



EUROPEAN COMMISSION

FORWARD STUDIES UNIT

The Future of European
Regulation: A Review of the
Workshop 11th June 1997

Notis Lebessis

John Paterson



Forward Studies Unit

CSB: I/24

#19472 061.3 351. 443, 34.04 341.018 389.6 4414.3 342.33 614.8

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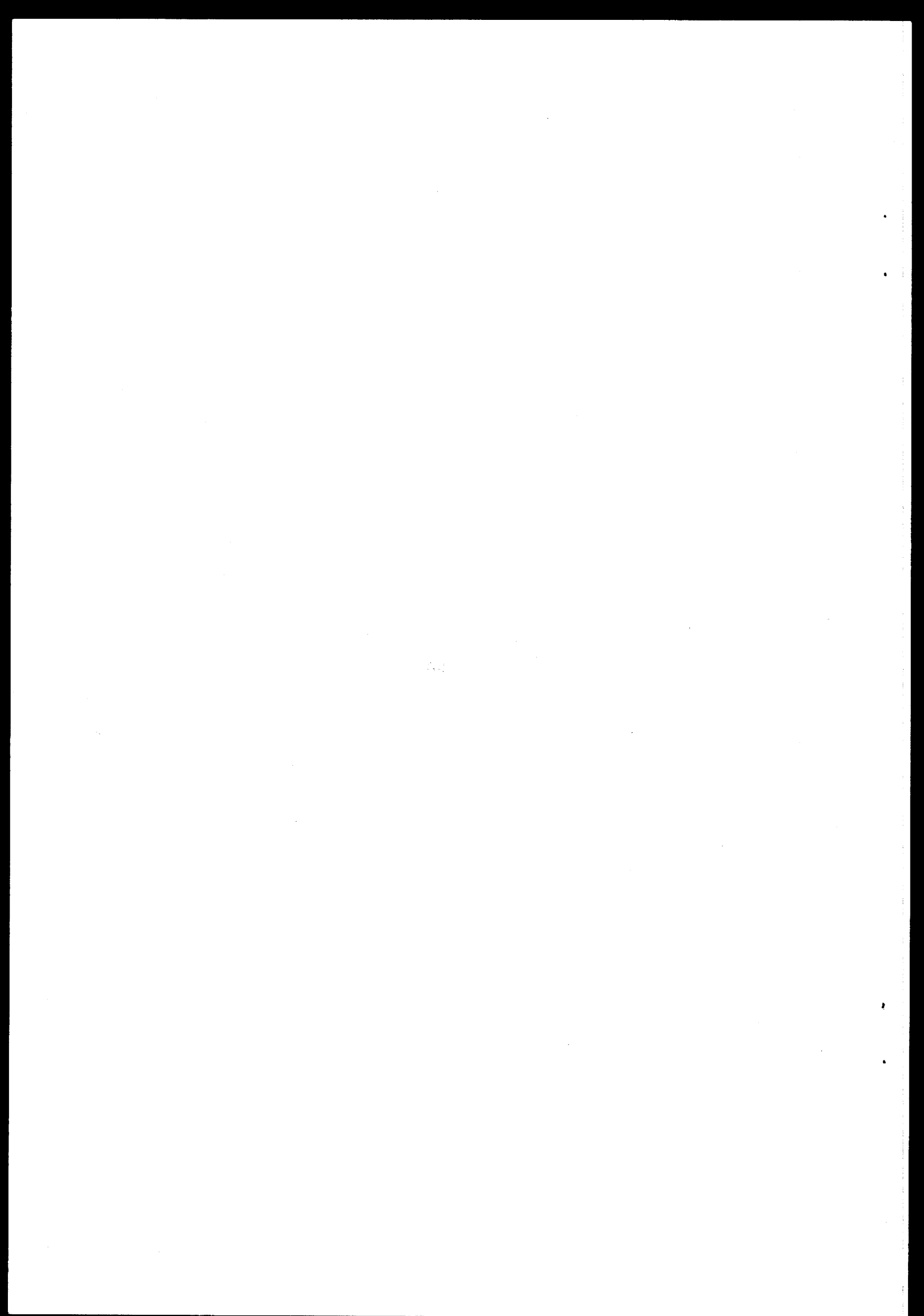
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Regulation: A Review of the
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John Paterson

WORKING PAPER, 1999



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Notis LEBESSIS & John PATERSON*

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1. Introduction

As the European Union moves towards further enlargement and finds itself confronted with ever more complex problems, a number of principles have been adopted to assist its adaptation to this context: subsidiarity, proportionality, transparency and flexibility. These principles reflect a concern to leave as much scope for national decision as possible, to respect national arrangements and legal systems, to act only insofar as is necessary to achieve Treaty objectives, to consult widely, to take decisions as openly as possible and as closely as possible to the citizen, to recognise the possibility of differing arrangements between groups of Member States. Taken together, they aim to improve both the effectiveness and the legitimacy of European policy.

For the Commission, the meaningful implementation of these principles is vital to the success of the policies with which we are entrusted and hence of the European project as a whole. This depends, however, upon a clear understanding of what is at stake in the process of regulation which these principles are ultimately aimed at - the role of the public actor, the limitations of traditional modes of action and the opportunities offered by alternative modes of governance. Such an understanding is necessary as we consider the reorganisation required to meet future challenges and how we may best deploy our available resources.

Just as the role and methods of the Commission are evolving, so the regulatory situation at the national level has by no means been static. Rather, a rich picture of innovation is evident. The Workshop on the future of European regulatory action which took place on 11 June 1997 was organised within the framework of the seminar on transformations of governance which the Forward Studies Unit has devoted to the study of these innovations. Professors Giandomenico Majone and Renaud Dehousse from the European University Institute in Florence presented a diagnosis of the problems posed by the development of regulatory policies at the European level and offered some proposals for a long-term response. Their interventions throughout the Workshop and the discussions with personnel from the different services of the Commission who were present (see the annexed list) was organised in a spirit of assisting the self-understanding of the Commission in this developing context. While it is often tempting to believe that we are already doing our best and are well-adapted to the contemporary context, understandable self-assurance must never become complacency. There may sometimes be a reluctance to listen to outsiders who lack intimate knowledge of our daily practice, but their distance and consequent breadth of view can provide a useful balance.

