

The Politics of EC Regulation

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Martin Shapiro, in a discussion of legal scholarship on the European Union, refers witheringly to:

constitutional law without politics...[which] presents the Community as a juristic idea; the written constitution as a sacred text; the professional community as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology.¹

Clearly, we are not here about to assert that such a judgement holds true of all legal scholarship, and certainly not of that to be found in the rest of this volume. Yet we do maintain that a purely legal perspective on European integration, and perhaps particularly on its regulatory role, will reveal only a partial, and potentially misleading, picture, redolent of the elephant famously painted by Donald Puchala's blind men.²

The purpose of this chapter is straightforward. We aim to provide a brief overview of the politics of EC regulation, and to do so in four stages. First, we consider where the need for regulation comes from. Secondly, we investigate the processes by which the EC goes about the business of regulation. Thirdly, we examine the changing nature of EC regulation. Fourthly, we consider some normative implications of the Union's regulatory role. A concluding section briefly reviews some of the broader political factors that may impact upon EC regulatory policy.

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¹ M Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 *Southern Californian Law Review* 537.

² D Puchala, 'Of Blind Men, Elephants, and International Integration' (1972) 10 *Journal of Common Market Studies* 267.

A. THE DRIVERS OF EC REGULATION

Political scientists have advanced numerous explanations for EC regulation. In general terms, its desirability is seen to stem from the problem of 'negative externalities'—the undesirable impact of regulation (or the lack of regulation) in one country on another. Explanations for the scope of EC regulation range from the active role of the European Commission, to that of national or transnational interest groups.³ Some have been moved to view the Union as a 'regulatory state', pointing to its lack of distributive or redistributive powers in order to explain its striking reliance on the regulatory mode of governance.⁴

More specifically, we can identify a number of factors that account for what has been a significant increase in the amount of EC regulation over the course of the last two decades. Most EC regulation adopted since the mid-1980s has been linked, either directly or indirectly, to the drive to 'complete' the Single Market. This may strike some as a paradox: the Single Market, after all, has been viewed by friends and foes alike as a neoliberal project aimed primarily at dismantling barriers to trade. However, from the outset, Delors' project of completing the Single Market involved far more than mere deregulation. Creating an open, and level, playing field for business involved replacing the patchwork of national regulations with harmonised measures at the EC level. This deregulation–reregulation dynamic was driven primarily by three sets of forces: political pressure from pro-regulation Member States, entrepreneurship of a European Commission eager to champion 'the people's Europe', and the functional demands of regulating a diverse and dynamic pan-European market.

For Member State governments whose voting publics demanded high regulatory standards in areas such as environmental or consumer protection, acquiescing in EC inspired deregulation was simply not acceptable. Such governments reacted to the downward pressure on their regulations—coming either from attacks on their legality (as non-tariff barriers) or simply from enhanced competition from 'lax' states—by demanding the establishment of common regulatory standards at the EC level. In other words, they refused to engage in a regulatory 'race-to-the-bottom' and instead demanded that the EC engineer a pan-European 'race-to-the-top'. Such states, led by Germany, sought to use political influence and market power to reregulate Europe in their image.

Why, one might fairly ask, would laggard states acquiesce in this race-to-the-top, forcing them to raise production costs and surrender competitive advantages they had derived from their lower standards? The answer lies in

³ M Thatcher, 'European Regulation' in J Richardson (ed), *European Union: Power and Policy-Making*. 2nd edn. (London, Routledge, 2001) at 303.

⁴ G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17(3) *West European Politics* 78; G Majone, *Regulating Europe* (London, Routledge, 1996).

what scholars of regulatory competition refer to as ‘the California effect’.⁵ The California effect can arise in the context of a common market, when an economically and politically powerful jurisdiction has a preference for high standards of regulatory protection in areas such as public health, consumer or environmental protection. In these circumstances, the ‘California’ (or in the EU’s case Germany) can use its market power and political influence as a lever to force up the regulatory standards of laggard jurisdictions. In some cases, laggards are compelled to raise standards in order to gain access to valuable export markets in states with high standards. In other cases, powerful jurisdictions convince laggards to raise standards through mixtures of side-payments⁶ and policy log-rolls, and—just perhaps—moral suasion. Finally, in some cases in the EU, laggards were simply outvoted under the Single European Act’s qualified majority voting system.

