THE EUROPEAN COMMUNITY

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There is at the present time no clearly established European Community (EC) law and economics movement. However, the interest economists have for customs unions' and economic integration, the growing importance of EC law, and the fact that it increasingly affects member states' law (especially where directly applicable) make it worthwhile to investigate the prospects for law and economics at the EC level. Besides economic policies, the EC is pursuing social issues, the Europe of citizens, and political integration. However, we will focus here on economic integration, because it is still the major aim of the EC, and it is the area most likely to provide some data useful to assess the prospects for such a movement.

European economic integration is being achieved through the completion of the "internal market," which means undistorted freedom of movement within the EC for goods, services, money, and economic agents. However, economic integration cannot be achieved only through the elimination of obstacles (negative integra-

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2See, e.g., David G. Mayes, "The Effect of Economic Integration on Trade," in: The European Internal Market (supra note 1), pp. 97-121.
5The EC level is here defined as the level of EC law: Treaties, directives, regulations, recommendations—hereafter "regulations." Such a definition is admittedly somewhat artificial: EC law and economics could also be understood as incorporating comparative economic analysis of member states' regulations or, at least, of member states' statutes that implement EC regulations. However, a narrow definition seems preferable, as it provides an aggregate picture of the law and economics movement in the EC; on the relationship between an EC law and economics movement and member states' law and economics movements, see below.

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tion): it needs the creation of equal conditions for the functioning of the integrated parts of the economy (positive integration), which involves intervention by EC bureaucrats, for example, by way of harmonization or coordination.1

The Treaty of Rome, which established the EC, is drafted in such a way that it permits minimal as well as systematic intervention, the only limits being pure laissez-faire and imperative planning.2 The regulatory measures taken today to achieve economic integration are generally based on a philosophy of economic liberalism and on the method of minimum or key organization. As evidence, there is the European Court of Justice case law,3 the Commission's 1985 White Paper,4 and even European Parliament resolutions.5

To summarize the EC philosophy, negative integration demands deregulation and liberalization, and positive integration should be kept at an efficient minimum. Both approaches commend themselves to microeconomics. Therefore, economic analyses of EC law or, at least, studies of the economic consequences of EC regulations, should be quite widespread. Yet, as recently as 1986, one could read that "no general view on the relationship between the law and institutions of the European Community and the scope and nature of economic integration among the Ten has ever been adequately developed, either by legal scholars or economists."6 Even today, in an area law and economics scholars traditionally focus upon—corporate law—it is pointed out that one of the main differences between European and American evolution lies in the influence of modern economic theory on the legal debate;7 hence, analysts of EC corporate law "still bemoan the little advanced theoretical and empirical foundation of European efforts towards harmonization."8 Although these statements may be overly negative, it would be preposterous to pretend that an established EC law and economics movement exists. The status of this movement is that of an emerging one.

It is therefore difficult to find proof of reception of an EC law and economics movement, or even evidence of the impact of research in EC economics on the legal framework. Within the Commission, some are "cheerfully unprepared in face of the criticism that the Commission has not made any serious attempt to develop a theory of harmonization."9 One will also barely find references to a law and economics approach or to economic analyses at the European Parliament's level or in the European Court of Justice case law.

Yet the European Commission has shown to be quite receptive to economic theories and to taking into account economic consequences of proposed institutions or regulations. For example, Jacques Delors, president of the European Commission, has given speeches10 in which he expressly refers, quoting American scholars,11 to the spillover theory (externalities imply that liberalization cannot occur without harmonization) and to its necessary counterweight, the principle of subsidiarity (EC interventions are called for only when they are more efficient than member states' interventions), as well as to the theories of public choice and games. Community civil servants point out that economic analysis does have something to offer to those who have to decide whether any particular activity needs to be regulated and how it is to be regulated, whether a subject should be regulated at the EC or state level: economic analysis is considered useful in illuminating the types of costs and benefits that should enter into the calculus, especially the Schattschneider theory of economic integration,12 the theory of public choice, the theory of pure public goods, and the theory of externalities.

This willingness to tackle complex economic theories results from two factors. One is the role played by commissioners and civil servants who are either economists or familiar with economics; indeed, this role may be greater than in a given member state administration because the Treaty of Rome aims at efficiency gains. The other is the necessity to convince member states that the loss of national sovereignty resulting from EC interventions is economically beneficial.

