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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES

EUI Working Paper SPS No. 93/9

The European Community: An "Independent Fourth Branch of Government"?

GIANDOMENICO MAJONE

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in September 1993
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

The European Community: An "Independent Fourth Branch of Government"?

Giandomenico Majone
European University Institute, Florence

Like H.P.Ipsen's characterization of the European Community as "Zweckverband funktioneller Integration" (Ipsen 1972), the characterization proposed here is not meant to be either a legal definition or an anticipation of future institutional or political developments. In Ipsen's words: "kein Versuch rechtsbegrifflicher Qualification, auch nicht der einer definitiven Stellungnahme zu gegenwärtigen oder künftigen Staatlichkeit oder Staatsähnlichkeit oder gar zu einer angeblichen 'Entpolitisierung' der Integration" (Ipsen 1984: 84).

Rather, the purpose of describing the Community as an independent fourth branch of government of the member states -- the regulatory branch -- is to focus attention on a crucially important function of EC institutions from a perspective which deliberately eschews loaded terms like "federalism", "intergovernmentalism", or "functionalism". Instead, in the spirit of recent suggestions made by Keohane and Hoffman (1990), my approach draws on contemporary theories of institutional choice and international political economy, as well as on methods of regulatory analysis.

Lecture given on the occasion of the 10th Anniversary of the Zentrum Für Europäische Rechtspolitik at the University of Bremen, Bremen, April 23, 1993.

A view of the European Community through the lens of regulation reveals aspects of great significance also for economic and European law. However, to quote Ipsen once more, "[d]ass sich auch bei solcher Gestaltbeschreibung als Nebenbetrag bereits rechtserhebliche Aus- und Eingrenzungen entstehen können ... ist nützlich und als solcher zu akzeptieren, nicht aber eigentliche Intention der Gestaltbeschreibung" (Ipsen 1984: 80). Achieving a better understanding of EC policy making is the sole objective of the "Gestaltbeschreibung" offered here.

The metaphor of the fourth branch of government is of American origin. In order to make its meaning clear, I could not avoid giving a short account of a debate which has engaged scholarly and public opinion in America at least since the 1930s. This may appear to be a detour from the goal of an improved understanding of EC policy making, but I hope to show that the American experience has several interesting lessons for European scholars and policy makers.

Perhaps the most important lesson is that independence and accountability, at least in the case of regulatory agencies, can be mutually reinforcing rather than antithetical. From this insight follows a richer and more flexible notion of control which is better suited to the task of disciplining regulatory discretion than traditional methods of political and administrative oversight. The problem of the "democratic deficit" of the Community is by no means unique, although this is the impression given by so many disquisitions on the subject. In reality, it is a problem common to all non-majoritarian institutions -- independent regulatory agencies but also courts and central banks. If the problem is more visible at the Community level, this is because regulation is relatively more important there than at the national level. The metaphor of the fourth branch of government helps us perceive such underlying similarities more clearly.

Changing Views on the "Fourth Branch"

The expression "fourth branch of government" was introduced to stress what already in the 1930s were considered major defects of the independent regulatory commissions (IRCs): violation of the principle of separation of powers, lack of political accountability, and poor coordination. According to the Committee on Administrative Management (Brownlow Committee) established by President Franklin Roosevelt in 1936, the independent commissions

> are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. Thy constitute a headless "fourth branch" of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three branches of government and only three (cited by Litan and Nordhaus 1983: 50).

Writing almost a generation later, a political scientist expressed similar concerns in equally strong language:

> The theory upon which the independence of the commission is based represents a serious danger to the growth of political democracy in the United States. The dogma of independence encourages support of the naive notion of escape from politics and substitution of the voice of the expert for the voice of the people ... The commission has significant anti-democratic implications. (Bernstein 1955: 293).

To understand the terms of the debate it is important to bear in mind that the IRCs are independent only in the sense that they operate outside the presidential hierarchy in making their policy decisions and that, as asserted by the Supreme Court in Humphrey's Executor vs. United States (1935), commissioners can be removed from office only for official misbehaviour, not for disagreement with presidential policy. In fact, the IRCs were created by

Congress precisely to ensure agency independence from presidential control and short-term political considerations.

In the discussion over the degree of independence which regulatory agencies should enjoy, the majority of liberal scholars have traditionally supported stronger presidential supervision. Marver Bernstein, for example, maintained that isolation from the presidency results in a lack of political support, and this political vacuum leads to capture of the regulators by the supposedly regulated industries. More recently, Cass Sunstein has added three more reasons for presidential supervision. First, the president's supervisory role increases the likelihood that discretionary decisions by regulatory agencies respond to the national interest rather than to the parochial pressures of Congress. Second, only the president can coordinate the entire regulatory process -- an especially important capacity in light of the proliferation of regulatory agencies with overlapping responsibilities. Finally, the president is able not only to coordinate, but also to direct regulatory policy in a way that would be difficult or impossible if that policy were set individually by agency officials. Presidential control allows the government to respond to shifts in public opinion, reducing the likelihood that politics will become routinized and heavily bureaucratized (Sunstein 1987: 452-53).

