Integration v. Regulation? On the Dynamics of Regulation in the European Community

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I. Introduction

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

> We have not successfully rolled back the frontiers of the state in Britain only to see them re-imposed at a European level, with a European super-state exercising a new dominance from Brussels. *(Guardian,* 21 September 1988)

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

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

The purpose of this article is to sketch the patterns of relationships that have emerged between the EC and its Member States in a number of fields which belong to what can be defined broadly as *social regulation.* By social regulation we mean here the environment, or the interests of consumers by correcting collateral effects of economic activities or information asymmetries.[2]

This sector has been chosen for a variety of reasons. In industrialized societies government intervention in areas such as consumer or environmental protection has developed considerably over the last 20 years. The phenomenon is even more striking when compared to the general crisis of welfare policies. The European Community was not exempt from this general trend. Created as an economic organization, it gradually expanded its activities in areas like environmental and consumer protection and, more recently, in health policy – a transition which, as will be shown later, was not without problems. Academic literature reflected this movement only after some delay: while relations between the Community and its Member States in the sphere of economic regulation have been the object of some systematic studies which tried to identify the basic principles underlying the 'economic constitution' of the Community (Constantinesco, 1977; IEJE, 1972; Mertens de Wilmars, 1988), social regulation as a whole has so far received less attention, even if some of its branches have been analysed in detail.

It is worth stressing at the outset that the aim of this article is not to present a complete overview of social regulation in the European Community, but rather to outline the manner in which the division of competences between the Community and its Member States affects the way social regulation has developed and is carried out in Europe.

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

II. The Scope of EC Intervention

The gradual widening of Community policies to the sector of social regulation is a well-known story which need not be repeated here. However, a number of

[2] Social regulation is thus quite distinct from traditional social *policy,* the aims of which are primarily redistributive (Majone and La Spina, 1991, p. 31).

[3] For a recent examination of this question see, for instance, Weiler (1991).

remarks can usefully be made to illustrate the specific features of Community intervention in this field.

For a long time, social regulation was not a primary concern for Community institutions. The Community was set up (and is still often referred to) as a 'common market'. Quite logically, emphasis was laid on the removal of obstacles to the free movement of goods, capital, persons and services, rather than on the control of the side-effects of economic activity. True, from the outset the Community was endowed with some competences in the field of workers' health and safety,[4] but policy areas such as consumer or environmental protection had not gained political prominence at the time the Treaty of Rome was drafted. The method of sectoral integration which was chosen thus focused on the economic field, as exemplified by the important powers granted to the Community in agricultural and competition policies. The generous wording of Article 36 of the Treaty of Rome clearly suggests that large sectors of social regulation were regarded as a matter remaining in the hands of the Member States.

Some 35 years later, the picture looks quite different. A mere glance at the Community's 'constitution', the EEC Treaty, suffices to portray how wide-ranging the evolution has been. Environmental policy, consumer protection and health policy have been added to the list of Community competences, the first by the Single European Act, the other two by the recent Maastricht Treaty. This shift was reflected in the latter agreement by the renaming of the EEC, which is now referred to as the European Community *tout court* (Article G(A) (1)).

The reasons for this change are manifold. As government intervention in these areas grew, it became apparent that divergence in national approaches could create regulatory barriers to trade, no matter whether they were inspired by protectionist motives or not. This is especially true as regards product standards (Siebert, 1989, p. 55). To take one example, it is unlikely, in the absence of any co-ordination, that a given good would meet the standards set by 12 distinct sets of product safety rules. The Community's first response to this danger was essentially a judicial one. The broad interpretation given by the Court of Justice to Article 30 of the EEC Treaty, which prohibits 'measures having equivalent effect' to quantitative restrictions in intra-Community trade, has had a strong impact on the Member States' room for manoeuvre. In a somewhat sweeping statement, the Court ruled that

> all trading rules enacted by the Member States which are capable of hindering, actually or potentially. directly or indirectly, intra-Community trade are to be

[4] Article 118 of the EEC Treaty.