The second key driver of EC level reregulation was the European Commission. Germany, the Netherlands, Denmark and other Member States that wanted to see the EC pressure regulatory laggards to raise their standards found an enthusiastic ally in the European Commission. In launching the Single Market, the Delors Commission was sensitive to criticisms from the Left that the EC in general and the Single Market project in particular were merely instruments of big business. Delors’ own ideological predispositions made him uncomfortable with such an idea. Moreover, and with strong backing from the European Parliament, the Commission saw regulatory activity as a means of enhancing the EC’s popular appeal by demonstrating its ability to address areas of great public concern, such as social, consumer and environmental regulation.

Thus, the dismantling of national regulatory barriers was coupled with ‘flanking policies’ in areas such as social, consumer and environmental regulation designed to ensure high levels of protection across the EC. Likewise, during moments of clear regulatory failure at the national level, such as the BSE crisis, when national governments could hardly claim that their regulatory regimes were successful, the Commission was more than willing to step in with proposals for enhancing the EC’s role in protecting the public.

Finally, the very nature of the EC’s Single Market influenced both the style and scope of EC regulation. When, in response to the political pressures mentioned above, EC policy-makers attempted to re-regulate at the European level, they confronted a number of functional pressures inherent

⁵ D Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Mass, Harvard University Press, 1997).

⁶ Revealingly, the SEA was followed by a massive increase in the funds provided for poorer EC regions; whilst never admitted officially by the EU, such payments represent a form of compensation for what poorer regions regard as potentially economically harmful EU initiatives: see D Allen, ‘Cohesion and the Structural Funds: Competing Pressures for Reform?’ in H Wallace, W Wallace and MA Pollack (eds), *Policy-Making in the European Union* (Oxford, OUP, 2003).

in regulating an open, dynamic market on a continental scale. The dynamic that emerged in the EC followed a familiar pattern that Steven Vogel identified in earlier studies of liberalisation in Japan and the UK; a dynamic in which 'freer markets' actually require 'more rules'.⁷ EC policy-makers had to craft regulatory frameworks suited to markets with a great diversity of players (including foreign firms) and little trust between regulators and the regulated. They could not adopt the sorts of informal, flexible (and often opaque) approaches to regulation that many governments had relied on at the national level. To be effective and legitimate, EC regulation had to promote a level playing field across the Community and ensure equal treatment for new entrants and foreign firms. Thus, EC regulation often relied on a rather formal, legalistic approach to regulation. Ultimately, as national regulatory practices were dismantled, they were replaced with new EC level regulations that involved more red tape than the national systems they replaced.

Finally, it is worth noting that in a number of policy areas the politics of blame avoidance encouraged the growth of the EC's regulatory power. In other contexts, political scientists have explained the decision to delegate responsibilities to independent bodies such as the Commission as a function of a desire on the part of politicians to avoid blame. Delegation, according to this view, represents a means of shifting responsibility to other decision-makers. As Fiorina puts it, by delegating:

legislators not only avoid the time and trouble of making specific decisions, they avoid or at best disguise their responsibility for the consequences of the decisions ultimately made.⁸

Elements of such thinking are clearly discernible behind the recent debate in the UK about the possibility of devolving operational matters pertaining to the National Health Service to an 'independent' body.⁹ Appreciating this dynamic is of crucial importance for understanding the current state of the EC and its regulatory implications. To take but one example, the decision to share regulatory authority between national capitals and the EU post-BSE can be seen in this light.

Certainly, the motives for the delegation of powers by the Member States to the European Commission are far too varied and complex to be reduced to such a simple formula, yet, as we illustrate in subsequent sections, the blame shifting potential of delegation has not gone unnoticed by national politicians.

⁷ S Vogel, *Freer Markets, More Rules* (Ithaca, NY, Cornell University Press, 1996).

⁸ M Fiorina, 'Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?' (1982) 39 *Public Choice* 33, at 47.