At the Workshop, the development of agencies in the European context was considered together with their future potential for improving the effectiveness and legitimacy of European policy. As was stressed by both Professors Majone and Dehousse, agencies were by no means presented as the unique possible response to contemporary problems but rather as an interesting and instructive example of what is taking place both at the European and national levels. Agencies as they currently exist are certainly not perfect and they raise as many questions as they answer. But these are questions which go to the heart of the regulatory process and thus of the European project. An examination of agencies with their network organisation and their need to integrate a variety of actors at different levels thus helps to identify the key issues at stake which we need to take

into account as we ponder reorganisation. Equally, such an examination allows a consideration of what the principles guiding European policy, such as those of subsidiarity and transparency, can mean in practice.

The discussion provoked by the interventions of Professors Majone and Dehousse allowed the identification of methods and practices in the Commission which already go beyond the traditional conception of our role and which aim to enhance the legitimacy and effectiveness of our policies. This has provided us with a great deal of material for future meetings of the seminar at which the aim will be initially to deepen our shared understanding of the evolution of our role and methods and of the context of this evolution, and ultimately to enhance our ability to anticipate the further transformations that will be required in future.

2. Diagnosis: The Regulatory Deficit in the European Community

2.1. Departure points

The principal point of departure for the Workshop was that there is evident within the EC a regulatory deficit, that is, a growth of responsibilities accompanied by only a sub-optimal ability to deal with those responsibilities. The Commission has had the task of completing the internal market and its principal tool in this regard has been harmonisation. In order to achieve harmonisation, directives have been produced which set out the requirements which Member States must transpose into their own legal orders. The Commission has tended thereafter to concentrate on the question of whether directives have been formally transposed as opposed to the question of whether they are being substantively implemented or substantively observed. While this is a reflection at one level of the sometimes sluggish response of the Member States in even transposing directives, it is more importantly a reflection of our lack of expertise and resources to operate at any more detailed level. Despite this inability, the logic of achieving an internal market has led us to become involved in ever more areas where initially we had no competence. The need to remove barriers to the free movement of goods, services, capital and people means that divergences between Member States in the treatment of a whole range of social issues cannot be countenanced where they result in distortions of the market. Increasingly, therefore, there are issues of occupational health and safety, environmental protection and consumer safety to be dealt with and it is a question whether the harmonisation technique with its emphasis on detailed provisions and uniformity is appropriate in these circumstances.

2.2. From the logic of the market to the logic of protection

On the one hand the logic of the market places a primary emphasis on the achievement of uniformity per se rather than on the precise level at which uniformity is achieved. On the other hand, the same logic assumes that the causal models upon which detailed provisions are based are uncontroversial and relatively stable. With issues of environmental, occupational and consumer safety, however, questions of the appropriate level of safety become predominant and the inherent instability of causal models becomes increasingly evident. In other words, it is increasingly the case that experts are explicitly uncertain about the appropriate causal models on which to base regulatory action or the variety of expert opinions available reveals the uncertainty. In such circumstances, where the status of expert opinion must be reappraised, regulation has to consider how expertise and social judgement can be integrated and it is increasingly clear that the pre-existing models of legislature, executive and judiciary are strained by this requirement. As means are sought to come to terms with complex, interdependent problems about which both uncertainty and a plurality of perspectives exists, a blurring of the classical separation of powers sometimes emerges as one institution carries out the functions previously associated with the others. It is no longer sufficient to see politics taking once and for all decisions on the basis of expert advice. Some occupational health and safety arrangements in which work-force and management are integrated into the process of identifying, assessing and managing

risks together with experts and regulators on an ongoing basis are examples of new approaches to regulation which attempt to accommodate the dynamic and interdependent nature of problems. The fact that the practical solutions that emerge from such arrangements often manifest enhanced legitimacy and effectiveness indicates the potential that a fresh approach to regulation can possess. It is a question, then, of examining the new approaches to regulation that we in the Commission have experience with and of drawing the lessons from them that can be shared more widely.

2.3. Mutual recognition and delegation to standardisation bodies

One response to this critique can be that the new approach to the completion of the market has adequately taken account of this shift. Mutual recognition and the delegation of standardisation decisions to private standards authorities on the basis of broadly-drawn instructions can be said to indicate an awareness of the difficulty of imposing detail from the European level. That said, however, it can be seen that this approach places its faith in the ability of Member States themselves to determine appropriate levels of protection and equally assumes the existence of stable models sufficient to ground the decisions of private standard authorities. In each case, the appropriateness of the mechanisms employed for the integration of expert and social knowledge and for the ongoing assessment of the assumptions underlying standardisation decisions is not addressed.

This approach to the completion of the single market results in a diversity of rules among the Member States and raises the question of mutual trust and confidence. Are rules in each Member State being enforced equitably or is, for example, the regulation of risks to consumers or workers being used to provide a competitive advantage? If we accept that a return to trying to impose a unified approach from the European level is not possible, such a question indicates a need for measures which allow trust and confidence to be built up among those who are responsible for enforcement in the different Member States. Among existing measures cited by participants at the Workshop are those aimed at improving transparency between enforcement agencies such as the organisation of exchanges, common evaluations and joint inspections. Not only, therefore, must regulatory approaches address the problem of integrating expert and social judgment but they must also do so in a way which takes account of the question of mutual trust and confidence among Member States.

