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# The Credibility Crisis of Community Regulation\*

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## Abstract

The credibility crisis of Community regulation is symbolized by the recurrent food scares, and even more by official reactions such as the refusal of the German and French governments to abide by the decision of the Commission to lift the ban on exports of British beef. However, the crisis is not new, nor is it limited to food safety. Problems of regulatory credibility in the EC/EU arise at different levels. Some are rooted in the deep structure of the founding treaties, while other problems result from path-dependent aspects of the integration process, from institutional inertia, or from the pursuit of short-term advantages. This article is primarily concerned with the second group of problems, but a short discussion of the more fundamental issues seems useful as a reminder of the limits of what can be achieved by piecemeal institutional engineering.

The article addresses two specific threats to credibility: the mismatch between the Community's highly complex and differentiated regulatory tasks and the available administrative instruments; and the problem of credible commitment caused by the increasing level of politicization and parliamentarization of the Commission. The solution to both sets of problems, it is argued, may be found in a more far-reaching delegation of powers

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to independent European agencies embedded in transnational networks of national regulators and international organizations. Recent theoretical advances in the area of institutional design and procedural controls suggest that such networks could be made to satisfy all reasonable requirements of subsidiarity, accountability and efficiency.

## I. Introduction

After more than three decades of continuous expansion, EC regulation constitutes an impressive body of public law, affecting practically every aspect of economic activity as well as many dimensions of social life. Its scope may be appreciated by examining the list of the main administrative structures necessary for the implementation of the *acquis communautaire* by countries wishing to join the EU. A recent Commission internal paper identifies scores of areas where candidates for membership have to set up new administrative bodies, or adapt existing ones, in order to implement EC rules. In addition to the major Community policies – from agriculture and free movement to competition and environment – these areas include: intellectual and industrial property rights; company law; accounting and auditing; data protection; telecommunications; postal services; audiovisual services; energy; rail, air and maritime safety; consumer protection, and so on. This impressive expansion of competences has not been matched, however, by a corresponding growth of confidence in the effectiveness of the EC regulatory system. On the contrary, there are reasons to believe that the more competences the Community acquires, the more serious the credibility problem becomes (see Section II). At any rate, the exasperated reactions of consumers and traders to the series of crises that have upset the market for foodstuffs in recent years, are a telling indication of widespread dissatisfaction with the present system.

Concerns about the credibility of the EC approach to economic and social regulation are not new. The main reforms undertaken in the 1980s – the shift from total to optional and minimum harmonization; the New Approach to technical standardization; the establishment of mutual recognition as a key regulatory principle – were in fact attempts to increase the effectiveness and credibility of European regulations. However, these reforms were driven more by immediate policy concerns than by a determination to attack the underlying structural problems. This explains, for example, the reformers' optimistic assumptions about the practical implementation of the principle of mutual recognition.

The New Approach to technical harmonization likewise leaves a number of issues still unresolved. The crucial problem here is the tension between the essential safety requirements of the New Approach directives, which are legally binding, and the voluntary character of the harmonized standards which

provide the technical framework for risk assessment. Most directives involve essential requirements expressed in such general terms that risk assessment is impossible without the support of detailed technical standards set by the European standardization bodies. Thus the Commission is confronted by a dilemma that cannot be resolved within the present institutional framework. On the one hand, the separation of regulation and standardization, and the independence of the standardization bodies, were necessary in order to allow internal market legislation to advance rapidly. On the other hand, independence implies that harmonized standards must be voluntary – since, allegedly, delegation of the power to adopt binding standards is not possible under the Treaty – with all the legal uncertainty entailed by a situation where standards that are *de jure* voluntary often become binding *de facto* (Previdi, 1997).

A way out of this dilemma would be the creation of regulatory agencies ‘to set all the parameters and reference values to flesh out the legislative objectives, which by their nature cannot be part of the voluntary area now set consensually through technical negotiations’ (Previdi, 1997 p. 241). In this as in most other areas of regulation, however, the tendency has been to evade clear institutional choices in favour of stop-gap measures. The price of this short-sighted strategy is the serious loss of credibility of the EC regulatory system with which the present article is concerned.

The article is organized as follows. Section II discusses what may be called intrinsic threats to credibility – threats which are inherent in the institutional architecture of the EC/EU. As such, they cannot be removed by piecemeal constitutional engineering, but would require a radical transformation of the relationship between the European institutions and the Member States. Such a transformation is not likely to occur in the foreseeable future. Hence, the bulk of the article deals with issues that could be on the agenda of the next Intergovernmental Conference. The mismatch between the Community’s increasingly complex regulatory tasks and the available administrative instruments is the topic of Section III, while Section IV addresses the credibility problems raised by the growing politicization of the Commission. I argue that both sets of problems could be ameliorated by delegating implementing powers to autonomous European agencies. Section V is devoted to issues of institutional design, including the design of mechanisms to discipline agency discretion and enforce accountability, and the emergence of a distinctive European model of administrative regulation through transnational networks. General conclusions are drawn in Section VI.

## II. A Fragile Regulatory System

The fragility of the EC regulatory system is the root cause of its credibility problems. This fragility is due to a multiplicity of factors. Some factors are intrinsic to the logic of the founding treaties, and cannot be removed without radical constitutional changes. Other sources of fragility could be corrected by improved institutional design, or by fairly minor treaty revisions. One such revision would be the addition to Art. 4 of the Treaty of Rome, which enumerates the European institutions, of a sentence empowering the Council and the European Parliament to establish new bodies that may be needed for the efficient functioning of the internal market.

Although, as noted, this article concentrates on the second group of factors, it is important to recognize the limits of what can be achieved by piecemeal institutional and constitutional engineering. This is the purpose of the present section, where we discuss the credibility problems created by the expansion of Community competences, on the one hand, and by the Community's limited external powers, on the other.

### *New Competences as a Threat to Credibility*

Contrary to the assumptions of the neofunctionalists concerning the expanding authority and jurisdiction of the supranational institutions at the expense of the national governments, the growth of Community competences actually tends to increase the fragility of those institutions. One reason is the unwillingness of the Member States to provide the resources necessary to fulfil the new tasks effectively. Thus, in 1987–88, at the start of the internal market programme, the national governments rejected President Delors' proposal to raise Community spending to 1.4 per cent of Community GDP, granting only 1.2 per cent. Similarly in 1992 there was broad opposition to the 1.37 per cent GDP figure (to be reached by 1997) envisaged by the Delors II package. In a document significantly entitled *From the Single Act to Maastricht and Beyond: The Means to Match our Ambitions*, the Commission argued, without success, that this was the minimum figure necessary if the Community was to fulfil the goals it set itself in the Maastricht Treaty (Shackleton, 1994).