⁹ Some might argue, of course, that politicians aspire to have their cake and eat it, by blaming a supposedly independent body whilst, at the same time, designing it in such a way as to be able to control it.

B. THE REGULATORY PROCESS

Many of those who argue in favour of EC regulation do so based on claims regarding the efficacy of the process of EC regulation. Thus, Majone famously argues that the Commission makes an ideal and highly credible regulator because it is less likely to be captured by an individual firm or industry than are national regulatory authorities, and hence more inclined to be tough and enforce sanctions than the latter.¹⁰ Gatsios and Seabright give a practical example:

Where pollution has international effects, and fines impose significant competitive disadvantages on firms that compete internationally, firms are likely to believe—correctly—that national regulators will be unwilling to investigate and fine them as rigorously if they determine the level of enforcement unilaterally as if they had done so by international agreement. And the less rigorously they believe that regulatory standards will be enforced, the weaker will be their attempts at compliance.¹¹

This is all very well in principle. Yet many of the claims regarding the efficacy of the EC regulatory process are based on assumptions concerning the neutrality and political independence of the European Commission, on the claim that ‘transfer of powers [to an international authority] makes it easier to avoid regulatory capture’.¹² Such assumptions are at best questionable. As in the case of the nation state itself, the Commission has discovered that:

increasing intervention makes [the Commission] more clearly an arena of social conflict and makes its constituent parts more attractive for take-over. In other words, the contradictions of civil society become more embedded in [it] as [it] more deeply penetrates civil society, potentially undermining both its coherence as a corporate actor and its autonomy.¹³

Political and regulatory authorities, in other words, can become victims of their own success. The expanding EC regulatory agenda, which has come to encompass ever more politically salient aspects of socio-economic management, has increased the attractiveness of the Commission as a target for capture by those private interests it seeks to regulate. Witness, for

¹⁰ G Majone, ‘Europe’s “Democratic Deficit”: The Question of Standards’ (1998) 4 *European Law Journal* 5 at 17–18.

¹¹ K Gatsios and P Seabright, ‘Regulation in the European Community’ (1989) 5(2) *Oxford Review of Economic Policy* 49.

¹² *Ibid.*

¹³ D Rueschemeyer and PB Evans, ‘The State and Economic Transformation: Towards an Analysis of the Conditions Underlying Effective Intervention’ in PB Evans, D Rueschemeyer and AT Skocpol (eds), *Bringing the State Back In* (Cambridge, Cambridge University Press, 1985) at 69.

example, the influence exerted by the European advertising industry over early attempts on the part of the Community to carve out a role for itself in broadcasting policy (to the point of having advertising defined as a 'service' in a 1984 Green Paper).¹⁴

Moreover, capture is particularly problematic for an international institution such as the EC, in that the objects of its regulatory activity are sovereign states as well as private actors. The concern here is that states exercise significant control over the nature, resources and functioning of the Commission. Recent years have witnessed a marked trend on the part of national governments to try to limit the autonomy and influence of the Commission.

Partly, this is through the creation of policy processes that limit its role. The so-called Open Method of Cooperation (OMC), increasingly relied upon for aspects of social and particularly employment policy, represents a case in point, limiting the powers of the Commission in favour of a decentralised system of benchmarking and providing for no centralised enforcement mechanisms.

Perhaps more importantly, national governments are ultimately in charge of the staffing of the Commission. As the EC becomes a more important regulatory actor, national governments have become increasingly preoccupied with their ability to shape its actions from within. Interview evidence gleaned from discussions with numerous senior Commission officials between 1999 and 2006 reveals that capitals go to great lengths to 'place' nationals in strategically important posts within the Commission. The high profile wrangling between national governments over the trade off between the number of Commissioners and the voting weights in the Council in the context of debates about the Constitutional Treaty revealed all too clearly the degree to which the notion of an impartial and independent Commission has been eroded. Similarly, the recent proposal by EU finance ministers to cut the Commission's staff by approximately 8.5 per cent sends another clear signal, if any was needed, that the Member States ultimately determine the level of the Commission's administrative capacity.