2.4. Comitology, impact assessments and risk assessment

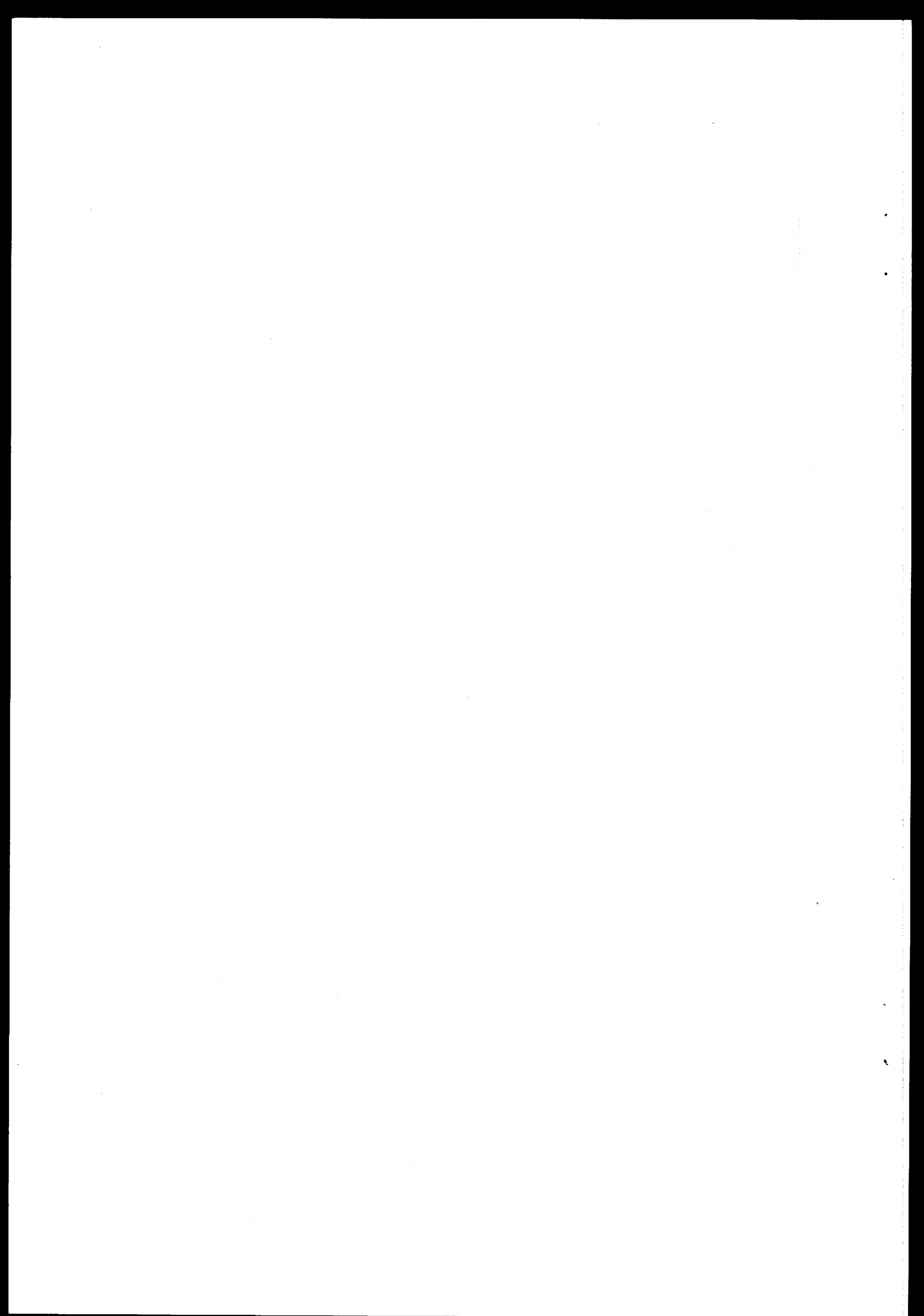
But if harmonisation struggles to accommodate these new problems, what can take its place? To be sure, the Commission is by no means unaware of these issues and it is clear that there is considerable evidence of a move away from a pure logic of market completion to a logic of protection with increasing emphasis on the identification, analysis and assessment of risks. At one level, the comitology approach possesses elements of the flexibility required both as regards the integration of expert and social knowledge and the need to transcend the classical separation of powers. At another, there are examples of regulatory approaches which represent significant advances over the traditional model: in the field of environmental protection, for example, one can mention the use of impact assessments and in the field of occupational health and safety one can point to the requirement for risk assessment in the Framework Directive.

2.5. Limitations

Despite these advances, however, reservations remain. Regarding comitology, a number of criticisms can be levelled: there are doubts about its ability to cope with an ever increasing workload; the rules are complex and ambiguous and by no means easy to discover; there is a general lack of transparency about the whole process; and there is no clear means of ensuring coherence among different sectoral policies. While the response of several participants was to minimise the importance of these criticisms, we should perhaps ask ourselves whether, if academic researchers from the Institute with the closest ties to the Commission are unable easily to discern the rules and processes of comitology, the experience of ordinary citizens is likely to be more positive. Albeit that efforts are made to identify stakeholders and to ensure that decisions are not imposed as some participants demonstrated, a number of questions arise. To what extent is the full range of perspectives on any given problem integrated by the comitology system? How representative are so-called representative organisations who may frequently be consulted? If poorly- or under-represented interests are excluded, what are the implications for the effectiveness and legitimacy of the decisions reached? Does the claimed flexibility of comitology become in practice rather rigid resulting in a fragmentation of policy and hence poor co-ordination? And finally, if everything in comitology is as good as has been claimed, can there be any objection to greater openness and a more systematic approach to its organisation?

Beyond comitology, however, doubts can also be expressed about other attempts to come to terms with the challenges raised by the issue of risk. For all that the Commission's approach to environmental regulation is very forward-thinking, a fact endorsed at the Workshop by representatives from a range of DGs, the question arises as to how adequate this approach can be while other sectoral policies continue to be conducted according to less advanced means and methods. If Environmental Impact Analyses are widely recognised as a good idea, why do other sectoral policies not similarly require impact assessments? What does this reveal about the adequacy of our approach to the co-ordination of policy? The very fact that risk is the prime question demands that an integrated and co-ordinated approach is adopted otherwise there can by no means be said to be an appropriate or adequate identification and assessment of risk. Equally, in the example of health and safety regulation, the Framework Directive's general requirement for risk assessment appears to be compromised by the daughter directives' detailed regulatory requirements which impose solutions which may be at odds with the assessment of risks in context. It would appear, therefore, that the future meetings of the seminar should examine some of our methods and practices in this light, notably mainstreaming and the use of risk assessment by the Commission.

