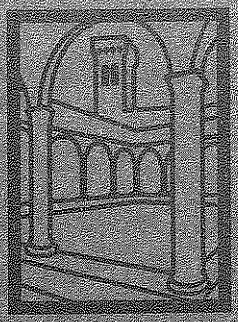

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Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market

GIANDOMENICO MAJONE

EUI Working Paper RSC No. 95/1

European University Institute, Florence

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market *

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1. Introduction

As sociologists from Simmel to Luhmann have argued, trust is a basic social mechanism for coping with system complexity. It facilitates cooperation, simplifies transactions and makes available the knowledge and experience of others. Also recent research in game theory and in industrial economics emphasizes the importance of trust, and of the reputation system on which trust is based, for sustaining cooperation in a world of self-interested individuals, and for governing contractual relations more complex than simple spot-market transactions.

The significance of mutual trust for a system as complex as the single European market could not have escaped the attention of the drafters of the founding treaties. Article 5 of the Treaty of Rome expresses the requirement of Community loyalty in the following terms:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
> They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Analogous prescriptions are contained in article 86 of the treaty establishing the European Coal and Steel Community, and in article 192 of the Euratom treaty.

Mutual trust is clearly crucial for a system which depends on the loyal cooperation of the member states, and of their administrations, for the formulation and implementation of common rules. In fact, the European Court of Justice has interpreted article 5 in a way that, going well beyond the principle of international law that pacta sunt servanda, approaches the

principle of Bundestreue or "federal comity" of German constitutional law (Due, 1992; Scharpf, 1994).

In the interpretation of the Court, article 5 gives expression to a general principle of mutual trust and cooperation not only between member states and Community institutions, but also among national governments. In the same spirit, the Commission's White Paper on the Completion of the Internal Market (Commission of the European Communities, 1985) lists mutual trust as the first element of the new approach for the mutual recognition of diplomas.

Thus, the starting point of this paper -- the strategic significance of trust in a system as open-ended and interdependent as the Community -- is hardly new. Unfortunately, the current debate on this issue tends to be legalistic, and seems to assume that trust can be elicited by preaching or imposed by judicial fiat. Still lacking are systematic analyses of the cascading effect of distrust on many problematic aspects of the integration process -- from excessive centralization and unnecessary uniformity to the paradox of over-regulation and under-implementation -- as well as concrete proposals for improving an increasingly unsatisfactory state of affairs. This paper is a first attempt to make some progress in both directions. Much more work remains to be done in preparation of the forthcoming Intergovernmental Conference on institutional reform.

2. Distrust and the paradox of centralization

If trust is so important in reducing social complexity and sustaining cooperation then its lack must have serious consequences for the evolution of a system like the European Union. In this and the two following sections I examine the implications of distrust through the prism of several issues which figure prominently in the current debate on institutional reform:

centralization, over-regulation, non-compliance, subsidiarity and mutual recognition. The general argument is that in all these cases, distrust -- toward the European institutions and among the member states themselves -- has impeded the development and/or the implementation of efficient solutions.

Let us begin with what may be called the paradox of centralization. Member states strive to preserve the greatest possible degree of sovereignty and policy discretion. This is shown, for example, by their stubborn resistance to the extension of supranational competences in the areas of foreign and security policy, taxation, and macroeconomic management, and by their refusal to give the European Commission a direct role in implementing EC policies. At the same time, however, these states have been willing to delegate important regulatory powers even in areas not mentioned by the founding treaties and for purposes not essential to the smooth functioning of the internal market.

Thus, of seven areas of significant policy development at present -- regional policy, research and technological development, consumer protection, education, culture, environment and health and safety at work -- only the latter is explicitly mentioned in the Treaty of Rome, and then only as a field where the Commission should promote close cooperation among the member states (Article 118, EEC).

Environmental policy is a striking illustration of the paradox of centralization. In the two decades from 1967 to 1987, when the Single European Act (SEA) finally recognized the competence of the Community to legislate in this area, well over 100 directives, regulations and decisions were introduced by the Commission and approved by the Council. Budgetary crises, intergovernmental dissensions, and the Europessimism of the 1970s and early 1980s hardly affected the rate of growth of Community

environmental regulation. From the single directive on "the approximation of laws, regulations, and administrative provisions relating to the classification, packaging and labelling of dangerous substances" of 1967 (Directive 67/548/EEC) we pass to 10 directives/decisions in 1975, 13 in 1980, 20 in 1982, 23 in 1984, 24 in 1985, and 17 just in the six months preceding the passage of the SEA (Johnson and Corcelle, 1987). Today European environmental regulation includes more than 200 pieces of legislation. In many member states the corpus of environmental law of Community origin outweighs that of purely domestic origin (House of Lords, 1992).

Moreover, while the first directives were for the most part concerned with product regulation, and hence could be justified by the need to prevent that national standards would create non-tariff barriers to the free movement of goods, later directives increasingly stressed process regulation (emission and ambient quality standards, regulation of waste disposal and of land use, protection of flora and fauna, environmental impact assessment), aiming at environmental rather than free-trade objectives.