But what if shifts in public opinion lead to the election of a president with strong deregulatory views, like President Reagan? An important idea behind the creation of the IRCs was to ensure consistency in regulatory policy making by insulating the regulators from the potentially destabilizing effects of the electoral cycle. However, because of the liberal critique of the IRCs, most of the regulatory bodies created in the 1970s -- agencies like the Environmental Protection Agency, the Occupational Safety and Health Administration or the National Highway Traffic Administration -- were organized as single-headed executive agencies, either reporting directly to the

president (the case of the EPA) or in the line of command from the president down through the executive-branch hierarchy.

Once elected, President Reagan tried to use his control of the budgetary process to reduce the activity of the EPA and the other social regulatory agencies and to slow down enforcement of antitrust legislation. At the same time Congress, concerned about the mounting cost of social regulation and the consequent threats to employment and to the international competitiveness of American industry, was not pushing the agencies very hard to implement the statutes of the 1970s.

Faced by a reluctant Congress and by a president opposed to any form of regulation, some liberal scholars and representatives of public-interest groups began arguing that not only the IRCs but also the social regulatory agencies should be viewed as an independent branch of government not answerable to either Congress or president, but closely monitored by the courts. As Martin Shapiro writes:

> If you don't trust Congress and know that the president is the enemy, who is left to love and nurture the health, safety and environmental legislation of the sixties and seventies? All that is left is the bureaucracy of the new federal agencies who were recruited only recently and retain their enthusiasm for doing what they were hired to do. They want to regulate in behalf of the great public values of health, safety, and environmental purity. So it becomes attractive to those favoring regulation to turn the federal bureaucracy into an independent branch of government. Such a branch would be free of the president, even free of the Congress of the eighties, but loyal to the sweeping statutory language of the sixties and seventies (Shapiro 1988: 108).

Independence and Accountability

The notion of an independent regulatory branch appears at first sight problematic in view of the traditional separation-of-powers theory and of the constitutional position of the president as head of the executive branch and its agencies. The crucial political issue, however, is control. Regulators are appointed
-- not elected -- officials, yet they yield enormous power. How is their exercise of that power to be controlled? I hope to show that the answers given by American scholars to this and related questions are also relevant to the current debate about the role of regulation in the European Community and its member states.

The advocates of an independent regulatory bureaucracy use a variety of political and legal arguments. In terms of political philosophy, they draw on strands of the American tradition that emphasize the value of independent, non-majoritarian institutions, such as the courts, for democratic government. There is, first, the Madisonian tradition that views insulation of government as a possible safeguard against "factionalism" -- the usurpation of government by powerful and self-interested groups -- and the threats which factionalism poses to the republican belief in deliberative democracy. Also the tradition of the Progressive movement, represented by such political leaders as Theodore Roosevelt and Woodrow Wilson, attached great importance to the insulation of government from short-term party politics and electoral interests as a way of ensuring both efficiency and honesty in public affairs (Hofstadter 1955). Finally, the ideology of the New Deal defended the independence of the regulatory commissions as necessary to the acquisition and use of that expertise which was their raison d'être. Such commissions emerged and became important instruments of governance for industry precisely because Congress and the courts proved unable to satisfy the "great functional

imperative" of specialization. In the words of Merle Fainsod, regulatory agencies "commended themselves because they offered the possibility of achieving expertness in the treatment of special problems, relative freedom from the exigencies of party politics in their consideration and expeditiousness in their disposition" (Fainsod 1940: 313).

One must remember that the independence of the regulators is relative. As already mentioned, even the IRCs are independent only in the sense that they operate outside the presidential hierarchy and that commissioners cannot be removed from office for disagreement with presidential policy. All regulatory agencies are created by congressionally enacted statutes. The programmes they operate are defined and limited by such statutes; their legal authority, their objectives and sometimes even the means to achieve those objectives are to be found in the enabling laws.

Regulatory discretion is also severely constrained by procedural requirements. Since passage of the Federal Administrative Procedures Act (APA) in 1946, followed in 1976 by the Freedom of Information and by the Government in the Sunshine Acts, regulatory decision making has undergone a far-reaching process of judicialization. Under APA, agency adjudication was made to look like court adjudication, including the adversarial process for obtaining evidence through presentations of the contending parties, and the requirement of a written record as the basis of agency decision. Clearly, these and similar procedural requirements greatly simplify judicial review of administrative adjudication.

On the other hand, APA requirements for rule making are less demanding: before promulgating a rule, the agency must provide public notice and opportunity for comments; when it promulgates the rule, it must supply a concise general statement of the rule's "basis and purpose"; the rule can be set aside by a court only if it is "arbitrary, capricious, or abuse of discretion" -- the

"lunacy test", as this lax standard of judicial review has been called. Such difference in requirements for adjudication and rule making did not matter much as long as most regulation was of the rate-setting and permit-allocation types and hence relied largely on adjudication. However, with the growth of social regulation in the 1960s and 1970s, rule making (e.g., standard setting) became much more important. Thus, the courts began to develop a large body of new procedural rules and strict standards of judicial review for rule making proceedings. Finally, in the 1980s there were serious attempts to make the exercise of regulatory discretion -- the residual category of what agencies do, which is neither adjudication nor rule making -- court-like as well (Shapiro 1988: 111). For example, agencies were required to justify their regulatory priorities or risk assessments through the use of cost-benefit or risk analysis. In turn, such requirements strengthened the role of professionalism as a foundation of agency independence. Professionals are oriented by goals, standards of conduct, and career opportunities that derive from their professional community, giving them strong reasons for resisting interference and direction by political outsiders (Moe 1987: 291).

