

REGULATORY REGIMES WITHIN THE SINGLE MARKET

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Introduction

Establishing a suitable theoretical framework in which to situate the development of the EC has not been without its difficulties and has been subject to differing winds of fortune. The belief in an ever-onward process of integration gave rise to functionalist theories only to see their predictive power challenged by inertia at the European level and increasingly protectionist measures by the Member States. Thus, intergovernmentalist approaches and interdependence theories gained credence (Webb, 1983).

The launch of the White Paper and the Single Market program have all lent credence to a revised interest in functionalist theory as the EC once more appeared to be realising the hope of an integrated common or single market (Tranholm-Mikkelsen, 1991). Yet the difficulties encountered with the negotiation and ratification of the Maastricht Treaty, the stresses of the European Monetary System, and general recession within Community countries have once again placed doubt on a straightforward and logical transition to European Union.

In short, at the macro-level of the EC it is very difficult to predict what will happen next given the problems of fitting a single theoretical paradigm to a diverse set of arrangements. One way round this problem is to adopt an approach that takes as its starting point, the existence of diversity and the adaption of organisations and norms to complex social and economic activities.

Our central contention is that the EC can be analyzed in terms of the diverse regulatory arrangements that pertain within its organisational and normative structure. This is expressed within the concept of "regimes" (Krasner, 1983; Young, 1989).

In this paper, we seek to achieve two goals. The first is the mapping of the regulatory regimes within - or allied to - the Single Market program. To this end, the paper will focus on the Merger Control Regulation¹, procurement practices within the Utilities², and the harmonisation of technical regulations and standardization. Our concern will be to establish the forces that gave rise to the particular regimes and which continue to shape their evolution. The second goal follows from the first and seeks to establish what the dynamics of regime change and evolution tell us about likely future developments.

Firstly, the paper will give a short indication of how the term "regime" will be employed and why it is considered to be useful. Secondly, the relationship between our case studies and the Single Market will be considered. Thirdly, the paper will consider the assumption of Community competence in the regimes under discussion. Fourthly, the organisational and normative structure of the regimes will be sketched. Fifthly, an indication will be given of the possible future dynamics of these regimes.

¹ Regulation 4064/89/EEC on the control of concentrations between undertakings, corrected version O.J. L257 (21.9.90), p.14.

² Directive 90/531/EEC, O.J. L297 (29.10.90), p.1.

Regimes as Institutions

Broadly, we take a regime to be constituted by its organisational and normative structure. Each regime will have an organisational profile (with its own constituency of actors, power relationships, with its own procedures for decision-making, its hierarchies, and its resources) and a normative context (a collection of rules, rights, norms and conventions) relating to the relationships between organisations, between socio-economic and political actors, and between organisations and socio-economic and political actors.

In many ways this definition of a regime corresponds to Hall's definition of an "institution" which he takes to refer to,

"the formal rules, compliance procedures, and standing operating practices that structure the relationships between individuals in various units of the polity and the economy." (Hall, 1986, p.19)

Unlike Hall, we do not treat "institutions" and "organisations" as synonymous, and it is appropriate that some comment be made on the usage of these terms.

We argue that regimes are "institutions". However, as the literature on institutionalism makes clear, the role of institutions in politics is far from undisputed (March & Olson, 1989; Jordan, 1990; Cammack, 1992; Schimank, 1992). This debate on the role of institutions within the national state is mirrored at the international level by the debate on the role of regimes. In essence, three possible positions are available:

1. institutions/ regimes are irrelevant. What is important is the bargaining between political actors seeking to maximise their own utility. At most, institutions/ regimes are the fora in which these activities occur (Strange, 1983).
2. institutions/ regimes are the fundamental factors in political life. It is pointless to view political actors as utility maximisers because it is only within the context of institutions that preferences are framed and political life understood and interpreted (March & Olson, 1989; Young, 1989).
3. both institutions/ regimes and political actors matter (Keohane, 1983; Schimank, 1992).

The distinction between the second and third of these options is not altogether easy to draw given that those who assert some role for institutions vary widely in why they consider institutions to be relevant (for example, if 'institutions' and 'organisations' are treated as synonymous, then institutions may matter because they are political actors).

In this paper, the third of the possible approaches is followed. That is to say that the behaviour of the fundamental political actors of Community policy-making is considered to be important in terms of bargaining at any given moment of time. However, across the temporal dimension, the dynamics of regimes - the organisational and normative context - is taken to be an important factor in the structuring of debates, discussions, attitudes, preferences and future directions. Thus, while we shall be concerned with the attitudes of particular political actors (be they the Member States or the Community organisations) in particular negotiations on formal texts, the role of those negotiations and the role of the texts

can only be understood in terms of the development of the institutions/ regimes in which they are situated.

To avoid confusion, in this paper the institutions of the EC (the Commission, the Council of Ministers, the European Council, the European Parliament, the Economic and Social Committee and the European Court of Justice) will be referred to as the "organisations" of the Community. The term "institution" is taken to have a more expansive meaning in that it comprises the organisations, rules, norms, procedures and conventions in operation in any area of Community governance.

Regimes within the Single Market

At the outset it was stated that a disaggregated approach - through the notion of regimes - was a preferable way to discuss the exercise of governance by the Community. The idea that the regimes to be discussed can be seen as part of, driven by, or necessary to the creation of, a Single Market implies a degree of re-aggregation that requires explanation.

The Single Market program cannot merely be reduced to the White Paper³ any more than the Community can be reduced to its Treaties. It must be viewed in context. The context is the creation of an Internal Market: a context which has its roots in the original attempt to create a Common Market. However, the creation of an Internal Market implies more than one thing. It implies new measures in policy areas already 'colonised' by the Community in order to make Community action more effective; it implies new competencies in areas which - if left unregulated - would create a distorted market; and it implies broader 'constitutional' change to ensure that the Community can supply the tools necessary for its effective and legitimate governance.

To be sure, the political commitment to the creation of the Internal Market has had repercussions across a number of policy areas. Crudely, the logic of the "removal of barriers to trade" has been influential. But, it would be a mistake to consider that the Single Market program has homogenous dynamics across all policy areas. Rather - as we hope to indicate - it is only by an understanding of the organisational and normative context for regime creation that we can make sense of the regimes which have emerged in support of the Single Market.

Our three case studies are illustrative of the point. The Merger Control Regulation adopted in 1989 was not mentioned in the Commission White Paper and was not included in the list of measures required for the creation of the Internal Market. Indeed, the Regulation has its origins in the 1972 Paris Summit followed by a 1973 Commission proposal. Yet, it falls within the Single Market rubric in the sense that the opportunities to be posed by an integrated market implied a rationalization of European industry through some level of merger and acquisition. A Community instrument of merger control was more obviously lacking, while national regulatory controls might themselves amount to barriers to trade.

