logie," in: Voigt, R. (ed.), *Neue Zugaenge zum Recht, Law and Legal Science*. Universitaetsdruckerei Siegen, Siegen.
———. (ed.) (1989). *Limits of Legal Regulation*. Centaurus Verlagsgesellschaft m.b.H., Pfaffenweiler.
Walz, R. (ed.) (1983). *Sozialwissenschaften im Zivilrecht*. Luchterhand, Neuwied, Darmstadt.
Wegehenkel, L. (1980). *Coase-Theorem und Marktsystem*. Mohr-Siebeck, Tuebingen.
Weizsaecker, C.C., von (1981). "Rechte und Verhältnis in der modernen Wirtschafts lehre," 34 *Kyklos*, pp. 345–376.
Weyers, H.-L. (1971). *Unfallschaeden: Praxis und Ziele von Haftpflicht- und Vorsorgesystemen*. Athenaeum, Frankfurt am Main.
Wieacker, F. (1990). "Foundations of European Legal Culture," 38 *American Journal of Comparative Law*, pp. 1–29.
Wiethölter, R. (1968). *Rechtswissenschaft, Funk-Kolleg zum Verstaendnis der modernen Gesellschaft*. Fischer Taschenbuch Verlag, Frankfurt am Main.
Zöpel, Ch. (1974). *Oekonomie und Recht*. Kohlhammer Verlag, Stuttgart, Berlin, Koeln, Mainz.

Internationa view of Law and Economics (1991), *11*(293–300)

SWITZERLAND

GÉRARD HERTIG

University of Geneva Law School, Bd. des Philosophes, 12, CH-1205 Geneva, Switzerland

Although several scholars have shown an interest in this approach, at the present time there is no law and economics movement in Switzerland. However, the economic consequences of law may be taken into account when new legislation is drafted. Moreover, it is quite possible, especially under the influence of scholars who have studied in the US during the past decade, that a law and economics movement will begin to develop within the next decade.

1. THE STATUS OF THE LAW AND ECONOMICS MOVEMENT

That no such movement actually exists should not mislead the reader into thinking that the analysis of the economic consequences of regulation is an unknown phenomenon or that the law and economics approach has not yet reached Switzerland.

There are two (traditional) areas where the economic consequences of legal rules are debated by scholars, either directly or through the analysis of the legality of the structure of an industry or of entrepreneurs' behavior.

(1) Statutes providing for *administrative supervision* of a sector of the economy or of a specific category of entrepreneurs are not enacted or implemented without an (often heated) discussion of their economic consequences. There are various schools of thought regarding the extent to which administrative supervision should exist. For some authors, of course, the state should intervene as little as possible,[1] whereas for others, state intervention is not the greatest evil.[2] One may also distinguish between instrumentalists, for whom competition is only an instrument for the well-being of society, and institutionalists, for whom economic freedom is essential,[3] or between those who see the federal Constitution[4] as protecting competition directly or only negatively.[5] Hence, there is quite a rich body of general literature in this field.[6] Nevertheless, although some authors are at ease with

[1]See notably Charles-André Junod, "Problèmes actuels de la constitution économique suisse, Rapport à la Société suisse des juristes," *Zeitschrift für schweizerisches Recht* 89 (1970II): 591–820.

[2]See notably Fritz Gygi, *Wirtschaftsverfassungsrecht* (Bern: Stämpfli, 1981); Gygi, *Die schweizerische Wirtschaftsverfassung*, 2d ed. (Bern/Stuttgart: Haupt, 1978); Paul Richli, *Zur Leitung der Wirtschaftspolitik durch Verfassungsgrundsätze* (Bern: Stämpfli, 1983).

[3]See, on these schools, Egon Tuchtfeldt, "Konzepte der Wettbewebspolitik," in: *Recht und Wirtschaft heute, Festgabe zum 65. Geburtstag von Max Kummer* (Bern: Stämpfli 1980), pp. 549–563.

[4]RS 101.

[5]See René Rhinow, Art. 31, in: *Kommentar zur Schweizerischen Bundesverfassung* (Basel/Zurich/Bern: Helbing und Lichtenhahn/Schulthess/Stämpfli, 1988).

