

## The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics

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European Integration online Papers (EIoP) Vol. 1 (1997) N° 019;  
<http://eiop.or.at/eiop/texte/1997-019a.htm>

Date of publication in the : 14.11.1997

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### Keywords

economic law, harmonisation, standardisation, regulatory competition, networks, regulatory politics, social regulation, European polity formation, governance, institutionalisation, institutions, legitimacy, political science, law

### Abstract

The paper reacts to a widespread perception of the development of the European Community after the adoption and implementation of the internal market programme. These perceptions are characterised as endorsing the emergence of a "market without the state". This vision, the paper argues, is neither normatively sound nor empirically correct. The normative doubts are elaborated with the help of a comparative discussion of three competing approaches to the understanding of European Integration (German "Ordnungspolitik", Ipsen's Neo-Functionalism, Joseph Weiler's Dual Supranationalism). The empirical part of the argument is elaborated with the help of a comparison of the internal market programme and its actual implementation. This implementation can be characterised as a rebirth of regulatory politics. After a discussion of current approaches or suggestions such as regulatory competition, neo-corporatism and the building up of non-majoritarian institutions of governments, the paper asserts, that the Community will have to embark upon the task of meditating between mainly functional needs of market integration and broader regulatory concerns of the European Polity.

Both the analysis of legal perception of the European integration process and the normative suggestions are further taken up in a related paper: Joerges, *State without a Market? Comments on the German Constitutional Court's Maastricht-judgement and a Plea for Interdisciplinary Discourses*, European Integration online Papers Vol. 1, No. 20 (<http://eiop.or.at/eiop/texte/1997-020a.htm>).

### Kurzfassung

Der Beitrag reagiert auf verbreitete Wahrnehmungen der Entwicklung der Europäischen Gemeinschaft nach der Annahme und Umsetzung des Binnenmarktprogramms. Danach geht es in dieser Porgrammatik um die Etablierung eines „Marktes ohne Staat“. Diese Interpretation, so wird behauptet, sei weder normativ tragfähig noch empirisch korrekt. Die normativen Vorbehalte werden auf der Grundlage einer vergleichenden Analyse von drei Ansätzen der rechtswissenschaftlichen Integrationstheorie präzisiert (der deutschen Ordnungstheorie, Ipsens Neo-Funktionalismus, Weilers Dualem Supranationalismus). Die empirische Seite des Arguments wird durch eine Kontrastierung von offiziösen Darstellungen der Binnmarktprogrammatik mit ihrer tatsächlichen Implementation substantiiert. Die Implementation läßt sich als eine Renaissance der regulativen Politik kennzeichnen. Vergleichend werden hierbei Programmatiken einer regulativen Konkurrenz, eines europäischen Neokorporatismus und des Aufbau unabhängiger regulativer Agnturen bzw Institutionen diskutiert. Demgegenüber beharrt der Autor auf einer konstitutionellen Perspektive, die funktionale Zwänge der Marktintegration mit der Anerkennung normativer regulativer Zielsetzungen verbinden müsse.

Sowohl die Analyse der rechtlichen Wahrnehmung des Europäischen Integrationsprozesses als auch die normativen Vorschläge werden in einem in Verbindung stehenden Papier weiter ausgeführt: Joerges, *State without a Market? Comments on the German Constitutional Court's*

*Maastricht-judgement and a Plea for Interdisciplinary Discourses*, European Integration online Papers Vol. 1, No. 20 (<http://eiop.or.at/eiop/texte/1997-020a.htm>).

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## Preliminary

"The European Economic Community is a phenomenon of law in three respects: It is a creation of law, it is a source of law, and it is a legal order" (Hallstein 1974, 33). German commercial lawyers,

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

## I. Legal Structures and Integration Policy

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

### 1. Starting Points and Approaches

There is no title for 'regulatory policy' in the text of the EEC Treaty adopted in 1957. The real issues it denotes were at the time partly not debated at all, and partly in different forms. There was a vacuum in all the activities that appear as 'social regulation' in American heuristics of the regulatory debate. In 1957, the environment was not even a subject of interest in national policy; certainly, there was consumer protection policy (Egner 1956), but it was not taken into account as a European task; the sole exception, though admittedly of minor importance, was safety at work (Schulte 1990, 389 *et seq.*). The Treaty provisions on control of the economy kept terminologically and factually to the state of the economic policy debate of the 1950s, with its twofold disjunction -- between law and policy, economic sectors and exceptional areas: the Treaty proposed to implement the well-known 'four freedoms' (Articles 48 *et seq.*, 52 *et seq.*, 59 *et seq.*, 67 *et seq.* EEC). For economic policy, however, it was in principle the Member States that were competent. Their macroeconomic policies were defined in Articles 103 *et seq.* EEC as "a matter of common concern", and were kept together solely by agreements on coordination and cooperation. The Community was given genuine regulatory powers in competition policy. Yet the accepted areas known in domestic law remained untouched. Thus, transport policy was explicitly singled out as a Community task (Article 74 *et seq.* EEC), and a special regime was laid down for agriculture (Article 38 *et seq.* EEC).

The context of the freedoms aimed at bringing about the Common Market includes the legislative powers assigned to the Community pursuant to Art. 100, 1st paragraph, EEC, wherever divergent legal and administrative provisions hinder market integration. But how are such powers to be handled in legislatively responsible fashion if competences for environmental, consumer and other regulatory policies are missing? How is Community competence for competition policy to be reconciled

with Member State competence for economic policy? How are the macroeconomic effects of the four freedoms, namely a liberalization of capital movements, to be coped with? What type of 'rationality' can be expected to emerge from such decision-making rules, and how can parliamentary democracies accept a "*législation des gouvernements*"? With all these questions the Community got along astonishingly well for astonishingly long. It used its legislative powers under Articles 100 and 235 EEC extensively, developed ambitious programmes for environmental and consumer policy, kept conflicts between the achievement of the freedoms and extension of its competition policy and Member State economic policy powers from coming to the surface, and successfully solved the problems of currency policy cooperation (McDonald/Zis 1989).

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The complex conditions for the legal stability, economic success and political acceptance of European integration must be left on one side here. It seems foreseeable at present that the new dynamics unleashed by the Commission's internal market programme will affect and intensify all the conflicts so far kept latent: the more decisively the Community checks national consumer and environmental provisions for their effect of restraining trade, the less can it do so purely in the name of a merely 'negative' policy directed towards achieving the internal market, and the more pressing will the question of the 'positive' legislative policy quality of this sort of influence become. The more decisively it proceeds against the dense network of national economic regulations, the more it will have to expect resistance based on the Member States' residual economic policy powers. And this is true irrespective of whether national regulations are replaced by a competitive arrangement or by a European reregulation. Finally, the example of the liberalization of capital movements shows most clearly that the achievement of freedoms without a Europeanization of regulatory instruments is not conceivable and creates pressure for the creation of macroeconomic policy powers(1).

None of this is meant to assert some sort of inevitable logic of development. But when it comes to approaches which are normatively convincing and practically at least plausible(2), then the question of the possibility of developing regulatory policies in the framework of the Community's legal structures becomes relevant(3). However, everything depends on acknowledging that this query presents in fact a problem that needs to be addressed. The term 'regulatory policy' is not intended for the moment to denote anything more than the efforts to guarantee the social acceptability of the use of rights to act -- the justification of these attempts at intervention and guidance. But also, and above all, the appropriateness and possibility of juridification of regulatory policy are not threatened thereby. Accordingly, the question of the Europeanization of regulatory policy is not aimed at making Europe into a State, in the sense of replacing national regulations by European ones; instead, the point is rather to consider the Community's possibilities of successfully coping with the tasks that are in part accruing to it and in part have been taken over by it.