³ *Completing the Internal Market*, COM(85) 310 final.

While the logic of the Single Market was important in coalescing support around the idea of the necessity of the instrument, nonetheless the actual substance of the instrument which was agreed can only be understood in terms of the negotiations between the parties; the role of the Commission in competition policy; and the history and role of merger control within European competition policy.

Procurement in the utilities, on the other hand, is expressly included in the White Paper⁴ and its list of necessary measures. It was apparent to the Commission that discriminatory procurement was both a large and costly barrier to trade which stifled competition within the Community market⁵. Yet, the origins of a regime for procurement pre-date the White Paper and can be traced back to two General programmes of 1969, and Directives in the late 1960s and early 1970s. And again, the substance of the Directive owes much to the development in the political economies of the Member States and the dynamics of negotiation, as well as the history of EC regulation of procurement.

The harmonisation of technical regulations pre-dates the Single Market. The tool of harmonisation - the approximation of the laws of the Member States under Article 100 - can be found in the Treaty of Rome. However, the need for harmonisation directives under the Single Market program highlighted both the deficiencies of the old approach to harmonisation while signalling the need for a new approach. Thus the Single European Act heralded in qualified majority voting under Article 100a. Moreover, the legislative role was to be limited to the agreement of the essential requirements of products within a broad product category. Standardization was to be a tool for the fulfilment of the technical requirements of conformity to the essential requirements (in the sense that conformity to a European standard would give rise to a presumption of conformity with the essential requirements).

Once again, the regime is a combination of both the demands of the Single Market and the history of the regime in the particular area.

In the following section we highlight the path dependency of the regimes within the Single Market in an examination of the assumption of competence in our three case studies.

Assumption of Competence: Regime Creation and Evolution

The logical starting point for a discussion of regime creation is the Treaties establishing the Community. Nonetheless, given that the Treaties are merely formal texts and have no life or even normativity outside of their application by political and legal actors, we must look to the organisational context in which they are operationalised. The operationalisation of rules and norms (especially, though not exclusively, in discrete policy areas) lies at the heart of regulatory regimes.

The assumption of regulatory competence in a given area cannot be simply reduced

⁴ Ibid, paras. 81-87.

⁵ *Communication on a Community regime for procurement in the excluded sectors*, COM(88) 376 final.

to the allocation of regulatory responsibility by the Treaties. While the Treaties do sketch out policy areas for action, they are neither exhaustive nor determinative of action under them⁶. Equally, the absence of competence has not prevented Community action (though has often resulted in formalising measures in later Treaty amendments)⁷. Rather, the assumption of competence must be viewed as the attempt by EC organisations - most notably the Commission - to bring an area within its regulation.

Taking the development of a system of merger control, the Treaty of Rome - unlike the Treaty of Paris - contains no specific allocation of regulatory authority in this field to Community organisations. Rather, in Articles 85 & 86 it provides for the prohibition of restrictive agreements and abuses of dominant positions. Regulation 17 - enacted under Article 87 - gives executive authority to the Commission to regulate economic actors directly through the application of the competition rules.

While the absence of a power to appraise mergers at Community level may have been consistent with the economic development of the Community in the 1950s (and the absence of any power to regulate mergers at the national level until the late 1960s and early 1970s⁸), the merger growth of the 1960s and the 1980s⁹ highlighted the importance of such a power for the development of competition policy. In other words, a competition policy based solely on the regulation of economic behaviour and not including the regulation of economic structure was seen by Community organisations (most notably DGIV and the European Parliament) as inadequate, especially in view of the restructuring envisaged by the creation of the Single Market.

Aided by the Court of Justice, DGIV set about creating a system of merger control out of Articles 85 & 86¹⁰. The inadequacy of the regime for merger control thereby established, aided in the creation of a formal purpose built regime in the form of the Merger Control Regulation. Further, the desire from industry for a "one-stop-shop" system of merger control that would free industry from the pursuit of national industrial policies through national regulation, was an important factor in coalescing support for the adoption of the

⁶ For example, the lack of action under the Treaty's transport provisions resulted in the Parliament commencing legal action against the Commission.

⁷ Thus, the Commission promulgated legislation in the area of environmental control prior to its inclusion within the Single European Act.

⁸ The Monopolies and Mergers Act 1965 introduced merger control to the United Kingdom, whereas a modification in 1973 to the Gesetz gegen Wettbewerbsbeschränkungen brought merger regulation to Germany.

⁹ The number of Community mergers rose from 38 in 1982-83 to a peak of 257 in 1989-1990, according to figures reported in the Commission Annual Reports on Competition Policy.

¹⁰ See, *Europemballage Corporation and Continental Can Co. Inc. v. Commission* (Case 6/72) [1973] E.C.R. 215 and *British American Tobacco Co. Ltd. v. Commission & R.J. Reynolds Industries v. Commission* (Joined Cases 142/84 & 156/84) [1987] E.C.R. 4487.

Regulation (Woolcock, 1989). Nonetheless, the Regulation had been sixteen years in negotiation before it was finally adopted. Member States - especially the United Kingdom, Germany and France - were sceptical as to the need for any such control (both the UK and Germany had adopted national systems of control by the time of the Commission's first proposed regulation in 1973). The UK and Germany were also concerned as to the power this might cede to the Commission in terms of the shaping of the industrial landscape of the Community.

Thus, the specific dynamics of norms, organisations and regulatory environment contributed to the creation of a specific regime for merger control complete with its own formal rules, norms and organisations.

The extension of the Community's regime on procurement to the utilities also highlights the importance of normative, organisational and environmental dynamics within a specific policy area. Once again, the Treaty makes no direct reference to procurement within the Member States. However, the creation of a procurement regime can be understood in terms of the pursuit of free movement of goods (Articles 30 *et seq.* of the EEC Treaty), freedom of establishment (Articles 52 *et seq.*) and freedom to provide services (Articles 59 *et seq.*). Moreover, the Cecchini Report on the *Cost of Non-Europe*¹¹ had indicated that savings of between ECU 8bn and 19bn in annual public expenditure could be reaped by the opening up of procurement.

The EC regime attempts to go beyond the prohibition contained within the Treaty on discrimination on grounds of nationality or origin of goods, by establishing procedures for the open, transparent and non-discriminatory award of contracts. This it attempted in its Supplies and Works Directives of the 1970s¹² (but whose ambit did not include the utilities).

The revision of these Directives as part of the Commission's Internal Market program provided the opportunity for the extension of the regime to the utilities, and also provided a model on which legislation could be based. Institutionally, the non-inclusion of the utilities was viewed by DGIII as inappropriate to an internal market which - if it was to compete with the United States and Japan - required competition in the provision of supplies and works, and the rationalisation of low-capacity utilising industries traditionally propped up by nationalistic procurement patterns. Further, by the mid-1980s, the use by Member States of their utilities as instruments of economic policy increasingly gave way to their subjection to the forces of competition and to a lesser extent privatisation.