Why did the member states accept such a massive transfer of regulatory powers to the supranational level? After all, in the Community system the Council of Ministers, which represents the national interests, must approve all Commission proposals. In order to control transboundary pollution, countries have to cooperate, of course, but international cooperation can take many forms. As Coase (1960) showed, problems caused by negative externalities could be solved efficiently through decentralized arrangements. If national regulators could credibly commit themselves to take into account the international repercussions of their decisions and to implement in good faith intergovernmental agreements, international market failures could be managed in a decentralized fashion, without delegating regulatory powers to a supranational authority. An international secretariat would suffice to facilitate

the exchange of information and to reduce the costs of organizing cooperation.

The problem with international regulatory agreements is that it is often difficult for the parties concerned to know whether or not an agreement is properly kept. The main reason for this is that economic and social regulation is unavoidably discretionary. Because regulators lack information that only regulated firms have and because governments are reluctant, for political reasons, to impose excessive costs on industry, bargaining is an essential feature of regulatory enforcement. Regardless of what the law says, the process of regulation is not simply one where the regulators command and the regulated obey. A "market" is created in which bureaucrats and those subject to regulation bargain over the precise obligations of the latter (Peacock, 1984). Since bargaining is so pervasive, it is often difficult for an outside observer to determine whether the spirit, or only the letter, of an international agreement has been violated.

When it is difficult to observe whether the parties are making an honest effort to enforce a cooperative agreement, the agreement is not credible. Hence, many international market failures cannot, in practice, be corrected in a decentralized fashion because of problems of trust and credibility. Notice, too, that international regulatory failures may occur even in the case of purely local market failures. For example, problems of safety regulation for construction of local buildings create no transboundary externalities and thus, according to the subsidiarity principle, should be left to the local authorities. However, if safety regulations specify a particular material produced only in that locality, they may amount to a trade barrier and thus have negative external effects. In such a case, local regulation of a local market failure creates an international regulatory failure.

Similarly, local authorities have sometimes controlled air pollution by requiring extremely tall smokestacks on industrial facilities. With tall stacks, by the time the emissions descend to ground level they are usually in the next city, region or state, and so of no concern to the jurisdiction where they were produced.

These examples illustrate a dilemma of regulatory federalism which the principle of subsidiarity cannot resolve in the absence of mutual trust and a sense of comity. Local or national governments may be more attuned to individual preferences, but they are unlikely to make a clear separation between providing public goods for their citizens and engaging in policies designed to advantage the locality or the country at the expense of its neighbours. Centralization of regulatory authority at a higher level of government can correct such externalities, and possibly capture economies of scale in policy making. But its cost is the homogenization of regulation across jurisdictions that may be dissimilar with respect to underlying preferences or needs (Noll, 1990).

In sum, the paradox of centralization can be explained, in part, by the fear that national governments may use regulation to promote their own interests rather than common regulatory objectives (for a more complete analysis of the paradox see Majone, 1992). On the other hand, it should be noticed that the optimal assignment of regulatory responsibilities among different levels of governments need not coincide with existing jurisdictional boundaries. There may be significant externalities and a need for joint action between some, but not all, regions within a country or group of countries.

Hence the optimal solution may be found neither at the European nor at the national level, but at some intermediate level comprising a group of states (or regions within different states) facing the same problem. The scope of the externality would determine the membership of the group. Self-

regulating organizations encompassing several states ("regional compacts", such as the Delaware River Basin Commission) have been used in the United States since the 1960s and in some cases even earlier (Derthick, 1974). More recently, institutional arrangements encompassing American states and Canadian provinces have been created in order to control pollution in the Great Lakes region.

By pooling their financial, technical and administrative resources these consortia of states or regions are in a better position to deal satisfactorily with their regulatory problems than either by acting alone or by relying exclusively on centralized regulation which cannot be closely tailored to their specific needs. The "regional compact" model combines flexibility with economies of scale in policy formation and implementation. Its adoption on this side of the Atlantic would have far-reaching consequences for the future of European regulation. Instead of the traditional dichotomy of centralized or national regulation, with its artificial separation of rule making from enforcement, we would have a system of different, but compatible, regulatory regimes coordinated and monitored by a small regulatory body at the European level. Among the tasks of this body would be providing technical and administrative assistance, facilitating the diffusion of ideas and policy innovations, and acting as "regulator of last resort" where regional regulators failed to achieve their objectives.

Ten years ago, a major study of European environmental law and policy noted that "[i]t is striking that the Community has not yet used the concept of regionally differentiated standards as a distinct harmonization strategy" (Rehbinder and Stewart, 1985, p.221). This is still true today, even if a few environmental directives allow member states to set regionally differentiated standards in zone designated by them in accordance with Community guidelines. The model suggested here goes much beyond these

timid attempts to tailor regulation to the specific needs of different regions of Europe. However, it assumes that member states are prepared to grant their own regions the freedom to deal directly with other regions and with the European institutions. Once more we run into the problem of trust.

