THE MUTATION OF THE EU AS A REGULATORY REGIME

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ABSTRACT

The nature of regulatory governance in the EU is changing radically as a consequence of increasing socioeconomic heterogeneity, and of a growing mismatch between regulatory commitments and available normative resources. When socioeconomic conditions differ significantly regulations should be different rather than harmonized. This is because the gains from harmonization are outweighed by welfare losses caused by common rules not tailored to national preferences except in an average sense. Moreover, every expansion of positive integration unmatched by a corresponding increase in legitimacy can only aggravate the democratic deficit. Hence, greater emphasis on negative integration is to be expected. Under a negative-integration regime most regulatory responsibilities would be left with the people most directly affected by a given problem, and who have to bear the costs of regulation. European institutions would monitor national regulators and enforce rules regulating interstate competition—a powerful preference-revelation device. Such a limited regime would reduce the democratic deficit at EU level, and improve the quality of democratic life at national level.

Keywords: accountability**;** effectiveness and legitimacy**;** harmonization; interstate competition; negative integration; supranational constitutionalism.

1. Introduction: positive and negative integration

The distinction between positive and negative integration—crucially important for understanding the present and future role of the EU as a regulatory regime--goes back to the earliest studies of regional integration. The Treaty of Rome did not attach any normative connotation to this distinction. The common market was to be achieved by both methods, but in fact with greater reliance on negative integration--witness the number and significance of such rules as Articles 12-17 (elimination of customs duties); 30-37 (elimination of quantitative restrictions to intra-Community trade); 48-73 (free movement of persons, services, and capital); 85-94 (rules against distortion of competition); and, not least, Article 119 prohibiting gender discrimination at the workplace. Also the legislative strategy devised by the European Commission to accomplish the

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objectives of the Single Market Programme was largely based on measures of negative integration, to remove physical, technical, and fiscal barriers to trade.

Fritz Scharpf, Juergen Habermas, and other scholars have criticized the "institutional asymmetry" between positive and negative rules—an asymmetry which they believe a supranational social policy should correct. Their contention is that while the rules of negative integration, being primary (i.e., treaty-based) European law, are directly enforceable by the European Commission and Courts, policies promoting social protection and cohesion—positive integration—usually require intergovernmental agreement (in some cases unanimous agreement) and are therefore designed and implemented with much greater difficulty. There is indeed an asymmetry between primary and secondary rules; but it is far from clear how, or even whether, it should be corrected. The basic reason for this asymmetry is that heavily regulated national markets could not have been integrated without primary rules restricting the interventionist tendencies of national governments, and the protectionist temptations of both publicly-owned and private firms. Since the method adopted by the founding treaty makes the integration of national markets the starting point of a long march toward "ever closer union", it follows that negative integration is a *constituent*, rather than a contingent, element of the grand strategy of the fathers of communitarian Europe.

Over the years the superiority of positive over negative integration has come to be taken for granted by many students of European integration. The former has been identified with positive values like environmental protection, reduction of social inequality, the correction of market failures, and "deep" integration; the latter, with deregulation, narrow economic interests, and "shallow" integration. As it turns out, economic and other special interests often find it expedient to support measures of positive integration, such as harmonization, while fundamental rights under European law are generally better protected by means of negative integration. The latter is not only about removing national restrictions to the free movement of the factors of production. It is also about limiting monopoly power and market dominance, restricting the discretionary power of the national governments, protecting the diffuse interests of consumers, and fighting discrimination on grounds of gender, nationality, age, and other factors. Conversely, the Common Agriculture Policy--still the largest programme of positive integration in terms of budget, administration, and volume of legislation—is well-known for its perverse redistributive consequences. Recent evidence shows that the redistributive consequences of the CAP are even more perverse than analysts had assumed in the past (Majone 2009a: 146-7).

The best-known example of negative integration in the area of individual rights is the already mentioned Article 119 of the Rome Treaty (now Article 141 EC), which requires

application of the principle of equal pay for male and female workers for equal work or work of equal value. The Article itself conferred no positive regulatory powers, until it was amended by the Treaty of Amsterdam. The new paragraph (3) inserted by that treaty extends the scope of the article to positive measures ensuring equality of opportunity and is thus not restricted to measures simply outlawing discrimination. So far, however, the most dramatic results have been achieved by Article 119 in its original, "negative", formulation. In the landmark *Defrenne II* case (*Defrenne v. Sabena*, Case 43/75) the European Court of Justice held that the article is directly enforceable and grants rights to an individual if remedies do not exist under national law. In the *Bilka* case of 1986 the Court indicated its willingness to strike down national measures excluding, without a clear justification, women from any employer-provided benefits, such as pensions. In a later case, the ECJ held that all elements of pay are due to all employees in a particular activity, without regard to the hours worked. In Germany, at that time, employees who worked less than ten hours a week for a commercial cleaning company did not receive statutory sick-pay. This regulation affected mostly women, thus the Court saw it as an indirect discrimination against women, hence as a violation of Article 119. The *Barber* case (1990), in which the Court extended the meaning of Article 119 to cover age thresholds for pension eligibility, demonstrates the symmetric effect of this norm. Mr. Barber, having been made redundant at age 52, was denied a pension that would have been available immediately to female employees. Instead, he received a lump-sum payment. The Court held that this treatment was illegal since pensions are pay and therefore within the scope of Article 119.

Consider now the difference between the judicial enforcement of the right not to be discriminated against on the ground of, say, gender or nationality, and the promotion of substantive equality, or even of equality of opportunity. The latter objectives are much broader than the simple prohibition of discriminatory practices, and normally require positive interventions. The costs of such interventions will fall on the citizens of the member states affected by the measures, without having been authorized through the normal democratic process. Similarly, positive integration in the form of harmonized regulations, for instance in the area of environmental protection, imposes costs which may not adequately reflect national resources, preferences and policy priorities, see section 3. At issue here is not the merit of the objectives of various positive measures, but whether, or to what extent, they can be legitimately pursued at European level. Supporters of a stronger role of the Union in social policy, deem the principle of non-discrimination and the resultant negative law insufficient because they do not tackle the roots of inequality; on the contrary, they are premised on the existing cultural and social divides to be found in the member states. One example of the static nature of the concept of non-discrimination is taken to be the comment of the ECJ—in *Hofmann v.*

Barmer Ersatzkasse—that the 1976 Equal Treatment Directive was "not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents" (cited in Ellis 1998: 323). This attitude is considered too timid. What is required if real equality of opportunity is to be achieved, social-rights activists argue, is "law and policy which encourage a degree of social engineering and transform some of the ways in which our lives are presently organized" (ibid.: 324).

Such sweeping legal and policy changes are incompatible with the nature of a system based on the principles of subsidiarity, proportionality, and enumerated powers, but activists hope that the EU may evolve into a political union with the legal and financial resources needed to enforce all kinds of positive social rights—and thus able to overcome the institutional asymmetry between the two modes of integration. Unfortunately, such a vision is not shared by a majority, or even a significant minority, of European citizens. As long as federalist aspirations continue to enjoy only elite support, the legitimacy of the integration process, such as it is, will continue to depend largely on negative integration, see section 9. The principle of non-discrimination may not tackle the roots of inequality, yet its enforcement by the ECJ has improved the quality of the democratic process in the member states; while an activist social policy would aggravate the EU's legitimacy problem: instead of generating a sense of transnational solidarity it would reinforce the popular image of an ever-expanding and highly bureaucratized Union. In fact, the historical experience of both the American New Deal and the European welfare states shows that the expansion of redistributive social policies has been one of the main causes of political and administrative centralization in the twentieth century.

When comparing the two modes of integration another factor should be taken into account. While the outcomes of positive-integration policies are uncertain, in part because of their dependence on implementation by national bureaucracies with their different methods and uneven levels of efficiency, the results of negative integration are clear-cut, and generally implemented, albeit reluctantly, by the affected member states. The power of negative integration was again revealed by the ECJ's decision of October 2007 against a German law protecting Volkswagen from hostile takeovers—a significant legal victory for the Commission, which, in an effort to get rid of the law, had taken the German government to court in October 2004. This victory followed the decision of Microsoft to surrender in its nine-year battle with the Commission over its dominance of the software market. Microsoft agreed to apply the decision globally, thus acknowledging that the Commission's reach as a competition regulator extends beyond Europe. More recently, the Commission has imposed a record fine of euro 1.06 billion on Intel, and called for changes in the way the company sells its microprocessors. According to *The Wall Street Journal* of May 14, 2009,

the decision "confirmed the EU's role as jurisdiction of choice for U.S. tech companies seeking redress from larger competitors". Comparing such results with the failure, or limited success, of so many positive-integration policies (see, for example, Majone 2005: 111-138) we can see that negative integration still works—even in a period of growing doubts about the effectiveness of the EU.