In short, the creation of a regime on procurement, while not explicitly a Community competence, nonetheless has a solid foundation in its linkage to the process of the creation of the Internal Market. Taking the organisational desire of the Commission to seek to remove barriers to trade (aided by Court of Justice decisions in the area prohibiting the specification

¹¹ *The European Challenge: 1992, The Benefits of a Single Market*, Vol.5, (Brussels, 1988).

¹² Directive 71/305/EEC, O.J. L185/5; Directive 77/62/EEC, O.J. L13/1.

of national standards within procurement contracts¹³ and prohibiting regional preference schemes¹⁴); the experience of the operation of the Supplies and Works Directives of the 1970s; and the changing political economy of the Member States, we can understand the forces for the assumption of competence in this area.

The assumption of competence within the area of technical harmonization is a somewhat different matter from the other two regimes. Here we are not concerned with the detail of particular legislative instruments in particular policy areas, but rather, the legislative process of the Community itself. As such, it is a competence which the Community has enjoyed since its inception.

The necessity for a harmonization competence is *prima facie* obvious. Differences in the laws of the Member States may pose such barriers to trade that they require to be removed. Nonetheless, the legislative goal of the Member States may be a necessary one. Hence the requirement to produce a harmonised legislative instrument under Article 100.

As the subsidiarity and Maastricht debates have highlighted, the locus and form of legislative competence is not un-controversial. A belief in a straightforward and easy transition from national regulation to Community regulation would be misplaced in view of the politics of Community membership. Thus, the regime for harmonization has been framed by the politics of Community legislative intervention. It has also been framed by the failure of the total harmonisation strategy (in which detailed technical requirements for particular products were included within the texts of the harmonisation directives) employed in the past.

The Commission and the Council tried unsuccessfully throughout the 1960s and 1970s to adopt directives at the EC level under Article 100 (requiring unanimous voting). The failure of the total harmonisation approach has many causes¹⁵ not least of which was the protection of domestic markets at the expense of the promotion of the common market. This concern for domestic protection was echoed by the inability of the Member States to reach agreement on legislative proposals within the Council.

¹³ *EC Commission v. Ireland*, (Case 45/87) 1988 E.C.R. 4929.

¹⁴ *Du Pont de Nemours Italiana, S.p.A v. Unità Sanitaria locale No. 2 di Carrara*, (Case c-21/88), 1990 E.C.R. 889.

¹⁵ Pelkmans (Pelkmans, 1987) notes the following limitations of the traditional approach:

1. time consuming and cumbersome decision-making procedures,
2. excessive uniformity,
3. the necessity for unanimity under Art.100,
4. failure to link harmonization with standardization,
5. continued creation of national regulations and standards compared to slow European regulation and standardization,
6. neglect of testing and certification issues,
7. failure to address the issue of third country access,
8. problems of implementation within the Member States, and
9. a lack of political interest.

Nonetheless, the need for harmonisation was made all the greater by the expansive interpretation of Article 30 by the ECJ, and especially the decision in the *Cassis de Dijon* case¹⁶. Here the ECJ held that the Member States were legally entitled to take legislative measures to protect the consumer and to provide health and safety measures, insofar as they were proportionate to the risk sought to be regulated. Following that decision it was all the more necessary for the Community to adopt measures in the field of the approximation of health and safety requirements.

The recognition of the failure of previous attempts at harmonisation resulted in a shifting of priorities. The introduction of the New Approach to technical harmonisation¹⁷ with its attempts at restricting increased national regulation (in the form of the Information Procedure Directive¹⁸) and easing the process of EC regulation by the use of the "reference to standards"¹⁹ (and the introduction of qualified majority voting under Article 100a of the Single European Act) can thus be seen not merely as an attempt by the Commission to create a more effective regime for technical harmonisation, but also as an attempt to assume real competence in the area. Further, in those areas in which harmonisation was either unnecessary or particularly problematic, mutual recognition of national regulations was to complement the new approach to harmonisation.

Moreover, the attention that has been paid to European standardisation - as a partner in the harmonisation process - has itself resulted in a new attentiveness to the barriers to trade posed by national standards. Standardisation has become important in its own right.

To summarise, whereas we have noted the connection of each of our case studies to the Single Market, it is also clear that each regime has its own particular history and evolutionary path. And, in many ways it is insufficient to treat the history of a regime as

¹⁶ *Rewe-Zentralfinanz v. Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] E.C.R. 649.

¹⁷ *Technical harmonization and standards: a New Approach*, COM(85) 19 final.

¹⁸ Directive 83/189/EEC, O.J. L109 (26.4.83) This Directive aims to ensure that the Commission is kept aware of new national legislative proposals in the area of technical harmonisation and affords the Commission the opportunity to suggest EC legislation in the area or an opportunity for Member States to suggest amendments to the legislation to reduce the risk of the creation of a barrier to trade.

The directive supersedes a "gentleman's agreement" concluded in the 1960s but which has been regarded as having been honoured more in its breach than in its observance. The 1983 Directive also applies to the adoption of new national technical standards.

¹⁹ This approach limits the legislative role to the identification of the "essential requirements" requiring harmonisation, while leaving it up to manufacturers to demonstrate that their products meet these requirements. Where European standards have been promulgated to meet the essential requirements, then conformity to the standards gives rise to a presumption of conformity with the essential requirements and access to the European market.

simply the attempt to assume competence, but as also the attempt to make competence significant and effective.

The existence of a common 'spine' of rules and organisations overstates the homogeneity of Community policy areas. Rather it is the creation of specific rules and practices and particular organisational arrangements which together constitute the Community. To be sure, changes at the constitutional level - be they negotiated changes to the Treaty provisions like the Single European Act and the Maastricht Treaty, or the creation of the doctrine of direct effect by the Court of Justice - have the potential to fundamentally alter the nature and existence of more than one regime. But in many ways, it is the internalisation of these changes within particular regimes that is important.

In the following section we outline the organisational and normative structure of the regimes under consideration.

Regulatory regimes

In this section we shall sketch the relevant organisations; the socio-economic and political actors; the regulatory environment; and the rules, norms, conventions and ideologies associated with the regimes under discussion. In an attempt to give some consistency of approach across each of the case studies, certain characteristics of regimes - identified by Young - are utilised (Young, 1989). Young identifies three criteria relating to the "physical characteristics" of regimes: the **substantive** component (the expression of the objective of the regulatory regime); the **procedural** component (the process by which the regulatory goal is to be attained) and the **implementation** component (the means by which compliance is ensured).

