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**"Associative Regulation" in the European Community:  
The Case of Technical Standards**

by

**Michelle Egan**

**Department of Political Science  
University of Pittsburgh**

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**West European Studies Program  
University Center for International Studies  
University of Pittsburgh, Pittsburgh, PA 15260  
Tel: (412) 648-7405; Fax: (412) 648-2199**

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The creation of a single integrated market has captured the imagination of many Europeans and Americans as an exercise in "deregulation". Achieving the free movement of goods lies at the heart of this drive to create a deregulated, single market in the European Community by 1992. Yet behind this exercise in economic liberalization exists a complex interrelationship between Community institutions and the private sector. Such an interrelationship, this paper argues, can best be described as the public use of the private sector rather than by the concept of "deregulation". In brief, regulation has always been and will remain a central feature of the European Community.

The analysis presented here argues that the public use of the private sector is especially important in the European standards setting process. The relationship between standards and the Single Market has not received widespread attention. In fact, the Financial Times reported in October 1990 that standards "have been the most neglected part of the 1992 program" (1). Arguably, the lack of attention to standards has encouraged the uncritical use of "deregulation" to describe the single market in goods.

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1. Lucy Kellaway "Commission urges need to improve standards system. Financial Times October 4th 1990 p.2.

TECHNICAL STANDARDS: THE NEGLECTED SECTOR OF THE 1992 PROGRAM

A technical barrier to trade exists when EC producers must alter products to comply with industrial standards or legal regulations in order to export to another EC country <sup>(2)</sup>. The existence of technical barriers to trade constitutes a barrier to entry in the drive to create a "free internal market". The negotiation and enactment of European-wide technical standards, therefore, represents a form of regulatory activity given priority by the Commission in the program for the completion of a market (in goods) without internal frontiers by 1992.

Consider the case of an Italian manufacturer of motorcycles who has to produce over 400 different versions of the same motorcycle to satisfy a variety of Community regulations <sup>(3)</sup>. These different technical requirements increase production costs by as much as 30%.

Without question, the development of technical standards is the most important aspect in the Commission's White Paper to establish the free movement of goods. The White Paper lists 279 measures that hinder efforts to create a "Common European market". Over half of the barriers designated in the White Paper for completing the internal market involve the removal of technical barriers to trade. In fact, the removal of technical barriers to

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<sup>2</sup>. Financial Times March 7th 1991 p.4.

<sup>3</sup>. Financial Times "EC Standard for mopeds urged" March 7th 1991. p.4.

trade is ranked by companies as the single most important part of the single market (4).

In reviewing the literature on 1992, the emphasis has been on the deregulatory nature of the program (5). In this paper, I wish to challenge this assumption by looking at the area of technical harmonization and standards. By emphasizing the important role that the development of standards plays in the European market, I will argue that regulation has always been and will remain a central feature of the European Community (6). The development of technical standards represents a critical area for business where regulatory activity continues to take place.

The potential benefits to European and American business as a result of the elimination of technical barriers and the development of common European product standards have been estimated for a variety of industrial sectors (7). These studies have drawn

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4. see CEC: "Research on the Costs of Non-Europe"; The completion of the internal market: a survey of European industry's perception of the likely effects European Economy no. 35 March 1988 cited in CEC "Research of the Costs of Non-Europe: Technical Barriers in the EC" Volume 6, 1988.

5. For a critical analysis of the "deregulatory" aspect of the program see Martin Shapiro "The European Court of Justice" in Alberta Sbragia (ed). Euro-Politics : Politics and Policy-Making in the "New" European Community Washington D.C: Brookings, Forthcoming 1991; G. Majone Regulating Europe: Problems and Prospects EUI Working Paper no. 89/405 1989.

6. G.Majone in Regulating Europe: Problems and Prospects EUI Working Paper No. 89/405 makes a stronger case for regulation by arguing that a greatly accelerated growth of regulation is to be expected. p.10.

7. Sectoral studies have been requested by the Commission in a number of areas including foodstuffs, Construction products, pharmaceutical and telecommunications see Commission of the

attention to the costs of market segmentation or have evaluated the completion of the internal market against an "ideal type" integrated entity (<sup>8</sup>). Because these studies have been primarily concerned with the economics of technical standards (<sup>9</sup>) they are more often concerned with the market structures that promote the emergence of standards rather than the institutional context within which standards setting takes place (<sup>10</sup>).

However, as the Commission states, these benefits of a single common market in technical products will only become a reality "in so far as common technical standards can be developed progressively

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European Communities Research on the "Cost of Non-Europe" Basic Findings Various Volumes but especially volume 6 "Technical Barriers in the EC: Illustrations in Six Industries". For a survey of the effects on U.S. business sectors see "1992: The Effects of Greater Economic Integration Within the European Community on the United States: First Follow Up Report" Investigation No. 332-267 USITC Publication 2268 March 1990. The report estimates that \$41 billion in U.S exports and \$65 billion in U.S. direct investment could be affected by the 1992 standards agenda.

<sup>8</sup>. See Helen Wallace "The Best is the Enemy of the Could: Bargaining in the European Community" Secondo Tarditi, Kenneth J. Thompson, Pierpaolo Pierani, and Elisabetta Croci-Angelini (eds) Agricultural Trade Liberalization and the European Community. Oxford: Clarendon Press, 1989. for an elaboration of this theme. For an economic perspective on the costs of market fragmentation see footnote 6.

<sup>9</sup>. See for example Jacques Pelkmans "Fifteen Years of Traditional Harmonization: Accomplishments and Deficiencies" in Jacques Pelkmans and Marc Vanheukelen (eds). Coming to Grips with the Internal Market Maastricht: European Institute of Public Administration, 1986;

<sup>10</sup>. For an example of analysis of market structures see Marvin Sirbu and Steven Stewart Market Structures and the Emergence of Standards: A Test in the Modem Market MIT Research on Communications Policy June 1986.

at the European rather than the national level" (11). The institutional context in which this regulatory activity takes place is the primary focus of this paper (12).

To better understand the influence of this institutional context, this paper is divided into four sections. Firstly, to illustrate the importance of regulatory policy, this paper will provide a historical review of standards setting activity. In this section, emphasis is placed on the institutional context in which this activity has taken place. Secondly, the paper considers some of the literature on deregulation and regulation which may be helpful in describing the policy process. This discussion of the regulatory process draws on comparative work based on the American context. Studies of the regulatory policy process within the European Community have often drawn on models of regulatory policy

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<sup>11</sup>. Commission of the European Communities COM (90) 456 Final Brussels, 8 October 1990.

<sup>12</sup>. The debate over the choice of policy mechanisms in the European Community have generally been concerned about distributive policies rather than regulatory policies. Much of the literature focuses on distributive policies such as agricultural, regional and social policy while regulatory policy has not received as much attention as a policy instrument. See for example, Doreen Collins Social Policy of the European Economic Community New York: Wiley, 1975; Doreen Collins Operation of the European Social Fund London: Croom Helm, 1983; Michael Keating and Barry Jones Regions in the European Community Oxford: Clarendon Press, 1985; Tony Cutler et al.; In particular this may be the result of limited policy encroachment by the European Community in those areas that they were given policy competence to regulate. For example, limited progress has been made towards the establishment of a common transport policy, despite the legislative authority being provided under Part 2 Title 4 of EEC Treaty of Rome. See Neil Nugent Government and Politics of the European Community, Duke: Duke University Press, 1989. Regulatory policy has thus elicited less attention than that of distributive policy, due to the inability of the Community to translate its policy action into intent.

from the United States. Comparisons with the United States have been drawn due to the wave of interstate deregulation that took place at the end of the 1970's and early 1980's. However, as scholars of the United States policy process recognize, regulatory relief i.e. reducing the "burden" of both economic and social regulation needs careful reassessment <sup>(13)</sup>. As Shapiro comments "the 1980's were not simply a period of deregulation but one in which some regulatory regimes were eroding and others flourishing." <sup>(14)</sup>.