Under a negative-integration regime, most regulatory responsibilities would be left with the people most directly affected by a given problem, and who have to bear the costs of regulation. As far as market regulation is concerned, the tasks of the European institutions would consist primarily in monitoring the behaviour of national regulators to make sure that they do not abuse their autonomy for protectionist purposes, or to violate rights guaranteed by European law. Where the functional requirements of the common market require some type of harmonization, this could be achieved by a variety of methods: ex-post harmonization brought about by regulatory competition; statutory regulations developed and implemented by transnational regulatory networks; greater reliance on (non-binding) international standards; self regulation. Centralized, top-down harmonization would become an instrument of last resort. In addition to monitoring the activities of the national regulators, the European institutions would enforce the rules regulating inter-state competition, the importance of which as a device for the revelation of the preferences of the citizenry will be discussed in section 6.

2. Rise and decline of regulatory harmonization

Harmonization of national laws and regulations is one of the three legal instruments available to the Commission for establishing and maintaining the common market—the other two being liberalization and the competition rules. While liberalization and the rules against anticompetitive behaviour are modes of negative integration, centralized harmonization is the main tool of positive integration. For this reason the crisis of harmonization, to be discussed in this and in the three following sections, has implications for the entire policymaking machinery of the EU.

From the early 1960s to the mid-1970s, the Commission's approach to harmonization was characterized by a distinct preference for detailed measures designed to regulate exhaustively the problems under consideration, to the exclusion of previously existing national laws and regulations—the approach known as *total harmonization*. Under total harmonization, once European rules have been put in place, a member state's capacity to apply stricter rules by appealing to the values mentioned in Article 36 of the Treaty of Rome—such as the protection of

the health and life of humans, animals, and plants—is out of question. Total harmonization corresponds to what in the language of American public law is called "federal pre-emption", and it does indeed reflect early federalist aspirations. For a long time the ECJ supported total harmonization as a foundation stone in the construction of the common market. By the mid-1970s, however, it had become clear that total harmonization "confers on the Community an exclusive competence which it is simply ill-equipped to discharge…The Community lacks the expertise and the institutional maturity to exclude the participatory role of national authorities" (Weatherill 1995: 154). At the same time, mounting opposition to what the new member states considered excessive centralization convinced the Commission that harmonization had to be used so as not to interfere too much with the regulatory autonomy of the national governments. The emphasis shifted from total to optional and minimum harmonization, and to mutual recognition. Optional harmonization aims to guarantee the free movement of goods, while permitting the member states to retain their traditional forms of regulation for goods produced for the domestic market. Under minimum harmonization, the national governments must secure the level of regulation set out in a directive but are permitted to set higher standards--provided that the stricter national rules do not violate Community law. Finally, the mutual recognition of national laws and standards does not involve the transfer of regulatory powers to the supranational institutions, but nevertheless restricts the freedom of action of national governments, which cannot prevent the marketing within their borders of a product lawfully manufactured and marketed in another member state.

The idea that economic integration demands extensive harmonization of national laws and regulations has been criticized by a number of distinguished economists since the early years of the EC. According to Harry Johnson, for instance, "[t]he need for harmonization additional to what is already required of countries extensively engaged in world trade is relatively slight…The problems of harmonization are such as can be handled by negotiation and consultation according to well-established procedures among the governments concerned, rather than such as to require elaborate international agreements" (Johnson 1972, cited in Kahler 1995: 12). Against the harmonization bias of the literature on economic integration, Johnson argued that the gains from harmonization should be weighed against the welfare losses caused by harmonized rules not tailored to national preferences except in a rough, average sense. The welfare losses entailed by centralized harmonization has become a major theme in the recent literature on free trade and harmonization (Bhagwati and Hudec 1996), but has been largely ignored by EU policymakers and analysts. The first crisis of harmonization was initiated by the member states' loss of trust in the capacity for self-restraint of the European institutions, rather than by a clear realization of the welfare losses potentially caused by the method.

The Treaty of Maastricht defined for the first time new European competences in a way that actually limited the exercise of Community powers. For example, Article 126 (now Article 149 EC) adds a new legal basis for action in the field of education, but policy instruments are restricted to "incentive measures" and to recommendations: harmonization of national laws is explicitly ruled out. Likewise, Article 129 (Article 152 EC) creates specific powers for the Community in the field of public health protection, but this competence is highly circumscribed as subsidiary to that of the member states; harmonization is again ruled out. The other provisions of the Treaty—defining new competences in areas such as culture, consumer protection, and industrial policy—are similarly drafted. Unwilling to continue to rely on implicit powers, which seemed out of control, the framers of the TEU opted for an explicit grant that delimits the mode and the reach of action (Weiler 1999). The same approach has been followed by the Treaties of Amsterdam, Nice, and Lisbon.

In its *Tobacco Advertising* judgment of October 2000—annulling for the first time a measure adopted under the co-decision procedure—the ECJ showed how seriously the limits on the Community's regulatory powers are taken today. The Court argued that recourse to Article 95 (on the harmonization of national laws and regulations) must be aimed at improving the conditions of the internal market, not at market regulation in general. As the requirements for resorting to Article 95 had not been fulfilled—the prohibition of all forms of tobacco advertising neither facilitated trade nor contributed to eliminate distortions of competition—Directive 98/34 was annulled. Such care in spelling out the limits of the conferred powers reveals growing awareness of the fact that "harmonization tended to be pursued not so much to resolve concrete problems encountered in the course of constructing the common market as to drive forward the general process of integration". This, professor Dashwood continues, "was bound to affect the judgment of the Commission, inclining it towards maximum exercise of the powers available under Article 100 and towards solutions involving a high degree of uniformity between national laws" (Dashwood 1983: 194). One of the unanticipated consequences of the latest enlargements of the Union has been to call attention to the welfare costs of harmonization—the issue economist Harry Johnson raised in the early 1970s, but which has been ignored for thirty years.

3. The changing cost-benefit calculus of harmonization

Growing socioeconomic heterogeneity is likely to become an even more serious obstacle to centralized harmonization than opposition to the Commission's centralizing tendency. Because significant cross-country differences in socioeconomic conditions are necessarily mirrored in a diversity of national priorities, welfare-enhancing regulations have to be different rather than

harmonized. This means that each new enlargement of the EU is likely to change the calculus of the benefits and costs of harmonized rules. The economic theory of clubs, originally developed by James Buchanan (1965) and further developed by Alessandra Casella to study the regulatory implications of expanding markets, provides a useful perspective on the socioeconomic limits to top-down harmonization:

> Once we recognize that standards are public goods fulfilling specific functions deemed desirable by the community that shares them, it becomes clear that they must reflect the characteristics of the community: preferences, endowments, and technological possibilities and constraints. Two conclusions follow. First, we expect different communities to need and have different standards. There is no presumption that in general standards should be the same across economies, even when they fulfil the same function, since other characteristics of the economies will differ…Second, standards should change as these characteristics change: standards are endogenous (Casella 1996: 124).

It follows that "opening trade will modify not only the standards but also the coalitions that express them. As markets…expand and become more heterogeneous, different coalitions will form across national borders, and their number will rise" (ibid.: 149). The relevance of these arguments extends well beyond the narrow area of standard-setting. In fact, Casella's emphasis on heterogeneity of endowments and preferences as the main force against centralized harmonization and for the multiplication of "clubs" suggests an attractive theoretical basis for the study of differentiated integration in the EU (see below and Majone 2009a, chapter 8).

Before proceeding with the argument we need to introduce the key concepts of Buchanan's theory. *Pure public goods*, such as national defence or environmental quality, are characterized by two properties: first, it does not cost anything for an additional individual to enjoy the benefits of the public goods, once they are produced (*joint-supply property*); and, second, it is difficult or impossible to exclude individuals from the enjoyment of such goods (*non-excludability*). A *club good* is a public good from whose benefits individuals may be excluded—only the joint-supply property holds. An association established to provide excludable public goods is a *club*. Two elements determine the optimal size of a club. One is the cost of producing the club good—in a large club this cost is shared over more members. The second element is the cost to each club member of the good not meeting precisely her individual needs or preferences. The latter cost is likely to increase with the size of the club. The optimal size is determined by the point where the marginal benefit from the addition of one new member, i.e. the reduction in the per capita cost of producing the good, equals the marginal cost caused by a mismatch between the characteristics of the good and the preferences of the individual club members. The important question is: what happens as the society becomes more complex, perhaps as the result of the integration of previously

separate markets? Casella shows that under plausible hypotheses the number of clubs tends to increase as well, since the greater diversity of needs and preferences makes it efficient to produce a broader range of club goods. The two main forces driving the results of her model are heterogeneity among the economic agents, and transaction costs—the costs of trading under different standards. Generally speaking, harmonization is desirable only when the market is small and relatively homogeneous.