This reluctance to match objectives and resources is only part of the credibility problems raised by the expansion of Community competences. Structurally more significant is the fact that, as a general rule, the more competences the Community is acquiring, the less exclusive will be its jurisdiction (Norbert Reich, cited in Weatherill, 1995, p. 156). Exclusive competence has the advantage of simplicity: once the Community has acted, national rules no longer apply. The common market is regulated by a common set of rules, and traders can plan in accordance with the common rules

(Weatherill, 1995, p. 138). The more flexible approaches used with increasing frequency since the 1980s – partial, optional and minimum harmonization; mutual recognition; options in directives; the New Approach to technical standards – reduce the rigidity of the EC regulatory system, but at the same time make it more unpredictable. The pattern of options and exemptions allowed to the Member States may fragment a directive to such an extent that the claim to provide a source of common rules for the entire Community is a sham (Weatherill, 1995, p. 158).

The unpredictability of the system is further increased by differences in the regulatory capacities of the Member States. For example, in the area of public utilities, many countries still lack regulatory authorities that are sufficiently credible in terms of expertise and independence. The problem of public utility regulation is complicated by the fact that in Europe most public utilities were until a few years ago, and some still are, state monopolies. Because of their close association with national governments, the former monopolists continue to enjoy enormous political and economic advantages with respect to would-be competitors. In fact the managers of the newly privatized utilities have played an important role in the very definition of the regulatory system that was supposed to control their companies (Veljanovski, 1991).

Since the European and national levels are closely interdependent in terms of administration – a situation not likely to change in the future – significant regulatory failures at national level influence the effectiveness and credibility of EC regulation. The case of telecommunications regulation discussed in Section III, shows quite clearly that the present highly decentralized system of Community regulations cannot compensate for the lack of credibility of some national regulators, nor can it provide a credible countervailing force to the power of the former state monopolies. Analogous problems arise in all areas of shared competence, from environmental protection to food safety. In the field of external relations, shared competences give rise to other threats to credibility.

### *The Challenge of International Regulatory Co-operation*

The results of the Uruguay Round of trade negotiations concluded in 1993 demonstrate the importance achieved by international regulatory co-operation. For the first time, harmonization of national rules and policies was incorporated in GATT agreements as a norm of international economic relations. Harmonization has always been a key component of the strategy of European integration, and the experience of the EC in this area provides important lessons for the world trading system. Paradoxically, however, the Community faces serious problems when it seeks to establish itself as a credible actor in the arena of international regulatory co-operation.

It is important to realize that, while the external powers of federal governments are typically broader than their purely domestic powers, the external powers of the EC, and specifically its power to conclude agreements with third countries, are even more limited than its internal powers. Strictly speaking, the Community is exclusively competent to act externally only with respect to association agreements, under Art. 310, and to commercial matters in the sense of Art. 133 of the EC Treaty (except in quotations, this article follows the numbering of treaty articles as in the Amsterdam Treaty). The European Court of Justice (ECJ) has constructed the scope of the latter Article rather narrowly. According to Opinion 1/94, the concept of commercial policy is restricted to trade in goods and to cross-border services. In this opinion the Court ruled against the Commission, which had argued that the EC was exclusively competent to conclude the Uruguay Round agreements under what became Art. 133. The ECJ found that the subject matter, which also included agreements on trade in services and on trade-related aspects of intellectual property rights, extended beyond the areas covered by exclusive Community competences under that Article; it mandated the Community and the Member States to co-operate closely. Other opinions of the Court confirm that in the area of external relations, shared competence is more likely to be found to exist than exclusive competence (Weatherill, 1995, pp. 142–4).

The fragmentary character and diverse nature of the Community external competences represent a serious threat to the credibility of the EC's international commitments. Thus, when the Council – which is in most cases the only organ competent to conclude international agreements – decides under the unanimity rule, each Member State through its veto power has the capacity to challenge Community action. In 1991, for instance, an agreement was entered between the U.S. Department of Justice and the European Commission designed to facilitate enforcement of competition rules, and to limit jurisdictional conflict through improved co-operation. Commission officials recognized that they were taking a risk that the agreement could be challenged by the Member States. In fact, France, joined later by Spain and the Netherlands, filed an annulment proceeding before the ECJ after the agreement was signed in September 1991. France alleged that the Commission was not competent to conclude such an agreement because Art. 300 of the EC Treaty reserves to the Council the power to conclude international agreements. On 9 August 1994 the Court annulled the act by which the Commission had concluded the agreement (though not the agreement itself) on the grounds that the Commission lacked competence to take this action. Eventually the Council approved the agreement, but only after a new proposal by the Commission made clear that the European and American competition authorities remain bound by the internal rules protecting confidentiality of information gathered during investigation.

The inability to share confidential information under the agreement has been a serious limitation. One U.S. official commented that this has so limited the information exchanged that the provision has been of little practical importance. For instance, it has never been used in cartel cases (Laudati, 1996).

Again, in spring 1998, the New Transatlantic Market Initiative put forward by the Commission was thought to require the Council's unanimous approval, and was rejected because of French opposition. Given all these uncertainties, American scepticism and even opposition to the EU's being recognized as an international actor, for example in environmental negotiations, are understandable. They reflect serious doubts about whether the EU can actually assure compliance with international agreements as effectively as can governments operating at the national level (Sbragia, 1998).

Additional problems arise from the regulatory powers of the Commission, which are typically more limited than the powers of the Commission's international counterparts. This applies even to competition policy, one of the few areas where the Commission enjoys true executive powers. Thus, the Competition Directorate has only two main tools for obtaining evidence in investigations – information requests and on-site inspections – and it can investigate only firms since, according to the prevailing legal opinion, it has no powers against individuals. U.S. competition regulators, on the other hand, may issue civil investigative demands and subpoenas; in criminal cases they may empanel a grand jury and interrogate witnesses under oath. After a lawsuit is filed, a full arsenal of discovery tools is available, including written interrogations and oral examinations of witnesses. The difference in the powers of the US and EU competition authorities limits the ability of the two jurisdictions to co-operate with respect to assistance in gathering evidence, or in their willingness to use their full range of evidence-gathering tools on each other's behalf (Laudati, 1995).

### **III. The Institutional Deficit**

One of the most obvious defects of the EC regulatory system is the mismatch between the Community's highly complex and differentiated regulatory tasks, and the available administrative instruments. This is not only a problem of insufficient resources but, even more, of insufficient recognition that policy credibility depends crucially on effective implementation. Steeped in the traditional legal approach to market integration, the Commission used to be more interested in the rewarding task of developing new rules rather than in the thankless and politically costly task of implementing existing ones. Today it seems to be more aware of the importance of effective enforcement, as shown by such documents as the Commission's recent report on 'Better Lawmaking'

– a notion which includes better implementation – and the successive *Reviews of the Internal Market*.

Regulation is not achieved simply by rule-making; it also requires detailed knowledge of, and intimate involvement with, the regulated activity. In all industrialized countries this functional need has led, sooner or later, to the creation of specialized agencies, capable not only of rule-making, but also of fact-finding and enforcement. As the examples discussed in this section show, the lack of such administrative infrastructure at the European level is a serious obstacle to the completion of the internal market and thus a serious threat to the credibility of the integration project.