In short, for all that there are examples of the Commission's response to the shift from the logic of the completion of the market to the logic of protection, it is not clear that these form part of an integrated approach nor that they are based on a well worked out conceptualisation of the nature of the problem. If new methods and arrangements are based on the same presuppositions that underpinned foregoing approaches any gains will at best be temporary and at worst illusory



3. The Regulatory Process: The Nature of the Regulatory Process and The Logic of Delegation

3.1. From direct government to indirect governance

Confronted by this type of problem, where the emphasis comes to be placed upon risk, there is evidence in a number of Member States of a shift away from direct or external government to indirect or internal governance: that is, the regulation of decentralised units responsible for the delivery of services or 'government by proxy'. While at the Workshop there were expressions of regret that the Commission could not exercise more power centrally and directly, there must be a recognition that such a desire is at odds both with the complexity of the problems confronted and with the increasing demand of the wider public not simply to be governed but to be more directly involved in the process of regulation at every stage. Insofar as regulation does not take account of the individual contexts in which it is applied, it is doomed to failure. The centralised exercise of detailed regulation is simply inappropriate to this task.

Consequently, as public actors come to recognise that the problems they confront are increasingly complex and that their ability to achieve stated objectives by coercive means has diminished, so these problems are delegated to units possessing expertise and independent judgement. While according to traditional models such a move can be seen to offend the notion that power should only be exercised by elected bodies, there are indeed good reasons why such majoritarian bodies are ill-suited to cope in such circumstances. In dealing with the most complex issues, the body entrusted with the task must possess credibility if it is to enjoy the support of the stakeholders in defining and analysing problems and in implementing solutions. In such cases, a vital component of this credibility will be the ability to demonstrate a long-term commitment to the tasks in hand. This is precisely what elected bodies cannot do because of their need to seek periodic re-election with the result that actions which produce short-term tangible gains are likely to be prioritised over those where the gains will only arise beyond the period of the next election. In such circumstances, credibility depends precisely on a non-elected, non-majoritarian status.

3.2. New roles for public actors

If public actors such as the Commission therefore feel a sense of loss in the transfer of power, however limited, to the new European agencies, this understanding of the situation provided by Majone and Dehousse should allow us to recognise the opportunities such a delegation allows for a more effective, legitimate and coherent approach to governance. Such a delegation may result in the loss of some tasks but increases the importance of others. Delegation of power to such bodies results in less detailed and technical work for the centralised public actor but implies an increase in internal regulatory tasks: the setting of priorities, the elaboration of mandates and guidelines for decentralised units, the monitoring and evaluation of the operation of these units and the ongoing overall co-ordination of policy.

3.3. Limitations

This does not mean, however, that agencies are a panacea for contemporary problems. If agencies are able to overcome the temporal limits restricting the action of the elected public actor, the question remains as to their ability to overcome the cognitive limits. Indeed, the strict limitation of their role which delegation implies can result in a narrow focus which is ill-adapted to a recognition of horizontal problems. Thus, the precise organisation of the agency and the broader context in which it operates are of prime importance and the role of the centralised public actor is highlighted in terms of the overall co-ordination of policies. It may also be the case that some policies are unsuitable for delegation because of their global reach - as was convincingly argued for competition policy by one of the participants. While many policies need to be understood in a broader context, the risks arising from the narrower view of competition that an agency would probably possess appear greater than the potential benefits of delegation. That said, however, the question remains of the adequacy of the Commission's integration of other policies with competition decisions.

4. The Transnational Dimension: Regulation by Networks

4.1. Networks as guarantors of credibility

Although the problems facing centralised public actors lead to delegation, the potential for decentralised expert institutions to be isolated and subject to ongoing interference means that the expected credibility gains may not be realised. As a consequence, such institutions need to establish networks of similar bodies to provide mutual support. The need to maintain credibility and reputation within such a network where there is a long-term commitment to a given policy area means that both political interference and capture by powerful interests can be more easily resisted.

The new European agencies have established such networks of private and public actors with the aim of establishing a 'community of views'. As a consequence, these agencies are not so much new concentrations of power as the organisers or the animators of transnational regulatory networks. Similarly, their powers are limited and their primary role is the collection of data and the provision of information. While true objectivity is an unattainable goal, the need for the agencies to maintain independence and credibility within their networks means that their information has the potential to be particularly reliable and of value not only to policy makers at the European and national levels but also to the wider public.

4.2. Limits and opportunities of networks

But while networks can help to maintain the independence and credibility of agencies, there remains the danger that these networks of expert institutions may reflect an unduly narrow vision of the problems they have been entrusted to deal with. As a consequence, mechanisms are required which ensure the identification and integration of stakeholders into the networks. Nor should such a move be restricted to the better-organised and easily identifiable stakeholders but should also include the provision of assistance to the less well-organised. While several DGs are already involved in such initiatives, a more systematic and explicit approach would only serve to enhance the legitimacy and ultimately the effectiveness of European policy. The IMPEL network was particularly mentioned by participants as an example of the advanced nature of our current practice and other examples in different sectors were also mentioned.

And beyond ensuring that other perspectives are integrated into the operations of agencies, these expert institutions must be proactive in identifying potential conflicts with other policy programmes and in ensuring ongoing review of the assumptions and models upon which the information they provide is based. In other words, networks of such institutions must not operate so as to limit their vision of the policy area but must be an opportunity to assist in the overall co-ordination of policies. Similarly, the involvement of other stakeholders must not simply be an exercise in easing the dissemination of information or in formal legitimisation, but rather a genuine integration of other perspectives in order to enhance the quality of information and action. Key features of such a use of networks are the adoption of methodologies which enable horizontal communication with other policy areas and of participative qualitative

methods to supplement more technical quantitative methods as a means of improving the quality of data and of assisting communication with other stakeholders.

The examples presented by participants at the Workshop of networks with which different DGs are already involved can allow us in future meetings to consider our awareness of and response to the issues discussed above: the role of the animator of networks, the identification and integration of stakeholders, and the co-ordination of policies.

5. Improving Regulatory Co-ordination

While individual policies can appear coherent and to have a high probability of success within the terms of their own particular area, they can ultimately fail or produce unintended side-effects in other areas. This is due at one level to the inadequacy of political oversight both of individual programmes and of the totality of programmes. One way of dealing with this problem is to require impact assessments not just for some areas of policy (such as the environment or SMEs) but for all policies. Experience with these assessments can assist in the overall setting of priorities and in better adapting the approach of individual policies.