## 2. Legal Theories of Integration

The present debate in legal science about the future of the integration process displays all the features of a transitional state. In view of the downright inflationary growth of European law, the legal policy debate on all regulatory projects is intensifying, but so too is the endeavour to deal with the constitutional anomalies in the Community system. In such a stage of reorientation, it makes sense to start by recalling the traditional perspectives of legal theory of integration(4). Reconstructively, it is easier to see what limits these theories came up against, to what extent they have already incorporated the move on from them in their own thinking, and the ways in which in current debates on how to handle the integration process from the legal viewpoint traditional thought patterns continue to operate.

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

It is among the achievements of German theory of the Community's economic constitution that it has never been content with merely positivist and pragmatic interpretations of the EEC Treaty, but has always striven for a functional understanding of European law and a normatively consistent overall perspective on the integration process. The integration of the Member States and the consequential renunciation of sovereignty set the scene for the creation of a 'Law' which would dictate the substantive process and the substantive results of integration. This 'Law' is at its core 'economic' constitutional law since integration should be based on open markets and should aim for the creation of one common market; at the same time, this 'Law' is economic 'constitutional' law as it envisages that the opening up of markets should follow through the competitive process and that this common market should constitute a system of undistorted competition. The foundations of this interpretation were laid during the construction phase of the EEC and were further refined during the debates of the late 1970s (see Scherer 1970; Rahmsdorf 1980/1982). That this theory did not accurately portray the construction phase of the EEC, nor the historical 'will' of the Member States that can be deduced from it, was well known by its promoters (v.d. Groeben 1981, 217 *et seq*). But nevertheless the fact that the agreement made among the founder states resulted in the development of a Treaty dominated by very strong anti-interventionist policies, and thus favoured the establishment of a liberal economic regime, has been interpreted as "the cunning of reason" (*List der Vernunft*) -- a term borrowed from Müller-Armack (1964, 405). The interpretation of the EEC Treaty as an economic constitution committed to the advancement of market integration and the achievement of the principles of a market economy then gave a theoretical evaluation of this cunning of reason. This brought two results: on the one hand, the Community, through its interpretation as an order constituted by law and committed to economic freedoms, acquires a legitimacy that protects it against all attacks motivated by democracy theory or constitutional policy (Mestmäcker 1973, 23 *et seq*). On the other, the restriction of Community powers provokes an effect of blocking social policy moves considered illegitimate from the point of view of neoliberal order theory (Mestmäcker 1972).

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This argument is not disconcerted by references to the contingencies of the unification process and the indeterminacies of the Treaty text (see VerLoren van Themaat 1987), since the very intention it pursues is to transcend the unclear or even contradictory compromise formulas of the text in a theoretically consistent conception. Accordingly, a critique that can satisfy the demands of European economic constitution theory needs to deal with its sociological, economic and integrational theoretical premises. The objections have been put forward often enough: there has been no success in establishing a dignity in the organizational principles of a market economy that sets them above the democratic process of constitutionally structured societies (Homann 1988, 134 *et seq*); but then the development of European economic policy too could not be legally immunized against the competition of other economic concepts (Rahmsdorf 1982, 103 *et seq*); this was said to be the case specifically because competition policy alone was not in a position to deal with the economic and social problems consequent upon market integration (Krugmann 1988).

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

Just as neoliberal theory explicitly referred to non-positive assumptions in its interpretation of the Community as a market economic legal constitution, so too does Ipsen in terming the Communities "special purpose associations of functional integration" (1972, 176 *et seq*). But by contrast with neoliberal theory, Ipsen does not envisage the law as the centre of a concept that envelops both an

economic and a legal order. Ipsen's 'key concepts', while intended to take political and economic analysis into account, nonetheless presume an irreducible difference between the cognitive interests and statements of legal and non-legal disciplines (1972, 976 *et seq.*, 983).

The originality and productiveness of Ipsen's concept lay in the fact that by comparison with constitutionalist-federalist perspectives of integration on the one hand, and the reduction of the Community to an organizational form in international law on the other, he defined their specific feature as the assignment of competences for specific areas which are correspondingly to develop the functionalist logic of the integration process and to be handled in a technocratic-bureaucratic fashion. In this view there can be no *a priori* rule-exception relationship between the specific task areas relying on the four freedoms and market principles on the one side, and the policy areas where the Community itself acts in 'regulatory' fashion on the other. Ipsen therefore uses the expression, the 'economic constitution' of the Community merely for the relevant elements of primary law, a customs union committed to principles of competition, the four freedoms, the ban on discrimination in Art. 7 EEC, as well as for planning that respects competitive and economic freedoms (Ipsen 1972). All this is certainly compatible with a neoliberal programme but does not require it as an unshakeable commitment. The social functions of law in the integration process and its detailed formulation instead remain contingent (Ipsen 1972, 995 *et seq.*, 1054-55).

Seeing the Community as a technocratic arrangement to solve specific economic and social policy tasks also points, however, to the dependence of this conception on the circumstances it was designed to address legally. Specifically, if the boundaries between comprehensive competence for the States and the partial Community competences become blurred, if the distinction can no longer be drawn, in deciding upon questions that arise, between "organized creation of knowledge (*Wissensbildung*)" as a neutral consensus area and "organized creation of aims (*Willensbildung*)" which is in need of legitimacy, then "representation, legitimacy and consensus formation" must, Ipsen admits, be rethought (Ipsen 1972, 1045). There was every occasion to do so, even in the 1970s (Everling 1977). But there is all the more reason to do so with the present dynamics of internal market policy: certainly, the Community is continuing to act on the basis of formally limited powers, only marginally expanded even by the SEA. But even in the classical areas related to market integration, its powers are so intermeshed horizontally with neighbouring and competing policy areas that the limits to competences can scarcely be used any more to derive substantive limitations on action(5), still less can rationality guarantees be employed for the content of policies. At the same time, the transfer of partial powers in no way means that they are now to be dealt with, or could be dealt with, autonomously and entirely at Community level. This is not some sort of 'deconcentration' process in which the Community would become dependent only on 'administrative aid' from the Member States (so Ipsen 1972, 1052), but the inevitable establishment of mutual dependencies, if only because the steps towards integration usually cover only partial areas of a policy sphere and the Community, for all the steps towards completion and approximation, remains dependent on the Member States.

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

The question that can no longer be answered in Ipsen's approach -- how the transference (out and) of powers can be kept reconcilable with Member States' political interests -- lies at the centre of Weiler's approach to integration theories. Weiler developed his theory ten years after Ipsen, and thus against a different background of experience. The starting point for his analysis is an apparent paradox: while European law, in a continuing process of evolution, erected two constitutional structures, the Community went through one political crisis after another. This paradox between legal

evolution and political erosion was resolved by Weiler in his discovery of mutual dependencies between the presumably divergent legal and political processes. He saw the decisive step to the establishment of these dependency relationships in the thesis set forth by the ECJ as early as the 1960s on the direct effect<sup>(6)</sup> and the supremacy<sup>(7)</sup> of European primary and secondary law (Weiler 1982, 69 *et seq.*). These claims to validity were accepted by the courts of Member States, even if in part hesitantly and unwillingly. But the ECJ's leading decisions of the 1960s were followed by de Gaulle's empty chair policy, which in 1966 led to the Luxembourg compromise. The veto right of Member States claimed therein brought a radical reshaping of Community decision-making processes. At all levels -- from the formulation of political objectives through the preparation, the adoption and then to the implementation of Community law -- the Member States were able to secure extensive rights of participation (for details Weiler 1982, 117 *et seq.*, 409 *et seq.*). It is precisely this development, which from the viewpoint of an interest in advancing integration looks merely like a phenomenon of decay, that Weiler interprets as a recipe for success. He views the influence of Member States on Community decision-making processes as legitimate, in accordance with its overall structure as a combination of sovereign states; in practical political terms, it amounts to a counterweight to the building up of the supranational structure of constitutional law considered indispensable for the stability of the European system.