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

considered as measures having an equivalent effect to quantitative restrictions.6

This amounts to saying that even rules which are not designed to restrict cross-border transactions can hamper the free movement of goods. As such, they will come under the Count's scrutiny *ex* Article 30 (Gormley, 1985). Thus, even in fields which, as we saw remain primarily in the domestic sphere of competence, the Member States must pay regard to the need not to erect legislative barriers to trade. As a result, their regulatory capacity can sometimes be severely constrained by their Community membership.?

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

One of the main avenues for Community intervention was Article 100 of the EEC Treaty, which provides for the harmonization of national provisions that 'directly affect the establishment of the functioning of the common market'. Although the exact scope of this provision and its relationship to other Treaty provisions is the subject of legal controversy,8 the requirement of a direct link with the common market makes it clear that it could not serve as a basis for any activity in the field of social regulation. Likewise, the very concept of 'harmonization of national provisions' seems to indicate that complete uniformity of national legislation was not being sought. Resorting to the 'necessary and proper' clause of the EEC Treaty, Article 235, thus proved indispensable on a number of occasions.9

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

[6] ln case 8/74, *Procureur du Roi* v. *Dassonville,* [1974) ECR 837.

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

• It is now generally accepted that it can cover product-related requirements as well as producer-related requirements such as emission standards, that impinge on competitive conditions (Rehbinder and Stewart. 1985, pp. 21-6). See also Ehlermann (1987) for the post-SEA discussion of the question.

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

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

It is only with the Single European Act that the protection of the environment has been given unambiguous recognition in the EEC Treaty and that its main objectives have been specified.[10] At the same time, Community intervention in the field of workers' health and safety was made easier by a shift to majority voting.[11] Even so, the wording of the relevant provisions makes it clear that their objective is not to pre-empt Member States' action, which suggests that this change was not accepted easily. Article 130R, for instance, specified that 'the Community shall take action relating to the environment to the extent to which the objectives [of environment policy] can be attained better at Community level than at the level of the individual Member States.' Although the exact status of this provision - mere political guideline or enforceable legal restraint -was debatable, its restrictive intent was quite clear.[12] Community legislative competence appeared to be even weaker with regard to consumer protection, which was merely presented as a concern to be taken into account in harmonization directives.[13] One had to wait until the Maastricht Treaty to see the insertion into the Treaty of a comprehensive consumer protection policy.

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

It seems difficult to avoid the conclusion that the long-term trend has been towards an increase in Community competences. Yet, the movement is less one-sided than a superficial examination might suggest. Prompted by market integration, Community action in the area of social regulation remains largely conditioned by the Community's emphasis on the removal of barriers to trade.

[10] Article 130R.

[11] Article l 18A.

[12] This provision was deleted by the Maastricht Treaty, as it duplicated the subsidiarity principle established by Article 38.

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

One could summarize the situation by speaking of the 'dual subsidiarity' of social regulation in the structure of the Treaty of Rome: subsidiarity with respect to the Community's main *raison d' etre,* namely market integration, and subsidiarity with respect to national regulatory policies.

This tension appears quite clearly in the title devoted to consumer protection in the Maastricht Treaty. On the one hand, the possibility of dealing with consumer protection matters in the context of internal market policy (Article 1OOA) is confirmed; on the other hand, the Community's power to act 'to protect the health, safety and economic interests of consumers and to provide them with adequate information' is recognized, but such action must only 'support and supplement the policy pursued by the Member States'.[14] For those who would regard the above developments as being symptomatic of lawyers' formalist mode of reasoning, it might be useful to recall that in contrast to the power dynamics in 'classical' federal systems, Member States retain a central role in the Community decision-making process (Scharpf, 1988). Not only will problems of competence surface each time a Community measure is deemed by certain governments to be too intrusive but, equally importantly, patterns of Community intervention are likely to bear the mark of these institutional restraints.

III. **Patterns** of EC **Intervention**

One of the striking features of the American way of approaching regulatory issues is a clear reluctance to accept outright federal intervention. Even in fields where legislation might be legitimate, Congress has often preferred to rely on a carrot-and-stick approach by setting up large grants-in-aid programmes, which aim at inciting states to adopt the standards worked out at the federal level (Stein, 1985). Likewise, federal intervention has often taken the form of the establishment of specialized agencies, to which some rule-making, fact-finding and enforcement powers in a specific field were given. The functional arguments that have been used to justify the creation of such agencies are particularly interesting since they could easily be transposed to the Community. It is often argued, for instance, that the delegation of powers to administrative agencies represents a means whereby specific problems might be entrusted to experts who possess a deep knowledge of the industry which they regulate, and a way of insulating decisions from the pressures of party politics (Majone, 1989).