Equally insidiously, governments have become adept at criticising the Commission for decisions that do not chime with their preferences. Several Spanish ministers have recently done so over Commission attempts to investigate the legislation brought in to allow the Spanish electricity and gas regulator to block foreign takeovers. Public political criticism of the Commission for implementing rules to which the Member States have themselves signed up is at best disingenuous and at worst potentially damaging. At a time when public support for the EC is fragile, the fear of

¹⁴ M Fraser, 'Television' in H Kassim and A Menon (eds), *The European Union and National Industrial Policy* (London, Routledge, 1996) at 204–25.

provoking such reactions may, at the least, serve to render the Commission reluctant to wield its powers to the full in defence of the Treaty.

Challenges to the Commission do not emanate merely from the Member States. A variety of regulatory networks and comitology committees have long contributed to the regulatory process and, in the case of comitology committees, acted as overseers of policy implementation by the Commission. More recently, a number of EC level regulatory agencies have been created outside the Commission hierarchy, partly as a consequence of Member States' refusal to provide the Commission with the resources necessary to carry out the new regulatory tasks emerging from the single market programme.¹⁵ After 1989, the Council, Commission and European Parliament struck a compromise in which new staff, resources and regulatory responsibilities would be delegated to decentralised, 'independent' European regulatory agencies, rather than to the European Commission itself.

The creation of agencies can be viewed as a sign of the erosion of the Commission's power, in that they perform some functions that the Commission might otherwise have performed, and are controlled by management boards dominated by national government representatives. Ultimately, however, the creation of agencies may best be viewed as a process linked to the increasing politicisation of the Commission. With more and more routine regulatory tasks being delegated to EC agencies, the Commission is increasingly left to focus on the altogether more political tasks of driving forward the policy agenda and enforcing EC regulation, sometimes in the face of stiff national resistance.

Negotiations between the Member States are also crucial in terms of shaping the Union's regulatory activity. That the EC now impinges on increasingly sensitive aspects of national economic management should come as no surprise. The Member States are, after all, currently haggling over those aspects of the Single Market that proved too contentious for agreement to be reached earlier in the process of market building. Such haggling becomes more difficult as the stakes increase. A recent example of this phenomenon and its possible consequences was provided by negotiations over the Takeover Directive. Agreement on this was finally reached in 2004—after 13 years during which the Commission had unsuccessfully proposed legislation. Yet this proved possible only on the basis that opt-outs be available to Member States on the need to consult shareholders on bids and on the legality of certain forms of takeover defences. Twenty-one Member States have decided to opt out of the provisions on the latter, while Germany, Denmark, Luxembourg, Poland and the Netherlands have opted out of the former. And all this without taking account of the fact that the Directive itself will doubtless be implemented in different ways

¹⁵ D Kelemen, 'The Politics of "Eurocratic" Structure and the New European Agencies' (2002) 25(4) *West European Politics* 93. See also the contribution of Vibert to this book.

in the different Member States. Our point here is not that Member States are unable to legislate on issues concerning the Single Market—indeed the recent agreement on the Services Directive clearly shows that they can. The point rather is that Member States are doing their utmost to wriggle out of making firm commitments to market integration by exploiting opt-outs and derogations. With the proliferation of opt-outs, derogations and toothless policy instruments, compounded in their effects by increasing reliance on toothless procedures such as the OMC, the danger is that the supposedly Single Market may wither into little more than a loose patchwork of non-binding regulatory good intentions.

C. NEW DIRECTIONS IN EC REGULATION

While the Single Market initiative kick-started the process of re-regulation at the EU level in the late 1980s, major regulatory failures at the national level and growing public scepticism concerning both science and business propelled the process forward throughout the late 1990s and up to the present day. As David Vogel has pointed out, throughout much of the 1990s, the prevailing public sentiments in Europe concerning regulation resembled those in the US during the 1970s. Dramatic regulatory failures at the state level, coupled with (and contributing to) mounting public concern over the safety of new technologies and distrust of business, led to heightened demands for regulatory protection from the ‘federal’ level. In the EU, national regulatory failures in the 1990s including those concerning BSE, AIDS-tainted blood and dioxin in chicken feed contributed to a sense that national regulatory regimes were not up to the challenge of protecting consumers and public health.