However, there is an ambiguity that makes it difficult to evaluate the prospects for an EC law and economics movement. To get a better understanding, it is useful to undertake a three-stage analysis: (1) Point out factors that are obstacles to the development of such a movement; (2) Point out factors that mitigate such obstacles; and (3) Define the areas where the law and economics approach can be expected to develop.

THE OBSTACLES

There are at least three factors that we believe are obstacles to the development of a law and economics movement at the EC level.


4See Committee for the Study of Economic and Monetary Union (Delors Committee), Report on Economic and Monetary Union in the European Community (Brussels: Commission of the European Community, 1989), which established the subsidiary principle as one of the fundamental guiding principles of the next reform of the Community.


6Flitche (supra note 9) at 1–2.


8See supra note 7 at 318.


10See below.
First, the EC has only the powers granted to it by the Treaty of Rome. Although those powers are quite broad (and broadening), the extent to which they permit the EC to enact regulation in the areas that are described as common law or case law in the US (for example, in the contract law area) or in other areas that are typical of a law and economics analysis (for example, criminal law) is debatable; consequently, EC regulations in such areas are scarce.

Second, political constraints are even tighter in the EC than within a sovereign state, which may discourage attempts to suggest efficient legal solutions. This is quite obvious at the legislative level (where, at least for economic integration, a major role can be played by the negotiation of specific measures, but also the enacting of regulations, the analysis of the efficiency of their provisions was not a priority item: economists were more concerned with macroeconomic problems—and lawyers with traditional constitutional issues.

THE MITIGATING FACTORS

There are at least three factors that mitigate these obstacles.

First, although the EC may have limited powers in some areas that have traditionally been discussed by law and economics scholars, it has clear legislative powers in other areas, for example, in the field of corporate law and capital market law. Moreover, it has recently undertaken to adopt directives in the areas of torts and contract law. Hence, standard materials for a law and economics approach exist.


This is why the few existing law and economics analyses of EC regulations are mostly done by German authors, Germany being the country where the law and economics movement is the strongest; see, e.g., Peter Behrens, Die Ökonomischen Grundlagen des Rechts (Tübingen: J.C.B. Mohr, 1980); Hans-Bernard Schäfer and Claus Ott, Lehrbuch der Ökonomischen Analyse des Zivilrechts (Berlin: Springer, 1986).

On this topic, see Hardy Bouillon and Gerard Radnitzky, Die ungewisse Zukunft der Universität: Folgen und Ausweger aus der Bildungskatastrophe (Berlin: Duncker & Humblot, 1991).

Obviously, the absence of an established EC law and economics movement does not mean that the analysis of the economic consequences of regulations as an unknown phenomenon or that the law and economics approach has not yet reached the EC. Indeed, the general interest of economists for customs unions and economic integration and their specific interest in EC economic policy and its implementation should make it a foregone conclusion that, directly or indirectly, some economic analyses of EC law (Treaty of Rome, directives, etc.) exist. However, most of the economic analyses center on the macroeconomics of integration. Hence, there are numerous studies on monetary policy or on tax harmonization. There are also quite a number of contributions by economists that, at least indirectly, concern the legal aspects of common EC policies, like agriculture, trade policies, or regional policies. While these are not what is commonly known as contributions in law and economics, they have a direct impact on the drafting of legal provisions that affect the wording of amendments to the Treaty of Rome and pave the way for further research on the economic consequences of regulations.

That most studies center on the macroeconomics of integration does not mean that the microeconomics of integration has not been discussed. Strangely enough, the original impetus for such an approach to the completion of the internal market may have come from the EC Court of Justice. The court made it clear early on that the EC is characterized by three elements: the elimination of barriers to free movement, fair competition, and unity of the market. But in its landmark decision Cases C-324/79 and C-223/81 on the principle of equivalence, the court stated for the first time that the institutional arrangement of a member state of origin is to be mutually recognized.

That was the basis for the White Paper’s “new approach” according to which member states have to ensure that products and services originating from another member state comply with their own standards (mutual recognition), provided that essential requirements have been set at the national level. This evolution, which has altered the integration process from ex-ante harmonization to a more market-oriented approach, had an impact on the development of economic analysis of EC regulations. It led the EC to commission studies on the benefits of the new approach and to encourage scholars to research its economics. To better assess the importance of that phenomenon and the extent to which it will help the development of an EC law and economics movement, it is useful to: (i) consider microeconomic analyses published by the EC Commission; (ii) investigate whether EC regulations that imply administrative supervision have lately been the object of economic analysis; (iii) research whether the economics of competition law are as closely focused upon as elsewhere.

