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From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance

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ABSTRACT

Since the late 1970s European governments have been forced to change their traditional modes of governance in response to such trends as increasing international competition and deepening economic and monetary integration within the European Union. Strategic adaptation to the new realities has resulted in a reduced role for the positive, interventionist state and a corresponding increase in the role of the regulatory state: rule making is replacing taxing and spending. The paper's first part identifies three sets of strategies leading to the growth of the regulatory state as external or market regulator, and as internal regulator of decentralised administration. The second part examines major structural changes induced by changes in regulatory strategies. The institutional and intellectual legacy of the interventionist state is a major impediment to the speedy adjustment of governance structures to new strategies. It would be unwise to underestimate the difficulties of the transition from the positive to the regulatory state, but it is important to realise that international competition takes place not only among producers of goods and services but also, increasingly, among regulatory regimes. Regulatory competition will reward regimes in which institutional innovations do not lag far behind the new strategic choices.

1. Strategy and structure

More than thirty years ago, Alfred Chandler (1962: 16) 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 a step further by asking two related questions: (1) If structure does follow strategy, why

should there be delays in developing the new organisation needed to meet the administrative demands of the new strategy? (2) Why did the new strategy, which called for a change in structure, come in the first place?

Chandler's thesis had a profound impact on the study of the modern industrial enterprise, and of business organisation generally. The same is not true of the study of public policy and public management, even though the issues raised by this eminent business historian are as relevant to the public as to the private sector. Traditionally, changes in public policy and in governance structures have been treated, at best, as loosely connected processes to be analysed by separate sub-disciplines, using different conceptual frameworks and analytic tools. This disjunction has greatly impoverished both public policy analysis and the study of public administration. Recent advances in the positive theory of institutions and in the political economy of public policy may eventually lead to general models capable of explaining both policy innovation and the corresponding structural changes. Meanwhile, however, the transformation of public policy and governance structures is proceeding at such a pace that the student of public policy cannot await the development of such models before trying to make sense of what is happening.

This paper is concerned with significant structural changes induced by a 'concatenation of several basic strategies': privatisation, liberalisation and deregulation (in the correct meaning of regulatory reform); fiscal retrenchment, economic and monetary integration; and various policy innovations associated with the New Public Management paradigm. In spite of their heterogeneity, these new strategies concur in limiting the role of the interventionist or positive state, in particular by restraining its power to tax and spend, while enhancing the power of rule making and, hence, the role of the regulatory state. Although the shift from the positive to the regulatory state has recently attracted the attention of several scholars, especially in America (Seidman and Gilmour, 1986), we still lack systematic analyses of the political, legal and institutional consequences of this change in governance. This paper attempts to provide a first, rough map of a largely unexplored terrain, rather than an exhaustive survey of its many features.

2. The decline of the positive state

Modern politico-economic theories of the state distinguish three main types of public intervention in the economy: income redistribution;

macroeconomic stabilisation; and market regulation. Redistribution includes all transfers of resources from one group of individuals, regions or countries to another group; as well as the provision of 'merit goods' – goods such as primary education, social insurance, or certain forms of health care which government compels citizens to consume.

Macroeconomic stabilisation attempts to achieve and sustain satisfactory levels of economic growth and employment. Its main instruments are fiscal and monetary policy, together with labour market and industrial policy. Regulatory policies are aimed at correcting various types of 'market failure': monopoly power, negative externalities, incomplete information, insufficient provision of public goods.

Behind the notion of market failure is a fundamental theorem of welfare economics according to which under some conditions competitive markets lead to a Pareto-optimal allocation of resources (Stiglitz 1988). Market failures occur when one or more of the conditions for the validity of the theorem are not satisfied. Hence regulation, if it succeeds in removing such failures at a reasonable cost, can improve market efficiency, or even ensure the viability of markets, such as those for financial services, where trust, transparency, and information disclosure are crucially important.

Now, all modern states engage in income redistribution, macroeconomic management, and in market regulation, but the relative importance of these functions varies from country to country and from one historical period to another. Thus, at the end of the period of reconstruction of the national economies shattered by World War II, redistribution and discretionary macroeconomic management emerged as the top policy priorities of most Western European governments. The market was relegated to the role of providing the resources to pay for government largesse, and any evidence of market failure was deemed sufficient to justify state intervention, often in the intrusive form of centralised capital allocation and the nationalisation of key sectors of the economy. Indeed, centralisation and unfettered policy discretion came to be regarded as prerequisites of effective governance.

The importance attached to redistributive policies and to discretionary management of aggregate demand is revealed by the labels 'Welfare State', 'Keynesian State', or 'Keynesian Welfare State', which became popular in that period. However, the social democratic consensus about the beneficent role of the positive state – as planner, direct producer of goods and services, and employer of last resort – began to crumble in the 1970's. The combination of rising unemployment and rising rates of inflation could not be explained within the

Keynesian models of the day, while discretionary public expenditure and generous welfare policies were increasingly seen as part of the problem of poor economic performance.

It is at this time that the notion of government failure appears, with public-choice theorists identifying various types of public-sector failure, just as previous generations of economists had produced an ever-lengthening list of market failures. Nationalisation policies seemed to provide compelling evidence of the failure of the positive state. In one country after another, publicly owned firms came under fire for failing to achieve their social as well as their economic objectives; for their lack of accountability; and for their tendency to be captured by politicians and trade unions (Majone 1996: 11–23).

That such criticisms are not always fair or empirically founded is immaterial; the fact is that an increasing number of voters were convinced by them and were willing to support a new model of governance that included privatisation of many parts of the public sector, more competition throughout the economy, greater emphasis on supply-side economics, and far-reaching reforms of the welfare state. The failure of the socialist experiment of President Mitterand in 1981–82 reinforced the view that redistributive Keynesianism was no longer possible in countries which, like France, are closely integrated in the European and world economy.

It is even clearer today that globalisation and, more immediately, economic and monetary integration within the European Union, are eroding the very foundation of the positive state: its power to tax (or borrow) and spend. Thus, Article 104c of the Maastricht Treaty enjoins member states to avoid excessive government deficits, and requires the Commission to ‘monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors’. Paragraph 11 of the same article gives the Council of Economics and Finance Ministers the power to require member states with an excessive government deficit ‘to make a non-interest-bearing deposit of an appropriate size . . . until the excessive deficit has, in the view of the Council, been corrected’, and/or to impose fines.

Moreover, the fact that only monetary variables were used for the convergence criteria which members of the monetary union must satisfy, indicates that there is no real trade-off between price stability, on the one hand, and growth and employment, on the other (Tsoukalis 1993: 219). In sum, the activism of the positive state is increasingly restrained by a variety of domestic, European and international factors. The nature and timing of the first policy responses to these constraints varied a good deal from country to country, but by now all European governments, including those of

the former centrally planned economies, seem to be adopting roughly the same new model of governance.

3. The growth of the regulatory state

The new model that began to emerge in the late 1970's includes privatisation, liberalisation, welfare reform, and also deregulation. Indeed, together with privatisation, deregulation is generally considered to be one of its most distinctive characteristics. Paradoxically, the same period has seen an impressive growth of regulatory policy making both at national and European levels, see below. However, the paradox is more apparent than real. What is true is that in this period traditional methods of regulation and control were breaking down under the pressure of powerful technological, economic and ideological forces, and were dismantled or radically transformed. This is often referred to as 'deregulation', but the term is misleading. What is observed in practice is never a dismantling of all public regulation – a return to a situation of *laissez-faire* which in fact never existed in Europe – but rather a combination of deregulation *and* re-regulation, possibly at a different level of governance.