3. Distrust and the paradox of over-regulation and under-implementation

The Brussels authorities are accused not only of centralizing tendencies but also of producing too many, and too complicated, rules. A recent report of the French Conseil d'Etat uses expressions like "normative drift", "luxuriating legislation" and "regulatory fury". It notes that by now the Community introduces into the corpus of French law (and presumably of other national laws as well) more rules than the national authorities (Conseil d'Etat, 1992).

At the same time, it is common knowledge that many European rules are not faithfully implemented, or not implemented at all. The implementation deficit has become so serious over the years that the member states now realize that non-compliance threatens the credibility of their collective decisions. The European Council meeting at Dublin in June 1990 first gave the issue of non-compliance a high political profile in its final declaration. At the Maastricht summit, the heads of state and government stressed again the need for Community rules to be accurately transposed into national law and effectively implemented, while the Treaty on European Union contains new powers for the European Court of Justice to fine member states which fail to comply with judgements of the Court.

Despite this new awareness of the seriousness of the problem, the question raised by Joseph Weiler some years ago is still pertinent: how can there be a compliance problem given the strict control by the member states of the legislative process? (Weiler, 1988). Even more puzzling are the complaints about over-regulation since the Council, not the Commission, is

the ultimate legislator. To be sure, many factors are involved both in over-regulation (Majone, 1994) and in non-compliance (Krislov, Ehlermann and Weiler, 1986). A full analysis of these phenomena is beyond the scope of this paper; here I limit myself to arguing that distrust must be included among the explanatory variables.

In order to understand non-compliance one must keep in mind not only that member states are not enthusiastic about strict surveillance of their own markets in the interest of Union objectives, but also that their determination to implement vigorously European rules is weakened by the suspicion that other national governments may not behave in the same correct way (Vervaele, 1992). Without concrete measures to increase the level of mutual trust, therefore, the obligation of Community loyalty contained in article 5 of the Rome Treaty remains dead letter and cannot serve as a basis for a system of effective enforcement.

In the preceding section I argued that the mutual distrust of the member states is responsible, in part, for a higher level of centralization than is strictly necessary for the smooth functioning of the internal market. But member states also mistrust European institutions and this attitude has significant, if paradoxical, consequences both for the quantitative growth of Community rules and for the poor level of enforcement. The immediate consequence is that the Commission is kept on very tight rein: it is chronically understaffed; closely monitored through an intricate system of "regulatory" and "management" committees which can block its proposals and transmit the file to the Council, which can overrule the Commission; and obliged to rely almost exclusively on the national bureaucracies for the implementation of the measures it elaborates.

These drastic methods of control are only partially successful in limiting the regulatory discretion of the Commission (Majone, forthcoming)

but produce several undesirable, and probably unanticipated, consequences. Consider first the budget constraint.

By national standards, the Community budget is quite small: less than 1.3 per cent of the gross domestic product of the Union or about 4 per cent of the combined expenditures of the central governments of the member states. It is also very rigid, since compulsory expenditures represent almost 70 per cent of the budget. These limited resources are insufficient to support large-scale initiatives in areas such as industrial policy, energy, transport or research and development, not to mention social policy or macroeconomic stabilization (Majone, 1993). However, the budget constraint has only a limited impact on regulatory activities. This is because the real costs of regulation are borne by the organizations and individuals who have to comply with it. Compared to these costs, the cost of producing the rules is negligible.

The structural difference between regulatory policies and policies involving the direct expenditure of public funds is especially important for the analysis of EC policy making since not only the financial, but also the political and administrative costs of implementing European rules are borne by the national administrations rather than the Commission. Thus, the attempt to restrict the scope of supranational policies by imposing a tight budget constraint has unwittingly favoured the expansion of a mode of policy making that is largely immune to budgetary discipline. Given the constraint, regulation turned out to be the most effective way for the Commission to maximize its influence.

Moreover, by denying the Commission any significant role in implementation the member states have encouraged a tendency to focus on the quantitative growth of European legislation (so that, for example, the number of directives approved by the Council is viewed as an important indicator of success) rather than on effective compliance and actual results.

Over-regulation cannot be blamed only on the Commission, however. Many regulations and directives are introduced at the demand of individual member states, the Council, the European Parliament, the Economic and Social Committee and a variety of private and public-interest groups, rather than by autonomous initiative of the Commission. While responsiveness to such demands may increase the legitimacy of the Commission, it also contributes to the apparently unstoppable growth of EC regulation.

The consequences of uncontrolled and un-coordinated demands for EC legislation are aggravated by institutional factors. Because the Commission is a collegial body, central control over the regulatory activities of the different Directorates General (DGs) is weak. Lack of central coordination leads to serious inconsistencies across and within regulatory programmes, absence of rational procedures for setting priorities, and insufficient attention to the cost-effectiveness of individual rules. One method of limiting regulatory growth would be to set up an office with the power to oversee the entire regulatory process and to discipline the activities of the DGs by comparing the social benefits of proposed measures with the costs imposed on the European economy by the regulatory requirements.

