with the USA, the implementation of a particular regulatory concept in Europe regularly comes up against differing traditions and patterns of interest.

– Economic differences in development and development interests have greater weight in Europe. They can be brought into decision-making processes at EC level as national economic interests. The resulting additional load on regulatory policy debates of appropriate regulatory forms and unification processes through standards and safety standards can

97. Referring to Selznick 1985, 363-64.

98. See Müller-Graff 1989, 38 *et seq.*, and on the case of competition policy, II 1 c above.

99. Cf. Majone 1991, 22 *et seq.*

be shifted only to a very limited extent onto abstract mechanisms for reaching agreement (transfer efforts).

The question of whether market failure is responsible for wrong developments and to what extent it can be corrected by regulatory intervention is never free of dispute – neither between economic experts nor in the political process. This is even more true for all areas of social regulation. The establishment of safety standards or of threshold values for environmental pollution has a normative-practical dimension that scientific discourse cannot cognitively cope with, but on the other hand is brought to bear only in abbreviated form in economic and political interest bargaining.

– For regulatory policies in the sense of 'sustained and focused control', administrative competencies and resources, provided for only exceptionally by Community law, are necessary. The paradigm of EC regulatory policy is centralized legislation, with implementation through the legislation and administration of Member States. Simple following of American patterns is not possible within these structures.

– Last but not least, the American agencies are tangled up in all sorts of formal and informal networks from which they derive information and in which they agree on the securing and acceptance of their measure. Heclo has described this phenomenon as the breaking down of the 'iron triangle' of executive, parliamentary control and interest groups[100]. Majone interprets it as the move away from Weber's ideotype of the purpose of rationality of administrative action, explained on the basis of the scientific and normative policy complexity of regulatory policy and justifies the move to a procedural rationality of administrative action[101]. But at European level, this 'functional shift' in administration cannot be directly taken as a model.

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100. Heclo 1978, 88-89.

101. Majone 1979.

## 2. Institutional Framework Conditions and Integration Policy Concepts

Despite these difficulties, the Europeanization of regulatory policy is rapidly advancing in all areas of economic and social regulation. Its main institutional medium has developed more or less naturally: in an incomprehensibly vast multiplicity of advisory, administrative and regulatory committees, Commission and Member State officials come to agreement on the implementation of Community law. Relatively little is known about the mode of operation of this network of committees[102]. Structurally, this is administrative law-making, the supranationality of which, entirely in line with Weiler's theses[103], remains tied to the involvement of Member States.

The effectiveness of comitology system certainly calls for more exact evaluation. From a constitutional viewpoint, however, this form of Europeanization of regulatory tasks is questionable, if only because it takes place largely without public involvement and leaves the mediation of economic oppositions of interests and regulatory objectives at the mercy of non-transparent bargaining processes. In the Commission's more recent programmatic projects, the committee system has been squeezed aside by other concepts.

### *a) Regulatory Competition: Market Rationality as Arbitrator of Legislative Policy?*

The Commission's White Paper on the completion of the internal market[104] gained prominence for its reorientation of harmonization policies. In technical legal language this reorientation is termed 'mutual recognition' and in the jargon of regulatory discussion 'regulatory competition'. Following the *Cassis-de-Dijon* judgement[105], the view came to prevail that in the EC the assumption should be the equivalence of the regulatory goals in health and consumer protection, so

102. For a summary of the state of affairs see Meng 1988; for more up to date details in the area of product regulation see Bentlage 1990.

103. See I 2 c above.

104. Kommission 1985.

105. ECR [1979] 649.

that the principle of 'host state control' could be replaced by that of 'home state control'[106]. 'Mutual recognition' as an alternative to positive harmonization has subsequently been taken up, particularly in relation to free movement of services.

The idea is fascinating[107]: just as private economic action is subject to control by competition, so the constructivist 'presumptuousness of knowledge' that any legal intervention involves is made subject to indirect control. Member States may retain differing regulations; they must merely shape them and handle them in such a way that citizens of the EC market can 'choose' which regulatory regime the products or services demanded or supplied by them are to come under.

However attractive this notion may seem, its practical difficulties, and those of principle, remain for the moment considerable. From the legal viewpoint, the obligation to recognize regulations of the state of origin is an equivalent to 'positive' harmonization. From that viewpoint alone, the obligation can only subsist where it is rooted in primary Community law itself or else positively prescribed in a directive. Two starting points are available in primary Community law. The first is constituted by the checking of national measures for compatibility with the principle of free movement of goods since the *Cassis-de-Dijon* judgement. A complementary second approach lies in the theory of the economic constitution of the Community. If the Community is legally obliged to set up a system of undistorted competition, if, as the Monopolies Commission sees it[108], in any case duties of regulatory self-restraint follow from the case-law on Art. 5 (2) EEC, then this may imply the less far-reaching obligation to open the national markets to suppliers from states with other regulatory systems. So far, however, in primary Community law duties of recognition are demonstrable only to a very limited extent. It is true particularly for the case-law in Art. 30 EEC, by which the substantive control of national regulations has

106. Kommission 1985, 58.

107. 107.It was developed in the recent American federalism debate as a critique of the centralism of the regulatory state (for a survey see Sternberg 1990; see also the references in Joerges *et al.* 1988, 243 *et seq.*). From the German debate see esp. Wissenschaftlicher Beirat 1986; Meyer-Schatz 1989; Siebert 1989; Donges 1990.

108. Cf. II 1 above.

remained extremely slight[109]. And the existing case-law on Art. 5 (2) EEC is still less able to support the far-reaching consequences the Monopolies Commission wishes to draw from it[110].

These legal reservations are comprehensible: on the logic of regulatory competition, after all, the delimitation between competitive and non-competitive regulatory patterns should no longer be seen as a normative and legislative policy problem, but economic rationality should be allowed to make its way outside of political and legal procedures *vis-à-vis* the interests pursued by democratically legitimated legislators. Merely in consideration of these normative and legislative policy difficulties, there ought to be clarity at least as to the fields of application and mode of operation of regulatory competition. In the sphere of 'economic' regulations, the opening up of regulatory competition on economic regulations is in principle acceptable where no 'exogenous' regulatory objective, like distributive justice or other social policy interests, are pursued[111]. But there must be further questions about how the actors concerned actually set in motion the game of regulatory competition and can exploit it – and a distinction must therefore be drawn between, say, the deregulation of paternalistic regulations between 'professional' and 'private' demanders. In the recognition of foreign product regulations, the essential point is whether information on quality and safety differences adequately protects the product users concerned. In the sphere of so-called process regulation, in particular in the case of environmental and work safety provisions, the principle of regulatory competition means that a regulatory interest recognized as legitimate 'politically' may indirectly, namely through the competitive advantages that may result from lower production costs with lower safety standards, fall into danger. But whether such consequences arise and to what extent they have to be tolerated is not something that can be predicted and assessed in general. But if they are not decidable *ex ante*, then regulatory competition itself proves in need of regulation. It would have to take the form of observing the successes and failures of regulations, and remain subject to checking. This sort of experimental, self-observing and improving

109. References in Joerges/Falke 1990, section II 2.; from the recent case-law, a noteworthy one is case 382/88, judgement 7.3.1990 - INNO-BM/Confédération du Commerce Luxembourgois (not yet in ECR) on the checking of the German UWG against the Community's consumer policy programmes (!).

110. Cf. II 1 *supra*.

111. See Meier-Schatz 1989.

legislative policy cannot, however, then simply be handed over to an anonymous mechanism.

### b) *European Corporatism: Europeanization through the Self-Organization of the Economy?*

Regulatory policy relates its powers of resistance to deregulatory strategies not only to the paternalistic inclinations of governmental actors but also to the functional conditions of markets and the interests of the economy. This interplay of political regulatory claims and private regulatory interests can well be seen in the example of product regulation, so important for the achievement of the internal market[112]: the 'new approach to technical harmonization and standards' was set up as a deregulation strategy in two respects. On the one hand, it was to unburden the Community legislator and exploit the standardization capacities of private standardization organizations. It was also, however, to encourage the mutual recognition of product regulations and national standards. This second element in the 'new approach' is hardly talked of any more. The so-called new harmonization policy has since been proving to be a strategy to promote self-regulation mechanisms – in standardization just as much as in the area of certification.

Just like the idea of regulatory competition, European corporatism has also since been moving in a legal no-man's land, and its practical chances of implementation are uncertain. Community law contains only one clear relevant rule on cooperation with private organizations in the European-law-making process: the ban on the delegation of law-making powers to actors not legitimated by the EEC Treaty[113]. Accordingly, the new standardization policy must be located in a legal framework that forms a counterpart to the goal aimed at – to unburden the legislator – and at the same time covers up these contradictions by fictions: directives should be so precisely formulated that administrative authorities can be guided by them; the standards worked out by

112. Cf. II 2 b *supra*.

113. EuGH 1958, 149 - Meroni/Hohe Behörde.

standardization organizations must be formally recognized by the Commission before they can develop the effects attributed to them[114].

