

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 unions¹ and economic integration,² the growing importance of EC law,³ and the fact that it increasingly affects member states' law (especially where directly applicable⁴) make it worthwhile to investigate the prospects for law and economics at the EC level.⁵ 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-*

¹See, e.g., Wilfried Ethier and Henrik Horn, "A New Look at Economic Integration," in: Alexis Jacquemin and André Sapir, eds., *The European Internal Market: Trade and Competition* (Oxford: Oxford University Press, 1989), pp. 71-93.

²See, e.g., David G. Mayes, "The Effect of Economic Integration on Trade," in: *The European Internal Market* (supra note 1), pp. 97-121.

³On EC institutions and legal framework, see, e.g., Paul Kapteyn and Pieter VerLoren van Themaat, *Introduction to the Law of the European Communities: After the Coming into Force of the Single European Act*, 2d ed. (Deventer: Kluwer Law and Taxation Law Publications, 1989); Hans Smit and Peter Herzog, *The Law of the European Economic Community: A Commentary on the EEC Treaty* (New York: Matthew Bender, 1986).

⁴Direct applicability means that EC law is to be maintained even against national rules, and this not only by the Court of Justice, but also by member states' courts; see, e.g., Pieter VerLoren van Themaat, "The Contributions to the Establishment of the Internal Market by the Case-Law of the Court of Justice of the European Communities," in: Roland Bieber et al., eds., 1992: *One European Market? A Critical Analysis of the Commission's Internal Market Strategy* (Baden-Baden: Nomos, 1988), pp. 109-126, at 112-113; René Barents, "Some Remarks on the 'Horizontal' Effect of Directives," in: David O'Keefe and Henry Schermers, eds., *Essays in European Law and Integration* (Deventer: Kluwer Law and Taxation Law Publications, 1982), pp. 97-104.

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.

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.⁶

The Treaty of Rome, which established the EC, is drafted in such a way that permits minimal as well as systematic intervention, the only limits being pure *laissez-faire* and imperative planning.⁷ 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,⁸ the Commission's 1985 White Paper,⁹ and even European Parliament resolutions.¹⁰

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."¹¹ 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 debate¹²; hence, analysts of EC corporate law "still bemoan the little advanced theoretical and empirical foundation of European efforts towards harmonization."¹³ Although these statements may be overly negative,¹⁴ 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 unrepentant in face of the criticism that the Commission has not made any serious attempt to

⁶See, e.g., Willem Molle, *The Economics of European Integration, Theory, Practice, Policy* (Aldershot: Dartmouth, 1990), especially at pp. 11–12, a contribution that contains an impressive bibliography.

⁷See Jacques Pelkmans, "The Institutional Economics of European Integration," in: Mauro Cappelletti et al., eds., *Integration through Law: Europe and the American Federal Experience*, Vol. 1, Book 1: *A Political, Legal and Economic Overview* (Berlin: de Gruyter, 1986), pp. 318–396, at p. 371; on the economic "neutrality" of the Treaty of Rome, see, e.g., Ernst-Joachim Mestmäcker, "Auf dem Wege zu einer Ordnungspolitik für Europa," in: Ernst-Joachim Mestmäcker et al., eds., *Eine Ordnungspolitik für Europa* (Baden-Baden: Nomos, 1987), pp. 9–49, at pp. 16ff.

⁸See, e.g., the famous *Cassis de Dijon* decision, Case 120/78, [1979] E.C.R. 649.

⁹*White Paper on Completing the Internal Market*, Doc. COM(85) 310, June 14, 1985; on that topic, see Geoffrey Fitchew, "Introductory Remarks, Discussion and Political Choices," in: Richard M. Buxbaum et al., eds., *European Business Law: Legal and Economic Analyses of Integration and Harmonization* (Berlin: de Gruyter, 1991), at pp. 16–17.

¹⁰See e.g., O.J. No. C 231/163, Sept. 19, 1990.

¹¹Pelkmans, *supra* note 7 at 318.

¹²Christian Meier-Schatz, "American Legal Harmonization from a European Perspective," *European Business Law* (*supra* note 9), pp. 61–88, at p. 61.

¹³*Id.* at 65.

¹⁴See below.

develop a theory of harmonization."¹⁵ 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 speeches¹⁶ in which he expressly refers, quoting American scholars,¹⁷ 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),¹⁸ 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, or whether a subject should be regulated at the EC or state level¹⁹: economic analysis is considered useful in illuminating the types of costs and benefits that should enter into the calculus, especially the Scitovsky theory of economic integration,²⁰ 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.