We shall also utilise certain criteria identified by Young as pertaining to the "operational characteristics" of regimes. These are the **extent** of regimes (e.g. the density and relevance of rules and organisations); their **formalisation** (the degree to which the norms, rules and procedures are written down in recognised Community legal instruments); their **direction** (this can mean an ideological or paradigmatic shift, or, as in the case of the EC a shift from national governance to supra-national regulation); and their **coherence** (for example the coherence of one Community regime with another, or the coherence of Community governance with national control). One additional characteristic is utilised, namely the **scope** of regimes. This criterion serves to differentiate between activities covered by the regime and those not falling within it or directly excluded.

A word of caution should be given. The use of these criteria tends to give a static picture of regimes in order that different regimes can be compared. Of course, regulatory regimes are not static, but are constantly changing.

The Regime for Merger Control

Prior to the adoption of the Merger Control Regulation in 1989, the **substantive** component of the regime rested primarily on Commission and Court of Justice decisions under the competition rules of the Treaty. Moreover, the Commission's activism in this regard by the mid-1980s resulted in the creation of an informal **procedural** component in that

Community undertakings habitually notified the Commission - and sought comfort letters - as to their proposed merger activities. Nonetheless, the regime lacked the solid legitimacy of a formal agreement among the Member States to subject certain types of mergers to Community regulation. This inhibited the **implementation** of Community governance.

The 1989 Merger Control Regulation comprises the central formal substantive component of the regime. The various drafts and proposals leading up to its adoption were the focus for the articulation of what the regulatory goal ought to be. Thus, the substance of the Regulation must be seen as the product of negotiation between all the political actors, especially the Member States and the Commission. Were it not for the desire of both the Commission and the Parliament for some form of Regulation - especially in light of the restructuring foreseen by the Single Market - it is doubtful that any regime would have emerged beyond that constructed by the Commission and the ECJ out of the creative (but limited) application of Articles 85 & 86. Moreover, the desire of the Commission to have a useful tool prevented the Regulation from being mere tokenism.

The regime for merger control is highly **formalised** in terms of the written rules established in the Merger Control Regulation. Further, the procedure for the notification of an intended merger must be communicated using the appropriate Form CO, and all important actions on the appraisal of a merger are communicated by way of Decisions. The regime does, however, have important informal elements, not least of which are the negotiations between the Commission and undertakings in the modification of mergers and the attaching of conditions thereto. Moreover, statements in the Minutes of the Council provide important pointers to the operation of the regime²⁰.

It was clear from the earliest proposals that any system of merger control would allocate regulatory authority to the Commission and would give the Commission exclusive authority to regulate mergers falling within its scope. It was evidently important for those Member States who were most sceptical about the Commission's role that the substance of the regulation should confine the **scope** of the regime by providing limits within which the Commission was to operate. The input of the Member States into the substance of the Regulation was facilitated by the requirement that it be founded on Article 235 of the Treaty as well as Article 87, requiring unanimity within the Council of Ministers.

The Regulation applies to the creation or strengthening of "a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it"²¹. However, it only applies to concentrations having a Community dimension i.e. the undertakings concerned have a combined turnover of more than ECU 5bn (and at least one of which has a community turnover of more than ECU 250 million). Thus, the thresholds act as one of the keys to the scope of the Commission's

²⁰ For example, it is noted in the Minutes that the Commission will not apply Articles 85 & 86 to concentrations falling within the scope of the Regulation. The Minutes are reproduced in J. Cook and C. Kerse, *EEC Merger Control*, pp.226-230.

²¹ Article 2(3).

jurisdiction. The higher the threshold, the greater the number of transactions which will be subjected to national control, while the lower the threshold, the greater the power of the Commission. The figure of ECU 5bn forms a compromise between, on the one hand, the desire of the Commission to have an ECU 2bn threshold and, on the other hand, the desire of the UK and Germany to set a level of ECU 10bn. These thresholds are set to be reviewed this year.

Whereas thresholds are indicative of the scope of the Commission's jurisdiction, the criteria for appraisal are both indicative of the **scope** and **direction** of Commission discretion. In essence, the choice facing legislators was between a system of "public interest" regulation (in which the economic, political and social effects of mergers could be balanced), and a system based simply on the economic effects of a merger on competition. Clearly, the former implies a less confined exercise of discretion and one which could include elements of both competition and industrial policy.

The UK and Germany succeeded in limiting the Commission's powers in the regulation of mergers, by restricting the appraisal to the effects of a merger on competition. Thus, the discretionary power to permit an otherwise anti-competitive merger (a feature of previous drafts and based on the exemption in Article 85(3)) was found to be unacceptable to these two countries. It is the effects of a merger on the competitive structure of markets that is the touchstone of the Commission's power to prohibit a merger.

In short, the emphasis within the appraisal of the effects of a merger on competition serves to limit or pre-empt the power of the Commission. It also maintains merger control within the ambit of the competition policy - out of which it grew - rather than a more instrumental industrial policy.

That the Commission was to have exclusive authority to regulate mergers having a Community dimension has already been mentioned, as has the reticence on the part of certain Member States to relinquish national regulation of mergers (both the UK and Germany came under pressure from their own competition authorities to limit the Commission's jurisdiction²²). As a condition of their agreement the German government succeeded in securing a clause providing that where a concentration took place within a distinct market within a Member State, that Member State could apply to the Commission to have the appraisal referred back to the national competition authorities²³. This is the so-called German clause. While the terms of the clause ensure that only one regulatory authority is seized of the matter at any one time, from the point of view of industry it detracts from the principle of the "one-stop-shop" that was central to industry's support for the Regulation.

By contrast, the Dutch clause permits countries (especially those without a system of merger control) to ask the Commission to appraise a merger falling below the level of the thresholds specified in the Regulation. We can see that the centrality of the concept of a "concentration having a Community dimension" as the cornerstone of the **coherence** of EC

²² See N. Tait, "Borrie questions EC merger role", *Financial Times*, 20.6.89, p.2.

²³ Article 9.

merger regulation (in terms of defining the boundary between EC and national regulation of mergers), became weakened in the course of negotiation.

One final aspect relating to the coherence of merger regulation at the EC level lies in the relationship between the Merger Control Regulation and Articles 85 & 86 (i.e. the boundary between merger regulation under one Community system of regulation and another). As we have noted the Commission managed to create a system of merger control out of Articles 85 & 86. It would make a nonsense out of the Regulation if the strict time limits set down for the appraisal of mergers (1 month for an initial appraisal and a further 4 months for a full investigation) and the carefully negotiated criteria of appraisal could be avoided by a subsequent application of the Treaty provisions.

The Regulation attempts to oust the Commission's jurisdiction under the Treaty by preventing the Commission relying on Regulation 17/62 which provides the machinery for their application. Nonetheless, as the provisions are directly effective in law - if not in practice - there is nothing²⁴ to prevent the Commission from applying these provisions to a merger otherwise falling within the ambit of the Merger Control regulation. And, there is nothing to prevent private parties from claiming a breach of these Articles in their national courts. However, it is expected that, if not in theory, regulatory exclusivity and coherence will be preserved.