Just as in Ipsen's theorem of "special purpose associations of functional integration", Weiler's theory of the supranational and intergovernmental dual structure of the Community is concerned with a normative programme founded upon analytical observations of the real world. Weiler's analytical statements have proven to be a great aid to interpretation (see esp. Krislov *et al.* 1986; Weiler 1987 XXX). The normative message is admittedly 'conservative': it states that the involvement of national political actors in the Community's political decision-making process is indispensable for the stabilization and expansion of supranational legal structures; the Community's precarious 'dual structure' would be endangered either by ignoring political interests of Member States or if the Member States ignored Community legal principles.

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

### 3. First Interim Observation

Academic legal theories do not represent the actual law. Nor are they, however, just arbitrary normative constructs. All academic legal theories of integration are similar in that, in their interpretation of the EEC Treaty, they refer to assumptions that are partly extralegal, partly empirical, and partly theoretical. They reflect what is possible and desirable under specific historical conditions. This explains the wide range in positions referred to, but also their convergence in relation to regulatory policy: neoliberal theory holds no legitimate place for economic (non-competition) or social regulation. In Ipsen's functionalist perspective, regulatory policy is assigned to a European expert technocracy. In Weiler's construction it remains attached to the Member States and is at the mercy of their bargaining processes. If, then, the conclusion may be drawn from the dynamics of the integration process that there is a new need to structure it, this goes beyond the perspectives of integration theory to date.



## II. Practice as a Discovery Process

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

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

Competition policy is rooted in Community primary law, and the Commission has its own administrative instruments and resources to implement it. This special position of competition policy in no way means that its present state was established as soon as the EEC Treaty came into force. It was only after a laborious process that the conditions for implementing competition policy could be created, and the principles of Articles 85 and 86 EEC could be successfully converted into legal rules and extended into what has since become a comprehensive system of European competition law. This growth process was bound up with reorientations of central categories and decisional criteria, through which competition policy responded to changing conflict patterns and took up new tasks. It is therefore not merely a quantitative but also qualitative growth.

#### a) Jurisdiction and Supremacy

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

Supported by consensus on all sides, the Commission and the Court of Justice have in the course of time interpreted the criterion of jurisdiction, the restriction of trade, so extensively that it may even be termed functionless today (Steindorff 1988a, 32-33.; Reich 1990). The logic of this interpretation is ultimately a consequence of integration itself. To the extent that the breaking down of barriers to trade is successful and Community internal trade becomes free, the question of restrictions on it loses its original meaning (Faull 1989). The potential general competence of European competition law has practical and administrative consequential problems simply arising out of the notoriously slight endowment of the competent Directorate General, DG IV. From the point of view of legal systematics, it means that Community competition law overlays the antitrust systems of Member States, making their harmonization superfluous. Such a radical formulation of this consequence is usually avoided (Zuleeg 1990). But on the logic of the case-law on direct applicability and supremacy of Community law, it is undeniable (Steindorff 1988a, 34-35; Klaue 1990), even if the Court of Justice itself did not put it quite so drastically in its decision of principle over 20 years ago(8).

## b) Competition Policy as Economic Policy

The Community is competent for competition policy as a whole, but only to a limited extent for economic policy. This division of powers leads to a complex dispute at Community level and in relation to the Member States<sup>(9)</sup>. At Community level, the point is first of all the conceptual approach of competition policy itself. Nothing can be derived from the text of the EEC Treaty for the scholastic disputes among competition theoreticians about freedom of competition as an end in itself, the possibility and justification of instrumentalization of competition law for economic and social policy, or the value of efficiency or distribution criteria. In particular, the underlying Art. 85 EEC, in the prohibitory rules of paragraph 1 and the discretionary elements of paragraph 3, displays an indeterminacy typical of codifications. But the interpretation of the competition rules concerns not only competition policy as such; it is at the same time of importance for the Community's possibilities of economic policy action as a whole. For the more comprehensively the list of goals of competition policy is understood, the sooner the Community can make use of its competence for far-reaching regulatory purposes. The legal-technical machinery for this was created by the Court of Justice and the Commission through their handling of the prohibitory norms of Art. 85 (1) EEC and the exemption possibilities of Art. 85 (3) EEC. A formalistic, extensive application of Art. 85 (1) EEC allows the prohibition of practices on which no definitive negative value judgement is to be pronounced. Instead, the definitive valuation comes about only in connection with the application of Art. 85 (3) EEC -- and this happens in the Commission's exclusive competency<sup>(10)</sup>. Its exclusive competence for exemption decisions and the broad catalogue of aims in Art. 85 (3) EEC, including "promoting technical or economic progress" and giving "consumers a fair share of the resulting benefit", offer the Commission the possibility of combining exemptions from antitrust prohibitions with regulatory objectives which must then in turn be respected by the Member States.

This technique has been tested in inconspicuous steps and in striking examples (see c below) A genuine dispute as to principle came out only in connection with European merger control. The prehistory of the present debates is instructive in this connection. In 1973 the Commission had already, following the ECJ decision in *Continental Can*<sup>(11)</sup>, presented a first draft regulation<sup>(12)</sup>. The draft fell into a sort of sleeping beauty slumber until a new ECJ judgement<sup>(13)</sup> disclosed possibilities for merger control by using the EEC Treaty competition rules in force. The Europeanization of merger control then emerged as a development that could not be stopped. This situation was used by the Commission for a new initiative. The draft it submitted<sup>(14)</sup> was based on the competence for competition regulations under Art. 87 EEC, and additionally on the residual powers clause of Art. 235 EEC, for the criteria named in Art. 2 (4) of the draft for allowing mergers contained material for regulatory policy conflicts. The draft took off from the exemption regulations of Art. 85 (3) EEC, extended them by further criteria (improvement of competitive structures and the taking of international competitiveness into account) and by a reference to the Community's general goals. By 1988 these already included the SEA title on social coherence (Art. 130a EEC) and technology policy (Art. 130f EEC). The regulatory policy criticism of the catalogue of objectives of merger control thus enriched was obvious. If the freedom of "competition as a discovery process" counts as an end in itself, then there can be no industrial or social policy requirements of higher rank<sup>(15)</sup>, and the constructivist interventionism of technology policy in any case counts as a classical example of what Friedrich von Hayek would call a presumption of knowledge (cf. Mestmäcker 1988, 357). Translated into the language of economic constitutional law, this means that the competition competency norm of Art. 87 EEC is sufficient to bring merger control in conformity with the competition rules of Articles 85, 86 EEC. If and because this competency norm is enough, reference to Art. 235 EEC was misplaced<sup>(16)</sup>. Moreover, a regulation could not in any case amend Articles 85 and 86 EEC as primary Community law (Steindorff 1988b, 64-65).

The regulation finally adopted in December 1989<sup>(17)</sup> keeps the reference to Art. 235 EEC, but is more reticent in its catalogue of objectives than the April 1988 draft. According to the 13th recital,

the Commission is committed to the "basic objectives of the Treaty pursuant to Art. 2 thereof, including the objective of strengthening economic and social cohesion"; in the evaluative criteria of Art. 2 (1) (b) of the regulation, "promoting technical or economic progress" retained but an insignificant position. This is just the way legislation usually deals with conceptual difficulties, leaving the parties at dispute to their controversies(18).