(i) The EC Commission recently produced or commissioned quite numerous studies on the economics of integration and related regulations. Brussels civil servants are even instructed to include a section on the economic costs and benefits in proposals for draft regulation. Some of those studies come close to what a law and economics scholar would produce. Others are closer to politics than economics; this may be particularly true for the just mentioned sections on the economic costs and benefits of draft regulations. Nevertheless, even studies clearly undertaken to achieve political results can
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nomic analysis of integration, they are a sign of the positive climate for the development of an EC law and economics movement.

(ii) Numerous EC regulations provide for an administrative supervision of the economy, especially where positive integration is felt necessary. Such regulations are not adopted or implemented without discussing their economic consequences. Hence, there are microeconomic studies on regulations concerning goods, services, or money. More recently, studies have developed beyond the "four liberties" and have addressed the public administration law, for example, in the environment and consumer protection. However, it should be pointed out that such contributions represent a very small share of the huge number of books and articles devoted to this topic; for example, law reviews seldom publish articles seriously dealing with the economics of regulation.

(iii) Competition policy is a core EC policy. It shall prevent private economic actors from monopolizing the benefits of integration and ensure that member states' activities remain "neutral." As could be expected, there are numerous studies dealing with the economics of competition policy in the EC, many of them carried out by experts appointed by the Commission.

In the antitrust area, there are economic analyses concerning EC policy in


See, e.g., Moli (supra note 6) at p. 361.


genera or regarding specific issues like mergers or intrabrand competition. Other contributions deal specifically with Article 85 of the EEC Treaty, which bans agreements having as their object or effect the restriction of competition, restriction, or distortion of competition within the Common Market, or with Article 86, which bans any abuse by one or more undertakings of a dominant position within the Common Market. Nevertheless, generally speaking, most of the literature is still dealing with traditional legal issues; a good example is provided by the just adopted Council Regulation on the taking of measures against a concentration of undertakings; although many lawyers commented on it, a true economic analysis of the regulation has not, to my knowledge, been published. Admittedly, the Commission, which enforces EC antitrust law, seems to emphasize the role of economics in competition policy; however, when it comes to cases, "the difficulty...remains the extent of the Commission's economic reasoning or rather the lack of it." Quite similar conclusions may be drawn in the state aids and public procure-


See, e.g., its annual Report on Competition Policy (Luxembourg: Office for Official Publications of the European Communities).

Smith (supra note 66) at p. 222.


10See pp. 338-339.


supply and concern mainly two areas, consumer safety and capital markets. This confirms that there is no established EC law and economics movement.

CONCLUDING REMARKS

The EC's aim at economic integration and the emphasis on minimizing EC intervention provide a favorable background for the development of an EC law and economics movement. Nevertheless, such a movement is merely emerging. This situation reflects the existence of various obstacles. Some are typically EC-related, like the limited powers provided by the Treaty of Rome in traditional law and economics areas. Other barriers may be found at the member states' level, like the lack of competition among universities that prevents law and economics programs from multiplying, thus hampering development from below.

To date, therefore, economic analyses of EC regulations have focused on the macroeconomics of legal integration. At the microeconomic level, even taking into account competition law, little research has been done; this is especially obvious in areas where traditional law and economics contributions have first developed.

This does not prevent us from believing that the prospects for the development of the EC law and economics movement are good. Some of the elements justifying our optimism have already been mentioned: the willingness (and need) of the Commission to justify its regulations in economic terms; the broadening powers of the EC in areas where traditionally law and economics research has taken place; the increasing number of member state statutes that implement EC directives and thus pave the way for national law and economics analyses of EC rules.

There is one additional favorable element to consider. The main challenge during the 1990s will no longer be the adoption of EC regulations but their enforcement. This task will have to be achieved by the use of various sanctions and by increasingly filing cases before member states' courts and/or the EC Court of Justice. Enforcement and jurisprudence being two strengths of law and economics analysis, this can only help to establish the EC law and economics movement.