The progressive judicialization of regulatory proceedings makes the arguments in favor of an independent regulatory branch more plausible by making the agencies more and more court-like. After all, one of the most important characteristics of courts is their independence. If it is improper for a president or member of Congress to interfere with a judicial decision, the same ought to be true with respect to the decisions of a court-like agency. This does not mean, of course, that regulatory decisions should be taken in a political and institutional vacuum. The authority of Congress to define broad policy objectives and the responsibility of the president to coordinate the entire regulatory process to ensure internal coherence, are not questioned. Rather, the advocates of an independent fourth branch, but also some supporters of

stronger presidential control like Cass Sunstein, favor a bigger role for the courts in controlling agency discretion through procedural and substantive review of rule making (Ackerman and Hassler 1981; Shapiro 1988; Edley 1990; Sunstein 1990; Rose-Ackerman 1992).

If a pro-deregulation president can mount a frontal assault on social regulation, and if members of Congress are too concerned with their own re-election to worry about the coherence of statutory programs, only the courts can provide the necessary continuity of the regulatory process. They, more than any other branch of government, are committed to preserving continuity of meaning in statutory law. What is suggested here is a partnership between regulatory agencies and courts. By both procedural and substantive means, but especially by statutory interpretation, the courts should insist that regulators continue to pursue with vigor the objectives set by Congress in the 1960s and 1970s, even when other political forces try to use recently elected members of Congress and presidents to cut back on regulation in the name of economic development (Shapiro 1988: 127). In return, judges should protect the independence of the regulators.

But what about political accountability? Is government by judges and technocratic experts compatible with democratic principles? The writers considered here are quite aware of the importance of these questions, but they point out that government by elected politicians, too, suffers from a number of defects that have been extensively discussed by public-choice theorists (Mueller 1989). For example, in seeking re-election, legislators engage in advertising and position taking rather than in serious policy making, or they design laws with numerous opportunities to aid particular constituencies. In either case, re-election pressures have serious consequences for the quality of legislation. On the other hand, proregulatory scholars ask rhetorically, if the courts require the regulatory process to be open to public input and scrutiny

and to act on the basis of competent analyses, are the regulators necessarily less accountable than elected politicians? (Rose-Ackerman 1992: 34).

At any rate, the value of agency responsiveness to political principals begins to appear questionable once it is realized that new political forces can put pressure on Congress and the president to cut back on social regulation. Under such circumstances continuity with the policies of the past could be preserved only by reasserting the faith of the New Deal in the independence of the regulatory branch. However, while New Dealers viewed the courts with suspicion, the new advocates of an independent fourth branch see judicial review as the most effective means to ensure the public accountability of the regulators.

Perhaps the most important lesson to emerge from the American debate on independence and accountability in the regulatory state is that agency independence and public accountability should be viewed as complementary and mutually reinforcing rather than antithetical values. Professionalism, expertise, statutory goals, procedural requirements, judicial review, budgetary discipline, monitoring by interest groups, and even inter-agency rivalry, are all elements of a complex system of immanent control. When the system works properly, no one controls an independent agency, yet the agency is "under control" (Moe 1987).

The tendency to assume that independence and accountability are mutually exclusive is due to the conventional view of control as "self-conscious oversight, on the basis of authority, by defined individuals or offices endowed with formal rights or duties to inquire, call for changes in behaviour and (in some cases) to punish" (Hood 1991: 347). For a highly technical and discretionary activity like regulation a more appropriate notion of control is one which Christopher Hood has called "interpolable balance": a view of control that takes as its starting point a need to identify self-policing

mechanisms which are already present in the system, and can contemplate a network of complementary and overlapping checking mechanisms instead of assuming that control is necessarily to be exercised from any fixed place in the system (ib.:354-55). In Europe, however, the complementarity of independence and accountability is still poorly understood.

The Development of Regulation in Europe

Administrative regulation -- economic and social regulation by means of agencies operating outside the line of hierarchical control or oversight by the central administration -- is becoming the new frontier of public policy and public administration in Europe. The development has been particularly intense during the past two decades. In France, for example, the expression "autorité administrative indépendante" was used for the first time by the law of 6 January, 1978 creating the Commission Nationale de l'Informatique et des Libertés. Today there are some 17 independent agencies, including such bodies as the Commission des Opérations de Bourse, the Commission Bancaire, the Commission de la Sécurité and the Commission de Contrôle des Assurances.