[6]For a recent survey, see Klaus A. Vallender, *Wirtschaftsfreiheit und begrenzte Staatsverantwortung, Grundzüge des Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrecht,*

economics,[7] an explicit economic analysis of regulation is rare.[8] There are also various publications (normally law review articles) dealing with specific areas of economic regulation; here again, an explicit economic analysis is the exception, although one can find such analysis in contributions on, for example, exchange rates,[9] housing,[10] or economic activities that are energy consuming.[11]

(2) *Antitrust and unfair competition* is the second area in which there has always been some sort of economic analysis of the law. This is very obvious in the case of the Federal law on cartels and similar organizations (Cartel Act),[12] which should come as no surprise, as the Cartel Act provides for an administrative supervision of entrepreneurs.[13] Such an approach, however, has also been used for the part of the Cartel Act that is not enforced through an administrative body (the private law section)[14] and for the Federal law against unfair competition (Unfair Competition Act),[15] which only grants private actions.[16] There are even some articles explicitly referring to the law and economics approach; in a recently published paper, one of the leading Swiss scholars, Walter Schluep, has gone one step further, dedicating it entirely to the economic analysis of trademarks.[17]

Vol. I (Bern: Stämpfli, 1989); Rhinow, (supra note 5); see also Leo Schürmann, *Wirtschaftsverwaltungsrecht*, 2d ed. (Bern: Stämpfli, 1983).

[7]See, for example, Walter R. Schluep, *Zum Wirtschaftsrecht* (Bern: Stämpfli, 1978).

[8]See, for example, Martin Janssen and Konrad Hummler, *Bundesverfassung und Verfassungsentwurf, Eine ökonomisch-rechtliche Analyse* (Zurich: Schriften des Schweizerischen Aufklärungs-Dienstes, 1979); Hugo Sieber, "Wirtschaftsfreiheit und Wirtschaftspolitik," in: *Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag* (Bern: Stämpfli 1981), pp. 447–465; Silvio Borner, "Wirtschafts-Sozial-und Eigentumsordnung im Verfassungsentwurf—ein Diskussionsbeitrag aus ökonomischer Sicht," *Zeitschrift für schweizerisches Recht* 98 (1979I):463–479.

[9]See Leo Schürmann, "Konjunkturpolitik und freie Wechselkurse," in: *Schweizerische Wirtschaftspolitik zwischen gestern und morgen* (Bern: Haupt, 1976), pp. 265–277.

[10]See Charles-André Junod, "L'indexation des crédits hypothécaires pourrait-elle à la fois améliorer le fonctionnement du marché du logement et servir de correctif à l'inflation?" *Wirtschaft und Recht* 40 (1988):88–123.

[11]See Paul Richli, "Handels- und Gewerbefreiheit contra Energiepolitik," *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 86 (1985):1–14.

[12]RS 251.

[13]See, for example, the pioneering work of Fritz Marbach, "Der 'Mögliche Wettbewerb' als schweizerische Lösung des Kartellproblems," in: *Wettbewerbspolitik in der Schweiz, Festgabe zum 80. Geburtstag von Fritz Marbach* (Bern/Stuttgart: Haupt, 1972), pp. 291–302; see also Markus Ruffner, *Funktionale Konkretisierung der Schlüsselartikel des neuen schweizerischen Kartellgesetzes* (Zurich: Schulthess, 1990); Kurt Aeberhard, *Der Preismissbrauch im schweizerischen Kartellrecht* (Bern/Stuttgart: Haupt, 1979); Leo Schürmann, "Wettbewerb und Gemeinwohl," in: *Festgabe für Henri Deschenaux* (Fribourg: Universitätsverlag, 1977), pp. 531–541.

[14]For an analysis of the enforcement value of private actions, see Gérard Hertig, *Le rôle du consommateur dans le droit suisse de la concurrence en Suisse, aux Etats-Unis et dans la CEE* (Lausanne: Payot, 1984), pp. 143ff. In general, see Roger Vuaridel, "L'objet et le niveau de la concurrence dans la théorie économique et dans la jurisprudence," *Wirtschaft und Recht* 20 (1968):111–128.

[15]RS 241.

[16]See mainly Carl Baudenbacher, "Zur funktionalen Anwendung von §1 des deutschen und Art.1 des schweizerischen UWG," *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 144 (1980):145–170; Baudenbacher, *Suggestivwerbung und Lauterkeitsrecht* (Zurich: Schulthess, 1978); see also Jürg Purtschert, *Der Schutz des unmittelbaren Ergebnisses einer Arbeits- oder Unternehmensleistung* (Fribourg 1974).

[17]See Walter R. Schluep, "Anmerkungen zur ökonomischen Analyse des Markenrechts,"

Recently, the analysis of the economic consequences of legal rules or even the law and economics approach has influenced contributions outside the traditional areas of administrative supervision of the economy and competition law.