The use of the legal instrument of a Regulation is important in that it does not require transposition by the Member States. Nor is its application reliant on the activities of the Member States in that undertakings entering into activities falling within the scope of the Regulation are obliged to notify the Commission directly and to provide such necessary information for the appraisal of the activity. In this sense, the **procedural component** of the merger control regime is in contrast to the Community's normal mode of decentralised administration (Majone, 1992). Both procedurally and substantively, the regulation of mergers having a Community dimension is largely a supranational activity.

The supranational nature of EC merger control is also reflected in the organisational structure of its operation. Given the on-going nature of its regulatory activities, the functions allocated to the Commission by the Regulation are in fact not merely carried out by the Competition directorate, but by the Merger Task Force within DGIV. Staffed by Commission employees and secondees from the national competition authorities, the Task Force's work provides the basis on which the Competition Commissioner presents his or her conclusions to the College of Commissioners as to whether or not to approve a merger. The task force is more akin to the US-style of regulation by regulatory agency. The Member States are also represented at the supra-national level in the Advisory Committee on Concentrations which is informed of the Commission's decision and which gives a (habitually published) opinion on it.

²⁴ The Minutes of the Council indicate that the Commission will not apply Articles 85 and 86 to mergers. Nonetheless, the Treaties are the fundamental rules of the Community and cannot be contradicted by secondary legislation or soft law.

The supranational nature of the Merger Control Regulation has important consequences for compliance with its terms. Firstly, Community undertakings subject to the terms of the Regulation must notify the Commission. Thus, the Commission is alerted from the start and is in a position to appraise a merger before any structural or proprietorial changes have been undertaken. A system of *ex ante* regulation is preferable to a system of *ex post facto* regulation in ensuring compliance.

Secondly, the Commission is not reliant upon the Member States to ensure compliance: it has the power to regulate economic actors directly. Thirdly, because the legal instrument is a Regulation, there are not the habitual problems of transposition to contend with. Finally, the Regulation contains powers to fine companies for failure to provide relevant information and notification (up to ECU 50 000), and for failure to comply with Commission decisions (up to 10% of aggregate turnover): Article 14. Where undertakings persist in their non-compliance, the Regulation provides for "periodic penalty payments" of up to ECU 25 000 per day: Article 15.

In summary, the merger regime contains highly developed substantive, procedural and implementation components. It places the Commission in a strong position to regulate mergers falling within the ambit of the Regulation. And, as with other aspects of EC competition policy the regulation of mergers is very much a supra-national matter.

Procurement in the Utilities

The formal substantive component of the regime consists of Directive 90/531/EEC which extends the Community's regime on procurement to the utilities - the previously "excluded sectors"²⁵. The Directive applies to the award of contracts by entities operating in the water, energy, transport and telecommunications sectors. These sectors were highlighted by Commission studies as areas in which there was strong national influence (often through state ownership) and insulation from market forces.

The directive is replete with exclusions (the purchase of energy, fuels and water; airline and shipping procurement), conditional exemptions by right (provision of bus services) and conditional exemptions by agreement with the Commission (oil, coal and gas exploration). Thus, the **scope** of the regime for the utilities is not quite as encompassing as one might have expected, given both the desire of some Member States (the UK, Germany and Spain) to retain some strategic control over their oil, coal and gas exploration activities, and the existence of competition in some of the sectors.

Further, the **extent** of the regime is also limited in that any one of three tendering procedures (*open*: fully competitive; *restricted*: limited invitation to tender or use of lists of approved contractors; *negotiated*: agreements are negotiated with chosen contractors) may be utilised by contracting entities. The revised Supplies and Works Directives make the use of the "open" procedure the norm. The insistence by the utilities and the Member States on a light, flexible regulatory regime can be seen as the quid pro quo for the Commission's

²⁵ For an analysis of the Directive from a legal point of view see O'Loan, 1992, and Trepte, 1990.

insistence on a regime at all.

The regime is also limited in scope insofar as it only applies to contracts of a value greater than ECU 1 000 000 for works contracts (ECU 600 000 in the case of telecoms) and ECU 400 000 for supply contracts. As with the thresholds for mergers, the levels were the source of some debate between the Commission and the Member States: higher levels would mitigate against its rigour. But, it is the lack of a homogenous industry structure across the Member States and across sectors that truly will be an important test of the reach of the regime. For example, in France, EdF is the sole utility in the electricity sector, compared with hundreds of smaller electricity utility entities in Germany. Whereas almost all of EdF's contracts will fall over the thresholds, comparatively few of Germany's electricity utilities will have to comply with its terms.

The extension of the Community's procurement regime to the utilities indicates the **direction** of Community policy in favour of liberalisation and competition within these sectors. To this extent, it supports the sectoral policies being pursued by the Commission most especially in the telecoms and energy sectors. The regime is also **coherent** with the Commission's policy of using standardization as a means of facilitating market integration. Thus, the Directive requires that the contract documents refer to European standards where such standards exist. As the Council's recent resolution on standardization makes clear²⁶, the procurement regime and standardization form a partnership in the attainment of the Internal Market.

The logic of the Internal Market runs through the procurement regime: the competitive award of contracts will - it is hoped - result in the rationalisation of European industry in key areas where surplus capacity exists. Yet the opening up of the Community procurement market runs the risk of giving non-Member States' companies access to a market without reciprocal entry for Community undertakings in their markets. The issue of third country entry has run throughout the GATT negotiations and framed part of the discussions on the Utilities Directive. On the one hand, France, Spain and Italy wanted a strongly protectionist measure for the Community market. On the other hand, this was opposed by Germany, Denmark and the Netherlands.

The Directive provides that a Community bid may be preferred provided that its price is no more than 3% higher than a bid from an undertaking in a country with whom the EC has not negotiated reciprocal agreements. The United States has reacted strongly to this clause, particularly as it wishes to ensure access for its companies in the EC's telecoms and energy markets. Indeed, the clause has been subject to negotiations at the highest levels between the EC and the US. To state that the clause is indicative of a protectionist direction in Community policy is to perhaps ignore the role the clause might play in ensuring equal access to US contracts for Community undertakings. In this way it is useful to regard the Directive as a source of future negotiating agendas rather than as a conclusion of particular negotiations.

²⁶ Council Resolution of 18 June 1992 on the role of standardization in the European economy: O.J. C173 (9.7.92), p.1.