More generally, mounting public concern over the safety of new technologies—above all genetically modified organisms (GMOs) in the food supply—led to increased public support for relying on ‘the precautionary principle’ as a basis for regulation. The resolution on the precautionary principle¹⁶ adopted by national leaders at the Nice Summit in 2000 provided a firm basis for relying on the principle as a guideline in EU regulation. The precautionary principle, at least as applied by the EU after Nice, empowered regulators to act to address ‘urgent’ risks even in the absence of scientific data concerning risk levels. Moreover, regulators were called on to be open to public participation, to take a ‘multi-disciplinary’ approach and to consider the ‘public acceptability’ of their regulatory decisions. In short, regulators were given a green light to adopt regulations where there was considerable public perception of, and concern over, risk, even in the absence of conclusive evidence. This precautionary approach encouraged

¹⁶ Nice European Council, Presidency Conclusions, Annex III, 7–9 Dec 2000.

EU regulation on issues such as GMOs and bovine growth hormone, which could not have been justified strictly on the basis of available scientific evidence.

Regulatory failures have not been confined to areas such as food safety; major corporate scandals also undermined confidence in the national regulation of business conduct and increased pressure for EU level controls. Following US accounting and securities scandals such as those involving Enron and Worldcom, similar malpractice came to light in Europe, involving notably Parmalat and Ahold. The failure of national regulators to control corporate malfeasance strengthened the arguments of those interest groups, governments and EU officials that hoped to see the EU play a greater role in protecting investors, for instance through its increasingly stringent regime for securities regulation.

As the volume of EC regulation has grown, so too has the number of initiatives launched by EC policy-makers promising to 'reduce' or 'improve' regulation. When confronted with particular policy challenges—removing sewage from drinking water, protecting consumers from dangerous food-stuffs, combating corporate fraud—voters, politicians and interest groups often fight for strict regulations. However, when confronted with the entire body of regulation and regulatory procedures that result from such worthy initiatives, many of the same voters and politicians decry the excessive regulation and red tape. EC red tape is a tempting target for EC and particularly national politicians anxious to find a scapegoat for economic underperformance.

At the EC level, at least since the Delors' Commission's *relance* of the Single Market, policy-makers have coupled their regulatory initiatives with ceremonial self-flagellation concerning the inflexibility of EC regulation and the need to 'simplify' and 'improve' it. The 'new approach' which underpinned the 1992 initiative promised to move away from 'total harmonisation' and make EC regulation more flexible so that it could better accommodate distinct national approaches. The Santer Commission launched its regulatory simplification initiative promising that the EC would 'do less in order to do it better'.¹⁷ The Prodi Commission produced an action plan on better regulation, linked to the Lisbon Agenda.¹⁸ The Barroso Commission raised the profile of such efforts with its 2005 'better regulation' initiative, which promised to improve the regulatory environment for business by simplifying EC regulation. Barroso's better regulation initiative also required that new and existing legislative proposals be subject to 'regulatory impact assessment' that takes into account the

¹⁷ Commission Communication on 'Simpler Legislation for the Internal Market' (SLIM), COM(1996)204 final, 8 May 1996.

¹⁸ Communication from the Commission: Action Plan 'Simplifying and Improving the Regulatory Environment', COM(2002)278 final, 5 May 2002.

Lisbon Strategy's objectives.¹⁹ These attacks on old-fashioned, inflexible, top-down, command-and-control regulation have been linked to promises to promote new, more flexible modes of regulation, including the Open Method of Coordination (OMC) mentioned above.

Despite all the fanfare surrounding such initiatives, they are unlikely significantly to alter patterns of EC regulation. The Barroso Commission's Better Regulation initiative may lead to some consolidation and simplification of directives and regulations, and new modes of governance such as the OMC may become more prevalent in marginal areas of EC competence such as social policy. However, the drive for Better Regulation and efforts to promote new flexible modes of governance will be limited by many of the same forces that have stymied such initiatives in the past. The tendency to produce detailed, inflexible regulations is deeply rooted in the EC's political system. With its extreme fragmentation of political power and the distrust between EC policy-makers and the Member State administrations that implement most EC policy, the EC is simply not a polity structured to produce simple, flexible and informal regulation. For one thing, a structure containing a number of very different Member States is almost inevitably going to incorporate elements of the regulatory traditions of each. Each new wave of enlargement has seen new regulatory priorities adopted that reflect the traditions of the accession states (witness Portugal's insistence on the need to define carrots as fruit as a function of that country's curious jam-making proclivities). Over-regulation in this instance is a function of the weakness and permeability of Brussels to Member States' demands, rather than of an overweening excessively regulatory Commission.