Hence, 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 an obstacle to the development of a law and economics movement at the EC level.

¹⁵Geoffrey Fitchew, "Political Choices," in: *European Business Law* (*supra* note 9), pp. 1–15, at p. 1.

¹⁶See inaugural address to CEPS Sixth Annual Conference, reprinted in: *Governing Europe, 1989 Annual Conference Proceedings*, Vol. I (Brussels: Centre for European Policy Studies, 1990), pp. 7–13.

¹⁷Robert Keohane and Stanley Hoffman, *European Integration and Neo-Functional Theory: Community Policy and Institutional Change* (Cambridge: Harvard University Press, 1989).

¹⁸See 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 Treaty of Rome. The principle has now a broad political support: see, e.g., the European Parliament's Resolution on the Principle of Subsidiarity, O.J. No. C 231/163, Sept. 19, 1990.

¹⁹Fitchew (*supra* note 9) at 1–2.

²⁰Tibor Scitovsky, *Economic Theory and Western European Integration* (London: George Allen and Unwin, 1958).

First, the EC has only the *powers* granted to it by the Treaty of Rome.²¹ 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 (which, at least for economic integration, plays a more important role than in the US²²) because of the necessity to achieve a consensus or at least to gain the approval of a majority of member states to enact regulations.

Finally, *economic policy* and its implementation have, until quite recently, tended to monopolize the attention of economists and of scholars who may otherwise be tempted to devote time to a law and economics approach. Even though implementation meant not only the giving out of subsidies or the taking 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 problems²³—and lawyers with traditional constitutional issues.²⁴

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.²⁵ Moreover, it has recently undertaken to adopt directives in the areas of torts²⁶ and contract law.²⁷ Hence, standard materials for a law and economics approach exist.

²¹See Ernst Steindorff, *Grenzen der EG-Kompetenzen* (Heidelberg: Recht und Wirtschaft, 1990).

²²See Cass R. Sunstein, "Protectionism, the American Supreme Court, and Integrated Markets," in: *1992: One European Market* (supra note 4), pp. 127–147, at p. 141; on the limits of the European Court of Justice's possibilities and their justifying new efforts at the legislative level, see Pieter VerLoren van Themaat (supra note 4) at 123ff.

²³See, e.g., Michel Catinat, "The Large Internal Market under the Microscope: Problems and Challenges," in: *The European Internal Market* (supra note 1), pp. 334–356; John Pinder, "Enhancing the Community's Economic and Political Capacity: Some Consequences of Completing the Common Market," in: *1992: One European Market?* (supra note 4), pp. 35–53.

²⁴See, e.g., Léontin-Jean Constantinesco, "La Constitution économique de la CEE" *Revue trimestrielle de droit européen* 13(1977):244–281.

²⁵See on that topic Richard M. Buxbaum and Klaus J. Hopt, *Legal Harmonization and the Business Enterprise* (Berlin: de Gruyter, 1988).

²⁶See, e.g., the Proposed Directive on Waste Damage Liability, O.J. No. C 192/6, July 23, 1991, and No. C 251/3, Oct. 4, 1989; the Proposed Directive on Services Liability, O.J. No. C 12/8, Jan. 18, 1991; the Directive on Product Liability, O.J. No. L 210/29, July 25, 1985.

²⁷See, e.g., the Proposed Directive on Unfair Terms in Consumer Contracts, O.J. No. C 243/2, Sept. 28, 1990.

Second, political constraints are *not an EC characteristic* and have never proven by themselves to be sufficient to discourage scholars from starting a law and economics analysis.²⁸ Political constraints could even be a factor favoring the development of a law and economics movement since it is necessary to convince member states of the efficiency of EC interventions, although the studies undertaken on behalf of the EC or published by it have until now emphasized macroeconomic aspects.²⁹

Finally, there are within the EC well-trained economists who are, especially because of the just mentioned political factor, *able and willing* to take into account a law and economics analysis.