Also in Britain the 1970s have been a period of significant institutional innovation, particularly in the area of social regulation: Independent Broadcasting Authority, Civil Aviation Authority, Health and Safety Commission, Equal Opportunities Commission, and the Commission for Racial Equality, among other agencies. Despite the hostility of Conservative governments toward any kind of "quangos", a number of independent agencies were set up also in the 1980s and early 1990s, partly because it was realized that in many cases privatization would only mean the replacement of public by private monopolies unless the newly privatized companies were subjected to public regulation. Thus, the privatization process has been paralleled by the development of a whole new regulatory structure, including a new breed of

regulatory agencies, the regulatory offices: Office of Telecommunications, Office of Gas Supply, Office of Water Services, Office of Electricity Regulation.

Similar, if slower, institutional developments are taking place everywhere in Europe, so it is natural to ask what are the reasons for both the sudden growth of administrative regulation and the lateness of its arrival on the European political stage (Majone, forthcoming). The growing realization that the interventionist and welfare policies of the past either had failed or could not be afforded any more, did not lead to demands for a return to laissez-faire, as the more radical advocates of privatization and deregulation seemed to expect. Instead, there was a demand for better focused and more flexible forms of public intervention, and for more attention to those areas of social regulation (environment, consumer protection, freedom of information) which were often neglected by the welfare policies of the past. Thus, paradoxically, the debate on privatization and deregulation contributed to directing the attention of European public opinion to regulation as a distinct mode of policy making aimed at correcting specific types of market failure.

Unlike older forms of state intervention, regulation is primarily concerned with increasing microeconomic efficiency. This is true not only of economic, but also of social regulation. Thus, the purpose of environmental regulation is to reduce negative externalities caused by pollution; microeconomic efficiency is increased by reducing the difference between the private and the social cost of pollution.

The adoption of microeconomic efficiency as the main normative criterion has several important consequences. It implies, for example, that regulatory instruments should not be used to achieve redistributional or other social policy goals (Majone 1993). The institutional implications are particularly relevant to our discussion. The use of specialized, single-purpose

agencies is a direct consequence of the focused approach characteristic of regulation. Also in this respect, there is a striking difference between administrative regulation and traditional modes of public intervention. In Europe, even when techniques of administrative regulation were used, such as entry and price regulation, standard setting, or licensing, there was a general reluctance to rely on specialized, single-purpose or single-industry regulatory agencies. Instead, important regulatory functions were assigned to some obscure office buried deep inside some large ministry, or to an inter-ministerial committee effectively protected from any kind of judicial review or independent scrutiny. Hence the low visibility of regulatory policy making.

The reasons for the reluctance to set up independent agencies varied according to different constitutional, political and administrative traditions, but the net result was everywhere the same: a serious mismatch between the increasingly specialized functions of government and the administrative instruments at its disposal. Only after the mismatch became too obvious to be overlooked did European scholars begin to produce functional justifications for the rise of independent regulatory agencies. These justifications are strongly reminiscent of the arguments of earlier American writers. Thus it is said that agencies are justified by the need of expertise in highly complex or technical matters, combined with a rule making or adjudicative function that is inappropriate for a government department or a court; that an agency structure may favor public participation, while the opportunity for consultations by means of public hearings is often denied to government departments because of the conventions under which they operate; that agencies' separateness from government is useful whenever it is hoped to free government administration from partisan politics and party political influence. Agencies are also said to provide greater continuity and stability than cabinets because they are one step removed from election returns; and the exercise of a policy making function by

an administrative agency should provide flexibility not only in policy formulation but also in the application of policy to particular circumstances. Finally, it is argued that independent agencies can protect citizens from bureaucratic arrogance and reticence, and are able to focus public attention on controversial issues, thus enriching public debate (Baldwin and McCrudden 1987: 4-9).

The rise of administrative regulation in Europe owes much to these newly articulated perceptions of a serious mismatch between existing institutional capacities and traditional styles of administration, on the one hand, and the new demands of public participation and growing complexity of policy problems, on the other. Old habits of secretiveness and ministerial interference continue to persist, however. 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. The danger is that these powers of direction "could be abused to exert behind-the-scenes pressure on the regulator in much the same way as pressure was put on the nationalized industries by government, precisely the situation which the privatization programme is supposed to render impossible" (Prosser 1989:147).

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. Obviously, the government has kept for itself these important prerogatives in order to be able to deploy the "competition weapon", and especially the power to launch an investigation, in its dealing with economic interests. Also the German Bundeskartellamt, despite its considerable powers,

must occasionally yield to ministerial decisions. This was clearly demonstrated when, in 1989, the agency opposed the merger of Daimler Benz with the Messerschmidt-Bölkow-Blohm Company on the ground that the new group would have a dominant position in several industries ranging from defense electronics to aerospace and transportation. Despite the clear danger of a distortion of competition in 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, shows how precarious the position of national regulators still is. Considerations of political expediency are often disguised as constitutional concerns. It is said that independent agencies are constitutional anomalies which do not fit well into the traditional framework of controls, checks and balances. Regulation is seen to be highly discretionary, suffering from weak accountability to Parliament, weak judicial review, absence of procedural safeguards, and insufficient public participation (Baldwin and McCrudden 1987; Prosser 1989; Veljanovski 1991).