The approach in the US is instructive in this regard where the Office of Management and Budget organises a regulatory budget. This requires the different agencies to submit regulatory proposals in terms of their costs and benefits and allows rational oversight of the entire programme. Horizontal transparency is improved as is the transparency of the regulatory process to other stakeholders. Despite the particular difficulties at the European level (for example the difficulty of evaluating the impact of measures which will be determined according to national modalities that are uncertain at the outset) CBA is already practised in certain circumstances by the Commission as it is increasingly required in such areas as the environment and in occupational health and safety. But again, positive claims for current practice in these domains must be set against the absence of such an approach elsewhere especially in view of its clear utility in giving meaning to the principle of proportionality. Once again, our current practice of CBA and of more qualitative methods can provide a focus for future meetings of the seminar.

5.1. Limitations

However, it is a question of the extent to which the perspectives of other stakeholders are integrated into the regulatory process. Co-ordinating programmes is a step forward but there must be awareness of the limits of co-ordination restricted to monetised values and of the ability of a regulatory budget to engage and integrate other stakeholders. Such an awareness implies not only the establishment of a central body such as the OMB but also of ongoing mechanisms at the level of agencies, their networks and lower level actors which encourage a broader vision than individual programmes and the expert models associated with those programmes.

The OMB model is, then, not a panacea, but it is instructive insofar as it represents an attempt to deal rationally and systematically with the co-ordination of policies. In the absence of such an attempt, the possibility of duplicated effort, of counterproductive interactions and even of dangerous side-effects increases. Similarly, the chance to take advantage of regulatory synergies and to foresee expensive problems is lost.

5.2. Opportunities

Considering new approaches to co-ordination is especially important as we embark on the reorganisation aimed at dealing with the challenges of enlargement. Claims at the Workshop that the Commission already carries out a role analogous to the OMB were tempered by a recognition that it nevertheless could benefit from clarification. As the logic of this approach to governance becomes more compelling in the context of enlargement, the need to understand the co-ordinating role of the Commission in a systematic and rational way becomes urgent. Are our methods aimed at the integration of the perspectives of other services really sufficient? What improved means could be deployed in order that other points of view are actively sought and considered at a sufficiently early stage?

6. Improving Legitimacy and Procedural Rationality

While agencies represent a potential gain over comitology in terms of legitimacy because of their greater visibility and their ability to feed the policy debate in both directions, the danger remains that they can fail to fulfil that potential as a result of precisely the same problems which have beset comitology: a diversity of rules, an expansion of committees, an overlap of activities and ultimately a reduction in transparency both horizontal and vertical. There was indeed acceptance at the Workshop that the current European agency model precisely risks these problems insofar as it is essentially pre-Maastricht, technocratic and thus ill-suited to the current context in terms of its inability to integrate other perspectives. One way of dealing with these problems would be to adopt a unified set of rules equivalent to the Administrative Procedures Act of the US. This would rationalise decision making and both guarantee and regulate the involvement of other stakeholders. And, together with developments of European law associated with access to justice and *locus standi*, the consequent availability of judicial review would enhance the legitimacy of European regulatory action - the very possibility of its use would have a beneficial effect on the development and implementation of policy. Although the problems of delays and costs associated with judicial review in the US can lead to skepticism about its benefits, it was pointed out that the culture of litigation evident in that jurisdiction is not such a feature of the European context.

While the Workshop considered the possibility of extending the agency model and of introducing a European Administrative Procedures Act to address the legitimacy and effectiveness problems confronting the EU, this was done less as a firm proposal for what ought to be done and more with a view to highlighting the sorts of issues that the Commission needs to address as it considers reform in the contemporary context.

In other words, it is not a question of which institutional arrangement is better *per se* but rather of how well any institutional arrangement is able to deal with the nature of contemporary problems. If these problems are understood as complex and interdependent as opposed to being susceptible to the tools provided by one expert discipline; as possessing the potential to reveal further aspects of uncertainty in the future as opposed to being clearly definable once and for all in advance; as being open to differing definitions according to different perspectives, etc. then any institutional arrangement needs to address a number of key issues:

- the need to identify and to integrate multiple perspectives in all stages of the regulatory process from the setting of problems and priorities, through the implementation of solutions to the evaluation and revision of policy;
- the importance of horizontal policy co-ordination and the need to avoid narrow economic and expert co-ordination mechanisms;
- the importance of reflexivity or the ongoing questioning of assumptions, assessments of risks, etc.;
- the need to achieve a contextualised approach to the regulatory process;
- the utility of a vision of the regulatory process as a process of collective learning.

It is a question then of considering whether our methods and organisation sufficiently address these issues and whether we are engaged in a sufficiently systematic appraisal of our reorganisation. The examples cited by participants at the Workshop of how we have already adapted ourselves to the developing context in ways which go beyond the traditional conception of our role will allow us in future meetings to deepen a shared understanding of the nature of the problems we face and of the appropriate responses.

There are risks in adopting any more *ad hoc* approach to reform. In this regard, the BSE case was cited at the Workshop as an example of our ability to reform ourselves in response to emergent problems. In terms of a traditional understanding of the process of regulation this is perhaps true. But in the context of the understanding developed by this project, such a response can be said to indicate the dangers of complacency and an inability to draw the wider lessons. The Commission has undoubtedly reformed itself as a result of this case with regard to food safety. But it did so only reactively in the context of unprecedented public concern and of the threat of firm action from the Parliament and only in the field of food safety. Has it taken any steps to consider proactively the potential problems which may lie latent behind other administrative arrangements which are ill-adapted to the co-ordination of policy and the interdependence of problems?