Thirdly, focusing on the area of standards in the European Community will also illustrate the existence of regulatory regimes. The regulatory process in the area of technical harmonization and standards is a web of public and private institutions that constitute the political context within which regulatory decisions

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<sup>13</sup>. the term "social regulation" is often applied to "regulatory techniques to achieve broad social goals- a cleaner environment, safer and more beautiful workplace, safer and more effective consumer products, and the assurance of equal employment opportunities" By contrast "economic regulation" refers to the "programs that attempt to control prices, conditions of market entry and exit, and conditions of service usually in specific industries considered to be affected by the "public interest". Susan Rose Ackerman "Deregulation and Reregulation: Rhetoric and Reality" Journal of Law and Politics volume 6 1989/1990 p.288; for a good distinction between the two in comparative perspective see Shapiro "The Court of Justice" in Alberta Sbragia (ed). Euro-Politics: Politics and Policy-Making Within the "New" European Community Brooking Institution (Forthcoming 1991); for a comprehensive analysis on American Regulatory agencies engaged in social regulation see James Q. Wilson (ed). The Politics of Regulation New York: Basic Books 1980 and Kenneth Meier Regulation: Politics, Bureaucracy, and Economics New York: St Martins Press, 1985.

<sup>14</sup>. Martin Shapiro "The Court of Justice" in Alberta Sbragia (ed). Euro-politics: Politics and Policy-Making Within the "New" European community Washington D.C: Brookings, Forthcoming 1991.

are made. This institutional world is composed of the Community institutions and the national representatives of private standards organizations <sup>(15)</sup>. By focusing on the multi-faceted interactions and linkages between these institutions, we cannot ascribe all the policy initiatives and programs of 1992 to the collective actions of member governments through the Council or Commission. This regulatory process in the area of technical standards represents a distinct policy arrangement. The final part of the paper suggests an alternative regulatory framework with which to view the technical standards policy process.

## Section II HISTORY OF REGULATION IN TECHNICAL STANDARDS

The 1992 initiative towards the creation of an internal market is part of a long historical process designed to facilitate the free movement of goods between members <sup>(16)</sup>. The removal of technical barriers to trade constitutes one of the mechanisms by

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<sup>15</sup>. For a discussion of the organization of European Standards bodies see Florence Nicholas Common Standards for Enterprises Commission of the European Communities 1988; E.Vardakas "Role and Accomplishments of CEN with respect to Industrial Standards" in Coming to Grips with the Internal Market Jacques Pelkmans and Marc Vanheuklan (eds). Maastricht: EIPA 1986.; H.K. Tronnier "Standardization and Harmonization Efforts in Europe, the Role of CENELEC and the Experience With the Low Voltage Directive" in Jaques Pelkmans and Marc Vanheuklan (eds). Coming to Grips With the Internal Market Maastricht: EIPA 1986.

<sup>16</sup>. See Julian Carrell "Some Aspects of the Relations between Article 30-36 and Article 100 of the EEC Treaty with a closer look at Optional Harmonisation" in Yearbook of European Law F. Jacobs (ed). Volume 4 1984; for an excellent review of the literature see Peter Oliver Free Movement of Goods in the EEC; Under articles 30 to 36 of the Rome Treaty London: European Law Center 1982 (First Edition).

which the European Community aims to achieve the free movement of goods. <sup>(17)</sup>. Barriers to trade within the European Community can be created by the divergence of standards and regulations between member states. Differing national standards were initially perceived by the European community as barriers used by the member states to protect their own markets. Yet if we examine the historical role of the European Community in eliminating barriers to trade, we find that the Community has fostered an approach that uses the adoption of technical standards as an instrument of harmonization. Paradoxically, technical standards have been perceived as both a barrier to trade and a means towards constructing a fully fledged common product market within the EC <sup>(18)</sup>.

Technical trade barriers concern the specifications of a given product or the procedures by which product specifications are verified to conform to existing regulations to gain market access. Industry standards that vary across countries as a condition for sale, entry or market access constitute a significant trade barrier. These standards are voluntary specifications regarding

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<sup>17</sup>. A technical barrier to trade may be defined as "an obstacle to international trade resulting from differences between national legislative and administrative provisions concerning the marketing or the use of products, which necessitates the adaptation of export products during the production process" P. J. Slot Technical and Administrative Obstacles to Trade in the EEC Leyden, 1975 p.4

<sup>18</sup>. See for example Jacques Pelkmans Completing the Internal Market for Industrial Products Maastricht: EIPA, 1986. Published as a Commission Document; Florence Nicholas Common Standards for Enterprises Luxembourg: Office for Official Publications of the European Community, 1988.

product form, design and compatibility. Although these standards impose no legal obligations restricting the free movement of goods, the harmonization of technical regulations inflicts costs and affects interests of producers (<sup>19</sup>).

More intransigent are the technical trade barriers caused by differences in legal regulations across the member states. Legal regulations differ from standards in that they are legally binding and more effectively prevent the free movement of goods across the community. Legal regulations are often invoked on the basis of health, safety and environmental concerns. Historical and philosophical differences that exist between the members on how to protect public safety, health and the environment constitute formidable barriers to trade (<sup>20</sup>)

Although not considered in this paper, it should be noted that the final barrier to trade are the procedures for testing and certification to ensure that products conform to existing

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<sup>19</sup>. see for example 1992: The effects of Greater Economic Integration Within the European Community on the United States First Follow Up Report USITC Publication 2268 March 1990.

<sup>20</sup>. see for example Erich Kaufer. "The Regulation of New Product Development" in G. Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990; Chrisitan Joerges. "Paradoxes of Deregulatory Strategies at Community Level: The Example of Product Safety Policy" in G. Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990.

regulations or standards <sup>(21)</sup>. Testing and certification procedures differ across countries <sup>(22)</sup>. Users of the products are often reluctant to use products tested and designed on the basis of another countries' set of standards.

Though differing standards were perceived as trade barriers that hindered the free movement of goods, standards have also become an instrument with which to construct an internal market through harmonization of differing standards across countries. Instead of equating a standard with a technical barrier, the Community has transformed the technical harmonization and standards process to one of market integration when it occurs EC-wide. This market integration in the area of standards and technical harmonization represents a dominant policy role for the European Community's institutions that will remain in place after the target for creating a single market by 1992.

A review of the history of regulatory activity in the area of product standards and harmonization highlights some of the most important Community activities shaping present policy choices and

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<sup>21</sup>. Testing and certification has not received the same scholarly attention as the elimination of technical barriers to trade through harmonization and standardization. In fact, the White Paper deals in a very limited manner with this area.

<sup>22</sup>. Several initiatives have been taken by the European Community including a European framework for the organization of mutual recognition agreements within the Community. The framework will assist the Commission in the regulatory field in defining the technical conditions for mutual recognition of test responses. This is extremely important if one compares the institutional mechanisms for testing across the EC. In Greece, for example, there is only one testing laboratory. As a result, Greece often seeks outside certification.

decisions <sup>(23)</sup>. While the regulatory goals of the Community have been constant, the methods for achieving those goals have changed dramatically.