### c) Integration Policy as Deregulation Strategy?

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

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The first conflict pattern -- the loosening up of national antitrust law by European competition law -- has been well known since the *Walt Wilhelm* decision(19),(20). There was less clear awareness that the sequence of steps from a ban under Art. 85 (1) to exemption under Art. 85 (3) could amount to centralist reregulation of national regulations(21); and with remarkable nonchalance regulatory elements of European exemption regulations, such as regulations to protect the weaker contractual party or consumers, are taken over into national contract law(22). The archetypal situation, that is, the conflict between Community competition principles and national regulations, has recently moved into the centre of interest, thereby taking on the importance of a crucial question for European competition law(23).

The starting point for this development is a judgement of 1977(24) in which the ECJ declared a Belgian regulation on the taxation of tobacco products, whereby taxes were to be calculated on the basis of the retail prices indicated on the products, to be ineffective: the taxation system was guaranteeing the cigarette manufacturers' and importers' price policy more perfectly than could a market-dominating firm (or vertical mandatory price system). By introducing this system, Belgium was held to have infringed its loyalty obligations laid down in Art. 5 (2) EEC. It was not until 1985 that the ECJ came back to this precedent. It questioned French book price maintenance, based on the '*loi Lang*'(25), though admittedly without concluding by declaring it ineffective. It thereby exclusively confirmed French price regulations for petrol that were administered directly by government officials(26). There are only two sets of cases where the ECJ has shown itself to be more open: national permission for cartel agreements that made it easier for them to come about or that strengthened their effect(27) was held to breach the loyalty obligation, as was a delegation of price-setting powers to professional organizations or economic associations whose price policy was given the blessing of government offices(28).

The German Monopolies Commission attaches far-reaching hopes to this case-law: for the prohibition on delegation of government regulatory powers to corporatist self-regulatory associations could be interpretable as an approach to a "general control of government action on the basis of its effects on the competition system"; a consequence of this approach would be an opening up of the

possibility of "assessing government measures in general on the criterion of compatibility with competition provisions"(29). Wishful thinking? The Monopolies Commission(30) itself admits that the ECJ case-law leaves many questions open. Not even its results are unambiguous. In the case of French book price maintenance, no infringement of the duties under Art. 5 (2) EEC was found, and even a European confirmation of the special treatment of the book market was declared possible(31); the importance of the *Nouvelles Frontières* decision becomes relative in the overall context of the rather cautious endeavours towards liberalizing European air transport(32); the *Cullet/Leclerc* and *Van Eycke/ASPA* decisions can also be interpreted as explicit confirmation of the economic policy powers of Member States; the dislike for corporatist-self-regulatory practices revealed in these judgements, but also the *BNIC/Aubert* decisions, contrasts strikingly with the approval of such arrangements both inside and outside (see 2 *infra*) European competition law. Even in the case of decisions that seem to point towards an instrumentalization of European competition law for a deregulation strategy, those very countervailing tendencies become effective that in the conflict between a 'weak' European and a 'stronger' national competition policy make the supremacy principle seem so problematic from a regulatory policy viewpoint.

#### d) Second Interim Observation

The prospective theories of the integration process each have specific problems with the picture of competition law presented here. (1) There is clearly not a merely technical and bureaucratic administration of 'technical tasks' in Ipsen's sense. Particularly in the present debates on the re-employment of competition policy for industrial policy, on the applicability of innovative deregulation strategies against regulatory protected zones and the replacement of national regulations by European ones, these are politically highly sensitive questions that are recognized and treated as such. (2) Can the Europeanization of competition policy be understood as expansion of a supranational legal order carried by the assent of the Member States? (3) Weiler has always tended to concede a special status to competition policy. But his analysis may prove to be more illuminating than he suggested. The influence of states seems considerably more massive than suggested by the genuine policy and administrative competencies of the Commission, and the mutual disputes over deregulation in the Member States and reregulation at European level confirm the Community's dependence on Member States' interests and competition policy conceptions.(33)

The practice of competition policy is hardest to fit into the interpretative framework of the neoliberal theory. The difficulties do not just stem from the effective power of legal practice over normative prescriptions. They rather concern the theoretical-normative premises of this conception. Obviously, the problems which European competition law and European competition policy are responding to by the integration of non-competition criteria are in principle, and rightly so, object of positively creative integration policy(34). Policy 'may' understand the labour market and distribution policy effects of economic integration in the Member States and the divergent drifting of living standards in the Community as a mandate for action. Nor can the Community simply proceed in the name of an economic rationality allegedly built into the Treaty against national regulations that prove to be an obstacle to the achievement of a common competitive market -- not just because jurists are accustomed and obliged to respect economically irrational regulations and/or ones that favour the interests of a particular clientele, but because diagnoses of market or government failure are as a rule theoretically controversial, and the question of whether or to what extent the market's control effects are socially acceptable must in principle be askable. The objection that the Community is not legitimated for a positive, shaping of economic and integration policy (Mestmäcker 1987, 16 *et seq.*; cf. Steindorff 1990, 18) is certainly to be taken seriously. But this also applies to the EEC Treaty's claim of a replacement inspired by neoliberal theory of the plurality of national governmental

policies. Niederleithinger, in his critique of the extensive interpretation of the supremacy claims of European law over the competition policy of Member States, called for conflict solutions in which "all legitimately competing objectives and viewpoints" are to be weighed up and "competition restrictions as a part of Community policy" must be justified by the general Treaty objectives of Art. 2 EEC (Niederleithinger 1989, 87). This sort of comprehensive weighing up of clashing regulatory claims of the Community and the Member States might indeed act to settle disputes. But for the integration policy it would presuppose a readiness to 'mutual recognition' of differing regulatory policy concepts, and legally it would assume a conflict of law's reinterpretation of the supremacy principle.

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

The Community's powers to harmonize the laws of Member States are enormously broad, and yet limited in a specific sense. According to the formulation in Art. 100 EEC, the power for approximation of laws relates to "such provisions as laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the Common Market". This applies to the whole sphere of social regulatory law -- consumer, labour and environmental law. The need for a 'positive' legislative policy by the Community in all these areas is confirmed by Art. 36 EEC. According to it, the freedom of movement mentioned in Art. 30 EEC has its limits in the case of provisions "justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants...". But the powers and requirements of harmonization are in no way covered by corresponding political and administrative competencies. The 1957 Treaty transferred very limited powers of action to the Community in the title on social policy. These have been expanded by the SEA (Art. 118a EEC) and systematically augmented by the new environment policy powers. The changes in the approximation of laws provisions of Art. 100a EEC, generally relating to the achievement of the internal market, do not however contain any explicit extensions of powers (cf. Steindorff 1990, 94-95). They merely combine the new majority decision procedure (Art. 100a (1) EEC) with the obligation on the Commission "in its proposals envisaged in paragraph 1 concerning health, safety, environment protection and consumer protection" to "take as a base a high level of protection", while Member States retain powers of action even after a decision on harmonization measures (Art. 100a (4) and (5) EEC). This leaves the dilemma that marked even 'traditional' harmonization policy unchanged: In order to implement its internal market policy, the Community must become involved in the same way about social regulations, but its powers to develop an independent regulatory policy remain limited and its possibilities of implementing such policies have not improved.