Thus, privatisation of the public utilities is typically followed by price regulation, while newly privatised firms lose their pre-existing immunity from national and European competition law. In fact, the power of the incumbent operators (and former monopolists) to fight off would-be rivals is so great in such industries that governments have to intervene in order to restrain it. In this as in other cases, competitors owe their existence to the regulatory constraints imposed on their larger rivals.

Deregulation can also mean less restrictive or rigid regulation. For example, the rationale for some form of government intervention has seldom been challenged in the increasingly important area of social regulation – environment, health, safety, consumer protection. The issue here is not, strictly speaking, deregulation but, rather, how to achieve certain regulatory objectives by less burdensome methods. Thus, the replacement of environmental standards by pollution charges does not do away with environmental regulation but only introduces different, and presumably more effective, policy instruments.

Far from being a deviation from the general trend toward a leaner, more efficient state, the growing importance of regulation in Europe is best understood as a direct consequence of the same processes that have contributed to the decline of the positive state. This may be shown by considering three such processes: privatisation; the Europeanisation of policy making; and the growth of indirect or 'third party' government, to be discussed in the next section.

To understand the relationship between privatisation and regulation (more precisely: statutory regulation administered by independent agencies or commissions) one must keep in mind that public ownership has been, historically, the main mode of economic regulation in Europe. Although publicly owned enterprise can be traced back at least to the seventeenth century, its use became widespread only in the nineteenth century with the development of public utilities – gas, electricity, water, the railways, the telegraph and, later, the telephone. These industries, or parts of them, are natural monopolies, produce necessities, and were often considered to be strategically important. Hence, it was assumed that public ownership would give the state the power to impose a planned structure on the economy and at the same time to protect the public interest against powerful private interests.

However, experience was to show that public ownership and public control cannot be assumed to be the same thing. In fact, the problem of imposing effective public control over the great nationalised enterprises proved so intractable that the main objective for which they had ostensibly been created – regulating the economy in the public interest – was almost forgotten (Majone 1996: 11–15).

The failure of regulation by public ownership explains the shift to an alternative mode of control whereby public utilities and other industries deemed to affect the public interest are left in private hands, but are subject to rules developed and enforced by specialised agencies. Such bodies are usually established by statute as independent administrative authorities – independent in the sense that they are allowed to operate outside the line of hierarchical control by the departments of central government. Thus, the causal link between privatisation and statutory regulation provides an important, if partial, explanation of the growth of the regulatory state.

A second explanatory variable is the Europeanisation of policy making, by which is meant the increasing interdependence of domestic and supranational policies within the European Community/European Union (EC/ECU). This complex process is still poorly understood, but for the purpose of this paper it is sufficient to call attention to two aspects which are fairly uncontroversial: the central position of regulation in EC policy making on the one hand, and the impact of EC policies on regulatory developments in the member states, on the other.

The importance of rule making in the EC is shown, first, by the almost exponential growth, during the last three decades, of the number of directives and regulations produced by the Brussels authorities each year. As a result, by 1991 the EC was introducing into the corpus of French law more rules than the national authorities themselves: it has been estimated that today only 20 to 25 per cent of the

legal norms applicable in France are issued by the national government without any previous consultation in Brussels (Conseil d'État 1993). However, as the single market programme has passed its peak, the growth of EC/EU directives has slowed down and some have been withdrawn in the name of subsidiarity.

European regulation has grown not only quantitatively, but also qualitatively. Especially since the Single European Act introduced qualified majority voting for a number of important policy areas, European rules have often been more innovative than those of all or most countries of the EU (Majone 1996: 74–78). It is also important to note that the expansion of EC/EU competences has remained largely confined to economic and social regulation. For example, while EC environmental regulation today includes more than 200 pieces of legislation (so that in many member states the corpus of environmental law of EC origin outweighs that of purely domestic origin), European competences in the area of social policy remain quite limited. We shall come back to the reasons for this selective expansion of competences in a later section.

It is at any rate clear that the remarkable growth of European regulations could not fail to have a significant impact on the development of regulatory policies and institutions at national level. Competition policy provides the best illustration of this impact. When the Treaty of Rome was signed only Germany, among the founding members, had a modern anti-trust law and a forceful regulatory body, the Federal Cartel Office, to implement it. Forty years later, all members of the European Union have competition laws which substantially resemble European law, and competition authorities that are closely linked to the Competition Directorate (DG IV) of the Commission. In fact, DG IV has recently initiated a decentralisation project with the long-term goal of having one Community competition statute applied throughout the EU by a network including national competition authorities, national courts, and DG IV itself.

Such a strategy of co-ordinate partnership between national and European regulators would have been unthinkable even ten years ago. It is possible today because a high level of harmonisation of national competition laws has occurred spontaneously in the member states, and because national competition regulators are becoming more professional and increasingly jealous of their independence from their own governments (Laudati 1996).

Although legal and institutional developments are not as advanced in other areas of regulatory policy making, one can observe a general trend towards harmonisation of regulatory approaches and close co-operation between national regulators and their counterparts at Euro-

pean level. What is even more significant for the growth of the regulatory state, the delegation of important powers to European level has not reduced, but actually increased the importance of regulatory policies and institutions at national level. This apparent paradox is easily explained. In the policy making system created by the Treaty of Rome, implementation of most EC rules is the responsibility of the member states, which often have to create new bodies, or at least expand existing ones, for that purpose. Moreover, in many cases, EC law creates new regulatory responsibilities for national governments. For example, most environmental and consumer-protection regulations in the countries of Southern Europe have been developed in order to implement EC directives. Even in Britain, the chairman of the Health and Safety Commission has recently noted that the EC must now be regarded as the principal engine of health and safety regulations affecting the United Kingdom, not just in worker safety but in major hazards and most environmental matters (Baldwin 1996).

In short, in order to take an active part in the formulation of all these new rules in Brussels, and then to implement them at national level, member states have been forced to develop regulatory capacities on an unprecedented scale. In this way, the development of the EC as a regulatory state has strongly influenced a parallel development in the member states.

4. The inner face of the regulatory state

The shift from direct to indirect or proxy government (Seidman and Gilmour 1986) is the third important cause of the growth of the regulatory state; more precisely, of the growth of what Hood and James (1996) have called the inner face of the regulatory state. Familiar aspects of this development include: administrative decentralisation and regionalisation; the breakdown of formerly monolithic entities into single-purpose units with their own budgets; delegation of responsibility for service delivery to private, for profit or not-for-profit organisations, and to non-departmental bodies operating outside the normal executive branch framework; competitive tendering and other contractual or quasi-contractual arrangements whereby budgets and decision making powers are devolved to purchasers who, on behalf of their client group, buy services from the supplier offering the best value for money.