#### THE EARLY HARMONIZATION PROCESS

In its first twenty years of regulating standards from 1963-83, the European Community has followed a program of harmonization, rather than unification of national regulations <sup>(24)</sup>. Although harmonization is an exercise in the adaptation by member states to Community requirements, it does not entail the elimination of all legal disparities between them <sup>(25)</sup>. Harmonization is the adjustment of national rules to the

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<sup>23</sup>. For a review of the traditional approach to standards see Jacques Pelkmans and Marc Vanheukelen (eds). Coming to Grips with the Internal Market Maastricht: European Institute of Public Administration, 1986; Alan Dashwood, "Hastening Slowly : The Community's Path Towards Harmonization" in Policy Making in the European Communities Helen Wallace, William Wallace and Carole Webb (eds). New York: John Wiley, 1983 provides a review of the harmonization policy process prior to the White Paper and the change in decision rules with the enactment of the Single European Act which facilitated the progress on harmonization due to the shift to unanimous voting by the Council; Richard H. Lauwars, "The Model Directive on Technical Harmonization" in Roland Bieber, Renaud Dehousse, John Pinder and Joseph H. H. Weiler (eds). 1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy. Baden Baden :Nomos Verlagsgesellschaft, 1988.

<sup>24</sup>. Giandomenico Majone, "Regulating Europe: Problems and Prospects" EUI Working Paper No. 89/405. EUI, Florence: October 1989.

<sup>25</sup>. Alan Dashwood, "Hastening Slowly : The Community's Path Towards Harmonization" in Policy Making in the European Communities Helen Wallace, William Wallace and Carole Webb (eds). New York: John Wiley, 1983.

requirements of a single market. It constitutes an activity by the Community to approximate or align differences between the European countries.

#### TOTAL HARMONIZATION: THE COMMUNITY'S "TRADITIONAL" APPROACH

The construction of the common market in the area of technical standards initially resulted in a drive towards total harmonization. This "total" approach to harmonization was based on a distinct preference by the Commission to attempt to approximate product standards across every conceivable product sector.

Until 1985 the European Community approached the task of harmonizing product standards by drafting detailed technical specifications for adoption by the Council <sup>(26)</sup>. The harmonization provisions given to the Community by the Treaty of Rome represented a regulatory system distinct from that of the member states. Yet the regulatory system of the Community was not designed to replace that of the member countries but to supplement it. In fact, the Community was faced with a fixed stock of over 100,000 existing national technical regulations across the Community.

Therefore, the harmonization activity of the Community was not replacement but simply the specification of rules and regulatory

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<sup>26</sup>. For an explanation of the harmonization process under the traditional approach see Alan Dashwood "Hastening Slowly : The Community's Path Towards Harmonization" in Policy Making in the European Communities Helen Wallace, William Wallace and Carole Webb (eds). New York: John Wiley, 1983; Jacques Pelkmans "The New Approach to Technical Harmonization and Standardization" Journal of Common Market Studies. Volume 25 no.3 March 1987.

objectives that left the implementation to the member states <sup>(27)</sup>. As a policy system, the regulatory activity of the European Community required vigorous action and mutual cooperation by the Commission and Council <sup>(28)</sup>. This "tandem" decision making process tended to atrophy for a number of reasons <sup>(29)</sup>.

Perhaps more importantly, the Council had to approve the harmonization measures for the Community wide standards to be adopted and transposed into national legislation. Since the Council was operating under the principle of unanimity, the "congested" agenda of the Council meant that few were adopted.

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<sup>27</sup>. see Alan Dashwood. "Hastening Slowly : The Community's Path Towards Harmonization" in Policy Making in the European Communities Helen Wallace, William Wallace and Carole Webb (eds). New York: John Wiley, 1983; Helen Wallace "Negotiation, Conflict and Compromise: The Elusive Pursuit of Common Policies" in Helen Wallace, William Wallace and Carole Webb (eds). Policy Making in the European Communities New York: John Wiley, 1983; for an illustration of the implementation deficit in the area of environmental policy see Alberta Sbragia "The Implementation Deficit and Environmental Policy: A Comparative Perspective". Paper delivered at "Consortium on 1992" workshop, Duke University, March 23-24 1991.

<sup>28</sup>. Martin Shapiro, "The Court of Justice" in Euro-Politics: Politics and Policy-Making Within the "New" European Community Alberta Sbragia (ed). Washington D.C.: Brookings, Forthcoming 1991.

<sup>29</sup>. Pelkmans summarizes the deficiencies of the traditional approach under eight headings in Jacques Pelkamns and Marc Vanheuklan (eds). Coming to Grips with the Internal Market Maastricht : EIPA, 1986 pp 25-27. The main deficiencies reflect the governing arrangements for the establishment of standards. Several other authors have recounted the problems with the traditional approach to harmonization based on a concern with results. The emphasis has been on implementation, the divergence between the statutory objectives of a common market and the regulatory outcomes (or lack of them) and the "efficiency of the regulatory apparatus.

The Commission commented itself in the White Paper of 1985 that the traditional approach to the problem of technical barriers could not be achieved by relying exclusively on the total harmonization approach. In the words of the Commission, "experience has shown that the alternative of relying on a strategy based totally on harmonization would be over-regulatory, would take a long time to implement, would be inflexible and could stifle innovation" <sup>(30)</sup>. Many of the incessant difficulties in harmonizing technical standards are, however genuine, reflecting pride about technical quality and deep-rooted differences across Europe. Take the case of social attitudes towards medicine and the arguments about the safety of new drugs, where each country has a different system for approving and pricing medicines <sup>(31)</sup>. Although the Community has made some progress in harmonising standards for drug licensing, "there are significant differences to be faced before regulations systems in Europe can be harmonised and unified to enable the free circulation of medicines by 1992" <sup>(32)</sup>.

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<sup>30</sup>. Completing the Internal Market White Paper from the Commission to the European Council, COM (85) 310 of 14 June 1985 Paragraph 64.

<sup>31</sup>. For an excellent illustration of this see Erich Kaufer. "The Regulation of New Product Development" in G. Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990; Clive Cookson "In Search of Harmony of Europe's Ills" Financial Times 11th March 1991 p.4.

<sup>32</sup>. Dr. John Griffin, the Director of the Association of the British Pharmaceutical Industry quoted in Clive Cookson "In Search of Harmony to Cure Europ's Ills" Financial Times March 11th 1991

As an alternative to the total approach, the Council adopted a resolution proposed by the Commission that would resolve the excessive deliberation, delays, and difficulties of harmonization caused by detailed technical specifications <sup>(33)</sup>. The resolution was aided by Cassis de Dijon, a very important Court ruling that altered the rationale for total harmonization.

TOWARDS "DEREGULATION" ? : THE DECLINE OF TOTAL HARMONIZATION  
AND THE EMERGENCE OF MUTUAL RECOGNITION

The Commission's "new approach" to standards setting stems from the 1979 Cassis de Dijon Court decision ruling that any product legally marketable in one member state must also be admitted to markets in other member states <sup>(33)</sup>. In an effort to minimize technical restrictions that hinder the free flow of products throughout the EC, the Commission now advocates that only essential requirements to protect the health and safety of

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p.4.

<sup>33</sup>. Bulletin of the European Communities 1985.

<sup>33</sup>. Cassis de Dijon Case 120/78. The principle of proportionality is central to this case. This means that legal measures may not go any further than is genuinely deemed necessary to achieve the desired objective. For a discussion of the importance of this case see Martin Shapiro "The Court of Justice" in Euro-Politics: Politics and Policy-Making in the "New" European Community Alberta Sbragia (ed) Washington D.C.: Brookings, Forthcoming 1991; Pietr Verloren van Themaat "The Contributions to the Establishment of the Internal Market by the Case-Law of the Court of Justice of the European Communities" in Roland Bieber, Renaud Dehousse, John Pinder and Joseph H. H. Weiler (eds). 1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy. Baden Baden :Nomos Verlagsgesellschaft, 1988.

consumers and the environment is needed <sup>(34)</sup>. Based on the concept of mutual recognition, if a product meets these essential requirements in one state, it can be freely marketed in another. Member states must accept the adequacy of each others' standards.