### *Pharmaceuticals*

The evolution of drug regulation in the EC is particularly instructive because it shows the limits of the traditional decentralized approach and, at the same time, the most likely path of institutional development in other areas of Community regulation.

The first procedure for the Community-wide approval of new medical drugs included a set of harmonized criteria for testing new chemical entities, and the mutual recognition of toxicological and clinical trials conducted according to EC rules. In order to speed up the process of mutual recognition, a ‘multi-state drug application procedure’ (MSAP) was introduced in 1975. Under the MSAP, a pharmaceutical company that had received a marketing authorization from the regulator of a Member State could ask for the recognition of that approval by five other countries. The agencies of the countries nominated by the company had to approve or raise objections within 120 days. In case of objections, the Committee for Proprietary Medicinal Products (CPMP) – which at that time included Commission as well as national representatives – had to be notified. The CPMP would express its opinion within 60 days, but could be overruled by the national agency that had raised objections.

The procedure did not work well. Actual decision times were much longer than those prescribed by the 1975 directive, and national regulators did not appear to be bound either by the decisions of other regulatory bodies, or by the opinion of the CPMP. Because of these disappointing results, the procedure was revised in 1983. Now only two countries had to be nominated in order to apply for multi-state approval. But even the new procedure did not succeed in streamlining the approval process because national regulators continued to raise objections against each other almost routinely (Kaufer, 1990). The system lacked credibility, and was held responsible for the loss of international competitiveness by the European pharmaceutical industry. These concerns finally induced the Commission to propose the establishment of a European



drug agency, and the creation of a new centralized approval procedure, compulsory for biotechnology products and certain types of veterinary medicine, and available on an optional basis for other products, leading to an EU-wide authorization. Both the agency and the centralized procedure were established by Council Regulation No. 2309/93 of 22 July 1993. Today the European Medicines Evaluation Agency (EMA) is the great success story of EC regulation. The system for managing applications operates to a tight time-scale with strict deadlines, and the agency enjoys an excellent international reputation.

A central role in EMA's work is played by two committees – the CPMP mentioned above, and the Committee for Veterinary Medicinal Products (CVMP). These committees are entrusted with the task of formulating the scientific opinions of the agency, and also of arbitrating disputes between pharmaceutical firms and national authorities (Vos, 1999). The committee members represent the national regulatory authorities, and serve for renewable three-year terms. However, it would be wrong to assume that through their power of appointment the national governments effectively control the authorization process. In fact, since the creation of EMA both committees have become not only more important but also more independent. This is because it is in their interest to establish an international reputation for good scientific work, and for this purpose the degree to which they reflect the views of the national governments is irrelevant (Gardner, 1996).

EMA has been designed not as a traditional regulatory agency, but as a network where national regulatory authorities, independent scientific experts, Member States, Commission, and European Parliament each have a role to play. This complex structure was largely dictated by the political realities of European policy-making, but could provide, as a more or less unintended by-product, a favourable environment for the development of the most important qualities of credible regulation: independence, expertise, and legitimacy. The role of regulatory networks in a reformed system of EC regulation will be discussed in Section V.

### *Food Safety*

The food sector is an area where EC regulation dates back to the earliest days of the Community. EC provisions relating to foodstuffs are collected in a volume which by the mid-1990s had already run to more than 700 pages. Community policy on food safety is developed by the Commission assisted by a number of committees of which the most important are: the Standing Committee on Food, a comitology committee representing the Member States; the Advisory Committee for Foodstuffs, representing various economic and social interests; and the Scientific Committee for Food (SCF)

established in 1974. Most regulations adopted in the foodstuffs sector require the SCF to be consulted before the adoption of rules which may have an effect on public health.

The members of the SCF, who are appointed by the Commission for three years, renewable, are qualified experts. However, the resources at their disposal are quite limited, leading to a growing backlog of cases. Also, there is a general feeling among the relevant Commission officials that the SCF is not sufficiently involved in actual policy-making (Hanking, 1997). For these reasons, the Commission in the past had seriously considered the creation of a European Food Agency. However, a political decision was taken towards the end of 1990 that the agency model would not be appropriate for the foodstuffs sector. Instead, it was decided to try an alternative approach, based on improved scientific co-operation between the Commission and the Member States. The idea was that the Member States would use their own scientific resources to lend the Commission the assistance it needs in the examination of questions relating to food safety (Hanking, 1997).

This decentralized system of rule-making has proved to be inadequate. The BSE crisis not only revealed the failure to establish a stable and internationally credible community of scientific experts on food safety, but also exposed serious shortcomings in the overall co-ordination of European policies on agriculture, the internal market and human health. European citizens and the European Parliament have raised concerns that various Member States might have used their position in the comitology system to further national economic interests rather than Community health and safety goals. Moreover, the division of scientific tasks between committees of experts dealing with individual issues of animal and human health, has been identified – among others by the EP – as contributing to the dangerous confusion between the pursuit of market or agricultural policy aims and the protection of human health.

The most recent institutional reform – which has seen all scientific committees dealing with the issue of human health and safety, rationalized and grouped under the co-ordinating umbrella of the Director General for Consumer Protection – has yet to be tested as to whether it is a credible long-term arrangement, or merely yet another stop-gap institutional measure (Everson and Majone, 1999). At any rate the old idea of a European Food Agency has been resurrected in the wake of the BSE and other crises, and has received the endorsement of Commission President Prodi in his speech to the European Parliament of July 1999, and again in October 1999.

The idea is strongly supported also by the food industry. For example, Anthony Burgman, co-chairman of the Anglo-Dutch multinational, Unilever, recently advocated a powerful and independent European Food Safety Agen-

cy, on the model of the US Food and Drug Administration. A strong European agency would streamline the testing and introduction of new food products which is now left to Member States, and help restore consumers' confidence after such episodes as the dioxin food scare in Belgium and the BSE crisis in the UK. Burgman is aware that national governments would probably oppose the loss of powers to a centralized agency as running contrary to the policy of subsidiarity, but he warned that the absence of a powerful EU-wide agency could leave European customers at the mercy of US food producers (*Financial Times*, 7.9.1999, p. 2).

The proposal for an independent European Food Authority advanced by the new White Paper on food safety (Commission, 2000) falls far short of what Anthony Burgman and probably also President Prodi would have liked. The Authority is supposed to monitor developments touching upon food safety issues, provide scientific advice, collect and analyse information, and communicate its findings to all interested parties. Thus it would be responsible for risk analysis and risk communication but would have no regulatory powers. The White Paper does not exclude the possibility of future extensions of the Authority's competences, but for the moment it is not even clear how the proposed body would relate to the existing system of scientific committees and to the Commission itself.

### *Telecommunications*

While the food sector is one of the oldest areas of EC regulation, telecommunications is one of the newest, but here also the regulatory framework is highly decentralized and comitology is pervasive. The most important committee is the Open Network Provision (ONP) Committee established by the framework Directive 90/387. The Committee functions as an advisory body except for certain tasks – such as the adoption of rules for the uniform application of essential requirements of objectivity, transparency, equality of access, and non-discrimination – where the procedures are the more restrictive ones of a regulatory committee. One of the functions of the ONP Committee, the members of which are drawn from the national regulatory authorities (NRAs), is to arbitrate in disputes between telecom operators and NRAs that cannot be resolved at the national level, or that involve operators from more than one Member State. The arbitration is not binding, however.