But as was suggested above, independence and accountability are complementary rather than mutually exclusive. If regulation in Europe suffers from the defects just noted, the cause is not an excess of independence but, on the contrary, the constant threat of political interference. Such interference compromises not only the continuity and coherence of regulatory policy making, but the very credibility of national regulators in the eyes of regulated firms and of other governments. As I show in the next section, the issue of credibility is very important for understanding the rationale of supranational regulation, and the role of the European Community as an independent fourth branch of government.

Supply and Demand of Community Regulation

It has been rightly said that the regulation issue -- what, how, and at what level of government to regulate -- is the core of the compromise between the European Community and its member states that made the Internal Market programme possible (Pelkmans 1989). Of course, the importance of Community regulation was well established long before the relaunching of European integration in the mid-1980s; but the reasons for this growing importance are less obvious than may appear at first sight. Aside from competition policy and from measures necessary for the free movement of goods, persons, services and capital, and for the operation of the Common Agricultural Policy, few regulatory policies are specifically mentioned in the Treaty of Rome. The transport and energy policies which could have given rise to significant regulatory activities, have remained largely undeveloped until recently.

Nonetheless, EC regulation has grown continuously since the first directive "on the approximation of the rules of the Member States concerning the colouring matters authorised for use in foodstuffs intended for human consumption" (JO/1962, p.2645) was adopted by the Council on October 23, 1962. Often, regulation was introduced even in the absence of an explicit legal mandate, as in the case of environmental protection before the Single European Act. Thus, the almost 300 measures proposed by the 1985 Commission White Paper on the internal market (COM(85),310 final) only represented the acceleration of a trend set in motion two decades before.

It is also clear, now, that the method of mutual recognition outlined in the same document is not, and was not meant to be, an exercise in deregulation. As one of the drafters of the White Paper writes, the focus on mutual recognition

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deregulation. As one of the drafters of the White Paper writes, the focus on mutual recognition

> is not motivated by ideological or political reasons, but by tactical and practical considerations, namely to reduce the Council's workload and to obtain rapid results... Indeed, harmonization is not dead and may sooner or later start to flourish again. It has been relegated only in the specific context of the White Paper and its objective of abolishing all barriers to the free movement of goods, persons, services and capital. Mutual recognition achieves this objective, but it does not satisfy all aspirations of consumers and producers... only harmonization can implement effective Community policies for e.g. the protection of the environment or can give the Community a leading role in the fields of public health, technical security and consumer protection (Schmitt von Sydow 1988: 96-97).

The most striking feature of the directives inspired by the new approach is the combination of extensive deregulation at the national level with re-regulation at EC level. This apparently paradoxical combination of deregulation and re-regulation may be called "regulatory reform" (Majone 1990). In this sense, the essence of the new strategy is not deregulation, as it is so often asserted, but regulatory reform.

Now, to explain the continuous expansion of Community regulation we must consider both the supply and the demand for it. A simple model is sufficient to explain the supply side. Let us assume that the Commission's objective is to maximize its influence or power. This is a standard assumption of the economic theory of bureaucracy, except that in our model the Commission attempts to maximize its influence as measured by the scope of its competencies; while in the standard theory bureaucrats wish to maximize their budget, since the budget is supposed to be positively and monotonically related

to such goals as "salary, the perquisites of office, public reputation, power, patronage, output of the bureau" (Niskanen 1971: 38).

However, budget maximization is not a plausible hypothesis for a regulatory agency and, in fact, public choice and other economic theories of regulation make no use of it in modelling the behaviour of regulators. This is because budgetary limitations have only limited influence on the activities of regulators. The size of non-regulatory, direct-expenditure programmes is constrained by budgetary appropriations and, ultimately, by the size of government revenues. In contrast, the real costs of most regulatory programmes are borne directly by the firms and individuals who have to comply with them. Compared with these costs, the resources needed to produce the regulations are trivial. This structural distinction between regulatory policies and policies involving the direct expenditure of public funds is particularly important in the Community context, since not only the economic, but also the political and administrative costs of enforcing EC regulations are borne by the member states.

Of course, regulation is not the only way by which the Commission can attempt to expand its influence. Thus, a number of ambitious initiatives have been recently launched in fields ranging from technology policy and research and development to regional policy and macroeconomic management. However, severe budget constraints set narrow limits to the scale of Community programmes involving direct expenditures. The budget of the Community is small (less than 1.3 per cent of the combined GDP and less than 4 per cent of the central government spending of the member states) and rigid: about 70 per cent of the budget is allocated to the common agricultural policy and to a handful of redistributive programmes. In practice, regulation offers the only solution to the problem of maximizing the influence of EC policy makers, subject to such severe budget constraints. Thus, while the power of the

member states is still the traditional power of taxing and spending, that of the Community is, to a large extent, the power of rule making: this is the conclusion of our model of the supply side of EC regulation.

We must now consider the demand side. First, important economic interests prefer Community to national regulations. For example, multi-national, export-oriented industries want to avoid inconsistent and progressively more stringent regulations in various EC and non-EC countries. Community regulation can eliminate or at least reduce this risk. A similar phenomenon has been observed in the United States where certain industries, faced with a significant loss of markets through state and local legislation, have strongly supported federal regulation. For example, the car industry, which during the early 1960s had successfully opposed federal emission standards for motor vehicles, abruptly reversed its position in mid-1965: provided that the federal standards would be set by a regulatory agency, and provided that they would preempt any state standards more stringent than California's, the industry would support federal legislation.