An important example is the British 'Next Steps' programme, the major thrust of which is the break-up of the unified civil service. Within three years of the start of the programme, over 50% of civil servants had moved from ministerial departments into agencies, which may or may not eventually be privatised, and by the end of 1994 nearly 62 per

cent of civil servants had done so. As Dowding points out, although there have been agencies before, the main difference between these and the Next Steps agencies is the framework agreement negotiated between the agency and the core department. This agreement may be seen as a corporate plan establishing current and future objectives, financial arrangements, basic conditions of employment, and the review procedures by which the core department will monitor the agency (Dowding 1995: 75).

Indirect government involves not only a structure of responsibilities, but also new forms of control and accountability. If policy makers wish to control or influence agencies and other organisations operating at arm's length, they must do so by contractual arrangements, and by means of rules and regulations: 'government by regulation is the inevitable concomitant of government by proxy' (Seidman and Gilmour 1986: 128).

In a system of indirect government, management increasingly tends to be identified with the regulation of third parties who provide the goods and services, rather than with responsibility and accountability for service delivery. As Hood and Scott point out contracting-out, delegation to non-departmental bodies and 'contractorisation' (in which 'purchaser' and 'provider' operate at arm's length through formal contracts or at least quasi-contracts, even if both are public organisations) have brought internal regulatory bodies into sharper relief. Thus, the Civil Service Commissioners, originally established to organise 'merit' recruitment of civil servants, have steadily shed the operating side of recruiting, and their main role under a 1995 Order in Council has become that of a regulator setting standards and checking on quality control (Hood and Scott 1996: 13–14). Also under the Next Steps programme, regulation of public service provision is emerging as one of the key functions of the core departments.

The European Community provides an interesting example of indirect governance in the area of technical standardisation. Following the 'new approach' outlined in the 1985 White Paper on the completion of the internal market (Commission of the European Communities 1985), European directives are now restricted to setting out the essential requirements that products must meet. These essential requirements encompass primarily health, safety, environment and consumer protection. The specification of detailed standards is delegated to European standardisation bodies: Comité Européen de Normalisation (CEN), Comité Européen de Normalisation Électrotechnique (CENELEC), and European Telecommunications Standards Institute (ETSI). These are private law associations of the member states' standardisation organisations.

Relations between the EC Commission and the European standardisation bodies are regulated contractually. Thus, the contractual arrangements between the Commission and the CEN/CENELEC specify that the Commission's proposals for technical harmonisation shall explicitly refer to standards to be set by these organisations. The Commission is also expected to actively support the use of European standards at national and international levels. For their part, CEN/CENELEC take responsibility for ensuring that their standards conform to the essential requirements of EC directives. In case of doubts concerning conformity, the matter is referred to a Standing Committee, which is an advisory board to the Commission. In addition, the standardisation bodies guarantee the right of all interested parties (industry users, trade unions, consumers, state agencies) to participate in the standard-setting process and, in particular, the right of the Commission to be invited to all meetings of the technical committees. In short, under the new approach the Commission has shed the operating side of technical harmonisation and has, instead, assumed responsibility for monitoring the quality and fairness of the standard-setting process at European level.

Before proceeding further, it may be useful to summarise the argument developed so far. In the spirit of Chandler's thesis we identified a 'concatenation of several basic strategies' leading to the growth of the regulatory state in its dual role of external, or market, regulator, and of internal regulator. Three groups of strategies were discussed: privatisation, liberalisation and regulatory reform (deregulation); the adaptation of domestic policies and institutions to deepen European integration; and the shift to indirect government. During the last two decades all West European governments have adopted these strategies, though the timing, speed, and determination of their choices have varied a great deal from country to country. Hence, the structural adaptations needed to meet the political and administrative demands of the new strategies are not equally well worked out across Europe. The general trend is, however, reasonably clear, and it is this trend, rather than country-specific developments, with which the second part of the paper is concerned (Table 1).

5. Taxing and spending vs. rule making

Most structural differences between the positive and the regulatory state can be traced back, ultimately, to a distinction between two sources of governmental power: taxing (or borrowing) and spending on the one hand, and rule making, on the other. In concrete terms, this is a distinction between policies that require the direct expenditure of

TABLE 1. Comparing two models of governance

	Positive State	Regulatory State
<i>Main Functions</i>	Redistribution, macroeconomic stabilisation	Correcting market failures
<i>Instruments</i>	Taxing (or borrowing) and spending	Rule making
<i>Main Arena of Political Conflict</i>	Budgetary allocations	Review and control of rule making
<i>Characteristic Institutions</i>	Parliament, ministerial departments, nationalised firms, welfare services	Parliamentary committees, independent agencies and commissions, tribunals
<i>Key Actors</i>	Political parties, civil servants, corporate groups	Single issue movements, regulators, experts, judges
<i>Policy Style</i>	Discretionary	Rule-bound, legalistic
<i>Policy Culture</i>	Corporatist	Pluralist
<i>Political Accountability</i>	Direct	Indirect

public moneys, and regulatory policies. The crucial point is that budgetary constraints have very limited impact on rule making, while the size of non-regulatory, direct-expenditure programmes is determined by budgetary appropriations and, thus, by the level of government tax revenues.

The public budget is a soft constraint on rule makers because the real cost of regulatory programmes is borne not by the regulators but by those who have to comply with the regulation. In the words of Christopher De Muth (1984: 25), a former administrator for regulatory affairs in the US Office of Management and Budget:

Budget and revenue figures are good summaries of what is happening in welfare, defence or tax policy, and can be used to communicate efficiently with the general public over the fray of program-by-program interest group contention. . . In the world of regulation, however, where the government commands but nearly all the rest takes place in the private economy, we generally lack good aggregate numbers to describe what is being 'taxed' and 'spent' in pursuit of public policies. Instead we have lists – endless lists of projects the government would like others to undertake.

It is impossible to overstate the significance of this structural difference between regulatory policies and those involving the direct expenditure of public moneys. The distinction is particularly important at European level since not only the economic costs but also the political and administrative costs of implementing European rules are borne, directly or indirectly, by the member states. In fact, the structural characteristics of regulatory policy making go a long way towards explaining the regulatory bias of Community policy making (Majone 1996: 64–66).

Briefly, the explanation runs as follows. Despite significant growth in recent years, the EU budget represents only 2.4 per cent of all the

public sector spending of the member states, and less than 1.3 per cent of the gross domestic product of the Union. By comparison, between 45 and 50 per cent of the wealth produced in the member states is spent by the national and local governments. The EU budget is not only very small, but also rigid: more than 50 per cent of total appropriations consist of compulsory expenditures. These resources go for the most part to the Common Agricultural Policy and to a handful of redistributive programmes. What remains is insufficient to support large-scale initiatives in politically appealing fields such as industrial policy, welfare and job creation programmes, research, or technological innovation. Given such constraints, the only way for the European Commission to increase its influence is to expand the scope of its regulatory activities: rule making puts a good deal of power in the hands of the Brussels authorities, in spite of the tight budgetary constraints imposed by the member states. In other words, since the EC lacks an independent power to tax and spend, it could increase its competencies only by developing as an almost pure type of regulatory state.