It is only in the Commission's most recent documents that a constructive alternative to this form of underpinning European corporatism is taking shape. The Green Paper on standards of 8 October 1990 states that standards are of too great importance "to be left to the technical experts alone". "Other interested groups like consumers, users and workers must equally be prepared to organise themselves better to take part in the European standardization process"[115]. With such demands, the Commission wishes to take account of objections long discussed at national level to the self-regulatory handling of governmental tasks[116]. The normatively so plausible efforts at breaking down the European 'iron triangle' of Commission, Member States and standardization organizations by pluralizing standardization procedures at Community level[117] are, however, scarcely compatible with the institutional structures of the EC, and hard to put into practice. Even the transformation of the European standardization organisations into actors that replace the bargaining process between national delegations, and are themselves to organize the mediation between economic interests and technical possibilities, is an enormously ambitious project. If over and above this, the feedback established at national level is to be taken as a model with further social actors at European level, then the Commission is postulating interest mediation processes for which the actors are not yet noticeably visible.

### c) *European Agencies: Regulatory Policy as 'Organized Formation of Knowledge'?*

As a further possibility of guaranteeing the compatibility of internal policy objectives and regulatory claims, the setting up of European agencies is being

114. For details on all this see Joerges *et al.* 1988, 380 *et seq.*

115. Kommission 1990b, 29, 33; see 63 *et seq.*

116. Most recently see in detail Denninger 1990, 141 *et seq.*

117. See Joerges *et al.* 1988, 401 *et seq.*

discussed. Such proposals have already been put forward frequently, but have always failed – in both the economic and the social regulation spheres[118].

The legal problems of establishing European agencies are considerable[119]. Community law does not have any powers to set up autonomous institutions not provided for in the Treaty; it is derived from the Community's organizational power. But the specific legal feature of the American agencies, namely the autonomous exercise of regulatory powers, is difficult to achieve within the legal structures of the EC, or only with restrictions: the EEC Treaty in principle only legitimates law-making by the Council – it makes no provision for the political responsibility of an agency equipped with discretionary powers. More or less far-reaching possibilities of transferring "applicator, implementing and monitoring powers" can be derived from Art. 235 EEC (and Art. 100a EEC), but these powers must keep within the arrangement of competencies provided for in the EEC Treaty and may not cross the threshold into autonomous law-making. But the legal difficulties are not the only obstacle that all the efforts to set up independent agencies have so far encountered. The demands raised as early as the 1960s and renewed in connection with the Europeanization of merger control[120] for a European antitrust authority, instead, failed partly because their regulatory policy goal, namely a consistent competition policy approach to merger control, could not be implemented[121]. The future European environmental agency[122] is to operate only as a body for scientific policy advice – here the Member States' interests in political action have won through. Also instructive is the fate of the Commission's endeavours to secure extension of its powers of action in 'implementation' of Community law, in connection with adoption of the SEA. In its decision of 13.7.1987[123], the Council opposed

118. See the survey in Hilf 1982, 147 *et seq.*

119. The most thorough discussion continues to be that in Hilf 1982, esp. 293 ff; also detailed is Schwartz in: v.d. Groeben *et al.* 1983, art 235, 227 *et seq.*

120. Cf. Monopolkommission 1989, note 136 *et seq.* and on the earlier debate Hilf 1982, 147-48.

121. See II 1 b fn. 49 *supra*.

122. OJ L 120/1990,1.

123. OJ L 197/1987, 33.

these efforts and defended Member States' influence on the implementation of Community law[124].

Yet the demand for central European agencies is highly plausible[125]. When regulations are seen as indispensable, then the establishment of a European central agency in principle corresponds to the interest of the industries concerned, insofar as these are in any case oriented towards the European market. This perception seems to be winning in the sphere of regulation of pharmaceuticals. This derives from a proposal made by the Commission in February 1990[126], and apparently supported by the pharmaceutical industry[127], to set up a European agency. In order to overcome the legal difficulties of the ban on delegating regulatory powers, the Commission proposal treats the evaluation of safety of medicines as an advisory activity, the findings being then passed on to the Commission for legal decisions[128]. In the most important working bodies of the new agency, however, there are not only academically trained experts but also representatives of Member States[129]. The Commission *must* deal with their objections and, where necessary, secure a Council decision (in the so-called regulatory committee procedure)[130].

The legal constructions found in the proposals to set up a European pharmaceutical agency are instructive. The interest in decisions that would apply Community-wide was to be made implementable by planning a discrepancy between form and function, between merely theoretically legal control possibilities and de facto processes of decision. Accordingly, the evaluation of safety of medicines is treated as a matter for expert advice that can and should

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124. Cf. Joerges *et al.* 1988, 337 *et seq.* with references.

125. For the case of safety of medicines see Hart 1989; Kaufer 1989; Hart/Reich 1990, esp. 36 *et seq.*, 119.

126. Kommission 1990a.

127. Cf. May/Wolllnitz 1990; admittedly, these authors' advocacy of an agency that acts "like a seal of approval" has two aspects, safety policy and industrial policy.

128. Cf. esp. Art. 10 of the Draft, which says that the Commission will as a rule take up the new agencies' proposals without substantive verification of its own.

129. Art. 51 of the Draft.

130. Through the reference in Art. 10 (4) to Directive 75/318 (OJ L 14771975, 1).

be guided by supranational criteria. To that extent, the Commission proposal treats control of health risks as 'organized formation of knowledge'. Admittedly, it does not achieve this vision consistently. The consensus of the experts remains under political control: where differences of opinion cannot be eliminated, it falls back on the procedure known from the comitology system, of underpinning national rights of decision. This form of repoliticization of scientific controversies is the price that regulatory policy has to pay for the institutional weakness of the EC.

## 3. Regulatory Networks: Mediation of Market Integration and Regulatory Policy?

The programmatic concepts of regulatory competition, European corporatism and the setting up of European agencies can readily be brought into connection with the paradigms of the academic legal theories of integration. Regulatory competition has to do with the correction of economic and social regulation by an arrangement for competition. The transfer of standardization powers to private organizations and their experts, and still more the building up of European agencies as advisory bodies with de facto powers of decision, fits in with Ipsen's view of an institutionalization of regulatory powers as 'organized formation of knowledge'. Finally, the possibilities of influence that Member States secure for themselves and through which they make the implementability of integration policy concepts relative confirm the realism of Weiler's theorem of the paradoxical concordance of supranational legal and intergovernmental decisional structures.

Yet the conclusion that the new dynamics of the integration process can be coped with in the framework of the traditional paradigms would be too hasty. In the further development of these concepts, problems that go beyond their limits are emerging, indeed in intensified form.

– The idea of regulatory competition overloads the integrating power of competitive processes. It would, if erected into generally binding programmes, call for the giving up of creative powers that all national political systems lay claim to and that were also embodied in the EEC

Treaty – in however imperfect a form – alongside the internal market programme. But if regulatory competition is to be legitimated in normative constitutional terms only as a law-making policy that observes its own effects and intervenes correctively if necessary, then its legal policy function ought to consist in the institutionalization of legislative policy as a learning process. In this area of economic regulation, such possibilities open up just because of the tension between Community competence for internal market and competition policy on the one hand, and the regulatory powers of Member States on the other. The competencies of Community law should then be grasped as commands to justify and to bring about compatibility, with national powers and regulatory differences to be removed neither by imperative deregulation nor by reregulation at Community level. In the area of social regulation, too, the idea of organized and regulated regulatory competition is applicable. Admittedly, it would in each case have to be verified whether, say, information policy measures were indeed functional as a substitute for uniform product regulations. And in the case of environmentally motivated process regulation and with protective standards in safety at work, the possibility must exist of responding to a 'race to the bottom'[131].

– European corporatism, discernible above all in standardization policy, is – despite the Commission's declared willingness to work towards pluralization of standardization procedures – not an acceptable model for the Europeanization of technology and product safety policy[132]. Indeed, even standardization policy in the narrower sense is systematically supplemented by two complementary intentions: on the one hand, to build up a certification system that has to be organized decentrally and remains dependent on the assent of national bodies; on the other, by general product safety legislation which in turn must be implemented by the Member States[133]. The function of certification can be understood as substantive control in safety terms of European standards, while general product safety policy should organize the systematic determination of

131. See a *supra*.

132. See b *above*.

133. See II 2 b and c *supra*.

product risks, the updating of assessment criteria and intervention against hazardous products. Both tasks must necessarily be handled on a decentralized level. Community law can therefore reasonably only provide a framework that ensures equal possibilities of action by Member States, but leaves to them both implementation of product safety law and the function of initiative in applying safety standards, and then organizes the process of debate on divergent evaluation criteria. In this perspective, possibilities of harmonizing internal market policy with social regulation and, tying down the centralist corporatism of standardization policy become visible: the working out of standards would be a European task, but the certification of safety conformity of products and general product safety policy would remain the primary responsibility of specialized agencies of Member States.