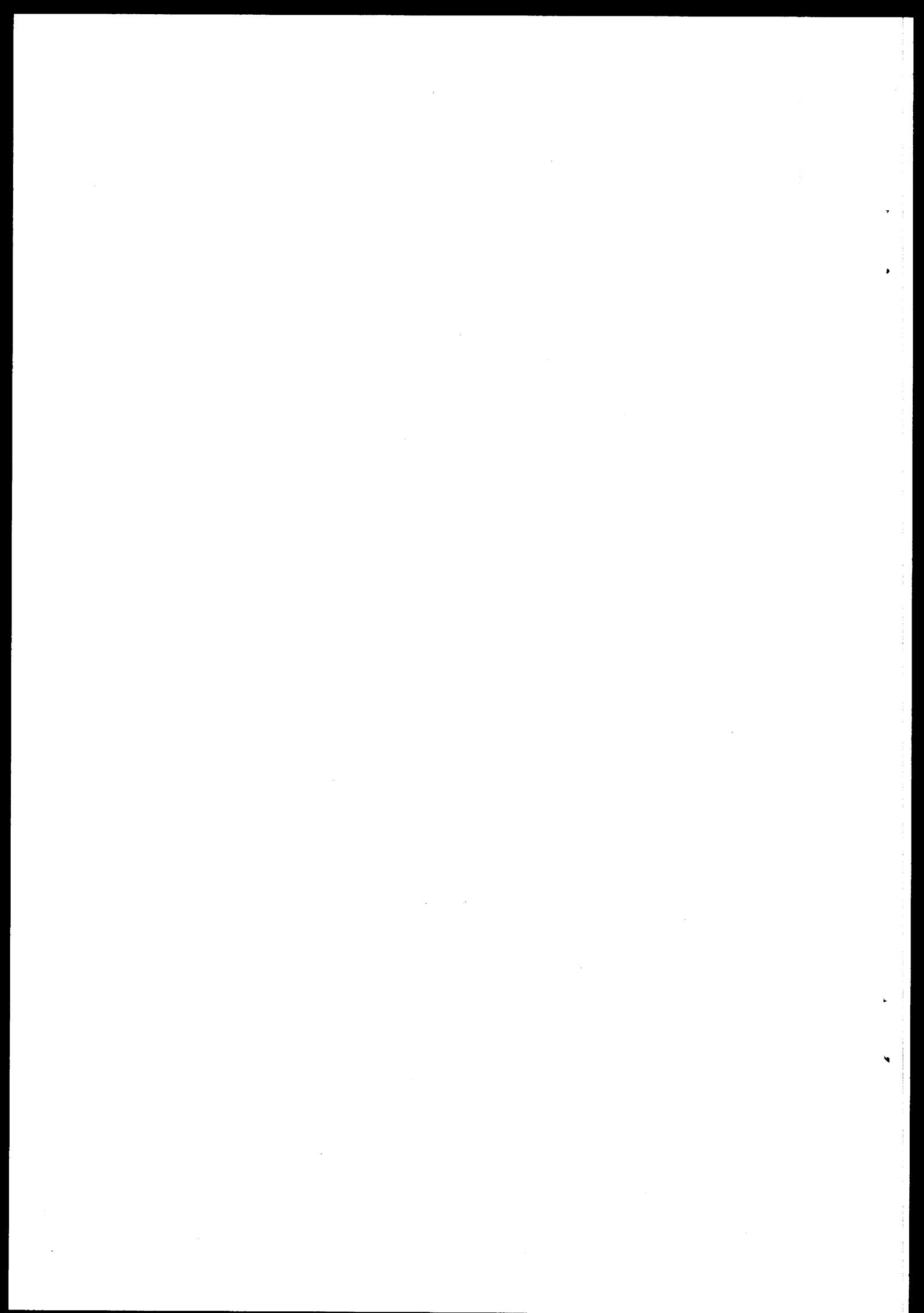
Another speaker appeared nearer the mark when he endorsed the need to consider a procedural approach. He stressed that the central question in European policy was one of confidence and that there was a need to consider new forms of representation which could achieve a better integration of economic and social policy. While the presuppositions of traditional regulatory approaches remain unchallenged such an integration will be extremely difficult to achieve and the guiding principles of subsidiarity, proportionality, transparency and flexibility could fail to fulfil their potential in the absence of a coherent and systematic understanding of the nature of the regulatory process in contemporary and foreseeable conditions.

APPENDIX 1

7. Programme of the Workshop

FORWARD STUDIES UNIT
GOVERNANCE PROJECTWorkshop: Improving the Regulatory Process in the European Community
Brussels, 11 June 1997

9h30 - 9h40	Introductory Comments : The Governance Project Jérôme VIGNON
	DIAGNOSIS
9h40 - 10h10	The Regulatory Deficit in the EC Renaud DEHOUSSE
10h10 - 10h30	Short Discussion introduced by John FARNELL
	THE REGULATORY PROCESS
10h30 - 11h15	The Nature of the Regulatory Process and the Logic of Delegation Giandomenico MAJONE
11h15 - 11h30	<i>Coffee break</i>
11h30 - 11h50	Short Discussion introduced by Niels AHRENDT, Evangelos VARDAKAS
	THE TRANSNATIONAL DIMENSION
11h50 - 12h10	Regulation by Networks Renaud DEHOUSSE
12h10 - 13h00	Round Table and Open Discussion Jonathan FAULL, Ronald HAIGH, Mary SANCY, David WHITE
13h00 - 14h30	<i>Lunch Break</i>
	PROBLEMS OF COORDINATION AND OF LEGITIMACY
14h30 - 14h50	Improving Regulatory Coordination Giandomenico MAJONE
14h50 - 15h00	Comments Jacques LENOBLE
15h00 - 15h20	Short Discussion
15h20 - 16h00	Improving Legitimacy and Procedural Rationality Giandomenico MAJONE & Renaud DEHOUSSE
16h00 - 16h15	<i>Coffee break</i>
16h15 - 16h25	Comments Jacques LENOBLE
16h25 - 17h20	Round Table and Open Discussion Giuseppe CIAVARINI AZZI, Claire-Françoise DURAND, Michel BOURGES-MAUNOURY, Robert HULL, Reinhard SCHULTE-BRAUCKS, Hilkka SUMMA, Patrick VENTURINI
17h20 - 17h30	Conclusions Jérôme VIGNON



8. Key points of the governance project approach vis-à-vis the presentation by professors Majone and Dehousse

8.1. The Regulatory Deficit in the European Community

A. The Shortcomings of the Harmonization Model

MAJONE AND DEHOUSSE

Majone and Dehousse describe a situation in which a growth of responsibilities for the EU is accompanied by its ability to deal with those responsibilities only in a sub-optimal way - a regulatory deficit.

This is due to a combination of factors including the fact that in attempting to achieve harmonised standards for the internal market, the Commission tends to focus on whether or not directives have been formally transposed as opposed to whether they have been substantively implemented or are being substantively observed. It is in any event a question whether the Commission possesses the resources, the expertise or indeed the authority to assess such substantive issues.