The impact of Cassis de Dijon altered the premise under which member states could prohibit the importation of goods from other member states based on differing manufacturing rules and processes. Prior to Cassis de Dijon, the Court had required an element of discrimination against imports for a measure to constitute having the equivalent effect to a quota restriction <sup>(35)</sup>. The judgement in Cassis de Dijon altered this approach to one of demonstrating restriction of imports.

Thus, Cassis de Dijon provided the rationale on which to relaunch the European Community's drive towards creating an internal "deregulated" market. Instead of free circulation of goods conforming to detailed technical standards, harmonization of national regulations was replaced by mutual equivalence. Although, as Dehousse and Weiler indicate, both the harmonization method and that of mutual equivalence are aimed at the same result, namely the free movement of goods, they provide remarkably different

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<sup>34</sup> White Paper Completing the Internal Market COM (85) 310 Final, Brussels, 14 June 1985 Paragraph 65.

<sup>35</sup>. For a discussion of the appropriate case law, see Greg Myles EEC Brief "Free Movement of Goods Update 1986" Lisburn, Ireland: Locksley Press, 1986.

incentives to member states <sup>(36)</sup>. Harmonization represents a communitarian goal designed to continue to regulate the market through the adoption of a Community wide norm. In contrast, mutual recognition lessens the need for protracted negotiations concerning standards among member states. As a result, this method has been depicted as a deregulatory mechanism.

But in the context of the European Community, the fact that the new approach to technical standards removes the detailed legislative requirements from the legislative domain and transfers them to the voluntary domain, in no way decreases the regulatory thrust of the Community. This regulatory framework of the European Community includes private, non-governmental bodies that act in policy concert with the Council and Commission in setting European standards.

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<sup>36</sup>. They argue that mutual recognition imposes a negative obligation on member states in preventing them from imposing restrictions on imported goods. Mutual recognition, thus requires less adjustments and impositions. Renaud Dehousse and Joseph Weiler "The Legal Dimension" in William Wallace (ed). The Transformation of Western Europe New York: Council of Foreign Relations Press, 1990 p.245.

THE PUBLIC USE OF THE PRIVATE SECTORTHE ROLE OF CEN AND CENELEC

Private, non-governmental, European standards bodies have been created to promote European standardization. They are composed of national standards bodies from the member countries of EC and EFTA<sup>(37)</sup>. The national bodies are "almost always associations set up by trade associations to prepare and publish standards by a procedure ensuring all those involved can have a say"<sup>(38)</sup>. National public authorities recognize their own standards bodies as providing technical advice for the application of technical regulations.

However, the European standardization organizations were designed to harmonize divergent national standards and to create European standards where none existed<sup>(39)</sup>. These private non-governmental bodies, CEN and CENELEC<sup>(40)</sup> were set up in 1961 and

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<sup>37</sup>. CEN is the Comite de Normalisation. CENELEC is the is the Comite Europeen de Normalisation Electro-Technique. Although CEN and CENELEC have repeatedly stressed that their membership is restricted to members of EC and EFTA, at an ANSI Conference in March 1990, a CENELEC representative predicted that most East European standards institutes will become members of CEN/CENELEC within the next 10 to 15 years. see ITC report p.6-13. Turkey has been a candidate for CEN/CENELEC for some time. Even without these "new" members, CEN and CENELEC are the largest regional standards setting bodies.

<sup>38</sup>. Florence Nicholas Common Standards for Enterprise Luxembourg: Offical Publication of the European Communités, 1988.

<sup>39</sup>. COM (90) 456 Final Brussels, 8 October 1990

<sup>40</sup>. CEN is the Comite de Normalisation; CENELEC is the Comite Europeen de Normalisation Electro-Technique.

1962 respectively, to act as agents of public policy on behalf of the European Community.

Between 1961 and 1982, the output from these European standards organizations was extremely low (as the European Community sought total harmonization). During this period, CEN adopted only 96 European standards. In comparison, in 1989 alone, purely national standards published by France, Germany and the United Kingdom were approximately 350, 650 and 400 respectively.

In addition to the divergence between national and European activity, the institutional capacity of CEN and CENELEC remains low in comparison to the member states national organizations. As a result of the new approach to technical standards and harmonization that gave a larger role to the development of European standards, CEN and CENELEC expanded their secretariats. Between 1985-89, CEN increased its staff from 10 to 70 while CENELEC's increased from 13 to 32.

Historically, the role of CEN/CENELEC has always functioned in a "supportive, facilitating" adjunct of Community activities in the standardization area. The Community has had the use of CEN/CENELEC to draw up standardization proposals on the basis of standardization mandates. Yet, the Community has made little use of this measure until a formal framework for its use was established in 1985 <sup>(41)</sup>.

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<sup>41</sup>. Florence Nicholas Common Standards for Enterprises Luxembourg: Office for Official Publications of the European Communities, 1988; EEC Brief.

The relationship between the public and private actors engaged in the standards arena has evolved from one of ad hoc co-operative basis until the 1980's to one that is based on different legal foundations <sup>(42)</sup>. The cooperation or concertation between the public and private institutions was already in operation prior to the publication of the White Paper and the formal framework established in 1985. One of the prior legal foundations was the adoption of Directive 83/189 which established mechanisms for the circulation of information in the field of technical standards and regulations. The Directive required member states to notify the Commission in advance of draft regulations and standards that they intended to adopt. The draft rules are then considered by the Commission and other member states through CEN/CENELEC in order to identify and remove any possible restrictions on the free movement of goods before adoption by the member state involved <sup>(43)</sup>. In essence, it expands the policy reach of both the Commission and private standards bodies. It is possible then, that the Commission and private standards bodies have increased their regulatory authority and oversight at the expense of the member states. This represents a curious paradox since Directive 83/189 signifies

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<sup>42</sup>. See Florence Nicholas Common Standards for Enterprises Luxembourg: Official Publication of the European Communities p. 36 ff.; Council Directive of 28 March 1983 (83/189/EEC) concerning information procedure in the area of technical standards and regulations, Official Journal EC 26 April 1983 no. L 109.; Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards (85/C 136/01).

<sup>43</sup>. As of December 1988, the Commission had received 615 notifications Official Journal No. C171 6.7.1989 p.10.

policy encroachment by the Commission and private standards bodies while Article 36 of EC Treaty allows member states specific discretion in establishing regulations which coexist or deviate from the Community norm <sup>(44)</sup>.

In addition to Directive 83/189/EEC, the concertation between CEN/CENELEC and the Commission was formalized in November 1984 <sup>(45)</sup>. The purpose of the agreement was to organize relations between the two bodies so that the Commission can propose the use of European standards as means for technical harmonization. Given the adoption of the new approach to technical harmonization and standards, the cooperation agreement with CEN/CENELEC has become more important. The new approach maintains Community/Council action with regards to essential requirements but gives the responsibility for the detailed technical specifications to CEN/CENELEC. Therefore, the establishment of technical specifications by European standards committees like CEN/CENELEC is not a purely private activity but implies a delegation of executive

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<sup>44</sup>. Shapiro in his discussion of article 36 notes that the Court has given the member states quite wide "concurrent" powers to regulate as long as their regulations did not "discriminate". The notion that state regulation can co-exist with Community regulation provided that the Community did not intend to "preempt" the area with regulatory action works in opposition to the member states obligations under Directive 83/189/EEC. National standards under this directive may be subject to a standstill effect or alterations in order to prevent the trade impeding effect of the intended national regulation. To what extent does article 36 allow member states not to comply with Directive 83/189/EC ? The distinction that Jacques Pelkmans defines between the legal regime (re:article 36) and the policy regime (directives) is useful in thinking about the disjuncture. cite article.