– The expansion of regulatory networks that differentiate between central and decentralized functions could also apply in areas where at present European agencies are being discussed. Thus, for medicaments regulation, it is foreseeable that the new European authority, if only because of its limited resources, will not be able to do without the expertise of national authorities in the case of licensing decisions, but particularly is the case of so-called follow-up market control. But this means that differences between medical schools and disputes as to the weighing-up of the risks and advantages of medicines cannot be silenced by setting up a European agency[134]. Just as in general product safety policy, the Europeanization of medicament regulation can be conceived of in a regulatory network: the continued existence and initiative functions of national agencies would then be guarantees for the plurality of the scientific-normative discourse. The European decision-making level would, then, have to be shaped in such a way that disputes over assessment of risks did not simply lead to a political bargaining process.

All these considerations on the mediation between the economic logic of market integration and the normative logic of social regulation are certainly in need of greater precision. This is true particularly in relation to the topic of the

134. Cf. Kaufer 1990, 163; Hart/Reich 1990, 45-46.

'regulatory network'. This concept is used in economics to describe the forms of cooperation 'between' enterprise and market, and in political science, following the corporatism debate, in analysing decentralized forms of organization. Here it is used in order to respond to a specifically European problem: the need to find a way, difficult as it is, towards a Europeanization of regulatory policies, *despite* the EC's institutional and political bottlenecks. The 'regulatory networks' that are to take up this task must link the Community with the Member States and overcome the legitimation deficits of their institutional structures. The hope that this can succeed is not an abstract speculation. It is thoroughly in line with the competency structure of the EEC Treaty to start from primary Community competence for the 'economy' and Member States' rights of action in order to 'regulate' it; the complexity and openness of the integration objectives in the EEC Treaty equally suit a search for alternatives to strategies of Euro-wide regulated deregulation *and* for a centralization of regulatory tasks. The 'regulated' regulatory competition and the building up of regulatory networks would certainly institutionalize tensions because Member States' rights of action would mean a permanent threat to the unitary nature of market conditions. But the differentiation of decisional levels and functions and the differentiation of decisional tasks at the same time have unburdening effects: if national agencies are to seek forms of regulation that are as compatible as possible with integration, if they have to prove the justification for the interventions, if disputes about national protective measures can be kept free of strategic interest calculations, then the tension between market integration and regulatory policy may have thoroughly positive effects.

# States Without a Market?

## Comments on the German Constitutional Court's Maastricht-Judgement and a Plea for Interdisciplinary Discourses*

CONTENTS:



* Translated from the German by Thomas Christiansen. This lecture draws upon an article in German written for political scientists (Das Recht im Prozeß der europäischen Integration. Ein Plädoyer für die Bachtung des Rechts durch die Politikwissenschaft und ihre Beteiligung an rechtlichen Diskursen) in M. Jachtenfuchs and B. Kohler-Koch (eds.) *Europäische Integration* (Opladen: Leske & Budrich 1996, 73 - 108). - I would like to thank Thomas Christiansen, Michelle Everson, Andreas Furrer, Stephan Leibfried, Jürgen Neyer, Francis Snyder and Michael Zürn for their comments and critique.

## Preliminary

Are we witnessing the emergence of 'a market without a state?' was one of the questions posed in an analysis of the dynamic evolution of the integration process since the launching of the internal market programme in the mid-1980s. Not really: the completion of the internal market is bound to lead to a *renaissance* of regulatory policies, to a reregulation of the economy at European level; at the same time it restructures the economic law and threatens the survival of social institutions. Precisely because of these effects, we have to take economic integration seriously – and reflect on its 'constitutional' importance. The present paper pursues this same issue from another perspective. Are we faced with the revival of the nation-state defending its constitutional achievements against the intrusions of a non-democratic supranational regime? This turning around of my previous question is motivated by the judgement of the German Constitutional Court on the Treaty on European Union[1]. As one may expect, the new question will not affect my normative answer.

This answer, however, will remain provisional. It could be more adequately called a long-term research agenda. One important element of this agenda is a methodological concern. It is a plea for interdisciplinary discourses on the perception of European integration between lawyers and political scientists. This is not to suggest that political science has the answers at hand to problems which lawyers are not (yet) able to resolve. On the contrary, my argument is to be understood as a rigorous defence of the 'juridification' of Europe and a plea to political scientists to 'take the law seriously'. On the other hand, we lawyers should pay special attention to the recent efforts of political scientists to overcome both neo-functionalist and intergovernmentalist research traditions and to reconceptualize Europe as a denationalized non-hierarchical governance structure, and thus an attractive alternative to supranational and national systems[2].

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1. Bundesverfassungsgericht, Judgement of 12 Oct. 1993, 2 BvR 2134/92 and 2 BvR 2159/92 (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155-213; English translation in [1994] CMLR 1.

2. Recent contributions to this kind of analysis include Scharpf 1994 and 1995; Grande 1995; Hix 1994; Jachtenfuchs 1995; Zürn 1995.

This theoretical background agenda will be introduced in the first part of this paper. But it will then remain in the background. The second part will address the controversy between the supranationalism of the European Court of Justice and the German Constitutional Court's (*BVerfG*) national constitutionalism. 'The state without a market' is an implication of the reasoning of that judgement, which will be examined in the third part – only to urge once more for the type of research agenda called for in this introduction.

## I. Taking the Law Seriously: Cleavages and Linkages Between Legal Research and Political Science

'Integration through Law' was the title of a transatlantic project launched in the early 1980s by Mauro Cappelletti, Monica Seccombe and Joseph Weiler at the European University Institute in Florence[3]. The formation processes of the American federation and the European Community were to be compared and the experiences of both systems in developing legal frameworks and techniques were to be evaluated. For Europe, the title was of programmatic significance, albeit allowing for different readings of its meaning.

Firstly, the formula 'integration through law' may be understood functionally: a statement regarding a particular strategy of integration policy and its strength. Social scientists might regard this interpretation as provocative, in so far as it appears to demonstrate a naive or uncompromising understanding of law. The formula does not exhibit any of the contingencies of law-making and of the effectiveness of legal systems in presenting law as an autonomous world governed exclusively by legal doctrines and techniques of interpretation.

A second understanding proves to be more interesting. Here the formula 'integration through law' refers to the special contribution that law has made in the construction of the European Community. In this view, the quality of Community law as a 'constitutional charter' of the participating states differs from international legal orders: it is different to international law, which is based on agreements between sovereign states and/or generally recognized legal

3. Cappelletti, M., M. Seccombe and J.H.H. Weiler 1986.

principles; it is different to public international law, which leaves the unilateral definition and defence of public or governmental interests to each individual state jurisdiction; and it is different to private international law, which – at least theoretically – regularly applies foreign laws but bases such legal implants on domestic sources and, in principle, limits them to private law. This particular role of Community law may be reconstructed, in the language of political science, as a statement about the specific density of juridification at European level which needs to be distinguished from the contingencies of consensual cooperation among sovereign states on the one hand, and international organizations or regimes on the other.

Such parallelisms between legal conceptualizations and reconstructions informed by political science lead – as far as recognition of the particular role of law in European integration is concerned – to a number of questions relating to a third interpretation of the 'integration through law' formula: How – and within which limits – can legal science justify the validity of a supranational European legal order? How can the development of supranational law be explained? Under which conditions can compliance with the law be expected and its effectiveness be ensured? We will explore these questions more fully below. They will require concrete analyses of the dynamic developments of integration policy and European law. The argument may at the outset be presented in an abstract form: the validity claims of European Law cannot be justified legalistically; they depend on its 'normative quality'. A further demand follows from this statement: political science ought to recognize these 'normative properties' of law and integrate this normative dimension into its conceptualizations of European integration.

Consequently, the present treatment of the role of law in the process of integration, addressed to both social scientists and to lawyers, has to take account of the diversity of legal approaches. At the same time, it must consider the theoretical spectrum on offer in the field of political science. A systematic analysis would thus have to reconstruct the competing approaches of either discipline, and would then be able to make certain structural affinities visible: between an understanding of the Community based on classical international law[4] and a 'realist' international relations analysis which views the Community

4. Cf. Bülck 1959.

as intergovernmental cooperation; between the legal category of the Community as an 'association of functional integration' (*'Zweckverband funktionaler Integration'*)[5] and neofunctionalism and regime theories[6]; between neoliberal conceptualizations of the Community as a supranational economic 'constitutional' order (*'Wirtschaftsverfassung'*)[7] and neoclassical economic theory[8]; as well as institutional and social choice approaches.