Yet, turning to the European Community, one might not discern similar developments: in the field of social regulation, harmonization of national legislation has remained the primary form of action. The EC has occasionally provided guidelines for implementation by the Member States, requiring them,

[14] New Article 129A.

for example, to collect specific data, or mutually to inform each other of decisions adopted in a given field. [15] Yet, if one overlooks the important powers enjoyed by the Commission in the framework of competition or anti-dumping policies, the Community has never really departed from its traditional mode of decentralized administration.

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

In the first place, it should be noted that few alternatives to a legislative approach were available at the Community level. The Community has limited financial resources, and a large part of these are devoted to a voracious agricultural policy, leaving only limited room for manoeuvre in other sectors. In any event, it seems clear that the principle of attributed powers makes it impossible for the Community to use its spending powers beyond its sphere of legislative competence (Lenaerts, 1990, p. 233). As early as 1958, the European Court of Justice also indicated that delegation of powers to *ad hoc* bodies, not envisaged by the ECSC Treaty, was possible only subject to strict conditions and that, in any event, the delegation of broad discretionary powers was not permitted. [16] The difficulties which surrounded the creation in 1990 of the European Environment Agency have confirmed that the US agency model is far from being commonly accepted in the Community. [17]

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

The first factor is the limited Community competence in the field of social regulation. As indicated above, the Community was supposed to act only if, and

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

[16] Case 10/56, *Meroni*, [1957-58] ECR 157. It is generally held that although this ruling dealt with the fairly detailed provisions of the ECSC Treaty, its conclusions are *mutatis mutandis* applicable in the broader context of the EEC Treaty (Kapteyn and VerLoren van Themaat, 1989, pp. 121-2). However, it is not clear that the Meroni precedent would be of great help in the area of social regulation, as powers delegated to agencies would be taken away from the Member States, rather than from the EC.

[17] See the Council Regulation on the establishment of the European Environment Agency, OJ L 120/1, 11 May 1990. The Commission has recently advocated the establishment of an agency to regulate the marketing of medicinal drugs, but the powers of the proposed body have been adapted to meet the concerns expressed by the Court in the Meroni case. See the Commission's proposal in OJ C330/1, 31 December 1990 and the amendments in OJ C310/7, 30 November 1991.

to the extent that, national regulatory policies had an adverse effect on the establishment of a unified market. It was therefore proper to limit its intervention to a mere harmonization of national provisions, rather than endowing it with more substantial means of action. The emphasis on the harmonization of national provisions can thus be seen as an institutional reflection of the peripheral importance of social regulation in the Community context. Indeed, Community lawyers tend to insist that the use by the Community of its competences should be such that it will not completely pre-empt Member States' competence in the area of social regulation. [18] Hence, *inter alia,* a strong insistence on the resort to directives, which need to be transposed by national authorities into their legal orders, and thus leave them in theory a certain leeway as to the methods by which their objectives are to be achieved.[19]

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

However, the expansion of Community powers can retain this neutral character only as long as Community intrusion into spheres which have traditionally been part of the Member States' competence is compensated for by the representation of the Member States at all stages in the decision-making process. This concern has led to the establishment of expert committees, composed of Member States and Commission representatives, to assist the Commission in its executive functions (preparation and implementation of Community legislative acts). Although the working practices of such committees have so far been the object of little systematic attention, it seems that the Commission's role in these procedures is primarily one of co-ordination (Cassese, 1987). Thus, the functional need for expertise to which I referred earlier has been accommodated, but in a manner that clearly reflects the specific features of the Community's institutional setting. In contrast, the delegation to

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

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

an autonomous body of wide-ranging law-making and enforcement powers, similar to those enjoyed by US regulatory agencies, is likely to be resented by the Member States as more intrusive, since it would alter the delicate balance of power which has presided over the growth of Community competences. Undoubtedly, concerns of this kind have played an important part in the definition of the functions granted to the newly established European Environment Agency, which is more concerned with research and data collection than with regulation *per se*.