Such an evolution is mainly due to those Swiss scholars who have taken courses in law and economics during their postgraduate studies in the US. Three other factors should also be mentioned. One is the growing importance of the "functional analysis" school. According to this doctrine, the law has to be applied in compliance with its "function," notably its economic function.[18] Another is the influence and publication in Switzerland of the works of German authors—Germany being a country that has always been an important model for Swiss scholars' thinking. Finally, the growing role of environmental issues has the almost inevitable consequence of the encouraging of economic analysis of the law.[19] Hence, contributions focusing on the economic consequences of regulation have recently been published in Switzerland in the areas of enforcement of private law,[20] general terms and conditions,[21] consumer protection,[22] contract law,[23] torts,[24] corporate[25] and capital market laws,[26] insurance,[27] and even international

---

in: *Festschrift zum 65. Geburtstag von Mario M. Pedrazzini* (Bern: Stämpfli, 1990), pp. 715–735.

[18]Schluep and Baudenbacher are among the main proponents of the "functional" movement in Switzerland. This school is also being criticized: see Herbert Wohlmann, "Zur funktionalen Auslegung im Kartellrecht," in: *Freiheit und Verantwortung im Recht, Festschrift zum 60, Geburtstag von Arthur Meier-Hayoz* (Bern: Stämpfli, 1982), pp. 461–473.

[19]See, for example, Bruno Fritsch, "Welchen Beitrag kann die Volkswirtschaftlehre zur Umweltpolitik leisten," in: *Praxisorientierte Volkswirtschaftslehre, Festschrift für Francesco Kneschaurek* (Bern: Stämpfli, 1988), pp. 193–213; René L. Frey and Robert E. Leu, "Waldsterben: von der naturwissenschaftlichen Analyse zur Umweltpolitik," *Wirtschaft und Recht* 39 (1987):58–72; Holger Bonus, "Wider die Vulgärform des Verursacherprinzips, Ökonomische Wegmarken," *Neue Zürcher Zeitung*, Aug. 29/30, 1987, no. 199, p. 33.

[20]See Carl Baudenbacher, *Rechtsverwirklichung als ökonomisches Problem? Zur Überlastung der Zivilgerichte* (Zurich: Schulthess, 1985).

[21]See Carl Baudenbacher, *Wirtschafts-, schuld- und verfahrensrechtliche Grundprobleme der Allgemeinen Geschäftsbedingungen* (Zurich: Schulthess, 1983).

[22]See Ernst A. Kramer, "Konsumentenschutz als neue Dimension des Privat- und Wirtschaftsrecht," *Zeitschrift für schweizerisches Recht* 98 (1979I):49–92.

[23]See Michael Adams, "Der Irrtum über 'künftige Sachverhalte'—Anwendungsbeispiel und Einführung in die ökonomische Analyse des Rechts," *Recht* 4 (1986):14–23.

[24]See Jörg Finsinger, "Der heutige Stand des Haftpflichtrechts aus der Law and Economics Perspective," in: *Colloque, Problèmes actuels de la responsabilité civile*, Centre d'études juridiques européennes ed. (Zurich: Schulthess, 1991), pp. 41–55; Michael Adams, *Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung* (Heidelberg: R.v. Decker's Verlag, 1985).

[25]See mainly Christian Meier-Schatz, "Über die Notwendigkeit gesellschaftsrechtlicher Aufsichtsregeln: Ein Beitrag zur Ökonomischen Analyse des Gesellschaftsrechts," *Zeitschrift für schweizerisches Recht* 107 (1988I):191–241.

[26]See mainly Christian Meier-Schatz, "American Legal Harmonization from a European Perspective," in: *European Business Law: Legal and Economic Analyses of Integration and Harmonization*, ed. Richard M. Buxbaum et al. (Berlin/New York: de Gruyter, 1991), pp. 61–88; Meier-Schatz, *Wirtschaftsrecht und Unternehmenspublizität* (Zurich: Schulthess, 1989); Meier-Schatz, "Europäische Harmonisierung des Gesellschafts- und Kapitalmarktrechts," *Wirtschaft und Recht* 41 (1989):84–110; Meier-Schatz, "Unternehmenszusammenschlüsse mittels Übernahmeangebot," *Wirtschaft und Recht* 39 (1987):16–39. See also Werner Hermann, "Ziele eines Börsengesetzes: ein Diskussionsbeitrag aus ökonomischer Sicht," *SNB Quartalsheft* (Mar. 1991):75–88; Luc Thévenoz, *Error and Fraud in Wholesale Funds Transfers* (Zurich: Schulthess, 1990).

[27]See Association internationale pour l'étude de l'économie de l'assurance, *Law and Eco-*

private law.[28]

Nevertheless, one cannot claim that there is a law and economics movement in Switzerland. Most of the contributions do not refer to the law and economics approach, and the analysis of the economic consequences is at times very ancillary.