THE PROSPECTS

It seems that these mitigating factors sufficiently balance the above mentioned obstacles to conclude that there are no insuperable obstacles to the development of an EC law and economics movement. Nevertheless, there is today no such movement. Therefore, it seems to us that we will have to wait for law and economics movements to establish themselves in a majority of member states before witnessing the spreading of a true EC law and economics movement; in other words, the EC movement will further develop from below rather than from above.³⁰

Admittedly, a rapid horizontal, and consequently vertical, spillover effect is hampered by still existing national barriers, that is, the lack of international competition among European universities,³¹ which makes it possible not to follow the trend set by those already offering law and economics lectures or programs; the legal and factual obstacles to the mobility of lawyers, which prevent those who use the approach from spreading it to other countries; the insistence by some EC countries (especially France) that they still have their national culture, which results in excessive caution toward an approach originated in a foreign/common law country. However, these obstacles will gradually disappear, and we shall certainly witness the above mentioned vertical spillover effect. In addition, analyses of members states' statutes implementing EC regulations in countries where a national movement is well established should lead to direct law and economics analyses of EC law.³²

²⁸For a comparison with the US, see Thomas Heller and Jacques Pelkmans, "The Federal Economy: Law and Economic Integration and the Positive State—The USA and Europe Compared in an Economic Perspective," in: *Integration Through Law* (supra note 7), pp. 245–253, at p. 247.

²⁹See below.

³⁰This 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, 1986); Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der Ökonomischen Analyse des Zivilrechts* (Berlin: Springer, 1986).

³¹On that topic, see Hardy Bouillon and Gerard Radnitzky, *Die ungewisse Zukunft der Universität: Folgen und Auswege aus der Bildungskatastrophe* (Berlin: Duncker & Humblot, 1991).

³²Environmental rules are a prime candidate for such a development; see, e.g., Michael Lehmann, "The New German Act on Strict Liability for Environmental Damage," *Europäisches Wirtschafts & Steuerrecht* 2 (1991):202–205.

Obviously, the absence of an established EC law and economics movement does not mean that the analysis of the economic consequences of regulations is 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 integration³³ and their specific interest in EC economic policy and its implementation³⁴ should make it a foregone conclusion that, directly or indirectly, some economic analysis of EC law (Treaty of Rome, directives, etc.) exists.

However, most of the economic analyses center on the *macroeconomics* of integration.³⁵ Hence, there are numerous studies on monetary policy³⁶ or on tax harmonization.³⁷ There are also quite a number of contributions by economists that, at least indirectly, concern the legal aspects of common EC policies, like agriculture,³⁸ trade policies,³⁹ or regional policies.⁴⁰ While these are not what is commonly known as contributions in law and economics, they may 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

³³See supra notes 1 and 2.

³⁴See p. 334 herein.

³⁵See Jorgen Mortensen, *Federalism vs Coordination, Macroeconomic Policy in the European Community* (Brussels: Centre for European Policy Studies, 1991).

³⁶See, e.g., Rudiger Dornbusch, "Problems of European Monetary Integration," in: Alberto Giovannini and Colin Mayer, eds., *European Financial Integration* (Cambridge: Cambridge University Press, 1991), pp. 305-327; Marcello de Cecco and Alberto Giovannini, "Does Europe Need Its Own Central Bank?" in: Marcello de Cecco and Alberto Giovannini, eds., *A European Central Bank? Perspectives on Monetary Unification after Ten Years of the EMS* (Cambridge: Cambridge University Press, 1989), pp. 1-12; Francesco Giavazzi et al., eds., *The European Monetary System* (Cambridge: Cambridge University Press, 1988); Peter Coffey, "The European Monetary System," in: *Main Economic Policy Areas of the EEC—Towards 1992*, 2d ed. (Dordrecht: Kluwer Academic Publishers, 1988), pp. 1-29; Rolf H. Hasse, "Costs and Benefits of Financial Integration in Europe," in: Donald E. Fair and Christian de Boissieu, eds., *International Monetary and Financial Integration—The European Dimension* (Dordrecht: Kluwer Academic Publishers, 1988); Pascal Salin, ed., *Currency Competition and Monetary Union* (The Hague: Martinus Nijhoff, 1984); M. Fratianni and T. Peeters, eds., *One Money for Europe* (New York: Praeger, 1979); Harry Johnson and Alexandre Swoboda, eds., *The Economics of Common Currencies* (London: George Allen and Unwin, 1973).

³⁷See Alberto Giovannini and James R. Hines, Jr., "Capital Flight and Tax Competition: Are There Viable Solutions to Both Problems?" in: *European Financial Integration* (supra note 36), pp. 172-210; Dieter Biehl, "On Maximal Versus Optimal Tax Harmonization," in: *1992: One European Market?* (supra note 4), pp. 261-282.