Such structural affinities between legal approaches and political science theories do not remove the differences between the disciplines. But they require political scientists seeking an improved understanding of the role of law to take the theoretical foundations of legal concepts into account. Equally, lawyers studying the 'reality' of integration are called upon to consider the theoretical context of political science analyses.

It is certainly impossible to offer here a complete picture of the cross-cutting links between the disciplines. By way of an alternative, the development of a single substantial position may be traced: the initial thesis that the normative quality of Community law is one of the conditions of its effectiveness. With regard to the study of law, this thesis concerns with the rational foundations of a legal system which commands neither the sanctions of a state-like sovereign nor the legitimacy of the democratic constitutional state. In terms of method, this implies that law must not be satisfied with a purely formal and positivist treatment of its object of study.

As for political science, there is a distinction between scientific explanation and the recognition that reflectivist theories linking the effectiveness of rules to their normative and moral content are better able to understand the role of law in European integration[9]. The Community's 'legitimacy problem' is an abbreviated (but less precise) description of this interface between law and social

5. Ipsen 1972, 176 *et seq.*

6. Gehring 1994.

7. Cf. Behrens 1994; Mestmäcker 1994; Petersmann 1994.

8. Cf. Streit and Mussler 1995.

9. Cf. Hurrel 1993; Schaber 1994.

science. In this respect, one might ask[10]: Is the legality of European law institutionalized in such a way as to rationally convey the validity of its claims? And, leading on from this question[11]: Will European law manage to guarantee its own acceptance and compliance in the long run?

These questions might seem abstract and theoretical, yet they are of considerable practical significance. Indeed, in the present contribution the practical aspects constitute the dominant part of the analysis, even though they can only be treated in an impressionistic manner. Two areas are exemplary for this purpose.

On the one hand is the debate about the nature of the legal reconstruction of the Community system. This complex deals with the particularities of European law *vis-à-vis* national legal systems and international law. This constitutional aspect of European law has received renewed attention since the Maastricht judgement of the German Constitutional Court. Yet its significance is independent of the hopes and fears regarding this particular judgement. It concerns core constitutional problems of the European project which in any case belong high up on the academic and political agenda. On the other hand, there is the problematic of designing a socially acceptable 'constitution' of the European economy. This second complex is concerned with the form and the consequences of the economic emphasis of the European project.

These two aspects – constitutional law and economic law – are closely related. Even though economic law is principally 'regulatory' rather than 'constitutional', the aims and the substance of economic law are always tied up with the definition of the functions of the constitutional state[12]. Indeed, the precise form assumed by the market economy is itself one of the core constitutional questions for a legal system. This is why the transfer of economic regulation to the European arena has indeed turned out to be a significant constitutional problem: the institutionalizing of a European market order does not simply bear upon states' capacity for political action, but ultimately also on the states' own legal identity.

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10. Cf. Habermas 1987.

11. Cf. Franck 1990; Weiler 1991, 2466 *et seq.*

12. Cf. Häberle 1993.

The two topics are presented as legal issues. However, the following analysis will not lose sight of the theoretical claims raised above. Its objective is to demonstrate that the parties to legal controversies should search for a 'convincing' law for the European polity. It is also to confirm the thesis that political scientists should take that normative search seriously, and contribute to it.

## II. The Constitutional Significance of the Supremacy of European Law

At the outset of every legal innovation we observe the creation of a concept. Here the term 'Community Law', denoting European law's special place *vis-à-vis* both national and international law, has been commonly used for quite some time. Yet approaching this term's complex meaning remains a long-term effort. The doyen of German Community law declared as late as 1994 that the creation of this term ought to be understood as nothing more than a provisional characterization of the gestalt of the Community. The use of this type of definition, he continued, is always appropriate when and as long as there is not yet a legal definition of abstract measures, but where at the same time an illustrative, precise and empirically reasonable description of a phenomenon is possible if it corresponds to its objectives.[13]

Such reservations should not be surprising to political scientists. International relations theory, not unlike the disciplines of international and European law, is constantly trying to identify and conceptually adapt to transformations of its subject-matter. More radical still – indeed at the risk of self-eradication – integration theory has reacted to changing conditions in the process of 'uniting Europe' in its early advances, the crises of the 1960s, the new dynamism of the 1980s, as well as current uncertainties[14]. Legal science, by contrast, has apparently achieved greater conceptual stability. The conceptualization of the 'Community system' as a supranational legal order, which assigned the term Community law its dominant interpretation, became

13. Ipsen 1994, 7, cf. Ipsen 1983, 79 *et seq.*

14. For a recent resume cf. Welz and Engel 1993.

accepted during the early 1980s just as the EC was in a state of crisis. And it was only with the October 1993 judgement of the German Constitutional Court on the Maastricht Treaty that this legal *acquis communautaire* seemed to be seriously questioned. How can this continuity of juridical conceptualization be interpreted and explained? What is the significance of recent legal disputes about the juridical characterization of the Community system? The reconstruction below intends to show that juridical conceptualizations are not simply a problem for legal science; by contrast, useful and rewarding opportunities for interdisciplinary thinking can be found in the openness and interdependence of legal categories.

## 1. The EC System as a Supranational Legal Order

The interpretation of the EC system as a supranational legal community which is above all a product of the jurisprudence of the European Court of Justice has found – in the legal system and beyond – such widespread support that it can well be regarded as the dominant orthodoxy of Community law. The fascinating story of the gradual construction of this legal architecture need not be retold here.[15] Through the doctrine of 'direct effect' and the recognition of subjective rights, the Court has 'integrated' societal actors into the promotion of the Community's legal system while at the same time ensuring the collaboration of national courts; the doctrine of the supremacy of Community law could then be introduced as a logically imperative implication of 'direct effect'[16]; 'direct effect' and supremacy lead on to the principle that Community law has the effect of pre-empting Member States from taking legislative action, if and when a policy area has become occupied by the Community; demanding that Community law have equal relevance in all Member States is to say that the ECJ must have the final competence to rule on the limits of its application[17]. Jurisdiction concerning the 'functional' Community competences – based on the objectives of the Treaty – as well as the 'implied powers' doctrine carried on from this judgement.

15. Case 26/62 *Van Gend en Loos* [1963] ECR 1.

16. Case 6/64 *Costa v Enel* [1986] ECR 593.

17. Case 72/70 ERTA [1971] ECR 263.

Inevitably, the application of these principles did and does pose difficult problems, from which respective controversies of interpretation follow. But as long as these doctrines are accepted in principle and as long as the ECJ remains able to take conclusive decisions in cases of conflict, we are dealing with a supranational order that is fundamentally different from choice-of-law rules and international law. Precisely because of this difference, one may assign to the structuralization of the Community legal system, as has been endorsed by the ECJ, the status of a 'constitutional charter'[18]. The ECJ could not, for its landmark decisions, muster the support of the European nations; frequently it did not even meet with the consensus of their governmental representatives[19]. Equally, the Court was unable to rely on force or on the kind of sanctions that a supranationally institutionalized power centre might possess. Instead, support came from the Court's Advocates General, from the Commission and, after some resistance, from the national courts[20]. But even basic changes in law-making procedure, such as the move to majority vote for measures related to the Single Market programme – with its strengthening of the European Parliament – have not fundamentally affected the legal basis of supranationalism. All that followed was a modification of individual elements of the system and the use of greater caution in its further expansion. Consequently, the ECJ protected the European Parliament's participatory rights in the legislative process[21]. The transposition of secondary Community law was supported through the requirement of conformity in the interpretation of directives and through the promotion of individual rights to compensation *vis-à-vis* a Member State in case of non-implementation of directives. In contrast, a 'horizontal' direct effect of non-implementation has been refused[22].

All ECJ statements on the quality and the content of Community law have been based on strictly juridical operations. Nowhere do we find explications of methodological premises or theoretical deliberations as to the legitimacy of

18. Stein 1981; Weiler 1991, 2413; Pernice 1993, 449.

19. Stein 1981, 25.

20. Beutler, Bieber, Pipkorn and Streil 1993, 98; Weiler 1993.

21. Case C-70/88 *Parliament v Council* [1990] ECR I-2041; case C-65/90 *Parliament v Council* [1992] ECR I-4625, also case 138/79 *Roquette Frères* [1980] ECR 3333.

22. Case C 91/92 Dori [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 498.

Europe's 'constitutional charter'. How stable can such a constitution that presents itself as a purely legal product of law be?

## 2. The EC System as an Association of States (*Staatenverbund*)

There are sound reasons for the Court's choice of a strictly juridical line of argumentation. Certainly, the distance between legal terminology and political arenas has facilitated consensus-building on the European level as well as the integration of domestic legal actors into the Community system. But the significance of the law which has thus developed has an impact which reverberates beyond its own internal structures. Its meaning must be communicated to non-participants and ought to remain explicable in such a way that it can stand up to questioning from many affected quarters. There have been numerous indications of such a crisis of acceptance since the signing of the Single European Act in 1987 and the subsequent rapid expansion of European law. Yet it was to be the German Constitutional Court (*BVerfG*) that would forcefully articulate this widely discernable scepticism. The determination with which the *BVerfG* revoked basic elements of the *acquis communitaire* forces the orthodoxy of European law to explain and justify itself. On the other hand, whether the *BVerfG's* type of criticism can have constructive results is a different question.