Recent models of bureaucratic behaviour provide another example of the importance of distinguishing between regulation and other types of policy making. One of the best-known public-choice models of bureaucracy assumes that officials try to maximise the size of their agency's budget. According to this model, budget maximisation is possible because the managers of the agency know the true cost of producing a given level of services, while parliament or other funding bodies lack such information (Niskanen 1971). As Dunleavy (1991) points out, however, Niskanen developed his model bearing in mind agencies administering direct-expenditure programmes. Budget maximisation may be a plausible hypothesis for such agencies but, for the reasons given above, not for regulatory agencies. In fact, economic theories of regulation make no use of the budget-maximising hypothesis in modelling the behaviour of regulators. According to such theories, regulators maximise their utility not by concealing their true cost function – which largely consists of personnel costs that the funding body can estimate fairly accurately – but rather by providing regulatory benefits to various interest groups (Majone 1996: 31–34).

The absence of a binding budget constraint for regulatory policy making has several important consequences. First, neither parliament nor the government systematically determine the overall level of regulatory activity in a given period. Second, no office is responsible for establishing regulatory priorities across the government. Finally, while spending programmes are regularly audited, no such control is exercised over regulatory programmes. In an attempt to correct such problems, some analysts of regulation have advanced the idea of a 'regu-

latory budget' (Litan and Nordhaus 1983). In its basic outline, the regulatory budget would be established for each agency, perhaps by starting with a total (national) budget and allocating it among the different agencies. In the intentions of its advocates, the regulatory budget would clarify the opportunity costs of adopting a regulation, and thus encourage cost effectiveness. The simultaneous consideration of all new regulations would also allow their joint impact on particular industries and the economy as a whole to be taken into account.

The US Office of Management and Budget (OMB) has applied the idea on an experimental basis, apparently with good results. What is important for us, however, is not the success of this or other proposals to improve the regulatory process, but what this debate suggests: in the regulatory state the political contest shifts from the traditional arena of the budgetary process to a new arena where jurisdiction over the review and control of the regulatory process provides the main source of conflict. According to Seidman and Gilmour (1986: 129–31) Reagan was the first American president to clearly perceive the significance of regulations in a government that depended increasingly on agencies operating outside of the normal executive-branch; and to understand that review of regulations would take its place with the traditional budgetary review as one of the principal management tools available to the chief executive.

Hence, the growing importance of the OMB, which is located in the Executive Office, as a sort of 'regulatory clearing house'. Executive Order No. 12291 of 17 February 1981, determined that a cost-benefit test would be applied to all major rules and regulations, giving the OMB authority to prescribe criteria for determining what was 'major'. The OMB's hand was further strengthened by Executive Order No. 12498 of 4 January 1985, which requires each agency to submit 'an overview of the agency's regulatory policies, goals and objectives for the program year and such information concerning all significant regulatory actions of the agency, planning or underway . . . as the director [OMB] deems necessary to develop the administration's regulatory program' (ib.: 131)

The US Congress opposed strongly, if ultimately unsuccessfully, such centralised monitoring of the regulatory process. Seidman and Gilmour concluded that while in the past the contest between the president and the Congress for power to direct public policies focused mainly on issues related to budgetary allocations and to executive-branch structure, now the major conflict is over control of rule making.

This is even more so in the European Union, where the contrast between member states and the EC executive over budgetary allocations pales by comparison with the conflict over the scope, level and methods of rule making. The Maastricht Treaty is only the latest stage

in an ongoing struggle for the control of European regulation. Thus, while the Single European Act considerably extended the regulatory powers of the Commission, the Treaty often excludes harmonisation of the laws of the member states in new areas of Community competence. Many new provisions give the impression that their main objective is not so much to legitimise the regulatory power of the EC in a number of new fields, but rather to make sure that this power is not used beyond certain limits – an impression which is only strengthened by the inclusion of the subsidiarity principle in the Treaty. Also, the declarations attached to the Treaty on transparency and access to information, and on the cost-benefit evaluation of Commission proposals should be seen as part of the same effort to monitor more closely the regulatory process.

6. From centralised bureaucracy to the agency model

Among the most obvious structural consequences of the shift to a regulatory mode of governance is the rise of a new breed of specialised agencies and commissions operating at arm's length from central government. Income redistribution and macroeconomic management require a high level of centralisation in policy making and administration. Hence, a unified civil service, large nationalised enterprises and expansive welfare bureaucracies are characteristic institutions of the positive state. The administrative demands of rule making, however, are quite different. Such demands are best met by flexible, highly specialised organisations enjoying considerable autonomy in decision making: the independent regulatory agencies.

Advocates of the agency model sometimes argue as if the model were unconditionally superior to traditional methods of making and implementing policy. This is not true, of course. For example, redistributive policies, or policies with significant redistributive consequences, should remain under the direct control of political executives. The agency model is only applicable in limited, but important, areas such as economic and social regulations and other administrative activities where expertise and reputation are the key to greater effectiveness.

In such areas, independent agencies enjoy two significant advantages: expertise and the possibility of making credible policy commitments. Faith in the power of expertise as an engine of social improvement – technical expertise which neither legislators, courts nor bureaucratic generalists presumably possess – has always been an important source of legitimisation for regulators, especially in America. According to writers of the New Deal era, such as the youthful Merle Fainsod (1940: 313), regulatory commissions emerged and became important instru-

ments of governance precisely because Congress and the courts proved unable to satisfy the 'great functional imperative' of specialisation. Independent commissions 'commended themselves because they offered the possibility of achieving expertness in the treatment of special problems, relative freedom from the exigencies of party politics in their consideration, and expeditiousness in their disposition'. James Landis (1996 [1938]: 23), one of America's best known students and practitioners of regulation, wrote that '[t]he demands for expertness, for a continuity of concerns, naturally leads to the creation of authorities limited in their sphere of action to the new tasks that government may conclude to undertake'.

Certainly the New Deal advocates of the independent commissions knew that, as Fainsod put it, the expertness of the regulatory bureaucracy is not always above suspicion. Still, they justified the establishment of the commissions by the greater ease in recruiting experts for an independent agency than for executive departments. This may be less true today when departments routinely recruit high-level experts and can rely on extensive networks of consultants. The real comparative advantage of independent agencies is the combination of expertise with the 'continuity of concerns' mentioned by Landis.

Policy continuity is notoriously difficult to achieve in a democracy, which is a form of government *pro tempore*. The time limit imposed by the requirement of elections at regular intervals is a powerful constraint on the arbitrary use by the winners of the electoral contest of the powers entrusted to them by the voters. However, the segmentation of the democratic process into relatively short time periods has serious consequences whenever the problem faced by society require long-term solutions. Under the expectation of alternation, politicians have few incentives to develop policies whose success, if at all, will come after the next election. Hence, it is difficult for political executives to credibly commit themselves to a long-term strategy. The commitment problem is further aggravated by the fact that in collective decision making there are many possible majorities, whose respective preferences need not be consistent. Again, since 'political property rights' are attenuated – a legislature cannot bind a subsequent legislature and a government cannot commit another government – public policies are always vulnerable to renegeing and thus lack credibility.

One important solution of the commitment problem consists in delegating policy-making powers to institutions such as independent central banks and regulatory agencies, or even to a supra-national authority like the European Commission. Whether at national or supra-national level, the logic of delegation is essentially the same. In the words of Gatsios and Seabright (1989: 46), '[t]he delegation of regulatory

powers to some agency distinct from the government itself is . . . best understood as a means whereby the governments can commit themselves to regulatory strategies that would not be credible in the absence of such delegation. It is an open question in any particular case whether the commitment is most effectively achieved by delegation to national rather than to supra-national agencies'.