³⁸See Claude Pondaven, *La théorie de la réglementation: efficacité économique ou efficacité politique? Application économétrique à la politique agricole commune* (Paris: Librairie générale de droit et de la jurisprudence, 1989); P.C. van den Noort, "European Integration and Agriculture Protection," in: *Main Economic Policy Areas of the EEC* (supra note 36), pp. 31-51; A. Buckwell et al., *The Costs of the Common Agricultural Policy* (London: Croom Helm, 1982).

³⁹See, e.g., T. Hitiris, *European Community Economics*, 2d ed. (New York: Harvester Wheatsheaf, 1991), especially chapter 8.

⁴⁰See Wilhelm Molle, "Regional Policy," in: *Main Economic Policy Areas of the EEC* (supra note 36), pp. 67-97.

that the *microeconomics* of integration has not been discussed.⁴¹ 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 very early on⁴² 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 *Cassis de Dijon*,⁴³ 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,"⁴⁴ according to which member states have to presume that products or services originating from another member state comply with their own standards (mutual recognition), provided that essential requirements have been set at the EC level. This evolution, which has altered the integration process from ex-ante harmonization to a more market-oriented approach,⁴⁵ 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 sponsored 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.⁴⁶ Others are closer to politics than economics⁴⁷; 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

⁴¹See, e.g., Paul Krugman, "Economic Integration in Europe: Some Conceptual Issues," in: *The European Internal Market* (supra note 1), pp. 357-380.

⁴²Italy v. Council and Commission, Case 32/65, [1966] ECR 389.

⁴³Supra note 8.

⁴⁴See, e.g., William Poeton, "The White Paper: Pre-Conditions for Its Success," in: Rita Beuter and Jacques Pelkmans, eds., *Cementing the Internal Market* (Maastricht: European Institute of Public Administration, 1986), pp. 1-6, at p. 2: "The judges of the European Court have shown us how, in many areas, we were trying to do too much, to be too perfectionist."

⁴⁵See Horst Siebert and Michael J. Koop, "Institutional Competition: A Concept for Europe?" *Aussenwirtschaft* 45(1990):439-462.

⁴⁶See, e.g., the report of the study group chaired by Tommaso Padoa-Schioppa, *Efficiency, Stability and Equity—A Strategy for the Evolution of the Economic System of the European Community* (Brussels, 1987); Jacques Pelkmans, *Completing the Internal Market for Industrial Products* (Luxembourg: Office for Official Publications of the European Communities, 1986) and the studies quoted therein.

⁴⁷This is quite inevitable when economic integration is a vehicle to political integration, as it is in the EC; see, e.g., Jacques van Eesch, "How Relevant Are Economic Integration Effects?" in: *Essays in European Law and Integration* (supra note 4), pp. 73-78.

contribute to the development of the economic analysis of law, as two famous contributions show:

- A global analysis was initiated by the Commission in 1986, whose objective was to evaluate the potential economic impact of completing the internal market by 1992.⁴⁸ It emphasized that the removal of constraints and the emergence of new competitive incentives will lead to four principal types of effects⁴⁹: a significant reduction in costs; an improved efficiency in enterprises; adjustments between industries on the basis of a fuller play of comparative advantages; a flow of innovations. The most publicized claim relates to the substantial benefits of completing the single market program, which are not once and for all gains, but also dynamic gains, that is, a higher sustainable rate of economic growth. It is suggested that if the entire program is achieved, there should be a gain to Community GDP of the order of 5%. Admittedly, most benefits cannot be clearly traced⁵⁰ and escape the measurement powers of any social science⁵¹; the analysis has, however, brought to public attention the view that one should consider the economic costs and benefits of integration.
- The recently published report "One Market, One Money"⁵² is designed to be the sales brochure for the European Monetary Union (EMU) that the just mentioned global analysis (also called the Cecchini Report) was for the single market program. It hence emphasizes the benefits resulting from EMU, among them the elimination of uncertainty and transaction costs. Again, most benefits (the Commission provides a check list of sixteen) are intangible and difficult to quantify, but the report is another example of applied economic analysis of regulation.