Moreover, satisfying the increasing democratic demands for openness, transparency and legal certainty in the EC's regulatory processes, not least demands emanating from the European Parliament, will require further formalisation of EC regulations and regulatory procedures. In short, more red tape.

D. NORMATIVE QUESTIONS

Particularly since the inception of the Single Market, there has been a marked increase in the regulatory activity of the EU/EC, all of which poses a normative question regarding the legitimacy of the Union as a regulatory body. Exponents of the so-called democratic deficit are often acerbic in their critiques of the legitimacy of the EC system. Most recently, Follesdal and Hix have argued that the crucial weakness of the EC system in

¹⁹ Communication from the Commission to the Council and the European Parliament: 'Better Regulation for Growth and Jobs in the European Union', COM(2005)97 final, 16 Mar 2005.

normative terms stems from the lack of political contestation within it, a situation which they argue could be remedied via measures such as allowing the direct election of the Commission President.²⁰

There are several possible responses to such critiques. Andrew Moravcsik, for instance, argues that a crucial feature distinguishing the EC from traditional federal states is its relative lack of competence over core areas of public policy (and of interest to electorates). In the crucial areas of education, culture, infrastructure, redistribution and defence, Moravcsik emphasises, the Union enjoys little, if any, real capacity for effective action.²¹ In short, the EC's rather limited degree of democratic legitimation is perfectly adequate for the rather limited role it plays.

For Majone, regulation is about Pareto efficiency and can be distinguished, in both substantive and legitimacy terms, from redistributive policies:

Efficiency-oriented policies attempt to increase the aggregate welfare of society, while redistributive policies are designed to improve the welfare of one particular group in society at the expense of other groups. In a nutshell: redistributive policies can be legitimated only by majoritarian means and thus cannot be delegated to institutions independent of the political process; efficiency-oriented policies, on the other hand, are basically legitimated by results, and hence may be delegated to such institutions, provided an adequate system of accountability is in place.²²

Consequently, it is wholly appropriate that the Union, with its largely regulatory role, relies largely on output legitimation. The unelected nature of the Commission and Court serves to ensure the Pareto optimality of the EU's regulatory decisions, which would be compromised by resort to processes of input legitimation.²³

Delegation in these areas, both in Member States and in the EC, often occurs precisely in order to shelter agencies from the vicissitudes of democratic politics. Delegated institutions are necessary to provide credible commitments and overcome problems of time inconsistencies inherent in the actions of politicians with an eye perpetually on the next election. The key distinction here is between what Fritz Scharpf has labelled 'input legitimacy'—suggesting a chain of accountability linking those governing to those governed—and 'output legitimacy'—conferred when those exercising

²⁰ A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EC: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533.

²¹ Interestingly, what this means is that EC activity is largely confined to areas where delegation to non-majoritarian institutions is the norm in the Member States themselves: see A Moravcsik, 'Federalism in the European Union: Rhetoric and Reality' in K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, OUP, 2001) at 161–87.

²² Majone, above n10, at 26.

²³ *Ibid*; G Majone, 'The European Commission: The Limits of Centralization and the Perils of Parliamentarization' (2002) 15(3) *Governance* 375.

political power are able to meet the expectations of the governed.²⁴ The economic benefits generated by the Single Market, commonly portrayed as evidence of the efficiency gains to be garnered via transnational regulation, are often held up as examples of the ability of the Community to generate legitimacy via efficiency.²⁵