This compromise on a highly decentralized set-up was probably necessary in order to establish an internal market for telecom services in the first place. Nonetheless, the system suffers from a number of serious shortcomings: imprecise obligations and pricing rules for interconnection; inadequate mechanisms of dispute resolution; low credibility of some national regulators

in terms of both expertise and political independence; poor co-ordination among NRAs and between the NRAs and the Commission (Pelkmans, 1997).

While some of these shortcomings may be remedied by better legislation, the deeper problems are institutional. What we have here is another instance of the mismatch between highly complex regulatory tasks and available administrative instruments, which has become a distinctive feature of EC-style regulation. However, the Commission is beginning to realize that the effective implementation of existing rules is essential both to its own credibility and to the industry's perception of the potential value of any proposals for new measures. In spring 1997 the European Parliament, in the conciliation procedure on the Interconnection Directive, forced the Council to agree that the Commission should study the 'added value of setting up a European Regulatory Authority' for telecommunications; and that the results of the study be used in the review of the present system, to be carried out in 1999.

In response to this request of the EP, the Commission asked two consulting firms to conduct a broad survey of telecom players in all 15 Member States. The results of the survey, still unpublished at the time of writing, indicate a certain dissatisfaction with the NRAs, especially in the countries of southern Europe, and especially a very low level of confidence in the ONP Committee in such crucial areas as interconnection, competition, control of the dominant incumbent operators, frequency allocation, numbering, and development of pan-European services. For these areas the survey reveals some support, throughout the EU and for most categories of respondents, for a European Regulatory Authority to replace the present decentralized structure. At the same time, the majority of respondents do not favour a highly centralized body like Oftel in the UK, or the U.S. Federal Communications Commission. What seems likely to happen in the near future, therefore, is that the current decentralized system will be maintained, albeit with a strengthened ONP Committee.

In sum, with the partial exception of medical drug regulation, recent attempts to reduce the institutional deficit appear to be failing. At the same time, the need for stronger and more autonomous regulatory institutions is becoming more urgent because of the increasing politicization of EC policy-making.

#### **IV. The Perils of Politicization**

One of the core insights of functionalist theories is that integration is most likely to occur within a domain shielded from the direct clash of political interests. For several decades, law and economics – the discourse of legal and market integration – provided a sufficient buffer to achieve results that could not be directly obtained in the political realm. It was generally admitted that the

credibility and coherence of European regulatory law depends crucially on the perception that the Commission is able and willing to enforce the common rules in an objective and even-handed way.

Today the increasing politicization and parliamentarization of the Commission forces us to rethink the reasons for separating politics and economics at the EC level, and to identify domains which still may have to be protected from the total sway of majoritarian principles. It should be remembered, however, that the enforcement of European law does not depend exclusively on Commission supervision. Another important route, at least with regard to directly effective provisions, is through action taken by private individuals in the national courts; national governments are not likely to disobey the rulings of their own courts.

### *The Collegial Principle and Bureaucratic Politics*

The politicization, as distinct from the parliamentarization, of the Commission is not a new phenomenon. European Commissioners have never been completely immune from political influences both from the Member States and within the Commission itself. Although they are not supposed to pursue national interests, many Commissioners are politicians who, after leaving Brussels, will return to their home country to continue their career there. This makes national pressures often difficult to resist, especially since the Commission needs the co-operation of national governments in order to fulfil its mission. Despite the popular image of a Community run by faceless bureaucrats, the EC policy process has always been to some extent politicized, even in highly technical areas such as the implementation of competition rules.

In the early 1990s, some observers saw an increasing politicization of competition policy in the approvals by the Commission of huge injections of state aid for state-owned steel companies and airlines (Gerber, 1994). To oppose this trend, some national competition regulators, notably the German Federal Cartel Office and competition officials in Britain, put forward the idea of creating an independent European Cartel Office. An independent authority, it was argued, would allow decisions to be made on the basis of competition criteria, and eliminate political interference, either from interventionist Member States or from other Directorates-General (DGs). Because all final decisions in competition cases are reached through a vote of the entire Commission, the Competition Directorate cannot act independently of the other DGs. In general, political pressure from the other DGs runs against negative decisions of the Competition Directorate, particularly with regard to mergers. For instance, the directorates for industrial and for social policy frequently take positions at odds with those of the competition regulators (Laudati, 1996).

The well-known case of the DeHavilland merger shows the difficulties DG IV had to face within the Commission when it opposed a merger for its anti-competitive effects. DG IV had recommended a prohibition of the takeover of DeHavilland, a Canadian aircraft manufacturer, by ATR, a French–Italian consortium. Within the full Commission, however, the Competition Commissioner, Sir Leon Brittan, was opposed by the French and the Italian commissioners, and by Industrial Policy Commissioner Martin Bangemann, who argued that the merger would give European aircraft manufacturers the economies of scale they needed to compete in world markets.

The DeHavilland prohibition ultimately remained in effect, but the case had made clear how haphazard the Commission's decision-making process was even in the crucial area of competition policy, and it provided grist for the mill of the Commission's critics in Germany and elsewhere. Moreover, in January 1994 the Commission voted to allow a merger between three European tube manufacturers, notwithstanding recommendations by Commissioner Karel Van Miert and the Merger Task Force that the merger should be prohibited. This decision seemed to call into question the authority of the Merger Task Force and the personal reputation of Commissioner Van Miert, as it was the first time he had been overruled by his colleagues in a competition case (Laudati, 1996, p. 238). The idea of an independent European Cartel Office acquired new support in various Member States, although the Commission continued to oppose it, fearing a loss of power in an area where it enjoys significant executive competences.

Similar disputes arise over the control of state aids. Such examples suggest that the collegial principle should be used sparingly, for decisions involving great uncertainty and/or significant value trade-offs, rather than routinely. Even in the cabinet system of government, individual ministers are usually granted autonomy for all decisions within their competence that do not involve the collective responsibility of the executive.

Bureaucratic politics is an old and reasonably well understood phenomenon. The threats to the credibility and coherence of EC regulatory policies may become even more serious when European regulators are exposed to political pressures coming not only from national governments and from within the Commission itself, but also from an increasingly assertive European Parliament (EP).

### *The Parliamentarization of the Commission*

The idea of reducing the democratic deficit of the EC policy-making process by assigning a larger role to the European Parliament, and in particular by involving the EP in the appointment of the Commission, is not new. However, the procedure introduced by the Treaty of Amsterdam (Art. 214 of the

Consolidated Treaties) contains a number of radical changes not only with respect to previous practices – the custom of the newly appointed President of the Commission to be heard by the EP's enlarged Bureau, and for the Commission to present its programme to the full house of the EP shortly after it takes office – but also with respect to Art. 158 of the Maastricht Treaty. If under Art. 158 the national governments could nominate a new Commission President only after consulting the EP, now their nomination must be approved by Parliament. Moreover, the President and other members of the Commission are subject to a vote of approval by the EP, as in classical parliamentary systems. The link, established in 1995, between the EP's term of office and that of the Commission is another institutional innovation.