Think now of a society composed not of individuals, but of states. Associations of independent states (alliances, leagues, confederations) are typically voluntary, and their members are exclusively entitled to enjoy certain benefits produced by the association, so that the theory of clubs is applicable to this situation. Actually, since excludability is more easily enforced in the context envisaged here, many goods that are purely public at the national level become club goods at the international level (Majone 2005: 20-21). The club goods in question could be collective security, policy coordination, common technical standards, or tax harmonization. In these and many other cases, countries unwilling to share the costs of producing the goods are usually excluded from the benefits of inter-state cooperation. Now, as an association of states expands, becoming more diverse in its preferences, the cost of uniformity in the provision of such goods—harmonization—can escalate dramatically. The theory predicts an increase in the number of voluntary associations to meet the increased demand of club goods more precisely tailored to the different requirements of various subsets of relatively homogeneous states. It should be clear now why growing heterogeneity in the EU is such a serious problem for regulatory harmonization; not only for total harmonization, which is seldom used nowadays, but even for minimum harmonization. Today, income inequality, as measured by the Gini coefficient, is greater in the socially-minded EU than in the arch-capitalist USA. Hence, it is increasingly difficult to ignore the welfare costs of harmonized regulations. In fact, heterogeneity is an obstacle not only for regulatory harmonization, but also for its main alternative: the mutual recognition of national regulations.

4. The limits of mutual recognition

Since the landmark *Cassis de Dijon* ruling (1976), it has been thought that harmonization problems, whatever their source, could be overcome by appealing to the principle of mutual recognition. Unfortunately, also mutual recognition presupposes more homogeneity (and more trust) between countries than can be assumed in the present Union. Growing popular resistance to both top-down harmonization and mutual recognition is the reason why the integration of the national markets for services has proved to be so problematic. “Is Europe still capable of moving forward?” asked the

editorial of *Le Monde* of 16 February 2006. The topic was the draft Services Directive then being considered by the EP. The editorialist of the influential French newspaper stated very clearly the dilemma facing the EU today. On the one hand, integration of the market for services is indispensable: with agriculture and industry no longer creating new jobs, only the services sector—which counts for more than 70 per cent of the GDP of industrialized countries--can contribute decisively to a reduction of the high level of unemployment in the eurozone. On the other hand, in a socially and economically highly differentiated Union, such integration implies serious social problems, in particular with respect to wages. In fact, Directive 2006/123/EC seeking to facilitate the exercise of the freedom to provide services became the most controversial piece of EU legislation in recent history. Previous directives liberalizing particular services--such as Directive 89/646 on credit institutions, the "Second Banking Directive"--had relied on mutual recognition and the country-of-origin principle, i.e., home-country control. Also Directive 89/48, which aimed to create a single market for the regulated professions, did not attempt to harmonize the length and subject-matters of professional education, or even the range of activities in which professionals can engage. Instead, it relied on mutual recognition to prevent member states from denying access to, or the exercise of, a regulated profession on their territory to EU citizens who already exercise, or could legitimately exercise, the same profession in another member state. The question is why an approach which had been used without serious problems in the 1980s should become so controversial some twenty years later.

Like the previous directives based on mutual recognition, the draft Services Directive presented in early 2004 by Internal Market Commissioner Bolkestein was based on home-country control. Bolkestein was convinced that this was the only way to dismantle the many regulatory and bureaucratic obstacles still remaining at the national level, and to make access to the market for services as automatic as possible. The draft did not address sectors already covered by European regulations, such as the directives dealing with "posted workers" working for no more than twelve months in another EU country; it only aimed to complement such measures. The most controversial aspects of the draft directive had to do with the conditions applicable to workers providing cross-border services. In principle such movement falls under the 1996 Directive on the Posting of Workers, by which *host-country* conditions are always imposed on posted workers (except for social security dues). Thus, a French firm hiring a Polish construction worker must apply French standards and regulations, and offer a French wage and French working hours. One may assume that under such conditions the firm has few incentives to hire Polish or other East-European workers; as a result, labour mobility across Europe is severely restricted.

The 2004 Bolkestein draft explicitly stated that the directive on posted workers would not only remain in force, but in case of conflicting rules it would prevail over the new directive. The proposed regulation focused instead on the temporary provision of services rendered by self-employed individuals in another EU country. Article 16 of the draft stated: "Member States shall ensure that [service] providers are subject only to the national provisions of their Member State of origin". According to economist Kostoris Padoa-Schioppa (2007: 741), "[t]his sentence by itself, if adopted, would have implied a true revolution. That was so well understood by trade unions, by protected employees and by their parties in continental Western Europe that they aimed only at its cancellation, after massive demonstrations where they pretended to represent social Europe". The Services Directive finally approved in December 2006--against the strong opposition of East European governments--made no reference to the home-country principle, so that the host-country rule now applies to self-employed and to employee workers. As a matter of fact, the new directive does little more than restate principles that have evolved in the case law concerning the freedom to provide services, and the freedom of self-employed professionals and companies to set up the base of their operations anywhere in the EU ("freedom of establishment").

A recent reconstruction of the history of the Services Directive from the initial draft to the approval by the EP and the Council of the final, watered-down, text in December 2006 concludes that "[t]here is little doubt that the EU's biggest enlargement since its inception conditioned the reactions to the services proposals…the level of differences in national regulatory and legal settings was becoming too great to sustain the permissive consensus on liberalization that had (more or less) prevailed until then" (Nicolaïdis and Schmidt 2007: 724). The campaign against the "Frankenstein Directive"—as the Bolkestein draft had been renamed by its opponents—could elicit popular support because diffuse fears of "social dumping" and wage competition, previously associated with globalization, now had a specific (East-) European focus. After eastern enlargement public opinion could be fed concrete images such as that of the "Polish plumber" taking away jobs from French workers—an intentionally deceptive symbol since France has a minimum-wage law, but one which played a role in the rejection of the Constitutional Treaty, as well as in the fate of the Bolkestein draft.

After passage of the watered-down services directive, some economists predicted that it would take a decade, or more, to have an internal market for services. However, such predictions were based on the assumption of rapid economic convergence between the new member states and the old EU-15—a doubtful assumption in view of the fact that the process of enlargement is far from being concluded. Thus, Nicolaïdis and Schmidt (2007) report that in Poland Solidarność justified its opposition to the Bolkestein draft by pointing to the risk that Polish workers would soon

suffer from wage differentials with Ukrainian workers. Obviously, the argument could be repeated with each new enlargement bringing in countries whose GNP is considerably below the EU average, say, the Balkan countries or Turkey.

The principle of mutual recognition is supposed to play a key role also in the area of Justice and Home Affairs (JHA). At the Tampere European Council of 1999 it was decided that this principle should become a cornerstone of judicial cooperation in both civil and criminal matters within the EU. The first, and symbolically most important, measure to apply mutual recognition in JHA was the Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW). According to this measure, a decision by the judicial authority of a member state to require the arrest and return of a person should be recognized and executed as promptly and as easily as possible in the other member states. Being based on mutual recognition, the EAW Framework Decision presupposed the essential equivalence of national standards, in this case standards of criminal law. For this reason the Ministers of Justice of the EU had initially agreed to limit the application of the Decision to the members of the old EU-15, where the assumption of equivalence of standards of criminal law was likely to be more easily satisfied. The agreement was later reversed by the Committee of Permanent Representatives on political grounds, but the initial doubts were apparently justified: recent decisions by national courts show that the necessary level of trust in each other's judicial systems cannot be assumed (Lavenex 2007).