Such an office or "regulatory clearing house" (somewhat similar to the U.S. Office of Management and Budget) should be established at the highest level of the Commission. A centralized review process would help the Commission's president screen demands for EC regulations and shape a consistent set of measures to submit to the Council and to the European Parliament.

Also the phenomenon of regulatory complexity can be usefully analyzed from the perspective of this paper. Many students of EC policy making have pointed out that Community directives usually contain many more technical details than comparable national legislation. The explanation

that such regulatory complexity is due to the technical perfectionism of the Commission lacks plausibility: the Commission, as noted above, is chronically understaffed, has no in-house research capabilities, and is largely composed of generalists, not of technical experts.

Rather, regulatory complexity is in part another manifestation of the cascading effect of mutual distrust. Doubting the commitment of other governments to seriously implement European rules, and being usually unfamiliar with different national styles of administration, national representatives often insist on spelling out mutual obligations in the greatest possible detail. On the other hand, a vague and open-ended directive not only gives a member state wide latitude for wrongful or self-interested application, but also prevents the possibility of invoking it by an individual before a national court (Weiler, 1988). Thus, regulatory complexity may also serve the objectives of the Commission by providing partial compensation for its exclusion from the implementation process.

Also the labyrinthine system of committees of national experts, created to assist the Commission and at the same time to limit its discretion, favours regulatory complexity by introducing a strong technical bias into the Community regulatory process. In many cases, national experts have significantly increased the quality of Commission proposals (Weiler, 1988; Dehousse et al., 1992; Winter, 1993). In fact, what is known about the modus operandi of these committees suggests that debates there follow substantive rather than national lines. A good deal of copinage technocratique develops between Commission officials and national experts interested in problem solving rather than in defending national positions (Eichener, 1992). By the time a Commission proposal reaches the Council of Ministers all the technical details will have been worked out -- but little or no attention will have been paid to issues of cost-effectiveness or practical implementability.

This technical bias, combined with the reluctance of the Council to engage in difficult and time-consuming policy control, and with the lack of central oversight at the Commission level, may be another factor contributing to regulatory complexity.

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

4. Mutual trust and mutual recognition

The new approach to harmonization and technical regulation outlined in the Commission White Paper on Completing the Internal Market (COM (85) 310 final) represents the most important attempt so far to reduce both over-regulation and regulatory complexity at the European level. As is known, the main elements of the new approach are the mutual recognition of national regulations and standards, and the delegation of quasi-legislative powers to European standardization bodies. Here I focus on the first element, and more specifically on the crucial importance of mutual trust for the success of the strategy of mutual recognition.

Since the free movement of workers is an essential condition for a common market, the idea of the mutual recognition of "diplomas, certificates and other evidence of formal qualifications" can be found already in article 57 of the Treaty of Rome. The idea was in fact implemented fairly early in certain fields where national legislations were already similar, so that no complex harmonization was needed: in 1976 for medical doctors, in 1977 for nurses, in 1978 for dentists and veterinary surgeons, in 1983 for midwives and in 1985 for pharmacists. Little progress, however, could be made in other fields, notably law, architecture, engineering and the pharmaceutical profession, where national practices differed widely. Also, experience showed that the large measure of discretion retained by the member states often impeded the harmonization process. The national governments only implemented the minimum requirements of the directives, retaining the power to decide which diplomas of other member states complied with the relevant Community directive (Zilioli, 1989).

In the 1985 White Paper, the Commission announced its intention of applying the Cassis de Dijon philosophy also to professional mobility. The new strategy aimed at a general (rather than sectoral) system of recognition based on the following elements: mutual trust between the member states; comparability of university studies across the member states; mutual recognition of degrees and diplomas without prior harmonization of the conditions for access to, and the exercise of, professions; and the extension of the general system to salary earners.

These principles find concrete application in Directive 89/48 on "a general system for the recognition of higher education diplomas awarded on completion of vocational courses of at least three years' duration". Unlike the older sectoral directives, the new directive does not attempt to harmonize the length and curricula of professional education, or even the range of activities

in which professionals can engage. Instead, the directive introduces a system by which the states can compensate for such differences, without restricting the freedom of movement. Mutual trust and loyal cooperation among the member states are supposed to replace the impossible task of harmonizing vastly different national systems of professional education and licensing. Each state is supposed to trust other states' courses of study as being generally equivalent to its own, and a competent national authority must accept the evidence provided by another member state.

Mutual trust as a substitute for legally binding harmonization is an admirable principle, but it remains to be seen whether the appeal to a common cultural heritage shared by the different national systems of education is sufficient to limit the traditional right of the states to control the education of citizens and residents and to regulate the professions. The scattered empirical evidence so far available is not very encouraging.

The problem is that instead of proposing concrete measures to increase mutual trust, the Commission tends to invoke general principles such as the common cultural heritage of European universities. In the 1985 White Paper it argued that "the objectives of national legislation, such as the protection of human health and life and of the environment, are more often than not identical", so that "the rules and control to achieve those objectives, although they may take different forms, essentially come down to the same thing, and so should normally be accorded recognition in all Member States (Commission of the European Communities, 1985, p.17).