Since a newly elected Parliament takes part in nominating the Commission, any significant changes in the EP's composition can be reflected at the Commission level. Not surprisingly, influential MEPs openly advocate a 'Parliamentary Commission', in which the composition and programme of the European executive would reflect the will of the parliamentary majority (Club de Florence, 1996; Dehousse, 1997).

Indeed, the difficulties surrounding the appointment of the Santer Commission showed that the EP intends to influence the distribution of portfolios among Commissioners. The process of parliamentarization has been accelerated by the events of March 1999, leading to the resignation of the Santer Commission, and by the extended committee hearings of individual members of the Prodi Commission. Henceforth, it will be virtually impossible for an individual Commissioner to remain in office against the wish of the majority in the EP.

As Dehousse points out, these developments amount to a deep transformation of the relationship between the EP and the Commission. The Commission will be fully responsible to the Parliament, whose influence will be felt in all its activities, whether administrative or legislative. Thus the right given to the EP to request the Commission to 'submit any appropriate proposal on matters on which it considers that a Community act is required' (Art. 143 of the Consolidated Treaties), comes close to a true right of legislative initiative. It appears that the framers of the Maastricht and Amsterdam Treaties, in their desire to reduce the Union's democratic deficit, have radically modified the balance of power between Commission and Parliament (Dehousse, 1997).

An increasing level of politicization of EC policy-making becomes unavoidable as more and more tasks involving the use of political discretion are shifted to the European level. Thus, a significant part of the third pillar, as well as the Schengen arrangements on border control, have been moved to the first pillar. These new competences and the problems connected with the next enlargement, not only increase the administrative tasks of the Commission, but

also emphasize the Commission's political responsibilities. In this context, the demand for a greater role of the European Parliament becomes understandable. At the same time, one should not be blind to the risks which politicization entails for the credibility of EC regulatory policies.

### *The Commitment Problem*

One of the defining characteristics of democracy is that it is a form of government *pro tempore* (Linz, 1998). The time limit inherent in the requirement of elections at regular intervals is one of the main arguments for democracy, but it implies that the policies of the current majority can be legitimately subverted by a new majority with different and perhaps opposing interests. For this reason, elected politicians tend to have fairly short time horizons, and lack the means of credibly committing themselves to long-term policies.

This lack of an adequate 'technology of commitment' (Dixit, 1996) explains why in areas such as monetary and regulatory policies, where credibility is essential to success, delegation to non-majoritarian institutions is increasingly seen as the most effective means of achieving policy credibility. The European Central Bank (ECB) is the most striking example of the steadily growing role of institutions that are not directly accountable to the voters or to their elected representatives. The political independence of the ECB has an even stronger legal basis than the celebrated independence of the German Bundesbank. This is because the independence of the ECB is guaranteed by the Treaty on European Union rather than by a law that may be changed by a parliamentary majority. With minor exceptions, the status of the ECB can only be modified through treaty amendment, and this requires the unanimous consent of the Member States.

Thus, electorally accountable politicians can override the ECB's policies only through an extremely demanding procedure. Moreover, since in monetary union the governors of the national central banks are members of the European System of Central Banks, they too, according to Art. 107 of the Treaty on European Union (TEU), must be insulated from domestic political influences in the performance of their tasks.

Rogoff (1985) is the classical reference on delegation of monetary policy to a central banker who is more 'conservative' (i.e. more inflation averse) than the government or the median voter. A commitment to a low average rate of inflation becomes credible because the delegate values *ex post* inflation less than his political principals. The logic of Rogoff's model can be extended to other areas of public policy where credible long-term commitments are particularly important, such as economic and social regulation. In most countries, regulatory policy-making today is delegated to agencies operating



at arm's length from government. The point of insulating regulators from the political process is to enhance the credibility of the government's policy commitments. Agency heads are usually chosen not only for their expertise, but also for their personal commitment to pro-environment, pro-competition or pro-consumer objectives (Wilson, 1989). This suggests that they tend to attach more importance to the agency's statutory objectives than the government or the median voter.

Hence, the delegation of regulatory powers to some agency distinct from the government itself is best understood as a means whereby governments can commit themselves to regulatory strategies that would not be credible in the absence of such delegation (Gatsios and Seabright, 1989). Similarly, the commitment of the Member States to the process of European integration would lack credibility without the delegation of important powers of rule-making and adjudication to supranational institutions like the Commission and the Court of Justice. The validity of this strategy is demonstrated by the extraordinary results achieved in less than four decades.

However, the progressive politicization and parliamentarization of the Commission raise again the issue of credibility, this time at the European level. A less technocratic, more political Commission may enjoy greater democratic legitimacy, but eventually it will have to face the same commitment problem of all democratic governments. Indeed, according to the critics, such as the advocates of an independent European Cartel Office, the problem is already serious. The argument sketched in the preceding pages suggests that the delegation of powers to regulatory bodies distinct from the Commission itself, or at least enjoying significant decisional autonomy, may provide a feasible solution to the credibility problem under the new political conditions prevailing in the Union.

Delegation of power to independent European agencies has been impeded, in part, by a narrow reading of Art. 4 of the Treaty of Rome. This article lists the various European institutions, and states that each of them must act 'within the limits of the powers conferred upon them by this Treaty'. This has been interpreted as a general prohibition on the establishment of additional bodies, so that nothing short of a treaty revision would allow for the creation of truly independent agencies.

The ECJ, with its 'Meroni doctrine', has slightly eased the consequences of such a reading of the Treaty, thus allowing the Commission to delegate certain of its executive functions to bodies not named in the Treaty, but such delegation is subject to severe limitations. At any rate, the so-called Meroni doctrine is totally out of step with the development of European regulatory policies. Lip-service notwithstanding, it has *de facto* been overruled. It is true that the new European agencies have not been granted formal independence. However,

their creation suggests a large functional need not satisfied by the existing institutions. Their very existence confirms that the Commission as well as the Member States, are becoming increasingly aware of the severe mismatch between the increasingly specialized functions of the Community and the administrative instruments at its disposal. Thus the relevant question is no longer whether agencies, operating with different degrees of independence, have a role to play in European governance, but rather how they should be designed and made accountable to their political principals. We turn now to such design issues.

### **V. Independence and Accountability**

In his call for a powerful and independent European agency for food safety, the co-chairman of Unilever suggested the U.S. Food and Drug Administration as the appropriate model (see Section III). Actually, such a centralized and bureaucratized agency is neither politically feasible nor generally desirable in the European context. However relevant in other respects, the experience of the American regulatory state does not provide institutional models that are directly applicable abroad. The challenge to Europe is to design institutional arrangements capable of fostering close working relationships with national regulators, European institutions, and with international organizations, while avoiding the major defects of the comitology system: opaque procedures, poor accountability, and lack of effective co-ordination of sectoral responsibilities with broader horizontal concerns.