### a) Old and New Harmonization Policy

The intrinsically irresolvable tension between European legal approximation and national social regulation has not overly preoccupied practice and theory (but see Hailbronner 1990). Since the 'General Programme to Eliminate Technical Barriers to Trade' of 1969(35), approximation of laws has been entirely dominated by unification (approximation) of all provisions restricting intra-EC trade. Alongside this -- and independently of it -- the Community in the 1970s presented consumer and environmental policy programmes. The objectives of product regulation also certainly aimed at in these programmes remained unrealized. In particular, efforts at a separate European product safety policy have remained stuck at initial approaches (the setting up of accident information systems; mutual information by government authorities on product hazards; Joerges *et al.* 1988, 282 *et seq.*)

Admittedly, the 'traditional' harmonization policy has also failed. Characteristically, the reasons held

responsible for its failure have nothing to do with the regulatory one-sidedness of internal market policy. The decisive weaknesses were instead seen exclusively in the notorious bottlenecks in the European legislative process: the hurdles of the unanimity rule of Art. 100 EEC and the difficulty of using a harmonization of 'legal and administrative provisions' to achieve the practically so important transformation of private sets of norms in a way that would conform with integration (for details see Joerges *et al.* 1988, 272 *et seq.*, 346 *et seq.*). This diagnosis then led to the treatment whereby harmonization policy was renewed step by step:

- As early as 1983 the existing restriction of the approximation of laws to the legal and administrative provisions mentioned in Art. 100 EEC was overcome, and its non-governmental appendage, namely technical standards, included. The so-called Information Directive of 28.3.1983(36) obliged Member States to provide early mutual information on legislative and standard-setting intentions. Since then, the Commission has been able to respond early to threatened market splitting by developing European solutions; in particular, it can guarantee the primacy of Community law anticipatorily by standstill orders.
- A second possible therapy was supplied by the *Cassis-de-Dijon* judgement of 1979(37), with a statement that only those legal provisions that took into account actually 'mandatory requirements' justified restrictions on the free movement of goods guaranteed by Art. 30 EEC, but that otherwise positive harmonization measures could be done without. The "new approach to technical harmonization and standards"(38) drew a twofold conclusion from this: since only 'mandatory requirements' legitimated restrictions on freedom of trade by national law, harmonization must in future concentrate on the unification of 'essential safety requirements'. Other 'positive' measures not belonging to this legislative policy core area could be left to the standardization organizations, and the Community could content itself with procedural measures to guarantee the compatibility of the outcome of standardization with the basic safety requirements (for more details see Joerges *et al.* 1988, 345 *et seq.*).
- The taking of decisions on the new type of directive was facilitated by Art. 100a (1) EEC, introduced by the SEA. The sphere of application of this provision is, insofar as product regulations are concerned, very wide: in particular, it also covers environment policy provisions (as Ehlermann already noted, 1987, 383). Admittedly, Art. 100a (3) EEC obliges the Community to a "high level of protection", and in accordance with Art. 100a (4) and (5) EEC the Member States retain considerable possibilities of action.

## b) Successes and Difficulties

The stagnation of harmonization policy was overcome by the 'new approach' and the European standardization organizations have energetically taken up their new task. Admittedly, the expectation that the new harmonization policy would be a deregulation strategy was not fulfilled(39). There has been deregulation purely in a sense of a 'denationalization' and 'degovernmentalization' of product safety law. The European standardization organizations that are supposed to secure the harmonization of standards in the place of the previously competent government representatives are plainly doing the job quicker than was possible under an arrangement of national and Community law. But they are in turn likely to meet with difficulties in reaching agreement. At any rate, standardization practice has rejected the idea of a 'mutual recognition' of national standards.

At the moment the Commission is endeavouring to perfect its standardization policy at two levels. In a new Green Paper (Kommission 1990b), standardization policy is explicitly committed to the objective of a technological conversion of Europe, and a shift of standardization activity to European level is called for: European standardization organizations are no longer to see themselves as assemblies of national delegations, but are themselves to organize the process of clarifying economic interests and technical possibilities.

In a complementary programme on standardization, the building up of a European certification

system is being pushed ahead. The practical importance of this programme can scarcely be overestimated. Neither government offices nor 'the market' could just accept the conformity to standards of products. Conformity to standards must instead be positively established -- that is, certified. But the special feature of the certification question lies in the fact that it cannot be handled along the lines of legislative or standardization acts at European level. The certificates must necessarily be issued in decentralized fashion -- with the consequence that the equivalence of national practices must, in the interest of the recognition of such certificates by administrative offices in the Member States and by demanders of products, be guaranteed. Accordingly, the new directives contain detailed provisions on the issuing and recognition of certificates; but for that reason, too, the success of the new approach remains dependent on the success of the Commission's efforts to solve the certification question: legally binding requirements on the 'quality' of certification offices, the encouragement of their cooperation and the building up of a European agency to organize all this(40). Here a strategy can be seen emerging in which the Community hopes, by using cooperative arrangements, to overcome not only its dependency on political assent by the Member States but also its administrative weakness.

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

The successes in the new harmonization policy are impressive even now, and the conceptual imaginativeness with which the practical and legal difficulties are being approached is admirable. Precisely because of these successes, however, the problem of the relation between internal market-oriented approximation policy and social regulation, so long kept latent, now seems to be becoming acute. For environmentally motivated product regulation, this is emerging first in the fact that there is in principle no trust in the technique of reference to standards in this area(41). But even with directly health-related product regulation, the differentiations known from national law continue to be retained. In law on medicines, the 'new approach' plays no part, and in foodstuffs law the regulatory structures have scarcely changed(42).

It is noteworthy that not only is the extension in regulations on health protection advancing in these areas well known for their consumer policy sensitivity, but the Commission has now also systematically supplemented the whole new harmonization programme with a draft directive on general product safety(43). The complicated technical details can be left to one side here. The new directive is to apply to all products not already covered by special regulations which are "industrially manufactured, processed or agricultural, ... new, used and reprocessed". Member States are called on for legislative activities that go well beyond the existing state of product safety law. It provides for coordination of product safety policy priorities and activities at Community level. In 'emergency cases' the Commission obtains powers of action of its own. One should hesitate with predictions on the fate of this draft. But there can be no doubt that the very logic of the matter requires the establishment of the second policy level to systematically supplement the existing one-dimensional harmonization policy with its internal market policy orientation.

### **d) Third Intermediate Observation**

The finding seems paradoxical: the new harmonization policy, announced as a deregulation strategy, at first produces cooperative arrangements between the Community and standardization organizations, then forces cooperation among the national administrations, and finally leads to intensification of product safety law and to the establishment of a new policy area for the Community. These results seem less surprising, however, if the functions of standardization are borne in mind. The cooperative relationships known particularly in German law between state and

standardization organizations in product regulation are to be explained on the basis of the market-constituting function of standardization, and at the same time are a response to the fact that the State, in an apparently irreversible development, is forced to take on increasingly wider protective tasks, yet cannot handle these tasks itself without coming to an agreement with economic interests(44). These cooperative regulatory patterns have so far proved resistant to every critique on regulatory policy grounds(45).