A further problem at the European level is the need for there to be trust and confidence among Member States that each is implementing agreed policies. The lack of a centralised authority with inspection and enforcement powers makes this difficult to achieve.

In addition, it may not always be possible to anticipate in a legislative instrument the elements that will emerge in the implementation phase. Thus, even where directives are transposed and implemented, there is no guarantee that they will produce the desired effect.

The completion of the single market has resulted in the extension of EU competences into areas where initially there was none but where intervention is required to prevent distortions of the market. This has been accepted by the Member States only with great reticence and on the basis that they maintain control of negotiation and have the exclusive right to implement decisions. Majone and Dehousse stress in addition the fact that the completion of the single market implies the ability to detect and control risk. This implies new competencies for the Commission and the uncertainty involved requires greater flexibility, the integration of expert and social judgement *throughout* the regulatory process instead of just at the beginning and a shift to the legal provision of procedures rather than of fixed solutions.

GOVERNANCE PROJECT - DIAGNOSIS

The governance project would agree with this diagnosis and would emphasise especially the impossibility in any event of a body such as the Commission taking on centralised responsibility for the detailed provision of rules and their detailed implementation.

The complex and interdependent nature of many contemporary problems has rendered this model of regulation and this role for the public actor redundant in many instances as has been demonstrated by the project so far.

GOVERNANCE PROJECT - PROPOSALS

An explicitly enabling role for a public actor such as the Commission is envisaged as opposed to an interventionist role.

The aim is more actively to seek to anticipate the elements that may emerge in the implementation phase (for example, unintended side-effects, the realisation of risks) by integrating more perspectives, both internal and external to public actors at Commission and national level.

This involves at the highest level an emphasis on the co-ordination of policies.

B. Comitology

MAJONE AND DEHOUSSE

Comitology allows the Community to have an influence beyond the level of rule-making. Such an approach allows economic and cultural differences to be considered in the elaboration phase as different perspectives (political, interest group and expert) are brought to bear on policy questions. It is thus useful for developing working routines and commonly shared assumptions. But there are limits to the workload it can handle, a lack of uniformity of rules and a lack of transparency.

GOVERNANCE PROJECT - DIAGNOSIS

Emphasises especially the question of accessibility and transparency as regards comitology. Which perspectives are included in the elaboration of policy? There is a danger that poorly-organised or unrepresented interests are simply ignored or at best under-represented with the implications this has for the legitimacy and the effectiveness of the decisions ultimately taken.

Equally, there is a question about the ability of comitology to adapt to the horizontal and evolving nature of problems which are often difficult if not impossible to perceive in advance. Can this be achieved in a systematic and sufficient way within the comitology structure? There is a danger that the consideration of policy becomes fragmented and rigid.

There is a shift from a situation where rules are formulated in advance and then applied to a situation where the process of regulation is understood as ongoing.

GOVERNANCE PROJECT - PROPOSALS

Mechanisms are required which are more flexible and which can enhance the input of different perspectives throughout the regulatory process with improved possibilities for multidisciplinary approaches and stakeholder involvement, leading to greater transparency and improved effectiveness. Experience with more decentralised negotiated rulemaking could be instructive in this regard.

The development of working routines and commonly shared assumptions must be accompanied by reflexivity - i.e. ongoing evaluation, risk assessment, questioning of assumptions - again with a multidisciplinary approach incorporating stakeholders.

C. Alternative Responses to the Regulatory Deficit

MAJONE AND DEHOUSSE

Two broad alternatives are put forward and rejected.

Legislative - i.e. specify in greater detail the obligations for national administrations. This is rejected on the basis of resentment at further intrusion.

Supranational - i.e. enhancing the Commission's implementation and control powers. This is rejected on the grounds of lack of resources, expertise, etc.

GOVERNANCE PROJECT - DIAGNOSIS

The governance project stresses the cognitive limits standing in the way of detailed regulation handed down from any centralised authority whether the response to the regulatory deficit is legislative or supranational.

GOVERNANCE PROJECT - PROPOSALS

A radical rethinking of the way in which norms are elaborated and applied is therefore required. It is no longer possible to view regulation as the elaboration of norms by legislators followed by their application by administrators or judges. Issues such as uncertainty and complexity render this linear model of regulation inadequate.

Majone and Dehousse recognise this when they state that 'The most urgent task is the development of sophisticated legal techniques which oversee the ongoing process of risk-evaluation and standard-setting.'

This opens the way for discussion of the nature of the regulatory process in these conditions.

8.2. The Nature of the Regulatory Process and the Logic of Delegation

MAJONE AND DEHOUSSE

Majone and Dehousse emphasise the shift from direct governance to the regulation of decentralised units responsible for the delivery of services.

This is due to a recognition of the increasingly complex problems confronted which call for expertise and independent judgement.

It is equally due to the increasingly limited ability of public actors to achieve policy objectives by coercive means.

For both reasons, an approach which possesses credibility is required. However, political institutions because of their limited time horizons lack credibility in cases where a long-term commitment to policy is required.

The answer is delegation to non-majoritarian expert institutions.

A list of institutional choices for principals (i.e. those delegating) is provided, the main consideration being whether agency costs exceed the benefits.

Agencies are envisaged which are characterised by their limited scope, the fact that they are evaluated on their performance, etc.

GOVERNANCE PROJECT - DIAGNOSIS

The governance project would agree with this assessment and acknowledges the important addition to the logic of delegation which the idea of temporal horizons offers.

However, it would insist on the importance of the cognitive limits not only on the public actors who must now delegate authority but also on those institutions to which authority is delegated.

As a consequence, while limiting the scope of agency authority is an understandably cautious approach, it may unduly restrict their ability to identify and respond to horizontal problems. Similarly, evaluating an agency on its performance with regard to a limited function may be an exercise of little practical value if horizontal problems and side-effects have emerged.

GOVERNANCE PROJECT - PROPOSALS

Mechanisms are required which ensure that the limitations on expert and bureaucratic models at the level of centralised authorities do not reappear at the level of decentralised institutions.

Thus, the integration of social with expert perspectives; co-ordination with other policies; ongoing assessment of risks, evaluation of policy and revision of objectives and means are all important.