The main purpose of these studies is to achieve political consensus. Moreover, they still emphasize macroeconomic policy issues, and it would be exaggerated to pretend that they reflect the influence of an EC law and economics movement. On the other hand, coupled with the trend toward a more comprehensive eco-

⁴⁸See EC Commission, *Research on the "Cost of Non-Europe,"* 16 volumes (Luxemburg: Office for Official Publications of the European Communities, 1988); "The Economics of 1992: An Assessment of the Potential Economic Effect of Completing the Internal Market of the European Community," *European Economy*, No. 35, Mar. 1988; Michael Emerson et al., eds., *The Economics of 1992: The E.C. Commission's Assessment of the Economic Effects of Completing the Internal Market* (Oxford: Oxford University Press, 1988).

⁴⁹*The Economics of 1992* (supra note 48), at p. 2.

⁵⁰See, e.g., Jean Waelbroeck, "1992: Are the Figures Right? Reflections of a Thirty Per Cent Policy Maker," in: Horst Siebert, ed., *The Completion of the Internal Market* (Tübingen: J.C.B. Mohr, 1990), pp. 1-23; Anton Bakhoven, "An Alternative Assessment of the Macro-Economic Effects of 'Europe 1992,'" in: *The Completion of the Internal Market*, pp. 24-44. Waelbroeck suggests that the benefits will be much larger than the figures published by the Commission, whereas Bakhoven takes the opposite view.

⁵¹Edmund Kitch, "Introductory Remarks, Discussion and Economics and the Law," in: *European Business Law* (supra note 9), at p. 90; see also Edmund Kitch, "Business Organization Law: State or Federal. An Inquiry into the Allocation of Political Competence in Relation to Issues of Business Organization Law in a Federal System," in: *European Business Law* (supra note 9), pp. 35-50.

⁵²*European Economy*, No. 44, Oct. 1990.

nomical 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 implemented⁵³ without discussing their economic consequences. Hence, there are microeconomic studies on regulations concerning goods,⁵⁴ services,⁵⁵ or money.⁵⁶ More recently, studies have developed beyond the "four liberties" and have addressed supervision in the area of common policies, like the environment⁵⁷ and consumer protection.⁵⁸ 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 integration⁵⁹ and ensure that member states' activities remain "neutral."⁶⁰ 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.⁶¹

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

⁵³On implementation as such, see Eleanor Sharpson, "Legitimate Expectations and Economic Reality," *European Law Review* 15(1990):103-160.

⁵⁴See, e.g., Wouter Wils and Geert Wils, "Free Movement of Goods and Quality Regulation of Foodstuffs," *European Food Law Review* 1990: 92-117; Leigh Hancher, *Regulating for Competition, Government, Law, and the Pharmaceutical Industry in the United Kingdom and France* (Oxford: Clarendon Press, 1990), especially chapter 5, devoted to EC law; Jacques Pelkmans, "The New Approach to Harmonization and Standardization," in: *Cementing the Internal Market* (supra note 44), pp. 15-33.

⁵⁵See, e.g., Colin Mayer and Damien Neven, "European Financial Regulation: A Framework for Policy Analysis," in: *European Financial Integration* (supra note 36), pp. 112-132; Jean Dermine, ed., *European Banking in the 1990s* (Oxford: Basil Blackwell, 1990); Rainer Masera, "Issues in Financial Regulation: Efficiency, Stability, Information," in: Donald E. Fair and Christian de Boissieu, eds., *Financial Institutions in Europe under the New Competitive Conditions* (Dordrecht: Kluwer Academic Publishers, 1990), pp. 319-343.

⁵⁶See, e.g., Norbert Klotten and Peter Bofinger, "Währungsintegration über eine europäische Parallelwährung?" in: Dieter Duwendag, ed., *Europa-Banking* (Baden-Baden: Nomos, 1988), pp. 57-84.

⁵⁷See, e.g., Horst Siebert, *Economics of the Environment: Theory and Policy*, 2d ed. (Berlin: Springer, 1987); Eckart Rehlinger and Richard Stewart, in: *Integration through Law* (supra note 7), vol. 2, book 2: *Environmental Protection Policy* (Berlin: de Gruyter, 1985).

⁵⁸See, e.g., Christian Joerges, "The New Approach to Technical Harmonization and the Interests of Consumers: Reflections on the Requirements and Difficulties of a Europeanization of Product Safety Policy," in: 1992: *One European Market* (supra note 4), pp. 175-225; Thierry Bourgoignie, *Éléments pour une théorie du droit de la consommation* (Brussels: Bruylant, 1988), especially at 425ff.