### *a) 'Requalifications'*

The German Court's statements on the gestalt of the European Union and Community are legally conspicuous warning signals. The normally commonly used term 'Community' was avoided by the Court. Instead the Union is declared to be an "association of democratic states" which, to be precise, is not a state-like entity[23]. The topos 'state association' was recommended by the rapporteur of the 2nd senate of the Court, Paul Kirchhof, to denote an organizational form between confederation and loss of statehood of the Member States. The *BVerfG*

23. Bundesverfassungsgericht, Judgement of 12 Oct. 1993, 2 BvR 2134/92 and 2 BvR 2159/92 (1994) 89 *Entscheidungen des Bundesverfassungsgerichts* 155-213 at paras. C 1, C II 1a, C II 2 b1 and C II 3 d.

explicitly refrained from presenting this new form as a final legal description[24]. But it did not hesitate to operationalize the meaning of its terminology in various respects.

(1) Supremacy: A key test of the 'association' terminology is its 'application' to the relationship between European and national law. In the previously dominant understanding, this relationship is described by the term 'supremacy'. Which bears a substantive and an institutional dimension. Substantively, the primacy of European *vis-à-vis* national law is at stake, but by the same token the question remains as to what extent European law – precisely because of its quality of law – restricts the freedom of political action of the Member States and grants individual citizens subjective and enforceable rights. From an institutional point of view, supremacy describes the direct effects of European primary and secondary law. Last but not least, supremacy implies the ECJ's competence to rule on jurisdictional conflicts between the Union and the Member States.

In its Maastricht judgement, the *BVerfG* departed in each of these dimensions from the conventionally dominant understanding. The most revealing passage is found in the context of the Court's statement on majority decisions, which the Court accepts in principle as a functional necessity of integration. But here the Court adds: "Yet the majority principle is limited – through the requirement for mutual respect – by the constitutional principles and fundamental interests of the Member States."[25] With the requirement of mutual respect, the Court elaborates on its own understanding of the term 'community of law'[26], and thus limits the validity of European law through national law. The reference to "fundamental interests of the Member States" goes beyond the Member States' positive right of unilateral action recognized by European law, for instance, in Article 100a (4) of the EC Treaty. Thus the Court questions the juridification of the relations between Community and Member States. Decisions as to which interests are of 'fundamental interest' for Germany can and should apparently only be determined by Germany itself.

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24. Kirchhof 1992, 859.

25. Para. C II a.

26. Para. C II 2 b d2(2).

These substantial limitations of the supremacy of European law led to restrictions on the institutional role of the ECJ as well as on the binding nature of European rules for national authorities. This has been frequently noted in comments on the judgement[27]: The *BVerfG* does not view itself as a lower tier in a European judicial hierarchy, but prefers to define its link to the ECJ as a 'cooperative relationship'. In particular, this wording refers to the Court's mandatory protection of human rights under the Basic Law[28]. Equally, the Court reserves for itself a specific, not transferable right to adjudicate on the assignment of competences. Should the Community misjudge its power to extend its competences unilaterally when, in fact, a Treaty revision is called for, then this process will not have a binding effect for Germany[29].

The *BVerfG's* refusal to recognize the ECJ's right to delimit the competences of the Community touches on a precarious element in the architecture of European law[30]. The difficulty of appreciating these limits is contained in the rules governing the transfer of competences themselves. On the one hand, these are described substantially and are therefore explicable as a transfer of enumerated powers[31]. On the other hand, in Article 100 EEC Treaty the powers of legal harmonization are simply described 'functionally', by way of the goal of "creating a functioning Common Market". Beyond this, Article 235 simply states that, if Community action is required in an area not envisaged by the Treaty, the Council may decide unanimously on a proposal from the Commission after consulting the European Parliament on suitable measures. Until 1987, the willingness of the ECJ to accept law-making powers that were justified merely through reference to their objective – and thus to defend Community activity in the fields of environmental and consumer protection – was supported by the agreement of all Member States. However, with the introduction of qualified majority voting (Article 100a) for the measures required for the realization of the Single Market and the extension of the majority rule in

27. Tomuschat 1993, 492.

28. Cf. 7 and para. B 2 b.

29. Para. C II 3 b; cf. Zuleeg 1994, 3.

30. Cf. Weiler 1991, 2403-2483.

31. Article 3 and 4 EEC Treaty, confirmed through Article E EU Treaty, Article 3b I 4 EC Treaty.

the Maastricht Treaty, this barrier against unwanted enlargement of Community competences has fallen. The introduction of the principle of subsidiarity in Article 3b does not offer any clear direction in this respect since the relevant criteria for deciding which level is 'better' able to perform a given function – cannot be defined by legal concepts[32].

With each transfer of competence to the European level, the nation-state's capacity for political action erodes further. But this surrender of competences also reflects an increased capacity to act where unilateral 'national' action has lost his feasibility. The dispute about the limits of EC competences is the legal expression of this balancing act. The *BVerfG's* reservations about a purely functional orientation in this process of extension of competences is as understandable as the scepticism about the subsidiarity principle. The *BVerfG* searches for a way out of this by trying to rehabilitate the sovereignty of the nation-state. The German ratification law is to maintain and limit the transfer of sovereign rights, and it is the right and duty of the *BVerfG* to supervise the observance of this law and therefore control integration policy[33].

### *b) Legitimation*

Reservations about the supremacy principle and the transfer of competences delineate the theorem of the 'association of states'. But they only become comprehensible in the context in which they are situated in the *BVerfG's* reasoning. This context constitutes the 'trans-disciplinary' core of the judgement. Three points of reference can be distinguished:

(1) *Democracy*. The *BVerfG* found an entry-point for a substantial examination of the Maastricht Treaty through its reading of Basic Law Article 38, which it interprets as guaranteeing "the subjective right to participate in the election of the German parliament and thereby to cooperate in the legitimation of state power by the people at a federal level, and to influence the implementation thereof"[34]. This interpretation of electoral rights as a "claim to the existence of

32. Dehousse 1994, 107.

33. Para. C I 2 a and 3.

34. Para. B 1 a.

a democratically constituted statehood"[35] is easily transformed into conservation of the form of the nation-state. From this, one may draw protective rights against the recognition and implementation of 'foreign' not domestically legitimated sovereign acts. But how is this conception reconcilable with the openness to integration as provided for by Article 24 Basic Law? Yet the subject-matter of this law also requires precise definition. Is the capacity of constitutional states to provide for social responsibility in the economy a democratic right? Are there protective rights against the social consequences stemming from foreign sovereign acts?

(2) *Integration.* Even before the Maastricht Treaty, the reliance on the 'integration lever'[36] of Article 24 Basic Law to transfer sovereign rights had been the cause of some concern.[37] What barriers to integration do the principles and rules of Article 79 (3) – declared as irrevocable – pose to integration? The *BVerfG's* statement on the collision between the openness as well as the limits to integration contained in German constitutional law derives from its understanding of the principle of democracy. This principle requires that the execution of sovereign rights must derive from "the people of the State" ("*Staatsvolk*")[38]. This did not exclude membership in a "community of states authorized to issue sovereign acts", but it did mean that the authority of the Community remained limited and that the body representing the German *Staatsvolk* was left with "sufficient powers of substantial political weight"[39]. "If the peoples of the individual States (as is true at present) convey democratic legitimation via their national parliaments, then limits are imposed, by the principle of democracy, on the extension of the EC's functions and powers. State power in each of the states emanates from the people of that State. The States require sufficient areas of significant responsibility of their own, areas in which the *Staatsvolk* concerned may develop and express itself within a process of forming political will which it legitimizes and controls".[40]

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35. Ipsen 1994, 2.

36. Ipsen 1972, 58.

37. Schilling 1990.

38. Para. C I 2 before a.

39. Para. C II 3.

40. Para. C I 2 b b2.

The 'association of states' theorem is thus to be understood as a normatively framed analysis which demonstrates and limits the evolutionary possibilities of the European political system. With this limitation, the *BVerfG* wants to balance the principle of democracy with the integrative openness of the Basic Law. The balancing condition is not written in stone, yet it is conceived in such a way that it must act as an impediment to growth. This is due to the linkage of political democracy to the organizational form of nation-states.