Before tackling these issues, a conceptual clarification seems advisable. In the debate on the reform of European institutions, ‘agency’ has often been taken to mean an organization, such as the European Central Bank, operating in complete independence from the other European institutions as well as from the national governments. The ECB is an extreme example of an independent agency, but the agency model includes a wide range of variants, corresponding to different functional and institutional requirements.

#### *The Agency Model*

‘Agency’ is an omnibus label to describe a variety of organizations – commissions, boards, authorities, services, offices, inspectorates – that perform functions of a governmental nature, and which often exist outside the normal departmental framework of government. The U.S. Administrative Procedure Act (APA) provides what is probably the most useful interpretation of the term. According to this important statute which regulates the decision-making processes of all federal agencies, an agency is a part of government that is

generally independent in the exercise of its functions and that by law has authority to take a final and binding decision affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication.

Agency status does not require that an agency exercise its power with complete independence, either vertically (in terms of being subject to administrative review), or horizontally (in terms of being required to act in concert with others). If an authority is in complete charge of a programme, it is an agency with regards to that programme, despite its subordinate position in other respects (Freedman, 1978). Thus, the independent regulatory commissions, such as the Interstate Commerce Commission or the Securities and Exchange Commission, are agencies in the sense of the APA, but so are the Occupational Safety and Health Administration (located within the Department of Labour), the Food and Drug Administration (located within the Department of Health and Human Services), and the Army Corps of Engineers.

In the EU context, most of the new European agencies, as well as Eurostat (the European statistical office), which is a Directorate General of the Commission, are *de facto* agencies in the same sense. In order to achieve credibility, however, agency independence should also have a legal basis. Without such a basis, the agency's capacity to resist politically motivated attempts to influence its decisions will remain in doubt. Credibility is particularly important to regulatory and other agencies, whose main task is to provide objective information and to take decisions or deliver opinions based on the best available evidence rather than on political expediency.

For example, many decisions on financial transfers in the EU are based on Eurostat data. Eurostat has played an important role also in the enforcement of the convergence criteria for monetary union. However, the fact that the European statistical office is actually a Directorate General and falls under the authority of the Commissioner for Economic and Monetary Policy, has created the impression that Eurostat's independence is sometimes compromised. Even according to insiders, its decisions are sometimes political, as shown most recently by the elastic interpretation of the EMU criteria (Schout, 1999). This explains the insistence with which statisticians in the national statistical institutes (NSIs) – the NSIs together with Eurostat form the European Statistical System (ESS) – have been demanding more independence not only for their own institutes, but also for the European counterpart (Garonna, 1996).

On the other hand, there are definite advantages in being a part of the Commission. Thus, as a Commission service, Eurostat can draft directives and regulations obliging the Member States to provide needed data – something which the European Environment Agency, for example, cannot do, even though it is almost wholly dependent on data from the national governments.

The agency model, in the sense of an authority which is in complete charge of a programme, offers the possibility of retaining the advantages of being a part of the Commission, while ensuring that Eurostat is not only *de facto* independent, at least for most operational decisions, but that it is also seen to be independent. Concretely, agency status would mean that the head of the agency is no longer a Commissioner, but an executive chosen primarily for his or her reputation as an independent expert, and that the approval of the Commission as a collegial body would not be required for every agency decision.

The advantages of being a part of the Commission are even more obvious in the case of the Directorate General for competition policy. The Treaty of Rome gave the Commission independent powers to ensure the application of the Community's competition rules. This is one of the few policy areas where the Commission enjoys true executive powers. As a consequence, the Competition Directorate is one of the most powerful and influential DGs. In addition to its primary responsibility for developing and implementing EC competition policy, it promotes competition-oriented ideas within the Commission, and provides advice and support to other DGs engaged in market liberalization, for example in telecommunications, or handling important cases of state aid.

Opponents of an independent European Cartel Office (see Section IV) can make a strong argument that a regulatory body operating at arm's length from the Commission could never exercise the same influence on the Member States as the former DG IV. Now, the most serious conflicts between the Competition Commissioner and the rest of the Commission usually erupt in merger cases. As the examples in Section IV indicate, this is an area where the credibility of EC regulation is severely tested by the bureaucratic politics and bargaining style of decision-making that result from the collegial principle. If the Merger Task Force, possibly together with Directorate E for state aids, were transformed into an agency located in the Commission, it would be possible to reduce such threats to credibility, without unduly weakening the Commission itself.

Agency status, either within or outside the Commission, does not exclude the possibility of political intervention when the issue under consideration has broad social or policy implications. The strength of the agency model – a high level of specialization and a firm commitment to the agency's statutory objectives – is also its limitation. Agencies have no special expertise in balancing different interests or in resolving value conflicts. At the European level these are tasks for the Council, the Parliament, the Commission and, in some cases, the Court of Justice. However, the procedures which political executives should follow to overrule an agency's decision must entail high political costs and make the interference plain for all to see. The German Cartel Law provides a useful, even if not a perfect, example (Baake and Perschau, 1996).

The choice of procedures for overriding agency decisions is part of the broader problem of designing agencies that are accountable as well as independent. We now turn to this problem.

### *Procedural Controls of Agency Discretion*

As the term indicates, agencies are agents established by some principals to carry out their purpose. An agency problem arises because of the possibility that the administrative agents will not comply with the policy preferences of the principals. Agents usually have more information than principals about the details of the tasks assigned to them and about their own actions and preferences. They can take advantage of the high cost of measuring their characteristics and performance to engage in opportunistic behaviour.

There are two main forms of control of agency behaviour: oversight (monitoring, hearings, investigations, budgetary reviews, sanctions), and rules that specify the procedures to be followed in agency decision-making. Although the literature on the political control of the bureaucracy is concerned mostly with oversight, this direct form of control suffers from several limitations. First, it does not deal directly with information asymmetries. If agencies have better information than their principals, their permissible range of discretion cannot be easily determined.

Also, most of the methods for imposing meaningful sanctions for non-compliance create costs for the overseers. Thus, a publicly visible investigation and punishment of an agency may raise doubts in the mind of citizens about the efficiency and honesty of the principals themselves. At the same time, the sanctioning process lowers morale and distracts the agency from the pursuit of its statutory objectives (McCubbins *et al.*, 1987). Thus, direct oversight of agency behaviour is not a completely effective solution of the control problem; it needs to be supplemented by more indirect and less costly mechanisms of a procedural nature.

Procedural rules are a means of assuring transparency and accountability, but they also provide cost-effective solutions to the agency problem. The simplest and most effective way of improving transparency and accountability is to require agencies to give reasons for their decisions. This requirement in turn activates a number of other mechanisms for controlling agency discretion. For example, under the US Administrative Procedure Act (APA) of 1946, an agency, before promulgating a rule, must provide notice and opportunity for comments; when it promulgates a rule, it must supply a concise statement of the rule's 'basis and purpose'; and the rule can be set aside by the courts only if it is 'arbitrary, capricious, or [an] abuse of discretion'. Starting from such general and apparently innocuous requirements, federal judges have succeed-

ed in formulating new principles to improve the transparency and rationality of informal rule-making (Shapiro, 1992).