Procedurally, the creation of the Community's procurement regime, and its extension to the utilities has entailed some organisational developments at the EC level. Its new-found priority within the Single Market has been accompanied by a growth in the number of staff within the Commission working in the area, and a division of labour within the public procurement unit within DGIII. Thus, III B 3 works on policy development while III B 4 is employed in the task of monitoring implementation and compliance. Two consultative committees - the Advisory Committee for Public Contracts and the Advisory Committee on Telecommunications Procurement - have also been created to assist the Commission in the monitoring of the regime.

By contrast with merger control, the regulation of the procurement activities of the utilities conforms to the traditional pattern of decentralised administration exhibited by the Community. The legal instrument establishing the formal rules takes the form of a Directive and, accordingly, requires transposition by the Member States. Moreover, contracts are still awarded through the appropriate national contract-awarding entity. However, the contracts must be advertised in the Official Journal of the Communities and must be awarded according to one of the three procedures (noted above). Further, the contract awarding procedures must be transparent and non-discriminatory.

By contrast with the regime for mergers, the regime is much more reliant on implementing structures and compliance monitoring within the Member States. This has consequences for the **compliance** component of the regime. Compliance is in large part a matter of bringing about a slow shift in attitude: to encourage purchasers to look at the benefits of the creation of the Single Market in the long-term as compared to short-term protectionism. Nonetheless, lessons have been learned from the problems associated with the Community's original procurement regime under the Supplies and Works Directives. Thus, in its remedies directives for the utilities and non-utilities sectors, the Commission has sought to aid compliance with the terms of the substantive directives by availing private parties of remedies for transgression of Community rules. In a manner similar to the creation and evolution of the doctrine of direct effect, the Community legal system is harnessed in the attempt to ensure compliance. Moreover, post-Francovich²⁷ (in which it was held that a Member State was liable for losses as a result of its failure to transpose a directive into national law) there is a strong incentive on Member States to transpose Community directives.

In summary, the pattern of regulation of the procurement activities of the utilities is markedly different to that of merger control. With regard to mergers, the Commission has been an important actor in both the framing and implementation of the regime. In the area of procurement, the Commission's role has been much greater in agenda setting and rule creation rather than in the application and implementation of the regime. Further, the most important organisations for the regulation of mergers are located at the supra-national level, whereas it is the willingness of the utilities themselves to comply that is more significant given the weak arrangements at the supra-national level for the monitoring of compliance.

²⁷ *Andrea Francovich & Daniela Bonifaci v. Italian Republic* (Cases C-6/90 and C-9/90).

The Harmonisation of Technical Regulations and Standardisation

The **substantive** component of the harmonisation regime has two elements. The first element relates to the harmonisation of technical regulations; the second element is concerned with the harmonisation of technical standards. A technical regulation consists of a prescriptive legal requirement relating to the design, production, manufacture or marketing of a product. Only, where the requirements of the regulation are complied with can a product be lawfully placed on the market. A technical standard, on the other hand, is a voluntary description of a product or service conformity to which may enable a manufacturer or service provider to compete on quality as well as price. For the most part, standards are a form of consensual self-regulation by manufacturers and producers.

The processes by which regulations and standards are harmonised within Europe are equally distinctive²⁸. The former involves a process utilising the legislative organs of the Community. As such the **formal** 'constitutional' arrangements for law-making are an essential component of the regime. As we have noted already, a significant limitation of the traditional approach to harmonisation was the difficulty associated with unanimous voting under Article 100. Since the Single European Act introduced Article 100a, qualified majority voting has been introduced.

The harmonisation of standardisation at the European level involves the European standards setting bodies: the Comité Européen de Normalisation (CEN), the Comité Européen de Normalisation Electrotechnique (CENELEC) and the European Telecommunications Standards Institute (ETSI)²⁹. CEN and CENELEC operate almost identical working procedures and share common Internal Regulations.

It will be clear from the foregoing, that it is only the structure for the harmonisation of technical regulations that utilises the traditional organisations and norms of the Community. Standardization is a process with its own organisations and own actors.

The harmonisation of technical regulations and the harmonisation of standards have become linked in the New Approach. Here the legislative role is limited to the harmonisation of the "essential requirements" of directives (normally setting health and safety requirements across a range of products), while conformity with harmonised European standards is one means of meeting the essential requirements of directives.

Thus, the organisations of European standard-setting have become partners in the

²⁸ For other literature on this subject, see, Pelkmans & Vollebergh, 1986; Schreiber, 1991; Burrows, 1990.

²⁹ Both CEN and CENELEC were established in the early 1960s, and thus, it is important to continually bear in mind that these bodies pre-dated the Commission's attempts to forge a partnership between the harmonisation of technical regulations and technical standards.

process for the harmonisation of technical regulations³⁰. That is not to say that the two have become fused. The relationship of the Community to CEN and CENELEC was formalised in a Framework Contract in 1985 and renewed in 1989. Only where mandates have been given by the Commission do the standard-setting bodies undertake work on behalf of the Community (and also the EFTA countries). Currently, approximately 20% of CEN's work is mandated (of which approximately 50% is in support of New Approach directives). However, the priority given to Community work within European standards bodies and the increase in the volume of work has itself had an important impact on the development of the standards bodies. Thus, since 1983, the number of technical committees has grown from 53 to 253 by 1992.

The New Approach has another two dimensions. The first is the Information Procedure Directive 83/189 which seeks to ensure that the Commission is aware of all new technical regulations which the Member States wish to adopt. Draft regulations are considered in a Standing Committee established under the Directive. This procedure gives the Community the opportunity to take action at the Community level should this be required. It also gives other Member States the opportunity to comment on the trade effects of a proposed regulation. The procedure also applies to new national standards work which should be notified directly to the European standards bodies for their comments. In short, the Directive attempts to prevent the creation of new barriers to trade be they new national technical regulations or new national standards.

The other aspect of the new approach lies in mutual recognition. This itself has two aspects. In those areas in which the Community has not taken any harmonisation measures, then a product lawfully placed on the market in one Member State may be marketed in another Member State. The second aspect is that where harmonisation measures have been agreed, the conformity of a product with the essential requirements is a matter for the manufacturer and the national authorities responsible for testing and certification. A product accompanied by an appropriate means of attestation of conformity with the essential requirements may be lawfully marketed in another Member State.

The **scope** of the harmonisation regime is expansive, given that it covers all regulations which, while performing legitimate national functions, also create barriers to trade within the Community. The scope of the regime is limited by the limitations on harmonisation, not least of which is the efficiency of the legislative process. The New Approach attempts to make that process more effective by limiting the legislative role. Potentially, the New Approach will expand the **extent** of Community's influence on product regulation in the medium to long term.

While the **direction** of the harmonisation regime has turned towards the attempt to harmonise the performance requirements for a group of products in an area - rather than all the technical characteristics of a single product - the traditional approach to harmonisation has not been abandoned. Further, it can be argued that the problems associated with obtaining agreement among the Member States on the technical characteristics of products under the traditional approach has been shunted on to the European standards bodies. The

³⁰ Egan (Egan, 1991) has described this partnership as "associative regulation".

success of the New Approach rests with the ability of the European standards bodies to create harmonised European standards timeously.