On the other hand, the law and economics approach no longer has to face the hostility it encountered a decade ago.[29] For example, articles are being published whose purpose is to make Swiss lawyers familiar with the law and economics approach.[30] Very recently, there was even a law journal that openly proclaimed its law and economics content,[31] although one should not overlook the fact that the review *Wirtschaft und Recht,* Switzerland's most respected journal in the field of the analysis of regulations affecting the economy, has been publishing articles by lawyers and economists for decades.[32]

Thus, while there is at present no law and economics movement worth mentioning, the seeds of such a movement are there.

II. THE RECEPTION OF THE LAW AND ECONOMICS MOVEMENT

As there is no law and economics movement, it is to be expected that no law in Switzerland has been affected by it; neither should there be any cases, parliamentary debate, or regulator influenced by it.

This conclusion is correct for the area that is described as common law or case law in the United States. It has to be tempered for the public regulation of the market area.

As mentioned, statutes providing for administrative supervision of a sector of the economy or of a specific category of entrepreneurs are not enacted without a discussion of their economic consequences. Such discussions are obviously not only the work of academics. They pervade the legislative process and affect the reasoning of judges and regulators. However, these discussions, in general, do not really reflect a thorough economic analysis. It is normally an ideological debate, where participants often resort to the use of "intuitive" economics to sustain their conclusions. Hence, this cannot qualify as fulfilling the standards of a law and economics approach.

Three examples may be provided. (1) Basically, intervention of the state (at the federal or cantonal level) in the economy is, under current legal thinking, admissible only if it respects the conditions set for not infringing the citizens' "freedom of trade and industry," guaranteed by article 31 of the federal Constitution.

The analysis of case law, regulatory jurisprudence, or statements made by the various administrations shows that such intervention is relatively easy to justify for measures adopted to police the economy or for measures reflecting social policies. It is much harder to justify for measures reflecting economic policy concerns. On the face of it, this should mean that economic analysis is of importance whenever a statute is being adopted, a case judged, or a decision pronounced. Unfortunately, this is not so. The categories mentioned are defined[33] in ways that have nothing to do with an economic analysis[34]; for example, measures the purpose of which is to provide for "the well-being of all or most citizens or to increase such well-being by improving the conditions of life, health or spare time" are considered to reflect social and not economic policies. This is certainly a more than questionable definition under a law and economics approach, and it should come as no surprise that its use by judges or regulators results in economically strange decisions.

(2) Moreover, state subsidies, an important form of state intervention in the economy, are not even subjected to such scrutiny, on the grounds that they do not restrict the economic freedom of entrepreneurs.[35] This is an amazing conclusion for an economist, but a very understandable one for a politician. Indeed, it permits the preservation of cantonal autonomy and federalistic concerns[36]: submitting state aid to a scrutiny versus the "freedom of trade and industry" would mean the end of cantonal aid, because it would have to be qualified as a restriction, reflecting economic policy purposes, a restriction that cantons are not allowed to impose.

(3) The new federal law on the supervision of prices (Price Supervision Act)[37] had to be adopted following the surprising success of consumer groups that managed to get the federal Constitution amended by a new article, 36septies, which creates an obligation to adopt an administrative price supervision scheme at the federal level.[38] Hence, economists had had little to say on the principle of such legislation.[39] Moreover, although "abusive" prices are those that do not reflect "efficient competition" ("concurrence efficace," "wirksamer Wettbewerb"),[40]

nomics of Professional Liability Insurance, The Geneva Papers on Risk and Insurance, vol. 14 (1989) and vol. 15 (1990); note that the papers published in those two issues are from foreign scholars.

[28]See Anton K. Schnyder, *Wirtschaftskollisionsrecht* (Zurich: Schulthess, 1990), especially pp. 32ff.

[29]See Beat Hotz, "Ökonomische Analyse des Rechts—eine skeptische Betrachtung," *Wirtschaft und Recht* 34 (1982):293–314.

[30]See Henner Kleinewefers, "Ökonomische Theorie des Rechts, Über Unterschiede zwischen dem ökonomischen und dem juristischen Denken," in: *Staat und Gesellschaft, Festschrift für Leo Schürmann zum 70. Geburtstag* (Fribourg: Universitätsverlag, 1987), pp. 83–116; see also Adams (supra note 23) and Finsinger (supra note 24).

[31]The *Swiss Review of International Competition Law* renamed itself *World Competition, Law and Economics Review* in 1987.

[32]Unfortunately, *Wirtschaft und Recht,* notably due to too small a circulation, ceased publication at the end of 1990.