5. Social harmonization

Let us return to regulatory harmonization. One of the standard arguments in favour of top-down harmonization of national laws and regulations is the need to prevent the possibility that the members of the EU take advantage of the single European market to engage in a competitive lowering of social standards ("social dumping") in order to attract foreign investments. Indeed, many measures of positive integration in the areas of health, safety, and environmental regulation, have been justified by the argument that without EU-level harmonization member states would engage in a socially undesirable 'race to the bottom'; i.e., they would compete for industry by offering social standards that are too lax relative to the preferences of their citizens. It is not difficult to show, however, that the argument is unsound—not only in our case, but generally. Following Revesz (1992) we may take the simplest case of two states that are identical in all relevant aspects, including (say) the level of environmental quality desired by their citizens. State 1 initially sets its standard of pollution control at the level that would be socially optimal if it were a completely independent country. State 2 then decides to set a less stringent standard, and we assume that

industrial migration from State 1 to State 2 will ensue. To recover some of its loss of jobs and tax revenues, the first state then considers relaxing its own standard, and so on. The process of adjustment continues until an equilibrium is reached. At the conclusion of the race, both states will have adopted sub-optimally lax standards, but will have roughly the same level of industrial activity as before engaging in the race. If the two states could enter into a cooperative agreement to adopt the optimally stringent standard they could maximize aggregate welfare without engaging in 'unfair' competition for industry. This presupposes, of course, that the agreement is enforceable and that preferences for environmental quality are about the same in the two jurisdictions. As long as the jurisdictions are independent states, any cooperative agreement would lack credibility, but the situation is different if they are part of a federal or quasi-federal system. In such a case the sub-optimal outcome could be avoided if national environmental standards were harmonized—*provided* that the harmonized standards were equal to the standards the two states would find optimal if they were independent. The proviso about the equality between the harmonized and the optimal national standards is crucial; it implies what has already been noted above, namely that in a highly heterogeneous union of states, rules that maximize welfare should be different rather than harmonized. If the level of socioeconomic heterogeneity is high, even a minimum common standard reduces aggregate welfare--unless the minimum is lower than all the national standards, in which case it is useless.

Moreover, Revesz points out that the race-to-the-bottom argument is incomplete because it fails to consider that there are more direct means of attracting foreign investments than lowering social standards. The advocates of social harmonization implicitly assume that states compete over only one variable, such as environmental quality or labour costs. Given the assumption of a "race", however, it is more reasonable to suppose that if harmonization prevents competition on the social dimension, states would try to compete over other variables, such as taxation of corporate profits. To avoid such alternative "races", the central regulators would have to harmonize national rules, so as to eliminate the possibility of any form of inter-state competition altogether. This would amount to eliminating any trace of national autonomy, so that the race-to-the-bottom argument is, in the end, an argument for centralization and against subsidiarity.

Naturally, the fear of social dumping is not the only rationale for harmonization of social standards. A more plausible argument for EU-wide harmonization is the need to dismantle non-tariff barriers to trade within the Single Market. Even in this respect, however, ex ante, top-down harmonization may have been pushed too far. A number of case studies have shown that the costs imposed by social standards are only a minor consideration in the location decisions of multinational firms: quality of infrastructure, education of the labour force, or political stability are

much more important factors influencing their decisions (Majone 2005: 153-5). Today it is also recognized that an initial difference in health, safety, or environmental standards need not distort international trade; rather, it is trade itself that leads to their eventual convergence. The reason is that the level of social standards is positively correlated with the standard of living: as wealth grows as a result of more inter-state trade, the endogeneous demand for higher social standards grows as well. As a matter of fact, the 1957 Treaty of Rome rejected the view that differences in social conditions between the member states represent a form of 'unfair' competition, so that social regulations ought to be harmonized prior to, or concurrently with, trade liberalization within the common market. Rather, the Treaty, and the authors of the Treaty's precursor, the Spaak Report, assumed that social harmonization should in general be regarded as a corollary of, rather than a requirement for, market integration: a rapid amelioration of living standards throughout the Community would bring about an ex-post harmonization of social conditions, (Sapir 1996). This assumption has proved to be largely correct, at least in the old EC/EU.

6. Inter-state competition as a preference-revelation device

The theory of clubs explains why in an expanding and increasingly diversified polity, net aggregate welfare is enhanced, not by centralized harmonization, but by allowing a variety of rules tailored to the resources and preferences of different communities. This line of reasoning can be further strengthened by the argument that inter-state or inter-jurisdictional competition, as well as policy innovation and learning, are more likely to occur in a decentralized system. Thus, policies that prove to be politically unfeasible in the EU at large might be acceptable to the members of a smaller, more homogeneous subset of states. Instead of compromise solutions that do not really satisfy anyone, genuine policy innovations would become possible—albeit on a smaller scale—and other members of the Union could later draw lessons from the practical experience of the pioneering states. In this way the "clubs" forming within the Union could effectively become policy laboratories, without the bureaucratic complications and background noise that necessarily arise when all the member states are expected to participate in the experiment, as in the case of the Open Method of Coordination (OMC), see below.

In an important contribution to the economic theory of politics and public finance, André Breton (1996) has shown that competition within and between governments drives democratic politics to equilibrium outcomes by revealing the citizenry's demand functions for public goods and services. Rules on market competition are a key element of the EU institutional framework. As already mentioned, a common European market would be practically impossible without such rules;

but this pro-competitive philosophy does not extend to inter-jurisdictional competition—in particular to competition between different national approaches to economic and social regulation. Indeed, a well-known legal scholar maintains that regulatory competition is incompatible with the notion of undistorted competition in the internal European market. For this reason the UK—the member state which has most consistently defended the benefits of inter-state competition—has been accused of subordinating individual rights and social protection to a free-market philosophy incompatible with the basic aspirations of the European Community: "Competition between regulators on this perspective is simply incompatible with the EC's historical mission" (Weatherill 1995: 180). Unsurprisingly, Breton finds that in the EU inter-country competition has been virtually suppressed through excessive policy harmonization. His conclusion is worth quoting here: "[in the Union] competition is minimized through excessive harmonization of a substantial fraction of social, economic, and other policies…if one compares the degree of harmonization in Europe with that in Canada, the United States, and other federations, one is impressed by the extent to which it is greater in Europe than in the federations" (Breton 1996: 275-6).

The Canadian economist points out that part of the opposition to the idea that governments, national and international agencies, vertical and horizontal networks, and so on, should compete among themselves derives from the widespread notion that competition is incompatible with, even antithetical to, cooperation. He cogently argues that this perception is mistaken. Excluding the case of collusion, cooperation and competition can, and generally do, coexist, so that the presence of one is no indication of the absence of the other. In particular, the observation of cooperation and coordination does not per se disprove that the underlying determining force may be competition. If one thinks of competition not as the *state* of affairs neoclassical theory calls "perfect competition", but as an *activity*—à la Schumpeter and Hayek—then it becomes plain that "the entrepreneurial innovation that sets the competitive process in motion, the imitation that follows, and the Creative Destruction that they generate are not inconsistent with cooperative behaviour and the coordination of activities" (ibid.: 33). Given the appropriate competitive stimuli, political entrepreneurs, like their business counterparts, will consult with colleagues at home and abroad, collaborate with them on certain projects, harmonize various activities, and in the extreme case integrate some operations—all actions corresponding to what is generally meant by cooperation and coordination.

In some governmental systems the potential movement of citizens from one jurisdiction to another offering comparable services at lower cost may act as a stimulus to intergovernmental competition. According to the so-called Tiebout hypothesis, inter-jurisdictional competition results in communities supplying the goods and services individuals demand, and producing them in an efficient manner. Breton, following Pierre Salmon, extends this hypothesis to governmental systems

where Tiebout's potential entry and exit mechanisms do not work effectively, for instance because mobility is limited by language and/or cultural and social cleavages, as in the EU. The extension consists in assuming that the citizens of a jurisdiction can use information about the goods and services supplied in other jurisdictions as a benchmark to evaluate the performance of their own government. This is of course the idea underlying the OMC, but the results of the method so far have been disappointing (Majone 2009a). One important reason is that national parliaments are largely excluded from the OMC process, so that citizens are unable in practice to use information about the performance of other member states to induce their government to improve its own. Hence, the stimulus to intergovernmental competition which is assumed by the proposed extension of the Tiebout hypothesis, is missing.

Like market competition, interstate competition needs clear rules and forceful competition regulators. Hence, in the model of differentiated integration suggested here—a variety of "clubs" cooperating and competing within a general framework of common rules, preferably legitimated by referendums to be held simultaneously in all the member states--the European Commission and Court would still play a crucial role in enforcing both the rules of negative integration, and the meta-rules of inter-jurisdictional competition. Many people will strongly object to the idea of a Union limited to managing negative integration and monitoring inter-jurisdictional competition. In the remainder of this paper I argue that the opportunity cost of giving up overly ambitious goals is not as high as it is often assumed—indeed, there may be a net gain in legitimacy.