<sup>45</sup>. See Florence Nicholas Common Standards for Enterprises Luxembourg: Official Publication of the European Communities p.37.

powers by the Council <sup>(46)</sup>. The European standards bodies are delegated "executive powers" so that in essence regulations are a result of a mixture of public and private rule making <sup>(47)</sup>. However, the new approach raises questions about the delimitation of responsibilities since the Council is responsible for essential requirements and the European standards bodies for the detailed technical specifications <sup>(48)</sup>.

The delegation of "executive powers" to the European standards bodies recasts the role of both the European standards bodies and the Community institutions. The Council has formally recognized the role of European standardization in Community legislation, so that it has reduced its role to the outlining of essential requirements

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<sup>46</sup>. Richard H. Lauwars "The Model Directive on Technical Harmonization" in Roland Bieber, Renaud Dehousse, John Pinder and Joseph H. H. Weiler (eds). 1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy. Baden Baden :Nomos Verlagsgesellschaft, 1988; also White Paper COM (85) 310 Final Brussels, 14 June 1985 paragraph 64.

<sup>47</sup>. In a footnote, Dehousse and Weiler note that legally speaking this must be regarded as a delegation of normative powers to private bodies, which has given some doubts as to the lawfulness of this strategy. Renaud Dehousse and Joseph Weiler "The Legal Dimension" in William Wallace (ed). The Transformation of Western Europe 1990 p.259. See also R. Lauwars "The Model Directive on Technical Harmonization" in Bieber, Dehousse, Pinder and Weiler pp 165-167.

<sup>48</sup>. Graham Bennett in The Internal Market and Environmental Policy in the Federal Republic of Germany and the Netherlands London: Institute for European Environmental Policy, November 1989 suggests that increasingly CEN/CENELEC are drafting basic essential requirements as well. This would involve a complete rather than partial devolution of public responsibilities to the private sector. No other sources indicate that this policy arrangement is extensively occurring.

(<sup>49</sup>). The fact that essential safety requirements must be met since they represent legally binding obligations maintains an element of regulatory policy decisions by the Community (<sup>50</sup>).

More importantly, the role of the Commission in the area of technical standards highlights its capacity to shape both institutional and policy developments in the European Community (<sup>51</sup>). The Commission is empowered to establish contracts for the development of European standards and establish priorities within the standards setting bodies. In addition, to the delegation of responsibility for drawing up technical specifications to CEN/CENELEC, the Commission has through its requests altered the institutional structure of the standards bodies.

Often institutional innovation has been defined as the shift to qualified majority voting with the Single European Act. Yet, the Commission has shifted the adoption and resolution of European

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<sup>49</sup>. See the Council Resolution of 7 May 1985 on the new approach to technical harmonization and standards, OJ C 136 1985 Annex II Part A, Part B V Article 4, VIII Article 2.

<sup>50</sup>. Adherents to the deregulatory momentum of the Community's approach may distinguish between mandatory essential requirements and voluntary standardization since the latter are not legally binding. A national authority may still approve a product which does not conform to the standards set by CEN/CENELEC as long as it is deemed to comply with the Directive.

<sup>51</sup>. For an important analysis of the implications of the institutional developments and their effects on the policy making process see Alberta Sbragia (ed). in Euro-Politics: Politics and Policy Making in the "New" European Community Washington D.C.: Brookings Forthcoming 1991; Alberta Sbragia "Asymmetrical Integration in the European Community: The Single European Act and Institutional Development" in Dale L. Smith and James Lee Ray (eds) The 1992 Project and the Future Integration of Europe . Sharpe, Forthcoming 1991.

standards within CEN/CENELEC to weighted majority voting. There is no doubt that like the Single European Act, the use of qualified majority voting will change the dynamics of bargaining and decision-making within the standards sector <sup>(52)</sup>.

The institutional impact of the Single European Act has simultaneously altered the basis on which CEN/CENELEC operate. In the event that a standard does not achieve a majority of the membership agreement, the votes from the EC member states are counted separately <sup>(53)</sup>. A qualified majority in favor requires the adoption of the standard by all EC bodies and those EFTA countries that had voted in favor. Not only is the European Community creating a common "standard market" that will ease the free movement of goods, but the European dimension of regulatory activity extends beyond the Community <sup>(54)</sup>.

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<sup>52</sup>. For an illustration of this in response to the institutional dynamics of the Single European Act see Helen Wallace "The Best is the Enemy of the Could: Bargaining in the European Community" in Agricultural Trade Liberalization and the European Community Secondo Tarditi, Kenneth J. Thompson, Pierpaolo Pierani, and Elisabetta Croci-Angelini (eds). Oxford: Clarendon Press, 1989.

<sup>53</sup>. The weighted majority voting procedure is more stringent than Article 148 of the EC Treaty. No more than three members may vote negatively on the standards proposal. The Commission has requested that the standards bodies change this restriction but no action has so far been taken.

<sup>54</sup>. The inclusion of EFTA within this process illustrates that the *acquis communautaire* in standards is already in place for the EFTA countries.

## SECTION III

REGULATION IN A DEREGULATED MARKET ?

The debate in Europe has focused on the possibility of deregulation as the mechanism to achieve the "internal common market". Many of the explanations of the 1992 program have focused on the removal of trade impeding factors that restrict the development of a deregulated, free market.

Like the United States experience, deregulation in the European Community has not meant an end to all regulation. Instead, contrary to expectation, the "introduction of free markets, far from doing away with the need for control, regulation and intervention, (will) enormously increase(d) their range" (<sup>55</sup>) Arguably, regulation has always represented a significant part of European Community activities and will continue to do so. (<sup>56</sup>).

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<sup>55</sup>. Karl Polyani The Great Transformation Boston: Beacon Press, 1944. p.140. Polyani is describing the emergence of the market economy in the nineteenth century. His historical and economic interpretation of the purposeful intervention of the state in the creation of a laissez-faire market has important analogies for the development of the "common market" in the European Community.

<sup>56</sup>. For an important example see Erich Kaufer who argues that continued regulation will exist in the drug and medicine industry. "The Regulation of New Product Development" in G. Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990; Christian Joerges. "Paradoxes of Deregulatory Strategies at Community Level: The Example of Product Safety Policy" in G. Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990.

It has been argued that regulatory activity in the area of standards appears to be moving towards a deregulatory style of policy making <sup>(57)</sup>. However, we are still heavily influenced in this analysis by focusing on the main institutions of the European Community. Each of the institutions has a distinct function resulting in a legal, executive and judicial capacity that provides for three different arenas of political choice. Our conceptual foci has made us conscious of the political choices and political structures of the Commission, Council (and to a lesser extent the Court of Justice, but we have been far less concerned with the political/policy choices and organizational design of the technical institutions (CEN and CENELEC) associated with aspects of the Single market and Community regulation <sup>(58)</sup>. As Majone notes, a

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<sup>57</sup>. Emile A Campo in Jacques Pelkmans Privatization and deregulation writes "the elimination of technical barriers to trade by harmonizing safety and quality standards for industrial products is again a form of deregulation (my emphasis added). p.75. In reply, Pieter Jan-Slot raises the problem of what actually constitutes deregulation.

<sup>58</sup>. For several exceptions in the policy arena of technical standards within the European Community, the work of Jacques Pelkmans and Christian Joerges has been extensive in this area. In addition, Martin Shapiro in a thoughtful essay on the "Court of Justice" focuses on the legal dimensions of technical standards and harmonization. In a recent Financial Times article, the opening paragraph stated "If you utter the words *technical standards* you lose your audience". The article goes on to add that the removal of technical barriers to trade is ranked by companies as the single most important part of the Single Market. With the breakdown of GATT negotiations that Earl Gibbons describes in his paper, the issue of standards has been similarly neglected at the international level. "Agricultural Brinkmanship: The Community and the Uruguay Round" Paper Presented at the European Community Studies Association Biennial Conference, May 22-24 1991.

study of the organizational and politico-economic aspects of Community regulatory policy has been neglected.