For a European example, consider Directive 79/831/EEC amending for the sixth time Directive 67/548/EEC on the classification, packaging and labelling of dangerous substances. The 1979 directive does not prevent member states from including more substances within the scope of national regulations than are required by the directive itself. In fact, the British Health and Safety Commission proposed to go further than the directive by bringing intermediate products within the scope of national regulation. This, however, was opposed by the chemical industry which argued that national regulation should not impose greater burdens on British industry than the directive placed on its competitors. The industry view prevailed, thus ensuring that Community regulation would in fact set the maximum as well as the minimum standard for national regulation (Haigh 1984). Also German firms, concerned about an

environmentally conscious public opinion at home and wishing to avoid the commercial obstacles that would arise from divergent national regulations, pressed for a EC-wide regulation of toxic substances.

The European chemical industry had another reason for supporting Community regulation. The U.S. Toxic Substances Control Act (TSCA) enacted in 1976, represented a serious threat for European exports to the American market. A European response to TSCA was needed, and the Community was the natural forum for fashioning such a response. In fact, the 1979 directive has enabled the Community to speak with one voice in discussion with the United States and other OECD countries, and has strengthened the position of the European chemical industry in ensuring that the new American law did not create obstacles to its exports. There is little doubt that the ability of the Commission to enter into discussion with the USA has been greatly enhanced by the directive, and it is unlikely that each European country on its own could do so effectively (Brickman, Jasanoff and Ilgen 1985: 277).

If it is fairly easy to explain the preference of export-oriented industry for Community regulation, the willingness of member states to delegate increasingly important regulatory powers to EC institutions requires more subtle theoretical considerations. The spillover effects of functionalist theory do not provide a satisfactory explanation since they fail to differentiate between areas where policy development has been slow and uncertain (for example, transport and energy) and areas where significant developments have taken place even in the absence of a clear legal basis, as in the case of environmental regulation.

On the other hand, a famous result of transaction-cost economics due to Ronald Coase (1960), implies that the presence of externalities alone does not

necessarily prevent effective coordination among independent actors. Hence, international market failures could be managed by cooperative agreements among sovereign states, without the necessity of delegating regulatory powers to a supranational level, provided that the costs of organizing and monitoring the agreements were negligible. This would be the case if national regulators were willing and able to take into account the international repercussions of their choices; if they had perfect information of one another's intentions and actions; and if they were prepared to enforce the agreements in a credible way, regardless of the consequences for their own firms. Of course, these conditions are seldom satisfied, and this explains why effective international policy coordination is so rare. When the conditions for international coordination are not satisfied, even approximately, we speak of international regulatory failure. Following Gatsios and Seabright (1989), I shall argue that international regulatory failure, rather than market failure, explains the willingness of member states to delegate regulatory powers to the EC.

Among the main causes of international regulatory failure are the strategic use of regulation, lack of information, and credibility problems. Domestic regulation can be used strategically in order to gain advantages with respect to other countries or jurisdictions. For example, local authorities have sometimes controlled air pollution by requiring extremely tall smokestacks on industrial facilities. With tall stacks, by the time the emissions descend to ground level they are usually in the next city, province, or country, and so of no concern to the jurisdiction where they were emitted. Within a federation or a supranational system like the EC, centralization of regulatory authority to a higher level of government can limit such strategic use of regulation. Similarly, EC-wide harmonization of essential health and safety requirements and European standards serve to limit the strategic use of technical specifications and standards by national regulators.

Lack of information makes it difficult to determine whether international agreements are kept or not. In some cases, this may be due to severe measurement problems. Because of quickly changing atmospheric conditions, for instance, it may be difficult to know whether a given environmental standard has been exceeded, and for how long. Again, because regulators lack information that only regulated firms have, and because governments are reluctant, for political reasons, to impose excessive costs on industry, regulators and regulated constantly bargain over the precise obligations of the latter. Bargaining being such a pervasive feature of regulatory enforcement, it is usually quite difficult for an outside observer to determine whether the spirit of an international agreement has been violated. Although the monitoring capacity of the Community institutions is still underdeveloped in most areas of regulation, it is considerably greater than that of purely intergovernmental institutions.

When it is difficult to observe whether member states are making an honest effort to enforce a cooperative agreement, the agreement is not credible. The issue of credibility is central to international regulatory failure and, more generally, to the failure of international policy coordination. Member states have problems of credibility in the eyes of each other because of the problems noted above -- inadequate information and the strategic use of regulation. They may also have credibility problems in the eyes of third parties, such as regulated firms or governments outside the Community. For example, where pollution has international effects and fines impose significant competitive disadvantages on firms that compete internationally, firms are likely to believe that national regulators will be unwilling to prosecute them as rigorously if they determine the level of enforcement unilaterally rather than under supranational supervision. Hence the transfer of regulatory powers to a supranational authority like the EC Commission, by making more stringent

regulation credible, may improve the behaviour of regulated firms (Gatsios and Seabright 1989:49).