What distinguishes the agency model from the traditional bureaucratic model, then, is the combination of expertise and independence, together with specialisation in a fairly narrow range of policy issues. Now, the contrast between expert agencies and generalist bureaucracies has an interesting analogue in the way legislatures organise their work by means of specialised committees and subcommittees. The oldest and most fully developed committee system is that of the US Congress. Congressional committees have near-monopoly jurisdiction over a small set of policy issues. This includes the power to make proposals as well as veto powers over proposals made by legislators not on the committee. Thus, committees afford members extraordinary influence over a subset of policies. Again, Congressional committees tend to adopt a non-partisan, problem-solving style of decision making, rather than the traditional bargaining style of distributive policies (Krehbiel 1992).

The committee system is not as well developed in most European parliaments, but the situation is rapidly changing. Thus, while select committees of the British Parliament used to be obscure and rather ineffective (Craig 1994), recently the *Economist* could write about a quiet revolution transforming parliament: 'Its real work is no longer done on the floor of the House of Commons, where debate . . . is confined to ritual partisan abuse. The action has moved upstairs, to the all-party select committees, where MPs now focus their efforts to hold the executive to account' (The Economist, March 12th 1994: 47).

The structural similarities between the committee system and the agency model explain in fact why political control of the regulatory agencies is exercised largely through the oversight committees. A theoretical explanation could be developed along the following lines. Principal-agent theory would predict that among the political principals of statutory agencies, legislators are the most influential ones. This is because it is statutes that create the agencies and provide the structure of incentives that should minimise the divergence between legislative intentions and regulatory outputs. But the theory also assumes that information is asymmetrically distributed. Agents usually have more information than their principals about the details of the task assigned to them, and about their own preferences, abilities and actions. Hence,

they can take advantage of the high cost of measuring their characteristics and performance to engage in opportunistic behaviour.

To reduce such agency costs, legislators will not only frame a suitable system of incentives, but also find it in their interest to create special mechanisms to monitor the behaviour of their agents. Legislative committees with near-monopoly jurisdiction over a small subset of policies are such monitoring devices. Empirical support for this conclusion is provided by several American studies. Thus, Weingast and Moran (1983) used annual data on decisions of the Federal Trade Commission (FTC) to show that the policy preferences of congressional committees with oversight responsibilities play an important role in determining the agency's actions: shifts in committee preferences are what causes changes in agency policy. Similarly, in a detailed legislative and legal history of anti trust policy making from 1969 to 1976, Kovacic (1987) argues that the FTC, rather than ignoring congressional preferences, as suggested by older theories about the limits of political control of the bureaucracy, actually chose programmes that were consistent with and responsive to the policy preferences of its oversight committee. A very detailed study of seven regulatory agencies from the late 1970s through most of the 1980s reached similar conclusions (Wood and Waterman 1991).

Because statutory regulation is a much more recent development in Europe, no comparable studies of the relations between agencies and parliamentary committees have yet been conducted either at national or EC level. However, the available empirical evidence seems to indicate that also on this side of the Atlantic parliamentary committees are beginning to play an important role in shaping the activities of statutory agencies, especially through the appointment process and by conducting oversight hearings. For all these reasons, in the table in section 4 parliamentary committees have been listed among the characteristic institutions of the regulatory state, along with agencies and tribunals.

7. New actors, different styles of governance

In addition to new organisational structures and institutional arrangements, the shift from the positive to the regulatory state entails also the emergence of new actors in the policy arena, or at least a significant re-allocation of power among old actors. For example, it has been argued that 'the growth of the regulatory state has converted the one unelected branch of government, the Judiciary, from a relatively neutral referee to an active player in the administrative game' (Seidman and Gilmour 1986: 132).

In fact, the involvement of the courts in administration and policy making is perhaps the most important consequence of the growth of the regulatory state. When direct administration is replaced by contractual relationships with more or less independent suppliers of services, it is no longer possible to resolve disputes through hierarchical channels. What used to be internal bureaucratic conflicts are 'externalised', leading to litigation. But once judges accept the appropriateness of their courts as sites for the resolution of disputes between governmental rule makers and autonomous agents, they become significant, sometimes the most significant, actors in the administrative process. (ib.: 136)

The role of judges is equally crucial in relation to market regulation. The American experience is again very instructive. In the United States, the decision-making process of regulatory agencies has been largely shaped by the courts. Since passage of the Federal Administrative Procedures Act (APA) in 1946, regulatory decision making has undergone a far-reaching process of judicialisation. Under APA, agency adjudication was made to look like court adjudication, including an adversarial process for obtaining evidence from the contending parties, and the requirement of a written record as the basis of agency decisions. Such requirements greatly facilitated judicial review of administrative adjudication. On the other hand, APA requirements for rule making were less demanding. Such differences did not matter much as long as most regulation was of the rate-setting and permit-allocation types and hence relied largely on adjudication. However, when rule making (e.g., standard setting) became much more important with the growth of social regulation in the 1960s and 1970s, the courts promptly began to develop a large body of new procedural rules and standards of judicial review (Shapiro 1988). In short, the politics and policy of regulation in America cannot be understood without taking into consideration the role of the courts and, in particular, the ever present possibility of judicial review of agency decisions.

In Europe, too, the growth of regulation is giving the courts a new role in the policy-making process. This is especially evident at Community level. Already in the early 1960s a series of landmark decisions of the European Court of Justice (ECJ) succeeded in moving the review of member-state acts from the sphere of international law to that of constitutional law. According to the Court, the founding treaties are not simply agreements under international law but create a constitutional regime. Hence, the treaties themselves, as well as Community acts done under their authority, take precedence over national law and have direct effect in the member states (Shapiro 1992a: 126).

The powers of the ECJ to exercise constitutional and administrative review over all Community acts, and many acts of the member states,

are by now well established. A determined use of such powers has profoundly affected policy making at national and EC levels. Thus, the famous *Cassis de Dijon* decision of 1979 – by which the ECJ determined that the member states could no longer prevent the marketing within their borders of a product lawfully manufactured in another member state – introduced a new phase in EC regulatory policy making, characterised by reduced emphasis on harmonisation of national regulations and greater reliance on the principle of mutual recognition.

A discussion of this principle is beyond the scope of the present paper, but in order to give an idea of the practical impact of the Court's decision at least two consequences should be mentioned. First, mutual recognition entails an enormous expansion of EC regulations, which now include not only the decisions and statutes approved by the EC Council, but also all the regulatory measures adopted by the several member states – to the extent that such measures affect the free movement of goods, services, and persons in the European market. Second, mutual recognition creates a system of competition among the regulations of the member states. Since *Cassis de Dijon*, national regulations satisfying some basic common requirements are applicable throughout the EU; hence, individuals and economic activities will tend to move to the countries offering the most favourable regulatory environment. This is a striking illustration of the impact of judicial decisions on regulatory policy making in Europe.

Experts and regulators are another important group of actors. Regulation depends so heavily on scientific, engineering and economic knowledge that, as already noted, expertise has always been an important source of legitimisation of regulatory agencies. Both supporters and opponents of particular regulatory measures usually cast their arguments in the language of 'regulatory science' rather than in the more traditional language of interest or class policies. Paradoxically, the very fact that the scientific basis is often uncertain and contestable tends to increase the role of experts at every stage of the regulatory process.