7. Integrationist myths

Let me start by recalling Martin Lipset's point that legitimacy and effectiveness are distinct but closely related concepts, especially in the case of new political systems: if a new polity is unable to sustain the expectations of major groups for a long enough period to develop legitimacy on a new basis, then a serious legitimacy crisis is likely to arise, sooner or later (Lipset 1960: 64-70).To which extent has the EC/EU been able to sustain the expectations of the majority of Europeans? The opening lines of the Commission's White Paper on *European Governance* claim: "European integration has delivered 50 years of economic prosperity, stability and peace. It has helped to raise standards of living, built an internal market and strengthened the Union's voice in the world. It has achieved results which would not have been possible by individual Member States acting on their own" (Commission 2001: 9). The same optimistic message is reiterated by EU leaders on every possible occasion. In reality the accomplishments celebrated by the political elites are more in the nature of legitimating myths than actual achievements of the integration process (Majone 2009a:81-

90). This is not to deny that such myths, like all myths, contain a grain of truth. It is certainly true that since the end of World War II Europe has experienced unprecedented prosperity. The doubts concern, not the evidence of economic progress, which gives the myths the necessary plausibility, but the causal role of the integration process in the economic development of the continent. If that causation cannot be clearly determined—and most accurate quantitative studies indicate that the gains from the Common Market were very small in relation to the increases in income that the member states enjoyed in the 1950s and '60s—then it must be admitted that the myth of fifty years of prosperity made possible by European integration rests on the *post hoc, ergo propter* hoc fallacy: inferring a causal connection from a mere sequence in time. Between 1950 and 1970 Europe was the fastest-growing region in the world, Japan excepted. During this period European GNP grew on average by about 5.5 per cent per annum, and industrial production by 7.1 per cent (compared to a world rate of 5.9 per cent), so that by the end of the period output per head in Europe was almost two and a half times greater than in 1950. However, "this growth was shared in all parts of the continent—in northwestern Europe's industrial core, in the Mediterranean lands, in eastern Europe; even the sluggish British economy grew faster during this period than it had for decades" (Kennedy 1987: 421). In sum, the earliest stages of economic integration of the six original members of the EEC could not have played a significant causal role in the impressive post-war development of Europe.

After the phase of very rapid catch-up with the United States, moreover, convergence in the levels of per capita income stopped at the beginning of the 1980s and has remained unchanged since, at around 70 per cent of the U.S. level. A common trade policy, extensive harmonization of national laws and regulations, the Single Market Programme, finally a centralized monetary policy, apparently made no difference as far as the economic performance of the EC/EU, relative to its major competitors, was concerned. While the American economy was generating employment as well as maintaining working hours, Europe's employment performance was weak and working hours fell consistently: "Overall growth slowed from the 1980s, which itself had slowed from the 1970s, in spite of the implementation of far-reaching reforms in both the macro-environment (consolidation of public finances and lower inflation, EMU) and micro-environment (Single Market Programme, Uruguay Round and to a certain extent labour market reform)" (Sapir *et al.* 2004: 25).

The will to improve poor economic performance has driven EU policy over the last thirty years: from the Single Market Programme, meant to be a response to perceived "Eurosclerosis" in the 1970s and '80s, to EMU in the 1990s, and to the "Lisbon Strategy" in the following decade. At the summit held in the Portuguese capital in March 2000, the European Council announced two unrealistic objectives: by 2010 the EU should become the "most competitive, knowledge-based

economy in the world"; in the same period it should grow at an annual average rate of 3 per cent, so as to create 20 million new jobs. In fact, the data show that, far from closing the gap, and then overtaking the U.S. economy, the EU as a whole continues to lag behind in terms of employment and productivity, and in most years also in terms of growth rates. Although generally ignored by writers on the democratic deficit, the ineffectiveness of many EU policies has significant implications for the legitimacy and stability of the EU system. Michael Shackleton (1998) has argued that it is not necessary for the EU to meet the same level of legitimacy as its member states, provided it delivers a reasonable level of benefits in terms of efficiency. This may be true, but the problem is that only pro-integration elites seem to agree that the EU satisfies even Shackleton's modest standard.

Disappointed expectations are one important, if not the main, reason why the EU, instead of progressively attracting the loyalty of its citizens, is becoming less popular with the years. "The Union is losing touch with citizens on concrete issues", warned the EU foreign ministers, at a meeting on 16 June 2008, after the Irish voters had rejected the Lisbon Treaty. Indeed, the concomitance of the referendum with protests across Europe against rising food and energy prices underlined a loss of confidence among significant parts of the electorate in the EU's ability to deal with everyday issues. Inflation and economic stagnation had hit hard the European economy also in the 1970s, yet few people at the time accused the EC of being unable to deal with everyday issues. The politically significant new factors in the present legitimacy crisis are: the end of what has been called the "permissive consensus" of the 1960s and '70s; the growing divergence between elite and popular estimations of the value added by integration; and, at the most basic level, the steady expansion of supranational competences without a corresponding growth either in problem-solving capacity or in normative resources. Since its beginning, the process of European integration has been driven by economics. Indeed, the essence of the Monnet method consists in pursuing political integration under the guise of economic integration--integration by stealth. The major risk of this strategy is that poor economic performance over a period of decades may undermine the normative foundations of the entire integration project.

What about the claim that European integration delivered fifty years of peace and stability, and strengthened the Union's voice in the world? Peace in Europe as the greatest achievement of the integration process is the commonest of commonplaces of Euro-rhetoric, but largely a fiction nevertheless—in fact, another instance of the *post hoc, ergo propter hoc* fallacy. It is certainly true that since the end of World War II Western Europe has enjoyed more than half a century of uninterrupted peace. Doubts concern, once more, the causal role of European integration in this achievement. A moment's reflection suggests that it is hardly believable that after the disastrous

results of two world wars in fifty years, West European states had either the resources or the will to use again military means to resolve their conflicts. This is precisely the conclusion Albert Hirschman had reached almost thirty years ago: "[T]he European Community arrived a bit late in history for its widely proclaimed mission, which was to avert further wars *between* the major Western European nations; even without the Community the time for such wars was past after the two exhausting world wars of the first half of the twentieth century" (Hirschman 1981: 281; emphasis in the original). In the same essay Hirschman advanced the "ironic conjecture" that although the EC had arrived too late to claim to have averted further wars between European countries, it could nevertheless have as one of its important missions "the avoidance of civil wars or wars of secession *within* some of the Western European countries, as it provides the newly secession-prone regions with novel channels for voice" (ibid.; emphasis in the original). It is doubtful, however, that the EU has either the moral or the institutional resources necessary to intervene in conflicts of this type. Being one of the founding members of the EC, and actually hosting its headquarters, has not helped the people of Belgium to bridge the deep division between Flemish and Walloons which undermines the foundations of their federation. According to some Flemish leaders "it is the entire Belgian construction that is going to implode" (*Le Monde* of 27 August 2007), but no mention has ever been made of a potential mediating role by the EU. Neither is it the case that Spain's membership in the Union has helped terminate four decades of violence in the Basque region that has claimed more than 800 lives. Northern Ireland seems to have finally found peace, but the EU as such hardly played a role in the peace process.

Performance has been even more disappointing in the EU's "near abroad". When the Yugoslav crisis broke out in June 1991, Jacques Poos, the rotating president of the European Council, unwisely declared: "This is the hour of Europe, not the hour of the Americans" (cited in W. Wallace 2005: 437). Unfortunately, the EU proved unable to enforce stability and peaceful coexistence among the peoples of the former federation, and had to appeal to the United States for help. The civil war in Bosnia was ended by the intervention of the American superpower, which also mediated and guaranteed the Dayton Agreement of November 1995 between Serbs, Croatians, and Moslems. Again in 1999, this time in Kosovo, the EU was forced to ask the military assistance of the United States; an assistance President Clinton would provide only under the condition that the war be conducted on American terms, i.e. only from the air, and on targets selected by the US military—with the well-known disastrous consequences for the population and the civilian infrastructure of Serbia. On a number of other occasions the EU—"one of the most formidable machines for managing differences peacefully ever invented," according to some starry-eyed academics (Menon et al. 2004:11)--proved incapable of taking at least adequate diplomatic and

economic sanctions. Thus, it failed to impose sanctions on Uzbekistan when in May 2005 the armed forces of that country opened fire on peaceful demonstrators in the city of Andijan, probably killing several hundreds. The EU expressed horror at the worst massacre of demonstrators since Tiananmen Square, but in practice it displayed, in the words of the editorialist of *The Economist* of August 27th 2005, a "spinelessness worthy of a sea full of jellyfish".