As we saw above, Directive 79/831 has enabled the Community to speak with one voice in discussions with the United States over the regulation of toxic substances, and has strengthened the position of the European chemical industry in ensuring that the new American law (TSCA) did not create obstacles to its exports. We noted there that it is unlikely that each member state on its own could have entered into discussion with the USA so effectively. Thus, involvement of the EC can lend greater credibility to international regulatory cooperation than would unilateral activity by the member states.

The issue of the credibility of national regulators is closely linked to the problem of "regulatory capture", that is, the possibility that regulatory agencies become captured by the very interests they are supposed to regulated. This possibility exists also at Community level, but EC authorities are less vulnerable to lobbying by firms and trade unions. This is a considerable advantage in cases involving state aids to industry, merger authorisations, and competition policy. In fact, the EC Commission has consistently taken a stricter pro-competition stance than national authorities such as the British Monopolies and Mergers Commission and the German Bundeskartellamt.

One reason why EC authorities are less vulnerable to lobbying by interest groups is that the EC is involved in the regulation of a large number of firms throughout the Community. Hence it has much more to gain by being tough in any individual case than a national regulator: weak enforcement would destroy its credibility in the eyes of more firms (Gatsios and Seabright 1989: 50). Perhaps even more significant is the fact that EC authorities are not as vulnerable as national regulators to political pressures. As we saw above, ministerial interference in the decisions of regulators is still fairly common in

the member states. On the other hand, Article 157(2)EEC states: "The members of the Commission shall ... be completely independent in the performance of their duties ... they shall neither seek nor take instructions from any Government or from any other body ... Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks". With some notable exceptions, member states seem to understand that these prescriptions are essential for the credibility of EC regulation.

Finally, it should be noted that, just as not all central banks enjoy the same credibility with financial markets, so credibility is not uniformly distributed among national regulators. Some countries have low credibility because they lack, or are perceived as lacking, the scientific knowledge, technical expertise and administrative skills to regulate effectively in sensitive areas such as the testing of medical drugs. To take another example, until recently most member states lacked the legal and administrative instruments to regulate mergers and acquisitions. Under such circumstances, delegation of regulatory powers to the Community not only can achieve economies of scale in research and administration (given the low cost of regulation, probably a fairly minor point), but, what is more important, can improve the overall quality of regulation in the EC.

To conclude, I have tried to show that supply and demand meet to produce a supranational regulatory regime which not only complements, but is in many respects more credible than, the national systems. Indeed, in an increasingly integrated market the credibility of national regulation will depend more and more on the effectiveness of an independent "fourth branch". Mutual recognition and subsidiarity notwithstanding, European regulation will remain necessary to curb excessive or counter-productive regulation by national authorities.

The Need for Regulatory Reform

There are indications that the member states are beginning to realize that it is in their own national interest to promote the effectiveness of the regulatory branch in Brussels. The issue of implementation of Community regulations was given a high political profile for the first time by the European Council at its meeting in Dublin in June 1990. The Council, realizing that the credibility of EC policy making was at stake, asked for periodic evaluations of existing directives to ensure that they are adapted to scientific and technical progress, and to resolved persistent implementation problems.

In October 1991 the Council of Environmental Ministers held an informal meeting on implementation, as a result of which the Commission was instructed to submit proposals concerning the further development of policy on compliance and enforcement. At the Maastricht summit the member states again stressed the need for Community legislation to be accurately transposed into national law and effectively applied, while the Maastricht Treaty contains new powers for the European Court of Justice to fine member states who fail to comply with its judgements.

There is also renewed interest in European regulatory agencies and inspectorates. A European Environmental Agency was established by Council Regulation No.1210/90 of 7 May 1990. A proposal for the establishment of a European Agency for Evaluation of Medicinal Products was submitted by the Commission on 14 November, 1990 (COM(90)283 final), and amended on 12 November 1991 (COM(91)382 final). The proposal has not yet been accepted by the Council. Also under discussion is another proposal made by the Commission on 25 September 1991 for a European Agency for Safety and Health at Work (COM(90)564 final).

The creation of European agencies faces not only legal problems concerning the separation of powers and the delegation of legislative powers in

the Community (Lenaerts, 1992), but also the opposition of some member states. This explains why the tasks of the European Environmental Agency -- the only one to be formally approved by the Council so far -- are essentially limited to research and data collection. However, knowledgeable observers inside and outside Community institutions, believe this to be only a first step in the direction of a fully-fledged regulatory agency. Suggestions have already been made that the agency could monitor compliance and the effectiveness of environmental regulations. In time, the agency could also examine the extent to which directives have in fact resulted in substantive environmental improvements (House of Lords Select Committee 1992:19).

In the meanwhile, the regulatory activities of the Commission are supported by a dense network of consultative, regulatory and management committees. The comitology system has proved quite useful in tapping the technical and administrative resources of the member states, and also in ensuring that cultural and economic differences within the Community are taken into account. Some committees such as the Scientific Committee for Food have gained wide recognition and respect. Regardless of their effectiveness, however, the proliferation of committees has aggravated one of the most serious defects of Community institutions: the lack of transparency of their decision-making processes. Because of the opacity of the procedures, it is difficult for Community citizens to identify the body which is responsible for decisions which apply to them, and the legal remedies that are available.