[33]For a description see Blaise Knapp, "Les limites à l'intervention de l'Etat dans l'économie," *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 91 (1990):241–269.

[34]See, e.g., Sieber (*supra* note 8), p. 450.

[35]See Gérard Hertig, "Les aides des cantons aux particuliers," *Revue de droit administratif et fiscal* (1985):1–40.

[36]On that subject see S. Bieri and G. Müller, "Begründung und Ausrichtung kantonaler Wirtschaftspolitik," *Wirtschaft und Recht* 29 (1977):223–241, especially 232.

[37]RS 942.20.

[38]Consumer groups especially were relying on the positive experiences made under a temporary price supervision statute: see *Surveillance des prix 1973–1978,* Rapport final du Prépose à la surveillance des prix. (Bern: OCFIM, 1979).

[39]On that topic, see Paul Richli, "Zum Gesetzgebungsauftrag für die Preisüberwachung," *Zeitschrift für schweizerisches Recht* (1984I):47–70.

[40]On this concept, which is also valid for the 1985 Cartel Act (see *infra* note 46), see Bernd Schips, "Der Wettbewerb im Urteil der Nationalökonomie," *Wirtschaft und Recht* 42 (1990):22–34; Walter R. Schluep, *"Wirksamer Wettbewerb": Schlüsselbegriff des neuen schweizerischen Wettbewerbsrechts* (Bern: Huber, 1987); on the general concept of "functionality" for Swiss competition laws, see Walter R. Schluep, "Über das innere System des neuen schweizerischen Wettwerbsrechts," in: *Freiheit und Zwang, Festschrift zum 60. Geburtstag von Hans Giger* (Bern: Stämpfli, 1989), pp. 561–596.

there is strong pressure for applying the law in a manner reflecting political rather than economic concerns—the Federal Council (the Swiss government) having made sure of that by designating a former politician as "Price Supervisor."[41]

These three examples are not meant to imply that economic analysis plays no role whenever a statute is drafted or that Parliament does not take economic consequences into account. The point is rather that, whenever the state regulates the economy (which at the federal level it often does directly[42]), it is very difficult to separate economic and political aspects and that the impact of the former is all but obvious. Admittedly, this may be true anywhere[43]; however, notably because of the emphasis in Switzerland on reaching a broad consensus before enacting new regulations, the impact of economic analysis is here even more difficult to perceive.

Economics play a more important role in the competition law area. (1) The Cartel Act had originally been drafted on the basis of proposals made by economists.[44] Since the setting up of the Cartel Commission, the best known commissioners have been economists or lawyers well trained in economics; moreover, the "balancing test" used by the Cartel Commission was conceived by an economist.[45]

It is true that, for years, the business community managed to avoid economic reasoning playing a decisive part in the recommendations of the Cartel Commission. However, the new 1985 Cartel Act emphasizes the importance of "efficient competition" ("concurrence efficace," "wirksamer Wettbewerb") in the Swiss market[46] and, although it does not provide for an effective merger control device,[47]

[41]See Paul Richli, "Erste Eindrücke von der Praxis zum Preisüberwachungsgesetz," *Wirtschaft und Recht* 41 (1989):191–209, although the "Price Supervisor" seems to have been willing to put emphasis on the competition side of its task, the published reports regarding its activities do not provide enough data to evaluate its interventions. The recent controversy about applying the Price Supervision Act to mortgage rates is also a good example of politics mixing with economics concerns; on that topic, see, e.g., Ernst Baltensperger, "Hypothekarzinsüberwachung ante portas ?" *Neue Zürcher Zeitung*, Sept. 19, 1990, N° 217, p. 35.

[42]See, e.g., Roger Zäch, "Geschlossene oder offene schweizerische Wirtschaftsverfassung?" in: *Staat und Gesellschaft, Festschrift für Leo Schürmann* (Fribourg: Universitätsverlag, 1987), pp. 131–143.

[43]See Willy Linder, "Veraltete Grundlagen der Wettbewerbspolitik?" *Neue Zürcher Zeitung*, June 9/10 1990, N° 131, p. 34.

[44]See Marbach (*supra* note 13) and *Les cartels et la concurrence en Suisse*, 31e Publication de la Commission d'étude des prix du Département fédéral de l'économie publique (Bern: OCFIM, 1957).

[45]See Hugo Sieber, "Aktuelle Probleme der schweizerischen Wettbewerbspolitik," *Wirtschaft und Recht* 19 (1967):15–32.