In trying to understand the institutional arrangements that govern the regulatory process in the standards area, it is useful to look at the ways that regulation has been traditionally conceived both conceptually and empirically.

#### REGULATION IN RESPONSE TO THE MARKET

Regulation has been studied from several analytical approaches. The economic or market perspective has dominated much of this literature. As Breyer notes "a small number of important economic reasons appear and reappear as "justification" for particular kinds of regulation (<sup>59</sup>). Those economic reasons that justify intervention assume that an unregulated market is the norm (<sup>60</sup>). Breyer continues "Regulation is then "justified" in so far as it is needed to overcome market defects that might otherwise prevent purely free markets from serving the public interest" (<sup>61</sup>).

Yet focusing on the role of regulation in correcting market failures is a distinctly economic approach. Important as economic approaches to regulation are, they often are conceived in terms of a "problem-policy emphasis" that documents an emerging problem,

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<sup>59</sup>. Stephen Breyer "Regulation and Deregulation in the United States: Airlines, Telecommunications and Antitrust" in G. Majone (ed). Deregulation or Reregulation St Martins Press 1990.

<sup>60</sup>. For an exception to this Charles Wolf in his book Markets or Governments Rand Corporation. Cambridge, Mass.: MIT Press 1988 examines a theory of non market failure. He concludes that although both markets and governments have shortcomings, government has an important role to play in the functioning of markets.

<sup>61</sup>. Stephen Breyer in Majone (ed) op cit p.10.

subsequent action and policy outcome. In fact, regulatory activity should be perceived as a political effort. Regulatory choices are political choices that involve a myriad of actors and institutions.

Regulation of the economy is not simply a problem (oriented) policy based on market failure but is a policy choice largely determined by institutional arrangements and capabilities <sup>(62)</sup>. Rather than emphasizing market failure, we should be more concerned with the institutional context from which regulatory systems have arisen. The economic approach ignores or inadequately discusses the importance of the government or public authority in regulating the market <sup>(63)</sup>.

In the regulatory policy area, the state or government plays a direct role in private sector activity. Contrary to much of the economic literature that focuses on the market or economic interests as shaping public policy, the state constitutes an important facilitating and limiting institution upon any market arrangements <sup>(64)</sup>. Just as the state or government depends upon the

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<sup>62</sup>. For an excellent discussion about the political choices of regulation see Samuel P. Hays "Regulation as a Political Choice" in Thomas Macgraw (ed). Regulation in Perspective Boston: Harvard University Press, 1981

<sup>63</sup>. Konstantine Gatsios, and Paul Seabright. "Regulation in the European Community" Oxford Review of Economic Policy Volume 5, no. 2 1989 provides an indication of the importance of government control of the market p.37.

<sup>64</sup>. Karl Polanyi in describing economic liberalism as the organizing principle of market society sees it as a "creed" rather than an actual policy. For him, the notion of a self regulating market is inconceivable. Although, his historical analysis is based on the market system of the nineteenth century, his interpretation of the creation of a laissez-faire "free, self regulating market" has continued currency in the light of the deregulatory debates in

market to generate the financial sources necessary to engage in esoteric goals for public purposes and the enumeration of those who occupy its positions of coordination and authoritative allocation, so does the market need rules and protection to facilitate its operation (<sup>65</sup>).

#### "REGULATION" IN THE AMERICAN CONTEXT

Much of the debate about regulation as a policy choice in the European Community is a reflection of similar debates within both member states and the United States about the proper role and function of the state or government in the economy. One common theme reflects a conception of whether the government or state should intervene in the market (<sup>66</sup>). Domestic responses in the

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both the European Community and the United States. As he points out, "free markets could never have come into being by allowing things to take their course...the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism..even free trade and competition required intervention to be workable". Karl Polanyi The Great Transformation Boston: Torch Books 1944 p.144 ff.

<sup>65</sup>. For a discussion of this market/state interaction see Charles Lindblom Politics and Markets Basic Books 1977. Esoteric goals have increasingly characterized government activity. This is particularly noticeable in for example health care and the environment where the goals are more complex and the statutory language "highly aspirational" and general. For a further discussion of this point see Martin Shapiro "The Court of Justice" in Alberta Sbragia (ed) Euro-Politics: Politics and Policy-Making in the "New" European Community Washington D.C: Brookings, Forthcoming 1991, (Manuscript p.19-22).

<sup>66</sup>. For a discussion of the debate surrounding the level, mode and intensity of government involvement in the economy see Jacques Pelkmans and Martijn van Nie (eds). Privatization and Deregulation: The European Debate Maastricht: European Institute of Public Administration, 1985 especially pp 1-12 and 181-189.

1970's within member states have been to shift their policy choices towards deregulation and privatization (<sup>67</sup>).

From this debate, scholars have adopted the language of deregulation as the mode towards the creation of a "common market". Yet there remains much conceptual confusion in the literature as to the meaning of deregulation (<sup>68</sup>). Deregulation is often assumed but not defined (<sup>69</sup>). Application of the term itself has had different meanings depending on the context and particular kind of regulation at issue.

As an analytic construct, regulation is perceived as a distinct type of policy process in the United States (<sup>70</sup>). Theoretical and empirical models of the regulatory process have

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<sup>67</sup>. Jacques Pelkmans and Martijn van Nie (eds). Privatization and Deregulation: The European Debate Maastricht: European Institute of Public Administration, 1985; Giandomenico Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990; Bruce L. R. Smith (ed). The New Political Economy: The Public Use of the Private Sector Wiley & Sons: New York, 1975.

<sup>68</sup>. Giandomenico Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990 discusses the ambiguity in the comparative usage of deregulation.

<sup>69</sup>. For an illustration of this point see Joel. A. Bleeke. "Strategic Choices for Newly Opened Markets" Harvard Business Review September-October 1990 p.158. For a comprehensive attempt at dealing with the extensive literature on deregulation see Barry Mitnick The Political Economy of Regulation New York: Columbai University Press, 1980.

<sup>70</sup>. See for example Barry Mitnick The Political Economy of Regulation New York: Columbia University Press, 1980;

elevated the study of regulation to the status of a subdiscipline<sup>(71)</sup>. In contrast, European scholars have devoted limited attention to the political economy of regulation. As Majone writes, "the fact that we still lack theories capable of explaining the recent growth of regulatory policies at the national, and especially the Community level"<sup>(72)</sup> is based on the fact that American theories of regulation have a more specific meaning than that used in the European context.

To Americans, regulation is the sustained and focused control by a public agency over activities that are generally regarded as desirable to society. The emphasis on public agencies as regulatory instruments enhances the visibility of the regulatory policy process in the United States. This goes some way to explaining the scholarly attention on regulatory policy making. Yet the focus on single purpose commissions or administrative agencies in the United States represents a distinct regulatory choice.

American models of the regulatory process represent significant institutional and historical differences from Europe

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<sup>71</sup>. Roger G. Noll (ed). Regulatory Policy and the Social Sciences Berkeley, California: University of California Press, 1985.

<sup>72</sup>. Giandomenico Majone. "Regulating Europe: Problems and Prospects" EUI Working Paper No. 89/405. EUI, Florence: October 1989. Giandomenico Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990. I have relied heavily on Majone for my discussion of the contrasts between the American regulatory approach and that of the European. Majone in his introduction states that the "study of aspects of Community regulatory policy making have been sadly neglected..." resulting in a "conceptual deficit" at the Community level.

with regards to the political control of the market. The historical evolution of regulation in the United States at the federal level began with the Interstate Commerce Commission (1887) (<sup>73</sup>). The American regulatory model of setting up independent commissions was based on the philosophy that the market intervention should only occur on the basis of market "failure" such as monopoly power, negative externalities or due to inadequate information (<sup>74</sup>).