A similar situation arose in the USA at the time of the New Deal, which saw, as is known, a dramatic growth in government intervention. The establishment of new specialised agencies, the functions of which were extremely complex and varied, created a need for rules to ensure they did not act arbitrarily or unlawfully. In the absence of a true administrative law tradition, the rules governing the federal administration had developed in a

piecemeal fashion as they had been worked out in response to ad hoc needs. However, such an approach was deemed insufficient to cope with the changes under way. The Administrative Procedures Act adopted by Congress in 1946, aimed to legitimise the growth of federal bureaucracy by providing a single set of rules explaining the procedures to be followed by federal agencies and providing for judicial review of many of their decisions.

It is submitted that the Community could usefully draw on such a precedent. The enactment of an EC Administrative Procedures Act would of course provide the Community with a unique opportunity to decide what kind of rules are more likely to rationalise decision making, to what extent interest groups should be given access to the regulatory process, or when judicial review is necessary. Even if it were to limit itself to the writing of existing practices into the law, such as the APA largely did, the adoption of a single set of administrative rules would at least provide for a hard core of provisions applicable to the developing regulatory process. Such a move would bear witness to the EC's unwillingness to allow an unregulated growth of the Community's administrative functions. As such, it would certainly be useful if, as suggested above, the Community will be called upon to establish administrative agencies of its own in a number of areas (Dehousse et al. 1992: 30-31).

The Community regulatory process suffers also from other defects such as the absence of central coordination, leading to serious inconsistencies across and within regulatory programmes; lack of rational procedures for selecting priorities; insufficient attention paid to the cost-effectiveness of individual rules; inadequate staffing and insufficient research capabilities. The patchwork character of Community regulation and the lack of incentives to search for economically efficient solutions are in large part due to political and institutional factors: the complexity of EC policy making, disagreement among

member states concerning priorities, the inadequacy of political oversight, and the need for the Commission to respond to national initiatives.

However, the shortcomings of Community regulation also have causes that are intrinsic to the regulatory process. While the scope of non-regulatory programmes is constrained by the size of the Community budget, the costs of most regulatory decisions are borne directly by the firms, individuals and governments who have to comply with them. The significance of this fact has already been stressed above. If lack of budgetary discipline is a basic reason for the structural defects of the regulatory process, whether at the national or at the Community level, one should attempt to create control mechanisms similar to those traditionally used for direct public expenditures.

Following this line of reasoning, several analysts of the American regulatory process have proposed the introduction of a regulatory budget. In its basic outline the regulatory budget would be established by Congress and the President for each agency, perhaps by starting with a budget constraint on total private expenditures mandated by regulation, and then allocating the budget among the different agencies. By setting a budget constraint on mandated private expenditures, the regulatory budget would clarify the real costs to the economy of adopting a regulation and encourage cost effectiveness. The knowledge that agencies would be competing against each other would lead them to propose their "best" regulations in order to win presidential and congressional approval. Simultaneous consideration of all new regulations would permit an assessment of their joint impact on particular industries and the economy as a whole. Finally, the placement of the regulatory budget decisions in the hands of Congress and the President would force them to assume responsibility for the overall magnitude and priorities of regulation. (Litan and Nordhaus 1981).

A number of serious technical difficulties have to be resolved before the regulatory budget could actually be implemented. However, the analogy with the budgetary process suggests several practical possibiiities for improving the Community regulatory process. One such possibility is the creation of a "regulatory clearing house" located at a sufficiently high level in the Community bureaucracy, possibly in the office of the President. Directorates-General would be asked to submit annually draft regulatory programmes to the clearing-house for review. When disagreements or serious inconsistencies arise, the President or a "working committee on regulation" would be asked to intervene. By extending centralised control over the regulatory agenda of the Directorates-general, this review process would help the Commission shape a consistent set of regulatory measures to submit to the Council and the Parliament. The usefulness of the procedure as a tool of managerial control could be increased by coordinating the regulatory review with the normal budgetary review, thus linking the level of budgetary appropriations to the cost-effectiveness of the various regulatory programmes.

One key function of such a clearing-house system, in addition to providing for greater coherence, would be to flesh out the concept of subsidiarity: only through the systematic review of the proposals put forward by the various Directorate-Generals will the Commission be able to determine when action by the Community is necessary. Obviously, a regulatory clearing house would be useful also at the national level (Majone, forthcoming).

To conclude, the twin problems of effectiveness and accountability of the regulatory process are present at all levels of government. If they are more

obvious at the Community level, this is because regulation is the core of EC policymaking. In the member states, foreign, security, welfare, and macroeconomic policies are politically more prominent than regulation. The metaphor of the fourth branch of government has been introduced precisely to highlight this difference, as well as the increasing reliance of national on Community regulation. In the future, the Community's competencies will probably cover many more policy areas than at present, while its membership will expand. However, it seems likely that only some members will join in the implementation of monetary union, or of a common immigration, defense, or foreign policy. Everyone, however, will have to take part in the core areas of economic and social regulation. Thus, the fourth branch will form the hub of an expanding network of European institutions.

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