[46]On this concept, see generally Schluep (*supra* note 40); for the Cartel Act, see Walter R. Schluep and Leo Schürmann, *KG + PüG, Kartellgesetz, Preisüberwachungsgesetz* (Zurich: Orell Füssli, 1988), and Article 29 Cartel Act: Pierre Tercier, "Droit des cartels et surveillance des prix," in: *Kartellrecht auf neuer Grundlage* (Bern: Haupt, 1989), pp. 309–343; Peter Böckli, "Harte Kartelle und Marktübermacht—Herausforderung für das neue Kartellrecht," *Wirtschaft und Recht* 39 (1987):1–15.

[47]See Hugo Sieber and Egon Tuchtfeldt, "Die Fusionskontrolle im revidierten Kartellgesetz," in: *Staat und Gesellschaft, Festschrift für Leo Schürmann* (Fribourg: Universitätsverlag, 1987), pp. 353–366.

it is flexible enough to permit the use of almost any new economic theories.[48] Hence, the Cartel Commission is giving more weight to the microeconomic impact of cartels and is less willing to tolerate the reduction of competition on "social" grounds.[49]

The exact role and accuracy of economic analysis under the Cartel Act remain to be seen. Indeed, there is currently a lively debate on the importance of economic considerations when applying the 1985 Cartel Act.[50] There is also a heated discussion about the validity and up-to-dateness of the Cartel Commission's economic reasoning.[51]

Obviously, such debates are not devoid of economic policy, social, and political concerns. Therefore, their eventual outcome is unclear. Especially considering pressures to adjust to the rules enacted at the European Community (EC) level, one might think that microeconomic considerations will play an increased role[52]; indeed, the Cartel Commission already pays attention to EC rules whenever adopting recommendations.[53]

(2) The Unfair Competition Act of 1988 was drafted by a member of the "functional school." Hence, it was intended to be applied with attention being given to economic rather than "good faith" considerations.[54] However, Parliament has watered down some of the provisions, notably the one on general terms and conditions. Moreover, a review of current literature shows a movement against "functionally" implementing the act.[55] Therefore, although the legislative prerequisites for a law and economics implementation of the act are at least partially fulfilled, it must be noted that there is no case that can be mentioned that embodies such an approach—nor should we expect one in the near future, given the lack of

[48]See Markus Ruffner, *Neue Wettbewerbstheorie und schweizerisches Kartellrecht, Möglichkeit und Grenzen einer markt- und institutionentheoretischen Fundierung der Wettbewerbspolitik* (Zurich: Schulthess, 1990); Schips (*supra* note 40), p. 34.

[49]See notably Leo Schürmann, "Der Wettbewerb im Urteil der Staatswissenschaft," *Wirtschaft und Recht* 42 (1990):35–41.

[50]Cf. Eric Homburger, "Fragwürdige Anwendung des Kartellgesetzes," *Neue Zürcher Zeitung*, Sept. 19, 1989, N° 217, p. 41; Schluep (*supra* note 40); Bruno Schmidhauser, "Entstehung und Auslegung von Artikel 29 Absätze 2 und 3 des Kartellgesetzes vom 20. Dezember 1985," in: *Staat und Gesellschaft, Festschrift für Leo Schürmann* (Fribourg: Universitätsverlag, 1987), pp. 367–402.

[51]See Linder (*supra* note 43), p. 34; Schips (*supra* note 40), pp. 32–33; Schürmann (*supra* note 49), p. 39; Tercier (*supra* note 46), p. 63.

[52]On the importance of EC policies see Franz Blankart, "Wettbewerb und Binnenmarkt im Verhältnis Schweiz-EG," *Wirtschaft und Recht* 41 (1989):5–13; Marino Baldi, "Die Wettbewerbsbestimmungen internationaler Abkommen der Schweiz und die Art. 42/43 des Kartellgesetzes," in: *Kartellrecht auf neuer Grundlage* (Bern: Haupt, 1989), pp. 279–308.

[53]See Tercier (*supra* note 46), pp. 64–65; "Taugliches Kartellgesetz im europäischen Wettbewerb," *Neue Zürcher Zeitung*, Mar. 31/Apr. 1, 1990, N° 76, p. 21. On the taking into account of the level of competition outside Switzerland, see Walter Schluep, "Internationale Wettbewerbsfähigkeit als Topos des neuen schweizerischen Kartellgesetzes," in: *Weltwirtschaft im Wandel, Festgabe für Egon Tuchtfeldt zum 65, Geburtstag* (Bern: Haupt, 1988), pp. 453–482.

[54]See, e.g., Carl Baudenbacher, "Schwerpunkte der schweizerischen UWG-Reform," in: *Das UWG auf neuer Grundlage* (Bern: Haupt, 1989), pp. 15–36.