However, the Europeanization of these national models remains in need of analysis and explanation. As long as the EC is an aggregate of States, interest representation can in principle not be given a new 'supranational' function (Ipsen 1972, 1005). If, as Weiler has shown, the Member States essentially determine the Community's decision-making processes, then this is not reconcilable with the (functional) delegation of legislative powers to supranational systems of 'private government'. These constitutional positions find support in political science analysis of the role of economic associations in Community policy (Kohler-Koch 1990, 225 *et seq*). Certainly, Ipsen already predicted that a shift of administrative competences to Community level would be bound to have effects on the organization of interest representation (1972, 1005). In accordance with this prognosis, Kohler-Koch notes that reorganizations of associational cooperation aimed at "increased efficiency ... with the greatest possible control by the Member Associations" (1990, 226). The procedure of the new harmonization policy in fact suggests a dual strategy. For the Member States remain present not only in the adoption of new directives but also in all Commission decisions affecting standardization policy in advisory or even regulatory committees (by representatives "who may be supported by experts or advisors"(46)). The European standardization organizations are in turn combinations of national organizations (Joerges *et al.* 1988, 360 *et seq*). Accordingly, at both national and European level there are indications of possibilities of the representation of interests that continue to be defined in primarily national terms. But for all this, decisions at Community level are taking on increasing importance, and this suggests legal and institutional consequences: to the extent that the functions of self-regulation are shifted to European standardization organizations, functional equivalents for the mechanisms for regulating-self-regulation, found in national frameworks, must also be devised. Among these are measures to secure 'balanced' representation at European level (Joerges *et al.* 1988, 44 *et seq*), and also governmental administrative control which must in turn be coordinated at Community level

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### III. Programmes and Options

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



delimitation of central and decentralized powers sparked off by the internal market policy programme will not come to a halt. If the efforts towards a specifically European federalism in a future European union still seem all too vague, it is nonetheless certain that particular framework conditions for a Europeanization of regulatory policies will not change (see 1 below, at end). And it is also certain that all considerations on the Europeanization of regulatory policy will have to deal with the debates on the crisis of regulatory law(47).

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

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

The conceptions so emphatically and successfully advocated in the Commission White Paper on completion of the internal market from 1985 can be termed a specifically economic integration strategy: the internal market is to be aimed at because of its economic advantages and is to be accomplished above all by guaranteeing rights of market access. This programme now, however, seems to be developing a peculiar dialectics that can be typified as a change in form of regulatory policy in Europe. Majone, in his studies on American and European regulatory policy, has worked out the traditional differences and drawn attention to more recent convergencies that can be observed (Majone 1989/1990/1991). The European forms of 'intervention' in the economy were and are much more comprehensive and ambitious than the controls of a 'regulatory state'. This is particularly true of the nationalization of branches of industry, but tends to be so also for municipal and socialized enterprises, and corporatist interwinings between government offices and private organizations. By contrast, the American regulatory programmes are less comprehensive, though also more targeted: 'economic regulation' is no substitute for socialization, but is intended merely to compensate for specific forms of market failure. 'Social regulation' is concerned with external effects, the protection of health and environmental interests, and the protection of workers and consumers (for more details see e.g. Reagan 1987, 45 *et seq.*, 85 *et seq.*). The characteristic of this form of control is found by Majone (referring to Selznick 1985, 363-64) in "sustained and focused control exercised by a public agency over activities that are socially valued".

The regulatory semantics of the EEC Treaty -- including the remnant of socialization in Art. 222 EEC -- is clearly marked by the European traditions of influencing the economy. Not least because of the strength of these traditions and the differences between them, the object of a 'Common Market' for long seemed vague and utopian. The Community's integration prospect has, however, taken on clearer outlines through the internal market initiative and the SEA. It is in line with the logic of this programme for European policy to scarcely dream any longer of a 'harmonization' of national traditions, but instead to be in principle questioning everywhere the continued existence of all regulatory forms where they seem incompatible with the creation of a unitary economic area(48). But it correspondingly seems to fit the logic of consistent market integration for new forms to be sought to achieve regulatory goals, the justification for which is in principle not disputed. The 'regulatory state' is acquiring new topicality (cf. Majone 1991, 22 *et seq.*), deriving precisely from the fact that its activities are not replacing market economy processes but are intended to 'accompany' them.

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

EEC:

- By contrast with the USA, the implementation of a particular regulatory concept in Europe regularly comes up against differing traditions and patterns of interest.
- Economic differences in development and development interests have greater weight in Europe. They can be brought into decision-making processes at EC level as national economic interests. The resulting additional load on regulatory policy debates of appropriate regulatory forms and unification processes through standards and safety standards can be shifted only to a very limited extent onto abstract mechanisms for reaching agreement (transfer efforts).

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

- For regulatory policies in the sense of 'sustained and focused control', administrative competencies and resources, provided for only exceptionally by Community law, are necessary. The paradigm of EC regulatory policy is centralized legislation, with implementation through the legislation and administration of Member States. Simple following of American patterns is not possible within these structures.
- Last but not least, the American agencies are tangled up in all sorts of formal and informal networks from which they derive information and in which they agree on the securing and acceptance of their measure. Hecló has described this phenomenon as the breaking down of the 'iron triangle' of executive, parliamentary control and interest groups (Hecló 1978, 88-89). Majone interprets it as the move away from Weber's ideotype of the purpose of rationality of administrative action, explained on the basis of the scientific and normative policy complexity of regulatory policy and justifies the move to a procedural rationality of administrative action (1979). But at European level, this 'functional shift' in administration cannot be directly taken as a model.

## 2. Institutional Framework Conditions and Integration Policy Concepts

Despite these difficulties, the Europeanization of regulatory policy is rapidly advancing in all areas of economic and social regulation. Its main institutional medium has developed more or less naturally: in an incomprehensibly vast multiplicity of advisory, administrative and regulatory committees, Commission and Member State officials come to agreement on the implementation of Community law. Relatively little is known about the mode of operation of this network of committees<sup>(49)</sup>. Structurally, this is administrative law-making, the supranationality of which, entirely in line with Weiler's theses (see I 2 c above), remains tied to the involvement of Member States.

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

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

The Commission's White Paper on the completion of the internal market (Kommission 1985) gained

prominence for its reorientation of harmonization policies. In technical legal language this reorientation is termed 'mutual recognition' and in the jargon of regulatory discussion 'regulatory competition'. Following the *Cassis-de-Dijon* judgement(50), the view came to prevail that in the EC the assumption should be the equivalence of the regulatory goals in health and consumer protection, so that the principle of 'host state control' could be replaced by that of 'home state control' (Kommission 1985, 58). 'Mutual recognition' as an alternative to positive harmonization has subsequently been taken up, particularly in relation to free movement of services.

The idea is fascinating(51): just as private economic action is subject to control by competition, so the constructivist 'presumptuousness of knowledge' that any legal intervention involves is made subject to indirect control. Member States may retain differing regulations; they must merely shape them and handle them in such a way that citizens of the EC market can 'choose' which regulatory regime the products or services demanded or supplied by them are to come under.

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However attractive this notion may seem, its practical difficulties, and those of principle, remain for the moment considerable. From the legal viewpoint, the obligation to recognize regulations of the state of origin is an equivalent to 'positive' harmonization. From that viewpoint alone, the obligation can only subsist where it is rooted in primary Community law itself or else positively prescribed in a directive. Two starting points are available in primary Community law. The first is constituted by the checking of national measures for compatibility with the principle of free movement of goods since the *Cassis-de-Dijon* judgement. A complementary second approach lies in the theory of the economic constitution of the Community. If the Community is legally obliged to set up a system of undistorted competition, if, as the Monopolies Commission sees it (cf. II 1 above), in any case duties of regulatory self-restraint follow from the case-law on Art. 5 (2) EEC, then this may imply the less far-reaching obligation to open the national markets to suppliers from states with other regulatory systems. So far, however, in primary Community law duties of recognition are demonstrable only to a very limited extent. It is true particularly for the case-law in Art. 30 EEC, by which the substantive control of national regulations has remained extremely slight(52). And the existing case-law on Art. 5 (2) EEC is still less able to support the far-reaching consequences the Monopolies Commission wishes to draw from it (cf. II 1 *supra*).