⁵⁹See, e.g., Molle (supra note 6) at p. 361.

⁶⁰See, e.g., Roland Tavitian, *Le système économique de la Communauté européenne* (Paris: Dalloz, 1990), p. 150.

⁶¹See, e.g., very recently Guiseppina Gualtieri, ed., *The Impact of Joint Venture on Competition, The Case of Petrochemical Industry in the EEC* (Luxemburg: Office for Official Publications of the European Communities, 1991).

general⁶² or regarding specific issues like mergers⁶³ or intrabrand competition.⁶⁴ Other contributions deal specifically with Article 85 of the EEC Treaty, which bans company agreements having as their object or effect the prevention, restriction, or distortion of competition within the Common Market,⁶⁵ or with Article 86, which bans any abuse by one or more undertakings of a dominant position within the Common Market.⁶⁶ 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 control of concentrations between undertakings⁶⁷; although many lawyers commented on it,⁶⁸ 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 policy⁶⁹; however, when it comes to cases, "the difficulty . . . remains the extent of the Commission's economic reasoning or rather the lack of it."⁷⁰

Quite similar conclusions may be drawn in the state aids and public procure-

⁶²See, e.g., Peter de Wolf, *Competition in Europe* (Dordrecht: Kluwer Academic Publishers, 1991); Richard Whish, *Competition Law* (London: Butterworths, 1989); Stephen B. Hornsby, "Competition Policy in the 80's: More Policy, Less Competition," *European Law Review* 12(1987):79-101; Ingo Schmidt, *Wettbewerbspolitik und Kartellrecht*, 2d ed. (Stuttgart: Gustav Fischer, 1987), especially chapter 10; Jacques Pelkmans, "Consumer Interests in the EC Competition Regime: An Economic Perspective," in: M. Goyens, ed., *EC Competition Policy and the Consumer Interest* (Brussels: Bruylant, 1985), pp. 21-69; Dennis Swann, *The Economics of the Common Market*, 5th ed. (Harmondsworth: Penguin Books, 1984); Henk W. de Jong, "Reflection on the Economic Crisis, Markets, Competition and Welfare," in: *Essays in European Law and Integration* (supra note 4), pp. 79-93.

⁶³See, e.g., Richard E. Caves, "Corporate Mergers in International Economic Integration," in: *European Financial Integration* (supra note 36), pp. 136-160; P. H. Admiraal, ed., *Merger and Competition Policy in the European Community* (Oxford: Basil Blackwell, 1990); Monopolkommission, Sondergutachten 17: *Konzeption einer europäischen Fusionskontrolle* (Baden-Baden: Nomos, 1989).

⁶⁴See, e.g., Norbert Reich, *Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften* (Baden-Baden: Nomos, 1987), especially chapter 4.

⁶⁵See, e.g., Martin Schödermeier, "Collective Dominance Revisited: An Analysis of the EC Commission's New Concepts of Oligopoly Control," *European Competition Law Review* 11(1990):28-34; J. S. Chard, "The Economics of the Application of Article 85 to Selective Distribution Systems," *European Law Review* 7 (1982):83-97.

⁶⁶See, e.g., Paul Smith, "The Wolf in Wolf's Clothing: The Problem with Predatory Pricing," *European Law Review* 14(1989):209-222; Paul A. Geroski and Alexis Jacquemin, "Industrial Change, Barriers to Mobility, and European Industrial Policy," in: *European Internal Market* (supra note 1), pp. 298-333, especially at p. 331; Luc Gyselen and Nicholas Kyriazis, "Article 86 EEC: The Monopoly Power Measurement Issue Revisited," *European Law Review* 11(1986):134-148; C. Baden Fuller, "Article 86: Economic Analysis of the Existence of a Dominant Position," *European Law Review* 4(1979):423-434.

⁶⁷O.J. No. L 395/1, Dec. 31, 1989.

⁶⁸See, e.g., Aurelio Pappalardo, "Concentrations entre entreprises et droit communautaire," *Revue du Marché Unique Européen* 2(1991):11-45; Andreas Röhling, "Offene Fragen der europäischen Fusionskontrolle," *Zeitschrift für Wirtschaftsrecht* 11(1990):1179-1186; James S. Venit, "The Merger Control Regulations: Europe Comes of Age . . . Or Caliban's Dinner," *Common Market Law Review* 27(1990):7-50.