[55]See, e.g., Edmond Martin-Achard, "Les principes généraux de la nouvelle loi," in: *La nouvelle loi contre la concurrence déloyale* (Lausanne: CEDIDAC 1988), pp. 9–15.

knowledge in economics demonstrated by the judges who apply the Unfair Competition Act.

As already emphasized, the law and economics approach plays no role whenever a statute is drafted or revised in the common law or general private law area. For example, it was not even considered during the recent modifications of regulations concerning rental agreements or corporations. The same conclusion can be drawn for case law.

III. FUTURE PROSPECTS

It is not expected that the law and economics approach will play an important role in Switzerland in the near future.[56]

There are three main reasons for such a pessimistic assessment. One is that judges, regulators, and even lawyers at large are ill at ease with economics. The second is the consultative way in which statutes are drafted and weight given to mere political considerations. The third is that Swiss law schools do not offer any full law and economics courses, which is a prerequisite for any development of the approach—although it has to be pointed out that (1) lectures on law and economics are being incorporated as part of courses on economic legislation (especially at the Universities of St. Gallen and Geneva law schools) and (2) postgraduate students at Swiss universities are increasingly beginning to pay attention to this approach (Michael Adams's law and economics "Habilitationsschrift"[57] remaining, however, an isolated event).

This is why those interested in law and economics are primarily trying to inform lawyers and, hopefully thereafter, politicians about the purpose and impact of such an approach, e.g., by systematically integrating a law and economics paper whenever organizing a conference on a specific topic.[58]

It is nevertheless possible that a law and economics movement will develop earlier than anticipated due to the current willingness to conform Swiss law as much as possible to EC law. Indeed, any law and economics impetus at the EC level is likely to affect Swiss regulations: its impact on EC rules will have to be taken into account, or even straightly copied, at the Swiss level—which, indirectly, will help the emergence of a Swiss law and economics movement.

[56]More optimistic: Wolfgang Wiegang, "Die Rezeption amerikanischen Rechts," in: *Die schweizerische Rechtsordnung in ihren internationalen Bezügen* (Bern: Haupt, 1988), pp. 229–262, especially p. 257.

[57]See *supra* note 24.

[58]See, e.g., Colloque, *Les prises de participations: L'exemple des offres publiques d'achat*, Centre d'études juridiques européennes (Lausanne: Payot, 1990); Colloque, *Problèmes actuels de la responsabilité civile*, Centre d'études juridiques européennes (Zurich: Schulthess, 1991).

Internatic Review of Law and Economics (1991), 11(301–308)

LAW AND ECONOMICS IN JAPAN: HATCHING STAGE

SHOZO OTA

School of Law, University of Tokyo, 7-3-1 Hongo, Bunkyo, Tokyo 113, Japan

1. CHARACTERISTICS OF JAPANESE JURISPRUDENCE

The legal scholarship of Japan has unique characteristics that are derived from the historical development of the modern Japanese legal system. Law and economics scholarship in Japan is influenced by the characteristics of legal scholarship.

It is only a little more than one hundred years since Japan abolished its feudalistic social system and began transplanting modern legal, economic, and political systems. Japan has been introducing a Western-style legal system and legal theories since Meiji-ishin (Meiji Restoration) in 1867. There was a reason why Japanese government at that time was so eager to introduce a Western-style legal system. After the Meiji Restoration, Japan was forced to enter into unequal treaties with Western countries because of overwhelming Western military power. According to these treaties, for example, Japanese courts had no civil or criminal jurisdiction over Western people living in Japan. The European countries claimed that it was because Japan had no civilized legal system. The Japanese government made every effort to transplant a Western-style legal system in order to revise the unequal treaties.

The Japanese government had to establish de novo universities, a court system, a police system, and so on. The government had to enact all sorts of laws from practically nothing, e.g., there were no notions such as right and duty before the Meiji Restoration.[1] In the first ten years after the Meiji Restoration, the influence of French law was predominant, e.g., Gustave E. Boissonade, among others, was invited to draft the old civil code and the criminal code. Thereafter, German influence was overwhelming until World War II.[2] After the war, the influence from the USA has become greater and greater. As a result, the Japanese legal system is a mosaic of laws of different origins, e.g., the Japanese civil code derived mainly from France with substantial modification under German influence; the Constitution, corporate reorganization law, and criminal procedure from the USA; commercial law, bankruptcy law, criminal law, civil procedure, and administrative law from Germany.[3]

[1]The legal notions in Japan such as *saibansho* [court], *kenji* [prosecutor], *saibankan* [judge], *kenri* [right], *gimu* [duty], and *bengoshi* [lawyer] are all translations of Western notions.