Partly because of this dependence on expertise, regulators enjoy greater power and discretion than the other administrators. They also face a different structure of professional and career incentives. The chief executives of regulatory agencies have a well-defined agenda and their success is measured by the amount of the agenda they accomplish. The focus on particular regulatory objectives – whether enforcing competition law, improving environmental quality, or protecting the economic or health interests of consumers – not only favours a higher level of professionalisation than is possible for bureaucratic generalists, but also facilitates accountability by results, a point we shall return to in the following section.

Just as the regulatory agencies focus on a single task, so the new pluralist groups which thrive in the regulatory state are concerned with a single issue – the environment, consumer advocacy, civil rights, gender issues. It is instructive to compare such non-economic, single-issue groups with the corporate interest groups that, until recently, played such a key role in macroeconomic policy-making in Europe. In countries where a single interest group could speak for its sector of society – business trade associations, trade unions, farmers' groups – that monopoly has been created or strongly encouraged by the state. Governments have reinforced the monopoly of such corporate groups because they needed their co-operation to support particular types of policy. The help of these groups was particularly needed for economic planning and government-led growth, and for formulating and implementing incomes and welfare policies. Neocorporatist countries such as Sweden and Austria, for example, relied heavily on employers' associations and trade unions to restrain the inflationary potential of their commitment to full employment (Wilson 1990: 90).

On the other hand, in a country like the United States, where economic planning, industrial policy and incomes policy never enjoyed widespread political support, and where political power is fragmented, no corporate interest group entitled to speak for an entire economic sector, could ever exist: the political culture of America, the oldest regulatory state, is pluralist rather than corporatist. But while corporate interest groups have been considerably weaker in the United States than in Europe, non-economic, single issue groups have had an extraordinary impact on American regulatory policies. Courts have been very important in making this influence possible – another indication of the centrality of the judicial branch in the regulatory state. For example, by relaxing the requirements for standing to sue in the 1960s and 1970s, US courts made it far easier for a variety of public-interest groups to challenge policies in the courts, a particularly important development in the politics of regulation. (*ib.*: 89).

However, the contrast between pluralist America and neocorporatist European countries does not extend to the European Community. As Streeck and Schmitter (1991) point out, tripartite corporatist bargaining never really worked in Brussels, and where it was tried it was always so marginal it could not come close to a neocorporatist model of governance. At most, labour-capital relations enter the political arena at EC level in the form of a set of discrete 'social regulation' issues.

As such they will lend themselves to being dealt with by bureaucrats, experts and intergovernmental committees in the same way as are, for example, labelling rules regarding the cholesterol content of palm oil or regulations for the

recycling of mineral water containers. Rather than driving the constitutional bargain underlying the political system, the traditional class issues of industrial society will have to compete on an equal plane with 'postindustrial' themes like environmental protection, consumer rights, equality between men and women, and so forth . . . The evolutionary alternative to neoliberalism as a model for the European political economy is clearly not (German or Scandinavian) neocorporatism. More likely appears an American-style pattern of 'disjointed pluralism' or 'competitive federalism' organised over no less than three levels – regions, nation-states, and 'Brussels' (ib.: 158–59)

I have quoted at length from Streeck and Schmitter's insightful essay on the transition from national corporatism to trans-national pluralism in order to show how, starting from a quite different research programme, they reach very similar conclusions concerning the political consequences of the shift to a regulatory mode of governance. This shift not only entails the political, legal and institutional consequences discussed so far, but also raises important normative issues.

8. New standards of legitimacy

Democracy is commonly thought of as government by majority rule. A radical formulation of this view holds that in a democracy majorities should be able 'to control all of government – legislative, executive and, if they have a mind to, judicial – and thus to control everything politics can touch. Nothing clarifies the total sway of majorities more than their ability to alter and adjust the standards of legitimacy' (Spitz 1984, quoted in Lijphart 1991: 485). Such a radical interpretation of majority rule also implies that the government system should be unitary and centralised in order to ensure that there are no policy areas which the Cabinet and its parliamentary majority fail to control.

Now, the regulatory state is characterised by pluralism, diffusion of power, and extensive delegation of tasks to non-majoritarian institutions like the independent agencies or commissions. If it is assumed that the only standard of democratic legitimacy is direct responsibility to the voters or to the government expressing the current parliamentary majority, then a state of courts and technocratic experts obviously suffers from a serious democratic deficit. In particular, independent regulatory agencies will be seen as 'constitutional anomalies which do not fit well into the traditional framework of controls, checks and balances' (Veljanovski 1991: 16), even as challenges to basic principles of democratic theory.

But the majoritarian or 'populist' (Dahl 1956) model of democracy is not the only possible one. The alternative, or 'Madisonian', model aims to share, disperse, delegate and limit power. The over-riding goal

is to protect minorities from the 'tyranny of the majority', and the judicial, executive and administrative functions from representative assemblies and from fickle mass opinion (for classic statements of this position, see *The Federalist*, nos. 48, 49 and 71). Thus, delegation – a non-majoritarian strategy, whose significance for the regulatory state we have repeatedly stressed – attempts to restrain majority rule by placing public authority in the hands of officials who have limited or no direct accountability to either political majorities or minorities.

It follows that the legitimacy of independent agencies is much less problematic in the context of the madisonian model of democratic governance. In fact, it is not difficult to show that in terms of standards of legitimacy derived from this model rather than from strict majoritarian principles, independent agencies may be superior to departments under the direct control of elected political executives. To this end, it is convenient to distinguish between a procedural and a substantive dimension of legitimacy (Majone 1996: 291–6).

Procedural legitimacy implies, among other things, that the agencies are created by democratically enacted statutes which define the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that regulatory decision-making follows formal rules which often require public participation; finally, that agency decisions must be justified and are open to judicial review. The simplest and most basic means of improving agency transparency and accountability is to require regulators to give reasons for their decisions. This is because a giving-reasons requirement activates a number of other mechanisms for controlling regulatory discretion, such as judicial review, public participation and deliberation, peer review, policy analysis to justify regulatory priorities and so on.

The already mentioned US Administrative Procedures Act (APA) provides an excellent illustration of the potential of the giving-reasons requirement. It will be recalled that the APA prescribes quasi-judicial hearings for adjudication, but it is less stringent about rule-making. In the latter case the agency is not required to base its decisions solely on the written comments submitted by interested parties, but may take into consideration any information which it finds relevant to the case. However, rules must be accompanied by a 'concise general statement of their basis and purpose', and may not be 'arbitrary, capricious, or an abuse of discretion'.

Starting from such general and apparently innocuous requirements, federal judges have succeeded in formulating new principles to improve the transparency and rationality of rule-making. For example, they have demanded that both the essential factual data on which a rule is based and the methodology used in reasoning from the data to the

proposed standard should be disclosed for comment at the time the rule is proposed. Moreover, the agency's discussion of the basis and purpose of its rule must detail the steps of the agency's reasoning, while significant comments received during the public comment period must be answered at the time of final promulgation (Pedersen 1975). Thus, today 'informal' rule-making has to be accompanied by records and findings even more detailed and elaborate than had been initially envisioned for formal adjudication. To a large extent these strict procedural requirements have been achieved by elaborating the giving-reasons requirement of the APA (Shapiro 1992b: 185).