Finally, a small but influential body of elite opinion sees not only economic, but also political integration as steps toward the ultimate goal of a "Social Europe". Only a strong social dimension, they claim, can legitimate the process of European integration, and rescue the national welfare state threatened by globalization. After the rejection of the Constitutional Treaty, then Belgian Prime Minister Guy Verhofstadt claimed that the French and Dutch voters had opposed the treaty, not because it was too ambitious, but because it did not go far enough in the direction of a supranational welfare state. Also Juergen Habermas explained the failure of the draft Constitution primarily as an indication of the opposition of the voters to the neo-liberal bias of the document, and as an expression of popular demand of a more welfare-oriented Union. In an article in the *Sueddeutsche Zeitung* of 9 June 2005 Habermas wrote: "If something can be deduced with certainty from the [French and Dutch] vote, it is this: that not all western nations are willing to accept the social and cultural costs of welfare inequality, costs which the neo-liberals would like to impose on them in the name of accelerated economic growth". In reality, European voters, not neo-liberalism, are the real obstacle to the establishment of a European welfare state.

One of the major strengths of the welfare state is the broad electoral base for core social programmes. Naturally enough, the same voters who strongly support the national welfare state also resist any significant transfer of social policy competences to the European level. Eurobarometer data mapping the responses of citizens in the EU-15 with regard to their preferred level of government for social policymaking, indicate that merely one-third of the population is favourable to a shift of social policy competence to the Union (Obinger *et al.* 2005: 556). The only countries where a majority of citizens support social-policy integration are the net receivers of European transfers. If such countries are excluded, then the data show that support for a European social policy has declined among the wealthier member states, and net contributors to the EU budget, at least since the late 1980s. The impossibility of transferring to the supranational level even a "light" version of the existing welfare states implies the political unfeasibility of a European federal state. A full-fledged European federation would face a highly constrained public agenda, being barred from pursuing policies subsidizing particular socioeconomic groups or jurisdictions at the expense of other identifiable groups or jurisdictions. Hence, it could not pursue precisely those redistributive policies that legitimate the national welfare state; and being unable to provide the variety of public

goods citizens of modern welfare states take for granted, it could not attract sufficient popular support—or retain it for long. *Pace* Habermas and Verhofstadt, the root of the EU's democratic deficit is not an alleged social deficit, but a *sui generis* political culture.

8. The primacy of (positive) integration

The core principle of this culture is the primacy of integration. Democracy as well as policy effectiveness have been willingly sacrificed on the altar of integration. Community law, Jean-Paul Jacqué tells us, "s'est vu assigner un objectif économique à court term, la construction d'un marché commun, et un objectif politique à plus long term, la creation d'une Union européenne" (Jacqué 1991:247). Two different objectives with different time horizons inevitably raise a "time-inconsistency" problem. Because democracy is a system of government *pro tempore*, democratic politicians tend to resolve the problem in favour of short-term goals; this is the main rationale for the independence of central banks. In the EC/EU, a political system largely exempt from the uncertainties of democratic politics, the long-term objective generally prevails. Hence the Commission's monopoly of agenda setting (see below), but also measures of positive integration undertaken less to solve problems which could not be tackled at the national level, than as a means of expanding supranational competences. People familiar with policymaking in Brussels discovered this bias long ago. Thus, N.J.D. Lucas, who analyzed Community energy policy from the late 1950s to the mid-1970s, concluded that "sectorial policies will not be designed simply to produce an optimal technical solution, but to some extent will be designed to promote the influence of the Commission and to forward the aim of European political unity…technical soundness need not be a high priority in Commission work" (Lucas 1977: 96-97).

Similar observations have been made in other, very different, policy fields. For example, the Common Fisheries Policy (CFP) has largely failed in its aim of conserving fishery resources, notwithstanding its seeming institutional advantages over other international fisheries regimes. The problem is that the CFP has been shaped more by concerns about Community powers than about effective conservation measures. According to Symes and Crean (1995, cited in Payne 2000: 312) 'the underlying principles of the CFP...have more to do with reinforcing the concept of European unity and co-operation than with effective management of a seriously depleted, highly sensitive and unstable resource. The CFP is a political statement neatly aligned with the Community's general principles, and designed to avoid rocking the European boat'. It should be noted that the conservation part of the CFP is one of the few exclusive competences of the EU (Majone 2005:111-114).

Also insiders have paid tribute to the skill of the Commission in using all the ambiguities built into the European treaties in order to advance integrationist objectives by roundabout means. In the words of one of the first and most influential members of the college of Commissioners: "The Commission was determined to push ahead with the process of integration, not only in the economic field but also from the institutional and political aspects, and to this end to make use of all weapons and methods provided in the [Rome] Treaty and to employ all the opportunities for further development" (von der Groeben 1987: 31). This roundabout strategy—integration by stealth--is made possible by the first rule of the Community Method: "The Commission is independent of the other European institutions; it alone makes legislative and policy proposals" (Commission 2001: 12). The Commission's monopoly of legislative and policy initiative implies that other European institutions, including the parliament, cannot legislate in the absence of a prior Commission proposal. It is up to this institution to decide whether the Community should act and, if so, in what legal form, what should the content be, and which implementing procedures should be followed. The Commission can amend its proposal at any time while it is under discussion, but the Council can amend the proposal only by unanimity. On the other hand, if the Council unanimously wishes to adopt a measure that differs from the Commission's proposal, the latter can deprive the main Community legislator of its power of decision by withdrawing its own proposal. This monopoly of agenda setting granted to a non-elected body represents a violation of fundamental democratic principles that is unique in modern constitutional history (Majone 2009a: 30-32). It is of course true that in contemporary parliamentary systems most legislative proposals are introduced to parliament by the executive as draft legislation. Once legislators receive such proposals, however, they are free to change or reject them, which is not the case under the Community Method.

Some years ago a sympathetic American observer noted: "It is unimaginable that Americans would grant such political power as the Commission staff enjoys to a career bureaucracy. Not surprisingly, the people of Europe increasingly expect democratic accountability by Community political and bureaucratic leaders" (Rosenthal 1990: 303). These words were written a few years after the Single European Act (SEA) greatly extended the Community's competences. It is indeed significant that the issue of the democratic deficit was hardly ever raised before the SEA. The delegation of important policymaking powers to a non-elected body could be normatively justified as long as the Community's powers remained limited. What was originally a marginal trade-off—a small sacrifice of democracy for the sake of greater efficiency in limited areas of economic integration—became a surrender of basic democratic principles as the competences of the EU kept growing. In the early stages of integration, moreover, the primacy assigned to integration could be viewed as a temporary expedient. Neo-functionalist scholars assumed that the superior problem-

solving capacity of the supranational institutions would be sufficiently evident to induce the progressive transfer of the loyalties and political demands of key social groups from the national to the European level. This is what Haas meant by political integration: "Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new centre, whose institutions possess or demand jurisdiction over pre-existing national states" (Haas 1958: 16). The progressive shift of legitimacy to the supranational level has not taken place, quite the contrary. Hence, it is impossible to pretend that the primacy of integration is only a temporary phenomenon.

The willingness of integrationist EU leaders to sacrifice democracy for the sake of deeper integration was again demonstrated at the time of the Maastricht Treaty, when it was decided to give quasi-constitutional status (i.e., a treaty basis) to the independence of the ECB. Before monetary union, the independence of national central banks had only a statutory basis. This meant that in principle national parliaments could always change the rules if they thought the central bank was using its independence in a way of which they did not approve. This was true of the Bundesbank, and is still true of the Bank of England and of the U.S. Federal Reserve. Instead, to change the rules under which the ECB operates requires a treaty revision acceptable to all the member states—a complex and politically hazardous procedure. The net result is that the national parliaments have lost any control over monetary policy, while the EP has no authority in this area. The ECB is free to operate in a political vacuum since there is no true European government to balance its powers, and even the institutions of economic governance are still poorly defined. Unless the holes in the policymaking machinery are filled, authority over the entire domain of monetary policy will continue to flow, by default, to the ECB.

Monetary economists generally agree that the socially optimal delegation of monetary policy is not to a completely independent central bank; rather, governments should have the option of overriding central bank's decisions under some circumstances. This is because there is a trade-off between the competing benefits of commitment to monetary stability and flexibility. But since there is no secretary of the treasury or finance minister at the European level, it is unclear how appropriate procedures for overriding ECB decisions could be designed and enforced. This is a revealing example of how the democratic deficit entails not only normative but also efficiency costs: it deprives the EU of many instruments which democratic governments can use in order to reduce political transaction costs (Majone 2009b).