As compared with national standard-setting institutes, the European bodies have promulgated far fewer European standards. This gap is understandable in the sense that standardisation is itself complex and especially so in the case of the bringing together of Twelve cultural and economic traditions. Nonetheless, it has been clear that if the Commission's ambitions for the Internal Market were to be realised, then the standardisation process was required to be better able to respond to the challenge.

Moreover, the Commission's attention towards the barriers to trade posed by standards themselves - especially in sectors where the Commission is attempting to liberalise the provision of services e.g. telecommunications - and the Commission's use of standardization in support of its procurement regime, has itself resulted in the agreement of mandates between the Commission and the standards-setting bodies. The pressure of work on these bodies has been increasing.

The Commission's recent Green Paper on Standardisation attempted to suggest procedural and organisational changes in the form of a "European Standardization System". However, while highlighting the importance of standardization, it also highlighted the market-driven nature of the process. Standards are agreed following upon consensus on the need for their creation. Standards will only be created where national delegations are willing to devote the resources to their creation, which is itself a function of market need. As the responses to the Green Paper highlighted, in many cases, the market appeared to be demanding *international standards* rather than European standards.

Thus, the sweeping organisational changes within CEN/CENELEC anticipated by the Green Paper have not materialised. However, CEN has introduced Sectoral Technical Boards in an attempt at ensuring a more efficient co-ordination of work between technical committees.

It will be evident from this brief mapping of the structures for the harmonisation of regulations and standards, that the organisational structures and the relationship between structures is one that is continually evolving. The shift in regime direction towards the harmonisation of standards has highlighted the role of standards and has required organisational change to meet the challenge. For example, consumer groups have sought representation through observers in the work of the standards-setting bodies. At the European level this is co-ordinated through the Secrétariat Européen de Coordination pour la Normalisation (SECO).

The regime shares some of the same problems of the regime for procurement in terms of **implementation** and **compliance**. Even New Approach directives require to be transposed into national laws. Moreover, European standards - which appear some time after the Directives - require to be adopted as national standards. Implementation is still very much a decentralised affair.

The Information Procedure Directive has already been noted. There have been compliance problems associated with it. This prompted the Commission to remind Member

States of their obligations under the Directive³¹; to amend the Directive in 1988³²; and to propose a second amendment in 1992³³. The evolution of the regime continues the search for greater compliance.

Regime Analysis

We have argued that regimes as institutions matter. This goes beyond the view that the organisations of the EC - as political actors with relative autonomy - are important. The contention is that the particular regimes of the Community as institutions have an impact upon the political behaviour of social, political and economic actors. They provide an organisational and normative context for the articulation of disputes and the creation of structures of governance. The evolution and creation of new norms and new structures afford a new institutional context for future negotiations. In this way, the adoption of new formal legislation can be seen as not the end of negotiations and development within a regime, but as part of the process of a regime's evolution.

It is precisely because of the dynamic nature of regimes that the concept is useful in making predictions about likely future changes and developments. By mapping the particular organisations, actors, norms and events, we can identify more clearly the sources of regime change. That is not to say that there are not "constitutional" or systemic dynamics that ripple across all the governance structures clustered within the Community. The introduction of co-decision between the Parliament and the Council under the Maastricht Treaty has important implications for the future development of many policy areas. Equally the systemic problems of the monitoring of implementation and compliance and the whole issue of the "effectiveness" of Community law, affect all the Community regimes, and particularly those areas in which the Community is reliant on decentralised regulation by directive (Snyder, 1993). However, these events are best understood in the context of their significance to particular regimes.

While the emphasis in the foregoing has been on regime change and sources of change, we must state clearly that the existence and persistence of a regime also implies a level of stability and continuity. A situation consisting of rapidly changing rules, organisations and actors would be both difficult to map and to describe as being a regime.

In this final section, some examples from our case studies will be illustrative of the sources of change and stability within regimes.

In the field of merger control, the first source of change is the Regulation itself, in

³¹ O.J. C245 (1.10.86), p.4.

³² O.J. L81 (26.3.88), pp.75-76.

³³ O.J. C340 (23.12.92), pp7-12; COM(92) 491 final.

the sense that it provides that its operation is to be reviewed in the course of 1993³⁴. It seems likely that this will open up new debates and continue unresolved ones. Thus, the controversial level of the thresholds (above which the Regulation becomes operative) is due for discussion. At the time of the adoption of the MCR in 1989, the Commission made clear its desire to see the main threshold for aggregate turnover reduced to ECU 2bn. Clearly, this would result in an augmented role for the Commission.

However, one factor which might be of relevance in the framing of discussions is the continuing debate on the appropriate allocation of regulatory responsibility between the EC and the Member States: the subsidiarity debate. While the tenor of the debate - regardless of the attempted neutrality of the wording of the principle - has been about limiting EC competence, in the context of competition policy it is generally recognised that this is an area in which the appropriate level of governance is the Community level. This has been recognised since its earliest inception by the unique power given to the Commission by the Treaty in competition policy matters. Thus we should not automatically assume that it is unlikely that the thresholds will be lowered in line with the Commission's wishes. Indeed, in a recent speech, the Competition Commissioner has suggested an increased role for the competition authorities of the Member States in return for an ECU 2bn threshold.

Another debate which ensued during the negotiations of the MCR was on the need for an independent European cartel office. This debate was of particular importance when the then proposed regulation contained provisions for the approval of an otherwise anti-competitive merger on the grounds that the merger would promote the industrial or other objectives of the Community. Both the UK and German competition authorities were fearful of a Commission controlled back-door industrial policy. Their solution was an independent cartel office appraising mergers on purely competition grounds, with the possibility of an override by a distinct political decision. Ultimately, the suggestion was rejected as making the process more rather than less politicised.

In the light of the Commission's decisions under the MCR, this debate has been re-opened. More particularly, the Commission's decision in the *Aérospatiale-Alenia/ de Havilland*³⁵ case has prompted the French government to consider the utility of such a system. The Commission's slender (9 to 8) decision to prohibit the concentration on the grounds of its impact on competition (on a narrowly defined market), despite potential benefits to the Community aircraft industry has proved to be a controversial re-statement of the competition thrust of the instrument. Thus, the French are thought to be considering whether a European cartel office (but with the possibility of an override on industrial policy grounds) might be a useful strategy.

One final potential source of regime change worth noting rests with the recent change in Competition Commissioner from the economic liberal Sir Leon Brittan to the Flemish

³⁴ The Member States agreed at the time of the adoption of the Regulation, that changes to it would be agreed by qualified majority vote, rather than the unanimous voting required for its original adoption.