By contrast, in Europe the regulatory response has usually consisted of assigning responsibility to ministerial committees that rely on informal mechanisms of regulatory control and on

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<sup>73</sup> For a comparison of institutional differences between Europe and United states in terms of regulatory design see the chapters in Giandomenico Majone (ed). Deregulation or Reregulation ? : Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990.

<sup>74</sup>. However, several interpretative frameworks have emerged in the history of American regulation that no longer stress market failure as a precursor for regulation. Attention has focused on the coalescence of public and private interests that have shaped the activities of the regulatory agencies. Government has been described as a crucial actor in shaping America's development. see Thomas McGraw Regulation in Perspective Boston: Harvard University Press 1981; Louis Galambos "Technology, Political Economy, and Professionalization: Central Themes of Organizational Synthesis" Business History Review volume 57 no. 4 Winter 1983. In addition, Gabriel Kolko argues that the movement to regulate railroads in the Interstate Commerce act of 1887 was not an effort to limit monopoly pricing by railroads rather it was an attempt by farmers and shippers to limit the economic power of railroads. Railroads and Regulation Princeton: Princeton University Press, 1965.

various modes of self regulation rather than independent regulatory agencies (<sup>75</sup>).

Despite these institutional and historical differences, the shift in emphasis from technical harmonization to mutual recognition has elicited comparisons with recent regulatory reforms in the United States (<sup>76</sup>). Major reforms enacted in the 1970's and

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<sup>75</sup>. See for example Rob Baggott, "Regulatory Reform in Britian: The Changing Face of Self-Regulation" Public Administration Volume 67 Winter 1989 pp 435-454; W. Streek and P. Schmitter Private Interest Government Beverley Hills: Sage, 1985. Charles Blankart, "Strategies of Regulatory Reform: An Economic Analysis with some Remarks on Germany" in G. Majone (ed). Deregulation or Reregulation?: Regulatory Reform in Europe and the United States New York: St. Martins Press, 1990. The main differences between Europe and United States in regulatory decision making is the degree of formality. Regulatory policy making in Europe is based on the informal procedures that often delegate regulatory functions to semi-private bodies see Nicholas. In contrast, the United states, there are numerous formal regulatory agencies, many of which were created in the last two decades. In addition, the U.S. federal government is not the sole regulatory creator since state governments have created a variety of environmental and consumer agencies. These distinctions should not obscure the fact that differences do exist between the European regulatory agencies, in terms of organizational capacity, regulatory approaches, (or policy traditions) and their relationship with the state. For an overview of regulatory agencies in the area of technical standards see Florence Nicholas Common Standards for Enterprise Luxembourg: Offical Publication of the European Communities. Christian Joerges in "The New Approach to Technical Harmonization and the Interests of Consumers: Reflections on the Requirements and Difficulties of a Europeanization of Product Safety Policy" in Roland Bieber, Renaud Dehousse, John Pinder and Joseph H. H. Weiler (eds). 1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy. Baden Baden :Nomos Verlagsgesellschaft, 1988 discusses the different policy tradition and regulatory approaches in the area of product safety regulations across Europe.

<sup>76</sup>. For example Stephen Breyer "Regulation and Deregulation in the United States: Airlines, Telecommunications and Antitrust" and Robert W. Crandall "Entry, Divestiture and the Continuation of Economic Regulation in the United States Telecommunications Sector" in G. Majone (ed). Deregulation or Reregulation? : Regulatory Reform in Europe and the United States St. Martins Press: New York, 1990.

1980's in the airline, telecommunications, natural gas and railroad industries were labelled "deregulatory". Yet the result was a mixture of deregulatory and re-regulatory patterns of behavior.

As several commentators note, the deregulatory activity in one area of the economy may itself produce the need for more regulation somewhere else <sup>(77)</sup>. In moving towards a more competitive situation in one sector, market imperfections and bottlenecks emerge in other sectors <sup>(78)</sup>. For example, airline deregulation with its corresponding opening of markets to competition resulted in more deregulation of routes and fares while concurrently necessitating increases in regulating airline safety and allocational space to carriers. This deregulation of price and entry may necessitate more government intervention to protect consumers and enforce antitrust laws <sup>(79)</sup>.

Thus, deregulation in the United States has not meant an end to all regulation. This point should be kept in mind when evaluating comparisons between regulatory trends in the United States and the European Community.

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<sup>77</sup>. see Martin Shapiro "Court of Justice" in Alberta Sbragia(eds). Euro-Politics: Politics and Policy-Making in the "New" European Community Washington, D.C.: Brookings, Forthcoming 1991; Susan Rose-Ackerman "Deregulation or Reregulation: Rhetoric or Reality" Journal of Law and Politics Volume 76 1989/1990.

<sup>78</sup>. For an excellent example of this in the U.S "deregulated" industries see Stephen Breyer in Majone (ed). Deregulation or Reregulation New York: St. Martins Press, 1990.

<sup>79</sup>. For several examples of this argument Susan Rose Ackerman "Deregulation or Reregulation: Rhetoric and Reality" Journal of Law and Politics vol 76 1989/1990.

THE EUROPEAN COMMUNITY EXPERIENCE

The discussion of regulatory policy making in the American context has presented some questions about the possibility of deregulation as a means to achieve an internal "common" market. The question remains whether the European Community has reduced regulatory burdens in the elimination of technical barriers to trade. The scope of regulation appears to be reduced since harmonization and mutual recognition should lead to fewer sets of regulations and less tendency for members to reduce market access by the imposition of higher regulatory standards <sup>(80)</sup>.

In addition to the fewer regulations as a result of the principle of "equivalent" and mutually recognized standards, the new approach recognizes that a clear distinction for internal market initiatives needs to be drawn between those that are essential to harmonize and those to be left to mutual recognition of national regulations and standards. This removal from market intervention reflects a deregulatory shift in removing technical obstacles to trade.

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<sup>80</sup>. Martin Shapiro "Court of Justice" in Alberta Sbragia (ed) Euro-Politics: Politics and Policy Making in the "New" European Community Washington D.C.: Brookings Forthcoming, 1991 (p.17 Manuscript); Jacques Pelkmans "A Grand Design by the Piece? An Appraisal of the Internal Market Strategy" in Roland Bieber, Renaud Dehousse, John Pinder and Joseph H. H. Weiler (eds). 1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy. Baden Baden :Nomos Verlagsgesellschaft, 1988.

Yet arguably "the deregulation thrust of 1992 is not nearly as strong as its initiators desired" <sup>(81)</sup>. In terms of economic "deregulation", the European Community is still engaged in regulatory activity. In fact, the White Paper advocates the new approach as the means to facilitate free movement but combines this deregulatory thrust with a regulatory one.

Various exceptions and restrictions are written into the proposals for the "deregulated" market. Over ninety proposals continue under the traditional approach that will be accompanied by detailed technical, specifications <sup>(82)</sup>.

In addition to the derogations in the White Paper, the member states have retained intact their right to control the free flow of goods in the interests of protecting health, safety and the environment <sup>(83)</sup>. Where two or more states differ in the application of these controls, the need for a directive to harmonize the conflicting regulations is deemed necessary. Thus, the general principle of free movement is rescinded if there are imperative requirements that make it necessary to limit the free

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<sup>81</sup>. Martin Shapiro "The Court of Justice" in Alberta Sbragia (ed). Euro-Politics: Politics and Policy Making in the "new" European Community Washington D.C; Brookings, Forthcoming, 1991.