[2]The French influence in the civil code survived the German impact.

[3]For example, the old code of civil procedure was almost the literal translation of the code of German civil procedure at that time. The old code was revised in 1925, but the fundamental structure has been maintained.

International Review of Law and Economics (1991), *11*(331–342)

THE EUROPEAN COMMUNITY

GÉRARD HERTIG

University of Geneva Law School, Bd. des Philosophes, 12, CH-1205, Geneva, Switzerland

There is at the present time no clearly established European Community (EC) law and economics movement. However, the interest economists have for customs unions[1] and economic integration,[2] the growing importance of EC law,[3] and the fact that it increasingly affects member states' law (especially where directly applicable[4]) 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-*

[1]See, 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.

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

[3]On 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).

[4]Direct 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.

[5]The 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 debate[12]; 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 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 speeches[16] 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 level[19]: 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.

[6]See, 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.

[7]See 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.

[8]See, 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.

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

[11]Pelkmans, supra note 7 at 318.

[12]Christian 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.

[14]See below.

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

[16]See 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.

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

[18]See 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.

[19]Fitchew (supra note 9) at 1–2.

[20]Tibor 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 US[22]) 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 problems[23]—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 torts[26] and contract law.[27] Hence, standard materials for a law and economics approach exist.

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

[22]See 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.

[23]See, 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.

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

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

[26]See, 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.

[27]See, 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]

[28]For 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.

[29]See below.

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

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

[32]Environmental 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 integration[33] and their specific interest in EC economic policy and its implementation[34] 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 policy[36] 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

[33]See supra notes 1 and 2.

[34]See p. 334 herein.

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

[36]See, 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).

[37]See 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.

[38]See Claude Pondaven, *La théorie de la réglementation: efficacité économique ou efficacité politique? Application econometrique 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).

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

[40]See 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 on[42] 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 economics[47]; 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

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

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

[43]Supra note 8.

[44]See, 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."

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

[46]See, 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.

[47]This is quite inevitable when economic integration is a vehicle to political integration, as it is in the EC; see, e.g., Jacques van Esch, "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 effects[49]: 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 substainable 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 traced[50] and escape the measurement powers of any social science[51]; 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-

[48]See 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.

[50]See, 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.

[51]Edmund 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.

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[53] 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 environment[57] 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 integration[59] 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

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

[54]See, 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.

[55]See, 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.

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

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

[58]See, 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, *Eléments pour une théorie du droit de la consommation* (Brussels: Bruylant, 1988), especially at 425ff.

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

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

[61]See, 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).

general[62] or regarding specific issues like mergers[63] 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 undertakings[67]; 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 policy[69]; 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-

[62]See, 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.

[63]See, 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).

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

[65]See, 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.

[66]See, 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.

[67]O.J. No. L 395/1, Dec. 31, 1989.

[68]See, 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.

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

[70]Smith (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 policies[72]; 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 directly[73] 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

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

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

[73]See pp. 338–339.

[74]See 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.

[75]See, 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).

[76]Jörg 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, *Allokationseffiziens 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).

[77]Hartmut 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.

[78]See 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.

Annual Index

Volume 11, 1991

Baird, D. G., *The Initiation Problem in Bankruptcy* 223

Broder, I. E., and Husted, T. A., *The Effect of Post-Trial Activity on Large Jury Awards* 251

Chu, C. Y. C., *An Economic Analysis of the Criminal Procedures in Civil-Law Countries* 111

Cooter, R. D., *Lapses, Conflict and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will* 149

Cooter, R., and Gordley, J., *Economic Analysis in Civil Law Countries: Past, Present, Future* 261

Drukarczyk, J., *Secured Debt, Bankruptcy, and the Creditors' Bargain Model* 203

Easterbrook, F. H., *High-Yield Debt as an Incentive Device* 183

Faure, M. *See* Van Den Bergh, R.

Finsinger, J., *The Choice of Risky Technologies and Liability* 11

Finsinger, J., Hoehn, T., and Pototschnig, A., *The Enforcement of Product Liability Rules: A Two-Country Analysis of Court Cases* 133

Gordley, J. *See* Cooter, R.

Gravelle, H., *Insurance Law and Adverse Selection* 23

Heremans, D. *See* Van Cayselle, P.

Hertig, G.
—*The European Community* 331
—*Lugano Conference: Foreword* 122
—*Switzerland* 293

Hoehn, T. *See* Finsinger, J., et al.

Hustad, T. A. *See* Broder, I. A.

Kirchner, C., *The Difficult Reception of Law and Economics in Germany* 277