³⁵ Commission decision 91/69/EEC, O.J. L334/42.

Socialist Karel Van Miert. The issue of the role of personality in the operation of policy raises important questions. In one sense, our approach would suggest that a change in Commissioners (especially a change from liberal to socialist) should be an important source of change. However, whether a source of change does in reality result in change depends upon its interaction with other sources of change and, of course, sources of stability.

It would appear that the experience of the Merger Task Force and the decisions it has taken thus far may have created a relatively stable pro-competition approach to mergers which any new Commissioner would find difficulty replacing. Given that merger control has grown out of the competition rules of the Community, it might be said to be difficult - and perhaps even illegitimate - for a new Commissioner to attempt to use merger control as a tool of industrial policy.

Future developments in the area of public procurement can also be suggested in terms of a mapping of stability and change within the regime. As we noted above, the extension of the regime to the utilities formed part of a package of measures which included attempts at making the regime more effective: namely, the revision of the Supplies and Works Directives to make the use of the competitive "open" procedure the norm, and the Remedies directive aimed at ensuring the provision of remedies for aggrieved tenderers. Thus, we can expect future changes aimed at making the regime more effective.

In one sense, changes can be expected across all policy areas as the effectiveness of Community regulation becomes an increasingly important issue. However, the search for effectiveness has its own likely consequent changes at the regime level. Thus, it seems possible that attempts will be made to change the utilities directive to limit the use of the "negotiated" and "restricted" procedures. Other attempts might be made to limit the grounds upon which a call for competition need not be made.

Given that the Utilities Directive only came into force on 1 January 1993, it is too early to tell what its impact will be. Yet, even at the time of its adoption, it was clear that in some areas, the merger of supplier companies across the Community would render the regulatory goal - the breaking of patterns or networks of nationalistic procurement - somewhat obsolete. This suggests a need for a monitoring of the changing regulatory environment to ensure that the stability of the regime owes as much to its relevance as it does to its mere existence.

One area of likely regime change has been attracting much recent attention, namely the "buy Europe" clause. Negotiations between the US and the EC are continuing at the highest levels. The US wish to ensure entry for their telecommunications and power suppliers to the Community market, and are threatening to block Community undertakings from bidding for lucrative US government contracts. In turn Community negotiators are looking for an opening up of US procurement markets. These events tend to reinforce a view of Community legislation as part of the negotiation process between the important political actors, rather than as a resolution of those negotiations. Further, they emphasise that the sources of regime change are not merely within the Community, but are increasingly from outside the EC.

It will be apparent from earlier discussion that the history of the regime for the

harmonisation of technical regulations has been one of slow change and evolution. Particularly as what is involved is the Community's law-making process, one can expect a high degree of stability and a low degree of change at least at the level of formal changes to the legislative process. However, as the New Approach indicates, important regime change can be brought about by shifting the direction of the regime away from an inefficient approach to one that limits the legislative role and harnesses the process of the harmonisation of technical standards.

The increased role given to European standards-setting bodies by the New Approach has in turn highlighted the necessity for a more efficient program of standardisation, and has also highlighted the barriers to trade posed by voluntary national standards themselves. The highlighting of the importance of the creation of European standards has itself placed further pressure on European standardisation.

The Commission, in its Green Paper on standardisation, sought to address the efficient development of standardisation, and to ensure that industry played a greater role in the future funding of standardisation programs. The failure of the Green paper to attract support for sweeping organisational changes, and the desire indicated for international as well as European standards highlights that standardisation is a market-driven process in which manufacturers and national standards institutes are key players.

Interestingly, the highlighting of standards at the European level has attracted interest from the United States. Fearing a technologically harmonised European market, the US has indicated an interest in standardisation at the international level. To the extent that industry appears also to be looking towards standardisation at the international level, co-ordination of standardisation between European bodies like CEN and CENELEC and the international standards bodies, the ISO and IEC looks set to be an important area of future development.

This last point brings us to a trend which cuts across the three regimes discussed: **internationalisation**. In the area of mergers, the US and the EC agreed in 1990 to increase co-operation in the application of their competition laws to mergers. In the area of procurement, negotiations within and outside the context of GATT highlights the importance of these contracts to international suppliers. And, in the area of standards, it is evident that international standardisation and increased co-operation between European and international standards bodies will be a feature of the future.

CONCLUSIONS

In this paper we have sought to argue that attempts to analyze the Single Market in terms of broad paradigms which overstate the homogeneity of the Single Market are misplaced. Rather, a disaggregated approach which recognises the organisational and normative diversity of the regimes which pertain within the Single Market, seems to offer important insights. At the simplest descriptive level, the mapping of regulatory regimes alerts us to the fundamental actors in the process under consideration, as well as to the relevant rules, norms and procedures which structure these relationships. It serves to highlight the assumptions under which certain policies proceed. Through this mapping exercise, we are better placed to predict future change in that we can indicate points of stability and points of change.

This approach does not pretend to be a radical re-think of the Community. Rather, it is a shifting in focus to the micro-level of Community action. Aggregate trends can, of course, be indicated where they are evident. Not surprisingly, because the regimes within the Single Market are regimes under the Treaties and organisations of the Community, they are subject to the pathologies of the Community. Thus, the problems of implementation and the monitoring of compliance associated with decentralised regulation through directives, has an impact across all regimes which rely on directives as the regulatory tool.

Regimes will also be affected by constitutional change whether it be a negotiated Treaty change or a fundamental principle of the Court of Justice. In addition, regimes can be transformed by a renewed willingness to make the Community - as a Community - work in a more efficient manner. Both the Single Market program and the subsidiarity debate have had important roles in these respects.

But if one takes the subsidiarity debate, and attempts to answer the question of where regulatory authority ought to lie, inevitably one is forced to look at actual regimes. By an understanding of the evolution of a regime - the evolution of the patterns of governance; past disputes and continuing negotiations; the constituency of socio-economic and political actors - one is in a better position to predict how the debate is likely to turn.

As we have seen, each of our case studies exhibits its own organisational and normative pattern of governance. As the regime evolves and new secondary legislation is added, the normative context changes. These changes can be accompanied by further organisational change - the addition of Committees, new associations with other Community, or extra-Community organisation - and the introduction of new players. Moreover, changes in one regime can prompt changes in another. Thus, the opening up of procurement in the telecommunications sector must be considered alongside the sectoral policy for telecommunications liberalisation and the use of European standards to achieve the goal. In a sense, this highlights that "spill-over" can, in fact, be better identified by micro-level analysis, rather than assumed by macro-level theory.

It is suggested that by mapping the regimes of the Community we can establish a better picture of the dynamics of the Community. As a result, research can be targeted: whether that research is concerned with the changing legal picture; the economic efficiency of regulation; or the politics of Community decision-making. It is to be hoped that better predictions as to the future direction of the Community will follow.

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