Lastly, mention should be made of elements of European administrative culture which have also played a role, albeit an indirect one, in the developments under review. The creation of specialized agencies endowed with extensive powers is a far from traditional feature throughout Europe. On the contrary: regulatory functions are often assigned to ministries, or to the cabinet as a whole (Majone, 1989). Even in the realm of monetary policy, where the need for expertise is widely accepted, the recent debates over the creation of a European system of central banks have clearly shown that most central banks do not enjoy the same degree of autonomy as the German Bundesbank. Many of them are still largely dependent on decisions made by the Treasury. Governmental supervision and, indirectly, parliamentary monitoring of administrative action are often regarded as necessary in a democratic society. All this makes it rather unlikely that national governments will be willing to concede to Community bodies powers which they are not always prepared to delegate to domestic bodies.

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

The difficulties which surround the harmonization process are well known. Decision-making is slow and cumbersome because of the ever-growing complexity of the subjects covered and the necessity to achieve consensus. The adjustment to technical progress is difficult (Dashwood, 1983). Moreover, harmonization is achieved through resort to an instrument – the directive – which has to be transposed by Member States into their domestic legal order. This often results in huge bottlenecks at the implementation level; it may also explain the attention given by Community bodies to formal compliance, namely the adoption by national legislatures of the measures prescribed by directives, rather than to substantive observance of their provisions.[20] Although the Commission has repeatedly stated its intention to go beyond transposition, and to monitor administrative application more systematically, it is not clear

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

whether it is well equipped to do so. Lastly, this two-tier legislative process means that the Community is deprived of any direct power over firms and other private actors, which are the real subjects of social regulation, since it does not have the power to attach sanctions to the violation of Community standards and to enforce them.

All these elements clearly curtail the overall efficiency of Community standards. Another problem is the lack of flexibility inherent in such a system. As indicated above, the harmonization process was dominated primarily by market integration concerns, with a parallel emphasis on uniformity. This tendency was further aggravated by the fact that the Community, being deprived of an administrative power of its own, has often resorted to very detailed directives in order to ensure their uniform application. It is doubtful whether such a process is capable of fully addressing the variety of situations existing within the Community. True, it has been demonstrated that, even in its current stage of development, Community law possesses a wide range of techniques providing an important measure of flexibility (Ehlermann, 1984). Yet, for a variety of reasons, not all difficulties may be anticipated or accommodated in a complex and fairly inflexible legislative phase (Scharpf, 1988). Very often, it is only when applying a norm to a concrete problem that the various interests involved can be properly assessed and balanced. The regulation of pharmaceutical products offers an example of such a situation: although national rules pursue similar objectives, their application differs widely from country to country because of existing divergences between medical and regulatory cultures (Kaufer, 1989).

Naturally, this plea for flexibility should not be seen as an invitation to grant greater discretionary powers to the Member States, if market integration is not to be put at risk. But the issue will have to be addressed eventually: otherwise, there is a real risk that Community regulation will aggravate an already serious implementation problem by being insufficiently sensitive to the variety of situations with which national regulators have to deaJ.2I

Awareness of these problems has clearly grown in Community circles over the last few years. Several features of the internal market programme aimed to provide a remedy for the shortcomings of the earlier approach. The emphasis on the mutual recognition of national regulations and standards, and the delegation of quasi-legislative powers to private standardization bodies were conceived as alternatives to a cumbersome rule-making process. As a result, the White Paper suggested restricting harmonization to the laying down of basic health and safety requirements (CEC, 1985, p.18). It was also envisaged that this new approach would increase the range of choices available to consumers, thereby

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

creating proper competition between national rules. The assumption is that this process will facilitate technical and regulatory adjustment and lead eventually to convergence around one or a few basic models. Thus, *ex-ante* harmonization would be, in part at least, replaced by a market-driven process resulting ultimately in spontaneous adaptation (Prosi, 1990). Yet, in spite of its many advantages, mutual recognition is not a panacea. It is not adapted to all kinds of goods, nor can it deal with all regulatory problems (Siebert, 1989; Majone, 1991). In fact, rather than as a regulatory technique, mutual recognition should be seen as an *integration instrument*, which creates pressures in favour of the removal of trade barriers. Thus, how exactly regulatory interventions should be conducted at Community level remains largely an open question.