These legal reservations are comprehensible: on the logic of regulatory competition, after all, the delimitation between competitive and non-competitive regulatory patterns should no longer be seen as a normative and legislative policy problem, but economic rationality should be allowed to make its way outside of political and legal procedures *vis-à-vis* the interests pursued by democratically legitimated legislators. Merely in consideration of these normative and legislative policy difficulties, there ought to be clarity at least as to the fields of application and mode of operation of regulatory competition. In the sphere of 'economic' regulations, the opening up of regulatory competition on economic regulations is in principle acceptable where no 'exogenous' regulatory objective, like distributive justice or other social policy interests, are pursued (see Meier-Schatz 1989). But there must be further questions about how the actors concerned actually set in motion the game of regulatory competition and can exploit it -- and a distinction must therefore be drawn between, say, the deregulation of paternalistic regulations between 'professional' and 'private' demanders. In the recognition of foreign product regulations, the essential point is whether information on quality and safety differences adequately protects the product users concerned. In the sphere of so-called process regulation, in particular in the case of environmental and work safety provisions, the principle of regulatory competition means that a regulatory interest recognized as legitimate 'politically' may indirectly, namely through the competitive advantages that may result from lower production costs with lower safety standards, fall into danger. But whether such consequences arise and to what extent

they have to be tolerated is not something that can be predicted and assessed in general. But if they are not decidable *ex ante*, then regulatory competition itself proves in need of regulation. It would have to take the form of observing the successes and failures of regulations, and remain subject to checking. This sort of experimental, self-observing and improving legislative policy cannot, however, then simply be handed over to an anonymous mechanism.

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

Regulatory policy relates its powers of resistance to deregulatory strategies not only to the paternalistic inclinations of governmental actors but also to the functional conditions of markets and the interests of the economy. This interplay of political regulatory claims and private regulatory interests can well be seen in the example of product regulation, so important for the achievement of the internal market (cf. II 2 b *supra*): the 'new approach to technical harmonization and standards' was set up as a deregulation strategy in two respects. On the one hand, it was to unburden the Community legislator and exploit the standardization capacities of private standardization organizations. It was also, however, to encourage the mutual recognition of product regulations and national standards. This second element in the 'new approach' is hardly talked of any more. The so-called new harmonization policy has since been proving to be a strategy to promote self-regulation mechanisms -- in standardization just as much as in the area of certification.

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Just like the idea of regulatory competition, European corporatism has also since been moving in a legal no-man's land, and its practical chances of implementation are uncertain. Community law contains only one clear relevant rule on cooperation with private organizations in the European-law-making process: the ban on the delegation of law-making powers to actors not legitimated by the EEC Treaty(53). Accordingly, the new standardization policy must be located in a legal framework that forms a counterpart to the goal aimed at -- to unburden the legislator -- and at the same time covers up these contradictions by fictions: directives should be so precisely formulated that administrative authorities can be guided by them; the standards worked out by standardization organizations must be formally recognized by the Commission before they can develop the effects attributed to them (for details on all this see Joerges *et al.* 1988, 380 *et seq*).

It is only in the Commission's most recent documents that a constructive alternative to this form of underpinning European corporatism is taking shape. The Green Paper on standards of 8 October 1990 states that standards are of too great importance "to be left to the technical experts alone". "Other interested groups like consumers, users and workers must equally be prepared to organise themselves better to take part in the European standardization process" (Kommission 1990b, 29, 33; see 63 *et seq*). With such demands, the Commission wishes to take account of objections long discussed at national level to the self-regulatory handling of governmental tasks (most recently see in detail Denninger 1990, 141 *et seq*). The normatively so plausible efforts at breaking down the European 'iron triangle' of Commission, Member States and standardization organizations by pluralizing standardization procedures at Community level (see Joerges *et al.* 1988, 401 *et seq*) are, however, scarcely compatible with the institutional structures of the EC, and hard to put into practice. Even the transformation of the European standardization organisations into actors that replace the bargaining process between national delegations, and are themselves to organize the mediation between economic interests and technical possibilities, is an enormously ambitious project. If over and above this, the feedback established at national level is to be taken as a model with further social actors at European level, then the Commission is postulating interest mediation processes for which the actors are not yet noticeably visible.

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

As a further possibility of guaranteeing the compatibility of internal policy objectives and regulatory claims, the setting up of European agencies is being discussed. Such proposals have already been put forward frequently, but have always failed -- in both the economic and the social regulation spheres (see the survey in Hilf 1982, 147 *et seq.*).

The legal problems of establishing European agencies are considerable(54). Community law does not have any powers to set up autonomous institutions not provided for in the Treaty; it is derived from the Community's organizational power. But the specific legal feature of the American agencies, namely the autonomous exercise of regulatory powers, is difficult to achieve within the legal structures of the EC, or only with restrictions: the EEC Treaty in principle only legitimates law-making by the Council -- it makes no provision for the political responsibility of an agency equipped with discretionary powers. More or less far-reaching possibilities of transferring "applicator, implementing and monitoring powers" can be derived from Art. 235 EEC (and Art. 100a EEC), but these powers must keep within the arrangement of competencies provided for in the EEC Treaty and may not cross the threshold into autonomous law-making. But the legal difficulties are not the only obstacle that all the efforts to set up independent agencies have so far encountered. The demands raised as early as the 1960s and renewed in connection with the Europeanization of merger control(55) for a European antitrust authority, instead, failed partly because their regulatory policy goal, namely a consistent competition policy approach to merger control, could not be implemented (see II 1 b *fn.* 49 *supra*). The future European environmental agency(56) is to operate only as a body for scientific policy advice -- here the Member States' interests in political action have won through. Also instructive is the fate of the Commission's endeavours to secure extension of its powers of action in 'implementation' of Community law, in connection with adoption of the SEA. In its decision of 13.7.1987(57), the Council opposed these efforts and defended Member States' influence on the implementation of Community law (cf. Joerges *et al.* 1988, 337 *et seq.* with references).

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Yet the demand for central European agencies is highly plausible(58). When regulations are seen as indispensable, then the establishment of a European central agency in principle corresponds to the interest of the industries concerned, insofar as these are in any case oriented towards the European market. This perception seems to be winning in the sphere of regulation of pharmaceuticals. This derives from a proposal made by the Commission in February 1990 (Kommission 1990a), and apparently supported by the pharmaceutical industry(59), to set up a European agency. In order to overcome the legal difficulties of the ban on delegating regulatory powers, the Commission proposal treats the evaluation of safety of medicines as an advisory activity, the findings being then passed on to the Commission for legal decisions(60). In the most important working bodies of the new agency, however, there are not only academically trained experts but also representatives of Member States (Art. 51 of the Draft). The Commission *must* deal with their objections and, where necessary, secure a Council decision (in the so-called regulatory committee procedure)(61).

The legal constructions found in the proposals to set up a European pharmaceutical agency are instructive. The interest in decisions that would apply Community-wide was to be made implementable by planning a discrepancy between form and function, between merely theoretically legal control possibilities and de facto processes of decision. Accordingly, the evaluation of safety of medicines is treated as a matter for expert advice that can and should be guided by supranational criteria. To that extent, the Commission proposal treats control of health risks as 'organized formation of knowledge'. Admittedly, it does not achieve this vision consistently. The consensus of the experts remains under political control: where differences of opinion cannot be eliminated, it falls

back on the procedure known from the comitology system, of underpinning national rights of decision. This form of repoliticization of scientific controversies is the price that regulatory policy has to pay for the institutional weakness of the EC.