The European Community could usefully draw on this long experience in controlling regulatory discretion. The enactment of an Administrative Procedure Act for the EC would provide the Community with a unique opportunity to decide what kind of rules are more likely to rationalize decision-making, to what extent and in which form interest groups should be given access to the regulatory process, or how judicial review could be facilitated. The proliferation of committees, working groups and agencies shows how urgent is the need for a single set of rules explaining the procedures to be followed in regulatory decision-making.

As noted above, procedures serve also important control functions. For example, the notice and comment requirements of the APA oblige an agency to announce its intention to consider an issue well in advance of any decision. Hence political principals cannot be presented with a *fait accompli*. The same requirements assure that the agency learns who are the relevant stakeholders, and takes some notice of the distributional impacts associated with various actions. Indeed, under APA procedures the entire sequence of agency decision-making – notice, comment, deliberation, collection of evidence, and construction of a record in support of a chosen action – affords numerous opportunities for political principals to respond when the agency seeks to move in a direction they do not approve of (McCubbins *et al.*, 1987).

Moreover, procedural rules controlling the extent and mode of public participation can strengthen the position of the intended beneficiaries of the bargain struck by the coalition that supported the creation of the agency. Such ‘deck-stacking’ enables legislators to cause the environment in which an agency operates to mirror the interest configuration that gave rise to the agency’s statutory mandate, long after the initial coalition has disbanded. The agency may seek to develop a new clientele for its services, but such an activity must be undertaken not only in full view of the members of the initial coalition, but following procedures that automatically integrate the interests of particular groups – environmentalists, consumer advocates, trades unions or representatives of small and medium-sized enterprises – in agency decision-making (McCubbins *et al.*, 1987, pp. 256–9).

In sum, while the older literature, European as well as American, tended to support the popular view of a bureaucracy out of control, newer research shows that agency discretion may be disciplined without excessively intruding upon the authority implicit in the decision to delegate. Political principals design agencies, specify decision-making procedures, control budgets, appoint key personnel. It is up to them to structure relationships with their administrative agents so that the outcomes produced through the agents’ efforts are the best

the principals can achieve, given the choice to delegate in the first place (Horn, 1995).

*Towards a European Model: Transnational Regulatory Networks*

As noted above, the American model of centralized federal agencies operating independently from the regulatory authorities of the states, cannot be transposed to the EU. In addition to practical and political constraints, such a model would violate the principle of subsidiarity. In the long run, it would aggravate, rather than ameliorate, the credibility problem. Since preferences vary locally and local conditions often affect both the costs and benefits of regulation, decentralized rule-making and enforcement can provide a better match between local public goods and citizen preferences. Hence subsidiarity is an important source of regulatory legitimacy, as long as it does not compromise the credibility of the project of European integration.

An original European response to the double challenge of subsidiarity and integration is the emerging model of transnational regulatory networks. Recall that the essential characteristic of an agency is not its institutional separateness but the decisional autonomy it enjoys with respect to some defined policy area. As long as an administrative office is in complete charge of a programme, it is an agency even if it is a sub-part of a larger unity. In particular, an agency can operate as a part of a network including both national and European regulators. In fact, the new European agencies have not been designed to operate in isolation, or to replace national regulators. Rather, they are expected to become the central nodes of networks including national agencies as well as international organizations.

National and EU representatives and experts sit on the management boards and the scientific committees of the new agencies. The committees formulate the scientific opinion of the agency, and may perform other important functions. Thus, the two scientific committees of the EMEA (see Section III) also arbitrate in disputes between pharmaceutical firms and national authorities. As we saw, both committees played a significant role in the old multi-state drug application procedure, but they have become more important and more independent since the creation of the EMEA. In the new situation, the committee members have more incentives to establish EMEAs and their own international reputation, in competition with such bodies as the U.S. Food and Drug Administration, than to defend national positions.

This change in the incentive structure of regulators operating in a transnational network corresponds to the distinction introduced by Alvin Gouldner in his work on the sociology of the professions, between 'cosmopolitans' and 'locals'. Cosmopolitans are likely to adopt an international reference-group orientation, while locals tend to have a national or subnational (e.g. organiza-

tional) orientation. Hence, 'local' experts tend to be more submissive to the institutional hierarchical structures in which they operate than do 'cosmopolitan' experts, who can appeal to the standards and criteria of an international body of scientific peers (Gouldner, 1957–58). Using this terminology we may say that the EMEA creates a favourable environment for the transformation of national regulators from locals to cosmopolitans. It does this by providing a stable institutional focus at the European level, a forum in which different regulatory philosophies are openly discussed, and by establishing strong links to extra-European regulatory bodies.

Another interesting network structure is emerging in the area of competition policy. This development has been made possible by significant changes that have occurred in recent years in competition law enforcement in the Member States. Where, with the exception of Germany, national enforcement of competition law was virtually non-existent until the mid-1980s, today many Member States have professional competition authorities structured to perform their functions with limited political interference – at least with respect to non-merger cases – and with a clear mandate to enforce competition rules relying on economic analysis rather than to protect national champions.

As early as 1992 Sir Leon Brittan, then Competition Commissioner, anticipated that this evolution of the national authorities, in conjunction with an increased emphasis on the subsidiarity principle, would lead to 'the achievement of the Community's objectives through a co-ordinated partnership involving regulators at the Community and national level' (quoted in Laudati, 1996, p. 248). The 1999 Commission *White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*, represents a very significant move toward the co-ordinated partnership envisaged by Sir Leon. Regulation 17, implementing Arts. 85 and 86 of the Rome Treaty, laid down the system of supervision and enforcement procedures which the Commission has applied for over 35 years without any significant change. Under this Regulation, the Commission, national courts, and national authorities can all apply Art. 85(1), but the power to grant exceptions under 85(3) was granted exclusively to the Commission. Now the White Paper proposes the abolition of the present notification and exemption system and its replacement by a Council Resolution which would render the exemption rule of Article 85(3) directly applicable, without prior decision by the Commission, by national competition authorities and national courts. In the words of the document,

After 35 years of application of the Community competition rules, the time has come to make better use of the complementarity that exists between the national authorities and the Commission, and to facilitate the application of



the rules by a *network of authorities* operating on common principles and in close co-operation. (Commission, 1999, p. 32; emphasis in the original)

For a transnational regulatory network to function properly, several conditions have to be satisfied. First, there must be a good deal of mutual trust and co-operation. In the case of competition policy, for example, if a national authority comes to the conclusion that a case has a Community dimension and requires action by the Commission, it should be able to forward its file, including any confidential information, to the Commission. Conversely, if the Commission finds that the effects of a disputed practice are felt primarily in one Member State, it should be entitled to send the whole of the file to the competent authority in that Member State, so that the authority can continue the investigation, making direct use in evidence of the information supplied (Commission, 1999, p. 33).