IV. The Dynamics of Regulation in the European Community

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

A similar constellation has yet to emerge in the European Community. Like their American counterparts, export-oriented industries clearly have an interest in the removal of legislative barriers to trade-hence their strong support for the 1992 programme. In contrast, representatives of diffuse interests, like consumer or environmental protection organizations, have shown more ambivalent feelings towards the Community, in particular in Member States where high standards of protection already exist.22

Why this has been so can be understood only with reference to the structural elements mentioned earlier. The emphasis on free movement in the Treaty of Rome and the generous way in which relevant provisions of the Treaty have

"See. for instance, Bourgoignie (1987, pp. 121-3, 215-16) who deplores the absence of a strong European consumer movement.

been read by the European Court of Justice have to a large extent limited the Member States' capacity to regulate their own economies- not because of a congenital objection to any kind of government intervention, but rather because it was felt that such intervention should not hamper free movement or distort competition.23 This appears very clearly in the Court's case-law on free movement of goods: in case of conflict, free movement prevails as a rule over regulation. There are of course several important exceptions to this rule, some of which are explicitly mentioned in Article 36 of the Treaty of Rome. The Court of Justice has also admitted that consumer and environmental protection can, in given circumstances, justify the maintenance of obstacles to free movement.[24] But these are only exceptions to a general rule and, as such, they are construed narrowly.25 The Court has stressed that Article 36 should in no way be seen as reserving given powers to the Member States.26

At the same time, the Community has been relatively slow to establish its own regulatory activities. Not only was its legal title to intervene in the field of social regulation rather thin in a first phase, but the nature of Community decision-making processes is such that Community regulatory intervention is often difficult to achieve, since the Community is far less immune from Member States' influence than the US federal government. In such a context, a political consensus of the necessity of acting at the European level will be a prerequisite to any kind of Community intervention. This tends to give a bargaining advantage to Member States which oppose high levels of protection, who can trade their acceptance of Community intervention against a number of substantive concessions. The problem was further complicated by the fact that some countries in which a regulatory tradition existed, such as Denmark or the United Kingdom, did not favour large transfers of power to the Community.

Adopting a comprehensive view of social regulation, encompassing both the national and the EC level, some have argued that the division of competences between the EC and its Member States created a true 'regulatory gap': whereas in theory Community competences remained limited and difficult to use, Member States' Treaty obligations made it more difficult for them to exercise fully the regulatory competences they still retain (Bourgoignie and Trubek, 1987). This deregulatory bias was implicitly acknowledged by Member States'

[2.] A similar reasoning was defended by Pescatore (1979) as regards economic regulation.

[24] See cases 120/78. *REWE* v. *Bundesmonopoll•erwaltunx fur Branntwein (Cassis de Dijon),* [1979] ECR 649 and 302/86, *Commission* v. *Denmark,* [1988] ECR 4607.

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

'"Case 5/77, *Simmenthal,* ECR [1977] 1555, p. 1557.

representatives at the time of drafting the Single Act: in direct contradiction to the case-law of the European Court of Justice,[27] it was felt necessary to provide for escape clauses enabling Member States which enjoyed high levels of protection to retain their national rules even in the presence of harmonization measures.[28] Interestingly, no corresponding mechanism was provided for those Member States which favour a lower level of protection, which may be seen as a confirmation that the system as it stood was not seen to involve real dangers for them.[29]

The 1992 programme has given rise to increased fears of deregulatory pressures. As is known, this programme aims essentially at a complete elimination of non-tariff barriers to trade in the EC, many of which arise out of differences between the regulatory policies of the Member States. Thus, the thrust of the programme consists of increased emphasis on what is often defined as *negative* integration, rather than on a complete take-over of given policy areas by the Community. The central technique proposed by the Commission's White Paper to achieve this objective was mutual recognition of national standards- a concept stemming from the idea that the main regulatory policies pursued by the Member States attempt, as a rule, to achieve similar objectives.