⁶⁹See, e.g., its annual *Report on Competition Policy* (Luxemburg: Office for Official Publications of the European Communities).

⁷⁰Smith (supra note 66) at p. 222.

ment areas. There are contributions dealing with the economics of Articles 92 to 94 (which declare state aids to firms incompatible with the Common Market in so far as they distort trade among member states or damage competing firms)⁷¹ or of public procurement policies⁷²; however, they are few in relative terms.

As a general assessment, one might say that even in the competition law area microeconomic analysis of regulations is not easy to come across. That approach definitely plays a smaller part in the literature here than in the US, although the Commission seems, at face value, as receptive to it as the US Justice Department.

EC harmonization also touches areas that are traditionally focused upon by law and economics scholars, either directly⁷³ or indirectly.⁷⁴ Hence, contributions typical of a law and economics approach should exist at the EC level, and indeed it is possible to name a few. There are studies published in the areas of consumer protection,⁷⁵ product liability,⁷⁶ insider trading,⁷⁷ and takeovers.⁷⁸ Although this is not a comprehensive list, it has to be recognized that contributions are in short

⁷¹See, e.g., Andrew Evans and Stephen Martin, "Socially Acceptable Distortion of Competition: Community Policy on State Aid," *European Law Review* 16(1991):79-111.

⁷²George Sharp, "How Can the Community Promote Greater Value for Money," in: *Cementing the Internal Market* (supra note 44), pp. 79-87.

⁷³See pp. 338-339.

⁷⁴See Guido Calabresi, "Incentives, Regulation and the Problem of Legal Obsolescence," in: Mauro Cappelletti, ed., *New Perspectives for a Common Law of Europe* (Florence: European University Institute, 1978), pp. 291-307.

⁷⁵See, e.g., Christian Joerges (supra note 58) at pp. 185-191; Thierry Bourgoignie and David Tribek, in: *Integration through Law* (supra note 7), Vol. 2, Book 3: *Consumer Law, Common Markets and Federalism in Europe and the United States* (Berlin: de Gruyter, 1987); Jacques Pelkmans, "The Consumer and Market Integration in the European Community," in: Thierry Bourgoignie, ed., *European Consumer Law* (Brussels: Bruylant, 1982).

⁷⁶Jörg Finsinger, "Safety Standards and the Expectation Standard, Collective Standard Setting and Positive Incentives," in: Bernd Stauder, ed., *The Safety of Consumer Goods* (Zurich: Schulthess, forthcoming); Jörg Finsinger and Jürgen Simon, "An Economic Assessment of the EC Product Liability Directive and the Product Liability Law of the Federal Republic of Germany," in: Michael Faure and Roger van den Bergh, eds., *Essays in Law and Economics* (Antwerpen: Maklu, 1989); Gert Brüggemeier, "Die Gefährdungshaftung der Produzenten nach der EG-Richtlinie—ein Fortschritt der Rechtsentwicklung?" in: Claus Ott and Hans-Bernd Schäfer, *Allokationseffizienz in der Rechtsordnung, Beiträge zur Ökonomische Analyse des Zivilrechts* (Berlin: Springer, 1989), pp. 228-247; Michael Adams, *EG-Produkthaftungs-Richtlinie: Wohltat oder Plage? Eine Ökonomische Analyse* (Saarbrücken: Europa-Institut, 1987).

⁷⁷Hartmut Schmidt, "Insider Regulation and Economic Theory," in: Klaus Hopt and Eddy Wymeersch, eds., *European Insider Dealing* (London: Butterworths, 1991), pp. 21-38; David Haddock and Jonathan Macey, "Controlling Insider Trading in Europe and America: The Economics of the Politics," in: J.-M. Graf von der Schulenburg, *Law and Economics & The Economics of Legal Regulation* (Dordrecht: Kluwer Academic Publishers, 1986), pp. 149-167.

⁷⁸See Yves E. van Gerven, "In Search for an Efficient and Equitable Balance between Hostile Takeover Attempts and Defensive Tactics," *Droit et Pratique du Commerce International* 16(1990):492-541; Dieter Hahn, "Takeover Rules in the European Community: An Economic Analysis of Proposed Takeover Guidelines and Already Issued Disclosure Rules," *International Review of Law and Economics* 10(1990):131-148; Henry W. De Jong, "The Takeover Market in Europe: Control Structures and the Performance of Large Companies Compared," *Review of Industrial Organization* 6(1991):1-18.

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.

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