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

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

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

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- The idea of regulatory competition overloads the integrating power of competitive processes. It would, if erected into generally binding programmes, call for the giving up of creative powers that all national political systems lay claim to and that were also embodied in the EEC Treaty -- in however imperfect a form -- alongside the internal market programme. But if regulatory competition is to be legitimated in normative constitutional terms only as a law-making policy that observes its own effects and intervenes correctively if necessary, then its legal policy function ought to consist in the institutionalization of legislative policy as a learning process. In this area of economic regulation, such possibilities open up just because of the tension between Community competence for internal market and competition policy on the one hand, and the regulatory powers of Member States on the other. The competencies of Community law should then be grasped as commands to justify and to bring about compatibility, with national powers and regulatory differences to be removed neither by imperative deregulation nor by reregulation at Community level. In the area of social regulation, too, the idea of organized and regulated regulatory competition is applicable. Admittedly, it would in each case have to be verified whether, say, information policy measures were indeed functional as a substitute for uniform product regulations. And in the case of environmentally motivated process regulation and with protective standards in safety at work, the possibility must exist of responding to a 'race to the bottom' (see a *supra*).
- European corporatism, discernible above all in standardization policy, is -- despite the Commission's declared willingness to work towards pluralization of standardization procedures -- not an acceptable model for the Europeanization of technology and product safety policy (see b *above*). Indeed, even standardization policy in the narrower sense is systematically supplemented by two complementary intentions: on the one hand, to build up a certification system that has to be organized decentrally and remains dependent on the assent of national bodies; on the other, by general product safety legislation which in turn must be implemented by the Member States (see II 2 b and c *supra*). The function of certification can be understood as substantive control in safety terms of European standards, while general product safety policy should organize the systematic determination of product risks, the

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

- The expansion of regulatory networks that differentiate between central and decentralized functions could also apply in areas where at present European agencies are being discussed. Thus, for medicaments regulation, it is foreseeable that the new European authority, if only because of its limited resources, will not be able to do without the expertise of national authorities in the case of licensing decisions, but particularly in the case of so-called follow-up market control. But this means that differences between medical schools and disputes as to the weighing-up of the risks and advantages of medicines cannot be silenced by setting up a European agency (cf. Kaufer 1990, 163; Hart/Reich 1990, 45-46). Just as in general product safety policy, the Europeanization of medicament regulation can be conceived of in a regulatory network: the continued existence and initiative functions of national agencies would then be guaranteed for the plurality of the scientific-normative discourse. The European decision-making level would, then, have to be shaped in such a way that disputes over assessment of risks did not simply lead to a political bargaining process.

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

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**Note** that due to technical reasons this bibliography also includes literature which is only referred to by the author's related paper, *States Without a Market? Comments on the German Constitutional Court's Maastricht-Judgement and a Plea for Interdisciplinary Discourses*, European Integration

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## Endnotes

(\*) The text has originally been published in German: *Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik*, in: R. Wildenmann (ed.), *Staatwerdung Europas? Optionen einer europäischen Union*, Baden-Baden: Nomos 1991, 225-268; translated from the German by Ian Fraser. The paper was previously included in a working paper of the European University Institute with the number LAW No. 96/2 which is now out of print: *The Market Without the State? States Without a Market? Two Essays on the Law of the European Economy*.

(1) Padoa-Schioppa 1988, 53 *et seq.*; Horn 1989; Steinherr 1989.

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

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

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

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

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

(7) ECR [1964] 585 - Costa/Enel.

(8) ECR [1969] 1 - Walt Wilhelm/Bundeskartellamt.

(9) There is an instructive survey in Monopolkommission 1990, 387 *et seq.*

(10) Art. 9 of Regulation 17/62.

(11) ECR [1973] 215 - Euro Emballage Corp. and Continental Can/Commission.

(12) OJ C 92/1973, 1.

(13) ECR [1987] 4487 - Philip Morris/Rothmans.

(14) OJ C 130/1988, 4.

(15) Monopolkommission 1989, 67, 69-70, 77 *et seq.*

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

(17) OJ L 395/1989, 1.

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

(19) Fn. 9 *supra*.

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

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

(and to selling practices tolerated in antitrust law elsewhere, particularly in the Federal Republic).

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

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

(24) ECR [1977] 2115 - GB-Inno-BM/ATAB.

(25) ECR [1985] 1 - Leclerc/Au blé vert.

(26) ECR [1985] 315 - Cullet/Leclerc.

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

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

(29) Monopolkommission 1990, 401, 389.

(30) Monopolkommission 1990, 401.

(31) *Supra* (fn. 26); confirmed by ECJ, ECR [1988] 4468 - L'Aigle distribution.

(32) See Monopolkommission 1990, 300 *et seq.*, 308 *et seq.*

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

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

(35) OJ C 76/1969, 1.

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

(37) ECR [1979] 649.

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

- (39) I shall merely refer to the available theoretical explanations: an instructive sociological and political analysis can be found in Bolenz 1987; from the economic literature, see Pfeiffer 1989; see also Falke 1989; Joerges 1990.
- (40) For more details see Joerges/Falke 1991, section II 3; Micklitz 1990b.
- (41) Pernice 1990, 210 *et seq.*; by contrast, on the national law, see Voelzkow *et al.* 1987; Denninger 1990, 18 *et seq.*
- (42) What is instead to be noted is the attempt to coordinate national foodstuffs checks embarked on by Directive 89/397 (OJ L 186/1989, 23).
- (43) A first draft (OJ C 193/1989, 1) has since been amended by the Commission (KOM (90) 259 final, 11.6.1990); see Joerges/Falke 1991, section IV.
- (44) Bolenz 1987, 5 *et seq.*, 94 *et seq.*, 160 *et seq.*; on the constitutional policy dimension see Micklitz 1990a.
- (45) See Streeck/Schmitter 1985 on the one hand and Streit 1987 on the other.
- (46) Section 9 of the Model Directive (for more details see Joerges *et al.* 1988, 345 *et seq.*).
- (47) Cf. the documentation (and continuation) of this debate in Teubner 1990b.
- (48) See Müller-Graff 1989, 38 *et seq.*, and on the case of competition policy, II 1 c above.
- (49) For a summary of the state of affairs see Meng 1988; for more up to date details in the area of product regulation see Bentlage 1990.
- (50) ECR [1979] 649.
- (51) It was developed in the recent American federalism debate as a critique of the centralism of the regulatory state (for a survey see Sternberg 1990; see also the references in Joerges *et al.* 1988, 243 *et seq.*). From the German debate see esp. Wissenschaftlicher Beirat 1986; Meyer-Schatz 1989; Siebert 1989; Donges 1990.
- (52) References in Joerges/Falke 1990, section II 2.; from the recent case-law, a noteworthy one is case 382/88, judgement 7.3.1990 - INNO-BM/Confédération du Commerce Luxembourgeois (not yet in ECR) on the checking of the German UWG against the Community's consumer policy programmes (!).
- (53) EuGH 1958, 149 - Meroni/Hohe Behörde.
- (54) The most thorough discussion continues to be that in Hilf 1982, esp. 293 ff; also detailed is Schwartz in: v.d. Groeben *et al.* 1983, art 235, 227 *et seq.*
- (55) Cf. Monopolkommission 1989, note 136 *et seq.* and on the earlier debate Hilf 1982, 147-48.
- (56) OJ L 120/1990,1.
- (57) OJ L 197/1987, 33.
- (58) For the case of safety of medicines see Hart 1989; Kaufer 1989; Hart/Reich 1990, esp. 36 *et*

*seq.*, 119.

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

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

(61) Through the reference in Art. 10 (4) to Directive 75/318 (OJ L 1477/1975, 1).

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