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

It is fair to say that neither of these two trends has yet materialized to any substantial degree. In spite of the indisputable success of the 1992 programme, there is no evidence that it has generated any significant reallocation of resources on the part of industry. Neither has a real race to the bottom in terms of regulatory protection been noted. True, a measure of government retreat has been noticeable in some countries, but this evolution seems more linked to a

[27] Case 251n8. *Denka1•it,*]1979] ECR 3369.
"Articles 1 OOA, para. 4, and 130R (Relabelled 130T by the Maastricht Treaty). Safeguard clauses inspired by the 'Model Directive· of 4 May 1985 (OJ C136, 4 June 1985) have been inserted in many consumer protection directives (Joerges and Mick1itz, 1991).
[29] However, this proved to be a shortsighted view, as the shift to majority voting made it possible to ignore isolated opposition to regulation (Weiler, 1991).

general rediscovery of the virtues of the market economy, rather than being a mere by-product of the integration process.30

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

The advocates of the 'race to the bottom' theory also appear to have overestimated the risks inherent in the mutual recognition strategy. What they failed to understand is that mutual recognition cannot operate in a vacuum: for the system to work, its basic premise (the equivalence of national provisions) must reflect reality. Where the objectives pursued by the Member States or their methods diverge, mutual recognition is of no help.31 Thus, as anticipated in the Commission's White Paper on the completion of the internal market, mutual recognition is a viable avenue only if accompanied by a harmonization of basic requirements contained in national provisions. In this sense, harmonization and mutual recognition do not cancel each other out, but rather are complementary approaches. Basic regulations and standards, if adopted throughout the Community, should both prevent an unlimited 'race to the bottom' and provide a target for regulatory convergence. Moreover, a number of elements will act as a brake on the downwards spiral: a country lowering its level of protection, for instance, would put at risk the health of its own citizens, which might have some bearing on their electoral choices (Siebert, 1990).

Another element which was ill-perceived was the impact of the institutional reforms contained in the Single European Act. The Community's competence to intervene in the field of social regulation was strengthened, even though somewhat ambiguously. A majority vote was made possible in a number of areas, in particular for the adoption of product legislation, which occupies a central place in Community activities. This change proved to be more important than many initially expected (Dehousse, 1988). Even if majority voting in the Council of Ministers remains to a large extent an exception, the possibility that a vote will be taken has had a decisive impact on decision-making. Instead of negotiating in the shadow of a veto, Member States very often have to negotiate while keeping in mind the possibility of being outvoted, should a vote be taken.

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

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

In many fields where for many years no decision had been possible, compromise has now been reached within months (Ehlermann, 1990). In other words, the most radical critique of the White Paper strategy proved to be excessive at both levels: the regulatory competition among Member States has not dramatically increased, and the possibility of an intervention at the EC level has proved more concrete than it was initially thought.

This notwithstanding, a number of bottlenecks remain. By and large, social regulation is still largely regarded as a secondary field of activity for the Community-a field in which the EC should in theory intervene only to prevent national regulatory policies from hampering free movement. And the fact that unanimity is still required in certain sectors, even after Maastricht,[32] slows down decision-making, sometimes to a considerable extent. It also reinforces the part played by jurisdictional concerns in any decision as to the necessity for Community action in a given field.

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

Such a change may be prompted by a variety of reasons. Community environmental policy relies increasingly on the active involvement of environmental groups (Sands, 1990), which may have generated new expectations. As indicated above, even national governments appear to be more clearly aware of the deregulatory impact inherent in the current division of labour between the Community and its Member States. Ten years ago, it could be asserted that in a field such as consumer protection, 'there is no situation wherein the national policy option is not a ... viable alternative in the absence of agreement at the Community level' (Weiler, 1982, p. 49). This no longer seems to be the case: the increasing reach of Community law makes it evermore difficult for Member States to conduct their own regulatory policies separately. Those Member States that favour high protection levels increasingly prefer to press for a decision at Community level, rather than seeking an escape clause which might harm the interests of their own producers.[33] Significantly, a country like Denmark, which has always shown great reluctance to delegate new powers to the Community, has been pressing for a generalization of majority voting in the areas of social and environmental protection. Thus, even for national governments, jurisdic-

[12] Although majority voting has now become the rule in environmental policy, unanimity is still required in certain cases (New Article 130S).