The project thus proposes more contextualised regulatory processes producing differentiated rules which nevertheless respect overall coherence and co-ordination.

This leads on to the role which networks can play in meeting the concerns raised by the governance project as well as the problems of trust and confidence which the lack of a strong central authority produces.

8.3. Regulation by Networks

MAJONE AND DEHOUSSE

Although the problems facing majoritarian centralised authorities leads to delegation, the potential for decentralised expert institutions to be isolated and subject to ongoing political interference means that the expected credibility gains may not be realised.

As a consequence, the establishment of networks of such institutions is required to produce mutual support. The need to maintain credibility and reputation within such a network where there is a long-term commitment to a given policy area means that political interference can be resisted as can capture by powerful interests.

The new European agencies have established such networks of private and public actors leading to a 'community of views'. With narrowly defined powers, they exist at the heart of transnational regulatory networks rather than as concentrations of power.

They are better than comitology at reducing decision-making costs and agency costs and they improve accountability and legitimacy.

The new agency approach operates on the basis of the provision of information to Community and Member State policy makers.

GOVERNANCE PROJECT - DIAGNOSIS

The project stresses the need for networks as a means of ensuring that a variety of perspectives are brought to bear on complex problems. While networks can assist in dealing with the problems of trust and confidence that can arise among Member States, a network of expert institutions adhering to a closed vision of a policy area would not represent an advance over traditional models.

GOVERNANCE PROJECT - PROPOSALS

Mechanisms are required which ensure the identification and integration of involved public and private stakeholders into networks. This involves, for example, going beyond organised interests and assisting less organised stakeholders both to receive information and to present their perspectives. The Commission is already active in this direction but a more systematic approach would improve the legitimacy and effectiveness of European policy.

Agencies must be proactive in identifying potential conflicts with other policy programmes and in ensuring ongoing review of the assumptions and models upon which the information they provide is based. Networks must therefore not operate so as to limit their vision with regard to their policy area but must be an opportunity to assist co-ordinated action. The use of methodologies which explicitly take account of other policies and other perspectives and the adoption of participative qualitative methods to supplement CBA are important factors in achieving transparency of agency action both with regard to other agencies (assisting horizontal co-ordination) and with regard to other stakeholders (improving legitimacy and effectiveness).

This leads to the issue of improving co-ordination.

8.4. Improving Regulatory Co-ordination

MAJONE AND DEHOUSSE

While individual policies can be aimed at correcting market failures, they can equally produce side-effects which constitute regulatory failure. This is due to inadequate political oversight of the totality of programmes and of individual programmes and to economic inefficiency.

There is a need for impact evaluation of the totality of programmes, priority setting within and across programmes and at the lowest level a comparison of individual rules on the basis of cost-benefit analysis.

A regulatory budget on the US model is one solution although in itself this is inadequate. Impact assessments are also required together with comment and review procedures.

GOVERNANCE PROJECT - DIAGNOSIS

The project agrees with this diagnosis but points out that it is not simply a question of co-ordinating diverse agency programmes but of recognising the need to co-ordinate a multitude of perspectives.

The ability of a regulatory budget to accommodate issues which are not easily monetised is therefore crucial, as is the ability of impact assessments and related comment and review procedures to engage all relevant stakeholders.

Minimising the risk of unintended side-effects from interacting programmes depends on moving beyond the restricted vision of expert models.

Governance project - Proposals

A centralised co-ordinating mechanism which operates so as to enable the assessment of risks, costs and benefits as between programmes including social as well as expert judgement is required.

Cost-benefit analysis must be sufficiently open as to allow assessments of social costs and benefits which may be masked by narrow economic indicators.

The potential for savings and gains due to co-operative regulatory approaches, regulatory synergies, greater responsiveness to emergent problems, improvements in legitimacy and effectiveness must also be recognised and set against the undoubted costs involved in establishing co-ordinating mechanisms.

Such a view of co-ordination implies not only the establishment of a central body like the OMB/OIRA but also of ongoing mechanisms at the level of agencies, their networks and lower level actors which encourage a broader vision than individual programmes.

This takes us back to some of the points mentioned in earlier sections and leads to the next section where the key features of a procedural approach can be emphasised.

8.5. Improving Legitimacy and Procedural Rationality

MAJONE AND DEHOUSSE

Majone and Dehousse identify the agency approach as leading to gains in legitimacy because of their greater visibility and their feeding of the policy debate. They note, however, that there are dangers that they may go the same way as comitology in terms of diverse rules, an expansion of committees and eventually a reduced transparency.

As a result they advocate the establishment of a European APA to rationalise decision making, regulate the involvement of interest groups and allow judicial review.

GOVERNANCE PROJECT - DIAGNOSIS

The project agrees with the usefulness of an APA in establishing clear procedures and guarantees for participative decision-making.

It is a question, however, of the adequacy of an APA (in the minimal form which they envisage - namely consolidating current practice) to accommodate the issues highlighted in previous sections.

GOVERNANCE PROJECT - PROPOSALS

The project emphasises:

- the identification and integration of multiple perspectives in all stages of the regulatory process from the setting of problems and priorities, through the implementation of solutions to the evaluation and revision of policy;
- the importance of horizontal policy co-ordination and the need to avoid narrow economic and expert co-ordination mechanisms;
- the importance of reflexivity - the ongoing questioning of assumptions, assessment of risks, etc.;
- a contextualised approach to the regulatory process ;
- a vision of the regulatory process as a process of collective learning.

The principles of proportionality and subsidiarity can be given renewed meaning in the context of such an approach and the efficiency and legitimacy deficits confronting European policy can be addressed.

8.6. General Questions

What would the role of the Commission be vis-à-vis the agencies if their role was to develop further?

What would be the impact of mechanisms aiming at the overall coherence of policy on the structure and methods of the Commission?

What would the implications be for the judicial approach of the ECJ?

What would the role of the Parliament and the consultative bodies (ECOSOC, Committee of the Regions) be?

APPENDIX 3

9. Liste des participants

GOVERNANCE PROJECT
L'AVENIR DE LA RÉGULATION EUROPÉENNE
CCAB - 11 JUIN 1997

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DG V	GONZALEZ DORREGO ROSENDO	CdP	HUBERT AGNÈS
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