9. Negative integration improves the democratic process

Every expansion of positive integration unmatched by a corresponding increase of legitimacy and problem-solving capacity can only aggravate the EU's democratic deficit. In contrast, enforcement of the commonly agreed rules of negative integration can improve the quality of democratic life at national level. The importance of negative integration for the protection of individual rights has already been mentioned in section 1. Here I wish to call attention to another positive contribution of negative integration. Contemporary western democracies are constitutional democracies, but 'democracy' and 'constitutionalism' are, both historically and conceptually, distinct ideas. While a constitution is an instrument to limit, control, and divide the power of governments, democracy--at least in its populist version--tends to concentrate potentially unlimited power in the hands of the current majority. According to the populist model, 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' (Spitz 1984, quoted in Lijphart 1991: 485). Today it is generally admitted that a constitutionally unconstrained democracy is not only more unstable but also less efficient than a constitutional democracy. This is because constitutional constraints, like most other constraints, are not only limiting but also enabling. It is only an apparent paradox that Jean Bodin--the first modern theorist of sovereignty and absolutism--was also one of the first political philosophers to point out that limited power is more powerful than unlimited power, and that by closing off some options a ruler can open up others. As he writes in Book IV of the *République*: 'The less the power of the sovereign is…the more it is assured' (cited in Holmes 1995: 115). Bodin understood very clearly that in order to achieve his objectives a king must cultivate a reputation for trustworthiness, and this requires him to play by the rules. In similar fashion, constitutional constraints improve the effectiveness of the modern sovereign—the sovereign people—by guaranteeing property and basic civil rights, limiting arbitrary executive discretion, and enhancing the credibility of long-term policy commitments (Majone 2005: 195-198).

This is the reason why constitutional scholars have been concerned about the 'eclipse of constitutionalism' in twentieth century Europe (Matteucci 1993). During this period, the need to tax, spend, and borrow to finance two world wars and extensive welfare provisions greatly increased the economic role of the state. The constitutional consequence was to strengthen the executive branch of government. The assumption of macroeconomic responsibilities by the 'Keynesian state' further extended the already wide discretionary powers of the executive. In the end, it was inevitable that the old constitutional truth would be rediscovered: that discretionary powers can be abused and that the prevention of such abuse is, to a large extent, a matter of good institutional design (Harden 1994). In Europe the rediscovery of the virtues of constitutionalism has

been greatly facilitated, perhaps made possible, by the process of economic integration. Keynesian policies require not only extensive discretionary powers to 'fine-tune' the economy, but also the separateness of the national economies. The creation of a common European market and the attendant rules of negative integration, meant that governments could no longer pursue protectionist policies within the EC, nor continue to protect public and private monopolies within the national borders. The discipline imposed on state subsidies and on the methods of public procurement further reduced the discretionary powers of the national executives--and the various forms of rent-seeking and political corruption which often accompany administrative decisions in these areas.

The constitutionalization of the EC/EU and the evolution of dispute-resolution mechanisms in the GATT/WTO are notable examples of what, in spite of occasional lapses, appears to be a general trend: the transition from a power-oriented to a rule-oriented approach in international economic relations. Under the former approach, international disputes are settled by negotiations where the relative bargaining power of the parties inevitably counts a great deal. Failure to reach agreement would involve the use of all instruments of retaliation -- economic, political, possibly even military--available to the more powerful country. Understandably, a small country would hesitate to oppose a large one on whom its trade and international position depend. Under a rule-oriented approach, on the other hand, disputes are resolved by reference to norms to which both parties have agreed. The current movement towards a rule-based system of international relations in a sense recapitulates the process of progressive constitutionalization of domestic governance during the last two centuries. Transnational constitutionalism may not be a prelude to transnational democracy, but it can improve the quality of democracy at the national level, as noted above. Its contribution to the practice of democracy consists, to paraphrase Joseph Weiler (1999: 341), in affirming the values of the liberal nation-state by policing its boundaries against abuse.

In order to realize the democratic potential of transnational systems of rules, national parliaments must devise more effective ways of enforcing public accountability at European and/or international level. Concretely, this means that national legislatures should assume an active role in areas traditionally reserved to the executive branch of government. The domain of foreign affairs has historically been regarded as a core executive function over which parliaments have had difficulty in extending their control. Even the 'sovereign' British parliament has failed to establish full control over foreign affairs and treaty-making--historically both aspects of the royal prerogative. In an age of growing interdependence among nations, however, any sharp distinction between 'domestic' and 'foreign' is becoming increasingly difficult to maintain. It is certainly true that European integration has weakened the position of national parliaments to the benefit of political executives, represented in the Council of Ministers, and of the supranational institutions. Nevertheless, some parliaments

have undertaken to react to the challenge of supranationalism by strengthening their control of the executive branch. The most stringent control is through mandate, and the Danish parliament, on accession to the EU, has extended to the supranational level its constitutional power to mandate its ministers in matters relating to European policymaking. No other member state has adopted the mandate model, but everywhere mechanisms are put in place to ensure better control of European policymaking by the national parliaments. Thus, the French Assembly, although handicapped by the exceptionally strong position of the President of the Republic in foreign affairs, and by a constitutional limit on the number of parliamentary committees which could be appointed, was able to circumvent the latter constraint by setting up *délégations* of eighteen members, selected along party lines, which would report on EU matters to their respective chambers (Harlow 2002).

In the UK, the House of Commons in 1980 established the 'parliamentary reserve', prohibiting British ministers in the EU Council of Ministers from giving assent to any proposal subject to scrutiny or awaiting consideration by the House. The principle of parliamentary reserve has been adopted by several other European parliaments, including the French one. Thus, five national parliaments were recorded as placing a reserve on Council discussion of the European arrest warrant in 2002. The House of Lords, with a greater degree of autonomy from government, has reacted to the challenges of European integration even before the House of Commons. The House of Lords Select Committee on the European Communities, established in 1972 with a wide mandate to consider policy as well as draft legislation, concentrates on prior control of policy, preferably at an early stage in the debate. Its expert reports on a wide range of topics, are widely circulated in Brussels, and extensively used by academic specialists on European integration, and by many NGOs. In sum, 'a picture emerges of national parliaments increasingly on the alert, anxious to participate in EU affairs and keen to strengthen machinery for scrutiny of government' (ib.: 91-2).

The very recent judgment of the German Constitutional Court on the Lisbon Treaty goes considerably further in strengthening the position of national parliaments vis-à-vis Brussels. According to the *Bundesverfassungsgericht*, primary responsibility for lawmaking belongs to the national parliaments which, contrary to the EP, do not suffer from any "structural democratic deficit". The Court concluded that no new integrationist moves should be allowed to "undermine the capacity of the national states to shape their own policies". Even more explicitly: "European integration must not be allowed to undermine democracy in Germany". Thus, comments Hans Hoyng in *Spiegel On Line* of 1 July 2009, the Court has explained, to the Germans and to all Europeans, where true democracy is to be found: not in the EU, but at the national level.

10. Concluding remarks

In their background paper for this RECON midterm conference, Eriksen and Fossum express the fear that a significant downscaling of the present EU would imply: a serious loss of the protective apparatus of human rights; a weakening of the constraints on aggressive nationalism; possibly the end of positive-integration measures, including some redistributive schemes; and a loss of organized capacity to make binding decisions. The arguments and data presented in the preceding pages suggest that such fears are either ungrounded, or that the feared losses may be more than compensated by potential benefits. For example, the enforcement of positive rights at the EU level can only increase the democratic deficit for the simple, but often overlooked, reason that such rights--say, the right to education or to a clean environment—entail costs, and hence cannot all be enforced simultaneously. They have to be prioritized and traded off at the margin, and in a democracy such choices are made through the political process rather than by bureaucratic fiat or through interstate bargaining based on opaque package deals. Again, losses of power due to downscaling of EU competences may be more than compensated by the reduction of commitments which exceed the available normative and institutional resources. It was precisely the recognition of the importance of matching commitments and resources that led Tocqueville to observe that " the real weakness of federal [i.e., central] governments [in confederations] has almost always increased in direct proportion to their nominal powers" (cited in Breton 1996: 247). I have argued that reducing the present overload would actually increase the effectiveness of the Union by forcing the supranational institutions to concentrate on what they can do best: monitoring the implementation of commonly agreed rules and the enforcement of rights protected by European law. More concretely, a clearly defined range of tasks would help reduce the democratic deficit by allaying widespread fears of creeping competences and of government by judiciary.

Concerning Model 1, I think it is increasingly difficult to envisage the present EU as a functional regime to address issues which the member states cannot resolve on their own. I have repeatedly stressed that the EU's problem-solving capacity is limited: example of regulatory failures abound (Majone 2005, 2009). Regulatory failure is a well-known phenomenon also at the national level, but there voters can express their dissatisfaction by changing the governing majority at the next elections. Failed European policies and institutions can survive for years, sometimes for decades: EURATOM still manages to survive. At any rate, growing socioeconomic heterogeneity is a key factor behind the mutation of the regulatory regime from positive to negative integration. As suggested by the economic theory of clubs, positive integration above the national level can still be welfare enhancing, but on a scale smaller than the present EU.