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

tional interests can give way to regulatory concerns. Assuredly, this shift has played an important part in the further extension of Community competences enacted by the Maastricht Treaty.

V. Conclusion: Regulatory Gaps Revisited

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

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

The 'classical' regulatory gap theory argues that the overall effect of Community intervention has been deregulatory. Whereas Member States have seen their regulatory capacity constrained by their EC membership, the Community has not clearly emerged as a dominant regulator in the manner of the US federal government. As a result, Member States with high levels of protection, often unable to secure the development of far-reaching policies at Community level, have traditionally insisted on retaining a margin of discretion.

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

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

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

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

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

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

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

References

Beer, S. H. (1974) 'The Modernization of American Federalism'. In D.J. Elazar (ed.), *The Federal Polity* (New Brunswick, N.J.: Transaction Books}, pp. 49-95.

Bourgoignie, T. (1987) 'Consumer Law and the European Community: Issues and Prospects'. In Bourgoignie and Trubek (1987).

Bourgoignie, T. and Trubek, D. (1987) *Consumer Law, Common Markets and Federalism in Europe and in the United States* (Berlin/New York: de Gruyter). Cassese, S. (ed.) (1987) *The European Administration* (Paris: International Institute of Administrative Science).

Commission of the European Communities (1985) *Completing the Internal Market: White Paper from the Commission to the European Council,* COM (85)310 final.

Constantinesco, L.-J. (1977) ·La constitution economique europeenne'. *Revue trimestrielle de droit europeen,* pp. 244-81.

Dashwood, A. (1983) 'Hastening Slowly: The Community Path towards Harmonization'. In Wallace, H., Wallace, W. and Webb, C. (eds.), *Policy-Making in the European Community* (London: Wiley, pp. 177-208).

Dehousse, R. (1988) 'Completing the lntemal Market: Institutional Constraints and Challenges'. In Bieber, R., Dehousse, R., Pinder, J. and Weiler, J. (eds.), *i992: One European Market? A Critical Analysis of the Commission's internal Market Strategy* (Baden-Baden: Nomos, pp. 311-36).

Dehousse, R. (1989) '1992 and Beyond: The Institutional Dimension of the International Market Programme'. *Legal issues of European integration,* pp. 109-36.

Ehlermann, C.-D. (1984) 'How Flexible is Community Law: An Unusual Approach to the Concept of "Two Speeds"'. *Michigan Law Review,* Vol. 82, pp. 1274-93.

Ehlermann, C.-D. (1987) 'The Internal Market Following the Single European Act'. *Common Market Law Review,* Vol. 24, pp. 361-409.

Ehlermann, C.-D. (1990) 'The "1992 Project": Stages, Structures, Results and Prospects'. *Michigan Journal of International Law,* Vol. 11, pp. 1097-118.

Fallon, M. and Maniet, F. (eds.) (1990) *Product Safety and Control Processes in the European Community* (Brussels: Story-Scientia).

Gormley, L. (1985) *Prohibiting Restrictions on Trade within the EEC* (Amsterdam/New York/Oxford: North-Holland).

IEJE (lnstitut d'etudes juridiques europeennes) (1971) *La constitution economique europeenne* (Liege/The Hague: Nijhoff).

Joerges, C. (1990) 'Product Safety Law, Internal Market Policy and the Proposal for a Directive on General Product Safety'. In Fallon and Maniet (eds.) (1990) pp. 177-213.

Joerges, C. and Falke, J. (1991) *'Traditional' Harmonisation Policy, European Consumer Protection Programmes and the New Approach.* EUI Working Paper LawN. 91/13.

Joerges, C. and Micklitz, H.-W. (1991) *internal Market and Product Safety Policy.* EUI Working Paper LawN. 91/14.

Kapteyn, P. and Verloren van Themaat, P. (1989) *Introduction to the Law oft he European Communities* (ed. L. Gormley) 2nd ed. (Deventer/Boston: Kluwer).

Kaufer, E. (1989) *The Regulation of Drug Development: In Search of a Common European Approach.* EUI Working Paper N. 89/41 l.