(3) '*Staatsvolk*': *Herder v. Kant*[41]. Yet the pertinent statements of the *BVerfG* are difficult to decode as the judgement indeed contain passages that are open to further development of the EC's political system. The link between democracy and the nation-state, on the other hand, is constructed in such a way that a democratic supranationality becomes inconceivable. Both constructions relate to the 'materialization' of the principle of democracy, which names its pre-legal prerequisites and at the same time treats them as inalienable legal principles[42]. Democratic legitimation of state power is constituted through the provision of political discourses ("an ongoing free interaction of social forces, interests and ideas")[43]. The EC system does not fulfil this requirement. But at least it is still conceivable that at some stage, once the process of creating a 'European public opinion' has advanced the political objectives of the European institutions will not have to be conveyed within the nations. The *BVerfG* creates a genuine legal barrier only by defining the democracy principle as 'popular democracy'[44], and thereby assigning it a meaning that is principally not transferable to the European construction. The peoples of the states should "develop and express" what concerns them, "on a relatively homogeneous basis – spiritually, socially and politically"[45]. Hermann Heller, to whom the Court refers here, had in his time demanded a "certain degree of social homogeneity" as precondition for the self-

41. On the following cf. the analysis of Weiler 1995. 'Herder v. Kant' is a more benevolent title than 'ethnos v demos' but it addresses the same problematic; my additional concerns with the *BVerfG's* judgement relate to its treatment of economic integration (cf. infra III).

42. Para. CI 2 b b1.

43. Para. C I 2 b b1.

44. Bryde 1994.

45. Para. C I 2 b b2.

assertion of the Weimar Republic's parliamentary system[46]. The *BVerfG's* appeal to homogeneity is not prompted by a crisis comparable to that of the Weimar Republic, and thus inspires different connotations. The capacity of the European nation-states for economic and social problem-solving is more fundamentally eroded – and their commitment to peace within the Community incomparably stronger – than was conceivable in Heller's time. The rules of the Treaty, most notably the anti-national its prohibition of Article 6 and the anti-protectionist stipulation of Article 30, have had an impact on both aspects of this process[47]. To be sure, the *BVerfG* has not failed to note that universalistic legal principles and the Europeanization of external trade policy have and should limit state sovereignity. The problem with its theorem of the association of 'relatively homogeneous' states remains that it conceives the constitutional state only retrospectively and only as a nation-state that cannot be integrated with legal instruments. As with all guiding principles of EC law, this theorem presents an amalgamation of empirical observations, abstract theoretical concepts and normative premises linking law and politics. The thesis that the European construction – now and in the foreseeable future – comprises an association of peoples organized in states is a legal-conceptual reconstruction which limits the expansion of supranational competences and constitutes a constitutional requirement to defend national legal traditions by unilaterally defining national interests.

We will have to explore in greater depth one important dimension of the controversy, namely the constitutional importance of economic integration. At present, however, one interim conclusion should be noted. The legal dispute between the EJC and the *BVerfG* concerns the deep structures of European law and German constitutional law. The 'association of states' concept, which the *BVerfG* uses in order to give legal form to the European project, is of-one-sided origin and direction in that it measures the Federal Republic's capacity to integrate simply in terms of its own constitutional provisions and its essential national interests. This view is in conflict with the supranational nature of the ECJ's 'community of law', which does not discriminate among constitutional states. Supranational and national law each have their own legitimacy: How is the law to mediate between them? Any search for a response to this question

46. Heller 1928, 427; an interpretation in Böckenförde 1987, 348 and Bryde 1994, 311.

47. Cf. Weiler 1994a.

should start by reflecting upon the weaknesses of the competing positions. The *BVerfG's* anchoring of the demos in the ethnos has the consequence of foreclosing the law against the potential benefits of European integration. The ECJ's supranationalism fails to satisfactorily explain the constraints that European law imposes on the political autonomy of constitutional states. The common weakness of both conceptions seems to be their incapability of coping with the dynamics of the integration process: on the one hand, this process erodes the competences of constitutional states and, on the other hand, it has not yet generated a European polity[48]. The focus on economic integration in the next section proceeds from the assumption that the debate on the future European polity will have to shift its attention to the constitutional dimension of the Europeanization of national economies if it is to provide 'convincing' answers to the dynamics of the integration process and the concern for the preservation of democratic structures.

## III. Europeanization of Economic Law

The 1957 EEC Treaty initiated the process of European integration by opening up the borders between states. In this context, the project of economic integration and the realization of a 'Common Market' certainly constituted a political programme. Yet its repercussions on the domestic conditions and the political sovereignty of the European nation-states remained undefined. Meanwhile, the ambivalent results of the eroding economic management potential of nation-states are becoming politically apparent and occupy central space in the discussion, both in the political science and legal fields, on the European constitution. This, if nothing else, requires an analysis of the role of law in the process of European integration to examine at the significance, in particular, of economic law. Yet again thematical limitations and a structuring of the argument are necessary from the outset. The following initial discussion of the *BVerfG's* statements on the constitutional value of economic integration should complete the critique of the judgement (*infra* 1). This section will also serve as an alternative introduction to the search for a common starting-point for a political science analysis of

48. Cf. the observations of Schwarze 1994.

European regulatory policy-making and a legal analysis of the Europeanization of economic law (*infra* 2 and 3).

## 1. The European Economy and the National State

In the constitutional critique of the Maastricht Treaty, it was repeatedly asserted that the Federal Republic would lose its quality as a State and become part of a European federation. This thesis was based not only on the loss of national monetary sovereignty, but also on the transfer of further regulatory competences to the EC[49]. The plaintiffs' arguments regarding the effects that the loss of economic regulatory powers must have on the constitutional state's ability to shape living conditions for its citizens did not impress the *BVerfG*. Its response was simple: European state-building does not occur if and because those European competences, which have actually been transferred to the Community, are primarily and only of economic significance.

Much more thorough was the *BVerfG* in its treatment of the agreements on monetary union. According to the overall conception of its argument, the *BVerfG* also had to examine also in this respect whether the projected European monetary system was in line with the German Constitution. Yet the Basic Law did not explicitly determine German monetary policy. Article 88 merely envisaged the creation of a central bank, the independence of which was later guaranteed in the Federal Bank Law of 1957. Since then the constitutional debate has concerned the transfer of a discretion to a politically independent institution[50]. The *BVerfG* sums up the discussion only very briefly: the "modification of the democracy principle", with which monetary policy is being protected against short-term interests and pressures, has been proven to be successful and seems "acceptable"[51].

The Bundesbank's 'external relations' were reorganized by the new Article 88 (2), inserted into the Federal Bank Law by the Law of 21 December 1992.

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49. Cf. Murswieck 1993, 187; Steindorff 1992, 13.

50. Cf. Ladeur 1993.

51. Para. C II 3 a.

It stipulates that the Bundesbank's tasks may be transferred to a European Central Bank that is "independent and which serves the primary objective of price stability". Tensions between supranational and domestic law result firstly from the fact that the institutionalization of monetary policy is more insulated against democratically legitimized decision processes in the Treaty on the EMS than it is in the Basic Law. This increase in the autonomy of monetary policy-making is not addressed by the *BVerfG*. Any independent European monetary policy also lacks the backing that develops with decades of social and scientific consensus – the 'pre-legal preconditions', therefore, which formed the basis in the Federal Republic for the institutional independence of the Bundesbank and the orientation of its monetary policy. In contrast to its approach to the democratic deficit, the Court refrained from specifying the conditions for the workability of monetary union. Instead, it declared the relationship between monetary and economic union contingent and politically determinable[52]. Precisely in this way politics has indirectly become involved: the federal parliament has the right to examine, before entering the third stage of monetary union, the fulfilment of the Treaty criteria on price stability and convergence – and exercise of the Bundestag's right to supervision is bound to the agreed-upon objectives[53]. Furthermore, if monetary union "could not develop continuously in line with the agreed stability mandate", then the Treaty conception assumed by the German ratification law would be abandoned[54].

Economic integration as a non-state and unpolitical process and monetary union as a project condemned to succeed and only legitimized by success – this argumentation is, at the least, in need of further interpretation: Did the court agree with the ordo- and neo-liberal theory of the economic constitution, which always conceptualized supranational economic law as being independent of and unaffected by politics?[55] Does the *BVerfG* confirm the view of the Community as an 'association of functional integration' which remains limited to questions of 'technical realization' and is therefore sufficiently legitimated through

52. Para. C II 2 f.

53. Para. C II 2 d d2 (3).

54. Para. C II 2 e.

55. Cf. Behrens 1994; Mestmäcker 1994.

expertise?[56] Does the Court's treatment of economic integration as 'low politics' relate to the respective views in functional integration theories? Or does it confirm political science diagnoses which state that the EC system conserves the nation-state precisely by the way in which it takes away its capacity for socio-economic decision-making?[57]

## 2. Economic Law and Market Integration

All of these questions were not raised by the *BVerfG*. Yet confronting them is unavoidable if the Court's assertions are to be judged and the difficulties of the law in the process of integration are to be understood. The *BVerfG's* careless treatment of the transfer of competences of economic regulation is – in view of the regulatory density and functions of domestic economic law – difficult to comprehend. Even if one, by way of a functional delimitation of 'economic' law, simply looked at those matters intended to institutionalize markets and provide for their functioning, there would be no end in sight. Apart from private economic legislation – corporation law, property law, competition law and merger regulation – general private law, on the one hand, and the law of public economic administration, on the other, would have to be considered. In addition, one would also need to examine at the whole of product safety regulation which covers the marketing of any product and thus both constitutes and regulates markets. Finally, in responding to the question of what else concerns 'the economy', one encounters labour and social law, environmental law and safety at work regulation.