The limits of such a priori reasoning are shown, for example, by the judgement of the Court of Justice in the "wood-working machines" case (Case N°188/84 ECR, 1986, p.419). In this case the court was confronted with two different national approaches to safety: German regulation was less strict and relied more on an adequate training of the users of this type of

machinery, while French regulation required additional protective devices on the machines. The Court ruled against the Commission which had argued that both regulations were essentially equivalent, and found that in the absence of harmonization at Community level, a member state could insist on the full respect of its national safety rules, and thus restrict the importation of certain goods.

Advocates of mutual recognition often do not seem to realize how demanding the principle is. An American scholar has noted that the mutual recognition approach may require a higher degree of comity among member states than the commerce clause of the U.S. Constitution requires among individual states. The commerce clause has been interpreted by the U.S. Supreme Court to allow each state to insist on its own product quality standards -- unless the subject matter has been preempted by federal legislation, or unless the state standards would unduly burden interstate commerce (Hufbauer, 1990, p.11).

The crucial importance of trust between national administrations is demonstrated by the failure of early attempts to harmonize national regulations for the approval of new medical drugs. The old EC procedure included a set of harmonized criteria for testing new products, and the mutual recognition of toxicological and clinical trials, provided they were conducted according to EC rules. In order to speed up the process of mutual recognition, a "multi-state drug application procedure" (MSAP) was introduced in 1975. Under the MSAP, a company that had received a marketing authorization from the regulatory agency of a Member State could ask for mutual recognition of that approval by at least five other countries. The agencies of the countries nominated by the company had to approve or raise objections within 120 days. In case of objections, the Committee for Proprietary Medicinal Products (CPMP) -- a group which includes experts

from Member States and Commission representatives -- had to be notified. The CPMP would express its opinion within 60 days, and could be overruled by the national agency that had raised objections.

The procedure did not work well. Actual decision times were much longer than those prescribed by the 1975 Directive, and national regulators did not appear to be bound either by decisions of other regulatory bodies, or by the opinions of the CPMP. Because of these disappointing results, the procedure was revised in 1983. Now only two countries had to be nominated in order to be able to apply for a multi-state approval. But even the new procedure did not succeed in streamlining the approval process since national regulators continued to raise objections against each other almost routinely (Kaufer, 1990). These difficulties finally induced the Commission to propose the establishment of a European Agency for the Evaluation of Medicinal Products and the creation of a new centralized Community procedure, compulsory for biotechnology products and certain types of veterinary medicines, and available on an optional basis for other products, leading to a Community authorization. Both the agency and the centralized procedure have been established by Council Regulation No 2309/93 of 22 July 1993.

The Regulation justifies the creation of the new agency and the centralized procedure by the need "to provide the Community with the means of resolving disagreements between Member States about the quality, safety and efficacy of medicinal products". The problem with the old decentralized procedure was that differences among national schools of medicines and differently perceived needs for new drugs led to divergent interpretations of drug approvals despite the fact that they had been prepared according to a standardized European format (Kaufer, 1990). Thus, mistrust may reflect insufficient understanding of different regulatory philosophies and of national styles of policy making.

However, it is likely that the decentralized procedure did not work also because some national regulators lacked, or were thought to lack, the scientific and technical expertise, financial resources, and policy infrastructure needed to deal effectively with complex regulatory issues. Community assistance may be needed in order to help all members achieve a level of competence sufficient to support mutual trust and effective cooperation. As a recent study of new regulatory strategies in the EC argues, "the 'Europeanization' of expertise upon which a mutual recognition of risk assessment and consensus building may be built, presupposes the setting up of an infrastructure which not only ensures continuous cooperation between the Community and national administrations, but also an ongoing involvement of those communities of experts on which national administrative authorities rely" (Dehousse et al., 1992, pp.15-16).

5. The fourfold path to trust and credibility

The analysis developed in the preceding pages suggests several reforms -- some quite radical, others more incremental and in part already implemented on an ad hoc basis -- to improve cooperation among national and supranational institutions. The protracted and acrimonious debates which have accompanied the ratification of the Maastricht Treaty have at least made clear that the future of the Union lies not in further centralization but in an ever closer cooperation among the different levels and institutions of governance.

The reforms suggested here are inspired by the following principles. First, mutual trust and credible commitments cannot be achieved by contractual means or by other legal obligations, but only by changing the motivations of all the relevant actors. Second, a lasting reform of the present system cannot be limited to the European institutions, as much of the current debate seems to assume, but must also embrace national and sub-national governments, as well as non-governmental actors. Third, in a phase of transition like the present one, clarity about objectives and about the best strategies for achieving them is more important than attention to what is politically or legally possible today: to reform is precisely to remove the constraints of the past. Finally, it should be noted that although the proposals made here address only some of the issues currently being debated, they form a reasonably coherent and self-contained subset. Moreover, they could be easily expanded to cover other issues such as the democratic deficit of European institutions and how to achieve transparency and political accountability without compromising the efficiency objectives of the internal market programme (Majone, forthcoming).