It is doubtful that many framers of the Treaty of Rome were familiar with this statute, but they seem to have understood the significance of the giving-reasons requirement for improving the legitimacy of the non-majoritarian institutions they were creating at European level. According to Article 190 of the Treaty, 'regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based'. Also, Article 15 of the Treaty of Paris establishing the European Coal and Steel Community, provides that 'Decisions, recommendations and opinions of the High Authority shall state the reasons on which they are based'; while Article 5 of the same treaty states that 'the Community shall . . . publish the reasons for its actions'. It is interesting to note that there is no *general* requirement to give reasons in the law of most member states, so that these Community provisions were, and to some extent still are, not only different from, but also in advance of, national laws (Hartley 1988). This example shows that non-majoritarian institutions may be subject to stricter standards of accountability than the traditional departments of government. The latter are supposed to be under the control of ministers directly responsible to parliament; and though this form of accountability is often a myth, it provides an excuse for not imposing formal requirements of transparency and rational justification on central departments of government.

The legitimacy of institutions depends also on the capacity to engender and maintain the belief that they are the most appropriate ones for the functions entrusted to them. In the case of independent regulatory institutions relevant criteria of substantive legitimacy are: policy consistency; the expertise and problem solving skills of the regulators; their ability to protect diffuse interests; professionalism; and most important, a clear definition of the objectives of the agency and of the limits within which the agency is expected to operate.

Clear objectives are important from a normative viewpoint because accountability by results cannot be enforced when the objectives are either too vague or too broad. The question of the proper limits of

agency responsibility is more delicate and needs more detailed exploration. I argue that the familiar distinction between efficiency and redistribution provides a sound conceptual basis for deciding whether the delegation of policy-making authority to an independent regulatory body has at least *prima facie* legitimacy.

In a democracy, public decisions concerning the redistribution of income and wealth can be taken only by a majority vote since any issue over which there is unavoidable conflict is defeated under unanimity rule. Pure redistribution is a zero-sum game since the gain of one group in society is the loss of another group. Efficiency issues, on the other hand, may be thought of as positive-sum games where everybody can gain, provided the right solution is discovered. Hence, such issues could be settled, in principle, by unanimity. The unanimity rule guarantees, under some conditions, that the result of collective choice is efficient in the Pareto sense, since everybody adversely affected by the collective decision can veto it.

Naturally, unanimity is practically impossible in a large polity, but there are second-best alternatives, of which delegation of problem-solving tasks to an independent expert agency is the most relevant in the present context. The main task delegated to regulatory agencies is the correction of market failures so as to increase the efficiency of market transactions. It is important to note that the adoption of efficiency as an important standard by which the regulators are to be evaluated implies, *inter alia*, that regulatory instruments should not be used for redistributive purposes. Regulatory policies, like all public policies, have redistributive consequences; but for the regulators such consequences should represent potential policy constraints rather than policy objectives. Only a commitment to efficiency, to a problem-solving rather than a bargaining style of decision-making, and to accountability by results can substantively legitimise the political independence of regulators. By the same token decisions involving significant redistribution of resources from one social group to another cannot be legitimately taken by independent experts, but only by elected officials or by administrators directly responsible to elected officials. This is true at national and, *a fortiori*, at European level (Majone 1996: 296–300).

Thus, the distinction between efficiency-enhancing and redistributive policies turns out to be crucial to the substantive legitimacy of regulatory policies. To repeat, the delegation of important policy-making powers to independent institutions is democratically justified only in the sphere of efficiency issues, where reliance on expertise and on a problem-solving style of decision-making is more important than reliance on direct political accountability. Where redistributive concerns prevail, legitimacy can be ensured only by majoritarian means.

In conclusion, the key normative problem of the regulatory state is how agency independence and democratic accountability can be made complementary and mutually reinforcing rather than antithetical values. I have tried to show that independence and accountability can be reconciled by a combination of control mechanisms rather than by oversight exercised from any fixed place in the political system: clear and limited statutory objectives to provide unambiguous performance standards; reasons-giving and transparency requirements to facilitate judicial review and public participation; due-process provisions to ensure fairness among the inevitable winners and losers from regulatory decisions; professionalism to withstand external interference and reduce the risk of an arbitrary use of agency discretion. When such a system of multiple controls works properly, no one controls an agency, yet the agency is 'under control' (Moe 1987).

9. Matching strategy and structure

This paper has attempted to provide a rough sketch of the most significant consequences entailed by a shift from a mode of governance based on direct state intervention, supported by the power to tax and spend, to one characterised by rule-making and extensive delegation of powers to institutions operating at arm's length from government. The evidence and arguments presented in the preceding pages support our initial hypothesis that Chandler's thesis holds also in the public sector. As we saw, the structural changes induced by the strategic choices made by governments since the late 1970s are manifold and far reaching: new actors and institutional arrangements, new arenas of political conflict, different styles of policy-making, more complex standards of legitimacy and methods of accountability.

Limits of space did not allow more than passing references to Chandler's question about the reasons for delays in developing the structures needed to implement the new strategies. To deal adequately with this question would require detailed country-by-country analyses, or even comparative investigations of particular industrial sectors such as telecommunications. Even without the benefit of such book-length studies, however, it is possible to surmise that the institutional and intellectual legacy of the interventionist state is a major impediment to the speedy adjustment of governance structures to the new strategies. This can be seen, for example, in the widespread reluctance to accept all the implications of agency independence.

As was argued in section 6, delegation of powers to a politically independent agency is an important means whereby governments can commit themselves to regulatory strategies that would not be

credible in the absence of such delegation. Now, while European governments are aware of the importance of policy credibility in an increasingly interdependent world, and are thus prepared to accept the independence of national and European regulators in principle, in practice they are often driven by considerations of political expedience to interfere with the regulator's decisions. Thus, the way in which the French 'independent administrative authorities' have been designed and their powers defined still leaves a considerable margin of influence to the central government. Even the relatively powerful Council for Competition does not have the authority to initiate investigations; that power remains in the hands of government. In fact, the 1986 competition law fails to take its own logic to its ultimate conclusion, preserving a considerable margin of arbitration and discretion to the central government and, in particular, strengthening the power of the Minister of Economics in relation to mergers (Demarigny 1996).

In Britain, too, the legacy of the interventionist past is apparent in the design of the agencies created to regulate the privatised public utilities. Many important regulatory powers have been given directly to government rather than to the new agencies, whose operations depend at any rate on prior decisions of the Minister as to the principles to be applied. The danger is that such powers of discretion 'could be abused to exert behind-the-scenes pressure on the regulator in much the same way as pressure was put on the nationalized industries' (Prosser 1989: 147). In Britain, as elsewhere in Europe, it is still an open question how the limits of the political independence of regulators are to be defined.

The question remains open also at EC level, and this is even more worrying since 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. Precisely for this reason Article 157 of the Treaty of Rome states, in part, that 'the members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties . . . They shall neither seek nor take instructions from any government or from any other body'.

In practice, however, the Commissioners are not immune to political influences both from the member states and from within the Commission itself. Although they are not supposed to pursue national interests, many European 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 withstand. On the other hand, the Commission is a collegial body, and the need to

achieve a majority within the *collegium* has on several occasions produced flawed or inconsistent regulatory decisions.