The legitimising potential of the Union, moreover, extends further than simply the justification of its own existence via its efficiency. The basis of the legitimacy of the nation state itself has changed over time. Once purely procedural, it too is now increasingly performance related.²⁶ However, states acting individually are no longer capable of performing adequately. Whether or not one buys into the extreme view of globalisation, according to which it is eroding the 'the authority, legitimacy, policy-making capacity and policy-implementing effectiveness of the state',²⁷ increasing interstate trade and consequent interdependence has reduced the ability of individual governments to deliver to their electorates. Institutions such as the EC provide a means of reinforcing this ability, through both addressing the problem of negative externalities of the actions of other governments and allowing these states more effectively to shape the global economy.²⁸ In this context, it is important to grasp that the Union not only secures output legitimacy of its own, but also serves to address problems of output legitimacy at the national level.²⁹

Whatever the limits of the EC's legitimacy as a regulator, it is important to recognise that many Member States' governments are themselves far from paragons in this regard. Many critiques of EC regulation emphasise the lack of openness and transparency in EC regulatory procedures. However, these critiques hold up the EC against a non-existent ideal-type and do not withstand comparison with existing democracies. Indeed, in his comparative study, Zweifel found that the EC's policy-making processes were as open and transparent as those in Switzerland and the US.³⁰ More generally, in terms of openness, transparency and accountability of regulators, the EC compares favourably with the governments of most EC Member States. The traditional national regulatory systems in the EC Member States had

²⁴ FW Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, OUP, 1999).

²⁵ A Menon and S Weatherill, 'Democratic Politics in a globalising World: The European Rescue of National Democracy', unpublished paper.

²⁶ S Bartolini, 'Old and New Peripheries in the Processes of European Territorial Integration' in CK Ansell and G di Palma (eds), *Restructuring Territoriality: Europe and the US Compared* (Cambridge, Cambridge University Press, 2004) at 25–6.

²⁷ PG Cerny, 'Globalization and the Changing Logic of Collective Action' (1995) 49(4) *International Organization* 595, at 621.

²⁸ A Hurrell and A Menon, 'Institutions, International Relations and the State in Western Europe' in J Hayward and A Menon (eds), *Governing Europe* (Oxford, OUP, 2003).

²⁹ Menon and Weatherill, above n25.

³⁰ T Zweifel, *Democratic Deficit? Institutions and Regulation in the European Union, Switzerland, and the United States* (Boulder, Colo, Rowman and Littlefield, 2002).

many virtues, but transparency and accountability were not among them.³¹ The EC may fall short of role models of transparent government, such as Finland and Sweden, but it surely presents an improvement on national regulatory systems long characterised by opacity and corruption, such as those in Greece, Italy and, perhaps, France. The EC's relative transparency and accountability are reflected in public opinion. Eurobarometer surveys routinely find that more European citizens trust EU institutions than trust their national political institutions (with 41 per cent responding that they 'tend to trust' the EU, while only 30 per cent 'tend to trust' national institutions).³² Many Europeans may distrust faceless Brussels bureaucrats. But even more of them distrust their national politicians.

As Member States' administrations are increasingly occupied with the implementation of EC policies, they are finding themselves pressured to abandon their traditional administrative practices and comply with the EC's more strictly codified procedures.³³ For countries that have long been laggards in terms of regulatory transparency and accountability, EC requirements are forcing them to enhance opportunities for participation and for holding regulators accountable for their decisions. For instance, one effective way of enhancing transparency is to require regulators to provide reasons for their decisions. As Shapiro says:

[giving] reasons is a device for enhancing democratic influences on administration by making government more transparent. The reasons giving administrator is likely to make more reasonable decisions than he or she otherwise might and is more subject to general public surveillance.³⁴

Article 253 of the Treaty of Rome requires that '[r]egulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based'. This EC-mandated Giving Reasons Requirement stands in stark contrast to traditional procedural requirements in most Member States, which included no requirement for regulators to give reasons. Thus the spread of the EC's Giving Reasons Requirement, like the spread of many other EC requirements concerning legal certainty and transparency, has substantially 'democratised' the regulatory process at the national level.

³¹ RD Kelemen, 'Federalism and Democratization: The US and EU in Comparative Perspective' in A Menon and M Schain (eds), *Comparative Federalism: The European Union and the United States* (Oxford, OUP, 2007).

³² European Commission, *Eurobarometer No. 61: Public Opinion in the EU 15—First Results* (May 2004) 5.