<sup>82</sup>. Jacques Pelkmans "A Grand Design by the Piece? An Appraisal of the Internal Market Strategy" in Roland Bieber, Renaud Dehousse, John Pinder and Joseph H. H. Weiler (eds). 1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy. Baden Baden :Nomos Verlagsgesellschaft, 1988. p. 370

<sup>83</sup>. See the new article 100a Section 4 which preserves the exceptions of the old Article 36.

movement of products (<sup>84</sup>). Article 36 of the Treaty establishes the exceptions that restrict mutually equivalent goods. It states " the provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic or archaeological value, or the protection of industrial and commercial property"

In addition to these derogations, Cassis de Dijon has increased the exceptions to a "free market" by adding the extra categories of the effectiveness of fiscal supervision, the protection of public health and defence of the consumer. The exceptions do not appear to be definitive. As Helen Wallace explains, the Single European Act introduced several important changes relevant to the argument that the main thrust of the program is not towards less regulation and more freedom of choice within the Community (<sup>85</sup>). Wallace maintains that "it (SEA) enters new policy commitments that insure increased Community regulatory activity, in particular in terms of environmental, health and

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<sup>84</sup>. Graham Bennett The Internal Market and Environmental Policy in the Federal Republic of Germany and the Netherlands London: Institute for European Environmental Policy, November 1989.

<sup>85</sup>. This is the rationale that the European Commission uses in a document title "Completing the Single Market: The Removal of Technical Barriers to Trade Within the European Economic Community" 111/B/4 Brussels 8.1.90. Directorate- General for Internal Market and Industrial Affairs.

safety requirements" with the corresponding caveat that there remains a degree to which the operating rules may be circumscribed by the inclusion of legal devices that "deviate from the negotiated consensus" <sup>(86)</sup>.

In practice, the essential safety requirements that are laid down in directives by the Council are regulatory in the sense that industry needs to confirm compliance to produce and market their products. The task of defining the technical specifications that will conform to legislated requirements will be given to European Standards bodies such as CEN or CENELEC. Although the aim is to gradually replace the national standards with European standards emphasizing the reduction in rules and regulations for member states, the net result is a reduction in regulation at the national level only to be replaced by re-regulation at the Community level <sup>(87)</sup>

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<sup>86</sup>. For example, in the Danish case, the declaration of the right to maintain higher national standards.

<sup>87</sup>. On the basis of the fact that the number of standards produced at the national level proliferates despite the advent of EC standards, Majone's comment may over emphasize the extent of deregulation at the national level. see Nicholas. Common Standards for Enterprises Luxembourg; Official Publications of the Communities, 1988 for an indication of the national activity.

## SECTION IV

ASSOCIATIVE REGULATION IN THE EUROPEAN COMMUNITY

By focusing on the standards sector, we find that traditional notions of regulatory policy making in the European Community as characterized by the interaction of government actors at the European and national level provide only part of the picture. Although discussion about the regulatory process in this paper has drawn on comparative work in the American and European context, the regulatory process that has been constructed in the area of technical standards and harmonization represents a distinct policy arrangement. This policy arrangement is based on the public use of private organized interests which take the form of devolved public responsibilities.

This distinct policy arrangement in the standards setting process represents a policy of associative regulation. Associative regulation is based on accommodation, policy concertation and partnership. It reflects a new public-private dimension by adopting a partnership arrangement between the private, European standardization bodies and the European Community institutions.

This pattern of policy making in the regulatory arena represents a distinct policy arrangement to coordinate activity in the standards and technical harmonization sector. The regulatory activity is being conducted through policy concertation between public and private actors. This form of associative regulation is distinctive in that it is not a private activity simply among business and private groups to reach compromises in pursuit of

their own interests. Instead it represents institutionalized organizational participation in regulatory activities within the Community.

Although the notion of associative regulation has broad similarities to corporatist arrangements, it represents a distinct regulatory policy arrangement. Schmitter, as one of the leading exponents of corporatism, differentiates corporatism from alternative policy arrangements such as concertation. His distinction between the two provides a useful referent for the notion of associative regulation since it corresponds more closely to the latter.

In brief, Schmitter argues that within corporatism "affected interest become incorporated in the policy process as recognized, indispensable negotiators and are made responsible for the implementation of policy decisions". By contrast, concertation results in affected interests remaining outside the policy process "as consultants or combatants on the issues involved, and the implementation takes place exclusively under the authority of public authorities, however much they may be influenced by the autonomous actions of organized interests in the course of their activities" (<sup>88</sup>). Having shared in the process of defining European standards, CEN/CENELEC are not engaged in their implementation

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<sup>88</sup>. Philippe Schmitter "Conclusion" in Gerard Lehmbruch and Philippe Schmitter Patterns of Corporatist Policy Making Beverly Hills: Sage 1979 p.262.

(<sup>89</sup>) Thus, what exists in the creation of a Single European Market in standards proceeds by a combination of giving some governmental activity to the private sphere, while retaining significant governmental authority in the implementation process (<sup>90</sup>).

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<sup>89</sup>. The notion of implementation is an extremely complex question that the Community recognizes as crucial to the creation and credibility of an internal market. It is interesting to note that when considering the policy process, "it is essential to differentiate between the stated intentions and what was actually put into practice" since "implementation analysis covers both dimensions, policy objectives and policy practices" Jan -Erik Lane "The Concept of Implementation" Statsvetenskaplig Tidskrift Volume 86 no. 1 1983 p. 20. In the standards area, we have considered the institutional context in which the policy objectives are formulated but we have not considered their implementation. As Alberta Sbragia writes about the environmental sector, there exists an "implementation deficit" that presents a significant challenge to the Community. Arguably, this "implementation deficit" is one of the key obstacles to the creation of a common "standards market".

<sup>90</sup>. Interestingly, Benny Hjern and David O. Porter in their article "Implementation Structures : A New Unit of Administrative Analysis" Organization Studies, Volume 2, 1981, p.214ff suggest the use of the notion of implementation structures . Although, this notion of implementation structures as "parts of many public and private organizations" which cooperate in the implementation of a program provides an associative, partnership notion, the concept/approach does not account for the structural relationships between the organization as a result of legal, economic and political factors. For an important critique of this approach see Sabatier "Top Down and Bottom Up Approaches to Implementation Research: A Critical Analysis and Suggested Synthesis" Journal of Public Policy volume 6, 1985.

## CONCLUSION

### REGULATION, STANDARDS AND 1992

In spite of the rhetoric of 1992, the European Community is not engaging in complete deregulation. In contrast to the advocates of "deregulation", the internal market in goods is being created by deliberate private and public activity. As the Italian motorcycle case illustrated, the single market involves initiatives to breakdown the anomalous technical and regulatory barriers to trade. Accordingly, the Single European Market will involve a significant transfer of regulatory activity from member states to the European Community as well as the initiation of regulatory activity in areas that had previously not been regulated at the European level <sup>(91)</sup>.

This paper has challenged the view that the internal market program is an exercise in "deregulation" but instead represents a policy of **associative regulation which involves the public use of private organized interests**. Within the regulatory policy process, the emergence of standards is based on the existence of a complex bargaining process between the governments of private and public interests. The private organizations, CEN/CENELEC, act as agents of public policy in setting technical standards.

Yet standards as the "most neglected sector" of the 1992 program needs more attention because of its importance to the single market and its distinct policy arrangement whereby the private organisations, CEN and CENELEC are closely tied to the

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<sup>91</sup>. As Graham Bennett writes in 1987 the Single European Act provided for the first time a firm legal basis for a comprehensive EC environmental policy p.5.

Community institutions resulting in associative regulation as an alternative regulatory framework.

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