Such concerns are reflected in the proposals to transform the Commission's Competition Directorate, DG IV, into a European Competition Authority, independent not only from the member states but from the Commission itself. A model often cited in this respect, and indeed one of the driving forces behind such proposals, is the German Cartel Office. It is true that the Cartel Office itself is not completely immune to political influences. However, the procedures which the German government must follow when it wishes to overrule a decision of the Office entail high political costs and make the interference plain for all to see. Relations between the Commission and the European Cartel Office could be regulated in a similar way.

There are also proposals for a European Telecommunications Office, while a European Medicines Evaluation Agency (EMA) is in operation since February 1995. However, EMA cannot take autonomous decisions concerning the Community-wide licensing of the new medical drugs, but must submit its recommendations for the approval of the Commission. This is because the creation of truly independent regulatory agencies at European level presents legal problems which only a revision of the treaties could resolve satisfactorily. On the other hand, delegating autonomous powers to such agencies would be an important means of adapting the present institutional framework to the realities of an expanded EU. Unfortunately, at the time of this writing it seems highly unlikely that the current intergovernmental conference will create the necessary legal basis.

The question of agency independence is only one example, though a particularly revealing one, of the difficulties experienced at both national and European levels in adapting traditional structures to new regulatory strategies. It would be unwise to assume that such difficulties can be overcome in a short time, but also to forget that international competition takes place not only among producers of goods and services but, increasingly, among regulatory regimes as well. Regulatory competition will reward regimes in which institutional innovations do not lag too far behind the new strategies.

REFERENCES

- Baldwin, Robert (1996) 'Regulatory Legitimacy in the European Context: the British Health and Safety Executive', in Majone 1996, 83-105.
Chandler, Alfred D. Jr. (1962) *Strategy and Structure*. Cambridge, MA.: MIT Press.
Commission of the European Communities (1985) *Completing the Internal Market*. Luxembourg: Office for Official Publications of the European Communities.

- Conseil d'État (1993) *Rapport Publique 1992*. Paris: La Documentation Française, Études et Documents.
- Craig, P. P. (1994) *Administrative Law*, Third Edition. London: Sweet and Maxwell.
- Dahl, Robert A. (1956) *A Preface to Democratic Theory*. Chicago: The University of Chicago Press.
- Demarigny, Fabrice (1996) 'Independent Administrative Authorities in France and the Case of the French Council for Competition', in Majone 1996, 157–179.
- DeMuth, Christopher C. (1984) 'A Strategy for Regulatory Reform', *Regulation* 4: 25–30.
- Dowding, Keith (1995) *The Civil Service*. London: Routledge.
- Dunleavy, Patrick (1991) *Democracy, Bureaucracy and Public Choice*. London: Harvester-Wheatsheaf.
- Fainsod, Merle (1940) 'Some reflections on the nature of the regulatory process', in K. Friedrichs and P. Mason (eds.), *Public Policy*, Cambridge, MA.: Harvard University Press, 72–100.
- Gatsios, Konstantine and Paul Seabright (1989) 'Regulation in the European Community', *Oxford Review of Economic Policy*, 5: 2, 37–60.
- Hartley, T. C. (1988) *The Foundations of European Community Law*. Oxford: Clarendon Press.
- Hood, Christopher and Oliver James (1996) *Regulation Inside British Government: The Inner Face of the Regulatory State?* London: Department of Government, London School of Economics, Discussion Paper No. 1.
- Hood, Christopher and Colin Scott (1996) *Bureaucratic Regulation and New Public Management in the UK: Mirror Image Developments?* London: Department of Government, London School of Economics, Discussion Paper No. 2.
- Kovacic, William E. (1987) 'The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective', in R. J. MacKay, J. C. Miller III, B. Yandle (eds.) *Public Choice and Regulation*. Stanford, CA.: Hoover Institution Press, 63–120.
- Krehbiel, Keith (1992) *Information and Legislative Organization*, Ann Arbor, Mich.: The University of Michigan Press.
- Landis, James M. (1966) *The Administrative Process*, New Haven, CT.: Yale University Press [originally published in 1938].
- Laudati, Laraine (1996) 'The European Commission as regulator: the uncertain pursuit of the competitive market', in Majone 1996, 229–261.
- Lijphart, Arend (1991) 'Majority rule in theory and practice: the tenacity of a flawed paradigm'. *International Social Science Journal*, 129/1991: 483–493.
- Litan, Robert E. and William D. Nordhaus (1983) *Reforming Federal Regulation*. New Haven, CT: Yale University Press.
- Majone, Giandomenico (ed.) (1990) *Deregulation or Re-regulation?* London: Pinter.
- Majone, Giandomenico (1996) *Regulating Europe*. London: Routledge.
- Moe, Terry (1987). 'Interests, institutions and positive theory: the politics of the NLRB'. *Studies in American Political Development* 2: 236–299.
- Niskanen, William A., Jr. (1971) *Bureaucracy and Representative Government*. Chicago: Aldine-Atherton.
- Pedersen, William F. Jr. (1975) 'Formal records and informal rule-making'. *Yale Law Journal* 85: 38–88.
- Prosser, Tony (1989) 'Regulation of privatised enterprises: institutions and procedures', in: Leigh Hancher and Michael Moran (eds.) *Capitalism, Culture and Economic Regulation*. Oxford: Clarendon Press, 135–165.
- Seidman, Harold and Robert Gilmour (1986) *Politics, Position and Power*, Fourth Edition. New York: Oxford University Press.
- Shapiro, Martin (1988) *Who Guards the Guardians?* Athens, GA.: The University of Georgia Press.
- Shapiro, Martin (1992a) 'The European Court of Justice', in Alberta M. Sbragia (ed.) *Euro-Politics*. Washington, D.C.: The Brookings Institution, 123–156.
- Shapiro, Martin (1992b) 'The giving-reasons requirement'. Chicago: *The University of Chicago Legal Forum*, 180–220.
- Spitz, Elaine (1984) *Majority Rule*. Chatham, N.J.: Chatham House Publishers.
- Stiglitz, Joseph E. (1988) *Economics of the Public Sector*. New York: W. W. Norton.
- Streeck, Wolfgang and Phillippe C. Schmitter (1991) 'From national corporatism to transnational pluralism: organised interests in the Single European Market'. *Politics and Society* 19, 133–164.
- Tsoukalis, Loukas (1993) *The New European Economy*. Oxford: Oxford University Press.
- Veljanovski, Cento (1991) 'The regulation game', in: Cento Veljanovski (ed.) *Regulators and the Market*. London: Institute of Economic Affairs, 3–28.

- Weingast, Barry R. and Mark J. Moran (1983) 'Bureaucratic discretion or Congressional control? Regulatory policy making in the Federal Trade Commission'. *Journal of Political Economy* 91: 765–800.
- Wilson, Graham K. (1990) 'American interest groups in comparative perspective', in Mark P. Petracca (ed.): *The Politics of Interest*. Boulder, Co.: Westview Press, 80–95.
- Wood, Dan B. and Richard W. Waterman (1991) 'The dynamics of political control of the bureaucracy'. *American Political Science Review*. 85: 801–828.

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