Thus, more than marginal matters are at stake when the European Union assumes 'competences and tasks' in the construction of an economic community. By contrast, we are faced with a project with highly complex regulatory techniques and extremely charged normative politics. Adapting economic law to the requirements of market integration therefore comes up against a complex web of active rules and common practices. That is why integration policy can only proceed selectively – and it must have a two-sided effect: the Europeanization of economic regulation with the objective of integration is, from

56. Ipsen 1972, 176 and *idem* 1993.

57. Streeck, W. 1995a, 1995b.

the perspective of domestic legal orders, an intervention with disintegrative consequences[58]. The more integration proceeds through market-constitutive regulation, the more these repercussions will become apparent. Market integration does affect the constitutional state more fundamentally than appears from the *BVerfG's* judgement. The *BVerfG's* reasoning presupposes either a purely formal understanding of sovereignty which ousts all the modern regulatory functions of the welfare state or, what amounts to the same result, a legally binding commitment of supranationalism to the concept of a minimal state[59].

## 3. Regulatory Patterns of Europeanized Economic Regulation

For a long time the Community only very cautiously advanced the construction of a Common Market. Comparing the rules and decision procedures of the EEC Treaty to the substance and the law-making procedures in national economic law, this seems all but surprising. Certainly the EEC Treaty was meant to guarantee the four basic freedoms: the mobility of goods, services, capital and labour. But even though the ECJ deduced applicable civil rights and legal rules from these stipulations, European law hardly interfered with the networks of economic regulation. The Treaty's guarantee of the freedom of trade in goods was limited by all the objectives named in Article 36. Those who wanted to exercise the freedom of services were obliged to respect professional regulations and other rules concerning the quality of their performance. The title on the mobility of capital did in any case respect the sensibilities of monetary policy; this freedom was not 'directly applicable'.[60] Institutional limitations played their part. The Community could, within the limits of its enumerated competences, pass directives in accordance with Article 100 or it could act on the basis of Article 235: the unanimity principle meant that each Member State remained in a position to defend its regulatory system or its economic interests using the veto. European competition policy continued a piecemeal existence, even though

58. Everson 1993; Joerges 1994a, 32-34.

59. *Wissenschaftlicher Beirat beim Bundesministerium* (1994), 11 *et seq.*

60. Case 203/80 Casati [1981] ECR 2595.

its rules were directly applicable and were implemented by the Commission itself – *vis-à-vis* protectionist national regulatory patterns it proved to be helpless.

### *a) Single Market Programme*

This might explain why the continuous growth of European economic regulation was carefully documented, but – apart from the ordo- or neoliberal legal theory – was rarely seen as a constitutionally relevant process. Only as it became possible in the 1980s to overcome the blockages of the integration process and to initiate a conceptually renewed internal market programme did the perception of 'Europe' change. The internal market initiative was presented as a project to enhance the competitiveness of the European economy through an efficiency-oriented deregulation strategy. The legislative core of this strategy was the retreat from the 'traditional' policy of harmonization. In principle, the doctrine of mutual recognition of essential regulation was supposed to make the passing of detailed ('positive') Community regulations unnecessary. Essential regulatory objectives were to be brought into the form of easier to agree upon general principles; the further concretizations of such essential requirements were to be removed from the European political system and their implementation transferred to the Commission, who would cooperate with non-governmental organizations and rely on the European committee system. The move to – qualified – majority voting for all measures relating to the internal market (Article 100a) was the most visible institutional innovation.

This transformation of the EC system not only stimulated political practice, but also caused commotions in the legal and social sciences. The move to majority voting affected precisely that legal-political balance between legal supranationalism and intermediation of national interests that Joseph Weiler had identified as the hidden stability condition of the EC system[61]. Did supranational law – as did Münchhausen in the swamp – pull itself away from its ties to the nation-state? In fact the new legislative policy turned out to be the 'implementation' of a principle that the ECJ had previously developed from primary Community law. A German barrier to the marketing of French liquor had been declared incompatible with the principle of the free movement of goods

61. Weiler 1981, 267 and 1991, 2423.

in the *Cassis-de-Dijon* judgement. The Federal Government's argument in that case that the higher alcohol content required by German law was to protect German citizens against alcoholism was refuted. This judgement was convincing. But it is also true that the ECJ had quite cautiously formulated the principle of mutual recognition and its competence regarding the control of national legislation. It remained for the Commission to read into the ECJ decision a new guiding principle of harmonization policy and to expand on this in the White Paper on the internal market[62]. Yet this did not suffice either. The internal market initiative received its binding legal form only in the 1987 Single European Act that was negotiated by the national governments themselves.

Did this herald the end of 'integration through law'? Is the broad acceptance of the internal market initiative due to a programmatic orientation that followed an efficiency and deregulation rhetoric which steered clear of controversial redistributive and other social welfare policy objectives?[63] Did the design of a new programme and the negotiating skills of the Commission President bring together European business interests, thus utilizing an ultimately neofunctional logic.[64] Or should the change in the integration process be attributed to the interests and power of the three most important Member States?[65] Political science analyses of the conditions and consequences of the internal market programme always – at least implicitly – also contain judgements about the functions of law. It would certainly be rewarding to trace in more detail these perceptions (and misperceptions). In this context, the thesis must suffice that, particularly in the implementation process of the internal market programme, the law has maintained its role as an independent and resistant factor. Evidence for this thesis is found in the results – equally surprising for both – critics and supporters of the internal market programme of its implementation. Internal market policies have not removed the 'juridification' of the Western European economies. They have created a large number of

62. Cf. the Commission of the EC, 'Communication on the implications of the ECJ judgment of 20 February 1979 in case 120/78 (*'Cassis-de- Dijon'*)', OJ 1980 C 256, 2 and the Commission's White Paper to the European Council on "Completion of the Internal Market", COM (85) 310 final of 14 June 1985; Alter and Meunier-Aitsahalia, 1994, 555.

63. Majone 1995.

64. Sandtholtz and Zysman 1989.

65. Moravcsik 1991.

arrangements which demonstrate notable patterns: a tendency towards high-level regulation; the development of new forms of cooperation; a renaissance of regulatory functions for the nation-state[66].

(1) Market integration and legislative activism. In each case in which Community law addresses the institutional framework and the legal fine-tuning of markets, this takes place in an extraordinary manner. The most striking examples are to be found in product regulations which aim at consumer and health protection, but which also involve some concerns of labour and environmental protection. In this context Article 100a (3) EC Treaty and the right 'to go it alone' given to those Member States willing to regulate[67] entail that an opening of markets can only be achieved at the price of modernizing and improving the quality of respective regulation[68]. But it also becomes clear in the economic regulation of the markets for goods and services that a single market requires the establishment of measures of legal protection, such as a partial harmonization of supervisory rights and arrangements for the coordination of practice of national supervisory authorities[69]. The harmonization of private law demonstrates that European law cumulates and improves protective measures found in domestic legal systems whenever the functioning of markets actually demands genuine legal harmonization[70]. Such legislative policy cannot identify itself as simply functional. It remains tied to the legal systems of the Member States and must respect the standards of justice which have won recognition in them.

(2) Supremacy of European law and horizontal cooperation. Since the EC does not itself wield the resources to generate standards and since it also lacks the administrative competence to enforce legally binding decisions in the Member States, it must seek to counterbalance these deficits. It is for this reason that the Commission cooperates with European standardization organizations in the definition of product safety regulation and supports the coordination of national

66. Cf. more extensively in Joerges 1991a, 234 and *idem* 1994, 41-51.

67. Article 100a para. 4, Article 118. para.3, Article 130t EC Treaty.

68. Joerges 1994b.

69. Reich 1992, 869.

70. Joerges, and Brüggemeier 1993, 252.

certification authorities. Furthermore, the Community operates through a dense network of committees with the participation of administrative experts from the Member States as well as independent scientists and representatives of economic and social interest organizations. This opening is supported by moves towards a procedural juridification which is based on demands for transparency, promotes the consideration of scientific knowledge, gives in to claims for participation and extends the possibilities for judicial protection[71]. The dependence of the Community on national administration therefore demands some form of horizontal coordination. The intensity of judicial control over administrative acts and over the European 'fourth branch of government' will increase. In this way the practical weakness of 'comitology' becomes its (potentially) normative strength: without the law cooperative solutions to regulatory tasks will not be successfully mastered, and with the law they can only succeed in the long term if they develop a legal constitution corresponding to the conflict potential of regulatory politics.