After these preliminary remarks, we are ready to consider separately the four ways to increase trust and credibility.

Greater political independence

The fear that governments may use regulation strategically, to pursue short-term political advantages rather than regulatory objectives, is arguably the main source of mutual distrust and lack of policy credibility. The consequences, as we saw, are more centralization and greater uniformity of norms than is necessary for market integration. Under the present institutional arrangements, however, a plea for more decentralization and greater normative flexibility is easily seen as an open invitation to grant further discretionary powers to the member states thereby placing market integration in jeopardy.

The way out of this dilemma is to grant more independence to national (and, as I argue below, supranational) regulators so that their commitment to a set of objectives decided at the European level is not compromised by domestic political considerations or by ministerial interference. Independence

changes the motivation of regulators whose reputation now depends more on their ability to achieve the objectives assigned to their agencies than on their political skills. With independence, a problem-solving style of policy making tends to replace the more traditional bargaining style. Also, it is not difficult to show that greater independence implies more, rather than less, public accountability (Majone, 1994b).

By now the independence of central banks enjoys widespread political support in most countries of Europe. Also the Treaty of Maastricht, although generally opposed to further delegation of policy making powers to the supranational level, assigns sweeping powers to the European Central Bank (ECB). The ECB can make regulations that are binding in their entirety and become European and member states' law, without the involvement of the Council or of national parliaments. The Bank has a single objective, monetary stability, and the freedom to pursue this objective in complete independence of the other European institutions and of the national governments. Moreover, since the governors of the central banks of the member states are members of the ECB Council, they too must be insulated from domestic political influences in the performance of their task; they can no longer be players in the old game of pumping up the economy just before an election (Nicoll, 1993).

The recent rise of (more or less) independent regulatory agencies throughout Europe (Majone, 1994b) shows that the perceived advantages of independence are not confined to central banks. Among the justifications for such agencies are the need for expertise in highly complex matter, combined with rule making and adjudicative functions that are inappropriate for a government department; and the usefulness of the agency model whenever it is hoped to free public administration from partisan politics and party political influence. Agencies are also said to provide greater policy continuity

and stability than cabinets because they are one step removed from election returns (Baldwin and McCrudden, 1987).

While these advantages of agency independence are acknowledged in theory, old habits of ministerial interference continue to persist in practice. Even in Britain, after more than a decade of privatizations and deregulation, government departments still preserve important regulatory powers so that the operations of agencies often are dependent on prior decisions of the minister laying down the principles to be applied. In France the minister of the Economy maintains important powers to regulate economic competition despite the creation in 1986 of the supposedly independent Conseil de la Concurrence. The minister remains the final decision maker in matters relating to mergers and acquisitions, and the power of investigating anti-competitive practices is still in the hands of the administration.

Even the powerful Bundeskartellamt of Germany must occasionally yield to ministerial decisions. Thus, in 1989 the agency opposed the merger of Daimler Benz with the Messerschmitt-Bölkow-Blohm Company. Despite the clear danger of a distortion of competition in several important markets, the Minister of the Economy overrode the Bundeskartellamt allowing the merger to take place, subject to some conditions, in the name of industrial policy.

The relative ease with which agency autonomy can be disregarded in the name of political considerations extraneous to the logic that led to the creation of independent bodies in the first place, show how precarious the position of national regulators still is. Until the respect of agency independence becomes part of the different national political cultures, the national and international credibility of their regulatory policies will continue to remain open to doubt.

Networking

Credibility can be developed through team work. Although people may be weak on their own, they can build resolve by forming a group (Dixit and Nalebuff, 1991). The same is true of organizations. A regulatory agency which sees itself as part of an international network of institutions pursuing similar objectives and facing analogous problems, rather than as a new and often marginal addition to a huge national bureaucracy, is more motivated to resist political pressures. This is because the regulator has an incentive to maintain his or her reputation in the eyes of fellow regulators in other countries. A politically motivated decision would compromise his/her international credibility and make cooperation more difficult to achieve in the future.

Professional associations of regulators working in the same policy area (antitrust, regulation of financial services, environmental protection, occupational health and safety, and so on) have been in existence for many decades in the United States and Canada. The experience of these countries shows that such regulatory networks serve a variety of useful functions, including the exchange of information and the comparative evaluation of new policy ideas and instruments. Professional associations of regulators are also beginning to develop at the international level -- for example, the International Organization of Securities Commissions, IOSCO. The need of close professional links is even more urgent in Europe than in North America since, as was seen in section 4, lack of familiarity with the regulatory philosophies and administrative practices of other countries breeds distrust and impedes the practical implementation of the principle of mutual recognition.