A second condition for the viability of the network, is a high level of professionalization of the regulators. One reason why Regulation 17, which was adopted in 1962, established a centralized authorization system for all restrictive practices requiring exemption under Art. 85(3), was that, in the early years, the contours of competition policy were not widely known in many parts of the Community. A decentralized authorization system is possible today because all national competition authorities are becoming more professional and increasingly jealous of their independence.

A common regulatory philosophy is a third important condition for the proper functioning of a regulatory network. A good example is again provided by competition policy, where a high level of harmonization has already been achieved spontaneously in the Member States. However, regulatory philosophies evolve in response to changing economic, technological and social conditions. Hence, some institutional mechanism should be available in order to facilitate a continuous exchange of views among national and Community regulators. To this end, the White Paper proposes to reinforce the role of the Advisory Committee on Restrictive Practices and Dominant Positions. The strengthened Committee 'would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with them ... the Commission, acting on its own initiative or at the request of a Member State, could also be empowered to ask the Committee for its opinion on cases of application of Community law by national authorities' (Commission, 1999, p. 37). It remains to be seen whether such a forum would be sufficient to ensure policy consistency. Several commentators have expressed concerns that the release of exclusivity over Art. 85(3) may damage the credibility of even EU-wide enforcement of the competition rules. Decentralized implementation does raise the prospect of generous grants of exemptions

to domestic firms, especially where the anti-competitive effects may be expected to be felt primarily out-of-state.

At any rate, the conditions for the viability of a transnational regulatory network – mutual trust, professionalism and a common philosophy – will not be satisfied from the beginning. However, the very existence of the network provides an environment favourable to the development of the requisite qualities. A national agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing analogous problems, rather than as a marginal addition to a large central bureaucracy pursuing a variety of objectives, is more motivated to defend its professional standards and policy commitments against external influences, and to co-operate with the other members of the network. This is because the agency executives have an incentive to maintain their reputation in the eyes of their international colleagues. Unprofessional, self-seeking or politically motivated behaviour would compromise their international reputation and make co-operation more difficult to achieve in the future (Majone, 1997).

Thus, the function of a network is not only to permit an efficient division of labour and exchange of information, but also to facilitate the development of behavioural standards and working practices that create shared expectations and enhance the effectiveness of the social mechanisms of reputational enforcement. There is no reason why the network model could not be extended to all areas of economic and social regulation of Community interest, and indeed to all administrative activities where mutual trust and reputation are the key to greater effectiveness.

## **VI. Conclusion: Matching Strategy and Structure**

In his classic study of the diffusion of the decentralized form of organization in modern corporations, Alfred Chandler advanced the thesis that ‘structure follows strategy and that the most complex type of structure is the result of the concatenation of several basic strategies’. He then carried the theoretical discussion one step further by asking, if structure does follow strategy, why should there be delays in developing the new organization needed to meet the administrative demands of the new strategy? (Chandler, 1962, p. 16). Chandler’s research shows that an important condition of success for large-scale enterprises is that institutional innovations do not lag far behind the new strategic choices.

One of the major problems facing the Commission today is that its structure has remained essentially unchanged for more than 40 years, and has proved to be increasingly inadequate to manage the growing complexity of EC regulation. The strategic reforms of the 1980s, such as more flexible approaches to

harmonization and standardization or the mutual recognition of testing and certification, were highly innovative and may one day become a model for the world trading system. However, these innovations made even more evident the failure in developing the organizational structures needed to meet the administrative demands of the new strategy. The same is true of the reforms of the 1990s, using the Community competition rules to achieve market integration in such areas as telecommunications, energy and transport. Here too the new liberalizing strategy was not followed by the development of new administrative capacities. For instance, it is by now fairly clear that the Community's traditional supervisory machinery in the field of telecommunications is insufficient to create a level playing field for all telecom operators (see Section III). The price of such lags in matching structure to strategy, this article argues, is a serious loss of credibility.

The new Commission is keenly aware of the urgent need for administrative reform. However, purely internal reforms, such as new rules for the relationship between Commissioners, their cabinets, and career civil servants, the reduction in size and greater national diversity of the same cabinets, or the reduction in the number of administrative departments, are nowhere near sufficient to reduce the institutional deficit, let alone improve the credibility of EC regulation. The grant of full administrative autonomy to the directors general, as envisaged by Neil Kinnock, is a useful step in the direction of a clearer separation of political and administrative tasks; but again, it is unlikely to be sufficient to reduce significantly the risks of politicization, in the dual sense of the politics of collegial decision-making, and of the growing parliamentarization of the Commission.

The model of an independent and competent civil service, which Kinnock would like to establish at the European level, has been implemented long ago in at least some Member States. Yet these same countries have found it necessary to establish regulatory agencies operating at arm's length from the central departments of government. This suggests that an honest, competent and apolitical civil service is considered no longer to be sufficient to achieve the level of expertise, flexibility and, especially, credibility that is required today in most areas of economic and social regulation.

The proposals advanced in this article – a more limited reliance on collegial decision-making, and a greater willingness to delegate implementing powers to autonomous bodies – go further than the measures of internal reorganization currently under discussion, but remain well within the limits of what could be achieved at the next Intergovernmental Conference. At any rate, the EC has reached a point where clear institutional choices can no longer be postponed. What is most needed now is the courage to test the boundary of what is politically and legally possible.

In his first single-issue speech to the European Parliament in October 1999, the new Commission President, Romano Prodi, promised a discussion paper on food safety, including options for a European food agency. The only way to restore public confidence, according to Prodi, is to put in place a truly efficient and credible food safety system, where scientists are seen to be totally independent from policy-makers. One way to achieve this would be through an independent food agency. Prodi indicated two possible models: EMEA, which has no decision-making powers of its own but takes technical action swiftly; and the U.S. Food and Drug Administration, which has far-reaching powers and can act swiftly on safety, independently of political institutions. The problem with the latter model, the Commission President is quoted as saying, 'would be how to ensure democratic accountability. Nor am I sure that such an agency could be set up under the Treaty' (*Financial Times*, 6.10.1999, p. 2).

As this article has attempted to show, there are many substantive and procedural means by which independence and accountability can be made to be mutually reinforcing, rather than mutually exclusive, values. In this respect, to repeat a point already made, the Community can learn a good deal from the century-old experience of the American regulatory state. On the issue of institutional design, on the other hand, this article has argued that EMEA is the superior alternative – provided it is granted *de jure* as well as *de facto* decisional autonomy, so as to avoid conceptual ambiguities and to define clear lines of responsibility. Perhaps the time has come when the Commission should ask the ECJ for an opinion on the issue of delegation of powers to bodies not mentioned in the Treaty? After so much inconclusive debate on institutional reform, the citizens of the Union are at least entitled to know that the main obstacles to the creation of credible regulatory institutions are political, not legal.

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