The dependence of the Community on the harmonization of private economic law through directives is even stronger. Following their adoption and transposition into domestic law directives are primarily a matter for national courts. Through the procedures of Article 177, the ECJ comes to deal with Community legislation only after national courts have been involved. It would undermine its own effectiveness if, in its interpretations of the meaning and content of Community, it was to go beyond the social ties of private and economic law – ties which national courts have established within their legal systems[72].

(3) Market integration and regulatory autonomy of the Member States. The validity claims of so-called secondary Community law – its primacy and its preemptive effect – are not only limited by primary law which gives Member States the right to 'go it alone', but are typically also circumscribed in the directives themselves and, finally, are only applied cautiously by the ECJ[73].

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71. Cf. case C-212/91 Angelopharm [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 213, more generally European Parliament, Bericht des Institutionellen Ausschusses über die Transparenz in der Gemeinschaft of 21 March 1994, PE 207.463/final.

72. Joerges and Brüggemeier 1993, 281; Joerges 1995.

73. Furrer 1994, 43, 165.

Neither does the ECJ use its supervisory powers under primary law simply with a view to enforcing deregulatory programmes or to moving towards a European neo-liberal economic constitution.

It is true that ECJ jurisdiction on Article 30 EC Treaty in the-follow-up to the *Cassis-de-Dijon* case evaluated national regulation according to its compatibility with the functional requirements of a market economy[74]. But it is also true that convincing regulatory interests motivated by consumer, social or environmental protection were addressed very cautiously[75] and that the ECJ has shown particular reserve when addressing issues that concern the national *ordre public*, i.e. subjects that open up the debate over political-ethical traditions[76]. In the latter two groups of cases, the ECJ has now initiated an explicit withdrawal of its supervisory claims and has, at the same time, formalized this self-correction: only product regulation is now to fall under the *Cassis* terms of reference, while all 'modalities of purchase' may be regulated by Member States independently[77].

In addition to Article 30 EC Treaty, the ECJ has used Articles 85 and 5 EC Treaty to gain access to state measures endorsing anti-competitive practices[78]. More precisely, the German *Monopolkommission* has sought to read into that jurisprudence a move towards a general control of state measures[79]. Yet, once again in 1993, the ECJ refused the request for a substantial examination of regulatory arrangements between state authorities and the "economic circles concerned". Instead, a kind of European 'act of state' doctrine was announced: EC law merely checks whether Member States take formal

74. Cf. case C-362/88 GB-INNO-BM [1988] ECR I-667 and case C-126/91 Yves Rocher [1993] ECR 3187.

75. Wils 1993.

76. Phelan 1992.

77. Cases 267 and 268/91 Keck and Mithouard [1993] *Europäische Zeitschrift für Wirtschaftsrecht* 770, latest also cases C-69 and 258/ 93 Punto Casa [1994] 5 *Europäische Zeitschrift für Wirtschafsrecht* 434.

78. Particularly case 136/86 *BNIC v Aubert* [1987] ECR 4789 and case 276/86 Van Eycke [1989] ECR I-4789.

79. Monopolkommission 1990, 401.

responsibility for such regulatory techniques; it does not examine their regulatory rationale[80].

This renewed self-restraint should not be interpreted as the renunciation of regulatory competence[81], nor can it be explained simply as the result of the Court's workload. The Court always had to react to the tension between the validity claims of Community law geared towards the realization of trade liberalization on the one hand, and the regulatory interests of the Member States on the other hand. The latest judgements respond negatively that these questions may not be decided according to a higher regulatory rationality of Community; they may be understood as imposing demands for justifications at either level, the European as well as the national, and may thus be interpreted as a search for compatibility[82].

### *b) Rationalization Processes*

All of these developments have also been observed, explained and interpreted by social scientists. This is true, first of all, for the legislative activism of the Community and its emphasis on market-related economic law and product-related regulation. This is indeed a process of 'market-building'[83] and the stringent level of regulation, particularly of products – which also concerns safety at work via machine-safety – corresponds to the conditions and configurations of interests in the politics of market-building[84].

The move to horizontal forms of cooperation in the production and implementation of Europeans standards can be equally well explained. In the related growth of a comitology directed by the bureaucracy and supported by

80. Cf. case C-185/91 *Bundesanstalt für den Güterverkehr v. Reiff* [1993] 4 *Europäische Zeitschrift für Wirtschaftsrecht* 769 and as a recent example cases C-401 and 402/92 t'Heukske [1994] 5 *Europäische Zeitschrift für Wirtschaftsrecht* 435.

81. Reich 1994.

82. Cf. Joerges 1994a.

83. Streeck 1995b.

84. Scharpf 1994.

experts, Bach[85] has identified – very much in line with Ipsen[86] – the emergence of a new type of regime to which he attributes a technical-bureaucratic character removed from the domestic context. More open to the legitimacy problems of this regulatory practice is Majone's[87] perspective of a European 'fourth branch of government'. Majone[88] attributes to the whole range of Community activities in social regulation a role of politics that compensates market failure and deficits of 'soft' international cooperation. But he pleads not only for respective restrictions, but also for institutional innovations which can ensure some form of political accountability of this 'fourth branch of government'[89].

Wishful thinking? Are lawyers merely observing differently or is what they see in fact marginal? It depends whether European legislation is really exposed to demands for justification which cannot be dissolved by functional arguments. It depends on how European comitology reacts to its legitimacy problems. And it depends not the least on whether European and national courts are indeed willing to pass the survival of normative ties of the economy on to the processes of regulatory competition or whether they search for legal principles ensuring the coexistence of supranational linkages with national regulatory interests.

Yet, even if all this proves to be possible, the integration process will still have disintegrative implications. Developing a European equivalent of the degree of legal commitment in the economy which constitutional states have achieved presupposes a transformation process which would replace national legal traditions by European principles and rules. The development of European basic rights toghether with the detection of common European constitutional principles[90] and common private law traditions are necessary but not sufficient elements for this project. The Europeanization of economic law is driven by the impetus for legal change coming from the logic of market integration. It cannot

85. Bach 1993, 227.

86. Ipsen 1993.

87. Majone 1994a, 23.

88. Majone 1993a, 156 and *idem* 1993b.

89. Majone 1994b.

90. Häberle 1991.

be content with the codification of legal norms which are in any case common tradition, but must orient European law towards the functioning of the Common Market. In this sense market integration has to push forward a 'rationalization' of economic and private law[91]. But this does not exclude the emergence of procedural as well as substantial criteria of justice. Yet rationalized law must also remain able to recognize its limits of legitimacy. It has to differentiate between universal criteria of justice and political-ethical questions. It has to recognize, above all, limitations of its effectiveness: given the uneven conditions of economic development among the European economies and the resultant differing national preferences in the fields of labour, social or environmental law, it cannot respond constructively with the creation of a European system of fiscal equalization in order to compensate for the raising of regulatory standards[92]; it cannot simply release the more developed economies from the drive towards 'social dumping', nor prepare the ground for the formation of transnational coalitions of homogeneous social interest groups[93]. Yet the financial costs following the opening up of borders and the need to devise communitarian regulatory strategies are not, *per se*, unjust.

## Conclusion

Analysis of the *BVerfG's* Maastricht judgement has demonstrated that the judicial controversy over the qualification of the EC system as either a legal Community or a mere 'association of states' is essentially about the compatibility of the European supranational legal constitution with democracy constituted in the nation-state. Yet it was only discussion of economic integration that brought to light the difficulties of a coexistence of these two legal orders. The resort to supranational sovereign rights according to the convincing dictum of the *BVerfG* requires specific legitimation, a type of legitimation which cannot be found through the legal operations on which the ECJ has built its architecture of supranationalism. European economic integration directly affects individuals and social actors all over Europe. By granting these actors European rights, the Court

91. Joerges 1994b, 1995.

92. On the related economic reasoning Sinn 1994.

93. Streeck 1995a.

itself has paved the way for the emergence of a European civil society. By transforming its institutional structures into new forms of governance, the legal system has responded to the need for a juridification of the European economy. In the German Constitutional Court's neglect of the implications of economic integration, it sees but a helpless retraction from these challenges. These challenges are not yet adequately understood. They should concern lawyers and political scientists alike. Legal science will need to listen to economic and political science analyses and rationality concepts when it comes to the search for institutional solutions which safeguard the achievements of national constitutional states, secures the taming of the nation-state through supranational law and, finally, also provides for the social acceptability of economic integration. But political science ought also to be interested in the possibilities of the law to pre-structure intergovernmental bargaining and to tie the conflicts over economic and social consequences of market integration to principles and rules.

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