The European Commission should obviously play a key role in facilitating and coordinating the work of EU regulatory networks, and in

ensuring that their activities are consistent with European objectives. The network model is perhaps easiest to visualize in the field of competition. An over-worked and under-staffed DGIV has already advocated a move toward a decentralized system of enforcement via proceedings before national courts. However, it has been rightly pointed out that it would make more sense to transfer responsibility for enforcement to the national competition authorities than to national courts and private litigants. These authorities perform a role which is analogous to that of DGIV, and they possess the kind of experience and expertise which courts of ordinary jurisdiction often lack. Moreover, there already exist direct links between Commission inspectors and national competition authorities as regards any investigations carried out by the Commission. In fact, under Regulation 17, the relevant national competition authority must be associated with inquiries and investigations, and its officials must be present if a search of premises is carried out (Harding, 1994, pp.7-9).

There is no reason why the network model could not be extended to other areas of economic and social regulation. In fact, at an informal meeting of the Council of Ministers in October 1991, it was agreed that member states should establish an informal network of national enforcement officers concerned with environmental law. The recent creation of a number of European agencies (see below) may be seen as a further move in this direction. However, the logic of the model suggests that not only national regulators but also their counterparts in the Commission should be independent. Although European commissioners are not supposed to pursue national interests, usually they are politicians who, after leaving Brussels, will continue their careers at home. This makes national pressures often difficult to resist. In a number of well-publicized cases, such pressures have produced flawed or at least inconsistent decisions. Again, competition policy, including the control of mergers and of anti-competitive state aid, provides the clearest

examples. Several analysts have argued that Europe will never have a coherent competition policy without a cartel office independent both from the national governments and from the Commission. Commissioners would still be able to reverse an independent agency's decisions, as the German government does in the case of some Bundeskartellamt's rulings. But the political costs of doing so would be high, and the interference plain for all to see.

Less legislation, better implementation

The paradox of over-regulation and under-implementation was discussed in section 3. There is was pointed out that at present the Commission is motivated to pay more attention to rule-making than to the effective enforcement of the rules it proposes. This is because, with a few exceptions like competition policy and fisheries, the Commission plays no direct role in implementation. Future reforms must correct this bias. Closer cooperation among independent national regulators or among groups of countries, or regions in different countries, would make more decentralized rule making possible; but it would also increase the need for greater powers of inspection of national or regional regulatory activities.

Even in areas like competition policy and environmental protection where many rules will continue to be set at the European level, there is a strong case for some form of centralized oversight of the measures taken by the member states to monitor and enforce compliance. This is because, to repeat a point already made, EC regulations lose credibility if they are not consistently implemented throughout the Union. Consistent implementation would require the creation of European inspectorates, but the reluctance of member states' governments to accept such a concept is almost universal.

A second-best solution, the idea of an "audit" inspectorate to examine the policies and performance of national regulatory authorities, rather than seek to supplant them, has received much favourable attention recently. The audit inspectorate would publicly report its findings to member states, the Commission and to the European Parliament. It would report not only on actual outcomes, but also on shortcomings in administrative arrangements, such as inadequacies of training or resourcing, leading to insufficient regulatory activities.

The issue of independence arises also in this context. The 1992 Report of the House of Lords Select Committee on the European Communities on Implementation and Enforcement of Environmental Legislation (House of Lords, 1992) rightly points out that the functions and powers of a European inspectorate should be carefully distinguished from the Commission's own duty to enforce Community policies in the event of failure to do so by the member states. Thus, in the case of environmental policy, the inspectorate should not be part of DGXI. Rather, "the logical home for an environmental inspectorate on the lines indicated is the European Environmental Agency, with whose functions the inspectorate would neatly dovetail" (ib., p.41). Institutional separation from the Commission would enable the inspectorate to scrutinize the Commission's own role, notably in providing assistance to the member states through the Structural Funds or the Cohesion Funds. Indeed, the use of such funds in the countries of southern Europe has sometimes produced serious consequences for the environment.

For analogous reasons, European inspectorates in such fields as the regulation of medical drugs, veterinary and plant control, and health and safety at work should be organized within the corresponding new European agencies (Office of Veterinary and Phytosanitary Inspection and Control, European Agency for the Evaluation of Medicinal Products, Agency for

Health and Safety at Work) rather than as offices of the Commission. Also existing European inspectorates in the areas of competition, agriculture and fisheries -- now housed in DGIV, DGVI and DGXIV, respectively -- should be insulated from the Commission, possibly in connection with the transformation of the corresponding DG into an independent agency, see above.

Improving regulatory capacities

As was shown in section 4, early attempts to introduce the mutual recognition of toxilogical and clinical trials for approval of new medical trusts failed because national regulators raised objections against each other almost routinely. We suggested that in this as in other cases, mutual distrust may also have been caused by the perception that some regulators lacked the resources and expertise needed to deal competently with complex regulatory issues.

It is a fact that regulatory capacities vary a good deal across the European Union. For example, until the late 1980s several member states lacked independent competition authorities or legislation on mergers. Even today most countries do not have a fully-fledged environmental protection agency or a specialized environmental inspectorate. Decentralization, both of rule making and of enforcement, remains problematic as long as such differences in regulatory capacity persists. Here, then, is a potentially fruitful field of cooperation between Community institutions (in particular the new European agencies) and national administrators.