While I stress the limitations of the EU as a functional regime, I fully acknowledge its importance as a device to limit the discretionary powers of national governments. Future historians may well consider supranational constitutionalism the greatest contribution of the integration project. This project has also shown how difficult it is to transfer the national model of democracy to the supranational level. The experiment has failed, in spite of the fact that the background conditions were probably more favourable in Europe than in any other part of the world. This, in itself, is a very important lesson, for it shows that the third transformation of democracy—after the direct democracy of the Greeks and modern representative democracy—is very unlikely to be a simple extrapolation of the national model.

More precisely, such an extrapolation would perhaps be possible if a majority of European voters supported the establishment of a full-fledged European federation. I have no doubts that in such a case the institutional architecture of the polity envisaged by Model 2 would satisfy all democratic canons. For the reasons explained in section 7, however, a federalist solution is unfeasible for the foreseeable future. Of course, federalists are entitled to continue their efforts to convert to their credo as many people as possible. What is unacceptable, as well as counterproductive in the long run, is the tendency to pursue strategies of positive integration *as if* the EU was bound to become a federal state. Let me mention some applications of this philosophy: the judicial doctrine of the supremacy of Community law (Article 6 of the U.S. Constitution: "The laws of the United States…shall be the supreme law of the land"—*Bundesrecht bricht Landesrecht*);total harmonization ("federal pre-emption"); monetary union (total harmonization of national monetary policies and consequent federal pre-emption of the field); the CAP (the ECJ has taken the view that member states are precluded from legislating within the field covered by it); the CFP (the member states can no longer enact conservation laws, even if no Community measures have been taken). Hans Vaihinger, the author of *Die Philosophie des Als Ob* (1911; English translation: *The Philosophy of "As If"*, 1924) argued that falsehoods or fictions should be accepted in order to live peacefully in an irrational world. To this end, man must use his will to construct fictional explanations of phenomena "as if" there were rational grounds for believing that they reflect reality. According to the German philosopher, acceptance of false fictions is justified as non-rational solutions to problems that have no rational answer. Personally, I still hope that the problems of European integration—unlike the deeper problems of physics, psychology or ethics considered by Vaihinger—may find rational, or at least reasonable, solutions.

I am not sure I understand Model 3: it has to be specified more precisely before it can be usefully discussed in general terms. Let me raise only a few specific issues. First, the model posits that the EU's democratic legitimacy can be based on public debate, multi-level democratic decision-

making, etc. There is no indication of how these mechanisms could be implemented, even though Eriksen and Fossum stress the importance of clarifying "the feasibility of EU democracy". Now, in section 8 (and in greater detail in Majone 2009), I argued that it is impossible to have democracy in the EU without giving up, not only something as central as the Community Method, but much of the political culture developed in half a century of attempts to "make Europe without Europeans". In political terms, nothing less would be required than transforming an elitist project into a mass movement. Such a transformation would amount to dismantling the present EU—i.e., undertaking that "transformative project of near-revolutionary proportions" which Eriksen and Fossum seem to fear.

Second, in discussing the emergence of cosmopolitanism, the EU is described "as a part, and a vanguard, of an emerging world order". It is however difficult to see in which sense the EU may be considered a "vanguard" of cosmopolitanism. On the contrary, Eurocentricity is a basic tenet of the political culture of the integrationist elites. One among many possible examples (Majone 2009: 79-81): the Commission's *Communication on the Precautionary Principle* states, *inter alia*, that in considering the positive and negative consequences of alternative risk strategies, one should take into consideration '*the overall cost to the Community*, both in the long- and short-term' (Commission 2000: 19; emphasis added). Such Eurocentrism could perhaps be justified if the cost of precautionary measures was felt only by exporters from rich countries, but what if the cost is borne by very poor countries? The EU claims to be deeply committed to assist, financially and otherwise, developing countries, especially African ones. However, World Bank economists have been able to estimate the serious impact on some of the poorest African countries of precautionary standards for aflatoxins proposed by the Commission in 1997. The proposed Community standards were significantly more stringent than those adopted by the US, Canada, and Australia, and also stricter than the international standards established by the FAO/WHO Codex Alimentarius Commission.

Using trade and regulatory survey data for the member states of the EU and nine African countries between 1989 and 1998, the World Bank economists calculated that the Community standards would decrease African exports of cereals, dried fruits, and nuts to the EU by 64 percent, relative to regulation set at the international standards (Otsuki, Wilson, and Sewadeh 2000). The total loss of export revenue for the nine African countries amounted to US$ 400 million under the Community standards, compared to a gain of US$ 670 million if international standards were adopted. Were these costs imposed on some of the poorest countries in the world justified by the health benefits to Europeans? According to studies conducted by the Joint Expert Committee on Food Additives of the Food and Agriculture Organization and World Health Organization, the

Community standard of 2 ppb for B_1 aflatoxin would reduce deaths from liver cancer by 1.4 deaths per billion, i.e. by less than one death per year in the EU. Since about 33,000 people die from liver cancer every year in the EU, one can see that the health gain promised by the precautionary standard was indeed minuscule, certainly out of proportion to the cost imposed on the countries of Sub-Saharan Africa. Given such examples, and the built-in protectionism of the CAP, it is easy to imagine the reaction of developing countries to the idea of the EU as the vanguard of cosmopolitanism

A further point I would like to raise in connection with Model 3 concerns the issue if accountability. The problem of establishing an effective system of accountability, while less daunting than the elimination of the democratic deficit at European level, has become more urgent since the launching of EMU, the start of an indefinite enlargement process, and the string of negative referendums. The EU's accountability deficit (Majone 2009: 175-178) is an important special case of the general issue analyzed by Ruth Grant and Robert Keohane in a paper on "Accountability and Abuses of Power in World Politics," published in 2005. The problem discussed by these scholars is how to secure accountability in situations where the traditional standards of democratic accountability are either inapplicable or unenforceable. The first step toward understanding the general issue, I argue, is to recognize that accountability to the voters, or to their elected representatives, is only one dimension of accountability—important, but not always the most relevant one. Also in democratic polities giving reasons to one's peers, to experts, to stake holders, or to particular segments of public opinion, may be the most appropriate way of explaining one's decision, and of activating other accountability mechanisms. At international (or supranational) level, the very meaning of democracy, hence of democratic accountability, is contested. It is, however, important to realize that although there is no global state, there is a global civil society, and an ever more active international public opinion. Paradoxically, the influence of international public opinion is made more significant by the absence of a global state, which could oppose its official views to those of global civil society—or, in the extreme case, use coercion rather than persuasion. The existence of a global public opinion means that what is most urgently needed today is a sophisticated *technology of accountability,* going beyond the one-dimensional model of accountability to the voters. The crucial element of a good accountability framework is the choice of appropriate criteria. I suggest that we should think in terms of *accountability vectors*--where each entry corresponds to a particular criterion--and also of *accountability spaces*, since the set of appropriate accountability criteria will generally vary according to the level of governance: sub-national, national, regional, global.

To conclude, I am struck by the little attention by the Eriksen and Fossum background paper, as by much current literature on the EU, to the failures of half a century of European integration. True, the focus of the project is on normative issues, but as I repeatedly pointed out, for a new polity poor performance in functional terms can have serious normative implications. The present global crisis is providing fresh evidence that the present Union is a fair-weather construction—large and ornate, but not robust enough to protect its dwellers against major external shocks. At the end of November, 2008, the Commission unveiled a "giant stimulus package" to meet the economic downturn. But this was another case of "as-if" thinking, since Brussels has neither the money nor the ability to shape a European economic programme: money and ability lie with the member states themselves. In the end, the super crisis-rescue package turned out to be the simple sum of previously announced national measures. Unsurprisingly, Elmar Brok, an influential German MEP, spoke of "false labelling" in Brussels (*Spiegel On Line* of 25 November 2008). Such developments are too important for the future of the EU to be overlooked by a project on the possibility of democratic governance above the national level. In the preceding pages I argued that under present conditions it is impossible to reduce the democratic deficit without drastically reducing EU competences. I would be delighted to be proved wrong; but absent a convincing demonstration of how the integration/democracy dilemma can be overcome by other means, the RECON project would do well to devote more attention to the pre-democratic issues of generalized accountability and transnational constitutionalism.

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