³³ J Schwarze, *Administrative Law under European Influence: On the convergence of the Administrative Laws of the EC Member States* (Baden Baden, Nomos Verlagsgesellschaft, 1996).

³⁴ M Shapiro, 'The Giving-reasons Requirement' [1992] *The University of Chicago Legal Forum* 180, at 183.

A final possible defence against so-called ‘democratic’ critiques of the Union requires a (grudging) acceptance of the need for political scientists to pay more attention to the workings and impact of the law. For all its shortcomings in this regard (see above), delegation has long been recognised by political scientists as providing a barrier to regulatory capture. In the case of the EU, prevention of capture is supplemented by another highly political rationale. Simply put, national political processes are not attuned to the transnational realities of market integration in Europe. Specifically, they tend to exclude or fail adequately to represent not only diffuse domestic interests, but also those extra-national actors profoundly affected by national regulations. The application of EC rules serves to correct such malfunctions. This, it has been argued, is notably the case with free movement cases such as *Cassis de Dijon*,³⁵ and with applications of Treaty rules on state aids and public monopolies.³⁶ EU law provides a mechanism for out-of-state interests, unrepresented in purely national political processes, to seek redress against national regulatory activity incompatible with the Treaty. Seen in this light, the Union is capable not merely of legitimising both itself and the Member States via its ability to enhance economic efficiency, but also of modernising national democratic systems increasingly out of step with the realities of a transnational market-place.³⁷

E. CONCLUSIONS

A new series of challenges has emerged to confront the European Union as it strives to carry out its new regulatory functions. New regulatory challenges often require complex solutions, rendered all the more difficult because of the need to reach agreement between 27 Member States. At the same time, political pressures within the Member States mitigate against what some characterise as ‘excessive’ regulation. Perhaps more worryingly, politics is increasingly coming to shape the mechanisms by which EC regulations are promulgated, threatening not only the ability of the European Commission to play its role in an impartial manner but also the quality and effectiveness of those regulations finally issued. And, at the same time, voices are raised to criticise the legitimacy of EC activity in this realm.

If there is a general lesson to be gleaned from the above, it is that the nature of EC regulatory activity is shaped by a myriad of—not least political—forces. However rational the economic and legal cases for regulation beyond the nation state may be, political incentives and loyalties often

³⁵ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

³⁶ Menon and Weatherill, above n25.

³⁷ D Chalmers, ‘The Reconstitution of European Public Spheres’ (2003) 9 *European Law Journal* 127, especially at 184–5.

function on the basis of a different logic: the 'functional need for human cooperation rarely coincides with the territorial scope of community'.³⁸

Above and beyond specific incentives that influence the politics of EC regulation—such as the incentives that encourage national politicians to blame the Union for their woes and claim credit for its successes—the prevailing political atmosphere can impact upon EC regulatory activity. As we have argued at greater length elsewhere,³⁹ the EC remains remarkably stable and robust despite recent spats between the Member States and much political rhetoric suggesting it has entered a period of profound crisis. Yet the potential implications of the prevailing political mood following budgetary squabbles, the demise of the constitutional treaty and profound soul searching over enlargement are serious.

For one thing, the proclivity on the part of national political leaders, as the Union becomes more politically salient at home, to attempt to control all of its workings at the expense of the autonomy of the Commission augurs ill for the effective regulation of the market. Of equal concern is the danger that, confronted with a series of high profile problems on the European Council agenda, national political leaders forget about the apparently more mundane yet practically tremendously important undertaking of completing the Single Market. Political will is required in order to tackle head-on some of the various problems confronting the Union acting in its regulatory capacity. Political posturing combining theological debates on institutions with a proclivity to attack the EC at every opportunity will only exacerbate what to us appears to be a series threat to the Union's core function of economic management.

³⁸ L Hooghe and G Marks, 'Europe's Blues: Theoretical Soul-Searching after the Rejection of the European Constitution', *PS: Political Science and Politics* (Apr 2006) 247.

³⁹ D Kelemen and A Menon, 'Crisis? What Crisis?' (2006) 13 *Public Policy Research* 71.