The practice of regulatory federalism in America provides some useful suggestions in this direction. For example, when the Occupational Safety and Health Act (OSH Act) was passed in 1970, few states had comprehensive laws dealing with safety and health at work and fewer still had adequate

programmes to enforce them. In spite of this, the OSH Act did not provide for the complete federalization of this area. The objective of assuring safe and healthy conditions at the workplace was to be reached, in part, by "encouraging the States to assume the fullest responsibility for the administration and enforcement of state occupational safety and health laws", by means of federal grants and approved state plans (OSH Act, Section 2(b)(11)).

The Act incorporates special mechanisms for utilizing state resources. The most important of these are the provisions for "state plans" contained in Section 18(b) through (g). While the Act generally preempts state enforcement once the federal government regulates, Section 18(b) provides that states desiring to regain responsibility for the development and enforcement of safety and health standards under state law, may do so by submitting and obtaining federal approval of a state plan which meets the requirements set forth in section 18(c). Approval of a state plan by the Occupational Safety and Health Agency (OSHA) permits the state to re-enter the field of occupational health and safety regulation.

The Secretary of Labor (in whose Department OSHA is located) is to approve a state plan only if it demonstrates the availability of adequate financial resources and the existence of a sufficient number of trained personnel. States are entitled to receive federal funding for developing the plan and implementing it after approval. For the first three years after initial approval, all state plans are considered "developmental". During this period, when federal and state governments have concurrent jurisdiction, the Secretary evaluates the state plan at least every six months. States must submit annual activity reports and inform the public of its right to file written complaints during this three-year period. This procedure known as CASPA (Complaints About State Plan Administration) provides information which

OSHA uses to determine whether a developmental plan should be rejected or certified as operational.

Thus, the American implementation plans have three attractive features: (a) states retain the possibility to act if they see fit; (b) in order for them to do so, they must meet precise standards; (c) such a flexible solution takes due account of the fact that not all states enjoy a similar regulatory capacity; some of them need federal assistance in order to meet national standards. Could such a model be transposed at the EC level? The setting is of course radically different here. Far from being the exception, decentralized implementation tends to be the rule. Yet, to require member states to draw up an implementation plan and to set up the means that are necessary to make it operational would force them to address the implementation issue more systematically than is currently the case. Resources form the structural funds could be used to assist those member states lacking sufficient resources to develop the plans and the requisite structures.

It is clear, however, that such a system can work only if the Community is technically equipped to assess the adequacy of implementation plans, to monitor the activity of national regulators, to provide guidance -- all activities that, by its own admission, the Commission is currently not in a position to carry out satisfactorily, but which could be entrusted to the new European agencies. Despite the practical difficulties, the proposed scheme is quite in line with the subsidiarity principle: member states would retain their primary responsibility, while the Community's main task would be to assist and supplement their action (Dehousse et al., 1992, pp.63-65).

6. Conclusion: reform begins at home

The Treaty on European Union contains two important political signals: first, the member states are not prepared to accept an unlimited expansion of

Community competences and, second, the Commission has been weakened. The "three pillar" structure of the Union signifies a refusal to "communitarize" foreign policy and immigration matters. Even the new competences established by the treaty in fields such as education, culture, public health or consumer protection are replete with reservations: the Community can encourage cooperation among the member states, support and supplement their action, but harmonization of national laws is often excluded. As far as the Commission is concerned, not only were most of its proposals postponed or rejected, but its institutional status was weakened. One cornerstone of its power, the right of initiative, has been watered down in monetary policy where it only enjoys the right to put forward recommendations. It is also bound to play a lesser role in the new co-decision procedure. Furthermore, some declarations attached to the treaty (declarations on transparency and access to information, and on the cost-benefit evaluation of Commission proposals) suggest that its legitimacy has been questioned (Dehousse et al., pp.8-10).

The Intergovernmental Conference on institutional reform scheduled to begin in 1996 should draw all the conclusions that logically follow from these premises. If the future of the Union lies not in more centralization but in closer cooperation among the different levels and institutions of governance, then the member states must be prepared to take concrete measures to improve mutual trust and the credibility of their commitment to the common objectives. This will require, inter alia, greater determination to resist the pressures coming from domestic distributional coalitions, and the temptation to gain short-term political advantages at the expense of policy consistency. Given the nature of the democratic process, these conditions are best met by delegating regulatory powers to politically independent institutions. I have argued that such delegation would not only increase policy

credibility, but also greatly facilitate cooperation among national, subnational and European authorities. A similar institutional development at the EC level, resulting in a bigger role for the European agencies, would also make possible to undertake activities, such as monitoring and certain types of research, best done at that level, without increasing the size of the Commission.

In the post-Maastricht era institutional reform must begin at home. Unless the national governments are willing to rethink their role in the economy and to show concretely their commitment to the common objectives, the only alternatives are more centralization or a progressive weakening of the economic and political foundations of the Union.

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