Laski, H. (1939) 'The Obsolescence of Federalism'. *The New Republic,* 3 May, pp. 367-9.

Lenaerts, K. (1990) 'Constitutionalism and the Many Faces of Federalism'. *American Journal of Comparative Law,* pp. 205-63.

McGee, A. and Weatherhill, S. (1990) 'The Evolution of the Single Market: Harmonisation or Liberalisation'. 53 *Modern Law Review,* pp. 575-96.

Majone, G. (1989) 'Regulating Europe: Problems and Prospects'. *3Jahrbuch zur Staats- und Verwaltungswissenschaft,* pp. 159-77.

Majone, G. (1991) *Market Integration and Regulation: Europe after 1992.* EUI Working Papers SPS N. 91/10.

Majone, G. and La Spina, A. (1991) 'Lo Stato regolatore'. 3 *Rivista Trimestra/e di Scienza de/I'Amministrazione,* pp. 3-61.

Mertens de Wilmars, J. (1988) 'Retlexions sur l 'ordre socio-economique de Ia Communaute europeenne'. In Duthei l de Ia Rochere, J. and Vandamme, J. (eds.), *1nterventions publiques et droit communautaire* (Paris: Pedone) pp. 15-36.

Pelkmans, J. (1990) 'Regulation and the Internal Market: An Economic Perspective'. In Siebert, H. (ed.}, *The Completion of the Internal Market* (Ttibingen: Mohr), pp. 91-117.

Pescatore, P. (1979) 'Quelques themes de structure economique dans Ia jurisprudence de Ia Cour de Justice des Communautes europeennes'. In Demaret, P. (ed.}, *Aides et mesures de sauvegarde en droit international economique* (Paris: Editions du Moniteur}, pp. 143-59.

Prosi, G. (1990) 'Comments on Horst Siebert, "The Harmonization Issue in Europe: Prior Agreement or Competitive Process?"'. In Siebert, H. (ed.}, *The Completion of the Internal Market* (Ttibingen: Mohr), pp. 76-84.

Behbinder, E. and Stewart, R. (1985) *Environmental Protection Policy* (Berlin/New York: de Gruyter).

Sands, P. (1990) 'European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups'. 53 *Modern Law Review,* pp. 685-98.

Scharpf, F. W. (1988) 'The Joint Decision Trap: Lessons from German Federalism and European Integration'. *Public Administration,* Vol. 66, pp. 239-78.

Sedemund, J. (1988) 'Statement on the Concept of the Free Movement of Goods and the Reservation for National Action under Art. 36 EEC Treaty'. In Schwarze, J. (ed.), *Discretionary Powers of the Member States in the Field of Economic Policy and their Limits under the EEC Treaty* (Baden-Baden: Nomos), pp. 25-36.

Siebert, H. (1990) 'The Harmonization Issue in Europe: Prior Agreement or Competitive Process?'. In Siebert, H. (ed.), *The Completion of the Internal Market* (Ttibingen: Mohr), pp. 53-75.

Snyder, F. (1990) *New Directions in European Community Law* (London: Weidenfeld and Nicolson).

Stein, E. (1985) 'Uniformity and Diversity in a Divided-Power System: The United States' Experience'. 61 *Washington Law Review,* pp. 1081-2002.

Sternberg, C.W. (1990) 'Regulatory Federalism: An Overview of American Experience'. Paper presented at the conference on *Regulatory Federalism,* Florence, November.

VerLoren van Themaat, P. (I 990) 'Some Comments of a Former Advocate-General at the Court of Justice of the EC'. In Fallon and Maniet (eds.) (1990) pp. 129-32.

Von Heydebrand u.d. Lasa, **H.** (1991) 'Free Movement of Foodstuffs, Consumer Protection and Food Standards in the EC: Has the Court of Justice got it Wrong?'. 16 *European Law Review.* pp. 391-416.

Weiler, **J.H.H.** (1982) 'Community, Member States and European Integration: Is the Law Relevant?', *l6Journal ofCommon Market Studies,* p. 40.

Weiler,J.H.H. (1991) 'The Transformation of Europe', 100 *Yale Law Journal,* p. 2403.